

ZOLTÁN KÁNTOR

The recommendation on the concept “nation” of the PACE*

The resolutions and the recommendations of the Parliamentary Assembly of the Council of Europe (PACE) are not binding. They reflect the central values of an important European political body and may help orient how European politicians think about certain issues. They do not reflect the position of the European Union; however, they may become one of the underlying principles of EU politics.¹ These resolutions and recommendations are in the first instance political documents, and it would be a mistake to consider them as the peak of scientific thought. However, the report we are analyzing is among these and studied an issue that normally belongs to the realm of social scientists, philosophers and lawyers.²

Debates concerning the definition of the concept *national minority* have a long history among minority rights' lawyers. It is worth noting that none of the definitions supposed the existence of a kin-state or other co-nationals that share the same cultural, linguistic, etc. characteristics. Even if it is obvious that several national minorities came into being as a result of border modification, formerly being parts of a nation, this has not been reflected in any definition on national minorities. Reading these documents, it seems as if there is no link at all between national minorities and particular states or nations. Beside this, one also has to observe that minority protection is not regarded as the primary concern;

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¹ For a general account on the minority issue in the EU see: Vizi Balázs: An unintended legal backlash of enlargement? – The inclusion of minority rights in the EU Constitutional Treaty. *Regio*, Vol. 8, 2005. 87–108.

² The author of this paper is not an attorney; therefore, he focuses especially on the sociological and political scientific elements of the issue of nation.

stability and security seems to be more important in any approach to national minorities.³

This approach – regarding the link between nation and national minority – changed with a report of the Venice Commission that was concerned with the preferential treatment of national minorities by their kin-state.⁴ The root of this major change was the internationalization of the Hungarian Status Law.⁵ Since then, it has become a norm that national minorities may be supported – under certain conditions – by their kin-state. The recognition of this principle also led to a new debate concerning the definition of national minorities and the nation, and – in relation to this – a new approach on minority protection. Nevertheless, the support of national minorities by their kin-state does not belong to the classic understanding of minority protection; in practice, national minorities perceive this form as protection. At the same time, the involved actors – the nationalizing state, the national minority (kin minority) and the external national homeland (kin state) – perceive this support as an expression of nationalism. Therefore, the preferential treatment of kin-states may be considered both as kin-state nationalism and minority protection.

This article deals with the report on the concept nation; however, in order to fully understand the importance of the report, PACE's path to the recommendations made in this report should be examined.

3 See the argument of Majtényi Balázs: Utilitarianism in Minority Protection? Status Laws and International Organisations. *Central European Political Science Review*, Vol. 5, Nr. 16, 2004.

4 European Commission for Democracy Through Law (Venice Commission), 'Report on the Preferential Treatment of National Minorities by their Kin-State,' adopted by the Venice Commission at its 48th Plenary Meeting, (Venice, 19–20 October 2001). (hereinafter: Venice Commission)

5 For comprehensive overviews on the theoretical and legal issues on the Hungarian Status Law see: Kántor Zoltán – Majtényi Balázs – Osamu Ieda – Vizi Balázs – Iván Halász (eds.): *The Hungarian Status Law: Nation Building and/or Minority Protection*. Sapporo: Slavic Research Center, Hokkaido University, 2004. and Osamu Ieda (editor in chief), Editorial board: Balázs Majtényi, Zoltán Kántor, Balázs Vizi, Iván Halász, Stephen Deets: *Beyond Sovereignty: From Status Law to Transnational Citizenship?* Sapporo: Hokkaido University – Slavic Research Center, Slavic Eurasian Studies, 2006.

International aspects

As previously mentioned, the Hungarians status law that was passed in the Hungarian parliament in 2001 raised the issue. After the law was passed, Romania and Slovenia expressed their concerns that the status law might present a problem on an international level. The first international organization to issue such a statement on the “status law syndrome” was the Venice Commission. Its conclusion noted the following: “Preferential treatment may be granted to persons belonging to kin-minorities in the fields of education and culture, insofar as it pursues the legitimate aim of fostering cultural links and is proportionate to that aim.”⁶ In stating this, the Venice Commission recognized the right of kin-states to support their co-nationals living in other states. This was a novelty in international minority protection. While this declaration had become a contentious issue, an international recommendation was put forth for consideration and, thus, indicated that the Venice Commission implicitly acknowledged special bonds between a state and its kin-minorities. Moreover, the recommendation implies recognition of *the nation conceived in ethno-cultural terms*.

