

## Chapter 17

# **An Analysis of the ‘Act on Hungarians Living in Neighbouring Countries’ and the Validity of Measures Protecting and Promoting the Culture and Identity of Minorities Outside Hungary**

Fernand de Varennes

### **Introduction**

This paper deals with concerns about the consequences of recently adopted Hungarian legislation, the ‘Act on Hungarians Living in Neighbouring Countries’. It considers from the point of international legal obligations whether this statute is (a) an extraterritorial – and therefore illegal – application of Hungarian law on the territory of other countries or (b) discriminatory against citizens of neighbouring countries who are not of Hungarian nationality. The issues these questions raise will be examined from a minority rights point of view, and special attention will be given to whether minorities are entitled to freely receive the benefits provided for in the act. This will bring us in turn to the suggestion that governments in neighbouring countries can prohibit minorities from seeking and receiving these benefits. My aim is not to dwell on the political or diplomatic issues, but to focus purely on the legal dimension on the basis of international law, with particular attention the those rights of minorities that are recognised in various European and international treaties. In particular, this paper is concerned not with the quarrel between governments, but with the crucial issue of the individuals involved and the question of whether governments can deny to their own citizens benefits ‘coming from the outside’.

### **I. Denying Minorities Benefits on the Grounds of the Status Law’s Extraterritoriality**

It has been suggested – though perhaps not seriously – that minorities cannot be allowed to receive any benefits under the ‘Act on Hungarians Living in Neighbouring Countries’ because the law impinges upon the territorial sovereignty of other states. This raises the issue of whether the Hungarian legislation breaches the principle of extraterritoriality. In order to answer this question, it is first necessary to define what is meant in international law

by extraterritoriality, and then look at what the consequences of the act are both inside and outside of Hungary.

### 1. Extraterritoriality in International Law

It is a basic principle of international law that states are sovereign and equal. It follows that Hungary may not exercise its jurisdiction in a way that interferes with the rights of neighbouring states. Put simply, the principle of the sovereign equality of states generally prohibits extraterritorial application of domestic law. It is widely accepted then that in most instances the exercise of jurisdiction beyond a state's territory constitutes an interference with the exclusive territorial jurisdiction of another state that is unacceptable under international law.<sup>1</sup>

The fundamental bases for the exercise of jurisdiction by a state rely upon two aspects of the modern concept of the state itself: a fixed territory and a permanent population. In principle, a state has jurisdiction over all persons, property and activities in its territory. Any attempt to apply domestic law beyond Hungary's borders would result in 'extraterritoriality', but only if it involves the operation of laws upon persons or rights existing beyond the territorial limits of Hungary. Conversely, it can be said that as long as domestic law is limited to within Hungary's borders, there is no violation of the principle of territoriality. A state can only enforce its laws within its own territorial boundaries.

The key element of the above principle is its reference to the application or enforcement of one state's laws or powers – such as Hungary's 'Act on Hungarians Living in Neighbouring Countries' – on the territory of other countries. It has been suggested that by giving benefits<sup>2</sup> to minorities outside Hungary, the Hungarian government may be in violation of this principle of international law in one of two ways: either in making its benefits available to selected individuals who are members of minorities in neighbouring countries who are not citizens of Hungary, or in exercising selection and other activities on the territory of neighbouring states.

---

1 Permanent Court of International Justice, 'Case of the S.S. "Lotus"', *PCIJ*, A:10 (1927), at pp. 18-19:

Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

2 By the word 'benefits', in this paper, the author means both benefits and grants. (Editors' note)

## 2. Minorities Receiving Benefits in Hungary

Put in very blunt terms, there is a suggestion that individuals – in this case members of a linguistic and cultural minority – must not receive any benefit, prize, award or recognition from foreign governments unless they are authorised by public authorities in their own country of citizenship. This argument however has no validity in international law. Awarding a prize, granting a benefit or a scholarship, for example, does not involve any issue of extraterritorial application of a law. Neither the law nor powers of the United Kingdom are being applied to the territory of other countries if an individual accepts the benefits of a British government fellowship, nor is the United States violating international law when it awards scholarships or other benefits to students from Europe to study English in that country. Logically, this argument would also mean that no individual or non-governmental organisation could be allowed to receive any grants or subsidies from European Union programmes since they would be based on EU legislation and therefore involve an extraterritorial invasion by outside legislation.

