

TREATMENT OF NATIONALS BY THEIR KIN STATE – THE ROMANIAN CASE*

Abstract

Treatment of nationals by their kin state deals with what legal science amuses itself to call “concepts à géométrie variable” or even “non-identifiable objects” (Horchani, 2003, pp. 189). To the date there is no broadly accepted definition of the concept of nationalities or national minorities and, in order to identify a kin-state**, one needs to clarify the concept of nation, which remains a challenge even in postmodern era (Toperwien, 2001, pp. 44, 187-189). Postmodern writings have criticised modern definitions of the concept of nation as relying too heavily on objective criteria and neglecting a possible more subjective approach. Also, globalisation might necessitate a new concept of nation. No attempt to provide formal definitions will be attempted in this article, but some explanations regarding the use of words and concepts are deemed necessary before sketching some features of history in order to venture understanding the treatment that the state reserves to Romanians living abroad.

** It is the Venice Commission which has coined the term “kin-state” in order to indicate the country where the identity of the national minority is that of the dominant culture, particularly with regard to relations between neighbouring States where a minority in one is a majority in the other. Various bodies (Parliamentary Assembly, Council of Ministers) of the Council of Europe seem to prefer this terminology as the word “kin” is considered to be more neutral than the word “mother-state”, which is common in some texts, but may wrongly suggest that such a State has formal relations with citizens of other States.

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* This paper represents the finalised text of a conference held by the author at the Institute of Federalism of the University of Fribourg (Switzerland) on August 15th, 2008.



*Transylvanian Review
of Administrative Sciences,
25E/2009 pp. 147-164*

I. On words and concepts

The current use of the concept of national minorities presupposes that nation and people are somewhat different entities. In fact all these words refer to communities of human beings, describing a part or the entirety of the more general concept of state population. It would be easy if population, people and nations were all synonyms, but they are not.

The history of the formation of the present population differs from one state to another. The population of only a tiny minority of states comprises only persons of a single ethnic origin (Iceland), while the population of the majority of states represents nowadays a nation mainly amalgamated, although originally composed of different ethnic groups (Netherlands, France) or it represents a multi-national society (Switzerland, Belgium, Canada) or a community where the dominant ethnic group lives alongside others which are numerical minorities (Hungary, Italy, Romania, Slovenia). The population of some states has been formed by indigenous populations and successive waves of immigration, while integration of the entire population has been only partially achieved (Australia, Brazil, New Zealand). The national unity demonstrated at the time when independence was granted to some newly created African states proves today to be rather fragile (Nigeria, Rwanda, Sudan). The dissolution of (long time presumed) integrated multi-national societies in Europe (Soviet Union, Yugoslavia, Czechoslovakia) proved the frailty of their homogeneity. Seen from this perspective, one might conclude that history proved Georges Scelle was right when claiming that “nation-States are, in principle, stronger and last longer than multi-national States (Scelle, 1948, pp. 83).

State populations are currently identified via normative concepts (as *members* of a legally defined group and no longer *subjects* of a government) which give little consideration to ethnical, linguistic or religious characteristics of individuals thus related into a community, despite objective evidence that any community is bound into an integrated body via elements which also refer to such distinctive characteristics. There is no generally accepted definition of the terms people or nation, rather nation is generally explained as a people wanting its own state. However, self-determination has been recognised as a fundamental right in legal texts (Charter of the United Nations, International Covenant on Civil and Political Rights, First Protocol to the Geneva Convention relating to the Protection of Victims of International Armed Conflicts) without consensus on its content or beneficiary: there is no enlightenment whether it means right to statehood or merely self-government via thorough autonomy or whether it belongs to *demos* or *ethnos*. And if self-determination leads to the creation of a new state, this last one may well include groups which can claim specific characteristics as a community and thus request implementation of the right to self-determination. In this way the right to self-determination of one group/community may impede on the right to self-determination of others or, indeed, on the very essence of the State.

According to the predominant paradigm, nation is a concept of comparatively recent origin and a result of modernism; following the American Constitution and the French Revolution the modern concept of nation has spread all across Europe (to start with) via the principle of people's sovereignty and cultural standardisation within a

given territorial boundary. One of the leading exponents (Gellner, 1983, pp. 39) of such (functional) theories argues that nations are products only of industrial and capitalist societies because earlier societies did not need nations as a vehicle for the state power, while another (Hobsbawm, 1990, pp. 9) insists that nations emerged only in the modern era at a particular stage of economic and technological development of society; they are constructed by nationalists, that is by intellectual elites who invented the nation's history and myths (Anderson, 1991, pp. 5). Under West European terminology a nation can be the total of the citizens of a state; under East European terminology it can also be equivalent of people meaning ethnic community. Indeed, literature displays two completely different and opposed types of definitions of what kind of group can form a nation, both relying on supposedly objective criteria. According to the *ethnic definition*, a nation is a community based on common descent or culture. According to the *civic definition*, a nation is a sovereign people - *demos* - living under common political institutions. As a consequence, nationality, which in French and Anglo-Saxon public law was initially identified with citizenship, has always had the significance of people – and, at times, of ethnic group – in Central and Eastern Europe, meaning a large ethnic community, however always within the boundaries of a State. A good case in point are the nationalities established under the Austrian Empire and defined by the Constitution of 1867 as „tribes” or “races” meaning the today currently used term of ethnic groups. More numerical minorities, which did not make up any compact group or which had not formed any united community in any location, were not recognised as nationalities and, consequently, not as ethnic groups (Jews or Tziganes-Roma). It is still the case even nowadays that in multinational states, where pluralism is effectively taken into account, groups which take part in the full exercise of state power are called nationalities, whereas the ethnic groups which do not participate in the running of the state are called merely national minorities or ethnic groups. According to the ethnic definition, these last ones are not part of the nation.

