



JAN KUDRNA

Karolio universitetas, Praha, Čekija  
Charles University, Prague, Czech Republic

# KELETAS PAMAŠTYMŲ APIE VALSTYBĖS MOKSLĄ IR KONSTITUCINĘ SĄVOKĄ „TAUTA“

Some Reflections on the State Science  
and Constitutional Term “People”

**In memory of a valued friend, prof. Gediminas Mesonis**

## SUMMARY

This article is devoted to considerations of what the term “people” means within constitutional law and science of state. It is typical feature of constitutional law as a legal discipline that it does not itself define the terms it uses. Either it leaves their definition to the implementing laws, or this service is rendered to it by doctrine in the form of typically science of the state, or in some cases the necessary interpretation is provided by the decisions of the courts, typically the Constitutional Court or the Supreme Court. The term “people” is subject to doctrinal interpretation. However, even this is far from uniform. The present article demonstrates many of the paradoxes that anyone dealing with the concept of “people” will encounter. The view that the people, who are the source of power, are the citizens of the state is highly formalistic. It does not consider that many citizens of the state are completely passive and do not influence public life in any way. On the contrary, it excludes foreigners living in the territory of the state and participating in the shaping of public life. And it ignores the fact, that exercising many of the political rights granted to everyone could be more influential than using the individual right to vote. Even in the case of a formalistic interpretation based purely on citizenship, other issues need to be resolved. Are citizens who do not (yet) have the right to vote part of the people? And are citizens who permanently live abroad and who, for example, have never visited the territory of the state and do not share its fate part of the people? The author inclines to the view that foreigners who share the destiny of the state together with the citizens and participate in its maintenance should also be considered part of the people. They should be given access to the right to vote.

RAKTAŽODŽIAI: piliečiai, tauta, teisės, viešasis gyvenimas, dalyvavimas, įtrauktis, užsieniečiai, svetimšaliai.

KEY WORDS: citizens, people, rights, public life, participation, inclusion, foreigners, aliens.

## SANTRAUKA

Šiame straipsnyje svarstoma, ką valstybės konstitucinėje teisėje ir moksle reiškia sąvoka „tauta“. Konstitucinei teisei, kaip teisės disciplinai, būdinga tai, kad ji pati neapibrėžia savo taikomų terminų. Tuos terminus nustato įgyvendinami įstatymai, kartais pati konstitucinė teisė, remdamasi doktrina – valstybės mokslu, o kai kuriais atvejais reikiamus aiškinimus pateikia teismų, pvz., Konstitucinio Teismo arba Aukščiausiojo Teismo, priimti sprendimai. Sąvoka „tauta“ gali būti aiškinama pagal doktriną. Vis dėlto net ir tokie atvejai toli gražu nėra vienodi. Šiame straipsnyje nurodyta daugybė paradoksalių situacijų, su kuriomis susiduria kiekvienas asmuo, besigilinantis į sąvoką „tauta“. Požiūris, kad žmonės, kurie yra valdžios šaltinis, laikytini valstybės piliečiais, yra labai formalus. Vadovaujantis tokiu požiūriu, neatsižvelgiama į tai, kad daugelis valstybės piliečių yra visiškai pasyvūs ir nedaro jokios įtakos viešajam gyvenimui. Be to, šis požiūris neapima užsieniečių, gyvenančių valstybės teritorijoje ir dalyvaujančių formuojant viešąjį gyvenimą. Taip pat neatsižvelgiama į tai, kad, naudojantis daugeliu kiekvienam piliečiui suteiktų politinių teisių, galima būtų daryti didesnę įtaką, nei naudojantis asmenine teise balsuoti. Net ir apsiribojant formalioju aiškinimu, grindžiamu tik pilietybe, reikia išspręsti kitus klausimus. Ar sąvoka „tauta“ apima piliečius, (dar) neturinčius teisės balsuoti? Taip pat ar piliečiai, nuolat gyvenantys užsienio šalyje, niekada nesilankę savo valstybės teritorijoje bei nesidaliję jos likimu, priklauso tautai? Autorius laikosi nuomonės, kad užsieniečiai, kurie kartu su šalies pilietybę turinčiais piliečiais dalijasi valstybės likimu ir dalyvauja ją išlaikant, taip pat turėtų būti traktuojami kaip tautos dalis. Jiems turėtų būti suteikta rinkimų teisė.

