

From the Status Law to the Initiative for 'Dual Citizenship': Aspects of Domestic Hungarian and International Law

Herbert Küpper

The eastern enlargement of the European Union (EU) not only brings about the (re)unification of the European continent, but it also establishes a new separation line several hundred miles east of where it used to be in the Yalta system. An external Schengen border separates the 'ins' from the 'outs'. The Republic of Hungary belongs to the 'ins', but some of its neighbours with sizeable Hungarian minorities remain outside for the time being or even permanently. Since the mid-1990s, there has been a vivid public discussion in Hungary about the scenario in which Hungary would become an EU member state while most of its neighbours would not. This discussion put pressure on the political leadership to try to minimise the effects that a Schengen border between Hungary and its less fortunate neighbours would have on the Hungarian minorities in those countries. After a heavy debate, the so-called Status Law was enacted in 2001. It grants special privileges to members and organisations of the Hungarian minorities outside Hungary. This is not enough for some, and in 2003 several initiatives started to force Parliament to amend the nationality laws to create the possibility for members of Magyar minorities to obtain Hungarian citizenship without putting up residence in Hungary. In March 2004, the Hungarian Constitutional Court did not find any legal obstacle for such a motion and allowed the people's initiative. This paper outlines the legal implications of both the Status Law and the changes that the people's initiative aspired to bring about, implications that can be felt in both Hungarian and international law. This paper includes an analysis of the underlying legal philosophies of and whether changes can be seen between the Status Law and the proposed amendments to the nationality laws.

I. The Attitude of the 'Motherland' Towards the Hungarian Minorities

1. General Aspects

The 'Hungarians beyond the borders', as the Hungarian Constitution calls them, are deemed to be an integral part of the Hungarian nation. In this context, nation in Hungary is defined not with a view to the Hungarian state, but on the assumption that all individuals of Hungarian language, culture and, arguably, descent form the Hungarian nation. Therefore, their Romanian, Ukrainian or Slovenian citizenship does not prevent members of local Hungarian minorities from defining themselves as part of the Hungarian nation and from being accepted as such by the Hungarian state and the Hungarians inside Hungary.

There is wide agreement within the Hungarian nation that the best solution for the minorities beyond the borders is to remain in their traditional dwelling grounds and to continue to live their Hungarian culture there. Depending on the political point of view, some think that it is sufficient that the respective resident states grant far-reaching minority rights to enable the survival of Hungarian culture and of Hungarian minorities, whereas others prefer that the territories in question are taken away from their present states and reintegrated into the Hungarian state.¹ No major political force advocates the relocation of the Hungarian minorities onto the territory of Hungary. The consensus is that Hungarian minorities should preserve Hungarian culture in their respective territories under conditions as favourable as possible. One policy central to achieving this goal is that members of the Hungarian minorities can travel freely into Hungary in order to maintain close cultural and other ties with the 'motherland' (anyaország).

Since Trianon (1920), the Hungarian public has taken a lively interest in the situation of the Hungarians beyond the borders, and this part of the 'national question' has played a considerable role in Hungarian politics. During the communist period, the *pax sovietica* within the Eastern bloc made it impossible for the Hungarian state to represent the interests of the

¹ A revision of borders is not espoused by any major political party, but in the Hungarian population there is a certain acceptance of the idea that the only, or at least the best, way to redress the injustice of the Trianon Treaty would be to give back to Hungary the territories which are inhabited by a Hungarian majority, if this could be done in a non-violent way.

Magyar minorities to the 'brother countries' in which these minorities lived. Kádár's passiveness in defending the interests of the Hungarian communities in the neighbouring countries was one factor that contributed to his downfall. Public opinion, slowly emancipated from the Party's control in the mid-1980s, no longer tolerated the absolute priority of bloc interests over the interests of the Hungarian minorities.

2. The Constitutional Amendments of 1989

In late 1989, extensive amendment of the Constitution replaced the socialist order with a transitional regime that became the basis for the later introduction of a multi-party democracy and a market economy. In this early stage, a clause was introduced to the Constitution that 'The Republic of Hungary bears a feeling of responsibility for the fate of the Hungarians beyond its borders, and promotes the maintenance of their contact with Hungary'.² This clause does not create any tangible and concrete legal obligations for the Hungarian state, but it forbids complete official passivity towards the Magyar minorities. Since 1990, all Hungarian governments have acted upon this duty and have included the interests of the Magyars beyond the borders into their politics in one way or the other.³

² § 6(3) Act 1949: XX on the Constitution of the Republic of Hungary, in force since 23 October 1989. On the legal meaning of this clause, see 'Balogh' in Zsolt Balogh et al. (eds.), *Az Alkotmány magyarázata* (Budapest, 2003), pp. 158–159; István Kukorelli, 'A "felelősségi klauzula" [Alkotmány 6. § (3) bekezdés] értelmezési lehetőségei' in Judit Tóth (ed.), *Schengen: A magyar-magyar kapcsolatok az uniós vízumrendszer árnyékában* (Budapest, 2000), pp. 175–179; Herber Küpper, 'Das neue Minderheitenrecht in Ungarn', *Untersuchungen zur Gegenwartskunde Südosteuropas* 36 (1998), pp. 121–126; Herbert Küpper, 'Völkerrecht, Verfassung und Außenpolitik in Ungarn', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (1998), pp. 255–256; Judit Tóth, 'A határon kívül élő magyarokért való felelősség egyes alkotmányjogi összefüggéseiről' in Tóth (ed.), *op. cit.*, pp. 123–173.

