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MINORITY ISSUES

**European Minority Rights Law:
Unilateral Legislation in Favour of
Kin-Minorities**

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ECMI WORKING PAPER #60
July 2012



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ECMI Working Paper
European Centre for Minority Issues (ECMI)
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European Minority Rights Law: Unilateral Legislation in Favour of Kin-Minorities

A number of countries in Europe have adopted legislation or policies that pertain to kin-minorities living outside the territory of the state. While a number of the new democracies in Eastern Europe after 1989 incorporated statements in their constitutions indicating concerns for nationals living outside the mother state¹, ten European countries have taken explicit unilateral action to adopt public law legislation or regulations in favour of kin-minorities outside the mother state². Not all of these actions have extraterritorial reach, nor do all appropriate specific funds. Some address the financial side of minority life. Beneficiaries are mostly individuals, whereas some pieces of legislation support activities and/or institutions. Most authorize an entity in the mother state to be in charge of implementing the measures, and most provision for special status of members of minorities in both the home state and the mother state. However, international law does not sanction unilateral legislation as a means to protect minorities. Only in the event that no other measure or mechanism can secure the protection, does international law reluctantly sanction legal unilateralism. And in such cases, both parties to the issue must agree and consent. This Working Paper examines ten unilateral measures in force in Europe and puts them in the perspective of international law.

Tove H. Malloy, July 2012
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I. INTRODUCTION

The international approach to unilateral legislation with extraterritorial reach is quite clear. General principles of customary international law entrust the state where national minorities reside with the task of securing the rights of all persons within its jurisdiction. Preferential treatment of national minorities by their kin-state is considered the exception unless it is established through bilateral treaties, or as a minimum agreed among the parties involved. The League of Nations system was the first European multilateral attempt to provide protection for minorities outside the mother state through bilateral treaties. After the collapse of

the League of Nations system and the transfer of international protection of minorities to the United Nations system, bilateralism was not specifically promoted but nonetheless carried over as the main approach to kin-minority protection. This approach came under pressure after 1989 and the collapse of Communism when a number of countries adopted unilateral laws on kin-state minorities and compatriots living abroad. The bilateral approach received renewed attention, therefore, as part of the multilateral approach promoted by the international community after 1989.

Bilateral treaties have the advantage that they can procure specific commitments on sensitive issues, while multilateral agreements



can only provide for an indirect approach. Furthermore, they allow for the specific characteristics and needs of each national minority as well as of the peculiar historical, political and social context to be taken into direct consideration.³ Bilateral treaties usually contain mutual commitments to respect international norms and principles regarding national minorities. They often incorporate references to soft law provisions, such as the Council of Europe Parliamentary Assembly Recommendation no. 1201 (1993) and the CSCE Copenhagen Document (1990), and, by so doing give them binding effect in their mutual relations.

In 1993, bilateralism received a strong impetus when the EU adopted the so-called *Balladur* initiative, a French proposal for a Pact on Stability in Europe.⁴ The Pact aimed at achieving stability through the promotion of good neighbourly relations in Eastern Europe, including questions related to frontiers and minorities, as well as regional co-operation and the strengthening of democratic institutions through co-operation arrangements.⁵ As part of its first phase, the Pact on Stability was handed over to the Organization for Security and Co-operation in Europe (OSCE) and eventually adopted by 52 member states in 1995. The OSCE agreement was not identical with the Balladur plan, but contained the same aims together with principles and commitments earlier agreed to in the CSCE context. It included a list of bilateral treaties, all of which were drawn up outside of the Stability Pact with the exception of the one between Slovakia and Hungary,⁶ as well as a package of co-operative measures financed by the EU.⁷ It is estimated that around 100 treaties and agreements were concluded as a result of the Pact. In 2008, the OSCE High Commissioner on National Minorities (HCNM) followed up with a set of Recommendations on inter-state relations in connection with protection of national minorities.⁸ The notion of bilateralism as a tool in minority protection was, therefore, clear from 1995 onwards.

II. MULTILATERALISM

At the multilateral level, specific international agreements have assigned the role of supervision of states' obligations to the international community. In Europe, the Council of Europe Framework Convention for the Protection of National Minorities (FCNM) is the primary legal document establishing this rule. Article 18 of that Convention provides for bilateral and multilateral agreements to be concluded with other states, in particular neighbouring states in order to ensure the protection of persons belonging to national minorities. The United Nations (UN) also promotes the stipulation of bilateral and multilateral treaties.⁹ In the specific case of national minorities, the OSCE HCNM set of recommendations on bilateralism, the so-called Bolzano/Bozen Recommendations, on National Minorities in Inter-State Relations mirror the obligations that states have under international law. Thus, the Bolzano/Bozen Recommendations hold that:

“States should refrain from taking unilateral steps, including extending benefits to foreigners on the basis of ethnic, cultural, linguistic, religious or historical ties that have the intention or effect of undermining the principles of territorial integrity. States should not provide direct or indirect support for similar initiatives undertaken by non-State actors.”¹⁰

While the Recommendations do recognize that a state may have an interest even a constitutionally declared responsibility to support persons belonging to national minorities residing in other states based on ethnic, cultural, linguistic, religious, historical or any other ties, this does not imply, in any way, a right under international law to exercise jurisdiction over these persons on the territory of another state without the consent of that state. Unilateral legislation with extraterritorial reach is therefore only legitimate if it is agreed with by the legal authority of the territory in the external territory



or with a legal authority which covers both territories and through which another mode of protection could not be found.

III. LEGAL UNILATERALISM

Legal unilateralism is to be distinguished from political unilateralism. The latter is mostly known from the individual acts of states, often military acts, such as the United States' invasion of Grenada in 1983 or the bombing of Libya in 1986. This type of actions does not find any sanction in international law, and little if any in international relations. It is for this reason that unilateralism has a strong pejorative connotation.¹¹ Legal unilateralism is not sanctioned either by international law, but has become increasingly an issue, especially in the areas of international aviation,¹² international trade,¹³ international fishing,¹⁴ environmental protection,¹⁵ and as will be discussed in this paper, in minority protection.

