

# **Devising Cultural Autonomy: Case Study of Serbia and Romania**

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In partial fulfillment of the requirements for the degree of Master of Arts in Human Rights

MASTER'S THESIS

LEGAL STUDIES DEPARTMENT

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Hungary

2012

## EXECUTIVE SUMMARY

Cultural autonomy appears to be the controversial notion. It is rejected by both liberal and multicultural scholars; international and regional documents do not provide clear standards for implementing this concept and, accordingly, the way it is implemented is sometimes characterized as an “embarrassment”. The Thesis argues that in the context of intensive interplay between European (i.e. OSCE, CoE, the EU) and national actors, the emergence of common standards concerning cultural autonomy seems inevitable. It is further argued that due to the central role of the right to identity for minority protection, cultural autonomy may serve as an adequate mechanism for the self-government of persons belonging to minorities in this area. Based on the attempt to introduce national councils in Romania similar to those in Serbia, it is suggested that this institution may contribute to devising the common model for cultural autonomy. This contribution is evaluated by using indicators derived from the relevant liberal and multicultural critiques of cultural autonomy. The application of these indicators has shown that national councils may serve as the common model, since they can effectively protect the right to identity. However, further improvements are needed concerning effective participation of persons belonging to minorities. The Thesis provides recommendations for these improvements. It is concluded that the Draft Law on Statute for National Minorities aiming to introduce cultural autonomy in Romania should be adopted, but only after amending certain provisions. It is believed that such model of cultural autonomy may address different needs of different minorities and avoid further ethnic segregation.

## Table of Contents

EXECUTIVE SUMMARY .....	ii
Table of Contents .....	iii
Introduction .....	1
Chapter One: Literature Review .....	8
1.1. Individual <i>versus</i> Group rights .....	9
1.2. Right to identity .....	12
1.3. Cultural autonomy .....	15
1.3.1. Revival of Renner’s model.....	15
1.3.2. Why multiculturalists do not like cultural autonomy?.....	17
Chapter Two: Emergence of Common European Standards of Minority Rights Protection.....	21
2.1. “Stigmatization” of minority rights – political approach .....	22
2.2. “Legalization” of minority rights - Legal approach .....	26
2.2.1. What does the Framework Convention adds to the minority protection?.....	26
2.2.2. Effective participation of persons belonging to minorities .....	30
2.3. EU minority protection framework .....	34
2.3.1. “Loose” political Copenhagen criteria.....	34
2.3.2. Defining the politics of conditionality – “ <i>carrot and stick</i> ” approach.....	37
2.3.3. Western Balkans – revision of conditionality?.....	42
Chapter Three: International Standards in Serbian and Romanian Context.....	45
3.1. Unwanted multiculturalism.....	45
3.2. Comparative historical perspective .....	47
3.3. Minority rights under Constitution.....	51
3.3.1. Nation-building Constitutions .....	51
3.3.2. Minority rights in Constitutions of Serbia and Romania .....	52
3.3.2.1. Constitutional engineering: Defining the nation.....	52
3.3.2.2. Minority rights .....	55
3.4. Cultural autonomy according to the law .....	59
3.4.1. The definition of minorities.....	60
3.4.2. The scope of the right to identity .....	64
3.4.3. National Councils in Serbia: the first attempt 2002-2009.....	67

3.4.4. National Councils in Serbia: the second attempt 2009-.....	69
3.3.5. Effective participation in Romania .....	74
3.3.6. National Councils <i>of</i> National Minorities or Council <i>for</i> National Minorities? .....	78
3.3.7. Introducing cultural autonomy in Romania .....	79
Chapter Four: National Councils in Practice .....	85
4.1. Establishing councils .....	85
4.2. Hungarian and Roma National Council.....	87
4.2.1. Media .....	88
4.2.2. Official language and script .....	90
4.2.3. Education.....	91
4.2.4. Culture.....	93
4.3. National Councils – Lessons Learnt.....	94
Conclusion .....	103
Bibliography .....	108

## Introduction

Rights of persons belonging to minorities have gained, as Rechel correctly notes, “unprecedented attention” in the last two decades<sup>1</sup>. Starting from the early 1990s, minority rights became part of the global agenda, resulting in the accelerated development of protection mechanisms. However, international minority standards remain full of “loopholes”<sup>2</sup>. This is particularly true for cultural autonomy that is accepted as one of the forms of effective participation of persons belonging to minorities in areas vital for their identity. One of the reasons for this underdevelopment is that cultural autonomy cuts across many controversial issues, most notably – the notion of collective rights and the right to identity of persons belonging to minorities. While there is consensus that the right to identity is necessary for substantive equality between minority and majority, when it comes to the measures to achieve that, consensus vanishes.

For this reason, regional documents (i.e. OSCE Copenhagen Document, the Framework Convention for the Protection of National Minorities and Lund Recommendations) leave broad margin of discretion to national authorities when design and implement effective participation mechanisms. However, discretion that Central and East European countries had in implementing cultural autonomy, point to the weaknesses of such approach. Namely, in the early 1990s these countries revived 19<sup>th</sup> century concept of cultural autonomy considering it as compatible with their nation-building projects<sup>3</sup>. However, the way they implemented it Kymlicka described as an

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<sup>1</sup> Bernd Rechel, ed. *Minority Rights in Central and Eastern Europe* (London and New York: Routledge, Taylor & Francis Group, 2009) Introduction, 2

<sup>2</sup> Christin Henrard, *Devising an Adequate System of Minority Protection*, (The Hague: Martinus, Nijhoff Publishers, 2000), 274

<sup>3</sup> Ephraim Nimni, ed. *National Cultural Autonomy and Its Contemporary Critics* (London and New York: Routledge, Taylor & Francis Group, 2005), 7-8

“embarrassment”<sup>4</sup>. Other multiculturalists share his view that this concept of cultural autonomy as having competences much narrower than territorial autonomy should be disregarded<sup>5</sup>.

But, if the right to identity is central to minority protection, why cultural autonomy cannot be sufficient protection of it? If the recognition of cultural autonomy still amounts to an “embarrassment”, how can one explain the fact that the Draft Law on the Statute for National Minorities (hereinafter the Draft Law) introducing cultural autonomy is in the procedure in Romanian Parliament for several years? Does this mean that the trend of experimenting with Renner’s model of cultural autonomy continues or a new phase in cultural autonomy’s development started? Serbia and Romania might be a good illustration in this sense.

Romania and Serbia seem perfect comparators. They have similar historical experiences of wars, communism and transition. Furthermore, both have heterogeneous populations and the same biggest minorities – Hungarians and Roma. On the level of international law, both countries have ratified the most important universal and regional treaties for the protection of persons belonging to minorities, including the Framework Convention for the Protection of National Minorities (hereinafter FCNM)<sup>6</sup> and the European Charter for Regional or Minority Languages (hereinafter Language Charter)<sup>7</sup>. Furthermore, both share orientation toward the EU integrations, with the distinction that Romania has become an EU member state in 2007, while

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<sup>4</sup> Will Kymlicka, “Renner and the Accommodation of Sub-state Nationalism”, in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 140

<sup>5</sup> Ibid. 138-139

<sup>6</sup> Romania was the first country to sign and ratify FCNM in 1998, while Serbia ratified it in 2001. Framework Convention for the Protection of National Minorities, Available at <http://conventions.coe.int/Treaty/en/Treaties/html/157.htm> (accessed 26 March, 2012)

<sup>7</sup> Serbia has ratified Language Charter in 2006, while Romania did it in 2008. European Charter for Regional or Minority Languages, Available at <http://www.coe.int/t/dg4/education/minlang/> (accessed 5 June 2012)

Serbia is approved candidacy in 2012. However, what they do not have in common is the understanding of minority protection.

In 2002 Serbia introduced national councils of national minorities as the form of cultural autonomy regarding the use of language and script, education, information and culture<sup>8</sup>. The idea was to promote a “new minority policy” that will enable persons belonging to minorities to establish institutions for the self-government in the areas that are of the vital importance for their identity<sup>9</sup>. The 2006 Constitution of Serbia entrenched this right, affirming its collective nature<sup>10</sup>. It is significant to note that the Advisory Committee (hereinafter ACFC) described the national councils as “promising innovations” that “*may become a central tool in the implementation of Article 15 of the Framework Convention*”<sup>11</sup>. On the other hand, the Romanian Constitution provides effective participation in the form of guaranteed representation at the elected bodies<sup>12</sup>. Nevertheless, in 2005 minority organizations prepared the Draft Law aiming to introduce cultural autonomy<sup>13</sup>, welcomed by the Advisory Committee<sup>14</sup>. Drafters designed national councils with the same purpose and similar competences as in Serbia. Are these similarities accidentally, or it might be that persons belonging to minorities in Romania have considered that standards implemented in Serbia may be equally implemented in Romania?

<sup>8</sup> Law on Protection of Rights and Freedoms of National Minorities, Available at <http://www.unhcr.org/refworld/type,LEGISLATION,,SRB,4b5d97562,0.html> (accessed 25 November, 2011)

<sup>9</sup> First report of Serbia on the implementation of the FCNM, ACFC/SR(2002)003

<sup>10</sup> Constitution of Republic of Serbia, article 75, Available at <http://www.predsednik.rs/mwc/epic/doc/ConstitutionofSerbia.pdf> (accessed 25 November, 2012)

<sup>11</sup> ACFC, First opinion on Serbia, ACFC/INF/OP/I(2004)002, para. 106 and 107

<sup>12</sup> Constitution of Republic of Romania, article 59, Available at <http://www.cdep.ro/pls/dic/site.page?id=371> (accessed 25 November, 2012)

<sup>13</sup> The Draft Law on the Statute for National Minorities (2005), article 3, Available at the website of the Venice Commission: <http://www.venice.coe.int/docs/2005/CDL%282005%29059-e.pdf> (accessed 5 June 2012)

<sup>14</sup> ACFC Second opinion on Romania, ACFC/OP/II(2005)007, para. 68

The thesis will evaluate the contribution of national councils of national minorities in Serbia to the overall development of the concept of cultural autonomy. It is suggested that in spite of acknowledging the role of domestic context in the area of minority rights, common model of cultural autonomy is inevitably emerging as the result of continuous and intensive interplay between European and domestic actors. Based on comparative analysis of Serbia and Romania, it is shown not only that the potential common model of cultural autonomy is emerging, but also that this model needs further improvements. The thesis proposes possible indicators for the evaluation of national councils' model (i.e. the Constitutional recognition, the form of group representation and existence of pluralism within minorities, sliding-scale approach towards different situations of minorities, efficiency of participation in decision-making and ethnic compartmentalization). Application of these indicators has shown that national councils can sufficiently protect the right to identity, but further improvements are needed in the area of effective participation of persons belonging to minorities in the self-government. The Thesis provides recommendations for improvements. Accordingly, it is suggested that the Draft Law should be amended, in order to omit the introduction of the uniform national councils for all minorities, centralized organization and preferential treatment of specific minority organizations.

The first Chapter discusses the controversial issues concerning cultural autonomy – the notion of group rights and the right to identity. It is argued that proponents of cultural autonomy are in a difficult position between *Scylla and Haribda*, since both liberal and multicultural scholars reject this concept. The former deny it on the basis of the principle of equality, while the latter consider it as too weak compared to territorial autonomy. These criticisms leave the model undefined. In spite of such attitude, CEE countries revived the Renner's model of cultural autonomy during the 1990s. Moreover, this model seems attractive to other countries as well. For



this reason, the Chapter suggests further improvements. Based on the existing critiques, indicators are formulated for the purpose of the assessment of national councils introduced in Serbia as the possible model for common standards in the area of cultural autonomy.

The second Chapter focuses on the way the European triangle of minority rights protection encompassing European Union, Council of Europe and Organization for Security and Co-operation in Europe affects and shapes domestic policies on minority protection. It is argued that connecting minority issues with the stability of democracy and consequently, including it under the Copenhagen political criteria determined the development of the domestic minority policies of the CEE candidate countries toward providing the effective participation of persons belonging to minorities through various mechanisms, including cultural autonomy. Hence, the partial success of many of these policies might reveal the underdevelopment of the minority protection requirements and inconsistent assessment of achieving these standards. These inconsistencies leave broad margin of discretion to both European and domestic actors that does not necessarily benefit persons belonging to minorities from the countries concerned. After the Eastern Enlargement in 2004 and 2007, Copenhagen criteria remain underdeveloped and it is most likely that politics of conditionality will remain the main approach during the next enlargement toward Western Balkans.

The third Chapter provides a comparative analysis of the constitutional, legislative and institutional setting for the effective participation of persons belonging to minorities in Serbia and Romania. It has shown that while Romania recognizes minority rights on individual basis only and guarantees minority representation in the elected bodies, the Serbian Constitution entrenched collective rights and introduced cultural autonomy. It is suggested that, irrespective of individual or collective approach, legislation concerning cultural autonomy rights (i.e. culture,

education, information and the official use of language and script) introduces more or less the same standards. The difference is in the form of the effective participation. While minorities have their councils in Serbia, in Romania all of them are represented at the parliament and the Council for National Minorities. Comparing to the former, the latter are less efficient in terms of participation. In addition, the Chapter compares cultural autonomy model that the Draft Law aims to introduce in Romania with Serbian model, arguing that similarities come from the continuous external influences.

The fourth Chapter looks into functioning of the national councils in Serbia on the basis of comparative analysis of the two biggest councils – Hungarian and Roma. It aimed to determine whether introducing the uniform institution for all minorities is an adequate solution. By applying indicators defined in the Chapter One, it formulated recommendations for both improvement of national councils and devising common model of cultural autonomy. Therefore, it is recommended that cultural autonomy should be constitutionally guaranteed; national councils should reflect all diversity within minorities, with exclusion of political organizations; councils should be decentralized and sufficiently flexible to address various needs that different minorities might have; additional mechanisms for intercultural dialogue (i.e. bilingual or multilingual education; efficient national institution for interethnic dialogue between majority and minority) should be introduced. Accordingly, amending the Draft Law is strongly recommended.

It is concluded that national councils can sufficiently protect the right to identity, but some improvements are needed in the area of effective participation of persons belonging to minorities which councils represent.

These findings are based on the following methodology. Having in mind the nature of the topic, qualitative method was used mostly. The hypothesis is formulated according to the detailed literature review. It should be emphasized that except domestic authors, no substantive work has been carried out on the national councils as a mechanism for effective participation. The insight into constitutional, legislative and institutional arrangements in Romania and Serbia is based on the critical analysis of primary sources (i.e. Constitutions of Serbia and Romania, legislation, state reports to ACFC, ACFC opinions, Venice Commission opinions). In addition, due to the lack of literature on functioning of national councils, interviews were conducted with the Province Ombudsman Deputy for National Minorities, and Head of Education of Roma National Council<sup>15</sup>. Limitations include poor secondary sources on this institution, and, apart from the Venice Commission opinion, no analysis of the Draft on the Statute for National Minorities in Romania could be found. Furthermore, language obstacle prevented the thesis writer from the analysis of some sources from Romania (parliamentary and government websites, where only very limited and general information are available in English).

It is believed that this analysis might provide two possible modest contributions to the cultural autonomy concept development. It might provide some direct insight and lessons learnt from Serbia in the case of functioning of national councils for all those that would like to introduce them, including minorities in Romania. In addition, comments on the Draft law and proposals for its amendment may be added value of the thesis.

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<sup>15</sup> It is worth noting that after interviews being held, Province Ombudsman report on national councils was published in June 2012. However, it does not include Roma National Council.

## Chapter One: Literature Review

Cultural autonomy is based on the personality principle, meaning that individuals may freely express their cultural self-identification establishing “autonomous communities [...] organized as sovereign collectives whatever their residential local within a multinational state”<sup>16</sup>. This type of autonomy usually encompasses self-government in rights concerning identity – culture, education and language. Even though this concept is elaborated under various theories and implemented by some countries, there is no, as Eide confirms, “established right to cultural autonomy under general international law”<sup>17</sup>. Why is that so? One of the possible answers may lie in the fact that this notion cuts across many controversial issues concerning minority rights: autonomy is a group right; it is based on the right to identity; there is much powerful alternative in the form of territorial autonomy.

It seems that cultural autonomy has many opponents. It is interesting that, in spite of general disagreement upon minority rights, both liberal egalitarians and multiculturalists agree that the concept of cultural autonomy should be disregarded. While the former consider it as unnecessary, the latter claim that it is too weak. Having in mind this theoretical *Scylla and Haribda*, arguing in favor of cultural autonomy does not seem so plausible. Nevertheless, the halfhearted implementation of this concept in some Central and East European countries (hereinafter CEE) not only keeps this debate alive, but it also compels for some clarifications and improvements.

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<sup>16</sup> Ephraim Nimni, ed., *National Cultural Autonomy and Its Contemporary Critics*, (London and New York: Routledge, Taylor & Francis Group, 2005), Introduction, 1

<sup>17</sup> Walter A. Kemp, “The Politics of Culture. The Limits of National Cultural Autonomy”, in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 207

### 1.1. Individual *versus* Group rights

In spite of a fairly developed system of international and regional minority rights protection, the debate over the collective dimension of these rights is still ongoing. As Varady correctly notes, “[w]ithin the last few decades, collective rights have probably become the most controversial notion in the area of minority rights”<sup>18</sup>. One of the possible reasons might be that term “collective rights” is loaded with political connotations, which makes it even more difficult to achieve international consensus<sup>19</sup>. The debate is reinforced in the light of introducing cultural autonomy. For this reason, let us briefly summarize the main arguments for and against collective rights.

Liberal scholars oppose collective rights for many reasons. They are troubled with both the recognition of groups *per se* and a group’s relation toward its members. For instance, Makkonen considers groups as the social construct created by the positive legal and political framework<sup>20</sup>. In similar terms, Raikka claims that even in the case of group rights recognition, the problem of determination of groups remains. One of the most frequent critiques against the recognition of group rights points to group members’ freedom of choice restriction. These questions are specifically relevant for the situation when rights of collectives may clash with rights of individuals belonging to minorities, such as some traditional customs. In this regard, Makkonen has developed the concept of so-called the “paradox of multicultural vulnerability”, arguing that the paradox lies in the fact that granting protection to a specific group may leave in-

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<sup>18</sup> Tibor Varady, Minorities, Majorities, Law and Ethnicity: Reflections of the Yugoslav Case”, *Human Rights Quarterly*, 19/1 (1997) 9-54

<sup>19</sup> Ibid.

<sup>20</sup> Timo Makkonen Equal in Law, Unequal in Fact. Racial and ethnic discrimination and the legal response, (PhD diss., Faculty of Law, University of Helsinki, 2010), 23

group discrimination out of regulation.<sup>21</sup> Concerning inter-group relations, it is argued that the classification along ethnic lines will freeze subdivisions and further antagonize majority against minority concerned.<sup>22</sup> In this regard, Vanernoot argues that minority rights are dangerous even for the minorities themselves in terms of reinforcing their isolation<sup>23</sup>. Liberals go even further, pointing to the problem of group representation. In this respect, Kukatas argues that conflict of interest may appear within the groups between masses and elites, where the former may care more about economic progress while the latter are more interested in the preservation of tradition<sup>24</sup>. For all these reasons, it is the general argument of liberal theory that persons belonging to minorities can be sufficiently protected by proper implementation of individual human rights<sup>25</sup>. Accordingly, cultural matters should be kept in private sphere<sup>26</sup>.

Multiculturalists argue exactly the opposite. In general, they consider that the individual human rights and the prohibition of discrimination cannot sufficiently cover all aspects of minority rights. Moreover, cultural differences cannot be kept in private sphere, since public sphere is already dominated by the majoritarian culture. When it comes to the rights holder, some differences appear. For instance, Henrard claims that group rights should be recognized to

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<sup>21</sup>Timmo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experience of the Most Marginalized to the Fore* (Institute For Human Rights, Åbo Akademi University, 2002) Available at <http://www.abo.fi/media/24259/report11.pdf> (accessed 25 November, 2011)

<sup>22</sup> Christin Henrard, *Devising an Adequate System of Minority Protection*, (The Hague: Martinus, Nijhoff Publishers, 2000) 221

<sup>23</sup> Ibid. 226

<sup>24</sup> Miodrag Jovanovic, "Postoje li kolektivna prava?" (Are There Collective Rights?), *Anali Pravnog Fakulteta u Beogradu/Belgrade Faculty of Law Journal*, 2008, 56/1, 89-107

<sup>25</sup> Christin Henrard, *Devising an Adequate System of Minority Protection*, (The Hague: Martinus, Nijhoff Publishers, 2000), 225

<sup>26</sup> Paul Kelly, "State and Nationas versus Liberal Egalitarianism", in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 176

reinforce individual rights of persons belonging to minorities. However, others argue in favor of the recognition of groups as such. Thus, Jovanovic considers that group rights do not derive their collective character from the way they are exercised, since the fact that some individual rights are exercised in community with others does not make them collective, such as freedom of assembly<sup>27</sup>. Therefore, he postulates that collectives are more than a sum of their individual members; they are specific entities capable of holding collective rights. However, Varady thinks slightly differently. He argues that collectives have to be recognized as rights holders since some rights, such as language rights, can be realized as rights of certain groups only. In other words, it is not that collective exercising these rights makes groups “visible”; instead, in order to be recognized, some rights have to be defined as rights of the specific groups<sup>28</sup>.

An interesting counterargument to all those concerned about the status of individuals within groups comes from Kymlicka. He believes that liberalism can accommodate group rights, as its purpose is to benefit individuals, since culture has the “fundamental importance” for them<sup>29</sup>. Referring to the concerns for group members’ rights, he explicitly rejects any kind of internal limitations. In this regard, he differentiates between the “external protection” against majority and the “internal protection” against its own members, arguing that only the former is

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<sup>27</sup> Miodrag Jovanovic, “Kolektivna prava i pozitivna diskriminacija – konceptualna razjasnjenja” (Collective Rights and Positive Discrimination – Conceptual Clarifications) in *Kolektivna prava i pozitivna diskriminacija u Ustavnom pravnom sistemu Republike Srbije (Collective Rights and Positive Discrimination under the Constitutional system of Republic of Serbia)*, ed. M. Jovanovic (Belgrade: Sluzbeni glasnik, 2009), 14

<sup>28</sup> Varady gives an example of the official use of language and script as the collective right of the majority. As it would be impossible to recognize this right to all individuals whose mother tongue is different from the official language, differentiation has to be made between specific groups of persons, and only some of them might get this right recognized as well. For instance, those groups that traditionally live in some settlement may have their language recognized as the official in the municipality concerned. See Tibor Varady, “Minorities, Majorities, Law and Ethnicity: Reflection of the Yugoslav Case”, *Human Rights Quarterly*, 19/1 (1997) 9-54.

<sup>29</sup> Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991) 39

justifiable. Therefore, groups do need “external protection” as the majority may constitute a threat for them, but this protection may not result in internal limitations imposed to group members<sup>30</sup>.

It seems that the debate over the recognition of collective rights is a never-ending story. Nevertheless, this has not prevented the development of minority rights in general, and the recognition of various group rights encompassed under the umbrella of effective participation of persons belonging to minorities in particular. We leave this debate here and go into the issue that is at the very heart of debate over cultural autonomy – right to identity.

## 1.2.Right to identity

According to Henrard, the minority protection system is based on two pillars: the prohibition of discrimination and the protection and promotion of minority identity. Both are necessary for the implementation of the principle of equality, with the distinction that the first refers to formal equality, while the second requires substantive (real) equality<sup>31</sup>. The *differentia specifica* of the second is that it calls for the differential treatment in different circumstances<sup>32</sup>.

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<sup>30</sup>Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991) 39

<sup>31</sup> Christin Henrard, *Devising an Adequate System of Minority Protection*, (The Hague: Martinus, Nijhoff Publishers, 2000), 8-11

<sup>32</sup> This principle is established by the Permanent Court of International Justice (PCIJ) in the Advisory Opinion regarding Minority Schools in Albania. PCIJ stated that “[e]quality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations”. Advisory Opinion No. 64 of 6 April 1935. Available at [http://www.worldcourts.com/pcij/eng/decisions/1935.04.06\\_albania.htm](http://www.worldcourts.com/pcij/eng/decisions/1935.04.06_albania.htm) (accessed 12 July, 2012)



Multiculturalists argue that for achieving substantive equality, affirmative action is insufficient<sup>33</sup>. Namely, while the affirmative action aims to achieve equality and is temporary, the preservation of identity requires the permanent safeguards that will preserve distinct features of some group. In other words, while affirmative action aims to erase differences; special measures tend to preserve them<sup>34</sup>. Walzer explains that national minorities in Europe, that found them in a minority position due to shifting borders during turbulent European history, do not tend to integrate in terms of assimilation; instead, they want to preserve their identity through some form of self-government<sup>35</sup>.