Constitutional law is a branch of law which, unlike other branches of law, does not define the concepts and institutions it deals with and regulates in its codified form. In the search for their meaning, there is no room for interpretation by legal methods, even the most sophisticated ones (Žák-Krzyžánková 2019: 37-56). What is necessary is an explanation of the concept itself. This service to constitutional law is provided by other social science disciplines, in the first place – in the Central European area formerly influenced by the German and Austrian legal tradition – by state science (Reschová 2019: XIX). Alternatively, the regulation of the relevant constitutional law concept will occur through case law. An example is the ruling of the Constitutional Court of the Czech Republic of 13 September 1994, file no. Pl. ÚS 9/94, which brought an explanation or definition of the term “citizenship”.

One of the many constitutional concepts not defined either by codification or by case law is the concept of “people”. Its definition is therefore still in the hands of academics. Yet the outcome of this doctrinal effort is highly ambiguous (Preuss 2015: 3–9). This is even more interesting because it is one of the fundamental concepts on which contemporary constitutionalism is built and without which one cannot imagine a modern theory of the state (Maršálek 2022: 273), as well as republicanism and democracy. Let’s remind in this context Lincoln’s words that democracy is government of the people, by the people and for the people.

In these considerations it is necessary to distinguish between the “population” of the state and the “people”. Some authors (e. g., F. Weyr, J. Filip, J. Svatoň) use these terms interchangeably (Kindlová 2019: 79). However, it is questionable whether this is a linguistic or editorial inconsistency rather than a concep-

tual intention. For there is a difference between population and people. The term "population" is broader, has a demographic rather than a legal basis, and includes all those who are relatively permanently resident in the national territory. The term "people", then, is usually narrower and consists of that part of the population which is the subject of governance in the primary sense and is endowed with decision-making powers.

The people are also the "source of power", at least in modern constitutional states, especially republics, but not only in them. Let's remind here the preamble to the 1978 Constitution of Spain stating the Spanish people exercising their sovereignty by, among other things, the creation of a constitution, and its approval by referendum. According to Article 57(3) of the Constitution, the sovereignty of the Spanish nation is also exercised in the event of the extinction of the ruling dynasty, when the power to decide on the occupation of the throne is in the hands of an elected parliament. The sovereignty of the nation is also reflected in Article 57(4) of the Constitution, whereby the conclusion of a marriage without the consent of the King and Parliament leads to the loss of succession rights.

In this context, the identification of the people with the citizens of the state is offered. However, when it comes to the definition of "the people" in relation to either the concept of "population" or "citizens", the situation is in many ways more complicated, and we again encounter a number of ambiguities.

If we start from the premise that the people are what is the source of state

power, we find very soon that public life in the state are influenced by the people rather than just by the citizens. This conclusion naturally holds if we consider power and its source in a broad sense. That is, if we consider the broad forces affecting the bearers and executors of state power on the one hand and the spontaneous social processes on the other. Here it is clear that outsiders can exert their influence, not only from among the population, but also those who have no legal relationship with the state. This is even more valid since political rights and their exercise are not currently limited to state citizens.

The civic character of political rights is preserved in contemporary Europe only in the case of the right to vote (both types), the right to resistance (if recognised), the right to hold (unelected) public office and, in a few countries, the right to associate in political parties. However, in most countries, not only in Europe, nothing currently prevents foreigners, whether they are relatively permanently settled in the territory of the state and thus form part of the population or have no closer relationship with the state, from, for example, convening meetings in the territory of the state, participating in them, expressing their views and persuading others of them, demanding information about the activities of the public authorities, drawing up petitions and other similar activities. For example, to broadcast radio or television, to publish a newspaper etc. Activities which have in common that they influence public life in the state and in many cases in a more fundamental way than some citizens do by participating in elections.

So, we are getting to the point that the main criterion defining a people is usually the right to participate in governance. This brings us back to the above category of civil rights and the fact that the people are citizens of the state.

However, arguably not all citizens of the state constitute the people, because not every citizen has the right to participate in the governance of public affairs by exercising a public function or choosing its holders. In the Czech Republic, only citizens who are at least 18 years old have the right to vote. In the case of the right to be elected, the situation is further complicated because there still exists an age limit of 21 and 40, which excludes other and other age groups of citizens from the people. In the case of the right to hold (non-elected) public office within the meaning of Article 21 of the Charter of Fundamental Rights and Freedoms (1991), we encounter another age limit of 30 years. However, we have only exhausted the minimum age limit. There are also maximum age limits, namely 65 years in the case of civil service and 70 years in the case of holding a judicial office.

