

KOVÁCS BÁLINT¹

Non-territorial Autonomy in East-Central Europe: What About Romania?

- **ABSTRACT:** *The paper attempts to provide an understanding of the reasons Romania has not sought non-territorial autonomy as a solution for minority claims by analysing a 15-year-old legislative proposal elaborated by a minority rights organisation. Although the analysis of this antiquated proposal seems long overdue, it holds answers relating to the attitude of the State and of minority organisations regarding autonomy, in which—ultimately—the issue seems to be a lack of serious intention by either of the two to change the minority legal status quo.*
- **KEYWORDS:** non-territorial autonomy, statute of minorities, Romania, Hungarian minority.

1. Introduction

The term autonomy is hard to define because a unitary institutional description of it is lacking, as noted in the professional legal literature. This has led to confusion regarding what constitutes autonomy in practice and the way it should be defined theoretically.² The term derives from ancient Greece and translates to self-legislation. The term is not to be confused with the right to self-determination, which is usually associated with the right to form a sovereign state when certain conditions are met.³ However, autonomy is a form of self-determination, and some interpret the concept as implying *internal self-determination*, meaning a form of democratic participation in the sense of the right to decide on the internal and local matters of a community.⁴

In general, autonomy is associated with claims of territorial self-administration (territorial autonomy [TA]). However, non-territorial autonomy (NTA) has also become

1 Researcher, Ferenc Mádl Institute of Comparative Law, Hungary; PhD Candidate, University of Debrecen, Géza Marton Doctoral School of Legal Studies, Hungary, balint.kovacs@mfi.gov.hu.
 2 Malloy, 2015, p. 5.
 3 Fisch, 2015, p. 53.
 4 Vizi, 2014, p. 31.



a popular subject not only among social science scholars, but also within minority organisations and more importantly, in the internal organisation of states as a solution for national minorities' claims regarding questions of identity preservation. As such, NTA has come to signify more generally the granting to a specific community (ethnic, religious, or linguistic) the right to self-government by its own institutions and rules regarding its cultural or social matters,⁵ or more generally, matters regarding their identity. Thus, the difference between TA and NTA is that the transfer of authority is accomplished at the community level, not territorial level, and thus, theoretically, it does not make a difference where members of the respective community reside territorially. The scholarship notes three general differences between TA and NTA: (1) the right to self-regulate is granted to a group of people defined culturally and not territorially, (2) self-government is limited to questions of culture, and (3) the given powers can only be exercised with regard to individuals who have voluntarily chosen to be members of the cultural group.⁶ In further delimiting the notion of NTA, from a general minority rights law perspective, the difference is mainly an institutional one, meaning NTA does not exist without self-regulating institutions.⁷

The concept of NTA has entered the mainstream through the political leadership of the late 19th and early 20th centuries during the search for an answer to questions regarding the cohabitation of nationalities. Similar ideas also emerged earlier, but without using the modern terminology. Lajos Kossuth, leader of the Hungarian revolution of 1848, described a principal feature of NTA, stating that the issue of nationality like that of religion, is a subject of social interest, and the state should not have anything to do with either of them.⁸ However, a much more complex development of the idea of cultural autonomy is found in the work of Karl Renner entitled *Staat und Nation* (State and Nation), published in Vienna in 1899.⁹ This is considered the primordial work on the subject, containing and constituting the foundation thereof and with it, of the debates it started.

Karl Renner and his contemporary Otto Bauer, both social-democratic politicians in the Austro-Hungarian Empire—also called Austro-Marxists—were working on a political program that aimed to maintain the territorial unity of the Empire by focusing on economic matters to unite the working class. The Empire was deeply divided along ethnic lines, and as secessionist nationalism was taking over, its territorial integrity was threatened. The two politicians proposed a solution that extended beyond territorial division. In their project, all national groups could freely enjoy their own cultural identity on the territory of a *denationalised* state, leaving common matters such as that of the economy or foreign affairs to the central government.¹⁰ Such a system would allow all national groups to determine their own destiny regarding matters of culture

5 Benedikter, 2011, p. 11.

6 Donders, 2008, p. 100 *cited by* Yupsanis, 2014, p. 12.

7 Malloy, 2015, p. 5.

8 Jászi, 1918, p. 17.

9 The English translation of the text can be found in Nimni (ed.), 2005, pp. 13–42.

10 Yupsanis, 2016, p. 111.

and identity. It was suggested that by introducing this type of institution, competition among ethnic groups would subside and the potential conflict between their interests and those of the State would likely disappear.¹¹

This system, called cultural autonomy or NTA, is based on two principles: the personality principle and principle of non-territoriality. The personality principle states that all citizens are allowed to freely determine their own ethnic identity, which usually implies voluntarily registering on special lists for minorities with the purpose of voting for their own cultural self-government institutions. The principle of non-territoriality establishes that the rights of registered persons belonging to national minorities will be granted regardless of their place of residence within the State. Of course, both principles have practical limitations; however, cultural autonomy remains an extremely relevant institution for the integration of persons belonging to national minorities.

The purpose of this paper is to present the main features of the concept of NTA, its relevance to minority accommodation, its place in international legal (or quasi-legal) instruments, and its potential place in the Romanian legal regime through the lens of the claims of national minorities. Their proposal is compared with existing systems implemented in the East-Central European region.

2. The purpose of non-territorial autonomy

At the end of WWI, the dismantling of East European Empires with the promise of the right to self-determination of peoples bore an expectation that each nation would have its own State. However, economic and strategic interests were concealed behind the right to self-determination, as the newly drawn borders could not assure the impossible *one country one nation* scenario. A solution was needed for the minorities remaining in newly formed or enlarged countries. The structural disadvantages minorities faced in these unitary nation States had to be countered with supplementary rights tailored to their needs, which could only be exercised collectively, such as the right to education or to their own culture.¹² Furthermore, to avoid internal conflicts, minorities also had to be integrated in the political structures of these States. Although representatives of the winning States had protested more or less loudly to Britain's imposition, France and the United States created a Committee on New States to draft a Minority Treaty, which was ultimately signed in a similar form by Poland, then Czechoslovakia, Romania, Yugoslavia, Greece, Austria, Hungary, Bulgaria, Latvia, Lithuania, and Estonia.¹³ Some of these treaties contained the obligation to provide for some form of cultural autonomy for minorities.

