

The Evaluation of the ‘Status Law’ in the European Union

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The great political upheaval provoked among neighbouring states—especially in Slovakia and Romania—by the adoption of the Hungarian Status Law in 2001¹ also evoked criticism by the OSCE High Commissioner on National Minorities,² the Council of Europe (CoE) Parliamentary Assembly,³ and the European Union (EU). In this context, the EU occupied a specific position among the international organisations. While minority issues are usual for the agenda of the CoE and the CoE Parliamentary Assembly, which provide an open forum for the representatives of its member states to discuss contentious issues at a political level, EU bodies have scarcely been involved in evaluating specific minority issues.⁴ Furthermore, at that time neither Hungary nor its critical neighbours were members of the EU. The EU’s involvement was particularly important, therefore, because of the strong efforts of Hungary, Slovakia, and Romania to join the EU and because at the time of the Hungarian Status Law’s adoption, both the accession date of the candidate states and the end of accession negotiations with their first group (including Hungary and Slovakia) were still open. Indeed, the reactions coming from the European Commission were often seen as determining

¹ Act 62/2001 on Hungarians Living in Neighbouring Countries (hereafter also referred to as Law).

² Rolf Ekéus (OSCE Minorities Commissioner), ‘Sovereignty, responsibility, and national minorities’, statement on 26 October 2001 <<http://www.osce.org/item/6352.html>>, accessed 18 January 2006. See also his statement on the ‘Hungarian Status Law Precedent’ on 24 June 2003.

³ See (PA Res. 1335(2003)) Doc.9744 rev., report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr. Jürgens.

⁴ The office of the OSCE High Commissioner was purposely established for mediating debates involving minority issues in the OSCE area. Though the High Commissioner did not directly step into mediating between Hungary and its neighbours, his statements on the matter focused on the conflict-potential of such unilateral kin-state legislations (see above under fn. 2).

both political and legislative aspects. The political concerns formulated by the Commission could hold back the progress made towards accession, while the threat of non-compliance with EU law could formally hinder accession (inasmuch the adaptation of the *acquis communautaire* was a precondition of EU membership). These concerns were reflected in the original version of the Hungarian Status Law, when it stated under Article 27(2): '[f]rom the date of accession of the Republic of Hungary to the European Union, the provisions of this Act shall be applied in accordance with the treaty of accession of the Republic of Hungary and with the law of the European Communities'.

Consequently, both providing a coherent legal framework for the support of Hungarian minorities living in the Carpathian Basin and compliance with EU law were present at the adoption of the Law. But, how did the representatives of the EU see legal compliance and the political impact of Status Law on Hungary's accession? The present paper makes an attempt to explore this, focusing on the development and background of EU positions expressed on this matter.

I. Leverage and Compliance

The process of European integration goes far beyond the classic model of international organisations. In the past ten-fifteen years the EU itself was increasingly positioned as a supranational political actor with its own (developing) political and cultural identity. It means that EU policies and legislation also reflect the common, shared values of its member states, including a growing interest on the protection and promotion of human rights and, more recently with the eastern enlargement process, the promotion of minority rights protection (at least in its external relations).⁵

From an institutionalist approach, EU enlargement can be seen as an institutionalised adaptation process of organisational norms, in which the organisations' foundational principles and norms shall be internalised by

⁵ Adam Biscoe, 'The European Union and Minority Nations' in P. Cumper and S. Wheatley (eds.), *Minority Rights in the 'New' Europe* (The Hague, 1999), and also Gaetanom Pentassuglia, 'The EU and the Protection of Minorities: The Case of Eastern Europe', *European Journal of International Law* 12:1 (2001), pp. 3–38.

applicant states largely by complying with the accession conditionality.⁶ In principle, joining the EU implies that candidate states give up a substantial part of their sovereignty, accept the accession criteria for membership, and implement its rules and legislation through the internalisation of the *acquis* in their domestic legislation. Furthermore, this internalisation process also could extend to the adaptation of policies and moral-political principles of integration.⁷

The EU applied a relatively strict and powerful conditionality policy towards CEE states. However its leverage remained quite unbalanced, for it could not be equally influential in all candidate countries and in all policy areas.⁸ Leverage on candidate states was especially less consequential in assessing their compliance with the political criteria of accession, i.e. 'the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.⁹ The nature of political criteria is that it does not necessarily mean a legal compliance with specific normative standards. Specifically, because of the lack of EU standards on minority rights, minority protection requirements have been largely defined in relation to broader international standards.¹⁰ As a consequence, the actors' positions (both that of the EU and that of the Hungarian government) were mutually clarified and developed in their respective interpretation of accession conditionality and the concept of minority protection in general. Both parties formulated their arguments in regard to compliance in the context of broader international legal and political standards on minority rights protection.