Legal unilateralism may be defined as expression of the will of one subject of law endowed with legal personality aimed at opposing either a legal order, or exercising sovereign rights, or creating new legal commitments.¹⁶ As such, unilateral action can be tailored to benefit national economic interests over foreign ones, or putting national interests before that of the collective interests. While withdrawing from or not signing up to a legal framework may be seen as unilateralism, a more controversial type of legal unilateralism is the imposition by one community of its values on another community without the consent to or acquiescence to these values. On this notion, legal unilateralism is 'intrinsically linked to sovereignty, territoriality and jurisdiction.'¹⁷ Legal unilateralism becomes controversial because imposing values on others can cause conflict or tension between states. Legal unilateralism should not be confused with the 'responsibility to protect' or R2P adopted by the UN General Assembly in 2005. R2P is an emerging norm, or set of principles, based on the idea that sovereignty is not a right, but a

responsibility. R2P focuses on matters that are relevant to minority protection, namely preventing genocide, war crimes, crimes against humanity, and ethnic cleansing. But it is clearly a norm, not a law, and it requires multilateral action through the UN Security Council and the General Assembly.¹⁸

Legal unilateralism is furthermore controversial seen from the perspective of international norms on the general obligation of co-operation in solving international problems of an economic, social, cultural, or humanitarian character, as enshrined in Article 1 of the UN Charter.¹⁹ Accordingly, states must engage in dialogue to find a solution to disputes and no state must adopt unilateral measures before first exhausting means of international negotiation. Nevertheless, legal unilateralism has become a stable part of international law, especially in matters of trade. The World Trade Organization (WTO), through the WTO Appellate Body's interpretation of WTO legal provisions, plays a key role in this regard. The WTO does not forbid unilateral regulatory action but it does press states to justify their actions substantively and procedurally or face potential trade sanctions. For example, WTO rules likely permit unilateral regulation of greenhouse gas emissions, especially when a country has engaged in multilateral processes in good faith and these processes have stalemated, but such regulation must be applied in a non-discriminatory manner and meet procedural safeguards of transparency and due process.²⁰ International law has a critical but delicate role to play in disciplining unilateral action. Therefore, unilateral action is not a one-step dance.

Some argue that unilateral action is better viewed as part of a dynamic process of action and reaction, reassessment and response, in which international law plays an uneasy role as both a check and a potential consolidator.²¹ According to this view, 'international law needs to discipline (or better stated, provide guidelines for) unilateral action, as part of this dynamic process.'²² This requires some balancing act to



avoid on the one hand discriminatory and opportunistic policies, and on the other, to avoid impeding needed action. Unilateral action's impact ultimately depends on whether it is persuasive in shaping norms of behaviour. Perceptions of legitimacy determine effectiveness, and if a rule or norm advanced unilaterally is deemed illegitimate, it will spur resistance, including challenges under international law, undermining its effectiveness. Such resistance can spur re-articulations of legal norms and rules as part of a recursive process. In contrast, where unilateral action contributes to the forging of a new consensus that results in the adoption and application of common law norms, it can create a transnational legal order, either in the form of international law or more informal institutional settlement. In other words, in this view, legal unilateralism can lead to diverse outcomes both in terms of regression and opportunity.

The key is, however, whether a state has consented to multilateral regimes prior to committing to unilateral action. If a state has consented to a multilateral regime and then subsequently adopts unilateral laws that mirror the provisions of the regime, then the state has not sought to exhaust all options through co-operation. In the case of minority protection in Europe, this would mean that states which have signed and ratified the Council of Europe's FCNM would be required to take the matter up with the Council of Europe first and second with the State in which the legislation is to take effect.

IV. EUROPEAN UNILATERALISM

Legal unilateralism in the area of minority protection in Europe is not new. It was largely the reason why the League of Nations collapsed when States party to the bilateral Minority Treaties began to 'defect' and declare that they no longer honoured the requirements enshrined in the treaties.²³ It should be noted that throughout the interwar years, political unilateralism was the policy of the Weimar

Republic.²⁴ After World War II and during the Cold War, legal unilateralism was not prevalent. One law without extraterritorial reach was adopted in 1979 (see below). The proliferation of legal unilateralism began after the adoption of the FCNM in 1995. In this section, unilateral actions will be discussed and put in the perspective of political motivations. While this is not an exhaustive analysis of the political situations surrounding the unilateral actions, it is deemed helpful to outline, however briefly, the political motivations, if any.

AUSTRIA

The Austrian Federal Law of 25 January 1979 provides for the equation of South Tyroleans with Austrian citizens in certain administrative areas.²⁵ The law applies to persons of German or Ladin language affiliation who were born in the province Bolzano having declared themselves being part of the German or Ladin language group at the latest census in the province Bolzano and who do not have Austrian citizenship. It also applies to persons who were not born in the province Bolzano but declared themselves as part of the German or Ladin language group at a census in the province Bolzano and have or had at least one parent of German or Ladin mother tongue. The law provides for certain special rights in the educational sector, especially within higher education. The reach of the law is not extra-territorial in so far that the beneficiaries can only enjoy the special rights while in Austria.

The political motivation for the Austrian Law should most likely be seen in the light of the autonomy settlement for the region Trentino/Alto Adige (Trent/South Tyrol) that had been agreed in 1946 through the Gruber-De Gaspari Agreement but which did not see implementation in earnest until after 1972 with the adoption of the New Autonomy Statute. The Autonomy Statute had the main aim to protect the Austro-German culture and language in the region. However, at the time, the Province of Bolzano (one of the two provinces in the arrangement) was rather rural and not



prosperous. It did not have a university. Young members of the German-speaking minority were left with no choice but to enrol in an Italian university or move to Austria or Germany to enrol in a university. Moreover, at the time there was no international treaty protecting the linguistic and cultural rights of minorities. The FCNM was only adopted in 1995 and came into force in 1998. The Austrian law was, therefore, seen as a necessary step to protect and promote the right to the Austro-German culture in South Tyrol.