This is evidenced in a statement made by Rolf Ekeus, OSCE High Commissioner on National Minorities, and a week after the Venice Commission had issued its report. The statement, though formulated in general terms, concerns the Hungarian Status Law. The text of the statement highlights the difference between the boundaries of the state and those of the nation; it recognizes the interest of persons of the same ethnicity living abroad. It reads in part, “National and state boundaries seldom overlap; in fact there are few pure ‘nation states’. Borders therefore often divide national groups. ... Although a state with a titular majority population may have an interest in persons of the same ethnicity living abroad ...”⁷ Although the spirit of the statement reflects a position against the Hungarian law, it recognizes a boundary between a kin-state and kin-minorities.

During the debate surrounding the Status Law, Günter Verheugen wrote a letter to the Prime Minister of Hungary, Péter Medgyessy, in

⁶ Venice Commission

⁷ ‘Sovereignty, Responsibility, and National Minorities’, Statement by Rolf Ekeus, OSCE High Commissioner on National Minorities, in The Hague, 26 October 2001.

which he focused on the issue of the nation. Verheugen's letter stated that the phrase 'Hungarian nation as a whole' could be understood as an indication that Hungary was striving to establish special political links with the minorities in neighboring states. He recommended that this phrase be replaced with more culturally oriented ones instead.⁸

The European Commission also expressed concerns regarding the Hungarian Status Law. In particular, it mentioned that the law does not harmonize with the *acquis* and that "some of the provisions lay down in this Law apparently conflict with the prevailing European standard of minority protection."⁹

In the following, I will analyze two documents that focus on the concept of the nation. The first one is the *Preferential treatment of national minorities by their kin-states: the case of the Hungarian Status Law of 19 June 2001*¹⁰; the second one is the *The concept of "nation."*¹¹ Beside the resolution and recommendation, I will also focus on the explanatory memoranda.

The Jürgens report

A debate concerning not only the law but also the broader principle of preferential treatment regarding kin-minorities subsisted in PACE. PACE appointed Eric Jürgens as the rapporteur on the Hungarian Status Law and other similar laws in Europe. Jürgens used a very one-sided approach to the concept of the nation, interpreting it only as a *political nation*. After presenting several drafts, PACE finally accepted Eric Jürgens' report on 25 June 2003. The manner in which the report was endorsed again highlights the significance of defining the "nation". In the explanatory memorandum Jürgens stated, "The definition of the concept 'nation' in the preamble to the [Hungarian Status – ZK] law is too broad and could be interpreted as non-acceptance of the state

⁸ Günter Verheugen's letter to Hungarian Prime Minister Péter Medgyessy, dated 5 December 2002.

⁹ Commission of the European Communities 2001. Regular Report on Hungary's progress toward accession, Brussels, 13.11.2001 SEC (2001) 1748, 91. For a detailed analysis see: Balázs Vizi: The Evaluation of the 'Status Law' in the European Context. In Osamu Ieda (editor in chief) *Beyond Sovereignty: From Status Law to Transnational Citizenship?* Op. cit. 89–107.

¹⁰ I will refer to it as the Jürgens-report

¹¹ I will refer to it as the Frunda-report

borders which divide the members of the ‘nation’.”¹² As the report fundamentally rested on the political conception of the nation, it created a distinction between Hungarians and Magyars – a distinction that is not made in Hungarian language. According to the report, Hungarians constitute citizens of Hungary while Magyars constitute Hungarians living abroad.¹³ All Hungarians, whether they reside in Hungary or in a neighboring state, refer to themselves as ‘Magyar’.¹⁴

In the Resolution 1335 (2003) of the Parliamentary Assembly of the Council of Europe it is stated that there is no common European legal definition of the ‘nation’:

10. Furthermore, there is a feeling that in these neighbouring countries the definition of the concept of ‘nation’ in the preamble to the law could under certain circumstances be interpreted – though this interpretation is not correct – as non-acceptance of the state borders which divide the members of the ‘nation’, notwithstanding the fact that Hungary has ratified several multi- and bilateral instruments containing the principle of respect for the territorial integrity of states, in particular the basic treaties which have entered into force between Hungary and Romania and Slovakia. *The Assembly notes that up until now there is no common European legal definition of the concept of ‘nation’.*¹⁵ (italics added – ZK)

¹² Erik Jürgens, ‘Explanatory Memorandum’ and Erik Jürgens, ‘Preferential treatment of national minorities by their kin-states: the case of the Hungarian Status Law of 19 June 2001,’ Council of Europe Parliamentary Assembly.

¹³ Magyars: people of Hungarian identity (i.e., citizens of the countries concerned who consider themselves as persons belonging to the Hungarian ‘national’ cultural and linguistic community).

