

# Utilitarianism in Minority Protection? (Status Laws and International Organisations)

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Status laws adopted in order to support kin minorities generally are treated within the framework of positive distinction and as a part of international minority protection. It is true that there is no other paradigm into which it really could be squeezed, but when treating status or benefit laws, one should not fail to notice the problematic nature of minority protection offered by the approach of international organisations. Namely, these organisations and the documents adopted within the current framework treat the international protection of minorities as a part of international human rights protection,<sup>1</sup> but they also sometimes regard it as a security policy issue.<sup>2</sup> This approach is obviously present in the documents of the Organisation for Security and Co-operation in Europe (OSCE), and we may encounter this outlook in several resolutions of the Parliamentary Assembly of the Council of Europe (CoE) as well as in the Regular

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<sup>1</sup> One can read for instance in Article 1 of the Council of Europe's Framework Convention for the Protection of National Minorities the following: 'The protection of national minorities and of rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international cooperation'. In connection to the human rights approach, see in detail: Enikő Felföldi, 'The Characteristics of Cultural Minority Rights in International Law—With Special Reference to the Hungarian Status Law' in Zoltán Kántor et al. (eds.), *The Hungarian Status Law: Nation Building and/or Minority Protection* (Slavic Eurasian Studies no. 4; Sapporo, 2004), pp. 431–460.

<sup>2</sup> In connection to this, see in detail: Fernand De Varrenes, 'Minority Rights and the Prevention of Ethnic Conflicts', UN Commission on Human Rights, Sub-Commission on Promotion and Protection of Human Rights, Working Group on Minorities, Sixth session, E/CN.4/Sub.2/AC.5/2000/CRP.3 (10 May 2000); Ted R. Gurr, *Minorities at Risk: a Global View of Ethnopolitical Conflicts* (Washington, D.C., 1993); Ted R. Gurr, *Peoples versus States: Minorities at Risk in the New Century* (Washington, D.C., 2000); Will Kymlicka, 'Justice and Security in the Accommodation of Minority Nationalism' in Alain Dieckhoff (ed.), *The Politics of Belonging: Nationalism, Liberalism and Pluralism* (Lanham, MD, 2004), pp. 127–154.

Reports on the former accession countries made by the European Commission.

The relation between the security policy approach and the current idea of human rights, however, is not exempt from tension, since this may lead to a utilitarian concept of human rights that is presently rejected by legal thought. The utilitarian approach of human rights would result in the legalisation and institutionalisation of a dangerous viewpoint that might diverge from the general protection of human rights in two ways. On the one hand, the human rights of persons endangering peace and security are restricted in certain cases, as it happened in the Iraqi jail of Abu Graib or on Guantanamo in the recent past, which obviously goes against the spirit of human rights. On the other hand, by granting minority members special rights, those menacing security might be appeased in the interest of greater social usefulness. However, according to current legal theory, the dangerousness of individuals or groups of individuals to security may not cause any infringement on general human rights nor may it generate the provision of special rights. If the basis of human rights is the fact that man is a moral creature and every man is equally valuable, then only in very exceptional cases can we accept measures that restrict human rights in the name of public good. In case of resigning ourselves to utilitarianism, the individual or groups of individuals might become a tool of lofty community objectives.

Based on the above, one might safely conclude that it is not proper to institutionalise the security policy approach as regards the issue of human rights protection. However, it has already been done in the framework of international minority protection when the institution of the OSCE High Commissioner on National Minorities was established. The office of the High Commissioner was established to identify and seek early resolution of ethnic tensions that might endanger peace, stability, or friendly relations between participating states.<sup>3</sup> This means that the international community deals with a particular minority when it is regarded dangerous to international security, whereas no attention is paid to other minorities in a similar situation. Nevertheless, one might adopt the security approach, but then the simultaneous treatment of special minority rights in the