These situations show the need to distinguish between the application of legislation or state powers – which is generally unacceptable in international law – and the mere conferral of certain benefits or awards to foreign citizens – which is not. In fact, it is very common for states to provide various types of benefits to non-citizens. The suggestion that minorities in neighbouring countries cannot accept scholarships or benefits from the government of Hungary – or other governments such as the United States, United Kingdom, Germany, France, etc. – unless approved by their state of citizenship is quite simply unsupported from the point of view of international law and international practice. For a foreign government to provide a sum of money to a non-citizen individual for the study of a language – be it Hungarian in Hungary or Japanese in Japan – is not the same as the situation of a state 'applying a law' or 'exercising a power' on another country's territory. No foreign law is directly applied on a neighbouring country's territory and no power is exercised by Hungarian state authorities on the territory of one of its neighbours. What happens is that some private individuals receive benefits which originate from outside their country of citizenship. But this does not involve a direct application of a foreign law or power on a country's territory. Therefore, the only possible basis on which it can be argued that minorities cannot be permitted to receive such a benefit is the claim that the receipt of financial support or other types of benefit also creates a situation of extraterritoriality in international law.

That claim is quite false. As indicated above, conferring some kind of benefit to non-citizens is a widespread international practice involving many – probably most – countries in the world. Many governments have various programmes, awards, scholarships, etc. specifically aimed at non-citizens in

neighbouring and other countries. There is no treaty provision which bans such conferring of benefits to non-citizens. There are no international decisions which support the view that such a conferral of benefits is contrary to the principle of territorial sovereignty. Quite the reverse would seem to be the case. The principle of extraterritoriality is clearly limited to the situation of a state exercising its laws or powers on the territory of another state. Awarding a prize, a scholarship, or financial assistance for the study of a country's language or culture does not involve any application of a law or power on the territory of another state.

In fact, since a state has jurisdiction over all persons, property and activities in its territory, international law entitles Hungary to provide whatever benefits it wishes to non-citizens on its territory, as long as this does not violate other principles of international law such as non-discrimination. Most of the provisions contained in the 'Act on Hungarians Living in Neighbouring Countries' are only applicable to individuals who are on the territory of Hungary. These include access to research material and visits to libraries and museums (Article 4), travel benefits within Hungary for certain categories of individuals such as children under the age of 6 (Article 8), access to higher education institutions in Hungary (Article 9), etc... The vast majority of the provisions in the Hungarian legislation apply to non-citizens only when they find themselves on the territory of Hungary. This is thus a case of the application of Hungarian law on Hungarian territory, not the application of Hungarian law on the territory of neighbouring countries. It would therefore appear clear that Hungarian minorities cannot be precluded from receiving these benefits from outside their country of citizenship.

### **3. Activities Occurring in Neighbouring States**

Slightly more problematic is the issue of some activities provided for under the act which could be described as occurring not in Hungary proper but on the territory of other states. There are two main situations where this occurs: (1) the allocation of benefits to minorities in other countries; and (2) recommendations by non-governmental organisations in other countries.

### **4. The Allocation of Benefits to Minorities in Other Countries**

Some of the benefits under the act are destined to assist minorities in their own country of citizenship instead of in Hungary. Students studying in Hungarian in neighbouring countries (Article 10), Hungarian teachers who work in these countries (Articles 11 and 12), parents with at least two children of school age (Article 14),<sup>3</sup> and some organisations outside of Hungary in-

---

3 In this paper the author reflects upon the 2001 version of the Hungarian Status Law. The Hungarian Parliament amended this Act in 2003. (Editors' note)

volved in the promotion or preservation of Hungarian language, culture and heritage (Article 18) may be entitled to certain forms of benefits or assistance in their own country. It has been suggested that members of the Hungarian minority in neighbouring countries should not be allowed to receive benefits from a foreign government (Hungary) since this involves an extraterritorial application of Hungarian law.

This argument can be easily dismissed on the grounds outlined in the previous section. No law or power is actually being imposed on anyone outside Hungary. Some individuals will receive benefits determined by authorities in Hungary itself, and this is where the funds and benefits will emanate from. Even if they are received by individuals in neighbouring countries, there is no fundamental difference from the situation in which scholarships, prizes and awards come from other foreign governments or their agents, whether it is the United States, the United Kingdom, France, Germany, etc., and are received by individuals while they are in their own country. No one has ever seriously suggested that all of these countries are violating the principle of extraterritoriality in international law, because none of them is actually imposing its laws or powers on the territory of other countries.

## **5. The Involvement of Organisations Outside Hungary in Selection and Certification**

A different situation arises in relation to the selection of individuals who are entitled to receive the benefits under this legislation. Some non-governmental organisations (NGOs) in neighbouring countries will assist the government of Hungary by identifying individuals who are of Hungarian 'ethnic origin' in these countries. Article 20 identifies the role of these NGOs as one of issuing recommendations to Hungarian authorities to help identify those who are eligible for a 'Hungarian Certificate', or in other words, who are members of the Hungarian minority in neighbouring countries. It appears that, in general, self-identification is the basic principle in this process. There seems to be a suggestion that the activities of these NGOs should be regarded as illegal in international law because they are acting as quasi-public officials for the government of Hungary in applying Hungarian laws outside of Hungary, and because this constitutes an impermissible extraterritorial invasion of the sovereignty of neighbouring countries.

