

ATTILA VARGA¹

Christian Values and the Protection of the Family in the Romanian Constitution and the Case Law of the Romanian Constitutional Court

- **ABSTRACT:** *The article starts from the hypothesis, which it seeks to prove, that legal systems, laws and especially constitutions are not value-neutral but rather defined by values. These values may be moral, political or religious. In Europe and the Western civilisation, a significant part of these values has been shaped by the Christian religion, culture, outlook on life and behaviour. As a narrower context, the article focuses on the moral and political values of the Romanian constitution, their Christian spirit and origin, and the related theoretical and constitutional interpretations. In the analysis, the author concentrates on human dignity, the free development of the human personality, and justice as the main values, as well as the fundamental rights related to them and the principles that define the organisation of the state. The influence of Christian values, thinking and perceptions can be seen in all of these. The author analyses in particular the Christian constitutional and civil law rules governing the family and the marriage on which it is based.*
- **KEYWORDS:** constitution, constitutional case law, fundamental rights, Christian values, human dignity, justice, equal rights, separation of powers, rule of law.

“Each rule and each norm expresses a requirement to be fulfilled, i.e. a value: what complies with the norm is valuable, what doesn’t comply is valueless in relation to the norm. (...) However, in pursuit of the correct or incorrect nature of positive law, this question cannot be answered through positive law itself. In this case a higher gauge is required; one that stands above the law to be judged. (...) And, since the characteristics of the empirical world are variable and temporal phenomena, if we are searching for eternal values and firm,

¹ Associate Professor, Department of Law, Sapientia Hungarian University of Transylvania, Romania; Constitutional Judge, Constitutional Court of Romania, vargaat@yahoo.com.



absolute gauges of value, (...) those can only be found in the realm of ideas that lie beyond the boundaries of empirical existence.”²

Gyula Moór³

1. A few thoughts on the status of inherent Christian normative value

In this idea the renowned Transylvanian jurist points out that the legal norm cannot be value-neutral but contains explicit and well definable inherent value. After all, it sets goals for human actions and prescribes behavioral patterns to be followed. And doing so, it draws a line between actions/behaviors that are valuable from a legal perspective, and those that are not. And this distinction creates an idea of value following a prior choice of values. Each norm is also a gauge for judging things. And the gauge of norms is value. This means, law inherently assumes both values and evaluation.

In Western and European civilization in particular, values, especially moral values are definitely related to the Christian religion, or are rooted in Christianity. This stands even if we consider the fact that a part of Europe considers religion in general, but particularly Christianity obsolete, rejecting or denying this system of values that has been passed on to them.

In constitutions, occasional references to Christian values are part of normative reality and can by no means be considered some nostalgic yearning for a long-gone era – as many try to make it appear to be. Instead – paradoxically – it actually appears in the laws and particularly in the constitution of each state as inherent value that should be implemented.

These two opposite phenomena or approaches imply an actual confrontation, conflict or battle between a reasonable, natural and proven System (of values) that has been working for centuries and is widely accepted by society, and a Relativity (of values) of a *nothing-is-what-it-is* nature, which is experimental, its outcomes are uncertain, and which lacks any foundation.

Let me highlight the view of a disappearing era through the thoughts of Milan Kundera. This is also a unique expression of the civilizational and cultural heritage of religious belief, nonbelief or Christianity, which may include both, and which has made Europe great, noble and respectable when this approach was still alive. “Over the course of the Modern Era, nonbelief ceased to be defiant and provocative, and belief, for its part, lost its previous missionary or intolerant certainty. The shock of Stalinism played the decisive role in this evolution: in its effort to erase Christian memory altogether, it made brutally clear that all of us-believers and nonbelievers, blasphemers and worshippers- belong to the same culture, rooted in the Christian past, without which

2 Püski, 1994, p. 241.

3 Gyula Moór (1888–1950) was born in Braşov; he graduated and did his doctorate at the University of Cluj-Napoca. He was a jurist, a professor, a member of the parliament and an interim president of the Hungarian Academy of Sciences. He died in Budapest.

we would be mere shadows without substance, debaters without a vocabulary, spiritually stateless.”⁴ The renowned Czech author considered himself an atheist, but he respected Christians and Christianity. The above thoughts are from his book *Testaments Betrayed*, and they express an evident truth that interests a lot of people nowadays, but even more try to deny it.

At the same time, Kundera’s decisive existential recognition would be essential, especially for the leaders and opinion makers of today’s European/Western world. Or at least, accepting the fact that the European identity, *modus vivendi*, thinking and behavior are all inseparable from the Christian spirit, values, culture and moral concept, in a sense Hungary’s former Prime Minister *József Antall* put it in a famous sentence that has become a catchphrase by now: “*In Europe, even the atheists are Christian*”. This cultural, civilizational value-determined “behavioral Christianity” appears excellently and powerfully in the below lines of Kundera: “I was raised an atheist and that suited me until the day when, in the darkest years of Communism, I saw Christians being bullied. On the instant, the provocative, zestful atheism of my early youth vanished like some juvenile brainlessness. I understood my believing friends and, carried away by solidarity and by emotion, I sometimes went along with them to mass. (...) I was sitting in church with the strange and happy sensation that my nonbelief and their belief were oddly close.”⁵

Most of all, it is this *modus vivendi*, view, approach, mutual respect and tolerance between Christian believers and nonbelievers (which was shaped right by the end of the 20th century) what today’s Western European official politics and ideology, lifestyle and worldview are trying to leave behind. Because in Europe, the Judeo-Christian religion is – and has been for centuries – not only a religious, but also a fundamentally social, moral, political and legal system of values, which served as a basis for individual and communal identity, and as such, it should not be denied but developed and passed on.

