

## Chapter 14

### **What Did the Venice Commission Actually Say?**

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The Venice Commission is a consultative body of the Council of Europe. Its members are legal experts independent of their respective governments and in the Commission they express their own standpoint, not the official one of their countries. The position adopted by the Commission is never a mandatory one, but the reports that have been released during its twelve-year history have been gaining increasing respect, and they provide a key point of reference when the question arises: What is the ‘European standard’ in issues of democratic institutions and legal protection?

In relation to the case of the ‘Act on Hungarians Living in Neighbouring Countries’, numerous statements have been made about how far ‘preferential laws’ comply with European requirements. However, full and accurate quotations of the Commission’s relevant declaration are hard to find. It is a rather lengthy report whose conclusions cannot be understood and interpreted without the whole of the document. This is perhaps why even Günter Verheugen, Commissioner for Enlargement of the EU, referred to it incorrectly in the legal assessment that he attached to his letter to the Hungarian Prime Minister evaluating proposed amendments to the preferential law.

As a member of the Venice Commission, I contributed to the draft report entitled ‘On the Preferential Treatment of National Minorities by their Kin-State’ and took part in the discussions of the sub-commission that confirmed the final form of the text before the plenary meeting. I know the ideas underlying the wording and underlying each slight change of phrase. I believe it is necessary for public opinion to be informed by an authentic source about what the Venice Commission actually said.

The Romanian government requested that the Venice Commission Report on the Hungarian preferential law, while the Hungarian government asked for a comprehensive study of European practice. The Commission put the latter request on its agenda, since it did not want to act as umpire in a Hungarian-Romanian dispute. The report examines the preferential treatment provided by Austria, Slovakia, Romania, the Russian Federation, Bulgaria, Italy, Hungary, Slovenia and Greece to ‘national communities’ living abroad and it consistently refrains from reporting on the approaches adopted by individual states.

The Commission declares that a new and original form of minority protection is emerging. The Hungarian preferential law is not a unique and unprecedented phenomenon (as Romania described it) but is a part of a new, accepted and positive direction of minority protection. Thus the Commission evaluates the appearance of preferential laws as a positive phenomenon. However, it adds that the time that has passed since their adoption is not sufficient to enable us to speak about international customary law. (Except for the Austrian one, all the acts emerged in the second half of the 1990s.) Given that the time is insufficient to recognise them as a part of customary law, the Commission regards unilateral preferential laws of kin-states as realisable and legitimate, but with the condition that they comply with four principles. These are the following: the territorial sovereignty of the states, respect for treaties, respect for friendly relations between the states, and finally respect for human rights and fundamental freedoms, with special regard for the prohibition of discrimination. Nevertheless, the Commission declares that the system of bilateral and multilateral agreements remains the main tool of minority protection.

The Venice Commission outlined seven requirements whose fulfilment renders a preferential law compliant with the above-mentioned principles of international law. These 'recommendations' cannot be interpreted in isolation, and indeed, when they are examined separately, they may seem contradictory. In the knowledge of the whole report, however, it becomes clear which condition applies which principle of international law to the preferential laws.

As a basic question, one has to clarify the concept of 'nation', for it is the different notions regarding the relation of state and nation that lie behind the dispute. According to the sound and formal concept of nation state, a nation consists of the citizens of a state. As opposed to this, the other concept of 'nation' could be circumscribed by common language, culture and perhaps ethnic group. In the doctrine of many states, and indeed in many languages the word 'nation' means nation state. Romania has fought hard for the recognition of every Romanian citizen being a member of the Romanian nation – to the Hungarian nation, however, only Hungarian citizens belong. A similar standpoint is implied in Verheugen's letter, which criticises phrases like 'unitary Hungarian nation', 'information about Hungary and the Hungarian people', 'Hungarian national traditions', 'the Hungarian national communities living in neighbouring countries'. There are indeed some difficulties of terminology (and translation). Nationality implies citizenship in several European documents. However, in the *Framework Convention on the Protection of National Minorities* (1995) the other sense of the attributive term 'national' cannot be ignored. Though the member states of the Council of Europe couldn't agree on a definition, as a 'pragmatic approach' to the notion they

added the explanation that a national minority is determined by common religion, language, traditions, cultural heritage and – additionally – ethnic group. The terms of the different preferential laws are various and the translations make for further complications. The Italian, Slovene and Greek laws, for example, use the notion of ‘autochthonous’ nationality. In other documents Bulgarian, Slovak, Romanian and Portuguese communities living abroad or outside the borders are mentioned. The Russian act affects ‘compatriots’ (*nota bene*: of foreign citizenship), whereas the Austrian act declares South Tyroleans as being of equal rights with the citizens of Austria. (Let it be admitted that it would be strange to speak of the Austrian nation.)