Even if we were to accept that these NGOs are acting as agents of the government of Hungary – which is certainly not obviously the case – it seems farfetched to then jump to the conclusion that making recommendations is an extraterritorial application of the Hungarian state's powers or laws. No law and no power are actually exercised by these NGOs in neighbouring countries. At the most it seems these NGOs would send recommendations and documents about who is eligible for a 'Hungarian Certificate' to public authorities

in Hungary itself, where the final decision would be made. Once again, *prima facie*, there does not appear, legally speaking, to be any problem of extraterritoriality presented this provision.

In any event, one needs only to look at the practice in countries around the world to realise that it is quite common to have recommendations made by outside bodies to foreign governments for numerous types of awards, prizes, benefits, etc. To give but one example, the Government of Canada supports a Canadian Studies Programme which provides benefits (fellowships, research grants, etc.) to foreign citizens for activities linked to Canadian studies, either in Canada or in their own country. Advisory committees made up of individuals based in countries outside Canada make recommendations as to which candidates should receive these benefits. No one has ever seriously argued that the activities of these committees are illegal because they are an extraterritorial application of Canadian laws. This type of practice is indeed quite prevalent in Europe, so to suggest that all of these countries are violating international law seems highly dubious, to say the least.

## II. Discrimination and Benefits for Minorities

Perhaps the most fundamental reservations some parties have with the ‘Act on Hungarians Living in Neighbouring Countries’ arise from the impression that it is discriminatory: Not everyone is entitled to the benefits the law confers. Broadly speaking, the benefits under this legislation are reserved for citizens of Croatia, Romania, Slovakia, Slovenia, Ukraine and Yugoslavia who are ‘of Hungarian ethnic origin’ and not citizens of Hungary, as well as their spouse and dependants who may or may not be of Hungarian ‘ethnic origin’ (Article 1).

It is not clear whether the claim of discrimination refers to discrimination under EU law (which will apply once Hungary joins the European Union) in relation to the citizenship restriction (the act is restricted to citizens of Croatia, Romania, Slovakia, Slovenia, Ukraine and Yugoslavia), or whether it is a more general claim of discrimination based on ‘ethnic origin’. In the former case the answer is straightforward: Article 27 (2) of the act indicates that all of the provisions of the law will apply to all citizens of the EU once Hungary accedes to the Union. Quite clearly, there is no preference based on citizenship within the EU since a citizen from any EU country who satisfies the other requirements would be eligible.

The more serious argument appears to be the second one: that all citizens of Croatia, Romania, Slovakia, Slovenia, Ukraine and Yugoslavia – not just those of ‘Hungarian ethnic origin’ and their spouse and dependants – should be entitled to the benefits described in the act. To provide benefits only to members of the Hungarian minority who wish to study in Hungarian (etc.) is alleged to be discriminatory since it is largely limited to individuals of one

ethnic origin (and their spouse or dependants). This is an argument that is based more on Council of Europe and United Nations treaties dealing with non-discrimination, such as the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*.

It should be emphasised that this argument does not suggest that the 'Act on Hungarians Living in Neighbouring Countries' intervenes improperly in the internal affairs of neighbouring countries. Rather, it accepts that this legislation is actually a valid domestic law and not extraterritorial, but proposes that it is problematic in that some non-citizens of Hungary are not entitled to the same benefits as minorities who have Hungarian 'ethnic origin'. Perhaps ironically, it represents a claim that Hungary is 'not generous enough', and is acting in a discriminatory manner by helping minorities more than, for example, those who are members of the majority.

It is an argument that must be taken seriously. The definition of what constitutes discrimination under international law and the *European Convention on Human Rights* in fact involves a rather complex formula of balancing various interests. What is certainly clear is that non-discrimination does not mean that governments must treat everyone identically. On the contrary, if there is any agreement at all on the issue of what constitutes discrimination from a legal point of view, it is that some forms of preferential treatment are in fact quite legitimate and appropriate, and even necessary. So to answer the question of whether it is discriminatory to give benefits to members of a minority and not afford the same benefits to the majority, it is necessary to have a clearer understanding of a simple question: What is discrimination?

## **1. What Is Discrimination?**

There are a number of different treaties from the United Nations, the European Union and the Council of Europe which prohibit discrimination on the basis of language, ethnicity, nationality and other grounds. The wording of these treaty provisions usually varies slightly, as do the interpretations of various courts or committees. Nevertheless, there tends to be a fairly broad consensus as to how one should understand the basic legal principle of non-discrimination. The United Nations Human Rights Committee (UNHRC), the body mandated with interpreting the *International Covenant on Civil and Political Rights* adopted the following position in its 'General Comment on Non-Discrimination' after considering a number of other international instruments:

While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground ... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing,

of all rights and freedoms. *The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance*<sup>4</sup> [emphasis added].

