András L. Pap

Who are "we, the people"? Biases and preferences in the Hungarian Fundamental Law

The following essay provides a critical overview of the biases and preferences within the phrasing of the Hungarian Fundamental Law. It is a short, primarily textual analysis, which unfolds possible interpretations and normative definitions for how the constitution envisages (ideal) members of the political community The starting point for the analysis is Herbert Küpper's essay entitled *Between collectivism and liberal individualism: the normative basis underlying the idea of the person enshrined in the new Hungarian Fundamental Law*. In his article Küpper points out that[1] "the constitution is not just a law but simultaneously also a value system. What underlies the values in a constitution is the idea of the person it espouses, that is the constitution's take on the individual and her place in society." In my view, however, the implications can be more far-reaching still: in some instances constitutions include normative definitions. In the following, thus, I will try to detect what concepts the new Hungarian constitution operates with, when "We, the members of the Hungarian nation" who, under the preamble, the National Avowal (*Nemzeti Hitvallás*),[2] establish a constitution which, in addition to serving as the 'basis of our legal order [...,] shall [also] be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation's will and the form in which we want to live.' " [3]

Küpper argues that the constitution-maker can choose between three models (or, naturally, some combination thereof): "At the center of the individualist model is the individual endowed with liberty and free will. If there is a conflict between the individual's freedoms and her obligations towards the state or obligations stemming from social coexistence, then the former shall prevail. (...) Collectivism starts with the assumption that humans are social beings and hence emphasizes the (public) interests of society at large. (…) The fundamental tenet of state paternalism is that the state knows better than the individual what is best for her (…) The difference between a democratic and a paternalistic state is that a democratic state derives its definition of the public good from citizens' self-understanding, whereas the paternalistic state comes up with its own understanding of individual interest and public good, which it then foists upon citizens. The democratic state is an instrument in the hands of its citizens, while the paternalistic state is their guardian. To this day the latter idea of the state has prevailed in Central and Eastern European - including Hungarian - mentality ever since absolutism."[4]

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[1] KÜPPER, Herbert: Paternalista kollektivizmus és liberális individualizmus között: az új magyar Alaptörvényben rögzített emberkép normatív alapjai (*Between paternalistic collectivism and liberal individualism: the normative bases of the idea of a person enshrined in the new Hungarian Fundamental Law*), *Közjogi Szemle* 2012/5(3). 8. The essay was published in the volume entitled "Viva vox iuris civilis: Tanulmányok Sólyom László tiszteletére 70. születésnapja alkalmából" [Viva vox iuris civilis: Studies in the honor of László Sólyom on the occasion of his 70th birthday], edited by Zoltán Csehi, Balázs Schanda and Pál Sonnevend. It is is an abbreviated version of Küpper's article entitled "Zwischen Staatspaternalismus, Kollektivismus und liberalem Individualismus: Normative Grundlagen des Menschenbilds im neuen ungarischen Grundgesetz."

[2] For an official translation of the Fundamental Law see http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf

[3] Pursuant to Article R) 3) in the constitution's chapter entitled Foundation, "[t]he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution."

[4] KÜPPER: op. cit. 8.

Even with the caveat that this typology could become more comprehensive by including several other ideological bases for a constitution (for example by considering communitarianism), I will adopt Küpper's typology as a framework for the analysis below, and, in line with his conclusion, I will systematically review - and occasionally expand to some extent - all those technical arguments and observations advanced on the subject which contain points that are critical of the prevailing constitutional arrangement. Focusing on aspects that the prominent (chiefly Hungarian) academic authors find objectionable on constitutional or political theory grounds, or occasionally even from a practical standpoint, I will seek to delineate the contours of the constitution's idea of the person who is defined as the member of the political community. Reviewing the entire profile, that is a comprehensive reconstruction of the Fundamental Law's idea of the person, is beyond the scope of this piece, which is why the objective pursued here is limited to the aforementioned.

I find it important to stress that the current writing will not take a position on the question whether a constitution-maker should be allowed to or be expected to commit herself to any single constitutional identity and idea of the person, or in how far the expectation that a constitution be based on an inclusive, potentially value-neutral approach, which also draws on the experience of multiculturalism, can be realistically met or even legitimately advanced. While a collectivist commitment is not inherently problematic (it can be compatible with a fundamental rights perspective, for example), the desire to render its implied preferences explicit makes it necessary for me to indicate which specific clauses and formulations in the constitution relegate individual liberties to the background. Yet the issue of constitutional constructs inspired by a paternalistic approach is altogether different. Based on the prevailing constitutional theory paradigm, these can hardly be reconciled with the ideas of a modern constitutional democracy.

The opinions cited in the current analysis will show that the textual and value preferences in the constitution not only espouse and project a paternalistic concept of the state, but that at the same time they also explicitly and exclusively define membership in the political community (occasionally approving and affirming jurisprudence that had continuously prevailed before the Fundamental Law was actually adopted) in a way that not only rejects the inclusive and multi-cultural models of liberal democracies, but is also downright exclusive in some instances. Moreover, as analysts, domestic and international civil rights organizations, and international organizations have often pointed out,[5] on occasion the new Hungarian

[5] See for example Report 25 June 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN, CDL-AD(2012)001-e *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session* (Venice, 16-17 March 2012), CDL-AD(2012)009-e *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), CDL-AD(2012)020-e Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session* (Venice, 12-13 October 2012), CDL-AD(2012)004-e *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary adopted by the Venice Commission at its 90th Plenary Session* (Venice, 16-17 March 2012) or the CDL-AD(2012)012 English 21/06/2012 - *Public Joint Opinion on the Act on the Elections of Members of Parliament of Hungary adopted by the Council for*

constitution also fails to live up to 21st century standards of human rights and constitutional democracy.

As noted above, for spatial limitations, I will not be able to examine here the question of whether one can legitimately expect the constitution-maker to hold certain specific values or, for that matter, to embrace strict value neutrality; nor will I explore what extent of social support can justify certain levels of exclusion of some social groups from the preferred, potentially explicitly defined, political community. Nevertheless, critics of the Fundamental Law may rightly point out that there was no persuasive and in depth social or political debate surrounding these preferences (thus for example the governing parties did not discuss their plans for a new constitution – or even the fact that they even sought to draw up a new constitution – in the election campaign of 2010, and hence their election victory did not include a mandate to adopt one). Furthermore, despite the process euphemistically labeled as "national consultation,"[6] the constitutional text cannot be regarded as resting on a broad social consensus – even if the re-election of the governing party alliance in the 2014 national parliamentary election might be considered a subsequent political legitimation of the Fundamental Law (*Alaptörvény*).