What makes the right to identity so special? Henrard considers that the preservation of group identity should be central to minority protection, since “group identity [...] determines individual identity (to a certain extent)”. In similar terms, Kymlicka considers that culture provides “a meaningful context for individual choice”<sup>36</sup>. Following this, Buchanan adds that cultural membership provides meanings to certain options and thus makes individuals able to identify with them, providing thus ideals with “wholeness and continuity” over generations<sup>37</sup>. The author considers that without this cultural orientation, individuals would be lost between fragmented goals, feeling “that nothing is worth doing because everything is possible”.

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<sup>33</sup> Christin Henrard, *Devising an Adequate System of Minority Protection*, (The Hague: Martinus, Nijhoff Publishers, 2000), 29

<sup>34</sup> Ephraim Nimni, ed. *National Cultural Autonomy and Its Contemporary Critics* (London and New York: Routledge, Taylor & Francis Group, 2005), 7-8

<sup>35</sup> Michael Walzer, “Pluralism: A Political Perspective”, in *The Rights of Minority Cultures*, ed. Will Kymlicka, (Oxford University Press, 1995), 139-155

<sup>36</sup> Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991) 53

<sup>37</sup> Ibid.

Indeed, it might be that individuals need some cultural orientation, but the assumption on the need for “wholeness” may be challenged on the ground that it implies that all members of culture think alike, which would hardly ever be the case. Moreover, since in the time of global communications individuals are exposed to the overlapping influences of various cultures, it might be legitimate to ask how influence of the “native” culture may be preserved as predominant? By isolation? In this regard, Bauböck claims that insisting on the moral value of the “intergenerational continuity” within specific culture might prevent intercultural relations thus resulting in closing culture<sup>38</sup>. In addition, if that orientation is so central to members of specific cultures how than immigrants live, far away from their compatriots and culture? At the end, insisting on the “intrinsic value of culture” might justify majoritarian monopolizing public sphere. For all these reasons, it might be plausible to justify the preservation of the culture on the non-discrimination ground. In this regard, Varady correctly notes that minority rights should not be considered as additional or special rights; on the contrary, these are rights already recognized to majority. Principle of equality requires granting the same rights to minority<sup>39</sup>. It should be emphasized that this ground is distinctive from the classical non-discrimination approach, as it allows exercising the rights concerning identity in the public sphere; rather than the private only.

For further discussion, it is worth noting that proponents of the collective rights acknowledge its limitations. Thus, Kymlicka considers that “legitimacy of certain measures may also depend on their timing”<sup>40</sup>. Furthermore, Henrard argues in favor of a sliding-scale approach,

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<sup>38</sup> Rainer Bauböck, “A Conceptual Critique of Renner’s Model”, in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 99

<sup>39</sup> Tibor Varady, “Minorities, Majorities, Law and Ethnicity: Reflection of the Yugoslav Case”, *Human Rights Quarterly*, 19/1 (1997) 9-54

<sup>40</sup> Christin Henrard, *Devising an Adequate System of Minority Protection*, (The Hague: Martinus, Nijhoff Publishers, 2000), 225

considering that collective rights can be limited in accordance with the principle of proportionality – in the same way as individual rights are limited. In her view, collective rights should be “tailored to each specific situation as fully as possible” and should not result in the complete segregation of the group concerned<sup>41</sup>. Regarding tailoring, Eide suggests that “ladder” of rights should be designed for different minorities, taking into account the origin of minority situation, the length of stay in the state concerned, and the reasonableness of its demands<sup>42</sup>. Hannum disagreed arguing that instead of different rights, different means for exercising the same rights should be introduced<sup>43</sup>.

In sum, it seems that there is a consensus that the protection of the right to identity in the name of the substantive equality calls for introducing special measures. However, when it comes to the type of the measures concerned, it seems that consensus disappears.

### **1.3. Cultural autonomy**

#### **1.3.1. Revival of Renner’s model**

The idea of the cultural autonomy dates back to the 19<sup>th</sup> century. In order to preserve the unity of the Austro-Hungarian Empire, Austrian politician Renner prepared the proposal to Socialist Party for the constitutional recognition of collective right to national cultural autonomy for communities on non-territorial basis<sup>44</sup>. He conceptualized autonomy on the personality principle, which meant that autonomous communities would be organized as sovereign collectives

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<sup>41</sup>Christin Henrard, *Devising an Adequate System of Minority Protection*, (The Hague: Martinus, Nijhoff Publishers, 2000), 226-227

<sup>42</sup> Ibid. 14

<sup>43</sup> Ibid. 14

<sup>44</sup> Ephraim Nimni, ed., *National Cultural Autonomy and Its Contemporary Critics*, (London and New York: Routledge, Taylor & Francis Group, 2005), Introduction, 1

irrespective of their residence within the state and would be entitled to deal with their own cultural affairs. The idea aimed to challenge the organization of the nation-state, arguing for detaching the nation from the territory. Nevertheless, it was not accepted. However, in 1925 Estonian authorities introduced the Cultural Autonomy Law allowing each ethnic group of at least 3,000 members to establish the cultural council that will be allowed to tax group members and exercise competences regarding culture<sup>45</sup>. It may be plausible to argue that the idea of cultural autonomy has not significantly evolved since then.

The collapse of communism and ethnic conflicts in the early 1990s gave a new life to the idea of cultural autonomy in CEE. Initially, European actors (OSCE, EU, CoE) were arguing in favor of territorial autonomy for minorities, but CEE countries were reluctant to grant it, due to the fear for the territorial integrity and national unity<sup>46</sup>. Therefore, cultural autonomy was seen as more compatible with their nation-building projects. However, implementation of this concept is considered as token<sup>47</sup>. For example, Estonia grants cultural autonomy for citizens only, thus excluding the majority of Russians within its territory<sup>48</sup>.

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<sup>45</sup> John Mc Garry and Margaret Moore, “Karl Renner. Power-sharing and non-territorial autonomy”, in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 80

<sup>46</sup> Christin Henrard, *Devising an Adequate System of Minority Protection*, (The Hague: Martinus, Nijhoff Publishers, 2000), 223

<sup>47</sup> John Mc Garry and Margaret Moore, “Karl Renner. Power-sharing and non-territorial autonomy”, in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 84

<sup>48</sup> Ibid.

### 1.3.2. Why multiculturalists do not like cultural autonomy?

Multiculturalists criticize cultural autonomy for having a very narrow scope of competences in the cultural affairs that cannot satisfy minorities' demands. Thus, Kymlicka considers this approach as ineffective, due to its inability to deal with ethnic conflicts that "had not broken out because of the right to enjoy culture". He argues that these conflicts involved large minorities that requested "territorial autonomy, official language status, minority-language universities and consociation power-sharing"<sup>49</sup>. Indeed, territorial autonomy might provide long-term solution for these minorities. However, the problem with Kymlicka's argument is that CEE countries' reluctance toward territorial autonomy has not changed. In addition, the claim for territorial autonomy is based on the assumption on the homogeneity of population within the territory concerned, which is not often the case. In addition, some members of the group live outside of this territory. In this regard, Kymlicka himself acknowledges that while territorial autonomy may apply to territorially concentrated minorities, cultural autonomy is more adequate for those that are dispersed<sup>50</sup>. Moreover, if cultural autonomy is so inefficient, why Hungarian minority, that Kymlicka strongly recommends for territorial autonomy, requests cultural autonomy in Romania for two decades?<sup>51</sup>. Additionally, the argument on cultural autonomy incapability to deal with ethnic conflicts may be challenged on the ground of the variety of approaches to cultural autonomy. Thus, if it is based on the mere coexistence of different cultures it might not be

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<sup>49</sup> Will Kymlicka, "The Evolving Basis of European norms of Minority Rights: Rights to Culture, Participation and Autonomy", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008), 23 - 24

<sup>50</sup> Will Kymlicka, "Renner and the Accommodation of Sub-state Nationalism", in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 137-138

<sup>51</sup> Ibid, 137-138

sufficient conflict prevention. On the other hand, in the society where cultural autonomy institutions are designed to provide intercultural exchange and mutual development of each of them it is less likely that a conflict will take place<sup>52</sup>.

Referring to the narrowness of cultural affairs, some scholars share the view that it should be combined with other forms of political participation for persons belonging to minorities, such as power-sharing and ethnic representation. In this respect, Lijphart defines power-sharing (consociationalism) as the group-based political representation in the central government. This model of state organization departs from the majority rule by introducing the coalition government, the mutual veto, the proportionality, and the segmental autonomy<sup>53</sup>. Lijphart argues that this model is good for multiethnic countries as it mitigates the risks of majority tyranny. However, some scholars disagree. For instance, Phillips worries that it might lead to closure of group identities, not allowing trans-communal connections. Moreover, she further argues that reserved seats for minority representatives may release them of any accountability to minority members. In other words, whatever they do or don't do, they do not depend on their voters as they will always have guaranteed seats<sup>54</sup>.

Argument on the closure of group identities is relevant for cultural autonomy as well, since Renner's model was criticized of "freezing ethnic identities" by requesting individuals to

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<sup>52</sup> Basic differentiates between segregative and integrative multiculturalism. While the former creates parallel worlds of coexisting culture that provides fragile peace, the latter provides intercultural intertwining and creation of variety of relationships. See Goran Basic, *Iskusenja demokratije u multietnickom drustvu/Trials of Democracy in Multiethnic Society* (Belgrade, Centar za istrazivanje etniciteta, 2006) 65-68. Available at [http://www.ercbgd.org.rs/index.php?option=com\\_content&view=article&id=26&Itemid=50&lang=sr](http://www.ercbgd.org.rs/index.php?option=com_content&view=article&id=26&Itemid=50&lang=sr) (accessed 10 July, 2012)

<sup>53</sup> Christin Henrard, *Devising an Adequate System of Minority Protection*, (The Hague: Martinus, Nijhoff Publishers, 2000), 271-276

<sup>54</sup> Will Kymlicka, ed. *The Rights of Minority Cultures*, (Oxford University Press, 1995), 17

declare affiliation<sup>55</sup>. It is said that it depends on “counting members”, which contravenes individual right to self-identification. Namely, by detaching the nation from the territory, it is stronger attached to its members’ affiliation. For this reason, it is argued that territorial autonomy is better, as fixed territory may be considered as the objective criterion<sup>56</sup>.

### **Concluding remarks**

Based on the theoretical concerns discussed above, it seems that any form of cultural autonomy should answer two questions: “Is the right to identity of persons belonging to minorities protected?”; “Do persons belonging to minorities effectively participate in self-government?”. Finding these theoretical concerns justified, we consider that they may serve for formulating indicators that will help the evaluation of cultural autonomy introduced in Serbia in 2002 and the proposal for its introduction in Romania. The indicators are as follows: the Constitutional recognition, the form of group representation and existence of pluralism within minorities, sliding-scale approach towards different situations of minorities, efficiency of participation in decision-making and ethnic compartmentalization. The indicators will be applied at the Chapter Four, after analysis of legislative and institutional setting of national councils has been completed.

Conclusion to this part may be formulated in terms of the lack of both theoretical and legal consensus upon fundamental principles that both minority rights and cultural autonomy are

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<sup>55</sup> Rainer Bauböck, “A Conceptual Critique of Renner’s Model”, in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 101

<sup>56</sup> Ibid. 102

based on – the recognition of the group rights and the justification for the right to identity. What makes cultural autonomy even more controversial is that it is rejected by both liberal and multicultural scholars. However, this has not prevented incorporation of this model within international and regional legal instruments. The next section will show that these principles are entrenched within both legally binding and non-binding documents and European actors monitor its implementation. However, numerous “loopholes” concerning these standards call for further clarifications.



## Chapter Two: Emergence of Common European Standards of Minority Rights Protection

Minority rights' protection in countries that accessed EU or aspire toward that goal, results from the interplay of the actors coming from both the European and the national level. There is no theoretical consensus over the side that is dominant in this interaction process. Some scholars argue that it is difficult to measure external influences<sup>57</sup>, while others believe that the influence of European organizations is predominant<sup>58</sup>. Focusing on the European triangle of minority rights protection encompassing European Union (hereinafter EU), Council of Europe (hereinafter CoE) and Organization for Security and Co-operation in Europe (hereinafter OSCE) might offer solid contribution to the argument on the external influences in this specific area of human rights. Each of these organizations developed own way of dealing with these issues. Thus, the OSCE uses diplomatic means for conflict prevention, CoE codifies legal standards and the EU monitors and supports implementation through politics of conditionality. In addition, overlapping activities have the effect of mutual reinforcing of each of them.

This chapter will look at the way this European triangle affects and shapes domestic policies on minority protection. It will be argued that connecting the minority issue with stability of democracy and consequently, including it under the Copenhagen political criteria<sup>59</sup> determined

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<sup>57</sup> Bernd Rechel, ed. *Minority Rights in Central and Eastern Europe* (London and New York: Routledge, Taylor & Francis Group, 2009) Introduction, 2

<sup>58</sup> Will Kymlicka, "The Evolving Basis of European norms of Minority Rights: Rights to Culture, Participation and Autonomy", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 11

<sup>59</sup> The European Council in Copenhagen in June 1993 set out so-called "Copenhagen criteria" that the countries that aspire toward EU membership should fulfill during pre-accession period. Available at [http://ec.europa.eu/enlargement/enlargement\\_process/accession\\_process/criteria/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm) (accessed 18 March 2012)

the development of the domestic minority policies of the Central and East European (hereinafter CEE) candidate countries toward providing effective participation of individuals belonging to minorities through various mechanisms including cultural autonomy. However, many scholars share the view that these experiments with alternative seen in Renner's model of cultural autonomy resulted in the "halfhearted" implementation<sup>60</sup>. This Chapter will argue that European actors contributed to this partial success of minority policies by insisting upon the implementation of the underdeveloped minority protection requirements and inconsistent assessment of achieving these standards.

## **2.1. "Stigmatization" of minority rights – political approach**

The best way to understand the current European system for minority protection is to look into the way it was created. It is worth noting that the legal approach, focused on post-communist states' compliance with minority rights standards, evolved from the security approach that treated post-communist states as the potential threats to the regional stability<sup>61</sup>. Namely, the rise of nationalism that triggered the civil war in the former Yugoslavia and the dissolution of the Soviet Union in the early 1990s gave the ground for concerns over the security of the whole CEE region. As the result, the first two regional documents on minority issues – OSCE's Copenhagen

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<sup>60</sup> John Mc Garry and Margaret Moore, "Karl Renner. Power-sharing and non-territorial autonomy", in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 84

<sup>61</sup> Will Kymlicka, "The Evolving Basis of European norms of Minority Rights: Rights to Culture, Participation and Autonomy", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 26

document<sup>62</sup> and CoE's Framework Convention for the Protection of National Minorities (hereinafter FCNM)<sup>63</sup> attempted to approach minority rights from the conflict prevention perspective. The same security concerns and their possible effect on the situation in the West European countries motivated the EU to include minority protection under the realm of Copenhagen political criteria for the EU membership<sup>64</sup>.

The OSCE was the first organization that touched upon the European “hot potato”<sup>65</sup> - the internationalization of the minority rights<sup>66</sup>. Two outcomes of the OSCE's work in this area are of particular importance for the discussion regarding cultural autonomy. The first refers to developing cultural autonomy within the framework of effective participation of the persons belonging to minorities. The second is the downside of the first – establishing political assessment of achieving these standards.

The connection between cultural autonomy and the right to effective participation dates back to the first politically binding document - the Copenhagen Document of 1990, that contains a detailed set of minority standards, embedded into the wider framework of the rule of law<sup>67</sup>. The Document stipulates the participation in the affairs relating to the identity of minorities by

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<sup>62</sup> Document of the Copenhagen meeting of the Conference on Human Dimension of the CSCE, 5-29 June, 1990, Available at <http://www.osce.org/odihr/elections/14304> (accessed 18 March, 2012)

<sup>63</sup> Framework Convention for the Protection of National Minorities, Available at <http://conventions.coe.int/Treaty/en/Treaties/html/157.htm> (accessed 26 March, 2012)

<sup>64</sup> Will Kymlicka, “The Evolving Basis of European norms of Minority Rights: Rights to Culture, Participation and Autonomy”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 13

<sup>65</sup> Hans-Joachim Heintze, “Human Rights and Political Interests “Is there a Double Standard?”, *OSCE Yearbook*, (Institute for Peace Research and Security Policy, University of Hamburg/IFSH, 2000) 219-237

<sup>66</sup> Krzysztof Drzewicki, “The Enlargement of the EU and the OSCE HCNM”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 157

<sup>67</sup> Hans-Joachim Heintze, “Collective Rights in the Context of EU Accession”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller, et al. (London: Palgrave Macmillan, 2008) 44

“establishing, as one of the possible means to achieve these aims, *appropriate local or autonomous administrations* corresponding to the specific historical and territorial circumstances of such minorities”<sup>68</sup>. It seems that these formulations clearly refer to territorial autonomy. How it suddenly disappeared and where cultural autonomy came from?

Many scholars share the view that CEE countries were reluctant to grant the territorial autonomy due to perceiving minority rights as a threat to territorial integrity<sup>69</sup>. Minorities were seen as “potentially disloyal”, due to their connections with neighboring kin-states<sup>70</sup>. Such “stigmatization” of minority rights resulted in the understanding that cultural autonomy for persons belonging to minorities is more compatible with their nation-building projects<sup>71</sup>.

Therefore, cultural autonomy found its way to regional documents. The principles set forth by Copenhagen Document are further elaborated by the set of recommendations for regulating various aspects of minority protection<sup>72</sup>. The most significant for the cultural autonomy are the Lund Recommendations of 1999 that concerned “the political dimension of minority aspirations” and the right of minorities to effective participation in decision-making

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<sup>68</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, para. 35 Available at <http://www.osce.org/odihr/elections/14304>, (accessed 1 June 2012)

<sup>69</sup> Will Kymlicka, “Renner and the Accommodation of Sub-state Nationalism”, in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005) 141-143

<sup>70</sup> Ibid.

<sup>71</sup> Marc Weller, “Introduction: The Outlook for the Protection of Minorities in the Wider Europe”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 3-5

<sup>72</sup> The Hague Recommendations of 1996 were predominantly focused on education rights of national minorities; the Oslo Recommendations of 1998 concerned minority’ linguistic rights.

process<sup>73</sup>. These aspirations suppose to be fulfilled either by territorial or non-territorial arrangements of self-governance, including personal or cultural autonomy. Lund Recommendations stipulate that competences of these institutions should be determined in accordance with the national context and desires of minorities. In general, it should encompass areas that are crucial to the identity of national minorities such as the education, the culture, the use of minority language and the religion. In addition, the adequate financial resources for performance of these public functions are strongly recommended<sup>74</sup>.

The aim of the document was “to serve ultimate conflict prevention goal of the High Commissioner on National Minorities”<sup>75</sup> (hereinafter HCNM). It was believed that enabling persons belonging to minorities to effectively participate in public affairs, combined with other standards would be sufficient safeguard from the potential conflicts. Therefore, it seems that CEE countries were not the only “stigmatizing” minority rights. What might be considered as the additional negative legacy of OSCE’s political approach is the establishment of the political assessment of the implementation of these standards focused on the guarantee of peace and often leaving aside achievement of the concrete standards of cultural autonomy. Namely, the diplomatic character of the HCNM’s mandate left the ample space for its political actions. One of the results of such approach was the use of ‘double standards’ and predominantly focusing on the CEE new democracies, excluding Western European countries<sup>76</sup>.

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<sup>73</sup> The Lund Recommendations on the Effective Participation of the National Minorities in Public Life & Explanatory Note, 1999, para. 6. Available at <http://www.osce.org/hcnm/32240?download=true> (accessed 15 June, 2012)

<sup>74</sup> Ibid. para. 17

<sup>75</sup> Ibid, para. 6

<sup>76</sup> Heintze argues that Great Britain, Spain, France and Turkey “did everything they could in political terms to prevent the establishment of the HCNM at all. When this became inevitable, they structured the mandate in such a

## 2.2. “Legalization” of minority rights - Legal approach

The CoE’s efforts to create the regional standards for minority rights resulted in what is being considered as “the most developed international minority protection system to date”.<sup>77</sup> Such understanding is grounded in the fact that one of these efforts’ products – the Framework Convention for the Protection of National Minorities (hereinafter FCNM) is the only legally binding instrument for this area of human rights in the world. In addition, the CoE is the only European organization whose dealing with the minority issues is not affected by the EU accession and goes beyond this timeframe<sup>78</sup>.

### 2.2.1. What does the Framework Convention adds to the minority protection?

Before we focus on the concrete FCNM’s provisions that concern cultural autonomy, let us briefly describe the way that the Framework Convention deals with the basic dilemmas concerning minority rights. Contrary to the OSCE's political declarations, its translating into legally binding provisions on the minority protection underwent scrutinized and heated debate.

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way that their states would not fall under its scope.” See Hans-Joachim Heintze, “Human Rights and Political Interests – Is there a Double Standard?”, in *OSCE Yearbook 2001* (Institute for Peace Research and Security Policy, University of Hamburg/IFSH, eds.) 219-237

<sup>77</sup> Dimitry Kochenov, “A Summary of Contradictions: an Outline of the EU’s Main Internal and External Approaches to Ethnic Minority Protection”, in *Boston College International and Comparative Law Review*, 31/1, 2008, Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1119883##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119883##) (accessed 25 April, 2012)

<sup>78</sup> Gwendolyn Sasse, “The Politics of EU Conditionality: the norm of minority protection during and beyond EU accession”, *Journal of European Public Policy*, 15:6, 2008, 842-860

The first question raised was the one on the mere necessity of the Framework Convention. It was argued that it has “added-value”, meaning redundant character of these standards<sup>79</sup>.

For more than a four decades it was believed that the ECHR provided sufficient protection for individuals, as article 14 covered a broad range of issues related to the prohibition of discrimination on various grounds, including ethnic, cultural or religious. In addition, the European Court of Human Rights (hereinafter ECtHR) developed a significant case law considering complaints on violation of minority rights on the individual basis for non-discrimination. Nevertheless, the Court was rather reluctant to take into consideration a group dimension of these cases.<sup>80</sup> Furthermore, non-discrimination approach was strengthened by adding the Protocol 12, which broadens the scope of prohibition of discrimination transferring that into self-standing right under the ECHR.

However, the internationalization of minority issues by the OSCE in the early 1990s drew CoE’s attention to this matter. The initial idea to adopt the Framework Convention as the Protocol to ECHR, was rejected at the CoE’s Vienna Summit in 1993 due to the resistance to include minority rights under the ECtHR jurisdiction<sup>81</sup>. As a result, the new instrument - FCNM disconnected minority rights from European human rights protection mechanisms. Nevertheless,

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<sup>79</sup> Kristin Henrard, “The Added Value of the FCNM; the Two Pillars of an Adequate System of Minority Protection Revisited”, in *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?*, ed. Annelies Verstichel et al. (Antwerp-Oxford-Portland: Intersentia 2008) 91-117

<sup>80</sup> Dmitry Kochenov, “A Summary of Contradictions: an Outline of the EU’s Main Internal and External Approaches to Ethnic Minority Protection”, in *Boston College International and Comparative Law Review*, 31/1, 2008, Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1119883##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119883##) (accessed 25 April, 2012) The way the ECtHR was approaching the issue of minority discrimination may be illustrated through the case *D.H. and others v. The Czech Republic* (57325/00). The case concerned the special schools for Roma pupils in the Czech Republic; in the admissibility phase the Court was considering the case as a general problem, rather than the situation of individual applicants. However, in the reasoning on the merits it stated that its role is not to assess social context. Para.45.

<sup>81</sup> Hans-Joachim Heintze, “Collective Rights in the Context of EU Accession”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 42-54

the FCNM contains explicit reference to the ECHR in areas such as freedom of expression, assembly, association or religion, where the ECtHR has developed extensive case law.

The FCNM follows the traditional approach in considering minority rights as a part of individual human rights.<sup>82</sup> The Explanatory Report explicitly states that the Convention is not intended to convey collective rights to national minorities; instead, it protects rights of persons belonging to minorities.<sup>83</sup> This embedding of minority rights within the corpus of individual human rights revived the dilemma of opting for the formal or substantive equality. The FCNM confirmed that minority rights should be considered as “a special” since persons belonging to minorities cannot be protected under principle of non-discrimination only. For this reason, the Framework Convention’s provisions call for introducing the effective equality<sup>84</sup>. Accordingly, the FCNM has established positive obligations of States in order to achieve the factual equality.