This definition of non-discrimination coincides with a trend apparent since the very earliest period in the evolution of human rights after the Second World War, and even predating it. There appears to have been a consensus during the drafting of the *Universal Declaration of Human Rights* that equality does not mean treating everyone identically in every circumstance. Mrs. Roosevelt, as chairperson of the United Nations Commission on Human Rights at the time, pointed out that ‘equality did not mean identical treatment for men and women in all matters, for there were certain cases, as for example, the case of maternity benefits, where differential treatment was essential’.<sup>5</sup> One can safely assume that most international law commentators would probably agree with the following comment on non-discrimination:

As far as [the prohibition of discrimination] is concerned, it should be observed that Article 14 [of the *European Convention*] – despite the French text ‘*sans distinction aucune*’ – does not prohibit every difference in treatment. On the contrary, the obligation contained therein may even entail unequal treatment. For Article 14 is not only concerned with formal equality – equal treatment of equal cases – but also with substantive equality: unequal treatment of unequal cases in proportion to their inequality.<sup>6</sup>

The *South West Africa Case (Second Phase)*<sup>7</sup> confirms the necessity of an understanding of equality such that it cannot turn a blind eye to differences, especially in relation to minorities. Judge Tanaka’s dissenting opinion in particular provides insight on the reasons why:

[The principle of equality before the law] does not exclude the different treatment of persons from the consideration of factual differences ... To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently.<sup>8</sup>

Judge Tanaka also made reference to the issue of language of education and the principle of equality, as follows:

[I]f there exists the necessity to treat one race differently from another, this necessity is not derived from the physical characteristics or other racial qualifications but other factors, namely religious, linguistic,

---

4 United Nations Human Rights Committee, *General Comment on Non-Discrimination* (New York, 1989), paragraphs 7 and 8.

5 Warwick McKean, *Equality and Discrimination under International Law* (Oxford, 1983), p. 65.

6 P. Van Dyk and G.J.H. Van Hoof, *Theory and Practice of the European Convention of Human Rights* (Deventer and Boston, 1990), p. 539.

7 [1966] International Court of Justice 284.

8 *Ibid.*



educational, social, etc. which in themselves are not related to race or colour ... For instance, if we consider education ...we cannot deny the value of vernacular as the medium of instruction and the result thereof would be separate schooling as between children of diverse population groups ... In this case separate education and schooling may be recognised as reasonable. This is justified by the nature of the matter in question.<sup>9</sup>

The key word here is reasonable. What Judge Tanaka and Mrs. Roosevelt both emphasised is that to impose any requirement involving language, culture, nationality, or any other personal characteristic is legitimate as long as it is reasonable in the effects or burden it imposes on an individual. This is also true in the case of the European Convention of Human Rights. In the now famous *Belgian Linguistic Case*, the European Court of Human Rights declared:

Article 14 of the Convention does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.<sup>10</sup>

Similar issues have been considered by the European Court of Justice and essentially the same approach followed. In *Groener v. Minister for Education*,<sup>11</sup> the European Court of Justice took into account the emotional and symbolic ties between the Irish language and Irish society generally in determining whether Ireland's policy – aimed at the promotion and protection of the Irish language – constituted reasonable differential treatment. There is in that country a requirement that all teachers have some knowledge of Irish, as part of the country's policy for its promotion. The European Court decided that this was justified.

Whether in the *Belgian Linguistic Case*,<sup>12</sup> the Inter-American Court of Human Rights' opinion in the *Costa Rican Naturalisation Case*,<sup>13</sup> or other in-

---

9 *Ibid.*

10 *Belgian Linguistic Case*, [1968] 1 Yearbook of the European Convention on Human Rights 832, at p. 884.

11 Case 379-87, [1990] 1 Common Market Law Review 401.

12 *Belgian Linguistic Case*, [1968] 1 Yearbook of the European Convention on Human Rights 832, at pp. 884-885:

Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention. In examining whether the legal provisions which have been attacked satisfy these criteria, the Court finds that their purpose is to achieve linguistic unity within the two large regions of Belgium in which a large majority of the population speaks only one of the two national languages.

ternational and national decisions involving discrimination, a frequent factor considered when evaluating the reasonability of differential treatment on the ground of language is the purpose of legislation or practice at issue. In *Ballantyne, Davidson and McIntyre v. Canada*, the Québec commercial sign case, the Human Rights Committee even went so far as to acknowledge that the government could validly seek to protect the French language in Québec but that such a legitimate objective could not be invoked in order to ban the use of non-official languages in private affairs, although these comments were not specifically made in the context of the application of the principle of non-discrimination.