The concept of national minorities has existed only since the end of the First World War and the creation of the League of Nations. As mentioned above, groups of persons that differed linguistically, religiously or ethnically from the other inhabitants of any given state existed long before, but whenever they represented a numerical minority – which was not always the case – they were referred to as nationalities and not as national minorities. Indeed, the word *natio* was used under the Austrian Empire to stress quality over quantity; it encompassed only those individuals who possessed special rights and immunities that allowed them to participate in the government of the state. Exceptionally such individuals could constitute ethnic groups, but they were not national minorities, as a certain status and not numerical dominance was required in order to be recognised as *natio*. However, history has also recorded cases where individuals who belonged to ethnically different groups were considered inferior beings (Hitchins, 2001, pp. 83) and were denied rights of political representation or participation in the government (e.g. *Unio Trium Nationum*); such ethnical minorities were known as minorities (Hitchins, 2001, pp. 78), although numerically they represented the majority of the population.

In fact, legal systems of past empires (British, French or Austrian, Russian, Turkish) were more concerned with the definition of social estates than of nationalities, by awarding them unequal rights and duties and thus consolidating horizontal lines of distinction and, eventually, exclusion from the exercise of some (mainly political) rights. Modern states have replaced the historical structure of the population with the idea of equality. However, the new model of legal inclusion based on equality of all citizens before the law evolved in parallel with a vertically structured form of exclusion, whereby the exercise of political and economic rights became linked to the concept of citizenship. In this respect, it is worth recalling that in the nineteenth century all inhabitants of a territory, irrespective of their language, religion or ethnic origin, were considered to be *subjects* of the state. It is only after the “national” revolutions of 1848-1849 that citizenship got gradually “nationalised” and equal treatment before the law became a privilege only for nationals, while foreigners were treated differently as an inherent consequence of their social condition. The *horizontal* distinction between social estates, which in some cases coincided with ethnical groups or nationalities, has been replaced with the *vertical* distinction between nationals (read citizens) and aliens. Therefore, all citizens (read nationals) are entitled to participate in the government of the state, irrespective of their nationality (read differences on the account of ethnicity, religion, language etc.). This explains the use of the word “co-inhabiting nationalities” in some Constitutions (Romania in 1948 or the Preamble of the 1990 Croatian Constitution). Thus, nationalities are peoples or parts of the population who participate in the Government of a (multinational) state.

Even if the criterion of participation in government and not a numerical reference (based on ethnical grounds) to the population of the state makes the difference between nationalities and national minorities, the famous definition Francesco Capotorti suggested for national minorities (“*National minorities are ethnic, religious or linguistic groups numerically smaller than the rest of the population of the State to which they belong and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population*”) seems quite operational, although it has been criticised as having some flaws (Veiter, 1977, pp. 273 et seq). Mention has to be made here that the absence of any normative definition of the concept of nation and, consequently, of national minority suits well not only states, but even some minorities: some states might take this opportunity in order not to recognise existing minorities and thus deny them any form of protection (Bahāi minority in Iran or German minority in France), while some national minorities may try to share granted protection by the host state only with particular ethnic groups and not with other types of numerical minorities (Csango, religious minority within the ethnic Magyar minority in Romania¹).

¹ In its Second Opinion on Romania adopted on 24 November 2005, the Advisory Committee of the Council of Europe on the Framework Convention for the protection of national minorities notes that persons belonging to other groups than those included in the Romanian Council of National Minorities have expressed interest in the protection afforded by the Framework Convention. „This primarily concerns the Hungarian Csangos, who informed the Advisory

In this context it is worth to mention that an ethnic group is part of a people which lives in a state having an ethnically different majority, both in national and numerical terms. Far from being a national-socialist creation, the term ethnic group has rather been distorted by the German use during the Second World War. Ethnic groups and national minorities may, at times, be synonymous, but according to various criteria. For instance, perfect equivalence of the two terms is common to some United Nations documents, the most prominent being article 27 of the International Covenant on Civil and Political Rights, generally considered as the most protective provision of general international public law concerning minorities (in general). Article 27 provides: „In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” But here the numerical criterion is used. However, this identification no longer subsists when the ethnic group does not represent a numerical minority. In fact, an ethnic group which is numerically the largest, but politically the weakest represents a national minority in terms of decision-making power, although the situation becomes rarer recently (Flemish in previously unitary state of Belgium or Hutu in Rwanda before the genocide of 1994). Also, for instance, it is not common to speak of national minorities in Switzerland, where linguistic groups which take part in Government have no minority characteristics, although French, Italian or Rumanch ethnic groups do represent, each, a numerical minority at the level of the Confederation (while in some cantons they are the numerical majority). Only in specific cases can ethnic groups be synonym of national minorities from the numerical standpoint and the typical example is the situation of (neighbouring) states which are kin, each other, for small parts of their respective population. Mention has to be made here that this does not refer to the situation of neighbouring states which all host and share the same nation, while also integrating numerical minorities of halogen ethnic origin or indigenous peoples (North African States, also known as Maghreb or even Pan-Arabia).

