

Chapter 13

The Kin-State and Its Minorities: Which European Standards? The Hungarian Status Law: Its Antecedents and Consequences

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I. Too Much Noise

In its 'Report on the Preferential Treatment of National Minorities by Their Kin-States' the European Commission for Democracy through Law (hereafter 'the Venice Commission') noted:

The more recent tendency of kin-States to enact domestic legislation or regulations conferring special rights to their kin minorities had not, until very recently, attracted particular attention, nor aroused much, if any at all, interest in the international community. No supervision or co-ordination of the laws and regulations in question has so far been sought or attempted. Yet, the campaign surrounding the adoption of the Hungarian 'Act on Hungarians Living in Neighbouring Countries' shows the impellent necessity of addressing the question of the compatibility of such laws and regulations with international law and with the European standards on minority protection.

An 'impellent necessity'? After all, among the nine sets of legislation analysed by the Venice Commission, the 'Act on Hungarians Living in Neighbouring Countries' was, in chronological terms, the most recent. It is my personal conviction that from the moment of its conception the Hungarian Status Law was designed to give rise to a lot of noise. Similar provisions on preferential treatment have already affected minorities living in this part of the world, either through domestic laws, bilateral treaties or administrative decisions, without raising any problems. But in this particular situation, the Hungarian government could be quite sure about the reactions that would follow, at least in some countries. Its recent history with some neighbouring countries, and the difficulties in completing bilateral treaties with them, were strong enough indications that where the Hungarian minority was concerned, some countries were very sensitive. This is why not consulting them on a number of details regarding the rights provided by the law and the procedure

for its implementation looks very much to me like a deliberate mistake. From this perspective, I think that the noise was intended and desired.

In its turn, the Romanian government was unable to understand the stratagem, and as if not wanting to disappoint those who masterminded the whole thing, its response went far beyond any normal substantive critique of the law and the way it was adopted. As a consequence, for the last several months Romania's major concern has been not the country's bad economic situation, nor the poor social security affecting the vast majority of its citizens, including the major public health problems we have faced, but the potential privileges Hungarians and their families may enjoy. Instead of a rational position expressed with dignified arguments, we have witnessed a campaign against this law on the part of almost all of the country's political elite and media, most often expressed in language that I was hoping had been forgotten and belonged only to our past.

II. What European Standards?

The Romanian government went so far that on the evening of 19 October 2001, after a meeting of the Supreme Council for the Defence of the Country, the Prime Minister called the media to offer a statement. To everybody's legitimate surprise, his speech was not about the decisions taken during the meeting but about the report issued by the Venice Commission, and stressed the huge success achieved by the government in having its position regarding the Hungarian law endorsed by the European forum.

On 30 October, the Romanian opposition, divided and in permanent internal conflict, got together for the first time and issued a statement in which it accused the government of betraying the national interests and emphasised its own role in the campaign against the law. Their statement mentioned that they had all outspokenly and vigorously opposed 'ethnic discrimination against Romanian citizens through a foreign government initiative, discrimination which could lead to a profound division between our country's citizens'. Moreover they considered that 'the reaction of Romanian society was an example of equilibrium, solidarity and decisiveness, and [their] opinion was legally confirmed before the whole of Europe by the decision of the Venice European Commission for Democracy through Law. The courage to point out the truth without hesitation has been the basis of Romania's success'.¹

Both the Prime Minister and the opposition have over and over again emphasised that the provisions of the Hungarian law were in conflict with European standards and that the Venice Commission Report made that very clear. The media have conveyed this message and most of the Romanian

1 www.mediafax.ro, 30 October 2001.

public is convinced that this is an anti-European law which violates the standards set out by European agreements and treaties. The government press release of 19 October commented: 'A comparison of the Hungarian law and of the Venice Commission conclusions clearly proves that the Hungarian law should be substantially amended in order to be compatible with the interpretation of existing standards on this subject as issued by the Commission'. The government expressed its expectation that the report of the Venice Commission would 'prompt a clarification of the aspects of this law which we dispute so as to bring them into compliance with European values and norms'.²

