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## **Priorities for Kin-State Policies within Constitutions<sup>1</sup>**

When discussing the priorities for Hungarian kin-state policy, the following will first be addressed. Before we begin to map out the key issues underlying the relation of constitutional values and kin-state policy trends, we will first and foremost say a few words about the importance and actual meaning of kin-state policy. How should we interpret kin-state policy within a definitive inquiry focused on constitutional values that are present in fundamental laws?<sup>2</sup>

Let me evoke the thoughts of my paternal ancestor, Ignác Kuncz, who – in 1902, disserting about the likeness of nation-states – wrote that *the nation is the active collective subject of the state in thought, will and act.*<sup>3</sup> Obviously, the directions of the academic discourse have significantly changed since the appearance of nation states doctrine in the work of the Council of Europe, but, nonetheless, I assert *that kin-state policy as reflected by modern nation-concepts is indeed a reflection of thought, will and act, all implemented by the constitutional legislator. (Moreover, kin-state policies will formulate reflections on the cultural reality that the concept of nation designates.*<sup>4</sup>)

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<sup>1</sup> This paper is the written *summary of the main conclusions* of a talk presented at the round-table “Hungary and Hungarian Kin-State Policy” on the Trends and Directions of Kin-State Policies in Europe and Across the Globe international conference (September 28th 2012, Budapest, Magyarország Háza).

<sup>2</sup> The Fundamental Law of Hungary sets forth in its Preamble (National Avowal) that the nation is the fundamental, principal framework for the community, and its most important cohesive values are fidelity, faith, and love.

<sup>3</sup> Original in Hungarian: “*A nemzet az activ államalany gondolatban, akaratban és tettben.*” Ignác Kuncz: *A nemzetállam tankönyve*, Stein János M. Kir. Könyvkereskedése, Cluj-Napoca, 1902, 4. As an analogy, we will mention Jakab’s argument referring to Brubaker in *Defining the Borders of the Political Community – Constitutional Visions of the Nation*, where he cites that the category of nation structures perception, informs thought and organizes political action. (p. 1.) (The paper is available in the SSRN Working Paper Series, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2045648](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045648))

<sup>4</sup> Council of Europe Parliamentary Assembly (PACE) Recommendation 1735 (2006) The concept of “nation”, Article 6. <http://assembly.coe.int/ASP/Doc/Xref-ViewHTML.asp?FileID=17407&Language=EN>

*Expatriate national corpora will be borne in mind – thought of – by the constitutional legislator when formulating the content of national self-definition within the constitution. This “thought” then requires the constitutional legislator to dispose of adequate political “will” to assert said thought and realize it through “acts” that strive to reach the “common good”, as the preamble of the constitution of Poland so aptly sets it forth.*

Kuncz also argued that “*substantially, within the state the nation aside nothing else exists*” and the legal element in this discussion is only the outer frame of the notion.<sup>5</sup> Consequently, the mapping of this concept on non-legal factors is quintessential for a better understanding of the topic by filling in the frame with content through a host of cultural, sociological, ethnic and political science viewpoints. Wide-range debates surround these issues on a societal level that are almost always subject to extensive scrutiny by the public opinion, and certain political decisions are prone to inspire the academia to express their views abundantly on certain topics.

This study aims to primarily dissert on some of these issues with respect to the following two questions:

- (i) *What defines the main directions/trends and priorities for a national kin-state policy?*
- (ii) *How can kin-state policy priorities of the constitutional legislator be reflected within a constitution?*

### **Delimitation of the Subject Matter**

*The two questions need to be examined and answered in conjunction with each other; we cannot seek to clarify them independently.*

*Ad (i) supra, I start out from the statement that priorities, trends and directions for kin-state policies are defined by the subjection of the constitutional legislator to the responsibility in relation to the national corpora beyond the borders of the state. Hungary’s policy for the Hungarian communities abroad includes the statement that the Hungarian communities abroad constitute the “border of the nation”. Although the concept of nation is often criticized for being fluid and “borderless”, we might argue that the “borders of the nation” tighten or broaden based on the extent of the obligation the constitutional legislator assumes on*