ITALY

An Italian law No. 19 of 9 January 1991 provides for the development of economic activities and international cooperation of the Region Friuli-Venezia Giulia, the province of Belluno and the neighbouring areas.²⁶ The law appropriated 12 billion Lire for the period 1991-1993 for activities in favour of the Italian minority in Yugoslavia, to be organized in co-operation with the Region Friuli Venezia-Giulia and with other institutions. By law No. 73 of 21 March 2001, the provisions were extended for the period 2001-2003 in the amount of 29 million Lire (approx. EUR 15,000).²⁷ According to the 2001 law, the funds would be used through a convention to be stipulated by the Ministry of Foreign Affairs, the Italian Union and the University of Trieste, in consultation with the Federation of the associations of exiles from Istria, Fiume or Dalmatia or, at any rate, with the single associations. The funds were to be used for measures and activities in the fields of education, culture, information, as well as, up to 20% of the annual budget, in the socio-economic field. Neither of the two laws defines the beneficiaries more specifically but references to activities and institutions indicate that it is not aimed at individual members of the minorities. The laws had extraterritorial reach as the funds were to be used by the Region of Friuli Venezia-Giulia in nearby regions in the former Yugoslavia and later in Slovenia and Croatia.

It is not clear what could have motivated the Italian legislation politically, except that in 1991

neither the FCNM nor the European Charter for Regional and Minority Languages had been adopted. The lack of international instruments could have motivated the Italian authorities. The area of Friuli-Venezia Giulia and Istria has of course a long history of changing borders and the thereto related division of communities and families. The area is also home to a good deal of cultural heritage that can be seen as influencing the identities of groups on either side of the border. Thus, the opening up of Yugoslavia and the sudden access to and ability to co-operate across formerly closed borders no doubt has motivated policy makers. The ability alone to interface and move across the border between Italy and Slovenia, which has long been the home of a small Italian minority, could be a driving force behind the legislation. Moreover, the proximity of South Tyrol whose Autonomy Act was becoming a good practice example exactly at that time. Parity in terms of employment in the public sector was reached in 1992.

SLOVENIA

In 1996, a Slovenian Resolution on the position of autochthonous Slovene minorities in neighbouring countries and the related tasks of state and other institutions in the Republic of Slovenia was adopted.²⁸ The Resolution applies to autochthonous Slovene minorities that live in the Austrian provinces of Carinthia and Styria, the Italian region of Friuli-Venezia Giulia, the Raba basin area of Hungary, and in areas on the Croatian side of the Croatian-Slovenian border, particularly Istria, Gorski Kotar and Medmurje. It provides for financial support for the activities of cultural, educational, sports, research and other institutions and organisations of civil society in Slovenia which co-operate with autochthonous minorities. These institutions are able to include their projects in the annual programmes of work of state bodies of the Republic of Slovenia. The method and scale of financial support provided by the Republic of Slovenia to minority organisations is not indicated in the Resolution but defined by separate statute and other legal documents.



While the Resolution is not a law and thus is not under international law oversight, any statutes or legal documents that might have accompanied it would likely have extraterritorial reach.

There is no indication in the Resolution text that it has been agreed upon by the neighbouring states. Moreover, unlike the Austrian and Italian laws, the Slovenian Resolution was adopted after the FCNM had opened for signature but before it had come into force. The political motivation behind the Resolution could, perhaps, be found in the experiences of turmoil that Slovenes across the Balkans were having due to break-up of Yugoslavia and the conflict of the mid-1990s. Many Slovenes were living outside Slovenia in other parts of the former Yugoslavia, and due to the splitting up of Yugoslavia Slovenes were also immigrating to Austria.

SLOVAKIA

The Slovak law of 14 February 1997 on Expatriate Slovaks adopted by the Slovak National Council regulates the status of expatriate Slovaks as well as their rights and duties in the territory of the Slovak Republic.²⁹ It also defines the process for recognizing expatriate Slovak status and the competencies of the different state administration central bodies regarding expatriate Slovaks. In the same manner as the Austrian law, the Slovak law provides for special rights of expatriate Slovaks to education in Slovakia as well as a number of other socio-economic advantages. The beneficiaries are individuals, and the law only applies in the territory of the Slovak Republic. The political motivation for the Slovak law seems different in that it does not have extra-territorial reach, and it does not stipulate any geographic area as to the residence of the beneficiaries, except that they live outside the Slovak Republic. The relevance of the FCNM, which was not in force at the time, is thus less significant since the beneficiaries of the Slovak law can be seen also to include the Slovak diaspora. Moreover, the bilateral agreement signed by the Slovak Republic and Hungary two

years earlier in 1995 in connection with the Stability Pact for Europe had regulated the situation of Slovaks in Hungary. The motivation must, therefore, likely be found internally in domestic politics.

