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National Self-Governments in Hungary and Serbia in the Context of Public Power Decentralising Solutions

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Abstract: The aim of the paper is to verify a thesis according to which countries which are considered to be the most representative examples of implementing the national cultural autonomy concept (Hungary and Serbia) in fact use the construct of national minority self-government, which, according to administrative law commentaries, is classified as non-territorial, or special self-government. In order to fulfill this task two decentralisation solutions which are aimed at pursuing national and ethnic minorities' ambitions to maintain and enhance their cultural identity: national minority self-governments and national cultural autonomy has been presented. These legal constructs are not equivalent, although in international literature on the subject they are often treated as synonyms. In this context Serbian and Hungarian regulations has been presented and assessed.

1. Introduction

The objective of the paper is to verify a thesis according to which countries which are considered to be the most representative examples of implementing the national cultural autonomy concept (Hungary and Serbia) in fact use the construct of national minority self-government, which, according to administrative law theory, is classified as non-territorial, or special

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self-government[1]. These countries deserve special attention. According to David J. Smith the Hungarian legislation after 1993 offers the best-known and most-fully developed system of minority non-territorial autonomy in post-communist central and eastern Europe[2]. More than 1 000 cultural self-governments were created there during the decade after 1993, over half of them by the Roma[3]. Hungary has widely been considered, in international comparative terms, a trailblazer in granting extended minority rights and non-territorial cultural autonomy[4]. As for the Serbian 2009 minority law, in Smith's opinion it offers the most substantive provisions for autonomy of any country in the region outside Hungary[5]. Both non-territorial arrangements are entrenched in public law[6].

In order to fulfil the objective of this study, it is necessary to make a number of initial determinations. The corporate aspect of the definition of self-government indicates a social foundation of this legal construct, and the possibility for its creation on the basis of various criteria. It does not need to be residence in a given territory, it may be a specific type of bonds between people, such as a shared profession, belonging to the same national community, or practising the same religion. As regards the concept of national cultural autonomy, proposed by the representatives of Austro-Marxism, Karl Renner and Otto Bauer, emphasis should be placed on

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1 Markku Suksi, "Non-Territorial Autonomy: The Meaning of '(Non-)Territoriality," in *Minority Accommodation through Territorial and Non-territorial Autonomy*, ed. Tove H. Malloy and Francesco Palermo (Oxford: Oxford University Press, 2015), 92; writes that "institutional solutions that could be characterized as national cultural autonomies are found in several countries, like Hungary, Latvia, and the Russian Federation, as well as Serbia, Estonia, and Finland."

2 David J. Smith, "Challenges of Non-Territorial Autonomy in Contemporary Central and Eastern Europe," in *The Challenge of Non-Territorial Autonomy. Theory and Practice,* ed. Ephraim Nimni, Alexander Osipov and David J. Smith (Oxford – Bern – Berlin – Bruxelles – Frankfurt am Main – New York – Wien: Peter Lang, 2013), 121.

3 Smith, "Challenges," 122.

4 Balázs Dobos, "With or without you: integrating migrants into the minority protection regime in Hungary," *Migration Letters,* vol. 13 no. 2 (2016): 245.

5 Smith, "Challenges," 123.

6 Levente Salat, "Conclusion," in *Minority Accommodation through Territorial and Non-territorial Autonomy*, ed. Tove H. Malloy and Francesco Palermo (Oxford: Oxford University Press, 2015),253.

its legal and state system aspects. In this context Serbian and Hungarian regulations will be presented and assessed.

2. The essence and objectives of self-government

In Polish literature on administrative law, decentralisation is understood as "an administration system where administrative entities enjoy independence from central authorities" which is equal to the abolishment of hierarchic subordination. In this context, self-government is only a certain type of decentralisation[7]. The success of this public authority organisation concept is expressed in the statement that it is "a prerequisite to the proper functioning of a democratic state which applies the principles of political and social pluralism in practice."[8] The legislator decides on the limits of decentralisation. They may change, depending on the adopted concept of state system or socio-economic transformations[9]. In line with the principle of subsidiarity, public authorities should perform their tasks as close to their citizens as possible, following an in-depth assessment of socio-economic circumstances. Decentralisation-related legal solutions may range between constructs limited to the elimination of hierarchical subordination, through public undertakings, to subjective forms of decentralisation[10]. From the territorial perspective, contemporary forms of decentralisation can be manifested in basic self-government units (communes, single level self-governance), two-level

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7 Tadeusz Bigo, *Związki publiczno-prawne w świetle ustawodawstwa polskiego* (Warszawa: Przemiany, 1928), and also Wacław Komarnicki, *Polskie prawo polityczne* (Warszawa: Księgarnia F. Hoesicka, 1922), 367, and Henryk Dembiński, *Osobowość polityczno-prawna samorządu w świetle metody dogmatycznej i socjologicznej (*Wilno: Skład Główny w Księgarni Św. Wojciecha, 1934), 68, as cited in Ewa Nowacka, *Samorząd terytorialny w systemie administracji publicznej w Polsce. Studium politycznoprawne* (Warszawa: LexisNexis, 1993), 19; Zbigniew Leoński, *Zarys prawa administracyjnego* (Warszawa: LexisNexis, 2001), 68.

8 Krzysztof Łokucijewski,"Decentralizacja," in: *Leksykon prawa administracyjnego. 100 podstawowych pojęć*, ed. Eugeniusz Bojanowski and Krzysztof Żukowski (Warszawa: C.H. Beck, 2009), 43.

9 Magdalena Kisała, "Granice decentralizacji," in *Decentralizacja i centralizacja administracji publicznej. Współczesny wymiar w teorii i praktyce*, ed. Barbara Jaworska-Dębska, Ewa Olejniczak-Szałowska and Rafał Budzisz (Warszawa – Łódź: WoltersKluwer, 2019), 65.