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<sup>3</sup> In connection to this, see: CSCE Helsinki Document 1992, 'The Challenges of Change II'. For more details, see: Walter A. Kemp, *Quiet Diplomacy in Action: the OSCE High Commissioner on National Minorities* (The Hague, 2001).

framework of human rights protection might be called with due reason ‘absurdity on stilts’ (Bentham’s expression). The ideal human rights approach would provide special protection not because of security risks, but in order to balance the disadvantages deriving from the minority situation and would claim the legal protection of minorities based on the concept of just equality. The granting of special minority rights should not be simply the utilitarian distributing of special rights independently of the moral nature of man. It should serve to raise persons in a disadvantageous position to a higher level and thereby enabling them to enjoy human rights granted to all.

How and in what context international organisations treat the Hungarian Status Law follow from the security approach. In its regular country monitoring reports, the European Commission, for example, dealt with the Status Law mainly in the chapter on common foreign and security policy and not under the protection of minorities within the human rights chapter.<sup>4</sup> A necessary corollary to this approach is that in international documents adopted in this subject—apart from the report of the European Commission for Democracy through Law of the Council of Europe (Venice Commission)<sup>5</sup>—very few conclusions were made with regard to the justifiability of the regulation. International documents, while elaborating on security risks, tend to leave the human rights aspects of this issue quite in the background. A fine example of this is the statement of Rolf Ekéus, OSCE High Commissioner on National Minorities, entitled *On Sovereignty, Responsibility and Minorities*, which he made on 26 October 2001.<sup>6</sup> In this document the High Commissioner admits that international peace, security, and prosperity are based on the protection of national minorities. Then he adds that history teaches us that unilateral measures adopted by states for the support of its national

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<sup>4</sup> European Commission Regular Report on Hungary’s Progress towards Accession 2001, 2002.

<sup>5</sup> ‘Report on the Preferential Treatment of National Minorities by Their Kin-state’, adopted by the European Commission for Democracy through Law (Venice Commission) at its 48th Plenary Meeting, Venice, 19–20 October 2001, CDL-INF (2001) 19. See the document in: Kántor et al. (eds.), *op. cit.*, pp. 550–568. Also available at <[http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp)>, accessed 23 January 2006.

<sup>6</sup> *Sovereignty, Responsibility, and National Minorities* Organization for Security and Co-operation in Europe High Commissioner on National Minorities (Rolf Ekéus, OSCE High Commissioner on National Minorities, The Hague, 26 October 2001). See the document in: Kántor et al. (eds.), *op. cit.*, pp. 581–582.

minorities living beyond its authority might sometimes lead to tension, frictions, and even violent conflict. As a result, it is among his duties to pay special attention to situations in which such measures are being considered without the consent of the state of residence. The High Commissioner's standpoint might be called remarkable, nevertheless; because of the lack of legal argument, no conclusion can be drawn from it as regards the international legal justifiability of status laws. Let me add one more thing in connection to the High Commissioner's argument itself: the results of positive measures taken by democratic states in order to protect their kin minorities abroad do not necessarily support his point of view. It is sufficient to think of the measures taken by Austria in order to solve the question in South Tyrol, which as opposed to the High Commissioner's claim led to the decrease of violent actions after a period of time.

Though having no requirements towards its member states, by demanding the protection of minorities from candidate countries in the course of accession, the European Union also adopts and represents the security based approach. The decision-makers of the EU were possibly driven by the objective to minimise the possible sources of danger surrounding the new member states. The security based outlook is obviously present in the way the EU treated the Roma issue. Examining the documents adopted in this subject, it seems that the Union was interested in the Roma issue only up to the accession of the new countries. Whereas in its regular monitoring reports drawn up under the accession process the European Commission elaborated on the situation of the Roma in detail, in its comprehensive reports made at the end of the accession process it cut the question very short.<sup>7</sup> Furthermore, the documents adopted on this subject by the EU can sometimes be understood only by taking into account the security approach. In one of its decisions the European Parliament declared: 'there is widespread discrimination against the Roma in practically every country where they are settled, but [...] their numbers in Central and Eastern Europe make the problem particularly acute'.<sup>8</sup> This is a very down-to-earth political statement, and

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<sup>7</sup> European Commission Regular Reports (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia, Slovenia), Comprehensive Monitoring Reports (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, Slovenia).

