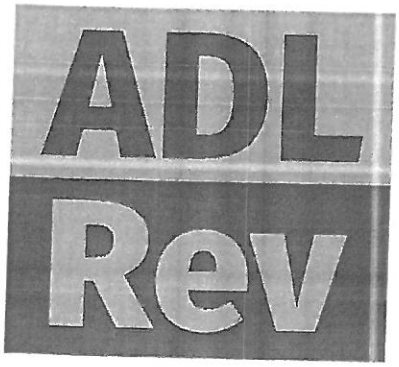
Anti-Discrimination Law Review

1 (3)

October 2018



PUBLISHER:
Wolters Kluwer SA, 01-208 Warszawa, ul. Przyokopowa 33, www.wolterskluwer.pl
Director of the Department of Periodicals:
Klaudia Szawłowska-Milczarek, Klaudia.Szawlowska@wolterskluwer.com
Typesetting and text makeup: Kamila Tomecka
Circulation: 500 copies

For journal subscription details call: +48 801 044 545, +48 22 535 82 72
prenumerata@wolterskluwer.pl
E-shop: www.profinfo.pl

János Fiala-Butora, András L. Pap, Anna Śledzińska-Simon

„Intimate citizenship" and illiberalism: lessons from Hungary, Poland, and Slovakia

Populist Backlashes, Disenchantment and the Raise of Illiberalism[1]

Populist rhetoric questioning the validity and sustainability of the post-WW2 liberal consensus on human rights and constitutionalism seems to be on the rise in the Western world. The emergence of this New Populism follows the concept, ideology, and Zeitgeist of disenchantment that has both economic and cultural roots. On the one hand, growing economic inequality and instability, and on the other hand, cultural backlash against modernity and progressive values may contribute to this phenomenon, which transforms the traditional division between left and right into an ideological cleavage between populists and cosmopolitan liberals.[2]

Although populism offers multiple operationalizing strategies both for right- and left-wing leaders in their contestation of the existing establishment, it primarily serves neoconservative social movements to attack neoliberal policies or even state institutions such as constitutional courts. Characteristically, illiberal populism may be initiated by bottom-up civic groups, political elites, or the government. It can serve as a tool for political mobilization of nationalist groups against various 'isms': multiculturalism, modernism, or even secularism. In Eastern and Central Europe it becomes a discursive framework for building constitutional identity and a model of illiberal democracy. What they share is challenging the legitimacy of liberal democracy.

Characteristically, the defining feature of populism motivated by disenchantment is that it is not accompanied by new grand narratives such as Marxism, Socialism, Communism, Fascism, or Nazism. Rather, disenchanted illiberalism is very similar to how Eric Hobsbawm saw nationalism in the 20th century: it is a substitute, a placebo for disorientation, and a surrogate for integration in a disintegrating society; when society fails, the nation appears as an ultimate guarantee.[3]

---

[1] An aerlier version of this project, containing the Polish and Hungarian case studies was published as 'Intimate citizenship and illiberal democracy: twilight or rebirth of constitutionalism?', in: Iulia Motoc, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek (eds), *New developments in constitutional law: essays in honour of András Sajó*, Eleven International Publishing 2018, 399-423.

[2] Roland Inglehart, Pippa Norris, 'Trump, Brexit, and the rise of Populism: economic have-nots and cultural backlash', paper presented at the plenary panel 'Legitimacy of political systems. System support for comparative perspective', 24th World Congress of the International Political Science Association, Poznan, 24 July 2016.

[3] Eric J. Hobsbawm, *Nations and Nationalism Since 1780 Programme, Myth, Reality*, Cambridge University Press 1992. See Chapter 6 'Nationalism in the late twentieth century', 163-192.

Despite all superficial analogies with the 1930s concerning anti-Semitism, nationalism, and the like, new populist illiberal movements are actually quite different. Today anti-Semitism does not, and cannot, include the political, economic, and legal project of discrimination, exclusion, deportation, and annihilation of Jews. Similarly, contemporary nationalism is equally hollow. For example, in Hungary, the discourse of restoring pre-WW1 borders remains at the level of symbolic rhetoric, and actual revisionist policies are nowhere to be seen or called for. In Poland, nationalism is not based on revisionist tendencies either. Instead, it presents itself as 'modern nationalism', which promotes cooperation between sovereign nations in a Christian Europe. In Slovakia, illiberal populism has no identifiable goals apart from protecting the majority Christian nation and its morals from all challenges, mostly imagined, presented by ethnic and sexual minorities. In its policies, illiberalism is aimed at entrenching the status quo by refusing to recognize and expand the rights of minorities.

In other words, the New Populism is hollow in the way that it does not provide any alternative ideology, only criticism of the current political and economic regimes (including the uniforming influence of foreign powers – transnational corporations, the WTO or the European Union). Apparently, no new 're-enchanting' ideology is needed for the New Populism to gain support since the rejection of a fatigued human rights discourse can be easily fueled by essentialism, spirituality, and religious fundamentalism.

This shallowness and emptiness is the unique and engaging feature of the potentially exportable Hungarian model of 'illiberal democracy'. In Hungary, the term has been coined by Viktor Orbán, a former liberal, now a missionary and messiah of illiberalism, in his speech at the 25th Bálványos Summer Free University and Student Camp.[4] His government successfully built a state-funded (pseudo-)NGO sector to support, alongside the existing racist and nationalist movements, anti-modernism and anti-cosmopolitanism/Europeanism as a viable alternative to neo-liberal democracy and the market economy.

In Poland, the turn toward illiberal democracy is less clear, although Jarosław Kaczyński, a *de facto* leader of the government, has adopted most of Orbán's strategies to dismantle a liberal constitutional regime and restore traditional Christian values and national sovereignty, yet still within the European Union. For the governing Law and Justice party, the place of individuals is 'nested in history, tradition, and culture, while the West is associated with moral nihilism'.[5]

Slovakia presents itself as a pragmatic state without an underlying ideology, one which did not take an explicit turn towards illiberal democracy and is committed to European economic integration. Yet, in its policies the country has adopted an extremely restrictive approach towards the rights of ethnic and sexual minorities, and rhetoric about protecting the majority Christian Slovak nation is regularly deployed in the political discourse. The success of the far right party People's Party – Our Slovakia in the 2013 regional elections and the 2016 parliamentary elections resulted in more right-wing rhetoric being used by

[4] For the official translation of the speech, see: <www.kormany.hu/hu/a-miniszterelnok/beszedek-publikaciok-interjuk/a-munkaalapu-allam-korszaka-kovetkezik>.

[5] James Traub, 'The party that wants to make Poland great again', *New York Times*, 2 November 2016.

the government to show commitment to protecting traditional values and the cultural make-up of Slovakia.

Although illiberalism is most often equated with the anti-democratic backlash that surfaces first and foremost in the weakening of checks and balances through institutionalized government control over the media, the NGO sector, civil service, the prosecutor's office, and the judiciary, the authors of this article argue that illiberal democracies also share certain value preferences concerning the model of individual and social life.[6] Most significantly, they are reflected in illiberal populist rhetoric, using 'gender' as a proxy for diverse threats to national culture.[7] In some countries, the opposition to the so-called 'gender ideology' denoting all sorts of threats to traditional family model resulting from the transformation of gender roles, same-sex unions or marriages, the recognition of gender-variant persons, as well as new technologies in the area of reproductive health became the most serious barrier to the effective protection of equal rights of women and sexual minorities.

While focusing on the concept of 'intimate citizenship', the following sections identify common themes to which neoconservative leaders have used the constitution as a frame for populist rhetoric. The aim of this analysis is to demonstrate the ways in which cultural (ideological) war is waged at the constitutional level, taking the form of constitutional interpretation, isolated constitutional amendments, or new constitutions. The article provides a comparison of three case studies of Hungary, Poland, and Slovakia where the illiberal concept of intimate citizenship has been elevated to the rank of constitutional identity.

The concept of intimate citizenship

In the following analysis the concept of intimate citizenship is used as an analytical tool to describe the engagement of illiberal populist movements with the constitution. Illiberalism manifests itself in the ways of constitutional interpretation or design that fails to recognize individual autonomy as a constitutional principle. Moreover, illiberalism is also exposed in ideological commitments and constitutionally enshrined value preferences that may authorize future legislation inimical to individual autonomy.

The concept of intimate citizenship refers to the status of citizens defined by the level of protection of their rights and freedoms regarding gender, sexuality, intimate and private relationships, and family life. While citizenship has always been used to include and exclude, women and sexual minorities traditionally have additionally been positioned as secondary

[6] Andras L. Pap, 'Who are „we, the people"? Biases and preferences in the Hungarian Fundamental Law', in: Zsuzsanna Fejes, Fanni Mandák, Zoltán Szente (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary*, L'Harmattan 2015, 53-75.