Denying (abandoning) the Christian roots and outlook on life may also be harmful because it means divorcing a decisive part – we might even say, foundation – of a European theosophical development process, which also renders a part of later modern thinking incomprehensible and uninterpretable; a part which might still be accepted today, and which still has some relevance to European civilizational values.

Paradoxical as it may be, in some European states (with rare exceptions), and even more in the public policies, ideological efforts and constrains of the European Union, the Christian spirit is totally absent. Still, in the constitutions of certain states (i.e. the text in which the social values of the given society are explicitly stated – whether in the preamble and/or in specific provisions) we can find statements, theoretical phrases or even regulations with reference to Christian values, symbols or views. Because, for European states the Christian religion and Christian churches – despite all the distortion, abuse or injustice that happened throughout history – carry, safeguard and express values that have proven to be viable, essential and indispensable. And,

4 Kundera, 2017, p. 15.

5 Ibid.

if a society is left without these religious and other values, it becomes a society that has lost its identity, lacks any points of reference, is divided against itself, lost and perplexed.

2. On the inherent moral value of the Constitution of Romania of Christian spirituality and Christian origins

For each state with a constitution that had been developed and accepted on its own, that document is in fact a catalog of the values of the given society, state, nation or political community, be it totally sufficient for some, while for others it may be too narrow or deficient.

Romania's current constitution was accepted in 1991 and amended in 2003. Basically it isn't a proof of an organic development process; it rather reflects a constraint and/or belief to adapt to the new, modern, commonly accepted trends that followed the radical (revolutionary) changes.

I believe this is important to highlight because the Christian spirit of the Romanian Constitution (if any) does not exclusively stem from the Eastern Orthodox⁶ view, tenets or dogmas. In fact, the impact of Roman Catholic or even Protestant spiritual legacy and values prevail much stronger, or at least, certain elements thereof can be traced.

The reason is the phenomenon called constitutional transplants: both the original constituent body that created the new Romanian Constitution in 1990 – 1991 and the derived constituent body that amended it in 2003 definitely intended to adapt to and join the spiritual, cultural and political values of the Western civilization that had been defined by Christianity in many aspects back then.

Consequently, when we talk about inherent Christian moral values in the Romanian Constitution, that's not because the constituent body was led by Orthodox doctrines in wording the document, but because they wanted to adopt a European model (a model that was interwoven with western-type Christian values, among others) in which these values were (still) present and are (or may be) still present, and they could also identify with these values.

And this is of great significance in the Romanian constitutional law. In the Romanian constitutional technical literature, although pretty sporadically, we could recently find a few studies which aim to interpret or discover the Christian- or even Orthodox-rooted content in certain constitutional provisions.⁷

6 Based on the data of the 2011 population census, 99.79% of Romania's population reported to belong to some religious denomination, and more than 90% thereof reported to be Orthodox – more precisely, to belong to the Orthodox Church. Source: Institutul Național de Statistică din România (National Statistical Institute). Available at: www.insr.ro.

7 See also: Necula, 2020; Boari (ed.), 2018; Ionescu and Dumitrescu, 2017; Ardelean, 2011; Tănăsescu, 2009.

The inherent Christian value in constitutional texts is not obvious each time, not even for the constituent body. However, their choices and decisions are still conscious, and this also defines the validity thereof. Values are valid because they are chosen. And the act of choice itself inherently defines an intention of commitment; a belief or conviction that this choice of values conforms to the conviction of society, which grants it validation and legitimacy.

■ 2.1 *The general provisions of the Constitution on core values*

The first Chapter of the Romanian Constitution defines general principles i.a. human dignity, the free development of human personality and justice as *core values*.⁸

2.1.1. *Human dignity*

According to the Christian concept – and there are definitely no significant denominational/dogmatic differences on this matter – the dignity of each human being stems from being created in God’s image, after God’s likeness. Due to their souls, as well as their intellectual, intentional and spiritual abilities, human beings are provided freedom, which is a privilege of being created in God’s image.

According to the Catholic indoctrination, “Human life is sacred because from its beginning it involves ‘the creative action of God’, and it remains forever in a special relationship with the Creator”. Furthermore, “God alone is the Lord of life from its beginning until its end: no one can, in any circumstance, claim for himself the right to destroy directly an innocent human being”.⁹ The Church condemns suicide, abortion and euthanasia actually on the basis of the sanctity of life.

From the standpoint of value theory and axiology, both human life and human dignity are considered absolute values (self-worth). These two notions belong together, as each human life is provided human dignity, and there is no human dignity without human life. This is a core value that should be recorded in writing in the constitution of any constitutional state.¹⁰ In general, each country includes values in its constitution as core values and grants them legal protection, of which worth is supported by the common historical experience of humankind on one hand, and the specific traditions, cultural and civilizational heritage of the given nation or political community on the other hand.

