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2014 was a year of transition and controversy in Europe: a new Parliament and new Commission were constituted and Opinion 2/13 of the Court of Justice of the European Union on the EU's accession to the European Convention on Human Rights raised serious questions about the coherence and future character of the human rights protection regimes in Europe.

Across 38 contributions by 61 authors in five sections, the European Yearbook on Human Rights 2015 explains and contextualizes key developments in human rights and provides much needed analysis.

Edited jointly by representatives of four major European human rights research, teaching and training institutions, the Yearbook 2015 covers political and legal developments in the field of the three main organizations charged with securing human rights in Europe: EU, Council of Europe and OSCE, accompanied by a chapter on cross-cutting topics. Now in its seventh edition, the Yearbook remains essential reading for anyone interested in human rights in Europe and the world.

Benedek/Benoît-Rohmer/Kettemann/Kneihis/Nowak (Eds.) European Yearbook on Human Rights



European Yearbook on Human Rights

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Wolfgang Benedek
Florence Benoît-Rohmer
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Balázs MAJTËNYI

The Nation's Will as Trump in the Hungarian Fundamental Law^{*}

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Keywords

European Union, national identity of the states, human rights protection, Fundamental Law of Hungary, antiegalitarian ethnic concept of nation, domestic protection of fundamental rights, constitutional tragedy

A Introduction

No European standards apply directly to questions concerning the national identity of states that can include questions like the concept of the nation or ideological references used in a constitution. If anything, the Treaty of the European Union (TEU) is based on respect of states sovereignty: according to Article 4 para. 2, the EU shall respect the identity of member states. But the national identity of member states might cause legitimate concerns for domestic human rights protection, the rule of law and democracy which are protected by the Article 2 of the TEU. There is no hierarchy between Article 4 para. 2 and the Article 2 of the TEU.

Nowadays, Hungary presents the most obvious case where all elements of constitutional democracy are threatened: checks and balances, fundamental rights, the rule of law – all protected under Article 2.¹ This paper analyses

^{*} The research leading to this paper has received funding from the European Commission's Seventh Framework Programme (FP7/2007-2013) under the grant agreement FRAME (Project No. 320000), www.fp7-frame.eu.

¹ See e.g. European Parliament Resolution of 10 March 2011 on Media Law in Hungary, P7_TA(2011)0094; European Parliament Resolution of 16 February 2012 on the

through the example of the Hungarian Fundamental Law the conflict between the universal values of human rights and the particularistic national identity of the states. Even the importance of the universal human rights movement can be better understood if we one focus on examining illiberal, anti-democratic ideas that also influence constitution-making. It examines how an antiegalitarian ethnic concept of nation has been given primary role in the Hungarian Fundamental Law and how it leads to a constitutional tragedy.²

B The Fundamental Law of Hungary

In May 2010 the National Assembly of the Republic of Hungary accepted the government programme of the Fidesz-KDNP party alliance that obtained more than two-thirds of the seats in the parliamentary election.³ Shortly thereafter, in June 2010 the National Assembly approved the Declaration on National Cooperation as a political document, in which it declared that “a new social contract was laid down in the April general elections through which the Hungarians decided to create a new system: the National Cooperation System”.⁴

The Hungarian Parliament passed Hungary’s new constitution (entitled the Fundamental Law) on 18 April 2011, which entered into force on 1 January 2012 and superseded the previous constitution (Constitution of 1989). The Fundamental Law and its five amendments were passed by the members of parliament belonging to the governing party alliance, without the support of the opposition parties.

Recent Political Developments in Hungary (2012/2511(RSP)), P7_TA(2012)0053; Council of Europe, Opinion of the Commissioner for Human Rights on Hungary’s Media Legislation in Light of Council of Europe Standards on Freedom of the Media (25 February 2011), CommDH (2011), 10; European Commission for Democracy through Law (Venice Commission), Opinion on the New Constitution of Hungary – Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), Strasbourg (20 June 2011), Opinion No. 618 (2011), Council of Europe (2012), https://sites.google.com/site/amicusbrief_hungary (accessed 12 December 2014). (CDL-AD (2011) 016), para. 91 et seq. See also Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation. On Hungary’s 2011 Fundamental Law*, Central European University Press (2012); Miklós Bánkúti and others, *Opinion on Hungary’s New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws*, (Gábor Halmai and Kim Lane Scheppele (eds.) (2012)), <https://sites.google.com/site/amicusbriefhungary> (accessed 12 December 2014.)