<sup>8</sup> Minutes of 13/07/1995—Final Edition B4–0974/95 Resolution on Discrimination Against the Roma.

perhaps it means that in the latter case those belonging to the minority mean a greater security risk.

Or to cast a glance beyond Europe, the post-September 11 policies of the U.S. also embrace a security-based approach as regards human rights protection. They involve discrimination based on factors such as race, religion, and ethnic origin as well as citizenship.<sup>9</sup> The United States regards the Muslim people ‘with increased suspicion and hostility’,<sup>10</sup> and it discriminates against her Muslim citizens as a security measure, which involves the imposition of greater restrictions upon non-citizens from Arab and Muslim states. As a result of this, neither the citizens nor the non-citizens are treated equally, which is undoubtedly incompatible with the recent theory of human rights; the protection of human rights is based on the prohibition of discrimination and almost every international human rights instrument declares this principle.

## **I. Status Laws and the Basic Principles of International Law**

The theoretical questions raised by the so called status or benefit laws and the study of their compatibility with the norms of international law might be more interesting than examining the provisions of the concrete legal rules, which are sometimes of a low standard. The poor nature of regulation in this field is conspicuous when reading some of the acts. It is, for instance, difficult to reconcile the objectives of the mix of regulation accompanying various status laws, such as supposedly balancing minority existence with the elements of immigration law. Since general alien control rules apply to kin minorities falling under the scope of status laws as well, it is therefore unnecessary and offensive to remind the concerned of it again. Furthermore, any kind of limitation going beyond general alien control regulations is inconsistent with the point of status laws, and it

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<sup>9</sup> See in detail: Anthea Roberts, ‘Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11’, *European Journal of International Law* 15:4 (2004), pp. 721–749.

<sup>10</sup> *Ibid.* p. 727.

might endanger their justifiability.<sup>11</sup> Alien control restrictions can hardly serve to counterbalance the disadvantages deriving from minority existence, which is an explicit objective of status laws. Another thing to clarify is that theoretical legal questions raised by minority protection are indifferent to the distinction between within and beyond the borders, so statements made on minority protection in general are for the most part applicable to the protection of kin minorities as well.

Let us see the arguments of international law against status laws.<sup>12</sup> It is often argued as *ultima ratio* that current international human rights conventions lay the charge on contracting states to guarantee fundamental human rights and freedoms, including minority rights, to every individual living on their territory (and not on the territory of other states) or in certain cases only to their citizens. As the High Commissioner on national minorities declares, ‘Protection of minority rights is the obligation of the state where the minority resides’.<sup>13</sup> Many argue that these provisions of human rights exclude the possibility of providing benefits by kin-states as a part of international minority protection. The aforementioned provisions, however, do not mean that other states cannot participate in promoting human rights, but they only point out where obligation lies. That a state is not obliged to do something does not mean that it cannot do it. Another argument against status laws is that they do not respect the territorial sovereignty of other states, and consequently they are in contradiction with one of the basic principles of international law in force. According to the principle of sovereignty ‘No state or group of states has the rights to intervene, directly or indirectly, for any reason whatever, in the internal or

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<sup>11</sup> See in detail: Iván Halász, Balázs Majtényi and Balázs Vizi, ‘A New Regime of Minority Protection? Preferential Treatment of Kin-minorities under National and International Law’ in Kántor et al. (eds.), *op. cit.*, pp. 328–349; Balázs Majtényi, ‘A szomszédos államokban élő magyarokról szóló törvény vitás jogi kérdései’, *Magyar Kisebbség* 1 (2002).

