

Dr. Orsolya Benkő

All or nothing?

The concept of a minimum requirement of fundamental rights for
ideological neutrality

Theses of S.J.D. Dissertation

Supervisor:

Dr. Somody Bernadette Ph.D.

Eötvös Loránd University
PhD School of Law and Political Sciences
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1. Background and relevance of the research

The ideological neutrality of the state has become a much-vaunted requirement in legal literature, legal practice and public life. The same applies to the controversy over the traditional Christmas tree in Brussels' main square, the ban on burqas in public spaces, religious education and religious services in public schools without parents' knowledge and against infants' will¹. The constant assertion of neutrality in political and public debates has triggered by events in which the state or one of its representatives has engaged in any kind of value-laden behaviour or regulation. In the broadest sense, it has reduced the requirement of state neutrality to a politically selective 'value'.

Since the fall of Communism, Hungary has continued to debate the ideological neutrality of the state. Starting with the question of the neutrality of state education, through the Christian roots of the Sunday working day, the religious practice and expression of various political actors, the religious justification of legislation, to the provision in the Basic Law to ensure "education according to the values of Christian culture". Some see the last decade's legal and social changes as the state's total commitment while others see the legal changes and the updating of public policy as preserving traditions, national culture and common European values. The resurgence of the debate on ideological neutrality in Hungary encourages this study to delineate the core of neutrality in the fundamental law, with exceptional attention to Hungarian constitutional jurisprudence.

¹ In this case, the child was forced not just to listen or to study with excessive emphasis, but to practice religion. *Perovy v. Russia* Application no. 47429/09, Judgment of 20 October 2020.

2. The aim of the research

The ambiguity of ideological neutrality² is also a feature of the case law of the European Court of Human Rights and the Hungarian Constitutional Court. In addition to the uncertainty about the content of the requirement, an examination of the history of the idea, practice and interpretation of neutrality in the legal literature clearly shows that the ideological neutrality of the state is inextricably intertwined with the freedom of conscience and religion, the requirement of equal dignity and the freedom of expression. Historically and in jurisprudence, these fundamental rights have given rise to neutrality. Their stated purpose in legal literature and fundamental rights jurisprudence remains the freedom of conscience and religion, equal dignity and freedom of expression.

The paper hypothesises that this 'core' of ideological neutrality, stemming from its attachment to fundamental rights, must have a 'core' that is not a matter of political choice and is not only a means of establishing a republican morality that replaces religion,³ but is a binding requirement for democracies committed to fundamental rights. This part of the content 's requirement of being neutral, which is inseparable from fundamental rights, in this paper is referred to as the fundamental rights content of neutrality or the minimum requirement of neutrality.⁴ The final aim of the essay is to explore the content of the core of the fundamental right of neutrality.

The research does not aim to justify fundamental right or to give binding force to ideological neutrality in the broad sense. Its hypothesis is much less: a small core of fundamental rights can be isolated within the general requirement. The establishment of a core of fundamental rights promises two benefits. Foremost that it prevents the inflation of neutrality simply by establishing its existence. Secondly is that it can clean up and simplify fundamental rights approaches to the state's ideological bias and even fundamental rights adjudication.

² Corrado Del Bò: Tre concetti di neutralità, *Rivista di filosofia* 2009/2, 185-208, DOI: 10.1413/29553.

³ TROPER, Michel: A muzulmán fátyolviselés és az oktatás semlegességének problémája Franciaországban, *Fundamentum* 1997/2.

⁴ The fundamental rights approach of neutrality does not mean, therefore, that we want to assess every single act of state engagement listed above as a violation of fundamental rights.

Stripping away the requirement of ideological neutrality to find the core of fundamental rights may result in the research missing out on essential content elements, even from a constitutional law perspective. It is, therefore, essential to clarify that the research does not aim to define ideological neutrality.

The aim of the present work is, on the one hand, to demonstrate that neutrality has a substantive core which is directly imposed on the state by fundamental rights and, on the other hand, to identify the content of the core of fundamental rights. The definition of neutrality may therefore be much broader than the concise definition from the study. Nevertheless, exploring the core of neutrality as a fundamental right may be useful in preventing the inflation of neutrality. The devaluation of the requirement of neutrality may lead to a situation where all acts expressing the ideological commitment of the state are judged as 'only' violating the requirement of neutrality. The concept of a minimum fundamental right may prevent the devalued content of ideological neutrality from getting rid of together with some parts of the demand for the protection of fundamental rights.

3. The research methods used

The study is inspired by case law and aims to provide an approach to the neutrality requirement that can be used in practice. The research does not aim to create a new, as yet "undiscovered" fundamental right or to "override" existing fundamental rights jurisprudence. The study's methodology aligns with this, which guarantees that it does not attempt to override case law since it is primarily based on analysing the case law of Hungary's most important bodies of fundamental rights jurisprudence.