However, the regulation of politically highly sensitive subject resulted in the framework character of the Convention, thus leaving a wide margin of appreciation to the state parties in implementing its provisions.<sup>85</sup> In addition, provisions are set in the form of principles that have the programmatic character meaning that they cannot be invoked before the courts<sup>86</sup>; instead,

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<sup>82</sup> Hans-Joachim Heintze, “Collective Rights in the Context of EU Accession”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 42

<sup>83</sup> The Explanatory report on the FCNM, para. 31

<sup>84</sup> FCNM, article 4

<sup>85</sup> Marc Weller, “Introduction: The Outlook for the Protection of Minorities in the Wider Europe”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 1-11

<sup>86</sup> Bruno de Witte, “Introduction: Exploring a Central Pillar of the European Minority Rights System”, in *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?*, ed. Annelies Verstichel et al. (Antwerp-Oxford-Portland: Intersentia, 2008) 2



they are left to the international experts' assessment<sup>87</sup>. Let us remind that other international provisions concerning minorities have framework character as well, such as article 27 of the International Convention on Civil and Political Rights (hereinafter ICCPR)<sup>88</sup>. It seems that such framework character makes both article 27 and the FCNM as more appealing to the States. On the other hand, it shows that the willingness of States to protect minorities has not gone too far from the one expressed during the 1960s when ICCPR was drafted.

The FCNM, following other international instruments, remains silent on the issue of minority definition<sup>89</sup>. The Explanatory report itself states that the drafters “decided to adopt a *pragmatic approach*, based on the recognition that at this stage it is impossible to arrive at a definition [of a minority] capable of mustering general support of all [CoE] member States.”<sup>90</sup> This pragmatic approach is criticized by minority rights experts for leaving to the state parties to freely decide who will be granted protection under the Framework Convention. However, it might not be the case<sup>91</sup>. The ACFC developed a dynamic approach in interpreting the FCNM,

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87 Wojciech Sadurski, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 209-232

88 For instance, the Special Rapporteur stated that this article is programmatic as it sets the goal to be achieved by the positive obligations of the States. See Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991) 181

89 In the *Gorzelik and Others v. Poland* (44158/98) referring to the absence of an explicit definition of “national minority” in the FCNM and in the relevant instruments adopted by the United Nations, the Grand Chamber of the Court noted that there was no consensus on this point and itself avoided defining the scope of the concept. Para. 45

90 Explanatory report to the FCNM, para. 12.

91 Parliamentary Assembly Recommendation 1623, on Rights of National Minorities, para. 6: “[...] the States parties do not have an unconditional right to decide which groups within their territories qualify as national minorities in the sense of the [FCNM]. Any decision of the kind must respect the principle of non-discrimination and comply with the letter and spirit of the [FCNM].” Available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta03/EREC1623.htm> (accessed 26 November 2011)

tending to limit State parties' freedom of interpretation of the term "national minority"<sup>92</sup> by relying on the definition provided by the Parliamentary Assembly Recommendation 1201.<sup>93</sup> Such interference with internal affairs relies on the explicit FCNM's wording that the protection of national minorities is an integral part of the human rights protection and states do not have exclusive competence over it.<sup>94</sup>

### 2.2.2. Effective participation of persons belonging to minorities

According to the ACFC, article 15 (right to effective participation) taken in conjunction with articles 4 (full and effective equality) and 5 (obligation of State to promote and further develop minority identity) "form the main foundation of the Framework Convention"<sup>95</sup>. As the right to and respect for the distinct identity of a national minority are considered as the *conditio sine qua non* of minority protection<sup>96</sup>, the States have a positive obligation to protect and promote it<sup>97</sup>. Closely connected to this right is the right to self-identification and the prohibition of forced assimilation<sup>98</sup>. As the lack of universal definition leaves it to States to decide which groups will be recognized as minorities under the FCNM, the conflict between self-identification

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92 Hans-Joachim Heintze, "Collective Rights in the Context of EU Accession", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 48

93 Parliamentary Assembly Recommendation 1201 on Persons Belonging to National Minorities, available at <https://wcd.coe.int/ViewDoc.jsp?id=398899> (accessed 21 November, 2011)

94 The Explanatory report to the FCNM, para.30.

95 ACFC, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFC/21DOC(2008)001, para. 13

96 Ibid. para. 177

97 FCNM, articles 4 and 5

98 Ibid. articles 3 and 5

and State recognition may appear. Nevertheless, as it was noted above, States are not completely free when it comes to the recognition of minorities and the ACFC monitors these decisions in order to prevent arbitrary distinctions.

The FCNM defines religion, language, traditions and cultural heritage as the “essential elements” of the persons belonging to minorities’ identity<sup>99</sup>. Thus, persons belonging to minority have a right to manifest their religion and to establish religious institutions<sup>100</sup>. Freedom of expression encompasses imparting and receiving information in the minority language including both the access to audio-visual media and establishment of private print and audio-visual media<sup>101</sup>. Linguistic rights encompass the right to use one’s language in the private and public sphere and in contact with administrative and judicial bodies, the right to use their own name in the minority language and the right to display signs in minority language<sup>102</sup>. Concerning the education in mother tongue, persons belonging to national minorities should have opportunity either to take a course or to have whole education in own language<sup>103</sup>. The ACFC has stressed that the FCNM does not preclude the existence of an official state language, but States should introduce minority languages in municipalities where persons belonging to minorities live<sup>104</sup>.

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<sup>99</sup> FCNM, article 5

<sup>100</sup> Ibid. article 7

<sup>101</sup> FCNM, article 9

<sup>102</sup> Ibid. articles 10 and 11

<sup>103</sup> Ibid. articles 12, 13, 14.

<sup>104</sup> The ACFC has welcomed practice of Austria, Romania and Slovakia that allow use of minority languages in the areas where the minority population represents 10% (Austria) or 20% (Slovakia and Romania). See Rainer Hofmann, “The Future of Minority issues in the Council of Europe and the Organization for Security and Cooperation in Europe”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 189

ACFC argues that the enjoyment of all these rights is dependent upon effective participation of persons belonging to minorities in cultural, social and economic life and in public affairs.<sup>105</sup> The ACFC provided the range of possible ways for minority participation, such as representation in elected bodies and public administration at all levels, consultative mechanisms or cultural autonomy; arguing that States have the margin of appreciation to design the most appropriate means in accordance with national context<sup>106</sup>. However, States do have some limitations. Namely, introduced measures have to be effective, meaning that they have to provide the real and substantive influence<sup>107</sup>.

ACFC considers that “[t]he degree of participation of persons belonging to national minorities in all spheres of life can be considered as one of the indicators of the level of pluralism and democracy in a society”<sup>108</sup>. For this reason, minority representation should be constitutionally guaranteed<sup>109</sup>. It is worth noting that the ACFC does not consider representation as a sufficient tool; additional mechanisms, such as cultural autonomy arrangements or specialized governmental structures are needed<sup>110</sup>. The ACFC found that the legislative prohibition of establishing political parties of minorities is incompatible with article 7 of the FCNM<sup>111</sup>. In addition, minority political parties should be exempted from the threshold

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105 ACFC, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFC/21DOC(2008)001, para. 3

<sup>106</sup> Ibid, para. 10

<sup>107</sup> Ibid, para. 19

<sup>108</sup> Ibid, para. 8

<sup>109</sup> Ibid, para. 83

<sup>110</sup> Ibid, para. 72 and 73

<sup>111</sup> Political rights of minorities are treated under the ECtHR’s case law as well. The Court stated that the formation of political organizations for promoting of the distinct identity of some minority group does not amount to threat to national security and therefore must not be prohibited. See *Sidiropoulos and Others v Greece*, 57/1997/841/1047

requirements during elections<sup>112</sup>. It is interesting that ACFC calls States to support pluralism within minorities and ensure that minority representatives “represent the concerns of all persons belonging to national minorities”<sup>113</sup>. Concerning consultative mechanisms, the law should ensure that they “have a clear legal status, that the obligation to consult them is entrenched in law and that their involvement in decision-making processes is of regular and permanent nature”<sup>114</sup>. Therefore, mere consultation cannot be considered as the effective participation<sup>115</sup>. In addition, it is important to make sure that they have a legal personality and adequate resources<sup>116</sup>.

Concerning territorial or cultural autonomy, the ACFC states that the FCNM does not explicitly require recognition of none of them. Nevertheless, the Committee considers that both forms may have a positive impact over effective participation<sup>117</sup>. Cultural autonomy may be granted collectively to members of a particular national minority, regardless of territory where they live. The nature and the scope of autonomy should be specified by the Constitution; in general, it should encompass competences in the areas important for minority identity such as culture, language and education<sup>118</sup>.

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<sup>112</sup> ACFC, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFC/21DOC(2008)001, para. 82

<sup>113</sup> Ibid, para 79 and 101

<sup>114</sup> Ibid. para. 107

<sup>115</sup> Ibid. para. 71

<sup>116</sup> Ibid. para. 116 and 119

<sup>117</sup> Ibid. para. 133

<sup>118</sup> Ibid. para. 135

## 2.3. EU minority protection framework

The lack of its own standards made the EU to rely on existing external instruments on minority protection, most of which the FCNM<sup>119</sup>. Thus, during the pre-accession period of the CEE countries, CoE and OSCE were the main sources of information for the EU in the area of minority protection<sup>120</sup>. EU involvement brought a new dimension to the minority protection system. The positive side of this is that it provided a special weight to the OSCE and CoE standards. However, treating these standards within the framework of the politics of conditionality added to its politicization<sup>121</sup>. Furthermore, instead of being considered as a minimal threshold that the new democracies have to achieve and desirably, go beyond that, it turned out that the new EU Member States considered achieving these standards as fulfilling their international obligations<sup>122</sup>.

### 2.3.1. “Loose” political Copenhagen criteria

Much argumentation has been made of the loose character of Copenhagen political criteria, as they encompass broad categories such as democracy, rule of law and stability of

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<sup>119</sup> Gulara Guilyeva, “Lost in Transition: Russian-speaking non-citizens in Latvia and the protection of minority rights in the European Union”, *E. L. Rev.* 2008, 33(6), 843-869, footnote 864

<sup>120</sup> Chairman of the Advisory Committee for the FCNM and Director of the office of the High Commissioner for Minorities, OSCE were participating in the drafting process of the Commission’s Regular Reports on the progress of the CEE candidate states. See Gwendolyn Sasse, “Tracing the construction and effects of EU conditionality”, in *Minority Rights in Central and Eastern Europe*, ed. Bernd Rechel (London and New York: Routledge, Taylor & Francis Group, 2009) 21

<sup>121</sup> “[...] the EU was behaving as if minority protection were an export product that was not fit for domestic consumption”. See Gabriel von Toggenburg, “A Remaining Share or a New Part? The EU’s Role vis-à-vis Minorities after the Enlargement Decade”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 95

<sup>122</sup> Wojciech Sadurski, “Minority Protection in Central Europe and Accession to the EU”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 215-220

institutions; all of which the Treaty on European Union set forth as the values that the Union is based upon<sup>123</sup>. Nevertheless, it turned out that the political criteria went beyond these Treaty guaranteed values by including rights of persons belonging to minorities<sup>124</sup>. The reason for this was that due to the EU's security concerns, minority protection has become "one of the cornerstones of the pre-accession"<sup>125</sup>.

The looseness of these criteria mostly comes from the lack of the EU internal standards for minority protection. Namely, at the time of creating the minority rights criterion, no member state's national legislation had regulated specific minority rights<sup>126</sup>. In addition, the EU as not having an explicit competence in the area of minority protection, had no *acquis* upon which it could rely<sup>127</sup>. The minority protection was present in the nonbinding acts only. For instance, the Luxembourg European Council of 1991 adopted the Declaration on Human Rights, including the minority protection principle<sup>128</sup>. In addition, several European Parliament's (hereinafter EP) attempts to adopt declarations on these rights failed.<sup>129</sup> It was only after the eastern enlargement

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<sup>123</sup> Treaty on European Union, article B. Available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0001000001> (accessed 5 June, 2012)

<sup>124</sup> Dimitry Kochenov, "A Summary of Contradictions: an Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection", in *Boston College International and Comparative Law Review*, 31/1, 2008, Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1119883##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119883##) (accessed 25 April, 2012)

<sup>125</sup> Ibid.

<sup>126</sup> "If you would ask citizens or elites in Western Europe what 'the rights of national minorities' were, you would probably get a blank stare." See Will Kymlicka, "The Evolving Basis of European norms of Minority Rights: Rights to Culture, Participation and Autonomy", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 15

<sup>127</sup> Gwendolyn Sasse, "The Politics of EU Conditionality: the norm of minority protection during and beyond EU accession", *Journal of European Public Policy*, 15/6, 2008, 842-860

<sup>128</sup> Conclusion of the Luxembourg European Council, (28 - 29 June 1991), Available at [http://www.centrodirittumani.unipd.it/a\\_temi/normedu/003\\_ue/1\\_2/1\\_2\\_3\\_en.pdf](http://www.centrodirittumani.unipd.it/a_temi/normedu/003_ue/1_2/1_2_3_en.pdf) (accessed 23 March, 2012)

<sup>129</sup> It is worth noting that several attempts of the EP to legislate on minority rights had failed, and these rights disappeared from EU agenda. See Urlike Barten, "Minority Rights in the European Union after Lisbon", European Center for Minority Issues, Available at <http://www.uaces.org/pdf/papers/1102/barten.pdf> (accessed 20 March, 2012)

that the EP was able to adopt the Resolution on the Protection of Minorities and Anti-Discrimination Policies in an Enlarged Europe<sup>130</sup>.

Situation has slightly changed when the EU focused on legislative enforcing the prohibition of discrimination on the basis of ethnic or racial origin.<sup>131</sup> Comprehensive legal base for addressing negative discrimination is provided by the Directive on Race Equality of 2000, that applies both in cross-border and wholly internal situations, as well as to the public and private sector<sup>132</sup>. Nevertheless, other EU legislation apply mostly to the cross-border situations, protecting nationals of EU member state when reside in another EU member state<sup>133</sup>. It seems that this primarily focusing on non-discrimination results from the EU preoccupation with the integration of new minorities rather than preservation of identities, leaving the latter to the member states.

It may be plausible to conclude that the security concerned EU was insisting upon the criteria that it was not able to formulate in a sufficient manner, which consequently affected the whole process of national minority protection transformation, thus creating normative uncertainty around minority rights.

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<sup>130</sup> European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:124E:0405:0415:EN:PDF> (accessed 25 March, 2012)

<sup>131</sup> Dimitry Kochenov, "A Summary of Contradictions: an Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection", in *Boston College International and Comparative Law Review*, 31/1, 2008, Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1119883##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119883##) (accessed 25 April, 2012)

<sup>132</sup> Directive 2000/43/EC, OJ 2000 L 180/22, article 2: 'there shall be no direct or indirect discrimination based on racial or ethnic origin'. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:180:0022:0026:en:PDF> (accessed 15 April, 2012)

<sup>133</sup> Tawhida Ahmed, "A Critical Appraisal of EU Governance for the Protection of Minority Rights", *International Journal on Minority and Group Rights* 17 (2012), 265-285



### 2.3.2. Defining the politics of conditionality – “carrot and stick” approach

The Copenhagen political criteria, as not having “clear benchmarks” within the EU *acquis*, were the most important ground for establishing the politics of conditionality<sup>134</sup>. Therefore, this approach left ample space for political maneuvers for both the EU and the CEE candidate states<sup>135</sup>. The EU was able to politically assess fulfillment of the Copenhagen criteria, while the candidate states had a wide margin of discretion dealing with this criteria.<sup>136</sup>

Due to the lack of enforcement mechanisms, the EU developed so-called soft powers within the “carrot and stick” logic of interaction with candidate states<sup>137</sup>. The Commission used its annual Regular reports since 1997 as a key instrument to monitor and evaluate the candidates’ progress in fulfillment of the Copenhagen criteria. These reports have continuously been reminding candidate states to sign and ratify the FCNM, despite the fact that several member states have not done it. In addition, even when these reports included concerns over minority issues, they still were reporting on continuous progress of candidate states.<sup>138</sup> On the other hand, non compliance with these standards was not followed by sanctions, thus leaving to the domestic actors to shape these standards according to their own political needs. One can argue that this was an adequate approach, as the standards should be adjusted to the local context. However, the

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<sup>134</sup> Bernd Rechel, ed. *Minority Rights in Central and Eastern Europe* (London and New York: Routledge, Taylor & Francis Group, 2009) Introduction, 3

<sup>135</sup> Wojciech Sadurski, “Minority Protection in Central Europe and Accession to the EU”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 211

<sup>136</sup> Martin Brusis, “Enlargement and Interethnic Power-Sharing Arrangements in Central and Eastern Europe”, in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 232.

<sup>137</sup> Ibid.

<sup>138</sup> Gwendolyn Sasse, “Tracing the construction and effects of EU conditionality”, in *Minority Rights in Central and Eastern Europe*, ed. Bernd Rechel, (London and New York: Routledge, Taylor & Francis Group, 2009) 23

downside of this approach is that these standards were grasped by various political groups involved in broader political struggles risking of detaching the standards implementation from the real needs of the persons belonging to minorities<sup>139</sup>.

The concept of conditionality has been contested for several reasons<sup>140</sup>. First of all, its content depends on interactions and negotiations between various EU and domestic actors, all of which have their own interests<sup>141</sup>. Politicization is further enforced during the EU monitoring and assessments, as there are no clear benchmarks for assessing the level of the standards implementation. Connected to this is the dubious nature of the standards *per se* as there is no single European standard on minority protection.<sup>142</sup> The most problematic aspect of conditionality is its contribution to building the notion of double standards – using different yard sticks for measuring candidate countries' progress towards accession.

Double standards refer to the conditionality gap between the internal and external standards due to the lack of consensus among the EU member states over the minority protection system. This disagreement goes to the very basics of minority protection referring to the mere recognition of minorities as such. Therefore, some member states reject to ratify the FCNM considering that there are no minorities within their territories<sup>143</sup>. Even those states that are

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<sup>139</sup> Martin Brusis, "Enlargement and Interethnic Power-Sharing Arrangements in Central and Eastern Europe", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 236

<sup>140</sup> Bernd Rechel, ed. *Minority Rights in Central and Eastern Europe* (London and New York: Routledge, Taylor & Francis Group, 2009) Introduction, 2-5

<sup>141</sup> Gwendolyn Sasse, "The Politics of EU Conditionality: the norm of minority protection during and beyond EU accession", *Journal of European Public Policy*, 15:6, 2008, 842-860

<sup>142</sup> Ibid.

<sup>143</sup> Belgium, France, Greece and Luxembourg. See Marc Weller, "Introduction: The Outlook for the Protection of Minorities in the Wider Europe", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 1

parties to the FCNM limited the scope of its application to specific minorities<sup>144</sup>. Thus, the non recognition of the Roma as minority, resulted in the denial of their protection under the FCNM by several state parties<sup>145</sup>. Furthermore, some state parties differentiate between ‘old minorities’ in terms of indigenous people and ‘new minorities’ referring to the immigrants.<sup>146</sup>

In spite of the lack of internal consensus, the Commission was continuously insisting upon various minority standards in the CEE countries. Protection of the ‘rights of persons belonging to minorities’ clause was included within the Europe Agreements with CEE candidate countries. They were requested to adopt various measures such as the anti-discrimination legislation; ratification of the FCNM; adoption of programs for integration of Roma; establishment of minority self-governments and granting limited cultural and linguistic rights<sup>147</sup>. In spite of all these requests, the security approach was still predominant, as the indicator of compliance with the accession criteria was the lack of major disputes. Thus, both the 2003 Treaty of Accession and the Treaty of Accession of Bulgaria and Romania remained silent on minority rights.<sup>148</sup>

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<sup>144</sup> Denmark, Germany and the Netherlands. See Marc Weller, “Introduction: The Outlook for the Protection of Minorities in the Wider Europe”, in *The Protection of Minorities in the Wider Europe*, ed Marc Weller et al. (London: Palgrave Macmillan, 2008) 1

<sup>145</sup> There was a long-term dispute between ACFC and Denmark on the Denmark’s exclusion of Sinti and Roma from protection under the Convention. Ibid.

<sup>146</sup> Germany recognized only indigenous groups as minorities, thus excluding ‘newly arrived’ sizeable migrant communities. Ibid., 1-2

<sup>147</sup> Bernd Rechel, ed. *Minority Rights in Central and Eastern Europe* (London and New York: Routledge, Taylor & Francis Group, 2009) Introduction, 2-4

<sup>148</sup> Dimitry Kochenov, “A Summary of Contradictions: an Outline of the EU’s Main Internal and External Approaches to Ethnic Minority Protection”, in *Boston College International and Comparative Law Review*, 31/1, 2008 Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1119883##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119883##) (accessed 25 April, 2012)

Whether the pre-accession reforms were sustained depended to a large extent on the Commission's approach toward minority issues during pre-accession process<sup>149</sup>. It follows that the Commission's differentiated approach toward different candidate states contributed to the inconsistency of the minority criterion. It seems, as Kochenov notes, that the EU applied two mutually exclusive standards during the pre-accession period of CEE – tolerating forced assimilation and promoting cultural autonomy<sup>150</sup>. He claims that in relation to Bulgaria, Romania, Slovakia, Hungary and Czech Republic, the Commission advocated for wider inclusion of minority population, respect and support for minority culture and language<sup>151</sup>. On the other hand, it “had little criticism of policy of assimilation” in countries belonging to the second group - Latvia and Estonia<sup>152</sup>.

The inconsistency of the Commission's approach is visible in the field of minority education as well. It was closely monitoring amending the Law on Education in Romania so as to provide the ground for establishing a Hungarian-German University. On the other hand, the fact that Latvia in the name of promotion of state language prohibited education in the native language for the Russian speaking minority did not prevent the Commission to state that “[t]he language law and implementing regulations [...] essentially comply with Latvia's international

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<sup>149</sup> *Monitoring the EU Accession Process: Minority Protection, Vol I, An Assessment of Selected Policies in Candidate States, 2002* (Open Society Institute/EU Accession Monitoring Program, 2002) 17

<sup>150</sup> Ibid.

<sup>151</sup> Dimitry Kochenov, “A Summary of Contradictions: an Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection”, in *Boston College International and Comparative Law Review*, 31/1, 2008 Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1119883##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119883##) (accessed 25 April, 2012)

<sup>152</sup> Ibid.

obligations”.<sup>153</sup> Such inconsistent approach provided limited results, as deeper structural issues have remained unaddressed once Latvia and Estonia acceded<sup>154</sup>.

Treating the Roma population may provide additional example of partial success of the EU conditionality.<sup>155</sup> The Accession Partnership documents in 1999, 2001, and 2003 identified integration of the Roma as a priority for the countries with significant Roma populations such as Bulgaria, the Czech Republic, Hungary, Romania and Slovakia. Nevertheless, these countries joined the EU without significant improving of the Roma situation since the implementation has always lagged behind policy adoption<sup>156</sup>.

Nevertheless, in some areas there is no consensus upon the success of conditionality. For instance, Kochenov considers that Commission’s differentiated approach was inefficient even concerning political representation of the minorities. In his view, the Commission was supporting minority representation in Government and police and organization of minority self-government in Hungary, Romania, Bulgaria and Czech Republic. On the other hand, the Russian-speaking minority was deprived even of elementary electoral rights in Latvia due to the lack of citizenship<sup>157</sup>. On the other hand, Brusis argues that the stabilization of the consociational model in accession countries may be considered as the positive outcome. He further argues that the EU has contributed to the emergence of the practical political but not constitutional model of ethnic

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<sup>153</sup> Dimitry Kochenov, “A Summary of Contradictions: an Outline of the EU’s Main Internal and External Approaches to Ethnic Minority Protection”, in *Boston College International and Comparative Law Review*, 31/1, 2008 Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1119883##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119883##) (accessed 25 April, 2012)

<sup>154</sup> Gwendolyn Sasse, “The Politics of EU Conditionality: the norm of minority protection during and beyond EU accession”, *Journal of European Public Policy*, 15:6, 2008, 842-860

<sup>155</sup> Peter Vermeersch and Melanie H. Ram, “The Roma”, in *Minority Rights in Central and Eastern Europe*, ed. Bernd Rechel (London and New York: Routledge, Taylor & Francis Group, 2009) 66-71

<sup>156</sup> Ibid. 70

<sup>157</sup> Ibid, 66-71

power sharing and provided the electoral platform for parties representing both ethnic majorities and minorities. Both sides adopted European values orientation and compromises around norms of interethnic reconciliation and coexistence<sup>158</sup>.

In the light of the vanishing power of conditionality after the accession, it seems that the pre-accession period is of great importance for the EU<sup>159</sup>. However, it seems that EU has not learnt how to sufficiently use these moments of the overall transformation of countries when it comes to the minority protection.