All of the above factors must be balanced in a final assessment of whether the end result is reasonable, or justified in pursuit of legitimate objectives.<sup>14</sup> In its ‘General Comment on Non-Discrimination’, the United Nations Human Rights Committee suggested that not every form of differential treatment constitutes discrimination, if the criteria for differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>15</sup> In *Groener v. Minister for Education*, the European Court of Justice recognised that any requirement for linguistic knowledge outside Article 3 (1) of Regulation 1612/68 must not be disproportionate to the object of the policy. In the *Belgian Linguistic Case*, the European Court on Human Rights clearly stated that Article 14 does not prohibit every distinction in treatment. What was required was an objective assessment of the facts and, whilst considering the public interest involved, striking a fair balance between the

---

13 *Costa Rican Naturalisation Case*, Inter-American Court of Human Rights, Case No. OC-4/84, at paragraphs 55, 56 and 57:

Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and are not arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.

14 Despite differences in terminology (some courts speak of ‘rational’, or ‘non-arbitrary’, or ‘proportional’), the standards used by courts in many countries are for the most part similar: in the end there must be a balancing act in order to determine whether or not a state's differential treatment based on characteristics such as language, race or religion is acceptable. Semantically, there are certainly distinctions to be made between a test requiring ‘non-arbitrary’ state behaviour and ‘proportional’ conduct, the former seemingly indicating that courts should show a greater degree of restraint in assessing whether or not the behaviour of public authorities is discriminatory. In other words, legislation prescribing differential treatment can be disproportionate without being irrational. By and large, most states and the interpretation favoured by most international bodies lean towards determining the reasonability of state actions *via* their ‘proportionality’.

15 United Nations Human Rights Committee, *General Comment*, paragraph 13.

protection of the interests of the community and the respect for the rights and freedoms safeguarded by the Convention.<sup>16</sup>

The same approach has essentially been employed in many jurisdictions including Canada,<sup>17</sup> Spain,<sup>18</sup> Belgium,<sup>19</sup> and within the United Nations itself:

That the right to equal treatment... has to be balanced off against other compelling interests is a principle that all accept. That is, they find a balancing test reasonable and justifiable. Everyone accepts the rule that for a right to be implemented there must be a relationship of proportionality between the benefits and the costs.<sup>20</sup>

The basic principle, then, is that distinctions based on language, culture or nationality may be used by a state in determining who will have access to and receive the most benefit – or the least disadvantage – but only when the specific context or object of regulation makes the preference a balanced and reasonable requirement. It is worthwhile repeating Permanent Court of International Justice's much-quoted decision, that in order to secure for minorities the possibility of living peacefully alongside the majority in true equality, two things are necessary:

The first is to ensure that nationals belonging to ... minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the state. The second is to ensure for the minority

---

16 *Belgian Linguistic Case*, p. 884.

17 See José Woehrling, 'L'article 1 de la Charte canadienne et la problématique des restrictions aux droits et libertés: l'état de la jurisprudence de la Cour suprême' in *Droits de la personne: l'émergence de droits nouveaux* (Cowansville, Québec, 1993), pp. 3-34, here pp. 13-14:

Dans l'affaire Oakes...le juge en chef Dickson a énoncé de la façon suivante le critère des moyens, ou 'critère de proportionnalité': 'À mon avis, un critère de proportionnalité comporte trois éléments importants. Premièrement, les mesures adoptées doivent être soigneusement conçues pour atteindre l'objectif en question. Elles ne doivent être ni arbitraires, ni inéquitables, ni fondées sur des considérations irrationnelles. Bref, elles doivent avoir un lien rationnel avec l'objectif en question. Deuxièmement, même à supposer qu'il y ait un tel lien rationnel, le moyen choisi doit être de nature à porter "le moins possible" atteinte au droit ou à la liberté en question ... Troisièmement, il doit y avoir proportionnalité entre les effets des mesures restreignant un droit ou une liberté garantis par la Charte et l'objectif reconnu comme "suffisamment important"'

18 Decision of the [Spanish] Constitutional Tribunal of 2 July 1981, *Boletín de Jurisprudencia Constitucional* 4 (1981), pp. 243ff, here p. 250:

[L]a igualdad es sólo violada si la desigualdad está desprovista de una justificación objetiva y razonable y la existencia de dicha justificación debe apreciarse en relación a la finalidad y efectos de la medida considerada, debiendo darse una relación razonable de proporcionalidad entre los medios empleados y la finalidad perseguida.

19 [Belgian] Council of State decision of 1 February 1973, Pasicrisie 1974, IV, 109, quoted in Bruno de Witte, 'Linguistic Equality: A Study in Comparative Constitutional Law', *Revista de Llingua i Dre* 3 (1985), pp. 43-126, here p. 69.

