

NATIONAL MINORITIES

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Pulling the Wool over Hungarains' Eyes

Facts and aspects

The complexity of issues and debates concerning the implementation of provisions of the Act on Hungarians Living in the Neighbouring States (No. 62 of 2001, hereinafter: the Act) can be approached in numerous ways.

One of the possible lines of analysis would follow the *potential legal development in diaspora law* or in a wider circle of domestic law in Hungary due to the fact that about 150 various legal sources have regulated in recent decades, in a hidden or in an obvious way, the benefits and distribution of support for ethnic Hungarians across the borders. This new stratum of law, namely diaspora law aims to draw further consequences for state administration, public management and legislation in contemporary Hungary.¹

Another analysis may investigate how the Act and its preparation as well as its practice influence *domestic policy*. For instance, which is more relevant – the competition for voters in the continuous electoral campaign for ruling power or its effect on nation building in the post-communist period. This approach has to be inserted into the process of how *diaspora policy* has become an organic part of domestic politics,² including the oscillating level of prejudices

1 Tóth, Judit: “Diaspora in Legal Regulations: 1989–1999”. In Kiss, I. – McGovern, C. (eds.): *New Diasporas in Hungary, Russia and Ukraine: Legal Regulations and Current Politics*. Budapest: Open Society Institute/COLPI, 2000, 42–95.

2 Tóth, Judit: “Diaspora Politics: Programs and Prospects”. In Kiss, I. – McGovern, C. (eds.): *New Diasporas in Hungary, Russia and Ukraine: Legal Regulations and Current Politics*. Budapest: Open Society Institute/COLPI, 2000, 96–141. Csigó, Péter – Kovács, Éva: “The Hungarian – Romanian Basic Agreement: Positions and Issues in the Debate”. In Kiss, I. – McGovern, C. (eds.): *New Diasporas in Hungary, Russia and Ukraine: Legal Regulations and Current Politics*. Budapest: Open Society Institute/COLPI, 2000, 142–190.

in Hungary toward ethnic Hungarians living in neighbouring countries or farther abroad (Figure 1),³ and whether the existing cleavages in ethnic cross-border politics have become greater or smaller.⁴

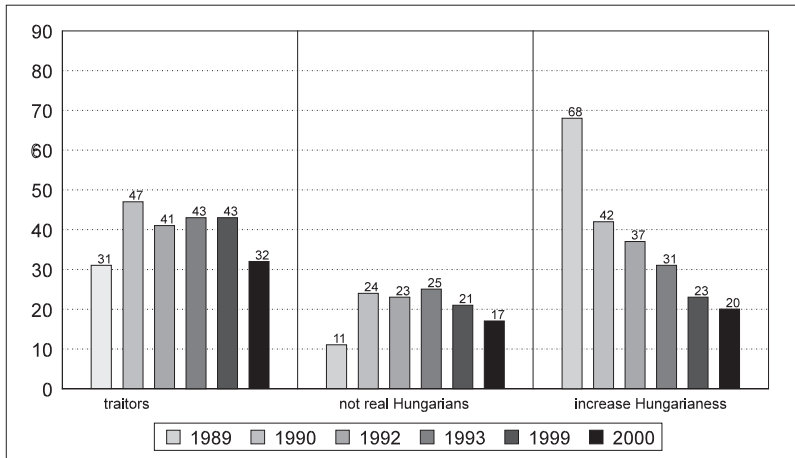


Figure 1. Attitudes toward ethnic Hungarians from Transylvania (1989–2000) (%)

Taking into account the context of the Act, the *external relations and European integration of Hungary* must be inserted into the structure of issues. From this perspective the Act will be evaluated as part of the compensatory measures of the changing time-frame of accession of the states from the region. Certain

Varga, György: "Diaspora Policy of the Hungarian Government: Means and Institutions". In Kiss, I. – McGovern, C. (eds.): *New Diasporas in Hungary, Russia and Ukraine: Legal Regulations and Current Politics*. Budapest: Open Society Institute/COLPI, 2000, 191–202.

3 Tóth, Judit – Sik, Endre: "Joining to the EU identity – integration of Hungary or the Hungarians?" Manuscript, 2002 (forthcoming). Source of data: Csepeli, György and Sik, Endre: "Changing Content of Political Xenophobia in Hungary – Is the Growth of Xenophobia Inevitable?" In Fullerton, Maryellen – Sik, Endre – Tóth, Judit (eds.): *Refugees and Migrants: Hungary at a Crossroads*, Budapest: MTA PTI, 1995, 121–128., further TÁRKI Omnibus 1999 and 2000.

4 Bárdi, Nándor: "Cleavages in Cross-Border Magyar Minority Politics 1989–1998". *Regio*, 2000, 3–36.

governmental efforts intend to eliminate the isolation of neighbouring people, in particular of ethnic Hungarians. The new walls of visa restrictions, border and migration control introduced in part as elements of the *acquis communautaire*⁵ will destroy regional trust, co-operation and communication precisely in the region with permeable borders and newborn *migratory movements*.⁶ For this reason, the multiplier effect of the Act on migration to Hungary, including the impact on the labour market, informal economy, social insurance, public utilities and services can form an important part of criticism.

Finally, the Act will be systematically described from the *perspective of diaspora* and Hungarian communities. It may affirm or deny whether the Act has contributed to the full emancipation and integration of an ethnic minority into the local society, or how support from the kin-state may assist the self-definition, national identity and institution building of Hungarian communities abroad – in other words, how the diaspora can become a definitive partner and actor in political discourse and in debates at local as well as state and regional level.