³ Georg Brunner, *Nationalitätenprobleme und Minderheitenkonflikte in Osteuropa* (Gütersloh, 1996), pp. 68–74; Ralf Thomas Göllner, 'Die Europapolitik Ungarns von 1990 bis 1994', *Studia Hungarica* 47 (2001), pp. 143–151; László Szarka, 'Die ungarischen Minderheiten in den Nachbarländern' in Georg Brunner and Hans Lemberg (eds.), *Völkerguppen in Ostmittel- und Südosteuropa* (Südosteuropa-Studien 52; Baden-Baden, 1994), pp. 163–170; Wolfgang Zellner and Pál Dunay, *Ungarns Außenpolitik 1990–1997: zwischen Westintegration, Nachbarschafts- und Minderheitenpolitik* (Baden-Baden, 1998), pp. 205–371.

3. A New Challenge: Schengen *ante portas*

In the first years of the transition, the Constitution's 'responsibility clause' and the government's politics against some of Hungary's neighbours, especially Romania with its then poor record of human and minority rights, settled the minority question as one of Hungarian domestic politics for the time being. In the mid-1990s, however, European integration of Hungary progressed, and at the same time, the Schengen system was being installed step by step. This created a new issue for public discussion: the future of the Magyar minorities 'after Schengen'.

At the time, the envisioned scenario included the several factors. First, Hungary would become an EU member in the foreseeable future and thus integrate into the Schengen system's rigid control of external borders. On the other hand, most of Hungary's neighbours would remain outside the EU; in the mid-1990s, this negative forecast included Romania, with its semi-authoritarian politics, and Slovakia under isolationist Vladimír Mečiar. Thus, the countries with the two largest Magyar communities were predicted to remain outside European integration longer than Hungary, and that meant their citizens, including the Hungarian minorities, would be cut off from Hungary by a Schengen border. Many feared that this would cause a grave impediment for members of the Hungarian minorities in the 'out-countries' to travel to, and foster contacts with, Hungary. Free travel and contact are considered essential in keeping the Hungarian minorities intact in their traditional dwelling grounds. Furthermore, the end of communism had made free travel between formerly socialist countries possible, and many East Europeans, not just Hungarians, found it hard to sacrifice this post-socialist achievement to the *acquis communautaire* in the course of integration.

If one looks at how the Schengen system evolved, there is little real cause for concern. However, this is a retroactive perspective; in the mid-1990s, the exact structures and the future development of the Schengen system were obscure and thus could prompt fears. The Schengen system's basic idea was and is free travel without internal border controls. In order to counterbalance perceived security deficits due to dismantling internal border checks, external borders were subjected to a tight control regime. The Treaty of Amsterdam (1997) integrated the previously independent Schengen Treaty into community law. Since then, Articles 61–69 ECT contain the basic provisions on the internal freedom of travel and external

border controls.⁴ One factor which has a distinct impact on the contacts of Magyar minorities with Hungary is the common visa policy.⁵ Article 62 (2b) ECT gives the Community the power to prescribe which country's citizens need a visa. In March 2001, the Council created the list of the countries whose citizens require a visa to enter EU territory (black list) and whose citizens do not (white list).⁶ This legal situation became compulsory for Hungary upon the country's accession to the EU on 1 May 2004.

Looking at Hungary's neighbours, Austria, Slovenia, and Slovakia are EU members, just like Hungary; their citizens enjoy complete freedom of travel. Croatia and Romania⁷ are on the white list, which means that their citizens may enter any EU country without visa; their accession to the EU can be expected in the medium-term, though perhaps not as early as 2007. Serbia and Montenegro and Ukraine are on the black list, so their citizens cannot travel into any EU country without a visa. This cuts off the Magyar communities in both countries from free travel into Hungary. Since the necessity to possess a visa is a matter of EU regulation and not an EU directive, Hungarian law cannot change this situation.

One should note, however, that the Schengen system allows individual states some scope of action. First of all, the Schengen visa system only refers to short-term visas (up to three months). Long-term visas (a stay more than three months) remain under national jurisdiction, so Hungarian law can decree a very low threshold for Serbian and Ukrainian citizens to obtain long-term visas for Hungary. Unlike the short-term Schengen visas, the national long-term visas are not valid for all of the EU, but only for the issuing country. For the maintenance of cultural and other ties to the kin-state, this restriction is not a severe

⁴ European Community Treaty: Treaty establishing the European Economic Community (1957), as amended by the Treaty of Amsterdam and the Treaty of Nice.

⁵ For an analysis of the community law relevant for the Magyar minorities, see Péter Kovács, 'A schengeni vízumrendszer és a határon túli magyarság' in Tóth (ed.), *op. cit.*, pp. 25–47; Herbert Küpper, 'Kisebbségek, kapcsolattartás és a nyugati integráció', *Kisebbségkutatás* (2000), pp. 60–71; Edit Sieber, 'Schengeni egyezmény', *Jogtudományi Közlöny* (1995), pp. 391–397.

⁶ Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

⁷ Romania was added in late 2001 when concrete accession negotiations opened.

disadvantage for members of Magyar minorities. Another ‘loophole’ for national legislation is local border traffic, which bilateral agreements may exempt from the requirement of visas. Since in both Serbia and Ukraine a considerable part of the Hungarian minorities live close to the border, local border traffic regulations may be a practical solution. Finally, an EU country may issue special visas for humanitarian and similar reasons. These visas are exceptional and therefore cannot serve as a basis for permanent contacts, but this provision would allow Hungary to react to severe anti-minority politics in Serbia and Ukraine.

In October 2003, Hungary concluded visa treaties with both Serbia and Montenegro and Ukraine. Hungarian citizens can travel into both countries without a visa, and the Hungarian state endeavours to create visa procedures that cause as little administrative and other expense to Serbian and Ukrainian citizens. These treaties do not differentiate between Serbian or Ukrainian citizens with a Hungarian ethnic background and other citizens.