The European standards invoked here have never been identified, but the terms in which the issue has been presented imply that what has been infringed have been standards on the protection of kin minorities. In its 2001 regular 'Report on Hungary's Progress Towards Accession', the European Commission itself states that '[w]hile the objective of the Law is to support Hungarian minorities in neighbouring countries and to maintain their cultural heritage, some of the provisions laid down in this Law apparently conflict with the prevailing European standards on minority protection, as determined in a report adopted on 19 October 2001 by the Council of Europe's Commission for Democracy through Law'. In a statement on 'Sovereignty, Responsibility, and National Minorities', issued on 26 October 2001, the OSCE High Commissioner on National Minorities stressed: 'In order to prevent conflict, protect minorities, integrate ethnic diversity and foster friendly relations between states, we must not erode the principles, standards and mechanisms that have been carefully developed in the past half-century'.

The purpose of this paper is to look beyond the rhetoric and to identify what these oft-mentioned standards are, and also to determine which and whose rights might be infringed by the Hungarian Status Law. In my view there are no minority rights that can be affected by the Status Law's provisions. Rather, some standards about which there may be concern relate to the general principles of international law on friendly relations between states, while others have to do with the protection of human rights of those who are potential beneficiaries of the law themselves. But certainly there are no provisions that can be considered discriminatory against the majority population or other minorities in any of Hungary's neighbouring countries.

Before proceeding to this analysis, two things need to be clarified.

2 Prime Minister Cabinet, DAIS, 19 October, 2001, www.guv.ro/presa/afisarhdoc.php?idpresa=2417&idrubricapresa

III. On Discrimination

The first point concerns the concept of discrimination. The Romanian government and political elite keep talking about how the Hungarian law discriminates against Romanian nationals, since the beneficiaries of the more favourable treatment will be only those Romanian citizens of Hungarian origin and their families. Is this true? Can this differentiation be considered 'discrimination'?

According to the only international definition of this concept, provided by the United Nations *International Convention on the Elimination of All Forms of Racial Discrimination*,

[Racial discrimination] shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

This means that for a measure to be considered discriminatory is necessary that it deprives individuals of their universally recognised human rights or the possibility of enjoying them. Accordingly, a measure which grants one group of persons additional rights, even if this is on ethnic grounds, cannot be considered discriminatory against others, as long as they continue to enjoy their own human rights.

Until recently this was the only definition of racial discrimination. On 20 June 2001, the European Union adopted the 'Directive Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin'. According to Article 2 paragraph 2 of this directive, 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'. Again, the less favourable treatment is indispensable for a law or an action to be considered discriminatory. Similarly, 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

It can hardly be argued on the basis of this definition that Romanian citizens of Romanian origin are discriminated against because the law of another state grants some privileges to its kin minority. Even if such privileges go beyond the human and minority rights recognised by international and European legal document, they will not deprive the Romanians of their universal human rights. Whether such conduct, namely treating a kin minority more favourably, may result in tension within the home-country, is another thing.

Many things, including a well-organised political and media campaign aiming at this very result, may very well generate an atmosphere of irritability and anxiety. But this is not because the law or its implementation is discriminatory, and I believe it is important to use the concept in its real and legal meaning already established by long practice. In short, the only scope for discrimination in the implementation of this law is in the treatment of those who declare themselves to be of Hungarian origin, that is, the beneficiaries of the law themselves. This aspect, as well as the issue of appropriate remedy in case of abuse, will be addressed below.

IV. The Protection of Minority Rights

The second point concerns the issue of minority rights protection. We need to make a clear distinction between the legal obligation to uphold minority rights, and the preferential treatment of some minorities by their kin-states. The former is an obligation which belongs to those states on whose territories minorities live and whose citizens they are, and a matter of general concern in international relations regulated through various international and European legal and political documents. The preferential treatment of some minorities by their kin-states, however, is not covered by any legal document, or by any political document issued by an intergovernmental body, and consequently is a matter not of obligation but of political will on the part of the kin-state.