Such holistic research requires team work and a relatively long time scale, not only for analytical description but also for time-series of social, legal and political effects and practices. Due to these difficulties the author may highlight from the whole package in an ad hoc way some elements inspiring further analysis.

The genesis

The Governing Programme of the ruling party (1998–2002)⁷ projected the possible creation of the Act, although it was not definitive. Under the sub-title of “*Integration policy expressing national interests*” the Programme refers to the close relation between EU accession and implementation of the Community rules on visas and immigration (of third country nationals) and the re-

5 Tóth, Judit: “The Impact of the EU Migration Policies on Central-Eastern European Countries”. *Refugee Survey Quarterly*, Vol. 20, No.2, 2001, 102–114. Tóth, Judit: “Security of Residence and Expulsion: Protection of Aliens in Hungary”. In Guild, E. – Minderhoud, P. (Eds.): *Security of Residence and Expulsion – Protection of Aliens in Europe. Immigration and Asylum Law and Policy in Europe Vol.1*) The Hague: Kluwer Law International, 2001, 165–174.

6 Hárs, Á. -Sik, E.-Tóth, J.: “Hungary”. In Wallace, C. – Stola, D. (Eds.): *Patterns of Migration in Central Europe*. Palgrave, 2001, 252–276.

7 The whole text in Hungarian can be found on www.htmh.hu/kormanyprogram.htm

lations with neighbours. “For this reason the Government is making efforts to prepare and have accepted by the EU *special solutions* that can ensure an uninterrupted relationship with the population of neighbouring countries, in particular with Hungarians living there, and that cannot diminish the attained level of Hungary’s good neighbourhood policies.” Integration policy based on (partly) national interests also includes assistance for the EU accession of neighbouring states as well as respect for bilateral agreements on friendship and co-operation (Basic Agreements) with neighbours that “shall be made more substantial and supplemented by further agreements on details and practical issues.” It is not clear whether one-sided regulation is an immanent element of “special solutions” or rather diplomatic measures and instruments are implied.

The Programme refers to legislation more unequivocally under the sub-title of *National policy*. Ethnic Hungarians living across the borders are mentioned as participants in the unification of Europe, as subjects who shall be growing in, and as people who are to remain in, the homeland (across the borders). “For these purposes the relations of Hungarians across the borders with Hungary shall be determined within a *legislative* and administrative framework which will be able to ensure an organic relationship of Hungarian communities to the kin-state even after EU accession.”

Citations can prove that the governing power has considered ethnic minorities beyond the borders as “historical obstacles” to politically smooth European integration and friendship with neighbours. This is the foreign affairs context. On the other hand, the ethnic communities are said to belong also to the fragmented nation that intends to be unified (at least spiritually) again. This dichotomy is reflected in the programme as well as the three priorities in foreign affairs doctrine followed since 1989 in Hungary. Accordingly, the major and equally important goals of external policy are as follows: accession to NATO and the EU; maintaining good relations with all neighbours; taking responsibility for ethnic Hungarians outside Hungary as a kin-state cherishing wide contacts with Hungarians living across the borders. Instead of the promised hard negotiations with the EU, there were noisy debates on the Bill inside parliament and in media political discourses about national interests, special solutions and compensatory measures for restrictions on movement. The closing of chapters of the *acquis* on movement, and justice and home affairs without any derogation (as a possible element of “special solutions”), but with the acceptance of temporary limitations for Hungarian na-

tionals concerning mobility in the EU, the adoption of the new, rigid Act on entry and residence of all kind of foreigners in Hungary, and the loud voting process on the Act all followed each other within a month in 2001.⁸

The Government started to outline the Act only in its third year in power. During the previous years it basically followed the existing diaspora policy and regulations, recruiting its own staff, clients and representatives of Hungarian communities in the Carpathian Basin. Then the Bill's preparation was upgraded in 2000. The Standing Conference of Hungarians as a forum for political negotiations was playing a declining role in this process. Although it was established by Parliament in 1999 and its tasks were defined and co-ordinated by the Government, the Conference could not democratically and publicly debate the substance of the Bill while forming a national consensus. The Government Office for Hungarian Minorities Abroad (inserted into the Ministry of Foreign Affairs) in a rather conspiratorial way managed the preparation and negotiated some principles with arbitrarily selected partners behind closed doors. In parallel, the media as actor in the eternal election campaign, was publishing controversial news about the Bill and its changing elements. Due to the wide range of promised and desired rights for Hungarians (i.e. double citizenship, Hungarian passport) the regulation was referred to as "Bill on the Act on Status of Hungarians", "Act on Status" or briefly "Status law". Finally, the majority of the Conference adopted the regulatory principles as the only option, but without consensus. Economic, budgetary, labour, legal or public management analyses were not made about the preconditions or consequences of the regulation and its benefits for ethnic Hungarians. In this way, alternative proposals could not be submitted.

Substantial and public discussion of the Bill started only inside Parliament in early 2001. At that time its title changed to "Bill on the Benefits for Hungarians Living Across the Borders". The Hungarian Socialist Party, as the major opposition party, submitted a lot of motions expressing its willingness to formulate an admissible common minimum in national policy and diaspora law. The Alliance of Free Democrats attacked both the principles and the legal provisions of the Bill. The overwhelming majority of the submitted amendments were rejected and despite dramatic arguments the Act under the simplified titles "on Hungarians Living Across the Borders" was passed

⁸ The Act was passed by parliament on 19 June 2001, the Act on entry of foreigners and residence in Hungary (No. 39 of 2001) was adopted on 29 May 2001. The closure of the mentioned chapters was announced in late June 2001.

by 90 per cent of MPs under the pressure of public opinion and with the heightened expectations of Hungarian communities beyond the borders.