However, the most educated citizens are also aware of the age limit of 60, after which conscription ceases. Thus, as Dr. Jiří Hřebek states in exaggeration, a person in the Czech Republic is a full citizen only at age between 40 and 60. After that, however, only about a quarter of the citizens of the Czech Republic are part of the people... The same is true in other European countries.

This result is somewhat contrary to the principles of democracy and civic

equality. It also presumably considers that the majority of the people do not want to hold any public office and limit themselves, if at all, to the right to vote. That is why it is usually only the lower limit of 18 years of age and the right to vote that is mentioned in discussions on this topic. Such argumentation excludes not 75% of the citizen population of the country, but only about 18%. The counterargument, of course, is that the exercise of political rights affecting the outcome of elections is not only not limited by citizenship, but often not even by age. Thus, even citizens under the age of 18 can participate in the exercise of power in the state, albeit indirectly, and are therefore part of the people. Note, however, that the same is true for non-citizens, and if we draw citizens under 18 into the people in this way, we also draw foreigners in, regardless of their place of residence and relationship to the state. It will not improve the situation much, and the ambiguity will not be removed by the possible argument that a minor citizen, unlike a foreigner, is "in expectation" of full participation in the people. Indeed, it cannot be ruled out that even foreigners, especially those residing in the territory of the state, will become its citizens. In some cases, they will thus acquire the full rights of members of the people earlier and more quickly than juvenile citizens.

This offers a certain reduction of the view of what the people are and who is part of them. The people, as the source of all power, exercise it primarily through elections, in a system of representative democracy, and referendums, in a sys-

tem of direct democracy. Then the people would typically be made up of state citizens entitled to vote or vote in a referendum. However, even this procedure is not entirely unproblematic. It ignores the existence of obstacles to the exercise of the right to vote, or to vote in a referendum. Those who are prevented from exercising their vote and thus participating in the creation of the general will of the people are not, at the moment, part of the people. The position of these citizens, although formally different from that of citizens under the age of 18, who do not have the right to vote at all, is materially identical. As a result, they are excluded from the people for as long as the individual barrier exists.

If we do not accept this reduced view, we could argue that even a citizen in quarantine or isolation, or a citizen limited in his or her right to vote and be voted for, can influence the decision-making process in society and thus participate in the will of the people and its formation. Of course, we must then accept that all foreigners politically active in the state are also part of the people. Or even outside it...

The situation is indeed ambiguous and leads from paradox to paradox. But this is not the end. It seems that the above assertion that the people are a subset of the population of the state may not even be true. Let's remind ourselves that M. Kindlová, for example, refers to the population of all those who are relatively permanently residing on the territory of the state and thus are state forming subject (Kindlová, 2019: 79). But how to deal with the citizens of the state

who do not reside on its territory at all? It seems that in states where they are endowed with the right to vote, they are part of the people without being part of the population of the state. At least in the sense how population as state forming subject is usually defined with reference to G. Jellinek. He defines the population of a state as the people permanently settled in the territory of the state, who are the source of state power and are subject to that power.

Thus, in certain circumstances, but not exceptional, individuals who have never been to the territory of the state and will never visit it may be part of the people. Or they may visit the territory of the state but do not remain there for a long period of time. In their case, another paradox arises, because they participate in decisions that do not affect them.

This contradicts one of the key legitimating principles of the American Revolution and the subsequent War of Independence, which are one of the fundamental sources of inspiration for contemporary (Western) constitutionalism. The final rupture between the American settlers and Britain occurred under the slogan "no taxation without representation".

Of course, one can turn this slogan around and ask whether it is acceptable, if people, even citizens, who are not affected by the common decision, should be entitled for example decide on taxes?

Another connection can be seen in the link between citizens' decision-making rights and their duties, specifically their conscription. In the past, many countries of the world demanded young citizens to serve in the army, even during war

times, but they were not granted the right to vote or to be elected. Many times, this situation was caused by age limit for election law, which was higher than age limit for conscription. The problematic nature of this practice is illustrated by the words of William F. Goodhue, a Wisconsin veteran of the American Civil War, who stated that a boy old enough for military service should be old enough to vote (Horton 2020).

Ideally, anyone who has participated in the destiny of the relevant state community for a relatively long period of time and shares its fate for better or worse would be considered part of the people. In practice, however, this is far from being the case. The requirement of active citizenship, in which the state required the citizen to fulfil certain duties, has essentially fallen away for the moment, not only in our region. Conscription seems to have ceased to exist. Even if in this case it is the proverbial “out of sight, out of mind”, this does not change the fact that an unrealised duty or obligation weakens.