II. The Status Law

1. The Political Constellation

Although it became clear around 2000 that the Schengen system would not cause members of the Hungarian minorities severe problems when travelling to Hungary, the situation of the Magyars beyond the borders and their free movement into Hungary continued to be an issue in Hungarian political discussions.⁸ The government reacted to this by proposing a bill on the legal status of the members of the Hungarian minorities beyond the border.⁹ It came against the background of the weakening of the Smallholders’ Party, the smaller partner in the

⁸ For a comprehensive analysis of the Status Law as a part of the Hungarian nation building policy, see Osamu Ieda, ‘The Status Law and New Nation Building in Post-Communist Hungary’, *Slavic Studies* 51 (2001), pp. 157–208; Osamu Ieda, ‘Post-Communist Nation Building and the Status Law Syndrome in Hungary’ in Zoltán Kántor et al. (eds.), *The Hungarian Status Law: Nation Building and/or Minority Protection* (Slavic Eurasian Studies no. 4; Sapporo, 2004), pp. 3–57.

⁹ On the Status Law as a reaction to the Schengen regime, see: Judit Tóth, ‘Connections of Kin Minorities to the Kin-state in the Extended Schengen Zone’ in Kántor et al. (eds.), *op. cit.*, pp. 371–395.

governing conservative coalition. With view to the 2002 general elections, Prime Minister Viktor Orbán and his party, FIDESZ (Young Democrats' Association), espoused a more national rhetoric and political agenda. When it was quite clear that the Smallholders' Party would not be represented in the following parliament, FIDESZ tried to gain the nationalist electorate of their coalition partner. In order to show their new target group some activity on the 'national question', the Orbán government presented the bill on the Magyar minorities. The bill was rammed through parliament without due preparatory work and without the necessary diplomatic co-ordination with either European institutions¹⁰ or the neighbouring states at which provisions of the bill were aimed. As a result, the Status Law¹¹ was technically poor, without much substance, and full of promises of future legislation. It also left Hungary in diplomatic isolation.

2. The Provisions of the Status Law

The Status Law contains certain privileges for ethnic Hungarians who live outside Hungary and are citizens of their state of residence. Some of these privileges are granted on the territory of Hungary, others can be claimed in the state of residence. Since the details of the Status Law are sufficiently described elsewhere,¹² this paper will concentrate on the most important traits.

¹⁰ On the initiative of Hungary's neighbours, the Venice Commission examined the Hungarian plans. Its comments, which criticise some parts of the bill but accept most parts of it, are more of a political document than a legal analysis.

¹¹ Act 2001: LXII on the Hungarians living in the neighbouring countries, of 7 July 2001.

¹² Stephen Farkas, 'Unilateral Minority Protection by Kin-State Governments: A Comparison of the Slovak and Hungarian Status Laws', *Columbia University Journal of East European Law* (2002), pp. 341–377; Iván Halász and Balázs Majtényi, 'A magyar és a szomszédos államok "státustörvényei"', *Kisebbségkutatás* (2001), pp. 470–479; Iván Halász and Balázs Majtényi, 'A magyar státustörvény a kelet-közép-európai jogi szabályozás tükrében' in László Szarka and Nóra Kovács (eds.), *Tér és terep: Tanulmányok az etnicitás és az identitás kérdésköréből* (Budapest, 2002), pp. 391–436; Zoltán Kántor (ed.), *A státustörvény: Dokumentumok, tanulmányok, publicisztika* (Budapest, 2002); Kántor et al. (eds.), *op. cit.*; Herbert Küpper, 'Ungarns umstrittenes Statusgesetz', *Osteuropa Recht (OER)* (2001), pp. 418–434.

a) Status and the Hungarian Identity Card

The members of the Hungarian minorities beyond the borders remain citizens of their country, and they are not awarded a special legal status in Hungary. The Status Law awards certain pecuniary and other privileges and benefits, but no comprehensive legal position, neither in public nor private law, which would justify the term ‘status’. The unofficial title ‘Status Law’ (státustörvény) is therefore not precise, but it was chosen for political propaganda reasons. The other unofficial title, the ‘Benefit Law’ (kedvezménytörvény), is much more on target.

A proven ‘Hungarian living in a neighbouring country’ can receive the so-called Hungarian Identity Card. This is issued by the Hungarian government to any individual who falls within the scope of the Status Law, i.e. those who can prove that they are of Hungarian ethnicity, do not possess Hungarian citizenship, and reside in one of the neighbouring states. Originally, Hungarian ethnicity was to be proven by a certificate granted by a recognised Hungarian minority organisation (including religious communities) in the state of residence. As a 2003 amendment¹³ repealed the involvement of minority organisations, Hungarian ethnicity is now shown through tests organised by a Hungarian government agency. If necessary, the Hungarian embassies and consulates can assist in the procedure.

From the outside, a Hungarian Identity Card strongly resembles a passport. This and the official term ‘Hungarian Identity Card’ bear a symbolic proximity to citizenship and the papers certifying this status. However, neither the Status Law nor the Hungarian Identity Card confers Hungarian citizenship or a similarly comprehensive status. The Hungarian Identity Card is a document that proves that its bearer is entitled to the privileges of the Status Law, and thus from a legal perspective it has merely an administrative significance. On a psychological level, however, it is designed to give the Hungarian minorities the feeling of receiving ‘Hungarian citizenship *in nucleo*’.

b) Privileges inside Hungary

The Status Law grants its beneficiaries access to numerous cultural institutions (libraries, archives, museums) in Hungary on the same

¹³ Act 2003: LVII of 15 July 2003.

conditions as Hungarian citizens. In some cases, the Status Law allows access at reduced fees or even free. The same is true for public transport. Furthermore, members of the Hungarian minorities may receive grants to attend schools or universities in Hungary, and teachers may receive additional training in Hungarian pedagogical institutions.