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<sup>5</sup> Kuncz, op. cit., fn. 3.

the imaginary lifeline between a sense of responsibility and an active compliance with the obligation to support its expatriates.<sup>6</sup>

The level of responsibility is obviously influenced by the development of international trends and the search for an all-encompassing identity that overarches and incorporates the concept of “nation” – whatever the limits thereof might be – thus becoming the core of national self-determination present in fundamental laws. This national identity, then, is unquestionably influenced by the “layered” (multiple) identity typically apparent in expatriate national corpora, who strive for support and recognition in their country of birth, their host country, which is not identical to their kin-state. This also shapes identity as a basis for national self-determination.

States that host large diasporas need to actively provide them – for lack of a better expression – with “an access to identity”, i.e. means for the diasporas to exercise their rights as minorities. The latter factor might eventually become a key element in a strategic partnership (especially within regions that are burdened with historical conflict and – from time to time – flammable neighborhood dynamics.)<sup>7</sup> I support this allegation by citing once again the well-known Recommendation 1735(2006)<sup>8</sup> that sets forth in its Article 12 that strengthening the links with one’s identity and allowing any individual to

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<sup>6</sup> For a definitive inquiry into the borders of the political community, see Andrés Jakab: *Defining the Borders of the Political Community – Constitutional Visions of the Nation* (SSRN Working Paper Series, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2045648](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045648))

<sup>7</sup> The Constitution of Slovenia e.g. sets forth that the state „*shall protect and guarantee the rights of the autochthonous Italian and Hungarian national communities.*” In parallel, the Spanish Constitution, sets forth (in its preamble) to “*protect all Spaniards and peoples of Spain in the exercise of human rights, of their cultures and traditions, and of their languages and institutions.*” In comparison, the Hungarian Fundamental Law undertakes to commit to “*promoting and safeguarding [...] the languages and cultures of nationalities living in Hungary*” (Preamble) and acknowledges (Article XXIX) that „*Nationalities living in Hungary shall be constituent parts of the State. Every Hungarian citizen belonging to any nationality shall have the right to freely express and preserve his or her identity. Nationalities living in Hungary shall have the right to use their native languages and to the individual and collective use of names in their own languages, to promote their own cultures, and to be educated in their native languages.*” [Slovenian Constitution - [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=180804](http://www.wipo.int/wipolex/en/text.jsp?file_id=180804); Spanish Constitution – [http://www.senado.es/constitu\\_i/indices/consti\\_ing.pdf](http://www.senado.es/constitu_i/indices/consti_ing.pdf); *The Fundamental Law of Hungary* – <http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>]

<sup>8</sup> PACE Recommendation 1735 (2006), fn 4.

define themselves as members of a cultural nation irrespective of the country of citizenship or the civic nation they belong to is quintessential in Europe. This *trend of the “evolution of nation state”* amounted to certain changes in national self-definitions globally. *Due to the fact that under this doctrine, the concept of the nation promotes contact between people and integrates the community of citizens, I argue that the direction of kin-state policy priorities is influenced by this trend.* Pertinent efforts –reshaping kin-state policy – have already been recognized: first in 2001, upon a Hungarian request to the Venice Commission<sup>9</sup>, and then later on on many occasions in terms of our neighboring countries (Croatia, Slovenia) as well.

*Ad (ii) supra, How can kin-state policy appear on the level of the fundamental law?* – that was the second question formulated in the first part of this paper. In order to be able to answer this question, we have to conduct a constitutional analysis of values present in constitutional documents.

