

BALÁZS MAJTÉNYI

Special Minority Rights and Interpretations of the Nation in the Hungarian Constitution

Interpretations of the nation and the neutrality of the state

The question of special minority rights arises in the Hungarian Constitution not only on the level of fundamental right but also on that of state organization. In order to interpret the latter and, simultaneously § 68(1)¹ on minority rights, it is worth examining the concepts of nation the Constitution utilizes and the meanings it attaches to the appellation of 'people' and 'nation', as well as why it refers back, in said paragraph, to § 2(2), which sets out popular sovereignty.² Analysis of the above is all the more important because – as we will see – it also signals the confines of minority protection and the outer boundaries of measures aimed at enhancing the situation of minorities. It is expedient to begin from the following in the interpretation of the terms 'people' and 'constituent part of the state': in the interest of strengthening the sense of belonging to a political community and of guaranteeing the authority of law, democratic constitutions generally use or at least refer by various names ('people', 'nation') to the concept of political nation (or state nation). The founding documents of political commu-

¹ § 68 (1) The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State.

(2) The Republic of Hungary shall provide for the protection of national and ethnic minorities and ensure their collective participation in public affairs, the fostering of their cultures, the use of their native languages, education in their native languages and the use of names in their native languages.

(3) The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country.

(4) National and ethnic minorities shall have the right to form local and national bodies for self-government.

(5) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the rights of national and ethnic minorities.

² §2(2) In the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives.

nities also often declare a commitment to those living beyond the borders (and members of the cultural nation that gives the state its name) and name individuals belonging to various cultural nations and resident in the territory of the country (national or ethnic minorities).³ Alain Dieckhoff defined political and cultural nations in the following manner: the political nation is a free association of citizens that links the concept of nation to a real or at least desired sense of belonging and that refers to the embodiment of a historical community. “This civic, contractual, elective nation is the basis of the French idea of the nation, conceptualized by the philosophers of the Enlightenment and realized by the great revolution”⁴ In contrast, the cultural nation is expressive not of a common law relationship between individuals, but of the expression of a feeling of identity,⁵ a natural order that was, for example, the basis of the division-born German understanding of nation. According to this approach, nations are defined by a common language, culture and literature. (Comparison (and contrast) of the above-mentioned two concepts of nation first appeared with Friedrich Meinecke, according to whom the cultural conception builds on “some jointly experienced cultural heritage (language, religion, etc.), while the political nation, in turn, relies on “the unifying force of a common political history and constitution”.⁶

The most important question that arises in the course of legal interpretation is which of the two definitions of nation or which possible combined use of them can be made to coincide with one of the basic principles of modern democracies: the moral equality of all members of the political community. In other words, the question is whether the concept of nation can be institutionalized in the legal order of democratic states; and, if so, with which interpretations. According to many, the most appropriate course of action would be if the public law documents of democratic political communities made no reference to the nation whatsoever; this could come about in a state neutral in respect of the nation. (The Constitution of such a state would men-

³ For a detailed discussion of the subject, see Iván Halász: A nemzetfogalom nyelvi-kulturális elemei a modern kelet- és közép- európai demokratikus alkotmányokban. In Iván Halász, Balázs Majtényi, László Szarka (eds.): *Ami összeköt? Státustörvények közel s távol*. Budapest: Gondolat, 2004. 27–41.

⁴ Alain Dieckhoff: *Beyond Conventional Wisdom: Cultural and Political Nationalism Revisited*. Alain Dieckhoff and Christophe Jaffrelot (eds.): *Revisiting Nationalism: concepts, structures, processes*. Hurst (UK), 2003.

⁵ Dieckhoff, op. cit.

⁶ Friedrich Meinecke: *Cosmopolitanism and the National State*. Princeton University Press, 1970. 10.

