



# Culture and Identity: Two Emerging Topics in Hungarian Constitutional Law

Miklós Könczöl\* 

\* Associate Professor, Department of Legal Philosophy, Pázmány Péter Catholic University, Budapest, Hungary. Research Fellow, Institute for Legal Studies, HUN-REN Centre for Social Sciences, Budapest, Hungary. E-mail: [konczol.miklos@jak.ppke.hu](mailto:konczol.miklos@jak.ppke.hu)

## Abstract

The paper discusses the concepts of culture and identity within the context of the Fundamental Law of Hungary. The first part focuses on the relationship between the state and culture, both from a conceptual and an ideological point of view. The second part examines how references to culture and identity appear in the Fundamental Law. It is argued that by juxtaposing the two terms in Article R, the Fundamental Law seeks to broaden the meaning of constitutional identity, to include a historical-cultural dimension, and make it a rhetorical topic useful for the construction of exclusivist arguments.

## Keywords

culture, identity, political ideologies, constitutional interpretation, Fundamental Law of Hungary, topics

## 1 Introduction

Since the Seventh Amendment of the Fundamental Law of Hungary (2018), Article R(4) provides that “The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State”. The Twelfth Amendment (2023) added a second sentence, according to which “In order to protect constitutional identity, an independent organ established by a cardinal Act shall operate.”<sup>1</sup> In what follows, I shall briefly consider (1) the possible links between state and culture, then (2) the possible constitutional role of the concepts of culture and identity. I am going to argue that by juxtaposing the two terms here and in the preamble, the Fundamental Law seeks to broaden the meaning of constitutional identity, to include a historical-cultural dimension, and make it a rhetorical topic useful for the construction of exclusivist arguments.

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<sup>1</sup> For the English translation of the Fundamental Law of Hungary (as in force on 1 April 2024) see <https://njt.hu/jogszabaly/en/2011-4301-02-00>.

## 2 State and culture

Already the 1949 text of the Constitution of the People's Republic of Hungary (Act XX of 1949)<sup>2</sup> contained several references to culture, mostly in terms of workers' cultural development [Art. 5, 56(1) and (2)], but also granting the right to ethnic minorities to foster their national cultures [Art. 49(3)]. After the 1990 revisions marking the democratic transition, the Constitution referred to state responsibilities in the “development of science and culture” [Art. 35(1)(f)] and the “dissemination and general access to culture” [Art. 70F(2)], granting equal cultural rights to men and women in terms of culture, among others [Art. 66(1)], while preserving the provision on minority rights [Art. 68(2)]. Before turning to the new approach of the Fundamental Law of Hungary, however, in this part I first sketch the conceptual links between state and culture, then some of the most important ideological positions on this connection.

### 2.1 Conceptual links

As for the relationship between state and culture, it seems obvious that it is possible for culture to exist without a state, but the state cannot exist without culture. If we regard culture as a set of meanings (albeit not immutable ones) belonging to a given human community,<sup>3</sup> it is easy to see that the state is nothing more than an element of culture, ultimately a cultural product itself.

This insight may be well illustrated by the observations of Hans Kelsen, a modern classic of state theory, who describes in a more or less explicit way the attribution of meaning characteristic of the state (and of law in general) in his explanation of the concept of “normative imputation” (see Kelsen, 1926, pt. I). According to Kelsen, we can speak of imputation when we attribute an action or event to the operation of a larger whole rather than to its physical subject. In the context of normative imputation we can say, interpreting Kelsen, that understanding social action and, within its framework, legal acts requires that we regard the physical manifestations that bring them about as signs we can interpret on the basis of a pre-existing code (see Jackson, 1985, 225–262; Jackson, 1996, 100–124). Just as the chalk lines drawn on the ground are hopscotch marks only for those who know the rules of the game, so the identification of the conclusion of a contract presupposes the prior existence and knowledge of relevant criteria.

The very notion of normative imputation in Kelsen merely suggests that the attribution of meaning is not “natural”, i.e., not based on perception alone. Beyond that, however, one may add that the state differs from other elements of culture, such as the game of hopscotch just mentioned, in that it seeks to control the process of meaning making (see Bor & Könczöl, 2019, 263–264, with reference to Jackson, 1985), insofar as it creates and enforces its rules. However, it is striking that such control can never be complete. In the rules of substantive law, we are constantly confronted with concepts whose meaning is not fixed by the state,<sup>4</sup> and even more concepts whose meaning is fixed not by the state.<sup>5</sup>

The state is therefore culturally determined by its very existence: it presupposes that members of a community attribute certain human actions to the state. In a peculiar way, these acts include

<sup>2</sup> For the English translation of the 1949 text, see Foreign Office (1958, 658–671), for the text as amended by Act XXXI of 1989, see Sólyom & Brunner (2000, 379–406).

