

Minority Rights and Diaspora-claims: Collision, Interdependence and Loss of Orientation

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The paper will investigate the conceptual and practical interdependence of minority rights (claims, aspirations) and diaspora rights (claims, aspirations). I will argue that in certain ethno-political situations, such as in Central Europe, neither can be comprehended without the other. That is, minority rights and the ‘minority condition’ are dependent on ethnic kins’ diaspora-claims and the ‘diaspora-condition’ and vice versa. I will use the case of Hungary, where, in the light of the European Union accession and subsequent changes in immigration and diaspora-policies, legislators will need to address fundamental considerations concerning minority rights. The traditional Hungarian approach to ethnic and national minority rights has always been defined by mostly subliminal reference to ethnic Hungarians’ diaspora rights in the neighbouring states. A substantial discrepancy between the two aspirations will have undesirable legal and political consequences.

In my analysis, first I plan to synthesise the diverse set of claims that can be associated with the generic term ‘minority rights’ (i.e. political representation, cultural autonomy, anti-discrimination/equal protection, hate-speech legislation, and, as the other side of the national minority preferential treatment-coin, diaspora rights). In addition to the traditional frameworks for justifying minority rights and preferential treatment, under certain conditions, there is a third alternative conceptual framework, one which sees domestic minority rights as the trade currency for diaspora-claims. That is, minority rights can sometimes be regarded as the price to be paid for the rights of ethnic kins in the diaspora. This third type of justification will be demonstrated through the case of Hungary.

I. Minority Rights, What Are They?

To start point, it is important to state that the focal point of minority claims and the morphology of the dominant legal instruments will always depend on the historical and political givens of the society in question. Protective measures for racial, ethnic or national minorities, i.e. minority rights in the broad sense, can therefore be targeting a number of different things, such as:

- socio-economic equality;
- de facto freedom of religion;
- the protection of potential pogrom victims and the prevention of brutal ethnic conflicts;
- decreasing cultural conflicts between majority and genuine minority or immigrant groups;
- combating racial segregation or apartheid; or
- race-based affirmative measures of compensatory, remedial or transitional or justice.

In line with this, minority law, the law of balancing obligations and freedoms pertaining to assimilation and dissimulation, may therefore take several forms: from affirmative action and social protection measures through declarations of religious and political freedom to setting forth cultural or political autonomy or controlling political extremists.

The context-dependent meaning of minority protection may refer to a widely diverse set of policies, such as:

- equal protection (non-discrimination);
- participatory identity politics: the political participation of identity-based groups in political decision-making;
- cultural identity politics: the recognition of identity-based groups in cultural decision-making by the state;
- the protection of historically rooted identity-based sensitivity, for example the criminalisation of hate-speech, holocaust-denial, etc.;
- affirmative action;
- special constitutional constructions form-fitted for the needs of indigenous population;

- policies recognising claims which mirror the state's ethnic kin's diaspora-claims abroad; or even
- international security.¹

II. Minority Rights, Why Are They?

Each and every one of the above models for individual and group protection and recognition will have differing institutional and doctrinal implications. In general, minority rights are viewed through two traditional conceptual frameworks. The first set of justifications for minority rights and preferential treatment is rooted in the concept of human dignity. Within this framework (as it can be seen in traditional continental constitutional jurisprudence) minority claims are seen as identity-claims, which constitute an integral part of human personality that is worthy of recognition and protection. The second theoretical framework for minority rights (for example, in the equal protection American jurisprudence) is rooted in an equality discourse in which the constitutional recognition of the minority group is justified by equality-based (either synchronic or diachronic justice) arguments.

In addition to the two traditional frameworks, under certain conditions, there is a third alternative framework for justifying minority rights, one which sees minority claims as reciprocate diaspora-claims. That is, minority rights can sometimes be regarded as the price to be paid for the rights of ethnic kins in the diaspora. Due to spatial and conceptual limitations, instead of expanding on the aforementioned classic frameworks, I will only focus on the latter phenomenon, the interdependence of the diaspora-condition and minority rights. Albeit not universally, under certain socio-political circumstances the political commitment and concern for ethno-national diaspora will have a formative influence on minority-politics.