tion the concept of the nation only when declaring the neutrality of the state in this regard. Combined with other forms of neutrality, a possible declaration could run as follows: The state rests on democratic values and is not bound to either a religion or a nation.) This is little more than an illusion, however, as Will Kymlicka and János Kis have pointed out.⁷ The birth of the majority of contemporary states is bound up with national movements, which cannot break away from concepts of nation, since even democratic states with rule of law cannot be neutral in a few essential questions. In order to come to this conclusion let us just think: if we accept that there is a need for the creation of some sense of belonging within the political community, any attempts geared toward its formation must necessarily be linked to the nation. States, namely, necessarily have an official language (or languages), while cultural and historical particularities can be found in all legal systems; and common state symbols are also tied to the nation. National tradition necessarily leaves its mark on common political culture also, as a result of which the demarcation of the political community in democratic states refers, almost without exception, to belonging to the political nation. Thus, as János Kis assessed: an analogue to the religious neutrality of the state is simply not applicable to the division of state and nation.⁸ (According to him, we are best off analyzing the model of the partner-nation state, putting aside the notion of the ethnically neutral state. In my view, the Hungarian Constitution outlines one version of this theoretical model.) It is enough to consider the following in order to admit how far from reality the ethnically neutral state is: assuming conservation of Hungary's [*Magyarország*] present-day state organization, the country could be called Central-Carpathia, its inhabitants Central-Carpathians; its new Constitution could presumably designate Esperanto as the official language.

The appearance of a conception of the nation in democratic constitutions

Contemporary democratic political communities are thus not neutral in respect of the nation and are (through their designations, anthems and other symbols, as well as history and official languages) linked, albeit to differing

⁷ In this connection, see Will Kymlicka and Christine Straehle: Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature. *European Journal of Philosophy*, Vol 7, Nr.1, 1999. 65–88, and János Kis: *Beyond the nation state*. *Social Research*, Nr. 63, 1996. 191–245.

⁸ János Kis, op. cit.

degrees, to the political nation, which encompasses all citizens and is reconcilable with the principle of equality. The political nation is, in turn, in a particular manner historically and as yet unalterably connected to the identity of the cultural nation that gives its name to the state (Hungarians in Hungary, Germans in Germany) for the majority of states. Naturally, exceptions are also possible in the context of political nations based on supra-national identities: the Swiss political nation, for example, does not rely to a significant extent on elements of identity linked to the German cultural nation. Use of the concept of political nation in public law has one undeniable advantage over that of cultural nation, given that the former does not refer to an ethnic conception of nation and that description of all the citizens of the state is conceivable only by means of this former. Its primary use is explicable by the following: if we join, to the two conceptions of nation, the principle of democratic constitutions whereby each member of the political community is equal, regardless of ethnic identity, it becomes clear that use of the concept of nation in reference to every member of said political community is necessary. Use of the concept of nation is, namely, acceptable only if it is reconcilable with the demand that the legal order of the democratic political community respect the equal dignity of every one of its citizens. The law-maker thus cannot act against the moral equality of citizens; and must exhibit equal attention to and respect toward each member of the political community.⁹ (Use of the political nation without regard for the principle of equality, such as when only the members of a particular social class /nobility, workers, members of a caste, etc./ may belong, naturally also does not fulfill this demand.)

Because of the principle of moral equality, utilization of only the concept of cultural nation to describe the political community in a democratic constitution is highly problematic: it does not extend to those citizens who consider themselves members of various minorities. Its exclusive use in an ethnically non-neutral political community may thus mean breach of the principle of moral equality, since, as we saw, contemporary democratic political communities are not ethnically neutral and, albeit to differing degrees, are (through their designations, anthems and other symbols, history and official languages) linked to the (cultural) nation. All this makes it at least questionable whether a state connected to one cultural nation can give equal attention and grant equal respect to the aspirations of those belonging to another cultural nation. In such an instance, if the state shows no attachment to its minor-

⁹ On this, see Mátyás Bódi and Tamás Györfi (eds.): *Államelmélet*. II. Miskolc: Prudentia Iuris, 2002. (especially 144–148.)

ities, the question of what possible basis for state loyalty these national minorities may have and of why these groups should consider themselves members of the given political community arises. This problem is not solved even if the state attempts to grant compensation for reliance on the cultural nation by means of a wide range of special minority rights. In my opinion, regulation that relies only on the cultural nation is thus hard to reconcile with the demand of moral equality.

If we accept the assertion that the concept of cultural nation is not capable of describing all individuals joined in a democratic community – since it has no regard for members of ethnic and national, or immigrant and already naturalized minorities – we can infer that this tenet may (still) appear as an accessory element in the national legal system: for example, in describing national communities resident in the state, in supporting those beyond the borders, in regulating admission to the political community (preferential naturalization) and in other situations. We may even consider appearance of the cultural nation in some manner natural and necessary in these latter cases, given that the following question arises during determination of the political community: what happens to those who do not become members of the political community in legal terms but belong to the cultural nation?¹⁰ If the majority of the political community wishes to support the ambitions of the latter, it is practical to already mention the group in the basic law. (This is what the Hungarian Constitution does, when it states in § 6(3) that: “The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary”). On the other hand, when it notes that national minorities are part of the political nation, the state already recognizes, in at least indirect form, that individuals belonging to different cultural nations are resident in its territory.