Let us discuss in turn each of the constitution's exclusionary preferences considered most significant by critics of the Fundamental Law.

1. The Fundamental Law suggests that the members of the political community, i.e. Hungarians, are all, without fail, patriotic

The Fundamental Law's preamble, the so-called National Avowal, which was proclaimed not in the name of the MPs who adopted the constitution but in the name of the "members of the Hungarian nation," in other words all Hungarians, sets out certain characteristics that Hungarians necessarily possess.[7] Thus for example "[w]e are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago. We are proud of our forebears who fought for the survival,

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Democratic Elections at its 41st meeting (Venice, 14 June 2012) and the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012) Also see: HUNGARIAN HELSINKI COMMITTEE, THE EÖTVÖS KÁROLY INSTITUTE AND THE HUNGARIAN CIVIL LIBERTIES UNION: *Newest amendment to the Fundamental Law of Hungary seriously undermines rule of law,* http://helsinki.hu/en/newest-amendment-to-the-fundamental-law-of-hungary-would-seriously-undermine-the-rule-of-law

[6] Under the so-called National Consultation, the government mailed a questionnaire regarding the proposed contents of the Fundamental Law to the entire adult population of Hungary in March 2011. A total of 11.3 percent, or 916,941, of the 8.09 million recipients completed and returned the 12 questions in the survey See: http://static.fidesz.hu/download/156/A_Nemzeti_Konzultacios_Testulet_kerdoivenek_eredmenyei_2156.pdf A self-addressed, stamped envelope was provided so that citizens could easily send back their glorious thoughts on twelve questions. See: http://hungarianspectrum.wordpress.com/2011/03/02/national-consultation-questions-on-the-constitution/ The Venice Commission held that the consultation process before adopting the new constitution was inadequate and unsatisfactory. See European Commission for Democracy Through Law Opinion on the New Constitution of Hungary, adopted by at its 87th Plenary Session, Venice, 17-18 June 2011.

[7] In my view such an interpretation of the text is not rendered impossible by the fact that the next to last line in the Fundamental Law reads as follows: "We, the Members of the National Assembly elected on 25 April 2010, being aware of our responsibility before God and man and in exercise of our constitutional power, hereby adopt this to be the first unified Fundamental Law of Hungary." Neither does the concluding line of the Preamble, which states that "[w]e, the citizens of Hungary, are ready to found the order of our country upon the common endeavours of the nation."

freedom and independence of our country. We are proud of the outstanding intellectual achievements of the Hungarian people. We are proud that our people has over the centuries defended Europe in a series of struggles and enriched Europe's common values with its talent and diligence. We recognize the role of Christianity in preserving nationhood. We value the various religious traditions of our country. (…)We believe that our national culture is a rich contribution to the diversity of European unity. (…)We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist (sic!) and the communist dictatorship. (…) We hold that after the decades of the twentieth century which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal. We trust in a jointly-shaped future and the commitment of younger generations. We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength. We, the citizens of Hungary, are ready to found the order of our country upon the common endeavors of the nation."

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A strict reading of the text would suggest that in terms of their membership in the political community, the status of those Hungarian citizens who disagree with these statements, or at least some portion of them, or who agree, but happen to be proud of or believe in other things, is thereby questioned.

2. The Fundamental Law suggests that the political community consists of Christians who are followers of traditional, and state-approved Christian denominations

Not only was the Fundamental Law adopted by MPs who are "aware of their responsibility before God,"[8] but, according to the National Avowal, "we, the members of the Hungarian nation, (…) recognize the role of Christianity in preserving nationhood. (…)We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love." The text does not presume an exclusive religious identity, but it does reserve a pre-eminent role for religion, specifically for Christianity. This preference is made explicit by Article 4 of Chapter VII, entitled Freedom and Responsibility, which states that "[t]he State and religious communities may cooperate to achieve community goals. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfillment of tasks that serve to achieve community goals." Under section (5) "The common rules relating to religious communities, as well as the conditions of cooperation, the established churches and the detailed rules relating to established churches shall be laid down in a cardinal Act."

In the opinion of the authors of one of the first comprehensive expert opinion on the Fundamental Law,[9] the new constitution "characterizes the nation referred to as the subject of

[8] See the next to last line in the Fundamental Law.

[9] FLECK Zoltán (et al.): Vélemény Magyarország Alaptörvényéről, *Fundamentum* 2011/15(1). 63. epa.oszk.hu/02300/02334/00043/pdf/EPA02334_Fundamentum_2011_01_061-077.pdf (Opinion on the Fundamental Law of Hungary. Authors: Zoltán Fleck, Gábor Gadó, Gábor Halmai, Szabolcs Hegyi, Gábor Juhász, János Kis, Zsolt Körtvélyesi, Balázs Majtényi, Gábor Attila Tóth. Edited by: Professor Andrew Arato, New School for Social Research, New York, Professor Gábor Halmai, Eötvös Loránd Tudományegyetem, Budapest, Professor János Kis, Central European University, Budapest) In English:

the constitution as a Christian community, narrowing even further the range of people who can recognize themselves as belonging to it. 'We recognize the role of Christianity in preserving nationhood', it declares, not as a statement of historical fact, but also with respect to the present. And it expects everyone who wishes to identify with the constitution to also identify with its opening entreaty: 'God bless the Hungarians!' "[10] The Fundamental Law also distinguishes between Christian churches, expressing a preference for certain (selected and mostly traditional) denominations that are recognized by the state.

Balázs Majtényi[11] writes as follows about the provisions that were explicitly included in the constitution to override, and overrule by constitutionalization the opinions of international organizations[12] and the Hungarian Constitutional Court:[13] "The first clause of the new constitution's Article VII (2) authorizes the National Assembly [*Országgyűlés* the Hungarian parliament] to recognize as registered churches those organizations engaged in religious activities which are willing to co-operate with the state for the purposes of realizing public objectives. The underlying distinction between [officially recognized] churches and other organizations engaging in religious activities may be used as a basis for discriminative practices, a fear that is all the more well-founded since the Fundamental Law associates the ethnic national community with Christianity…. (…) An application of this constitutional clause may simultaneously mark the end of the free establishment of churches."

