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“The Birth of a New Nation”³?

**Mapping progressive approaches to the nation-concept based on the
Hungarian Fundamental Law**

*“To put the world in order, we must
first put the nation in order; to put
the nation in order, we must put the
family in order; to put the family in
order, we must cultivate our personal
life; and to cultivate our personal life,
we must first set our hearts right.”
(Confucius)*

Reconciling Past, Present and Future...

The pressure-ridden 25 April adoption of the new Hungarian Fundamental Law in 2011 gave the idea for the analysis of the concept of the “nation” in this article, in which we also study its presence in constitutional regulations from a comparative constitutional legal and international legal point of view, complemented with the examination of political, cultural and ethnic aspects as well, because these approaches orient the outcome of any legal examination. We, however, cite Kuncz, who argues that the “legal element” is only the outer frame of the active development of a nation-state.⁴

Therefore, we agree with Jászi, who concludes that the nation concept shall be tied to objective, external and clearly distinguishable characteristics. Jászi declares that we shall understand the nation concept as to mean the one nationality in command of state public power; and, on the other hand, the scope of the nationality concept in a narrower sense means a nation that lives without a state, under the legal and economic rule of another nation. Therefore, Jászi argues that this fluctuating concept of the “nation” cannot be literally identified exclusively with the notion of “nation” in the strict sense.

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³ Title of a speech delivered by Martin Luther King on 7 April 1957 at the Dexter Avenue Baptist Church, Montgomery, Alabama (<http://www.mlkonline.net/nation.html>)

⁴ KUNCZ, Ignác: *A nemzetállam tankönyve* (Stein János M. Kir. Egyetemi Könyvkereskedése, Kolozsvár, 1902), 4 (in Hungarian)

NB any definition of a *national corpus* (“nemzettest”) shall appreciate and take into consideration the application of political, cultural and ethnic factors outside the frame constituted by the “legal element” cited above.⁵ The derivative conclusion of Joó supports this allegation, who argues that the Latin origin of the word “nation” can be found in ‘*natus-natio*’ that suggests the roots of a nation originating in the common origin.^{6,7}

Joó uses the example of Alsace when enlightening his conclusion stating that it would be irrational to delimit the two approaches (political and cultural) of the nation concept harshly. As he argues, in the traditional Anglo-French way of thinking the political aspect is dominant and states are often considered to be nation-states, i.e. communities of citizens equal in their rights; while in Central-Eastern Europe, states are considered to be communities of culture and origin (of a common kin), defined by the foundation lying in language and similar national character. In the case of Alsace, Joó presents the Franco-German dispute as to the nationality of the region. He cites Mommsen who e.g. argued that Alsace is German for its roots and language are German, while he also mentions that the French Numa Denis Fustel de Coulanges concludes⁸ that language is not an indicator of nationality, rather “nationality” and the love of the homeland (patriotism) are. This serves to foretell that solely linguistic approaches do not define nationality; other cultural factors that are present in the patriotic heritage of a nation (in the narrower sense, as seen by Jászi, *supra*) can also influence the definition of nationality.

That said, there are many approaches a legislator can abide by, when constitution-making, in wording a constitutional declaration about the scope of its “nation”. Therefore, many different nation concepts exist in forms such as “political nations” also known as nation states or cultural nations or ethnic nations, or even, as we argue comprehensive, intertwined (more inclusive and broader) nation concepts, such as ethno-political or ethno-cultural nations. We base these conclusions on the interpretation of the Preamble of the new Hungarian Fundamental Law, in light of Recommendation 1735 (2006) of the Parliamentary Assembly of the Council of Europe on the concept of “nation”.

Perceptions on nationality and the “nation” concept are of quintessential nature in the self-definition of a state. From among constitutional regulations usually preambles are the most

⁵ JÁSZI, Oszkár: *A nemzeti államok kialakulása és a nemzetiségi kérdés* (Közös Dolgaink Sorozat, Gondolat Kiadó, Budapest, 1986) 63-91

⁶ JOÓ, Rudolf: *Nemzeti és nemzetiségi önrendelkezés, önkormányzat, egyenjogúság* (Kossuth Könyvkiadó, Budapest, 1984), particularly 13-19.