Any appearance in the legal system of preferential treatment for those who belong to the cultural nation is often disapproved of by commentators, so that many reject, in general terms, constitutional responsibility clauses and legal regulation supportive of those beyond the borders, adopted because of said clauses. Such reasoning relies on a view whereby “ethnic- (cultural-) based nationalism” is generally considered bad, while “civic nationalism” is good.¹¹ The proponents of this viewpoint (somewhat) surprisingly accept as a necessary fact

¹⁰ On this question, see Máttyás Bódig: “Nemzeti történelem” és a jog autoritásának igazolása. *Állam és Jogtudomány*, Nr. 1–2, 2000. 18.

¹¹ For an overview and rejection of this viewpoint, see Kai Nielsen: Cultural Nationalism, Neither Ethnic nor Civic. *The Philosophical Forum*, Vol. 28, Nr. 1–2, 1996–1997. 53–72.

the common definition, by states, of the political nation by means of elements of the majority cultural nation's identity, however. Since complete separation of the two conceptions of nation is not always possible – the two are often intertwined –, as is clear from the discussion above, their sharp opposition is not useful.

In my view, the state may deviate from revered, but presently unattainable neutrality regarding members of the political community if it creates a conception of the nation that can apply to all citizens. Still, construction of some concept of the political community seems unavoidable in any case, to secure the authority and power of the state. For this, a strengthened sense of belonging among members of the community is necessary, so that durable political links may develop between people and individuals may – if conditions are otherwise given – define themselves as members of this community.¹² (Naturally, states may, besides guaranteeing legal equality, consider various conceptions of equality just and may, accordingly, pair different meanings of it with the concept of state nation, as we will discuss below.) The result of all this is that in most cases constitutions name not just the community of citizens as the primary source of power, but the sovereign people or nation.¹³ In most cases use of the designations 'people' and 'nation' in basic laws is with reference to the political nation; and, in this context, may name or automatically include the majority cultural nation and national or ethnic minorities as constituting entities. The Polish Constitution, for example, takes this route when it mentions "the Polish nation – every citizen of the Republic"¹⁴ as (the source of) constitutional power, as does the Ukrainian one, according to which the Constitution has been adopted in the name of the "the Ukrainian people – Ukraine's citizens of all nationalities".¹⁵ The Russian Constitution of 1993 is also similar, since it was adopted in the name of "the multi-national people of the Russian Federation". Article 2 of the Spanish Constitution, in turn, states "The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all."¹⁶ The Hungarian Constitution also follows this solution, when it determines,

¹² In this respect, see Mátyás Bódog: *A mérsékelt állam intézményes szerkezete*. In Mátyás Bódog and Tamás Györfi (eds.): *Államelmélet*, (especially 106–109.)

¹³ For a detailed analysis of this question, see Iván Halász: *A nemzetfogalom nyelvi-kulturális elemei a modern kelet- és közép- európai demokratikus alkotmányokban*. In *Ami összeköt?* 27–41.

¹⁴ See the Polish Constitution at the following web-site: <www.sejm.gov.pl.>

¹⁵ For a detailed discussion of these constitutions, see Halász: *A nemzetfogalom*, op. cit.

¹⁶ See the Spanish Constitution at the following web-site: <www.senado.es>

in §68(1) that: “The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State.” In other words, in referring back to popular sovereignty, the Hungarian Constitution found it necessary to highlight, as the basis for confirmation of minority rights, that the bearer of sovereignty is the multi-cultural people. (We can also find examples from outside Europe for the practice of placing declarations of belonging to a common political nation beside differentiation of “sub-communities” within this political community by virtue of national identities. Thus, Canada’s public law structure shows such a distinction.)¹⁷