The Act entering into force on 1st January 2002 contains the following benefits for a “Hungarian Certificate” holder as well as for his/her minor and spouse:

<i>Area of</i>	<i>How</i>	<i>Benefits and support</i>
<i>Cultural rights</i>		
	As nationals	Services in public institutes (i.e. in archives)
		Membership in the Hungarian Academy of Sciences
	Free of charge	Public libraries, public collections, museums
	As nationals	Competition for state scholarships
	Upon request	Regular training in Hungary for Hungarian teachers within the yearly quota
	Upon request	Contribution to training in home country for Hungarian teachers
	As nationals	Teacher card that provides some commercial discounts (i.e. buying books)
	Later defined by law	Undefined further benefits for Hungarian teachers and lecturers
	As nationals	State Awards
<i>Schooling</i>		
	As nationals	Studies at university, college, PhD and post-secondary courses
		Regular state scholarship at university or college within yearly quota
	Upon request	Contribution to fees in non-state studies
	As nationals	Student card that provides commercial discount (i.e. for public transport)
	Upon request	Contribution to setting up new department of university/college in co-operation with founding university/college in Hungary
	Upon request	Family care and education contribution for bringing up at least two minors attending public school in Hungarian language

<i>Area of</i>	<i>How</i>	<i>Benefits and support</i>
	Upon request	Contribution to study costs of attending university/college
<i>Social rights</i>		
	As ensured persons	Social insurance including pension and medical care if insurance contribution is paid in Hungary
	As bilateral agreement defined (free of charge)	Medical care in case of emergency
<i>Public transport</i>		
	Free of charge	Minor below 6 or over 65 on local and national public transport
	For 10 percent of the regular price	Persons aged 7–64 on public transport 4 times yearly
		Group travel (at least 10 minors)
<i>Employment in Hungary</i>		
	As privileged foreigners	Yearly a three month period of employment in possession of labour visa and permit within yearly quota
	Upon request	Contribution to fees and charges in labour authorisation
<i>Publicly financed media</i>		
	Ex officio	Broadcasting news about and programmes for Hungarians beyond the borders
	Ex officio	Contribution to costs of establishing and operation of editorial offices and studios for Hungarians beyond the borders
<i>Community building</i>		
	Upon request	Contribution to operational costs and programmes of civil organisations of Hungarians beyond the borders

A “Hungarian Certificate” shall be issued to persons declaring themselves to be of ethnic Hungarian who:

(1) are not Hungarian citizens, and

- (2) have their residence in the Republic of Croatia, the Federal Republic of Yugoslavia, Romania, the Republic of Slovenia, the Slovak Republic or the Ukraine, and
- (3) have lost their Hungarian citizenship for reasons other than voluntary renunciation, and
- (4) are not in possession of a “green card for permanent stay” in Hungary, and
- (5) have submitted a formal application to the appropriate Hungarian authority, and
- (6) have a clean criminal record in Hungary (“no criminal proceedings have been instituted against the applicant in Hungary for any intentionally committed offence”), and
- (7) have not been put on the list of unwanted foreigners (“neither expulsion order nor a prohibition of entry or stay, issued by the relevant Hungarian authorities on the basis of grounds determined in a separate Act, is in effect against the applicant in Hungary”).

A “Certificate for Dependant” shall be issued to persons who

- (1) (meet the above requirements, regardless of ethnic origin, and
- (2) (as spouse or minor child is living together with a “Hungarian Certificate” holder in his/her common household, and
- (3) (has submitted a formal application to the relevant Hungarian authority (if a minor, his/her statutory representative).

The most disputed issues

Ever since the inception of the idea, and then when the principles of the Bill and the text of the Act were made public, political opponents and various experts in differing geographical circles have discussed certain aspects of the regulation.⁹ These can be divided into the following domains.

⁹ Due to the large number of publications and media the MPs’ opinions can be read; see www.mkogy.hu/naplo and periodicals covering negotiations on the Act, such as *Beszélő* (i.e. May 2001), *Élet és Irodalom* (since 16 November) or *Magyar Kisebbség* (2002, No. 1.). Proceedings of a conference on the Act held by the Teleki László Institute and the Institute of 21st Century (Budapest, 30 November 2001). The articles were published in Kántor, Zoltán (ed.): *A státustörvény előzmények és következmények*. Budapest: Teleki László Alapítvány, 2002. A conference on the Act held by the Institute for Legal Sciences (H.A.S.) (19 July 2001) also generated deep discussion.

The basic question has been whether a *framework act is necessary or not*. For legal reasons the existing scattered legal provisions concerning Hungarians across the borders would have required a certain tidying and screening, but not through a new act lacking comprehensive principles. Such an act might have been necessary for non-legal reasons. Since those in power did not manage to generate broad political agreement within public opinion about the special motives or need for a symbolic bond between the kin-state and parts of the nation beyond the border in a globalised world, the sceptical voices have been more authentic. Due to the lack of consensus, criticism was sharp concerning how the Act was prepared. The absence of substantial consultations with Hungarian communities, home states and social partners in Hungary, and of social surveys about the impact of the Act were most frequently cited. The budgetary expenditures were not projected carefully or publicly. In the end, the spiritual and emotional unification of the truncated nation remained the most pressing argument for the Act. The Act only covers Hungarians living in the Carpathian Basin (originally the Bill included Austria, but it was deleted due to a motion submitted by the ruling party), while the Hungarian diaspora has spread to other European countries and indeed world-wide. The Act thus makes second class Hungarians of the millions of excluded persons.