11 Wong, 2013, p. 59.

12 Smith, 2014, pp. 15–16.

13 Fink, 1996, p. 280.

It is believed that the main advantage of cultural autonomy is that the debates around identity issues do not take place between the majority and minority, but are debated in the minority group itself.¹⁴

The rights of national minorities are still primarily approached from a national security perspective, especially in East-Central Europe. Generally, the fear associated with granting TA has to do with maintaining the territorial integrity of the State, which is why rational debate around such solutions cannot be had. TA seems to be an organisational policy reserved for Western democracies, where implementing such arrangements reflects trust from the part of the majority population. This translates into a higher degree of confidence that it is the right policy choice regarding the specifics of a particular State. It has been noted that Western countries have granted TA to all national minority communities with more than 250.000 members who have manifested claims for such accommodation, but it has also been granted to smaller communities.¹⁵ NTA has been implemented in many countries in the Central and Eastern European region as well. NTA is viewed as a means of granting national minorities the right to internal self-determination and self-government in identity matters (mainly culture and education) without compromising the sovereignty and territorial integrity of the State in the eyes of the majority. Thus, NTA appears as an institution that grants minorities the right to self-government in matters of identity, leaving matters not related to identity (such as economy, infrastructure, etc.) to be decided within the main institutions of the State, as they would normally be.¹⁶ NTA separates minority rights issues from territory through the personality principle, while addressing two major issues of national minorities in general: cultural self-government appears as a measure against assimilation, and the issue of minority representation and participation in public matters of the State.¹⁷ Political representation and participation in public life are considered fundamental rights of minorities, also constituting an important measurement in the State monitoring system of the Framework Convention for the Protection of National Minorities (FCNM) of the Council of Europe. Ensuring the right to self-government is considered one of the most efficient ways of representation and participation.¹⁸ Thus, by getting minorities involved in structures that ensure collaboration with the State—in this case the NTA institutions—the level of minorities' integration in public life is improved. In the present context of the European Union, where the limits of State sovereignty have become somewhat fluid, minority claims for autonomy should not be viewed as a security issue or challenge to State sovereignty. This is because these claims have mainly to do with establishing better institutions for representation and control over cultural, social, and economic development.¹⁹

14 Stroschein, 2015, p. 27.

15 Kymlicka, 2008, p. 19.

16 Stroschein, 2015, p. 28.

17 Smith, 2014, p. 17.

18 Art. 15 Framework Convention on the Protection of National Minorities; Para. 35 OSCE Copenhagen Document, Lund Recommendations.

19 Vizi, 2015, p. 38.

Seeking to better manage the situation of national minorities, countries in East-Central Europe have implemented different forms of NTA. This model is becoming quite popular, particularly with States where national minorities live spread out on their territory and as a complementary institution for TA arrangements, which is usually ideal for minorities living in compact communities.²⁰

3. Non-territorial autonomy in international law

The minority rights regime of the League of Nations, based on collective rights, has not been continued within the human rights regime of the United Nations, which is based on individual rights. However, the discussion around autonomy found its place in the existing regime, as more soft law instruments hint at collective rights for minorities and recommend the implementation of autonomy as a minority rights solution.

The International Covenant on Civil and Political Rights states in Article 27 that persons belonging to minorities should be granted the right to enjoy their own culture in community with other members of their group. In addition, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides in Article 3 the right of minorities to exercise their rights in a community. Although not expressly mentioning autonomy, these documents do open the floor to collective solutions for granting minority rights.

Article 3 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) provides for the right to self-determination of indigenous peoples by virtue of which they can freely determine their political status and pursue their economic, social, and cultural development. In exercising these rights, Article 4 of UNDRIP provides that indigenous peoples have the right to autonomy or self-governance in matters relating to their internal and local affairs. The legal literature notes that an increasing number of minority groups redefine themselves as indigenous peoples to obtain more rights, going beyond claims of cultural autonomy.²¹

Numerous international documents recommend NTA as a particularly good solution for ensuring the effective participation of national minorities in public life. Although these are just a set of recommendations, the implementation of any type of autonomy arrangement being an exclusive State right, the soft law instruments of international law should be considered in a modern and democratic State. Some of these documents are presented below.

The Advisory Committee on the FCNM Commentary on the effective participation of persons belonging to national minorities in cultural, social, and economic life and in public affairs states that beyond the representation and participation of persons belonging to national minorities in elected bodies, public administration, judiciary,

²⁰ Smith, 2014, pp. 19–20.

²¹ Marinkás, 2018, p. 31.

and law-enforcement agencies, attention should be given to cultural autonomy arrangements that can reinforce minority participation in public affairs.²²

Several other documents are also tied to the Council of Europe, such as Recommendation no. 1609/2003, the draft European Charter of Regional Self-Government, and Thematic commentaries no. 3 and 4 of the Advisory Committee on the Framework Convention for the Protection of National Minorities. These contain recommendations regarding the implementation of cultural autonomy.

Furthermore, several documents of the Organization for Security and Co-operation in Europe (OSCE) and recommendations of the High Commissioner on National Minorities deal with the protection of minority and identity rights. Among these, the Lund Recommendations must be mentioned because of its recommendation concerning the use of TA and NTA, or a combination of the two to ensure minority participation and regulate minority education, culture, language rights, religion, and other factors important in the identity of national minorities.