20 Vernon Van Dyke, *Human Rights, Ethnicity, and Discrimination*, (Greenwood Press, Westport CT, 1985), pp. 3-77, here pp. 16-17.

elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

The Permanent Court went on to state that these requirements were inseparable since ‘there would be no true equality between a majority and minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of its being as a minority’.<sup>21</sup>

If we look at the various decisions from the United Nations system, Permanent Court of Human Rights, the European Court of Human Rights and the European Court of Justice we can identify a broad consensus as to the main elements. Differences of treatment based on preferences due to language, culture or ethnic origin will not be discriminatory if they are in pursuit of a legitimate aim and are reasonable – or objective and justified – in the light of this aim. Put in a slightly, and perhaps clearer way, the European Court on Human Rights said that if preferential treatment pursues a legitimate aim and there is a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’, then there is no discrimination.

To give a positive answer to the question of whether the ‘Act on Hungarians Living in Neighbouring Countries’ violated the rule of non-discrimination in European and international law, it must be shown: (a) that there are individuals who are victims of ‘discrimination’ and (b) that the preferences based on ‘nationality’ are not in pursuit of legitimate aims, not proportionate to those aims, unreasonable in the circumstances, or without objective justification.

## **2. Discrimination If Only Minorities Receive Benefits?**

As stated at the beginning of this section, there is a concern being expressed by some parties that discrimination exists if only individuals of Hungarian ethnic origin (and their spouse or dependants) receive benefits or assistance under the ‘Act on Hungarians Living in Neighbouring Countries’. From a legal point of view, the argument is no longer that this law is extraterritorial. On the contrary, its validity is in fact accepted in this respect, but it is contended that some individuals are advantaged in a way that is contrary to the rule of non-discrimination under European and international treaties. Although somewhat unclear, the argument seems to be that limiting the benefits or assistance only to individuals of Hungarian ethnic origin (and their spouse and dependants) instead of making them available to all citizens of Croatia, Romania, Slovakia, Slovenia, Ukraine and Yugoslavia is discriminatory. The question therefore turns on whether it is discriminatory for this

---

21 ‘Advisory Opinion on Minority Schools in Albania’, *Permanent Court of International Justice*, A/B:64:3 (1935), also known as the *Minority Schools in Albania* case.

minority alone to receive assistance in terms of education, culture, etc. which is not provided to the majority.

It has been argued that since the 'Act on Hungarians Living in Neighbouring Countries' is a law which aims to achieve equality between minorities and majorities by assisting in protecting minority identity, it cannot be discriminatory. It aims in a sense to achieve the real equality mentioned by the Permanent Court of Justice in the *Advisory Opinion on Minority Schools in Albania*, and therefore is a necessary, positive measure of the kind cited in many other judicial decisions. As attractive as the above argument may appear to some, it is incomplete. The 'Act on Hungarians Living in Neighbouring Countries' is not a single, positive measure aimed at protecting the identity of minorities. It is a piece of legislation which contains many different types of measures, and each must be considered in light of the definition of non-discrimination if we are to establish whether its aim is 'a legitimate aim' and whether in the circumstances it has a reasonable and objective justification.

In order to answer those questions, it is necessary to go beyond abstract assertions and look at specific situations, analysing each according to the criteria identified earlier as to what constitutes discrimination in international and European law. We can do this by looking at the situation of university students of Hungarian ethnic origin who receive a number of benefits while studying in Hungary under Article 9 of the Act. The following provisions apply to them:

(1) Persons falling within the scope of this Act, in accordance with the relevant provisions of Act LXXX of 1993 on Higher Education applicable to Hungarian citizens, shall be entitled to participate, according to the conditions specified in this Article, in the following programmes of higher education institutions in the Republic of Hungary:

- a) undergraduate level college or university education,
- b) supplementary undergraduate education,
- c) Non-degree programmes,
- d) Doctor of Philosophy (PhD) or DLA programmes,
- e) general and specialised further training,
- f) accredited higher education level vocational training in a school-type system.

(2) Students participating in state-financed full-time training programmes specified in paragraph (1), shall be entitled to formula funding on the one hand, and financial and other benefits in kind on the other, both being part of the appropriations of budgetary expenditure for students, as well as to the reimbursement of detailed health insurance contributions provided by Act LXXX of 1993 on Higher Education. The detailed conditions of these forms of assistance and further

benefits shall be regulated by the Minister of Education in a separate legal rule.

These benefits are only available to members of the Hungarian minority (or their spouse and dependants). Members of the majority in the neighbouring countries of Croatia, Romania, Slovakia, Slovenia, Ukraine and Yugoslavia are not eligible. There therefore exists a preferential treatment, or differential treatment, based on ethnic origin (in the sense of cultural or linguistic background). To determine whether this differential treatment is discriminatory, one must consider if it ‘pursues a legitimate aim’ and if in the circumstances it has a reasonable and objective justification.

