CENTRAL EUROPEAN UNIVERSITY

TRACING THE LIMITS OF SECRET SURVEILLANCE

THE ESSENTIAL CONTENT DOCTRINE'S ROLE IN SETTING ABSOLUTE LIMITATION ON THE SURVEILLANCE POWER OF THE STATE IN HUNGARY AND IN GERMANY

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Abstract

This paper starts with an analysis of the "concept of the human being" (Menschenbild) in Hungary and in Germany. It identifies the problems in Hungarian constitutional law and as a special field, secret surveillance law. It argues the Hungarian Fundamental Law's miscellaneous nature can justify even a paternalistic position of the state towards individuals. However, the Hungarian Constitutional Court (HCC) did not go that far: it deduced its own Menschenbild from the Fundamental Law that can be categorized as communitarian. That Menschenbild is almost word-by-word the same as the one that emerged from the jurisprudence of the German Federal Constitutional Court (FCC) decades ago, although the HCC used the concept to justify harsher human rights limitations. The thesis then considers the application of the essential content doctrine as a possible solution to the problem identified. According to this doctrine, all human rights have a core area which deserves absolute protection. In its jurisprudence on secret surveillance the FCC protects the core area of private life comprehensively. I demonstrate the way and the extent of this protection and suggest the HCC to start the elaboration of a substantial human rights guarantee in the field of secret surveillance by using the German example of the essential content doctrine. I argue that there should be some most intimate places, situations, conversations in private life from where a constitutional state is completely excluded even when carrying out secret surveillance.

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Introduction

Nowadays terrorism is a very serious challenge. At the same time, fighting against it and especially the means of this "war" are highly controversial. Some governments try to tackle that problem by extending their field of action at the expense of the private sphere of individuals. How deeply can a state interfere with the life of an individual? Are there any absolute limits to secret surveillance? Are there situations which should not be subject to secret surveillance?

Secret surveillance measures have a crucial role in fighting terrorism and other serious crimes because they are extremely efficient, but these measures can interfere heavily with the private sphere of an individual.

Secret surveillance measures make individuals vulnerable to the state, therefore the use of these measures must be subject to strict regulation. In a constitutional democracy there should be no uncontrolled and unlimited power.[1] In our times we experience an incredibly fast development of technology. As a consequence, technical obstacles to large scale interception or observation are vanishing. Therefore, legal and constitutional barriers become more and more important.

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The main argument of my research is that there are absolute limits of secret surveillance in a constitutional democracy. A current event inspired my research. In the beginning of 2016 the European Court of Human Rights (hereinafter: ECtHR) delivered a judgment against Hungary, whereby the Court held that Hungary was unable to meet the European minimum criteria of human rights in the field of secret surveillance measures. The fact that the Hungarian Counter Terrorism Centre can apply secret surveillance measures without an independent and effective prior or posterior control, violates Article 8 of the European Convention of Human Rights (hereinafter: ECHR), held the ECtHR in its Szabo and Vissy v. Hungary[2] case. Although the Strasbourg court dealt mainly in its judgment with procedural questions, the lack of adequate guarantees and safeguards in the Hungarian legal framework, I would like to address in my present paper a slightly

[1] 28/1995. (V.19.) AB határozat, ABH 1995, p. 142.
[2] Application no. 37138/14.

more philosophical, but also very important question: how does a state treat individuals? This theoretical question has, however, practical consequences. If a state sees itself as a body which is meant to serve individuals living under its jurisdiction, and not as an entity which can force its will and preferences on individuals, then the sphere is accordingly smaller where state interest trumps rights of individuals. And, as I believe, then there should be a (most intimate) field of private life, where state interference is absolutely prohibited.

I approach my topic through a comparative analysis between Hungary and the Federal Republic of Germany and I furthermore combine these domestic viewpoints – where applicable – with criteria set up by the ECtHR. The Federal German Constitutional Court (hereinafter: FCC) is a very influential constitutional court in Europe. Its jurisprudence had a strong effect on the Hungarian Constitutional Court (hereinafter: HCC) after the system change in Hungary in the early 1990s.[3] The FCC has a detailed jurisprudence on the topic of secret surveillance measures and I will demonstrate that it defends human rights in this area more comprehensively than its Hungarian counterpart.

If the HCC aims to protect human rights against the state's constantly growing demand for secret surveillance of individuals, there is a possibility of protection within the framework of the Hungarian Fundamental Law (hereinafter: Fundamental Law). A tool for effective human rights protection becomes particularly important because I will demonstrate that the present Hungarian constitution has preferences which favor the state against individuals.

The HCC should – like the FCC did – start to elaborate the core area of the concerned human rights (their essential content) and start to set constitutional requirements that are indispensable for a secret surveillance regulation to comply with in order to protect this essential content.

The main sources to accomplish my research will be legal instruments (constitutional provisions, statutes) and also judgements and decisions mainly from the three relevant courts

[3] Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*, Human Rights Law in Perspective ; v. 1 (Oxford ; Portland, Or.: Hart, 2003). p. 63.

mentioned above: the two national courts, the HCC[4] and the FCC and the one regional human rights court, the ECtHR.

In the first chapter I will analyze the relationship of the state to individuals under its jurisdiction in Germany and in Hungary. First I will demonstrate three possible types of a constitution's concept of human being (hereinafter I will use the German term: Menschenbild), then I will speak generally about the normative grounds of the Menschenbild. Afterwards I deal with the Menschenbild as it emerged from the jurisprudence of the HCC and the FCC. Finally, I will turn to the use of the Menschenbild argument in the context of secret surveillance. I will try to assess the weight of this argument in the Hungarian and German jurisprudence.

I will show here that the new Fundamental Law and within it the normative grounds of its concept of human being does not foster effective human rights protection since the Fundamental Law overturns the balanced relationship between state and individuals in favor of the state.

After laying these theoretical foundations down, – in the second chapter – I will turn to the question of constitutional assessment in the field of secret surveillance regulations. I will concentrate on just one aspect, namely the essential content doctrine according to which there is a core of every human right which must not be infringed even when secret surveillance measures are applied.

I will shed some light on the main academic discussions around the doctrine and then I will analyze the doctrine's application in the German constitutional jurisprudence on secret surveillance. I will demonstrate the possibility of the Hungarian application of this principle in the field of secret surveillance regulation since, however, the Fundamental Law also states that the restriction of human rights should "respect" the "essential content" of the right,[5] we do not see the manifestation

[4] Thinking about the jurisprudence of the Hungarian Constitutional Court one has to bear in mind that the Fourth Amendment of the Fundamental Law of Hungary declared the before 2012 existing constitutional jurisprudence of the HCC void [Article 19 Section (2) of the Fourth Amendment. Now this rule is in point 5, Closing and Miscellaneous Provisions of the Fundamental Law]. The HCC elaborated a doctrine that where the content of the provisions of the old and the new constitutions are similar or the same, the HCC can build on the arguments of the "old" HCC decisions. See the decision of 22/ 2012. (V.11.) AB határozat, ABH 2012, pp. 15-16. and after Fourth Amendment came into force 13/2013. (VI.17.) AB határozat, ABH 2013, p. 452.

[5] Fundamental Law Article I Section (3).

of this clause either in the field of secret surveillance regulation, or in the case-law of the HCC concerning secret surveillance measures.