At the time of adoption of the Slovak law on Expatriate Slovaks, domestic politics in the Slovak Republic had been a bit volatile. Vladimir Mečiar, who came into power for the third time in 1994, held a strong grip on power in the young Slovak Republic. Mečiar had been in charge during the breakup of Czechoslovakia, which he negotiated directly with Vaclav Klaus, the then prime minister in the Czech part of the country, in 1992. Later he also became responsible for Slovakia's failed attempt to get its application to the European Union approved on the fast track together with Hungary, Poland, Estonia, Slovenia and the Czech Republic. In 1999 and 2004, now out of power, Mr. Mečiar ran for the office of President of the Slovak Republic but lost to the opponent. During his reign, Mr. Mečiar was seen in Europe as a nationalist authoritarian ruler with undemocratic tendencies due to his purge of the public administration of non-loyal civil servants, including many members of the Hungarian national minority, and he was to a large extent *persona non grata* in other European countries. In 1996, the same year as the Slovak law on Expatriate Slovaks was adopted, the Mečiar government undertook a vast reorganization of the districts of Slovakia through the "Law pertaining to the territorial and administrative reorganization of the Slovak Republic."³⁰ Unlike, the law on Expatriate Slovaks, which empowered expatriates if they came to Slovakia, the redistricting legislation was seen largely as an attempt to de-empower the Hungarian minority in those areas where Hungarians constitute large numbers of the population. The Law on Expatriate Slovaks could, therefore, be seen as an attempt by the Mečiar government to boost the Slovak ethnic group domestically.



GREECE

In Greece, a ministerial decree of April 1998 provided the right for Albanians of Greek origin living and working in Greece to identity papers.³¹ The validity of the identity card is three years and has the purpose of legalizing the stay and work of the beneficiaries. The Decree is not extraterritorial as its jurisdiction pertains only to individuals in the territory of Greece, and it does not grant any entitlements other than the right to work. It is not clear that there is any political motivation for this Decree other than administrative concerns with registration of individuals. After the breakup of Yugoslavia and the Soviet bloc, a large number of economic refugees and immigrants from Albania and other formerly Communist countries including Bulgaria, Republic of Macedonia, Romania, Russia, Ukraine, Armenia and Georgia arrived in Greece, often illegally to seek employment. Of these, Albanians comprise 60-65% of the total number of immigrants in Greece. According to the 2001 census, there were officially 443,550 holders of Albanian citizenship in Greece. Greece and Albania signed a Friendship, Cooperation, Good Neighborliness and Security Agreement on 21 March 1996,³² and the Decree could well be seen as an outcome of this since it was issued only two years later.

RUSSIA

On 5 March 1999, the Russian State Duma adopted a federal law on the State Policy of the Russian Federation in respect of compatriots abroad.³³ The law is based on the premise that compatriots who are resident abroad are entitled to rely on the Russian Federation's support in exercising their civil, political, social, economic and cultural rights, and in preserving their distinctive identity. The beneficiaries of the law are defined as citizens of the Russian Federation who are resident on a permanent basis outside the Russian Federation, who were citizens of the USSR and live in states that were formerly part of the USSR, who have become citizens of those states or become stateless persons, who are

expatriates (emigrants) from the Russian state, the Russian republic, the RSFSR, the USSR and the Russian Federation, who had the corresponding citizenship and have become citizens of a foreign state, or who have a residence permit in one of these states or have become stateless persons as well as the descendants of individuals belonging to the above-mentioned groups, with the exception of descendants of individuals from the titular nation of the foreign state.

The law aims to ensure that Russian compatriots can freely express, preserve and develop their distinct identity and develop their spiritual and intellectual potential, that they can establish freely multifaceted links with the Russian Federation, as well as receive information from the Russian Federation, that they can establish national-cultural autonomy, public associations and mass media and participate in the activities of these institutions, that they can participate in the work of non-governmental organisations at national and international level and develop mutually-beneficial relations between the state of residence and the Russian Federation as well as exercise their free choice regarding one's place of residence or the right to return to the Russian Federation. Specifically, the law supports compatriots in the field of fundamental human rights, the economic and social field, the field of culture, language and education as well as the field of information. The law does not refer to appropriations for these many areas but provisions that funding will be allocated from the federal budget. Funding is to be made available both outside and inside the Russian Federation.

The law has clear extraterritorial reach and there is no indication that the Russian Federation has sought approval from specific states in whose territory the law will have jurisdiction. By most accounts, the political motivation of the Russian law on compatriots abroad should be seen in the light of the large group of Russians living in Estonia, Latvia and Lithuania and who became minorities in the



Baltic states after the breakup of the Soviet Union and the independence of these states. With the adoption of stringent citizenship criteria in Estonia and Latvia, many Russians were unable to claim citizenship let alone become naturalized. For these people, the only resort in terms of citizenship was Russia which issued passports upon request. Over the years, Latvia has loosened the criteria whereas Estonia retains the level of criteria. Moreover, in 1998, Estonia adopted for the first time a social integration programme which has been renewed several times and is now in its third period. The programme takes starting point in the Estonian Constitution's clause on the ethnic Estonian origin of the state and was from the outset geared towards protecting the culture of the dominant group, the ethnic Estonians. Especially, the earlier programmes left many to believe that the aim of the social integration programme was assimilation of Russian speakers.³⁴ Although Russia had become a member of the Council of Europe in 1996 and ratified the FCNM in 1998, a year before law on the State Policy of the Russian Federation in respect of compatriots abroad, Estonia's accession to the EU was being negotiated during that period from 1997 to 2002. This may likely have had some influence on the motivations of the Russian law makers to adopt the law in 1999.

BULGARIA

The Bulgarian law for Bulgarians living outside the Republic of Bulgaria was adopted by the National Assembly on 29 March 2000.³⁵ It pertains to Bulgarians living outside the Republic of Bulgaria, who have at least one ascendant of Bulgarian origin, who have Bulgarian national consciousness, and who stay permanently or continuously on the territory of another country. The aim of the law is to support organisations of Bulgarians outside the Republic of Bulgaria whose activities are directed toward preservation and development of the Bulgarian linguistic, cultural and religious traditions. The law does not refer to appropriations but does provide for material support in the fields of

education, language, culture and religion both within Bulgaria and in the country where the individuals of Bulgarian origin are resident. It also facilitates repatriation and return. In addition, the law provides for a National Council for Bulgarians living outside the Republic of Bulgaria which is a state public body with organisational, co-ordinating and representative functions that expresses and co-ordinates the national interests with the interests of the Bulgarians living outside Bulgaria. The National Council is funded via the state budget. The territorial reach of the Bulgarian law is somewhat unclear in that it does not explicitly mention Bulgarian organizations abroad as beneficiaries but rather refers to the needs of Bulgarians living abroad.