### **3. Does the ‘Act on Hungarians Living in Neighbouring Countries’ Pursue a Legitimate Aim When Providing Benefits and Grants to Minority University Students in Hungary?**

All of the measures contained in the ‘Act on Hungarians Living in Neighbouring Countries’ aim to assist Hungarian minorities in neighbouring countries to maintain and develop their identity as national minorities and their language and culture. There is really little doubt that such a goal is legitimate. There are numerous Council of Europe conventions and Assembly recommendations which stipulate the responsibilities and obligations towards national minorities on the part of the states of which they are citizens and of the kin-states, as well as the obligation of persons belonging to national minorities to cooperate in this field. For example, paragraph 31 of the ‘Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE’ stipulates that ‘states will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms’. Paragraph 2 of Article 4 of the *Framework Convention for the Protection of National Minorities* obligates the states which are party to the Convention ‘to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority’; paragraph 3 of the same Article further specifies that such ‘measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination’.

The above deals more with a government’s treatment of its own minorities and not specifically with a situation of a foreign government – in this case Hungary – providing support in order to maintain and develop a national minority’s identity, language and culture. There are however more precise treaty provisions and politically-binding documents which do. Article 17 (1) of the *Framework Convention for the Protection of National Minorities* states that transfrontier cooperation must not be curtailed, and especially that parties

must not 'interfere with the rights of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers'. Indeed Article 17 (2) adds that states must actually take measures to encourage trans-frontier cooperation where national minorities share an ethnic, cultural, linguistic or religious identity or common cultural heritage with others across frontiers. In the present case, this indicates not only that there is nothing 'illegitimate' in having members of the Hungarian minority involved in transfrontier activities in Hungary itself, but that this is even something that the neighbouring countries of Croatia, Romania, Slovakia, Slovenia, Ukraine and Yugoslavia must actively encourage once they have ratified the framework Convention.

That this is a legitimate objective generally is further buttressed by a large number of other provisions. For example, in Paragraph 32.4 of the 'Document on the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE' one finds the statement that persons belonging to national minorities have the right 'to establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other states with whom they share a common ethnic or national origin, cultural heritage or religious beliefs', while Article 2 (5) of the United Nations *Declaration on the Rights of Persons Belonging to National or Ethnic, Linguistic and Religious Minorities* adds that minorities have the right to establish and maintain 'free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers of other states to whom they are related by national or ethnic, religious or linguistic ties'. Furthermore, there are various decisions from the European Court on Human Rights which confirm this interpretation:

The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.<sup>22</sup>

There is in other words widespread acceptance that it is a legitimate objective to seek to protect the identity of minorities and even an obligation to do so. It therefore cannot be seriously argued that Hungary is pursuing an illegitimate objective by providing benefits aimed at encouraging protection of the Hungarian minority's identity, in this case in helping individuals who wish to study in their language at institutions of higher education.

---

22 *Beard v. United Kingdom*, Judgement of 18 January 2001, Paragraph 104.

#### **4. Is There a Reasonable Relationship of Proportionality Between the Means Employed and the Aim Sought to Be Realised?**

While the aim of protecting the Hungarian identity is legitimate, the benefits which are only provided to students who are of Hungarian ethnic origin must still involve a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’. Is it in other words a reasonable and justified preference to limit these benefits to citizens of neighbouring countries who are of Hungarian ethnic origin, in terms of the aim of protecting the identity and culture of Hungarian minorities? If the means employed are disproportionate or unjustified, then Article 9 is discriminatory.

The means to be employed by the government is the grant of a small monthly living allowance to citizens of neighbouring countries of Hungarian ethnic origin who are studying in Hungarian higher education institutions. This allowance is the same amount as that given to Hungarian students. This monthly allowance is not available to citizens of neighbouring countries who are not of Hungarian ethnic origin.

The question, then, is whether the establishment of a difference of treatment between citizens of neighbouring countries who are of Hungarian ethnic origin and those who are not in respect of a living allowance for studying in Hungary (the ‘means employed’) appears proportionate and appropriate in relation to the aim pursued. It would appear that it is. The grant of a relatively small sum of money to members of the Hungarian minority, aims to provide assistance to individuals who will thereby be encouraged to study in their language and, in all likelihood, develop stronger links to their culture and identity. It should be noted that education in a minority’s language, which where appropriate should include higher education, is described as one method for protecting minorities in the *Framework Convention on the Protection of National Minorities*.<sup>23</sup>

The same benefit is not accorded to citizens of neighbouring countries who are not of Hungarian ethnic origin. The obvious reason for this is that giving a subsidy to members of the majority would not directly protect the identity of the Hungarian minority in these countries – the legitimate aim being pursued – while providing financial incentives for minority members to study in their language does. *Prima facie*, it does not appear unreasonable or disproportionate for Hungary to allocate its limited resources in this way.