My contribution is to suggest a strategy to the Hungarian Constitutional Court: despite the values of the Hungarian Fundamental Law, if the court takes its role in human rights protection in the field of secret surveillance seriously, it should consider elaborating a coherent essential content doctrine and start to use it in its constitutional jurisprudence concerning secret surveillance. Not necessarily in the same way as the FCC did, but the German application can serve as a useful example on which the Hungarian court can build its own.

1 The relationship between the state and the individual in the Fundamental Law and in the Grundgesetz - the Menschenbild

A Menschenbild both in Hungary and in Germany is a construction of the interpreter of the constitution, namely the constitutional court. There is no explicit reference either in the Fundamental Law, or in the German Basic Law (hereinafter: GG or Grundgesetz) to a Menschenbild. This concept is thus an interpretation of the general attitude of the constitution towards individuals which can be underpinned with concrete articles of the constitutions. But from which type of articles can the Menschenbild of the constitution concerned be approached? I agree with Ronald Dworkin when he claims that there are two types of constitutional provisions: those that are drafted in an abstract moral language, and the others that are not, for example the ones that are laying down procedural rules.[6] The first category can help constitutional interpreters in revealing the underlying concept about human beings in a constitution. Therefore, we have to make a distinction between two things: first, the textual underpinnings of a plausible interpretation and the interpretation itself.

In the following I will identify three possible directions for the relationship between the state and individual. Then I will sketch the most important textual references from which we can learn about the normative basis of the Menschenbild in the jurisdiction concerned and then I will analyze the Menschenbild concept in the constitutional jurisprudence and in the relevant scholarly writings, first in general, then in the German constitutional jurisprudence on secret surveillance.

[6] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996). p. 7. In a Hungarian context see János Kis, *Alkotmányos Demokrácia : Három Tanulmány*, Fundamentum Könyvek (Budapest : INDOK, 2000). pp. 126-130. I provide the English translation of titles of every non-English sources I use in my paper in the bibliography.

1.1 Individualist, communitarian and paternalist Menschenbild

There are three types of approaches which the state can take towards individuals: the individualist, the communitarian and the paternalist concept.[7] In order to provide conceptual clarity I look first into the exact meanings of these notions.

Individualism is a "social theory favoring freedom of action for individuals over collective or state control"[8], while on the other end of the scale, paternalism is a "policy or practice on the part of people in authority of restricting the freedom and responsibilities of those subordinate to or otherwise dependent on them in their supposed interest"[9]. The intermediary concept is communitarianism, which "(…)emphasizes the responsibility of the individual to the community(…)".[10] As we could see, the individualist concept sees the person as a self-standing human being, while the communitarian concept builds rather on the cooperation between individuals. Both of them see individuals as rational, grown-up persons, who are able to assess their interests. The third concept is different. There the individual is a mere subject to state power. Three lawyers of the Hungarian conservative institute Center for Fundamental Rights in a recently published study (hereinafter: CFR study), analyzing the differences between the Menschenbild of the old constitution and the Fundamental Law, point out that whereas the old constitution's Menschenbild was the "rational, selfish person, who does not care about the community", the Fundamental Law's Menschenbild is the person who is "not always a rationale, straight, but fallible person", who is sometimes lost in the globalized world, which modern world enables him/her to decide on too many things, it leaves open too many options.[11] Therefore it is important – argues the CFR study – that the Fundamental Law designates certain values that show the way out from the

[7] I build on the classification of Herbert Küpper. As we will see in subchapter 1.2, he used this categorization in order to reveal the normative grounds of a Menschenbild in the Fundamental Law. Herbert Küpper, "Zwischen Staatspaternalismus, Kollektivismus Und Liberalem Individualismus: Normative Grundlagen Des Menschenbilds Im Neuen Ungarischen Grundgesetz," in *Viva Vox Iuris Civilis: Sólyom László Tiszteletére 70. Születésnapja Alkalmából*, ed. Zoltán Csehi, Balázs Schanda, and Pál Sonnevend (Budapest: Szent István Társulat, 2012). pp. 215-239.

[8] https://en.oxforddictionaries.com/definition/individualism (accessed: 2017.02.12.).

[9] https://en.oxforddictionaries.com/definition/paternalism (accessed: 2017.02.12.).

[10] https://en.oxforddictionaries.com/definition/communitarianism (accessed: 2017.02.16.).

[11] István Kovács, Péter Törcsi, and Miklós Szánthó, "Megőrizni, Ami Értékes. Eltérő Emberkép Az Alkotmányban És Az Alaptörvényben.," in *Ésszel Az Ésszerűtlenségben. Aktuális Társadalmi Problémák Viselkedési Közgazdaságtani Megközelítésben*, ed. Gergely Deli (Budapest: Jogállam és Igazság Nonprofit Kft., 2016). p. 276.

"jungle" of this modern world. "It clearly flows from the text of the Fundamental Law that the framers of the constitution wanted to define the direction of the individual's preferences".[12] "A benchmark shall be provided for the fallible individuals who are limitedly rational" – argues one of the writers of the CFR study.[13] The definition of paternalism could not have been better formulated. In this concept the individual is just a vulnerable subject of state power who has to accept its limited autonomy within the framework of the values the state already laid down.[14]

Further on I will use the above elaborated categorization in classifying both the normative basis and the Menschenbild itself, which emerged in the jurisprudence of the relevant constitutional courts.

1.2 Normative grounds of the Menschenbild in Hungary and in Germany

There is a wide consensus among constitutional scholars about the fact that the Fundamental Law of Hungary favors an overall strong state.[15] It is obvious that if a state gets stronger and its sphere of action expands, it can happen just if parallel to this, autonomy of individuals decreases. Former HCC Judge Kukorelli contemplates this procedure with hope and emphasizes that constitutional state is not an enemy of individuals.[16] The above cited CFR study praising this strengthening of the state, calling it "constitutional paternalism" but – as if they would have already noticed that this concept-building touches upon something nasty, they add – "in a good sense".[17] Herbert Küpper analyzes this development more critically. In his article about the normative grounds of the Fundamental Law's Menschenbild he differentiates between three categories:

[12] Ibid. p. 276.

[13] "Sulyok Tamás: Az Unió Hatáskörgyakorlása Nem Sértheti Magyarország Szuverenitását," *Magyar Hírlap*, http://magyarhirlap.hu/cikk/73877/Sulyok_Tamas_Az_unio_hataskorgyakorlasa_nem_sertheti_Magyarorszag_szuverenitasat (accessed: 2016.01.29.).

[14] The constitutional problem is that this setup excludes whole groups of people (eg. atheists, cosmopolitans, LMBTQ people, unemployed people, homeless people). András László Pap, "Ki És Mi a Magyar? Az Alaptörvény Preferenciái Kritikai Perspektívából," in *Alkotmányozás És Alkotmányjogi Változások Európában És Magyarországon*, ed. Fruzsina Gárdos-Orosz and Zoltán Szente (Budapest: NKE Közigazgatás-tudományi Kar, 2014). pp. 245-263.

