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## **Collective rights and the concept of “nation” in the new Fundamental Law of Hungary**

### **Abstract**

*The new Fundamental Law of Hungary has become subject of extensive political and juridical disputes. One of the main issues of these debates is the question of the reference to collective rights. The Fundamental Law constitutes not only a new framework for the State, but it can be considered also as an initiator for a more complex concept of the Hungarian Nation. The approach seems to be in line with the Recommendations of the Parliamentary Assembly of the Council of Europe.*

The new Fundamental Law of Hungary has become subject of extensive political and juridical disputes in the past months; there are also various legal questions hidden under the surface offering topics for researchers and experts of international law and diplomacy. The Fundamental Law proclaimed on the 25<sup>th</sup> of April 2011 regulates such issues too that have not been mentioned in the current constitution, e.g. responsibility for the Hungarians living in neighbouring countries in aid of creating their community self-governments and enforce their community rights. In addition the nation concept of the Fundamental Law reflects a shift of the paradigm, the earlier ethnic-historical nation concept is changing by preserving the values up till now enriched by the elements taken from the political nation concept. The amalgam of the two is a seeming contradiction in reality the birth of a new nation concept can be witnessed that legally fits into the accepted European processes of nation development.

## 1. Collective rights

Article D) of the Fundamental Law expresses that ‘Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond its borders and shall facilitate the survival and development of their communities; it shall support their efforts to preserve their Hungarian identity, the assertion of their individual and collective rights, the establishment of their community self-governments and their prosperity in their native lands, and promotes their cooperation with each other and with Hungary.’<sup>1</sup> Interpreting the Fundamental Law there is frequent reference to the so-called ‘European standards’ in connection to the community or collective rights; it is a frequent element of the political discourse, however, it is important to establish what is regarded as European standard: whether it is the practice of the states, or the principles represented in the practice of the institutions of the Council of Europe and in the international agreements and recommendations accomplished within the framework of the CE. The latter do not regulate exclusively the protection of minorities; the areas governed by them do not comprise the whole scale of legal protection. Several member states of CE on their part accept the collective rights of minorities that also appear in their own legal system as well as in their bilateral agreements. (Cf. the rights of ethnic groups in Austria or the regulations of minority protection in Slovenia and Hungary). There was a survey using a questionnaire by the Venice Committee about the minority protection systems of the states whether based on collective or individual rights published on the 20<sup>th</sup> June 1994. According to the report it can be ascertained that 13 member states of the CE have accepted collective rights as a supplementary means of minority protection.<sup>2</sup>

One of the most important legislative achievement concerning minorities of the CE has been the Framework Convention for the

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<sup>1</sup> [http://www.kormany.hu./download/4/c3/30000/THE\\_FUNDAMENTAL\\_LAW\\_OF\\_HUNGARY.PDF](http://www.kormany.hu./download/4/c3/30000/THE_FUNDAMENTAL_LAW_OF_HUNGARY.PDF)

<sup>2</sup> KOVÁCS Péter: *Nemzetközi Jog és Kisebbségvédelem*. Osiris, Budapest, 1996, p.175. [International right and minority protection]; European Commission for Democracy Through Law, Replies to the questionnaire on the rights of minorities. CDL-MIN(93)10 Prov III.

Protection of National Minorities accepted in 1995. Though the protection of national minorities has been named at several instances, the accepted text of the Framework guarantees the protection of minorities through the right of individuals belonging to a minority. Nevertheless the international laws of minority protection do not exclude the possibility of collective legal protection either, as from the onset of the preparation of the Framework there was reference made to collective rights that has gradually been left out of the argumentation. Judging from the *travaux préparatoires* the primary suggestion was explicitly on the footing of collective rights and there were debates among the experts representing the member states over the concept of individual or collective rights.<sup>3</sup>

Though the agreements through CE are on the basis of the protection of individual right, however, it does not make the idea of collective protection of minority rights unacceptable or illegal that would guarantee a wider title for the minorities than individual protection and is known in the legal system of several member states of the CE.