In its original version, the Status Law awarded bearers of the Hungarian Identity Card privileged access to health care and the labour market. The 2003 amendments cancel these privileges and refer the regulation of these questions to bilateral agreements with the neighbouring state. This was a reaction to protests of the neighbours, especially Romania, against the differentiation between their citizens according to ethnic background.

c) Privileges in the State of Residence

Some privileges of the Status Law are awarded in the state of residence. Private individuals may ask for a monthly stipend and one-time payments for every child that they send to a Hungarian-speaking institution from nursery school to university. Magyar minority organisations may receive project subsidies and limited institutional financing. Until 2003, institutional financing required only that the organisation 'serves the aims of the Hungarian national communities living in the neighbouring countries'. The 2003 amendments introduced a more precise definition, which includes tasks in the cultivation of Hungarian language, culture, traditions or identity, and no longer mention assistance for children in educational institutions below the primary school level.

Foreign pedagogical institutions may be granted project and institutional financing by the Hungarian state for offering classes in Hungarian. In a parallel way, Hungarian institutions may obtain grants for relocating their capacities or part of them into the areas where Hungarian minorities live.

d) Questions that the Status Law Does Not Address

The Status Law leaves aside two major questions of the Hungarian communities: free movement and citizenship. Regarding free movement, the Status Law only awards the right to use public transport at a reduced price or for free, but does not regulate the entry into Hungary. When the bill was drafted in 2000 and 2001, Schengen was already part of the

supranational structures of the EU, and its details were being modified. Hungary's accession was close at hand, and any domestic law would have ceased to be applicable the minute of the accession. Hungary did not want to jeopardise its accession chances by ephemeral visa regulations in the Status Law. Thus, the question of free travel—the initial factor to start the whole discussion in the first place—was left out of the law.

The other issue about which the Status Law is silent is the citizenship of the minorities. Since the end of communism, Hungary's nationalist right has demanded the government confer Hungarian citizenship on the members of the Magyar minorities in the neighbouring countries without them having to move to Hungary. Although the Status Law does not deal with the issue of citizenship, it does address this political demand, which was central to the Smallholders' Party electorate that FIDESZ hoped to win with this piece of legislation. The government created the Hungarian Identity Card and called the act the 'Status Law' to insinuate that some status in public law, some minor form of citizenship, was created. As previously pointed out, the provisions of the act contain no such status, but the symbols are there in the law.

e) Problems of the Status Law in Domestic and International Law

The Status Law causes certain problems in both domestic Hungarian and international law. As they have been dealt with in legal literature,¹⁴ an outline can suffice here. In domestic law, the character of the Status law as a framework law requires a high degree of harmonisation of numerous other statutes and sub-statutory instruments with its provisions and aims. This harmonisation was neglected during the legislative process and had—and still has—to be conducted after the Status Law entered into force. There are further problems with the constitutional guarantee of equality and equal treatment in § 70/A Constitution. If one accepts Hungary's care for its kin minorities as a viable reason for differential treatment (which one has to because of § 6 (3) Constitution), then different treatment between ethnic Hungarians and Hungarian citizens or other aliens may be justified.

In international law, the problems arise from the fact that the law deals with persons living outside the territory of Hungary. Although international law does not totally forbid legislation with effect on other

¹⁴ Cf. fn. 12.

countries and their citizens, there are certain rules. The most important is the respect for the territorial and personal sovereignty of other states. Territorial sovereignty means that no state needs to suffer official acts of other states on its territory without its consent. This rule is in flux, but there still are many states that deem it to be valid in its classical form as outlined here. Government payments to recipients in foreign states as well as conducting parts of the administrative procedure that aims at issuing the Hungarian Identity Card outside the territory of Hungary are violations of this principle if the recipient state does not consent. The picture is less clear if money is not distributed directly by the foreign state, but by an autonomous body (decentralised state administration) or some institution of private law, such as a private foundation. In this latter case, the rule of territorial sovereignty in a more modern, looser interpretation would not prevent such payments. The same is true if the foreign state pays the money to bank accounts in its own territory.

The principle of personal sovereignty forbids all states from addressing legal rights and obligations to citizens of foreign states, at least as long as these citizens are not on the territory of the legislating state. Here again, this is the classical form of the rule, which is contested in legal literature as some advocate a less strict interpretation. Subsidising non-Hungarian citizens and associations outside Hungary may violate this principle, especially in its classical version, and so did the inclusion of non-Hungarian organisations in a Hungarian administrative procedure. It was against international law to make local minority organisations give official statements on individual's ethnic background in the procedure on issuing the Hungarian Identity Card (which is an official Hungarian procedure in execution of a Hungarian piece of legislation) without prior consent of the state of residence. For this reason, that point was changed by the 2003 amendments.

The sovereignty of states (both territorial and personal) no longer allows a state to ward off external intervention in the field of human rights: human rights no longer belong to the *domaine réservé* of the states. Minority rights are, or at least can be interpreted as, part of human rights and their violation therefore allows for external action. However, this can only mean that the state of residence is bound by international law to give its consent to activities of the 'motherland' that intends to assist its kin minorities. Unilateral actions by the kin-state without the consent of the resident state remain contrary to international law unless prior

negotiations between both states have failed and the human and minority rights situation in the resident state is intolerable. Even then it is questionable whether the right to interfere is with the kin-state or exclusively with the international community as a whole. There have been and still are decisive changes happening in humanitarian international law, so it is impossible to state what exactly the law is in this respect.

A third point is the differentiation between foreign citizens on ethnic grounds. In customary international law, any state may make all the differentiations it wishes; only extreme cases such as apartheid are forbidden. Yet in Europe, numerous human rights treaties forbid differentiation on the grounds of ethnicity, at least if there is no reasonable motive. Cultural care of the kin-state for kin minorities certainly is a reasonable motive, but it is questionable whether it makes a differentiation in the access to health care and the labour market necessary. Since the 2003 amendment requires a prior international agreement, this point has lost its relevance.