Therefore, in the Romanian constitution human dignity is referred to as a core value, not a fundamental right. On the other hand, the analysis of the constitution by the Constitutional Court clearly stated that it’s human dignity that serves as a basis for most fundamental rights. And the Constitutional Court stated in a resolution that “the

8 Article 1, paragraph (3) of the Constitution: “Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.”

9 The encyclical of John Paul II entitled *Evangelium vitae*.

10 For more details on this matter see: Barcsi, 2005, pp. 116–118.

fundamental rights and freedoms granted in the Constitution are based on human dignity.”¹¹ And this is an indirect acknowledgement of the proposition that human dignity is more than a mere declaration of moral value, even though this is also of great significance. However, the Constitutional Court went even further than that in a recent resolution, in which it stated that the constitutional concept of human dignity does not only have a declarative, but a normative value as well; it shall be considered a definite fundamental right with a substantive value of its own, and it defines the human quality of each individual. Consequently, any violation of fundamental rights also means a violation of human dignity, as the latter serves as a foundation of the former.¹²

The technical literature on Romanian constitutional law interprets human dignity as a “parent law”, which is the root of the most fundamental rights related to human existence and human quality. The legal and moral concepts of human dignity are based on the unconditional respect of human life, which is originated from the Christian concept of man being created in God’s image. Furthermore, the Christian tradition of natural law can still be found in some contemporary concepts of human dignity, i.e. the basis of human personality can be traced back to being created by God.

Therefore, the right to life, the prohibition of death penalty, the protection of the family, but even the right to property, solidarity or social security are basically based on human dignity, including the free choice of employment or the right to health or a healthy environment.

2.1.2. The free development of human personality

Among the major world religions, most probably Christianity defines and prioritizes the role and significance of the individual and the human personality to the greatest extent and in the most unique manner. It is the Christian teaching that points out the necessity of a harmonic balance between man as a separate individual/autonomous personality and as a social being.

It is the Christian system of values that – while acknowledging the importance of the community of individuals of the same religious beliefs – also highlights the individual and the need to support the evolution and development – of the individual personality, especially through letting the Christian free will and freedom of choice prevail.

Firstly, the Constitutional Court stated that the free development of human personality is closely related to human dignity, which is a source of constitutional fundamental rights. And secondly, it defined two aspects of the free development of personality: First, it means the freedom of action in an active sense; and second, in its passive sense, it means the respect of the private sphere of the individual and the requirements that follow from this. Consequently, to ensure free development, the

11 Resolution 1.109 of 2009 of the Romanian Constitutional Court.

12 Resolution 465 of 2019 of the Romanian Constitutional Court (published in issue 645 of 2019 of the Official Gazette).

individual must be granted freedom of action, and the state should establish a legal framework that can guarantee the respect of the individual, the expression of personality and equal opportunities.¹³

There are further fundamental rights that can be derived from the constitutional fundamental right of the free development of human personality including, but not limited to the freedom of conscience, religious freedom, freedom of expression or the right to education, the right to access culture, the right to information, the right to work and related social protection, or the right to identity.¹⁴

2.1.3. Justice

Human nature is integrally bound to the fundamental intention, desire or idea that social coexistence should be organized based on justice. The need for social justice in the broadest and most diverse sense is primarily expressed in the fundamental rights and principles of constitutional order on the level of legal regulation. Justice is a fundamental value and a normative (moral, religious and legal) requirement of today's modern societies, but basically any kind of human society.

Law is formed with the inevitable mission to meet the conditions of justice in each social relation it regulates.

In different (socially and historically defined) legal cultures, there are various concepts of right and justice in law, but the requirement for justice appears in each case. Consequently, it is the requirement for justice in the sense of natural and positive law that defines and provides the functions of law to protect society and itself at the same time.

While right is still defined by laws and legally founded judicial decisions in modern societies today, justice is an intricate conglomerate of extremely complex expectations, feelings and requirements that manifest in individual and communal activities and social processes, with or without legal relevance. Justice is a moral, ethical, theological, power-theoretical, sociological, economic, social and jurisprudential matter at the same time.

Justice assumes legal, moral and political theses (supposed fundamental values) like equality, fairness, liberty, tolerance, common good, public order, integrity, social care etc. And the Christian subject matter, explanation or origin of these imperative values could hardly be questioned.

According to the teaching of the Roman Catholic Church the quality of life of people living in societies can be described by the "*relationship between justice and love*", which "*makes up the fabric of society*". In this regard it is also expressed that "Society is about the dignity and the rights of the person as well as the peace of interpersonal and

13 Resolution 601 of 2020 of the Romanian Constitutional Court (published in issue 88 of 2021 of the Official Gazette).

14 These are all explicitly listed in the Catalog of Fundamental Human Rights of the Romanian Constitution.

inter-communal relations. These are benefits that shall be sought after and provided by the social community.”¹⁵

While the concept or at least the expression of justice is an essential part of any constitution, a legal, and especially a normative definition thereof would be pretty hard or even impossible to formulate, for the simple reason that this is basically not a legal term. In constitutional technical literature there are only a few traces of the explanation or interpretation of this concept; at best it came up in legal theoretical studies as a research topic.

During the norm control of the constitution there were only a few occasions when the infringement of justice as a core constitutional value as stated in Article 1 paragraph (3) was expressly criticized. Needless to say, justice has countless components including the equality of rights, or discrimination as the infringement thereof, which in undoubtedly the most common reason for requesting a norm control.