The paper starts by exploring the fundamental rights content of neutrality, a viewpoint that is consistently unasserted and undeveloped in both the AB and ECtHR jurisprudence. The paper is divided into two main parts. Chapters 2 and 3 demonstrate that neutrality, in terms of its ideological history, moral philosophical underpinnings, legal interpretation and use in jurisprudence, is intrinsically linked to certain fundamental rights. Chapters 4 and 5 are the second main reflection section, which deals explicitly with identifying the fundamental rights content of neutrality.

The analysis of the history of ideas, moral philosophy and law, as well as jurisprudence, is limited to the thinking within Western culture. I do not undertake to present a cross-cultural concept or its minimal neutrality requirement. Ideological neutrality is a contested and inflated requirement even within Western cultural circles. It is therefore worth examining the content of neutrality, which is not an optional requirement and cannot be settled along political lines, not only from the perspective of the entire cultural spectrum of our world but also from a perspective that is limited to states and legal cultures that are roughly identical in terms of the content of fundamental rights.

The study is not only practically inspired but also methodologically linked to case law. I will also justify the conception of neutrality as a fundamental right. Moreover, following this justification, identify the content of the core of the fundamental right through an analysis of case law. In analysing the jurisprudence, I will not seek to explore the interpretations adopted in Western countries one by one, given the objective of the thesis, but to identify a common minimum. This standard can be established through the case law of a forum of fundamental rights judges, where the fundamental rights disputes of European countries culminate, which itself judges on the basis of a minimum standard, leaving a wide margin of discretion to the Member states. This is the European Court of Human Rights, a forum with a long history and countless cases. The fundamental rights core of neutrality will be established by analysing ECtHR case law. Since the purpose of the paper is also to find the content of the minimum neutrality derived from the Hungarian fundamental rights jurisprudence, it will also analyse the decisions of the Hungarian Constitutional Court, in addition to the ECtHR.

The paper uses legal literature and the philosophy of law to interpret and structure the analysis of legal practice. For these sources, it makes extensive use of studies from the Western cultural context. In addition to the legal literature, examples from non-European countries belonging to the Western cultural sphere are also used not to draw conclusions but to help to illustrate or interpret legal problems.

4. Presentation of the results of the thesis

Interim results of the study:

- **Neutrality is not merely an optional principle but has certain substantive elements to guarantee freedom of conscience and religion, the right to equal dignity and freedom of expression.**⁵ This thesis will be demonstrated through an analysis of ideological history,⁶ moral philosophy,⁷ legal literature⁸, and EU law and jurisprudence.
- The analysis of neutrality from a fundamental right doctrinal point of view shows a **justification for defining certain substantive elements of the requirement as a subjective fundamental rights entitlement.**⁹

The paper identifies the ideological neutrality's dogmatic place through three indispensable fundamental rights properties. If the requirement of ideological neutrality - or some of its elements - can be interpreted as a fundamental right, it must be enforceable¹⁰ and binding on democracies in the Western cultural sphere. Furthermore, the third fundamental right is that, since freedom of expression, freedom of religion, and the right to human dignity are rights that bind the state, neutrality, defined as a fundamental right, must also be a right that can be interpreted in the relationship between the state and the individual.¹¹

⁵ Ian LEIGH - Rex AHDAR: Post- Secularism and the European Court of Human Rights: Or How God Never Really Went Away *The Modern Law Review* 2012/6.,

⁶ HORVÁTH Mihály: Williams Roger, a „szabad egyház a szabad államban” elv megteremtője s megtestesítője (Budapest Ráth Mór 1873), John LOCKE: Levél a vallási türelemről (Stenlic Cultural Foundation Budapest 2003), David LITTLE: Religion, peace, and the origins of nationalism, in. Scott Appleby - David Little (ed.) *The Oxford Handbook of Religion, Conflict and peacebuilding* (Oxford University Press Oxford 2015)., SAJÓ András: A semlegesség doktrínái és az állam, *Beszélő* 2003/10., John Stuart MILL: A szabadságról (Helikon Budapest 2020).

⁷ Jürgen HABERMAS: Between Neutralism and Religion, (Malden, Polity Press 2008), John RAWLS: Political Liberalism (New York Columbia University Press 1993), János KIS: Az állam semlegessége (Kalligram Pozsony 2015), Thomas NAGEL: Equality and partiality (Oxford, Oxford 1995), Joseph RAZ: Liberalism, autonomy and the politics of neutral concern, *Midwest Studies in Philosophy*, 1982/1., Ronald DWORKIN: Sovereign Virtue (Cambridge: Harvard University, 2001).