[7] Eszter Kováts, Maari Põim, Judit Tánczos, 'Beyond gender? Anti-gender mobilization and the lessons for progressives', *FEPS-FES Policy Brief*, 11 June 2015, 4-5. See also Eszter Kováts, Maari Põim (eds), *Gender as Symbolic Glue: The Position and Role of Conservative and Far Right Parties Anti-Gender Mobilizations in Europe*, Foundation for European Progressive Studies and Friedrich-Ebert-Stiftung 2015.

subjects of law.[8] For the purpose of this analysis, intimate citizenship will be used to assess whether certain groups within the political community who are formally citizens face stigmatization and marginalization based on their family status or choices and preferences in private life.[9] The article, thus, aims to evaluate whether constitutional value preferences may actually restrict access to certain political, economic, social, and cultural rights of some groups.[10]

Hungary enshrined illiberal value preferences in the new Constitution adopted on 18 April 2011, after Fidesz, Orbán's party (running in a coalition with the Christian Democratic Party) gained a supermajority in the 2010 parliamentary elections.[11] The new social contract of the Orbán regime was neither solicited nor was it put up for a transparent democratic pre-approval or a referendum. More strikingly, its constitutionally framed and cemented value preferences regarding intimate citizenship are not evidently supported by values and life-style choices endorsed by Hungarians. Not only does the Constitution fail to declare or recognize freedom to make autonomous choices in private matters as an explicitly endorsed value, the declaration of the principle of non-discrimination in regard to certain specific freedoms implied by intimate citizenship is also absent.

The Polish legal system is based on the Constitution of 1997, drafted by the Constitutional Assembly dominated by members of the Left Democratic Alliance, with the majority of post-Solidarity, right-wing parties in extra-parliamentary opposition. In order to maintain the character of a social compromise and gain popular support in a nationwide referendum, the Constitution did not make strong value preferences and left the choice open to constitutional interpretation and renegotiation in the political process.

While in Hungary it is the new Constitution and adjacent legislation that sets forth several normatively formulated value preferences that can be defined as illiberal in the sense that they either suggest the denial of or at least disregard for individual autonomy and liberty, and project a paternalistic, patriarchal, and heteronormative concept of the society and the political community, in Poland this project has been implemented on the basis of the 1997 Constitution by the legislature and the Constitutional Tribunal.

---

[8] David T. Evans, *Sexual Citizenship: The Material Construction of Sexualities*, Routledge 1993; Diane Richardson, 'Constructing sexual citizenship: Theorizing sexual rights', *Critical Social Policy* 20(105) (2000); Carl Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform*, Hart Publishing 2003; Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging*, Stanford University Press 2007; Uladzislau Belavusau, 'EU Sexual Citizenship: Sex beyond the Market', in: Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights*, Cambridge University Press 2015.

[9] Kenneth Plummer, *Intimate Citizenship: Private Decisions and Public Dialogues*, University of Washington Press and Combined Academic, 2003.

[10] For more on the subject matter, see also George L. Mosse, *Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe*, Howard Fertig Pub 1985; Lisa Duggan, *Materializing Democracy. Towards a Revitalized Cultural Politics*. Duke University Press 2002; Sylvia Walby, 'Is citizenship gendered?' *Sociology*, 28(2) (1994), 379–395; Roman Kuhar, 'Playing with science: Sexual citizenship and the Roman Catholic Church counter-narratives in Slovenia and Croatia', *Women's Studies International Forum*, 48 (2015).

[11] Renata Uitz, 'Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary', *International Journal of Constitutional Law*, 13(1) (2015), 279-300.

In Hungary, the new political community reflects an image of ethnic Hungarians who belong to the middle-class, are active in the labor market and are practicing Christians (or at least belong to a denomination that is recognized by the state). Moreover, the concept of intimate citizenship enshrined in the Constitution implies heteronormativity and monogamy. Thus, model Hungarians are married, live with their spouses, and are naturally fertile.

In Poland, the Constitution did not determine strong ideological commitments to Catholicism, but the majority religion has been the driving force of the legislature and the Constitutional Tribunal in cases concerning the protection of life, family, reproductive rights or the position of the Catholic Church ever since the democratic transition. While marriage is defined in the Polish Constitution as a union of a man and a woman, other forms of family life are not recognized by law. Yet, the majority of Poles are actually practicing Catholics and endorse marriage as the preferred form of living together.

In the case of Hungary, pointing to the particular constitutional preferences and biases triggers the question whether the founding fathers (who actually were overwhelmingly men) actually built this construction on actually shared values and support by the Hungarian people. (This is not to imply that popular support for illiberal or oppressive political commitments would make them legitimate.) This article will argue that the actual choices of Hungarians concerning marriage or church attendance do not appear to be in line with the constitutionally enshrined intimate citizenship concept, which makes Hungarian illiberalism even more harsh.

In Slovakia, the debates surrounding the adoption of the Constitution in 1992 were concerned with protecting the ethnic majority from traditional linguistic minorities, mostly the Hungarian community. The Constitution therefore elevated the status of the Slovak language from official to state language. The implementing legislation, the State Language Law, was adopted in 1995 to limit the use of minority languages in the country. Questions of Christian morals were not at the forefront at the time of drafting the Constitution. According to Article 1 of the Constitution, the country is not bound to any ideology and religion. This, however, did not mean neutrality in practice. Due to the strong influence of Christian churches in public life, state policy often reflects Christian morals. This includes attempts to prohibit abortions, lack of recognition of civil unions or other forms of relationship outside heteronormative marriage, which culminated in the 2014 constitutional amendment declaring marriage to be a unique union of man and woman.

A Christian state

Hungary

The preamble of the Hungarian Constitution of 2011 characterizes the Nation as a Christian community. Not only was the Fundamental Law adopted by MPs who are 'aware of their responsibility before God',[12] but, according to the National Avowal,

[12] In the second last line of the Fundamental Law.

> 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.

It is more than a festive declaration. Pursuant to Article R(3) of the Chapter entitled 'Foundation', the preamble has a normative force as it serves as a basis for constitutional interpretation.[13]

The text of the Constitution 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

> 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. 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.

Pursuant to Article 5 of the Constitution,

> 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.

The legislature further limited the endorsement of religious communities to a specific kind. On 30 December 2011 the Act on Churches was passed,[14] which made the official recognition of a church or religious organization conditional on prior approval by a two-thirds majority in the Parliament.

The new requirement for state recognition include a documented 20 years of existence in Hungary, in which case a church or religious organization need to demonstrate membership of approximately 10,000 people (ca. 0.1 percent of the total population of Hungary) or at least 100 years of international existence, in which case its foreign affiliation needs to be certified by at least two other churches of 'similar doctrine' recognized in foreign countries.[15] In practice, none of the statutory criteria binds the Parliament in practice as it may always refuse or 'pocket veto' the official recognition. [16]

---

[13] Article R(3) of the Hungarian Constitution, the Fundamental Law: 'The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution.'

[14] Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities.

[15] See International Religious Freedom Report for 2015 (further as the US State Department Religious Freedom Report), available at: <www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>.

[16] See a joint report by three leading Hungarian human rights NGOs, the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union, and the Eötvös Károly Institute, available at: <http://helsinki.

The new law distinguished between incorporated churches and other religious organizations, and granted privileges such as tax benefits and subsidies – including support for charitable activities – only to the former.[17] Subsequently, only 14 religious organizations became recognized religions and the rest was decertified.[18] In consequence, over 350 denominations lost their official status in Hungary, including tax exemptions and the authorization to run state-funded schools. In contrast, incorporated churches have maintained access to a range of state funding opportunities and thus enjoy financial autonomy. In particular, they are eligible for donations of 1 percent of personal income tax. Moreover, only an officially recognized church may be involved in the mandatory one-hour-per-week faith and ethics or ethics-only public education programs. While churches providing religious education may determine the program curricula and use their own textbooks, other religious organizations are not authorized to provide mandatory religious education in public schools, but they may offer extracurricular religious education if requested by students or parents. Furthermore, incorporated churches receive automatic authorization to provide pastoral services in hospitals and in the military, while other religious organizations must seek permission to do so. [19]

Notably, the text of the Constitution does not require the Parliament to take the universal guarantee of religious freedom into account when deciding on the status of a church or religious organization, as it is at full liberty to consider whether a particular church or religious organization 'realizes the public objectives' when selecting its social partners. The above cited constitutional provision has been passed in reaction to the decision of the Hungarian Constitutional Court[20] striking down the contestable Act[21] and a judgment of the European Court of Human Rights[22] that found Hungary in violation of freedom of association and freedom of religion.

Poland

The Preamble of the Polish Constitution of 1997 proclaims that the Nation comprises

hu/wp-content/uploads/Hungary_NGO_Fact_sheets_February2012.pdf>.

17 Opinion of the Venice Commission No. 664/2012 (CDL-AD(2012)004) 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. The Venice Commission held that the law 'falls short of international standards' on some key aspects.

18 While the number of recognized churches grew, the process of de- and re-recognition was accompanied by fierce legal debates. Some minority religious groups reached an agreement with the government on their compensations, others applied to the European Court of Human Rights.

19 The US State Department Religious Freedom Report, Section II.

20 Decisions of the Hungarian Constitutional Court No 6/2013. (III. 1.) and No 23/2015. (VII. 7.)

21 See also Balázs Majtény, 'Alaptörvény a nemzet akaratából', *Állam- és Jogtudomány*, 1(2014), 91–92.

22 *Magyar Kereszteny Mennonita Egyhaz and Others v. Hungary*, app. No 70945/11, judgment of 28 June 2016.

> all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources.

It also refers 'the culture rooted in the Christian heritage of the Nation and in universal human values' and, further, both to the responsibility before God and our consciences. Overall, the text gives the impression of viewpoint neutrality and does not grant Catholicism any special position. While emphasizing both religious and universal underpinnings of the constitutional order, the framers of the Constitution avoided formulations that would discriminate or exclude any members of the community.