10 Piotr Lisowski, "Samodzielność w administrowaniu," in *Decentralizacja i centralizacja administracji publicznej. Współczesny wymiar w teorii i praktyce*, ed. Barbara Jaworska-Dębska, Ewa Olejniczak-Szałowska and Rafał Budzisz (Warszawa – Łódź: WoltersKluwer, 2019), 91.

self-governance, regional self-governance (three-level self-governments), in autonomous decentralisation characterised by the division of the entire territory of a state into autonomous regions - at the same time maintaining a self-governance system in lower-rank entities, and, finally, in federalism[11]. However, the decentralisation of state authorities does not necessarily need to have only a territorial dimension, and might include a wider range of bodies which were granted public powers as a result of implementing this rule[12].

In recent definitions of self-government the corporate aspect of the self-government is underlined[13]. Marek Wierzbowski and Aleksandra Wiktorowska noted that the most commonly accepted definition of self-government is as follows: "self-government is administration performed by legal persons (corporations) which are separate from the state."[14] I concur with the views expressed by Ewa Nowacka who stated that self-government was different from other administration entities due to the legal personality of its units. Only corporately organised social groups are able to manage their affairs independently, as they establish bodies exercising administration tasks directly pursuant to organisational norms[15].

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11 Marek Domagała, "Z zagadnień decentralizacji w państwie współczesnym," in *Oblicza decentralizmu*, ed. Jan Iwanek (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1996), 10.

12 Michał Chmielnicki and Krzysztof Lewandowski, "Zasada udziału samorządu terytorialnego w sprawowaniu władzy publicznej na podstawie orzecznictwa Trybunału Konstytucyjnego," *Studia z zakresu prawa, administracji i zarządzania UKW* no. 13 (2013): 103.

13 See, for instance, Antoni Agopszowicz and Zyta Gilowska, *Ustawa o samorządzie terytorialnym. Komentarz* (Warszawa: C.H. Beck, 1997), 117; Michał Kulesza, "Słowo wstępne," in Aleksandra Wiktorowska, *Polska bibliografia prawnicza samorządu terytorialnego* (Warszawa: Zakład Narodowy im. Ossolińskich, 1986), 12; Zbigniew Leoński, "Ustrój i zadania samorządu terytorialnego," in *Samorząd w Polsce,* ed. Stanisław Wykrętowicz (Poznań: Wydawnictwo Wyższej Szkoły Bankowej w Poznaniu, 1998), 65–66; Hubert Izdebski nad Michał Kulesza, *Administracja publiczna. Zagadnienia ogólne* (Warszawa: Liber, 2004), 136; Zygmunt Niewiadomski, "Pojęcie samorządu terytorialnego," in *System prawa administracyjnego. Podmioty administrujące. Tom VI*, ed. Roman Hauser, Zygmunt Niewiadomski and Andrzej Wróbel (Warszawa: C.H.Beck, 2011), 105; Bogdan Dolnicki, *Samorząd terytorialny* (Warszawa: WoltersKluwer, 2012), 17.

14 Marek Wierzbowski and Aleksandra Wiktorowska, "Podstawowe pojęcia teoretyczne w nauce prawa administracyjnego," in *Polskie prawo administracyjne*, ed. Jerzy Służewski (Warszawa: Wydawnictwo Naukowe PWN 1995), 37.

15 Nowacka, *Samorząd*, 20.

In the literature on the subject, it is stressed that "the objectives of self-government are most of all to allow the civic society to take part in public administration and to juxtapose the representation of society with central government authorities, to allow due insight into the actual relationships in the life of the society, and to improve the way the demands voiced by certain social, professional, ethnic and cultural groups are satisfied, or to meet specific individual economic goals."[16] Profound ethnic and cultural differences in certain territories of the country might also contribute to the establishment of self-government institutions[17]. In general, self-government is aimed at improving the material and spiritual culture of population[18]. Voluntary-membership associations may serve the same purpose but such properties as mandatory membership, administrative powers, independence of actions, performance of public tasks, own sources of income (tangible assets obtained by way of mandatory collection) create a distinction between special self-government and private law associations[19].

The independence of self-government is not only related to formal responsibilities and powers vested in it, but also to providing the material grounds for exercising such powers. In the literature on territorial self-government, it is pointed out the financial independence is one of the immanent properties of budgets of self-government units. Without such independence they would cease to be budgets of separate public entities,

16 Zbigniew Grelowski, *Samorząd specjalny: gospodarczy, zawodowy, wyznaniowy według obowiązujących ustaw w Polsce* (Łódź: Społem, 1947), 44.

17 Jerzy Panejko, *Geneza i podstawy samorządu terytorialnego* (Paryż, 1926), 98–99. Péter Kovács rightly states that "self-government is also conceivable in the framework of the organisation of public administration and not necessarily in the human rights framework", "The Legal Status of Minorities in Hungary," *Acta Juridica Hungarica* vol. 43 no. 3–4 (2002): 209.

18 Maurycy Jaroszyński, *Rozważania ideologiczne i programowe na temat samorządu* (Warszawa: Wydawnictwo Przemiany, 1936), 18. As Balázs Szabolcs Gerencsér writes in "The Law of Coexisting Languages Examining the Quartet of Language Policy Fields," *Foreign Policy Review* no. 2 (2021): 97: "if the community can conduct their local affairs in its own language (e.g. chairing board meetings, making decisions), it can also serve social integration and political stability".

19 Jaroszyński, *Rozważania*, 19.

and they would no longer be self-governing authorities[20]. The analysis of self-government rights in respect of the income part of their budgets (income decentralisation) and the entitlements in the sphere of redistributing the income as part of such budgets (expense decentralisation) allows the assessment of the actual overall degree and range of decentralisation[21]. There are no reasons why the above findings cannot be applied to special self-government.