2 According to the definition given by Eskridge and Levinson, one can speak about constitutional tragedy if the flaws of the constitution itself threaten constitutional democracy. William N. Eskridge and Sanford Levinson (eds.), *Constitutional Stupidities/Constitutional Tragedies* (1998).

3 See Gábor Halmai, *An Illiberal Constitutional System in the Middle of Europe* (2014), in: Wolfgang Benedek, Florence Benoît-Rohmer, Wolfram Karl, Matthias C. Kettemann and Manfred Nowak (eds.), *European Yearbook of Human Rights 2014* (2014), 512.

4 Political Declaration 1 of 2010 (16 June 2010) of the Hungarian National Assembly on National Cooperation, http://www.kulugyminiszterium.hu/NR/rdonlyres/1EC78EE5-8A4B-499C-9BE5-E5FD5DC2C0A1/0/Political_Declaration.pdf (accessed 20 December 2014).

1 National Avowal

The Fundamental Law is introduced by a lengthy preamble called National Avowal, which defines the characteristics of the legal order. It is in the preamble that the legislator defined the national identity of the political community.

The constitutions of liberal democracies are founded on the acceptance of a pluralistic political community, the separation of church and state, the primary use of the concept of the political nation, and the assumption of the moral equality of citizens. These constitutions do not commit themselves to specific moral conceptions but intend to give everybody the possibility to live a good life by ensuring secular political values and freedoms that were mainly born in the period of the Enlightenment. The most serious charge against the preamble of the Fundamental Law is the absence of such values. Instead, starting from a moral approach it tries to form the constitutional identity of the country in a way that might lead to certain restriction of rights. The preamble provides a pre-modern list of non-neutral cohesive values such as fidelity, faith and love,⁵ belonging to Christian Church, belonging to the Hungarian ethnic nation while it does not mention, for instance, the principle of equality.⁶

Although the republic remains to be the form of government, the Hungarian Holy Crown, appearing as the embodiment of national unity, retrieves some of its constitutional function. This is in compliance with the statement of the present Prime Minister made in 2006: "the nation is the body, whereas the republic is only the clothes."⁷ The preamble furthermore includes reference to "the achievements of our historical constitution",⁸ which, however, unlike the Anglo-Saxon development of constitutional law, does not point towards the continuous expansion of rights, since Hungarian legal history has been frequently halted by rights restricting dictatorial periods.

National and ethnic minorities cannot participate in the creation of the constitution. This is made clear in the very first sentence of the document which begins with the following: "WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with a sense of responsibility for every Hungarian, hereby proclaim the following."⁹ The Preamble thus introduces an ethnic concept of the nation,¹⁰ especially when it goes on to explain that "We promise to preserve

5 Our fundamental cohesive values are fidelity, faith and love. (National Avowal)

6 Kriszta Kovács, Equality: The Missing Link, in: Gábor Attila Tóth (ed.), Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law, Central European University Press (2012), 186.

7 Orbán Viktor a miniszterelnök-jelölt. Viktor Orbán is the candidate for prime minister (2006), <http://2001-2006.orbanviktor.hu/hir.php?aktmenu=2&id=2447&printing=1> (accessed 13 November 2014).

8 See to this Zoltán Szente, A historizáló alkotmányozás problémái – a történeti alkotmány és a Szent Korona az új Alaptörvényben (2011), 3 *Közjogi Szemle* 1, Zoltán Szente The doctrine of the Holy Crown in the Hungarian Historical Constitution, *Journal on European History of Law* 1 (2013) 4, 109.

9 National Avowal (Fundamental Law).

10 Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws (2014), 7, or Zsolt Körtvélyesi, From "We the People" To "We the Nation", in: Gábor Attila Tóth (ed.), Constitution for a Disunited Nation Hungary's New Fundamental Law (2012).

the intellectual and spiritual unity of our nation torn apart in the storms of the last century".¹¹ As János Kis points it out, the Fundamental Law defines the nation as a community, the binding fabric of which is "intellectual and spiritual": not political, but cultural. There is no place in this community for the national minorities living within the territory of the Hungarian state.¹²