When the EU defined the accession criteria in 1993 at the Copenhagen summit, the inclusion of a specific reference to the 'respect for and protection of minorities' among the political criteria of accession was a new development. In fact, minority questions have never been

⁶ See: Lykke Friis and Anna Murphy, 'The European Union and Central and Eastern Europe: Governance and Boundaries', *Journal of Common Market Studies* 37:2 (1999).

⁷ Frank Schimmelfennig, 'The Double Puzzle of EU Enlargement: Liberal norms, Rhetorical Action, and the Decision to Expand to the East', Oslo, Arena Working Papers 99/15 (1999) <<http://www.arena.uio.no/publications/>> accessed 30 January 2006.

⁸ Heather Grabbe, 'A Partnership for Accession? The Implications of EU Conditionality for the Central and Eastern European Applicants', EUI-RSCAS Working Papers 99/12 (1999).

⁹ Presidency Conclusions, 21–22 June 1993, Copenhagen European Council, SN 180/93, p. 12.

¹⁰ See also: Pentassuglia, *op. cit.*

retained by member states as being relevant in the project of European integration, and consequently Community law did not include any reference on minority rights. The justification of minority protection requirement is rooted in the recent ethnic conflicts in the Central and East European candidate states. Furthermore, there were strong fears, shared by most of the policy-makers in the EU, that there is a strong need to exert pressure on CEE candidate states to resolve their 'ethnic minority' problems.¹¹ Obviously this specific interest on minority issues could be often conceived by candidate states as an imposition of a 'double standard' because formal EU membership has never imposed any minority rights obligations on member states.¹²

Furthermore, candidate states' compliance with minority protection requirements could not be assessed merely on the grounds of how a state meets international legal standards, because states may provide very different levels of protection for their minorities and still be in conformity with their relevant international obligations. The formulation of minority protection standards in international documents does not offer a clear consensus on the issue of collective rights, the definition of the term 'minority', and the interpretation of specific benefits provided by a kin-state to its kin minorities. On the other hand, the existing international instruments relevant for the rights of minorities offer a conceptual foundation, a set of basic principles on how minority-related issues shall be treated. These documents emphasise the respect for the sovereignty of states, the importance of good-neighbourly relations, and also the main issue areas (education, culture, language rights, etc.) relevant for the protection of minority identities.

In its legal analysis, evaluating the compliance of domestic legislation on the protection and support of kin minorities living abroad, with the principles of international law, the CoE European Commission for Democracy through Law (the Venice Commission) made the following conclusion:

¹¹ Giuliano Amato and Judy Batt, 'Minority Rights and EU Enlargement to the East – Report of the First Meeting of the Reflection Group on the Long-Term Implications of EU Enlargement: the Nature of the New Border', RSC Policy Paper 98/5 (1998).

¹² See also Bruno de Witte, 'Politics versus Law in the EU's Approach to Ethnic Minorities', EUI-RSCAS Working Papers 2000/4 (2000).

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. [...] 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 the Commission's opinion, the possibility for states to adopt unilateral measures on the protection of their kin minorities, irrespective of whether they live in neighbouring or in other countries, is conditional upon the respect of the following principles: a) the territorial sovereignty of states; b) *pacta sunt servanda*; c) friendly relations amongst states, and d) the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination.¹³

One of the most important questions on minority rights is which state actions are necessary for the protection of minorities. As the Venice Commission report reflected, it is even more relevant to ask what the acceptable state actions are if a kin-state is providing specific rights for its kin minorities living in other states. Most rights assigned to minorities cover linguistic, cultural, and social-political rights, and all relevant documents are based on the requirement that states need to go further than respecting the basic set of human rights, especially further than prohibiting discrimination on the grounds of belonging to a minority. Indeed, effective protection of minorities require state authorities to take *actions* to ensure specific rights in their domestic legislation and in principle this also includes the preferential treatment of minorities (i.e. positive distinction of people belonging to minorities, which is widely accepted in their protection).¹⁴ It is widely acknowledged that the state of citizenship bears the primary responsibility for the protection of minorities living in its territory, but still, the question whether specific state actions

¹³ 'Report on the Preferential Treatment of National Minorities by Their Kin-state', adopted by the European Commission for Democracy through Law (Venice Commission) at its 48th Plenary Meeting Venice, 19–20 October 2001, CDL-INF (2001) 19, Section D, paragraph (1) <[http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp)>, accessed 23 January 2006.