The Venice Commission, in the report adopted at its 48th Plenary Meeting (19-29 October 2001), made quite clear its position on this issue:

The paramount importance of an adequate and effective protection of national minorities as a particular aspect of the protection of human rights and fundamental freedoms and also in order to promote stability, democratic security and peace in Europe has been repeatedly underlined and emphasised. The full implementation of the international agreements on this matter... has become a priority for all the member States of the Council of Europe. Against this background, the emerging of new and original forms of minority protection, particularly by the kin-States, constitutes a positive trend insofar as they can contribute to the realisation of this goal.

In his statement of 26 October 2001, the OSCE High Commissioner for National Minorities emphasised the difference between the two situations while highlighting the risks: 'Protection of minority rights is the obligation of the State where the minority resides. History shows that when States take unilateral steps on the basis of national kinship to protect national minorities living outside of the jurisdiction of the State, this sometimes leads to tensions and frictions, even violent conflict'. This is not to say that such measures are not welcome or have to be avoided; it merely says that problems may arise in

situations ‘where similar steps, without the consent of the State of residence, are contemplated’.

The same idea was raised, although in a more constructive way, in the conclusions of the Venice Commission Report:

Responsibility for minority protection lies primarily with the home-States. The Commission notes that kin-States also play a role in the protection and preservation of their kin minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong.... The Commission considers, however, that respect for the existing framework of minority protection must be held as a priority. In this field, multilateral and bilateral treaties have been stipulated under the umbrella of European initiatives. The effectiveness of the treaty approach could be undermined, if these treaties were not interpreted and implemented in good faith in the light of the principle of good neighbourly relations between States. The adoption by States of unilateral measures granting benefits to the persons belonging to their kin minorities, which in the Commission’s opinion does not have sufficient *diuturnitas* to have become an international custom, is only legitimate if the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected.

It is thus meaningless to talk about observing European or international standards in respect of the preferential treatment of minorities by their kin-states. The only standards that can be invoked in this context are those governing human and minority rights protection, along with the general principles of international law, particularly regarding the friendly relations between states.

V. Some Provisions of the Hungarian Status Law

So far, the report of the Venice Commission seems to be the most comprehensive analysis of the Status Law, but it is important to point out that the Commission actually looked at how nine European countries handle the preferential treatment of their kin minorities, and its report does not rank either the legislation or the practice of these countries. It makes no evaluation, but rather provides a description of the situation in relation to various aspects of such policies, although it does point out some shortcomings and concerns.

1. Declaration of National Origin

One aspect that has proved very controversial is the requirement for a declaration of national origin. It has been argued that such declarations are not permissible. Three points need to be made here.

The first is that obliging a person to assume membership of an ethnic or national group and to declare that membership is not permissible if it consti-

tutes the basis for a discriminatory action. But adopting and declaring a national identity is not impermissible *per se*. Since there are international legal documents that speak about the right of persons belonging to national minorities to have education in their mother tongue, or to benefit from some cultural policy, or that provide for ‘special measures’ to strengthen minority identity, it is obvious that this is possible only if those who belong to a minority accept this status. Whether this is done in writing or orally, formally or by implication, is not important. The key point is that a person cannot benefit from human/minority rights addressed to a specific group, with a specific identity, unless that identity is adopted as such.

As the Venice Commission stated: ‘An administrative document issued by the kin-State may only certify the *entitlement* [my emphasis] of its bearer to the benefits provided for under the applicable laws and regulations’. The second point is thus that even in cases where positive discrimination (affirmative action or special measure) is under consideration, a person must not be *obliged* to adopt or declare a national or ethnic identity or be *obliged* to enjoy the rights or benefits gained on the basis of this identity. This is always a matter of the private decision of the person concerned; it is that person’s right to declare that identity or not. In this respect the standards are quite clear. International treaties, declarations or political documents on minority rights stress that no one will be harmed as a result of his/her membership of a national or ethnic group or refusal to declare such membership. This is true of Article 3 (2) of the UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, and of Article 3 (1) of the Council of Europe *Framework Convention for the Protection of National Minorities*, which states: ‘Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice’.