Including “emotions”, other constitutional values and relevant narratives within constitutions is an interesting topic.<sup>10</sup> *“Constitutional sentiments are particularly effective where they affirm an emerging national identity [... and successfully offer] values for public identification.”*<sup>11</sup>, argues Sajó, and this is certainly an issue that is central to the analysis conducted here. The specific structural unit within the texture of the constitution, in which ruling elites define the core values important to their perception of the “nation”, is the preamble. Orgad refers to Carl Schmitt when he declares that preambles have an important (i) integrative function<sup>12</sup> and (ii) they are the most suitable to express fundamental political decisions.<sup>13</sup>

<sup>9</sup> Report on the Preferential Treatment of National Minorities by Their Kin-State (2001) [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp); Balázs Vizi: *The Evaluation of the Status Law in the European Union*, [http://src-h.slav.hokudai.ac.jp/coe21/publish/no9\\_ses/06\\_vizi.pdf](http://src-h.slav.hokudai.ac.jp/coe21/publish/no9_ses/06_vizi.pdf)

<sup>10</sup> e.g. See: András Sajó: „Emotions” in *constitutional design*, ICON, Vol. 8, No. 3. 2010, 354-385

<sup>11</sup> Ibid. 362, 363.

<sup>12</sup> Kudrna argues that a preamble „may serve as a common starting point for the entire society, more connecting than dividing” and that it is a „common anchor.” (Jan Kudrna, *Two Preambles in the Czech Constitutional System*, Acta Juridica Hungarica, 1/2011, 19-28, 28.)

<sup>13</sup> Liav Orgad, *The Preamble in Constitutional Interpretation*, ICON, Vol. 8, No. 4. 2010, 714-738, 715. This integrative function is apparent in the National Avowal of the Fundamental Law of Hungary, where it declares that the Fundamental Law is a „covenant among Hungarians past, present and future; a living framework

As a matter of fact, national self-definition – besides being the embodiment of the integrative function – is a fundamental political decision, and as such it must be taken into consideration when defining key policy priorities related to constitutionally anchored kin-state responsibilities, which reflect public sentiment in a way. Sajó argues that “*constitutionalizing the dictates of public sentiment helps to [...] extend the cultural environment that, in turn, provides for interpretive schemes for these sentiments.*”<sup>14</sup> *Regarding these fundamental political decisions reflected in the preamble, their justification needs to be invoked in the context of expressing and interpreting constitutional sentiments. A preamble also serves to justify the constitution and describe the cultural environment – the roots – that defines national identity.*

Besides integration and justification (and their political contexts elaborated), preambles are also suitable to represent a subtext of normative nature as a basis for normative obligations, says Kovács.<sup>15</sup> For the purposes of our enquiry, such normative obligations are undertaken as embodied by an increased focus on kin-state policy and by the creation of an efficient dual citizenship and external voting regime.

In relation to what has been said before, we will now look at the different forms of preambles suitable to represent kin-state policy priorities, each on different theoretical and practical levels. The internal dynamics and emphases of the preambles’ wording signify the extent of responsibility undertaken by the constitutional legislator with respect to the expatriate national corpora. Orgad’s classification is most suitable for the purposes of our inquiry:

- (i) *Ceremonial-symbolic preambles* are used to consolidate national identity without binding legal force, through explanatory narrative. The constitutions of Hungary or Poland can be classified in this category.

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*which expresses the nation’s will.*” Orgad describes the integrative function as a “*formative purpose*”, a “*political resource for the consolidation of national identity.*” (Orgad, op. cit., 722)

<sup>14</sup> Sajó: op. cit, 363. The discussion by Sajó then takes a different direction and focuses on the relation of fundamental rights and constitutional sentiments; however, for the arguments sake it needs to be clarified that these sentiments might considerably influence national self-determination and identity as well, as it was also mentioned by Sajó himself.

<sup>15</sup> István Kovács: *New elements in the development of socialist constitutions*, Akadémiai Kiadó, Budapest, 1962, 141

- (ii) *Interpretive preambles* provide guidance for the interpretation of the fundamental law and inferior legislation. The Hungarian preamble had already been classified as such in 1990 by the Constitutional Court.
- (iii) *Substantive preambles* are sources of fundamental rights independent of the normative text of the constitution. The preambles of France<sup>16</sup> and Bosnia-Herzegovina can be invoked as examples.)