The approach of the recommendations formulated by the Parliamentary Assembly of the Council of Europe (PACE), however, is already not exclusively that of individual rights. According to Recommendation 1492 (2001) on the rights of minorities ‘[t]he Assembly again stresses the importance of effectively protecting the rights of minorities in Europe. It considers that adequate protection for persons belonging to national minorities and their communities is an integral part of the protection of human rights and is the only way in which states can reduce ethnic tensions that might give rise to more widespread conflicts.’<sup>4</sup>

The recommendation 1735 (2006) of the Parliamentary Assembly on the ‘concept of nation’ formulates in connection of collective rights

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<sup>3</sup> Several experts took the view that, when discussing the list of undertakings which could be included in the draft framework Convention, collective rights as such should be excluded. Several other experts were of the opinion that it would be better to see on a case-by-case basis whether collective rights should be formulated. It was underlined that this distinction might not be of significant importance for a framework convention which would include mainly State obligations.” Ad Hoc Committee for the Protection of National Minorities (CAHMIN) 1st meeting, 25 January – 28 January 1994, Palais de l’Europe, Strasbourg. Meeting report CAHMIN (94) 5 para. 20., Strasbourg, 1 February, 1994.

<sup>4</sup> Recommendation 1492 (2001) Rights of national minorities, para. 1.

that '[t]he Assembly notes that within the very complex process of nation building and of the nation-states' birth, the modern European states founded their legitimacy either on the civic meaning of the concept of 'nation' or on the cultural meaning of the concept. However, while the distinction between those two meanings is still to be identified in some of the Council of Europe member states' constitutions, the general trend of the nation-state's evolution is towards its transformation depending on the case, from a purely ethnic or ethnocentric state into a civic state and from a purely civic state into a multicultural state where specific rights are recognised with regard not only to physical persons but also to cultural or national communities.'<sup>5</sup>

'The Assembly also notes that since national minorities as such do not have legal personality they cannot be legal subjects and therefore they cannot be parties to contracts or covenants. However, they must be the object of collective protection and their members must enjoy the capacity to act, either as individual legal subjects or within the framework of various entities with legal personality, in defence of the respective national minorities' identity and cultural rights. These rights are not territorial or connected to territory and their recognition and protection must be legally organised both at the level of each nation-state concerned and at transnational (international) level.'<sup>6</sup>

## 2. The concept of nation

One of the critical elements against the Fundamental Law is connected to the concept of nation that has mainly been manifested in the (self)-definition of the Hungarian nation and in the sphere of the position of nationalities. The central element of the critiques is the question of nation based either on political (citizenship) or ethnic (origin, cultural belonging) definition. Both theories have appeared in the Fundamental Law considering the Hungarians living beyond the borders and thus without Hungarian citizenship they are also the members of the Hungarian nation (ethnic nation) as well as the

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<sup>5</sup> Recommendations 1735 (2006) The concept of 'nation'. para 7.

<sup>6</sup> Recommendations 1735 (2006) The concept of 'nation'. para 10.

nationalities being the members of the political community as nation-forming factors (political nation). The two notions do not contradict each other, as is supported by Recommendation 1735 (2006) of PACE that in Paragraph 5. claims that '[t]he Assembly has acknowledged that in some Council of Europe member states, the concept of 'nation' is used to indicate citizenship, which is a legal link (relation) between a state and an individual, irrespective of the latter's ethno-cultural origin, while in some other member states the same term is used in order to indicate an organic community speaking a certain language and characterised by a set of similar cultural and historic traditions, by similar perceptions of its past, similar aspirations for its present and similar visions of its future. In some member states both understandings are used simultaneously to indicate citizenship and national (ethno-cultural) origin respectively. To this end, the term 'nation' is sometimes used with a double meaning, and at other times two different words are used to express each of those meanings'.<sup>7</sup>

The first sentence of the National Avowal of Faith of the Fundamental Law is 'We, the members of the Hungarian nation' could be based both on the cultural (ethnic) or political concept of nation especially that the conclusive sentence of the Avowal is 'We, the citizens of Hungary, are ready to found the order of our country upon the common endeavours of the nation.' Paragraph 7. of the National Avowal promises 'the intellectual and spiritual unity of our nation torn apart in the storm of the last century. The nationalities living with us form part of the Hungarian political community and are constituent part of the nation.' The text here reflects the situation created by the historical developments causing the Hungarian nation to be torn into parts and represents the cultural (spiritual and mental) nation concept but stresses that the nationalities living in Hungary are considered as constituent part of the political community without trying to assimilate them to the Hungarian 'ethnic nation'. According to Paragraph 9. of the Recommendation: 'These national minorities or communities, often created as a result of changes in state borders, which represent a constitutive part and a co-founding entity of the nation-state of which their members are subjects as citizens, enjoy their rights in order to preserve, express and foster their national