The third point relates to the fact that it is a person’s right to declare his or her own ethnic or national identity and that intermediate organisations or state authorities are not allowed to decide on this. The Venice Commission Report particularly noted the risk to this principle inherent in the Status Law: ‘[I]f the wording of Article 1 §1 of the Hungarian law seems to suggest that the mere declaration by the applicant suffices, it appears that the organisations representing the Hungarian national community in the neighbouring countries will have to investigate the applicant’s national background before issuing – or refusing – the relevant recommendation. However, it is not specified in the law what criteria they will be applying’.

2. Beneficiaries of the Law

Two things must be considered in relation to the potential beneficiaries: how they will be identified, and what family members will share the benefits they enjoy. Regarding the categories of beneficiaries of such preferential treatment by the kin-state, the Venice Commission noted that ‘while the Italian and Romanian laws do not explicitly set out any criteria for establishing the national background, the other laws do, in greater or lesser detail’. But in fact the Hungarian law is not that explicit, since it merely says in Article 1 (1): ‘This Act shall apply to persons declaring themselves to be of Hungarian ethnic origin who are not Hungarian citizens’ and who reside in neighbouring countries. No other criteria are provided for; as Sándor Szilágyi put it in an excellent article, ‘Let’s put the question this way: On the basis of which “objective criteria” will a person be denied [recognition as a Hungarian national]?’ There aren’t any, and this is problematic in any case of abuse, since the person concerned has little means (if any) of proving that because his/her ethnic origin was not recognised he/she was wrongly denied the right to enjoy the benefits of the law. The next question is: What remedy is provided for a person in this situation? There is none, and in this particular case we can talk about the breach of a human rights standard, since the right to remedy is stipulated by several international human rights instruments, among them the *Universal Declaration of Human Rights* (Article 8) and the *European Convention on Human Rights* (Article 13).

The second issue is the family members who can benefit under the law. The Romanian authorities stressed on several occasions that extending these privileges to the wife, husband and minor children goes beyond minority rights standards. This is totally absurd. On the contrary, if we look into the letter and the spirit of international and European documents on minority rights, particularly the *Framework Convention for the Protection of Minorities*, we can easily see that the protection of minorities extends to whole families, regardless of whether the two spouses are of the same origin or not (although this is not explicit). Otherwise it implies discrimination on the grounds of the spouse’s ethnic origin, which is not permissible. Try to imagine for example how the right to use the mother tongue in private could be recognised for couples with the same national origin but denied to mixed families! As far as the children are concerned, it is also obvious that they benefit from all the minority rights that either or both of their parents enjoy. After all, the right to education in the mother tongue applies more often to children than to their parents.

3. The Document Proving Entitlement to Benefits

It has been said that it is ridiculous to hold and carry a document attesting one’s membership of a national group. It may be. But what is ridicu-

lous is not illegitimate as long as it is not used in order to discriminate against the holder. I, personally, do not like the idea of documents attesting ethnicity, and other means could have been found to achieve the same end. At the same time, we must admit that whatever they are called, such documents are issued because of the holder's national origin.

The Hungarian law is not the only one which makes entitlement to particular benefits subject to the holding of a particular document. The Slovak and Russian laws as well as the Greek ministerial decision have similar requirements although *the nature of the document* is not the same, and the report of the Venice Commission enumerated these differences:

The 'Hungarian Certificate' bears a photograph of its holder and contains all his or her personal data.

Under the Greek regulation, it is (and is called) an identity card (bearing a photograph and the fingerprints of its holder), issued for a period of three years (renewable); it also functions as a permit of stay and a work permit.