Diaspora concerns may be a very powerful drive for implementing schemes of minority protection and recognition, if such institutions are likely to serve as potential guarantees for equal freedoms to be granted for

¹ Let us remember the anecdote of one of the drafters of the UN Charter claiming that it is protection from minorities that the world needs nowadays (1945), not the protection of minorities.

the state's ethno-national kins abroad. It can be presumed that the state will be particularly willing to provide for such measures if its ethno-national kins disproportionately outnumber its minorities. This will be particularly true if large groups of ethno-national diaspora reside in neighbouring states, whose respective ethno-national minority happens to be present in the state. I argue that Hungarian minority politics have followed precisely this logic, and the generous cultural and political autonomies that are set forth in the 1993 Act on Minorities were in fact drafted in a Janus-faced way to set an example to and provide pressure on the neighbouring states with substantial Hungarian minorities.²

One could say that there is nothing wrong with such policies—it is just smart and prudent ethno-politics. After all, the state may easily offer something that hardly anyone would use (considering how few members some minority groups have; moreover, some minority groups are merely virtual), thereby providing a legitimate basis to demand reciprocity for its ethno-national kin. The problem arises however—and I will argue that this is the case with Hungarian minority-politics—when these spectacular ethno-political strategies are in fact used to cover up other more ardent minority problems or when these benevolent instruments prove to be controversial and have undesirable consequences in light of historical and political developments. These strategies also carry dangers: ethno-political considerations are often latent and subconscious, but nevertheless lead to problematic, both conceptual and practical, contradictions within the legal and institutional framework.

In the following, through the case study of Hungary, I will show that the conceptual framework of the 1993 Minority Act (and the government's 2004 proposal to amend it) proves unsatisfactory for two reasons. First, creating homogenous legislation for national and ethnic minorities may help promoting out-border Hungarians' rights; it will not, however, provide an effective institutional framework to deal with the specific and robust Roma-problem. Also, this monolithic minority category is inefficient to serve the needs of all thirteen official minority groups in Hungary, which substantially differ in size and consequent

² I find it important to stress that I cannot show an explicit constitutional or legislative evidence for this; these are theoretical deductions, based on policy analysis. In a few instances we actually see 'subconscious slips of the legislator's tongue' when certain institutional competences are washing together minority and diaspora interest protection.

claims and aspirations. Second, the European accession and the consequential change in the constitutional and socio-political climate will bring challenges with which the anachronistic, pre-accession minded diaspora-targeting law cannot cope.

III. Hungary at Crossroads

As indicated above, it has been my claim that post-1989 Hungarian minority-politics cannot be understood outside the context of the ethnic Hungarian diaspora. We can even say that, besides various commitments, one of the primary constitutional motivations for providing and recognising minority rights had been Article 6(3) of the constitution, which declares that 'the Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary'.

My aim is to show that with Hungary having joined the European Union, this stance can no longer be held and the focal points of both minority and diaspora law need to be adapted to the new constitutional and political circumstances. After 1 May 2004, a significant part of the Hungarian diaspora already finds itself within a common constitutional and legal framework with its kin-state, and soon much of the rest is scheduled to follow suit. Until then, however, Hungarian diaspora-politics will exist in an economic and political framework that no longer tolerates decisions to be made upon solely Hungarian considerations or to follow exclusive Hungarian national interests. Also, the appearance of European or other migrant workers and immigrants will bring challenges with which the existing legal framework may not be able to cope. Newly arriving groups will easily outnumber small traditional national minorities (such as the Armenians and Ruthenians), while the current legal framework does not have clear guidelines as to how new groups (such as the Chinese) can seek official recognition.

The present wording of the Act on Minorities³ defines national and ethnic minorities as groups who have been present in the territory of Hungary for over 100 years and constitute a numerical minority and

³ § 1.

whose members hold Hungarian citizenship and differ from the rest of the population in terms of their own mother tongue, culture and traditions. Minorities under the act also must prove to be a cohesive group committed to preserving all these and at articulating and safeguarding the interests of their respective historically developed communities. According to the listing within the Act, there are thirteen such minorities: Bulgarian, Roma (Gypsy), Greek, Croat, Polish, German, Armenian, Romanian, Rusin, Serb, Slovak, Slovene, and Ukrainian. In order to register a new minority group, a popular initiative signed by 1,000 citizens needs to be addressed to the Speaker of the Parliament.