<sup>12</sup> See more detail on this topic: Fernand de Varennes ‘An Analysis of the “Act on Hungarians Living in Neighbouring Countries” and Validity of Measures Protecting and Promoting the Culture and Identity of Minorities Outside Hungary’ in Kántor et al. (eds.), *op. cit.*, pp. 411–429.

<sup>13</sup> Sovereignty, Responsibility and National Minorities, Organization for Security and Cooperation in Europe, High Commissioner on National Minorities (Rolf Ekéus, OSCE High Commissioner on National Minorities, The Hague, 26 October 2001). See the document in: Kántor et al. (eds.), *op. cit.*, pp. 581–582. Also Available at <<http://www.osce.org/item/6352.html>>, accessed 11 January 2006.

external affairs of any other state'.<sup>14</sup> Before saying anything on this statement, let us recall that, apart from very serious cases, quite surprisingly interventions by states on the territory of other states for promoting human rights often have not even had their justifiability questioned. Democratic states, for instance, frequently support rebellious organisations or human rights NGOs in dictatorial states, or they exert pressure to save human rights activists of the state concerned. In spite of this, however, up to this day no one has raised the question of whether it is consistent with the sovereignty of states. According to many, if the state concerned does not object to intervention, the question of infringement on sovereignty does not even arise. However, there may be cases when, irrespective of whether this question is raised or not, the intervention of states must respect the sovereignty of other states.

It is often difficult to find consistency between the basic principles and other institutions of international law. For example, it is hard to solve the contradiction between the sovereignty and territorial integrity of states and the principle of self-determination assigned to peoples and nations. Or how can one reconcile the equality of states with the fact that certain states have permanent membership and veto in the Security Council of the UN? Is it a modified version of the Orwellian principle.<sup>15</sup> 'All states are equal but some states are more equal than others'? According to a very weak argument emitting the air of feudalism, the privileged states have not only special rights but special obligations as well. By the way, a distinction among states would be more consistent with the principle of equality if states in a disadvantageous position had additional rights, but of course such ideas are far from the reality of international life.

A further problem is that the concept of sovereignty is not defined, not even in binding documents. Though the UN Charter lays down the sovereign equality of states, the UN binding documents have not defined the whole concept of sovereignty. Detailed descriptions of it on a universal level can only be found in the soft law of UN General Assembly resolutions. UN General Assembly Resolution 2625 (XXV), adopted in 1970, on the principles of international law lists, for example, the

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<sup>14</sup> UN General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law, Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations <<http://www.un.org/documents/ga/res/25/ares25.htm>>, accessed 26 January 2006.

<sup>15</sup> George Orwell, *Animal Farm: A Fairy Story* (Harmondsworth, 1989).

elements of state sovereignty.<sup>16</sup> Out of these, people refusing status laws perhaps base their arguments on the one stating, ‘Each state has the right freely to choose and develop its political, social, economic and cultural systems’.<sup>17</sup> One has to see, however, that the fact that the addressees of a legal rule are foreign citizens who reside on the territory of their citizenship does not necessarily constitute an infringement on sovereignty, and it is not forbidden by international law, since we come across numerous instances of it in international life. Not even regulations providing dual citizenship are forbidden by international law, although these subject the citizen of a state under the authority of another state. Why should status laws then be absolutely forbidden? They offer much less; in fact, often almost nothing for their beneficiaries. For a kin-state to foster its relation with its co-nationals by way of extending citizenship is a generally accepted custom in international life; see, for example, Croatia and Italy. There was a referendum on the extension of dual citizenship in Hungary, too, but it failed because of low turnout (a national referendum in Hungary is successful if more than half of the votes of the citizens voting are valid, but at least more than one-quarter of all eligible voters have given the same answer in the referendum).<sup>18</sup> An important difference between dual citizenship and status laws is that dual citizens might enjoy their entitlements provided by the kin-state only if they arrive at the territory thereof or at least leave their home state, whereas status laws grant benefits, for example, educational or cultural benefits, on the territory of the home state. According to many, the principle of the sovereign equality of states generally prohibits the extraterritorial