3. Types of self-government and the notion of autonomy

In addition to territorial (local and regional) authorities (*Gebietskörperschaften*), German law also knew non-territorial authorities (*Genossenschaften*), appointed to perform special tasks, with no direct relationship to a certain specified territory, such as for example bar associations or commerce and industry chambers[22]. Non-territorial self-government is a well-established legal construct in German and Austrian law[23]. The construct of special self-government is widely accepted by contemporary Polish administrative law science[24], although a view is voiced that in the current legal status, there

20 Teresa Dębowska-Romanowska, "Wydatki na zadania własne gminy – granice prawne," in *Samorządowy poradnik budżetowy na 1996 r.,* ed. Wiesława Miemiec and Bogdan Cybulski (Warszawa: Municipium, 1996), 210; Piotr Chadała, "Samodzielność finansowa jednostek samorządu terytorialnego," *Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia Sectio H,* vol. XXXVI (2002): 227.

21 Elżbieta Kornberger-Sokołowska, "Realizacja zasady adekwatności w procesach decentralizacji finansów publicznych," *Samorząd Terytorialny,* no. 5 (2001): 5–6.

22 Grelowski, *Samorząd*, 56; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Zweiter Band. Staatsrechtslehre und Verwaltungswissenschaft 1800–1914* (München: C.H.Beck, 1992), 239; *Geschichte des öffentlichen Rechts in Deutschland. Dritter Band. Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914–1945* (München: C.H.Beck, 2002), 44; Wiesław Hładkiewicz and Adam Ilciów, "Idea samorządności w świetle rozważań o państwie Georga Jellinka," in *20 lat samorządu terytorialnego w Polsce. Sukcesy, porażki, perspektywy*, ed. Katarzyna Mieczkowska-Czerniak and Katarzyna Radzik-Maruszak (Lublin: Wydawnictwo UMCS, 2012), 102.

23 Steffen Detterbeck, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht* (München: C.H. Beck, 2008), 57 et seq.; Arno Kahl and Karl Weber, *Allgemeines Verwaltungsrecht* (Wien: Facultas, 2011), 94–95, 156 et seq., 205 et seq.

24 Leoński, *Zarys*, 70; Wierzbowski and Wiktorowska, *Podstawowe*, 38; Piotr Przybysz, *Instytucje prawa administracyjnego* (Warszawa: Wolters Kluwer, 2020), 196; Eugeniusz Ochendowski, *Prawo administracyjne. Część ogólna* (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora", 2006), 245; Lubomira Wegner, "Samorząd," in

are no legal grounds for the existence of national-minority and religious self-governments[25].

Special self-government includes public law associations of a mandatory nature whose jurisdiction covers a specified area of activities (professional, economic, cultural, religious, and national minority spheres) of a certain category of legal persons who are responsible for a decentralised part of state administration on a par with territorial self-government bodies[26]. The self-government is aimed at catering for specified interests of a closed circle of persons. In this case, emphasis is placed on the practising of specified professions or belonging to a certain social group with separate objectives and interests, e.g., a national minority or religious group, while territory constitutes a supplementary criterion which provides grounds for belonging to a given group only in conjunction with other defined factual conditions[27]. Although special self-government entities are public law associations which are mandatory by law, the change of a profession, economic activities, or religion are to a large extent dependent on the will of individuals, and provide grounds for leaving a specific self-government association, and avoiding subjection to the powers of their authorities[28].The existence of such self-governments is a form of material decentralisation[29].

According to the views of Polish legal academics and commentators, it is widely agreed that self-government is a uniform construct, which means that special self-government units should enjoy the same implied

Leksykon prawa administracyjnego. 100 podstawowych pojęć, ed. Eugeniusz Bojanowski and Krzysztof Żukowski (Warszawa: C.H. Beck, 2009), 356.

25 Mateusz Błachucki," Przemiany ustrojowe samorządu specjalnego w polskim prawie administracyjnym," in *Prace Studialne Warszawskiego Seminarium Aksjologii Administracji. Szkice z zakresu procedury administracyjnej t. III,* ed. Krzysztof Wąsowski and Katarzyna Zalasińska (Kraków: Wydawnictwo WIT, 2014), 15–35, at 28 et seq.

26 Panejko, *Geneza*, 5; Robert Kmieciak, "Wielowymiarowość pojęcia samorządu – od związków terytorialnych do specjalnych," *Środkowoeuropejskie Studia Polityczne,* no. 4 (2015): 59 (with references made to Kazimierz Kumaniecki who, as the author points out, introduced the notion of special self-government to the Polish legal language); Grelowski, *Samorząd*, 48.

27 Grelowski, *Samorząd*, 48; Stefan Zamoyski, *Samorząd rolniczy* (Kraków 1931), 57.

28 Grelowski, *Samorząd*, 48; Panejko, *Geneza*, 111–112.

29 Wierzbowski and Wiktorowska, *Podstawowe*, 35 et seq.

independence and judicial protection as territorial self-government units[30]. From the legal point of view, it is not important whether the boundaries of operation of local-government associations will be territorial, factual, or personal[31], as long as they are vested in statutory public powers to perform a specified domain of public administration tasks. In legal terms, the difference between common and special self-government is of a purely technical nature[32].

Autonomy is a term which is broader than the notion of self-government. While "self-government" refers only to administrative issues, "autonomy" does not only cover the administration sphere, but also legislative powers[33]. An independent commune is not an autonomous entity within the above meaning. It is a "self-governing" entity, authorised, i.a. to adopt legal acts under a specific statutory norm[34]. However, a close interrelation with the state is maintained. The state may influence the operations of self-governments through its bodies, although only within the strictly defined statutory limits. Such interference usually has the form of supervisory influence[35]. The above remarks can also be directly applied to self-government entities other than communes.