However, constitutional provisions regarding the autonomy of churches and religious organizations establish not only guarantees of religious freedom, but also lay down the foundation for cooperation between the state and churches and religious organizations for the individual and common good.[23] The strict separation between the state and religion under the 1952 Constitution was, nevertheless, turned into a 'friendly cooperation' between the state and the Catholic Church in the post-1989 constitutional practice. As a result, the Catholic Church could not only reinforce its superior position vis-à-vis other churches and denominations, but also restore the place of religion in the public space. The latter was a matter of dealing with the legacy of the communist regime, which purged religious symbols from public institutions and restrained religious cult and practices.[24]

Characteristically, the Polish Constitutional Tribunal approved of all legislative choices which granted the Catholic Church special rights and privileges in recognition of the will of the majority. In 1991, the Tribunal upheld a ministerial instruction introducing religion in public schools notwithstanding the fact that it lacked a clear statutory basis and was contrary to the binding Law on Education.[25] The instruction was later replaced by a ministerial decree issued on the basis of the 1991 Education Act, but again without a specific statutory authorization.[26] These early judgments contradicted the constitutional hierarchy of legal norms and the requirement that all limitations of fundamental rights are provided for by a statute. Still, the Tribunal relied on these judgments in its subsequent decisions

---

[23] Article 25 of the Constitution of Poland. See, for example, Daniel Augenstein, 'Europe's constitutional identity between religious and secular values', Working Paper Series No. 2009/13, 5. See also Lorenzo Zucca, The Crisis of the Secular State—A Reply to Professor Sajó', *International Journal of Constitutional Law*, 7 (2009), 494; András Sajó, 'The crisis that was not there: Notes on a reply', *International Journal of Constitutional Law*, 7 (2009), 494; Joseph H.H. Weiler, 'Lautsi: Crucifix in the classroom redux (Editorial)', *European Journal of International Law*, 21 (2010), 1.

[24] The Catholic Church in Poland had not been historically entangled in the authoritarian regime and could claim credit in the regime's peaceful overthrow.

[25] Judgment of the Polish Constitutional Tribunal of 30 January 1991, case No K 11/90 (teaching religion in public schools).

[26] Judgment of the Polish Constitutional Tribunal of 20 April 1993, case No U 12/92 (inclusion of a grade in religion in the student record).

concerning religious teaching in public schools,[27] which legitimized various legislative acts favoring the majority religion, for example by public funding of denominational schools.[28]

It is quite remarkable that in the entire case law of the Constitutional Tribunal there is no single decision that would undermine the privileged place of religion in the public space or the position of the Catholic Church vis-à-vis minority denominations.[29] The Constitutional Tribunal consistently upheld laws favorable to the Catholic Church and the moral standards accepted by the Catholic majority.[30] Conflating religious values with universal ethics[31] the Tribunal did actually attribute to 'We, the people' a social identity that is less inclusive than the citizenry as a whole.[32]

In a judgment concerning the ritual slaughter the Tribunal recognized that freedom of religion is not only guaranteed in the Constitution, but it is also one of the basic moral values in Polish society.[33] Consequently, the Tribunal held that it is consistent with the moral norms shared by the vast majority of Polish society that freedom of religion should have the most far-reaching protection. On this basis, the Tribunal confirmed that freedom of conscience and freedom of religion have a special place among other constitutional freedoms and rights.[34]

Slovakia

According to its Preamble, the Slovak Constitution was adopted by the Slovak nation 'bearing in mind the political and cultural heritage of [their] predecessors' and 'of the spiritual bequest of Cyril and Methodius'. The latter refers to St. Cyril and St. Methodius, who are believed to have brought Christianity to the current territory of Slovakia in the 9th

[27] Judgments of the Polish Constitutional Tribunal of 2 December 2009, case No U 10/07 (counting of the religion/ethics grade towards the average grade) and of 5 May 1998, case No K 35/97 (the right of minority churches and denominations to organize religion classes in public schools).

[28] Judgment of the Polish Constitutional Tribunal of 14 September 2009, case No K 55/07 (public funding of denominational schools). Also see: decisions of the Polish Constitutional Tribunal of 6 February 2007, case No K 16/06 (Temple of Divine Providence), of 8 June 2011, case No K 3/09 (Committee on Church Property). *ZNP v. Poland*, App. No. 42049/98, decision of September 21, 2004; *Polski Autokefaliczny Kosciol Prawoslawny v. Poland*, app. No 31994/03, ECtHR decision of 27 April 2010 and the decision of the Polish Constitutional Tribunal of 2 April 2003, case No K 13/02 (Polish Autocephalous Orthodox Church).

[29] Judgment of the Polish Constitutional Tribunal of 6 October 2015, case No SK 54/13 (public insult of religious feelings).

[30] Judgments of the Polish Constitutional Tribunal of 26 May 1997, case No K 26/96 (abortion on social grounds) and 7 October 2015, case No K 12/14 (conscience clause for medical professionals).

[31] Judgments of the Polish Constitutional Tribunal of 2 March 1994, case No W 3/93 (respect for the Christian system of values in public broadcasting) and of 7 May 1994, case No K 17/93 (prohibition of violation of religious feelings in public broadcasting).

[32] János Kis, 'The Principle of State Neutrality', in: Michel Rosenfeld, András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press 2012, 332.

[33] Judgment of the Polish Constitutional Tribunal of 10 December 2014 (ritual slaughter).

[34] See also judgment of the Polish Constitutional Tribunal of 7 October 2015, case No K 12/14 (conscience clause).

century. The text of the Constitution does not further entrench religious beliefs or commitments. According to Article 1, the country is not bound to any religion or belief. Article 24 of the Constitution guarantees the freedom of religion, the right to exercise religion, and the autonomy of churches and religious institutions of all religions and denominations.

While the Constitution is phrased neutrally, apart from the Preamble, the dominance of Christian churches in public life influences the implementation of its provisions. This is evident in regulating abortions, education, marriage and civil unions, discussed below. The registered churches are also financed from public funds to perform their religious, educational and social activities.

The dominant position of the Christian churches, and particularly the Catholic Church, is underlined by the Law on Churches.[35] Only churches and religious organizations registered with the Ministry of Culture are recognized by the state, and can benefit from tax exemptions, can provide religious education, build places of worship, and enjoy other rights. The original 1991 Law on Churches did not specify the number of members a church needs to have in order to be registered. In 1992, the Law was amended, and now requires 20,000 members for registration. The corresponding requirement at the time was 300 members in the Czech Republic, 100 members in Poland, and 10 members in Russia and Hungary. The threshold of 20,000 members was very high for Slovakia, making it practically impossible for any new churches to be registered. Even some of the most traditional churches did not have that many members, apart from the five largest ones.

The Constitutional Court considered the constitutionality of this requirement in 2010.[36] The Court held that the Law on Churches was constitutional, because the state had a legitimate interest in ensuring that only traditional religious faiths with stable membership enjoyed the advantages of registration. The government, in its arguments, referred to the Preamble of the Constitution as endorsing traditional churches,[37] a position which the Court accepted.[38] The Court elaborated that members of newer, less numerous denominations could also exercise their religion, though without enjoying the benefits granted to registered churches.

Even though no new Church in Slovakia had reached the number of 20 000 adherents, the requirement was raised further in 2016. On the proposal of the right-wing Slovak National Party, the threshold was set at 50,000 members.[39] The President of the Republic refused to sign the bill, but it was passed again by the National Assembly and became a law.[40] This amendment demonstrates well the current nature of illiberalism in Slovakia. It was surrounded by anti-Muslim rhetoric, related to the ongoing migrant

[35] Law on religious freedom and the position of churches and religious societies, Law No 308/1991 Col. l.

[36] Decision of the Slovak Constitutional Court of 3 February 2010, PL. ÚS 10/08-70.

[37] *Ibid.*, 12.

[38] *Ibid.*, 21.

[39] Law No 39/2017 Col. l.

[40] The President vetoed the amendment of the law on the registration of churches, Press release of the Office of the President, 20 December 2016, available in Slovak at: <https://www.prezident.sk/article/prezident-vetoval-novelu-zakona-o-registracii-cirkvi/>

crisis.[41] Its proponents wanted to make it impossible for any Muslim denomination to be registered in Slovakia. Even though Slovakia is the only European state without a mosque, the number of Muslims in the country is only a few hundred, and the number of refugees is not much higher, the imaginary threat of a registered Muslim denomination was something that the parliamentary majority could not ignore. The resulting policy has little practical impact, because even the previous threshold of 20,000 members was too high for any new denominations, whether Muslim or not. This did not stop the majority from endorsing a further restriction of religious freedom.