¹⁴ In the Hungarian language, no other word designates those who belong to the Hungarian nation. Hungarian is the term used in English. Romanians use both words, Hungarians (unguri) and Magyars (maghiari), but there is no systematic distinction between Hungarians living in Hungary and Hungarians living in Romania. The distinction between the “Hungarian” as political nation and “Magyar” as ethnic category would be justifiable only if the same distinction would be made in all other cases. For instance, according to this logic German citizens would be categorized as *Germans* while Germans living in other states would be categorized as *Deutsch* in an otherwise English-language text or document.

¹⁵ Council of Europe Parliamentary Assembly. Resolution 1335 (2003): Preferential Treatment of National Minorities by the Kin-state: The Case of the Hungarian Law on Hungarians Living in Neighbouring Countries (‘Magyars’) of 19 June 2001. (25 June 2003)

Although the resolution does not focus on the 'nation', the explanatory memorandum does deal in length with this term. It notes that the word 'nation' is employed in different parts of Europe in different ways, but there is a strong indication that the rapporteur prefers the political conception of the nation:

22. The Council of Europe should in my view [*Eric Jürgens – ZK*] take a further look at the concept of 'nation' as it is employed in many parts of Europe on the basis of traditions that precede the 19th century concept of the nation-state. The Council of Europe, and public international law in general, is based on the concept of 'state' and 'citizenship'. This leaves no room for the concept of 'nation'. This was done on purpose after World War II, because nationalist ideologies were root causes of that war (nationalist here used both in the sense of excessive state patriotism, and in the sense of proclaiming one's own 'nation' to be superior). Where claims are made on the citizens of other states by virtually 'enrolling' them as members of that 'nation' which the kin-state seeks to bring together and to represent, this nation-concept which is too strong could endanger the traditions of the Council of Europe.

The explanatory memorandum does not use of social scientific theories, but instead focuses on the presupposed perils of certain interpretations of the concept nation:

19. As described above, the concept of 'nation' can in its consequences sometimes be positive and sometimes relatively innocuous. But it can on the other side carry a suggestion of non-acceptation of those state borders which in fact divide the members of the 'nation'. This suggestion can have a negative effect if it causes unrest in the states in which the kin-minorities live, negative also for the position in that state of the kin-minorities concerned. ...

The argument of the rapporteur against the Hungarian Status Law is based on a unilateral definition of the nation. It should be noted that only considering the political conception of the nation could lead to this conclusion. Even if the recommendations and resolutions are primarily expressions of political will, the one-sided approaches discard the value of such resolutions. The rapporteur – at the end of the explanatory memorandum – shows that the concept "nation" is extremely problematic; he, therefore, suggests that PACE should attempt to find a more precise definition of the nation:

48. This report on the Hungarian law of 19 June 2001 tries to contribute to the solution of a specific issue round a specific Law. The general concept of ‘nation’ underlying this issue should therefore be elaborated on in a separate report tackling the question put forward in a more general way in the Motion for Resolution tabled by Mr. Van der Linden and others on ‘Trans-frontier co-operation in preserving the identity of national minorities’, Doc. 9163 of 3 July 2001.

The concept of “nation”

On the basis of the statement that there is “no common European legal definition of the concept of ‘nation’”, Mr. György Frunda was appointed as a rapporteur on 5 June 2003 by the Committee on legal Affairs and Human Rights. In the following years, he prepared a report with the help of specialists and used the answers given on a questionnaire by 35 European states.

In the ordinary session 26 January 2006, György Frunda argued for the necessity of this report, highlighting the demagogical misuse of the concept of nation:

Why is it necessary to speak about “nation”? In the past centuries, the notion of “nation” was often used demagogically to put people against people and nations against nations and to make citizens of the same countries citizens of the first or second degree. To avoid repeating history, which is negative, we have to handle this problem.

We can speak about several definitions of “nation”. The French definition traditionally says, “One country, one nation”. The German definition says that part of the nation can live abroad. In modern times, we have the so-called civic nation, whereby the state has a contract with each of its citizens and they can belong to one or another nation. Some theoreticians speak about the cosmopolitan nation – the future European nation when all of us will be citizens of Europe but each nation will be a minority. In a future Europe, all 27 member states will be, from one point of view or another, a minority.¹⁶

¹⁶ Transcript. 2006 ORDINARY SESSION (First part). Seventh sitting. Thursday 26 January 2006.