The Venice Commission solved the problem by speaking about ‘kin-States’ (mother-states) and ‘kin minorities’ (minorities of the nationality of the mother-states), the latter being citizens of the ‘home-State’ (the state of residence or simply homeland). In spite of Romania’s protests, this terminology has been sustained. In a space of barely one and a half years these widespread terms have come to be used with great relief in international conferences and articles. They imply the recognition of the existence of linguistic, cultural, perhaps religious and ethnic communities, communities that preserve common traditions and that reach beyond state boundaries. In such cases, on the level of individuals and communities, the mother nation is entitled to care for those parts of its nation that live in other states and hold different citizenship. In Hungarian, this community is called ‘nation’. Europe did not object to the designation ‘*homogenous*’ used in Greek law, though *genos* means genealogical community just like nation. In translations we can safely use the terminology provided by the Venice Commission and nobody can force us to use the customary terms relating to the concept of ‘nation state’. For it cannot be denied that there is another conceptual framework that equally conforms to European standards. Anyone who is outraged by the word ‘nation’, will be equally angry about the recognition of kinship: consanguinity, tribal kinship. Prejudiced and ill-grounded objections to the use of particular concepts thus have to be rejected. Let him be accursed, who distorts the meaning. Contrary to Verheugen’s letter, the Venice Commission itself made no suggestion that terms like ‘nation’ foster the creation of a ‘special political bond’ between the mother nation and the members of the minority. Setting aside the possibility of such a bond, the Venice Commission dealt exclusively with the certificates giving entitlement to various benefits.

The Venice Commission first of all examined the issue of territorial sovereignty of the states. It pointed out that a state could issue laws and regulations concerning foreign citizens as long as these come into force on its own territory. (According to the Commission’s example, a state may unilaterally decide to grant as many scholarships as it likes to foreign students who wish

to pursue their studies in the universities of that state.) If, however, the kin-state provides assistance abroad, in the place of residence of the minority, the consent of the other state is needed for those provisions to be implemented, unless that assent can be presumed on the basis of international practice. From the detailed report of the Venice Commission it turns out that – ‘at least between states which have friendly relations’ – such consent may be presumed in the field of education in the mother tongue in the (foreign) place of residence of the minority, and also in the case of support of students and educational institutions by the kin-state. The practice of preferential treatment pursuing clear cultural aims has developed and has been followed by numerous states; it is commonly accepted. In the Commission’s view, the explicit consent of the state to foreign support provided on its territory is indispensable only if the minority student pursues studies which have nothing to do with the kin-state and its culture.

The above points are confirmed by two rules which the Venice Commission set out in the interests of respect for fundamental rights, and especially to prevent discrimination. According to these, persons belonging to national minorities may be granted support in the field of education and culture, insofar as that support is directed to the legitimate aim of fostering cultural links and is proportionate to that aim. Preferential treatment cannot be granted in fields other than education and culture, save in exceptional cases and if its legitimacy and proportionality are justified. The prohibition of discrimination (and within that the prohibition of ethnic discrimination, which is highlighted by international human rights conventions) is a main rule that allows of several exceptions. In accordance with and proportionately to the cultural aim mentioned above, the Commission regards positive discrimination as acceptable. The equality requirements of the European Union, which are so frequently spoken of, will have to be treated in a similarly differentiated way, bearing in mind that preferential laws are in force between member states as well (Austria and Italy, Germany and Denmark). Thus Verheugen’s letter is not in accord with the Commission’s standpoint when it declares that support granted exclusively to Hungarian students who receive education in the Hungarian language or to teachers educating in Hungarian constitutes ethnic discrimination. The letter proposes that support should be assigned to the promotion of the Hungarian language and culture in general. The Venice Commission, however, makes a distinction between unilateral support of kin minorities and the general propagation of the culture of the kin-state for everybody. The Commission restricts the former possibility significantly, because in education and culture it insists on the presence of the component accounting for the national character, which in the case of Hungarians is for all practical purposes the Hungarian language. With the decline of traditionalist, closed, mainly rural communities, the social cohesion of a minority, especially