The abovementioned opinion by Fleck et al. argues that the Fundamental Law calls for a lifestyle model that the members of the community are required to comply with as part of the obligation they owe to the community; this model is based on Christian-conservative normative preferences.[14] Specifically, the authors argue that "the preamble, while giving preference to the thousand-year-old Christian tradition, states that 'we value the various religious traditions of our county.' The choice of words displays its idea of what model of tolerance ought to prevail, namely one in which the various worldviews do not have equal status, although following them is not impeded by prohibition and persecution. It is however significant that the tolerance thus declared only extends to the various 'religious traditions' but does not apply to more recently established branches of religion or those that are new to Hungary, or to non-religious convictions of conscience. This means that the Fundamental Law does not simply approve of the worldview, religion, practices and cultural heritage of a portion of the country's citizens, but also states a position regarding the question of which worldview and perception of life is true and correct, thereby according lower status to the rival doctrines and cultural practices. In other words, the Fundamental Law does not merely recognize the historical role of Christianity in the creation of the state, but also makes a commitment to its moral and political principles. Consequently it breaks with the solution applied in the 1989 Constitution, which remained neutral among the competing doctrinal approaches. (…) The Fundamental Law's model of 'separate, but cooperating' churches appropriates Hungarian constitutional court practice, under which the rules on public education, social- and health-care and taxation may give preference to the 'historical

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http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf The cited page numbers refer to this document.

[10] op. cit. 7−8.

[11] MAJTÉNYI Balázs: Alaptörvény a nemzet akaratából (*A Fundamental Law by the will of the nation*), *Állam- és Jogtudomány* 2014/1. 91–92.

[12] *Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012),* CDL-AD (2012)004.

[13] 6/2013. (III. 1.) *AB határozat* (Constitutional Court decision), ABH 2013, 194, 292.

[14] FLECK et al.: op. cit. 66–68.

churches' over other churches, and the churches may be given an advantage over other institutions (associations, foundations). The incorporation of this approach into the Fundamental Law makes it far more difficult for this constitutional-court practice— which does not comply with the principle of equality—to change."[15]

Pursuant to the *amicus brief*[16] drafted for the Venice Commission, the Fundamental Law authorizes the National Assembly to award the status of an officially registered church based on political considerations rather than with a view towards promoting the objective of the freedom of religion as a fundamental right. That is because in "realizing public objectives," parliament is under no obligation to work with social partners selected on the basis of constitutional criteria or human rights considerations. "In this respect the state cooperation condition is most problematic from a human rights perspective because the state's willingness to cooperate with a religious organization is not simply a solely discretionary criterion, but also openly invites the state to prefer certain religious organizations or communities above others on the basis of its own views of the helpfulness of specific churches to state goals. This criterion requires the state to abandon its neutral stance towards religious communities. This requirement clearly runs counter to the state's duty of neutrality and impartiality as required under Article 9, a duty that has been consistently upheld in the well-established case-law of the ECtHR."[17]

The fact that between 2001 and 2010 census data showed a substantial decline in the number of persons who claim belong to the major Christian denominations is a significant addendum in evaluating the constitutional construction adopted by the legislator. Over that decade the number of persons who self-identified as Catholic dropped from 5.5 million to 3.9 million, while the number of those who belong to the Reformed and Lutheran churches also fell, from 1.6 to 1.15 million and 304,000 to 214,000, respectively. The number of those who did not indicate any affiliation with any organized religious community simultaneously rose to 2.7 million in 2010, up from a level of 1.1 million in 2001.[18] According to an earlier research, the number of those who regularly exercise their religion (at least once a month) dropped by around a third between 1998 and 2008, and now amounts to roughly 13% of the total population.[19]

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[15] op. cit. 24−25.

[16] BÁNKUTI Miklós (et al.): Amicus Brief a Velencei Bizottságnak az Alaptörvény negyedik módosításáról, *Fundamentum (Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary)* 2013/17(3). 12. www.fundamentum.hu/alaptorveny-es-europa/cikk/amicus-brief-velencei-bizottsagnak-az-alaptorveny-negyedik-modositasarol. BÁNKUTI Miklós (et al.): Amicus Brief a Velencei Bizottságnak az Alaptörvény negyedik módosításáról, *Fundamentum* 2013/17(3). 6–8. www.fundamentum.hu/alaptorveny-es-europa/cikk/amicus-brief-velencei-bizottsagnak-az-alaptorveny-negyedik-modositasarol. (*Amicus Brief for the Commission on the Fourth Amendment to the Fundamental Law of Hungary*, Authors: Miklós Bánkuti, Tamás Dombos, Gábor Halmai, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, László András Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppele, Péter Sólyom, Renáta Uitz, Edited by: Professor Gábor Halmai, Eötvös Loránd Tudományegyetem, Budapest, and Princeton University, Professor Kim Lane Scheppele, Princeton University In English: http://halmaigabor.hu/dok/437_Amicus_Brief_on_the_Fourth_Amendment4.pdf. Page references concern this document.

[17] op. cit. 22.

[18] See http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_10_2011.pdf.

[19] KELLER Tamás: Változás és folytonosság a vallásossággal kapcsolatban (*Change and continuity in religiosity*), *Statisztikai Szemle* 2010/88(2). 144. www.ksh.hu/statszemle_archive/2010/2010_02/2010_02_141.pdf.

3. Members of the political community preferred by the Fundamental Law are married heterosexuals who live sexually monogamously and are naturally fertile

The National Avowal states: "We hold that the family and the nation constitute the principal framework of our coexistence." Article L goes on to say: "(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children." Kriszta Kovács argues that the absence of equality as an expressly endorsed value from the preamble[20] clearly reveals the essence of the new outlook.[21] Pursuant to the authors of one of the first comprehensive opinions on the Fundamental Law, "[t]he Fundamental Law's conception of marriage – which, incidentally, follows the definition serving as the basis for the Constitutional Court's Decision 154/2009 (XII. 17.) AB on the constitutionality of registered domestic partnerships – corresponds roughly to the Catholic natural-law interpretation of marriage, which regards [… fidelity] procreation and the unbreakable sanctity of the relationship between spouses as the most important elements of marriage. This constitutional regulation, founded on natural law principles, protects those of the people's interests that not everyone attributes to themselves, and with which they do not necessarily wish to identify themselves and, thus, it breaches their autonomy. When defining marriage and evaluating the role of the family a modern, living constitution – especially a new Fundamental Law – should accommodate the changes to society that increase the range of choices available to the individual. This should have required the Fundamental Law to regulate the institution of marriage and family together with the fundamental rights guaranteeing the self-determination of the individual and the principle of equality. (…)With the constitutional ban on same-sex marriage the constitution-maker has ruled out the future ability of the Hungarian legislature, following the worldwide tendency, to make the institution of marriage available to same-sex couples. In keeping with this, article XV of the Fundamental Law does not mention discrimination based on sexual orientation and gender identity in its list of prohibited forms of discrimination. This means that the Hungarian constitution-maker does not prohibit the state from supporting or negatively discriminating against a way of life—based on sexual orientation alone."[22]

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Though it is true that the open-ended prohibition of discrimination enshrined in Article XV (2) does not rule out official action against discrimination based on sexual orientation, neither does it involve an unequivocal commitment thereto.