In the European Union, minorities are mentioned in the Copenhagen accession criteria of 1993, where their protection seems tied to the abovementioned OSCE recommendations, FCNM, and European Charter for Regional or Minority Languages, even though the European Union itself does not have a mandate regarding minority rights. However, the Treaty of Lisbon has introduced the respect of the rights of persons belonging to minorities as a fundamental value of the European Union.

4. Autonomy in Romania

The word autonomy is not foreign to Romanian legislation. After the 1989 toppling of the communist regime, the concept was used in all laws concerned with the country's administrative organisation. However, this concept of autonomy does not embody a minority rights arrangement, but is a principle establishing the right and effective ability of local public administration authorities to manage and solve public matters in the name and interest of a local community.²³ This definition is based on the provisions of Article 3 of the European Charter of Local Self-Government.

Noteworthy is that during the communist regime in Romania, the so-called Autonomous Hungarian Region (later called the Mureş-Autonomous Hungarian Region) had existed for almost two decades. Of course, this TA cannot be deemed a genuine arrangement for the participation of minorities in public life, as it was a structure within a communist State with soviet roots and hardly accepted by the Romanian communist leadership.²⁴

22 Paragraph 72 of Document ACFC/31DOC(2008)001, available at: <https://rm.coe.int/16800bc7e8> (Accessed 06.07.2020).

23 As per the provisions of Art. 1 para. (3) of Law no. 69/1991 regarding local public administration, Art. 3 para. (1) of Law no. 215/2001 on local public administration, Art. 5 letter j) of the Administrative Code (Emergency Government Ordinance no. 57/2019).

24 Andreescu, 2001, p. 206.

Even though the concept of *autonomy* is not strange to the Romanian legal system, the claims of the Hungarian minority in Romania (numbering approximately 1,2 million individuals, constituting about 6% of the total population) are treated as a national security issue and refused immediately. The legal literature notes that the feelings of aversion towards such claims in this area of Europe have to do with the concept of the *nation state*, which even though conceived and developed in Western Europe in the 17–19th centuries but mostly relinquished after World War II through regionalisation and decentralisation, remains a defining factor in East-Central Europe.²⁵ Public discussions around autonomy rehash old stereotypes of the interwar period that autonomy translates to *state within a state*, the loss of sovereignty, loss of control, and ultimately the unravelling of the State itself. Thus, most public discussions, media reports, and majority opinions concerning autonomy claims paint the picture of a Hungarian community lead by enemies of the State. Neither the concept of autonomy nor the sources of the claims seeking such arrangements are understood by the public, even though in the last three decades there have been multiple attempts at generating genuine public debate around the subject. Regarding the sources of these claims, the legal situation in the interwar period is worthy of examination, a time in which international treaties resulted in extensive legal and political debate around the subject of cultural autonomy.

■ 4.1. *The interwar period*

At the end of World War I, in an attempt to avoid conflicts generated by the treatment of national minorities, special legal regimes were imposed on newly formed or enlarged countries through international treaties regarding the rights of minorities, as briefly mentioned above.

The Treaty concerning the protection of minorities in Romania was signed on 9 December 1919.²⁶ It provided for the recognition of some of its provisions as fundamental law so that no other legal instruments would contradict or oppose it and no other legal instruments or administrative actions would have priority over it (Art. 1 of the Treaty). Regarding the subject herein discussed, Article 11 of the Treaty is important because through this, Romania assumed an obligation to grant the Szekler and Saxon communities in Transylvania local autonomy in matters of religion and education. The legal literature at that time observed that this provision constitutes an undertaking through which the State obliged itself to grant at least cultural autonomy,²⁷ while other opinions suggested it was a foundation for the granting of collective rights.²⁸

Politicians, as representatives of minority communities, made multiple attempts at the time to introduce collective rights and cultural autonomy into Romanian legislation, but without success.²⁹ Even though Romania signed and ratified the Treaty, its

25 Kovács, 2012, pp. 1–4.

26 Published in the Romanian Official Gazette no. 140 of 26 September 1920.

27 Mikó, 1934, p. 5.

28 Gaftoescu, 1939, p. 116.

29 For details regarding these attempts see: Ciobanu, 2010, pp. 179–190; Zahorán, 2010, pp. 191–211.

application was not considered and structures establishing cultural autonomy were never actually founded. The non-application of the Treaty was also enforced by the legal system and given doctrinal support by legal professionals. The Constitution of 1923 did not even mention the Treaty or provide for a status of national minorities, and neither did the 1938 Constitution. Furthermore, regarding the application of the Treaty, by acquiring the right to analyse the constitutionality of laws, the Court of Cassation and Justice continuously noted that international treaties have the power of ordinary laws, meaning they can be modified by other ordinary laws.³⁰ Article 1 of both Constitutions provided that the Romanian Kingdom was a nation-State, unitary and indivisible. The proponent of the 1923 Constitution interpreted the term *unitary* as excluding any possibility for local autonomies, condemning any sense of regionalism, stating that it might constitute a ‘State crime’.³¹ Even though representatives of the Hungarian and other minorities tried to petition the League of Nations regarding these issues, their attempts were ultimately unsuccessful.³²

■ 4.2. *The communist period*

The communists came to power in Romania after World War II. Although the soviet-style reorganisation of the country resulted in the establishment of the aforementioned Hungarian Autonomous Region, cultural autonomy did not seem compatible with the soviet system. The name of this Autonomous Region, containing the word Hungarian, is certainly misleading at first glance, seemingly establishing TA on ethnic foundations even though it was moot. Nevertheless, this did not sit well with Romania’s communist leadership, which began to manifest its nationalism as it was gradually increasing the intensity of the façade of independence from the Soviet Union.

This national communist regime ended the Autonomous Region and began a cultural revolution with disastrous consequences for minorities. The regime became increasingly oppressive towards minorities, automatically considered enemies of a highly paranoid State, violating every aspect of their identity and fundamental rights such as the restriction of education rights (e.g. the merger of the Hungarian language Bolyai University with the Romanian language Babeş University, which negatively affected Hungarian language higher education), and massively curtailing cultural and religious expression.

