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THESES

of the doctoral dissertation entitled

THE MINIMUM FUNDAMENTAL RIGHTS
CONCEPT OF THE FAMILY

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I. Introduction

May a same-sex couple adopt a child? Must the State recognise polyamorous relationships? The questions arising in the discourse on the rights of those living in a family – and the answers that may be given to them – are well known; positions formed at opposing poles are difficult to reconcile. But what if we are not even asking the right questions?

Instead of the answers, the dissertation first concentrates on the questions themselves. These questions concern the struggle for the recognition of the family. The demand of rights defenders is that the State open up the concept of the family and insert into the constitutionally protected image of the family formations that differ from the family assumed to be “traditional”. The signs, however, suggest that this demand yields no results. So long as the question is posed in this way, the answer depends exclusively on the intention of the constituent power. The content of marriage or the family as a constitutional institution may legitimately reflect the value choices of the constituent power; and if that value choice is committed to the traditional interpretation of the concepts, it also puts an end to the debate (or, at least, channels it into the realm of theory). Question formulations that place the concept of the family at the centre amplify the ideological overtones of disputes about the family and create entrenched camps both in public discourse and in the scholarly literature.

The dissertation attempts to rephrase the questions. It seeks to identify where that core lies in which, with respect to the family – beyond the taken-for-granted requirement of equal dignity and autonomy – as little ideological layering as possible accumulates, so that family-related relations can be discussed in a common language, the language of fundamental rights dogmatics.

II. The aim of the research

The point of departure of the dissertation's inquiry is the fundamental rights concept of the family, by which the dissertation understands that substantive layer of the concept of the family in the constitutional-law sense which concerns the content of fundamental rights surrounding family life, the scope of the enjoyment of those fundamental rights, and their protection.

The dissertation set as its aim to identify the European standard which, in dogmatic terms, binds the fundamental rights content of the domestic constitution's image of the family. The dissertation refers to this standard, in summary form, as the minimum fundamental rights concept of the family.

In connection with the analysis of the European content of the fundamental rights concept of the family, one of the dissertation's main findings is that the fundamental rights concept of the family is burdened by severe tensions that constitute an obstacle to fundamental rights protection. These tensions are also demonstrable relative to the current constitutional-interpretation framework of the family, yet the domestic conceptual framework is additionally burdened by contradictions from within. The lack of coherence appears at several levels: the content of the fundamental rights concept of the family reconstructable from the text of the Fundamental Law, from the case-law of the Constitutional Court, and from the scholarly literature does not yield a uniform picture, and the contradiction is also demonstrable in comparison with the European standard.

The dissertation's next objective was delineated by identifying the fundamental rights concept of the family and the contradictions related to it: the dissertation's ultimate aim is to establish a new interpretive framework that offers a solution for dissolving the fundamental rights-protection tensions relating to the family.

This interpretive framework serves to answer a key question. The dissertation's principal aim is to set up a model that provides tangible assistance both for the legislator and for the decision-maker in deciding, among the many possible question formulations relating to the family – questions that may also be transformed into legal problems – which are the fundamental rights questions; that is, how fundamental rights problems can be delimited from problems of other kinds.

The basis of the model is that all family relationships of specific persons enjoy fundamental rights protection insofar as the participants in the relationship have shaped them by making use of the room for manoeuvre ensured by the right to self-determination. As regards the nature of human relationships, countless variations are conceivable; for present purposes, however, the question of significance is whether the specific relationship can be aligned with the quality that we attribute to a family relationship. From the content of the European minimum, the dissertation synthesises factors that help to decide whether the given relationship possesses those qualitative characteristics that make a relationship between people into a family relationship and thereby elevate the establishment and maintenance of that relationship into a fundamental rights question connected to the family.

In certain cases, the State subjects the establishment and maintenance of human relationships to restrictions. These restrictions sometimes take the form of an explicit prohibition on establishing relationships; more often, the State makes the everyday functioning of the relationship more

difficult in some manner. One such difficulty is, for example, when the State provides no legal recognition at all for the relationship, or does not provide it in the form desired by the participants. If, according to the standard set up, a given question is a fundamental rights question because it meets the requirements synthesised by the dissertation from the European standard of the family relationship, then the consequence is that restrictions imposed by the State on the establishment of that relationship, or difficulties imposed by the State on the maintenance of that relationship, must be assessed under the proportionality test applicable to the restriction of fundamental rights. If the given restriction does not satisfy the test, that entails the unconstitutionality of the restriction.