On the whole, the Arató-Halmai-Kis opinion argues that "[a]n analysis of the content of these duties reveals that the Fundamental Law is outdated… [t]he 1989 Constitution was based on the equal recognition of individual and communal forms of life and a plurality of views regarding the good life. The Fundamental Law breaks with this tradition by including moral

[20] Article XV (3) makes provisions concerning the equal rights of women and men, but a declaration to serve as a basis for reducing the widely documented gender pay gap, the integration of a constitutional clause involving the common principle of "equal pay for equal work" never found its way into the text.
[21] KOVÁCS Kriszta: Equality: The missing link, in TÓTH Gábor Attila (ed.), *Constitution for a disunited nation : on Hungary's 2011 fundamental law*. Central European University Press, Budapest, 2012. 186. Cited by Balázs MAJTÉNYI, who discusses the issue in more detail: Alaptörvény a nemzet akaratából (*A Fundamental Law by popular will*), *Állam- és Jogtudomány* 2014/1. 90.
[22] 17−18.

duties among the fundamental rights. It thereby selects those forms of the good life which it regards as morally valuable and worthy of constitutional protection. The Fundamental Law excludes the following components of the liberal constitutional conception: equal recognition of the plurality (freedom) of forms of life, the neutrality of (and tolerance by) the state and respect for personal autonomy. By defining one man and one woman as the subjects of marriage (…) the Fundamental Law creates a long-term constitutional obstacle to individual demands for extending the plurality of forms of partnership. Although, by doing so, it adopts the legal position of the Hungarian Constitutional Court, this measure will clearly hamper an eventual revision of existing legal interpretations. [23]

The amicus brief drawn up for the Venice Commission also points out that the amendment of Article L (1) was adopted in response to Constitutional Court decision 43/2012. (XII. 20.), in which the Court ruled that "family life" is a historically changing and evolving concept; one that is a matter of factual rather than legal assessment; and that same-sex couples are entitled to the same right of respect for their family life as heterosexual couples. Going against the decision of the Constitutional Court and the system of expectations set out in Article 8 of the European Convention on Human Rights, the National Assembly incorporated a concept of family into the Fourth Amendment of the Fundamental Law that the Constitutional Court had deemed unacceptably narrow. Article L does not merely establish that only a relationship between a man and a woman may qualify as a marriage, but also states that "[f]amily ties shall be based on marriage and/or the relationship between parents and children." Though this formulation recognizes parent-child relations that have emerged outside of marriages, it does not extend to the mutual relationship between parents who are not married to one another.[24] "This notion of family also infiltrates other fields of law, such as media and education. According to Act CXC of 2011 on public education, it is the task of the teacher to 'make students familiar with and respect family values.'[25] media services and mass media defines - among others - the aim of public broadcast to 'respect the institution of marriage and family values.' Read together with the Fundamental Law's exclusionary definition of family, these provisions might result in limiting freedom of expression with regard to LGBT people in the media, as well as encouraging ignorant and often discriminatory views on same-sex and other not marriage-based relationships in school curricula."[26]

According to the Arató-Halmai-Kis commentary, the same Christian idea appears in the passage codifying the protection of the fetus: "Apart from the Irish constitution of 1937, there is no other European constitution that protects embryonic and fetal life from the moment of conception. The Fundamental Law does not state explicitly that the embryo and fetus has a right to life, but it supports this interpretation by incorporating the phrase 'embryonic and

[23] P. 15.

[24] BÁNKUTI Miklós (et al.): Amicus Brief a Velencei Bizottságnak az Alaptörvény negyedik módosításáról, *Fundamentum* 2013/17(3). 6–8. www.fundamentum.hu/alaptorveny-es-europa/cikk/amicus-brief-velencei-bizottsagnak-az-alaptorveny-negyedik-modositasarol. (*Amicus Brief for the Commission on the Fourth Amendment to the Fundamental Law of Hungary*, Authors: Miklós Bánkuti, Tamás Dombos, Gábor Halmai, András Hanák, Zsolt Körtvélyesi, Balázs Majtényi, László András Pap, Eszter Polgári, Orsolya Salát, Kim Lane Scheppele, Péter Sólyom, Renáta Uitz, Edited by: Professor Gábor Halmai, Eötvös Loránd Tudományegyetem, Budapest, and Princeton University, Professor Kim Lane Scheppele, Princeton University In English: http://halmaigabor.hu/dok/437_Amicus_Brief_on_the_Fourth_Amendment4.pdf. The cited page numbers refer to this document.

[25] *27 Act CLXXXV of 2010 on on media services and mass communication*

[26] P. 12.

fetal life shall be subject to protection from the moment of conception' into the same sentence as the statement that 'every human being shall have the right to life.' In this way it prompts both the legislature, ordinary and Constitutional Court judges' interpretation of the law to restrict women's right to self-determination. Uncertainties also arise with regard to the artificial reproduction procedures that have been widely permitted by the medical act of 1997. By necessity, the in-vitro fertilisation methods permitted by law entail the death of numerous embryos, either inside or outside of the womb. In view of the fact that the Fundamental Law does not differentiate between in-utero and in-vitro embryos (…) It gives rise to considerable legal uncertainty if a country − like Hungary to this very day −,which promotes various means of treating infertility, including in-vitro fertilisation and implantation and, which also permits research on embryos, prescribes in its Fundamental Law the constitutional protection of embryonic and foetal life from the moment of conception. This requirement could bring into question the constitutionality of artificial reproduction procedures and the compatibility of the new constitutional provision with international treaties ratified by the Republic of Hungary, including the Oviedo Convention on Human Rights and Biomedicine, approved by the Council of Europe. All of these provisions breach the autonomy of individuals who do not accept the normative life models defined on the basis of the Fundamental Law's ideological values − as the preamble words it: 'the form in which we want to live' – and they are capable of ostracising them from the political community."[27]

In the context where it is mentioned, the term fidelity as used in the text may be construed as applying to marriage or (this is the considerably less unambiguous interpretation) to patriotic loyalty.[28]

Article XVI (4), which posits that "[a]dult children shall be obliged to take care of their parents if they are in need," yields the restriction of any freedoms derived from notions of citizens' private life that may diverge from traditional understandings of the concept, which the relevant academic literature refers to as "intimate citizenship."[29] The obligation in question may also apply to parents who abuse or molest their children, who have been convicted of such crimes in a legally binding decision, or have had restraining orders issued against them to protect their children from them.