III. The People's Initiative for Dual Citizenship

As mentioned before, on the right end of the political spectrum there is a strong wish to award the members of the Magyar minorities Hungarian citizenship. The peculiarity of this wish is that Hungarian citizenship would be granted to foreign citizens who continue to live in their current state. On a formal level, the reason for this wish is that the ancestors of the Magyar minorities had been Hungarian citizens until 1919/20. Ideologically, the political right advocates an image of nation based on cultural identity and descent. In this philosophy, it is quite a natural thought that all persons who are of Hungarian ethnicity and who are descendants of Hungarian nationals belong to the Hungarian nation and thus to the Hungarian state. The question of citizenship was brought into public discussion under the term 'dual citizenship'. It is thought that Hungarian citizenship would be given to individuals of Hungarian ethnicity as an extra citizenship in addition to their current one. The error of this concept will be discussed below.

Since Parliament and Government had gone as far as they would with the Status Law, the advocates of a dual citizenship could not hope for further legislation. Therefore, they resorted to direct democracy, starting a people's initiative in 2003. This mechanism enables the people to force Parliament to legislate in a given matter. This special form of 'active plebiscite' is operated by certain quorums of signatures.

1. The People's Initiative in Constitutional Law

After decades of political abstinence, the 1989 constitutional amendments did not only introduce the conventional forms of representative democracy, but gave the people additional rights to decide certain questions themselves. These mechanisms of direct democracy, the people's initiative and the referendum, were given more precise regulation by a constitutional amendment in 1997. Now, § 28/C(2) Constitution gives 200,000 voters the right to initiate legislation. If a question on legislation is opened to signature and collects 200,000 signatures within four months, there has to be a referendum on that question. The question has to be formulated in a way that a yes/no answer is possible and that a 'yes' is to be given in order to accept the proposal. The referendum is successful if more than half of the voters vote yes and if more than half of all Hungarian voters cast a valid vote. If a referendum is successful, Parliament is under obligation to legislate in accordance with the question put to the people's decision; the referendum does not replace the parliamentary legislative process.

Basically, a people's initiative and a referendum can be held on any question under Parliament's jurisdiction. However, § 28/C(5) excludes some fields from decision by direct democracy. Among the excluded matters are state finance, obligations stemming from international treaties that Hungary signed, and the dissolution of Parliament or a local council. In several rulings, the Constitutional Court added that a referendum may not aim at amending the constitution.¹⁵

A people's initiative is started by presenting the question to the National Election Committee. If the question is in accordance with the

¹⁵ For a critical assessment on the judgements that exclude constitutional amendment from direct democracy, see Herbert Küpper, 'Das verfassungsgerichtliche Verbot eines Referendums über die Direktwahl des ungarischen Staatspräsidenten', *Osteuropa Recht (OER)* (1999), pp. 422–434.

formal and material conditions of the Constitution and the relevant statutes, the Committee certifies the question. The certified question may be opened to signature. In all cases, legal protection may be sought with the Constitutional Court. If the National Election Committee refuses to certify the question, the Court can scrutinise this decision, and if the Committee certifies a question, every citizen has the right to challenge this decision before the Constitutional Court.

2. The Initiative of the ‘Hungarians’ World Federation’

In early 2003, several organisations presented questions for certification in order to force the Hungarian parliament to legislate on dual citizenship for the Hungarian minorities in the vicinity. The National Election Committee picked the question presented by the ‘Hungarians’ World Federation’¹⁶ as a test case and refused to certify all other questions because there can only be one initiative and one referendum at a time on an issue. This is to prevent conflicting referenda which would leave Parliament at a loss about which initiative to obey. The question presented by the World Federation ran:

Do you wish that Parliament passes a bill that the non-Hungarian citizen, who confesses to Hungarian nationality¹⁷ and who does not reside in Hungary, and who proves his or her Hungarian nationality by means of a ‘Hungarian Identity Card’ in accordance with § 19 Act 2001: LXII¹⁸ or in any other way to be defined by the bill which Parliament is to pass, is granted—on demand—Hungarian citizenship by way of a privileged naturalisation?

As the National Election Committee found the question to be in accordance with all legal requirements, it certified the question on 18 November 2003.¹⁹ When 200,000 signatures were collected, the initiative was declared successful, and Parliament decided to hold a referendum on the given question.²⁰ Subsequently, the President of the Republic set a

¹⁶ The Hungarians’ World Federation, founded in 1938, defines as its goal the care for Hungarians living abroad, especially those living in dispersed communities.

¹⁷ In Hungarian, the term ‘nemzetiség’ refers only to ethnicity, not to citizenship.

¹⁸ This is the Status Law.

¹⁹ Decision of the National Election Committee (OVB) 116/2003. (IX.18).

²⁰ Resolution of the Parliament (OGY) 82/2004. (IX.15); this resolution also regulates

date for the referendum²¹: 5 December 2004. The people's initiative was invalid because less than the necessary 50 per cent of the Hungarian electorate participated. Being invalid, the initiative had no binding force on Parliament.

3. The Ruling of the Constitutional Court

Immediately after the certification, action was brought before the Constitutional Court against this decision. The admissibility of the question was challenged on three grounds: the planned law would violate Hungary's obligation from two treaties it had signed (the Trianon Peace Treaty and the European Nationality Convention),²² the planned law would violate the equality clause in § 70/A of the Constitution, and the question did not conform with the formal requirements because it was too complicated, equivocal and fraught with legal expressions that the average citizen did not understand in their full meaning. In its decision of 2 March 2004,²³ the Constitutional Court upheld the Committee's decision and deemed the initiative constitutional and legal.

a) The Initiative and International Treaty Obligations

First, the Court dealt with the question of a conflict between the initiative and Hungary's obligations from international treaties. In the case of the Trianon Treaty, the Court took into account that that treaty contained regulations on citizenship; the treaty stated that the population of the territories ceded by Hungary to other states acquired the citizenship of the new state. The Court rightly found that this clause was not violated by an individual naturalisation on demand, but only by a collective naturalisation. The initiative does not aim at such a regulation. In its given form, it does not violate the obligation that the Trianon Treaty puts on the Hungarian state.