As the Jürgens-report operated only with the concept of the ‘political nation’, there was a need to clarify the concept of nation so that the question of national minorities could be addressed:

2. The Assembly, aware of the need to clarify the terminology used in constitutions and legislations in force to cover the phenomenon of ethnic, linguistic and cultural links between groups of citizens living in different states, in particular the use of the word „nation” as well as the correlation with a specific historical or political context, has considered whether, and how, the concept of nation – where applicable, a rethought and modernized concept – can help to address the question of national minorities and their rights in 21st-century Europe.¹⁷

The recommendation on the nation shifted and reflected upon the possible alignment of the “nation” with the definition and the protection of national minorities. Formerly, PACE defined national minorities without reference to kin-states or to another nation. The Recommendation 1201 (1993), stated:

“the expression ‘national minority’ refers to a group of persons in a state who: reside on the territory of *that state* and are citizens thereof; maintain longstanding, firm and lasting ties with *that state*; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of *that state* or of a region of *that state*; are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.”¹⁸ (italics added – ZK)

The recommendations, and basically all the legal documents, consider national minorities only in relation with the state in which they live. Status laws and legislation on citizenship (especially the issue of dual citizenship) highlighted the problem from another perspective. The

¹⁷ Parliamentary Assembly of the Council of Europe: The concept of „nation” Recommendation 1735 (2006). Text adopted by the Assembly on 26 January 2006 (7th Sitting).

¹⁸ Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights

link between the kin-state, the nation and national minorities, became unavoidable.

The Assembly’s recommendation reached extremely important conclusions regarding national minorities. The first accepts that both the political (civic) nation and the cultural nation are legitimate concepts and that an individual may consider him/herself to belong to a cultural nation in addition to his/her membership to the political community of another state.

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 every individual’s right to belong to the nation which he feels he belongs to, whether in terms of citizenship or in terms of language, culture and traditions.¹⁹

Regarding kin-state protection the Assembly recommends that the Committee of Ministers should:

16.5. draw up guidelines on procedures for developing relations between a state and the minorities residing in a different state – mainly in its neighborhood –, bearing in mind the criteria identified by the Venice Commission in its 2001 report, in the light of its analysis of existing legislations, as well as the pertinent Assembly resolutions and recommendations.²⁰

The recommendation can be considered a breakthrough in the field of minority protection, and even if this recommendation is not binding, it is worth analyzing its explanatory memorandum.

¹⁹ idem

²⁰ idem

The memorandum consists of four parts. In the first part, approaches and definitions of the nation are presented. The second part deals with the constitutional use of the concept of nation. The third part analyses the relationship between the nation and national minorities. The fourth part attempts to make a distinction between national minorities and „new” national minorities.

Regarding the definition of nation, the memorandum presents theoretical discoveries about the emergence of the nation. Compared to the Jürgens-report, the analysis is more sophisticated and equilibrated. It presents the different paths of nation-formation and the way in which the two ideal-type conceptions – the “French” and the “German” – became categories of legal and political scientific thought. The rapporteur concludes that one cannot reach a common definition of the nation, that the two concepts are of equivalent range, and that the individual should have the right to consider him/herself as belonging to a nation defined in the way he/she opts.

22. I consider that both definitions of “nation” are still valid today. A new definition is therefore unnecessary. What is important, from both a political and a legal standpoint, is genuine acceptance of every individual’s right to belong to the nation which he feels he belongs to, whether in terms of citizenship or in terms of language, culture and traditions.²¹

The report identifies five types of approaches in the constitutions of European states: 1. States whose constitutions refer explicitly or exclusively to the concept of “*nation*”, in the sense of a *civic nation*; 2. States whose constitutions refer explicitly or exclusively to the concept of “*nation*”, in the sense of an *ethnic nation*; 3. States in which the concepts of “*nation*”, as an entity that gives identity, and “*people*”, as a sovereign entity (democratic foundation of the state), exist side by side; 4. States whose constitutions do not mention the word or concept of “*nation*” but instead refer to the “*people*” as the holder of sovereignty; 5. Lastly, states where neither the concept of the “*nation*” nor that of the “*people*” appear in the Constitution.

Regarding the issue of national minorities, the memorandum presents the way European states recognize (or do not recognize) the

²¹ Frunda-report – explanatory memorandum

rights of national minorities and their kin-state politics regarding their co-nationals living in other states. The memorandum also summarizes how particular states deal with “new” minorities, i.e. those who are formed as a result of immigration. This part concludes that there are, even if limited, instruments for promotion the rights of minorities.

Both memoranda admit that the word nation is employed differently in different European languages, that it is often used as synonyms for state—or the totality of the citizens of a state—and the word nationality is used often as a synonym for ‘citizenship of a state’.