The Slovak 'Expatriate Card', which is issued for an indefinite period of time, contains the personal data of the holder, as well as his permanent address (the data of minor children can also be included, at the request of the person concerned, insofar as this is compatible with the applicable international treaties). This card does not amount to an identity card in that it is only valid when used together with a valid identification document (Article 4 §2 SL) issued in the home-State. The holder of the card, however, is admitted to the Slovak territory without written invitation, visa and permit of stay.

Regarding the nature of these documents, the Venice Commission noted:

To the extent that it allows easier access to these benefits, the Commission finds that this document can prove useful. However, it observes that in a number of countries this document has the characteristics of an identity document: it contains a photograph of its holder and all of his/her personal data. It makes reference to the national background of its holder. It is highly likely that the holders of these documents will use them as identity cards at least on the territory of the kin-State. In such form, this document therefore creates a political bond between these foreigners and their kin-State. Such a bond has been an understandable cause of concern for the home-States.

In the light of this concern, the Commission considers that home-states should have been consulted prior to the adoption of any measure aimed at creating the documents in question. The standard implicitly invoked here is that which arises from the principle of friendly relations between states.

Another aspect which may be of real concern relates to the bearer's personal data. There is a universal human right to private life which, among other things, covers personal data as well. Article 8 of the *European Convention on Human Rights* and the case law of the European Court of Human Rights are very clear in this respect. In my view the main concern relates to the lack of protection of personal data. Having collected data on Hungarians living in other countries for the purpose of granting them some benefits, it would not be permissible for the Hungarian authorities to hand this information over to state authorities or public or private institutions (including minority organisations or parties) in any other country, to be used for other purposes (such as managing the internal affairs of the minority community, elections, etc).

The procedure for issuing these documents has also been considered problematic. The Romanian authorities objected very strongly to the role assigned by the Hungarian law to the minority organisations in the country of residence, although it is clear that their role is merely to recommend and not to issue the certificate. How this would work was unclear from the very beginning, since the selection of recommending organisations was undecided and the criteria they would employ were ill-defined. Recent developments have proved that this is a problem not only for the governments of the states of residence but also for Hungarian organisations in those countries. I was convinced that in Romania at least the question of representativeness was not at issue, since the Democratic Alliance of Hungarians in Romania would have been entitled to claim the right to represent the Hungarian minority on the basis of the last eleven years' electoral results. I was wrong. There are other Hungarian entities – such as the churches – which claim the same right and there are no reasonable grounds to deny their claim. In the other neighbouring countries the situation is pretty similar.

Apart from this practical question, are there European standards that might be infringed by the issuing procedures? The Venice Commission paid special attention to this aspect and its conclusion was that these documents 'are issued by the authorities of the kin-State: a central public administration body designated by the Hungarian government (article 19 §2 of the Hungarian Law); the Slovak Ministry of Foreign Affairs (article 3 §1 of the Slovak Law); the "competent authorities" or the Russian diplomatic missions or consulates abroad (article 3 of the Russian Law); the police department responsible for foreigners (article 1 of the Greek Ministerial Decision)'. Generally the kin-states' consulates or embassies on the territories of the home-states have a role in the procedure, as for example under the Slovak law or the Russian law. In the Greek case, the consular authorities cannot play any role because the Greek special identity card can only be delivered to those actually on Greek territory.

In the Hungarian case however, the situation is different:

The Hungarian law does not assign any role to the Hungarian consulates or diplomatic missions, but provides for a constitutive role of the organisations of Hungarians abroad in the procedure. The Hungarian Certificate, in fact, is issued by the Hungarian authorities if the applicant has been 'recommended' by one of these organisations, which have to verify the declaration made by the applicant about his/her belonging to the Hungarian minority, to certify the authenticity of his/her signature and provide, *inter alia*, the applicant's photograph and personal data.

The lack of criteria is a matter of concern.