Committee of their wish to receive support from the State for their efforts to preserve their linguistic identity and their artistic, cultural and religious traditions.” According to the official results of the last population census 1,226 individuals identified themselves as Csangos. In the documentation provided to the Advisory Committee by this group, the term used is Hungarian Csangos. In this context it worth mentioning that within the Csango community diverging opinions exist with regard to their definition as a separate ethnic group or as a religiously distinct group belonging to the Magyar national minority. “Authorities seem to privilege the view that Csangos form a separate (Catholic) religious group within the majority population, but do not have a distinct ethnic identity, therefore, in practise, members of this community have for several years been able to study Hungarian in public schools and the number of pupils concerned has increased (from 32 in 2001/2002 to 725 in 2005/2006).” ([http://www.coe.int/t/e/human_rights/minorities/2._FRAMEWORK_CONVENTION_\(MONITORING\)/2._Monitoring_mechanism/4._Opinions_of_the_Advisory_Committee/1._Country_specific_opinions/2._Second_cycle/PDF_2nd_OP_Romania_en.pdf](http://www.coe.int/t/e/human_rights/minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/2._Monitoring_mechanism/4._Opinions_of_the_Advisory_Committee/1._Country_specific_opinions/2._Second_cycle/PDF_2nd_OP_Romania_en.pdf) (last consulted on the 1st of August 2008).

There may also be ethnics groups which are not ethnic communities and this does not make them less national minorities and not only on numerical grounds. Thus, when common characteristics are no longer vital for the individuals and an ethnic group is no longer dominated by the instinct of preservation as a community, it tends to become a simple numerical minority, thus paving the way towards political minority; this merely makes easier the process of assimilation. The example of Arumanians or Cutzo-Vlahos in what used to be Istria under the Austrian Empire is a case in point. Immigrants might well be another example. Although (mainly economic) immigrants do not necessarily constitute ethnic communities in their host countries they pose the same challenges as any numerical and, indeed, national minority (Turks in Germany, Albanians in Switzerland, Romanians in Italy or Spain). Whether, in time, such individuals might become (or not) ethnic groups, eventually synonym of national minorities mainly from the numerical standpoint, depends on a great number of factors. Typically, such a transformation would require that migrants acquire the citizenship of their host State, since “as long as they have not done so, we cannot in any case speak of ethnic groups, while we can speak of minorities in conformity with article 14 of the European Convention on Human Rights” (Veiter, 1977, pp. 283).

However, postmodernism has had its influence in this area as well, and a new tendency seems to be developing in this respect. According to the Advisory Committee of the Council of Europe the Romanian legal definition of national minorities should “prefer a formulation that, rather than excluding certain potentially concerned groups altogether, would leave scope for the possibility that, in the future, additional groups would fall within the scope of domestic minority legislation as well as within the scope of application of the Framework Convention. The Advisory Committee further considers that while citizenship is a legitimate requirement in areas such as representation in Parliament, the general application of this criterion nonetheless raises problems in relation to guarantees linked to other key areas covered by the Framework Convention, such as non-discrimination and equality, and certain cultural and linguistic rights.” Therefore, “in order to avoid arbitrary and unjustified exclusions and to maintain the possibility of the future inclusion of other groups, including non-nationals where appropriate, in the application of the Framework Convention” domestic authorities “should ensure that a flexible and open approach to the scope of application the Framework Convention is reflected”; in other words, non-nationals (read non-citizens in West European meaning) may be considered as national minorities where appropriate.²

One has to acknowledge that in international public law there is no clear distinction between nationality, ethnic group and national minority, while at state level there are regulations which differ widely one from another as well as in time. But one has

² Second Opinion on Romania adopted on 24 November 2005 by the Advisory Committee of the Council of Europe ([http://www.coe.int/t/e/human_rights/minorities/2._FRAMEWORK_CONVENTION_\(MONITORING\)/2._Monitoring_mechanism/4._Opinions_of_the_Advisory_Committee/1._Country_specific_opinions/2._Second_cycle/PDF_2nd_OP_Romania_en.pdf](http://www.coe.int/t/e/human_rights/minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/2._Monitoring_mechanism/4._Opinions_of_the_Advisory_Committee/1._Country_specific_opinions/2._Second_cycle/PDF_2nd_OP_Romania_en.pdf) (last consulted on the 1st of August 2008).

also to take into account that nation is a concept highly charged with historical and political connotations, even before it came to bear also legal consequences. In fact, from a rationally legal perspective nation does not always equate with state, although nation-state is a widely used expression. Alike, national minorities and ethnic groups are not always synonyms, rather to the contrary.