⁸ Jonathan Hanvan ANTWERPEN (ed.): The Power of Religion in the Public Sphere (Columbia University Press Columbia 2011).

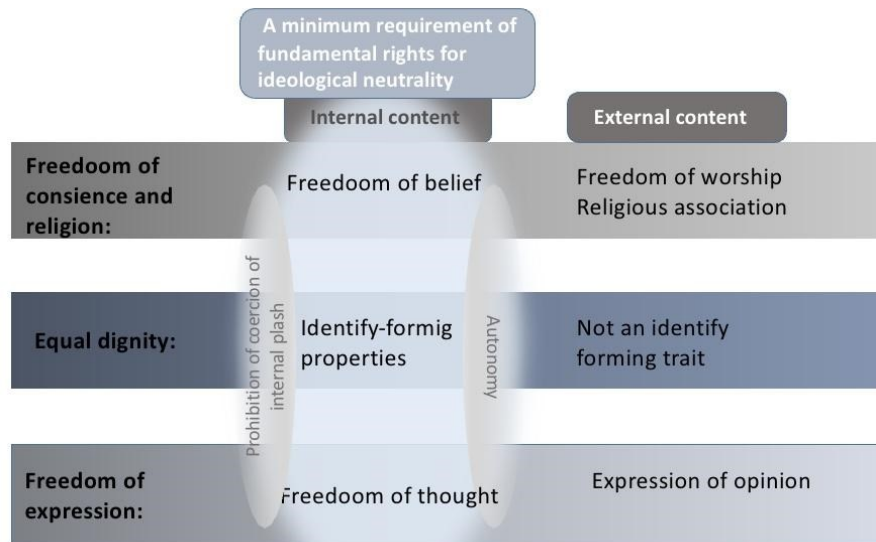
⁹ 4/1993 (II. 12.) AB decision, 3236/2015 (XII. 8.) AB decision, 6/2013 (III. 1.) AB decision, Szilvia KÖBEL: A köztisztviselői eskü és a lelkiismereti szabadság, *Fundamentum* 2009/4., Balázs SCHANDA: A világnézeti semlegesség jogi szemmel *Magyar Szemle*, 1994/ 6., Balázs SCHANDA: Vallásszabadság, közjó, keresztény kultúra *Acta Humana* 2020/3

¹⁰ János SÁRI - Bernadette SOMODY: Alapjogok (Osiris Budapest 2008) 23., Fruzsina GÁRDOS-OROSZ: *Az Alkotmány kommentárja* (Budapest Osiris 2009) 435-437., Gábor HALMAI - Gábor Attila TÓTH: Emberi jogok (Osiris Budapest 2008).

¹¹ János SÁRI - Bernadette SOMODY: Alapjogok. Alkotmánytan II (Osiris Budapest 2008) 24-25, Fruzsina GÁRDOS-OROSZ: *Az Alkotmány kommentárja* (Budapest Osiris 2009) 430-431., Gábor HALMAI - Attila Gábor TÓTH: Emberi jogok (Osiris Budapest 2008) 90-91.

In line with its chosen methodology, the paper will do the doctrinal positioning of neutrality in fundamental rights law based on the case law of the AB and the ECtHR¹², by examining whether the three fundamental rights characteristics characterise the neutrality requirement applied by the courts.

The final conclusion of the paper:



1. *Figure: The fundamental rights content of the requirement of neutrality*

- Figure 1 shows that **ideological neutrality is linked to the "internal" parts of freedom of conscience and religion, the right to equal dignity and freedom of expression. The "internal" part of the fundamental rights under consideration is understood as the life concepts (let that be religion, thought or the image we created of our life) that take place within the individual and determine his or her identity, which is intangible and untouchable by the state.¹³ In the case of freedom of conscience and religion, this is freedom of belief,¹⁴ in the right to equal dignity, it is one's identity as a**

¹² Lautsi and Others v. Italy, Application no. 30814/06, Judgment of 18 March 2011, Perovy v. Russia Application no. 47429/09, Judgment of 20 October 2020, Kerry O'HALLORAN: State Neutrality The Sacred, The Secular and Equality Law (Cambridge Cambridge 2021), Julie RINGELHEIM: state Religious Neutrality as a Common European Standard? Re-Appraising the European Court of Human Rights Approach *Oxford Journal of Law and Religion*, 2017/1, Malcolm EVANS - Peter PETKOFF: A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights, *Religion, state and Society* 2008/3., Kostas KOUKOUZELIS: Neutrality, Religious Symbols and the Question of a European Public Sphere, *Politics in Central Europe*, 2008/4.