The Constitutional Court formulated a comprehensive theoretical reasoning on the concept of justice in a 2021 resolution –¹⁶ probably for the first time – in an additional norm control¹⁷ in relation to one specific case. The Constitutional Court explained that “the rationale and finality of the existence of the state is based upon the core values stated in Article 1 paragraph (3) of the Constitution including justice. Justice does not only ensure the proper functioning of the state but also the trust of society in the measures taken by the state, and in specific, the trust in the administration of justice. A criminal procedure represents an explicitly public power relationship between the state and the citizen, in which the relevant public authority may apply the coercive power of the state legitimately. But it may do so within the framework of the constitution and the law, adhering to the procedures defined by law and respecting constitutional fundamental rights, principles and core values. Should any act of the state – even if each part of it is legitimate – come out to be unjust for the citizen at the end (in finding them guilty/not guilty), the state shall ensure legal remedy or even

15 The encyclical of John Paul II titled *Centesimus annus* (1991). See also: Pontifical Commission *Iustitia et Pax* (*Az Igazságosság és Béke Pápai Tanácsa*, 2007, p. 60.) Let me point out here that the justice requirements of the modern age were highlighted by John Rawls, a great expert on this topic, in two principles: a) every person shall be equal to an extent that is compatible with the liberty of others; b) social equality should be organized in a way that it shall be beneficial for everyone and establish positions that are accessible for everyone. And this results in equality and tolerance, and makes restriction of liberty for the sake of liberty itself acceptable.

16 Resolution 136 of 2021 of the Romanian Constitutional Court (published in issue 494 of 2021 of the Official Gazette).

17 The case in a nutshell: the petitioner was sentenced to imprisonment by the First Instance Court, but after an appeal, the Court of Appeal finally found the person not guilty. When this person demanded financial compensation, the request was denied on a basis that this is only granted by the relevant law if the authorities that conducted the procedure had made unlawful actions in relation to the person. The law (Code of Criminal Procedure) did not cover the possibility that someone may also be entitled to compensation in case he or she, though did not suffer any unlawfulness during the procedure, but was found innocent in the final judgment after spending almost a year in prison as a result of the first instance conviction. The petitioner definitely found this unjust.

compensation in a given situation, in order to restore justice for the person affected, as well as for society as a whole. (...) Justice is a constitutional concept which – taking its moral philosophical nature into account – cannot be made normative (cannot be formulated as a positive legal provision) on its own, still it serves as a framework and gauge for the actions of the state. Society understandably wants justice. And it is the duty of the state to demand and enforce it through its authorities. Justice is essentially and inherently involved in each act of the state, which is projected to the fundamental rights and the respect thereof. Consequently, any restriction of these fundamental rights should be complemented with guarantees that make sure for the affected person and society that the action made by the state was not arbitrary, moreover, it was actually fair. And, in case the state made a wrong judgement, the remedy in place should be capable of compensating for the injustice that took place.”

With regard to other cases, the Constitutional Court highlighted the component of justice that pertains to fairness, more specifically, the requirement of a fair legal procedure. Because, if certain infringements (for example, unduly late explanation of conviction) are made in certain obligatory phases of the procedure, that can lead to severe injustice for the person affected, which might even involve the dismissal of his/her human dignity.¹⁸

The interpretations of the constitution that have been drawn up in relation to these cases with the purpose of legal development indicate that moral philosophical aspects have been included that definitely represent a Christian approach, in some cases even commitment for the Christian approach, or simply the application and implementation of Christian values, and it probably doesn't even matter which judge in the Constitutional Court is religious and which isn't, to what extent or, to whichever denomination they belong.

■ 2.2 *Relations between the entrenched clause¹⁹ and the restriction of practicing²⁰ fundamental rights*

The Romanian Constitution contains a provision to restrict amendments. It states that certain principles and values included in other constitutional regulations are

18 Resolution 233 of 2021 of the Romanian Constitutional Court (published in issue 508 of 2021 of the Official Gazette).

19 Article 152 of the Constitution: “(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof. (3) The Constitution shall not be revised during a state of siege or emergency, or in wartime.” In this study I will not bring up any political or legal disputes in relation to the provisions. With regard to the current topic, I deem paragraph (2) relevant.

20 Article 53 of the Constitution: “(1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. (2) Such restriction shall only be ordered if necessary in a democratic

untouchable and unchangeable by the derived constituent body. This provision is called the entrenched clause in the legal technical literature, despite the fact that there are professional debates going on whether a law (even the fundamental law) can prohibit anything for a future constituent body by formulating provisions that are intended to be eternal. Furthermore, it is also subject to debate which ones of the explicitly listed values are reasonably “eligible” to be eternal and unchangeable, and which aren’t.

The concepts of “eternal” and “unchangeable” are basically religious and metaphysical concepts, although it’s not about that in this particular situation. However, the law does undoubtedly contain static elements that can be deemed permanent. These may not be considered eternal, especially in their subject matter, still they provide stability and predictability for the legal system as a whole. However, I don’t see the Christian spirit basically in this, but in the way the part of the entrenched clause with relevance to the fundamental rights is complemented by another constitutional provision that is aimed at restricting the exercise of fundamental rights.

The Entrenched Clause (paragraph (2) of Article 152) states that “no revision shall be made if it results in the suppression of the citizens’ fundamental rights and freedoms, or of the safeguards thereof”. This means that an amendment to the constitution allows changes or additions to the subject matter of each existing fundamental right, or even adding new fundamental rights, but it does not allow to revoke any existing fundamental right.

Article 53 of the Constitution (on the restriction of exercising fundamental rights) states firstly that “(1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be”. The circumstances and the arguments relevant to the given situation are listed one by one. (For example: national security, public order, public healthcare, public morality etc.). On the other hand, (2) “Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.”

In conclusion and to summarize the above: firstly, fundamental rights cannot be revoked; and secondly, they may be restricted exclusively by law. The restriction shall be proportional to the root cause and shall not concern or jeopardize the existence of the given fundamental right. In order to implement these provisions the Constitutional Court has drawn up a proportionality test and applies it in each case when the possibility of the infringement of Article 53 arises.