II. Short history of the Romanian modern state and nation

Following attempts of national revolutions in 1848, Romanian Principalities of Moldova and Wallachia united in 1859, enthroned Karl von Hohenzollern as prince and adopted a modern and democratic (for those times) Constitution in 1866, winning “independence and sovereignty”, in accordance with the Treaty of Berlin, after a victorious war (1877-1878) against the Turkish Empire (in which they were - partially - supported by the Russian Empire). After the First World War, in 1918, the Romanian Kingdom united with former Habsburg provinces (Transylvania, Banat and Bukovina) and former Tsarist province of Bessarabia, where the numerical majority of the population was of Romanian ethnical origins, and became what is commonly known as Great Romania. This democratic state lasted until 1938 when, under pressure from two sides (Germany and Russia), Romania lost Bessarabia and part of Bukovina towards Russia, parts of Transylvania towards Hungary and fell under the ruling of various right extremists. After the Second World War, Romania got back part of Transylvania, but not Bessarabia and North-Bukovina, which remained under Soviet ruling. Until 1989 Romania was governed by communists, who emphasised a nationalistic discourse.

This short history seems to point rather to a Romanian state based on the *ethnic* concept of nation, meaning a people that fought for its rights (including self-determination) during the revolutionary period of 1848 and undertook a secession war from a broader state (Turkish Empire) in order to establish its own nation-state. However, the post-independence period seems to be governed by a different approach, based on a *civic* definition of the concept of nation, as the Romanian kingdom did not show irredentism after gathering its independence in 1878 and even neglected the fate of Romanians outside the country, although they were denied elementary (political) rights both in Transylvania and in Bessarabia. Moreover, it did not expand beyond its borders of the time and did not use the argument of ethnic Romanians living outside the frontiers of the nation-state. In other words, Romania gave higher priority to its interests as a state than to its interest as a nation (including Romanians living abroad) (Alexandrescu, 2001, pp. 154-155). This translated into genuine interest for political nationalism and less for cultural nationalism and could explain why vociferous elites (from poet Mihai Eminescu to internationally renowned historian Nicolae Iorga in the rank of “traditionalists”, or from literary important Nechifor Crainic to famous writers such as Mircea Eliade or Emil Cioran in the rank of “modernists” (Livezeanu, 2001, pp. 110) were ignored by or put aside from political power, although they were granted freedom of speech. It may also explain why even nowadays the Constitution makes clear room for a civic definition of the nation (article 4 defines Romania as homeland of all its citizens), while still imposing a duty on the state to support

Romanians living abroad for the development and expression of their ethnic identity (article 7). Preferential treatment of (ethnic) Romanians, even though only abroad, may be considered problematic in a civic nation (Tooperwien, 2001, pp. 47), but can be explained both historically and legally.

In fact, the switch of the Romanian nation from *ethnos* to *demos* can also be traced in legal documents. The foundational document which is the Statute developing the Paris Convention of 1858 only refers to the set-up of political institutions of the newly created Romanian state, and this despite the fact that it was not yet independent and it had not been yet internationally recognised. However, since this document is one of the best expressions of the aspirations to self-determination of the Romanian people it seems reasonable to assert that it only referred to ethnic Romanians. But the Constitution of 1866 is different: *octroyée* by Karl the 1st, who was “designated Ruler of Romanians through the will of the nation”, it specifically mentions that only Christians can be Romanians (article 7) and that “any Romanian from whichever state, regardless of his place of birth, if he can prove that he no longer enjoys foreign protection, can immediately get the full exercise of political rights through a vote of Legislative Bodies” (article 9). In other words, the Romanian *ethnos* is acknowledged as possibly wider than the recently created Romanian state, but it is only the Romanian *demos* that may express the will of the nation. The entire ambiguity of the current constitutional provisions is to be found already in this historical legal text. Later on, the civic definition of the Romanian nation is predominant in all constitutional texts.

Within the League of Nations several states were required to enter into Minority Guarantee Treaties or to give unilateral declarations to the same effect in order to be recognised and admitted to the League. The Preamble of the “Treaty on the protection of minorities” signed between Romania and the main Allied Powers in Paris on the 9th of December 1919 announced that “Romania wishes to offer safe guarantees of freedom and justice to all its inhabitants, without distinction on the account of their race, language or religion”. The text of the Treaty mentions the principles of non-discrimination as well as the respect of the individuality, personality and distinctive characteristics of citizens belonging to ethnic, religious or linguistic minorities, while Romania obliges itself to recognise via internal “fundamental laws” the provisions of the Treaty and not to alter such provisions without prior agreement from the majority of members of the Council of the League of Nations. Article 5 the 1923 Constitution makes reference to “equality of all citizens, irrespective of their ethnical origin, language or religion”. This civic definition of the Romanian nation amply profited the ethnic minority of Jews, who previously were not recognised the status of citizens. It was a rather indirect way of implementing article 7 of the Treaty, which automatically granted Romanian citizenship to all Jews living on the state’s territory and who could exhibit another one.

The same approach, based on equality of all citizens without differences related to ethnical criteria, has been followed by the Constitution of 1938, although otherwise this fundamental law was heavily influenced by the national-socialist conception of state and society. In fact, a bilateral “Agreement between Germany and Romania” has

been signed in Vienna on 30 August 1940, followed by the adoption on 21 November 1940 of a “Decree on the creation of the German ethnical group of Romania”. The purpose of these acts was to regulate the “co-habitation of Romanian citizens of German ethnic origin with the Romanian people, while recognising legal personality to this ethnical group as constitutive element of the Romanian State”.