The state's secular character was also partly undermined by the Basic Treaty between Slovakia and the Holy See, signed in 2001.[42] According to Article 7 of the Treaty, Slovakia recognizes everybody's right to conscientious objection on the basis of the tenets of the Catholic faith. The details of this provision were supposed to be regulated by a separate treaty between the two parties. The proposal was, however, heavily criticized because it permitted wide-ranging exceptions from providing abortions, euthanasia, birth control, and sexual education, and thus has not been adopted so far.[43]

The only explicit forms of conscientious objection in Slovakia are permitted with regard to military service, which is not mandatory anymore, and healthcare services. According to Law No 578/2004 Col. l. on the providers of healthcare services, healthcare employees may reject the provision of a healthcare intervention if it contradicts their conscience, except in case of an immediate danger to life or health of the patient. They must notify the patient and their supervisors about their conscientious objection. Although it is unclear how often this provision is used, it allows doctors to refuse to perform abortions if they consider these to be contrary to their Catholic beliefs. According to newspapers, practically all doctors in some regions of Slovakia refuse to perform abortions,[44] and this has become the practice also in some hospitals in Bratislava after the Basic Treaty with the Holy See was concluded.[45]

Christian identity in Hungary, Poland and Slovakia

Although the new Hungarian Constitution proclaims the Christian heritage of the Hungarian nation and expresses dedication for religion, such firm and selective religious commitment turns out not to be supported by census data and social research.

---

[41] 'Danko vedie križiacku výpravu proti islamu', *Aktuálne*, 15.10.2016, available at: <https://aktualne.atlas.sk/slovensko/politika/kriziacka-vyprava-proti-islamu-danko-chce-sprisnit-registraciu-cirkvi.html>.

[42] Basic Treaty between the Slovak Republic and the Holy Sea, published as Law no. 326/2001 Col. l.

[43] Viktor Križan, 'Výhrada svedomia a možnosti jej uplatnenia v pracovnom práve', in: Michaela Moravčíková, Viktor Križan (eds), *Právna ochrana svobody svedomia*, Trnava 2013, 50.

[44] Daniel Vražda, 'Oravskí gynekológovia uplatňovali výhradu vo svedomí už za socializmu', *Sme*, 7 February 2006, available at: <https://www.sme.sk/c/2579296/oravski-gynekologovia-uplatnovali-vyhradu-vo-svedomi-uz-za-socializmu.html>.

[45] Iris Kopčayová, 'Interrupcie nerobíme. Z technických príčin...', *Pravda*, 22 January 2011, available at: < https://spravy.pravda.sk/domace/clanok/169160-interrupcie-nerobime-z-technickych-pricin/>.

In the 2011 national census, 16.7 percent of the population indicated no religious affiliation, 1.5 percent indicated they were atheists, and 27.2 percent offered no response to the question on religion.[46] The fact that between 2001 and 2010 census data showed a substantial decline in the number of persons who claim to belong to the major Christian denominations is significant for evaluating the constitutional construction adopted by the legislator. Over a 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 Calvinist and Lutheran churches fell from 1.6 to 1.15 million and from 304,000 to 214,000, respectively. Simultaneously, the number of those who did not indicate any affiliation with any organized religious community rose to 2.7 million in 2010, from 1.1 million in 2001.[47] According to earlier research, the number of those who regularly practiced their religion (at least once a month) dropped by around a third between 1998 and 2008, and now amounts to roughly 13 percent of the total population.[48]

In this context, it is also worthwhile to note the results of research on the national and European identity of Hungarians and other nationalities in the region in the two decades between 1992 and 2014. The project measured the personal construction of national identity through an assessment of eight constitutive elements of identity. In the survey, respondents were asked to rate the following factors in the order of importance they assigned to each in terms of its role in constituting a 'real Hungarian': (1) birthplace; (2) citizenship; (3) place of residence (whether or not someone spends most of their time in Hungary); (4) command of the Hungarian language; (5) Christianity; (6) acceptance of the democratic set of institutions; (7) self-identity (whether someone considers themselves Hungarian); and, in the years 2003 and 2013, (8) Hungarian ancestry (the individual is of Hungarian descent/has Hungarian forebears). Hungarian respondents rated Christianity as the least important factor in defining Hungarianness.[49]

In Poland, the 2011 national census covered 38.5 million persons,[50] out of which 7.1 percent refused to declare their religious affiliation, 2.4 percent indicated they were

[46] See <www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>.

[47] See <www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_10_2011.pdf>.

[48] Tamás Keller, 'Változás és folytonosság a vallásossággal kapcsolatban', *Statisztikai Szemle* 88(2) (2010), 144. <www.ksh.hu/statszemle_archive/2010/2010_02/2010_02_141.pdf>. The 2011 national census included an optional question on religious affiliation. Responses indicated that 37.1% of the population self-identified as Roman Catholic, 11.6% as Hungarian Reformed (Calvinist) Church, 2.2% as Lutheran, 1.8% as Greek Catholic, and less than 1% as Jewish. In the same census, 16.7% indicated no religious affiliation and 1.5% indicated they were atheists; 27.2% offered no response. Religious groups together constituting less than 5% of the population include Greek Orthodox, the Faith Congregation (a Pentecostal denomination), other Orthodox Christian denomination, other Christian denominations, Buddhists, and Muslims. See <www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>.

[49] Bori Simonovits, 'Nemzeti identitás, kisebbségek és társadalmi konfliktusok – A magyar társadalom attitűdjeinek alakulása 1992 és 2014 között', in: Tamás Kolosi, István György Tóth (eds), *Társadalmi Raport 2014*, Tárki 2014, 406.

[50] See <http://stat.gov.pl/spisy-powszechne/nsp-2011/nsp-2011-wyniki/wybrane-tablice-dotyczace-przynaleznosci-narodowo-etnicznej-jezyka-i-wyznania-nsp-2011,8,1.html>.

atheists, and 1.6 percent offered no answer to this question. Among those who declared their religious affiliation: 87.58 percent indicated they belonged to the Catholic Church. The Polish Autocephalous Orthodox Church with 156,000 believers (0.41 percent of the population) ranked second. The third and fourth place belong to the Jehovah's Witnesses and the Evangelical Church of the Augsburg Confession with 129,270 (0.36 percent) and 71,000 (0.18 percent), respectively. According to the census, there are 33,000 Orthodox Catholics in Poland. Other religions in Poland include Judaism and Buddhism, but neither is practiced by more than 1 percent of the population. In the light of this statistics the dominant position of the Catholic Church in Poland is unquestionable, although the number of believers who actually practice religion as regular church-goers (*dominicantes*) oscillates around 40 percent since the 2000s, with 17 percent those who partake of the Eucharist (*communicantes*).[51]

In Slovakia, the number of people declaring a religious affiliation rose from 1991 to 2001, and slightly decreased according to the 2011 census. At the time of the 2011 census, the country's population was 5.4 million.[52] Of the population, 13.4 percent declared no religious affiliation, while 10.6 percent offered no answer to the question. The remaining 76 percent declared to be members of some churches, compared to 84 percent in 2001 and 72.8 percent in 1991. From the 76 percent, 62 percent or 3.35 million persons belonged to the Roman Catholic Church, 5.9 percent to the Evangelical (Lutheran) Church, 3.8 percent were Greek Catholics, 1.8 percent belonged to the Reformed (Calvinist) Church), and 0.9 percent or 49,000 persons were Orthodox (*Pravoslav* in Slovak). These five churches thus comprised 98 percent of all adherents. The remaining churches had all less then 20,000 members: the Jehovist Church had 17,000 members or 0.3 percent of the population, the Methodist Church 10,000 members or 0.2 percent of the population, the Hussite Church, the Baptist church, the Adventist Church and other Christian denominations had fewer members. The only non-Christian churches in Slovakia were Judaism with 2,000 members and Bahaism with 1,000 members. These statistics underline the dominant position of Christians, especially that of Catholics in Slovakia.

Protection of marriage and family

Hungary

The new Hungarian Constitution expresses clear, normative preferences toward conservative family values. The Preamble holds that 'the family and the nation constitute

[51] See the Institute for Catholic Church Statistical in Poland – <www.iskk.pl/kosciolnaswiecie/231-dominicantes-2014.html>.

[52] See <https://slovak.statistics.sk/wps/wcm/connect/54eb0cba-ec99-4549-8a33-5c86eead59c1/Tab_14_Obyvatelstvo_SR_podla_nabozenskeho_vyznania_scitanie_2011_2001_1991.pdf?MOD=AJPERES&CVID=knLHnky&CVID=knLHnky>

the principal framework of our coexistence and that our fundamental cohesive values are fidelity, faith and love'. The Preamble also declares that

> the basis of our legal order [...,] shall be a covenant among Hungarians of the past, present and future; a living framework which expresses the nation's will and the form in which we want to live.[53]

According to one interpretation, the term 'fidelity' may apply both to patriotic duties and marriage.

The new Hungarian Constitution introduces a restrictive definition of marriage and the concept of a 'natural' family based on marital and parent–children relationships. Article L provides that

> (1) Hungary shall protect the institution of marriage as a union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival.

It also establishes the state duty to encourage the commitment to have children and states that 'family ties shall be based on marriage and/or the relationship between parents and children'.[54] This wording recognizes parent–child relations that have emerged outside of marriages, but not the relationship of the parents who remain unmarried or are in a civil law union. This is a clear expression of a moral standard that denies the equal recognition of the plurality (freedom) of forms of private life, the neutrality of (and tolerance by) the state and respect for personal autonomy.[55]

In one of the first most comprehensive legal opinions on the new Hungarian Constitution, it has been pointed out that

> the 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 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.[56]

It is also worth noting that the constitutional affirmation of a „natural" family based on marriage as a union of a man and a women and their children is a reaction to the decision

---

[53] 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'.

[54] Article L of the Hungarian Constitution.

[55] Zoltán Fleck *et al.* (eds.), Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary, available in English at: http://lapa.princeton.edu/hosteddocs/amicus--to-vc-english-final.pdf, 15.