■ 4.3. *Post-communist Romania*

While autonomy has remained one of the political desires of the biggest national minority group in Europe—the Hungarians living in Romania—legislative projects never passed through the Romanian legislative, even after the national communist regime

30 As per Decision no. 84 of 13 October 1938, and other similar earlier decisions, *cited by Nagy*, 1944, pp. 52–53.

31 Dissescu, G. Speech at the National Constituent Gathering (*Adunările Naționale Constituante*), *Proiectul Constituției*, p. 41 as cited by Nagy, 1944, p. 64, note 14.

32 For a short enumeration of these petitions, see Gaftoescu, 1939, pp. 108–109.

was toppled. The ‘new’ political class was made up of many former *apparatchik*, who used the nationalist card to strengthen their position. This resulted in an anti-minority and anti-Hungarian sentiment, which still constitutes the basis for refusing the claims for autonomy of the Hungarian minority. A result of these political views is a highly restrictive interpretation of the post-communist Romanian Constitution, which is not compatible with autonomy (in whichever form). Symbolism and stereotypes of the interwar period emerged, viewing autonomy as an assault on the territorial integrity of the Romanian State to its essence as a nation State and unitary State.³³

Although it seemed like international pressure was not fruitful, much hope was placed on external pressures. However, during the talks for Romania’s accession to the Council of Europe and OSCE at a conference in 1992, the Romanian Minister of Foreign Affairs stated that OSCE was focusing too much on the rights of minorities and not enough on minorities’ obligations to respect the territorial unity of and loyalty towards the State.³⁴ This was a turning back to the interwar period when minorities had to demonstrate their loyalty towards the State. Still, the Parliamentary Assembly of the Council of Europe in its Opinion 176 (1993) took notice of the written declaration of the Romanian authorities in which they commit themselves to basing their policies regarding the protection of minorities on the principles laid down in Recommendation 1201 (1993), and prescribes monitoring the honouring of these commitments. The question of monitoring Romania’s commitments regarding the minority regime prescribed by the Recommendation was reiterated in Order 508 (1995) of the Parliamentary Assembly. Recommendation 1201 contains provisions regarding collective rights and alludes to autonomy as a solution for ensuring minority rights: ‘In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state’.

Hungary also stepped in as it attempted to broker a deal between Romania and the Hungarian community living on its territory with the occasion of the accession of Romania to the North Atlantic Treaty Organization (NATO) and the European Union. However, these negotiations were also unfruitful. Hungary was not even able to negotiate the inclusion of autonomy among the obligations to Romania through the bilateral treaty between Romania and Hungary, a precondition of NATO membership. The Treaty of understanding, cooperation, and good neighbourliness, signed in 1996, also refers to Recommendation 1201, but with the clarification—at the request of Romania—that it does not refer to collective rights and does not impose on the parties the obligation of granting TA on an ethnic basis.³⁵

It was observed that because no international treaties impose an obligation on sovereign States to grant autonomy, whether territorial or non-territorial, such

33 Turda, 2001, pp. 199–200.

34 Decker, 2007, p. 440.

35 Salat, 2014, p. 133.

international intervention is usually exceptional and as such, appears as solutions imposed by the powerful on situations of prolonged conflict and violence (e.g. the Dayton Accords in Bosnia and Herzegovina, Good Friday Agreement in Northern Ireland, 2005 Iraqi Constitution granting limited autonomy to Kurdistan). Luckily, there have been no violent conflicts of such magnitude between the Romanians and Hungarians; however, this also means that international intervention seeking to impose autonomy is not considered possible.³⁶

With opportunities for internationally negotiating autonomy excluded, the representation of these claims now seems to be exclusively in the hands of the political representation of the Hungarian community in Romania, resulting in at least 16 legislative projects, some of which include NTA in some form.³⁷ However, these proposals could hardly have found place in a legal regime and State policy that completely exclude collective rights, as shown above. The exclusion of admitting collective rights has recently been reiterated in the Comments of the Government of Romania on the Fourth Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Romania [GVT/COM/IV(2018)001] paragraph 3, where the Government re-emphasised that its minority protection regime ‘revolves around the *right of the individual*’ and that ‘[t]he Romanian Government rejects any inference or recommendation that would oblige it to grant collective rights to national minorities...’. Emphasising the degree to which collective rights are unacceptable, the Comments also state ‘[a]s a disclaimer, the Government of Romania emphasizes that references in these Comments to “national minorities/ minorities” cannot in any circumstance be considered as an implied recognition by the Romanian authorities of the collective dimension of the rights pertaining to persons belonging to national minorities’.

This policy is also reflected in the Constitutional regime of the State. Regarding the right to identity contained in Art. 6 of the 1991 Romanian Constitution (revised in 2003), the State recognises and guarantees the right of *persons* belonging to national minorities to the preservation, development, and expression of their ethnic, cultural, linguistic, and religious identity. This provision limits cultural rights to the individual without providing for the possibility of collectively exercising these rights. The collective exercise of these rights, in case they comprise essential forms of self-determination (political, cultural, etc.), could result in autonomy.³⁸ Paragraph 2 of Article 6 provides that protection measures taken by the Romanian State for the preservation, development, and expression of identity of persons belonging to national minorities shall conform to the principles of equality and non-discrimination in relation to other Romanian citizens. This provision would allow for a restrictive interpretation in the sense that the supplementary rights necessary for the adequate protection of minorities could be deemed unconstitutional. In this context, granting supplementary rights to

36 Salat, 2014, p. 132.

37 For details concerning these proposals and the controversies surrounding them, see Salat, 2014.

38 Brunner, Küpper, 2002, p. 19 *cited by* Vizi, 2014, p. 28.

accomplish adequate minority protection is widely acknowledged in the legal doctrine, and it is the essence of minority protection to grant something more than 'equality'.³⁹