Although Bulgaria had ratified the FCNM in 1999, a year before, the political motivation for the Bulgarian law should most likely be seen in the perspective of domestic politics. Based on provisions in its Constitution, Bulgaria has enacted quite liberal laws on citizenship for returnees, and in 1998 it adopted a law on dual citizenship for Bulgarians living outside the country. As a result, many Bulgarians outside of Bulgaria have become citizens and are able to vote in national and local elections, a matter which has become somewhat controversial since Bulgaria became a member of the EU in 2007 because in effect it means that non-EU citizens are voting for the European Parliament. It is estimated that since 2001, thousands of ethnic Bulgarians have applied and received citizenship, and the law on Bulgarians living outside Bulgaria is generally seen as a supporting law to the citizenship law. Some have argued that it has a strong religious aim in that the Bulgarian government's organisational efforts in this area can be understood as 'an attempt to symbolically restore the Bulgarian Exarchate through some modern surrogate, which would institutionalise links with the ethnic Bulgarians abroad.'³⁶ Whether the aim is to increase the voting body or the scope of the Bulgarian Orthodox Church, the law seems to have mainly a domestic purpose.



HUNGARY

The Hungarian law on Hungarians living in neighbouring countries adopted on 19 June 2001 and amended in June 2003, is arguably the best known example of unilateral legislation favouring co-nationals outside the mother state.³⁷ The beneficiaries of the Hungarian law, also known as the “Hungarian status-law,” are persons living outside Hungary who declare themselves to be of Hungarian nationality who are not Hungarian citizens and who have their residence in the Republic of Croatia, the Federal Republic of Yugoslavia, Romania, the Republic of Slovenia, the Slovak Republic or the Ukraine. The aim of the law is to comply with Hungary’s responsibilities for Hungarians living abroad and to promote the preservation and development of their manifold relations with Hungary prescribed in paragraph (3) of Article 6 of the Constitution of the Republic of Hungary, and to ensure that Hungarians living in neighbouring countries form part of the Hungarian nation as a whole and to promote and preserve their well-being and awareness of national identity within their home country. The purpose of the law is to put Hungarian minorities in the targeted countries in the position to enjoy identical rights in the area of culture with Hungarian citizens. These rights are described in detail in the legislation. The law does not appropriate any amounts specifically but refers to a separate group of appropriations to be made annually by the state budget. The beneficiaries can on the basis of the establishment of their eligibility apply to a set of public benefit organizations regulated by the Act CLCI of 1997 on Public Benefit Organisations. The jurisdiction of the law is defined as the territory of the Republic of Hungary and the place of residence of the beneficiaries in the neighbouring countries.

The extraterritorial reach of the law is quite clear and has been discussed intensively publicly as well as in the writings of experts.³⁸ It does not appear that there were consultations with the governments of the targeted states during the drafting of the law. This eventually happened as a result of the public eye. It was

reviewed and amended in 2003 due to the ongoing scrutiny that Hungary was subjected to at the time as a candidate country in accession talks with the European Commission.³⁹ Much has been written and said about the Hungarian status-law, its controversial aims and its political motivation. The law was drafted during the first premiership of Viktor Orbán, leader of the Hungarian Civic Union Party, Fidesz, in power from 1998 to 2002, and the amendments made in 2003 came after a new government under Peter Medgyessy had come into office. Speculations range from the fact that Hungary was still experiencing the trauma of Trianon, the 1920 treaty which legitimized the changes to the territory of Hungary after World War I, and thus a need for Hungary to make a symbolic reversal of that treaty, to more urgent issues, such as the fact that when Hungary would join the EU and eventually the Schengen agreement, many Hungarian co-nationals in Romania would be legally barred from easy access to Hungary.⁴⁰ The latter problem has, of course, since become irrelevant. The actual value to Hungarians living outside Hungary remains to be fully assessed. But the law was conceived, drafted, adopted and amended during a time when Hungary was a member of the Council of Europe and had signed and ratified the FCNM immediately after it was adopted in 1995. The political motivation remains, therefore, a puzzle to many, not least because it was not repealed when the more moderate government of Medgyessy came into power.

ROMANIA

Not surprisingly, the Romanian law concerning Romanians living abroad adopted by the Romanian Parliament in November 2007 came to be seen as a reaction to the Hungarian law.⁴¹ The Romanian law replaced a previous law “Regarding the support granted to the Romanians communities from all over the world” of 15 July 1998. The 2007 law pertains to persons of Romanian ethnic origin, and those of persons sharing a common Romanian cultural identity, residing outside Romanian borders. It provisions undefined subsidies in the fields of



culture, including cultural heritage, education, language, and religion. The subsidies derive both from the annual state budget and private donations. The administration of the law is funded by the Romanian government budget. As to its jurisdiction, the law clearly has extra-territorial reach. However, the law stipulates that it shall be applied without prejudice to the principles of territorial sovereignty, good neighbourliness, reciprocity, *pacta sunt servanda*, respect of human rights and fundamental freedoms and non-discrimination, and it provisions that it will be implemented on the basis of the conclusion of agreements and programs with the states where the beneficiaries live or of protocols of the bilateral Joint Commissions and respectively on the basis of reciprocity as well as in line with the FCNM, the Venice Commission and the HCNM. The law thus remains within the internationally accepted approach to kin-state relations. Moreover, the law has global reach and thus might be seen as multilateral in that it complies with the international approach. Nevertheless, it was adopted five years after Romania had ratified the FCNM in 2002, thus leaving open the question as to the law's interpretation in European relations.