<sup>3</sup> For a now classic example of this approach, see Geertz (1973).

<sup>4</sup> See Herbert Hart's theory of the ‘open texture of law’ (Hart, 1994, 128–136).

<sup>5</sup> See e.g. Schanda (2008, 67–68), concerning the concept of marriage.

the creation and enforcement of rules that prescribe which acts are to be imputed to the state. The circularity that Kelsen identifies is not an insurmountable problem if seen within a cultural framework: if it is believed that a given community has certain cultural contents (meanings) that allow it to make this kind of normative imputation. The state is therefore dependent on other elements of culture.

All these conceptual connections can be seen from an external point of view: that of the community that fosters the culture. From the point of view of the state, the relationship with culture can be grasped in an (at least partly) different way. For the state, its own existence is a fundamental given, and thus, as it is situated in the Kelsenian cycle just described, it does not and cannot recognise the role of other factors in the creation of itself. It cannot even consider the foundation of the state as anything other than an act of the state (see e.g. Stein, 1925, 28–32). Culture, as all other factors, is visible from this perspective only insofar as it is represented by the state for itself through its own acts.

Related to this latter idea is the conception of Carl Schmitt, which focuses on the “political” as the basis of the “state” (see Schmitt, 1963, 24–26), attributing to the decision of the political community a key role in the existence of the community itself (as a political community). It does not follow from the Schmittian approach that he would deny the possibility of culture without a state (a non-political community may well have its own culture), but it does follow that from the point of view of the political, culture cannot be considered neutral and therefore inaccessible to political decisions. In the democratic – in Schmitt’s terms, the total – state of the 20th century, all decisions are in the hands of the political community. Therefore, along with religious, economic, and other issues, cultural decisions cannot be depoliticised and become independent of the state.

These two ways of approaching the relationship between state and culture are relevant, beyond a conceptual clarification, for the following considerations because a constitutional-law explanation should ideally give an account of both the reality of the state constructed by the law and the reality given to the state and the law, the interpretation of which, as we have seen, the state seeks to limit and control. This twofold nature is particularly striking in the field of culture, where conceptual systems that operate in parallel with the legal texts constantly meet (and sometimes collide) with the former, posing new challenges to those interpreting the law.

## 2.2 Normative approaches

As indicated in the introduction, the Constitution sets out, among other things, the state’s understanding of its roles, including in the field of culture. In the following, I shall present the typical approaches to these roles, with the caveat that my aim is not to provide an overview of the history of ideas, but to summarise certain lines of thought.<sup>6</sup>

### 2.2.1 Conservatism

The various strands of conservative thought, born out of a reaction to the French Revolution, have in common that they see community culture as a given, and also valuable by virtue of

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<sup>6</sup> For the same reason, I do not seek to provide a detailed description of the ideologies used as labels, but merely note that, on the one hand, the traditions are extremely diverse, with sometimes serious tensions and even contradictions between the various tendencies, and, on the other, they often serve to shape identity as the self-identification of certain political actors, sometimes far removed from their intellectual roots.

its very existence. However, the question of what is meant by the culture of a community is an important one, and different authors give different answers to that question. If what is given is the cultural contents of a specific period, for example the aristocratic culture of the *ancien régime*, then the rejection of the revolution implies the need for cultural restoration, which in any case implies state intervention and possibly restrictive measures to prevent a new revolution. If, on the other hand, we take the culture of the present as given, then the ground for criticising the revolution is precisely the unacceptability of intervention, of the violent interruption of organic development. The latter interpretation, however, does not and cannot lead to restoration in the substantive sense, since tradition cannot be created, only maintained. The practical consequence, if any, of such an approach may therefore be the dismantling of artificially constructed barriers. From our point of view, the tension between the two lines of thought is of particular interest since after the 1989 regime change in Hungary, as in other post-socialist countries, it emerged as a dilemma, together with the problem of the impossibility of creating tradition.