This approach and regulatory practice can be considered common in European legal systems and is aimed at the implementation of the rule of law and the protection of fundamental rights. In its deepest layers we might discover the Christian spirit, especially if we consider the fact that the fundamental rights originally stem from Christian principles.

society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.”

■ 2.3 *The Christian/moral inherent value in the system of fundamental rights*

Behind the development and institutionalization of fundamental human rights lies an idea that is deeply rooted in natural law, goes beyond legal positivism and basically stems from Christianity, as this is the only religion that is centered around man as an individual with a complex personality and dignity, as well as the unconditional respect of human life.

To illustrate this, let me cite the clear, exact and modern view of the Catholic Church on this matter: “The Church believes our age gives us an exceptional opportunity to make the acknowledgement and improvement of human dignity (as a trait that was implanted by God into his creatures) more effective worldwide through supporting human rights.

The source of human rights is the dignity every human being is entitled to. This dignity is inseparable from human life, identical for all persons, and most of all, the mind can grasp and understand it.

The ultimate source of human rights is not to be found in the mere will of human beings, the existence of the state or the public power, but in man itself and God, their Creator. These rights are universal, invulnerable and unalienable. *Universal* because they are present in each and every human being, regardless of place, time or person. *Invulnerable* because they form an integral part of each person and their dignity, and it would be futile to declare rights if, at the same time, we didn’t do everything to ensure that everyone is bound to respect these rights everywhere and in every person. *Unalienable* because no one can legally take away these rights from any fellow human being, as that would be a violation of their own nature as well as the other person’s nature.”²¹

Before I would name the specific fundamental rights, let me mention two principles which define the whole system of fundamental rights and can definitely be explained and interpreted along Christian values. These are the equality of rights, and liberty.

With regard to both of these principles, Christian thinking has also undergone long development, shaping and transformation processes, especially in their interpretation and practical implementation. However, the starting points i.e. biblical phrases and their theological explanation have proven to be correct.

Of course it is true that neither the equality of rights nor liberty was included in the text of the Constitution as principles, rights or values that are (also) related to Christianity in any form. But one thing is for sure: the Christian spirit, the acceptance of, and the belief and trust in Christian values was a decisive factor in the acceptance of these normative texts. Anyway, it couldn’t have happened differently, given the fact that the constituent power had set out the goal of catching up with European civilization and culture. There is no other world religion that propagates so apparently the freedom, free will and freedom of choice of the individual, as well as the equality of people (in front of God, at least), the unconditional respect of human life, human dignity,

21 Pontifical Commission Iustitia et Pax (Az Igazságosság és Béke Pápai Tanácsa, 2007, pp. 83–95.)

supporting the poor and the disadvantaged, fraternal love and care, just to mention the most basic principles, which all appear in the constitution as legal normative texts in various fundamental rights.

Let me cite a few fundamental human rights from the Romanian Constitution's Catalog of Fundamental Rights, which can be found in the constitutions of basically all Western democratic states, and which I believe are close to (or can be traced back to) the Christian thinking or teaching.

Just to mention a few: the right to life, as well as the right to physical and mental integrity, and the prohibition of death penalty (Article 22); individual freedom (Article 23); freedom of conscience including freedom of thought, opinion, and religious beliefs, and freedom of expression (Articles 29 & 30); the right to a healthy environment (Article 35); protection of children and young people (Article 49); protection of disabled persons (Article 50).

All in all we can see that the whole system of fundamental rights – as it is in the Romanian and European democratic constitutions in general – is interwoven with love, care, solidarity, being considerate of one another, mutual respect, the dignity of the individual and the community, freedom and free will, deliberation and choice, social peace and justice – both theoretically and based on the above quotes. All these appear basically and originally in Christianity, to be more specific, in the teachings of Jesus.

These fundamental rights (which might even be assumed as values) have been defined by the Christian civilization and culture beyond the Christian religion, and are basically stated so explicitly in the constitutions of western legal systems. And this is true even if we consider the fact that there were certain periods in history when people, Europeans, states and churches strongly diverged (and still diverge) from these values.

■ ***2.4 The theologically based Christian approach that appears in certain governmental organizational principles***

The famous Hungarian writer, jurist and politician József Eötvös put it a bit radically, but he was right: “Christianity is nothing else but the protest of the individual against the all-pervasive tyranny of the state.”²²

Regarding its wording, spirit and the governmental organizational principles, the Romanian Constitution is obviously intended to follow the European traditions and the accomplishments of political theory and the history of ideas that proved to be working in practice. We might discover faults, deficiencies or even wrong normative solutions in the exercising of power, the regulation of the institutional system of relations, and the implementation thereof in the past few decades, but these are less relevant to our current topic.²³

22 Eötvös, 1977, p. 189.

23 Let me mention only two examples: the unique semi-presidential political system that creates a lot of tension and conflict, and the institution of legislative mandate, which is often exercised in an abusive manner.

The most important governmental organizational principles including the division of power, the rule of law, representative democracy, local governments, political freedom or even the separation of church and state are basically universal values of which precursors and intellectual roots can be traced back to Protestantism, more specifically to Calvinism.