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<sup>16</sup> UN General Assembly Resolution 2625 (XXV), *op. cit.*

<sup>17</sup> *Ibid.*

<sup>18</sup> On 5 December 2004 a referendum took place in Hungary on offering Hungarian citizenship to Hungarian minorities living abroad. The question evoked a heated debate both among the political parties and in Hungarian society on the possible consequences and implications of extending Hungarian citizenship. On a popular initiative, the President of the Republic of Hungary put to a referendum the following question:

‘Do you want the National Assembly to adopt a law on offering—upon individual request—Hungarian citizenship, by preferential naturalization, to non-Hungarian citizens, living outside Hungary, declaring themselves to be of Hungarian ethnic origin, proving their Hungarian ethnic origin either by a “Hungarian Certificate” under Article 19 of the Act 62/2001 or in another way, defined in the law requested for legislation?’



application of domestic law,<sup>19</sup> therefore the kind of support provided by a kin-state for co-nationals may be subject to criticism. It would be preferable not to establish any direct public legal relation between the persons belonging to the kin minority and the kin-state; the grants could arrive at registered NGOs functioning on the territory of the home state, and these would then decide on distributing the subsidy by competition.

Furthermore, the line of thought above may be quite unnecessary considering the current international legal standpoint that human rights protection is no more a matter belonging to the internal authority of states.<sup>20</sup> If we accept this opinion, there is no place in general for the argument that status laws within the framework of international minority protection and human rights violate the principle of sovereignty. If this is true, it is worthwhile to examine whether these legal rules contradict the prohibition of discrimination, but then status laws should be treated together with the protection of minorities.

## **II. The Principle of Positive Distinction and Non-discrimination<sup>21</sup>**

A recurrent argument in the debates on the Hungarian Status Law<sup>22</sup> has been that it violates the principle of equality and is discriminatory because it differentiates on the basis of ethnic origin between the citizens of foreign states. But those who voiced their criticism on this point did not seem to be conscious of the fact that this argument reflects a long-standing and recurring debate over the interpretation of minority rights, though this time formulated in a new and very different context. In fact, the idea of granting specific rights for minorities has often been rejected with the argument that even the possibility of assuring such rights is excluded by

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<sup>19</sup> See this opinion for instance in: de Varennes, op. cit., p. 412.

<sup>20</sup> Felix Ermacora, Article 2(7), in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford, 1995), pp. 139–154.

<sup>21</sup> See in detail on this question: Halász, Majtényi and Vizi, op. cit.

<sup>22</sup> ‘Act 62/2001 on Hungarians Living in Neighbouring Countries’. Hereafter the term ‘status law’ refers to all domestic legal instruments which provide preferential treatment for ethnic co-nationals (kin minorities) living in other countries. Expressions like ‘Hungarian law’ or ‘Slovak law’ also refer to the same legal instruments in an abbreviated form.

national and international provisions prohibiting all forms of discrimination. Indeed specific minority rights which go beyond the equal enjoyment of fundamental rights may be seen formally, if not substantively, as a violation of the equality principle. Opponents of specific minority rights build their arguments on this principle, which in my opinion is purely formal, and appear before the public disguised as intrepid defenders of equality.

Substantially, however, there need not be a collision between the norms prohibiting discrimination against minorities and the norms granting their protection. Measures taken to eliminate disadvantage fit the Aristotelian concept of 'equality as justice', which is based on the idea that not everybody should be treated in the same way, but only those who are in the same situation. In this view, one acts justly by treating similar cases similarly and different cases differently. Those who claim the necessity of providing specific rights for minorities are in fact showing a commitment to this concept, when they call for positive distinction to combat the disadvantages arising from minority existence.<sup>23</sup>

As regards the problem of non-discrimination, the Venice Commission Report, referring to previous international human rights case-law,<sup>24</sup> reaffirmed that 'different treatment of persons in similar situations is not always forbidden' and emphasised that especially benefits related to the support of minority education and culture should not be considered as creating discrimination between the citizens of the home state. Nevertheless, outside the cultural and educational sphere, in the opinion of the Commission, preferential treatment 'might be granted only in exceptional cases'.