Fundamental rights dilemmas relating to the family confront both legislation and adjudication with challenges. The point of the fundamental rights minimum concept established by the dissertation is to provide assistance in structuring the fundamental rights conflict, regardless of which procedure the given issue is channelled into.

III. Research methods applied and the dissertation's system of sources

Fundamental rights questions relating to the family typically appear before fundamental rights protection fora through cases arising in specialised branches of law. The questions that trigger fundamental rights scrutiny stem from problems of specialised branches of law: in such cases, for example, the decision-maker must determine who qualifies as a family member for the purposes of the right of residence, who can be regarded as a parent in the legal sense, or whether a person is entitled to a social benefit linked to a family legal status. Fundamental rights bodies answer these questions, yet their decisions delineate an autonomous image of the family that is distinct both from the specialised-branch question formulation and from the family concept of the given branch of law.

Consequently, the legal concept of the family has two layers: first, there exists an extremely heterogeneous, specialised-branch conceptual layer; second, there exists a distinct fundamental rights layer separated from it. According to the dissertation's methodological point of departure, these two layers cannot be identified with each other, and the conclusions of the specialised-branch image of the family cannot be automatically transferred into the field of constitutional law. At the same time, specialised-branch analysis is an indispensable precondition for processing fundamental rights case-law, since fundamental rights jurisprudence is shaped along specialised-branch cases, and the question formulations of the branches of law show along which considerations family becomes a legally relevant phenomenon in law.

Accordingly, the dissertation applies, methodologically, two successive steps building on each other. The first step is mapping specialised-branch concepts of the family; the second is the fundamental rights case-law analysis built upon it. The specialised-branch inquiry is descriptive in nature and free from normative evaluation; its aim is not to define the "correct" family concept,

but to identify those recurring conceptual elements that regularly appear when the family is defined in different branches of law. In the Hungarian legal system, the specialised-branch analysis primarily draws on the images of the family in private law and criminal law; in a European context, it reviews the solutions of the Member States of the European Union, the practice of the Court of Justice of the European Union, and existing codification models. In the course of the specialised-branch inquiry, the dissertation relies predominantly on secondary sources – relevant scholarly literature and comparative surveys.

Specialised-branch concepts of the family display substantial diversity and often capture different aspects of the family in ways that even contradict one another. This conceptual diversity justifies rendering them surveyable by highlighting and systematising the characteristic elements, with the aid of a concept map. The dissertation applies a version of the concept-mapping method adapted to its own objectives, in order to make identifiable, within the complex conceptual field, those factors that ground the fundamental rights relevance of the family. The concept map does not depict legal concepts, but empirical and relational factors such as kinship, cohabitation, love and care, and material support and material dependence. The method makes it possible not only to identify these factors, but also to examine their relations to each other.

The concept-map method also provides a guiding thread for processing fundamental rights case-law: the dissertation examines the practice of the European Court of Human Rights along the factors identified on the concept map, given that the ECtHR's practice cannot be analysed along the concept of "family", since its activity does not set as its aim the definition of the concept of the family at all.

The central question of the fundamental rights case-law inquiry is which factors fundamental rights bodies attribute significance to when assessing whether a given relationship falls within the protective scope of the right to respect for family life. The analysis focuses specifically on questions affecting the relationship between the State and the individual, and examines what limits the case-law delineates for State interference, and what obligations it establishes on the State.

At the centre of the dissertation's system of sources are the European Convention on Human Rights and the case-law of the European Court of Human Rights, which constitutes a decisive European fundamental rights minimum for Hungary. The dissertation treats ECtHR case-law not as an exclusive source but as an exceptionally strong indicator, interpreted in connection with other sources. The inquiry also extends to the relevant practice of the Hungarian Constitutional Court, with the aim of uncovering the coherence between, or possible tensions among, the family concept of the ECtHR and that of domestic constitutional adjudication.

According to the dissertation's conception of fundamental rights, only rights that are enforceable by legal means and actually effective can be regarded as fundamental rights. Accordingly, it

derives the fundamental rights concept of the family from actually functioning case-law practice. In this sense, jurisprudence at a certain point becomes dogmatics: what appears, in the consistent practice of fundamental rights fora, as a minimum content of fundamental rights may be demanded and applied as a normative standard before other fora as well.