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<sup>7</sup> Recommendations 1735 (2006) The concept of 'nation'. para 5.

identity, as provided for in Assembly Recommendations 1201 (1993) and the Framework Convention for the Protection of National Minorities (ETS No. 157) and the European Charter for Regional or Minority Languages (ETS No. 148).<sup>7</sup>

There is no difference in the wording, the Fundamental Law illustrates the present situation of the Hungarian nation, stresses the acceptance of the nationalities and testifies the consideration of its own nation concept.

Article D) of the Fundamental Law is in accordance with the above as it regulates the responsibility for Hungarians beyond the borders (in the ethnical sense of nation whose members are not necessarily Hungarian citizens). It does not affect the existence of the political community that consists of the citizens of the state and that can be called 'political nation' conforming to the Recommendation of PACE 1735 (2006).

Paragraph 7. of Recommendation gives a better illustration of the question: 'The Assembly notes that within the very complex process of nation building and of the nation-states' birth, the modern European states founded their legitimacy either on the civic meaning of the concept of 'nation' or on the cultural meaning of the concept. However, while the distinction between those two meanings is still to be identified in some of the Council of Europe member states' constitutions, the general trend of the nation-state's evolution is towards its transformation depending on the case, from a purely ethnic or ethnocentric state into a civic state and from a purely civic state into a multicultural state where specific rights are recognised with regard not only to physical persons but also to cultural or national communities.'<sup>8</sup>

The right of belonging to a cultural nation independent of the 'nation of citizenship' as well as the effort for the possibility of the choice of citizenship appears in Paragraph 12 of Recommendation: 'The Assembly believes it necessary to strengthen recognition of every European citizen's links with his identity, culture, traditions and history, to allow any individual to define himself as a member of a cultural 'nation' irrespective of his country of citizenship or the civic nation to which he belongs as a citizen, and, more specifically, to

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<sup>8</sup> Recommendations 1735 (2006) The concept of 'nation'. para 7.

satisfy the growing aspirations of minorities which have a heightened sense of belonging to a certain cultural nation. What is important, from both a political and a legal standpoint, is to encourage a more tolerant approach to the issue of relations between the state and national minorities, culminating in genuine acceptance of the right of all individuals to belong to the nation which they feel they belong to, whether in terms of citizenship or in terms of language, culture and traditions.<sup>9</sup>

The Paragraph 16.4 of the Recommendation of Parliamentary assembly 'invite the member states to bring into line their constitutions with the contemporary democratic European standards which call on each state to integrate all its citizens, irrespective of their ethno-cultural background, within a civic and multicultural entity and to stop defining and organising themselves as exclusively ethnic or exclusively civic states'.<sup>10</sup>

The Hungarian Fundamental Law meets the above conditions, its inner logic and wording reflects the requirements of the Recommendation 1735 (2006) of the Parliamentary Assembly of the Council of Europe and at the same time opens the way for the development of Hungary never experienced before that could be described as ethnic-cultural in its character (from the point of view of the Hungarians living beyond the borders without Hungarian citizenship) and opening the vista toward a political nation concept that could integrate into the Hungarian political community those nationality communities that do not consider themselves to be nationally Hungarians as well as the Hungarians living beyond the borders with Hungarian citizenship (too). It is of great importance because the analyses evaluating the political and ethnic nation concept separately (e.g. European Commission for Democracy through Law and the opinion of the Venice Commission on the New Constitution of Hungary) have formulated a different opinion from the above statements and probably from the original aim of the Fundamental Law itself.<sup>11</sup>

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<sup>9</sup> Recommendations 1735 (2006) The concept of 'nation', para 12

<sup>10</sup> Recommendations 1735 (2006) The concept of 'nation', para 16.4

<sup>11</sup> European Commission for Democracy through Law (Venice Commission) Opinion on the New Constitution of Hungary, Opinion no. 618/2011, CDL-AD(2011)016, 20. June 2011. para. 39-40.