[15] Although there are exceptions. For instance, the state is very reluctant in the social sphere. The former right to social security became just a state objective after the Fundamental Law came into force. See Act XX of 1949 the Constitution of the Republic of Hungary, § 70/E Section (1) and Article XIX Section (1) of the Fundamental Law.

[16] István Kukorelli, "Az Új Alaptörvény Államfilozófiája," *ArsBoni*, http://arsboni.hu/az-uj-alaptorveny-allamfilozofiaja/. (accessed: 2016.01.28.).

[17] Kovács, Törcsi, and Szánthó, "Megőrizni, Ami Értékes. Eltérő Emberkép Az Alkotmányban És Az Alaptörvényben."p. 262.

individuals, collectivists and paternalist provisions.[18] The most commonly[19] mentioned new feature of the Fundamental law is the constitutionalization of the notion of the nation[20], the shift from a welfare society towards a workfare society,[21] the protection of the conservative family model[22] and the strong emphasis on collective rights and the rights of others[23]. These supported values are characterized as collectivist features by Küpper.[24] From the provisions considered as paternalist[25] in Küpper's classification I want to highlight one, according to which "the common goal of the people and the State is to achieve well-being, security, order, justice and liberty".[26] This statement implies the most important constitutional question in the domain of secret surveillance, which is the balancing between security and liberty. Küpper claims that this provision of the Fundamental Law makes these goals indisputable.[27] I see the situation slightly different. In my interpretation this

[18] Küpper, "Zwischen Staatspaternalismus, Kollektivismus Und Liberalem Individualismus: Normative Grundlagen Des Menschenbilds Im Neuen Ungarischen Grundgesetz." pp. 215-239. My slight critique on Küpper's terminology is that in my opinion the middle category between individualist and paternalist provision should be not collectivism but rather communitarianism. I use therefore as I above already mentioned for the purposes of my paper these three categories.

[19] I compared Kinga Zakariás, "Az Emberkép Formula. Az Egyén És Közösség Viszonyának Értelmezése a Német És Magyar Alkotmánybírósági Gyakorlatban.," *Iustum Aequum Salutare*, no. 4 (2015): 119–38. with Küpper, "Zwischen Staatspaternalismus, Kollektivismus Und Liberalem Individualismus: Normative Grundlagen Des Menschenbilds Im Neuen Ungarischen Grundgesetz." and Kovács, Törcsi, and Szánthó, "Megőrizni, Ami Értékes. Eltérő Emberkép Az Alkotmányban És Az Alaptörvényben.".

[20] Article D), Article L), Article P), Article IX Section (5). See: Balázs Schanda, "Nation and State," in *The New Basic Law of Hungary. A First Commentary*, ed. Lóránt Csink, Balázs Schanda, and András Varga Zs. (Dublin-Budapest: Clarus Press & National Institute of Public Administration, 2012).

[21] Article XIX Section (3) and in the preamble: "We proclaim that the strength of a community and the self-esteem of every human being are based on work and the achievements of the human intellect.". I use the English translation of the Fundamental Law as it is in the legal database "Complex" of Wolters Kluver.

[22] Article L) Section (1) and in the preamble: "We proclaim that family and nation are the cornerstones of co-existence, with loyalty, faith and love constituting the principal values of unity." Balázs Schanda, "Marriage and Family," in *The New Basic Law of Hungary. A First Commentary*, ed. Lóránt Csink, Balázs Schanda, and András Varga Zs. (Dublin-Budapest: Clarus Press & National Institute of Public Administration, 2012).

[23] Article D), Article I Section (2), Article XXIX Section (1) and also in the preamble: "We proclaim that individual freedom can only flourish in partnership with others".

[24] Küpper, "Zwischen Staatspaternalismus, Kollektivismus Und Liberalem Individualismus: Normative Grundlagen Des Menschenbilds Im Neuen Ungarischen Grundgesetz." pp. 224-231.

[25] Article G) Section (2), Article M) Section (2), Article I Section (1) second sentence, Article XVII Section (1) and from the preamble: "We profess that the common goal of the people and the State is to achieve well-being, security, order, justice and liberty".

[26] This statement is from the preamble of the Fundamental Law. Although there are debates on the normative force of preambles in constitutional scholarship, Article R) Section (3) of the Fundamental Law defines the role of the preamble in the Hungarian constitutional setup: it rules that the provisions of the Fundamental Law shall be interpreted in accordance with the preamble. Ferenc Horkay-Hörcher, "The National Avowal as an Interpretive Tool and as a Catalogue of Basic Values," in *The New Basic Law of Hungary. A First Commentary*, ed. Lóránt Csink, Balázs Schanda, and András Varga Zs. (Dublin-Budapest: Clarus Press & National Institute of Public Administration, 2012).

[27] Küpper, "Zwischen Staatspaternalismus, Kollektivismus Und Liberalem Individualismus: Normative Grundlagen Des Menschenbilds Im Neuen Ungarischen Grundgesetz." p. 232.

provision simply does not take side whether liberty or security is more important. It implies that both liberty and security can predominate parallel which is absurd because the very essence of the constitutional balancing question is to decide to what extent which constitutional value prevails. This question remains unanswered in the constitutional text, therefore it is up to the HCC to strike balance between security and liberty.

Küpper's main finding in his paper is that the ideology of the Fundamental Law is miscellaneous so it depends on the HCC which type of Menschenbild it picks out from the text.[28] This inconsistency of the constitutional text gives a relatively wide margin to the HCC to decide on the characteristics of a Menschenbild. The HCC has therefore the freedom to choose but I strongly believe that it cannot be an arbitrary decision: the HCC has to underpin its decision with a convincing argumentation.

There are a significant number of provisions in the GG which enable us to reveal the text's approach to the state-individual relationship. Here I will concentrate on Articles 1, 2, 12, 14, 15, 19 and 20 of the GG. These are the provisions on which the FCC built its Menschenbild concept according to its reasoning in the Investment aid decision[29]. It is out of the scope of my paper to scrutinize these provisions in detail. I analyze just the key content of them which can be relevant in revealing the normative grounds of the FCC's Menschenbild concept.

Article 1 Section 1 declares the inviolable right to human dignity. Section 2 of this article states that human rights are the basis of every community.[30] Article 2 of the GG guarantees right to life, physical integrity and the "right to free development of personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law".[31] Out of the latter mentioned three grounds for restriction on the right to free development of personality, two (rights of others and constitutional order) take into consideration the interests of the society. These

[28] Ibid. pp. 238-239.
[29] BVerfGE 4, 7.
[30] An interesting comparison: the preamble of the Hungarian Fundamental Law rules that "the strength of a community … [is] based on work and the achievements of the human intellect".
[31] I use the English translation of the GG published by the German Bundestag in Berlin, 2012.

are signs that the GG treats the individual as a socially-bound person. Article 12 consists the declaration of occupational freedom. In that provision a generally and equally applicable community service is being mentioned. Article 14 declares the right to property and to inheritance. Its second section states that "[p]roperty entails obligations. Its use shall also serve the public good." A similar provision can be found in the Fundamental Law, which's Article XIII Section (1) second sentence rules that "the ownership of property shall entail social responsibility". Article 15 of the GG contains provisions to socialization of "land, natural resources and means of production". Article 19 regulates the restriction of basic rights and grants legal remedies against violation of rights by public authorities. Article 20 is a famous article which is protected by the eternity clause of the GG. It contains the constitutional principles, out of which for our purposes the most important is, that Section 1 identifies Germany as a social state.