IV. Presentation of the dissertation's main findings

- 1. The dissertation reveals that there is a tension between the content of the fundamental rights concept of the family as it unfolds from the text of the Fundamental Law, and as it unfolds from the practice of the Constitutional Court and from the scholarly literature.*

The issue of the family is approached differently by the constitutional text and by the practice of domestic fundamental rights bodies, as well as by the scholarly literature. There is agreement between the practice of the Constitutional Court and scholarly sources that the constitutional content relating to the family also includes fundamental rights aspects. The existence of the freedom to marry and to found a family remains part of the current interpretive mainstream despite the fact that the constitutional text, in none of its temporal versions, mentioned these rights *expressis verbis*. Although the source of both institutional protection and fundamental rights protection is the constitutional text, the latter conclusion also holds for the Fundamental Law, whose text focuses exclusively on unfolding the content of marriage and the family as constitutional institutions. In general, it can be observed that the dogmatic foundations of institutional protection are far more elaborated than the fundamental rights content thus unfolded.

- 2. Constitutional-law questions relating to the family can be viewed through different dogmatic models. The current paradigm of constitutional thinking about the family places at its centre the concept of the family and, thereby, the considerations of the State.*

The central question of the interpretive mainstream is whether a certain formation can be aligned with the concept of the family protected by the constitution. In this approach, the family is a static phenomenon: by looking at the participants, it can be determined whether they belong to a family. If the answer to this question is no, then the consequence is that the problem of the actors in the story does not arise as a fundamental rights issue, and thus it does not even arise whether a lack of access to an institution or the lack of State recognition should be interpreted as a fundamental rights issue that must be tested under the proportionality test. In this paradigm, the preliminary question of fundamental rights balancing is whether a given formation, a given type of relationship, meets the concept of the family. The

constituent power's image of the family decides the fundamental rights balancing in advance: if a formation is not a family, then the proportionality test is not applied either; there is thus no interference that could be unconstitutional.

3. *The domestic and European understandings of the fundamental rights concept of the family, which captures the fundamental rights content relating to the family, are likewise burdened by tensions.*

At the European level, the non-specialised-branch content of the family is exposed as a fundamental rights-protection issue. The protection of the family as an institution is not a central question in the European context; European fundamental rights bodies deal with family-related issues through fundamental rights cases. One manifestation of the tension is that protection concerns different life situations. The practice of the European Court of Human Rights – which is of outstanding significance for European jurisprudence – always speaks of a family relationship or family life with reference to specific persons. The Court's case-law does not concern the question whether this particular relational system is a family, but rather whether family life exists in the relations examined between the actors appearing in the case. If the given relationship reaches the quality of family life that exists as a matter of fact, then the Court decides, by applying the proportionality test, whether State interference with the exercise of the fundamental right violated the Convention. Since the Court does not deal with the concept of the family, conformity with the concept of the family does not become a precondition for the applicability of the test. The Court evaluates the Contracting State's arguments concerning the justification of the interference within the test. The level of protection ensured by the domestic paradigm falls short of this minimum standard, because the condition of protection is not the family life that exists as a matter of fact, but rather conformity with the concept of the family posited by the State.

4. *Whereas the current domestic interpretive mainstream concentrates on the content of the family as an institution and on conformity with it, the European practice concentrates on the enforcement of fundamental rights relating to the family, treating the question within two different models. Depending on the model chosen to interpret constitutional-law questions relating to the family, decision-makers may reach divergent outcomes in deciding individual fundamental rights cases.*

Depending on the model chosen, it may be that the proportionality test is not applied at all. In the institutional-protection model, the State-positing content of the family plays an exclusive role in deciding who may have the possibility of

adoption opened to them, who may participate in an assisted reproduction procedure, what parameters are necessary for two or more people to embark on the path of becoming a family, or even what family construction is one in which a child's right to protection cannot be guaranteed. If, however, the institutional-protection model can be opened toward a new approach, that calls into question the constitutionality of a range of existing statutory restrictions and may change the assessment of a range of cases in which, in the absence of rules, balancing has greater room.

5. *The European fundamental rights minimum requires stronger enforcement of the fundamental rights-protective approach than the present one, because in the current domestic paradigm protection does not extend to every case that would compellingly follow from the European minimum. The fundamental rights concept of the family as it appears in domestic constitutional law and the minimum standard deriving from European practice can be harmonised in a new interpretive framework which understands freedom of choice as part of the constitutional-law problem field of the family.*

The dissertation's claim is that the European practice of protecting family life enriches the family's domestically traditional, static understanding with a dynamic element. The static boundaries of the family may be shaped by the participants either in a positive or in a negative sense. The protection of family life, alongside respect for an existing family relationship, also protects the freedom to shape the family relationship, interpreting the individual's freedom of choice as a fundamental rights issue that can be understood within the framework of the family. In this dogmatic model, the freedom of family life is an independently nameable substantive element of the protection of family life; as a consequence, identifying "family" becomes not exclusively a question of constitutional interpretation but also a question of autonomy. The freedom of family life – that is, the autonomy enjoyed in shaping family relations – is itself a value that forms part of the institution which the constitution protects as family. This model begins not from concepts constructed by the State but from the freedom of action, the content of which is filled by citizens' autonomy.