People arguing about the regulatory principles often raise the *benefits provided in Hungary* as pulling factors for migration to the kin-state in transition. Hungary is surrounded by depressed regions with a high unemployment rate, low incomes, poor health care and an undeveloped schooling system in terms of ethnic requirements. These factors cannot be balanced by the diaspora policy principle of keeping minorities in their home state as a heroic, living patriotic symbol of the continuity of Hungarian culture and history. It could cause severe frustration that a major part of benefits can be enjoyed in Hungary while free travel and residence in the kin-state is strongly limited. Moreover, the benefits are not based on individual rights and the growing discretionary power of Hungarian authorities including public foundations, representatives of state agencies and arbitrarily selected organisations of Hungarian communities in certificate proceedings altogether makes the *paternal connections* of the kin-state alive and strong toward members of the national communities beyond the borders. This rather intentional consequence would hinder their integration and emancipation in local society in the home state.

In addition to the above-mentioned criticism, the *personal scope of the Act* is also legally problematic. The overwhelming majority of Hungarians living in surrounding countries had never had Hungarian citizenship, and those persons who had ever been Hungarian citizens could have lost it in different ways (renunciation, removal, deprivation, optional decision from multiple citizenship, due to international treaty) between 1920 and 1994. In brief, the fair implementation of the Act could cover some thousands of elderly persons. Although citizenship law experts warned about it, the law-making mistake remained in the text. The regulations probably intended to cover not only persons who have ever had Hungarian citizenship but also their descendants, but in a state governed by the rule of law written provisions should be applied instead of instructions, circular letters or government intentions.

The benefits beyond the area of cultural heritage have generalised the *fear of a mass influx* of ethnic Hungarians into Hungary. The three-months labour and related social insurance have been forcefully targeted. *Challenging labour market and medical care* benefits has led trade unions and social organisations to obtain guarantees concerning the control mechanism for implementation of the Act. The Government, which had neglected employer-employee interest reconciliation for years, had to suddenly confer with social partners on the Act and its economic ramifications, in particular in the light of reactions of neighbouring states. As the Protocol in connection with the Extraordinary Meeting of the National Labour Council¹⁰ proved, the social partners were totally uninformed. Thus they required full information about negotiations with the Romanian government about labour migration. They also demanded participation in the necessary modification of the rules on employment of foreigners in Hungary, as well as up-to-date statistics on labour movements. The Government promised to involve the social partners in the preparation of the executive rules of the Act in the realm of labour. In order to make the labour market controllable (in principle), an annual quota of foreign workers was established – something that had never existed before. Similarly, the Public Health Committee of Parliament was urgently convened¹¹ to discuss the endangered medical care due to the influx of migrants. According to the relevant minister, the sum of social insurance contributions would be higher than the costs of appli-

10 *Official Gazette* (17 January 2002) published the Protocol of the Extraordinary Meeting of the Labour Council (4 January 2002) Tájékoztató az Országos Munkaügyi Tanács üléséről.

11 *Népszabadság*, 11 January 2002. “Ki fizet a külföldiek után?”

cable services. Not surprisingly, the arguments could not convince opposition MPs how the net income would be ensured.

Echoes from international bodies

As the Act in its unofficial English translation was available for an international audience, the legal and political reactions were born. In October and November 2001 the Council of Europe, the European Union and the Commissioner for Minority Issues of the OSCE gave their own opinion.

The Venice Commission, as the expert body of constitutional (and international public) law under the umbrella of the Council of Europe, put the Act on its agenda. The paper submitted by the *Hungarian government explained how and why* the goals and principles of the Act were in harmony with international standards on minority protection.¹² Respecting diversity as a value in Europe, as the Council of Europe has recognised many times in various documents, and taking into account the beneficial treatment of ethnic minorities on the basis of minority protection standards, the accusation of discrimination by the Act was rejected. Moreover, the Framework Agreement on the Protection of National Minorities (1995) in the CE allows for each party state to stand up for its own ethnic minorities including support provided for them. The Act is in accordance with the Framework Agreement because its compensatory measures are based on lawful, legitimate and objectively defined aims that are proportional to disadvantages related to being a minority. The Government strongly referred to legislation on national minorities issued by the neighbouring kin-states as a point of case law. Their legal practice and regulation have been criticised neither by Hungary nor by European forums. This may confirm the tacit consensus of states regarding the interpretation of co-operation between a kin-state and members of ethnic minorities living in neighbouring states. It can allow that organisations of minorities in the home state make suggestions to issue the Certificate as a basic requirement for benefits provided by the kin-state. This direct co-operation with the authorities of the kin-state means no authoritative power of organisations or communities of independent organisations. Finally, the personal scope of preferential treatment is opened up. A spouse or minor can enjoy it regardless of ethnic origin as the rules on the “Certificate for Dependand” prove.

¹² *Position Paper of the Hungarian Government in relation to the Act on the Hungarians Living in Neighbouring Countries*. Ministry of Foreign Affairs, 2001. Unpublished.