The question of a possible collision with the European Nationality Convention was not so easy to answer. Article 5 of the Convention

from which title of the budget the referendum is to be financed. The Constitutional Court (AB) upheld this resolution in its decision 40/2004. (X.27).

²¹ Decision of the President of the Republic (KE) 144/2004. (X.28).

²² European Convention on Nationality, of 6 November 1997, entered into force on 1 March 2000 (Council of Europe's treaty no. 166).

²³ AB Decision 5/2004. (III.2).

stipulates that the national citizenship law of the parties to the Convention must not discriminate against individuals on the ground of ethnicity. This ban on discrimination is backed, as the Court sees it, by the non-discrimination clause of Article 14 European Convention of Human Rights. The proposed Hungarian law offers privileged naturalisation to foreigners with a Hungarian ethnic background, whereas other citizens of the same countries who are not of Magyar ethnicity will not enjoy this privilege.

The Court's answer to this problem is entirely formal. The proposed law deals with naturalisation, i.e. with granting a legal advantage. Discrimination by definition can only occur if legal disadvantages are imposed.²⁴ If the state confers a legal advantage, it may differentiate between the beneficiaries on ethnic grounds if there is a reasonable motive to do so. The Court found that the facts that the potential beneficiaries are descendants of former Hungarian citizens, and their ethnic proximity to Hungary are sufficient reasons for privileges in the naturalisation law. Indeed, if one examines the citizenship laws of the European states, one finds that many contain privileged conditions for the naturalisation of members of kin minorities.

However, this reasoning is not satisfying because the people's initiative aims at a regulation which is unique in European citizenship laws. In this case, individuals are awarded the citizenship of their kin-state only on the ground of ethnic proximity, without moving to the kin-state and with a continued residence in the state of their first citizenship. In their dissenting opinion,²⁵ constitutional justices András Holló and István Kukorelli found that this 'remote naturalisation' for foreign kin minorities contravened the spirit, if not the wording, of the European Nationality Convention. The rules of this Convention refer to naturalisation only with a view to persons residing on the territory of the naturalising state, and privileges in naturalisation, e.g. for members of kin minorities, mean a shorter period of residence in the naturalising state. Naturalisation without residence is indeed beyond the concept of this Convention. It is a question

²⁴ The logical implications of this argument are dealt with by constitutional justice Mihály Bihari in his parallel opinion. In Hungary, the members of the Constitutional Court may deliver alternative or concurrent opinions for the majority's decision; these are published with the judgement.

²⁵ In Hungary, dissenting opinions are published with the judgement.

of treaty interpretation whether this means that the Convention intends to outlaw 'remote naturalisation' for the signatory states. Holló and Kukorelli answer to the affirmative, whereas the majority ruling of the Court does not deal with this aspect. The two dissenting judgements certainly meet the mainstream opinion of European states, but it is doubtful whether this opinion is a legal or a political opinion; only the legal opinion of a state is of relevance in international law.

b) The Initiative and Equal Treatment

The initiative aims at passing a bill. All statutes—including those initiated by the people—must conform to the Constitution. A question in a people's initiative cannot propose a bill which would be unconstitutional if it became statute. The question's review by the National Election Committee and the Constitutional Court therefore includes the constitutionality of the proposed legislation. In this case, the relevant constitutional point was the equality clause in § 70/A, which forbids unreasonable differentiation between individuals on the grounds of ethnic background. The Court argued that dual citizenship for foreign citizens of Hungarian ethnicity took into account their special emotional ties to Hungary and applied a reasonable differentiation. The existence of § 6(3) Constitution shows that Hungary's basic law considers these ties legitimate, so the Court did not find a violation of the equality clause.

c) The Formal Aspects of the Question

The formal aspects of the question were dealt with quickly. The Court held that a question was unequivocal in the sense of the referendum laws if an answer could be given as 'yes' or 'no'. This was the case with the proposed question. The Court conceded that the phrase was lengthy, but found that it was not beyond the comprehension of an average citizen. The legal terms such as 'privileged naturalisation' did not prevent the average citizen from understanding the question.

4. Problems in International Law

The Constitutional Court dealt with the problems that amendment of the citizenship laws might cause with international treaties. It did not, however, discuss the problems in customary international law. It had no reason to do so because a conflict with customary international law does

not make a people's initiative inadmissible. Yet, the initiative is not entirely free of problems for customary law.

a) The Nottebohm Rule

Basically nationality is an issue for domestic legislation. Customary international law contains only a few rules to co-ordinate national laws. The most important international rule is the so-called Nottebohm rule.²⁶ It says that each state is free to naturalise any foreign citizen it wants, but other states are only obliged to recognise a naturalisation if there is a 'genuine link' between the naturalising state and the naturalised individual.²⁷ If there is no such link, no other state is compelled to regard the naturalisation as valid, although it is free to do so.

If the people's initiative became law and Hungary naturalised on demand a Romanian or Slovenian citizen without residence in Hungary, but merely on the ground of ethnicity, the question arises whether Hungarian ethnicity is a 'genuine link'. The primary genuine links are residence, centre of business activities and interests, family ties and similar territorial aspects. Yet, the concept of genuine link is quite liberal, and ethnic proximity, combined with descent from ancestors who were, three generations ago, citizens of the now naturalising state, is probably sufficient to create such a genuine link. It is questionable whether international law requires the genuine link to be of a nature that forbids 'remote naturalisation', i.e. that it demands some attachment to territory. There is little precedent for such practices, and the quite liberal distribution of Romanian citizenship among Moldovan citizens and Greek citizenship among citizens of Macedonia and some Soviet successor states was never protested by the states concerned; therefore they can be deemed to be based upon the consent, or at least the connivance, of the state of previous citizenship. Thus, the stronger argument on international law

²⁶ Pronounced by the International Court of Justice in the Nottebohm case on 6 April 1955, *ICJ Reports*, 1955, p. 4.