The sense of belonging to the nation does not extend in this constitution to all residents of the state. There is not a single reference to the political nation: the phrase "we the people" and the sense of identity expressed therein do not appear.¹³ It follows that members of recognized national minorities¹⁴ become secondary and other, non-ethnic Hungarians who do not form a national minority, such as Jews, become third-rate citizens; they are not equally part of the constitutional power. According to the Fundamental Law national minorities only "form part of the Hungarian political community and are constituent parts of the State".¹⁵ (The former constitution also mentioned that national and ethnic minorities "participate in the sovereign power of the people". The new text does not contain this provision.) This is even more problematic if we take into account that the Hungarian state is not even neutral in name and not all citizens may, regardless of identity, belong to the privileged nation. The state grants special minority rights as compensation to national minorities, in return for which it expects the loyalty of said groups. All of this makes it at least doubtful whether the state of the Hungarian ethnic nation follows the aspirations of those with non-Hungarian identity with equal attention and whether it grants them equal respect. Such regulation does not comply with the demand of moral equality.

It was due to the appearance of the modern term of the nation that the members of political communities became capable of seeing each other as equals. In contrast, the Fundamental Law has a clear anti-egalitarian character and institutionalizes an antiegalitarian concept of the nation.¹⁶ It addresses only Hungarians (the ethnic nation), who thus constitute the subjects of the constitution, leading to the erosion of the theoretical basis of minority rights on which the former constitution was based, namely the fundamental principles of the multi-cultural model.¹⁷ According to the preamble "Our Fundamental Law shall be the basis of our legal

11 National Avowal (Fundamental Law).

12 See Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws, 7.

13 See in detail Zsolt Körtvélyesi, From "We the People" To "We the Nation", in: Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation Hungary's New Fundamental Law* (2012), 22.

14 The following ethnic groups qualify by Act on nationalities as national minorities (nationalities) of Hungary: Bulgarian, Roma, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian.

15 National Avowal (Fundamental Law).

16 By anti-egalitarian nationalism I mean that pre-modernity form of nationalism that does not recognize or limits the opportunity for people to belong to the nation independent of his/her group membership (i.e., material position, place of residence, origin).

17 See e.g. Balázs Majtényi, 'What Has Happened to Our Model Child? The Creation and Evolution of the Hungarian Minority Act', *European Yearbook of Minority Issues* 6 (2005) 5, 397.

order: it shall be a covenant among Hungarians past, present and future”.¹⁸ There are several possible interpretations of this provision. First, with the word ‘covenant’ it invokes social contract theory. However, without saying why in the official explanation of the bill,¹⁹ the Fourth Amendment replaced ‘covenant’ (szerződés) with ‘alliance’ (szövetség). It is a step back from the concept of the social contract: in the Hungarian language, the word ‘szövetség’ has less of a legal than a symbolic meaning. Finally, it can also refer to the transcendent, non-secular layer of contract, because in the Hungarian language the name of the Old and New Testaments are Ó and Új Szövetség. This interpretation is even more likely as the Preamble of the Constitution (National Avowal) links the nation to Christianity, stating that “we recognise the role of Christianity in preserving nationhood” In this case, the most appropriate translation would be: the Fundamental Law is a testament “among Hungarians past, present and future”.

It should not be surprising that, as Küpper remarks, in the Hungarian constitution even sustainable development and environmental protection gain a national character: Article P (Basic Provisions, Part entitled “Foundation”) declares that “all natural resources [...] form part of the nation’s common heritage”.²⁰ Or, for instance, the National Avowal mentions that “we commit to promoting and safeguarding our heritage [...] along with all man-made and natural assets of the Carpathian Basin”. (The Carpathian Mountains bordered Hungary before the Trianon Treaty 1920.)

The National Avowal also declares that “we believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength”.²¹ The wording of the provision is highly problematic because it invokes the historical “greatness”, i.e. greatness in size, of the country: it might be understood as referring to an intention of territorial revision, in particular the revision of the post-World War I Treaty of Trianon, where Hungary lost two-thirds of its territory and three-fifths of its population. The size of the population lost was 10,6 million of which the number of ethnic Hungarians was 3,5 million (today it is less than 2,2 million). Reference to the Holy Crown confirms this interpretation as it has traditionally been a unifying symbol for territories outside the current borders of Hungary. If we interpret this sentence together with other constitutional provisions though, the revisionist connotation fortunately fades; it might also refer to politics that serve, for instance, the improvement of the scientific or athletic importance of Hungary. Still, since the provision in this form is subject to misunderstanding, it would be better if the legislator annulled it.