¹⁴ Cf.: Article 4 (3) of the CoE Framework Convention for the Protection of National Minorities (ETS 157).

are appropriate for the protection of minorities are not universally verifiable. Furthermore, the extent to which a state is entitled to provide such protection for people who are citizens of other states—as it turned out also in the Venice Commission’s analysis—is even more contestable. states follow different practices in this policy field; they apply very different models in creating institutional-legal relations with their kin minorities or co-nationals living abroad.

In this policy area, apparently the interpretation of norms gained great importance. Hungary and its neighbours could not find a consensual understanding on what solutions are mutually, or in general under international law, acceptable in their relations with their kin minorities. Domestic structures and political traditions largely determined the arguments of neighbouring states against the application of the Hungarian Status Law.

In a similar way, the interpretation of international regulations was determinant also in evaluating the Law’s compliance with EU membership conditionality. The experience of eastern enlargement revealed that especially in the field of minority protection conditionality, candidate states and EU representatives often were confronted with interpreting norms; minority protection standards could be well contested by the EU and candidate states’ representatives alike.¹⁵ The confrontation between the EU Commission and the Hungarian government over the interpretation of the Hungarian Status Law is an illustrative example for this.

The contentious nature of international standards on minority rights poses the vital question of whether the EU Commission considered the Status Law as a minority protection instrument at all. Apparently, as it is reflected also in the above-quoted excerpt from the Venice Commission’s report, from a legal point of view, domestic legislation aimed at supporting kin minorities living abroad can be an effective tool of minority protection. This approach was underlined also by the CoE Parliamentary Assembly, when—following a heavy political debate on the Hungarian Status Law—it stated in its Resolution (1335)2003:

¹⁵ Antje Wiener and Guido Schweltnus, ‘Contested norms in the process of EU enlargement: non-discrimination and minority rights’, Constitutionalism WEB Papers 2/2004 <<http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudies/FileStore/ConWEBFiles/Fileupload,5307,en.pdf>>

The Parliamentary Assembly, in principle, welcomes assistance given by kin-states to their kin minorities in other states in order to help these kin minorities to preserve their cultural, linguistic and ethnic identity. However, the Assembly wishes to stress that such kin-states must be careful that the form and substance of the assistance given are also accepted by the states of which the members of the kin minorities are citizens, and to which the basic rules contained in the Framework Convention on National Minorities (ETS No. 157) are applicable.¹⁶

These quotations reflect very important visions both on the rationale of minority protection in general and on the role of kin-states in particular. While the Venice Commission's report clearly underlined the close interrelation between human rights protection and security interests in the protection of minorities, the CoE Parliamentary Assembly and especially the OSCE High Commissioner stressed more the importance of the eventual negative political consequences of unilateral actions in this field. The legal analysis offered by the Venice Commission has not in any way questioned the primary goal of the 'Status Laws', i.e. that the domestic legislations analysed primarily were designed to improve the level of protection of specific minority groups. From a different reasoning, the OSCE High Commissioner was much more concerned on the destabilising potential of such legislation, irrespective of its eventual positive impact on the protection of minorities.

In his first statement on the matter, the High Commissioner expressed the following opinion:

The lessons of the past have underlined the necessity of respect for the rights of persons belonging to national minorities freely to express, preserve and develop their cultural, linguistic or religious identity free of any attempts at assimilation. While maintaining their identity, a minority should be integrated in harmony with others within a state as part of society at large. This is fundamental to international peace, security and prosperity. Protection of minority rights is the obligation of the state where the minority resides. History shows that when states

¹⁶ Council of Europe Parliamentary Assembly Resolution 1335 (2003): Preferential Treatment of National Minorities by the Kin-state: The Case of the Hungarian Law on Hungarians Living in Neighbouring Countries ('Magyars') of 19 June 2001. Adopted on 25 June 2003.