30 Maria Karcz-Kaczmarek and Mariusz Maciejewski, "Samorządy zawodowe i zakres ich samodzielności w świetle doktryny oraz orzecznictwa," *Studia Prawno-Ekonomiczne,* vol. XCV (2015): 72.

31 As per the terminology devised by Jerzy Panejko, factual self-government includes economic self-government, while personal self-government is professional self-government (Panejko, *Geneza*, 111).

32 Zamoyski, *Samorząd*, 58; Wilhelm Szczęsny Wachholz, *Istota i prawo związków publicznych (publiczne osoby związkowe*) (Warszawa: Gazeta Administracji i Policji Państwowej, 1928), 55.

33 Krzysztof Skotnicki, "Pojęcie autonomii w teorii prawa państwowego," *Studia Prawno-Ekonomiczne,* vol. XXXVI (1986): 76. Similarly in the literature on national cultural autonomy, for example in Stefan Wolff and Marc Weller, "Self-Determination and Autonomy: A Conceptual Introduction," in *Autonomy, Self-Governance, and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies*, ed. Marc Weller and Stefan Wolff (London: Routledge 2005), 13.

34 Bogdan Dolnicki, *Samorząd terytorialny* (Warszawa: WoltersKluwer, 2012), 29.

35 Dolnicki, *Samorząd*, 30.

4. National cultural autonomy

Decentralisation in the form of delegating public powers to entities at the regional and local levels is widely applied for the purpose of protecting national and ethnic minorities. In such case, a minority, centred around a given geographical area, exercises the powers vested in regional and local authorities to promote and protect their culture[36]. The drawbacks of such solution result in the fact that in today's world it is possible to observe a growing significance of the concept of national cultural autonomy developed by Karl Renner and Otto Bauer, prominent politicians of Austrian Social Democracy who were searching for ways to rescue the Austro-Hungarian Empire from its fall[37]. Renner was not only an outstanding thinker and renowned constitutional law specialist, but was also engaged in political life, serving as the Chancellor of Austria (1918–1929 and 1945) and the President of Austria (1945–1950). Otto Bauer was a leader of Social Democracy, and a famous Marxist intellectual. He was a minister in Karl Renner's government. After 1933, he was considered the intellectual leader of Austrian Social Democracy[38].

Bauer and Renner rejected the concept of nation-state which always leads to the formation of a ruling majority constituting a dominant nation and national and ethnic minorities devoid of any influence on the government, and instead proposed to include the nations of the Empire into non-territorial public law corporations vested in comprehensive powers[39]. They rejected the possibility to rank the idea of self-determination of nations as an axiom, all the more so that it could lead to secession, as opposed to the right to self-government, endowed with broad powers and

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36 Bruce de Villiers, "Community Government for Minority Groups – Revisiting the Ideas of Bauer and Renner Towards Developing a Model of Self-Government by Minority Groups Under Public Law," *Die Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* no. 76 (2016):919.

37 See Barbara Stoczewska, "Autonomia narodowościowa jako koncepcja rozwiązania problemu mniejszości narodowych w europejskiej (głównie polskiej) myśli politycznej XIX i XX wieku," *Krakowskie Studia z Historii Państwa i Prawa,* no. 3 (2010): 357–375.

38 de Villiers, "Community," 923.

39 Ephraim Nimni, "National Multiculturalism in Late Imperial Austria as a Critique of Contemporary Liberalism: The Case of Bauer and Renner," *Journal of Political Ideologies,* vol. 4, no. 3 (1999): 4, as cited in Markku Suksi, "Non-Territorial," 85.

guaranteed constitutionally[40]. National communities should not be forced to adopt the culture of the majority, but should have the opportunity to develop their own cultural identity via their own national organisations, spanning the entire territory of their state, and having the status of a legal person governed by public law[41].

According to Bauer and Renner, nationality was defined through language, culture and traditions, while the state was defined through its territory. The territorial element was not significant for a nation[42]. In line with the presented concept, persons belonging to a minority, although they live on a territory where the majority of the population belong to another national group, should not be subject to the laws of the state in which they hold the citizen status in the scope of the internal affairs of their communities[43]. The law enacted by the law-making bodies of such non-territorial communities was to apply to all their members, notwithstanding their place of residence[44]. They should exercise their rights in the sphere of own culture, language and traditions, religion, private and family law, etc.[45].

Although a given national minority was territorially dispersed, it could receive a certain degree of autonomy. Renner and Bauer made the assumption that, through guaranteeing minorities the freedom of cultural development, the conglomerate of struggling national communities of the Austro-Hungarian Empire would transform into a democratic confederation of nations[46]. As regards the axiological dimension, centralist-atomistic liberal view of the Nation State would be replaced by an "organic conception,"

40 Ramón Maiz and Maria Pereira, "Otto Bauer: the Idea of Nation as a Plural Community and the Question of Territorial and Non-territorial Autonomy," *Philosophy and Society,* vol. 31, no. 3 (2020): 297.

41 Nimni, "National," 11; de Villiers, "Community," 929.

42 Suksi, "Non-Territorial," 98.

43 Robert A. Kann, "Karl Renner (December 14, 1870-December 31, 1950)," *Journal of Modern History,* vol. 23 no. 4 (1951): 244.

44 de Villiers, "Community," 935.

45 de Villiers, "Community," 913, 946.

46 Ephraim Nimni, "National-Cultural Autonomy as an Alternative to Minority Territorial Nationalism," in: *Cultural Autonomy in Contemporary Europe*, eds. David J. Smith and Karl Cordell (London – New York: Routledge 2008), 34.

that is, by the sovereignty shared among various nations, organised in the form of legal persons governed by public law[47].