A person usually becomes a citizen of the state without any special contribution of his or her own; in the vast majority of cases, one is born into it. Continued integration within the European Union has also led to lowering of the exclusivity of state citizenship.

Returning to the concept of the people, a formalistic approach also prevails in practice in the Czech Republic in relation to this concept. In principle, the people are those who have the right to vote. That is to say, citizens of the state over the age of 18. On deeper reflection,

this brings with it all the paradoxes outlined above.

The people of the Czech Republic explicitly decided on their self-definition three times. For the first time, this was done through Act No. 39/1969 Coll. on the acquisition and loss of citizenship of the Czech Socialist Republic. This was the first time, during the federalization of Czechoslovakia, that the people, i. e., the state-forming subject of the Czech state, were formally established, albeit then within the Czechoslovak federation. The decisive criteria at that time were affiliation to the Czechoslovak state, and therefore to its people, and affiliation to the territory of the Czech lands, determined primarily by birth. In the future, the decisive criterion was blood relationship to the citizens. If at the time of the federalization of the Czechoslovak state a Czechoslovak citizen was living abroad and had not been born on the territory of the republic and had no permanent residence, he did not automatically become a member of its people. In the context of the prevailing political conditions, citizens located abroad were only a potential part of the people; they could exercise their power only on the territory of the state.

For the second time, the people of the Czech Republic decided on their form at the time of the division of the federation and the establishment of the independent Czech Republic. The Constitution of the Czech Republic suggests an answer to the question of who is “the people of the Czech Republic”. In its preamble, it refers to the citizens of the Czech Republic, but only to those “in Bohemia, Moravia and

Silesia". Who else but the people give themselves a constitution? And this people has defined itself in truly Jelinekian terms, as citizens within the territory of the Czech Republic.

For the third time, the people of the Czech Republic decided on their form on 18 April 2002 with the adoption of Act No. 171/2002 Coll., which introduced the possibility of voting in elections to the Chamber of Deputies from abroad. Formally, of course, citizens residing abroad were never excluded from the people, but in fact their possibilities of participation were expanded in 2002, not to mention the symbolic significance of this step. Discussions about further facilitating the possibility for citizens abroad to exercise their right to vote have continued and have been very intense in recent years.

Here we can see a certain contrast and a shift in the view of this issue over the past 30 years of the existence of the Constitution of the Czech Republic and over 50 years of modern Czech statehood.

As can be seen, the answer to the question of who the people are is ambiguous from a theoretical point of view, and so is the attitude of the people themselves towards their own self-definition. There is no clear and firm position on this matter in terms of agreement on a fundamental principle. Various solutions are open to discussion.

Under these conditions, it would be worth opening a discussion on whether the concept of the people should be expanded to include, specifically, foreigners who have been granted a permanent residence permit by the Czech Republic.

Or at least part of this group, for example, citizens of the European Union. In both cases, it could be provided that they actually had to reside in the Czech Republic for a minimum period, for example, five years, and had to be insured in public insurance schemes.

Several reasons can be found to support such a discussion. The Czech Republic is one of the countries that have introduced public health insurance systems with compulsory participation for citizens and foreigners with permanent residence, and in addition for a few other groups of persons. In the case of social insurance, compulsory participation is a matter linked to the economic activity of an individual, whether he or she is an employee or a self-employed person. Permanent resident aliens residing in the Czech Republic territory are also subject to tax obligations. Contributions to health insurance are in the nature a tax. In the case of permanent residents fully participating in these systems, they are taxed without being able to participate in the decisions of their scope. Including them in the decision-making process would, on the contrary, be consistent with the principle "no taxation without representation".

Another reason for such a step may be that many foreigners participate more actively in society than many nationals. Thus, while the former often participate in the formation and functioning of the community, the latter often do not. However, even the less socially active permanent resident aliens are as much or as little a part of the community, whether local or national, as the state citizens. In

other words, they live with us and share our destiny, they also have a stake in it, and the question is why shouldn't they also have a direct political voice in it? It is more difficult to explain why this right is also enjoyed by citizens who have often never visited the territory of the state and are not part of the community and do not share its destiny.

The strict conditions of the Czech Republic Aliens Act (1999) may also play a role. It is not easy to obtain permanent residence in the Czech Republic. If we focus on matters of principle relating to the territory and population of the Czech Republic, the foreigner must have a long-term, genuine link to the territory of the Czech Republic. A link to the citizens of the Czech Republic may be a reason for granting permanent residence after a shorter period. In the case of a foreigner from a country outside the European Union, it is necessary for him or her to demonstrate knowledge of the Czech language. These conditions help to ensure that a foreigner who is granted a permanent residence permit is more likely to have a link to the Czech Republic than not.