⁷ WERBŐCZY, István; one of the most famous legal thinkers of XVIth century Hungary, wrote the following about the era of Saint Stephen in his concise of legal customs, entitled *Tripartitum*. Those, who neglected their duty to participate in mandatory armed services constituted by the act of presenting a sword plunged in blood symbolizing a call to arms, were to be punished by damnation to eternal servitude, unless they provided a ‘right excuse’ for their absence. Albeit; Werbőczy acknowledged that regardless the fact that some became masters or nobles and others became servants or peasants due to this punishment, they all „**originated under the same kin**, i.e. that of Hunor and Magor.” in Latin: “*Nam cum una, et eadem de generatione, a quodam scilicet Hunnor et Magor, unanimiter processerint*” [emphasis added, citation: Werbőczy István Hármaskönyve (translated to Hungarian from the original 16th century Latin by Kolosvári, Sándor and Óvári, Kelemen) reprint, 1989, Szikra Nyomda, Pécs, Part I., Title 3., 5. §, 58. The text of the *Tripartitum* is available in Latin and Hungarian at: <http://mek.niif.hu/03600/03613/pdf/index.html>]

⁸ FUSTEL DE COULANGES, Numa Denis cited by JOÓ relies on MAUGUE: *Contre l'état-nation* (Paris, 1975), 55.

suitable to contain such a self-definition as they set the framework for the normative text of the fundamental law.

We already argued in our earlier work that self-definition is a minimum requirement, a condition sine qua non of any preamble: it shall define “who” creates the law. Many models exist as to comply with this requirement, the most interesting of which might be the American solution where the identification of the legislator is fictitious. The Preamble of the US Constitution contains a reference to „*We the people*” and the Hungarian Preamble is similar, but goes further and integrates the „*we the people*” reference into a more explicit one: „*we, the members of the Hungarian nation*”.

Therefore, in the context of the Hungarian case, we shall look at the elements of the „nation” concept. Thus, it might be cleared what is the prevalent approach in the Hungarian national self-definition: does the Hungarian constitutional legislator defines itself as a cultural nation, a political nation, or a more inclusive ethnic, ethno-political or ethno-cultural nation? Such national qualities shall be defined in a preamble, finding their foundation in the political core of any fundamental law, as we argue, for any such statement pertains to the definition of the quality of the state. However, besides being based on political statements, such a national self definition finds support in elaborate historical narrative reflecting on the role of the different factors that shall be taken into consideration from its past. The historical narrative approach is also applied by the Preamble of the new Hungarian Fundamental Law⁹; therefore, it is also subject to our examination based on a *qualitative approach* to the nation concept.¹⁰

The existence, if any, of the normative content of constitutional preambles shall also be examined in this context since if we accept that a national self-definition contained within the preamble can serve as a basis to enforce normative obligations on the part of state then the exact content of said self-definition merits qualitative and quantitative analysis as well. The appearance and balance of religious, cultural, historical and other elements, narratives in a constitutional preamble can be analyzed in light of relevant international instruments containing guidance in terms of how a “nation” should be interpreted and what are the constituents of a nation. It was also Kuncz who said that substantively, in a state, the “nation” aside, nothing else exists.¹¹

As we have already mentioned, in this article we examine the content of the “nation” concept under different angles within the qualitative approach and analyze how the new Hungarian Fundamental Law (and mainly its Preamble) reflects on these different concepts and approaches, in light of Recommendation 1735, which admittedly takes a qualitative, value-based approach when concluding that unique national features cause the elements of the nation concept to vary on a case-by-case basis. (*Value-based approach*) That said, the Committee of Ministers concluded

⁹ NB the use of the term National Avowal in reference to the Preamble of the new Fundamental Law is hereby omitted due to the fact that the international documents scrutinized in this article operate with the term Preamble in expressing their views on its content.