The nations of the Empire were to be equal in status, regardless of their differences in numerical size, as it was the existence of a nationality that gave rise to certain political rights, not the numerical size of a community[48]. The source of legal personality under public law should be derived from constitutions or laws, and national communities should be recognised as international law entities[49]. As regards the internal structure of each national community, a special organisation that would hold cultural assemblies would function in each region, with a general cultural assembly for the whole country. The funding of the operations of such entities would be ensured by their entitlement to raise taxes on its members, or by state's allocation of a proportion of its overall budget to each of them[50]. Each community was to function in accordance with democratic principles of representation, accountability and judicial oversight[51]. Each adult individual could, and was obliged to, indicate his/her belonging to one of national communities. Once such a choice was made, it was final[52].

Such established national communities constituted the links of a confederation dealing with administrative, economic, tax-system, and military affairs[53]. Individual constituents of a confederated state - nationalities - were to cooperate at the local, regional and national levels to make decisions over matters that concerned all of the nationalities[54].

The discussed concept is consistent with the trend of public power decentralisation. Renner and Bauer argued that public powers might be delegated not only to entities operating across a given territory but also to corporations of individuals, e.g. national minorities, which could function

47 Maiz, Pereira, "Otto Bauer," 295.
48 de Villiers, "Community," 924, 935.
49 de Villiers, "Community," 935.
50 de Villiers, "Community," 944.
51 de Villiers, "Community," 948.
52 de Villiers, "Community," 930.
53 Ewa Czerwińska, *Filozof i demokrata. Studium myśli społeczno-politycznej Otto Bauera (1881–1938)* (Poznań: Wydawnictwo Fundacji Humaniora 1998), 192.
54 de Villiers, "Community," 935.

similar to the way in which regional or local governments do[55]. They did not reject territory for purposes of self-government by nationalities, but they did not see control over an own territory as a sine qua non condition for a nationality to acquire a juristic identity for self-government, and opened up to wider possibilities arising from the category of special self-government[56]. The essence of their proposals consisted in shifting the focus from territorial autonomy to cultural autonomy[57]. Contrary to decentralisation entailing the establishment of a self-government corporation, national communities were not only to self-administer their affairs, but also decide on economic, educational, linguistic, official and even some military matters (*Selbstgesetzgebung und Selbstverwaltung* - "self-legislation and self-admini-stration")[58]. In this case, the use of the word "autonomy" to define the position of individual national communities is fully justified, because a national community, as a legal person governed by public law, would be vested in legislative powers.

5. The institutional dimension of protecting national minorities in Serbia and Hungary

The primary source of law which constituted the basis for minority self-government in Hungary is Act No. 179 of 2011 on the Rights of National Minorities (further referred to as "the Hungarian Act 2011"), although a number of legal provisions on the protection of minorities are included in the Constitution of 18 April 2011. The Constitution of 2011 recognizes in Article xxix, para. 1 the 'nationalities' as "constituent parts of the State", and also grants them, in the second paragraph of the same stipulation, the "right

55 de Villiers, "Community," 911.

56 de Villiers, "Community," 938.

57 Registration of a public law legal person for each nationality was seen as an *"indispensable prerequisite*" (de Villiers, "Community," 944; Giovanni Mateo Quer and Sara Memo, "Releasing minorities from the "nationalist trap": from territorial to personal autonomy in a "multiple demoi Europe," *Cuadernos Europeos de Deusto,* no. 47 (2012): 163).

58 Maiz and Pereira, "Otto Bauer," 297. This was also noted by, e.g., Jan Erk, "Non-Territorial Millets in Ottoman History," in: Malloy and Palermo, "Minority," 126, who wrote that" "The nations would then be given exclusive powers in a number of policy areas (mostly education and culture) where they would have their own legislative, administrative, and executive institutions" (underlined by the author – A.A.).

to establish local and national self-governments"[59]. The new Act retained the essential elements of the existing system for the protection of minority rights[60]. National minority self-governments still constitute the organisational grounds for cultural autonomy. For that reason, under the Act, such self-governments are awarded a status of public law entities, authorised to perform public tasks. Annex No. 1 to the Act lists 13 nationalities vested in collective rights (Bulgarian, Roma, Greek, Croatian, Poles, Germans, Armenian, Romanian, Ruthenian, Serbs, Slovakian, Slovenian, and Ukrainian)[61]. It should be noted that the Hungarian Act 2011 is an organic law what means that its adoption and amendment requires the support of two-thirds majority of votes of members of parliament present[62].

Serbia has introduced its own form of minority diversity management based mainly on two legislative pillars, the Law on the Protection of the Rights and Freedoms of National Minorities (2002) and the Law on National Councils of National Minorities of 31 August 2009 (further referred to as "the Serbian Act 2009") which is a necessary supplement for the proper implementation of the Act of 2002. The construct of national minority self-government in the form of national minority councils is directly set out in the Constitution of the Republic of Serbia of 30 September 2006. As per Article 75 (2) of the Constitution, "persons belonging to national minorities, exercising their collective rights, acting in line with statutory provisions, shall participate in decision-making procedures or make independent decisions in any matters concerning culture, education, information, and the use of their language and script in official matters. As

59 Athanasios Yupsanis, "Cultural Autonomy for Minorities in Hungary: A Model to be Followed or a Futile Promise," *International Journal on Minority and Group Rights,* vol. 26 (2019): 32.