[56] *Ibid.*, 17–18.

of the Constitutional Court adopted in 2012[57] in which the Court held that „family life" is a historically changing and evolving concept, 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.

It also needs to be noted that the restrictive definition of marriage rules out the possibility of expanding its scope to same-sex couples.

> 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.[58]

In this way, the Constitution limits the autonomy of individuals who do not accept the normative model of a family and may result in banishing them from the political community.[59] Not only does it express a cis heterosexual and essentialist bias, but it also denies recognition of homosexual relationships and unions, as well as childless citizens. Still, same-sex couples may register their union in pursuance to the Act on the registered union adopted by the former government in 2009, which remains in force.[60]

Poland

In the Polish Constitution the protection of marriage, family, motherhood, and parenthood gained the status of the core principle of the system of government. Article 18 of the Constitution provides that

> marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.

Notably, in the Accession Treaty decision, the Constitutional Tribunal held that

> marriage, being a union of a man and woman, has acquired a distinct constitutional status within the domestic law of the Republic of Poland [...] and any modification of this status would be possible only by the way of an amendment of the Constitution (according to

[57] Judgment of the Hungarian Constitutional Court of 17 December 2012, No. 43/2012. (XII. 20.) reviewing Act No CCXI of 2011, passed on 23 December 2011. The Act provides that a heterosexual marriage is a privileged type of family and being raised in such a family is more secure than other forms of upbringing. In pursuance of this Act, the definition of a family based on a marriage would apply to all other laws, regardless of their purpose, and exclude all other forms of family relationships, such as cohabitation and registered unions.

[58] Fleck *et al.*, *supra* note, 15.

[59] Fleck *et al.*, *supra* note, 19.

[60] Act XXIX of 2009.

> Article 235 thereof); in no circumstances would it be possible by way of a ratified international agreement.[61]

Nevertheless, before the ratification of the Lisbon Treaty the government sought additional reassurance that the Charter of Fundamental Rights would not introduce same-sex marriages in the Polish constitutional order. Therefore, it signed the British Protocol concerning the status of the Charter of Fundamental Rights under domestic law.[62] The decision to accede to the British Protocol was clearly motivated by the fear of a liberal legal tradition implying the liberalization of abortion law, the legalization of euthanasia and same-sex marriages, and the revival of German compensation claims for property left behind within Poland's borders in 1945.[63]

The constitutional status of marriage as a union of a man and a woman was affirmed in the judgment of the Constitutional Tribunal concerning income tax.[64] In this decision the Tribunal explained that

> in the light of the constitutional provisions a 'family' must be recognized as any lasting union of two or more persons, consisting of at least one adult and a child, based on the emotional, legal, and usually also on blood ties. The family can be 'full', including 'large families', or 'incomplete'. A 'full' family consists of two adults who remain in the shared household and bound by emotional ties and a joint child (children) whom they raise. An 'incomplete' family consists of one adult and a child (children) whom she or he raises (....).

In the same decision the Tribunal stated that relationships in which children are raised do not fall in the concept of 'marriage'," but the Constitution grants them the social and economic protection specified in Article 71.[65] Notably, in the same decision, the Tribunal went on to say that

---

[61] Judgment of the Polish Constitutional Tribunal of 11 May 2005, case No K 18/04 (the Accession Treaty).

[62] Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, 2010 O.J. C 83/318, 13 December 2007. Although the British Protocol was typically understood as an opt-out from the Charter, excluding the jurisdiction of the Court of Justice of the European Union and domestic courts with regard to Charter rights, it was later explained that the Protocol had merely an interpretative nature. See Joined Cases *N. S.* (C-411/10) *v Secretary of State for the Home Department* and *M. E. and Others* (C-493/10) *v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform.*

[63] Mirosław Wyrzykowski, 'Wprowadzenie: granice władzy i granice interpretacji', in: Andrzej Wróbel (ed) *Ochrona praw podstawowych w Unii Europejskiej*, 2008, 25.

[64] Judgment of the Polish Constitutional Tribunal of 12 April 2011, case No SK 62/08 (income tax).

[65] Article 71 of the Polish Constitution:
'The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances – particularly those with many children or a single parent – shall have the right to special assistance from public authorities.'

> the family protection implemented by the public authorities must take into account the vision of family adopted by the Constitution as a lasting union of a man and a woman oriented towards motherhood and responsible parenthood [...].

It also reiterated that the state had an obligation to take such action that will 'strengthen the ties between the persons making up the family, and in particular the ties between parents and children and between spouses'.[66] Furthermore, in the view of the Tribunal, tax regulations may not, even indirectly, weaken the family ties by giving preference to single parents or even both parents who are not in a marital relationship.[67]

The constitutional definition of marriage and the interpretation of the notion of 'family' was at the heart of the parliamentary debates accompanying the bill on the registered union. In Poland, bills on registered union, opening the possibility to legalize both same- and opposite-sex unions were submitted to the Parliament in 2003, 2004, 2011, 2013, and 2015. Each of these bills was nevertheless voted down or not revisited after the end of the parliamentary term. According to those opposing same-sex union, Article 18 of the Constitution prohibits institutionalization of any relationships alternative to marriage. Thus, the recognition of same-sex unions would be an attack on traditional family and the natural order affirmed in the Preamble of the Constitution. Opponents of same-sex unions also argued that many rights of cohabitating same-sex partners were recognized in court decisions.[68]

In contrast, the proponents of registered union argued that the Constitution required the regulation of other forms of family life than marriage. They also claimed that the Constitution did not prohibit or exclude the institutionalization of registered union that would remain distinct from marriage.[69] For the time being, the status of cohabitating partners of either sex has not been formally recognized. While marriage remains open only to different-sex couples, same-sex partners are outside the protection of law.[70]

Slovakia

The 1993 Slovak Constitution, in its Article 41, provided protection to the family without defining it:

---

[66] Judgment of the Constitutional Tribunal of 18 May 2005, case No K 16/04 (supplements to family allowance for single parents).

[67] Marek Zubik, 'Podmioty konstytucyjnych wolności, praw i obowiązków', *Przegląd Legislacyjny* 2 (2007), 41.

[68] See, for example, judgment of the Polish Supreme Court of 28 November 2012, No III CZP 65/12 (the right of a surviving partner to enter into a tenancy agreement).

[69] See the opinion of the Committee of the Legal Sciences of the Polish Academy of Sciences, available at: <www.knp.pan.pl/images/stories/KNP_PAN/Pismo_do_Prezesa_PAN_z_23_04_2012.pdf>.

[70] Adam Bodnar, Anna Śledzińska-Simon, 'Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe,' in: Daniele Gallo, Luca Paladini, Pietro Pustorino (eds), *Same-sex Couples before National, Supranational and International Jurisdictions*, Springer 2014, 211-247.

> Marriage, parenthood and the family are under the protection of the law.

The Law on Family, in force at the time, defined marriage as a union of a man and a woman, therefore there was no doubt that the constitutional protection applies to different-sex relationships.[71] The question of same-sex relationships or other forms of marriage did not come up when the constitution was adopted.

Concerns about undermining the traditional moral norms of Slovak society were raised after accession to the EU. There was very little political support in Slovakia for recognizing same-sex civil unions or marriages. No proposals to adopt civil unions or same sex marriages have ever been submitted to the Parliament. The opponents of liberalization therefore mostly point to the example of Western European countries and international organizations that could force Slovakia to change its legal framework and recognize forms of relationship that are not in harmony with Slovak traditions.[72] As a response to such perceived threats, in 2013 the Alliance for Family was established to promote the values of traditional family. The Alliance is supported by 90 organizations, including the traditional churches.

In June 2014, the Slovak Constitution was amended. Two new sentences were added to Article 41:

> Marriage is a unique union between man and woman. The Slovak Republic protects marriage by all means and helps its welfare.

The protection of heterosexual marriage is thus elevated to the level of the Constitution, and the state has a constitutional obligation to protect and promote this form of marriage by all means. The amendment was adopted with the votes of both coalition and opposition Members of Parliament.

Before the constitutional amendment, in March 2014, the Alliance for Family initiated a nationwide referendum to entrench the traditional values. The referendum asked four questions. The first was whether marriage should be defined as a union of a man and a woman. The second concerned the permissibility of adoption and raising of children by homosexual couples or 'groups of persons'. The third asked whether children could be compelled to have sexual education in schools if their parents object. The fourth was whether any other forms of relationships other than marriage should be denied the rights accorded to marriage under the law.

The referendum was supported by the main churches, notably the Catholic Church. It also received support from local authorities, which compelled their employees to collect signatures supporting the referendum. The 350,000 signatures necessary to hold the referendum were collected by summer 2014. The President of the Republic submitted the referendum questions to the Constitutional Court to review their constitutionality.

---

[71] Law on Family, Law No 94/1963 Col., § 1.

[72] Aliancia za rodinu, Manželstvo, available at: <http://www.alianciazarodinu.sk/projekty/projekt/referendum/manzelstvo/>.

On 2 December 2014, the Constitutional Court decided that the first three questions were constitutional, while the fourth concerning the denial of rights to other forms of relationship is unconstitutional. The President thus declared the referendum with the three remaining questions to be held on 7 February 2015.