¹⁰ For more details, see: SÜLYÖK, Márton – TRÓCSÁNYI, László: *A Preambulum*, in: JAKAB, András (szerk.): *Az Alkotmány kommentárja*, I. kötet, 81-106., in particular 91-92. (in Hungarian)

¹¹ KUNCZ: op. cit. supra, 3.

that there is no need for a generic concept on nation in order to ensure the implementation of standards pertinent to national minorities. The Committee further stresses that ethnic purity shall no longer have place in democratic societies under the common European goal of building on diversity. The Steering Committee for Human Rights (CDDH) emphasizes the role of language and cultural rights in the context of its comments. Their opinion can be constructed in a way so as to mean that the focal point of creating a nation is to “*facilitate contacts between all persons, irrespective of their ethnic, cultural, linguistic or religious identity.*” The role of national constitutions is identified by the CDDH as “*facilitating integration of citizens within a civic and multicultural entity*” into a cohesive and inclusive society; therefore inclusive nation concepts shall be created in order to accommodate the societal need on the European level.

An important part of the ideologies surrounding the concept of the nation is to turn towards the people and provide different models as to their integration into the conceptual frame of the nation. With respect to the thinkers of the Hungarian Enlightenment, Arató argues, already in 1983, that in the way of thinking at that time, establishing the link between the critiques of feudalism and the „national thought” meant nothing else than the inclusion of the people in the nation concept.¹² This supports our assertion that inclusive nation concepts are not new-born ideas and can help recreate national identities that are thought to be (or are characterized as) lost.

It has been said many times during the Hungarian constitutional process over the past two decades that the creation of a unique national identity to integrate the Hungarian society is lacking and that the constitution, along with its preamble should be revised. This revision took place following the acquisition of a two-thirds’ majority in the legislative by the party FIDESZ-KDNP in April 2010. One year later, the Preamble was born as part of the new Fundamental Law of the country, which assumed the role of the former preamble with significant changes in its content. Contrary to the former preamble that rested on and centered around the declaration of legislative goals and carving the temporariness of the 1949 constitution (modified in 1989) in stone, the new preamble attempts of defining the nation based on a value-based approach and starts as follows: “*We, the members of the Hungarian nation, [...] with a sense of responsibility for every Hungarian*”. This inclusive concept of Hungarians that can be interpreted so as to extend to the incorporation of trans-border Hungarians as well as a part of the Hungarian nation shall be examined in the following, along with the rest of the value-based national self-definition contained in the Preamble, in light of other examples of Central-Eastern European countries’ constitutions and international recommendations. The most important initial determination that we have to make is: the exact content of a national self-definition in the preamble is based on the approach taken by the legislator in defining the state at a constitutional level as either a political nation (i.e. nation-state), either a cultural nation or an ethnic one. There are several examples for each in Europe, which we intend to discuss below.

¹² ARATÓ, Endre: *A magyarországi nemzetiségek nemzeti ideológiája* (Akadémiai Kiadó, Budapest, 1983) 260. (in Hungarian)

The Role of Preambles in Constitution-Making

Kovács wrote on the role of preambles in 1962 that the content, form and legal nature of preambles was formed by customary law and thus such flexible form made it possible to include in it such assumption of obligations which would be rather hard to include in the normative part of the legislative text. As Kovács concludes, the role of the preamble is similar in internal, domestic legislation as well. The preamble places the constitution in the context of historical development and refers to the circumstances of its creation. As he concludes, and one can identify with his conclusion, the content of the preamble is not defined; therefore it is not prohibited to include subtext of a normative nature in the preamble that can be interpreted as a basis for normative obligations.¹³ (It is another question that Kovács also mentions that normativity is slowly but surely substituted with declarativity in terms of the content of preambles in constitutional construction and he refers to this as a megatrend.)¹⁴

Partly, these determinations made by Kovács already in 1962 were reinforced by the statements made by Joseph K. Griebowski, who talked about the content of the nation concept and the importance of its elements at an international experts' conference in Budapest at the Hungarian Academy of Sciences in March 2011. He concluded that the recognition of a “national” identity in the new preamble is of fundamental importance. As he stressed: it is important when clarifying and defining the “nation” concept to address the question who will be the ones identifying themselves as Hungarians, although recognizing that nationhood (or statehood) has a broader meaning in today's Europe.¹⁵

He emphasized that the role of the preamble is nothing else but to justify the constitution and besides defining the sources of power it shall describe the cultural roots and define the national identity and describe the path that the constitution shall take in the future. As he concluded, in relation to the subject of this article, it is important to reach an agreement in the following question that shall be codified in the fundamental law: (i) what shall be the definition of the national identity? (ii) who are the constituents, In this respect, Griebowski suggested that any preamble should contain indications that it talks about the people and in the name of the people and it shall also identify the nation itself. The main reason for this, as he said, is that average citizens can identify themselves with the festive and historical narratives of the preamble and find their identity in them rather than in the detailed provisions on the structure of the state organs.