---

23 Article 14 (2): In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.



The benefit is rationally linked to the stated aim, it provides an incentive for minority students to study in their language, it may help in protecting the identity of the Hungarian minority from neighbouring countries, and there is nothing so disproportionate in the measure as to make it an unacceptable difference of treatment. For these reasons, and in conformity with the numerous European Court of Human Rights decisions which all confirm the above formula for determining what constitutes discrimination under Article 14 of the *European Convention on Human Rights* (and the new Protocol 12), it is not discriminatory for Hungarian minorities from Croatia, Romania, Slovakia, Slovenia, Ukraine and Yugoslavia to receive student allowances from the government of Hungary when they are studying in Hungarian in those countries.

### **5. Other Measures Contained in the Act**

There are many other measures in the 'Act on Hungarians Living in Neighbouring Countries' which, since they only provide advantages or benefits to citizens of neighbouring countries who are of Hungarian ethnic origin, involve a difference of treatment. Each means employed in this legislation must be, in the circumstances, proportionate or reasonably justified in pursuit of the legitimate aim of protecting the identity of the Hungarian minority. If they are not, then they are discriminatory.

It is not possible in this brief analysis of the act to examine in detail each and every one of these measures in order to determine whether they are consistent with the obligation of non-discrimination under the European Convention on Human Rights. However, it is possible to extrapolate some general conclusions from our examination of Article 9. First, the aim pursued under the 'Act on Hungarians Living in Neighbouring Countries' is legitimate and consistent with European treaty obligations and standards. Second, the benefits granted by the law are related to the stated aim. Third, the benefits cannot be described as 'extravagant'; they involve small allowances for education, teaching materials, temporary work permits in Hungary, free access to libraries, etc.

To argue that Hungarian minorities are not entitled to a single one of these rather small benefits because it would constitute discrimination against the majority seems something of an exaggeration. On the contrary, at first glance there appears to be nothing disproportionate in the measures provided for in the 'Act on Hungarians Living in Neighbouring Countries'. To put it bluntly, if minority students cannot receive even a small monthly allowance as a form of encouragement to study in the minority language, it might as well be argued that minorities must never receive any benefit or treatment different from what the majority enjoys. That would actually suggest that there are for all practical purposes no measures that can be adopted to protect

minorities unless they also provide in the same way for members of the majority. In other words, it would mean that a large number of laws, regulations and programmes introduced by the European Union, the Council of Europe and European States aimed, for example, at the Roma or the Sami, or specifically targeting minority languages, culture and identity, all violate the *European Convention on Human Rights*. Such a suggestion is absolutely unfounded from the point of view of a legal analysis of what constitutes discrimination, as shown in the previous sections, and indeed contrary to the spirit of tolerance which permeates many European treaties and documents. All agree that measures protecting and even promoting a minority's identity, language and culture are desirable, and indeed in a sense a part of a state's general obligation to promote equality, diversity and tolerance.

## Conclusion

Much of the debate on the validity of the Hungarian law has focused on the unease expressed that somehow, politically and legally, no foreign government may provide benefits or any grants to minorities because this would violate international law – especially the principles of extraterritoriality and non-discrimination. From a human and minority rights point of view, the contention that the ‘Act on Hungarians Living in Neighbouring Countries’ is against European or international law is really – reduced to simple terms – a statement that individuals must not be permitted to receive any aid, assistance or benefits from ‘outside’, that citizens may only receive this from their own governments, and not from any foreign country.

This is an extraordinary claim, and if valid would mean that many programmes for scholarships, support for NGOs or civil society, development projects, and cultural programmes around Europe are ‘illegal’ insofar as they are supported from ‘foreign governments’. It also means that individuals are not free to receive any aid from the outside. If it is ‘foreign’, the Government can stop its own citizens from benefiting. This would seem to go against the general rule of individual liberty that is the foundation of modern democracies.

From a legal point of view, the arguments that the ‘Act on Hungarians Living in Neighbouring Countries’ violates European or international law are clearly incorrect. As has been shown, there exists in fact no situation of extraterritorial application of Hungarian laws on the territory of its neighbours. Nor are the limited benefits granted to Hungarian minorities in neighbouring countries unjustified or disproportionate to the objectives being sought, objectives which in themselves are clearly legitimate.

If anything, the example of Hungary should be applauded and embraced since it conforms to the principles of pluralism, tolerance and respect of European cultural diversity which all governments in the Council of Europe have

accepted in numerous documents. Indeed, one would have thought that this law would provide an opportunity for dialogue between Hungary and neighbouring countries on how to effectively protect and promote the culture of all of their minorities, in the spirit of cooperation which also underlies many measures undertaken in fulfilment of the objectives of both the Council of Europe and the European Union.