We encounter only one example among the constitutions of democratic states of a solution that is substantially different – that of the Slovak Constitution, which renounces national neutrality and uses only the concept of cultural nation.¹⁸ Thus, the Preamble of the Slovak Constitution considers the Slovak cultural nation, which adopts the Constitution together with national and ethnic minorities, the (source of) constitutional power. The sense of belonging to the nation does not extend in this Constitution to all the citizens of the state, so that we look for a reference to the political nation, in any form, in vain: the formulation “we the people” and the sense of identity expressed therein do not appear. This in itself does not breach the legal equality declared in the Constitution, but is nonetheless problematic since the Slovak state is not neutral even in name (the country is not called Upper-Carpathia, for example) and not all citizens may, regardless of identity, belong to the privileged nation. (In this respect it is of no consequence whether Hungarians in Slovakia are willing to consider themselves part of the Slovak political nation; what matters is whether the state offers them this possibility. Granted, the state may in this context refer to special minority rights as compensation to national minorities, for which it expects the loyalty of said groups.) The Slovak cultural nation mentioned in the Constitution also appears in the name of the country (Slovak Republic) or that of the law-making entity (National Council of the Slovak Republic). Although the Slovak basic law establishes in article 1 that the state aims for ideological and religious neutrality, it makes no mention of national neutrality. All this makes it at least doubtful whether the state of the Slovak cultural nation follows the aspirations of those with non-Slovak identity with equal attention and whether it grants these equal respect. In my opinion, such

¹⁷ David Miller: *On Nationality*. Oxford: Clarendon Press, 1995. 142.

¹⁸ See the Hungarian translation of the Slovak Constitution in Károly Tóth (ed.): *Kelet-Európa új alkotmányai*. 302–329.

regulation is hard to justify, since it can (be made to) correspond to the demand of moral equality only with difficulty.

Naturally, cases in which basic laws make mention of members of the cultural nation for the purpose of support for said individuals beyond the borders or of securing special minority rights – for example, as in the Hungarian, Croatian or Romanian constitutions – are different from the mode of regulation chosen by the Slovak basic law. I believe it is better if in any instance of support for those beyond the borders – and except for preferential immigration politics or other cases when these individuals enter the territory of the kin-state – no direct public law relationship comes into existence between them and the kin-state. (Thus, I do not find it fortunate when measures based on § 6(3) of the Hungarian Constitution overstep this line.) After all, let us consider that those beyond the borders belong to the political community of another state, must succeed there and must reform the given conception of the given state nation to their own advantage. Any maintenance of direct contacts without a territorial component may, however, create an illusion among members of the kin-minority that the kin-state could address their problems in the state of residence. This is obviously not possible in a world organized around the principle of territoriality – and supportive of the inviolability of borders – if the goal is not resettlement (support of immigration) to the kin-state, but of success in the home-state. The state in any case needs a territorial connection for the grant of any legal status – citizenship, membership in a national or ethnic minority, refugee status, etc. – in other words, those with a particular status need to be present in its territory.¹⁹ (The general trend is, however, toward a convergence of the categories of resident and citizen.²⁰ Despite such developments, the two categories will presumably never overlap completely, so that citizens will continue to be treated in a manner distinct from residents, at least in the area of political rights, enjoyed in part only by the former.)

The discussion above does not cast doubt on the observation that the concept of cultural nation has a stronger tradition in public political thought in Hungary (than the alternative), but only proves that this concept of nation is not capable of describing the political community of the democratic state, each member of which holds an equal status under public law. (According to

¹⁹ For a detailed analysis of various constitutional legal statuses, see Judit Tóth: *Státuszjogok*. Budapest: Lucidus, 2004.

²⁰ See, for example, Rogers Brubaker (ed.): *Immigration and the Politics of Citizenship in Europe and North America*. London: University Press of America, 1989.

this assertion a cultural-linguistic understanding of the nation, rather than the tradition of political nation, became dominant in Hungary, as in the other states of East-Central Europe, during the 20th century. In other states (Canada, the United States and France), a different process of development took place, resulting in primary acceptance of the concept of political nation.)²¹

Use of the designations 'nation' and 'people' in the Hungarian Constitution

We encounter various elements of links to the political nation in the Hungarian Constitution also, in accordance with the practice already discussed. It appears in the names of the institutions (Hungarian National Bank) and national symbols (flag, crest, crown) of the country, like in the designation of the state (Republic of Hungary). These references to the ascriptive nation – despite common remarks to the contrary in daily political life – cannot be connected to other than every member of the political community of Hungary, to Hungarian citizens and, accordingly, to the concept of state nation. This is the case because the crest is a common symbol for all Hungarian citizens; because the Republic of Hungary belongs to all of us; and because the Hungarian National Bank is associated with the political nation, rather than the cultural one. Based on all this, we may agree that § 29(1) of the Constitution – which states that “Hungary’s Head of State is the President of the Republic, who represents the unity of the nation and monitors the democratic operation of the State” –, though often misinterpreted, can only refer to the concept of state nation. (In a (nonexistent) country that has successfully realized neutrality, the clause would perhaps run as follows: the President represents the political community of citizens.) Article § 68(1) of the Constitution, which declares minorities a constituent part of the state, can also be reconciled only with the concept of state nation. (“The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State.”) The appearance of the concept of people in § 68(1) may be understood to refer to the political nation, comprising every citizen of the Republic. (Appearance of the word ‘people’ elsewhere in the Constitution may carry a different