In the end, the referendum was unsuccessful because of the low turnout. Only 21.41 percent of voters came to the polls, falling short of the required threshold of 50 percent. Those who did vote, overwhelmingly supported the position of Alliance for Family: over 90 percent answered all three questions in the affirmative.

The referendum was highly divisive, especially due to the referendum campaign portraying same-sex couples as unsuitable parents. Despite the low turnout, the referendum can be considered successful in the sense that its goals are an actual practice in Slovakia: the protection of different-sex marriage had been elevated to constitutional status before the referendum took place, same-sex couples can form no legally recognized unions or adopt children, and there is no mandatory sexual education in Slovakia. The status quo was maintained: there is still discrimination of relationships non-conforming to the constitutional definition of marriage.

Family life choices in Hungary, Poland and Slovakia

The life choices of Hungarian citizens do not reflect the value preferences expressed in the new Constitution. On the contrary, the traditional family model preferred by the Fundamental Law is not embedded in the social reality. In recent years, the number of persons who get married has steadily decreased. While in 1949 there were 11.7 marriages per 1,000 persons (107,820 ceremonies were held); in 1980 there were 7.5 (80,331); in 1990 there were 6.4 (66,405); in 2001 there were 4.3 (43,583); in 2012, when the Fundamental Law entered into force, there were only 3.6 (36,161).[73]

In the same period the number of divorces has insignificantly changed because a rising trend is discernible. In 1949, 12,556 marriages were dissolved, giving a figure of 1.4 per 1,000 residents. In 1980, there were 27,997 divorces, that is, 2.6 per 1,000 persons. In 1990, this number dropped to 24,888 and a ratio of 2.4; and in 2001 it was 24,391 and 2.4, while in 2012 it stood at 21,830 and 2.2 per 1,000 residents. The divorce ratio was at 2.5 in 2002, 2003 and between 2005 and 2008.[74]

Similarly significant changes took place in regard to personal relationships, with marriage losing ground and cohabitation emerging as the primary type of relationship.[75] Around the time of the political transition, three-fifths of women between the ages of 23 and 25 were married. By 2011, the marriage rate dropped below 40 percent even among

[73] KSH, STADAT: Idősoros éves adatok, 1.1. Népesség, népmozgalom (1941–), <www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnt001a.html>, <www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnt001b.html>, and <www.ksh.hu/docs/hun/xftp/idoszaki/nepmozg/nepmoz13.pdf>.

[74] *Ibid.*

[75] Zsolt Spéder, *supra* note, 65.

women at the age of 40. When the new Constitution was adopted, fewer than a quarter of women aged 23–25 lived in long-term relationships, and fewer than every tenth were married. Furthermore, over a quarter of women in their thirties are not in any kind of relationship. [76]

The increased diversity of family types is thus an obvious trend. The ratio of people living in cohabitation that qualify as civil unions is clearly declining: dropping from 75 percent to 65 percent between 1970 and 2011.[77] The ratio of people living alone rose from 5 percent in 1960 to 14 percent in 2011, with a 5 percent increase between 1990 and 2011.[78] While the number of marriages decreased, that of cohabitations surged. In 1990, just 5 percent of people in a relationship lived together; by 2001 this percentage rose to 11 percent, and in 2011 it reached 18 percent. It has been also noted that

> the growth [of cohabitions] was especially rapid among youths: In the age group 25–29, more persons were cohabiting than living in marriage, while among 30–34-year-olds a third, and among 35–39-year-olds a quarter of all persons chose to live with their partner without getting married.[79]

Furthermore, the popularity of cohabitation is not limited to patchwork families. It is also quite common for relationships where all the children have the same biological parents. While in 1989 only 12.4 percent of children were born to unmarried women, by 2013 this ratio increased to 46.2 percent. Thus, almost half of all births take place in cohabitation.[80] However, patchwork families are also common and there is a growing proportion of children who do not live with both their biological parents or live in single-parent households.[81]

In Poland marriage is the dominant form of living together, while non-marital unions make – depending on the source – between 3 and 6 percent of all relationships.[82] Moreover, marriage is considered the preferred form of living together and raising children. However, an increasing number of people cohabitate for a short period, usually transforming their cohabitation into marriage. In this context, cohabitation appears only as a temporary relationship and a test for a permanent commitment. Although the number of children conceived or born out of wedlock has recently increased, their parents usually decide to get married soon before or after the child is born. In 2006–2010, only 9 percent of children were born and raised by cohabiting parents up to the age of two. In practice, the decision to remain in an informal union is usually dictated by legal or other, personal, constraints.[83]

---

[76] *Ibid.*, 69-70.

[77] István Harcsa, Judit Monostori, 'Demográfiai folyamatok és a családformák pluralizációja Magyarországon' in: Tamás Kolosi, István György Tóth (eds), *Társadalmi Riport 2014*, Tárki 2014, 86.

[78] *Ibid.*, 88.

[79] *Ibid.*, 94.

[80] *Ibid.*, 69-70.

[81] *Ibid.*, 100-104.

[82] Monika Mynarska, Anna Baranowska-Rataj, Anna Matysiak, 'Free to stay, free to leave: Insights from Poland into the meaning of cohabitation', *Demographical Research*, 31 (2014), 1106-1136, 1112.

[83] *Ibid.*, 1113.

Not only is cohabitation less socially acceptable than marriage, it is also not recognized by law. In Poland, cohabitating partners have very limited rights that stem from living together. Formally speaking, they are not recognized as a family. They may not use common tax declarations, inherit property, or claim social benefits as family members. Fathers of children born outside marriage need to declare their status in court with the mother's consent. Moreover, cohabitating partners do not have any rights or obligations in case of death or separation. Furthermore, the same-sex marriages or civil unions concluded abroad do not have any legal significance in Poland.

Notably, the national census of 2011 did not consider cohabitating same-sex partners as families.[84] Instead it presented the situation of biological families based on marriage or cohabitation of men and women (living with or without children) and single parents with children. It also does not reflect the situation of patchwork families. According to sociological research, there are 2 million gays or lesbians living in Poland and approximately 50,000 children are raised by same-sex couples.[85]

In this context, it is also worth noting that the majority of Poles remain skeptical about the legalization of same-sex unions: 78 percent of respondents are against same-sex marriage, while 47 percent oppose legislation that would enable same-sex partners to make joint tax declaration or inherit property from the deceased partner. 89 percent of respondents declare their disapproval of laws permitting same-sex couples to adopt children.[86]

In Slovakia, the number of marriages has been decreasing steadily for decades. The peak was reached in 1978 with 44,000 marriages. By 2001, it fell to 23,800, while in 2013, 25,500 couples married. The same year, 10,900 divorces took place. Since 2010, the number of marriages and divorces has remained stable.[87]

Marriage is still the main form of cohabitation. In 2016, in 1.1 million couples were married and enjoyed legal recognition and protection. Compared to marriage, other forms of cohabitation are not recognized by the law with limited exceptions, such as inheritance and tenants' rights. In 2001, the number of unions outside marriage was 30,000. By 2011, it rose to 90,000. 27 percent of these couples consisted of never-married partners. The rest are made up of relationships where one or both partners had been married before. Since non-marriage cohabitations are not legally recognized, the 2011 census did not gather data on the number and forms of cohabitations and the children raised in such relationships. According to sociological studies, around 30 percent of children are born outside of recognized marriages.[88]

---

[84] National census of population and housing 2011, http://stat.gov.pl/en/national-census/national-census-of-population-and-housing-2011/

[85] Marta Abramovicz (ed), *The Situation of Bisexual and Homosexual Persons in Poland.* Report for 2005 and 2006, Campaign Against Homophobia and Lambda Association, Warsaw 2007; Ireneusz Krzemiński (ed), *Naznaczeni. Mniejszości seksualne w Polsce*, Warsaw 2009.

[86] Opinion Poll No. BS/95/2010, CBOS, Warsaw July 2010.

[87] Eurostat, Marriages and births in Slovakia, <http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriages_and_births_in_Slovakia>

[88] Ladislav Csontos, Katolácka rodina na Slovensku v súčasných zmenách kultúrnej mentality, 2015.

Reproductive rights

Hungary

The new Hungarian Constitution also expresses an ideological bias with regard to reproductive rights. Article II of the Fundamental Law states that 'every human being shall have the right to life and human dignity; embryotic and foetal life shall be protected from the moment of conception'. The recognition of the right to life of a fetus endorses Christian values. Apart from the Irish Constitution of 1937, there is no other European constitution that protects embryonic and fetal life from the moment of conception.[89] The language of the Constitution, drawing a distinction between in utero and in vitro embryos not only imposes a limitation on women's right to self-determination, but may also lead to uncertainties regarding artificial reproduction procedures since IVF methods usually involve destruction of several embryos either inside or outside of the womb.[90]

It has been argued that although the Constitution does not state explicitly that the embryo and fetus has the right to life, it implies such interpretation by incorporating the phrase 'embryonic and fetal life shall be subject to protection from the moment of conception' into the same provision that guarantees the right to life to 'every human being'. This formulation not only opens the path for a restrictive legislative or judicial interpretation concerning abortion, but can easily be extended to limiting infertility treatments, and in particular in vitro fertilization and implantation.[91] It has to be added that the conditions for the termination of pregnancy in Hungary are still quite liberal compared to Poland.