Considering the issue in the light of international standards on minority protection, there seems to be a good reason to regard all provisions granting specific rights for minorities as being in principle 'discriminatory'. Most legal norms on minority protection indeed provide specific rights for persons belonging to minorities. These rights go beyond the classic set of citizen rights and are exclusively granted to a limited number of citizens, i.e. to those persons who actually belong to

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<sup>23</sup> See: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, 1995), pp. 107–130; András Sajó, *Jogszabványok* (Budapest, 1996), pp. 177–202.

<sup>24</sup> Specifically to the 'Belgian Linguistic Case' at the European Court of Human Rights (judgement of 9 February 1967, Series A, no. 6).

minorities.<sup>25</sup> Since 1966 when the *International Covenant on Civil and Political Rights* was adopted (including a specific provision on the rights of persons belonging to minorities under Article 27), differentiation between individuals has become an acknowledged principle when such differential treatment is aimed at changing the disadvantaged situation of groups or individuals in a society.<sup>26</sup> Article 27 was included in the *Covenant* despite the fact that Article 2 and Article 26 of the same *Covenant* endorse the general non-discrimination clause and there is nothing in the document that acknowledges the possibility of making positive distinctions. We might conclude from this that *positive* distinction is accepted in each field where international documents otherwise prohibit any form of discrimination, e.g. even in the area of social rights covered by the *International Covenant on Economic, Social and Cultural Rights*. Similarly, read in this light, the *European Social Charter* may not in principle prohibit positive distinction.

The European Commission nevertheless found the Hungarian Status Law to be in breach of specific articles of the Treaty on the European

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<sup>25</sup> As the Council of Europe *Framework Convention for the Protection of National Minorities* (hereafter *Framework Convention*) formulated under Article 4, '(1) The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited. (2) The Parties undertake 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. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities. (3) *The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination*' [emphasis added]. 'Framework Convention for the Protection of National Minorities', *European Treaty Series* no. 157 (Strasbourg, 1 February 1995) <[conventions.coe.int/Treaty/en/Treaties/Word/157.doc](http://conventions.coe.int/Treaty/en/Treaties/Word/157.doc)>, accessed 26 January 2006.

<sup>26</sup> Cf. United Nations Human Rights Committee General Comment no.18 (Article 26) (37th Session, 1989), U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994). paragraph 13, stating that 'the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'. Article 27 of the same *Covenant* expressly defines the protection of minorities as such a legitimate purpose, when it declares, 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. See also: Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford, 1991), pp. 141–241.

Union (TEU—the report referred to Article 6, 7, 12 and 13 of the TEU) which relate to the equal treatment of, and prohibition of discrimination among, EU citizens in the member states. Although the 2001 *Regular Report* did not specify which provisions of the Hungarian Status Law were found to be incompatible with the *acquis*, Günther Verheugen, the European Commissioner for Enlargement, in a letter addressed to Hungarian Prime Minister Péter Medgyessy on 5 December 2002, specifically called attention to the need to annul all provisions of the Hungarian Law ‘which would give rise to discrimination between nationals of EU Member States on the basis of ethnic origin’. and specified Articles 4, 8, 9, 11, 12, and 14 of the Hungarian law as discriminatory, because ‘the benefits thereby provided for, are in fact restricted to the nationals of certain member states and/or given on the basis of ethnic origin’. This statement is, however, in contrast with some provisions of community law itself. For instance the so-called Race Directive (2000/43/EC) adopted by the European Council in June 2000, while strongly prohibiting any form of direct or indirect discrimination based on racial or ethnic origin, actually promotes positive distinction, stating that the principle of equal treatment ‘shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin’ (Article 5). From a legal point of view, it may be argued that providing support on a preferential basis to members of minorities in fields related to their right to preserve and maintain their minority identity cannot be in any way regarded as discriminatory either under public international law or under the relevant provisions of community law. The main quandary in this regard is obviously not whether such a differentiation is discriminatory, but much more whether a kin-state is entitled under international or community law to provide preferential treatment for people who are not its citizens.