Thus a discriminative approach is far from the entire spirit of the regulation. The Hungarian government maintained a strongly defensive opinion instead of a progressive view concerning the framework and substance of international public law concerning the relations of the kin-state – home state – kin-minority triangle. An appendix enumerated the inter-governmental “consultations” (meetings, information supply) with neighbouring countries, rebutting the charge of unilateral decision-making and absence of dialogue.

The *Venice Commission’s advisory opinion*¹³ considers the recently spreading tendency of one-sided, domestic regulation of kin-states towards kin-minorities (i.e. in Constitution or in special law) as a non-desirable manifestation. This legislation reveals the failure of established co-operation and consent between the kin-state and home state. The correct legal policy should be based on bilateral regulation formed by the mutual interaction and dialogue of the states in question. This would involve either multilateral convention or bilateral treaty. Although the basic agreements (on friendship and co-operation) concluded by numerous European countries with each other provide only a general framework of interstate connections without special provisions on kin-minority issues, they should be supplemented by specific rules on interests, mechanisms and guarantees in favour of national minorities, and for kin-state and home state co-operation. These framework agreements would be subjected to prevailing international control and mediator mechanisms in case of disputes or violation of obligations by a party state. In addition, their provisions should be implemented directly through the courts in the home state. Moreover, there are no independent forums that could be entitled to interpret later rules in framework agreements or to reconcile the parties. Due to these limitations, governments have definitive power to execute the framework agreements while other democratic organs, including the representative organisations of kin-minorities, are excluded from the dialogue, from law-making and from implementation of the provisions (i.e. kin-minorities have no right of veto). The existing bilateral agreements on interstate relations and national minority issues shall be approached in a complementary way together with numerous international mediatory agencies (OSCE, its Commissioner, UN Human Rights Commissioner), good offices and missions, as well as soft-law orienting minority policy. Briefly, the

¹³ European Commission for Democracy through Law (Venice Commission) 168/2001 CDL-Inf (2001)19. Report on the preferential treatment of national minorities by their kin-state adopted by the 48th Plenary Meeting (Venice, 19/20 October 2001).

unilateral, domestic regulation of a kin-state cannot supersede bilateral or multilateral dialogue, mutual trust and interstate co-operation. If one-sided regulation were needed concerning national minority issues in a kin-state, it should have respect for principles of international law (*pacta sunt servanda*, respect for sovereignty of the home state, principle of good neighbourliness, respect for human rights and fundamental freedoms, in particular the prohibition of discrimination,) while preparations are made for the implementation of bilateral and/or international agreements.

“Responsibility for minority protection lays primarily with the home states. The Commission notes that kin-states also play a role in the protection and preservation of their kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong. [...] In fields other than education and culture, the Commission considers that preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of maintaining the links with the kin-states and to be proportionate to that aim (for example, when the preference concerns access to benefits which are at any rate available to other foreign citizens who do not have the national background of the kin-state).”

The *OSCE High Commissioner on National Minorities* drew the attention of kin-states to the same. The protection of minority rights as an obligation belongs to the state in whose territory national minorities are living, as he emphasised.¹⁴ “History shows that when states take unilateral steps on the basis of national minorities living beyond the jurisdiction of the state, this sometimes leads to tensions and frictions, even violent conflict. I am therefore obliged to focus special attention on situations where similar steps, without the consent of the state of residence, are contemplated.” Visiting Bratislava in late January 2002,¹⁵ he was less diplomatic, stating that the Act had extraterritorial effect and discriminatory elements. Thus it would establish a detrimental precedent.

The *EU Commission's Report*¹⁶ criticised the Act in the context of foreign and security policy. While Hungary has continued to develop good-neighbourly relations, the Act adopted without consultation raised controversies

14 Ekéus, Rolf: “Statement on Sovereignty, Responsibility and Minorities”. 26 October 2001. See www.osce.org/news/generate.php3

15 *Népszabadság*, 26 January 2002.

16 Commission of the European Communities: 2001 Regular Report on Hungary's Progress Towards Accession. Brussels, 13.11.2001 SEC(2001)1748

with some neighbouring states. While the objective of the Act is to support Hungarian minorities in neighbouring countries and to maintain their cultural heritage, some of the provisions laid down in the Act “apparently *conflict with the prevailing European standards of minority protection*” as determined in the Venice Commission’s Report. “Also, as foreseen in its Article 27 (2) the Law¹⁷ will need to be *aligned with the acquis upon accession at the latest, since it is currently not in line with the principle of non-discrimination* laid down in the EC Treaty (Article 6,7,12 and 13). As the Law itself represents framework legislation, it will not be applicable without the adoption of implementing decrees. Hungary will therefore need to comply with the above principles and hold the necessary *consultations in order to agree with its neighbours* also as regards implementing legislation in the future. Consultations with the Romanian and Slovak governments started in summer 2001, so far without concrete results. Following the adoption of the Venice Commission’s Report (including by Hungary itself), Hungary has, however, committed itself to complying with the report’s findings.”

Discourses with neighbouring home states

The top leaders of Romania were the first to send clear messages about rejection of the implementation of the Act in the territory of Romania. Their determination was well-founded in view of the statements of the Council of Europe, OSCE and EU. The position of the Hungarian government involved a kind of blackmail – it wanted to implement the Act on 1st January 2002 at any price. Thus a *Memorandum of Understanding*¹⁸ was put under the Christmas tree of Hungarians. It was signed on 22nd December 2001.