4. Members of the political community preferred by the Fundamental Law are middle class, employed and not homeless

Herbert Küpper[30] shows that the Fundamental Law basically paints a contradictory image of individual autonomy. For one, Article O of the Foundations states that "[e]veryone shall be responsible for him- or herself," which suggests that the individual is not subject to state or

[27] 18−19.

[28] Herbert Küpper's interesting assessment differs on this question, as he suggest that Article L (1) of the Foundations, which construes the "family as the basis of the nation's survival," protects the family only as part of the function it plays in the survival of the nation, and does not accord it any autonomous value or commitments." (Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children.) Op. cit. 10.

[29] Lásd például PLUMMER, Kenneth: *Intimate citizenship: private decisions and public dialogues*. Wash–Chesham: University of Washington Press–Combined Academic, Seattle, 2003.

[30] KÜPPER: op.cit. 8−9.

social guardianship. This is reinforced by Article V: "Everyone shall have the right to repel any unlawful attack against his or her person or property, or one that poses a direct threat to the same, as provided for by an Act." While this authorizes the wealthy to take even the most drastic measures against the extremely marginalized underclass, it might at the same time also undermine Article C) (3), which proclaims the state's legal monopoly on violence: "The State shall have the right to use coercion in order to enforce the Fundamental Law and legal regulations."

Küpper argues that the chapter on fundamental rights also suggests something similar trough its title "Freedom and Responsibility." "The individual's situation is expressed not only through the notion of freedom, but also through responsibility, since a person can only be free if she shoulders and is ready to shoulder the concomitant responsibilities."[31]

It is established already before, in Article O), that "[e]veryone shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities."And Article XIII of the chapter on Freedom and Responsibility states that "(1) … Property shall entail social responsibility," while Article XXX (1) mandates that "[e] veryone shall contribute to covering common needs according to his or her capabilities and to his or her participation in the economy."

This is not objectionable per se, but on the whole it betrays a decidedly collectivist idea of liberties, something that was also unequivocally reinforced by the preamble, which (following the Universal Declaration of Human Rights) states that "[w]e hold that individual freedom can only be complete in cooperation with others." Where this becomes reality interesting, however, is in Article XIX (3) of the chapter on Freedom and Responsibility: "The nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary's activity", read in conjunction with the National Avowal's thesis stating that "(…) the strength of community and the honour of each man are based on labour, an achievement of the human mind." Küpper argues that this work ethic displays "some extent of doubt concerning human dignity (…) Such formulations are reminiscent of the 20th century's totalitarian left- and right-wing ideologies, which suggest that the "value" of humans is not inherent but must be earned by the individual - generally by his/her work."[32]

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[31] KÜPPER: op.cit. 8.

[32] KÜPPER: op. cit. 9. Küpper also points out numerous other paternalistic elements. One example is the Foundation's Article G (2) ('Hungary shall protect its citizens.') in which, viewed from the perspective that the idea of the person offers, the individual is not (...) the subject but the object of the protection offered by the state. Another paternalistic element is clause 2 of Article I (1), which states that '[t]he inviolable and inalienable fundamental rights of MAN (sic!) be respected. It shall be the primary obligation of the State to protect these rights.' Article 8 (1) of the previous Constitution, in contrast, said the following: '(1) The Republic of Hungary recognizes inviolable and inalienable fundamental human rights. The respect and protection [sic! in this order!] of these rights is a primary obligation of the State.' The respect in question is meant to express the liberal perspective, since it implies that the state withdraws to give citizens the freedom to fully develop their liberties. Protecting rights, by contrast, implies that the state become active, that it acts, with the concomitant risk that instead of the individual the state will determine when and to what extent individual rights will apply." The author also construes Article XVII (1) of the Fundamental Law as a turn towards paternalism: "Employees and employers shall cooperate with each other with a view to safeguarding jobs and the sustainability of the national economy, as well as other community goals." In Küpper's reading "employees and employers can only assert their interests in the pursuit of objectives enshrined in the Fundamental Law, and other 'community goals' that are defined by the government as part of its economic policy objectives. In the case of a government that is active in terms of economic policy, there remains little latitude for dialogue, the autonomy of market economy and economic players in the realm of labor relations is done for. [...T]his is strongly reminiscent of the Kádár era's conomic regime." MAJTÉNYI: op. cit. 10–11.

The possibility of criminalizing homelessness (which has been the subject of forceful criticism by several domestic and international human rights organizations)[33] is a characteristic example of the value system espoused by the constitution. Though the National Avowal proclaims that we Hungarians "hold that we have a general duty to help the vulnerable and the poor," Article XXII (3) states that "In order to protect public order, public security, public health and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in public space as a habitual dwelling shall be illegal."

Balázs Majtényi writes the following about this: "Strikingly, the Fundamental Law authorizes the parliamentary majority to sanction homeless persons as part [sic!] of the provisions on the right to adequate housing. (…) In the human rights conventions ...restrictions with reference to public order, public safety and public health are indeed not unknown in the context of certain fundamental rights. Yet it is rather unusual to invoke cultural values as the basis for the restriction of rights. Viewed from the perspective of the previous fundamental rights-based approach, the individual's right to dignity was certainly not subject to restriction on this basis. Hence Article XXII runs counter to the notion underlying the protection of fundamental rights, and it violates certain internationally protected human rights expressly mentioned in binding international conventions. Thus the legislator argues that the rights of those (homeless persons) who do not lead a lifestyle in accordance with the values (which the constitution-maker had designated as "cultural values") that have been declared as guiding values for the imagined ethnic national community may be restricted." [34]

5. The Fundamental Law relies on an ethnically-based concept of nation, and among the minorities that live in Hungary it prefers those genuine nationalities "that have been living with us" for a long time

According to Herbert Küpper the "Fundamental Law derives the concepts it uses from the ethno-nationalist perspective that emerged in 19th century Eastern Europe - which stands in contrast to the concepts of the democratic nation and the cultural nation."[35] Küpper's assessment is primarily based on the National Avowal's declaration that the "(…)family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love." This is also reinforced by Paragraph 1 of the Foundation's Article L, which defines the " family as the basis of the survival of the nation" *(*Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation.) Moreover, he writes, the "end of the preamble[36] attributes an own 'will' to the nation since it suggests that the 'contract' is binding for all Hungarians - regardless of whether they wish to be party to it or not. The 'will' of the nation is superordinated to the freedom of the individuals who constitute the nation."[37] Küpper[38] also sees the manifestation of the national as a central value in the Foundation Article P (1).[39]

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[33] See for example www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13206&LangID=Eor Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary, http://tasz.hu/files/tasz/imce/appendix_1_main_concerns_regarding_the_4th_amendment_to_the_fundamental_law_of_hungary.pdf.