As for the constitutional process and its significance we shall now touch upon the issue of *constitutional moments*. Theorists say that constitutional moments are periods of time that represent an increased need and opportunity to redefine existing constitutional frameworks. If a

¹³ KOVÁCS, István: *A szocialista alkotmányfejlődés új elemei* (English title: New elements in the development of socialist constitutions), Akadémiai Kiadó, Budapest, 1962, 141 (in Hungarian)

¹⁴ KOVÁCS: op. cit. supra, 144

¹⁵ The opinion was presented as a contribution to an International Experts' Conference on the New Constitution of Hungary in Budapest, 4 March 2011, at the Hungarian Academy of Sciences. For the summary of the contributions in Hungarian, see: SULYOK, Márton: *Alkotmányozás: Példák és lehetőségek komparatív szemszögből - Nemzetközi szakértői konferencia az alkotmányozásról (Összefoglaló)*, Alkotmánybírószági Szemle, 2/2011, 122-124.

constitutional moment is adequately used, the new-born constitutional regulation would possess higher legitimacy.

A clear example for constitutional moments is the French Revolution, where it entailed “revolutionary” constitutional process as opposed to the one in Hungary in 1989 at the time of the Transition, where “revolution by negotiation” took place in the redefinition of the “legal element” of the constitutional framework took place.¹⁶ Another such constitutional moment in the case of Hungary is considered to have happened in 2004, at the time of the accession to the EU, which was however – according to some – not adequately used and the extent of anticipated benefits was lesser in terms of the constitutional renewal of the country.

Constitutional moments are significant in terms of the examination of the nation concept, because in constitutional moments the national self-definition usually changes as a reflection to the events leading to these constitutional moments. At the time of the accession of Hungary to the EU, the national self-definition included in the Preamble of the present Constitution could have been changed in applying the more inclusive and integrative approaches to the nation concept as implied by the “unity out of diversity” thought. The third constitutional moment in Hungary began in June 2010 when it became apparent that the newly elected governing party is intent on keeping its promise to adopt a new fundamental law. In our view, the Preamble of the new-born Fundamental Law may be construed as operating with a much more inclusive nation concept than before, which is in line with international recommendations made e.g. by the Council of Europe (Venice Commission), to be analyzed below.

Conclusions on the Interpretation of the Nation-Concept in the Hungarian Fundamental Law

In the following we wish to support our introductory assertions by starting out of the analysis of *Recommendation 1735 (2006) of the Parliamentary Assembly of the Council of Europe* (hereinafter: Recommendation 1735) on the concept of the nation. We will also reflect on certain determinations and recommendations made by the *Venice Commission Opinion on the New Constitution of Hungary*, adopted on 18 June 2011.

- (i) Recommendation 1735 analyzes the concepts of nation in the member states and lays out common core values that should be present in any national self-definition in the era of “evolution of nation-states”.
- (ii) The Venice Commission in their 18 June Opinion raised concerns about the language used in the Preamble of the new Fundamental Law that have implications with regard

¹⁶ NB Until 1949, when the first written constitution was adopted in the era of the communist dictatorship, Hungary was governed under a „non-written constitution”, similar to that of the United Kingdom, i.e. a greater body of laws containing regulations of constitutional significance. Then, in 1989, the „revolution by negotiation” modified the 1949 constitution and placed the rule of law in motion in Hungary.

to the topic of this article. Therefore, these assertions should be examined shortly hereby.

1. Issues of Collective Rights:

So called „European standards” are frequently referred to concerning collective rights, argumentation based on these is an everyday element of the political discourse. Nevertheless it is not indifferent whether we consider as European standards the practice of the individual states or the principles figuring in the international treaties and recommendations created in the practice and the context of the institutions of the Council of Europe. Obviously, the latter do not regulate exclusively the protection of minorities, the areas involved by them do not cover the complete scale of legal protection. Several member states of the Council of Europe recognize the collective rights of national minorities, which they also represent in their own national legal systems, as well as in bilateral agreements: e.g. the rights of ethnic groups (*Volksgruppen*) in Austria or the regulation related to the protection of minorities in Hungary.