The direct impact of the international climate can be proved both formally and substantially. The text was written exclusively in English for international consumption, although all existing bilateral treaties were drawn up in the official languages. The Memorandum as an instrument of *soft law* is far from the public law traditions of Hungary. The Memo in spirit of consensus

17 Article 27 (2) of the Act said: “From the date of accession of the Republic of Hungary to the European Union, the provisions of this Act shall be applied in accordance with the treaty of accession of the Republic of Hungary and with the European Community law.”

18 Memorandum of Understanding between the Government of the Republic of Hungary and the Government of Romania concerning the Law on Hungarians Living in Neighbouring Countries and issues of bilateral co-operation. Budapest, 22 December 2001

wanted to be in harmony with (1) the Venice Commission's opinion, (2) the statement of the OSCE High Commissioner, (3) the EU Report, (4) the "Treaty on understanding, co-operation and good-neighbourliness between the Republic of Hungary and Romania", in particular the provisions concerning the protection of the rights of persons belonging to national minorities, acknowledging that providing effective equality in rights and opportunities for the national minorities living in their respective countries and creating conditions for them to prosper in their land of birth, constitute an indispensable contribution to the stability of the region and to the creation of a future Europe, based on values such as cultural and linguistic diversity, and tolerance, (5) "the rhythm of development of bilateral economic relations and [...] commercial exchanges between their states", and (6) the "progress of Romania in meeting the accession criteria". The Hungarian party offered to support the proposal that Romania become a member of the North Atlantic Treaty Organisation.

This political document appears as an international binding treaty with substantial modification of the Act, although Parliament had given no authority to conclude it, and it was neither ratified nor published. "The present Agreement sets forth conditions of implementing the Law on Hungarians Living in Neighbouring Countries with regard to Romanian citizens." Accordingly: (1) All Romanian citizens, notwithstanding their ethnic origin, will enjoy the same conditions and treatment in the field of employment on the basis of a work permit on the territory of the Republic of Hungary. (2) Romanian citizens of non-Hungarian ethnic identity shall not be granted any certificate (for Dependant) and shall not be entitled to any benefits set forth by the Act. (3) The entire procedure of granting the Certificate (receiving of applications, issue, forwarding) shall primarily take place on the territory of the Republic of Hungary (through county public administration offices, Ministry of Interior) and at the Hungarian diplomatic missions. This excludes the organisations of Hungarian communities being actors that could issue a binding document as attachment to an application. (4) The Certificate shall contain only the strictly necessary personal data and the entitlement to benefits (name, forename, citizenship, country of residence, etc.) and shall include no reference to ethnic origin/identity. (5) The compulsory criteria on which certificates are granted shall be based on the free declaration of the person belonging to the Hungarian minority in the state of citizenship, knowledge of the Hungarian language or Hungarian ethnic identity, or

optionally, membership of a Hungarian representative organisation or of a (Hungarian) church. (6) Hungary shall not grant any kind of support to Hungarian political organisations in Romania unless previously informing the Romanian authorities and obtaining their consent. (7) The Parties shall start negotiations on an Agreement on the preferential treatment of the Romanian minority on the territory of Hungary and of the Hungarian minority on the territory of Romania, in order to preserve their cultural identity in accordance with the provisions of international documents, the Venice Commission's report, and the guidelines of the OSCE High Commissioner on National Minorities.

Both the legality and the legitimacy of the unpublished pact were severely criticised by the opposition parties, as well as diplomatic and legal experts.¹⁹ The kin-minority, as hostage of the disputed situation, had to be pleased, though members of the Hungarian community could obtain information only in part through the press. Elderly Hungarians and perhaps people of the middle generation could sigh with satisfaction, keeping in their hands the Certificate as an exhibit of his/her challenged Hungarian identity in the home state.

Bad things always come in threes. The Act having extraterritorial effects on Slovakia, the *Slovak parliament* discussed blocking implementation of the Act in Slovakia in early February 2002. While state secretaries and officials from the Ministry of Foreign Affairs were commuting between Bratislava and Budapest in order to outline a solution, the Slovak parliament was intending to adopt a negative position regarding MPs who requested a "Hungarian Certificate". According to the latest news the foreign minister of Slovakia announced the possibility of an accord with Budapest: it would be formed in a Memorandum of Understanding following the Romanian pattern.²⁰ It will refer to a Basic Agreement between the two states providing proper manoeuvring room for support of kin-minorities and monitoring their conditions. The Memorandum will invite the Hungarian parliament to harmonize the Act with the Report of the Venice Commission, looking for bilateral agreement in all kinds of benefits outside the cultural heritage.

¹⁹ See the set of articles in daily and weekly newspapers, such as Nagy, Boldizsár: "A szándék-buborék". *Élet és Irodalom*, 25 January 2002, Eörsi, István: "A visszavonulás pancseréi". *Népszabadság*, 12 January 2002.

²⁰ *Népszabadság*, 9 February 2002. Interview with Eduard Kukan minister.

In view of the experiences of neighbours, diplomats of *Ukraine* announced the requirement for “compensation” if the Act is intended to be implemented in its territory. In order to respect the non-discrimination requirement, the entire population of the Trans-Carpathian district would be covered by a bilateral agreement on labour, regardless of the ethnic origin of any potential labour migrant. As a Ukrainian proposal articulated in 2000, an annual quota for labourers in Hungary would be agreed.²¹ Being a poor region with high unemployment, cultural identity and related challenges vary in priority given the economic situation. The first reaction of Budapest was negative: the labour agreement had no connection with the Act. Furthermore, Hungary would maintain the visa-free regime toward Ukraine up to accession. What compensation, therefore, do they want?