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.¹⁷

Without mentioning the Hungarian Status Law, the High Commissioner's statement made clear, that unilateral actions favouring kin minorities, even if they are legitimate and legal, could be politically hazardous. In principle these statements show well that the interpretation of minority rights protection is not based exclusively on pure legal considerations, but political arguments on security and stability are often coupled with legal arguments underpinning the universal protection of human rights, including those of minorities. Nevertheless these two logics are not always easily reconcilable.¹⁸

To what extent were these arguments and interpretations shared by the EU Commission? How is the yardstick of compliance applied by the Commission to be defined? What were the main issues taken into consideration by the Commission in developing its opinion on the Hungarian Status Law? How did the Commission assess compliance with the *acquis*?

The duality of political and legal arguments in the Commission's opinion on minority issues in the enlargement process was a characteristic feature of monitoring compliance.

II. The Accession Criteria on Minority Rights

Before accession negotiations started in 1998, the EU handled the enlargement process, including the question of minorities in CEE, as part of its foreign policy strategy. This strategy was built on supporting regional and bilateral co-operation among CEE candidate countries without entering in the evaluation of specific domestic legislation on minority rights. In the pre-accession period, when the EU's policy on enlargement and minority issues was developed under the Common Foreign and Security Policy (CFSP), the formulation of EU position required a broad political consensus among the member states, which—in

¹⁷ Ekéus, op. cit.

¹⁸ See: Balázs Majtényi, 'Utilitarianism in Minority Protection?', in this volume, pp 3–16.

light of the great differences between member states' practices and legislation on minority rights—did not involve a thorough legal analysis of the legislations applied by candidate states.

The EU started to scrutinise the effective legal protection of minority rights in CEE when the Commission presented 'Agenda 2000' and the Opinions¹⁹ evaluating the application of CEE countries. The question was how the EU could evaluate candidate states' compliance with minority protection criterion without a clear internal consensus and set of obligations on the matter.

'Agenda 2000'²⁰ signalled a departure from previous rhetoric of EU representatives inasmuch as it drew attention to specific issues, and it also took note of the actual and formal position of minority rights and minorities in individual countries. The document also underlined that: '[m]inority problems, if unresolved, could affect democratic stability or lead to disputes with neighbouring countries. It is therefore in the interest of the Union and of the applicant countries that satisfactory progress in integrating minority populations be achieved before the accession process is completed, using all opportunities offered in this context'. Furthermore the document called attention on: '[a] number of texts governing the protection of national minorities [...] adopted by the Council of Europe, in particular the Framework Convention for the Protection of National Minorities and recommendation 1201 adopted by the Parliamentary Assembly of the Council of Europe in 1993'. But neither the implementation of these international documents nor their observance was directly monitored by the Commission during the accession process. It could be seen already at this stage that the Commission would not take the task of 're-interpreting' international minority protection standards in light of the *acquis* and in light of the new challenges posed by the accession of CEE countries.

Considering that the European Union does not offer a legal regulation on minority rights, this rather permissive approach could suggest that besides the implementation of the *acquis*, candidate states are rather free in interpreting the term of 'minority protection'. However it turned out that

¹⁹ For Hungary, see Commission Opinion on Hungary's Application for Membership of the European Union. 1997. DOC/97/13.

²⁰ Commission of the European Communities, *Agenda 2000: For a Stronger and Wider Union* (Luxemburg: OPOEC, 1997).

the EU placed a strong emphasis on the implementation of non-discrimination principle and on the social integration of minorities.²¹ The EU had great prestige in candidate states, and the Regular Reports had been long awaited before they were published and widely analysed in the press in the candidate states. The Regular Reports had been considered an annual evaluation of the general state of affairs in a country on the way towards accession. In this sense, the Commission paid attention to the balance between the divergent issue areas in the Regular Reports, and it was quite obvious that it would not take a hard position on such a contestable policy area as minority protection.²²

In fact, in evaluating the political criteria of accession, the Commission's task was not to provide a legal analysis, but much more to give a political evaluation on how specific legal instruments and policies are acceptable for the protection of minorities. Consequently it is not surprising that the mainstream approach of the Commission reflected in the Regular Reports reveals that in many cases it was much more concerned on *integrating* minority populations and combating discrimination than on elevating the existing level of minority protection in candidate states. The Commission focused more on the question of non-discrimination and on the conflict potential of minority questions than on reviewing the state of specific minority rights.