¹³ Rainer FORST: Two stories about toleration in Lorenzo ZUCCA - Camil UNGUREANU (eds.): Law, state, Religion in the New Europe (Cambridge University Press Cambridge 2012)

¹⁴ Paul M. TAYLOR: Freedom of Religion UN and European Human Rights Law and Practice (Cambridge University Press Cambridge 2006), Balázs SCHANDA: A gondolat, a lelkiismeret és a vallás szabadsága in

person.¹⁵ In the inner realm of freedom of expression is freedom of thought.¹⁶ And the requirement of ideological neutrality is intended to protect precisely this inner content by prohibiting the imposition of intolerance.

The inner world of man is a domain closed for the state, which cannot know it, characterise it, or define its scope based on objective criteria. Therefore, the paper provides a fundamental rights concept of ideological neutrality, with a test to identify the inner part of fundamental rights.

- **The final result of the essay is short and concise. It draws up a particular test to determine which behaviours violate a fundamental right by the state's ideological bias.** Some aspects of how to carry out the test are set out in the fundamental rights-specific chapters of the thesis (4.1.4 to 4.3). Such a yardstick for the fundamental right concept of neutrality naturally contains elements of discretion and, because of its novelty, crudity. It does not provide a mathematical solution to the cases but rather highlights the aspects and scope of the balancing exercise.

A) Where the case raises a violation of the individual's convictions (even if alleged by the person concerned):

- 1) Regarding beliefs worthy of protection, the state may only examine their substantiation, seriousness, coherence and importance. Its strict content cannot be examined, and the list cannot be extended to include variable and unpredictable criteria.
- 2) The state may not question an individual's adherence to a religion or belief without a well-founded and objective reason.

JAKAB András – FEKETE Balázs (szerk.): *Internetes Jogtudományi Enciklopédia* (Alkotmányjog rovat, edited by Eszter BODNÁR, András JAKAB) <http://ijoten.hu/szocikk/a-gondolat-a-lelkiismeret-es-a-vallas-szabadsaga> (2018).

¹⁵ John RAWLS: *Political Liberalism* (Columbia University Press 1993), KOVÁCS Kriszta: *Az egyenlőség felé* (L'Harmattan Budapest 2012), Christopher MCCRUDDEN: *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford University Press Oxford - New York 2018), Christopher MCCRUDDEN (ed): *Understanding Human Dignity* (Oxford, Oxford University Press 2013)., Sandra FREDMAN: *Substantive equality revisited*, *International Journal of Constitutional Law* 2016/3, Jürgen HABERMAS: *Between Naturalism and Religion* (Cambridge Polity Press 2008).

¹⁶ Ian LOVELAND: *Importing the First Amendment Freedom of Expression in American, English and European Law* (Hart Publishing 2014), Robert H. BORK: *Neutral Principles and some First Amendment Problems*, *Indiana Law Journal* 1971/1, András KOLTAY: *A szólásszabadság alapvonala* (Századvég Budapest 2009), Alexander MEIKLEJOHN: *Political Freedom: The Constitutional Powers of the People*, (Oxford University Press, Oxford 1965).

B) The state must refrain from

- 1) having a biased attitude towards a worldview, and thereby
 - 2) intervene in the life of the individual in a way that,
 - 3) It influences the decisions that an individual makes about his or her identity.
- These may include one's name, language, cultural identity, sexual orientation and religion.

C) The state, because of its ideological commitment, should not fail to.

- 1) concerning social differences, assist disadvantaged groups with specific measures, thus avoiding creating a situation whereby disadvantaged groups/individuals, by virtue of their situation, are prevented from reaching certain opportunities that open the door to the achievement of the overall objectives.
- 2) fulfil its obligation to ensure that people are not left in a completely vulnerable or subordinate role.

5. List of publications on the topic

Orsolya Benkő: A framework for the interpretation of "education according to Christian values"
HUNGARIAN LAW 2022/4.

Orsolya Benkő: Harmful self-determination? The Constitutional Court's Concept of Harm and the Decision-Making of People with Cognitive Disabilities
BIBO LAW AND POLITICAL SCIENCE REVIEW 2021/1. 29-44.

Orsolya Benkő: The right to the ideological neutrality of the state? II: The interpretation of the fundamental right of neutrality in the practice of the ECtHR
MTA LAW WORKING PAPERS 2021/20.

Orsolya Benkő: The right to the ideological neutrality of the state? I: The possibility of interpreting neutrality in the practice of the Hungarian Constitutional Court
MTA LAW WORKING PAPERS 2021/19.

Orsolya Benkő: Rope Dance: The Concept of Christian Culture and the Ideological Neutrality of the State
LEGAL STUDIES 22, 2021