### 2.3.3. Western Balkans – revision of conditionality?

It is worth noting that EU's internal situation has changed after the Eastern enlargement. It seems that the EU is more concerned with minority issues internally, since external actions contributed to the internal visibility of these issues. Moreover, the Reform Treaty and the Charter of Fundamental Rights finally provided a legal basis in primary law for the minority issues on the European level. The Reform Treaty brought a change by including minority rights within the values upon which the EU is founded<sup>160</sup>. Thus, respect for human rights now includes the rights of persons belonging to minorities<sup>161</sup>. Furthermore, it may be that the adoption of the Charter of Fundamental Rights and Freedoms will address the notion of double standards, as it imposes

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<sup>158</sup> Martin Brusić, "Enlargement and Interethnic Power-Sharing Arrangements in Central and Eastern Europe", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 236

<sup>159</sup> Gwendolyn Sasse, "The Politics of EU Conditionality: the norm of minority protection during and beyond EU accession", *Journal of European Public Policy*, 15:6, 2008, 842-860

<sup>160</sup> Consolidated version of the Treaty on European Union, article 2, Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF> (accessed 5 June 2012)

<sup>161</sup> Ulrike Barten, "Minority Rights in the European Union after Lisbon", European Center for Minority Issues, Available at <http://www.uaces.org/pdf/papers/1102/barten.pdf>, (accessed 23 March 2012)

obligations on member states to respect minority rights<sup>162</sup>. Nevertheless, its provisions are not considered as promising due to the vagueness of its wording.<sup>163</sup>

However, this internal improvement in minority rights has not resulted in external developments yet. In spite of a prominent place that minority protection occupied in the Commission's monitoring of CEE countries, these standards remained insufficiently formulated. Having in mind further EU enlargement toward Western Balkans, that historically has been struggling with minority issues, it seems that the precise formulation of these standards is compelling<sup>164</sup>. It seems that the EU conditionality made a new step forward during the engaging in enlargement process to Western Balkans' (hereinafter WB) countries. In this regard, Toggenburg argues that the Stabilization and Association process designed for WB countries brought the revision of the policy of conditionality, by tailoring membership criteria to specific conditions of each country<sup>165</sup>. In addition, monitoring of WB's countries started earlier comparing to the CEE countries. Namely, while the latter were closely monitored after getting candidacy status, the monitoring of former started after the ratification of the Stabilization and Association Agreement. This may mean that in this enlargement circle the EU will have more time and tools to affect minority protection development. In addition, as being more aware of the

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<sup>162</sup> Ulrike Barten, "Minority Rights in the European Union after Lisbon", European Center for Minority Issues, Available at <http://www.uaces.org/pdf/papers/1102/barten.pdf>, (accessed 23 March 2012)

<sup>163</sup> Gabriel von Toggenburg, "A Remaining Share or a New Part? The EU's Role vis-à-vis Minorities after the Enlargement Decade", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 102

<sup>164</sup> Dimitry Kochenov, "A Summary of Contradictions: an Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection", in *Boston College International and Comparative Law Review*, 31/1, 2008 Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1119883##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119883##) (accessed 25 April, 2012)

<sup>165</sup> Gabriel von Toggenburg, "A Remaining Share or a New Part? The EU's Role vis-à-vis Minorities after the Enlargement Decade", in *The Protection of Minorities in the Wider Europe*, ed. Marc Weller et al. (London: Palgrave Macmillan, 2008) 102

decrease of the influence after the accession, it might be that the EU's pressure on the newly candidate countries will be more intense than it was on the CEE. On the other hand, it seems that politics of conditionality is still in force, as the EU willingness to grant candidacy status to Serbia was mostly based on the security concerns over the issue of Kosovo.<sup>166</sup> Thus, in order to support Serbia's participation in the negotiations on the status of Kosovo, the EU approved candidacy<sup>167</sup>.

### **Concluding remarks**

In sum, this Chapter has considered the role of European actors in formulating and implementing minority rights standards. It argues that their security concerns and inconsistent approach have contributed to the insufficient result of CEE's experimenting with cultural autonomy. The next section will look into domestic approach toward cultural autonomy. Comparative analysis of Serbia and Romania will tend to reveal if the new phase concerning cultural autonomy development is taking place.

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<sup>166</sup> It is worth noting that one of the obstacles that appeared at the very last moment before granting the candidate status was Romania objection to the treatment of the Vlach minority in Serbia. Available at <http://www.europolitics.info/external-policies/foreign-ministers-back-serbia-s-eu-bid-artb327397-41.html>. accessed 20 March, 2012

<sup>167</sup> European Council Conclusions, 1-2 March 2012, §39. Available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/128520.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/128520.pdf). accessed 17 March, 2012



## Chapter Three: International Standards in Serbian and Romanian Context

As noted, CEE countries were determined during the 1990s to introduce various forms of cultural autonomy, considering it as compatible with their nation-building projects. However, the way they were implementing these standards was described as “embarrassment”<sup>168</sup>. This Chapter will tend to reveal whether this trend of token implementation of cultural autonomy continues or it entered a new, improved phase. Thus, the focus will be on the constitutional and legislative incorporation of international standards in the sphere of the effective participation of persons belonging to minorities in Serbia and Romania.

It might be plausible to say that legal systems of Serbia and Romania provide two different models in the area of the effective participation of persons belonging to minorities. While Serbian law is focused on the cultural autonomy, Romanian regulates ethnic representation in the elected bodies. However, persons belonging to minorities have prepared the Draft Law on Statute for National Minorities in Romania, aiming to introduce cultural autonomy. Does this mean both a step further for minorities at the domestic level and minority protection at the regional level?

### 3.1. Unwanted multiculturalism

Multiculturalism in Serbia and Romania shares some similar features. Both countries belong to the group of countries with relative heterogeneous populations. In terms of size, minorities in

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<sup>168</sup> Will Kymlicka, “Renner and the Accommodation of Sub-state Nationalism”, in *National Cultural Autonomy and Its Contemporary Critics*, ed. Ephraim Nimni (London and New York: Routledge, Taylor & Francis Group, 2005), 140

Romania make up 19 per cent of the total population<sup>169</sup>, while in Serbia 17 per cent<sup>170</sup>. Furthermore, both countries have the same biggest minorities – Hungarians and Roma. In terms of size, Romania has the largest number of Hungarians outside of Hungary – 7.1 per cent of the total population<sup>171</sup>, while in Serbia it is 3.91 per cent<sup>172</sup>. When it comes to the Roma, situation is specific due to the particularly difficulties they face with in both countries. Namely, even though the size of the Roma population is significant in both countries, the exact size is difficult to determine due to two factors. First of all, the Roma population shows so-called “ethnic mimicry”, meaning a reluctance of many Romani to reveal their identity as being afraid of discrimination. The additional obstacle is that many Roma stay unregistered due to the lack of personal documents<sup>173</sup>. Having in mind these features, it is no wonder that there is a significant gap between official statistics and the estimation of the actual size of this population. Thus, in Serbia the 2002 census counts 108,193 Roma, while the estimated number goes up to 500,000<sup>174</sup>. Concerning Romania, the discrepancy between the official number and estimations is even bigger. Thus, the official number shows that Roma make up 535,140, while the actual number

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<sup>169</sup> Melanie H. Ram, *From laggard to leader?*, in *Minority Rights in Central and Eastern Europe*, ed. Bernd Rechel (Routledge, London and New York: Routledge, 2009) 181

<sup>170</sup> First State Report of Serbia on the Implementation of the FCNM, ACFC/SR(2002)003

<sup>171</sup> First State Report of Romania on the Implementation of the FCNM, ACFC/SR(1999)011

<sup>172</sup> First State Report of Serbia on the Implementation of the FCNM, ACFC/SR(2002)003

<sup>173</sup> Petar Antic, *Roma and Right to Legal Subjectivity*, (Belgrade: Minority Rights Center, 2006) Available at [http://mrc.org.rs/starisajt/publikacije/pub\\_e\\_11.pdf](http://mrc.org.rs/starisajt/publikacije/pub_e_11.pdf) (accessed 25 May, 2012)

<sup>174</sup> Data Collection in Countries Participating in the Decade of Roma inclusion 2005-2015, Open Society Foundations, 2010, 40

might be much higher - 1.5 million, which makes them the biggest Roma community in Europe<sup>175</sup>.

### 3.2. Comparative historical perspective

It may be argued that during the most of communist period treatment of minorities was better in the former Yugoslavia than in Romania. The SFRY Constitution guaranteed protected status of national minorities and their participation in the decision making process according to the so-called “key principle”<sup>176</sup>. This principle provided that all constitutive nations and nationalities were proportionally represented at the level of the government. In addition, minorities were acknowledged some cultural and political rights in the field of education, media, the official use of language and script in the administration and the judicial system, as well as equal participation in public services and political institutions<sup>177</sup>.

The level of legal protection was lower in Romania. Persons belonging to minorities enjoyed some rights in the sphere of education, culture and religion. However, the overall restriction of civil and political rights affected minorities in particular. In addition, from the 1960s onwards situation worsened due to the lack of implementation of legislation<sup>178</sup>. The

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<sup>175</sup> The issue of incorrect data in Romania was addressed by the ACFC on several occasions. Thus, the Committee considered that persons belonging to minorities should be encouraged to identify themselves. ACFC, First Opinion on Romania, ACFC/INF/OP/I(2002)001, para. 21

<sup>176</sup> Tibor Varady, Minorities, Majorities, Law and Ethnicity: Reflections of the Yugoslav Case”, *Human Rights Quarterly*, 19/1 (1997) 9-54

<sup>177</sup> Ibid.

<sup>178</sup> Anna K. Meijknecht, *Minority Protection. Standards and Reality* (The Hague: T.M.C. Asser Press, 2004), 126

situation was particularly difficult under Ceausescu's regime which was considered as one of the most repressive in the region<sup>179</sup>.

The collapse of communism brought significant changes in both countries. While Romania had shown some willingness to improve minorities' position, the Yugoslav authorities diminished the granted level of protection. The 1990s development of minority protection in Romania might be divided into two phases. The first phase was characterized by some attempts to legislate minority rights. Introduction of the 1991 Constitution, including provisions which guarantee persons belonging to national minorities the right to identity, was not followed by the legislative implementation<sup>180</sup>. This triggered tensions, resulting in the first inter-ethnic conflict in post-communist Europe<sup>181</sup>. However, during the same period Romania was more successful at the international arena. It was brave enough to apply for the CoE's membership only three months after the 1989 Revolution. The Committee reviewing its application characterized Romania as starting "from the lowest possible base in the denial of human rights"<sup>182</sup>. However, it became a member of CoE in 1993 and was the first State to sign and ratify the FCNM<sup>183</sup>. Furthermore, in 1995 the Association Agreement between Romania and the European Union entered into force.

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<sup>179</sup> Melanie H. Ram, From laggard to leader?, in *Minority Rights in Central and Eastern Europe*, ed. Bernd Rechel (Routledge, London and New York: Routledge, 2009) 180

<sup>180</sup> Carmen Kettly, "Ethnicity, Language and Transition Politics in Romania: the Hungarian Minority in Context", in *Nation-building, Ethnicity and Language Politics in Transition Countries*, ed. Farimah Daftary et al. (Flensburg: European Center for Minority Issues, 2003) 247-253

<sup>181</sup> The deep-seated ethnic conflicts between ethnic Romanians and ethnic Hungarians in the Transylvania region occurred on several occasions. Melanie H. Ram, From laggard to leader?, in *Minority Rights in Central and Eastern Europe*, ed. Bernd Rechel (Routledge, London and New York: Routledge, 2009) 181

<sup>182</sup> Ibid. 180-195.

<sup>183</sup> First State Report of Romania on the Implementation of the FCNM, ACFC/SR(1999)011, 12

Second phase started after 1996 when significant changes in interethnic relations happened<sup>184</sup>. This new relation was described as “the emergence of a power-sharing experiment”<sup>185</sup>. One of the most important measures was guarantying the seats in the National Parliament for all national minorities. This contributed to the political organizing of minorities, in particular of Hungarians, providing them with the opportunity to participate in decision-making<sup>186</sup>.

At the same time, the collapse of communism revealed strong ethnic divisions capable of starting ethnic war in SFRY. This significantly affected the regulation of minority rights in Serbia during the 1990s. The process of the overall centralization of the state resulted in diminishing the attained level of minority rights<sup>187</sup>. Even though the Constitution of 1990 guaranteed the most important rights to national minorities, these provisions were not implemented. For instance, the centralization of education gave the Serbian government authority to control establishing of schools and nominating school principals<sup>188</sup>. In addition, the official use of minority languages

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<sup>184</sup> Numerous organizations representing minorities participated in the parliamentary and local elections in 1996 and their candidates won seats in the Romanian Parliament. The Democratic Union of Magyars of Romania (DUMR) won 36 seats in the Chamber of Deputies and Senate of the Romanian Parliament (7.62% of the total number of seats). Fifteen other organisations of persons belonging to national minorities each won one seat in the Chamber of Deputies. First State Report of Romania on the Implementation of the FCNM, ACFC/SR(1999)011, 29

<sup>185</sup> Carmen Kettly, “Ethnicity, Language and Transition Politics in Romania: the Hungarian Minority in Context”, in *Nation-building, Ethnicity and Language Politics in Transition Countries*, ed. Farimah Daftary et al. (European Center for Minority Issues, 2003) 247

<sup>186</sup> It is considered that the relationship between Romanian majority and Hungarian minority predominantly shaped minority protection policy and laws which “while concerning all persons belonging to national minorities, were drafted with the Hungarian minority in mind”. Ibid., 245

<sup>187</sup> The most tremendous outcome of this centralization was abolishing of the autonomy of Kosovo province. See Tibor Varady, *Minorities, Majorities, Law, and Ethnicity: Reflections on the Yugoslav case*, in *Human Rights Quarterly*, 19/1, 1997, 9-54

<sup>188</sup> Ibid.

was terminated in many local communities<sup>189</sup>. Such context contributed to the growing general feeling of insecurity, animosities and distrust among the ethnic communities.

After the fall of Milosevic regime in 2000, the protection of minorities had been considered as one of the crucial dimensions of the democratization and political stabilization of Serbia. According to Serbian authorities, “a new minority policy” aimed at a full integration of minorities, in parallel with the preservation and further development of their national identities<sup>190</sup>. However, there was a gap between these nice formulations and reality. Let us recall that Serbia of that time was a society divided on ethnic lines, and incapable of reaching consensus on basic principles, including multiculturalism<sup>191</sup>. For this reason, it might be legitimate to argue that the process of introducing minority protection was driven by international organizations, most notably CoE, as the Law on Minorities and ratification of the FCNM were the most important preconditions for CoE membership<sup>192</sup>. On the other hand, domestic actors instead of building comprehensive and strategic approach toward the development of multiculturalism, were mostly concerned with “fitting” minority rights within the nation-building project. The first dilemma they faced with was the Constitutional formulation of the nation.

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<sup>189</sup> Tibor Varady, Minorities, Majorities, Law, and Ethnicity: Reflections on the Yugoslav case”, in Human Rights Quarterly, 19/1, 1997, 9-54

<sup>190</sup> First State Report of Serbia on the Implementation of the FCNM, ACFC/SR(2002)003

<sup>191</sup> Goran Basic, *Iskusenja demokratije u multietničkom društvu/Trials of Democracy in Multiethnic Society* (Belgrade, Centar za istraživanje etniciteta, 2006) 67-68. Available at [http://www.ercbgd.org.rs/index.php?option=com\\_content&view=article&id=26&Itemid=50&lang=sr](http://www.ercbgd.org.rs/index.php?option=com_content&view=article&id=26&Itemid=50&lang=sr) (accessed 10 July, 2012)

<sup>192</sup> Miodrag Jovanovic, “Kolektivna prava i pozitivna diskriminacija – konceptualna razjasnjenja” (Collective Rights and Positive Discrimination – Conceptual Clarifications) in *Kolektivna prava i pozitivna diskriminacija u Ustavnom pravnom sistemu Republike Srbije (Collective Rights and Positive Discrimination under the Constitutional system of Republic of Serbia)*, ed. Miodrag Jovanovic (Belgrade: Sluzbeni glasnik, 2009), 11 It is worth noting that the team of OSCE High Commissioner for National Minorities participated in the drafting of the Law on Minorities. Serbia, First report, ACFC/SR(2002)003, 27

### 3.3. Minority rights under Constitution

#### 3.3.1. Nation-building Constitutions

Before we focus on the comparative analysis of Serbian and Romanian Constitutions, let us briefly summarize the general debate on the constitutionalization of minority rights. The main constitutional dilemma regarding minority protection is whether it is better to protect persons belonging to minorities through protection of individual rights backed up by the non-discrimination principle, or there should be a constitutional principle that confers special rights to minority groups<sup>193</sup>. The former approach is entrenched within the US constitution that stipulates that every citizen can be protected by individual, mostly civil and political rights and there is no need for special group rights. Scholars argue that this liberal-individual approach is well-suited for immigrant countries, where new minorities aspire to integrate into society<sup>194</sup>. However, some European countries, most of all France, share this understanding of the Constitution. Thus, French tradition considers that the Constitution has the power to build a new political identity that encompasses all citizens, while ethnic differences might be expressed in the private sphere only. Accordingly, no minorities are recognized within France<sup>195</sup>.

On the other hand, it is considered that most of the CEE countries' constitutions follow the German constitutional tradition. This tradition developed ethnic conception of the nation, based on the understanding of nation as a pre-political community, united by common features

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<sup>193</sup> Julie Ringelheim, "Minority Protection and Constitutional Recognition of Difference", in the *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?*, ed. Annelies Verstichel et al. (Antwerp-Oxford-Portland: Intersentia 2008) 33-51

<sup>194</sup> Joseph Marko, "Constitutional recognition of Ethnic Difference – Towards an Emerging European Minimum Standards?", in *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?*, ed. Annelies Verstichel et al. (Antwerp-Oxford-Portland: Intersentia 2008) 21

<sup>195</sup> For this reason, the French Council d'Etat found ratification of both the FCNM and the Language Charter as unconstitutional. Ibid. 21-24

such as origin, language, religion and culture. Within this framework, the main function of the Constitution is to recognize this pre-existing communal identity, giving priority to the ethnic and cultural links. One of the main common features of these constitutions is the recognition of the existence of some cultural sub-groups within the population<sup>196</sup>.

On the other hand, when it comes to the defining the rights' holder, Constitutions provide different solutions. Most of them apply an individual approach considering persons belonging to minorities as rights' holders. Nevertheless, some of them recognize collectives as holders as well. This is relevant due to the fact that the character of the holder might determine the character of the rights granted to the minorities<sup>197</sup>. In this regard, the comparison of collective approach of Serbian and individual approach of Romanian Constitution is relevant.

### 3.3.2. Minority rights in Constitutions of Serbia and Romania

#### 3.3.2.1. Constitutional engineering: Defining the nation

The new Constitution of the Republic of Serbia was endorsed in 2006. It is interesting that it defines the nation in a manner different from the old Constitution of 1990. Namely, the former defined Serbia as “*a democratic state of all citizens living in it*”<sup>198</sup>. On the other hand, the

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196 Joseph Marko, “Constitutional recognition of Ethnic Difference – Towards an Emerging European Minimum Standards?”, in *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?*, ed. Annelies Verstichel et al. (Antwerp-Oxford-Portland: Intersentia 2008) 21-24

197 Miodrag Jovanovic, “Kolektivna prava i pozitivna diskriminacija – konceptualna razjasnjenja” (Collective Rights and Positive Discrimination – Conceptual Clarifications) in *Kolektivna prava i pozitivna diskriminacija u Ustavnom pravnom sistemu Republike Srbije (Collective Rights and Positive Discrimination under the Constitutional system of Republic of Serbia)*, ed. Miodrag Jovanovic (Belgrade: Sluzbeni glasnik, 2009), 11-17

198 Constitution of Republic of Serbia, 1990, article 1, italic added. Available at <http://scr.digital.nb.rs/document/RA-ustav-1990> (accessed 25 November, 2012)



2006 Constitution stipulates that “Republic of Serbia is a state of *Serbian people and all citizens who live in it*”<sup>199</sup>. Therefore, it explicitly defines the nation in the ethnic manner by making a distinction between Serbian people and “all citizens who live in it”. Such differentiation might mean that “citizens” meaning persons belonging to minorities, do not belong to the nation. Nevertheless, the Venice commission had not expressed any concerns upon such formulation<sup>200</sup>. However, defining the state in accordance with the ethnic characteristics of the majority might be problematic in the context of *de facto* multicultural environment and might affect respect of minority rights<sup>201</sup>. For instance, using the national symbols of the majority such as the anthem, script and emblem might prevent members of minority communities from identifying with the state<sup>202</sup>.

The Constitution provides that official language is Serbian, and script is Cyrillic<sup>203</sup>. This is in accordance with ethnic conception of the Constitution, as Cyrillic is the script used by the Serbian majority, while most of the minorities use Latin alphabet. The Venice Commission correctly found this provision as striking due to decreasing the protection of linguistic rights of minorities, as 1990 Constitution expressly provided that the Latin alphabet shall also be officially

<sup>199</sup> Constitution of Republic of Serbia, 2006, article 1. Available at <http://www.predsednik.rs/mwc/epic/doc/ConstitutionofSerbia.pdf>, (accessed 21 November, 2011)

<sup>200</sup> European Commission for Democracy through Law, Opinion on the Constitution of Serbia (2007) Available at [www.venice.coe.int/docs/2007/CDLAD\(2007\)001-e.asp](http://www.venice.coe.int/docs/2007/CDLAD(2007)001-e.asp), (accessed 18 March, 2012)

<sup>201</sup> Human Rights in Serbia 2009 (Belgrade: Belgrade Center for Human Rights, 2009) 177

<sup>202</sup> However, the exclusive character of Serbian national symbols frequently causes problems. For instance, there is the recent case of exclusion of the footballer of Bosniak origin from the representation team due to its denial to sing the national anthem. It is worth noting that the anthem is based on the orthodox elements of Serbian ethnicity. For the news, see <http://www.novimagazin.rs/sport/bosnjacka-zajednica-protestuje-zbog-ljajica> (accessed 30 May, 2012)

<sup>203</sup> Constitution of Republic of Serbia, 2006, Article 10

used. This is in particular striking having in mind Constitutional prohibition of the decreasing the attained level of rights<sup>204</sup>.

When it comes to the Romanian Constitution of 1991, it seems that it combines both civic and ethnic understanding of the nation. Thus, it declares “the unity of Romanian people” and clarifies that Romania is “the common and indivisible homeland of all its citizens”, without any discrimination on the grounds such as race, ethnic origin and language<sup>205</sup>. Referring to “Romanian people” caused harsh reactions of minorities as it was not clear whether it refers to all citizens or to ethnic Romanians only<sup>206</sup>. However, the Constitution does recognize the right to preserve, develop and express the identity of persons belonging to minorities. Nevertheless, these protecting measures have “to conform to the principles of equality and non-discrimination in relation to other Romanian citizens”<sup>207</sup>. Nation-building needs nation language – the Constitution sets forth the Romanian as the official language<sup>208</sup>. Firm determination of Constitution’s drafters to preserve these formulations found its place within the Constitution. Thus, the provisions concerning the “national, unitary and indivisible character of the Romanian State [...] and the official language shall not be subject to revision”<sup>209</sup>.

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<sup>204</sup> European Commission for Democracy through Law, Opinion on the Constitution of Serbia, 12 (2007) Available at [www.venice.coe.int/docs/2007/CDLAD\(2007\)001-e.asp](http://www.venice.coe.int/docs/2007/CDLAD(2007)001-e.asp) (accessed 25 November, 2012)

<sup>205</sup> Constitution of Republic of Romania, article 4. Available at [http://www.cdep.ro/pls/dic/act\\_show?ida=1&idl=2&tit=1#1c0s0a4](http://www.cdep.ro/pls/dic/act_show?ida=1&idl=2&tit=1#1c0s0a4) (accessed 21 November, 2011)

<sup>206</sup> Carmen Kettly, Ethnicity, Language and Transition Politics in Romania: the Hungarian Minority in Context”, in *Nation-building, Ethnicity and Language Politics in Transition Countries*, ed. Farimah Daftary et al. (European Center for Minority Issues, 2003) 251

<sup>207</sup> Constitution of Republic of Romania, article 6

<sup>208</sup> Ibid. article 13

<sup>209</sup> Ibid. article 148

### 3.3.2.2. Minority rights

Serbian Constitution includes minority rights within the basic values of the society.<sup>210</sup> It is interesting that the Constitution recognizes most of the principles set forth by the federal Law on Protection of Rights and Freedoms of National Minorities of 2002<sup>211</sup>. This complies with the principle of acquired rights, meaning that once specific level of protection is achieved, the new laws cannot decrease it<sup>212</sup>. In terms of rights, the Serbian Constitution states that persons belonging to minorities shall be guaranteed “special individual and collective rights in addition to the rights guaranteed to all citizens [...]”.<sup>213</sup> Therefore, the Constitution affirms the Law on Minorities’ recognition of collective rights. The collective character of rights is defined due to its exercising in community with others, which might not be the correct interpretation. Namely, it is shared view that the way they are exercised does not determine the nature of rights<sup>214</sup>. The Constitution stipulate that collective rights refer to participation in decision-making or self-governance concerning their culture, education, media and the official use of language and script<sup>215</sup>.