What is the common feature of these articles? Almost all of them declare a human right but these provisions also contain a limit of the specific right within the same article with regards to the interests of the society.[32] The Grundgesetz guarantees human right protection on the one hand but on the other hand it ensures the framework of social coexistence as a society.

1.3 The Menschenbild – comparison between the concept of the Hungarian Constitutional Court and the German Federal Constitutional Court

Turning now from the textual reference points to the Menschenbild elaborated by the interpretation of the HCC, it is worth to express some preliminary considerations. In 2010 the conservative and the Christian-democrat parties formed a government with the support of the two-third of MPs in Hungary. This majority was strong enough even to adopt a new constitution.[33] The adoption of the Fundamental Law, Hungary's new constitution invoked serious debates. The document came into force on the 1st of January, 2012.

[32] Article 15 is a further limitation on the right to property in a self-standing article.
[33] Act XX of 1949 the Constitution of the Republic of Hungary, § 24. Section (3).

Moreover, the majority could elect judges of the HCC.[34] By now – except the latest election when four judges who took their office on the 1st of December, 2016 – all HCC judges were elected just with votes of MPs of governing parties.

In consequence of this, Hungarian constitutionalism became more open in the recent years to conservative thought and also – which is a greater concern in my assessment – it interpreted its role less as a check on the legislature than before.[35] I have to admit, that to be a "weak" constitutional court is – to some extent – though not corresponds to my constitutional sense of taste, a legitimate choice of the constitutional court.[36] But what we see in Hungary is not a clear "weak" constitutional court but rather an – with a legal benchmark[37] – unpredictable one, that is ready to be strong and activist sometimes[38] but in other times it emphasizes that it gives the legislature the "breathing space" to act freely to a large extent. This practice clearly not fosters legal certainty.

HCC jurisprudence in the 2010s differs in a lot of sense from the previous jurisprudence. My impression is that some kind of "new constitutionalism"[39] is emerging in Hungary. It is clearly out of the scope of my paper to reveal all aspects of this new approach, although ignoring it would be

[34] Act XX of 1949 the Constitution of the Republic of Hungary, § 32/A. Section (3) and also after 2012 in the Fundamental Law: Article 24 Section (8).

[35] That shift can be explained by the changing powers of the HCC. After the Fundamental Law came into force actio poplaris was abolished thus a postestiori control of statutes became harder to be initiated. Although not just the powers but the attitude of the court also changed. The majority of the newly elected judges is also not very active in the fulfillment of the HCC's role in the system of checks and balances. See for example an interview with Barnabas Lenkovics, who was the president of HCC between 2015-2016. "(…) we leave a greater margin for the government and the legislature, with regard to the greater need for action". See: Barnabás Lenkovics, Nem lett fideszes az Alkotmánybíróság – Lenkovics Barnabás a Mandinernek, Mandiner.jog, 2015, http://jog.mandiner.hu/cikk/20150710_nem_lett_fideszes_az_alkotmanybirosag_lenkovics_barnabas_a_mandinernek. (accessed: 2017.02.16.).

[36] There are constitutional courts in well-functioning democracies of the world that can be categorized as "weak". See: Tamás Győrfi, "A 'gyenge' Alkotmánybíráskodás. Modellek És Kilátások," *Fundamentum*, no. 2 (2015). pp. 5-18.

[37] Professor Gábor Halmai would say that this unpredictable operation could be described rather with political notions. Gábor Halmai, "In Memoriam Magyar Alkotmánybíráskodás. A Pártos Alkotmánybíróság Első Éve," *Fundamentum*, no. 1–2 (2014). pp. 36-64.

[38] A good example to activism is a recent decision. After the government's proposal on the Seventh Amendment of the Fundamental Law did not get enough vote in the parliament, the HCC in one of its decisions implemented to its jurisprudence one of the core concept of this amendment, namely that Hungary has a constitutional identity which – according to the HCC - is not the be deducted from the text of the Fundamental Law but rather from the sovereignty of Hungary. The EU cannot act so to harm this identity, however the content of it can be explored just case-to-case. See 22/2016. (XII.5.) AB határozat. In: Az Alkotmánybíróság Határozatai, 2016/28. pp. 1418-1436. Available in English: http://hunconcourt.hu/letoltesek/en_22_2016.pdf (accessed: 2017.03.16.).

[39] János Sári, "Az Új Magyar Alkotmány - Egy Újfajta Alkotmányosság Lehetősége," in *Alkotmány - Alkotmányosság. Konferenciakötet* (Budapest: Martin Opitz, 2014), pp. 47-62.

also not wise when thinking about the Menschenbild and the relationship between the state and individual in the Hungarian constitutional system.

In the jurisprudence of the HCC the Menschenbild as an elaborated concept did not appear for a long time.[40] Although in an early judgment[41] the HCC acknowledged that there is a Menschenbild which is used by the Court for interpreting fundamental rights, it did not indicate the characteristics of it. Then – after a long period of time – the Menschenbild formula showed up in one of a judgments delivered on the spring of 2011[42] when the Fundamental Law was already adopted but there was still more than seven month till it's coming into force. Thus this judgment was made on the basis of the Act XX of 1949 (hereinafter: the old constitution) and interestingly enough we learned something about the Menschenbild of the old constitution in its last couple of months in force. It enables us to draw a comparison between the Menschenbild of the old Hungarian constitution and the Fundamental Law since the appearance of the two formula happened within a short period of time. In the reasoning of the judgment the HCC made it clear that the Menschenbild of the old constitution is the "human being who is independent from the state, who is autonomous and self-sufficient", who's legally acquired property cannot be taken away by the state. After the individual payed all revenues he/she was obliged to pay at the time concerned, the state cannot establish retrospectively new taxes to pay. The court thus used the formula in order to defend the applicant's properties declaring a retrospective tax law unconstitutional.

The second decision in which the Menschenbild plays a role was delivered in 2013, when the Fundamental Law was already in force. In this decision the HCC elaborated its Menschenbild doctrine, which is used coherently afterwards. I will demonstrate that this new Menschenbild concept strongly builds on the German one.

[40] I do not enclose concurring and dissenting opinion to my analysis.
[41] 64/1991. (XII. 17.) AB határozat, ABH 1991, p. 312.
[42] 37/2011. (V. 10.) AB határozat, ABH 2011, p. 246.