After the end of the war, under the influence of the ideology coming from the Soviet Union, Romanian Constitutions addressed the issue in varied terms. While the first communist Constitution, of 1948, refers to nationalities as constitutive parts of the Romanian people (article 24 quoted above), the one of 1952 provides for “full equality between national minorities [...] and the Romanian people”, at the same time guaranteeing them “free use of maternal language, education at all levels, books, newspapers and theatres in maternal language”. Similar provisions are to be found in the last communist Constitution, adopted in 1965. In all cases, Romanian citizens are to be treated equally, thus *demos* formally prevailing over *ethnos*.

The current Constitution, adopted in 1991, has been revised in 2003. While protection of national minorities has seen significant improvements³, nothing was changed with regard to the protection granted by the state to Romanians (*ethnos* or *demos*) living abroad.

III. Protection of nationals by their kin-state

As mentioned earlier, nation does not always equate with state, particularly when *ethnos* does not equate *demos*, and ethnic groups are not always synonyms of national minorities, except in the case when an ethnic nation is spread across several (neighbouring) states and the numerical criterion is used. In such a specific situation national minorities are confronted with the complex situation where their integration

³ The second Advisory Opinion on Romania, adopted on 24 November 2005 by the Advisory Committee in charge with the monitoring of the implementation of the Framework Convention for the Protection of National Minorities (legal instrument of the Council of Europe) notes: “Since the adoption of the Opinion of the Advisory Committee in April 2001 and the Resolution of the Committee of Ministers in March 2002, Romania has continued to pay particular attention to the protection of national minorities. Important steps have been taken to consolidate and build upon Romania’s existing legislation and practice in the field of minority protection, while constantly involving the representatives of national minorities in this process. On the legislative level, these steps have resulted in new constitutional and legislative provisions in areas of direct concern to persons belonging to national minorities. Increased efforts have also been made to develop an adequate legal and institutional basis for preventing and combating manifestations of discrimination, intolerance and hostility based on ethnicity. In addition, a Draft Law on the Status of National Minorities is currently being examined by Parliament. Special measures adopted in order to promote the full and effective equality of persons belonging to national minorities have produced results in various fields, including education, the use of minority languages in the public sphere, and participation in decision-making. Representatives of national minorities acknowledge the existence of a social climate favourable to tolerance and intercultural dialogue and agree that progress has taken place in this regard.”

into the state(s) depends on pleading for both *undifferentiated* treatment based on the formal link of citizenship and *differentiated* treatment based on the status of numerical minority. However, all these complex relations refer to the state of which persons belonging to national minorities are citizens and pertain to its domestic area and sovereignty. The (eventually preferential) treatment which reserves them their kin-state pertains to the international area and has to stand by international public law.

The approach taken by international public law with regard to the protection of national minorities has varied widely between the creation of the concept (and of the League of Nations) and nowadays. Because new states were created “on the residuals of multinational empires which had deceased following the First World War” (Ermacora, 1983, pp. 258 et seq.) their respective populations could not fulfil the criterion of ethnic purity and necessarily included numerical minorities of other nationalities/ethnic groups. In order to equilibrate the situation, the Allied Powers (which had won the war) created an international protection of national minorities under the responsibility of the Council of the League of Nations. The general outcome of this system of protection being far from commendable (Sofronie, 1940, pp. 105 et seq.), after the Second World War at international level emphasis was put mainly on the protection of individual rights of human beings, with the added corrective of the right to self-determination of peoples. Thus, over the last century, the accent moved from primarily international mechanisms, which required implementation at national level for the protection of specificities of national communities, towards national protection of individual rights of human beings based on the principle of non-discrimination and complemented by international guarantees, when and where deemed necessary. The new approach has the double advantage of respecting the formal principle of equality while being able to deal with the variety of situations existing within states’ populations (ethnic purity, multiple nationalities, indigenous peoples etc.). However, international mechanisms of protection continued to exist even under the new approach, as safeguard against possible defections of national systems of protection.

In this context, specific treatment of nationals living abroad by their kin state represents a relatively new approach, which combines domestic protection with international mechanisms. Therefore, design of such a tool needs particular attention, including for domestic law of the host state of respective national minorities and to existing customs and rules of *jus cogens* in international public law.

1. Preferential treatment of national minorities by their kin-state

“In the last decade, Hungary (as kin-state) accorded great importance to the fate of Hungarians living outside its borders. This grew into one of its main foreign policy goals, playing an important role in Hungary’s bilateral and international affairs” (Horvath, 2000-2001, pp. 279). Impetus could be noticed with regard to measures fostering links of Hungarian minorities living in neighbouring states with their kin state and encouraging their sense of belonging to the Hungarian nation defined as an ethnic community. In parallel, Hungarian authorities initiated a set of policies intended to ensure that Hungarian minorities living in neighbouring countries do not

wish to move to Hungary and they are properly represented at all institutional levels in their host state. On 19 June 2001, the Hungarian Parliament passed the “Law on Hungarians Living in Neighbouring Countries” which aimed to provide economic, social, cultural and educational assistance to people of Hungarian identity who are citizens of neighbouring countries (Austria excepted) and who consider themselves as persons belonging to the Magyar national, cultural and linguistic community. Although this law did not constitute a novel instance of treatment granted by a state to individuals who have links of kinship, it has aroused anxiety in some neighbouring countries, mainly due to the unilateral approach taken by the Hungarian State and its definition of the concept of nation.