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<sup>210</sup> Constitution of Republic of Serbia, 2006, article 1. Available at <http://www.predsednik.rs/mwc/epic/doc/ConstitutionofSerbia.pdf>, (accessed 21 November, 2011)

<sup>211</sup> The Law on Protection of Rights and Freedoms of National Minorities, Official Gazette of FRY No. 11 of 27 February 2002

<sup>212</sup> Constitution of Republic of Serbia, 2006, article 20

<sup>213</sup> Ibid, article 75

<sup>214</sup> Miodrag Jovanovic, “Kolektivna prava i pozitivna diskriminacija – konceptualna razjasnjenja” (Collective Rights and Positive Discrimination – Conceptual Clarifications) in *Kolektivna prava i pozitivna diskriminacija u Ustavnom pravnom sistemu Republike Srbije (Collective Rights and Positive Discrimination under the Constitutional system of Republic of Serbia)*, ed. Miodrag Jovanovic (Belgrade: Sluzbeni glasnik, 2009), 11

<sup>215</sup> Jovanovic argues that this is the unique case in the world that Constitution tries to define the collective rights in spite of non existing theoretical consensus over this issue. Ibid, 11-14 In addition, let us remind that Explanatory Report to the FCNM itself explicitly states that exercising of rights in community with other does not make these rights as collective rights. See Explanatory report, commentary to article 3, para 37

The Constitution prohibits discrimination on the ground of belonging to minority<sup>216</sup>. Positive discrimination is allowed in the form of special and temporary measures in economic, social, cultural and political field, in order to achieve the full equality between minorities and majority<sup>217</sup>. The provision on positive discrimination has drawn attention of both the Venice Commission and the ACFC. Both were concerned that such restrictive approach to the positive measures is incompatible with the article 4 of the FCNM<sup>218</sup>.

The Constitution contains many rights that refer to the preservation of minority identity in the areas concerning language, education, information and the official use of language and script. In this regard, Article 75 guarantees right of the persons belonging to minorities to elect their national councils in order to exercise the right to self-governance in these areas. Therefore, it might be argued that the right to cultural autonomy is strengthened by getting the constitutional protection. Concerning the right to effective participation, the new Constitution has explicitly envisaged the right of the persons belonging to minorities to participate in administering public affairs and assume public positions, under the same conditions as other citizens<sup>219</sup>.

The Statute of Autonomous Province of Vojvodina has even more detailed provisions on minority rights compared to the Constitution. It defines multilingualism, multiculturalism and

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<sup>216</sup> Constitution of Republic of Serbia, 2006, Article 76, Available at <http://www.predsednik.rs/mwc/epic/doc/ConstitutionofSerbia.pdf>, (accessed 21 November, 2011)

<sup>217</sup> Ibid, article 14

<sup>218</sup> They were arguing that measures should be adopted in any case of inequality between minorities and majority in order to achieve full and effective equality See European Commission for Democracy through Law, Opinion on the Constitution of Serbia, 43 (2007) Available at [www.venice.coe.int/docs/2007/CDLAD\(2007\)001-e.asp](http://www.venice.coe.int/docs/2007/CDLAD(2007)001-e.asp) (accessed 17 March, 2012)

<sup>219</sup> Constitution of Republic of Serbia, 2006, article 77

multireligion as the “general value of particular importance for Vojvodina”<sup>220</sup>. In this regard, all province’s institutions are obliged to support and contribute to the preservation of the multiculturalism and cultural heritage of the traditional minorities in Vojvodina. The Statute stipulates that Vojvodina’s authorities may provide rights additional to the one guaranteed by the Constitution, in accordance with article 79 of the Constitution. Concerning the language rights, article 26 of the Statute provides that beside Serbian, official language at the province institutions are Hungarian, Slovak, Croatian, Romanian and Ruthenian, and their scripts<sup>221</sup>. It is worth emphasizing that Serbian Constitutional Court recently proclaimed several provisions of the Statute concerning Vojvodina’s competences as unconstitutional, that will affect the work of National Councils as well<sup>222</sup>.

On the other hand, Romanian Constitution does not explicitly refer to national minorities; instead it guarantees equal rights for all Romani citizens. However, while a number of provisions on human rights and fundamental freedoms are aimed at all Romanian citizens, some of them are of particular interest to persons belonging to national minorities. Thus, in a series of sector-based provisions, the Constitution guarantees the participation of persons belonging to national minorities in conditions of the full and effective equality with Romanian citizens belonging to the majority, in economic, social and cultural life<sup>223</sup>. It is worth noting that the Constitution defines the Statute of

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<sup>220</sup> Statute of Vojvodina, Article 7. Official Gazzette of the Autonomous Province of Vojvodina, 17/09 Available at the website of the Province’s Parliament: <http://www.skupstinavojvodine.gov.rs/?s=aktAPV004&mak=OpstaAkta> (accessed 5 June, 2012)

<sup>221</sup> On the Vojvodina territory 33 municipalities have, beside Serbian, at least one minority language and script as official (predominant are Hungarian (27), Slovak (11), Romanian (8) and Ruthenian (6). In the rest of Serbia, in some municipalities, for official languages are chosen Albanian, Bosnian and Bulgarian. Second Report of Serbia on the Implementation of the FCNM, ACFC/SR/II(2008)001

<sup>222</sup> For the news see [www.dnevnik.rs/politika/novi-statut-novi-ustav-ili-nova-politicka-kriza-0](http://www.dnevnik.rs/politika/novi-statut-novi-ustav-ili-nova-politicka-kriza-0) (accessed 15 July, 2012)

<sup>223</sup> First State Report of Romania on the Implementation of the FCNM, ACFC/SR(1999)011

national minorities as the organic law, thus giving it greater legal force comparing to the ordinary laws<sup>224</sup>. However, in spite of having this provision since 1991, Romanian legislators have not enacted the Statute yet<sup>225</sup>. Concerning the official use of minority language and script, the Constitution provides that it will be introduced in municipalities where persons belonging to minorities live in significant number<sup>226</sup>. In addition, other constitutional provisions guarantee the use of the mother tongue in court proceedings by using interpreters<sup>227</sup>.

The main difference from Serbian Constitution concerns the implementation of article 15 of FCNM. Romanian Constitution is focused on representation at the elected bodies. Thus, it states that persons belonging to minorities have the right to vote and to stand as candidates on the elections on all levels of state organization. However, the Constitution provides some affirmative measures concerning the direct participation of minorities in parliamentary life. Thus, they are guaranteed the one Deputy seat in the case of failure to obtain the number of votes necessary for the representation in the Parliament<sup>228</sup>. Therefore, irrespective of their election's results, minorities will always be represented in the Parliament. However, there is a significant limitation of the right to representation since the Constitution permits only one organization per minority<sup>229</sup>.

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<sup>224</sup> Constitution of Republic of Romania, article 173. Available at [http://www.cdep.ro/pls/dic/act\\_show?id=1&idl=2&tit=1#t1c0s0a4](http://www.cdep.ro/pls/dic/act_show?id=1&idl=2&tit=1#t1c0s0a4) (accessed 21 November, 2011)

<sup>225</sup> There is the Draft Law on the Statute for National Minorities (2005) that is still at the Parliamentary Procedure, Available at the website of the Venice Commission: <http://www.venice.coe.int/docs/2005/CDL%282005%29059-e.pdf> (accessed 5 June 2012)

<sup>226</sup> Ibid., Article 120

<sup>227</sup> Ibid., Article 128 (2) However, it is worth noting that the 1991 Constitution stated that an interpreter will be provided free of charge only in criminal cases. Nevertheless, the Law for the Revision of the Constitution of Romania extended that to all court proceedings. The Official Gazette of Romania no. 669 of 22 September 2003. Available at the Romanian Parliament's website: <http://www.cdep.ro/pls/dic/site.page?id=336> (accessed 7 July, 2012)

<sup>228</sup> Constitution of Republic of Romania, article 59. Available at [http://www.cdep.ro/pls/dic/act\\_show?id=1&idl=2&tit=1#t1c0s0a4](http://www.cdep.ro/pls/dic/act_show?id=1&idl=2&tit=1#t1c0s0a4) (accessed 21 November, 2011)

<sup>229</sup> Ibid, article 62

It might be concluded that both Constitutions more or less define the State in accordance with majoritarian preferences. This is confirmed by monolingualism that surely affect language rights of minorities. On the other hand, visible difference is that while the Serbian Constitution introduces collective rights and cultural autonomy, the Romanian Constitution is based on individualistic approach, guaranteeing minority protection on non-discrimination basis mostly. One of the rare affirmative measures concerns reserved seats for minority representatives at the elected bodies.

### **3.4. Cultural autonomy according to the law**

When it comes to the effective participation of persons belonging to minorities, three issues are of particular importance. First concerns the definition of minorities, since the State has to regulate conditions upon which some group might be considered as a national minority. The next important issue is to determine what kind of rights in the spheres of culture, education, information and the official use of language and script persons belonging to minorities are entitled to. At the end, it is of crucial importance to look into mechanisms of effective participation since, as the ACFC rightly points, enjoyment of all these rights is dependent upon participation of persons belonging to minorities in cultural, social and economic life and in public affairs.<sup>230</sup>

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<sup>230</sup> ACFC, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, 2008, para. 3

### 3.4.1. The definition of minorities

The Law on Protection of Rights and Freedoms of National Minorities of 2002<sup>231</sup> (hereinafter the Law on Minorities) defines a national minority as any group of citizens of Serbia

[...] that is numerically sufficiently representative, even though it represents minority on a specific territory [...], belongs to some of the groups that are in long-lasting and tight connection with the territory of the state [...] and has own specific features such as language, culture, national or ethnic affiliation, origin or religion that differs from majority of the population; and whose members show willingness to collectively preserve their common identity<sup>232</sup>.

The first issue to clarify is the understanding of the holder of minority rights. The wording of the Law clearly addresses minorities as such. However, let us remind that the Constitution guarantees special individual and collective rights to the *persons belonging to minorities*<sup>233</sup>. Having in mind legal supremacy of the Constitution, it is clear that minorities as groups are not recognized. Nevertheless, both the Law on Minorities and the Constitution itself explicitly recognize collective rights to the persons belonging to minorities. Accordingly, the Law stipulates that these rights encompass specific rights to self-government in the area of education, media, culture and official use of language and script<sup>234</sup>.

<sup>231</sup> The Law on Protection of Rights and Freedoms of National Minorities, Official Gazette of FRY No. 11 of 27 February 2002. This is the basic law that regulates the status of national minorities. It was introduced on the federal level during the existence of the Federal Republic of Yugoslavia, but it continued to be in effect in Serbia after the dissolution of the State Union of Serbia and Montenegro in 2006. Serbia is criticized for not adopting any basic law on minorities since 2000. For this reason, many important issues are solved by the bylaws and various acts, which further complicates this legal area. See Snezana Ilic, *Zakonsko regulisanje položaja nacionalnih manjina u Srbiji i njegova implementacija/Legal Regulation of National Minorities' Status in Serbia and its Implementation*. Available at <http://www.susedski2007.cdc.org.rs/Publikacije/2publikacije.pdf> (accessed 8 June, 2012)

<sup>232</sup> The Law on Protection of Rights and Freedoms of National Minorities, article 2. Available at <http://www.coe.int/t/dg3/romatravellers/archive/documentation/refugees/SaMsocialrights/law%20on%20minorities.pdf> (accessed 25 November, 2012)

<sup>233</sup> Constitution of Republic of Serbia, article 75

<sup>234</sup> Second Report of Serbia on the Implementation of the FCNM, ACFC/SR/II(2008)001, 56



Collective dimension is prescribed as the constituent element of the national minority. In this regard, “the subjective criterion for defining a national minority includes two subjective elements - *common awareness of self identity* that might rest on their culture, tradition, language or religion (alternatively), and *common concern for preserving and/or maintaining this identity*”<sup>235</sup>. It follows that without showing the common concern, a group shall not be considered a national minority<sup>236</sup>. These common concerns might be exercised in different ways, including establishing national councils or political parties<sup>237</sup>. It seems that a group has to prove existence of common concern in order to have minority status and thus other rights recognized as well. Accordingly, even though establishing the councils is not mandatory, minorities are in a way compelled to establish them.

One more provision might seem problematic. The wording of the Law on Minorities may be interpreted as leaving to the minorities to define themselves as such by showing or not the common concern for the preservation of their identity. However, the Law on Minorities explicitly recognizes the status of a national minority to the Roma<sup>238</sup>. It seems that legislator made an

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<sup>235</sup> First Report of Serbia on the Implementation of the FCNM, ACFC/SR(2002)003,

<sup>236</sup> Second Report of Serbia on the Implementation of the FCNM, ACFC/SR/II(2008)001, 52 Let us remind that this definition of subjective elements complies with Capotorti’s definition of minorities. Thus, as one of the elements of minority he defines “the groups’ wish to preserve its special characteristics and remain true to its traditions”. For more details see Patrick Thornberry, *International Law and the Rights of Minorities*, (Oxford: Clarendon Press, 1991) 165

<sup>237</sup> Article 3 of the Law on Political Parties defines the political party of national minority as the party whose activities are directed toward “representation of the national minority interests and protection and improvement of the rights of minority concerned”. The party may be established by 1000 citizens of Republic of Serbia (article 9). This is 10 times less than for the ordinary political party. Furthermore, minority political parties are exempted from the census, which means that they will get the seat at the Parliament even if they fail to reach 5 per cent threshold. Second Report of Serbia on the Implementation of the FCNM, ACFC/SR/II(2008)001

<sup>238</sup> The Law on Protection of Rights and Freedoms of National Minorities, article 4. Available at <http://www.coe.int/t/dg3/romatravellers/archive/documentation/refugees/SaMsocialrights/law%20on%20minorities.pdf> (accessed 25 November, 2012)

exemption for the Roma from the requirement of showing the common concern. In addition, it is worth noting that Romani in Serbia define themselves as “community” rather than “minority”<sup>239</sup>

The ACFC was critical of introducing the requirement of citizenship for the recognition of minority status, considering that it might have a negative impact on those persons whose citizenship status, following dissolution of the former Yugoslavia and the conflict in Kosovo, has not been solved yet<sup>240</sup>. Most of them are Roma that have difficulties with obtaining personal documents, resulting in the lack of either birth certificate or citizenship that deprives them of the most basic rights<sup>241</sup>. For this reason, the ACFC was urging Serbian authorities to limit the use of the citizenship requirement only to those provisions where it is relevant, such as electoral rights at the national level<sup>242</sup>. However, Serbian authorities disagreed, arguing that leaving out this requirement would allow other persons (i.e. asylum seekers, migrant workers from Asia) to apply for minority rights protection as well<sup>243</sup>. However, experts consider that this cannot happen due to the additional criteria of “long and tight connections with the territory of Yugoslavia” for the recognition of national minority status. Therefore, the only persons that would benefit from the citizenship requirement’s abolition would be stateless Roma from former Yugoslavia<sup>244</sup>.

In spite of the Constitutional recognition of the right to identity, Romanian legal system does not contain a definition of the national minority to date. The ACFC was quite critical on this situation. Even though it affirms that the absence of definition of minorities in FCNM leaves margin

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<sup>239</sup> Interview with the Head of Roma National Council’s Education Committee, conducted on 12 March, 2012

<sup>240</sup> ACFC Second Opinion on Serbia, ACFC/OP/II(2009)001, para. 35

<sup>241</sup> Petar Antic, *Roma and Right to Legal Subjectivity*, (Belgrade: Minority Rights Center, 2006) Available at [http://mrc.org.rs/starisajt/publikacije/pub\\_e\\_11.pdf](http://mrc.org.rs/starisajt/publikacije/pub_e_11.pdf) (accessed 25 May, 2012)

<sup>242</sup> ACFC Second Opinion on Serbia, ACFC/OP/II(2009)001, para. 37

<sup>243</sup> Serbia, Comments on the Second opinion, GVT/COM/II(2009)002

<sup>244</sup> Human Rights in Serbia 2011 (Belgrade: Belgrade Center for Human Rights, 2011) 154

of appreciation to states to adjust it to the domestic context, it does not mean that they can make arbitrary distinctions in terms of the recognition of minorities<sup>245</sup>. Additional problem is that in the lack of specific procedure for the recognition of minorities, Romanian authorities rely on the Law for the election of local public administration authorities (2004) that defines national minority as ethnic group which is represented in the CNM<sup>246</sup>. In order to be represented here, minority has to won elections for Parliament. Therefore, instead of the principle of personal self-identification guaranteed under article 3 of the FCNM, Romanian authorities recognize minorities on the basis of parliamentary election's results<sup>247</sup>.

Nevertheless, if the Draft Law on the Status of National Minorities is being adopted, Romania will get its first definition of national minorities<sup>248</sup>. However, the ACFC was not satisfied with this definition either, since the Draft Law includes exhaustive list of twenty communities. The Committee considers that the flexible spirit of FCNM requires the adoption of non-exhaustive list of minorities that would allow potential extension of the list, in accordance with Article 3 FCNM<sup>249</sup>. In addition, the definition of minorities contains the requirement of citizenship that was criticized by the ACFC in a manner similar to the Serbian report<sup>250</sup>. Venice Commission's expert adds that wording

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<sup>245</sup> First Opinion on Romania, ACFC/INF/OP/I(2002)001, para. 14-19

<sup>246</sup> At the moment, the following 20 national minorities are represented in the Council of National Minorities: Albanians, Armenians, Bulgarians, Croats, Germans, Greeks, Hungarians, Italians, Jews, Poles, Roma, Russian-Lippovans, Serbs, Slovaks and Czechs (represented by a single organization), Tatars, Turks, Ukrainians, Macedonians and Ruthenians. ACFC Second opinion on Romania, ACFC/OP/II(2005)007, para. 22

<sup>247</sup> Ibid, para. 27

<sup>248</sup> "National minority is understood to mean any community of Romanian citizens living on Romanian territory at the time of the establishment of the modern State of Romania, numerically smaller than the majority population, having a specific ethnic identity expressed through culture, language or religion, and wishing to preserve, express and promote its identity." The Draft Law on the Statute for National Minorities (2005), article 3, Available at the website of the Venice Commission: <http://www.venice.coe.int/docs/2005/CDL%282005%29059-e.pdf> (accessed 5 June 2012)

<sup>249</sup> ACFC Second opinion on Romania, ACFC/OP/II(2005)007, para. 29

<sup>250</sup> Ibid, para. 30

“living on the territory of Romania from the moment the modern Romanian state was established” needs further clarification, as it might exclude those minorities that were recognized only after census 2002, such as Macedonians and Ruthenians<sup>251</sup>.

### **3.4.2. The scope of the right to identity**

As was stated above, cultural autonomy of persons belonging to minorities encompasses their rights in the area of education, information, and the official use of language and script<sup>252</sup>. This comparison of Serbian and Romanian legislation will tend to show that irrespective of collective or individual dimensions of these rights, they are more or less equally recognized in both countries. The difference exists when it comes to the mechanisms for exercising of these rights.

Concerning education, legislation of both countries provides that persons belonging to minorities can exercise the right to education in minority language in two ways: teaching of all courses in minority language or learning additional course on minority language and culture at all levels of education<sup>253</sup>. However, both legislators imposed some restrictions. Thus, the classes will be taught in minority language in primary or secondary schools in Serbia if at least 15 pupils register for that<sup>254</sup>. On the other hand, in primary and secondary schools teaching in minority

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<sup>251</sup> European Commission for Democracy through Law, Observations on the Draft Law on the Statute of National Minorities of the Republic of Romania by Sergio Bartole, Opinion no. 345/2005. Available at <http://www.venice.coe.int/docs/2005/CDL%282005%29071-e.pdf>, (accessed 17 July, 2012)

<sup>252</sup> The area of culture is omitted due to the variety of activities, most of which are project based. In general, both countries provide state funding for various cultural activities of minority organizations.

<sup>253</sup> Serbia: The Law on Protection of Rights and Freedoms of National Minorities, article 13. Available at <http://www.coe.int/t/dg3/romatravellers/archive/documentation/refugees/SaMsocialrights/law%20on%20minorities.pdf> (accessed 25 November, 2012); Romania: The Law on Education, article 119. ACFC Second opinion on Romania, ACFC/OP/II(2005)007

<sup>254</sup> However, upon the permission of relevant authorities, such as national councils, the school concerned may organize classes in minority language even for smaller number of pupils. See Province Ombudsman’s Survey on

language, the History of Romanians and the Geography of Romania will be taught in these languages, but from the same textbooks as for teaching in Romanian language<sup>255</sup>. Learning of the official language (i.e. Serbian, Romanian) is compulsory. Both legislations provide the establishment of departments and faculties as a part of higher education, where teachers of national minority languages may be educated<sup>256</sup>. In addition, the persons belonging to minorities have the right to found private educational institutions with tuition in minority language or bilingually. However, none of them provided state university in minority language<sup>257</sup>. Concerning Serbia, National councils, as the institutions of cultural autonomy of minorities, participate in preparing curricula for tuition in minority language.

In the area of media, both legislations provide that minorities have a right to be informed in their language through print and broadcast media. Furthermore, the State shall provide information, cultural and educational content in minority languages as part of the public service TV and radio. In addition, persons belonging to minorities in both countries have a right to establish media in their languages. However, Serbian legislator is the only that stipulates obligation of partial State funding for media in minority languages<sup>258</sup>. It seems that Romania has more elaborated legislation in this area. Thus, the Romanian Broadcasting Law no. 504/2002 provides that all cable distributors have the obligation to include the Romanian Television

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National Councils (2012) Available at [http://www.ombudsmanapv.org/apvomb/attachments/article/741/Dve%20godine%20nac.saveta%20II%20deo\\_2012\\_.pdf.pdf](http://www.ombudsmanapv.org/apvomb/attachments/article/741/Dve%20godine%20nac.saveta%20II%20deo_2012_.pdf.pdf) (accessed 10 July, 2012)

<sup>255</sup> The Law on Education, Article 120 See ACFC Second opinion on Romania, ACFC/OP/II(2005)007

<sup>256</sup> The Law on Protection of Rights and Freedoms of National Minorities, article 14

<sup>257</sup> However, Hungarian minority had not recognized its long lasting demand – to have monolingual, meaning Hungarian university financed by the state. See Carmen Kettly, “Ethnicity, Language and Transition Politics in Romania: the Hungarian Minority in Context”, in *Nation-building, Ethnicity and Language Politics in Transition Countries*, ed. Farimah Daftary et al. (European Center for Minority Issues, 2003) 257

<sup>258</sup> Second Report of Serbia on the Implementation of the FCNM, ACFC/SR/II(2008)001

Society channels among those they transmit, to increase access to programs for national minorities. Moreover, in those cities where national minorities represent more than 20% of the population, local authorities are obliged to broadcast programs, which are free to retransmit, in the minority language<sup>259</sup>. After joining the European Union on 1 January 2007, Romania transposed Directive 89/552/EEC that provides that Member States “shall not restrict retransmissions on their territory of television broadcasts from other Member States”.<sup>260</sup> These provisions apply to Romania, Bulgaria and Hungary. In accordance with Law no. 41/1994, *the parliamentary groups of national minorities* shall have one representative in the Board of Directors of the Romanian Television Society".

It seems that in the field of the official use of language and script, Serbian regulations allow more freedom for minorities. While the Law on Minorities stipulates that the official use of the language and script of national minorities will be provided in municipalities traditionally inhabited by persons belonging to minorities where they make up at least 15 per cent of total population<sup>261</sup>, in Romania it is at least 20 per cent<sup>262</sup>. It is important that the Law, in accordance with the principle of acquired rights, stipulates that those minority languages that were at the official use in the time of the adoption of the Law, will remain in use. Furthermore, the scope of the official use of language of minorities is broader in Serbia. Thus, it encompasses the use in administrative and court proceedings, in communication with public administration, for public inscriptions, publishing of all legal acts, issuance of public documents and keeping official

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<sup>259</sup> Third State Report of Romania on the Implementation of the FCNM, ACFC/SR/III(2011)002, 50

<sup>260</sup> Ibid, 50

<sup>261</sup> The Law on Protection of Rights and Freedoms of National Minorities, article 11. Available at <http://www.coe.int/t/dg3/romatravellers/archive/documentation/refugees/SaMsocialrights/law%20on%20minorities.pdf> (accessed 25 November, 2012)

<sup>262</sup> Third State Report of Romania on the Implementation of the FCNM, ACFC/SR/III(2011)002

records and personal data bases, the use of language on the ballots and material used in voting and the use of the language in the work of the representative bodies<sup>263</sup>. In Romania it includes public inscriptions, communication with local authorities and issuing decisions, that have to be translated into Romanian as well<sup>264</sup>.