In its 3110/2013. (VI. 4.) AB határozat[43] the HCC emphasized that according to the Menschenbild of the Fundamental Law the human being is community-bound, "although without losing his/her individual value". In this very first appearance of the Fundamental Law's Menschenbild it was used as an argument in order to justify the restriction on the applicant's right to protection of personal data: "a person, as a social being, because of his/her social connection, has to tolerate to some extent the collection of its personal data by the state and its elaboration". Almost the exact same reasoning was used by the FCC in its Microcensus decision[44] delivered in 1969. "As a community-related and community-bound citizen", the individual "to some extent has to tolerate the collection of his/her data for statistical use and its state elaboration".[45]

This Hungarian Menschenbild concept was underpinned by the HCC with Article O) and Article II of the Fundamental Law. According to Article O) "everyone shall bear responsibility for his or her own self, and shall contribute to the performance of state and community tasks according to his or her ability and faculty".[46] Interestingly enough the first part of this sentence can easily be an underpinning of an individualist Menschenbild[47], whereas its second part pushes it into a communitarian direction. The obligation to contribute "to the performance of state and community tasks" is very vague. This provision is mostly used as one of the constitutional provisions that justify the tax power of the state.[48]

The second provision, which serves as the basis of the Hungarian Menschenbild, is Article II, which declares the right to life and the inviolable right to human dignity in the Fundamental Law. I agree with Küpper's assessment, that this is an individualist provision.[49]

[43] ABH 2013, p. 1748.
[44] BVerfgE 27, 1.
[45] BVerfgE 27, 1. p 7.
[46] This provision migrated to the Fundamental Law from the Swiss constitutional law. It was drafted after Article 6 of the 1999 Swiss Constitution. See: András Jakab, "Magántervezet Szakmai Álláspont Kialakítása Céljából," 2011, http://www.commonsensebudapest.com/en/wp-content/uploads/Jakab_Andras_Alkotmany_2011.pdf. p. 20 (accessed: 2016.01.28.).
[47] Küpper categorized this provision as individualist.
[48] Besides Article XXX. See: István Simon, "Pénzügyek Az Alaptörvényben" (Budapest, 2014, Manuscript).
[49] Küpper, "Zwischen Staatspaternalismus, Kollektivismus Und Liberalem Individualismus: Normative Grundlagen Des Menschenbilds Im Neuen Ungarischen Grundgesetz." p. 221.

The HCC elaborated its Menschenbild concept further in its 3132/2013. (VII. 2.) AB határozat.[50] It ruled on the basis of Article O) that the Menschenbild of the Fundamental Law is not an isolated individual, rather a "responsible person who lives in community". This time the concept was also used to argue in favor of the constitutionality of a decree.

In my assessment, the Menschenbild of the old Hungarian constitution is rather individualist, whereas the recently emerged Menschenbild concept of the Fundamental Law is communitarian.

The German Menschenbild concept was first mentioned[51] in an early judgment of the FCC, which was delivered in 1954 (Investment aid decision).[52] In this judgment the FCC made it clear that the Menschenbild of the GG is "not an isolated sovereign individual", rather a person who is "community-related and community-bound", also "without losing his/her individual value". The individual therefore has to tolerate certain restrictions on its autonomy (Handlungsfreiheit), which are defined by the legislature as justly expected from the individual "in order to maintain and further the social coexistence" (Zusammenleben) of the community. Although the independence (Eigenständigkeit) of the individual must be in all cases respected.

This Menschenbild concept has a mixed character as long as it emphasizes the individual value of persons alongside with its community-related and community-bound character. In practice however this is rather vague. Vague standards in principle give the constitutional courts more margin to decide which part of the Menschenbild is more important: the community-bound nature of the person or his/her individual value. In the next subchapter I will demonstrate how it played out when the two courts had to adjudicate on the constitutionality of secret surveillance regulations.

To sum up, the conclusions of subchapters 1.2 and 1.3 before turning to my specific area of interest – the use of the Menschenbild concept in the domain of secret surveillance measures – it is worth reiterating one important thing. I differentiated between the normative grounds of Menschenbild, and the Menschenbild itself as shows up in the jurisprudence of the two relevant

[50] ABH 2013, p. 1905 Point [95] of the reasoning.
[51] Ulrich Becker, *Das "Menschenbild des Grundgesetzes" in der Rechtsprechung des Bundesverfassungsgerichts* (Berlin: Duncker & Humblot, 1996). p. 80.
[52] BVerfGE 4, 7.

constitutional courts. We could see in subchapter 1.3 that the Menschenbild concept of the HCC is almost word by word the same as the FCC's. Both of them can be categorized as communitarian. Although, the normative ground – the text of the Fundamental Law – enables a much more paternalistic interpretation which might not be reassuring for those who think that the attained standard of human rights protection should not be decreased.[53] I agree here with Renata Uitz who concluded in her recent study analyzing the attitude of the Hungarian legal system towards human rights, that "however the text (of the Fundamental Law - MK) is able to accord with the international obligations and minimum human rights criteria, this interpretation is not evident and by no means the only interpretational modality".[54]

1.4 The Menschenbild concept as an argument in favor of the constitutionality of secret surveillance

The reasoning of the 3110/2013. (VI. 4.) AB határozat was brought up in the 32/2013. (XI.22.) AB határozat concerning the restriction of the right to personal data by secret surveillance measures as one of the arguments in favor of the constitutionality of the law.[55] This is the only decision of the HCC in the field of the constitutionality of secret surveillance measures in which the Menschenbild formula plays a role. The HCC had to deal with two main issues. First, whether the authorization of secret surveillance measures by the minister of justice is an adequate safeguard of the protection of the human rights of individuals. Secondly, whether the lack of concrete legal command concerning the deletion of the information which is not relevant is the case infringes the data protection rights of individuals. The constitutional issue was whether these restrictions are proportional limitation of the right to respect for private and family life, home, communications and reputation, as well as the right to the protection of personal data.[56]

After recalling its jurisprudence and main findings in the field of data protection, the HCC emphasized the change of the relationship between the individual and the community in the

[53] 61/2011. (VII. 13.) AB határozat, ABH 2011, p. 322.
[54] Renáta Uitz, "Nemzetközi Emberi Jogok És a Magyar Jogrend," in *A Magyar Jogrendszer Állapota*, ed. András Jakab and György Gajduschek, MTA TK (Budapest: 2016). p. 210.
[55] ABH 2013, p. 944.
[56] Article VI Section (1) and (2) of the Fundamental Law.

Fundamental Law's system. The rationale was that "a person, as a social being, because of his/her social connection, has to tolerate to some extent the extradition of his/her personal data". Which strikes prima facie from these words is the vagueness of the last condition, "to some extent". It remains unclear what exactly this extent is. In my opinion there are state interests – such as national security or law enforcement – that can, if they are serious enough and there are certain guarantees in place, justify the use of secret surveillance measures. These interests appeared in the reasoning as well but the Menschenbild-argument was a self-standing reason. The core idea of this argument is that where the community[57] wants to achieve a goal, the individual has to abide some restrictions on its human rights. This is actually a balancing test, which is problematic because the Fundamental Law expressis verbis prescribes the obligatory balancing test, that is the proportionality test. According to this a "fundamental right may only be restricted in order to enforce another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary and proportionate to the objective pursued".[58] In my opinion if the Menschenbild of the Fundamental Law can be a person who is under secret surveillance, than it has very serious consequences. The Menschenbild concept served in this decision as a general philosophical underpinning, an attitude in finding all the above mentioned issues constitutional. The HCC upheld[59] the system where a minister, who is a member of the government, authorizes secret surveillance measures which are carried out for national security reasons[60]. To understand the importance of this decision it is crucial to know the context of the authorization, namely that in the Hungarian setup external control bodies over the secret surveillance are either have questionable independence from the government[61] or do

[57] I just refer here to the debate whether and to what extent is the state different from the community.

[58] Article I Section (3).