DENMARK

On 23 March 2010, the Danish Parliament adopted Bill No L98⁴² appropriating funds for the Danish minority in Schleswig-Holstein, Germany.⁴³ The Bill titled, "Bill about the South Slesvig Committee and the subsidies for the Danish minority in South Slesvig⁴⁴ that lie within the Minister for Education's jurisdiction"⁴⁵ covers a major part of the subsidies that are appropriated each year to the Danish minority in Schleswig-Holstein.⁴⁶ A small number of subsidies for other Danish institutions in Schleswig-Holstein are not covered by the Bill.⁴⁷ The legislation entered into force on 1 April 2010. Before the adoption of the Bill, subsidies for the Danish minority were appropriated through a footnote (*tekstanmærkning*) to the state budget⁴⁸ and administered by the Committee Concerning

Cultural Issues in South Slesvig.⁴⁹ Heretofore, the Danish minority negotiated directly with the members of that Committee as to the allocation of the funds among the various organizations belonging to the minority. The new legislation will continue to be overseen by a committee, the South Slesvig Committee, and a secretariat has been established within the Ministry of Education to which the minority organizations must submit applications for subsidies and specific projects. This Secretariat furthermore provides government oversight in that the Minister for Education has to pre-review the allocations selected by the Committee.

The aspect of oversight was a key element and likely the political motivation for the adoption of the Bill. The Danish authorities have allocated subsidies to the Danish minority since 1920. Since 1995, the annual subsidies became a budget item approved by the Parliament, albeit in the form of a footnote. The idea of elevating the footnote policies of the Danish Parliament to a legal process began surfacing in 2009 when the Danish Auditor General's Office on the basis of its annual audit of the Ministry of Education indicated that the amount allocated to South Slesvig was of such a size that it warranted a proper law rather than a footnote. The purpose of the funding was also criticized as being far too broad and lacking operationalization. Moreover, the scrutiny by the Auditor General's Office had revealed criticism of the processes by which the funds were allocated. No application process existed, and the funds were allocated according to practice. Thus, no serious assessment of allocations took place, and virtually no conditions were attached to the funding. And lastly, the Committee and the Ministry were criticized for not following up on the actual use of the funds. Often accounting documentation was missing, and if received, it was seldom reviewed by the Ministry. Thus, there was clearly a feeling of lack of transparency and democratic openness in connection with the appropriations for the Danish minority in South Slesvig.



The unanimous adoption by the Danish Parliament was hailed by many as a historic day for Denmark and especially for the Danish minority in South Slesvig. The day the Bill was adopted, the Chairman of the Committee called the event unique not only for Denmark but also for Europe.⁵⁰ And he hoped that other countries in Europe would follow the good Danish example.⁵¹ Another member of the Parliament likewise underscored the Danish perspective that the Bill could stand as a good European example because it signified a positive story.⁵² The positivity of the Bill was further highlighted by yet another member of the Parliament who argued that it showed the international community that Denmark was able to find mutual solutions to minority issues that did not provoke Germany. In short, there was a general consensus that the Bill is good PR for Denmark as well as a broad expectation that the international community would greet the Bill with appreciation.⁵³

Other than compliance with the state subsidy requirements under EU Community Law, it is not clear whether any international obligations were taken into consideration during the drafting and eventual adoption of the Bill. According to the Ministry of Education, Danish norms for administration of subsidies played a vital role in the drafting of the legislation.⁵⁴ The provider of the subsidies must disburse of the funds according to Danish norms, including formulate clear goals for the appropriations, ensure that the goals are met, make the goals operational, and define clear targets and conditions for the subsidies. The provider must further require timely and correct reporting by the beneficiaries, and when reporting is received, the provider must review the material and assess whether targets are met. In addition to ensure adherence to Danish public administration norms, the draft Bill was sent for comments to the Danish Ministry of Ecclesiastical Affairs, the Ministry of Interior and Health, the Ministry of Justice and the Ministry of Foreign Affairs.⁵⁵ It was felt that since the Bill had no precedence in Danish law-

making, it was necessary to solicit a broad range of comments.

Furthermore, in order to ensure compliance with German legislation, the draft Bill was sent to the Danish Embassy in Berlin and the Consulate General in Flensburg. It is not clear how the Bill was assessed in these two entities. However, we know according to one source in the Federal government, that German officials were neither consulted nor informed about the Bill and its process.⁵⁶ Moreover, at the time, there was not any press coverage in German newspapers about the legislation, nor has any been identified later. This may explain why the Bill has not raised any interest in European countries with similar kin-state relations.

The bilateral relationship between Denmark and Germany with regard to minorities is based on the so-called Bonn-Copenhagen Declarations,⁵⁷ issued in 1955 by both governments. These took the place of a bilateral treaty. Both Denmark and Germany have signed and ratified the FCNM and the Language Charter. Nevertheless, any concerns with Denmark's and Germany's obligations under international law seem to have had little relevance during the drafting period. As the Bill went through the obligatory three readings in the Danish Parliament few objections were received. Only the authority which had set the entire process in motion, the General Auditor's Office noted that the Bill did not go far enough in reducing the role of the members of the Parliament in the Committee.⁵⁸ Apparently, the technicalities of good governance of state subsidies for kin-minorities motivated the drafting and the adoption of the Bill.

V. CONCLUSIONS

Unilateral action in favour of kin-minorities is not new to Europe. Throughout modern European history concerns for kin-minorities have been part of the fabric of inter-state politics, and this has contributed to relegating minority issues to the security area of international relations. Prior to the establishment



of the United Nations and the emerging human rights regime, irredentism was a prevalent concern in Europe. It was precisely this factor which contributed to elevating minority issues to the international arena after World War I. However, with the emergence of the international human rights regime after World War II, and especially with the emergence of the European minority rights regime after 1989, a gradual move from seeing minorities as a security concern to seeing them as a justice concern has basically eliminated the unilateral rhetoric on irredentism. This transformation from a security discourse to a justice discourse is thus a major change in Europe's approach to minority issues and protection.⁵⁹ And with this change, the need for unilateral kin-state action has come to be seen as a breach of international law.