The Romanian Constitution also contains provisions regarding religious autonomy (Art. 29), which provides that the State supports religious cults and for the organisation of denominational (religious) schools (Art. 32). Furthermore, the Constitution establishes the right of minorities to study and be educated in their mother tongue. There is also legislation regarding the use of mother tongue in public administration, and several other legal instruments that contain special provisions for minorities. Even though there is legislation in place with provisions that seem to afford special attention to the needs of minorities, the application of these legal provisions is inconsistent. Inconsistencies are due to the unwillingness of authorities to apply the law, which lands some cases in court, resulting in inconsistent jurisprudence. Such is the example of Cluj-Napoca/Kolozsvár, where civil society actors successfully sued the administration of the city in 2016 to ensure the application of the law on public administration (Law no. 215/2001) enacted in 2001. This Law provided extensive language rights for minorities constituting more than 20% of the local population. (This was the case of the Hungarian minority in Cluj-Napoca according to the 1992 census, which constituted the official headcount in accordance with the law.) However, as the complete application of this law did not occur even after the lawsuit had been won, in 2019 when the law was replaced, it resulted in a loss of rights for the local Hungarian community numbering around 50.000 members. Note that this all happened under the watch of the political representation of the local Hungarian community, which did not address the issue in any way.

The principles in accordance with which minority rights provisions should be interpreted are not always clear to authorities or the courts. A mix of international conventions, constitutional principles, and legal provisions containing minority rights, between which the hierarchy is not clear enough, usually leads to the ad-hoc establishment of a hierarchy of leading principles on a case-by-case basis. However, the fact that the legislation concerning minorities is spread out in many different legal instruments constitutes a major issue because of the difficulties in accessing them by persons belonging to minorities. The complications caused by the legal provisions being spread out in many legal instruments is sometimes also a problem for researchers and professionals. This constitutes an issue of access to law and results in a lack of awareness of rights by the average citizen belonging to a minority. Furthermore, the exact content of minority rights on which these citizens can rely becomes hazy.

The minority rights policies of the post-communist period have been described as 'two steps forward, one step back',⁴⁰ although in the last decade hardly any steps have been taken forward. One could easily argue that the steps forward in the last decade have been formal with inapplicable legal provisions. Such is the case of legal provisions adopted in 2017 requiring healthcare and social care institutions to employ persons speaking minority languages when the number of persons belonging to a

39 Humphrey, 1973, p. 81.

40 Decker, 2007, p. 438.

minority in a municipality totalled more than 20% or more than 5,000 individuals to ensure their language use rights.⁴¹ However, this legal provision has not been applied because the government has not implemented rules, which have yet to be adopted. Thus, it appears a step forward only because it adds to a multitude of legal provisions on which minorities cannot really rely.⁴² The adoption of the Administrative Code⁴³ in 2019 constituted a major step back for the second-largest Hungarian community living in Romania in Cluj-Napoca/Kolozsvár. These examples were briefly described to ensure the reader understands that the discontent is not without cause. A detailed analysis of the abovementioned issues might constitute the topic of a future paper. For the purposes of the present paper, the main draft proposal containing NTA is examined in slightly more detail in the next sections.

5. Legislative proposals

In the last three decades, a number of legislative proposals have been drafted promoting TA and NTA, some of which have also been submitted to the Romanian Parliament.⁴⁴ During the negotiations between the political representatives of the Hungarian minority (the only one to my knowledge that systematically manifested claims for self-organisation through autonomy) and those of the majority regarding any form of autonomy, representatives of the Hungarian community were systematically accused of intending to create a *state within a state*.⁴⁵

In recent political communication, the emphasis still seems to be on TA;⁴⁶ however, the attempts of these political organisations or clandestine attempts of individuals do not seem serious enough. Political representatives' insistence on the Hungarian minority for TA and mostly nothing more seems counter-productive, as the representatives of the majority do not seem to accept any type of territorial re-organisation based on ethnic criteria. This has been made clear by the political representation of the majority and all political parties. There is as yet no political

41 Law no. 95/2006 regarding reform in healthcare, republished in Official Gazette of Romania no. 652/2015.

42 Kiss, Toró, Székely, 2018, p. 117.

43 Published in Official Gazette of Romania no. 555 of 5 July.

44 Some of the legislative proposals have been analysed in Bognár, 2006, pp. 85–117 and Bakk, 2004, pp. 39–60.

45 This also happened at the Atlanta negotiations in the USA in 1995, which took place at the invitation of the Project for Ethnic Relations. Telling eyewitness accounts of these talks are contained in Andreescu, 2001, p. 159.

46 The latest attempt in this sense was in 2020, when the Statute of the Szekler Autonomy accidentally passed the Chamber of Deputies of the Romanian Parliament, but was subsequently swiftly repealed by the Senate. The occasion to publicly engage in anti-Hungarian rhetoric had not been missed by politicians. Even the President of Romania, whose office is apolitical and who has the constitutional duty to mediate, chose to engage in partisan political discourse, alienating the Hungarian community, a part of Romanian society.

party in Romania—except the parties of the Hungarian minority—that supports TA for minorities.

The situation seems different for NTA, which unlike TA, has thus far not been emphatically refused. In addition, while TA understandably touches a nerve with the majority mainly because of its territorial nature, NTA should be an easier sell because of its lack of pronounced territorialism. However, this has not been the case. There are two noteworthy legislative projects containing NTA: one is the project drafted in 2005 by the Democratic Alliance of Hungarians in Romania (DAHR) regarding the statute of national minorities, which contains provisions aimed at guaranteeing NTA. The other was drafted in 2004 by the Hungarian People's Party of Transylvania and is called the Legal framework for personal autonomy of national minorities. We briefly consider the 2005 draft proposal of the DAHR in the following section, however belated it seems, because it is the only project close to being adopted by the Romanian Parliament. We also compare its provisions to the NTAs in the region.