In its “Report on the preferential treatment of national minorities by their kin-state” the European Commission for Democracy through Law (Venice Commission) concluded that “Responsibility for minority protection lies primarily with the home-states. Kin-states also play a role in the protection and preservation of their kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong. However, respect for the existing framework of minority protection must be held as a priority. In this field, multilateral and bilateral treaties have been stipulated under the umbrella of European initiatives. The effectiveness of the treaty approach could be undermined if these treaties were not interpreted and implemented in good faith in the light of the principle of good neighbourly relations between states. The adoption by states of unilateral measures granting benefits to the persons belonging to their kin-minorities, which in the Commission’s opinion does not have sufficient *diuturnitas* to have become an international custom, is only legitimate if the principles of territorial sovereignty of states, *pacta sunt servanda*, friendly relations amongst states and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected.”

In fact, several were the points of criticism brought to the initial version of the “Law on Hungarians Living in Neighbouring Countries”: its unilateral approach in disrespect of the neighbours’ sovereignty, its definition of the concept of nation, its inconsistencies (with regard to the exclusion of Austria out of neighbouring countries and inclusion of family members having no Magyar kinship, as well as the discrimination operated with regard to Magyars living abroad elsewhere than in neighbouring countries to Hungary) and, finally, the involvement of non-governmental organisations of kin-minorities created within host-states in its implementation. The OSCE High Commissioner for Minorities pointed out that unilateral measures taken by states to protect national minorities living outside their jurisdiction could cause tension and should be avoided, while, in its 2001 Regular Report on Hungary’s progress towards accession, the European Commission considered that some provisions of the law in question conflicted with the conception of the protection of minorities prevailing in Europe. In the face of international criticism, Hungarian authorities embarked on consultations with neighbouring states on the implementation of the law and, eventually, revised it.

As a consequence, on the 23rd of June 2003, the Parliamentary Assembly of the Council of Europe adopted “Resolution 1335 (2003) on the 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” stating, *inter alia*, that responsibility for minority protection lies primarily with host states and existing multilateral and bilateral framework of minority protection, including European norms, must be held as a priority, while the emergence of new and original forms of minority protection, particularly by their kin-states, constitutes a positive trend in so far as they can contribute to the furthering of diversity in Europe. However, the Resolution took note that neighbouring countries to Hungary felt that “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*” and “up until now there is no common European legal definition of the concept of *nation*”.

As a follow up, on January 26, 2006, the Parliamentary Assembly of the Council of Europe adopted “Resolution 1735 (2006) - the concept of nation” where it asserts that in various European states the term nation may stand either for *ethnos*, either for *demos*, or for both, while the concept of national minorities has a merely numerical meaning, without any political connotations, although it is often a direct consequence of “changes in state borders”. It also notes that “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”. Therefore it recommends that the Council of Ministers invites member states of the Council of Europe:

- to promote in their national legislation the recognition of the cultural rights of minorities;
- to reject any attempt to promote the ethnic purity of the state or to organise the territory and the administration of the state on an ethnic basis, with the exception of affirmative measures which aim to achieve a fair representation of the national minorities in their country’s administration, at central and local level;
- to stop defining and organising themselves as exclusively ethnic or exclusively civic states;
- and to draw up guidelines on procedures for developing relations between a state and the minorities residing in a different state – mainly in its neighbourhood.

As noted before, ethnic minorities do not always equate national minorities and the case of (neighbouring) kin states is particular; Hispanic, Jewish or Magyar minority in, say, the United States of America are not the result of “a change in state borders”. Since Georg Jellinek (Jellinek, 1914, pp. 394 et seq.) legal science defines states using the tool called “theory of three elements”, namely “population, territory and sovereignty”, which has been confirmed not only by other scholars, but also by state practise. Changes in a state’s population may result not only from changes in one of its elements, territory, but also from changes in the other two, sovereignty and population itself, and we have seen that migration may bear important consequences in this respect. Besides, national minorities is a concept highly discussed at political level since the Parliamentary Assembly acknowledges that its origin, namely “the term *nation* is