### 3.4.3. National Councils in Serbia: the first attempt 2002-2009

The Law on Minorities introduced the NC in 2002 as the form of cultural autonomy and functional decentralization. The ACFC considered the NC as “promising innovations” in the area of effective participation that “may become a central tool in the implementation of Article 15 of the Framework Convention”<sup>265</sup>. However, it turned out that the absence of the clear legal rules on the competences and poor regulation of electoral procedure caused insufficient operating NC established in 2002<sup>266</sup>. Namely, the federal character of this law had not allowed more precise regulation, as it was in the competence of the federal unit level (Serbia and Montenegro)<sup>267</sup>. Furthermore, there was no stable and systemic funding by the state, as the State Fund for National Minorities even though provided by the Law on Minorities, had not been established at all<sup>268</sup>. In addition, some of these NC continued to operate even though their mandate had

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<sup>263</sup> The Law on Protection of Rights and Freedoms of National Minorities, Article 11

<sup>264</sup> Third State Report of Romania on the Implementation of the FCNM, ACFC/SR/III(2011)002

<sup>265</sup> ACFC, First Opinion on Serbia, ACFC/INF/OP/I(2004)002, para. 106 - 107

<sup>266</sup> Ibid, para. 248

<sup>267</sup> Miodrag Jovanovic, “Kolektivna prava i pozitivna diskriminacija – konceptualna razjasnjenja” (Collective Rights and Positive Discrimination – Conceptual Clarifications) in *Kolektivna prava i pozitivna diskriminacija u Ustavnom pravnom sistemu Republike Srbije (Collective Rights and Positive Discrimination under the Constitutional system of Republic of Serbia)*, ed. M. Jovanovic (Belgrade: Sluzbeni glasnik, 2009), 14

<sup>268</sup> ACFC Second Opinion on Serbia, ACFC/OP/II(2009)001, para. 91

formally expired<sup>269</sup>. For all these reasons, the ACFC considered that such situation might undermine both the role of the NC and implementation of the article 15 of the FCNM<sup>270</sup>.

In addition, the fact that the first NC were elected indirectly – by the electoral assemblies caused a great deal of discussion<sup>271</sup>. It was argued that electoral assembly cannot elect members of the NC as most of public officials who serve as electors are elected for different purpose on their positions. Therefore, their legitimacy as representatives of persons belonging to minorities does not give legitimacy to the NC as it is a different type of institution. Furthermore, those electors that have the political background coming from the elected bodies such as the National Parliament or local assemblies should not elect members of NC as it opens the ample space for influence of political parties. Thus, political parties' members easily can set aside those that are not party members (i.e. proposed by some minority associations)<sup>272</sup>. Scholars share the view that the predominant and direct influence of political parties to the work of the NC may debilitate the meaning of the cultural autonomy by marginalization of political opponents from the minority community, neglect the interest of compatriots that live outside of the territory where the minority is concentrated, and control the resources that belong to every member of the

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<sup>269</sup> Mandate of Hungarian National Council had expired in 2006. Nevertheless, there was no additional regulation on the new elections for councils. Goran Basic, *Iskusenja demokratije u multietnickom drustvu/Trials of Democracy in Multiethnic Society* (Belgrade, Centar za istrazivanje etniciteta, 2006) 78. Available at [http://www.ercbgd.org.rs/index.php?option=com\\_content&view=article&id=26&Itemid=50&lang=sr](http://www.ercbgd.org.rs/index.php?option=com_content&view=article&id=26&Itemid=50&lang=sr) (accessed 10 July, 2012)

<sup>270</sup> Ibid.

<sup>271</sup> Assembly will consist of federal, republican and provincial MPs belonging to national minorities, councilors elected in units of local self-government in which the language of a national minority is in official use, persons belonging to national minorities who collect at least 100 signatures and persons designated by the assemblies of national associations and organizations. First State Report of Serbia on the Implementation of the FCNM, ACFC/SR(2002)003

<sup>272</sup> Goran Basic, *Iskusenja demokratije u multietnickom drustvu/Trials of Democracy in Multiethnic Society* (Belgrade, Centar za istrazivanje etniciteta, 2006) 80. Available at [http://www.ercbgd.org.rs/index.php?option=com\\_content&view=article&id=26&Itemid=50&lang=sr](http://www.ercbgd.org.rs/index.php?option=com_content&view=article&id=26&Itemid=50&lang=sr) (accessed 10 July, 2012)



minority<sup>273</sup>. This reveals the risk of creating predominant position of minority political parties in the sphere of cultural autonomy that might result in the internal divisions within minority communities<sup>274</sup>.

The dissatisfaction among minorities' compatriots is illustrative in this sense. Thus, prominent members of some of the minority communities from Vojvodina argued that internal conflicts concerning the work of NC occurred within most of the minority communities. The NC were accused of introducing the control of media content (i.e. replacing main editors). In addition, many of the NC were accused of not using the competences provided by the Law on Minorities and taking care of party interests only. On the other hand, institutions of public administration that should implement minority rights often neglected NC's recommendations<sup>275</sup>. Thus, it turned out that NC had insignificant influence over decision-making concerning minorities. For all these reasons, some scholars argued that the Law on Minorities was a "dead letter on the blank paper"<sup>276</sup>.

#### 3.4.4. National Councils in Serbia: the second attempt 2009-

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<sup>273</sup> Zoran Lutovac, *Politicka participacija i kulturna autonomija nacionalnih manjina u Srbiji/Political Participation and Cultural Autonomy of National Minorities in Serbia* (Belgrade: Center for Ethnicity Research, 2006) 169

<sup>274</sup> Ibid, 169

<sup>275</sup> Goran Basic, *Iskusenja demokratije u multietničkom društvu/Trials of Democracy in Multiethnic Society* (Belgrade, Centar za istraživanje etniciteta, 2006) 104. Available at [http://www.ercbgd.org.rs/index.php?option=com\\_content&view=article&id=26&Itemid=50&lang=sr](http://www.ercbgd.org.rs/index.php?option=com_content&view=article&id=26&Itemid=50&lang=sr) (accessed 10 July, 2012)

<sup>276</sup> Vojislav Stanovic, "Nacela i pravna resenja zastite prava i sloboda manjina"/"Principles and legal provisions on the protection of rights and freedom of minorities", in *Iskusenja demokratije u multietničkom društvu/Trials of Democracy in Multiethnic Society*, Goran Basic ed. (Belgrade, Centar za istraživanje etniciteta, 2006) 104. Available at [http://www.ercbgd.org.rs/index.php?option=com\\_content&view=article&id=26&Itemid=50&lang=sr](http://www.ercbgd.org.rs/index.php?option=com_content&view=article&id=26&Itemid=50&lang=sr) (accessed 10 July, 2012) 125-137

The Law on National Minority Councils<sup>277</sup> (hereinafter the Law on Councils) regulates the elections, competences and funding of the national councils (hereinafter NC)<sup>278</sup>. It was adopted in order to clarify and further regulate issues concerning the NC introduced by the Law on Minorities in 2002.

Concerning elections, it established the uniform election procedure for all minorities, meaning that elections for all NC will be held at the same time every four years<sup>279</sup>. The election might be either direct or indirect – through electoral assembly. For holding direct elections, it is necessary that the number of registered minority members exceed the 50% of total population of that minority<sup>280</sup>. The candidates might be those who collect 100 signatures of support or are proposed by any kind of minority organization, including political party<sup>281</sup>. Every national minority has own electoral roll where citizens fulfilling voting criteria may be registered. The Ministry of Human and Minority Rights holds registry of all electoral rolls<sup>282</sup>. The NC might have a minimum of 15 and a maximum of 35 members, depending on the total number of persons belonging to the minority concerned.

It seems that apart from introducing direct elections, all other provisions on elections are overtaken from the Law on Minorities. The Law on Councils stipulates that minority self-governments are elected at the national level thus establishing strong centralist system that

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<sup>277</sup> The Law on National Councils of National Minorities, Official Gazette, 72/2009, Available at [http://www.zenta-senta.co.rs/doc/zonsnm\\_sr.pdf](http://www.zenta-senta.co.rs/doc/zonsnm_sr.pdf) (accessed 25 November, 2012) The first working version, prepared by the Agency for Human and Minority Rights was submitted for review to the experts of the Council of Europe through the Council of Europe Office in Belgrade Serbia, Second Report of Serbia, ACFC/SR/II(2008)001, 410

<sup>278</sup> ACFC Second Opinion on Serbia, ACFC/OP/II(2009)001

<sup>279</sup> The Law on National Councils of National Minorities, article 36

<sup>280</sup> Ibid, article 29

<sup>281</sup> The Law on National Councils of National Minorities, Official Gazette, 72/2009, Available at [http://www.zenta-senta.co.rs/doc/zonsnm\\_sr.pdf](http://www.zenta-senta.co.rs/doc/zonsnm_sr.pdf) (accessed 25 November, 2012), article 102

<sup>282</sup> Ibid, article 44

enables homogenization of minorities. Thus, citizens' influence over governing cultural autonomy is limited to electing representatives. In this way members of dispersed national minorities cannot influence neither decision-making nor decision implementation in local municipality where they live<sup>283</sup>. For instance, Roma live all around Serbia and due to the lack of firm connections between them, most likely that interests of many of them will not be represented by the NC<sup>284</sup>. This solution is difficult to justify, as the most of these collective rights are exercised at the local level<sup>285</sup>.

What is even more striking is that the Law on Councils provides that NC will nominate candidates for interethnic councils on the local level.<sup>286</sup> The Law on Local self-government provides that in multiethnic municipalities, the councils for interethnic relations should be established<sup>287</sup>. Apart from nominating members, these local councils do not have any other legal connection to the NC. Moreover, some of its competences even overlap with the NC, which makes their functioning even more complicated<sup>288</sup>. Therefore, the legitimacy of these councils

<sup>283</sup> Ombudsperson Recommendation to the Ministry of Human and Minority Rights, 16-1725/10, Available at [http://www.pravamanjina.rs/attachments/454\\_Min%20za%20ljudska%20i%20manjinska%20prava.pdf](http://www.pravamanjina.rs/attachments/454_Min%20za%20ljudska%20i%20manjinska%20prava.pdf) (accessed 7 June, 2012)

<sup>284</sup> Goran Basic, *Iskusenja demokratije u multietnickom drustvu/Trials of Democracy in Multiethnic Society* (Belgrade, Centar za istrazivanje etniciteta, 2006) 79. Available at [http://www.ercbgd.org.rs/index.php?option=com\\_content&view=article&id=26&Itemid=50&lang=sr](http://www.ercbgd.org.rs/index.php?option=com_content&view=article&id=26&Itemid=50&lang=sr) (accessed 10 July, 2012)

<sup>285</sup> It may be plausible to say that this kind of centralization of cultural autonomy is logical outcome of the overall process of centralized governing the state that is still in force in Serbia. Ibid, 170

<sup>286</sup> The Law on National Councils of National Minorities, article 10

<sup>287</sup> Ibid, article 98. The multiethnic municipalities are those where a minority make up 5 per cent or several minorities make up 10 per cent of total population. According to this criterion, there are 68 multiethnic municipalities in Serbia (41 in Vojvodina and 27 at the Central Serbia). Till 2006 only 22 municipalities established these councils. Goran Basic, *Iskusenja demokratije u multietnickom drustvu/Trials of Democracy in Multiethnic Society* (Belgrade, Centar za istrazivanje etniciteta, 2006) 89. Available at [http://www.ercbgd.org.rs/index.php?option=com\\_content&view=article&id=26&Itemid=50&lang=sr](http://www.ercbgd.org.rs/index.php?option=com_content&view=article&id=26&Itemid=50&lang=sr) (accessed 10 July, 2012)

<sup>288</sup> Ibid, 90.

may be questioned since instead of being elected by minority members living at the municipality concerned, representatives will be nominated by the central body.

Concerning competences, the Law on Councils elaborates upon those envisaged by the Law on Minorities<sup>289</sup>. The NC is the legal entity entitled to adopt its Statute and budget. This institution represents the national minority in the areas of culture, education, information, and the official use of language and script. The general competences include deciding on the national symbols and holidays of the minority concerned; establishing institutions, associations, foundations; nominating minority representative at the council for interethnic relations in the local municipalities; participation in the law making concerning minority issues and bringing complaint before the Constitutional Court, Ombudsperson, Province and local ombudsperson in the case of violation of legal norms on minority protection<sup>290</sup>.

The Law provides for different forms of participation of the NC in the decision-making process. The state authorities, territorial autonomies or the local authorities are obliged to request the NC's opinion when deciding on the issues concerning cultural autonomy. On the other hand, NC may address the public authorities on all levels with respect to all issues concerning cultural autonomy. Furthermore, public authorities can delegate some of its competences concerning minority issues to the NC that will be funded by the state. The NC may establish the cooperation with international and regional organizations, state authorities and organizations from kin-states<sup>291</sup>.

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<sup>289</sup> The Law on National Councils of National Minorities, Section III

<sup>290</sup> Ibid, article 10

<sup>291</sup> Ibid, article 27

The NC are funded by the state funds (Republic, Province and local municipalities) and through dotations<sup>292</sup>. Since the State Fund has not been established yet, the only source of funding is through dotations. The problem with this way of funding is that there is no budgetary control. Instead, the NC are obliged to report if the funding is spent for the purposes it was given<sup>293</sup>. Furthermore, the Law on Councils provides that 30 per cent of the state budget for the NC is equally distributed among the NC, while the rest is distributed proportionally to the size of national minority and the number of institutions it governs<sup>294</sup>. In other words, more institutions NC declares as of having a particular importance for the preservation of national identity of minority concerned, more funding it will get.

The State Council for National Minorities is established by the Government Decree in 2009<sup>295</sup>. The president of the Council is prime minister. Members are ministers whose ministries are closely connected to minority rights and councils' presidents. The Council supposes to confirm national symbols and national holidays of minorities, gives opinion on the legislation that affect minority rights, monitors minority rights implementation, proposes measures for the promotion of full and effective equality of persons belonging to national minorities; monitors cooperation of national councils with the competent bodies of Republic of Serbia and monitor international obligations implementation. It seems that this Council, after constitutive session in

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<sup>292</sup> The Law on National Councils of National Minorities, article 114

<sup>293</sup> Interview with the Province Ombudsman Deputy, conducted on 12 March, 2012

<sup>294</sup> The Law on National Councils, article 115

<sup>295</sup> Government Decree on Establishing the State Council for National Minorities, *Sl. glasnik RS*, 50/09

October 2009, had not held any additional meeting, which means that most probably it does not function at all<sup>296</sup>.

### 3.3.5. Effective participation in Romania

The effective participation of persons belonging to minorities in Romania has a different form comparing to Serbia. There is neither single basic law nor single institution that deals with cultural autonomy rights. On the contrary, they are entrenched in various legislative acts and implemented by various institutions. It remains to determine which of these two models is more efficient.

During the 1990s Romania was experimenting with power-sharing.<sup>297</sup> The effective participation of persons belonging to minorities was predominantly understood as minorities' representation at the elected bodies on the all levels of state organization<sup>298</sup>. This was guaranteed on both Constitutional and legislative level. The Law on Elections to the Chamber of Deputies and the Senate (1992) affirms the principle of reserved seats in the Chamber of Deputies of the Senate for those minorities whose organizations failed to obtain sufficient number of votes on elections<sup>299</sup>. It further guarantees the access to the public radio and television services that will be subsidized from

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<sup>296</sup> In spite of all the efforts, the author was not able to find any information concerning this Council on the Internet. Furthermore, it seems that there is no official state authority that National Council can cooperate with in the area of human and minority rights. Namely, due to decreasing of public spending, the Ministry of Human and Minority rights is replaced by the Departmental Unit within the Ministry of Public Administration and Local Self-Government. Even though its competences have not decreased, due to the decreased financial and human resources the Unit is not able to operate sufficiently.

<sup>297</sup> Carmen Kettly, "Ethnicity, Language and Transition Politics in Romania: the Hungarian Minority in Context", in *Nation-building, Ethnicity and Language Politics in Transition Countries*, ed. Farimah Daftary et al. (Flensburg: European Center for Minority Issues, 2003) 247

<sup>298</sup> Martin Brusis, The European Union and Interethnic Power-Sharing arrangements in Accession Countries, *Journal on Ethnopolitics and Minority Issues in Europe*, 1/2003

<sup>299</sup> Second State Report of Romania on the Implementation of the FCNM, ACFC/SR/II(2005)004

the State budget. The Law on Local Elections provides similar solutions for elections on the local level. It is interesting that the Law guarantees equal treatment of minority organizations and political parties<sup>300</sup>. Therefore, persons belonging to minorities are not entitled to establish political parties<sup>301</sup>.

The Advisory Committee was quite critical of legislative differentiation between minority organizations already represented at the Parliament and those that want to run the elections. Namely, the former are treated preferentially due to more restrictive conditions that the latter have to fulfill in order to take part in the elections<sup>302</sup>. Another dimension of preferential treatment is that only those minority organizations represented at the Parliament may be represented at other institutions as well. The ACFC was arguing that this kind of institutional arrangement gives the preferential treatment to minority organizations that are represented both in the Parliament and CNM<sup>303</sup>. This treatment is reinforced by the fact that these organizations receive most of the state funding allocated to national minorities. Therefore, there is the risk that specific minority organizations might monopolize minority representation sidelining other organizations<sup>304</sup>.

Apart from the elected bodies, the Council for National Minorities (hereinafter CNM) is the only institution where persons belonging to minorities are directly represented. The history of this institution is rather interesting. Namely, it was established in 1993 as the advisory body of the

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<sup>300</sup> Second State Report of Romania on the Implementation of the FCNM, ACFC/SR/II(2005)004

<sup>301</sup> According to Article 4 (2) of Election Law no.68/2000, there are no minority parties in Romania but the organisations of national minorities can participate to the election process and, in this case, they are assimilated to political parties. Ibid

<sup>302</sup> ACFC, First Opinion on Romania, ACFC/INF/OP/I(2002)001, 190

<sup>303</sup> This might be confirmed by the reaction of some of those organizations represented at these institutions to the adoption of Order No. 26. Namely, the Order simplifies procedures for establishing associations in Romania. In spite of clear benefits for freedom of association for minorities, minority organizations concerned argued the new regulations “may fragment their communities”. It is interesting that what one might consider as the beneficial pluralism, other can perceive as the “fragmentation of community”. ACFC, First Opinion on Romania, ACFC/INF/OP/I(2002)001, 67-68

<sup>304</sup> Ibid, 68

Romanian Government coordinated by the general secretary of the Government<sup>305</sup>. Its purpose was to follow up on the specific problems concerning exercise of the rights of persons belonging to minorities concerning their right to identity.<sup>306</sup> It consisted of representatives of the minority organizations constituted at the time of the general elections from 1992<sup>307</sup>. It had powers to communicate with minority organizations; to give opinion on or prepare the Draft laws concerning minority protection; to inform the Government about the problems concerning minority protection; to monitor the implementation of minority protection regulations at the local level; to receive requests or notifications of institutions, organizations or natural persons concerning its competences<sup>308</sup>.

In 1997 this body was transformed to the consultative body of the newly established Department for Inter-Ethnic Relations<sup>309</sup>. Structure was changed. Now it was composed of three representatives of each minority organization represented in the Parliament<sup>310</sup>. Its competences have changed as well. It seems that instead of addressing the Government directly, the novelty was that all communication and suggestions should go through the Department for Inter-Ethnic Relations (i.e.

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<sup>305</sup> Government Order No. 137/1993 On the functioning of the Council for National Minorities as amended by Government Order No. 220/1993, article 1 Available at <http://www.cilevics.eu/minelres/NationalLegislation/Romania/romania.htm> (accessed 5 July, 2012)

<sup>306</sup> Ibid, article 2

<sup>307</sup> Ibid

<sup>308</sup> Government Order No. 137/1993 On the functioning of the Council for National Minorities as amended by Government Order No. 220/1993, article 3 Government Order No. 137/1993 On the functioning of the Council for National Minorities as amended by Government Order No. 220/1993, article 1 Available at <http://www.cilevics.eu/minelres/NationalLegislation/Romania/romania.htm> (accessed 5 July, 2012)

<sup>309</sup> Government Decree No. 17 on the Creation, Organization and Functioning of the Department for the Protection of National Minorities of 31 January 1997, as amended by Government Decree No. 506 of 12 September 1997, Article 9 Available at <http://www.cilevics.eu/minelres/NationalLegislation/Romania/romania.htm> (accessed 5 July, 2012)

<sup>310</sup> Ibid



informing on problems that minorities face with, making draft law proposals)<sup>311</sup>. In 2001 one more transformation took place when it was upgraded to the Government's advisory body<sup>312</sup>. However, its competences have not changed significantly.

It seems that in the context of this institutional system a major role devolves on the Department for Inter-Ethnic Relations (hereinafter DIR) as governmental body without legal personality, coordinated by the General Secretariat of the Government<sup>313</sup>. Up to now, this office has been occupied by a representative of the some of the minority organizations represented at the Parliament<sup>314</sup>. The scope of its competences encompasses making proposals or giving opinion on the Draft legal acts concerning minority protection; granting financial assistance to minority organizations on a proposal from the CNM; ensuring the uniform application of provisions on minority protection by local authorities and the promotion of Romania's ethnic and cultural diversity<sup>315</sup>. The interesting task that DIR suppose to perform is promoting mutual understanding between national minorities themselves and between them and the majority.

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<sup>311</sup> Government Decree No. 17 on the Creation, Organization and Functioning of the Department for the Protection of National Minorities of 31 January 1997, as amended by Government Decree No. 506 of 12 September 1997, Article 10, Available at <http://www.cilevics.eu/minelres/NationalLegislation/Romania/romania.htm> (accessed 5 July, 2012)

<sup>312</sup> The Government Decision no. 589/2001 Available at <http://www.cilevics.eu/minelres/NationalLegislation/Romania/romania.htm> (accessed 5 July, 2012)

<sup>313</sup> Government Decree No. 17 on the Creation, Organization and Functioning of the Department for the Protection of National Minorities of 31 January 1997, as amended by Government Decree No. 506 of 12 September 1997, article 1. However, it was transformed several times. The newest reform was in 2003. Ordinance 64/2003, published in the Official Gazette no. 464 of June 26, 2003. Available at <http://www.cilevics.eu/minelres/NationalLegislation/Romania/romania.htm> (accessed 5 July, 2012)

<sup>314</sup> Second State Report of Romania on the Implementation of the FCNM, ACFC/SR/II(2005)004, 56

<sup>315</sup> Government Decree No. 17 on the Creation, Organization and Functioning of the Department for the Protection of National Minorities of 31 January 1997, as amended by Government Decree No. 506 of 12 September 1997, article 2; Available at <http://www.cilevics.eu/minelres/NationalLegislation/Romania/romania.htm> (accessed 5 July, 2012)

### 3.3.6. National Councils *of* National Minorities or Council *for* National Minorities?

Brief comparison of the main features will show that national councils in Serbia (hereinafter NC) are more powerful institutions compared to the CNM. In general, while NC are independent legal entities established by the persons belonging to each of minorities recognized in Serbia, CNM is the consultative body without legal entity established by the State that represents all minorities. In terms of members, there are some similarities. It might be argued that for both institutions representatives are directly elected. However, the difference is that while members of NC are elected for councils as such, members of CNM are elected for Parliament. Therefore, while members of NC are independent from elected bodies, at least on formal level, members of CNM belong to those organizations that are represented at the Parliament. Even more, sometimes these are the same persons.

In the field of competences, both represent minorities in cultural autonomy. However, competences of NC are more far-reaching. For instance, both participate at the law making process on the consultative level. However, contrary to the NC, there is no obligation of the Government to consult CNM. Furthermore, NC may establish institutions in areas concerning the preservation of identity, while nothing similar CNM can do.

It seems that the biggest difference concerns the communication with other institutions. Thus, NC are entitled to exercise some of the public functions delegated by the state or local bodies, while CNM does not even have legal entity and therefore cannot be entitled to exercise such functions. In addition, the Law on Minorities stipulates obligation of the state authorities, territorial autonomies or local municipalities to request the opinion of the NC in deciding on the issues in the fields concerned. In the case of Romania, the most similar to this is communicating with local authorities. However, this is exercised by the DIR, rather than CNM. NC may address the public

authorities on all levels with respect to all issues affecting the rights and status of national minorities. Again, in Romania this is competence of DIR. It might be argued that one of the most important differences comes within the area of the constitutional review. Namely, while NC are entitled to bring the claim to the Constitutional Court for the review of constitutionality of specific acts, nothing similar CNM can exercise.

For all these reasons, it is no wonder that the Advisory Committee considers CNM as having the limited impact on executive's decisions due to the lack of legal personality and modest human and financial resources. It concludes that "its influence on the political choices made, derives more from the presence of well-known figures among its members than from its institutional authority"<sup>316</sup>. Furthermore, the Committee is concerned that the Hungarian minority is the only which has a particularly prominent and effective presence in the public life, whereas the presence and influence of the other communities are much more subdued<sup>317</sup>.

### **3.3.7. Introducing cultural autonomy in Romania**

During the 1990s minorities in Romania had several attempts of introducing cultural autonomy in Romania. For instance, in 1993 Hungarian representatives proposed the Draft Law, which would allow minorities to declare themselves as autonomous communities and as such exercise some form of self-governance. Minorities would be able to choose, in accordance with own

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<sup>316</sup> ACFC Second opinion on Romania, ACFC/OP/II(2005)007, para. 188

<sup>317</sup> Ibid

needs, one out of three forms of self-governance: personal autonomy, local self-government of special status or regional autonomy<sup>318</sup>. The proposal was rejected.