Why then do states continue to issue unilateral laws and regulations after the adoption of the FCNM in 1995? Unilateral action prior to 1995 is perhaps understandable, especially in the years running up to the end of the Cold War and immediately after. But some of the strongest unilateral actions, such as the Russian policy on

compatriots abroad and the Hungarian Status Law have come after 1995, respectively in 1999 and 2001. This paper has tried to put these and other initiatives in a political and strategic perspective in order to begin the analysis from an international relations perspective. But more questions need to be asked and answered. Does legal bilateralism not work? Does legal multilateralism not work? Is there a tension between bilateralism and multilateralism in minority protection? How does the phenomenon relate to the debate on legal pluralism? Moreover, are there political instruments and fora that could avert unilateral action before it becomes legal? The political motivations behind unilateral action are domestic as well as external. And often they have roots in historical experiences, especially in the case of national minorities. At least this has been indicated in the case of the Hungarian Status Law. A contextual perspective of legal unilateralism is required with regard to inter-state minority politics in Europe to begin answering these questions.

Footnotes

¹ The Hungarian Constitution (1989), Art. 6; the Romanian Constitution (1991), Art. 7; the Slovenian Constitution (1991), Art. 5; the "Former Yugoslav Republic of Macedonia" (1991), Art. 49; the Croatian Constitution (1991), Art. 10; the Ukrainian Constitution (1996), Art. 12; the Polish Constitution (1997), Art. 6 and the Slovak Constitution (2001), Art. 7(a).

² See, Report on the Preferential Treatment of National Minorities by their Kin-State, adopted by the Venice Commission, CDL0INF (2001) 19 of 22 October 2001 available at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.pdf](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.pdf) (accessed 12 July 2012).

³ See further, Report on the "Preferential Treatment of National Minorities by their Kin-State" adopted by the Venice Commission at its 48th Plenary Meeting, 19-20 October 2001; Joseph Marko, Emma Lantschner and Roberta Medda, *Protection of National Minorities through Bilateral Agreements in South-Eastern Europe*, 2001 and Emma Lantschner, *Soft jurisprudence in Minderheitenrecht: Standardsetzung und Konfliktbearbeitung durch Kontrollmechanismen bi- und multilateraler Instrumente*, *Minderheiten und Autonomien*, 15 (Nomos, 2009).

⁴ French Proposal for a Pact on Stability in Europe, submitted to the summit meeting of the European Council, Copenhagen, 22 June 1993, in: Stockholm International Peace Research Institute (Ed.), *SIPRI Yearbook 1994*, pp. 247-249.

⁵ Pal Dunay and Wolfgang Zellner, "The Pact on Stability in Europe - A Diplomatic Episode or a Lasting Success?" in *OSCE Yearbook 1995* available online at http://www.core-hamburg.de/documents/yearbook/english/95_96/Dunay.pdf (accessed 12 July 2012).

⁶ Germany concluded a number of treaties with its neighbours between June 1991 and April 1992.

⁷ Dunay and Zellner, p. 300

⁸ See The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note, June 2008 available online at <http://www.osce.org/hcnm/33633> (accessed 12 July 2012).

⁹ See resolution of the Human Rights Commission of 22 February 1995, UN Doc. E/CN.4/1995 L. 32

¹⁰ The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, Section 10

¹¹ Pierre-Marie Dupuy, "The Place and Role of Unilateralism in Contemporary International Law" in *European Journal of International Law*, Vol. 11 (2000), No. 1, pp. 19-29 at p. 20.