18 The Fundamental Law’s preamble is entitled National Avowal. For the official English translation of the Fundamental Law, http://www.parlament.hu/angol/the_fundamental_law_of_hungary_consolidated_interim.pdf (accessed 13 November 2014).

19 See the official interpretation of the Fourth Amendment, Indokolás (Justification), <http://www.parlament.hu/irom39/09929/09929.pdf> (accessed 13 November 2014).

20 Herbert Küpper, *Hol vagyok én a szövegben?* [Where am I in the text?], in: Benedek Molnár, Márton Németh and Péter Tóth (eds.), *Mérlegen az Alaptörvény – Interjúkötet hazánk új alkotmányáról* (2013) 89.

21 National Avowal (Fundamental Law).

2 Introductory Provisions – The Chapter Entitled “Foundations”

Article A of the introductory provisions of the Chapter “Foundations” changed the name of the state from the Republic of Hungary to Hungary, thus emphasizing the decreasing role attributed to the republic as a form of government in comparison to the former constitution.

Article L para. (1) protects the family as the basis of the ‘nation’s survival’. Family as understood in the constitution is based on marriage between a man and a woman and the relationship between parents and children. The provision has the potential to restrict women’s autonomy, the rights of sexual minorities and the rights of childless couples.

Article R para. (3) of the Foundations endows the preamble with a normative character and it refers to the historical constitution when it declares that “the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution”. Reference to the historical constitution of itself endangers legal certainty as in Hungary the content of the historical constitution and its relationship with the written constitution is disputable. Reference to the National Avowal also involves dangers. According to the Dworkinian teleological interpretation there is always a moral conviction underlying a constitution, on which those interpreting and applying the law continuously rely.²² Relying on an interpretation that follows from the values included in the National Avowal (such as fidelity, faith and love, belonging to Christian Church, belonging to the Hungarian ethnic nation) might, however, lead to a restriction of rights not acceptable in constitutional democracies. Principles laid down in the Avowal shall be the moral basis and foundation of the legal order, therefore they can be invoked in the case of legislative gaps and dispute.

Article U para. (1) mentions the “form of government based on the rule of law, established in accordance with the will of the nation” Subpara. a) further on claims that “the Hungarian Socialist Workers’ Party and its legal predecessors and other political organisations established to serve them in the spirit of communist ideology were criminal organisations [...] and betraying the nation”. With the intention to restrict the rights of political opponents, the provision might violate the principle of *nullum crimen sine lege*, therefore the principle of the prohibition of retroactivity, furthermore the possibility of conducting a procedure at an inappropriate time might lead to the violation of the right to a fair trial. The rule of law concept of the EU is administered by an independent judiciary and right to a fair trial. The provision itself is very similar to Robespierre’s concept that the nation’s will is expressed in law, which can be derived from Rousseau’s ‘general will’.²³ According to Jacobin ideology “the state represents the people’s will, and the existence of plural institutions and social forces only fragments that will”.²⁴ In the Hungarian Constitutional regulation the ‘general will’ appears as the ethnic nation’s will. (In contrast to this, the general will meant the political nation’s will for the Jacobins. In the Jacobin political concept of nation “state and nation, and

22 Ronald Dworkin, *Law’s Empire* (1986).

23 Jean-Jacques Rousseau, *The Social Contract* (1968), Book 2, section 6.

24 William Safran, *Pluralism and Multiculturalism in France: Post-Jacobin Transformations*, *Political Science Quarterly* 3 (2003) 118, 439.

citizenship and nationality are congruent”).²⁵ In addition to this Article, the “will of the nation” also appears in the preamble, which states that “our Fundamental Law shall be the basis of our legal order: it [...] expresses the nation’s will”. That is, under Article U para. (1) read in conjunction with the preamble, in the name of the “nation’s will” the government can limit human rights, for instance the rights of their political opponents who ‘betray’ the nation. Under Article U, the Hungarian Socialist Workers’ Party, its legal predecessors and other political organizations are the enemies of the nation in the Jacobin sense. Arguably, it is not the ideology that is common between Jacobins and the present Hungarian government, but rather the way they exercise power and the assumption that the laws express the nation’s will.