Of course I do not want to say that in 2003, when the Romanian constituent power explicitly stated the principle of the division of power during the amendment of the Constitution (even though it had been accepted and used as a governmental organizational principle since 1991), they were guided by Calvin's thoughts as set out in one of his most important works called *Institutio Christianae religionis*²⁴ regarding the organization of church and civil government.²⁵ The same way they weren't thinking of the encyclical of Pope Leo XIII as the intellectual origin of the principle of subsidiarity.

However, by accepting these principles, the Christian origins of the fundamental governmental organizing principles in the Romanian Constitution can be traced – even if only indirectly. Anyway, this intellectual heritage can be at best knowledge or information for the Romanian society and political sphere, and by no means social and/or political practice or experience. That is to say that the existing constitutional exercise of power is not a result of centuries of organic development, but the transplantation and adoption of constitutional ideas.

One of the decisive elements of Calvin's view on the state and civil government is that he recognized the inclination and nature of the state to absolutism, autocracy and self-centeredness, which is still present today, and he was searching for means to hold these tendencies back and keep them in check. In his view the civil government is though ordained by God, it is also a necessity in order to maintain society, peace and common good. He puts the requirement of legitimacy, lawfulness and authority up against the possible autocracy of the civil power. The exercise of power, government and judgement can only be made lawful by existing legitimacy, within the framework of legitimate procedures.²⁶

24 Calvin, 1559.

25 Chapter 20 of *Institutio* is about the Civil Government. See also: Calvin (Kálvin, 1559, pp. 509–535.)

26 The timeliness of Calvin's view and its impact on the development of governmental organizational principles is analyzed by Béla Szathmáry in a comprehensive study. Hence, on one hand, Calvin puts the mandate and the obedience to civil government in the spiritual sphere of the individual as a spiritual freedom. And on the other hand, he links the obedience to secular power (as a means God ordained for implementing the common good) to civil obedience in a way that the obedience to God's will should be its core element. "According to Calvin, laws that apply to the power in charge and the subordinated citizens alike are based on what he calls moral laws that rely on two commandments: the unconditional love and respect of God, and the mutual love of one another. Calvin expands the conceptual scope of moral laws with natural laws, adds the requirement of fairness to the scope of laws, and makes the application thereof binding for governmental bodies. Doing so, he imposes further constraint on the civil government insofar as it is both limited by divine and natural laws. According to Calvin, power is lent to secular authorities by God, but not in order to renounce it or to transfer it to others, but to use it, promote it, protect good deeds and stand up against evil. According to modern

Protestantism has undeniably earned imperishable merits by reviving original Christian ideas and spreading the ideas of liberty, progress, religious and political freedom and the principles of modern democracy. It has contributed to the generation of comprehensive social, economic and political processes and changes that required a novel approach of law, and also reformulated the most important principles of natural law.

Finally, although it is not a governmental organizational principle, let me point out that the validity of the constitution and the mandate of the President of the Republic begins after taking the oath upon inauguration. And this oath ends with the phrase “*So help me God!*”²⁷ This oath is also taken by members of the parliament or members other public authorities, for example constitutional judges or mayors at local governments. Of course it is not mandatory to conclude or confirm an oath like this, but it is not likely to be missed either.

3. The regulation of marriage and family through constitutional and civil law of a Christian approach

Family and its foundation, marriage between man and woman is not an expression of the regulatory intention of the state but most of all, a fundamental institution that lies outside and beyond state and law. It has been shaped in the human community, according to the natural norms of coexistence and its function in society. In Western Christian culture, family, its objective and role are basically defined by religion, by Catholic or Protestant views.

“Family, as the first natural community, is the center of social life. (...) Family is born from the love-based partnership of conjugal unity, and this partnership is based on the marriage of a man and a woman. It has a specific and original social dimension in a sense that family is the primary source of interpersonal relationships, the atomic cell that gives rise to society. It is a divine institution and, as the prototype of all kinds of social organization, serves as a basis for every person’s life. (...) Family is a natural union for humans to experience human community and as such, it is one of society’s

concepts it serves the protection of the common good and order which – in Calvin’s opinion – is necessary because the liberty we got from Christ towards our fellow human beings is not unlimited, and we cannot forget about keeping to these limitations. By highlighting God’s absolute sovereignty, Calvin creates an opportunity for establishing the right proportion and boundary between authority and liberty, and establishes the relationship of power and the individual as a solid ground upon which the state philosophy of future centuries can be built. Through this, Calvin attempts to create balance between the power and its agent that are necessary for the coexistence of humans, and the need to restrict free human autocracy. All kinds of earthly power is limited; therefore, the authority that emerges this way cannot acquire unlimited power over the individuals who owe obedience primarily to God.” Szathmáry Béla: *Kálvin a kortársunk?* See also: Fazekas (ed.), 2009, pp. 382–383.

27 Article 82, paragraph (2) of the Constitution

unique and irreplaceable assets. (...) Family as a community of persons is the primary form of human society.”²⁸

After discovering that the social importance of family had started to erode, moreover, there were even conscious, organized and systemic efforts aimed at destroying the idea and reality of family, John Paul II voiced his concerns as follows: “The People of God should also make approaches to the public authorities, in order that the latter may resist these tendencies which divide society and are harmful to the dignity, security and welfare of the citizens as individuals, and they must try to ensure that public opinion is not led to undervalue the institutional importance of marriage and the family.”²⁹

Finally, let me sum up the above with another quote from this extremely substantial teaching: “Family is more than just a legal, social or economic base unit. It is a unity of love and solidarity, which is a unique means of passing on fundamental cultural, moral, social, spiritual and religious values for society and its members.”³⁰

The concept of family as per the Christian moral values is different from the contractual concept stated in Roman law, as well as from the family concept of totally different religious systems (for example, Islam).