deeply rooted in peoples' culture and history and incorporates fundamental elements of their identity". And the objective numerical criterion is not the only, neither the most important for its understanding. Also, there are national minorities which do not enjoy a kin-state and this does not make them less ethnic groups, subject of protection under the Framework Convention of the Council of Europe, Roma being the best example. Moreover, only exceptionally state populations are ethnically pure so that at least one of the so-called "general trends" noticed by the Parliamentary Assembly with regard to the evolution of nation-states seems rather difficult given the scarcity of its prerequisite. As to the second one, the latest evolutions of both domestic and international law confirm that protection of collective rights of national minorities is not envisaged. Paragraph 31 in the Explanatory Report of the Framework Convention on the protection of national minorities states that article 1 "refers to the protection of national minorities as such and of the rights and freedoms of persons belonging to such minorities. This distinction and the difference in wording make it clear that no collective rights of national minorities are envisaged (see also the commentary to Article 3). The Parties do however recognise that protection of a national minority can be achieved through protection of the rights of individuals belonging to such a minority."⁴ Members of the Council of Europe set the protection of national minorities as a goal best achieved through conferring effective protection to individual human rights of persons belonging to such groups (Vukas, 1991, pp. 504). In this context it seems somewhat difficult to clearly assert whether the Parliamentary Assembly makes any distinction at all between nationalities co-existing in a multinational state and national minorities in a state where numerical majority belongs with a different ethnic group. In fact, the paragraphs laying foundation of the Resolution mainly underline one of the two possible definitions of the term nation, placing it in a highly specific historic, geographic and political context. However, the recommendations to the Council of Ministers have a broader vocation and member states of the Council of Europe focused on these last ones.

The answer provided by the Council of Ministers on the 28th of February 2008 stated that:

- a common definition of the concept of nation is not necessary for the effective implementation of Council of Europe standards pertaining to national minorities;
- "promotion of ethnic purity" has no place in a democratic society, while efforts need to be made to facilitate contacts between all persons, irrespective of their ethnic, cultural, linguistic or religious identity,
- and, in order to be able to decide on the advisability of elaborating guidelines on procedures for developing relations between a state and kin minorities residing in a different state, including in neighbouring states, Council should first ask for an opinion on the potential added value of such guidelines given that, according to Article 18 of the Framework Convention, „Parties shall endeavour to conclude,

⁴ <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN017004.pdf> (last consulted on the 1st of August 2008).

where necessary, bilateral and multilateral agreements with these states in order to ensure appropriate protection”.

In other words, effective protection of national minorities does not depend on the ethnical or civic definition of the nation and kin-states are encouraged to promote international cooperation and not ethnic purity in all their approaches of the issue, including in their relations with neighbouring countries.

2. Support for the development of nationals living abroad

It is important to underline that the Hungarian law on the preferential treatment of Magyar minorities in neighbouring countries was not a novelty. In fact, most of its neighbouring countries display similar constitutional or legal provisions. Romania, Slovenia, Croatia, Macedonia, Ukraine have Constitutions which include specific references to nationals outside kin-state borders. Austria, Bulgaria, Italy, Romania, Russia, Slovakia or Slovenia have adopted domestic legislation regarding nationals living abroad. However, the underlying idea in most of these laws was support for nationals regardless their current settlement outside national borders rather than preferential treatment of national minorities in neighbouring countries. Furthermore, such legal provisions only occasionally had extraterritorial effects, most of them referring to actions of support taken by the kin-state on its own territory. But what they all underline is the ethnical link between individuals declaring themselves of a specific descent or origin and another nation-state than their host. In other words they all presuppose the ethnic definition of the concept of nation.

The Romanian Constitution adopted in 1991 contains complex and, at times, ambiguous provisions in this respect. Article 2 declares that “national sovereignty shall reside within the Romanian people”, while article 4 puts emphasis on the unity of the Romanian people and the solidarity of its citizens, declaring that “Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin.” So far, the civic definition of the Romanian nation seems to prevail, but article 7, entitled “Romanians living abroad” clearly uses *ethnos* when providing “The State shall support the strengthening of links with the Romanians living abroad and shall act accordingly for the preservation, development and expression of their ethnic, cultural, linguistic and religious identity, with the observance of the legislation of the state whose citizens they are.” All the more since article 17 regulates “Romanian citizens while abroad”: “Romanian citizens while abroad shall enjoy the protection of the Romanian State and shall be bound to fulfil their duties, with the exception of those incompatible with their absence from the country.”

The Law adopted in 1998 regarding the support granted to „Romanian communities from all over the world” clearly specified in its first article that it was meant to support „Romanian communities on the territory of other states”, i.e. ethnic Romanians not having lost their feeling of community, irrespective of the fact that individuals were no longer holders of Romanian citizenship. But the following Law, adopted in 2007 and published in Official Gazette no. 792/2007, concerned “support for Romanians

living anywhere abroad” instead of ethnic “Romanian communities”, thus inspiring itself from the very ambiguity of the title of article 7 in the Constitution. Indeed, in the process of revision of the Romanian Constitution (2003) voices were raised in support of a single constitutional provision regarding Romanians abroad, be them citizens who immigrate, temporarily or not, or individuals no longer holding Romanian citizenship. Over the last decade Romania being confronted with the phenomenon of migration (both emigration and immigration) to a greater degree than in the past, awareness and sensitivities inevitably raised. Be it as it may, no changes were brought to relevant constitutional articles and ethnic criterion in dealing with Romanians living abroad remained prevalent.