This indicates that the exchange of views, interstate co-operation and dialogue cannot be substituted by unilateral, one-sided regulation. The opinion and the climate formed by international organisations is coercive enough to force the Hungarian government and perhaps the parliament to amend prior principles. However, they are ready to re-shape the regulation and relations with kin-minorities *if it involves no loss of prestige of each actor*. The modification of rules is partial, making more confusing the legal provisions in question, while the negative reactions of home states have increased not only the Government's power in confrontation, but also the ethnic cohesion and feeling of endangered national identity of Hungarians across the borders. The leaders of Hungarian communities were interviewed non-stop, so publicity about the alleged subjects of benefits was grew strongly, which improved their legitimacy and positions, playing a political role in home state and kin-state alike. Moreover, the opponents of the Act (at least in this form) are satisfied in seeing the similar arguments of neighbouring states against the one-sided regulation. Finally, neighbours may also feel victory over the discriminatory rules of the kin-state in the international debates about the Act.

²¹ *Népszabadság*, 9 February 2002. Orest Klempus ambassador gave information on a press conference in Budapest, 8 February 2002.

Impact on the diaspora law

Since 1989 the Act has been the first legal instrument, which manifestly relates to the constitutional clause about guardianship of kin-state over ethnic minorities,²² yet all Hungarians not living in the enumerated six states became discriminated-against stepchildren. From the perspective of excluded Hungarians living in Siberia, the Czech Republic, in the Baltic area or even in overseas countries, the Act and its executive rules have remained *irrelevant as possible instruments in the protection of identity or keeping alive the relationship* between the kin-state and its “wards”. In brief, the distinctions made by the Act between Hungarians across the borders mean neither development in diaspora law nor minority protection, due to unilateral and biased regulation.

On the other hand, diaspora law is extended by the *growing circle of executive rules*. While the prior provisions have been deregulated by chance the new decrees involved issues rapidly ensuring an *unconstitutionally short time* for authorities and law practitioners to prepare, at least formally, for implementation. No public or expert discussions were possible in late December, when the major procedural rules about the Certificate and benefits were finalised and immediately published. This constrained regulation produced *unconstitutional* outcomes for further reasons. For instance, the Government *delegated its entitlement to designate* the NGOs representing each kin-minority as distributors of information about benefits, of forms for application and as those able to confirm the kin-membership of applicants. On behalf of the Government it is the foreign minister who can designate such partner organisations, without any public (legal, political, expert) control. Although the Government has no right to delegate this entitlement by law, it has been decided in a half-secret resolution without any substantial or formal criteria of designation.²³

At the same time, the Government substantially derogated some provisions of the Act. Considering the Memorandum of Understanding as an international treaty, the Certificate can be rejected on grounds additional to those defined in the Act. Beside its conditions, an applicant can be furnished with a Certificate if he/she “can speak in Hungarian or he/she is registered as an ethnic Hungarian at the local church or organisations of the Hungarian commu-

²² Art 6 (3) of the Constitution due to the amendment of the Constitution No. 31 of 1989.

²³ Resolution No. 2379 of 2001, 18 December (A 2001. évi LXII törvényben foglalt elismerési jog gyakorlására való felhatalmazásról). It was published in *Határozatok Tára* available only for high level state administrators.

nity in the home state, and if any international treaty does not exclude issuance of the Certificate".²⁴ Designated NGOs are defined as "contributor" organisations in the home state in co-operation with the relevant authorities. The charge of extraterritorial effect is intended to be countered by the appointment of competent authorities: the consular offices and Central Office for Data, Register and Elections (Ministry of the Interior) of the kin-state. Moreover, the county public administration office is responsible for the delivery of certificates, i.e. the office in Debrecen shall deliver the certificates for applicants living in Romania. Regulations about the technical issues of the Certificate²⁵ cut across discussions about its emotional, symbolic or legal relevance. The Certificate is an official document meeting legal security requirements, and this booklet, adorned with the gold images of the Hungarian crown and Parliament and citations from acts, is valid for five years. Decrees define organisations and agencies that can make notes in the booklet about how its holder applied for various benefits. The management and protection of personal data is not surrounded with genuine guarantees during the entire process, which involves several actors. Anyway, there is no obligation to request the certificate and an applicant voluntarily provides personal data.

By early 2002, the executive rules relating to *three major areas of benefits* had been published. They are as follows: (1) schooling benefits applicable in the kin-state (such as student card²⁶ or teacher card²⁷ providing discount prices on public transport and in trade, state financed scholarships and pedagogical training in Hungary within the annual quota, distance learning); (2) benefits in cultural areas (e.g. benefits concerning visits to museums, public libraries as defined originally in Government decrees are extended to certificate holders by a ministerial decree);²⁸ (3) employment in Hungary; sharp debates about foreign labour provoked the introduction of a more bureaucratic labour authorisation and defensive regulation in general, not only concerning ethnic Hungarians. The annual quota of labour permits, including the number of permits issued in the framework of treaties on mutual labour exchange, was at first articulated as an "achievement" of conciliation with social

24 Government Decree No. 318 of 2001, 29 December.

25 Joint Decree of Ministers of the Interior and Foreign Affairs, No. 49 of 2001, 29 December.

26 Government Decree No. 319 of 2001, 29 December.

27 Decree of Minister of Public Education No. 47 of 2001, 29 December .

28 Decree of Minister of Cultural Heritage No. 23 of 2001, 29 December.

partners. According to the new provision,²⁹ its number shall not exceed the average of registered vacancies in the previous year. For instance, in 2002 the quota is 81,000 persons, as the responsible minister defined³⁰ in a note instead of decree.³¹ Due to consideration of the Memorandum of Understanding as an international treaty, not only Certificate holders but all Romanian citizens can be employed in Hungary for 90 days annually if the labour authority issues the permit without scrutiny of the local labour force in stock (and without modification of the Act).