In the Christian family concept of European law, legal principles and legal values defined by the Christian concept of human dignity, divine and natural law, the equality of rights, mutual respect and care appear, as they prevail in the relationship between man and woman.³¹

28 Pontifical Commission Iustitia et Pax (Az Igazságosság és Béke Pápai Tanácsa, 2007, pp. 123–124.)

29 The apostolic exhortation of John Paul II entitled *Familiaris consortio* (1982). See also: Pontifical Commission Iustitia et Pax (Az Igazságosság és Béke Pápai Tanácsa, 2007, p. 132.)

30 Pontifical Commission Iustitia et Pax (Az Igazságosság és Béke Pápai Tanácsa, 2007, p. 132.)

31 A comparative analysis of laws will reveal that significant Christian moral value is attributed to family in the constitutions of several countries. The most convincing may be the Constitution of Ireland in Article 41 paragraph (1): “The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.” Article 21 (1) of the Constitution of Greece states that “The family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State.” Or we might mention the Constitution of Spain, Article 32: “Man and woman have the right to marry with full legal equality.” Or Article 18 of the Constitution of Poland: “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.” And finally, Article 29 of the Constitution of Italy: “The Republic recognises the rights of the family as a natural society founded on marriage.” What’s more, not so long ago, even the Supreme Court of the United States uttered that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation’s history and tradition.” Also it might be of interest to cite Article 12 of the European Convention on Human Rights which says: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” The UN Universal Declaration of Human Rights (Article 16) basically says the same. We might also mention the International Covenant on Civil and Political Rights (Article 23), complemented and confirmed by the International Covenant on Economic, Social and Cultural Rights (Article 10), which also prescribes for the

In the view of the Romanian constitutional and civil law, the legal concepts of marriage and family are interpreted separately, but are organically and inseparably interconnected, and have a causal relationship.

The Constitution considers marriage a life partnership that can be established solely by two people and, despite the peculiar wording (the grammatically neutral term *spouses* is used) it is definitely a life partnership between man and woman, and protects it as a moral, social and legal asset.

This also implies that the protection of marriage and family as legal institutions is primarily a matter of constitutional law; setting out related principles and objectives is in the scope of constitutional regulations in particular. On the other hand, the procedural rules of marriage, as well as the internal relations of marriage and family are regulated by the civil code or other regulations of family law.

The legal institution of family and marriage, which serves as the basis thereof, are regulated by Article 48 of the Constitution of Romania, which also provides an interpretation from the perspective of constitutional law. It says: “(1) *The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.* (2) *The terms for entering into marriage dissolution and nullity of marriage shall be established by law. Religious wedding may be celebrated only after the civil marriage.* (3) *Children born out of wedlock are equal before the law with those born in wedlock.*”

We can definitely say that in the Romanian legal system the traditional Christian view of marriage and family prevail both on the level of the Constitution, and particularly on the level of civil law, and this corresponds to the views of the overwhelming majority of society.

This is true even considering the fact that the citizen initiative that aimed to amend the constitutional definition of family in paragraph (1) of Article 48 to remove the reference to “spouses”, replacing it with a specific reference to one man and one woman, finally failed. Although the Parliament accepted the draft bill, it failed the referendum, as it was invalid and unsuccessful due to a low participation rate.³²

States Parties to recognize the following: “1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.” However, this formerly self-evident approach has undoubtedly changed by now; that is, the social role of marriage and family in particular has significantly declined.

32 The Constitutional Court has addressed this issue even in two resolutions. In Resolution 580 of 2016 of the Romanian Constitutional Court (published in issue 857 of 2016 of the Official Gazette) a citizen’s initiative was addressed with the purpose of amending paragraph (1) of Article 48. Accordingly, the amended text would go on as follows: “The family is founded on the freely consented marriage of one man and one woman, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.” As the Parliament accepted the draft bill for constitutional amendments in the sense and with the wording of the citizen’s initiative, the Constitutional Court also examined whether it is fit for the Constitution, in Resolution 539 of 2018 (published in issue 798 of 2018 of the Official Gazette), and qualified the procedure and the contents of the proposed text constitutional in a sense that it does not interfere with the entrenched clause.

The constitutional provisions define the concept and social function of family, as well as its basis, marriage, the constitutional prerequisite of marriage (free consent), its fundamental principle (full equality of the spouses), the socially and legally relevant purpose of marriage, that is parental care and the right and duty of the parents to ensure the upbringing, education and instruction of their children.

The Constitutional Court of Romania found that on one hand the Constitution uses the concept of family life – a concept that is much more complex and expansive, and allows the expression of the right of self-determination – and the duty of public authorities to respect family life including intimacy and private life.³³

On the other hand the Constitution uses the concept of family separately as something that is created through the marriage of a man and a woman, and which establishes the constitutional foundations of the relationship between parents and their children.

In Resolution 580 of 2016 the Constitutional Court stated that replacing the original term “*spouses*” with “*one man and one woman*” is basically just a clarification of exercising the fundamental right of marriage; a clear statement that it can be made between two persons of different biological sexes. The Constitutional Court also pointed out that the above interpretation also pertains to the original text, as it was also the intention of the original constituent (in 1991) to use the traditional concept of marriage (the one based on human nature), and to ensure protection for this concept.