The legal analysis of specific legislations was only considered in compliance with the regulations of the *acquis*. That is why the Hungarian legislator included a reference to the eventual harmonisation of the Status Law with the Community law at the time of accession. Indeed, the first statements of Commission officials on the Hungarian Status Law were rather positive and primarily focused on the political aspects of the criticism formulated by Slovakia and Romania. Eneko Landaburu, European Commission Director General for enlargement, at his visit to Budapest on 29 June 2001 was quoted as saying, the law 'appeared to be in line with EU regulations', and he underlined that it is 'very important that Hungary and its neighbours take normal diplomatic steps to solve their problems at bilateral level'. He argued that Hungary must reach

²¹ James Hughes and Gwendolyn Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs', *Journal on Ethnopolitics and Minority Issues in Europe* 1 (2003), pp. 1–37.

²² Interview with DG Enlargement official on 3 August 2003.

compromise agreements with both Slovakia and Romania before the Status Law was due to come into force on 1 January 2002.²³ Similarly, Günther Verheugen, Commissioner for Enlargement, in the same period stated at a press conference in Luxembourg that, though the Commission had not yet finished the analysis of the Status Law, it appeared to be in full conformity with Hungary-EU Association Agreement.²⁴ At a later stage, the Legal Service of the European Parliament also lined up with this conclusion; however it also noted that it was not in position to judge the Status Law's compliance with the *acquis*, because Hungary was not yet a member of the EU.²⁵ It is interesting to see that the exclusion of Hungarians living in Austria from the effect of the Law at this time did not raise specific interest on the Commission's side, while the main argument propounded by Slovakia and Romania on the 'non-European' character of the Law was that the only EU member state neighbouring Hungary was left out from the Law, thus the regulations of the Status Law are presumably not applicable in the EU.

At this period, in the Commission the evaluation of the Hungarian Status Law was primarily limited to its formal analysis. The Commission did not intend to observe it as a specific instrument of extra-territorial minority protection, but it has seen it as a matter of domestic legislation without far-reaching implications either on Hungary's bilateral relations or on Hungary's relations with the EU.²⁶

Nevertheless, by the end of the year, the Commission stepped forward and mentioned the Status Law in the 2001 Regular Report on Hungary's progress made towards accession. While it acknowledged the minority protection goal of the Law under the title of 'Minority rights and the protection of minorities',²⁷ a few pages later, it underlined the need to harmonise the law with the *acquis*, both concerning its provisions relevant for migration²⁸ and those relevant for the principle of the respect for non-discrimination.²⁹ But these latter statements have been included in the

²³ *Radio Free Europe/Radio Liberty [RFE/RL] Newswire* (2 July 2001).

²⁴ 'Verheugen: a státus törvény EU-konform', *Népszabadság* (26 June 2001).

²⁵ RP/AC/ab SJ(01) D/32439 (16 October 2001).

²⁶ Interviews with DG Enlargement officials (3–5 August 2003).

²⁷ Commission of the European Communities 2001 Regular Report on Hungary's progress towards accession, Brussels, 13.11.2001 SEC (2001) 1748, p. 22.

²⁸ *Ibid.* p. 86.

²⁹ *Ibid.* p. 91.

chapter on ‘Common foreign and security policy’ together with the requirements on following bilateral consultations on the application of the Law with Slovakia and Romania. Moreover, the Commission also concluded from the Venice Commission’s report, that ‘some of the provisions laid down in this Law apparently conflict with the prevailing European standard of minority protection’.³⁰

Seemingly these conclusions made in the 2001 Regular Report (and repeated also in the 2002 Regular Report) reflect a shift in the Commission’s approach. While the Status Law was developed by the Hungarian parliament as an instrument of minority protection, the Commission was much more concerned on its political implications. This was reflected also in the fact that the Commission formulated both its legal and political recommendations in the Regular Report under the Chapter on security policy. The most important problem was that two divergent interpretations conflicted between Hungary and the Commission on the nature and impact of the Status Law and apparently Hungary was not able to promote its own argumentation convincingly to Commission officials. To understand why the Hungarian party was not able to ‘convince’ the Commission of the primary ‘minority protection’ character of the Law, the monitoring procedure applied in the accession process shall be explained.