3 The Chapter on Fundamental Rights and Obligations: Freedom and Responsibility

In this section, the study will outline what impact the new constitutional identity of the state might have on human rights protection. When states reject the application of international and European human rights standards, they usually refer to the protection of constitutional values.²⁶ The theoretical curiosity of the Hungarian Fundamental Law is that it combines the term ‘nation’ with the aforementioned pre-modern constitutional values which in turn determine who belong to the ethnic nation. If human rights are interpreted with reference to pre-modern values, in practice it might result in human rights limitations.

The Fundamental Law reflects an intention not to stay neutral in respect of the life and ideology of citizens, and besides their rights it emphasizes their obligations and responsibilities, thereby narrowing down possible choices and guiding citizens towards the moral conviction and way of life deemed to be right by the legislator.²⁷ The new constitutional concept of the nation in Hungary can serve as a basis of human rights limitations and divides the political community. It means that members of minorities (ethnic, sexual, political, social and other) become, in principle, secondary citizens; they are not part (national minorities)²⁸ or not equal part (other minorities, such as sexual minorities) of the ‘we’ (the ethnic nation) in whose name the constitution was adopted.

In the spirit of the 1989 Constitution, the Hungarian Constitutional Court exercised a moral reading²⁹ of the constitution, putting the right to human dignity on the top of the hierarchy of human rights, and connecting it with equality or “the right to equal dignity constituted the basis of the most important decisions”.³⁰ The

25 Ibid., 465.

26 See, e.g. Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, *Vienna Journal on International Constitutional Law* 3 (2009) 3, 170.

27 Tamás Gyórfi, *Jogok az új alkotmánykonceptióban* [Rights in the Conception of the Constitution] (2011), <http://szuveren.hu/vendeglap/gyorfi-tamas/jogok-az-uj-alkotmany-konceptioban> (accessed 13 November 2014).

28 Named nationalities in the text of the Fundamental Law.

29 Ronald Dworkin, *The Moral Reading of the Constitution* (1996), www.nybooks.com/articles/archives/1996/mar/21/the-moral-reading-of-the-constitution (accessed 13 November 2014).

30 László Sólyom, *The Role of Constitutional Courts in the Transition to Democracy with Special Reference to Hungary*, *International Sociology* 1 (2003) 18, 133.

moral concept behind human rights is based on personal autonomy, freedom and equality. The former Constitutional Court's understanding of equality was based on Dworkin's theory of equality of resources.³¹ The Court underlined that everybody must be treated as persons with equal dignity. The Court defined the general equality rule "according to which the law should treat every person with equal respect".³² This required that all members of society must have equal human rights.

The text of the Fundamental Law no longer supports the former moral reading³³ of the Constitution, which was based on personal autonomy, freedom and equality.³⁴ (And it clearly differs from the EU's concept on dignity and equality).³⁵ This in itself can restrict the use of the previous decisions of the Hungarian Constitutional Court. Additionally, the Fourth Amendment adopted in 2013 effectively annuls all Court decisions prior to the entry into force of the Fundamental Law, stating that "Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings".³⁶

Article II ensures the right to life and the right to human dignity. The declaration that "the life of the foetus shall be protected from the moment of conception" and the provision that "every human being shall have the right to life" is included in one sentence, which might later on serve as a basis for acknowledging the foetus' right to life by the Constitutional Court.

In Hungary one can observe a process whereby extreme right-wing discourses on Roma minority have become increasingly mainstream, given that an ever wider swath of society relates to these discourses.³⁷ The Fundamental Law has provisions that are explicitly against the Roma minority and support the mainstreaming of these prejudice discourses.³⁸ For instance Article V ensures the following:³⁹ "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." The article is denounced for protecting the ethnic Hungarian middle class from the socially excluded (among whom Roma are overrepresented). As Kovács points out, "this article is about a right to self-defence in a state of nature described by Hobbes, and not a basic right in a

31 Ronald Dworkin, *Taking Rights Seriously* (1977).

32 9/1990. (IV. 25.) AB határozat/Hungarian Constitutional Court Decision 9/1990 (IV.25.).

33 Ronald Dworkin, *The Moral Reading of the Constitution* (1996), www.nybooks.com/articles/archives/1996/mar/21/the-moral-reading-of-the-constitution (accessed 13 November 2014).

34 In March 2013, the Hungarian Parliament adopted the Fourth Amendment, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court.

35 Catherine Dupré, *Dignity, Democracy, Civilisation*, *Liverpool Law Review* 33 (2012) 3.

36 *Closing and Miscellaneous Provisions, Fundamental Law*.