Poland

The Polish Constitution states in Article 38 that 'the Republic of Poland shall ensure the legal protection of the life of every human being'. In 2007 an amendment to this provision by adding the phrase 'from the moment of conception until the natural death' was proposed in the Parliament, but it failed due to insufficient support. Although the Constitution does not explicitly recognize the right to life of a fetus, the Constitutional Tribunal construed such right in the judgment concerning the termination of pregnancy in case of difficult social or economic conditions, which judgment was issued in May 1997, before the present Constitution came into force.[92]

In absence of a constitutional guarantee of the right to life in the 1952 Constitution, the Tribunal derived the notion from the principle of rule of law and extended it to a fetus. Since the decision was clearly contrary to the majoritarian choice of the day, Wojciech

[89] Fleck *et al, supra* note, 18–19.
[90] *Ibid.*
[91] Fleck *et al., supra* note, 19.
[92] Judgment of the Polish Constitutional Tribunal of 26 May 1997, case No K 26/96 (abortion on social grounds).

Sadurski called it 'the most outrageous case, of all constitutional courts [cases] in CEE, of judicial usurpation of the law-making power'.[93] Notably, the constitutional interpretation of the right to life as the right of every human being, including fetus, has been acknowledged in literature as a matter of constitutional identity.[94]

At present, the 1993 Act on Family Planning, Legal Protection of the Human Fetus, and Conditions for Termination of Pregnancy provides for three exceptions from the general prohibition of abortion. These include the situation 'when the pregnancy results from 'criminal activity'; 'when the woman's life or health is endangered by the continuation of pregnancy'; and 'when prenatal testing or other medical premises indicate high probability of serious and irreversible handicap of the fetus or other incurable illness threatening its life'. The abortion law is not only restrictively formulated, but also applied in a very restrictive fashion. In practice, women face serious problems with access to reproductive health and legal abortion services.[95]

Most recently, the new government supported a bill that would introduce almost a total abortion ban even in case of rape or incest. An estimated 100,000 people demonstrated against the proposal that would have subjected doctors and women seeking abortions to potentially long prison sentences. Although the bill was presented as a citizen's initiative and strongly advocated by the Catholic Church, the government abruptly withdrew its support for the legislation.[96]

The abortion case in Poland shows that, in a fledgling democracy, conservative ideology may become part of the national project aiming to defend national sovereignty, the Catholic religion, the sanctity of marriage, and the traditional family model against foreign influences. In the early years of democratic transition, governments made a concession to the Episcopate in exchange for the support for the Polish accession to the European Union (the so-called abortion compromise). [97] This way, a new social contract between laymen in power and the clergy was made in Poland, as a result of which women were subjected to rules that restricted their choices and expanded protection for conscientious objectors.[98]

---

[93] Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer 2005, p. 135.

[94] Andrzej Piotrowski, *The Rhetorics of Collective Identity in the Polish Political Discourse: A Case Study of Two Parliamentary Speeches*, ZiF 1993. However, the context of parliamentary debates on abortion law, same-sex unions, or gender recognition law show two opposite images of the constitutional identity: one formulated in terms of national identity, and the other in terms of liberal values and a pluralist society.

[95] *Alicja Tysiąc v Poland*, app. No 5410/03, ECtHR judgment of 20 March 2007; *R.R. v Poland*, app. No. 27617/04, ECtHR judgment of 26 May 2011; *P. and S. v Poland*, app. No 57375/08, ECtHR judgment of 30 October 2012.

[96] Paweł Sobczak, Marcin Goettin, 'Polish Parliament rejects near-total abortion ban after protests', *Reuters*, 6 October 2016, <www.reuters.com/article/us-poland-abortion-idUSKCN1260Q0>.

[97] The lack of consensus regarding the status of human embryos prevented the ratification of the Oviedo Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine.

[98] More recently, the Tribunal found the Law on Medical Professions unconstitutional because it excluded the use of the conscience clause by doctors in other than life saving emergency situations (judgement

Slovakia

In Slovakia, abortion was liberalized in 1986 with the adoption of the Law on Abortions.[99] This law, still in force today, allows abortions without cause until the 12th week of pregnancy, and beyond that if the pregnancy endangers the life or health of the mother or the fetus.

The Constitution protects the right to life in Article 15:

> Everybody has a right to life. Human life is worthy of protection already before birth.

The Constitution thus extended the right to life to fetuses as well, although it is unclear what level of protection is accorded to life before birth. In 2007, several Members of Parliament of the Christian Democratic Movement challenged the constitutionality of the Law on Abortions, arguing that it violated Article 15. The Constitutional Court rejected their request. The Court held that in line with the jurisprudence of the European Court of Human Rights, the right to private life includes the right to reproductive autonomy, which must be balanced against the fetus' right to life. According to the Court, the right balance had been struck by the legislator, therefore abortions on demand until the 12th week of pregnancy do not violate Article 15 of the Constitution.[100]

Since 2007, no legislative attempts have been registered to further limit the right to abortions. Pro-life NGOs, such as the Forum of Life, have organized campaigns for banning abortions, such as the 2015 March for Life, but this issue has not been high on the political agenda since.

Prohibition of discrimination

Hungary

In the new Hungarian Constitution, the Preamble does not mention equality as a fundamental value or principle of the constitutional order. The word only appears thrice in the entire text.[101] While Article XV (3) guarantees equal rights of women and men, the provision concerning equal pay for equal work is absent in the Constitution.[102] As Lidia Balogh points out, not only was the guarantee of 'equal wages for work of equal value' part of the 1989 Constitution, but it is also one of the fundamental principles of the European

of October 7, 2015, Case No. K 12/14). In the light of the above and the abortion decision, women's autonomy has a lower status than the right to life of a fetus and freedom of conscience of medical doctors.

[99] Abortion Law, Law No 73/1986 Col.

[100] Decision of the Slovak Constitutional Court of 1 December 2007, PL. ÚS 12/01-297.

[101] See also Krista 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.

[102] See also Balázs Matényi, 'Alaptörvény a nemzet akaratából', *Állam- és Jogtudomány* 1(2014), 90.

Union law, embedded in the Treaties since 1957.[103] Even though the new Labor Code[104] does endorse the principle of equal pay, in practice it is mostly applied to evening out regional wage differences.

Furthermore, the constitutional prohibition of discrimination contained in Article XV does not list sexual orientation and gender identity among the grounds of prohibited discrimination. While the list is open-ended and sexual orientation and gender identity can be protected as one of the 'other circumstances', it certainly does not involve an unequivocal commitment thereto. The European Parliament considered the formulation of the non-discrimination clause problematic.[105] Still, Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities offers a comprehensive framework of equality protection and covers all grounds of discrimination enumerated in Article 19 of the Treaty on the Functioning of the European Union.

Poland

The Constitution guarantees not only the principle of equal treatment and non-discrimination (Article 32), but also equal rights of men and women in all spheres of life (Article 33). The wording of the non-discrimination clause is the effect of difficult negotiations that resulted in an open-ended formulation rather than drawing a list of prohibited grounds. In result, the Constitution states that 'no one shall be discriminated against in political, social or economic life for any reason whatsoever'. This way, it avoided the controversy of mentioning the criterion of sexual orientation in the Constitution. Notably, the prohibition of discrimination with regard to sexual orientation was for the first time introduced to the Polish legal system in the amendment of the Labour Code aimed to implement an EU directive.[106]

Article 33 of the Constitution stipulates equal rights of men and women. Yet, the literal meaning of this provision does not suggest that there is an obligation to implement *de facto* equality between men and women. In fact, it is accepted in legal literature that compensatory privilege (positive discrimination) is permissible to benefit weaker social groups - like women - when it comes to social rights, but more restrictively in relation to

[103] Lidia Balogh, 'Az egyenjogúság értéke vagy a „gender-ideológia" fenyegetése? A nemek közötti egyenlőség elve és a protestantizmus: viták és narratívák', *Állam-és Jogtudomány* 4 (2014), 3-25. EU Gender Equality Recast Directive (2006/54/EC) on gender equality in the area of employment and occupation prohibits direct and indirect discrimination on grounds of sex in relation to pay. Also see, for example, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

[104] Act I of 2012 on the Labour Code.

[105] European Parliament (2011) Resolution on the Revised Hungarian Constitution, P7_TA(2011)0315, *Brussels* 5 July 2011, available at: <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN>.

[106] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303 of 2 December 2000.

personal and political rights. Consequently, social legislation not only petrified, but also deepened the existing inequalities between men and women, which manifest themselves as a gender pay gap and the relegation of women to low-paid sectors and positions in industry. Also notable are patterns of systemic gender discrimination engrained in the law and reinforced by state institutions.

For example, the state pension system froze the status of women as carers. Clearly, different treatment of men and women with regard to the pensionable age and early retirement pushed women out of the labor market and further made them bear the financial consequences of this situation. In addition, women also were responsible for state obligations towards those in need of care (such as children and the elderly) because of the shortage of institutional care. The Constitutional Tribunal did not regard this double jeopardy as a disadvantage and upheld the different pensionable age for men and women as consistent with the principle of gender equality.[107]

Slovakia

Article 12(1) of the Slovak Constitution declares all persons to be free and equal in rights and dignity. Article 12(2) prohibits discrimination on the ground of, among others, sex. However, this prohibition only applies with regard to basic rights and freedoms. The Constitution thus follows the example of Article 14 of the European Convention on Human Rights, which can be invoked only in conjunction with other rights protected by the Convention.