²¹ In this regard, see, for example, Bernard Yack: *The Myth of the Civic Nation*. *Critical Review*, Vol. 10, No. 2, 1996. 193–211.

meaning, though only when it does not refer to the “people” of Hungary. In § 6(2), for example, its use may allude to a people without its own state.)²²

Naturally, the responsibility clause of the Hungarian Constitution [§ 6(3)] does not render this conclusion doubtful when it states: “The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary.” Even this formulation does not include more than a declaration that the Republic cares for members of the cultural nation from beyond the borders; but does not create a public law relationship with them, nor makes them members of the Hungarian political community. Incidentally, this provision (presumably) deliberately makes no mention of the nation or the people, since use of these designations to refer to the cultural nation does not appear elsewhere in the Constitution either. The cultural nation thus appears as a supplementary element in the Hungarian Constitution and, generally, in Hungarian public law, through the fact that the state supports those belonging to the cultural nation: it helps their naturalization and grants them other benefits and support. The notion that the Republic of Hungary wishes to occupy itself only with Hungarians outside its borders and not the foreign “compatriots” of those “from Hungary” obviously rests on the majority and ascriptive quality of the Hungarian nation. Still, if we take seriously the contention that minorities in Hungary are constituent parts of the state and that the Hungarian state aims at the creation of a multi-cultural political community, a clause declaring responsibility for the compatriots of all those from Hungary – in other words, also those belonging to national and ethnic minorities in Hungary – would be more theoretically defensible.²³ Hence, there seems, at least at first sight, to be a contradiction between § 6(3), which forms the theoretical basis for kin-minority politics, and § 68, which lays the foundation for legal regulation of minority rights in Hungary. In fact, a multi-culturalist politics of minorities beyond the borders – one that would support all sometime Hungarian citizens now living as minorities – would, perhaps, be more successful, and more easily acceptable and justifiable than present practice. (We can find examples of such practice in other countries. The Austrian regulation accepted in 1979,²⁴ for example, granted not only

²² For more detailed discussion of § 6(2), see Gábor Sulyok’s commentary of this Paragraph. (Manuscript)

²³ Iván Halász and Balázs Majtényi: A Magyar Köztársaság Alkotmányának „nemzeti felelősségi klauzulája” (Egy értelmezési kísérlet) In *Ami összeköt?* 93–104.

²⁴ Bundesgesetz vom 25. I. 1979 über Gleichstellung von Südtirolen mit österreichischen Staatsbürgern auf bestimmten Verwaltungsgebieten. For a more in-depth discussion of

German- but also native Ladin-speakers benefits and protection in South-Tyrol. The Russian compatriot law adopted in 1999²⁵ also dealt with aid to “those from Russia” and not ethnic Russians.) Nonetheless, this mode of regulation is perhaps justifiable with the argument that the politics of minorities beyond the border hopes to help the situation of the descendants of those who became minorities through circumstances beyond their control, as a result of changed borders. (Changed borders theoretically had no negative effect on the situation of the compatriots of minorities in Hungary, since these individuals had already been living as minorities.) Alternatively, it is possible to argue that most of the minorities already have a kin-state that can also take measures on their behalf. (In applying this principle, however, the Hungarian state would be acting consistently only if it (also) supported those of the recognized national and ethnic minorities, like the Ruthene and Roma, who are lacking kin-states.)

In somewhat surprising manner, although the Hungarian Constitution names Hungarians beyond the border, it does not do the same for members of the ascriptive cultural nation residing within the borders of the state. As Iván Halász notes: our Constitution mentions only national and ethnic minorities as constituent parts of the state, but not the majority Hungarian nation.²⁶ Still, given that the Hungarian nation is the ascriptive one of the country and that the national symbols of the Hungarian political nation are also associated with defining elements of the Hungarian cultural nation’s identity, we may assume that the Hungarian national majority is, besides the recognized state-constitutive national and ethnic minorities, “implicitly” (but indisputably) a constituent part of the state.