37 See e.g. Zsuzsanna Vidra and Jon Fox, *Mainstreaming of Racist Anti-Roma Discourses in the Media in Hungary*, *Journal of Immigrant & Refugee Studies* 4 (2014) 12, 437-455.

38 Kriszta Kovács, *Equality: The Missing Link*, in: Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (2012), 190.

39 *Ibid.*, 190.

constitutional state".⁴⁰ This constitutional provision contributes to a violent climate and it is an indirect form of discrimination against socially marginalized groups.

By virtue of Article VII the state can differentiate between churches and other religious organizations and the state shall cooperate to promote community goals only with churches.⁴¹ Since the term "ethnic nation" is linked to Christianity,⁴² discriminatory legislation and practices can follow. The application of this new rule can lead to the end of the freedom to establish new churches in Hungary.

Under Article 36 of the Fundamental Law: "The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation." In the European tradition human dignity is linked to the individual, not the community. Human dignity "generally protects the individual personality", not the dignity of the community, and especially not that the majority community.⁴³ The parliamentary majority restricts more and more the term 'nation' according to its political interests. One is concerned that the above amendment will be an effective tool to prohibit criticism against the government. Since the parliamentary majority exercises constitutional power in the name of the ethnic nation, criticism of the Fourth Amendment might amount to a violation of the dignity of the Hungarian nation.

As part of the right to work Article XII stipulates the obligation to work according to one's abilities and possibilities: "Everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and possibilities." Like Article V, this provision has the potential to be directed against the Roma community, which is the biggest minority in Hungary afflicted by unfavorable social conditions and widespread prejudices. The provision removes those fundamental rights guarantees that prevent the introduction of measures which bind the provision of unemployment aid to work or to activity deemed to be socially useful.

The Fundamental Law authorizes the legislator to punish homelessness⁴⁴ as part of the right to adequate housing. Article XXII para. (1) stipulates the right to housing, stating that "Hungary shall strive to ensure decent housing conditions and access to public services for everyone." And as part of the same right, para. (3) further establishes that "in order to protect public order, public security, public health and cultural values, an Act of Parliament or a local ordinance may declare

40 Ibid., 190.

41 Due to the critique of international organizations (COE, EU) the Fifth Amendment of the Fundamental Law changed the Article but the possibility of discriminatory legislations stayed. According to the new text: "The 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." (4) VII. Article of the Fundamental Law.

42 "We recognise the role of Christianity in preserving nationhood ...", National Avowal.

43 Gábor Halmai and Kim Lane Scheppelle (eds.), *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary* (2013) 53, <https://sites.google.com/site/amicusbrieffhungary> (accessed 20 December 2014).

44 Bálint Missetics, *The Criminalisation of Homelessness in Hungary in Mean Streets*, in: Samara Jones (ed.), *A Report on Criminalisation of Homelessness in Europe* (2013), <http://www.housingrightswatch.org/sites/default/files/Mean%20Streets%20-%20Full.pdf> (accessed 13 November 2014).

illegal staying in a public area as a permanent abode with respect to a specific part of such public area". The limitation of the rights of homeless people particularly reinforces the anti-egalitarian character of the Fundamental Law. According to the paragraph above, the rights of homeless people may be restricted by law in order to protect some social values, in particular "public order, public security, public health and cultural values". It should be underlined that it is highly unusual to restrict a fundamental right in order to protect 'cultural values'.⁴⁵ The human dignity of the individual, which stands at the pinnacle of human rights protection, cannot be limited in the name of cultural values. Moreover, the law has a discriminatory impact on those living in poverty and belonging to disadvantaged social groups. It also misinterprets the right to housing. Since Article XXII goes against the former moral concept behind human rights protection, it violates internationally protected human rights (e.g., right to dignity, right to housing). According to the legislator, the rights of those who do not live according to the declared values of the imagined ethnic nation (e.g., homeless people) will be restricted.