[34] MAJTÉNYI: op. cit. 93.

[35] KÜPPER: op. cit. 9.

[36] "Our Fundamental Law shall be the basis of our legal order, it shall be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation's will and the form in which we want to live."

[37] KÜPPER: op.cit. 9.

In addition to those whose identity as "Hungarians" is ethno-culturally established, the Fundamental Law also has provisions regarding nationalities. In the National Avowal, 'we Hungarians' "proclaim that the nationalities living with us form part of the Hungarian political community and are constituent parts of the State." According to Article XXIX of the chapter on Freedom and Responsibility: "(1) Nationalities living in Hungary shall be constituent parts of the State. Every Hungarian citizen belonging to a 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 mother tongue, to use names in their own languages individually and collectively, to nurture their own cultures, and to receive education in their mother tongues. (2) Nationalities living in Hungary shall have the right to establish their self-government at both local and national level. (3) The detailed rules relating to the rights of nationalities living in Hungary, the nationalities, the requirements for recognition as a nationality, and the rules for the election of the self-governments of nationalities at local and national level shall be laid down in a cardinal Act. A cardinal Act may provide that recognition as a nationality shall be subject to a certain length of time of presence and to the initiative of a certain number of persons declaring to be members of the nationality concerned."

It is worth dwelling a little on this point. Under ethnic minorities international law − which primarily looks at the issue from an interstate perspective – refers to groups that lack a nation-state. Rights protections extended on the basis of ethnic identity involve protection from discrimination, verbal violence (hate speech) or physical violence aimed at individuals based on classifications undertaken without consideration of the affected person's identification, using attributes determined by the outside world (biological features or external racial markers).[40]

The legislator failed to further define the archaic and substantially hazy conception of "nationality" even in the new minority law. This provides an interesting contrast between the new minority law and the previously effective regulations. It is not clear what the legislator's problem with the previous definition of "national and ethnic minority" was. (Act LXXVII of 1993 on the Rights of National and Ethnic Minorities operated with a dual group concept.) Presumably the constitution-maker neither dispute that "nationalities" are likely to constitute a numerical minority within society, nor that they suffer from certain disadvantages (which the minority law is designed to redress by setting forth minority rights). Furthermore, there are key distinctions between "national" and "ethnic" minorities, and a "nationality" cannot be regarded as a greater set comprising both; the most accurate description would be that it is synonymous with national minority. It is no coincidence that the terminology used in international documents also employs this distinction, and that the original draft of the Fundamental Law talked of "nationalities and ethnic groups."
Under Act CLXXIX of 2011 on the Rights of Minorities *„§ (1) ... ethnic groups resident in Hungary for at least one century are minorities which are in a numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions and manifest a sense of collective affiliation that is aimed at*

[38] op. cit. 10.
[39] "Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."
[40] For more see PAP Andras L.: Overruling Murphy's law on the free choice of identity and the racial-ethnic-national terminology-triad: Notes on how the legal and political conceptualization of minority communities and membership boundaries is induced by the groups' claims, in HENRARD, Kristin (ed.), *The interrelation between the right to identity of Minorities and their Socio-economic Participation.* Brill, 2012. 115-155.

the preservation of these and at the expression and protection of the interests of their historically established communities." Copying the earlier 1993 law, Appendix No. 1 of the Act enumerates the 13 recognized groups (Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romania, Ruthenian, Serbian, Slovak, Slovene and Ukrainian, while Article 148 specifies the procedures for other minorities to be recognised: *„ (3) If a minority other than those listed in Appendix No. 1 wishes to verify that they meet the relevant conditions, minimum one thousand electors forming part of that minority may initiate that the minority be declared an ethnic group native to Hungary. ... The procedure shall be governed by the provisions of the Act relating to the initiation of national referenda… In the course of its procedure, the National Election Committee shall seek the position of the President of the Hungarian Academy of Sciences with respect to the existence of the statutory conditions."*

Based on the old-new regulation, therefore, in order for someone to submit a request - together with the required thousand endorsing signatures – for the National Assembly to expand the list of the thirteen minorities recognized by law, it is practically a requirement the minority group to already exist under the law at the time when it becomes recognized. In addition to requiring the Hungarian Academy of Sciences (MTA) to provide an expert's opinion, the National Assembly reviews compliance with the conditions set out by the law (that is whether the minority is real), and, having ascertained that these conditions have been met, recognizes the group as a new nationality (minority). There is also a potential contradiction here since parliament (and individual MPs) are free in making their decisions, and thus (similarly to the recognition of churches by parliament) even if the legal requirements are met there is no guarantee that the legal amendment that is necessary for the recognition of a minority will enjoy the support of the required two-thirds supermajority. In effect, therefore, there is a danger that the number of minorities will be frozen or that new minorities will be recognized on a politically selective basis. (Incidentally, it is questionably whether several of the groups recognized in 1993 met the requirements set out in the law.) The history of popular initiatives, all of which failed to succeed, and sometimes involved bogus groups, like the ancient Huns, provide perfect illustrations of the contradictory character of the regulations.[41]

Another important issue is the set of criteria to determine who belongs to a minority. The prevailing laws - and the Fundamental Law as well - are silent on any criteria that would define membership in a minority group. We see only a feeble attempt to define these in the context of a small segment of the privileges that minorities are entitled to, namely with regard to political representation. Here, however, the new legislation retained the nationality voter roll that existed already under the previous legal regime, and has been a source of continuous

[41] On this issue see for example PAP András László: *Identitás és reprezentáció: az etnikai hovatartozás meghatározásától a politikai képviseletig* (*Identity and representation: from defining ethnic identity to political representation*). MTA Kisebbségkutató Intézet-Gondolat, Budapest, 2007.; MAJTÉNYI Balázs - PAP András László: Végtelen történet: a kisebbségi hovatartozásról (*Infinite story: on minority affiliation*), *Fundamentum* 2006/10(2). 93–106. epa.oszk.hu/02300/02334/00024/pdf/EPA02334_Fundamentum_2006_02_093-106.pdf.; MAJTÉNYI Balázs - PAP András László: Sokasodó kisebbségek? (*Multiplying minorities*), *Élet és Irodalom* 2006/29. 50.; HALMAI Gábor: Pókhálóból font híd−Nemzeti kisebbség−identitás–zsidóság (*A bridge sewn from the spider's web-National minority-identity-Jewry*), *Magyar Narancs* 2006/5. 18. http://magyarnarancs.hu/publicisztika/a_pokhalobol_font_hid_-_nemzeti_kisebbseg_-_identitas_-_zsidosag-65094. Also see PAP Andras L.: Overruling Murphy's law on the free choice of identity and the racial-ethnic-national terminology-triad: Notes on how the legal and political conceptualization of minority communities and membership boundaries is induced by the groups' claims, in HENRARD Kristin (ed.), *The interrelation between the right to identity of Minorities and their Socio-economic Participation.* Brill, 2012. 115-155.