The necessity of using the concept of nation

In summary of the above it may be stated that, until we find a more ‘acceptable’ concept than state nation – a possible substitute –, we cannot consider it either outmoded or the product of an earlier age. The concept of nation is thus presently a category used out of necessity in public law – a fact recognized by the drafters of the basic laws of democratic states, who have not

the question, see Iván Halász: Tírol – egy tartomány szerepe az osztrák „határon túli” politikában. In *Ami összeköt?* 157–180.

²⁵ Russian Federation Federal Law On the State Policy of the Russian Federation in respect of compatriots abroad Adopted by the State Duma on 5 March 1999 Approved by the Federation Council on 17 March 1999.

²⁶ Iván Halász and Balázs Majtényi: A Magyar Köztársaság Alkotmányának „nemzeti felelősségi klauzulája” (Egy értelmezési kísérlet) In *Ami összeköt?* 93–104.

neglected the fact that it is primarily culture that mediates the individual-community relationship, and the language, history and traditions of the community that make the individual who she is.²⁷

Simple substitution of terms will, in itself, also not make use of the concept superfluous, so that we do not advance by changing the words ‘nation’ and ‘nationalism’ to ‘community’ and ‘culture’. Nonetheless, these terms doubtless sound more peaceful, so that their acceptance may also run an easier course. (I find use of the designation constitutional patriotism for political nation downright confusing, since some degree of overlap between the concepts ‘state’ and ‘nation’ is unavoidable. The concept of constitutional patriotism thus cannot express clearly enough what political loyalty is based on, given that some degree of overlap between the concepts ‘state’ and ‘nation’ is inescapable until the state becomes neutral.²⁸ Naturally, we may nonetheless analyze constitutional patriotism and even consider it a best possible solution, but in this case, it might happen that we will be unable to bridge the gap between theory and practice.²⁹ This method is thus of no help if we are looking to answer the question “what political philosophy is to be found in our institutions”.³⁰ Constitutional patriotism may today be used only in describing “political communities” based on supra-national identities. For example, the principle may perhaps be used in the case of the United States to define belonging within the political community.) Thus, we may also greet Sandel’s observation, whereby the national republic ran its course during the 20th century, with certain doubts.³¹ (It is true, however, that the author reached his conclusions after having used the constitutional system of the United States as his starting point.) And even though, as Rogers Brubaker notes, any use of the concept of nation as a “substantial, enduring collectivity”³² may be attacked – and that, in general terms, every concept is artificial and changes through history – we have not thereby shut out of our analysis, in any way,

²⁷ Zoltán Bretter: A közösség meghatározásának nehézségeiről. *Regio*, Nr. 4, 2002. 40–52.

²⁸ Jürgen Habermas: Citizenship and National Identity. In Ronald Beiner (ed.): *Theorizing Citizenship*. Albany: Suny Press, 1995; For a commentary in Hungary in support of constitutional patriotism, see András Bragyova: *Az új alkotmány egy koncepciója*. Budapest: Közgazdasági és Jogi Könyvkiadó – MTA Állam- és Jogtudományi Intézet, 1995.

²⁹ Michael Sandel: Procedural Justice and the Unencumbered Self. *Political Theory*, Nr. 12, 1984. 81–96.

³⁰ Sandel, op. cit.

³¹ Sandel, op. cit.

³² Rogers Brubaker: Rethinking nationhood as institutionalized form, practical category, contingent event. In Rogers Brubaker: *Nationalism Reframed. Nationhood and the National Question in the New Europe*. Cambridge University Press, 1996. 21.

use of the concept of nation as “as an institutionalized cultural and political form”.³³ This is so because varied interpretations of the concept of state nation appear in legal documents also; and it cannot be doubted that we live in a world where the concept of nation (whether considered good, bad or neutral) is necessarily institutionalized in the practice of states and in the operation of state structures.

More than one author has expressed the view that the appearance of nationalism was an unfortunate circumstance that took the development of democratic states down the wrong path. This idea may be refuted, at least in part, by the argument that it was thanks to nationalism, with the help of attachment to the nation, that the members of political communities became capable of seeing each other as equals.³⁴ Of course, one may argue about whether a system of beliefs other than nationalism could have institutionalized equality in society in a better way, but this discussion is not particularly fruitful when describing the present-day state system. According to Anthony D. Smith “The modern world has become inconceivable and unintelligible without nations and nationalism”.³⁵ In this way, at least today, no normative analysis can afford to ignore the concept of nation. Nonetheless, the view that – rather than re-using concepts from the 19th century – something new should be invented is obviously acceptable; but such re-thinking would require more of us than just a change of terms. To summarize, if the drafter of a constitution attempts to describe the political community, the concept of political nation may, in my view, be made to correspond to the moral equality of citizens.