[59] The HCC held however that this is constitutional obligation for the minister to give a reasoning in its authorization decision. 32/2013. (XI.22.) AB határozat, ABH 2013, p. 924.

[60] The Hungarian system differentiates between two types of secret surveillance on the basis of the reasons of authorization. When there is a national security interest, the minister of justice authorizes, when the interest is crime detection, then a judge authorizes the same measures. In my opinion if we see independent authorization as a guarantee of the constitutional restriction of fundamental rights, then the difference should be made on the basis of the deepness of the interference a secret surveillance measure may cause with human rights and not on the basis of the interest which serves as a ground of authorization. See in 2/2007. (I.24.) AB határozat, ABH 2007, pp. 933-934.

[61] The National Security Committee of the Parliament which should be the main check upon secret services is dominated by MPs from the parties that support the government. The National Security Committee's members are

not have effective powers to protect human rights either while carrying out secret surveillance measures or afterwards.[62]

The HCC also upheld the regulation where there is no specific legal command to delete data which are not relevant in the case. The court argued that this command can be inferred from the general rules concerning the deletion of "obviously unnecessary data"[63] and the legal obligation of the goal-bound nature of data collection[64] and moreover the concerned person can file a request in order to delete the – allegedly irrelevant – data concerning him/her. This latter argument is not convincing since because of the lack of a notification system where the concerned person does not even have a chance to know about whether or not he/she was a subject to secret surveillance measures.

The FCC has a detailed jurisprudence in the field of the constitutionality of secret surveillance measures. Although the Menschenbild argument shows up only in one analyzed decision.[65] In its Telephone Tapping Case the FCC used the Menschenbild argument to underpin the constitutionality of a amendment to Article 10 of the GG. This article protects the privacy of correspondence, post and telecommunication in the human rights catalogue of the Grundgesetz. The amendment added a second sentence to the second section of this article. According to that, privacy of correspondence, post and telecommunication may be restricted "[i]f the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies

selected on the basis of the distribution of parliamentary seats between the fractions. Act XXXVI of 2012 on the National Assembly § 17 Section (1).

[62] The ombudsperson can conduct an inquiry and publish a report, which shall not contain any details about secret surveillance operations in concrete cases. Then it is questionable how this report can go beyond obvious and general statements. See: Act CXI of 2011 on the commissioner of fundamental rights § 28 Section (3).

[63] Act CXXV of 1995 on the national security § 50 Section (2) point e).

[64] Act CXXV of 1995 on the national security § 43.

[65] I extended my research to the following decisions: BVerfGE 30, 1: Interception decision; BVerfGE 100, 313: Surveillance of telephone conversations from abroad; BVerfGE 107, 299: Surveillance of telephone conversations; BverfGE 109, 279: Surveillance of the dwelling/constitutionality of the amendment of art. 13 of the GG; BVerfGE 110, 33: Surveillance of telephone conversations; BVerfGE 112, 304: Surveillance and GPS; BVerfGE 113, 348: Surveillance of telephone conversations; BVerfGE 115, 320: Dragnet investigation; BVerfGE 120, 274: Online-investigation of computers; BVerfGE 125, 260: Data preservation; BVerfGE 141, 220: Online-investigation of computers.

appointed by the legislature." This sentence places two possible restriction on the Article 10 rights. First, it enables secret services to conduct their operation is secrecy without a prior notification, and the subsequent notification can be delayed as long as it serves the democratic basic order or the existence or security of the Federation or of a Land. Secondly, it enables not to give access to judicial remedy of alleged Article 10 right violations.[66] The constitutional issue was whether these restrictions violate Article 79 Section 3 of the GG (the eternity clause).

These restrictions were justified in the view of the FCC – among other justifications – with the help of the values (Wertordnung[67]) and the Menschenbild of the GG. The FCC reiterated – giving an interpretation to the amendment of the GG – that the interpretation of a constitutional provision should always be in line with the values and the elementary principles of the GG.[68] The court recalled the Menschenbild formula, namely that the Menschenbild of the GG is "not an isolated sovereign individual". The GG had determined the individual-community relationship with the notion of "community-related and community-bound" person, also "without losing his/her individual value". It follows from this Menschenbild concept that the individual therefore has to tolerate certain restrictions on his/her autonomy (Handlungsfreiheit), which are defined by the legislature as justly expected from the individual "in order to maintain and further the social coexistence" (Zusammenleben) of the community. Although the independence (Eigenständigkeit) of the individual must be in all cases respected.[69] After the interpretation of the amendment, the FCC interpreted[70] briefly the eternity clause and upheld[71] the constitutionality of this amendment of the GG.

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[66] Art 10 Rn. 174-175 in: Theodor Maunz et al., *Grundgesetz: Kommentar* (München: Beck, 2003).
[67] See to this topic: Joachim Detjen, *Die Werteordnung des Grundgesetzes*, 1. Aufl. (Wiesbaden: VS, Verlfür Sozialwiss, 2009).
[68] BVerfGE 30, 1 p. 19.
[69] BVerfGE 30, 1 p. 20.
[70] BVerfGE 30, 1 pp. 24-26.
[71] BVerfGE 30, 1 p. 26.

In previous subsections of my paper I differentiated between normative grounds of a Menschenbild and the Menschenbild itself. It is worth however adding at this stage a third component, which is a bit harder to assess. This third component is the weight of the Menschenbild argument. I evaluate this criterion just in the context of adjudication over the constitutionality of secret surveillance regulation. This argument is used both in Hungary and in Germany[72] as a underpinning of restriction of human rights. The individualist character of the Menschenbild – namely that a person does not loose his/her personal value in spite of his/her community-related and community-bound nature – is mentioned but not being used either in the German, or in the Hungarian jurisprudence (at least after the Fundamental Law came into force).

The assessment of the weight of the Menschenbild argument is, as I already mentioned, very hard. A standard may be related to the weight of the human right interference which was justified by the argument. It should be noted that both in the Hungarian and the German decision many constitutional questions and issues arose but for our purposes just those issues were relevant in which's justification the Menschenbild argument played a role. In order to use a general standard which is applicable both to Germany and Hungary I will use the criteria elaborated by the ECtHR to assess the seriousness of the human right restriction and by that the weight of the Menschenbild argument. The weakness of my method is that the Menschenbild argument was never a self-standing one, so it would require to look into the thoughts of constitutional court judges to measure the weight of this argument more precisely. Bearing this weakness in mind I believe that it still can shed some light on interesting facts to analyze whether the measures justified partly by the Menschenbild argument endures the scrutiny of the Strasbourg court or they failed to meet with ECtHR standards.

It is easy to compare the ECtHR case-law with 32/2013. (XI.22.) AB határozat since after having the main constitutional concerns of the legislation upheld by HCC the complainants of the procedure lodged a complaint to the Strasbourg court. The Szabo and Vissy v. Hungary case

[72] Peter Häberle, *Das Menschenbild im Verfassungsstaat*, Schriften zum öffentlichen Recht ; Bd. 540 (Berlin: Duncker & Humblot, 1988). p. 48.

adjudicated on the same constitutional issues as the 32/2013. (XI.22.) AB határozat. The ECtHR held in this judgment that ministerial authorization without an effective judicial (or quasi-judicial) control violates Article 8 of the ECHR.[73] The ECtHR was also not satisfied with the HCC's reasoning defending the lack of special command to delete information that has no relevance in the case. The ECtHR did not accept the HCC's reasoning on the same grounds of critique I already indicated above: in order to have a well-functioning data protection in the field of secret surveillance there should be a subsequent notification system in place. Without it, it is pure hierocracy to refer to the right to request the deletion of irrelevant personal data since it is a prerequisite of it even to know whether an individual was under surveillance or not.[74] The ECtHR found a violation of the convention with regard to both issues which's constitutionality was defended partly by using the Menschenbild argument by the HCC.