### 2.2.2 Liberalism

The liberal conception is based on the pivotal role of individual choice, as opposed to being determined by tradition on the one hand, or by the decision of the community on the other. That, of course, is not possible for culture as a whole, given the communal nature of culture, but it is possible in terms of certain elements. The issues that are considered liberal causes are therefore linked to meanings in which individual choice, according to the liberal position, does not imply a denial of culture or community. On the contrary, the argument is directed towards the integration of cultural elements that do not fit to tradition or are otherwise rejected by the majority, with tolerance as a minimal goal, and pluralism as the final one. Classical examples of such cases are the neutrality of the state in religious, scientific or artistic matters, or the protection of freedom of expression in the case of manifestations considered offensive or immoral by the community.

Like conservative expectations, the liberal agenda also leads to a dilemma, but unlike the former, it is not the result of – historically contingent – gaps within the tradition, but of its own principles, perhaps necessarily. The groups that make up a plural society are not typically neutral with regard to the cultural contents they represent. Thus, if the state wishes to maintain its own neutrality, it must, on the one hand, renounce the full integration of these groups and, on the other hand, force the members of these groups to give up, at least in part, their claim to exclusivity, precisely in the interest of integration.

### 2.2.3 Socialism

Socialist views on culture are interesting for us not only because of the constitutional history of the 20<sup>th</sup> century, but also because these raise the question of state roles in culture from a different (as compared to conservatism and liberalism) and still valid perspective. Egalitarianism concerns both the content and the formal-institutional aspects of culture. As far as content is concerned, the Marxist tradition sees culture as part of the superstructure in relation to the base (i.e., the relations of production), and considers it accordingly as necessarily reflecting the latter. Socialist culture is thus regarded as fundamentally different from the culture produced by capitalism. This necessity does not, however, mean that the direct intervention of the state is avoidable, and indeed justifies the state protection of elements of socialist culture against

competitors. From our point of view, the socialist conception of the role of the state in terms of culture's institutional background may be more important. Indeed, the egalitarian collectivist conception implies that access to cultural goods should be guaranteed to all members of the community, taking these goods out of the reach of market laws. The implementation of this principle, in conjunction with the intervention in terms of content, also constitutes a kind of economic filter, since cultural products not supported by the state cannot reach a wider audience, even in the absence of an explicit prohibition. On the other hand, the production, dissemination and preservation of cultural goods deemed acceptable by the public authorities must, according to this conception, be guaranteed by the state, by providing the appropriate resources and institutions.

#### 2.2.4 Nationalism

One of the important common points of the various strands of nationalism, operating with different notions of nation, is the prominence of culture. Whether we consider the state or the nation (as defined by culture, especially language) as primary to the other,<sup>7</sup> culture is the key to national existence in all conceptions. The situation is similar with regard to the role of the state: the different approaches all consider the role of the state to be essential for the further development and survival of culture. The only difference in this respect is perhaps the perception of multi-ethnic states – and hence the situation of national minorities. The state-centred concept of the nation is incompatible with national pluralism, at least in the sense that minorities as such can have a political role, which necessarily limits the possibility of recognising cultural diversity. In the case of the culture-based concept of the nation, the nation-state framework of autonomy appears rather as an objective, or an institutional guarantee of maintaining one's own culture.

### 3. The historical definition of the relationship between the state and culture in the *Fundamental Law of Hungary*

For Hungarian constitutional law, dealing with the concept of nation(s) and national minorities is a century-old challenge, which the drafters of the Fundamental Law had to face. As the following subsection points out, it is in this conceptual framework that culture first appears in the constitutional text.

#### 3.1 Nation and culture

The concept of culture is both explicit and implicit in the National Avowal, the preamble of the Fundamental Law of Hungary. It is made explicit in the following formula:

We commit ourselves to promoting and safeguarding our heritage, our unique language, Hungarian culture and the languages and cultures of national minorities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. [...]

We believe that our national culture is a rich contribution to the diversity of European unity. We respect the freedom and culture of other nations, and strive to cooperate with all nations of the world.

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<sup>7</sup> Even in case the concept of nation is based on ethnicity defined on a biological-genetic basis.

A common feature of these sentences is that they identify national and ethnic communities as the bearers of culture. A similar approach can be read in the phrases implicitly referring to culture through spiritual values, unity, or achievements (“We are proud of the outstanding intellectual achievements of the Hungarian people”, “We promise to preserve our nation’s intellectual and spiritual unity, torn apart in the storms of the last century”, “We hold that the strength of a community and the honour of each person are based on labour and the achievement of the human mind”), as well as those relating to certain elements of culture (in particular “religious traditions” and “historical constitution”).