The state nation and protection of minorities

The opinion of democratic states differs as to whether there is truly a need for special minority rights. States have thus arrived at different points of view on the question of which kind of social integration is desirable for minorities within the political nation. Some – like France and Greece – support assimilation and in any case try to avoid any assumption of duties that would grant to citizens who are members of national minorities any special rights beyond those human rights universally accepted. These states ignore linguistic and cultural differences between citizens for the purposes of state regulation (with the exception of prohibiting discrimination). In contrast, for a number of other states (such as

³³ Brubaker, *Rethinking*, op. cit.

³⁴ Liah Greenfeld: *Nationalism and Modernity*. *Social Research*, Vol. 63, Nr. 1, 1996.

³⁵ Anthony D. Smith: *The Origins of Nations*. *Ethnic and Racial Studies*, Vol. 12, Nr. 3, 1989.

Hungary and Germany) the unity of state and nation is of lesser significance – albeit due to varied considerations. Accordingly, protection of (resident) national minorities by means of special minority rights, in the frame of the political nation, appears as a state goal in official politics – so that preservation of the country’s ethnic and cultural diversity may even appear as a constitutional duty.³⁶ (It is a declaration of this intention that we find in § 68 of the Hungarian Constitution).

Thus, the problem of the manner in which the concept of state nation may be made acceptable to minorities still awaits us. Can a state biased from the national point of view, in which belonging to the political nation is often determined through elements of the identity of the cultural nation, treat various national identities completely equally (in actual terms) by equalizing opportunities? In my opinion – and in light of our discussion about the national neutrality of states – the answer can only be no for most states, since even if multi-nationalism and the existence of a multi-cultural political community may fit with the concept of state nation, neutrality cannot. (This observation is not necessarily true for states with political nations based on supra-national identities.) This also means that the factual equality of minorities within the frame of the political nation cannot be completely guaranteed in most states; and draws the outer boundaries of measures taken with the aim of bettering the situation of minorities. Such measures, brought in the name of granting real equality to members of minorities, can never fully reach their aim in states where elements of the identity definitive of the cultural nation are also used in determining the political one. (This observation is true for most European states, except perhaps Belgium and Switzerland.) Acceptance of the concept of political nation means simultaneously assuming that the state considers certain elements of assimilation or at least acceptance of the idea of attachment to the political nation desirable within the political community.³⁷ This is the case because belonging between individuals is strengthened when the majority of citizens declare themselves members of the same political nation; and politically efficient relationships develop with more difficulty among people when linguistic or cultural differences divide the latter.³⁸ Still, various identities may naturally exist within a political community; and states may develop public institutions in which citizens’ minority communities play a role, in order to realize just equality. The basis for development of

³⁶ For more detailed discussion of this question, see Balázs Majtényi and Balázs Vizi: Bevezető. In Balázs Majtényi and Balázs Vizi (eds.): *A kisebbségi jogok nemzetközi okmányai*. Budapest: Gondolat, 2003.

³⁷ See János Kis’s concurring opinion in *Beyond the nation state*

³⁸ Bódig, “Nemzeti történelem” ..., 18.

minority-interest public institutions may be that democratic states must aim to make it possible for each of their citizens to lead a valuable life (also) as a member of a community and to pursue happiness – since community-belonging is also a prerequisite for a good life. Special action aimed at placing minorities in a situation equal to the majority may be necessary everywhere, since individuals who “joined the given political community later as strangers who dropped in from outside (immigrants) and do not share in certain elements of the common culture”³⁹ may be found everywhere.

To justify such politics of minority affirmative action, we may recall that John Rawls, in his work *A Theory of Justice*, does not grant any community a constitutive role in the process of justifying social institutions and imagines a well-structured society as a kind of social union.⁴⁰ Everyone may take part in a just social union according to her inclination; the individual may thus freely choose (in this case also) among various national communities without the state pushing her in any particular direction at the moment of choice. The state may, in such a social union, be capable of understanding the diversity of individual identities and of national communities within the frame of the concept of political nation. A multi-cultural community may come to fruition and function in such a union.⁴¹ (However, the multi-cultural community may exist only in the cadre of the political nation.) This state may attempt to incorporate into the concept of political nation elements of the traditions and culture of resident minorities and to rely as little as possible on elements defining the identity of the majority nation. (This kind of conception of nation goes beyond the already-mentioned Hungarian concept of political nation, formulated by the liberal tradition of the 19th century.) Here, national and ethnic minorities also get public legal recognition in the state, in the frame of the political nation, so that they exist as “sub-political communities” within the former. This reasoning may justify the recognition of minority collective rights in the Hungarian Constitution. Creation of a concept of the state nation in this manner may be expected of states for one to even envisage that national minorities may consider

³⁹ Bódi, 13.