The constitutional issues of the German Telephone Tapping Case found their way to Strasbourg as well. The ECtHR ruled on these matter in its classic decisions on secret surveillance, which is the Klass and others v. Germany case[75]. The court held that the German legislation did not violate the Convention. Although the ECtHR made it clear that in principle the best control over secret surveillance is the judiciary, but it found that the German setup provides sufficient guarantees and therefore the lack of judicial control did not violate the ECHR.[76] The ECtHR also upheld the restriction on subsequent notification of the person who was subject to secret surveillance measures. The court found it convincing that subsequent notification in some cases may jeopardies the purpose of the measure but agreed with the FCC on the requirement that when the interest in keeping the secret surveillance measure in secret is ceased, then the notification should take place.[77]

Thus whereas the Hungarian provisions which were justified partly by the Menschenbild argument by the domestic constitutional court fell short in fulfilling the ECtHR's requirements, the

[73] Point 77.
[74] Point 87.
[75] Application no. 5029/71.
[76] Points 55-56.
[77] Point 58.

German ones found to be in line with the convention. Therefore, if we set the Strasbourg jurisprudence as a standard we can conclude that the almost word-by-word identical Menschenbild formula was used to justify harsher human rights interference in Hungary than in Germany.

*

We could comprehend in the first chapter two general things about the Menschenbild in Hungary and in Germany and another two lessons in these countries within the special field of application, secret surveillance. It is worth recalling before moving further that we have seen that the normative grounds of the Hungarian Menschenbild might underpin a paternalistic approach of the state towards individuals. Although both in Hungary and in Germany a communitarian Menschenbild concept emerged from the jurisprudence of the constitutional courts.

Concerning the constitutional jurisprudence in the field of secret surveillance, we could see that the Menschenbild argument was used in both countries as an argument supporting the constitutionality of human rights restriction. I concluded that with the help of this argument harsher human rights restrictions were justified in Hungary and in Germany.

Because of these two alarming facts – the problems with the text of the Fundamental Law and upholding the constitutionality of human right restrictions which were considered as a violation of the convention by the ECtHR – it is worth studying how to improve human rights protection in Hungary. This leads us to the second chapter of my paper which is about the essential content doctrine that is used extensively in the jurisprudence concerning the constitutionality of secret surveillance by the FCC.

2 Limitations of the right to private life – the role of the essential content doctrine in the field of secret surveillance

2.1 The essential content doctrine[78]

The spirit of the essential content doctrine is that a core area of human rights exists and this core area of human rights must be free from limitation. Thus, there is an absolute barrier before the legislator when it comes to human rights restrictions. Even the most convincing argument in favor of limitation cannot be strong enough to sacrifice the core content of a human right.

The essential content doctrine has travelled from Germany to other parts of the world.[79] Article 19 of the Basic Law contains rules about how a human right may be restricted constitutionally under the Grundgesetz. Article 19 Section 2 of the GG requires that "[i]n no case may the essence of a basic right be affected" by a limitation. Both the old Hungarian constitution and the current Hungarian constitution in force, the Fundamental Law, contains the doctrine. The old constitution ruled out that "[i]n the Republic of Hungary rules pertaining to fundamental rights and duties shall be determined by statute, which, however, shall not limit the essential content of any fundamental right."[80]. According to the rule of the Fundamental Law "[a] fundamental right may only be restricted (…) with respect to the essential content of the relevant fundamental right."[81] We can see that the manifestation of the doctrine in the Fundamental Law is softer than in the old constitution. Whereas the old constitution required that the essential content shall not be limited, the Fundamental Law requires just that this core content shall be respected. The meaning of that "respect-requirement" is very unclear. The HCC solved this problem in 2012 when it – disregarding the obvious differences between the wording of the two provisions – declared that the meaning of

[78] In this subchapter I rely on my previous paper, "The Essential Content Doctrine in Domestic and International Human Rights Law", that I submitted in March, 2017 to the course "Post-national Legal Orders and the Future of International Law" taught by Professor Marjan Ajevski at Central European University, Budapest. This subchapter may contain exact excerpts from that paper.

[79] Peter Häberle, *Die Wesensgehaltgarantie des Artikel 19 Abs. 2 Grundgesetz: zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt* (Heidelberg: Müller, 1983). p. 257.

[80] Act XX of 1949 the Constitution of the Republic of Hungary, § 8. Section (2). I use the English translation available at: http://hunmedialaw.org/dokumentum/150/Act_XX_of_1949_not_in_force.pdf (accessed: 2017.03.15.)

[81] Article 1 Section (3).

the provisions protecting the essential content of the rights in the old and in the old constitution is the same.[82]

In spite of the fact that the doctrine is widespread both within and outside of Europe [83], meaning and the concrete application is somewhat ambiguous. Two main theories are dominant concerning the right interpretation of the essential content doctrine.[84] According to the absolute theory, every single human right have a core that is absolutely free from limitation. In the absolute theory the adjudication on the constitutionality of a human right restriction consists of two main, different tests. First, if the restriction invades to the core of the given human right, it is unconstitutional *per se*. When the restriction does not reach the core of the human right, then can the general test (in the German and Hungarian context mainly the proportionality test) be applied which also might have the result that the limitation was unconstitutional.

According to the relative theory, the essential content of a right is what remains after applying the proportionality test. Human right restrictions that are not proportional, restrict the essence of a right and therefore they are unconstitutional and vice versa: if a human right restriction found to be proportional, then it did not restrict the essential content.

There is a third approach with regard to the use of the essential content doctrine which argues that this provision of the constitutions is rather symbolic.[85]

In the relative theory it is obvious, what the core content is. As I already mentioned above, the core content of a right is what remains after the application of the proportionality test. Therefore, this core is not firm, it can change with the jurisprudence of the given court.

[82] 30/2012. (VI.27.) AB határozat, ABH 2012, p. 42.

[83] Within Europe the doctrine migrated from Germany for instance to the Czech, Polish, Portugal, Rumanian, Slovakian and Hungarian constitutional law. Outside Europe maybe the most influential application of the doctrine is the South African one. The South African constitutional court used the doctrine in its S. v. Makwanyane decision which abolished death penalty in the country in the 1990s after the apartheid era. See: Opinion of Advocate General Szpunar delivered on 4 February 2016; Case C‑165/14; Alfredo Rendón Marín v Administración del Estado and Case C‑304/14; Secretary of State for the Home Department v CS; footnote 117.

[84] Péter Paczolay, ed., *Twenty Years of the Hungarian Constitutional Court* (Budapest: Constitutional Court of the Republic of Hungary, 2009). pp. 52-53. I use the good summary of this book to demonstrate the absolute and the relative theory of the essential content doctrine.