III. The Monitoring Procedure and the Analysis of the Status Law

The analysis of the formal procedure of monitoring in the Commission reveals that the perceptions of policy-makers on minority protection issues and the multiple goals the EU wanted to achieve through assessing conditionality made difficult the development of a consistent position in the Regular Reports. The EU was determined to minimise the conflict potential of political (in this sense including minority) issues in candidate states. Consequently, in assessing the political criteria of accession, the Commission did not extend strict normative compliance beyond the *acquis*, even if it needed to rely on other international standards on minority rights as well. And—in its efforts to avoid conflict—the

³⁰ Commission of the European Communities 2001, op. cit., p. 91.

Commission could hardly be expected to take a side in the eventual debates between minorities and their governments or between candidate states.³¹

Moreover, regarding the political criteria (including minority protection), the Commission involved a great number of different actors in the monitoring process. First of all, it closely co-operated with and often consulted the governments concerned, and it also consulted regularly the Council of Europe's Secretariat of the Framework Convention, the OSCE High Commissioner, and reports made by non-governmental organisations.³² The main goal of the Commission was to formulate a balanced view in a moderate tone on political issues, including minority protection, and to attempt to avoid serious conflicts among candidate states that could lead to hamper the accession process.

In this aspect, the Commission officials, lacking appropriate internal expertise, based their analysis on a number of different (external and internal) sources. But it also implied that the Commission did not see its task in evaluating the implementation of specific laws, but rather relied on their political and formal legal analysis. In case of the Status Law, the Commission first assessed the Law in light of the *acquis*, relied on the opinion of other international organisations (the OSCE High Commissioner and the Venice Commission), and evaluated the information coming from Hungary's neighbouring countries. In this regard, the Commission developed its political assessment on the Law, taking into consideration all arguments that emerged in the discussion at equal value. Because the Commission was primarily concerned on providing a balanced view, and on avoiding contentious issues, it took a rather 'conservative' position on the matter. As a reaction to the objections formulated by the Slovak and Romanian governments, the Commission called on Hungary to 'hold the necessary consultations in order to agree with its neighbours'³³ and did not consider in merit the primary goal of the Law or its appropriateness in improving the situation of its target minority groups.

³¹ Interviews with DG Enlargement officials 3–5 August 2003.

³² Interview conducted with an official of DG Enlargement of the European Commission on 3 August 2003.

³³ Commission of the European Communities 2001, op. cit., p. 91.

In fact, the Commission formulated both political and legal criticism on the Law, but the primacy of political considerations had an impact also on the evaluation of legal compliance.

IV. The Question of Legal Compliance

From a legal point, the 2001 Regular Report simply stated that the Law ‘is currently not in line with the principle of non-discrimination laid down in the Treaty (Articles 6, 7, 12 and 13)’. In some specific areas, like in provisions on facilitated access to the labour market, the problem of discrimination could be relevant,³⁴ but such a bold statement is hardly justifiable.

The mentioned articles of the Treaty on the European Union are related to equal treatment of and prohibition of discrimination (among others based on national or ethnic origin) among EU citizens in member states. Although the 2001 Regular Report did not specify which regulations of the Hungarian Status Law were found in non-compliance with the *acquis*, Commissioner Verheugen in a letter addressed to the Hungarian Prime Minister Péter Medgyessy listed all benefits offered on an ‘ethnic basis’.³⁵ The arguments propounded by the Commission in its Regular Report and in the letter of Commissioner Verheugen, however, apparently disregard the aforementioned permissive approach of international law and likewise seem to ignore existing practices in some of ‘old’ Member states (e.g. Austria, Germany, Italy) and recent legal developments within the EU assessing the relation between discrimination and the protection of minorities. The European Court of Justice, in line with the above mentioned international provisions on minority protection, declared in its judgement on *Bickel/Franz Case* that ‘of course, the protection of such a minority may constitute a legitimate aim’ for state behaviour;³⁶ even though the ECJ presumably did not intend to

³⁴ See Marten Breuer, ‘The Act on Hungarians Living in Neighbouring Countries: Challenging Hungary’s Obligations under Public International Law and European Community law’, *ZEUS Zeitschrift für Europarechtliche Studien* 2 (2002), pp. 270–279.