Given the fact that the subject present in the text of the National Avowal, named in two different ways (“we, the members of the Hungarian nation” and “we, the citizens of Hungary”), is itself linked to a cultural-political community, it seems obvious that the constitution-maker also understands the Fundamental Law as part of the national culture, which at the same time contributes to the creation and maintenance of the unity of this culture. The references in the National Avowal, both in its form and content, which are intended to create a link with the tradition of nationalist discourse, play a key role in this (see Hörcher, 2011).

As a consequence, the relationship between the two possible carriers of national culture in the text becomes an important issue, especially since the identification of the members of “the Hungarian nation” is less clear than that of “the citizens of Hungary”.<sup>8</sup> In relation to the former, the references to the “tearing apart” of the nation on the one hand, and to the “national minorities living with us” as distinct from the subject on the other, provide some clue. The nation thus has members living outside the borders of the state (“torn apart”), but the members of the national minorities living within the borders, with their own culture and language, do not belong to the nation, although they “form part of the Hungarian political community and are constituent parts of the State.” The concept of the nation, which can be reconstructed on the basis of the above, is linguistic-cultural and clearly distinct from the state or the political community. At the same time, the underlying concept of culture is primarily ethnic, in so far as “Hungarian culture” and “the cultures of national minorities living in Hungary” are inherently distinct. This perspective, which is more or less clear and has been the basis of many criticisms, is however relativised<sup>9</sup> by the last sentence, whose subject is “the citizens of Hungary,” and which thus indicates the link with the subject of constitution-making more clearly than any previous designation. The new constitution, “the Fundamental Law of Hungary,” is a political act in its content and a state act in terms of form, and is thus created by “the Hungarian political community” and the “constituent parts of the State.” Reading the text in a linear way, one can therefore say that in the “avowal”, which is also “national” in its title, the linguistic-cultural concept of nation gradually gives way to a state/politics-centred one, and thus the boundaries of national culture seem to expand.

In the following, the question requires attention whether, in addition to the link to the national community, substantive elements can be defined within the Fundamental Law’s concept of culture. This will be examined, on the one hand, through the reference to “Christian culture” and, on the other, through the concepts of “(the achievements of) the historical constitution” and “constitutional identity”.

<sup>8</sup> For a thorough analysis of the concept of nation in the (then current) text of the Fundamental Law see Smuk (2015).

<sup>9</sup> See, for example, Körtvélyesi (2012), referring explicitly to the opening sentence in his title, and Pap (2014).



### 3.2 Christian culture

While the National Avowal refers to the role of Christianity “in preserving nationhood”, Article R(4) (“The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State”), introduced by the Seventh Amendment (2018), is designed to protect Christian culture.<sup>10</sup> The first reactions in the literature tried to grasp the significance of the amendment from two perspectives, partly as a political act (Halmai, 2018) and partly as an interpretative task for the constitutional judiciary (Schanda, 2018). The former approach may be justified by the – historical – fact that the reference to Christian culture was introduced in the text by an amendment<sup>11</sup> and the latter by the – systematic – consideration that the previous paragraph (3) of Article R provides guidance on the interpretation of the Fundamental Law.

The two perspectives lead to two different readings. Halmai highlights the dichotomy inherent in the adjective “Christian” (Christian vs non-Christian) and points out that the amendment may provide a basis for questioning the equality of Christian and non-Christian citizens. Schanda, on the other hand, takes as his starting point the notion of “protection of culture”, contrasting the latter with faith and religion, and the former with the creation of culture. This interpretation thus emphasises that state authorities should not seek to strengthen the protection of Christian beliefs or religious convictions, still less to disseminate them, but to protect a culture<sup>12</sup> which is already considered to exist but whose content is changing. This, especially in the context recalled by the mentioning of “constitutional identity”, refers to a kind of national identity rather than a certain religious belief (see Schanda, 2018, 1; Könczöl, 2017, 255), in the same way as the National Avowal mentions Christianity for its political role and speaks of “religious traditions” not in general but in relation to the history of the country.

From our point of view, however, the debate is interesting primarily because it illustrates the thesis outlined in the introduction, according to which the state is involved in the construction of the meanings that constitute culture, and even tries to influence the interpretive activity of other actors in the process, but this influence has strong limits. It can be seen that a positive rule referring to “Christian culture” creates its own concept of “Christianity”, but the interpretation of that concept will not and cannot be completely independent of the concept of “Christianity” in other social discourses, while it is going to influence their interpretation.