On 3 March 2004 the Hungarian Government approved bill no. 9126 on the Election of Minority Self-Government Representatives and the amendment of the 1993 Act on the Rights of National and Ethnic Minorities. The proposed legislation made it a point to set forth a plan for institutional reorganisation of minority protection mechanisms. Answering to constitutional demands of the European Union accession, it would enable non-Hungarian citizens to be recognised as ethnic and national minorities.

In my opinion, the proposed legislation proves to be rather controversial. According to the bill, the Act will apply to Hungarian citizens as well as all resident European Union citizens, refugees and immigrants who consider themselves to be members of any of the recognised historical national or ethnic minorities. However, the bill will not eliminate the century-long residence criterion, nor will it specify adequately the procedures for additional groups seeking recognition. The status of newly arrived groups (such as the Chinese) therefore remains ambiguous.

It appears likewise ambiguous what the conceptual basis for such minority identity is. As stated above, the traditional Hungarian approach to minority rights is deeply rooted in a constitutionally articulated responsibility for out-border diaspora-Hungarians. For the general public, minority rights are the mirroring of what is perceived to be fair and just treatment of ethnic kins abroad. Thus, Hungarian minority law is a Janus-faced mixture of sincere internal group-recognition and the legal-political counterbalancing of the Trianon trauma. By having become European Union member states, the balance between minority- and diaspora-politics is no longer existent. Here I will only focus on the loss of

diaspora-politics as a reference point and the resulting loss of orientation in Hungarian minority-politics.

According to the dominant view, minorities are part of the Hungarian nation state. As Article 68(1) of the Constitution states: ‘national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State’. Simply put, bearing in mind the painful example of the Hungarian diaspora, the conceptual basis for the preferential treatment (i.e. constitutional recognition) of minorities is the acknowledgement of all the historic suffering peoples in this region of the world. A collective bad consciousness of legislators, a feeling of guilt, or at least sympathy, is behind the recognition of ethno-national identity as worthy of protection. Without specifying the historic injustice or responsibility of any particular government/state, the sincere component (by sincere I mean that it is not lead by diaspora-strategy) of providing minority rights is some sort of a compensatory, or at least sympathetic sentiment, for the pain and suffering traditional ethno-national communities (whoever they are) had to go through in the past decades of history.

Although no explicit constitutional or legislative reference is made to any of this, I am convinced of its presence. This attitude also serves as basis for the general perception that the moral basis for minority rights of newly arrived communities in this region is not regarded as equal to that of the ‘genuine minorities’’. Evidence for this can be seen from numerous remarks and statements made by representatives of Romanian or Armenian minorities in Hungary, who claim that those who recently moved from Transylvania are taking over the cultural programs and minority self-governments to such extent that it is now *theirs* and that the ‘genuine’ minority identity is no longer represented.⁴

It is my firm conviction that the present selective framework of recognising only traditional ‘genuine’ minority groups cannot be maintained. As the example of the newly arrived, and allegedly non-genuine, groups shows, this attitude is already anachronistic as well as absurd and discriminative. Besides being inherently arbitrary, as

⁴ See for example the speech of Traján Kreszta, President of the Romanian Self-Government, delivered on 23 March 2004, at the Parliamentary Commission of Human Rights, Minority and Religious Affairs, discussing the bill amending the Minority Act.

mentioned above, the measurement of the 100-year-presence is not supported by any legal guidelines. Therefore anyone commissioning a historical study showing a century-long presence of any given group can beat the system and get around the legislator's intent. The only question remaining is: of what use is this humiliating procedure?

To demonstrate how controversial this (otherwise weak) attempt is to prevent newly arrived, for example Chinese, Arabic, or even American or Dutch groups to seek official recognition as minorities, let us consider the following example. According to the proposed framework and the EU-conforming local electoral provisions, a resident Belgian citizen (to bring a demagogic example, a CEO of a multinational company who is commissioned to Budapest for four years) who identifies herself as German can vote in the election of and be elected to the German minority self-government, which is a political body of the *Hungarian* German minority. However, her compatriots who do not identify themselves as German cannot participate in this self-government and nor could they form a Flemish or French minority self-government.

The idea behind the bill, which no longer limits ethno-national minority affiliation to Hungarian citizens, will mean that minorities who continue to preserve their status as constitutive elements within the state will include all persons who reside in the territory of the Hungarian Republic and identify themselves with one of the predefined and enumerated groups.