The systems of minority protection of states based on collective or individual rights were surveyed by the Venice Commission, which published its findings on 20 June 1994. On the basis of this it can be stated that 13 members of the Council of Europe recognize collective rights as a complementary means of the protection of minorities. “*It is worth noting that despite of certain stereotypes and occasional propagandistic declarations, the collective approach – also in the protection of minorities – is compatible with actual European legal tendencies as it has become obvious from the results of the research carried out by the Venice Commission.*”¹⁷

One of the most important European results of legislation related to minority protection is the Framework Convention for the Protection of National Minorities adopted in 1995 within the framework of the Council of Europe. The accepted text of the Framework Convention – though it specifies the protection of *national minorities* in several places – intends to ensure the protection of minorities through the rights of the individuals belonging to the minorities. Nevertheless, the international regulation of minority protection does not exclude the possibility of the protection of collective rights, moreover, reference to collective rights appeared in the course of the preparation of the Framework Convention from the beginning, while being gradually omitted from the argumentation in the talks. According to the evidence of the *travaux préparatoires*, some proposals were expressly based on collective rights, and in the course of the preparation there were several debates on the individual or collective concept of these rights between the experts representing the different states.

To illustrate this, we may quote the following: „*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***”

¹⁷ KOVÁCS, Péter: *International Law and Minority Protection*. Akadémiai Kiadó, Budapest, 2000, 40.; see also: European Commission for Democracy Through Law, Replies to the questionnaire on the rights of minorities. CDL-MIN(93)10 Prov III.

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.”¹⁸

The individual approach to international treaties does not mean that the concept of collective protection of minority rights – which may ensure more extensive rights for minorities than the individual protection of rights, and which is recognized by numerous member states of the Council of Europe – is unacceptable or unlawful.

According to *Recommendation 1492 (2001)* of the Parliamentary Assembly of the Council of Europe on the rights of national minorities, the protection of the rights of persons belonging to national minorities and their communities, forms an integral part of human rights:

*“The 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.”*¹⁹

Recommendation 1735 (2006) of the Parliamentary Assembly on the concept of the “nation” phrases the following concerning collective rights:

*“7. 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.** (...)*

*10. 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.**”*²⁰

¹⁸ 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. Emphasis added.

¹⁹ **Emphasis added.**

²⁰ Emphasis added.

2. Minority Protection, Collective Rights and Extra-Territoriality

Under Subsection B (Foundation), Section III (Specific Remarks), §§ 41-44²¹ in the Venice Commission’s 18 June opinion the “*responsibility for the fate of Hungarians living beyond borders*” is scrutinized as unfortunate wording.²² In relation to this, it shall be pointed out that such a construction is already an integral part of the present constitutional framework as well, and when it is read together with the provisions of Article Q on international cooperation, and with the provisions of the Preamble to that effect, the true meaning of the legislative intent appears. It is also noteworthy at this point that the Commission welcomes the provisions of Article Q in its June Opinion.

Furthermore, it shall be clarified as to *the issue of collective rights* that the scrutinized Article of the Fundamental Law aims *only to support the efforts in the assertion of any collective rights* if and when such rights otherwise exist under the law of neighboring countries or under international law. The Commission notes that Hungary is not prevented to provide its national minorities with collective rights, but otherwise it does not follow from the provisions of the Fundamental Law (read and construed in their totality) that Hungary intends to proclaim or bequeath rights to trans-border Hungarians e.g. in establishing their self-governments, as feared by the Commission. “[W]e respect the freedom [...] of other nations”, sets forth the Preamble. Such a provision, read together with the whole of the Fundamental Law, *per se* unsubstantiates any fear from extraterritorial legislation.²³