60 As Balázs Vizi writes "Hungary has often been seen as an exception among post-socialist countries, offering a new model to diversity management, by including a clear formulation of collective minority rights and minority self-government in the 1989 Constitution and by adopting a specific law on minority rights in 1993" ("Minority Self-Governments in Hungary – a Special Model of NTA?," in Tove H. Malloy, Alexander Osipov and Balázs Vizi, *Managing Diversity Through Non-Territorial Autonomy. Assessing Advantages, Deficiencies, and Risks* (Oxford: Oxford University Press 2015), 31).

61 Vizi, "Minority," 37, 45, 50.

62 Balázs Dobos, "The Minority Self-Governments in Hungary," Online Compendium *Autonomy Arrangements in the World*,(2016), 14, accessed 2.11.2022 www.world-autonomies.info.

part of exercising their rights to self-governance in the sphere of culture, education, information and the use of their language and script in official matters, and acting pursuant to the laws, persons belonging to national minorities may elect national minority councils." Until October 2014, 19 national minorities established their national councils, and exercised their collective minority rights to self-governance[63]. At present there are 22 national minority councils and the Federation of Jewish Communities which has a status of the national minority council.

The Hungarian Act includes a number of legal definitions allowing a distinction between cultural autonomy and national minority self-government. The former notion is more comprehensive than the latter, as it covers multiple minority collective rights, including the establishment of a national minority self-government[64]. It is a representative body of a national minority and an administrative law construct, aimed at the implementation of its autonomy[65]. As per Article 2(2) of the Hungarian Act, national minority self-government means an organisation established on the basis of the Act by way of democratic elections that has legal personality, operates as a collegial body and performs national minority public services defined in the Act, and is established to assert the rights of national minority communities, protect and represent the interests of national minorities and to administer, at local, regional or national level, national minority public affairs falling within its functions and powers independently.

According to Article 2 of the Serbian Act 2009 "in order to accomplish their rights to self-government in culture, education, information and official use of language and script, the members of national minorities in the Republic of Serbia may elect their national councils". The Law defines the councils as representative organs of the respective minorities in the fields of culture, education, information in the language of the minorities as well as in the official use of language and script, and endows them with the powers

63 Tamás Korhecz, "National Minority Councils in Serbia," in Malloy, Osipov and Vizi, *Managing*, 71.

64 Under Article 2(3) of the Hungarian Act, national minority cultural autonomy means a collective national minority right that is embodied in the independence of the entirety of institutions and of the self-organisations of national minorities under this Act through their operation by national minority communities by means of self-governance.

65 Vizi, "Minority," 46.

to participate in the decision making processes or decide on the issues related to these fields and establish educational institutions[66], cultural institutions[67], institutions to perform the activities of newspaper-publishing and radio-television broadcasting, printing and reproduction of the recorded media[68], associations, funds, business companies and other organisations in the aforementioned areas[69]. Article 30 stipulates that "elections of national councils shall be based on the principles of freedom of choice, equality of voting rights, periodicity of elections and principle of secret ballot. The elections shall be especially based on voluntariness, proportionality and democracy". In Serbian official documents, the councils are defined as cultural autonomy institutions of national minorities in Serbia[70].

As far as the structure of self-government goes, it is more complicated in Hungary than in Serbia. National minorities in Hungary may establish, by way of direct elections, a) settlement national minority self-governments in villages, towns and capital districts; and regional national minority self-governments in the capital and in the counties (named jointly in the Hungarian Act 2011 as "local national minority self-governments"), and b) national self-governments of national minorities[71]. National minority self-government operates within basic territorial state division units[72]. There is no hierarchical relationship between national minority self-governments[73] nor such a relationship exists between local governments and national minority self-governments[74].

In Serbia, one national minority may elect one representative body (council) to exercise collective right to self-governance in the matters of

66 Article 11 (1) of the Law on National Councils of National Minorities of 31 August 2009, Official Gazette of the Republic of Serbia 2009, No. 72, as amended. Act on the State of Emergency of 21 June 2002, Journal of Laws 2014, No. 111, as amended.

67 Article 16 (1) of the Serbian Act 2009.

68 Article 19 (1) of the Serbian Act 2009.

69 Articles 2(2), 10(6) of the Serbian Act 2009.

70 Korhecz, "National," 70.

71 Article 50 of the Act CLXXIX of 19 December 2011 on the Rights of National Minorities, Official Gazette 2011, no. 154, as amended.

72 Vizi, "Minority," 46.

73 Article 76 (4) of the Hungarian Act 2011.

74 Article 76 (5) of the Hungarian Act 2011.

culture, education, information and the official use of language and script[75]. A national council of a given minority operates at the central level[76]. The Serbian Act may establish mandatory functions and powers for national minority self-governments, which entails simultaneous allocation of appropriate resources and measures for the performance of those mandatory functions and powers by the National Assembly.

The Hungarian national minority self-governments are legal persons. The representative body is an agency of local national minority self-governments while the general assembly functions in regional and national self-governments of national minorities[77]. In the course of administering national minority public affairs, national minority self-governments may, within their functions and powers, adopt decisions, administrate affairs independently, proceed in the capacity of owner in respect of their properties, determine their budgets and carry out budgetary management based on their budgets[78]. Similar regulation is provided in the Serbian Act 2009 linking the acquisition of the status of legal entity by a national council with registering itself with a register kept by the ministry in charge of human and minority rights, which signifies that a national council may acquire and dispose of movable and immovable property, and based on a decision of a competent authority, it may also be a beneficiary of public property, in accordance with the law[79].