the survival of its intelligentsia (and not only those in the humanities) is of vital importance for the minority to survive. In spite of this, the Venice Commission precludes support for Hungarian students pursuing (for example) medical or engineering studies in Romanian or Slovak. But surely it does not object to the preferential treatment of the Hungarian students and teachers (and not others) in a Hungarian school.

Nor did the Venice Commission propose any absolute prohibition on preferential treatment other than cultural. Contrary to Verheugen's letter, the Report offers no grounds for excluding support for disadvantaged settlements (aimed at maintaining their population and developing rural tourism) from the legitimate objects of policy. The fact that economic support may come up against special difficulties, as we have discovered in the field of employment, is another matter.

The issue of the documents proving entitlement to benefits touches both upon the principle of good neighbourly relations and upon the principle of sovereignty. The Commission openly declared that no quasi-official function may be assigned by a state to non-governmental organisations or the church beyond its boundaries; the certificates have to be issued by the consulates. The laws and regulations in question should list the exact criteria for falling within their scope of application; the sheer declaration of belonging to a particular nation or the 'national consciousness' which occurs in the wording of various laws is not sufficient. The proof of descent or (at least passive) knowledge of the language may, however, be enough. The organisations of the minority abroad can give information about the presence or absence of these criteria but they cannot issue any decisive recommendation. In this respect the Hungarian law needs amendment. Its executive degree, the Hungarian-Romanian memorandum of understanding and practice, has already been adjusted to the requirements of the Commission.

The Venice Commission analysed the procedure for issuing the certificates and their content so thoroughly because these seemed to be an instrument for transforming entitlement to benefits into a 'political bond' with the kin-state. That is why the Commission stipulated that the certificate issued by the kin-state may serve only as a proof of entitlement to benefits, i.e. it cannot substitute for the passport or the identity card. The Hungarian law does not go as far as other kin-states, which provide diplomatic protection for foreign compatriots. That the certificates include photos and personal data, and even the seal of the kin-state, may be said to be common practice. According to the proposed amendments to the Hungarian law, the Hungarian Certificate will include the statement that the certificate is not an identity card or a travel document, nor does it function as a frontier pass. Thus it is incomprehensible why Verheugen's letter – written in the knowledge of this

amendment – speaks about the risk of a political bond arising from the appearance of the certificate.

Finally, the Venice Commission deals in detail with the principle of international law relating to the observance of treaties. It points out that unilateral measures on the preferential treatment of kin minorities may touch upon areas demonstrably covered by bilateral treaties only with the express consent or the implicit but unambiguous acceptance of the home-state. Unilateral measures can be taken by the kin-state only after all the existing procedures for settling the dispute have been used. This effort to prevent the use of unilateral preferential treatment measures as form of sanction against the non-fulfilment of treaties on minority protection may be explained by previous (west) European experience (e.g. that of Italian-Austrian relations). But the new preferential laws pursue other aims. In conformity with international law, the home-state has the right to pursue an integrative policy and is not obliged to take measures against the natural assimilation of persons belonging to other nations. Not even bilateral treaties can provide protection against this. The standpoint adopted by the Venice Commission is significant because it admits that preventing natural assimilation, which is a danger even in the case of ideal minority policies, is a legitimate interest of the kin-state, and that for that purpose it can take unilateral measures. Consequently, according to the Venice Commission the only measure of the legitimacy of provisions is whether they aim at maintaining the original linguistic and cultural links. All that must be added to this is that, according to the Commission and the agreements in question, benefits can be conferred on kin-nationals holding foreign citizenship and their organisations on an equal basis.

(Translated by Ivett Császár)