This list of *unconstitutional actions* can be extended. While the Government and ministers without lawful entitlement have derogated existing provisions including the Act, the prevailing contradictions inside regulations are being increased by new rules. For instance, the Act on entry and residence of foreigners in Hungary shall be implemented vis-à-vis ethnic Hungarians on the same footing as other aliens, but free movement would be facilitated for benefits that are applicable basically in Hungary. In order to deter ethnic Hungarians giving up residence in their home state, a mixture of obstacles and exceptions is inserted into the provisions. Thus minimal exceptions are indirectly defined in favour of ethnic Hungarians: (1) an application for settlement permit can be issued without a three-year long residence preceding the submission if the applicant or his/her ancestor ever had Hungarian citizenship, not including years of study (involving many foreign students coming across the borders); (2) family unification is benefited to the extent that it is more frequent among ethnic Hungarians who have family members in the kin-state. At the same time, new police and labour inspectors' sanctions against unlawful employment were introduced³² that would be implemented against numerous black labourers coming from the surrounding countries and Hungarian communities.

The rules on the *state budget relating to the introduction of the Certificate, its proceedings and the costs of benefits* have remained unpublished or published only in part. Submitting the Bill to Parliament, the Ministry of Foreign Affairs made

29 Joint Decree of Minister of Economy, of Foreign Affairs, of Youth and Sport No. 2 of 2002, 29 January

30 A gazdasági miniszter közleménye a 2002-ben, Magyarországon engedéllyel foglalkoztatható külföldiek legmagasabb számáról. *Magyar Közlöny*, 2002, No. 13.

31 See the Act on Facilitation of Employment and Unemployment Care No. 4 of 1991, Art 7 (6).

32 Government Decree No.170 of 2001, 26 September Art.103 and Act No. 39 of 2001, Art 32, Act No.4 of 1991, Art 7 (4)

a summary of the possible costs of implementation on the basis of the annual budget for 2001–2002.³³ Accordingly, the Government can pay through the ministries and public foundations altogether 30.5 million Euro. Due to the Memorandum of late December and the supposed high number of applicants for certificate, the Government decided to add extra contributions for consular services, computerisation and certificate administration. These costs were up to 10.7 million Euro.³⁴ The total sum, together with the procedure for preparing the certificates, accounted for 19.6 million Euro by late January 2002, according to the Ministry of Foreign Affairs.³⁵ Randomly surveying the official publications, one can find further decisions about the procedural or marginal costs of the Act decided by various state agencies. For instance, the Governing Body of the Labour Force Foundation financed research on the labour migration of Hungarians and its possible control (it's cost was only 464.000 Euro).³⁶ Perhaps they can show that the government has money to burn, since it spends public money like water without previous estimates or projections, and sometimes without approval of Parliament.

Summary

The idea of organically reunifying the truncated elements of the Hungarian nation across the borders with Hungary as a kin-state could play a constructive role in terms of our challenged culture and identity in the era of globalisation. Through the mass media, free travel and easy personal communication, the circulation of opinions, views and thought can be in harmony with the different patterns of socialisation of Hungarian communities living in home states as well as of the diversity of population in the kin-state. However, neither nation building nor minority protection has been developed by the Act, its preparation and implementation. This unilateral regulation deepens the cleavages within public opinion and within the home states of disintegrating Hungarian communities. Internal political and regional tensions are

33 Act on State Budget of Hungarian Republic to the year of 2001 and 2002 No.139 of 2000. The summary was published i.e. in *Beszélő*, May 2001, 29.

34 Resolution of the Government on executive costs of the Act on Hungarians Living in the Neighbouring States No. 2002 of 2002, 11 January.

35 *Népszabadság*, 25 January 2002. "Státusrajt öt és fél milliárdért"

36 Resolution No. 50 of 2001, 1 August (MAT határozat, *Gazdasági és Foglalkoztatási Közlöny*, 2001/15) a határon túli magyarság munkaerő-piaci migrációjával kapcsolatos kutatás AFC-ből történő támogatására vonatkozó javaslat véleményezéséről.

stronger due to the absence of genuine dialogue and partnership between the governments and minorities. Although the Act is intended to compensate for the fact that Hungary can be a member of the EU, but not all Hungarians can, the compensatory measures have been selected regardless of the impact on external relations and the social, financial, minority or legal consequences. The political aspects of the Act have been obvious in the Government side recruiting more and more voters, clients and contributors, while pulling the wool over Hungarian's eyes. Furthermore, Hungarians not living in the six Carpathian basin states are definitively excluded from benefits and national (re)unification, while implementation of the rules discriminates against non-Hungarian people in possession of the same citizenship as kin-minorities. For these reasons the effects of the benefit/policy might be dismissed by the majority of Hungarians as well as the majoritarian societies in the short term.

In the longer term, the Act may have an influence on non-verbal, spiritual cohesion, addressing the needs also of symbolic policy. Is there a symbolic law or does a symbolic connection exist between the kin-state and the diaspora? We have to study further the lessons about the admissible framework of connections between a kin-state and home state in the fields of minority protection, nation building, regional policy and integration in the new European architecture.

Budapest, February 2002