The fundamental duty of national minority self-governments in Hungary is the protection and representation of the interests of national minorities, by exercising the functions and powers of national minority self-governments[80]. The lawful exercise of them falls under the protection of the Constitutional Court and courts[81]. According to Article 115 of the Hungarian Act the most important mandatory public tasks of local national minority self-governments cover: 1) tasks related to the maintenance of institutions that perform national minority duties (e.g. schools or cultural

75 Article 75 (3) of the Serbian Constitution. See Beretka, "National,"183.
76 Beretka, "National," 185.
77 Article 76 (3) of the Hungarian Act 2011.
78 Article 78 (3) of the Serbian Act 2009.
79 Suksi, "Non-Territorial," 93.
80 Article 86 (1) of the Hungarian Act 2011.
81 Article 10 (2) of the Hungarian Act 2011.

institutions), among them also transferred institutions and those taken over from other organisations, 2) tasks related to carrying out the interest representation of the community represented by them, in particular the tasks of local governments related to the enforcement of national minority rights, 3) exercising the powers of decision-making and co-decision concerning the operation of institutions operated by the state, local government or other organs in the area of territorial competence of the national minority self-government. Besides this the local national minority self-governments support community self-organisation in their activities, initiate the measures required for preserving the cultural goods associated with the national minority community in the territorial competence of the national minority self-government, participate in the preparation of development plans and assess the demand for education and training in national minority languages. They can also fulfil voluntary tasks in particular in the field of nationality education, culture, social inclusion, public employment, social, youth, and cultural administration.

National self-governments in Hungary, i.e. these self-governments with nationwide competence, have been granted the right of consultation or the right of agreement on different policy issues in relation to public education and cultural self-government affecting the nationality concerned[82]. They perform the duties of interest representation and interest protection of a given minority on national level and in those settlements where there is no local national minority self-government. As institutions functioning on the central level they maintain network of proper national minority arrangements. They should be also consulted on bilateral and multilateral international agreements related to the protection of nationalities and on issues concerning the educational self-administration of people belonging to proper nationality.

In two areas of minority self-governments activities we can discern stronger competences. The first one deals with situations when local governments need the explicit consent of the nationality self-government for any decision which would affect the nationality population in the field of public education, language use, media, culture, social inclusion policies, and social services (art 81(1)). The second is their right to take over public institutions

[82] Articles 27 and 33–49 of the Hungarian Act 2011.

from the state or from the local government, for example, minority schools or other state-financed minority institutions (a theatre, etc.)[83].

As far as Serbia is concerned following Tamás Korhecz typology we can divide all competences of national councils into three groups: 1) powers to express opinions regarding almost all administrative decisions in conjunction with culture, education, information, and language use of national minorities; 2) consent and proposing powers; 3) autonomous decision-making powers.

The first group is the most representative because the concept of the law was not to delegate (mainly administrative) decision-making powers to national councils, but to involve them in the decision-making process of central, provincial, or local authorities. Most often this involvement is in the form of giving opinions which is a weak form of participation in administrative proceedings[84]. Notwithstanding this, the Serbian Act 2009 guarantees that almost no decision of central administrative authorities or the authorities of an autonomous province and local self-government involving matters of a national minority can be made without the participation of its national council. Legal acts in the fields of education, culture, media and official use of language and script issued without national councils participation are null and void. This provision imposes sanctions on all the potential activities of state bodies and other authorities not respecting the rights and powers of national councils and opens the way toward lawsuits if competencies are violated[85].

In many other cases the involvement of national councils is more effective, such as when national councils are solely empowered to propose a draft decision or they have consent (veto) power concerning a decision. A national council can establish proposals of national symbols, emblems and holidays of national minority as well as appoint a member of the management board of an institution founded by the state or self-governmental bodies which was declared by the national council of particular importance

83 Vizi, "Minority," 50–51.

84 Korhecz, *National*, 81; Beretka, *National*, 190 is of the opinion that "national minority councils (…) have no real opportunity to impact on legal decision-making".

85 Tamás Korhecz, "Non-Territorial Autonomy in Practice: the Hungarian National Council in Serbia," in: *Autonomies in Europe: Solutions and Challenges,* ed. Zoltán Kántor (Budapest: Research Institute for Hungarian Communities Abroad, 2014), 155.

for a given minority. Besides this, the councils are authorised by law to protect minority rights in general by initiating a review of a law's constitutionality or by commencing criminal and administrative proceedings[86].

In a few cases, national councils are empowered to decide autonomously in matters related to the identity of the national minority (e.g. they determine the traditional names of settlements and other geographic names in the language of the national minority if the minority language is in official use in that area and decide on the official use of language and script as well as other areas of importance for the preservation of a national minorities' identity). They can manage their cultural and educational institutions and media outlets and claim the right to take from the government of the Republic of Serbia, the Assembly of the Autonomous Province or the local self-government units: 1) educational institutions where classes are held exclusively in the language of a national minority, 2) cultural institutions whose main activity is to preserve and develop the culture of a national minority, 3) institutions broadcasting public information exclusively in the language of a national minority[87]. In this context special importance has article 24 of the Serbian Act 2009. This provision stipulates that the founding rights of the most important state, provincial and local self-governmental public institutions serving the preservation of the specific identity of the respective national minority have to be (partly or completely) transferred to the national council in case if the national council requests so. It is also guaranteed that in the case of such transfer of the founding rights budgetary subsidies of these institutions transferred to the national councils cannot diminished. In case of reluctance to transfer a national council may pursue its claim before an administrative court[88].

The Serbian national councils also have explicit avenues for conducting cross-border and international affairs[89]. According to Article 27 of the Act a national council shall, in accordance with the law, co-operate with international and regional organisations, organisations and institutions in

86 Beretka, *National,* 191.

87 Beretka, *National,* 191.

88 For example 17 lawsuits launched by the Hungarian National Council against the municipality of Senta in 2011 which ended positively for the council (Korhecz, "Non-Territorial," 159).

89 Suksi, "Non-Territorial," 103.

its native countries, as well as with national councils or similar bodies of national minorities in other countries. The representatives of a national council may participate in negotiations, or be consulted during negotiations, on the conclusion of bilateral agreements with native countries in the part directly related to the rights of national minorities.