criticism for not having contained an form an eligibility criteria besides the individual's decision to sign up. On account of ethno-corruption practices in the election of a minority self-governments, a unique Hungarian institution established by the 1993 law and preserved by the new legislation, the question of how to regulate eligibility has been a repeatedly raised, sensitive issue. The 1993 regulation, which was essentially left unchanged by the new 2011 legal framework, was unable to prevent abuses of the privileges accorded to minorities; even though the persistence of such abuses can result in the hollowing out of these privileges. In its decision No. 45/2005, the Constitutional Court stated that it is constitutionally permissible for a law to require the declaration of minority affiliation, as long as it is justified by the necessity of protecting other constitutional rights or values, and it is realized with the smallest degree of restriction conceivable and the most suitable instrument to this end. Article XXIX of the Fundamental Law's chapter on Freedom and Responsibility could actually have provided a sufficient framework for this, by stating that "[e]very Hungarian citizen belonging to a nationality shall have the right to freely express and preserve his or her identity." The language, departing from the previous concept,[42] which centered around the free (unlimited) choice of identity, hints at an objectively existing minority identity (which can be expressed and preserved).

On a last note, the preamble's provision that "the nationalities living with us form part of the Hungarian political community and are constituent parts of the State," which is also repeated in Article XXIX of the constitution's chapter on "Freedom and Responsibility," is in need of interpretation and clarification. Though it is a restatement of the previous constitution's relevant provision (not a verbatim reiteration, but substantially the same),[43] despite several Constitutional Court decisions[44] seeking to construe its meaning, it remains ambiguous. If minorities were constituent elements of the nation/the political nation, then that would make sense, but the semantic connotations of minorities or nationalities that are constituent parts of the state is rather confusing outside a Bosnian-style ethnic federation. All in all it appears therefore that members of the Hungarian nation, who gave themselves a constitution, share public power with the nationalities who live here. Incidentally, pursuant to the interpretation outlined above, these nationalities are not subjects of the constitution (after all, the National Avowal is authored and framed by members of the Hungarian nation) - even if there may be, and in fact there are, members of parliament (even some governing party MPs) who are citizens of Hungary but may not be ethnically Hungarian, i.e. are members of one of the national minorities/nationalities.

[42] The preamble of the 1993 Hungarian minority rights act stated that "the right to national and ethnic identity is a universal human right," and the statement was reiterated in Article 3(2): "[t]he right to national or ethnic identity is a fundamental human right, and is legally due to any individual or community." Article 7 further declared that, "The admission and acknowledgement of the fact that one belongs to a national or ethnic minority is the exclusive and inalienable right of the individual".

[43] (1) The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State. (2) The Republic of Hungary shall provide for the protection of national and ethnic minorities and ensure their collective participation in public affairs, the fostering of their cultures, the use of their native languages, education in their native languages and the use of names in their native languages. (3) The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country. (4) National and ethnic minorities shall have the right to form local and national bodies for self-government. (5) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the rights of national and ethnic minorities.

[44] *1041/G/1999 AB határozat* (Constitutional Court decision), AB Közlöny: Vol. IX., No. 8–9, *35/1992. (VI. 10.)* and *24/1994. (V. 6.) AB határozat* (Constitutional Court decision).

6. The Fundamental Law suggests that the political community is entitled to unconditional respect (and this is extended to all its members in this capacity)

Article IX (5) of the Fundamental Law's chapter on Freedom and Responsibility states that "[t]he right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community, invoking the violation of their human dignity, as provided for by an Act."

This is an utterly unusual provision, as under the standard constitutional doctrine, in Europe the concept of human dignity is generally intended to protect the individual rather than the community,[45] and certainly not the majority, and definitely not against the minority. According to Balázs Majtényi, "The parliamentary majority has the authority to curtail rights on the basis of this clause, and hence one possible interpretation of the cited provision is that it could serve as an efficient instrument for taking action against criticisms of the government. If for example one were to criticize the parliamentary majority which acts in the name of the ethnic nation, which in our case is the power authorized to give us a constitution and amend it, one could in light of this article be seen as violating the dignity of the Hungarian nation."[47]

Törölt: [46]

The regulation is therefore problematic because the curtailing hate speech, and the protection of dignity on the basis of identity in general, becomes pertinent when it based on and applied to situations involving some sort of vulnerability – if there is a threat of potential or actual exclusion or marginalization. As things stand, however, it is unclear how being part of the ethnic/national majority or the Hungarian nation in today's Hungary could have implications that threaten individuals within this majority with a stigma and vulnerability that they should need special legal protections. When it comes to restricting the right of free expression, the arguments that carry the greatest weight are not those that seek to justify restrictions on hate speech with regard to general notions of dignity, but rather those that would legitimate such measures on the basis of protecting minorities. That is they would offer additional protections for groups with a reduced ability to assert their own interests, who are, as a consequence of for example, some historical trauma, prevented from participating in the democratic discourse on a level that is commensurate with the majority's involvement therein. The prohibition of hate speech can therefore serve as a means of righting a historical wrong,[48] or as an instrument for protecting groups that cannot ignore the hate they encounter or lack the wherewithal to take effective action against it. In my view, these are the only contexts when such restrictive measures may be called for.

7. Under the Fundamental Law members of the political community (may) avoid public scrutiny even if they are public figures - except if they were communists

[45] See for example Matthias MAHLMANN: Human dignity and autonomy in modern constitutional orders, in ROSENFELD, Michel and SAJÓ András (eds.), *The Oxford Handbook of Comparative Constitutional Law*. Oxford University Press, Oxford, 2012. 370–396., 384, 390−91.
[47] MAJTÉNYI: op. cit. 94.
[48] Cf.: UITZ Renata: Does the Past Restrain Judicial Review? (*Reference to History and Traditions in Constitutional Reasoning*), *Acta juridica Hungarica* 2000/41(1–2). 47–78.