At first sight the idea seems plausible, as it would be quite an awkward situation if resident EU citizens could vote for a local government candidate who runs as a representative of the minority, but could not vote for the very same person if she were a candidate for the local minority self government. They could not do it even if both the voter and the candidate were to belong to the same group, say Germans or Slovaks. Also, defenders of the bill could argue that if EU citizens will have passive voting rights and thus can be elected into local governments, and if they happen to constitute a majority within the elected body, then they should be given the right to form what is called a 'local minority self government'.⁵ In sum, the principle of equal treatment within the EU may

⁵ Article 22 of the Minority Law states that a local government may declare itself a local minority self-government if more than half the members of the elected body represent one national or ethnic minority. If more than 30 per cent of the members of the

very well require Hungarian authorities to provide the same identity-based treatment for all Germans, Slovaks, and Greeks, regardless of their citizenship. The bill's defenders seem to be right in saying that as is the case with museum entry, transportation or tuition fees, no discrimination may be justified among EU citizens; therefore, all persons under the territorial sovereignty of the Republic of Hungary should enjoy the same level of protection based on their specific ethno-national minority identity.

Plausible as it seems, the proposed framework does leave a fundamental question unanswered: what is it that makes the enumerated ethno-national identities so special and worthy of preferential recognition, which other identities, such as corporate or gender, or, for that matter, the non-enumerated ethno-national identities, do not enjoy? Thus far, the unspoken rule of thumb for diaspora-reciprocity could serve as a guideline for answering this crucial question. After all, Hungary has been a country where immigration had been limited, and ethno-demographic conditions had been more or less intact. Thus far, the legislator could enjoy the freedom of treating a relatively small number of indigenous (historic) national minorities with a wide spectrum of political and cultural autonomy. Considering the size of most of these groups, it was not demanding for the state. Also, as this could serve as a powerful tool in fulfilling the constitutional responsibility of promoting Hungarian diaspora-claims, its legitimacy was never questioned, and, in general, the benefits of the unique and peculiar Hungarian framework of minority protection vastly outweighed its controversiality.

It is my firm conviction that the situation changed. Legislators and policy makers now have a number of options. They can, for example, reinterpret the distinction made by Will Kymlicka⁶ and differentiate

self-government body represent one particular minority, the representatives, acting as a minority, may form a minority self-government (indirectly formed minority self-government) with a minimum of 3 members.

⁶ According to Kymlicka, national minorities and indigenous people will typically demand self-government powers (like federalism and territorial autonomy), while immigrants will try to negotiate what he calls polyethnic or accommodation rights. See for example: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, 1995), pp. 30–31. He claims that national minorities and indigenous people want to reproduce their (societal) culture, while immigrants seek to integrate into the mainstream society by learning the official language and participating in the mainstream economic and political institutions. The latter seek to renegotiate the terms of integration by demanding a more tolerant approach to their integration that would allow them to maintain various aspects of

between the claims and aspirations of ‘genuine’, indigenous minorities, who had been innocent and passive victims of cruel history, and the demands of voluntary migrants who choose their fates and the consequential minority status and introduce differing constitutional standards for the two. In doing so, however, the legislator will still have to take note of the fact that the decision of immigrants (or refugees) to change their domicile is always a reaction to certain political, economic, etc. conditions and their descendants’ (ethnic, national, religious, racial) minority identity or structural inequality will also pose political and constitutional questions worth considering.

Either way, the government and the legislator will have to declare (or at least start a meaningful public discussion on the question of) what is the basis for the preferential treatment of minorities: is it still the mirroring of the Hungarian minority’s diaspora rights; a symbolic compensation for diaspora-independent historic guilt; views of ethnocultural identity as an eminent part of human dignity; or the combating of social inequality, where ethno-national attributes serve as operational proxies for structurally underprivileged social strata.

Either way, it needs to be explained clearly what makes ethno-national identity worthy of this special, publicly financed and constitutionally articulated protection that is different from the recognition or protection of other cultural, sexual, gender, etc. identity, and why political and cultural organisations of the minorities will enjoy a more privileged status in, say, legislation or public administration than other civil or cultural organisations do.

There is one thing the legislator and the political class should not do: maintain the currently-existing conceptual ambiguity in the foundations of minority- and diaspora-politics.

their ethnic heritage (such as customs regarding religious holidays, dress, dietary restrictions, recreation).