The Venice Commission has noted that the minority organisations also have a role to play under the Slovak and Bulgarian laws, but the role assigned to them is quite different. In the Slovak case, the minority organisations 'can testify that an individual belongs to the Slovak minority in case he or she cannot provide the formal documents listed in article 2 § 4 SL. It must be remembered in this context that the Slovak law provides for a clear criterion for assessing national origin', namely a direct ancestor up to the third generation. The Bulgarian situation is not much different: '[T]he Bulgarian law (article 3 BL) provides for the possibility of proving one's Bulgarian origin through a statement of an association of Bulgarians abroad; the law, however, specifies what needs to be proved, i.e. to have at least one Bulgarian ascendant'. It is interesting to note that while the official statement of the Romanian government of 19 October 2001 asked for an amendment of the Hungarian law in respect of 'the procedure for issuing the document, which at present requires too many contacts between the individuals and the authorities of the Hungarian state', the Venice Commission confirms that this is the correct procedure to follow.

What is the real problem with the role assigned to these organisations, particularly in the Hungarian case? The report of the Venice Commission concluded: 'In the absence of such recommendation, the certificate cannot be issued; no remedy is available against the refusal by an organisation to provide the recommendation. It has been noted above that the criteria, which the organisations are to use, are unclear'. The right to remedy of a person who has been discriminated against or whose rights have been violated is a human right provided for by international and European legal documents, notably Article 13 of the *European Convention on Human Rights*. Its absence represents an infringement of a clear standard.

It is interesting to note that although both the Romanian government and the Venice Commission expressed their concern about the fact the minority organisations in home-states are given competencies for the entire process of issuing the certificate of Hungarian origin, their approaches are totally differ-

ent. While the Romanian government regards this as an attack on its own sovereignty, the Commission's concern is for a possible infringement of individuals' rights. And I would like to emphasise again that in this case we are talking about the lack of protection for the rights of potential beneficiaries of the law and not of the members of the majority population or other minorities.

4. The Nature of the Benefits

4-1. Education and Culture

The Hungarian law provides for various categories of benefits related to the strengthening of cultural identity through educational and cultural means both in Hungary and in the country of residence. The standards that may be invoked relate to the existing international legislation and practice. 'In these fields, if there exists an international custom, the consent of the home-State can be presumed and kin-States may take unilateral administrative or legislative measures'. A different approach is required in other cases: 'In fields, which are not covered by treaties or international customs, instead, the consent of the home-States affected by the kin-State's measures should be explicit'. What is called for here is the observance of a principle of international law, namely respect for the sovereignty of other states.

The Venice Commission goes a little further and alludes to the right not to be discriminated against:

Insofar as the first are concerned, the differential treatment they engender may be justified by the legitimate aim of fostering the cultural links of the targeted population with population of the kin-State. However, in order to be acceptable, the preferences accorded must be genuinely linked with the culture of the State, and proportionate. In the Commission's view, for instance, the justification of a grant of educational benefits on the basis of purely ethnic criteria, independent of the nature of the studies pursued by the individual in question, would not be straightforward.

While understanding the Commission's concern, I must say that to grant such benefits without making a necessary ethnic distinction is hardly conceivable. In such situations for example the requirement that a particular language be used is quite normal.

Theoretically, even here we need to make a distinction based on the purpose of the legal provisions and benefits. There are situations in which minorities and their identity may be endangered; supporting them is an obligation of the home-state and it may very well be a concern of the kin-state as well. In such cases, measures of positive discrimination on the part of the state of residence itself, aimed at strengthening their identity, are not to be considered discriminatory against individuals who do not belong to that mi-

nority. This is what Article 1 paragraph 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms *shall not be deemed racial discrimination*, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved [my emphasis].

There is also the situation where a state merely wants to promote its language and culture in other countries, and in such cases indeed discriminating on national grounds would be problematic; access should be granted to all those who speak the language. In addition, I cannot refrain from mentioning the specific situation of Roma, who badly need positive discrimination in order to overcome the difficulties they face today as a result of centuries of discrimination against them.