The Constitution does not contain a stand-alone equality clause applicable to equality of man and woman, either in general or with regard to pay. The Constitution provides some specific protection to women in its other articles. Article 38 provides for increased protection of health at work for women, youth, and disabled persons. Article 41(2) guarantees special care and work conditions to pregnant women.

Paternalism and essentialism

Hungary

The new Hungarian Constitution includes numerous provisions that embody the paternalistic and essentialist approach to citizens.[108] With relevance to intimate citizenship,

[107] Judgment of the Polish Constitutional Tribunal of 15 July 2010, case No K 63/09 (women's pensionable age). The Tribunal found that a gradual equalization of the pensionable age for men and women is consistent with the Constitution (judgment of 7 May 2013, case No K 43/12), but signalled that the pension reform should have been accompanied by effective and comprehensive employment and family policy supporting activation of certain socially vulnerable categories, as well as family responsibilities of working persons towards children and the elderly (judgment of 17 July 2014, case No S 3/14).

[108] See, for example, Herbert Küpper, 'Between collectivism and liberal individualism: The normative basis underlying the idea of the person enshrined in the new Hungarian Fundamental Law', in:

it assigns them model roles and rules of conduct in private relationships. One of clear examples of the paternalistic approach can be found in Article XVI (4), which posits that 'adult children shall be obliged to take care of their parents if they are in need'. This provision was further concretized in the amendment to the new Civil Code, where details of this obligation are specified. The new law even allows third parties, including institutions, to claim expenses from the children. Notably, this seemingly benevolent constitutional commitment not only imposes severe restrictions on individual decisions on how to conduct personal and family matters, but also permits the state to shift the burden of social obligations towards the elderly on other citizens, in practice on women and female offspring.

Poland

Although in the new social contract enshrined in the Polish Constitution of 1997 women and men are guaranteed equal rights in all aspects of life, including politics, the constitutional interpretation of substantive equality emphasized the remedial and compensatory function of positive measures and preserved the image of women in need of special protection in the social and economic sphere, rather than promoting the concept of equal citizenship, autonomy, or parity democracy. Instead, the focus of constitutional jurisprudence on the reproductive role of women reinforced the sexual contract and the traditional understanding of gender roles and gender relationships.[109]

In fact, this essentialist approach to women permeated the understanding of the Constitutional Tribunal of the substantive equality clause enshrined in Article 33 of the Constitution. The Constitutional Tribunal has consistently held that laws granting special economic or social rights or privileges to women are justified by biological differences and aim to compensate their role as caregivers.[110] In this vein, constitutional jurisprudence maintained the image of women as biologically determined and in need of special protection, rather than promoted equal citizens' rights in all areas of life.[111] In the end, neither integration with the EU nor the implementation of EU law could challenge the culturally entrenched model of power relations or discharge the existing 'sexual contract'.[112]

Zoltán Csehi, Balázs Schanda and Pál Sonnevend (eds.), *Viva vox iuris civilis: Tanulmányok Sólyom László tiszteletére 70. születésnapja alkalmából*, Szent István Társulat 2012. It is a shortened version of Küpper's article entitled 'Zwischen Staatspaternalismus, Kollektivismus und liberalem Individualismus: Normative Grundlagen des Menschenbilds im neuen ungarischen Grundgesetz'.

[109] Anna Śledzińska-Simon, 'Gender quotas and women's solidarity as a challenge to the gender regime in Poland', in: Eléonore Lépinard and Ruth Rubio Marin (eds), *Transforming Gender Equality: The Irresistible Rise of Gender Quotas in Europe*, Cambridge University Press 2018, 245-275.

[110] Judgments of 3 March 1987, case No P 2/87 (limits for medical schools); 24 October 1998, case No K 6/89 (pensions for coal miners and their families); 29 September 1997, case No K 15/97 (early pensions in civil service) and 4 November 2013, case No K 63/07 (pensionable age for men and women).

[111] Hanna Dębska, *Władza, symbol, państwo*, Wydawnictwo Sejmowe 2014.

[112] For the concept see Carole Pateman, *The Sexual Contract*, Polity Press 1988.

Slovakia

The Slovak Constitution is devoid of any overarching obligation to promote the equality of men and women. Similarly to Poland, when special protection is provided to woman, it is connected to their biological reproductive capacities. This underlines the image of women who are valuable to society due to their childbearing abilities, but also more frail and in need of protection in this regard. The Constitution locks woman in their biologically determined roles.

Conclusions

The Hungarian, Polish, and Slovak case studies offer important insights. In Hungary, the ideological commitment of the new Constitution to Christian values creates the risk that certain social groups (ethnic, religious, and sexual minorities, single-parent families, people living in civil unions, and women) will be discriminated against. Arguably, by prescribing value preferences in private relationships, the new Fundamental Law restricts individual autonomy and excludes persons who make different normative choices concerning their private life. The Polish Constitution does not officially endorse the concept of illiberal democracy, but the Constitutional Tribunal has adopted the conservative and traditionalist interpretation of individual rights pertaining to intimate and private life. In Slovakia, similarly to Poland, the Constitution is formally devoid of a commitment to illiberal democracy, but is interpreted and applied in a political context highly marked by the influence of Catholicism, resulting in conservative interpretations of the position of minority religions as well as family and gender roles.

In Hungary, paternalistic, patriarchal, and heteronormative value preferences do not outlaw or prohibit non-traditional life styles, but the open endorsement disfavors these citizens, and by no means only symbolically. Furthermore, as this article shows, census data and statistical research do not always support the firm and selective, normatively formulated, ideological biases that can be found in the new Hungarian Constitution.[113] The constitutionally affirmed family model excludes registered and non-registered unions, single-parent or patchwork families, which in fact constitute the majority of 'families' in Hungary.

In Poland, the constitutional interpretation of the concept of marriage, family, and parenthood does in fact recognize the societal choices of the majority, but leaves some minority groups without the protection of the law. These trends challenge the idea of universality of a normative conception of human rights, which requires the acceptance of the basic tenets of political liberalism. Traditionally, political liberalism implies skepticism about the objective moral truth (or at least, about resting legal prohibitions on moral

[113] See also Nóra Chronowski, 'The new Hungarian Fundamental Law in the light of the European Union's normative values', *Revue Est Europa – numéro spéciale,* 1 (2012), 111–142; Timea Drinóczi, Nóra Chronowski, Miklós Kocsis, 'What questions of interpretation may be raised by the new Hungarian Constitution?', *International Constitutional Law Online Journal,* 1 (2014), 41–64.

truths as espoused by the majority), and in contrast rests upon a conception of the self as a self-guiding agent, and a legal framework that provides all citizens with opportunities to make autonomous and informed choices.[114] Notably, this constitutional framework has been in place even before the rise of illiberal populism in Poland. It could be thus vigorously deployed by the government to support various political decisions strengthening traditional family values and roles.

In Slovakia, the constitutional interpretation of the concepts of family, marriage, gender roles and the position of minority churches in society reflects a highly paternalistic approach. The Constitution enforces a specific value order in which church-sanctioned morals receive the highest protection, while citizens not confirming to prescribed religious and gender roles are outside of the Constitution's protection. This constitutional order is not a result of a recent explicit illiberal turn. Rather, it has been manifest since the adoption of the Constitution in 1992. Illiberalism is not marked by further encroachment on the rights of sexual, religious, gender and other minorities, but a complete rejection of incorporating their concerns into the law or according them constitutional protection.

These three case studies demonstrate that in the global rise of populism, the challenge to liberal constitutionalism and the universal notion of human rights is the most worrying aspect. In a liberal democracy individual rights and freedoms define the framework of public morality, which rejects paternalism, at least in its extreme form. In contrast, in an illiberal polity, the government is free to promote 'a substantive vision of the good, informed by ethnicity, religion or communal morality'.[115] Unsurprisingly, after years of being forced to accept 'one truth' and 'one ideology', post-Communist countries are reluctant to accept the value of pluralism. For the same reason, people appear to be inclined to support political leaders who promise to protect the nation against 'evils' of the contemporary world (globalization, secularization, feminism, the LGBT movement, etc.) irrespective of whether the promise is made in the name of national sovereignty or traditional values.[116]

János Fiala-Butora, Research Fellow, Hungarian Academy of Sciences, Institute Centre for Social Sciences, Institute for Legal Studies
András L. Pap, Research Chair, Hungarian Academy of Sciences, Institute Centre for Social Sciences, Institute for Legal Studies/SASPRO-Marie Skłodowska-Curie Fellow, Institute of Sociology, Slovak Academy of Sciences
Anna Śledzińska-Simon, Assistant Professor of Constitutional Law at the University of Wrocław, Department of Law, Administration and Economy

[114] Robert D. Sloane, 'Human rights for hedgehogs?: Global value pluralism, international law, and some reservations of the fox', *Boston University Law Review*, 90 (2010), 975, 978.

[115] Lee-Ann Thio, 'Constitutionalism in illiberal polities', in: Michel Rosenfeld, András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press 2012, 136.

[116] Aleksandra Gliszczyńska-Grabias, Anna Śledzińska-Simon, 'Value pluralism without the value of pluralism? „Homosexual propaganda" bans as a litmus test for the acceptance of liberal and international human rights norms in the post-communist states', *Baltic Journal of International Law*, 15 (2015), 268-285, 284.