### III. The Protection of Kin minorities in International Legal Documents

The protection of kin minorities in international documents is regarded as a new effort within minority protection, and it is assumed that the states have entered an untrodden path. Even the very thorough analysis of the Venice Commission mentions that the protection of kin minorities represents a new tendency unknown to international documents related to minority protection. It is true that up to now no multilateral conventions have been adopted in international law which would regulate the relationship between kin-state and kin minorities. The intention of kin-states to take care of their kin minorities, however, can be traced back to times before the adoption of these acts. What is more, international minority protection started with something very similar to present-day status laws well before the emergence of present international regulation. Based on the peace agreement of Karlowac in 1699, the Habsburg Emperor and the Polish King were entitled to stand up before the Sultan for the Roman Catholics living in the Turkish Empire. A similar entitlement to protection was granted to the Russian Czar in the peace treaty adopted in Küçük Kajnarci. In this 1774 treaty, the Russian Czar was given the right to protect Turkish subjects of Orthodox religion living on the territory of the Turkish Empire.

The only international convention treating explicitly special minority rights, *the CoE Framework Convention for the Protection of National Minorities*<sup>27</sup> contains some provisions concerning the issue. In Article 17 of the Convention, the Parties assume the obligation not to interfere with the right of persons belonging to national minorities and to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other states, particularly those with whom they share an ethnic, cultural, linguistic or religious identity or a common cultural heritage. Article 18 provides that the Parties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other states, in particular neighbouring states, in order to ensure the protection of persons belonging to the national minorities concerned. And to add where relevant, the Parties shall take measures to encourage transfrontier co-operation. The last sentence in this provision, similar to the overall wording of the

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<sup>27</sup> 'Framework Convention', op. cit.

Convention, leaves much freedom for interpretation, and it may be regarded as entitling the states to adopt status laws. One can find similar provisions in other international documents, such as in the *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*<sup>28</sup> or in the *Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights*.<sup>29</sup>

Without multilateral and bilateral agreements, or perhaps an international customary law in the background, doubts about status laws seem to be justifiable. The issue is not as simple as it looks at first sight. The above-mentioned provision of the Framework Convention for the Protection of National Minorities, for example, leaves much freedom for the interpreter. One can argue whether there is or there is not an internationally accepted customary law in this field or whether it embraces every type of grants, but it would probably be a fruitless debate. If such an international customary law exists, states might as well take unilateral measures.

Trying to find the reasons for the inconsistencies and theoretical failures of international documents responding to status laws, we can safely claim that they are rooted in the security policy approach. The organisations—whether rightly or wrongly—found possible sources of danger in these legal rules and subsequently looked for legal arguments which would support their opinion.

(Translated by Ivett Császár)

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<sup>28</sup> UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities G.A. res. 47/135, 47 U.N. GAOR Supp. (no. 49) at 210-211, U.N. Doc. A/47/49 (1992). Article 5(1): National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities; Article 5(2): Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

<sup>29</sup> Article 10: Every person belonging to a national minority, while duly respecting the territorial integrity of the state, shall have the right to have free and unimpeded contacts with the citizens of another country with whom this minority shares ethnic, religious or linguistic features or a cultural identity <<http://assembly.coe.int/Documents/AdoptedText/ta93/erec1201.htm#1>>, accessed 26 January 2006.