³⁵ 5 December 2002, see: Zoltán Kántor et al. (eds.), *The Hungarian Status Law: Nation Building and/or Minority Protection* (Slavic Eurasian Studies no. 4; Sapporo, 2004), p. 585.

³⁶ Case C–274/96 judgement issued on 24 November 1998. (See under <<http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>>) For comment see: Bruno de

acknowledge such state behaviour irrespectively of the link of citizenship between the state and the right holders, but this is already the problem of sovereignty and not of discrimination. In a similar manner, the so-called Race Directive (2000/43EC) adopted by the European Council in June 2000, while strongly prohibiting any form of direct or indirect discrimination based on racial or ethnic origin, actually promotes positive distinction, stating that the principle of equal treatment 'shall not prevent any Member state from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin' (Article 5). Nonetheless, the question whether a kin-state is entitled to promote specific rights for its kin minorities is not *a priori* prohibited, but remains *unanswered* under the provisions of the *acquis*. In fact, these were also the main lines of the Hungarian government's argumentation in the discussions with the Commission.

But the European Commission did not share this view. From a legal point, it was a strong conviction among Commission officials that the assistances and benefits provided by the law on ethnic basis are discriminatory, because they differentiate between EU citizens on ethnic basis, therefore shall not be applied in EU member states, regardless whether are aimed at supporting cultural activities, education (core issues for minority protection), or economic and social rights.³⁷ The fact that this law was developed as a minority protection instrument was only marginally taken into consideration. Cultural, educational support is vital for every minority community in preserving its identity. The Venice Commission's Report (referred to also in the 2001 Regular Report) made a clear distinction between benefits provided by a kin-state in the field of culture and education, stating that unilateral actions in these fields may well conform to customary international law without infringing the sovereignty of other states.³⁸ Furthermore, while offering preferences in the labour market may well be contrary to EU legislation, in areas which belong almost exclusively to domestic competency, like education and

Witte, 'Free movement of Persons and Language Legislation of the Member States of the EU', *Academia* 18 (1999), p. 1.

³⁷ Interviews with DG officials, *op. cit.*

³⁸ When a kin-state takes unilateral measures on the preferential treatment of its kin minorities in a particular home state, the former may presume the consent of the said home state to similar measures concerning its citizens. See Venice Commission's Report, Section D, paragraph (1) (see above under fn. 13).

culture, the question of discrimination is even more problematic. In these areas member states may well express their own cultural preferences in their policies by providing support for such activities beyond the borders. Obviously the form of such support may be problematic, i.e. it could hardly be formulated as an individual right of persons belonging to a specific ethnic group, but instead it should be rather aimed at supporting specific cultural and educational activities or institutions, as it was reflected in the amendment of the Status Law;³⁹ but still this is a question of interpretation of the non-discrimination principle.

In their interviews with the author, Commission officials working at the Enlargement DG stressed two important rationales for their approach: first they argued that the limited geographic focus of the Status Law (i.e. it is applied only on the territory of the successor states of the former historical Hungary) and the objections formulated on the Hungarian certificate (its outlook, the involvement of private NGOs in its issuing process, etc.) suggest that the primary goal of the Law is something more than just a new approach to minority protection; second, they also argued that their task was not to provide a specific legal analysis of the Law under international law, but to assess all the relevant legal and political aspects of the question, taking into account equally the position of Hungary and of other candidate states affected.

These arguments indeed lead to the conflicting political interpretation of specific principles and norms emerged in relation to the Status Law.

V. Political Aspects

Besides the fact that already in the 2001 and 2002 Regular Reports, the Commission expressed its political concerns on the Law under the chapter on security and foreign policy, Commissioner Verheugen in his letter to the Hungarian Prime Minister Péter Medgyessy noted his concerns on the ‘political bond’ created by the Law and on the extra-territorial effects of the Law. While, as already noted above, providing benefits outside the kin-state’s territory to its kin minorities *in se* is not violating international and EU, Commissioner Verheugen’s letter combined political and legal interpretations in evaluating the effects of the Law. Referring to the

³⁹ Act 57/2003.

Report issued by the Venice Commission, he argued that the Law creates an unacceptable 'political bond' between Hungary and Hungarian minorities, and any reference to the 'Hungarian nation as a whole' conflicts with the sovereignty and jurisdiction of host-states.