Independent from the fact that the paragraph of the Constitution about marriage and family remained unchanged, the above interpretation is also supported by the Civil Code that entered into force much later, in 2011. The provisions of the Civil Code leave no doubt about the traditional views of the lawmaker on this topic and these concepts. Accordingly: “In the context of the current code, spouses mean man and woman united through marriage.”³⁴ And it goes on by stating clearly and categorically that “marriage is the freely consented union between one man and one woman made according to the law. The man and the woman have the right to marry in order to constitute a family/ have a family.”³⁵ And “Marriage is performed between the man and the woman through their personal and free consent.”³⁶

Regarding the marriage of same-sex couples the provisions of the Civil Code are again, fairly categorical. “Same sex marriage is forbidden. Same sex marriage contracted abroad whether between Romanian citizens or by foreign citizens are not recognized in Romania. Civil partnerships between opposite sex persons or same-sex persons, whether by Romanian citizens or foreign citizens are not recognized in Romania. Legal provisions regarding free movement in the territory of Romania of citizens from the EU member states and the EEA, are valid.”³⁷

33 This is regulated by Article 26 of the Constitution.

34 Article 258, paragraph (4) of the Civil Code of Romania.

35 Article 259, paragraphs (1) & (2) of the Civil Code of Romania.

36 Article 271 of the Civil Code of Romania.

37 Article 277 of the Civil Code of Romania.

Family, which is created through the marriage of man and woman, is basically considered a moral community by society, regardless of its legal regulation.

According to the most general and most widely accepted legal definition, family is a free consent-based life partnership between a man and a woman, who are connected by an actual relationship, bonding or dependence. In this relationship system, each party has well-defined rights and (except for the children) obligations.

Family is therefore primarily an emotional, moral and (of course) economic community, which constitutes family relations and serves as a basis for mutual support and care obligations.

Therefore, family has a status that lies beyond the realm of law; it is considered some kind of a natural state of humans by society, so much that even legal normative regulation may penetrate this sphere only discreetly, and to a limited extent.

All these provisions reflect a clear moral viewpoint that is based on the Judeo-Christian (in our case, Eastern Christian Orthodox) religious conviction that God created man male and female;³⁸ it's their natural, biological and also social inclination to form a family, and the legal means to do so is marriage.

Civil partnership is not regulated by the Civil Code, despite the fact that it was recognized by the former Family Code. However, this doesn't interfere with the legal regulation which states that children born out of wedlock are equal before the law with children that are born in wedlock or have been adopted.³⁹

To sum it up, we can say that the Constitution of Romania considers family the most basic form, way, and also a defining value of society and as such, human relations and coexistence, therefore it should be protected by law.

Although constitutional legislation contains laws to support families (especially families with children) through social measures, there is still a significant room for expansion in the scope of these measures and regulations.

In the Constitution the protection of family is intentionally separated from the protection of private life and intimacy, as the latter are spheres that need no intervention from the state, but the state is required to ensure protection from any intervention or attempts for intervention by natural persons, legal persons or public authorities.

These are in fact the social, social psychological or sociological processes that have been leading to the atomization of society for decades now, and which are being significantly facilitated by various technological means (as achievements of civilization). In such circumstances it may be understandable (although still not acceptable) if private life and intimacy come into view even for legislation, while marriage, family, having and raising children are becoming less important right in a Christian-rooted civilization in which these used to be defining values.

38 The Old Testament, First Book of Moses 1.27-29: "God created man in the image of himself, in the image of God he created him, male and female he created them. God blessed them, saying to them, 'Be fruitful, multiply, fill the earth and subdue it. Be masters of the fish of the sea, the birds of heaven and all the living creatures that move on earth'."

39 Article 260 of the Civil Code of Romania.

And all this happens in the European Union, even though the intention of the Founding Fathers as religious (mostly Catholic) men was to build the new European order, relations, cooperation and institutions to a foundation of Christian values.

4. Instead of conclusions

Let me cite two ideas (one from a Catholic and one from a Protestant person), as these are more concise and insightful than any of the conclusions I have made. One of them is from the past, while the other is basically from these days.

As a former governor of Connecticut, USA *John Winthrop* said at a people's assembly: "What we need is not the corrupt liberty that reduces man and gives free way to all kinds of whims, respects no authority, takes no order and is totally opposed to right and justice. No. Our liberty shall be true civil and moral liberty that does not destroy but create; that does in fact rely on authority and respects the law; and enables us to confidently channel our affections, thoughts and actions into something that is good, nice, noble and fair."⁴⁰

The other thought is from *Joseph Ratzinger*, a decisive spiritual and moral authority our time. "The two great cultures on the West, Christian faith and secular rationality (also, the two main partners in the essential correlation of mind and faith) are not actually universal, even though each of them has a decisive impact in its own way all over the world, in every culture. (...) It is important for both compounds of Western culture to pay attention to other cultures and create a true correlation with them. It is important to involve them in an attempt of a polyphonous correlation in which they can also open up to take in the essential complementarity of mind and faith, so that the universal process of purification can start. During this process, the essential values and norms that had been recognized or suspected by every human being in some way, will regain their light so that the powerful enlightening force that keeps the world together, can conceive in humankind again."⁴¹

The moral of both quotes is that law, legal and especially constitutional norms cannot exist and cannot be interpreted without moral and – in most cases – religious (Christian) inherent value. Without that, the coherent force that keeps society together, would decline or even cease, which would lead to the decay of not only society, but Western civilization itself.

40 John Winthrop (1616–1650) as cited by Kuyper, 1923, p. 5.

41 Habermas and Ratzinger, 2007, pp. 47–48.

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