3. Questions Regarding the Concept of the Nation

One of the elements of the critiques related to the Fundamental Law is the one concerning the concept of the nation, which appears basically in the determination of the Hungarian nation and in the status of the nationalities. The central motive of the critiques is related to the determination of the nation as a political entity (based on citizenship) or as an ethnic entity (based on origin and cultural relatedness). Both approaches appear in the Fundamental Law, as Hungarians abroad without Hungarian citizenship are also members of the Hungarian nation (ethnic nation), and as the nationalities in Hungary, – constituent parts of the state – are also members of the political community (political nation). The two approaches are not contradictory but they are mutually reinforcing each other and interrelate, as can be seen from *Recommendation 1735 (2006)* of the Parliamentary Assembly of the Council of Europe: “5. *The Assembly has acknowledged that in some Council of Europe member states, the concept of “nation” is used to indicate*

²¹ Cf. CDL-AD(2011)016, 10.

²² We note hereby that the Commission uses the same unfortunate wording to clarify its opinion, when it states that [in reference to its Report on Preferential Treatment of National Minorities by Their Kin-State, CDL-INF(2001)19] „*responsibility for minority protections lies primarily with the home-states.*”

²³ Cf. CDL-AD(2011)016, 10., para. 44.: „*The Venice Commission trusts that future interpretation of the Constitution and subsequent legislation and policies will be based on the interpretation of the said statement as a commitment to support the Hungarians abroad and assist them, in co-operation with the States concerned, in their efforts to preserve and develop their identity, and not as a basis for extra-territorial decision-making. The Commission wishes to emphasise that, in their dialogue with the Commission’s Rapporteurs, the Hungarian authorities have formally confirmed this narrow interpretation of the said statement.*”

*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.*²⁴

The first sentence of the Preamble of the Fundamental Law – “*We, the members of the Hungarian Nation*” – may be based both in the cultural (ethnic) or the political concept of the nation, as the closing lines of the Preamble phrase the readiness of the “*citizens of Hungary*” to cooperate.

Article 7 of the Preamble, besides promising to preserve the intellectual and spiritual unity of the nation “*torn apart in the storms of the last century*”, also underlines that “*the nationalities living with us form part of the Hungarian political community and are constituent parts of the State.*”²⁵ Thus, here the protection of the minorities responding to the situation originating from the relevant historic events (e.g. territorial changes, diaspora) symbolizes a cultural (intellectual and spiritual) approach of the nation, but, besides this, also stresses that it recognizes the nationalities in Hungary as constituent parts of the political community, i.e. of the State, and that it does not intend to mold them into the Hungarian “ethnic nation”. „***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 identity, as provided for in Assembly Recommendations 1201 (1993) and 1623 (2003) 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).***”²⁶

Therefore, there is *no contradiction in terminology*: the Fundamental Law clarifies the present state of the Hungarian nation, and reflects the recognition of the nationalities, as well as the most complex acceptance of their own nation concepts.

Article D of the Fundamental Law setting forth responsibility for Hungarians living beyond Hungary’s borders (on the basis of the ethnic concept of the nation), is also in accordance with the above. All this does not affect the existence of the political community, which consists of its citizens, and which may also be called the “political nation”, in accordance with *Recommendation 1735 (2006)* of the Parliamentary Assembly of the Council of Europe.

²⁴ ***Emphasis added.***

²⁵ The official translation of the Fundamental Law is available at: http://www.kormany.hu/download/2/ab/30000/Alap_angol.pdf (23 June 2011)

²⁶ Recommendation 1735, point 9. ***Emphasis added.***

The Recommendation sheds more light on this, wherein it states:

„7. 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.”²⁷

The right to belong to the cultural nation, independently from the “civic nation”, and the ambition aimed at the right to choose citizenship (!) also appears in the Recommendation:

„12. 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 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.”²⁸

According to Article 16.4 of the Recommendation, the Parliamentary Assembly proposes that the Committee of Ministers *„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”*.²⁹

In our view, the Hungarian Fundamental Law meets the above quoted requirement, its internal logics and its terminology reflects those phrased in *Recommendation 1735 (2006)* of the Parliamentary Assembly of the Council of Europe.

²⁷ *Emphasis added.*

²⁸ *Emphasis added.*

²⁹ *Emphasis added.*

4. Notes on the Concept of the Nation under Point 4 and the “Evolution of Nation-States” Doctrine

In the following, some reflections on the most recent opinion of the Venice Commission about the Hungarian Fundamental Law are elaborated, founded in the recommendations made by the Parliamentary Assembly of the Council of Europe, elaborated above.