But, as a member of the Venice Commission noted, the Venice Commission's Report did not make any political conclusions. It had a mandate to analyse the existing state practices in Europe on benefits given by kin-state to their kin minorities.⁴⁰ The terms of 'nation', 'national belonging', etc. are widely used in very different contexts without reflecting a universal legal definition. Consequently, what is regarded to be a 'political bond' could hardly be evaluated in legal terms; similar to the definition of 'nation', it remains open to various equally justifiable interpretations of every national community. National identity and state sovereignty are barely covering the same concepts. National minorities by definition cannot display the national identity of the majority, which is also reflected in the cultural identity of the state. National belonging in this sense has nothing to do with state sovereignty. The primary bond between the individual and the state—in legal sense—is citizenship, and not national identity. Furthermore, particularly in the process of European integration, the question of 'nation' is increasingly losing its legal/political relevance.

Indeed, the arguments forwarded by the representatives of the Hungarian government followed two lines of reasoning. First, based on the existing state practices analysed by the Venice Commission, the support provided by the Law to Hungarian minorities living abroad was considered as a legitimate goal of the Hungarian state. Second, the idea of 'transnational' minority protection was seen as conforming to the basic principles of European integration, suggesting that the institution of national citizenship is also changing and does not necessarily reflect an exclusive cultural bond with the state.⁴¹

From a political approach, it was also argued that in a politically integrating Europe, nation state sovereignty is also substantially

⁴⁰ László Sólyom, 'What Did the Venice Commission Actually Say?' in Kántor et al. (eds.), *op. cit.*, pp. 365–370.

⁴¹ Interview with the Political Director of the Hungarian Permanent Representation to the EU in Brussels, on 1 August 2003.

transforming. The concept of post-sovereign order in Europe⁴² may indeed lead to the acceptance of shared sovereignty, which could be interpreted not only vertically (i.e. as shared between the EU, the Member states, and the regions), but also horizontally (i.e. the shared goals and principles of European integration, like the protection of human rights and cultural diversity), could provide a broader field of action for states pursuing such goals. The ‘internationalisation’ of minority rights issues is not a novelty anymore and until state actions are aimed at improving the situation of a group at a disadvantage (i.e. a minority group) in line with the principle of positive distinction, they could be accepted as realising the common goals of the community of EU member states.

In this regard, the argumentation also pointed out, that—irrespective of the citizenship bonds—minority issues in principle are not alien from European integration either. EU law and legislative initiatives also provide a normative framework which has a direct impact on the citizens of EU, thus also on the situation of minorities within the EU, and as such could have determined the EU’s position on minority issues in the accession process. These cover basically two areas: a) the respect for diversity of national cultures, languages, traditions, etc. (i.e. how ‘diversity’ is tackled in EU’s cultural and regional policies) as reflected in, among others, Article 151 EC, more recently in Article 22 of the Charter of Fundamental Rights, and in a number of European Parliament resolutions calling on member states to take actions in protecting vulnerable cultural and linguistic groups within the EU;⁴³ and b) the protection of human rights, specifically emphasising the principle of non-discrimination (see e.g. 2000/43 Race Directive). Consequently the promotion of diversity, through providing cultural, educational benefits to kin minorities, could be seen also as a progressive move in European integration.

However, this argumentation went much further than what could be politically acceptable for the Commission. The main reason for this was that Commission officials felt they were being asked to develop ‘new concepts’ on minority issues. They did not see their task as formulating the Commission’s own, specific ‘EU’ normative framework on minority

⁴² Micheal Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford, 2001).

⁴³ Most recently see: EP Resolution on Regional and Lesser-Used Languages—Enlargement and Cultural Diversity, adopted on 4 September 2003, P5_TA(2003)0372.

protection; the Commission was asked by the European Council to review compliance with the political criteria. In this case, in the evaluation of the Hungarian Status Law, taking into account its 'engine role' in European integration, quite surprisingly the Commission formulated a strongly state-centric position.

Nevertheless, the experiences of the enlargement process, as the example of the 'Status Law debate' reveal, in a longer term may contribute to the development of new political and legal approaches to minority issues within European integration. Indeed, new minority protection instruments which go beyond the exclusivity of host-state's responsibility may also promote the realisation of common goals of European integration in respecting and promoting cultural and national diversity within the EU.