The newest initiative is the Draft on the Statute for National Minorities (hereinafter Draft Law), prepared in 2005 and since then is in the parliamentary procedure<sup>319</sup>. One of the possible reasons for such slow procedure of adopting the Draft Law might be the lack of Romanian authorities' willingness to introduce cultural autonomy in Romania, as the Draft Law provides<sup>320</sup>.

According to the Draft Law, "[t]he state recognizes and guarantees the cultural autonomy of national minorities"<sup>321</sup>. Cultural autonomy is defined as "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"<sup>322</sup>. Let us remind that the Romanian Constitution does not contain even a single word on collective rights. Concerning areas of cultural autonomy, it is worth noting that Councils do not have any competence regarding the official use of language and script that is commonly understood as part of cultural autonomy.

Competences are set on the framework level and resemble those provided by the Law on Minorities. The Draft Law provides 12 very general competences for councils, compared to around

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<sup>318</sup>The Law on National Minorities and Autonomous Communities Proposed by the Democratic Alliance of Hungarians in Romania 1993. The Law defines autonomous communities as "communities, which have the material and spiritual resources needed for their self- organization of a certain degree and for developing a necessary system of institutions". Available at [www.usefoundation.org/view/508+&cd=5&hl=en&ct=clnk&client=firefox-a](http://www.usefoundation.org/view/508+&cd=5&hl=en&ct=clnk&client=firefox-a) (accessed 20 July, 2012)

<sup>319</sup> The Draft Law was initiated and prepared by the UDMR, with consulting of all minority organizations. See ACFC Second opinion on Romania, ACFC/OP/II(2005)007, para. 185

<sup>320</sup> In 2003 Hungarians established the National Council of Hungarians in Transylvania which called for territorial and cultural autonomy for ethnic Hungarians living in Romania. It was not recognized by Romanian authorities, due to perceiving it as "irredentism". Anna K. Meijknecht, *Minority Protection: Standards and Reality* (The Hague: T.M.C. Asser Press, 2004) 130

<sup>321</sup> The Draft Law on the Statute for National Minorities (2005), article 56, Available at the website of the Venice Commission: <http://www.venice.coe.int/docs/2005/CDL%282005%29059-e.pdf> (accessed 5 June 2012)

<sup>322</sup> Ibid, Article 57

80 competences provided by the Law on Councils. Let us remind that such general formulation of competences resulted in several years of inefficient functioning of the NC in Serbia. Thus, the Councils are entitled to establish, administer or “control” institutions in the areas of education in minority language, mass media and culture. Furthermore, they may establish private educational or cultural institutions, nominate board members, prepare strategies in areas of cultural autonomy, award scholarships, administer allocation of funds for the purpose of preservation of national identity of minorities<sup>323</sup>. But, what they cannot do is to participate in the law-making. Venice Commission expert was concerned with the relation between Councils and private institutions, stating that the former should not interfere with the management of the latter<sup>324</sup>. It is interesting that the Draft Law provides that these institutions may establish special taxes “in order to ensure functioning of the institutions of cultural autonomy”<sup>325</sup>. Let us remind that this idea is not novelty since it was included under the Renner’s model of cultural autonomy.

The establishment of National Councils should be initiated by the minority organizations<sup>326</sup>. It is stated that establishment is not mandatory<sup>327</sup>. The Advisory Committee considers that further clarifications are needed in the case of minorities that are not able or not willing to establish these institutions in order to avoid preferential treatment of those that have established it<sup>328</sup>. They further argue that the Romanian authorities should assure that the Draft Law’s provisions comply with

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<sup>323</sup> The Draft Law on the Statute for National Minorities (2005), Available at the website of the Venice Commission: <http://www.venice.coe.int/docs/2005/CDL%282005%29059-e.pdf> (accessed 5 June 2012), article 58(f)

<sup>324</sup> CDL(2005)070 [Observations on the Draft Law on the Statute of National Minorities of the Republic of Romania](#) (S. Bartole) para 10

<sup>325</sup> The Draft Law on the Statute for National Minorities (2005), article 58 (f), Available at the website of the Venice Commission: <http://www.venice.coe.int/docs/2005/CDL%282005%29059-e.pdf> (accessed 5 June 2012)

<sup>326</sup> Ibid, article 59 (1)

<sup>327</sup> Ibid, article 59 (2)

<sup>328</sup> ACFC Second opinion on Romania, ACFC/OP/II(2005)007, para. 192

the principles of equal opportunities and pluralism both within minorities and between their representative organizations<sup>329</sup>.

These institutions are autonomous administrative authorities with juridical personality entitled to adopt Statute<sup>330</sup>. Councils are established through “internal” elections carried out by secret and direct elections by persons belonging to minorities<sup>331</sup>. From the perspective of Serbian councils’ negative experience with indirect elections, this solution should be welcomed. However, there are deficiencies concerning other provisions. Thus, it is stated that elections will be carried out by the representative organization of persons belonging to minorities<sup>332</sup>. This is not good solution, having in mind that the organization concerned will run for elections as well. Therefore, it provides ample space for political manipulations. In this regard, the Advisory Committee “regrets” for the preservation of the preferential treatment of minority organizations represented in the Parliament<sup>333</sup>. Furthermore, other provisions regarding elections raise concern as well. For instance, the Venice Commission expert was concerned with the data protection of persons belonging to minorities in the case of registration for elections and special taxes<sup>334</sup>.

It seems that the Law does not stipulate holding elections for all councils at the same time, which might be welcomed due to the freedom that it leaves to minority organizations to conduct internal affairs. However, it seems that it sets forth national councils as central institutions only,

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<sup>329</sup> ACFC Second opinion on Romania, ACFC/OP/II(2005)007, para. 196

<sup>330</sup> The Draft Law on the Statute for National Minorities (2005), article 61

<sup>331</sup> Ibid, article 62 (1)

<sup>332</sup> Ibid, article 62 (3)

<sup>333</sup> ACFC Second opinion on Romania, ACFC/OP/II(2005)007, para. 191

<sup>334</sup> CDL(2005)070 [Observations on the Draft Law on the Statute of National Minorities of the Republic of Romania](#) (S. Bartole) para 10

which is the weakness shared by the Law on Councils. In addition, it is not clear if it provides the uniform type of institution for all minorities.

When it comes to the internal organization, it is striking that the Permanent Secretariat of the Council has to be approved by the Government's decision, which leaves ample space for its interfering with Council's internal affairs<sup>335</sup>. The novelty is that the Councils are obliged to prepare annual reports concerning their activities for the Parliament<sup>336</sup>. This provision might be welcomed for at least two reasons. First of all, it provides transparency in the Councils' operating. In addition, this is the way to inform politicians in particular and general public in general on the issues concerning the position of persons belonging to minorities in Romania. In addition, reporting to the highest elected body might give additional legitimacy to the Councils and confirm that they are the part of the State political system. The Councils may be delegated some of the competences of the Counties concerning cultural autonomy. The novelty is that the Council in those local municipalities where a national minority makes at least one per cent of population and has no representative at the local council, might initiate debate and decision making in matters concerning its competences. Such initiative will be obligatory for local authorities concerned<sup>337</sup>.

This move toward cultural autonomy was welcomed by European organizations. For instance, Venice Commission Expert considers that even though there are no international standards concerning cultural autonomy, it is justified to entitle minority to "have a say in the matters which interest its protection"<sup>338</sup>. In similar terms, the Advisory Committee considers that the

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<sup>335</sup> The Draft Law on the Statute for National Minorities (2005), article 69, Available at the website of the Venice Commission: <http://www.venice.coe.int/docs/2005/CDL%282005%29059-e.pdf> (accessed 5 June 2012)

<sup>336</sup> Ibid, article 70

<sup>337</sup> Ibid, article 71

<sup>338</sup> CDL(2005)070 [Observations on the Draft Law on the Statute of National Minorities of the Republic of Romania](#) (S. Bartole) para 10

introduction of cultural autonomy would provide persons belonging to minorities to participate in decision-making in more effective way than they currently do due to the consultative character of the CNM<sup>339</sup>. However, the Advisory Committee considered that the Draft Law has to provide further clarifications concerning the nature and scope of envisaged cultural autonomy<sup>340</sup>.

### **Concluding remarks**

In conclusion, it seems that Serbian legislators by introducing the concept of collective rights and the institution of national councils have actually set new standards in the area of cultural autonomy. This might be confirmed by the desire of persons belonging to minorities in Romania to establish the same type of institution, due to the lack of effective participation in cultural affairs. However, it is less likely that this mutual influence would happen without mediators. Therefore, it might be plausible to say that European organizations, most notably CoE, played a significant role in introducing these innovative solutions. Mechanisms for this influence are various, starting from Venice Commission's opinion on constitutional and legislative provisions, the Advisory Committee opinions on state reports, Committee of Ministers' recommendations for improvements in the area of minority protection. As noted, the additional weight to these mechanisms is provided by the EU' entrenching minority rights within the Copenhagen political criteria for membership.

Therefore, it remains to be seen if politically unstable environment and frequent changes in institutional setting affected the final shape of these standards in Serbia. Functioning of councils in Serbia may give the answer for its possible introducing in Romania.

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<sup>339</sup> CDL(2005)070 [Observations on the Draft Law on the Statute of National Minorities of the Republic of Romania](#) (S. Bartole) para 10

<sup>340</sup> ACFC Second opinion on Romania, ACFC/OP/II(2005)007, para. 74



## Chapter Four: National Councils in Practice

Having in mind that previous section has concluded that there is the room for efficient participation improvement in Romania, one have to analyze how national councils function in practice. Let us remind that analysis of the Serbian legislation has found problematic centralized nature of these institutions and participation of political parties in the elections. Since the Law provides the uniform institution for all minorities in Serbia, we will compare how Hungarian and Roma minority are using it in order to evaluate adequacy of this approach.

In order to make the general evaluation of the institution of national council, indicators formulated in accordance with liberal and multicultural concerns over cultural autonomy will be applied. These findings may help in determination if this institution can serve as the common model for cultural autonomy, including Romania. The main questions one should answer are: “Is the right to identity of persons belonging to minorities protected?”; “Do persons belonging to minorities effectively participate in self-government?”

### 4.1. Establishing councils

The first elections for national councils were held in 2010. Sixteen national minorities fulfilled criterion for holding direct elections<sup>341</sup>. Members of Croat, Macedonian and Slovenian national minority conducted indirect elections through assemblies of electors. Numerous irregularities

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<sup>341</sup> Albanians, Ashkalia, Bosniaks, Bulgarians, Bunjevci, Czech, Egyptians, Greek, Hungarians, Germans, Roma, Romanians, Ruthenians, Slovaks, Ukrainians, and Vlach. See Province Ombudsman’s Survey on National Councils (2012) Available at [http://www.ombudsmanapv.org/apvomb/attachments/article/741/Dve%20godine%20nac.saveta%20II%20deo\\_2012\\_.pdf.pdf](http://www.ombudsmanapv.org/apvomb/attachments/article/741/Dve%20godine%20nac.saveta%20II%20deo_2012_.pdf.pdf) (accessed 10 July, 2012)

appeared during the elections. For instance, many institutions including Ombudsperson, Commissioner for Freedom of Information and Data Protection, and Commissioner for Equality reacted on the violation of citizens' rights during the registration in the electoral roll. It was argued that the Instructions of Ministry for Human and Minority Rights allowed third parties to submit applications for the roll, without any personal documents<sup>342</sup>. This made possible that citizens were registered against their will<sup>343</sup>. Nevertheless, the OSCE stated that elections were held in compliance with the international standards<sup>344</sup>.

Bosniacs were the only minority whose council was not established due to the interfering of Ministry of Human and Minority Rights. The Ombudsperson considered such interference as illegal. In addition, the Commissioner for Equality considered that introducing a specific criterion for establishment of Bosniac National Council put them into unequal position comparing to other councils<sup>345</sup>.

National Councils' elections proved to be highly politicized since both minority and majority political parties have shown a great interest for the involvement<sup>346</sup>. For this reason, the

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<sup>342</sup> Ombudsperson Recommendation to the Ministry of Human and Minority Rights, 16-1725/10, Available at [http://www.pravamanjina.rs/attachments/454\\_Min%20za%20ljudska%20i%20manjinska%20prava.pdf](http://www.pravamanjina.rs/attachments/454_Min%20za%20ljudska%20i%20manjinska%20prava.pdf) (accessed 7 June, 2012)

<sup>343</sup> Human Rights in Serbia 2010 (Belgrade: Belgrade Center for Human Rights, 2010) 302

<sup>344</sup> European Commission's Annual Report on Progress of Serbia 2010, 14 Available at [http://www.seio.gov.rs/upload/documents/eu\\_dokumenta/godisnji\\_izvestaji\\_ek\\_o\\_napretku/izestaj\\_o\\_napretku\\_srbije\\_2010\\_sa\\_%20aneksom.pdf](http://www.seio.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/izestaj_o_napretku_srbije_2010_sa_%20aneksom.pdf) (accessed 26 November, 2011)

<sup>345</sup> It turned out that the Ministry for Human Rights acted illegally by changing the Rule on the Establishing of Council a day before establishment Bosniac Council. Nevertheless, elected members constituted the Council, but the Ministry has rejected its registration, claiming that the Council has no legitimacy. New elections, scheduled for 2011, were canceled due to the lack of the agreement on the electoral procedures. Such Government's interference caused dissatisfaction and continuous protesting and incidents in Sandzak. See Ombudsperson Recommendation to the Ministry of Human and Minority Rights, 16-1725/10, Available at [http://www.pravamanjina.rs/attachments/454\\_Min%20za%20ljudska%20i%20manjinska%20prava.pdf](http://www.pravamanjina.rs/attachments/454_Min%20za%20ljudska%20i%20manjinska%20prava.pdf) (accessed 7 June, 2012)

<sup>346</sup> Human Rights in Serbia 2010 (Belgrade: Belgrade Center for Human Rights, 2010) 300

Ombudsperson has argued that leaving the ample space for politicization of the Councils' elections is one of the biggest weaknesses of the Law on Councils. In his view, the participation of the political parties at the elections for cultural self-government is the novelty in the region<sup>347</sup>. The main downside of allowing political organizations to nominate candidates for Councils is that it easily prevails over the position of candidates nominated by non-political associations, thus limiting access to the persons not connected to political parties<sup>348</sup>.

#### 4.2. Hungarian and Roma National Council

It may be plausible to say that the territory where minorities are traditionally settled may affect the National Councils' functioning. Thus, Hungarians are concentrated in Vojvodina, while Roma live all around the country. As provincial authorities are more willing to cooperate with minority institutions, Hungarian National Council is better positioned than Roma<sup>349</sup>. Namely, dispersed Roma communities force Roma National Council to predominantly cooperate with State institutions, that are less interested in minority issues<sup>350</sup>. For this reason, this Council established nine regional branches, but it is not clear if they operate at all.<sup>351</sup> Furthermore, the Law on Councils remains silent on the establishment of regional offices; all it says is that "State

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<sup>347</sup> During the latest parliamentary elections in Serbia in 2012, several National Councils signed agreements of support for some of the biggest political parties. Several Councils' representatives, including Hungarian and Roma, were candidates of mainstream political parties. For the news see [http://www.pressonline.rs/sr/vesti/vesti\\_dana/story/209438/DS+i+predstavnici+nacionalnih+saveta+zajedno+na+izborima.html](http://www.pressonline.rs/sr/vesti/vesti_dana/story/209438/DS+i+predstavnici+nacionalnih+saveta+zajedno+na+izborima.html) (accessed 10 July, 2012)

<sup>348</sup> Ombudsperson Recommendation to the Ministry of Human and Minority Rights, 16-1725/10, Available at [http://www.pravamanjina.rs/attachments/454\\_Min%20za%20ljudska%20i%20manjinska%20prava.pdf](http://www.pravamanjina.rs/attachments/454_Min%20za%20ljudska%20i%20manjinska%20prava.pdf) (accessed 7 June, 2012)

<sup>349</sup> ACFC Second Opinion on Serbia, ACFC/OP/II(2009)001, 13

<sup>350</sup> Interview with the Province Ombudsman Deputy, conducted on 12 March, 2012

<sup>351</sup> Roma National Council website: <http://www.romskinacionalnisavet.org/o-nama/regionalne-kancelarije.html> (accessed 8 March, 2012)

[of Council] may establish additional consultative *and other bodies* of the Council”<sup>352</sup>. It is not clear if regional offices can be considered as “other bodies”, but it is clear that Romani have a need for decentralized self-government.

According to the Province Ombudsman’s survey, Hungarian National Council is the most active council<sup>353</sup>. In the area of general competences, it has nominated Hungarian representatives at the local councils of interethnic relations; initiated the adoption of several legal acts in the sphere of education; started proceedings before the Constitutional Court, Ombudsperson and Province Ombudsperson for several alleged violations of the rights of persons belonging to minorities<sup>354</sup>. In order to explore if the institution of national council corresponds to the needs of both Hungarian and Roma minority, we will briefly compare both national council’s achievements in all four areas of cultural autonomy.

#### 4.2.1. Media

The Province Assembly has delegated its founding rights over minority media to national councils on territory of Vojvodina. Thus, the limited liability publishing company - ‘*Magyar Szó*’ (which publishes the only daily paper in Hungarian, ‘*Magyar Szó*’ and the children’s magazine ‘*Képes Ifjúság*’), as well as the limited liability publishing company - *Het Nap* (which publishes

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<sup>352</sup> The Law on National Councils of National Minorities, article 7

<sup>353</sup> Since Roma National Council had not participated, survey does not provide data on their activities. This proves that Roma Council does not cooperate with Province institutions significantly. For this reason, data on its activities are provided mostly by the interview held with the Head of Committee for Education, 12 march 2012

<sup>354</sup> Province Ombudsman’s Survey on National Councils (2012) Available at [http://www.ombudsmanapv.org/apvomb/attachments/article/741/Dve%20godine%20nac.saveta%20II%20deo\\_2012\\_.pdf.pdf](http://www.ombudsmanapv.org/apvomb/attachments/article/741/Dve%20godine%20nac.saveta%20II%20deo_2012_.pdf.pdf) (accessed 10 July, 2012)

the weekly) are now under Hungarian National Council supervision<sup>355</sup>. This transfer can be considered as justified, as it was the way to preserve media in minority language<sup>356</sup>. However, what turns to be problematic is the attempt of some Councils to interfere with editors' policy. Thus, Hungarian National Council replaced the main editor of the newspaper *Magyar Szó*, tending to establish a specific board that would monitor of the newspaper. The head of Steering Committee within the Council justified this decision saying that the "freedom of media is important, but is limited by the Hungarian Community interests"<sup>357</sup>. The provincial Ombudsman argued that the establishment of this kind of body would amount to censorship and requested interruption of this procedure<sup>358</sup>.

The Hungarian National Council exercised other competences in this area as well. For instance, it gave the opinion in the process of electing head of the Broadcasting institution of Vojvodina and participated at the distribution of public funds. Concerning broadcast media, Hungarian language is used in 20 private and 16 public radio stations; and in 9 private and 7 public TV Channels<sup>359</sup>.

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<sup>355</sup> Second Report of Serbia on the Implementation of the FCNM, ACFC/SR/II(2008)001

<sup>356</sup> Privatization of media would force media in minority languages to act commercially and thus decrease or even abolish programs in minority languages due to limited audience. On the other hand, proponents of integrative multiculturalism argue that media should be able to report on issues concerning other ethnic minorities and majority as well, providing intercultural communication. Thus, audience would be much broader and thus media sustainable even in the case of market competition. Goran Basic, *Iskusenja demokratije u multietnickom drustvu/Trials of Democracy in Multiethnic Society* (Belgrade, Centar za istrazivanje etniciteta, 2006) 83. Available at [http://www.ercbgd.org.rs/index.php?option=com\\_content&view=article&id=26&Itemid=50&lang=sr](http://www.ercbgd.org.rs/index.php?option=com_content&view=article&id=26&Itemid=50&lang=sr) (accessed 10 July, 2012)

<sup>357</sup> Available at [http://magyarszo.com/fex.page:2011-06-24\\_Ni\\_Dunav\\_nece\\_oprati\\_Nacionalni\\_savet\\_Madara.xhtml](http://magyarszo.com/fex.page:2011-06-24_Ni_Dunav_nece_oprati_Nacionalni_savet_Madara.xhtml), accessed 15 November, 2012

<sup>358</sup> Provincial Ombudsman Recommendation Concerning Minority Media I-NM-1-09/10, Available at [http://www.ombudsmanapv.org/apvomb/attachments/article/194/003\\_preporuka\\_nm.pdf](http://www.ombudsmanapv.org/apvomb/attachments/article/194/003_preporuka_nm.pdf) (accessed 10 April, 2012)

<sup>359</sup> Second Report of Serbia on the Implementation of the FCNM, ACFC/SR/II(2008)001, 198-204

Roma National Council has not been so active in this area. Since Broadcasting Institution of Serbia broadcasts program in Romani language once per week, Roma Council is entitled to give opinions on this program. However, it seems that it does not. On the other hand, the Vojvodina's Assembly has delegated to this Council founding right of the publishing company "PPI Them", which publishes a magazine "Them" and the magazine for children – "Chavorrengo Them". This publishing is subsidized by the Province Secretariat of Information. Roma National Council launched a monthly in Romani language in 2005, financed by Ministry of Culture<sup>360</sup>. Concerning broadcast media, Romani language is used in 16 private and 11 public radio stations and 5 private and 5 public TV stations<sup>361</sup>.

#### **4.2.2. Official language and script**

The Hungarian National Council required the use of Hungarian language and script in judicial and administrative proceedings, communication with public authorities and during elections<sup>362</sup>. In addition, the Council required issuing of bilingual birth certificates. Current practice of issuing these certificates to persons belonging to minorities only in Serbian language and in Cyrillic latter is not in compliance with the law<sup>363</sup>. On the other hand, Romani is not in the official use in none of the municipalities due to its non-standardization. For this reason, Roma National Council

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<sup>360</sup> Second Report of Serbia on the Implementation of the FCNM, ACFC/SR/II(2008)001, 180

<sup>361</sup> Ibid, 204-209

<sup>362</sup> Human Rights In Serbia 2011 (Belgrade: Belgrade Center for Human Rights, 2011), 257

<sup>363</sup> Interview with the Province Ombudsman Deputy, conducted on 12 March, 2012

does not exercise its competences in this area<sup>364</sup>. However, it is involved in the process of Romani language standardization<sup>365</sup>.

#### 4.2.3. Education

The Province of Vojvodina partially delegated its founding rights over eight secondary schools to Hungarian National Council<sup>366</sup>. However, many schools' statutes are not changed yet, which makes Council's participation in the schools' management more difficult. Furthermore, Ministry of Education approved partially transfer of founding rights of the State over twenty primary schools<sup>367</sup>. Many requests are still pending. Local authorities justify such delay of decisions by arguing that they are unfamiliar with this legal procedure<sup>368</sup>. Furthermore, it is not clear whether municipalities are obliged to accept all kind of councils' requests and what kind of founding rights they should delegate to the councils. Hungarian National Council was the most active in

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<sup>364</sup> The right to official use of language and script is recognized to Hungarian, Albanian, Romanian, Ruthenian, Slovak, Bulgarian, Czech, Croatian, Macedonian and Bosniak minority. Other minorities, including Roma, do not have official languages due to not standardized language, spontaneous assimilation, lack of teachers in that language; small communities or considering Serbian as their native language. See Province Ombudsman's Survey on National Councils (2012) Available at <http://www.ombudsmanapv.org/apvomb/attachments/article/741/Dve%20godine%20nac.saveta%20II%20deo%202012.pdf.pdf> (accessed 10 July, 2012)

<sup>365</sup> Roma National Council, Report, Available at <http://www.romskinacionalnisavet.org/naslovna.html> (accessed 5 June, 2012)

<sup>366</sup> Persons belonging to Hungarian minority can educate in native language in 78 elementary and 30 high-schools on the territory of Vojvodina. In the average, 77 per cent of Hungarian students learn in own language at the elementary school, while 65 per cent at the high-school level. University studying in Hungarian is possible on several universities. Most of these studies are bilingual. However, the courses in Serbian language are on the low level, so Hungarian students mostly do not speak Serbian fluently. On the other hand, National Councils themselves are not sufficiently interested in improving bilingual approach to education even though it might be very beneficial for persons belonging to minorities. Interview with the Province Ombudsman Deputy, conducted on 12 March, 2012

<sup>367</sup> See Province Ombudsman's Survey on National Councils (2011). Available at <http://www.ombudsmanapv.org/apvomb/attachments/article/244/Izvestaj-dve%20godine%20primene%20Zakona%20o%20nac.savetima.pdf>, (accessed 5 June, 2012)

<sup>368</sup> Since entering into force of the Law on National Councils, both Councils and local municipalities brought many complaints to the Province Ombudsman for breaching the Law. The Council complained of insufficient cooperation with local municipality authorities, while local authorities requested the additional interpretation of the Law, claiming that some of its provisions are in conflict with other laws. Ibid

the area of giving opinion or nominating members in management boards of the educational institutions. Thus, it has participated in the elections for 81 primary and secondary schools where classes are taught in minority language or students can learn it through additional courses. On several occasions, its opinion had not been taken into account<sup>369</sup>.