²⁷ This is the classical form of the relevant international law. The European Court of Justice took a more liberal stance in the Micheletti case (Case C-369/90, judgement of 7 July 1990, Collection 1990 I, p. 4239), but this decision was based on reasonings of community law, not of international law. Therefore, it is unclear whether and, if so, how this case has altered the international law among the Western European states. If one applies the Micheletti rule, then Hungary would be quite free to naturalize any foreign citizen without any requirement of attachment to Hungarian territory.

would accept that 'remote naturalisation' of members of kin minorities is admissible. In that case, other countries are compelled to recognise this naturalisation. This includes the country whose citizenship the fresh Hungarian citizen possessed before naturalisation—in our example, Romania or Slovenia.

Romania or Slovenia have to accept the naturalisation of one of their citizens by Hungary, but may further react to it. They have the right to withdraw their own citizenship so that the individual in question becomes a Hungarian citizen only. This withdrawal may be interpreted as a sort of retaliation for an act of disloyalty. Many states still regard citizenship as a bond of loyalty between the citizens and their state. The request to another country to be naturalised is considered a violation of, or a farewell to, this loyalty, and this is sanctioned by the withdrawal of citizenship. Another interpretation of the withdrawal of the old citizenship is that the withdrawing state wants to prevent dual citizenship, which until recently in Europe was considered a situation to be avoided. In either case, international law does not forbid the state of the earlier citizenship to withdraw it, and many citizenship laws in Europe, especially Western Europe,²⁸ contain clauses that citizenship is terminated either by an administrative act of withdrawal or *ex lege* if a citizen acquires a foreign citizenship on request.

Thus, Hungary's neighbouring states are free to withdraw their citizenship as a reaction to their citizen's request to receive Hungarian citizenship. As a result, the ethnic Magyar will not receive dual citizenship, but may end up as a solely Hungarian citizen and thus as an alien in the country he or she has resided in since birth. As an alien, the fresh Hungarian citizen may even be subject to expulsion. In the case of EU member states, the Hungarian citizen, being a European Union citizen, has the right to reside and work in any other EU member state (Article 18 ECT).²⁹ Croatia, Romania, Serbia, and Ukraine are not (yet) bound by community law, and they are free in international law to withdraw their citizenship and to send the Hungarian citizens 'home', since they are

²⁸ In Eastern Europe, the notion of citizenship is closer to the cultural community or to 'bonds of blood'; therefore, citizens are less easily released from the bond to their state simply because they requested naturalisation elsewhere.

²⁹ The restrictions on the free choice of residence for the citizens of the new East European member states are left out of consideration because they are of a transitional character and will end in some years' time.

aliens. Dual citizenship therefore may turn out as an illusion for the advocates of the people's initiative and of the naturalisation of Magyar minorities in the neighbouring countries.

b) Aspects of Human Rights

Citizenship is no longer a status conferred upon individuals by an omnipotent state, but it has turned into a more mutual relationship in which the individual possesses certain rights. Some of these rights are enshrined in international law. One basic rule is that every individual has the right to a citizenship; another basic rule is that citizenship must not be forced upon an individual who is unwilling to accept it. An exception to the latter rule arises when handing over territory. If a given territory comes under the sovereignty of a new state, then its inhabitants may be given the citizenship of the new state without being asked whether they accept it. Even in these cases, the practice of 20th century Europe was to give the population of the ceded territory a right to opt for the old citizenship within a certain deadline.

Forced naturalisation clearly would violate the human rights guarantees of international law. As the people's initiative aims at naturalisation on an individual basis and on request, there are no problems with human rights because the individual has a choice. However, Hungary's extreme right has discussed whether the law should naturalise all ethnic Hungarians in the neighbouring states even without being asked. These plans would violate international law and the European Nationality Convention, which provides for naturalisation only upon an individual's request. Arguably, a forced naturalisation also would violate the human and basic rights enshrined in the Hungarian Constitution.

IV. From The Status Law to 'Dual' Citizenship: Continuity or Change of Paradigm?

Both the Status Law and the initiative for 'dual' citizenship come from the political right. It is therefore interesting to see whether they follow the same philosophy, or whether there is a change of paradigm between the two measures.

1. The Status Law

The Status Law respects the existing citizenship of the members of the Hungarian minorities and does not aim to alter it. It provides for certain privileges that make access to Hungary and its cultural institutions easier for the Magyars of the neighbouring countries. In general, they enjoy equal treatment with Hungarian citizens and certain financial privileges. The Status Law does not react to the Schengen membership as a border regime, but rather to the fact that there is a growing 'poverty gap' between Hungary and the other EU-members on the one hand and the 'outs' on the other hand. Low incomes in Romania, Serbia, or Ukraine can bar local ethnic Hungarians much more efficiently from visiting Hungary with its raising incomes and prices than a visa regime could.

Whereas the Status Law limits its scope to members of the Hungarian minorities, the visa agreements with Serbia and Montenegro and Ukraine have no bearing on ethnicity. They promise to create a favourable visa regime for all citizens of these countries without regard of ethnic background.

Both the Status Law and the two bilateral visa agreements try to make travelling as easy as possible for members of the Hungarian minorities—both administratively and financially. They do not question the present status of the minorities as being foreign citizens, i.e. the citizens of the country in which they live. Nor do they give any incentives to move to Hungary. They try to make the best of the present situation and, by making the contacts with Hungary as easy as possible, to stabilise the Magyar minority populations in their traditional dwelling grounds.