A consequence of identifying the autonomy element is the recognition that, by drawing the boundaries of the fundamental rights concept of the family, the State restricts a fundamental right, and the constitutionality of that restriction is the subject of proportionality justification. In this approach, defining the concept of the family is a series of proportionality-balancing questions, and the consideration of institutional protection can be understood, within the fundamental rights test, as

a legitimate aim of restricting the fundamental right, the proportionality of which can be assessed by applying the test.

In this model, the constitutional-law concept of the family does not lose its significance; however, it derives that significance from the perspective of protecting the family as a constitutional institution, rather than as the point of departure for fundamental rights protection.

6. *The effective theoretical point of departure for the enjoyment of fundamental rights relating to the family is one that sets aside the concept of the family and, instead of defining the concept of the family, takes as its basis factual family relationships formed through the exercise of the right to self-determination. If a specific relationship reaches the quality of a factual family relationship, that relationship is entitled to fundamental rights protection. The decisive factors for the existence of a factual family relationship are kinship, cohabitation, love and care, and material support and material dependence.*

For family relationships, it is determinative whether a relationship reaches the quality that, in the European fundamental rights-protection context, can be attributed to it. The minimum conception provides a synthesis of these basic qualitative criteria. Conformity with the factors distilled from European fundamental rights protection practice – referred to as factors – delimits fundamental rights questions from questions of other kinds.

7. *The factors are to be assessed in their totality in relation to each other: no single factor is an indispensable condition for the existence of family life, and no single factor is sufficient for it in itself.*

Kinship, compared to the other factors, is situated “on a different plane”; vis-à-vis the other factors it stands in the relation of a possible, but not necessary, precondition. Kinship may remain a family bond standing on its own and is not indispensable for family life to develop; yet if it is present, it may serve as the basis for family members’ cohabitation, their emotions toward each other, and their emotional and material care for each other. The existence of kinship is an emphatic indicator of the existence of family life, carrying within it the possibility of the emergence of the other factors. Among the factors, the minimum conception also treats cohabitation as an element indicating the existence of a close personal relationship reaching the quality of a family relationship. A series of further questions attach to cohabitation in the literal sense: beyond physical co-residence, for “real” cohabitation it may matter whether family members take an interest in each other’s affairs, or whether signs of trust can be detected in their relationship.

The minimum conception of the family in fundamental rights terms approaches the significance of emotions along the emotional dimension of care. Finally, circumstances indicating the parties' economic interdependence also assist in identifying the family relationship.

If, on the basis of a complex assessment of the factors, the persons' relationship does not reach the quality of family life, the given problem does not fall within the range that the model can handle. If, however, on the basis of the existence of the factors a relationship, taken as a whole, carries the quality characteristic of family life, then the freedom to establish or to operate that relationship (its State recognition) is a fundamental rights question that requires applying the necessity-and-proportionality test.

V. List of publications in the field

Single-author publications:

1. Szakjogági családfogalmak Magyarországon. [Specialised-branch concepts of the family in Hungary.]
In: *Mi a család? Tanulmányok a család fogalmáról a jelenkori Magyarországon* [What is family? Studies on the concept of the family in contemporary Hungary] (ed. Ildikó Husz), Budapest, Akadémiai Kiadó, 2022.
2. [Applying the unapplicable—on the constitutional concept of the family.]
Fundamentum, 2018/2–3.
3. Jöttünk, láttunk, visszamennénk? Gondolatok az alapjogi családfogalom jelentőségéről. [We came, we saw, we would go back? Thoughts on the significance of the fundamental rights concept of the family.]
In: *Család és családtagok: Jogági tükröződések* [Family and family members: reflections across branches of law] (ed. Orsolya Szeibert), Budapest, ELTE Eötvös Kiadó, 2018.
4. Mi is család lettünk volna: Történet egy kislányról és az Alaptörvény családfogalmáról. [We, too, would have been a family: A story about a little girl and the concept of the family in the Fundamental Law.]
Budapesti Könyvszemle, vol. 29, nos. 3–4.

Co-authored publication:

5. Hungary: The Concept of Family Within the Framework of “Illiberal Democracy”.
Co-authors: Lídia Balogh, András László Pap
In: *Normativity and Diversity in Family Law: Lessons from Comparative Law* (eds. Marie-Claire Foblets; Nadjma Yassari), Cham, Springer Cham, 2022.