With respect to the identity-question, the historical narrative is another important element of preambles that serves to surround implied objectives for kin-state policy priorities. In the context of the preamble of the Fundamental Law of Hungary, national self-definition is complemented by an extensive historical narrative, in which the following kin-state policy priority is apparent, with a view to finding an identity: Hungary strives to preserve “*the intellectual and spiritual unity of our nation*”. It is noteworthy, however, that the case of Hungary is specific to a certain extent, since national self-definition also appears among the provisions the Foundation, as part of the normative text of the constitution.

The Slovenian model is similar to the Hungarian. Within historical narrative it makes reference to historical facts as “*centuries-long struggle for national liberation*” under the permanent right to national self-definition and, already within the normative text of the constitution, it contains the following provision: the state shall “*maintain concern for autochthonous Slovene national minorities in neighbouring countries and for Slovene emigrants and workers abroad and shall foster their contacts with the homeland.*”<sup>17</sup>

<sup>16</sup> By reference to the „*bloc de constitutionnalité*” in the preamble of the French Constitution, the French *Conseil Constitutionnel* made possible that a catalogue of explicit fundamental rights codified in the 1789 Declaration of the Rights of Men are used as a point of reference in French constitutional jurisprudence as „principles underlying the Republic.” As for the case of Bosnia-Herzegovina, Orgad observes that – in a context relevant to national self-determination – normative preambles are also sources of conflict. Ha argues that when the constitution has been adopted, following the Dayton Agreement, there has been a conflict between the constitutions of the Serbian and Bosnian constitutions due to the fact that the Serbian preamble has been in contradiction with the Bosnian constitution. Eventually, the Constitutional Court – in 2000 - quashed the preamble in question since it did not create two separate nation states, only separate political communities. (In detail, see: Orgad, op. cit., 729-730)

<sup>17</sup> Article 5, Constitution of Slovenia, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=180804](http://www.wipo.int/wipolex/en/text.jsp?file_id=180804)

In the Polish constitution, the expression kin-state is *expressis verbis* apparent as “Homeland” and “*the Polish Nation – all citizens of the Republic, [...] equal in rights and obligations [act together] towards the common good – Poland.*” Within the context of historical narrative bitter experiences of human rights violations within the Homeland appear, and the respect for the labor of the ancestors (Polish of the past) is emphatic, along with a bond “*in community with the compatriots dispersed throughout the world*” (Polish of the present), complemented with an obligation to “*bequeath to future generations all that is valuable*” from the over one thousand years’ heritage of Poland.<sup>18</sup>

### Conclusion

Following from the determinations made in the last portion of the previous part, the argument needs to be stressed that a sustainable and efficient kin-state policy needs to take into consideration temporal implications as well. National political will shall be asserted as a flagship of concrete objectives defined in the long term. The present Hungarian kin-state policy was indeed created as a “*covenant among Hungarians past, present and future*” – as it is declared by the Preamble of the new Fundamental Law. This statement makes reference to the changing façade of the nation-concept, which change needs to take into consideration new trends in kin-state policy across the globe.

The Preamble simultaneously embraces and mentions the forced diasporas of the past, the Hungarians of the present (and the different interpretive approaches to the nation-concept adopted by the Fundamental Law). Moreover, it also takes into consideration the future effects of ‘voluntary diaspora’ through migration, with a significant potential to further change the “borders of the nation.” As the Fundamental Law of Hungary explains, it is a “living framework”, expressing the nation’s will. If this framework is really alive, it must be open and subject to change following experiences through dialogue. Asserting change in the order of the country can be the result of the common endeavors of the nation as it is apparent in the Preamble.

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<sup>18</sup> For more on the analysis of the Polish preamble cf. Geneviève Zubrzycki, „*We, the Polish Nation*”: *Ethnic and civic visions of nationhood in Post-communist constitutional debates*, *Theory and Society*, Vol. 30, 5/2001, 629-668. or Ewa Poplawska, *Preamble to the Constitution as an Expression of the New Axiology of the Republic of Poland*, *Acta Juridica Hungarica*, 1/2011, 40-53.

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13. Spanish Constitution ([http://www.senado.es/constitu\\_i/indices/constit\\_ing.pdf](http://www.senado.es/constitu_i/indices/constit_ing.pdf))
14. *The Fundamental Law of Hungary* (<http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>)