2. The Initiative for Dual Citizenship

The Hungarians' World Federation and representatives of Hungary's political right argue that the Status Law does not go far enough. To them, the Status Law is at best a first step, an intermediate measure.³⁰ They want public law to create a legal bond between the Hungarian state and the individuals of Hungarian ethnicity in the neighbouring countries. They are right that the Status Law refrains from doing so; even the Hungarian

³⁰ Péter Kovács, 'A státustörvény mint köztes megoldás?' in Kántor (ed.), *op. cit.*, pp. 238–249.

Identity Card is far from awarding a minor form of Hungarian citizenship, as was pointed out above.

The 2004 people's initiative was intended to repair this 'shortcoming'. It wanted to legally bind the members of the Hungarian minorities to the Hungarian state, even if they continued to reside outside Hungary. The reasoning behind this initiative is that the old Hungary before Trianon is to be restored at least partially by bringing back part of the lost population into Hungarian citizenship. At least the descendants of former Hungarian citizens who are of Hungarian ethnicity and thus part of the Hungarian nation as it is understood in Hungary should be made Hungarian citizens again. Thus, one of the most disturbing effects of the Trianon Treaty could be undone. This makes sense, especially if one fosters a pre-democratic idea of citizenship, which defines the individual as a passive subject and not an active citizen of the state. In such a concept, the possession of Hungarian citizenship would indeed bring the individual under the authority of the Hungarian state even if their place of residence is beyond the state borders. Under such reasoning, it would be logical to disregard, if need be, the wish of the persons concerned and to extend Hungarian citizenship to all Magyars *ex lege*. The more extreme elements of the political right indeed favour such a solution. However, the Constitutional Court made it clear that neither a collective naturalisation nor a forced naturalisation without the prior request of the individual was admissible under the present constitution or international law. This is probably one reason why the comparatively moderate initiative of the Hungarians' World Federation was chosen as a test case.

This stance does not develop the philosophy of the Status Law, but means a definite paradigm shift. The Status Law accepts the present status and tries to seek solutions within it to make it as bearable as possible for the members of the Hungarian minorities. The people's initiative for 'dual' citizenship departs from this on both an ideological and practical level.

a) Aspects of Ideology

The initiative for dual citizenship accepts that the Hungarian citizenship of the non-Hungarian ethnic groups, such as the Croats, the Slovaks, or the Romanians, is lost permanently. Re-establishing Hungarian citizenship for ethnically Hungarian populations in the Carpathian Basin would redress some of Trianon's injustice in depriving a considerable number of

members of the Hungarian nation, i.e. the ethnic Hungarians who lived on the ceded territories, of their 'natural' citizenship. Furthermore, reincorporating these populations into the Hungarian citizenry would mean a late victory over the Allied Powers and their policy enshrined in the Trianon Treaty.

Looking at the facts, there is no need to award Hungarian citizenship in order to solve the present problems in the minority life of the Magyar communities. Travelling, temporary access to the Hungarian labour market, and school and university education either in Hungary or in Hungarian-speaking institutions in the respective states of residence can be dealt with efficiently under the present law. Even a potentially unstable situation in Serbia, which could lead to another wave of discrimination and oppression of the Hungarian minority in Voivodina, does not require the accordance of Hungarian citizenship in order to guarantee these people a safe haven as the Schengen regime allows EU member states to react to humanitarian catastrophes by temporarily introducing a special immigration regime.

b) Practical Aspects

There is a palpable difference in the practical effects of the Status Law on the one hand and the initiative for a dual citizenship of the other. While the Status Law tries to stabilise the Hungarian minorities in their traditional dwelling grounds, 'dual citizenship' would give kin minorities the right to set up residence in Hungary. So far, members of these minorities, being alien citizens, need a permit to move into Hungary, either temporarily or permanently, and to work there. If they were given Hungarian citizenship, they would automatically have the constitutional right to move to Hungary and to live and work there (§ 69(2) Constitution). This centripetal effect of Hungarian citizenship may increase the number of Magyar minorities wishing to emigrate to Hungary or Western Europe and may thus contribute to their departure from the traditional dwelling grounds. This result would be the exact opposite of what the Status Law tries to achieve.

V. Final Remarks

The admission of the people's initiative by the National Election Committee and the Constitutional Court was a Pyrrhic victory for the political right. Both institutions made it clear that the true intention, the collective naturalisation *ex lege*, was unconstitutional. By legalising a more modest version which is far from satisfying the far-right wing activists in this question, the Committee and the Court took care that no myth of martyrdom can arise.

The outcome of the initiative was another blow for the political right. The authors of the people's initiative were not able to mobilise a sufficient number of supporters. Due to a low number of participants, the initiative was invalid.

Yet, the question remains acute. In early 2005, two laws were passed that are directed towards the Magyar minorities in the region. Starting from fiscal year 2006, the Act 2005: II on the Homeland Fund makes new funds available for the financing of Magyar minority projects in the neighbouring countries. An amendment to the citizenship law and the law on aliens³¹ lowered the threshold for the naturalisation of ethnic Magyars who live in Hungary. Before the amendment, they needed one year of lawful residence in Hungary, whereas now naturalisation is possible earlier; it suffices to show a lawful residence in Hungary and a Hungarian ethnic background. The same amendment created a so-called 'national visa', which ethnic Magyars in non-EU member states may receive. The national visa confers the right to multiple entries into Hungary and to a sojourn of more than three months.

This legislation, despite its tangible effects, remains on a symbolic level because it cannot touch the root of the matter, i.e. the Trianon trauma. The Trianon Treaty was hypocritical and therefore unjust. An official acknowledgement of this injustice by Western states may lead to pacification in Hungarian politics and in the future may prevent similar initiatives that feed on this feeling of the nation having been treated unjustly. It would prevent Hungary from embarking on initiatives that are doubtful under international law and also cause problems in domestic law.

³¹ Act 2005: XLVI of 14 June 2005.