However, the law adopted in 2007 is an illustration that international (mainly European) developments in the treatment of national minorities by their kin-state were not in vain. Thus, the Preamble of this piece of legislation makes good reference to the Framework Convention on the protection of national minorities of the Council of Europe, to the “Report on the preferential treatment of national minorities by their kin-State” drafted in 2001 by the Venice Commission and to the “Declaration for Sovereignty, Responsibility and National Minorities” of the High Commissioner for Security and Cooperation in Europe of the same year. Its second article duly enumerates all principles underlined in the 2001 Report of the Venice Commission: territorial sovereignty, good neighbourhood, *pacta sunt servanda* and non-discrimination in the protection of fundamental human rights. Its third article ensures that all its provisions are implemented on the basis of agreements and programmes concluded with states where beneficiaries of the law exist. But in its first article, the law declares as beneficiaries “ethnic Romanians, as well as those who belong to the Romanian cultural vein, living outside the borders of Romania, and who endeavour to maintain, promote and assert their cultural, ethnical, linguistic and religious identity”. The scope of this provision is enlarged by article 4, which states that individual rights such as free access to cultural institutions or non-discriminatory access to education, scholarships and professional training are granted also to “any person who studies or teaches abroad in Romanian language, irrespective of its ethnic origin”. The 2007 Law on the support for Romanians living anywhere abroad is clearly a statement of the ethnic Romanian nation and one which takes into account relevant international treaties and other documents.

But evolutions at international level in 2007, some of which involved Romanian immigrants, particularly in Italy, have determined Romanian authorities to adopt a different approach. Considered responsible for a big proportion of petty crimes and even some serious crimes (murders) committed in Italy over the past years, Romanian immigrants started to face not only a hostile Italian public opinion, but also a harsher attitude from Italian authorities. The latest change of government in Italy has only added more in the same direction. The second destination of recent Romanian emigration, Spain, started also to give signs of worry with regard to the involvement of Romanian immigrants in petty crimes committed on its territory. In reaction, the Romanian Government proceeded to closer cooperation with law enforcement agencies in all states where Romanian emigration is relatively strong, but also revised the domestic law dealing with “Romanians living abroad”.

Emergency Ordinance no. 10 was adopted in March 2008 (and published in Official Gazette no. 131/2008) in order to revise the law of 2007 with the dual purpose to „enhance support for the activities of representative organisations of ethnic Romanians in their relation with authorities in the states of which they are citizens” and to prevent „the negative consequences of the implementation of this law on the ethnic Romanians and *Romanian citizens* (mine emphasis) who expect the support of the Romanian state in their effort to maintain Romanian identity”. Consequently, beneficiaries of support from the Romanian state are now “persons who freely assume the Romanian cultural identity – persons of Romanian origin and those who belong to the Romanian linguistic and cultural vein and who live outside Romanian borders”, but also “persons belonging to national minorities, linguistic minorities or ethnic autochthon groups existing in states neighbouring Romania, irrespective of the ethnic name they use” and “immigrant Romanians, irrespective of the fact that they have conserved or not Romanian citizenship, their descendents, as well as Romanian citizens residing abroad who work outside the territory of Romania”. The new legislative framework is clearly expanding its scope and objectives, but in a way which is both compatible and strange with regard to relevant documents issued by the Council of Europe. While maintaining basic principles and the mechanism of implementation already in place, the new provisions expand the protection previously granted to ethnic Romanians to various other categories of persons. Thus, not only national minorities are included, according to Resolutions 1335 (2003) and 1735 (2006) of the Council of Europe, but also autochthon groups which were not concerned by these documents. It may be interesting to note that some of the communities directly concerned by these provisions have the status of national minorities on the territory of Romania (e.g. Aromanians), while some others are not recognised this status in their respective host-states (e.g. Cutzo-vlahs or Vlahos in less cases). As for immigrants, Romania attempts to put into practise advice it has received from the Advisory Committee of the Council of Europe, only in a reversed way: if citizenship is considered “to raise problems in relation to guarantees linked to key areas covered by the Framework Convention, such as non-discrimination and equality, and certain cultural and linguistic rights” a “flexible and open approach” is ensured via including Romanian citizens living and working abroad in the scope of protection offered by the Framework Convention on national minorities. This very broad legal definition of “Romanians living anywhere abroad” questions the dogma of the *ethnos v. demos* definition of the concept of nation and seems to open a new approach with regard to treatment reserved to nationals by their kin-state, approach which goes beyond mere national minorities and includes other types of individuals sharing not only common ethnic origins, but also language, religion, culture and even citizenship.

IV. Instead of conclusion

Protection of national minorities is, above all, an internal issue of the State. Protection of nationals by their kin-state is, above all, an international issue. In extreme cases it may threaten international stability if secessionist claims of national minorities are supported by their kin-States and eventually succeed, in contempt of

international public law (e.g. recognition of Kosovo, particularly within the European Union). In any event it should involve careful design and due consideration to both individuals and states concerned. Last but not the least brief mention must be made of an idea which has become recurrent in the post-modern discourse regarding the state, namely that its role is obviously decreasing under the coordinated attack of globalisation at international level and protection of individual rights at internal level. As corollary, this has been considered opening new perspectives and possibilities for the accomplishment of requests coming from national minorities. But let us not fall into the trap: neither the predisposition of the contemporary state to participate in the development of international law, and thus to internationalise its constitutional legal system, nor the democratic idea, which contributed to the constitutionalization of international public law, should not conceal the reality that the state is and remains the common denominator of all communities of human beings (populations, peoples, nations, minorities) and the unique guarantor of their human rights.

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