The draft legislative proposal⁴⁷ was submitted to Parliament in 2005 based on the provisions of Article 73 paragraph (3) letter r) of the Romanian Constitution, which states that the law on the statute of national minorities shall be regulated by *organic law*. All other organic laws regulating the fields prescribed by the mentioned article in the Constitution have already been adopted, except for the statute of national minorities. For the purposes of the current research, only the provisions regarding NTA are explored.

The section on NTA of the draft law begins with the statement that the State recognises and guarantees the cultural autonomy of national minorities (Art. 56). The draft proposal of the DAHR wishes to establish cultural autonomy on the Estonian model, because the DAHR wanted to avoid conflict and refusal, which would have resulted from submitting a proposal consisting of autonomy with territorial elements.⁴⁸ However, this does not seem to be an issue nowadays when discussion surrounding NTA has simply vanished. Chapter V of the proposal contains a definition of cultural autonomy, stating that the concept signifies the capacity of a national minority community to gain decision-making competences regarding issues relating to cultural, linguistic, and religious identity through national councils elected by its members.

Although there are similarities between the provisions contained in the draft proposal and the legislation in other States with NTA arrangements, there are also large differences, as shown below. Certainly, political disagreements concerning the project doomed it from the start; however, analysing some of its provisions may provide insight into the intentions of those who proposed the law. Regarding the politics behind it, the opposition party at the time (in 2005), the Social Democrats, did not support the proposal and neither did the governing coalition in its entirety. Criticism also stemmed from other national minority organisations, who feared that the provisions ensuring that every person may freely declare one's own identity might lead to the emergence of

47 For details regarding the drafting of the project, see: Varga, 2010, pp. 395–410.

48 Decker, 2007, p. 443.

‘new minorities’ and that the functioning of the special registries would be thwarted by the phenomenon of ethno-business.⁴⁹ Issues of constitutionality also arose, with some authors arguing that the election of the leadership of national councils was incompatible with the Constitution.⁵⁰ Interestingly, issues of constitutionality did not arise in the opinion of the Legislative Council (the specialised advisory body of the Romanian Parliament charged with approving legislative proposals).⁵¹ Political hype had been created around the project several times after it was first submitted to Parliament, although the lack of understanding of the institutions contained in it did not enable serious discussion and the implementation of NTA.⁵²

All legislative projects concerning autonomy have been rejected in Parliament, while serious public debate around this issue is non-existent. The content and meaning of the notion of autonomy appear to be unclear both in minority communities and to the majority, mostly because of the political interests the term has served.⁵³ It has been observed that autonomy in Romania has become present as a goal in itself and not as a means for the political parties of the Hungarian community to improve its situation. This is demonstrated by the discourse attached to it, which is lacking in coherence and detail, and omits the essentials.⁵⁴ Social scientists contend that the lack of results in the ‘fight for autonomy’ in the last three decades has brought about a degradation of this subject to the level of electoral propaganda.⁵⁵ The struggle for TA is ceaseless, but without results, while NTA is not even on the agenda of minority representatives even though it would have a greater chance of acceptance by the majority. Comparative legal research of some provisions of the draft proposal has been included in this paper to assess its functionality and better grasp the intentions of the DAHR regarding this proposal.

■ 5.1. *Comparative analysis of the 2005 draft proposal*

NTA is not interpreted in the same manner in all countries and its implementation does not produce the same results in each State. The Romanian draft law, although seemingly a ‘classic’ NTA regulation similar to what we see in other countries in the region, is actually specifically tailored to the existing political powers. As mentioned, the draft law is modelled on Estonian law, which might not be the best model in the region.⁵⁶

The analysis shows that much is lacking in the draft law in comparison to the legal regimes adopted in other States in the region.

49 Decker, 2007, p. 445.

50 Decker, 2007, pp. 446–447.

51 Approval (aviz, in Romanian) no. 575/23.05.2005. <http://www.cdep.ro/proiecte/2005/500/00/2/cl502.pdf> (Accessed 06.07.2020).

52 Pepine, 2010.

53 Salat, 2014, pp. 124–125.

54 Bognár, 2006, pp. 110–111.

55 Kiss, Toró, Székely, 2018, p. 138.

56 The reports of the Advisory Council on the Framework Convention for the protection of national minorities even suggested drafting a new law. The Third Opinion on Estonia, ACFC/OP/III(2011)004, para. 61.

Many factors can influence the outcome when applying legal provisions establishing NTA. An important factor in the implementation of cultural autonomy is that it favours communities with a high level of socio-political cohesion.⁵⁷ Another important factor is the rules prescribed for financing NTA structures, which lacking consistent provisions for mandatory State financing, exposes these institutions to ad-hoc financing and the 'good will' of governments. More generally, when a law establishing NTA does not contain enough details regarding the extent of the power-sharing arrangement between State and NTA institutions, its functions can easily be restricted to a minimum, leaving NTA at the behest of State institutions. It is easy to observe that the Romanian draft law is poorly worded, in that it does not attempt a genuine reform of the minority rights regime. Rather, it seeks to introduce a new institution into an existing framework of minority representation without much actual change. The intention of the DAHR to maintain its status within the Hungarian community appears obvious, as in accordance with the law, the national council is formed by the organisations of national minorities and some of the provisions seem to consolidate the position of existing organisations.