Firstly, with regard to the Preamble, the Commission examines the “*strong emphasis [...] put on the national element and the role of the Hungarian nation [but welcome that] there has been effort to find balance in the Preamble between the national and universal elements [in the parts that set forth that] “we [Hungary] believe that our national culture is a rich contribution to the diversity of European unity and we respect the freedom and culture of other nations, and shall strive to cooperate with every nation of the world.”*”³⁰

We therefore shall examine the emphasis categorized as strong that is put on the national element and the role of the nation also in light of other Venice standpoints in this respect reflected by the following remark: “*It is also of particular importance that the constitutional legislator pays proper attention to the principle of friendly neighbourly relations and avoids inclusion of extra-territorial elements and formulations that may give rise to resentment among neighbouring states. In this respect, the Preamble seems to be premised on a distinction between the Hungarian nation and (other) nationalities living in Hungary. The Hungarian nation, in turn, includes Hungarians living in other states. Such a wide understanding of the Hungarian nation and of Hungary’s responsibilities may hamper inter-State relations and create inter-ethnic tension.*”³¹ Previously, the Commission aptly notes the wording stating that “*nationalities living with us form part of the political community and are constituent parts of the State*” is to be seen as an effort to create inclusiveness.³²

The national self-definition described by the Venice Commission is however, mistakenly identified as exclusive in our view. In line with the determinations made by the Parliamentary Assembly of the Council of Europe, modern national self-definitions become broader when they take the ethnic element into account. That is what is referred to as *the evolution of a nation-state* in Recommendation 1735.

As already asserted and agreed upon, in light of the constitutional regulation in Hungary, the nationalities in Hungary are parts of the political community, thus, constituents of Jászi’s *national corpus*. We already quoted Kuncz, who asserted that *in a state the nation aside nothing else exists*. Therefore, if we accept said premise, then all constituent parts of the state (which nationalities are in Hungary) shall also be parts of the nation as well, since in a state, the nation aside nothing else exists. The Fundamental Law, in our view, does not wish to assert any intention to integrate nationalities into the Hungarian ethnic nation.

The concepts of “nation” and “state” are interrelated and overlapping. If we apply definitive approaches different from that of a political nation or nation state then the conceptual borders of the “political (nation) state” *per se* become blurry, because the nation’s quality that fills in the

³⁰ Cf. CDL-AD(2011)016, 8., § 33.

³¹ Cf. CDL-AD(2011)016, 9., § 39.

³² Cf. *ibid.* § 40.

space surrounded by the “legal element”, i.e. Kuncz’s outer frame, is no longer merely and strictly political, but takes into consideration other factors as well, e.g. cultural, linguistic, ethnic or any combination of these.³³

We shall also take due note of the fact previously asserted herein, that the “*nationalities living with us form part of the [...] political community*” as codified in the Fundamental Law; thus, they are parts of the *political* nation state. In relation to this, the Commission suggested that the Hungarian nation concept should be more inclusive and provides recommendations with regard to the modification of the Preamble to reflect that the “citizens of Hungary” adopted the new Fundamental Law.

In our view, with this proposed wording, however, the Commission goes against its own recommendations wanting to make the nation-concept more inclusive due to the fact that the “*citizens of Hungary*” wording abides by the traditional paradigm of the political nation concept, irrespective of the “*evolution of a nation-state theory*” elaborated by the Parliamentary Assembly in its Recommendations.

Conclusions

Eventually it all boils down to one all-encompassing question in light of the evolution of nation-states in today’s European climate. *Which is the just path?* As it says in the King James Bible, Proverbs 4:18 „[T]he path of the just [is] as the shining light, that shineth more and more unto the perfect day.”

We sincerely hope that a perfect day might eventually arrive, when European legal academia can come to an agreement on the *aurea mediocritas* to abide by, simultaneously taking into consideration the implications of “the evolution of nation-states” theory on the conceptual frame of the nation in Central-Eastern Europe. We offer this article as a contribution that aims to enlighten some of the issues that are worth considering when choosing “*the golden mean*” in said theoretical debate.

³³ Cf. the „evolution of a nation-state” pattern described above.