4-2. Economic and Social Rights (Work Permit, Social Security and Health Coverage)

The Hungarian law is not the only one that provides for benefits related to the right to work in the kin-state. This has been strongly opposed by the Romanian government, although under the Hungarian law the work permit is only for three months, while under the Slovak law it is not even necessary to apply for a job permit. The Romanian authorities are concerned that an exodus of ethnic Hungarians to Hungary might leave the Romanian economy without the necessary workforce.

What the Venice Commission said in this regard was that ‘[i]n fields other than education and culture...that preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of maintaining the links with the kin-States and to be proportionate to that aim (for example, when the preference concerns access to benefits which are at any rate available to other foreign citizens who do not have the national background of the kin-State)’. The question of who will assess ‘the exceptional case’ and the measure of ‘proportionality’ – and on what basis – brings us back to the same general principles of friendly relations between states, since there is no international document or institution that can do it.

At the same time we must bear in mind the current situation, in which a very large number of people do work in Hungary without legal documents. To bring these people to light and grant them social and health benefits as well is to do no more than realise their economic and social rights. No one can

legitimately challenge these rights. The *European Social Charter* is quite clear in this respect, and sets a human rights standard that must be observed by both Hungary and Romania which ratified it.

5. The Issue of Extraterritoriality

The first thing that must be pointed out is that in order to assess whether a law has extraterritorial effects we have to look not at who will be affected, but where the effects will occur. The Venice Commission Report was crystal clear in this regard: ‘The mere fact that the addressees of a piece of legislation are foreign citizens does not, in the Commission’s opinion, constitute an infringement of the principle of territorial sovereignty’. The Romanian government has been very vocal on the extraterritoriality effects of the Status Law. It argued for example that the right of minority organisations to issue recommendations was an extraterritorial application of the law. The Venice Commission made clear that this is not the case, since the certificates have to be issued by a Hungarian authority. However, the report stresses that there are some principles of international law that must be observed, particularly regarding the friendly relations between states. Article 2 of the *Framework Convention for the Protection of Minorities* is invoked: ‘The provisions of this framework Convention shall be applied in good faith, in a spirit of understanding and tolerance and in conformity with the principles of good neighbourliness, friendly relations and co-operation between States’. The *Vienna Convention on the Law on Treaties* could also be invoked here. This means that states which have ratified the same international instruments (to say nothing of situations where bi-lateral treaties exist) have an obligation to consult one another.

VI. Bilateral Treaties

One last word on bilateral treaties, whose importance is indisputable. A very strong principle of international law, *pacta sunt servanda*, demands that states which have formalised their agreement on various issues in treaties observe those treaties and implement them in good faith. The report of the Venice Commission states: ‘Unilateral measures on the preferential treatment of kin minorities should not touch upon areas demonstrably pre-empted by bilateral treaties without the express consent or the implicit but unambiguous acceptance of the home-State’. And there is a very good reason for this: ‘In case of disputes on the implementation or interpretation of bilateral treaties, all the existing procedures for settling the dispute must be used in good faith, and such unilateral measures can only be taken by the kin-State if and after these procedures prove ineffective’.

The statement issued by the OSCE High Commissioner on National Minorities on 16 October 2001 sounds quite different:

Bilateral treaties can serve a useful function in respect of national minorities in the sense that they offer a vehicle through which States can legitimately share information and concerns, pursue interests and ideas, and further protect particular minorities on the basis of the consent of the State in whose jurisdiction the minority falls. *However, the bilateral approach should not undercut the fundamental principles laid down in multilateral instruments. In addition, States should be careful not to create such privileges for particular groups which could have disintegrative effects in the States where they live.* [my emphasis]

In my view the final part of this statement requires further clarification; otherwise, instead of playing its role in conflict prevention, it may lead to an escalation of tension. In this part of the world, words such as ‘disintegration’ or ‘disintegrative effects’ are extremely sensitive, and have a meaning that goes beyond the academic exercise. They should be used very carefully.