Both memoranda highlight the origins of the word nation and how it was used in earlier centuries.²² The explanatory memorandum on the concept nation offers a general overview on the formation of the French (political) and the German (cultural, linguistic) nations, considering them as ideal-types.²³

Jürgens contrasts between an ‘old’ and a ‘new’ conception of nation. The ‘old’ conception is described: „Historically the word was used to denote groups of which the members identify themselves as culturally, ethnically or linguistically as belonging to that group (i.e. the Franks, the Germans, the Italians)”²⁴ This is opposed to the new conception that basically equates the concept nation and the concept state.

The Frunda memorandum emphasizes that both – the political and the cultural – conceptions were and still are widely used:

„19. The two traditional definitions of the concept of “nation” – the French and the German – existed side by side for two centuries, each remaining stable within its sphere of influence.”

²² See point 5 in the Jürgens memorandum and points 12–13 in the Frunda memorandum

²³ A scientific critique may be offered on this part, but this critique would be misplaced regarding an explanatory memorandum. For contemporary accounts of this question see: Alain Dieckhoff: *Beyond conventional wisdom: cultural and political nationalism revisited*. In Dieckhoff, Alain – Jaffrelot, Christoph (eds.): *Revisiting Nationalism. Theories and Processes*. London: Hurst, 2005; Brubaker Rogers: “Civic” and “Ethnic” Nationalism. In Brubaker, Rogers: *Ethnicity without Groups*. Cambridge: Harvard University Press, 2004.

²⁴ Paragraph 5

Conclusions

Defining “the nation” remains a lucrative job both among scholars and nation-building politicians, and this does not even address the issue of various definitions. One may distinguish between definitions that emphasize objective elements and those that emphasize subjective elements. Since Ernest Renan’s famous article, literature on nationalism has continued to fuel this debate. Attempts to refine the definition can be traced back to Friedrich Meinecke. Perhaps these attempts clarified the picture or the adjectives but not the actual concept of nation itself. Rogers Brubaker recently showed that such typologies do not help much in the analysis of phenomena linked to the nation.²⁵

If one encounters the approach of European states towards the minority issue in the states of CEE, one may immediately observe that the legitimate definition is that of the political nation, even if in practice this is not always true. When this approach became a political norm, it also became highly problematic because it does not always reflect the real state of affairs.

An influential voice in the scholarly debate over definitions of “nation” in the context of the kin-state and minority relationship is Brubaker. He emphasizes that one should not think of ethnicity and nation in “terms of substantial groups or entities, but in terms of practical categories, cultural idioms, cognitive schemas, discursive frames, organizational routines, institutional forms, political projects and contingent events.”²⁶ So, we should not think of nations as really existing and definable groups but rather of politics and institutionalizations that rely on one or the other conception of the nation. Furthermore, we should take into consideration that in practice all nation politics operate with both concepts simultaneously. Therefore, we should not consider the nation as a central category. One should focus on nationalism, on nation building, or on nation policy. In this framework, one may interpret processes,

²⁵ Rogers Brubaker: *The Manichean Myth: Rethinking the Distinction Between Civic and Ethnic Nationalism*. In Hanspeter Kriesi et al (eds.): *Nation and National Identity. The European Experience in Perspective*. Zürich: Rüegger, 1999. 55–71., and Rogers Brubaker: *Myths and Misconceptions in the Study of Nationalism*. In John A. Hall (ed): *The State of the Nation: Ernest Gellner and the Theory of Nationalism*. Cambridge University Press, 1998. 272–305.

²⁶ Rogers Brubaker: *Ethnicity Without Groups*. *Archives européennes de sociologie*. 2002, 167.

politics that invoke one or another definition of the nation. By definition, status laws and laws on dual citizenship operate with the ethno-cultural conception. They extend the borders of the nation beyond the borders of the state.

The Hungarian law influenced European law by triggering a debate in important European institutions; the European norms that emerged during this process then, in turn, influenced Hungarian legislation. The recommendation *The concept of „nation”* shows that the question of nation remained on the political agenda. It also showed that in the last five years the views on the nation, on the rights of national minorities, and on the right of kin-states to support their kin-minorities has substantially changed. One has to notice that the recommendations of the PACE are not compulsory and cannot be enforced. Nevertheless, it shows a shift in thinking at a European level. In June 2001 it seemed that kin-state protection was considered as problematic; in January 2006 a Parliamentary recommendation stated that kin-states – under certain conditions – have a legitimate right to support kin-minorities.