### 3.3 Constitutional culture: achievements and identity

According to Article R(3) of the Fundamental Law, “The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic[al] constitution.” Since the Seventh Amendment, this has been followed by the provision on the protection of “constitutional identity” and Christian culture

<sup>10</sup> The Ninth Amendment (2020) added a sentence to Article XVI providing that “Hungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country.”

<sup>11</sup> For the original government proposal (proposal T/332) see <https://www.parlament.hu/irom41/00332/00332.pdf>, for the summary amendment proposal of the Legislative Committee (T/332/11) see <https://www.parlament.hu/irom41/00332/00332-0011.pdf>.

<sup>12</sup> And this culture contains elements both compatible and contradictory to Christian views: Schanda (2018, 3).

quoted above, while the Twelfth Amendment provided for the creation of a new administrative organ. It was also the Seventh Amendment that introduced the sentence linking the two concepts of constitutional identity and the historical constitution: “We hold that the protection of our identity rooted in our historic[al] constitution is a fundamental obligation of the State”.

Looking at the individual elements of the provisions cited, one can see that their interpretation raises more problems than that of Christian culture, since their meaning, unlike that of Christianity, does not seem to have its reference outside of the framework of the Fundamental Law. This is contradicted by the “historical constitution”, precisely because of its historicity, only insofar as it carries meanings that predate the act of constitution-making. However, these meanings must be linked to the text of the Fundamental Law by the interpreter who wishes to apply the text as a constitution: it is therefore a question of labelling certain clauses of the Fundamental Law or the underlying principles as “historical”.<sup>13</sup> In its much-quoted Decision 22/2016 (XII. 5.) AB<sup>14</sup> the Constitutional Court concludes a list of examples by stating that “[t]hese are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon.”<sup>15</sup>

The focus on the protection of national identity and constitutional self-identity can also (and above all) be explained by the fact that, with varying intensity, there is a constant struggle in the European Union between the different legal systems, domestic and European, which can be understood as a quasi-federal dispute with the nation states (Könczöl & Kevevári, 2020, 166). It is also in this struggle that the reference to (Christian) culture can be understood as a move to give priority to the historical-cultural element as opposed to the legalisation of the concept of constitutional identity.<sup>16</sup> It is important to see, however, that in all these references and their interpretation, the constitution-maker and the interpreter of the constitution are shaping a set of meanings that can be called culture, and within it, legal or constitutional culture. In this context, identity (self-identity) means nothing more than the non-contradiction of meanings, constantly changing in content but a constant expectation<sup>17</sup> and assumption in terms of form.

## Conclusion

From the brief overview of the history of the usage of “culture” in Hungarian constitutional texts it may be apparent that as an extra-legal term, it may serve as a versatile rhetorical topic,

<sup>13</sup> See, first of all, Decision 33/2012 (VII. 17.) AB (Reasons IV.1.). For the official English translation, see <https://jogkodex.hu/doc/3180976>. See also Schweitzer (2017, 144–145).

<sup>14</sup> For the official English translation, see <https://shorturl.at/zFZEd>

<sup>15</sup> While the decision states that “the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law” (Explanatory Memorandum, [67]), it also states that “[t]he Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary’s self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law” ([64]).

<sup>16</sup> On possible meanings of constitutional identity and the changing concept of identity in the treaties and case law of the European Union, see Faraguna (2017). On the concept of constitutional identity in general and in the context of the Fundamental Law, see Drinóczi (2016).

<sup>17</sup> Discussed in relation to Art. R (3) and (4), in terms of the legislative procedure, by Gera & Szentgáli (2022).



or source of arguments (see Könczöl, 2009, 403–405), the content of which is determined by the context where it is used. The same goes for “identity” in general. In the Fundamental Law, however, the term “constitutional identity” appears in a broader sense than what is usual in European constitutional discourse. That is due to the link established between the (historicised) concepts of culture and identity – and indeed that of constitutional identity, related in the text to “the historical constitution.” Thus, references to the constitutional identity of the country may yield arguments beyond the opposition of domestic and EU law, and certainly beyond the field of fundamental rights protection.<sup>18</sup>

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<sup>18</sup> As Drinóczi (2016, 40) has already pointed out.

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