■ 5.2. *Establishing institutions*

The draft proposal defines cultural autonomy as the capacity of national minority communities to have decision-making powers regarding cultural, linguistic, and religious matters through the councils elected by its members [Art. 57 para. (1)]. The establishment of the councils of national minorities is provided in the regulation of other States as well, constituting the basis of exercising the right to cultural autonomy. In accordance with the personality principle, legal provisions on NTA provide that persons who wish to adhere formally to a national minority group can do so by registering in an electoral registry. The number of persons registered must ensure the representativeness of the particular minority in correlation with the number of individuals belonging to that minority. Sometimes, this number is settled as a percentage of the number of those who identified with a particular minority during the census. However, this is not the rule. In Serbia, the proportion for representativeness is 40% (Art. 29 of the Serbian law), while the Estonian law from the interwar period mandated that at least half of the people belonging to the same ethnic group should be on the registry to be able to vote for their own cultural council. The new law in Estonia adopted in 1993 does not provide such a threshold, and neither does the law in Hungary. The draft law provides that the national council is to be established by the organisations of national minorities, the members of which must constitute at least 10% of citizens who declared themselves as belonging to a particular national minority in the latest census, and that a person may only be a member of one minority organisation at a time. The minority organisations thusly formed shall have the right to establish a National Council of Cultural Autonomy through internal elections. However, important is that in case the minority

57 Smith and Hiden, 2012, p. 82.

organisation decides not to constitute such a council, the law allows it to exercise most of the prerogatives reserved for national councils.

Regarding representativeness, Article 73 of the draft law sets an advantage for organisations of national minorities that have obtained a parliamentary mandate (which in Romania means crossing the 5% electoral threshold), prescribing that such parties shall be considered representative. According to the law, in case a minority group does not cross the electoral threshold to obtain parliamentary representation, the organisation that obtained the most votes shall be considered representative of the particular national minority group. Thus, minority organisations running in an election usually get one seat in the Chamber of Deputies (the lower house of the Romanian Parliament) to ensure parliamentary representation for minorities. However, according to Article 62 paragraph (2) of the Romanian Constitution, only one minority organisation may represent a particular minority. The draft law obviously puts its initiators at a great advantage, the DAHR being the only national minority organisation that ever passed the 5% electoral threshold in the last 3 decades. Although this is a merit of the DAHR, it is also a situation of a lack of choice and is perceptibly maintained by the initiator of the draft law.

The draft law establishes that after the formation of the national council, internal elections shall be held. No other details are specified in the law, and it is left up to the minority organisations how these are to be organised. Regarding the rules governing the national council, the draft proposal leaves it to the organisation itself to establish its own internal rules and regulations. The proposal only provides for the number of representatives in the national council, which is correlated with the number of persons belonging to a particular national minority and determined in accordance with the census and not with the number of those registered in a special registry. In this regard, a more detailed regulation is found in Serbia and Hungary, where the support needed for proposing candidates and the number of representatives who can be elected is clearly provided for by law. The Serbian law provides that candidates can come from organisations of national minorities (political parties or NGOs) and groups of citizens belonging to a specific national minority with the condition that 1% of those in the special electoral registry supports such a candidate. The Serbian system also provides for a special system of electors in case 40% of the members of a minority do not register for elections but the minority group still wishes to form a council. In Hungary, persons with the general right to vote who are registered in a particular registry have the right to vote for representatives in the minority council, and candidates must be proposed by 5% (or at least five persons) of the persons on the registry.

It seems that the Romanian draft law proposes the formation of one central representative organ for minorities, a unitary system, as in Serbia and Estonia, without any mention of smaller organisational forms. For example, the Russian system provides for three levels of organisation: local, regional, and federal. The Hungarian system also has more levels of organisation: the municipality level (townships, cities, the Capital), county level, and national level.

According to the draft proposal, only persons who are citizens are able to register with the organisations of national minorities to form national councils. This is similar to the situation in Estonia, Serbia, and Russia. There are also examples such as the law in Hungary (or interwar Latvia) where non-citizen permanent residents also have the right to vote on national councils.

Another important aspect relates to the fact that exhaustive lists are introduced of minorities recognised by the State as those having a right to establish NTA institutions. Article 74 of the draft law in Romania enumerates 20 such minorities, while the Hungarian law contains 12. The Serbian and Russian laws do not provide these exhaustive lists. Estonian law leaves the system open to all minority groups numbering more than 3,000 individuals to establish their own institutions for cultural self-governance, and enumerates some of the minorities with this right.

■ 5.3. *The powers of the national council*

The Romanian draft law limits the powers of national councils to issues concerning culture, language, and religion. Nevertheless, these fields are generally provided for in the regulation of other countries as well with local specifics that can be considered.

The draft proposal states that national councils will have the right to organise, manage, and control educational, cultural, and media institutions; to draft strategies and priorities for education and the protection of cultural heritage; the right to be consulted regarding questions of representativeness among the staff managing institutions that serve national minorities; to establish scholarships, as well as cultural and scientific awards; and to impose special taxes on its members. In the next part, these powers are examined through a comparative law lens.

The draft law provides the power to organise, manage, and inspect educational and cultural institutions, or to participate in such activities with other public authorities. Interesting is that the drafters of this proposal did not provide for the right to *establish* such institutions, as it appears in Serbian, Hungarian, Russian, or Estonian law. Oddly, the right to establish educational institutions is provided to the organisations of national minorities and religious cults, but not to the national council as per Article 16 paragraph (2) and (3) of the draft proposal.

Councils have the right to establish and manage public media institutions or take part in such activities with other public authorities. The draft law upholds the right to participate in the drafting of strategies concerning the protection of cultural heritage. Regarding private educational and cultural institutions belonging to minorities, the council shall be the one to appoint their leaders, while in appointing leaders of similar but public institutions, the State authority shall seek the approval of the minority council.

Note that legislation in many other States provides even more powers to national councils. For example, the Romanian draft law lacks provisions regarding the right of councils to legislative initiatives in questions concerning minorities or establishment of further institutions such as companies and foundations meant to serve minorities.

These are all provided for by the law in Serbia or Hungary. Even the Russian law contains provisions regarding the representation of the interests of national minorities through NTA institutions in relation with legislative and executive powers, and with local authorities. This shows that the institution of national councils has not been thought over thoroughly regarding the potential powers such an institution should be given.