Czech society does not even have to worry about being dominated by this group of foreigners. It is not a potential security threat (Višek et al. 2023). On the contrary. According to the Ministry of the Interior of the Czech Republic, 109 457 foreigners from EU countries had permanent residence permits in the Czech Republic as of 30 June 2023 (Ministry of the Interior of the Czech Republic 2023). This amounts to 1% of the population of the Czech Republic. The Ministry's data does

not show the age composition, so the number of foreigners over 18 years of age is likely to be even lower. This is an insignificant number which does not pose any threat in terms of the possibility of somehow influencing the outcome of the elections to the detriment of the citizens. This argument is all the stronger because, in the case of municipal elections. There in certain circumstances, if this group of foreigners were concentrated in a particular area, could influence, or even decide the result of the local elections. And the right to vote was granted to these foreigners without any such concerns being expressed.

This extension of the right to vote would not contravene the Charter of Fundamental Rights and Freedoms (1991). It guarantees the right to vote to citizens but does not exclude its granting to non-citizens. For the same reason, there is no concern about possible discrimination if the right to vote were granted only to a certain group and not to all foreigners. It is only on a decision of the state to whom it grants the possibility to participate in the establishment of public authorities and to what extent. Nor is there any need to worry about possible higher costs for social systems, since, as mentioned above, permanent resident aliens are their compulsory participants. Moreover, the right to vote is in no way linked to entitlement to social assistance.

Extending the right to vote, as outlined above, would also be in line with the interests of deeper integration of the European Union. At the moment, we are witnessing a paradox where further inte-



gration within the European Union is taking place in several areas, but not in people's political lives. Rather than the European Union and its member states going down the route of adopting the usual federal solutions of full opportunity and political involvement of migrant citizens, we are witnessing stagnation in this area. In the case of the Czech Republic, there has even been a countermovement, where (at least formal) advocates of European integration are looking not for a way to give newcomers the opportunity to participate in the political life of the country, but rather for a *de facto* extension of the possibility of deciding on public life in the place where the person concerned is not located. The European Union is, of course, far from being a political federation like the USA or India. However, it could at least approach the latter example. The way forward, however, is to remove the barriers to participation in the political life of state communities, not to maintain them and to maintain political sentiment in the relationship between the state and the long-term or permanently expatriate citizens.

As examples from abroad show, granting the right to vote to selected groups of foreigners is rare but possible. Among European countries, for example, Britain has granted both the right to vote and the right to stand for election to Commonwealth nationals and citizens of the Republic of Ireland since 1949. Since 1984, the Republic of Ireland has granted British citizens the right to vote in all elections except presidential elections. An exception is also made for participation in referendums. Uruguay

granted full suffrage to all resident aliens who have resided in the country for at least 15 years in 1952 (Earnest 2003: 19).

However, importantly, the decision about who makes up the political community is entirely up to the people themselves. There are many reasons for extending it, but I consider the strongest to be the general fairness that those who participate in the functioning of the community and share its fate should also be able to decide on it. This is a rather important reason. In other parts of the world, the expansion of local people has been for far less noble reasons.

For example, the state of Wyoming, famous in the field of state and political science for its world leadership in extending suffrage to (white) women, did so in 1869, while still a territory, for purely utilitarian reasons. First and foremost, because its legislators wanted to impress "the whole civilized world" and "attract the great capital" that would make their state great, and no advertisement would provide such publicity. Second, the legislators hoped that some women would find the booming Wyoming an attractive place to live, immigrate, and improve the current dismal demographic ratio of 6 men to 1 woman. Incidentally, in the very second (still territorial) term, women's suffrage was abolished. Only to have it reinstated again (Ellison 2008: 670). When Wyoming entered the Union in 1890 and Congress suspended approval of the state constitution precisely because of women's suffrage, the territorial legislature responded to Washington that it would rather be out of the Union for

another 100 years than enter it without Wyoming women (Karin 2004: 341).

As can be seen, the reasons leading to the redefinition of the people can be truly divisive. Seeking to include and align oneself with those who are part of the community of inhabitants should be a matter of basic justice, if not decency, and would certainly stand up with hon-

our before history. Such a discussion would be beneficial in any state in that, whatever the outcome, it would make clear who the people are and for what reasons. It would also be one of the positive manifestations of democracy, which, after all, can be seen as not only a form of governance but also an approach to life itself (Mesonis 2013: 100).

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