It is an often cited viewpoint that the archetypal liberal subject of human rights protection was the "white Christian male propertied citizen",⁴⁶ or, more generally, somebody who did not belong to a vulnerable group. Therefore nowadays international and European law, as well as constitutional democracies attempt to compensate vulnerable subjects and take measures to achieve the equality of these groups. One of the main questions is "how to take into account the position of vulnerable groups"⁴⁷ in the frame of human rights protection, i.e. how human rights protection can grapple with not only the formal but also the substantive concepts of equality. Against this trend the Hungarian illiberal constitution does not take into account the substantive, let alone the formal concepts of equality and it has a clear anti-egalitarian character.⁴⁸

4 Changes Concerning Institutions – Chapter Entitled “The State”

As a result of the new constitution institutions entrusted with fundamental rights protection were abolished, reshuffled and their powers were restricted. The curbing of powers of the Constitutional Court, which played a prominent and determining part in the 1989 transition to the rule of law, best illustrates the nature of changes. Article 37 of the part on public finances stipulates that financial acts can be reviewed by the Constitutional Court only in connection with the right to life and human dignity, the protection of personal data, freedom of thought, conscience and religion, or the rights related to Hungarian citizenship. This restriction of powers shall remain in force as long as the state debt does not drop below the half of the Gross Domestic Product. The fact that financial acts are not subject to constitutional control causes uncertainty in economic life, too. Individuals without

45 Gábor Halmai and Kim Lane Scheppele (eds.), *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary* (2013) 53, <https://sites.google.com/site/amicusbriefhungary> (accessed 20 December 2014).

46 FRAME Deliverable 3.1, 36, www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf (accessed 11 November 2014), 10.

47 *Ibid.*, 37.

48 Kriszta Kovács, *Equality: The Missing Link*, in: Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (2012).

being personally affected by a legal rule can no longer turn to the Constitutional Court, this right is reserved for the President of the Curia (the Supreme Court), the Prosecutor General, the Commissioner for Fundamental Rights, and one-fourth of the Members of Parliament. Several Constitutional Court judges have been recently appointed (quite flagrantly, a former Fidesz politician and MP has been elected into the body) and judges are now elected for twelve years, i.e. three parliamentary cycles. According to Article 24 para. 5 “the Constitutional Court may review the Fundamental Law or the amendment of the Fundamental Law only in relation to the procedural requirements laid down in the Fundamental Law for its making and promulgation”, i.e. a new constitution or any modification of the present Fundamental Law cannot be subject to constitutional control.

As opposed to the former constitution the Fundamental Law does not list the ordinary court levels. Under Article 26 para. 2 judges' retirement age was lowered from 70 years to the general retirement age of 62 years. As a result, 274 senior judges, among them 20 Supreme Court (renamed 'Curia') judges and 4 presidents out of the 5 Regional Courts were forced to retire.⁴⁹ The ECJ declared a violation of European Law on grounds of age discrimination violating Directive 2000/78/EC on equal treatment in employment and occupation, which led to a compensation of judges, but only a few judges resumed their office.⁵⁰

In the course of the constitutional changes the mandate of certain elected heads of public institutions was terminated ahead of time. The Supreme Court was renamed Curia, the mandate of its President was terminated ahead of time, as was that of the members of the National Council of Justice, the body responsible for the management of the courts. The President of the Supreme Court brought the case before the European Court of Human Rights, which ruled against the government of Hungary.⁵¹ Instead of the National Council of Justice, the President of the National Office for the Judiciary is entrusted with the central management of the courts, the President is supported by Vice-Presidents and an office. Article 27 para. 4 authorized the President of the NOJ to transfer any case to a court other than the one territorially competent to hear the case, as well as the Prosecutor-General to order to bring a charge before a court other than the competent one. It is hardly compatible with Article XXVIII of the Fundamental Law itself, under which “everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act”. Some cases appearing to have been politically motivated have been subject to transferal. It was based, for example, on a decision of the President of the NOJ on 16 February 2012 that the case involving fictitious contracts concluded by the former vice mayor of Budapest and opposition party politician, Miklós Hagyó was transferred to the Tribunal of Kecskemét, though it surely did not make the provision of evidence easier for the former vice mayor. It is not surprising that in the case the ECtHR held that Hungary violated Article 5 para. 4. Upon pressure by the EU and international organizations the

49 Katalin Kelemen, *The final Blow to the Hungarian Law Lowering Judges, Retirement Age Struck By the European Court of Justice* (2012), <http://www.diritticomparati.it/2012/11/the-final-blow-to-the-hungarian-law-lowering-judges-retirement-age-struck-by-the-european-court-of-j.html> (accessed 13 November 2014).