Concerning teaching programs, it gave recommendations for secondary education regarding courses of significant importance for its identity (literature, the arts, history, etc). In addition, it gave recommendations to the National Education Council concerning curricula of the course on Hungarian language and culture and the course on Serbian as foreign language. It declared 25 primary and 19 secondary schools as of particular importance for its identity<sup>370</sup>. Concerning teaching in minority language for less than 15 pupils, Hungarian National Council requested Ministry of Education permission for 49 primary and 9 secondary schools. It seems that, apart from not participating in the process of the distribution of state funds for educational institutions, it exercises all competences within this area.

Concerning education in Roma language, Roma National Council launched initiative for introducing the course on Roma language and culture at primary schools, but faced with the problem of the lack of teachers<sup>371</sup>. Roma National Council with the Department for Human and Minority Rights and Ministry of Education realized the affirmative action of the enrollment

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<sup>369</sup> See Province Ombudsman's Survey on National Councils (2011). Available at <http://www.ombudsmanapv.org/apvomb/attachments/article/244/Izvestaj-dve%20godine%20primene%20Zakona%20o%20nac.savetima.pdf>, (accessed 5 June, 2012)

<sup>370</sup> Only one (Croatian) out of seven National Councils that declared educational institutions of particular importance for identity of the minority they represent stayed within the limits on the number of these institutions set forth by the Law on Councils. The problem is that there is a high number of institution where either all or one of the courses is taught in minority language. Following this logic, majority of schools would be of particular importance for some minority. For this reason the Law set limits to the ¼ of the schools as maximum. See Province Ombudsman's Survey on National Councils (2012) Available at [http://www.ombudsmanapv.org/apvomb/attachments/article/741/Dve%20godine%20nac.saveta%20II%20deo\\_2012\\_.pdf.pdf](http://www.ombudsmanapv.org/apvomb/attachments/article/741/Dve%20godine%20nac.saveta%20II%20deo_2012_.pdf.pdf) (accessed 10 July, 2012)

<sup>371</sup> Interview with the Head of Committee for Education, National Council of Roma, conducted on 12 March, 2012



Roma students at the high schools and universities. In addition, within the Decade of Roma Inclusion, it realizes the project “Increasing of the accessibility of pre-school education for Roma children”. Furthermore, it participates at the project “Functional elementary education for adult Roma” jointly with Faculty of Philosophy, Ministry of Education and National Employment Service<sup>372</sup>.

It seems that problems that Roma National Council is concerned with are different comparing to the issues Hungarian National Council is dealing with. Namely, while the latter is concerned with the education in Hungarian language, the former deals with the issues of direct discrimination that is present on every step at the educational system. However, it seems that Roma National Council has not achieved substantive results in the sphere of education so far. Thus, it is argued that there is the lack of systemic coordination in the education. Furthermore, there are no data neither concerning children that leave the school nor those that are enrolled irrespective of the affirmative action programs<sup>373</sup>.

#### 4.2.4. Culture

Hungarian National Council has established in cooperation with the Province authorities *The Institute for Culture of Vojvodina's Hungarians* in municipality of Senta and Publishing company “*Forum*” in Novi Sad. In addition, it declared 37 institutions of having particular importance for the preservation of Hungarian national identity. However, many local authorities rejected to change founding acts of these institutions due to the alleged conflict between the Law

<sup>372</sup> Roma National Council, Report, Available at <http://www.romskinacionalnisavet.org/naslovna.html> (accessed 5 June, 2012)

<sup>373</sup> Interview with the Head of Committee for Education, National Council of Roma, conducted on 12 March, 2012

on Councils and Law on Culture<sup>374</sup>. Provincial Ombudsperson urged local authorities to comply with the Council's decision. Furthermore, these obstacles prevent Hungarian National Council from nominating candidates for institutions' steering committees<sup>375</sup>. It participated at the distribution of state funds for cultural events and associations.

Roma National Council proclaimed 8 institutions of particular importance for cultural identity of Roma<sup>376</sup>. In cooperation with the Cultural Institution of Vojvodina is established Romani museum and library "*Trifun Dinic*" in Novi Sad. The proposal for establishing Institution for Romani Culture is under consideration<sup>377</sup>.

#### 4.3. National Councils – Lessons Learnt

Having in mind analysis of legislative and institutional setting, we arrived at the point where we will try to answer two fundamental questions: "Is the right to identity of persons belonging to minorities protected?"; "Do persons belonging to minorities effectively participate in the self-government?" The contribution of national councils to the common model of cultural autonomy will be assessed in accordance with the answers to these questions.

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<sup>374</sup> Hungarian National Council brought complaint to Provincial Ombudsman for local municipalities' failure to comply with its requests on transfer of founding rights, alleging these authorities breach the Law. In 2011 it requested transfer of these rights for 13 institutions, but many municipalities did not start procedure. They were using the same arguments such as non compliance of the Law on NC with the Law on Culture, waiting for the mayor's decision whether this transfer is in conflict with the municipality's interests, etc. See Provincial ombudsman, Opinion, I-NM-1-54/11 of 9 January, 2012

<sup>375</sup> Province Ombudsman's Survey on National Councils (2011) Available at <http://www.ombudsmanapv.org/apvomb/attachments/article/244/Izvestaj-dve%20godine%20primene%20Zakona%20o%20nac.savetima.pdf>, (accessed 5 June, 2012)

<sup>376</sup> Roma Council proclaimed student dormitory in Subotica as the institution of special importance for Roma identity. Ombudsman report argues that this kind of institutions do not contribute to the preservation and improvement of national minority identity. Interview with the Head of Committee for Education, National Council of Roma, conducted on 12 March, 2012

<sup>377</sup> Ibid

The answers will be provided after applying indicators formulated within Chapter One on the basis of theoretical concerns over cultural autonomy. The indicators are as follows:

### 1. The Constitutional recognition

Comparative analysis of constitutional framework of Serbia and Romania has shown that providing constitutional guarantee for the right to effective participation of persons belonging to minorities in general, and cultural autonomy in particular is a necessary precondition for introducing this concept in the legal system. It was on this basis that the Law on National Councils of 2009 was adopted, which gave the new life to institutions, established in 2002. In addition, it seems that using of the language of collective rights in Constitution does not seem as necessary, since the way Serbian Constitution drafters defined it is actually on the individual basis. In addition, as was proposed at the Chapter One, the promotion of the right to identity may be strongly justified on non-discrimination basis. Let us remind that minority rights should not be considered as the additional, since these rights are already recognized to majority. For this reason, States might feel compelled to do that.

On the other hand, the fact that the Romanian Constitution, apart from guaranteed representation at the elected bodies, does not stipulate any additional form of effective participation for persons belonging to minorities might prove to be the obstacle for introducing cultural autonomy envisaged by the Draft Law on the Statute for National Minorities. Therefore, it might be recommended that cultural autonomy for persons belonging to minorities should have the constitutional ground.

### 2. The form of group representation and existence of pluralism within minorities

Comparative analysis of Serbia and Romania has shown that they opted for different forms of effective participation of persons belonging to minorities. While Romania introduced the system of power-sharing during the 1990s, Serbia is developing the system of cultural autonomy since 2002. However, Serbia also has some form of affirmative action for minority representation at the elected bodies, while Romania does not have any form of cultural autonomy. It may be plausible to argue that combination of both systems is needed, since the nature of these forms of participation is different. While cultural autonomy encompasses self-government in cultural affairs, representation at the elected bodies is much broader and refers to all public affairs. In addition, relying on ACFC Commentary, mere consultation that Romania provides within the Council for National Minorities cannot be considered as the effective participation<sup>378</sup>. Nevertheless, it remains to determine what kind of cultural autonomy may serve as the common model.

It seems well established that cultural autonomy should reflect variety of interests and opinions within minorities, as it would be incorrect to assume that all persons belonging to specific minority think alike. For this reason, institutions should be designed so as to promote and encourage this pluralism and provide the access for the variety of organizations. In the case of Serbian national councils it might be argued that pluralism exist as Councils constitute of representatives of various organizations. For instance, in the case of Roma and Hungarian minorities, both have developed civil society<sup>379</sup>. Nevertheless, since the Law on Councils allows participation of political parties at the elections for Councils, both the access and influence of

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<sup>378</sup> ACFC, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFC/21DOC(2008)001, para. 71

<sup>379</sup> Second Report of Serbia on the Implementation of the FCNM, ACFC/SR/II(2008)001, 150

many of these organizations is diminished. For instance, it is considered that national councils function like “small parliaments”, having position and opposition, which makes difficult adopting many decisions<sup>380</sup>. Thus, Hungarian Council consists of members of five political organizations, with Hungarian biggest political party – The Alliance of Vojvodina’s Hungarians being predominant<sup>381</sup>. Concerning Roma Council, out of 35 members, only one is not a party member. For this reason, Romani experts reject to work for the Council. What is the most striking concerning Roma Council is that its composition has not changed since 2002. It is no wonder that Roma community members show resistance toward Roma Council<sup>382</sup>. On the other hand, Romanian system restricts access to Council for National Minorities only to those organizations represented at the Parliament, which is indirect restriction of the freedom of association of persons belonging to minorities, since it encourages monopolizing of representation of minorities.

It may be concluded that apart from guaranteed representation, cultural autonomy for persons belonging to minorities should be introduced in the form that will reflect all potential diversity within these groups. In order to ensure that, political organizations should not be allowed to participate at the elections for national council. Their place is at the elected bodies.

### 3. Efficiency of participation in decision-making

Closely connected to the issues of the form of representation and pluralism within groups is the question of efficiency of participation. It may be argued that efficiency has two dimensions:

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<sup>380</sup> Interview with the Head of Committee for Education, National Council of Roma, conducted on 12 March, 2012

<sup>381</sup> Available at <http://www.vajma.info/cikk/szerbkiadas/2151/Problem-sa-kvorumon-na-sednici-Nacionalnog-saveta-Madjara.html>, accessed 13 July, 2012

<sup>382</sup> Interview with the Head of Committee for Education, National Council of Roma, conducted on 12 March, 2012

efficiency of institutions within overall state organization, and efficiency of participation of persons belonging to minorities in the affairs concerning their right to identity.

When it comes to the efficiency of national councils in general, it may be argued that they have sufficient competences in all areas covered by the cultural autonomy. The problem that they face with is “fitting” into general legal framework, as it seems that not all laws are harmonized with the Law on National Councils. In addition, local municipalities often do not cooperate with councils because of either ignorance or unwillingness to do that. However, these issues concern legal and institutional setting of Serbia in general, rather than legal regulation of councils as such. Therefore, competences that it has may provide efficient participation. Whether it will use it, depends on the council concerned. Nevertheless, the case of interfering with the freedom of expression has shown that competences should be carefully tailored when it comes to individual rights and freedoms. In this regard, Lund Recommendations stipulate that minority institutions should not have control over the media. On the other hand, this does not prevent persons belonging to minorities to establish and use own media<sup>383</sup>.

When it comes to the issue of effective participation of persons belonging to minorities in cultural affairs, several issues seem problematic. One of them is already described as limited access to minority organizations due to predominant influence of political parties. Additional obstacle is the establishment of national councils on national level only. Therefore, it seems that efficient participation of individuals is designed in terms of voting for representatives once per four years. In addition, it is striking that even for interethnic councils on the local levels

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<sup>383</sup> The Lund Recommendations on the Effective Participation of the National Minorities in Public Life & Explanatory Note, 1999, para. 18 Available at <http://www.osce.org/hcnm/32240?download=true> (accessed 15 June, 2012)

representatives are proposed by national council; instead of being elected by individuals living in municipality concerned. Let us remind that Lund Recommendations' consider that cultural autonomy is in particular convenient for dispersed minorities<sup>384</sup>. It follows, that institutions should be designed in the manner that reflects this territorial dispersion.

As noted, limited representation at the consultative body of Government cannot be considered as efficient participation of persons belonging to minorities in Romania, and for this reason, introducing national councils may be a good solution.

In sum, national councils can sufficiently promote and protect right to identity of persons belonging to minorities, but its setting has to have decentralized form, enabling individuals to participate in decision-making concerning cultural affairs.

#### 4. sliding-scale approach towards different situations of minorities

Serbian law does not provide sliding scale approach. Instead, it introduced the uniform institution that does not correspond to the needs of all minorities. As noted, comparison of Roma and Hungarian National Council has shown that different positions of these two minorities, and different problems that they face with affected the work of both Councils. It seems that issues concerning identity are on the second place of the agenda of Roma Council. As was already mentioned, the Council was criticized for extending its competences in the area of socio-economic integration of Roma that is not provided by the Law on Councils. For instance, the Council was engaged together with the UNHCR and NGOs in the action of providing free legal

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<sup>384</sup> The Lund Recommendations on the Effective Participation of the National Minorities in Public Life & Explanatory Note, 1999, para.18. Available at <http://www.osce.org/hcnm/32240?download=true> (accessed 15 June, 2012)

aid for IDPs and persons deported to Serbia due to readmission<sup>385</sup>. For understanding the urgency of this problem one should have in mind that an estimated 30-40 per cent of Roma in Serbia remains without personal documentation<sup>386</sup>. The non recognition of their legal status and consequently – the lack of identification documents result in deprivation of citizenship and the most basic rights. In addition, Romani population living in illegal settlements was addressing to the Roma council for help during the forced evictions performed contrary to the international standards.<sup>387</sup> Even ACFC addressed these issues, urging Serbian authorities to take more resolute action concerning the lack of personal documents and legalization of Roma settlements.<sup>388</sup>

Therefore, different minority groups have different needs<sup>389</sup>. In similar terms, Ombudsperson argues that it is possible that not all the minorities have a need for establishing of Councils, as, for instance, there has to be a clear need for the official use of minority language. Without such a need, the Councils turn out to “organizers of cultural manifestations in order to preserve national identity”<sup>390</sup>. Furthermore, let us remind that Lund Recommendations suggested that culture is a very broad notion, encompassing welfare, housing and child care as well, and

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<sup>385</sup> Roma National Council, Report, Available at <http://www.romskinacionalnisavet.org/naslovna.html> (accessed 5 June, 2012)

<sup>386</sup> Petar Antic, Roma and the right to legal subjectivity, Minority Rights Center, 2006

<sup>387</sup> Significant number of Roma dwell in informal segregated settlements, with extremely poor living conditions. They face with frequent forced evictions that are problematic due to the violation of rights during evictions, resettlement in racially segregated communities and not providing an adequate alternative accommodation. See Amnesty International: Briefing to the UN Committee on the Elimination of Racial Discrimination 78th Session: Serbia

<sup>388</sup> ACFC Second Opinion on Serbia, ACFC/OP/II(2009)001, 28

<sup>389</sup> It is worth noting that Kymlicka considers that the FCNM and OSCE norms do not refer to the Roma people. See Will Kymlicka, “The Evolving Basis of European norms of Minority Rights: Rights to Culture, Participation and Autonomy”, in *The Protection of Minorities in the Wider Europe*, edited by Marc Weller, Denika Blacklock and Katherine Nobbs, Palgrave Macmillan, 2008, 39, footnote 32

<sup>390</sup> Province Ombudsman’s Survey on National Councils (2011) Available at <http://www.ombudsmanapv.org/apvomb/attachments/article/244/Izvestaj-dve%20godine%20primene%20Zakona%20o%20nac.savetima.pdf>, (accessed 5 June, 2012)



that State should take into consideration these issues as well when it designs competences of self-government<sup>391</sup>.

In sum, it may be recommended that devising national councils as minority self-government should take into consideration variety of needs that different minorities have. This may result in flexible design of these institutions, leaving to minorities to decide what kind of competences they need.

## 5. Ethnic compartmentalization

Exacerbating of ethnic divisions is one of the main concerns that scholars share concerning cultural autonomy. In similar terms, scholars characterize national councils in Serbia as the model of segregative multiculturalism that reinforces isolation of minorities. This might be confirmed that there is no field of cooperation between various councils. There was one attempt of Hungarian National Council to prepare common strategy concerning the use of language, but it was not successful<sup>392</sup>. In addition, it is considered that councils are not interested for bilingual education, even though it is provided by law. Moreover, the quality of courses in Serbian in the educational institutions that teach in minority languages is very low, which result in not speaking Serbian fluently and thus, isolating minority students<sup>393</sup>. What is the most problematic concerning intercultural dialogue is the fact that the National Council for National Minorities, that supposes to establish dialogue between majority and minorities and between minorities

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<sup>391</sup> The Lund Recommendations on the Effective Participation of the National Minorities in Public Life & Explanatory Note, 1999, para.18. Available at <http://www.osce.org/hcnm/32240?download=true> (accessed 15 June, 2012)

<sup>392</sup> Interview with the Head of Committee for Education, National Council of Roma, conducted on 12 March, 2012

<sup>393</sup> Ibid

themselves does not operate. Therefore, it is no wonder that councils are left themselves to deal with issues concerning their identity.

It may be concluded that cultural autonomy does not necessarily have to end up in segregative multiculturalism, since its purpose is to integrate persons belonging to minorities into broader society. Therefore, it is up to designers to mitigate the risk of exacerbating ethnic divisions, which can always happen since national councils are institutionalization of national identities. However, introducing mechanisms for intercultural dialogue may contribute to further development of all cultures within one society. This may be ensured by bilingual or multilingual education for all students, irrespective of belonging to minority or majority. Furthermore, national interethnic dialogue should be institutionalized in the form of national institution that will operate properly.

### **Concluding remarks**

The aim of this Chapter was to determine if the introducing the uniform form of national councils can be a good solution for cultural autonomy, It is concluded that different positions and different needs of minorities concerned affected functioning of both councils showing that instead of uniform, institutions should be flexible enabling minorities to design its competences in accordance with own needs. Furthermore, indicators formulated within the Chapter One have been applied so as to determine if national councils might serve as common model for cultural autonomy, On it basis it may be concluded that these institutions can sufficiently protect right to identity, but some improvements are needed in the area of effective participation of persons belonging to minorities which councils represent.

## Conclusion

This Thesis has argued that due to the intensive interplay between European and national actors in the area of minority rights, the emergence of the common model of cultural autonomy seems inevitable. This understanding is further confirmed by the case study of introducing national councils in Serbia as the form of self-government of persons belonging to minorities in areas vital for their identity and its possible introduction in Romania.

The Thesis acknowledged that there are strong obstacles for coming to theoretical consensus upon the common model for cultural autonomy, such as controversies over the notion of collective rights and the right to identity. Nevertheless, the fact that countries do prefer this solution to territorial autonomy on the one hand and the fact that they do not implement it properly on the other, make search for appropriate model compelling. The Thesis has analyzed national councils as this possible model. In the absence of any clear benchmarks for the evaluation of this form of cultural autonomy, the Thesis suggests that possible indicators may be formulated in accordance with both liberal and multicultural concerns over cultural autonomy so as to include: the Constitutional recognition, the form of group representation and existence of pluralism within minorities, sliding-scale approach towards different situations of minorities, efficiency of participation in decision-making and ethnic compartmentalization.

Discussion of existing policies of minority protection on European level revealed not only that the establishment of common standards is possible, but also that it is necessary in order to avoid political assessments that often lack objectivity. The Thesis claims that in spite of the shared accusing post-communist countries for stigmatization of minority rights, European actors (i.e. OSCE, CoE and the EU) share the same security concerns. Therefore, connecting minority

protection with stabilization within Copenhagen political criteria paved the way for devising minority protection mechanism in the way that might not be so beneficial for persons belonging to minorities. Situation is more complicated by the fact that minority rights standards remain on the framework level, which does not prevent European actors to monitor its implementation. The downside of such approach is that it leaves the ample space for political actions of both European and domestic actors.

The comparative analysis of Serbia and Romania has shown that this mediating in implementation of minority standards may result in devising the common model. Furthermore, acting of national actors makes this standardization necessary. It turned out that Serbian new minority policy in 2002 was mostly focused on fulfilling criteria for CoE's membership (i.e. adopting the basic law on minorities, ratifying FCNM) in parallel with constitutional nation-building. Since international experts were participating at the drafting these laws, it might be that the idea on national councils has the external origin. It is no wonder then that the ACFC considered national councils as "promising innovations". That being so, the same mechanism might work for Romania. Its resistance toward cultural autonomy dates back to the early 1990s. Nevertheless, comparative analysis has shown that national councils in Serbia by far exceed power of the consultative Council for national Minorities. In this regard, the desire of minorities in Romania to introduce almost the same institution seems justifiable. All these prove that emergence of common standards is possible and on the way and for that reason existing standards should be carefully reshaped.

The comparative analysis of Hungarian and Serbian National Councils has shown that these minorities do not use this institution in the equal manner. Thus, while Hungarian minority is capable of exercising almost all competences that council has (let us remind that it is around 80 according to the Law), Roma merely use some. However, even though it does not use competences it has (i.e.

official language and script due to the lack of standardization of Romania) it went beyond the law in some other areas such as socio-economic issues that most Roma are concerned with. In addition, it proved that centralized character of the Council will not work for Roma, having in mind that this is dispersed community.

Application of indicators to all these findings has shown that the institution of national councils needs further improvements. These improvements are formulated as following recommendations: cultural autonomy should be guaranteed by the Constitution; national councils should reflect all potential diversity within minorities, with exclusion of political organizations; councils should be decentralized and sufficiently flexible to address various needs that different minorities have; additional mechanisms for intercultural dialogue (i.e. bilingual or multilingual education; efficient national institution for interethnic dialogue between majority and minority) should be introduced. Accordingly, amending the Draft Law is strongly recommended. In spite of downsides, it is concluded that national councils might serve as the possible common model for cultural autonomy.

The above analysis shows that instead of being disregarded, cultural autonomy deserves more attention, in particular having in mind the central role of the right to identity within minority protection. Furthermore, this Thesis calls for devising of an adequate model of cultural autonomy, since not all of them can be considered as such. The debate over possible model for cultural autonomy is even more important due to its close connection to the issues of basic principles that societies rely on and famous nation-building projects from 1990s and early 2000s. Therefore, opening this debate might touch upon these fundamental questions, asking again what kind of community some society aspire to. Therefore, European actors might get the second chance to redirect the way of developing minority rights. Instead of “fitting” it into nation-building projects of

CEE countries, they might opt for opening the debate over multicultural character as benefit of these societies. Furthermore, this might release minority rights from the burden of imposing by external pressure rather than resulting from internal consensus.

Indeed, it might be argued that this debate would not provide anything new since cultural autonomy inevitably brings ethnic issues into focus. However, this might not be the case. Cultural autonomy as such does not necessarily end up in segregation. It is up to various actors to design it in more appropriate manner. Let us remind that the main aim of cultural autonomy is integration into society and placing minorities on equal footing with the majority. Therefore, there are various ways to open channels of communication between majority and minorities and between minorities themselves. One of those might be introducing bilingual or multilingual education for all citizens, or having efficient institutions where all of them will be represented. On the other hand, fear that this kind of interaction might result in assimilation is not well-grounded. If that so, than any kind of cultural influence might be considered as the assimilation. On the contrary, isolation is not necessarily beneficial for any culture. Intercultural communications contribute development of each of them.

Furthermore, multiculturalists might continue arguing that cultural autonomy is the weak replacement for territorial autonomy. However, the fact that minorities themselves request cultural autonomy, including those whom Kymlicka recommends for territorial autonomy (i.e. Hungarians in Romania), confirm that this type of the self-government is meaningful. If the right to identity is central to minorities, than cultural autonomy may be an adequate protection.

It can be assumed that common standards might face with domestic opposition. It is already seen in the case of Romania where the main reason for delay in adopting the Draft Law is the fact that it tends to introduce cultural autonomy in Romania. Moreover, it is more likely that *status quo*

will remain having in mind that European actors cannot influence Romania to the same extent as they could during its pre-accession process. The reason is elaborated at the Chapter Two, but we can briefly recall that contrary to the pre-accession period, once the country joins EU, conditionality disappears. This is strengthened by the fact that there is no common European minority policy. However, this does not give the justification for pessimism. If that would be the case, there would be no international human rights norms at all. Facing with the wall of sovereignty is inherent to the concept of human rights in general. This is even more true for minority rights due to its close relation to the notion of nation-building. The remarkable development of human rights has shown that this wall is not unbreakable.

Devising cultural autonomy started at the time when sovereignty was at its peak. If Renner was brave enough to offer such proposal then, it is high time to make a new step. Recalling the Kant, we can remind that the goal is not in inventing the perfect structure since pursuit for “*de optimo rei publicae statu*” is never-ending process; rather it is in the pursuit itself.

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