The Hungarian law provides for the obligation of authorities to hand over institutions if NTA structures ask it whenever the institution serves a particular minority at a rate of 75%. There is also a provision in the Serbian law related to the transfer of so-called founders' rights over some cultural, educational, or media institutions towards national councils of minorities. No such provisions exist in the draft proposal.

Regarding internal powers, the Romanian draft law only specifies that national councils shall establish their own internal rules and regulations, without any mandatory provisions. It would be important to establish what the law allows regarding issues such as the use of symbols of minorities and other details that might conflict with other laws. Lacking clarity in the sharing of prerogatives might lead to issues in the application of the law and to conflicts with other laws.

The execution of the decisions of national minority councils would be ensured by the institutional structures of the council itself or by the competent public authorities, as per Article 57 paragraph (2). However, as shown above, if the sharing of prerogatives is not clearly provided for, national councils may find themselves isolated by unwilling public authorities, having to go to court every time the execution of council decisions is refused. The lack of precise provisions would lead to difficulty in the application of the law.

The Romanian draft law does not provide for the right to use minorities' languages as an official language, and does not contain the right to propose such a thing. However, Serbian law expressly provides for this.

In addition, regarding the issue of access to law, which was mentioned earlier regarding the mosaic of minority rights and legal provisions in Romania, the publication of important pieces of legislation in the language of minorities with assistance from the minority institutions should be included, similar to Serbian law. This will enhance legal awareness among minorities, and contribute to developing the minority language, especially regarding legal and technical terms.

As shown above, the draft law seems to need more work, as the cultural autonomy institutions formed under such a law by the organisations of national minorities would be established only formally because their establishment does not actually widen representativeness and does not offer a genuine chance for participation by persons belonging to national minorities. Rather, it extends to a certain extent the *hegemony* of the existing organisations of national minorities. Most important, from a functionality viewpoint, more specific rights, prerogatives, and obligations should be established regarding the minority council and State institutions that will be in contact with such bodies.

■ 5.4. *Financing*

Similar to the previous section, the regulation concerning the financing of national councils and their activities is poorly detailed. It is essential for the NTA to work and receive sufficient material support from the State to improve the situation of national minorities. A lack of accurately drafted legal provisions in this sense may result in weak institutions.

The Romanian draft law provides that minority educational institutions may be established by the organisations of national minorities, and that such institutions *may* receive State aid from the state or local budget. This financing situation is similar in Russia, where the law does not provide for mandatory financing, resulting in many minority councils not receiving financing. In some systems, the lack of clear financial backing from the State combined with the organisational specifics of cultural autonomy institutions (limited activities, broad government oversight, bureaucracy) has resulted in simple non-governmental organisations being considered more advantageous for minority self-organisation than the NTA institutions allegedly designed to benefit minorities.⁵⁸ Financing is also an issue in Estonia, where similarly, the law does not provide for mandatory government financing. Thus, it is up to the government to decide how much financing should be granted, if any. Some believe this hampers the functional existence of cultural autonomy.⁵⁹ In effect, in Estonia, only the Swedish and Ingrian Finnish minority have formed cultural autonomy institutions, while the Russian minority did not manage to organise itself and now have to organise their education through NGOs.⁶⁰ Furthermore, not even established cultural autonomy institutions seem functional (like in the case of the Ingrian Finns) because cultural autonomy institutions do not differ much from NGOs, especially from a financing viewpoint.⁶¹ In Serbia, not only is State financing mandatory, but the national councils can make suggestions on the allocation thereof to ensure the funds are put to better use. The same law provides that not more than 50% of the budget of national councils can be spent on current expenses such as rent, utilities, equipment, and staff.

Thus, financing seems to be one of the main and most important parts of NTA legislation, determining the functionality of the institution.

6. Conclusions

The Romanian draft law remained a draft and was never put in practice. The causes of this are manifold, but mainly political. After exploring the contents of the draft proposal, it can be said that an updated proposal would establish a genuine NTA and better suit the minorities living in Romania.

58 Barbieri, 2014, pp. 218–219.

59 Yupsanis, 2016, p. 123.

60 Smith and Hiden, 2012, p. 112.

61 Smith, 2014, p. 312.

The experience of other legal systems is noteworthy and should be considered in more detail when drafting a new proposal. The complexity of NTA brings with it new questions regarding minority rights. While this constitutes a step forward, it is by no means a panacea for the issues of minorities. Even though the Romanian Constitution and current political establishment do not favour granting collective rights, consistent and genuine communication from minority representatives could change that. Collective rights may be part of a well-drafted statute of national minorities prescribed by the Romanian Constitution as a legal instrument to be adopted by organic law. The purpose of such a law should be to establish self-regulating institutional structures suitable for the conservation of the identity of minorities and to ensure their political participation. Such participation should nevertheless be diverse and not reserved for a single organisation.

The understanding of NTA is essential to obtaining it. The term should be clarified both to minorities and the majority without unnecessary political discourse attached to it. Because this type of arrangement grants rights to individuals belonging to national minorities, it seems best suited for a system based on individual rights. While the idea of regulating NTA through the statute of national minorities seems good, it is puzzling that a modern law in this sense is lacking and the old law treated as if it did not exist. The political representatives of minorities seem lost in the labyrinth of legal provisions. 'Details' such as which legal provisions are in force must be carefully observed so that they can be fully used for the benefit of minority communities. It is not outlandish to state that minority organisations should be more focused on understanding the legal regime they are working in. Either way, the old statute on national minorities, Law no. 86/1945, seems applicable and should be employed lacking a more modern legal regime.

As no serious legislative proposals have been submitted to public debate and the term *autonomy* is still misunderstood and viewed negatively by the majority, the first step towards improving the situation and obtaining NTA should be taken by minority representatives, especially those of the Hungarian minority as the most numerous and vociferous in this regard currently. Nevertheless, such political clairvoyance seems lacking within the political representation of the Hungarian community.

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