50 Case C-286/12, *European Commission v. Hungary* (2012), ECR I-0000.

51 See Appl. No. 20261/12, *András Baka against Hungary* (lodged on 14 March 2012).

Fifth Amendment eliminated the possibility of case transferal.⁵²

According to the 1989 constitution, the ombuds-institution is based on the conception of ombudspersons of equal rank, namely ombudsperson, specialized ombudsperson for data protection, specialized ombudsperson for future generations,⁵³ specialized ombudsperson for national and ethnic minorities. The 1989 constitution specified that Parliament can create ombudsman positions for the protection of any fundamental right, or interrelated fundamental rights, pertaining to sensitive social issues provided that their everyday violation threatens the freedom of citizens. The institutions of the minority and data protection and freedom of information ombudspersons served as guarantees for the implementation of relevant directives of the EU. This system was now replaced by the institution of one ombudsperson and its deputies, thereby the number of independent opponents of the government were reduced. The ombudsperson for future generations and national minorities became deputies of the general ombudsperson, and with this reshuffle they lost their right to independent investigation. The ombudsperson responsible for the openness of public data and the protection of private data, lost its office ahead of time due to the Fundamental Law. In an infringement procedure, the CJEU decided that the way the position of the specialized ombudsperson for data protection was abolished breached EU law.⁵⁴ Later on the Minister of Justice apologised to former ombudsperson and he received a compensation of 69 million HUF. However, as civil organizations legitimately protested, nobody apologised to Hungarian citizens and the institution itself was not re-instituted.

Under Article 36 of the Fundamental Law the Hungarian government could impose special taxes as a result of failing to comply with EU Law or European human rights law. This implied that if, for example the ECHR ruled against the government of Hungary in a case, the government could have imposed the burden of compensation on those whose human rights had been violated. The Fifth Amendment repealed this provision, however, the main point has not changed: the procedures against Hungary before the ECtHR regularly result in the Court's ruling against Hungary, meaning that the government violated some fundamental rights, but these findings as well as measures taken by EU institutions are not followed by changes in the nature of the system. The compensation for violation of rights is ultimately imposed on the tax-paying citizens of the state.

The government has increasingly committed itself to the majoritarian conception of democracy, meaning that nobody and nothing, not even independent state institutions can stand in the way of the will of the majority serving national interests.⁵⁵ Following the restriction of powers of formerly independent state institutions, from August 2013 on steps were taken by the government together with state bodies against NGOs, including tax inspections and criminal procedures, in the manner familiar from authoritarian states.⁵⁶

52 Case of *Hagyó v. Hungary*, Appl. No. 52624/10, Judgment Strasbourg (23 April 2013).

53 This specialized ombudsperson was responsible for environmental issues.

54 Case C-288/12, *Commission v. Hungary* (2014), ECR I-237.

55 Zoltán Miklósi, *Demokrácia: liberális, alkotmányos és egyéb* (Democracy: Liberal and Other) (2014), <http://szuveren.hu/politika/demokracia-liberalis-alkotmanyos-es-egyeb> (accessed 13 November 2014).

56 Governmental attacks against Hungarian NGO sphere, http://tasz.hu/files/tasz/imce/timeline_of_gov_attacks_against_hungarian_ngos_20140921.pdf (accessed 13 November 2014).

C Conclusion

This study examined the relationship between the national identity of the state and the protection of fundamental rights through the example of the Hungarian Fundamental Law. The Fundamental Law defines the ethnic concept of the nation as a Christian community and institutionalizes an outmoded national-historical approach with religious, devotional overtones. This concept of the nation cannot be reconciled with the moral equality of citizens which requires states not to favor or disfavor anyone on the ground of their conception of the good life.

In the sense of the ideology of the Fundamental Law the preferred member of the Hungarian ethnic nation lives in a heterosexual marriage together with his or her spouse and their children, belongs to a traditional Christian community, does not confess his/herself a communist, and does not live in a public area. If somebody follows moral principles other than this or is just simply not in the position of conforming to this expectation, the government can restrict according to the "nation's will" their human rights in the name of the imagined "We". The "nation's will" serves as a trump card in public discourses and the Fundamental Law follows the interests of the government rather than moral values, and it in itself threatens constitutional democracy and leads to a constitutional tragedy.

In spite of the fact that Hungary is an EU member state, it diverges from the values enshrined in Article 2 of TEU. Criticism by international and European organisations has not been followed by changes affecting the fundamental characteristics of the newly setup constitutional system, which implies that the EU inadequately operationalises the concepts human rights, democracy and rule of law.