According to Article U (4) of the Foundations, "[t]he holders of power under the communist dictatorship shall be obliged to tolerate statements of facts about their roles and acts related to the operation of the dictatorship, with the exception of deliberate statements that are untrue in essence; their personal data related to such roles and acts may be disclosed to the public."

The Fundamental Law, thus declares that those who previously exercised public power in the communist regime (and of the two totalitarian regimes in the 20th century, this provision only applies to the communist) are quasi public figures who, in the name of historical justice, are subject to less severe privacy protections. Yet the new constitution fails to apply similar provisions to other public figures. This is highly relevant, because judicial practice has been controversial concerning public scrutiny of public figures, including both holders of public office and people pervasively involved in public affairs or distributing or having access to public funds. Until very recently, specifically up to the point when the office of the independent Parliamentary Commissioner (Ombudsman) for Data Protection was abolished, by the Orbán-government, (presumably because of the temporal proximity of the communist dictatorship) Hungary was among the countries with the highest levels of privacy protections. However over time, the practice of an over-zealous interpretation of privacy emerged, which practically led to the obstruction of transparency of public figures and an impediment of a thorough public discourse on politics and society -- an essential element of democratic societies. The possibility to monitor the activities of the authorities that exercise public power, and to render these transparent, is, thus often subordinated to the protection the privacy of public figures.

According to the Hungarian Supreme Court's jurisprudence, for example, mayors who utter racist statements during municipal assembly sessions or before the press are not subject to Act CXXV of 2003 on equal treatment and the promotion of equal opportunity (which bans discrimination and harassment) because even under these circumstances they can be considered not to be speaking in an official capacity, thus they may not necessarily qualify as public figures.[49] The Hungarian Civil Liberties Union (HCLU) once even had to sue the Constitutional Court for not disclosing the name of a petitioner, a Member of Parliament seeking the constitutional review of a provision of the Criminal Code on an official letterhead. The court, in line with the Constitutional Court (the ultimate guarantor of fundamental rights!) was of the opinion that cases initiated by Members of Parliament may amount to private data and can be exempt from disclosure. The case reached the Supreme Court, with the HCLU's requests denied at all instances.[50] Finally, the European Court of Human Rights ruled for the NGO.[51]

Törölt: to be

Both the Supreme Court and the data protection commissioner held that privacy protections apply to police officers, even when on duty using force, say arresting citizens in public areas, and no pictures are allowed to be taken without their consent.[52] An appellate court held that official communication between a former prime minister and other heads of governments and

Törölt: of the

[49] *Kfv. III.39.302/2010/8.* Also see PAP András László: A Legfelsőbb Bíróság ítélete az Egyenlő Bánásmód Hatóság határozatának hatályon kívül helyezéséről. Zaklatásnak minősülhet-e egy polgármester rasszista megnyilatkozása? (*The Supreme Court's ruling on setting aside the decision of the Equal Treatment Authority. Can a racist statement by a mayor be regarded as harassment?*) Legf. Bír. kfv. II. 37 551/2010/5, *Jogesetek Magyarázata* 2012/3(1). 91−100.

[50] See http://tasz.hu/hu/informacioszabadsag/33 (in Hungarian).

[51] *Hungarian Civil Liberties Union (Társaság a Szabadságjogokért) v. Hungary*, (*Application No. 37374/05*), Judgement of 14 April 2009.

[52] Case no.: Kfv.III.39.010/2012/7.

states should not be of public concern,[53] and another court ruled that the budgetary appropriations of a nuclear plant need not be disclosed.[54]

In a 2014 decision the Constitutional Court[55] ruled that a provision of the newly adopted Civil Code that only allowed the broader criticism of public figures in the context of public affairs contingent on the presence of a "*legitimate* public interest," ran afoul of the freedom of speech and expression laid down in Article IX of the Fundamental Law. At the same time, most of the new judges who had been elected by the governing majority that had also adopted the Fundamental Law wrote dissenting opinions, which reflects the legislator's preferences in terms of reasoning and attitudes. Judge Egon Dienes-Oehm Egon[56] writes for example that "[p]ursuant to clause eleven of the 'National Avowal,' 'individual freedom can only be complete in cooperation with others.' Comparing this requirement with the title of the chapter entitled Freedom and Responsibility, it is unequivocally apparent that the fundamental and substantial change in the Fundamental Law as compared to the previous constitution is that the constitution-maker sought to overrule previously established practice in terms of the extent to which individual liberties can[not]be limited. (…)[T]he exercise of any fundamental right also implies responsibility, and (…) an abusive exercise of (…) rights may violate the interests of the public."

Judge Barnabás Lenkovics further explains[57] that "(…) there is an increasing social desire (…) for the public power to defend the rights of free speech and free expression against the influence and domination of the press and media powers (…) [T]here is a growing expectation vis-à-vis the law that it protect free speech and free expression from becoming deformed and morphing into libertinism, turning on itself. (…) the exercise of all fundamental rights and liberties implies responsibilities, and may only occur responsibly."

Concluding thoughts

In conclusion, Herbert Küpper's words[58] may be most suitable for summing up the above: "An analysis of the Fundamental Law reveals a mixed picture (…) [The constitution] places the individual in a considerably tighter collective bond as compared to Western European constitutions. Moreover, many perceive that the bond which receives the greatest emphasis, namely the nation, is not future-oriented but backward looking, drawing on the 19th century (…) All considered, the Fundamental Law does not stand firmly on the ground of individual freedom as most (Western) European Constitutions (including the Hungarian between 1990-2011) do. The [constitution's] idea of a person has not managed to move beyond the inherited illiberal, collectivist and state paternalist elements."

The issue is not only that the Fundamental Law allows for curtailing the fundamental rights of certain groups of citizens, and potentially also for their social exclusion, but, going back to the

[53] Index: Kende megint vesztett Németh Miklós ellen (*Kende loses again against Miklós Németh*). *Index,* September 28, 2010. http://index.hu/belfold/2010/09/28/kende_megint_vesztett_nemeth_miklos_ellen

[54] The appellate court overruled the judgment. See Energia Kontroll Program 2011; Nem lát el közfeladatot a Paksi Atomerőmű – a TASZ szerint abszurd az ítélet (The Paks nuclear plant does not provide a public service). *Hvg.hu,* 2011. február 8. http://hvg.hu/itthon/20110208_paksi_atomeromu

[55] *7/2014. (III. 7.) AB határozat* (Constitutional Court decision)

[56] para. 83

[57] para. 103, 105

[58] KÜPPER: op. cit. 11.

introductory thoughts in the present essay, there is also no persuasive evidence to show that in codifying the new constitution the constitution-makers had indeed tried to discern and hew close to the genuine preferences of the members of the political community.