As far as financial aspects are concerned the elected representative bodies in Hungary depend on local authorities in this regard. One of the strongest elements of cultural autonomy – the right to take over from the state or the local government minority serving public institutions – is undermined by the serious financial risks incurred[90]. Activities of national councils in Serbia are financed in similar way, i.e. by the budget of the Republic, the budget of the autonomous province, the budget of local self-governments, donations, and other incomes[91]. Despite the legally regulated duty of multi-ethnic municipalities to contribute to the financing of councils that represent a national minority living in their territory, this contribution depends on how municipalities and minority councils actually co-operate[92].

Being self-government entities the minority cultural councils are supervised by government authorities. In Hungary the capital or local government office shall supervise the legality of national minority self-governments under the same terms and in the same ways applicable to the supervision of the legality of local governments, with the exception of substituting decisions that the national minority self-government failed to adopt[93]. The National Assembly acting on proposals submitted by the Government shall dissolve those national minority self-government bodies, the operation of which is contrary to the Fundamental Law[94].

In Serbia the legality of actions and acts of national councils shall be monitored by the Ministry in accordance with the Constitution and the Law[95]. The competent ministry shall initiate the proceedings before the Constitutional Court for the assessment of the constitutionality and legality

90 Salat, "Conclusion," 262; Vizi, "Minority," 51.
91 Article 114 of the Serbian Act 2009. See Korhecz, "National," 81.
92 Beretka, "National," 194.
93 Article 146 (2) of the Hungarian Act 2011.
94 Article 150 of the Hungarian Act 2011.
95 Article 120 of the Serbian Act 2009.

of a national council's statute, regulation and any other general act, if it considers that such an act is not in accordance with the Constitution, Law or another national regulation. The same steps are to be taken by the Autonomous Province authorities if they consider that such an act is not in accordance with provincial regulations[96]. The Ministry can suspend the implementation of any act of a national council which is not compliant with the Constitution, Law or another regulation. The suspension is to be terminated if the Ministry fails to initiate the proceedings before the Constitutional Court[97].

6. Conclusions

The national minority councils in Serbia and Hungary are without doubt forms of decentralization of public power but deviate from the concept of Otto Bauer and Karl Renner in that they are not entitled to exercise legislative power, nor members of minorities are exempted from the application of general national legislation[98]. They do not have any law-making nor tax-raising capabilities and sufficient financial backing[99]. In its current form these institutional arrangements should not be located in the context of the national cultural autonomy idea formulated by Otto Bauer and Karl Renner.

The competences of minority self-governments in Hungary and Serbia has been described by Lavente Salat as "symbolic competences with strong legal bases"[100]. The lists of these competences are long and comprehensive, although generally they have only consultative character. I agree with assessment that national councils exercise low level of public authority[101]. A proposal to equalize the status and position of national councils and units of local self-government seems to be rational taking into consideration the fact that they are both tools for decentralization of state

96 Article 121 of the Serbian Act 2009.

97 Article 122 of the Serbian Act 2009.

98 Athanasios Yupsanis, "Minority Cultural Autonomy in Slovenia, Croatia and Serbia: A Real Opportunity for Cultural Survival or a Right Void of Substance?," 12 (1–2) *Europäisches Journal für Minderheitenfragen,* (2019): 112.

99 Yupsanis, "Minority," 104.

100 Salat, "Conclusion," 260.

101 Suksi, "Non-Territorial," 114.

powers and democratically elected bodies with competences[102]. Minority self-governments are devoid of tax-raising capabilities so the effectiveness of their activity depends on the cooperation with local and central authorities. Without constant cooperation and "good will" between the minorities' self-government bodies and various public authorities (ministries, provincial authorities, municipal authorities) proper functioning of the system is impossible[103]. At the same time "the overly-detailed regulation of nationality self-governments' operation and supervision, as well as the sometimes unclear provisions regulating specific areas, may lead to undue restriction of the free exercise by the minorities of their rights and by nationality self-governments of their competences"[104].

These facts notwithstanding in my view the legal status of national self-governments should not be interpreted outside notion of special self-government as explained at the beginning of the paper. They perform public tasks, possess legal personality and are formally independent from other authorities being only supervised by state agencies. They have some decision-making competences for example in the area of the management of those public institutions, mainly cultural and educational, which were created by the respective council or which have been taken over from other public entities.

As we have noted the legislator decides on the limits of decentralisation. The protection of minorities shall be complete only when a community gets an opportunity to protect the language and culture by local normative decision-making and implementation[105]. Such a high level of decentralization does not exist in case of minorities' self-government in Serbia and Hungary but first level of subsidiarity is discernible here which occurs when the state creates a legal and institutional framework in which the factual

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102 Korhecz, "National," 90.

103 Gwyneth E. Edwards, "Hungarian National Minorities: Recent Developments and Perspectives," *International Journal on Minority and Group Rights,* no. 5 (1998): 351; Korhecz, "Non-Territorial," 162; 351.

104 Opinion No. 671/2012 on the Act on the Rights of Nationalities of Hungary, adopted by the Venice Commission at its 91 Plenary Session (Venice, 15–16 June 2012), cdl-ad(2012)011, Strasbourg, 19 June 2012, para. 33.

105 Balázs Szabolcs Gerencsér, "Protection of Local Indigenous Communities in the Scope of Governance," *Iustum Aequum Salutare,* vol. IX no. 2 (2013), 93.

implementation belongs to the minority[106]. Self-determination appears in implementation of rights within a central regulation framework.

The national minority councils in Serbia and Hungary are interesting examples of using one of the decentralisation model created in XIXth century European administrative thought for maintaining the cultural identity of national minorities.

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[106] Gerencsér, "Protection," 88.

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