- ¹² A number of cases on transgression of sovereign airspace have been adjudicated by the International Court of Justice.
- ¹³ Most notably within the GATT and WHO systems.
- ¹⁴ The case of Canada's action against a Spanish fishing boat, the *Estai* in 1995.
- ¹⁵ Unilateral action in environmental protection often occurs in the area of fisheries, either in terms of over-fishing according to quotas or in relation to protection of certain species.
- ¹⁶ Dupuy, "The Place and Role of Unilateralism in Contemporary International Law", p. 20.
- ¹⁷ Philippe Sands, "Unilateralism, Values, and International Law" in *European Journal of International Law*, Vol. 11 (2000), No. 2, pp. 291-302, at p. 293.
- ¹⁸ Hehir, Aidan; Cunliffe, Philip, ed. (2011), "Chapter 7, The responsibility to protect and international law", *Critical Perspectives on the Responsibility to Protect: Interrogating Theory, Practice*, New York, NY: Taylor and Francis e-Library, pp. 84–100, ISBN 0-203-83429-1
- ¹⁹ Dupuy, "The Place and Role of Unilateralism in Contemporary International Law", p. 22.
- ²⁰ See Gregory Shaffer and Daniel Bodansky, "Transnationalism, Unilateralism and International Law" in Legal Studies Research Paper Series, Research Paper No. 11-34 at p. 8 available on line at <http://ssrn.com/abstract=1920470> (accessed 23 June 2012).
- ²¹ Shaffer and Daniel Bodansky, "Transnationalism, Unilateralism and International Law"
- ²² Shaffer and Daniel Bodansky, "Transnationalism, Unilateralism and International Law", p.8
- ²³ In 1934, Poland rejected the treaty it had signed with the League of Nations in 1919.
- ²⁴ Annemarie H. Sammartino, *The Impossible Border. Germany and the East, 1914-1922* (Cornell University Press, 2010)
- ²⁵ BGBl. no. 57/1979
- ²⁶ Official Gazette no. 17 of 21 January 1991.
- ²⁷ Official Gazette no. 73 of 28 March 2001.
- ²⁸ Official Gazette of the Republic of Slovenia, No. 35-2280/1996.
- ²⁹ Law No. 70/1997.
- ³⁰ Collection of Laws of 1996, number 221.
- ³¹ Décision ministérielle commune N° 4000/3/10/e des Ministres de l'Intérieur, de la Défense, des Affaires étrangères, du Travail et de l'Ordre public du 15/29 avril 1998 sur les conditions, la durée et la procédure d'octroi de la carte d'identité spéciale aux ressortissants albanais d'origine grecque .
- ³² See further website of Greek Ministry of Foreign Affairs, <http://www2.mfa.gr/www.mfa.gr/en-us/policy/geographic+regions/south-eastern+europe/balkans/bilateral+relations/albania/>(accessed 12 July 2012).
- ³³ Approved by the Federation Council on 17 March 1999 and signed by the President of the Russian Federation on 24 May 1999.
- ³⁴ See discussion in Tove H. Malloy, "Social cohesion Estonian style: Minority integration through constitutionalized hegemony and fictive pluralism" in T. Agarin and M. Brosig (eds.), *Minority Integration: Debating Ethnic Diversity in Eastern Europe* (Radopi, 2009)
- ³⁵ Prom. SG 30/11 Apr 2000.
- ³⁶ Daniel Smilov and Elena Jileva, "The politics of Bulgarian citizenship: National identity, democracy, and other uses" in Rainer Baubock, Bernhard Perchinig, Wiebke Sievers (eds.), *Citizenship Policies in the New Europe*, (Amsterdam University Press, 2009), chapter 7
- ³⁷ Act LXII of 2001 on Hungarians Living in Neighbouring Countries adopted by the Hungarian Parliament on 19 June 2001.
- ³⁸ See, BBC article, "Hungary 'Status Law' irks its neighbours" of 19 June 2001 available online at http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1397385.stm (accessed 12 July 2012) and Osamu Ieda (ed.), *Beyond Sovereignty: From Status Law to Transnational Citizenship?* Slavic Eurasian Studies No. 9 (Slavic Research Center, Hokkaido University, Sapporo 2006).
- ³⁹ See, Balázs Vizi, "The Evaluation of the 'Status Law' in the European Union" Working Paper No. 9 published in the *Central European Political Science Review*, Budapest, 2004:2
- ⁴⁰ Michael Stewart "The Hungarian Status Law: A new European form of transnational politics? Transnational Community Programme, Working Paper, September 2002 available online at http://www.transcomm.ox.ac.uk/working_papers.htm (accessed 12 July 2012).
- ⁴¹ Law No. 299/2007 on the support granted to the Romanians living abroad.
- ⁴² L 98 Forslag til lov om Sydslesvigudvalget og tilskudsordninger på undervisningsministerens område for det danske mindretal i Sydslesvig, available at http://www.ft.dk/Rlpdf/samling/20091/lovforslag/198/20091_198_som_vedtaget.pdf (accessed 12 July 2012).
- ⁴³ The Danish authorities have allocated subsidies to the Danish minority since 1920. The northern part of the former Duchy of Slesvig which had been lost to Prussia in 1864 was returned to Denmark in 1920 as a result of two referenda in Denmark and Germany. As a result national kin-state minorities were created in both the northern and the southern regions of the former Duchy.
- ⁴⁴ South Slesvig refers to the northern part of the German Land Schleswig-Holstein that until 1867 was united with an area north of the Danish-German border and which is now termed North Slesvig by the German minority there and *Sønderjylland* by the Danish population. Slesvig is the Danish spelling of the German Schleswig.
- ⁴⁵ For a full description of the Bill, see Tove H. Malloy, "Denmark adopts Unilateral Legislation in favour of Kin-Minority" in the *European Yearbook of Minority Issues*, Vol. 9 (2010).
- ⁴⁶ In 2009 the amount was DKK 431.5 million (EUR 57.8 million) and in 2010, DKK 435.4 million (EUR 58.4 million).
- ⁴⁷ In 2009, this amounted to approx. DKK 70 million (EUR 9,4 million) mainly for the maintenance of the Danish state church in Schleswig-Holstein.
- ⁴⁸ See for instance the Danish budget 2009, Paragraph 20, No. 104, Ministry of Education.
- ⁴⁹ For more on the Committee, see below.
- ⁵⁰ Siegfried Matlok, "Das Folketing hat einstimmig in historischer Stimmung das neue Südschleswig-Gesetz angenommen", *Der Nordschleswiger*, 24 March 2010.
- ⁵¹ Per Dittrich, "Et stort tillykke til Sydslesvig", *Flensborg Avis*, 24 March 2010.
- ⁵² Matlock, *op. cit.* note 22.
- ⁵³ Jesper Petersen, MP, "Mindretallets arbejde anerkendt og sikret", *Flensborg Avis*, 15 April 2010.
- ⁵⁴ Introduction to the new legislation provided during a seminar at Sandbjerg Gods, Denmark, 19-20 April 2010.
- ⁵⁵ Interview with official from the Ministry of Education who had been involved in the drafting of the Bill, 20 April 2010.
- ⁵⁶ Author's interview with official in the German Federal Ministry of the Interior, 23 May 2011.



⁵⁷ The declarations of intent issued by the German and Danish governments in 1955, the so-called Bonn-Copenhagen Declarations were non-binding and hold no legal power. They declared the two governments' intentions to protect the other state's kin according to international human rights standards and seek equity in all subsequent measures.

⁵⁸ "Rigsrevisionen er blandt kritikere af et lovforslag om Sydslesvig", P4 Syd, 13 November 2009 available at www.dr.dk/Regioner/Syd/Nyheder/Gransen (accessed 12 July 2012).

⁵⁹ Tove H. Malloy, National Minorities in the 21st Century Europe: new discourses, new narratives? *ECMI Issue Brief*, No. 24, December 2010.

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