⁴⁰ John Rawls: *A Theory of Justice*. Cambridge, Massachusetts: Harvard University Press, 1971.

⁴¹ For more detail on multi-cultural political communities, see János Kis: Beyond the nation state, op. cit. According to János Kis the political community “becomes monocultural (a single-nation community) if it is created in competition and strife between ethnic groups living on the same territory in such a way that one group succeeds in taking possession of the state. The political community will be multicultural if it is formed from a union of ethnic groups living together.”

themselves part of the state's political community.⁴² Use of the (concept of) political nation assumes, however, agreement with some degree of assimilation, as János Kis has noted.⁴³ Pressure to assimilate may be all the stronger the more dominant elements of the majority cultural nation-linked identity are in describing the state nation; but a demand for identification can, in the same manner, also be found in political nations based on supra-national identities (Canadian, Swiss, New-Zealander, etc.).

Even if the state cannot be neutral – despite declaring legal equality – it can aim to create a minority friendly environment within the frame of the political nation. The reference in the Hungarian Constitution to minorities as constituent parts of the state also cannot refer to other than an intention to create a multi-cultural political community. In theory, minority legal regulation in Hungary (however inconsistent) also aims to attain this goal. It is questionable, however, whether a more or less homogenous society is the adequate model for the creation of an essentially multi-cultural political community. In my opinion, this is not the case. Widespread dispersion of the model of a multi-cultural political community in the states of East-Central Europe is made doubtful by the circumstance that the states of the region are still – even since the change to democracy – on a triumphant march toward the maintenance of only one “cultural” nation within the state. In other words, the political nation is hoped to be circumscribed, in ever more perfect manner, by elements of the identity of the cultural nation.

Conclusion

If the state cannot be neutral it must formulate the concept of political nation in reference to every member of the political community. This, having taken into account the moral equality of each member of the political community and in the interest of ensuring the power and prestige of the state. Thus, the state may take the first step away from much-revered but presently unattainable neutrality as regards each member of the political community only if it creates a political concept of nation that can pertain to each citizen.

The concept of cultural nation cannot comprehend every member of the political community and hence may be used in the constitutions of modern democratic states (only) next to the concept of political nation. (For example, it may be utilized when regulating access to the political community, when

⁴² Tamás Győrfi: A kommunitarizmus alkotmányelmélete. *Fundamentum*, Nr. 1, 2004. 8.

⁴³ Kis, op. cit.

supporting those beyond the borders or when mentioning the special rights of national and ethnic minorities.)

The political nation may be transformed into one acceptable to those belonging to minorities by ensuring that belonging (to the former) is limited to acceptance of minimal identification, so that a “multi-cultural political community” may develop within the cadre of said political nation. This is possible if the state shapes decisive (political) identity in such a manner as to try and integrate into the concept of the political nation as many of the traditions and cultures of resident minorities as it can, while relying as little as possible on elements of the identity determinative of the majority (ascriptive) cultural nation. Formulation of such a concept of state nation may also be expected (of states) for one to even envisage that national minorities may consider themselves part of the given political community.

The drafters of the Hungarian Constitution presumably aimed to realize all of the above when they declared, besides use of the concept of political nation, that “[t]he national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people.” (Therefore, these groups were recognized as kinds of apolitical communities organized on the basis of nationality.) It is of course questionable whether a more or less nationally homogenous society, like the Hungarian one, is the right model for the realization of this objective.

Multi-culturalism and multi-cultural political communities may fit with the concept of state nation, also used by Hungarian law-makers; but not national neutrality cannot. (The observation is not necessarily true for states with political nations based on supra-national identities.) This also means that real equality of minorities within the political nation cannot be ensured to the fullest extent in most states; and sets the outer boundaries of special minority rights aimed, like § 68 of the Hungarian Constitution, at placing minorities in a situation equal to that of the majority. Corrective measures brought in the interest (and for the real equality) of those belonging to minorities can never fully reach their goal in states (including Hungary) in which elements of the identity defining the cultural nation are utilized when determining the political one; and where the state considers some minimal level of identification with the political nation desirable for every citizen.

Translated by Enikő Horváth