[85] Zoltán Pozsár-Szentmiklósy, *Alapjogok mérlegen: az általános alapjogi tesztek dogmatikája* (Budapest: HVG-ORAC, 2016). p. 210.

The absolute doctrine presupposes a core content that is more stable. However, a lot of problems arising with defining this core content. Theoretically I agree with the definition of Tamás Győrfi, who separates a central and a peripheral domain of a right. The first defines the main function of that right, the central field of application, the essence, whereas the peripheral domain is less important with regard to the application of the right.[86]

This theoretical definition brings us a little further on the way to defining the essential content of a right. The central field of application is basically it's essential content.

Pozsár-Szentmiklósy thinks that there are in principle two ways to define that core area.[87] The first is to give an abstract definition that applies to every rights – which is, according to him, impossible[88] –, the second is to define the essential content on a case-to-case basis. Within this concrete, case-to-case method there are also two ways to go: the first is to try to list all the elements that are within the core area of a given right. If such enumeration is also impossible than the constitutional court can just decide case-to-case – without a complete list of the core elements – whether a restriction crossed the line and interfered with the essential content or not.[89]

I am arguing in favor of using the absolute theory since treating the provisions protecting the essential content of human rights as symbolic provisions without normativity is not right. If the framers of the constitutions wanted that provision to be a mere declaration, they could have placed it into the preamble of the constitution. I have to some extent the same problem with the relative approach. There it is not clear what is the added value of the essential content doctrine to the general proportionality test.

If I am arguing in favor of the absolute theory, then I have to suggest some solutions to the puzzle of defining the core content of rights. A complete enumeration of the core elements is impossible since life and society are always changing and constitutional law has to reflect those

[86] Tamás Győrfi, *Az alkotmánybíráskodás politikai karaktere: Értekezés a magyar alkománybíróság első tíz évéről*, Fundamentum könyvek (Budapest: INDOK, 2001). p. 85.
[87] Pozsár-Szentmiklósy, *Alapjogok mérlegen*. pp. 209-211.
[88] Ibid. p. 210 and 223.
[89] Ibid. pp. 209-211.

changes. Therefore, I am in favor of concrete (case-to-case) definition of the core content of human rights. As I indicated above, I have no illusion about the fact that this method – because of the complexity and ever changing nature of life – cannot lead to a complete enumeration of core elements with regard to a given right.

Case-to-case definition of a concept without the hope of reaching a complete definition is not unknown in constitutional theory. Constitutional courts are using this method especially when they face with highly abstract concepts. The same method was used recently by the HCC concerning the constitutional identity of Hungary.[90] The pitfall of this is the lack of legal certainty but I think if we want to have essential content protection in a way that goes further than the proportionality test, this is the only way to do it. The other ways are either impossible (to have a complete enumeration of the elements of essential contents of every single right) or add nothing to the general test (relative theory or treating the essential content protection just a symbolic declaration). Moreover, I think that if constitutional courts side firmly and follow the path I suggested above then with the crystallization of the jurisprudence, legal certainty problems will be smaller. If we have a firm line of case-law with regard to the essential content doctrine, then future jurisprudence becomes more predictable.

Although the reality is far from that desired situation. We could find examples both to the absolute[91] and relative[92] theory in the HCC's jurisprudence. The predominant theory in the jurisprudence of the HCC is the relative one, which means that the court conducts just the general proportionality inquiry with or without a reference to the essential content doctrine.[93]

[90] "The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case (…)." 22/2016. (XII.5.) AB határozat. In: Az Alkotmánybíróság Határozatai, 2016/28. pp. 1418-1436. English version is available at: http://hunconcourt.hu/letoltesek/en_22_2016.pdf (accessed: 2017. 03. 31.).

[91] 6/1998. (III.11.) AB határozat, ABH 1998, pp. 98-99.

[92] 18/2000. (VI.6.) AB határozat, ABH 2000, pp. 122-123.

[93] János Sári and Bernadette Somody, *Alapjogok: Alkotmánytan II* (Budapest: Osiris, 2008). p. 49.

The situation in Germany is very much the same. Both the absolute and the relative theory appear in the jurisprudence of the FCC.[94] Although the present jurisprudence seems to accept rather the relative theory.[95]

After trying to shed some light on these complex questions, which sometimes remain even in the constitutional jurisprudence unclear, I turn to the application of the essential content doctrine by the FCC in the field of the constitutionality of secret surveillance regulations.

2.2 The application of this doctrine by the German Federal Constitutional Court in the field of secret surveillance measures

The essential content doctrine is present from the first analyzed decision in the FCC jurisprudence.[96] The first analyzed decision, the Telephone Tapping Case[97] from 1970 concerned the adjudication on the constitutionality of a constitutional amendment modifying Article 10 of the GG. The FCC did not use the essential content doctrine effectively in this case.[98] In the German constitutional system, the FCC checks constitutional amendments whether they are compatible or not with Article 79 Section 3 of the GG, which rules that "[a]mendments to this Basic Law affecting (…) the principles laid down in Articles 1 and 20 shall be inadmissible". The court just mentions[99] the essential content doctrine in its argumentation but fails to use it in its substance, although telephone tapping is a matter that may be a serious threat to private life and the inviolable core of private life, as a appearance and concretization of the essential content doctrine, which was already present in the FCC jurisprudence since the Elfes Case.[100]

94 Art 19 Abs 2, Rn 38-39. in: Maunz et al., *Grundgesetz*.

95 Art 19 Abs 1-2, Rn 99-100. in: Karl Heinrich Friauf and Wolfram Höfling, *Berliner Kommentar zum Grundgesetz* (Berlin: Erich Schmidt Verlag, 2000).

96 See the list of the decisions I analyze in footnote 65.

97 BverGE 30, 1.

98 Although Dammann deals only with one special appearance of the essential content doctrine (core area of private life), he also notices that the FCC is reluctant to apply the doctrine. See: Ilmer Dammann, *Der Kernbereich der privaten Lebensgestaltung: zum Menschenwürde- und Wesensgehaltsschutz im Bereich der Freiheitsgrundrechte* (Berlin: Duncker & Humblot, 2011). p. 67.

99 The FCC interpreting Article 79 Section 3 in the Telephone Tapping Case stresses that this constitutional restraint is "not stricter" than the essential content guarantee of Article 19 Section 2. Both rules are guarantees of the substantial rule of law and the negation of the "formal-legal way", which can lead by obeying all formal requirements to a substantially unconstitutional legal situation. BverfGE 30, 1 p. 24.

100 BVerfGE 6, 32 p. 41.

The detailed elaboration of the essential content doctrine in the field of the constitutionality of secret surveillance happened just recently, in 2004 when the FCC decided on the matter of constitutionality of secret surveillance of dwellings (Large Eavesdropping Attack Case).[101] Further in this subchapter I will analyze the essential content doctrine as it was used in this case and I will discuss the role of the argumentation of the Large Eavesdropping Case in further judgements of the FCC concerning secret surveillance.

In the Large Eavesdropping Case the legal issue was the constitutionality of the amendment of Article 13 – which article of the GG guarantees the inviolability of home – as well as the constitutionality of rules of the German criminal procedure law concerning secret surveillance. I only deal with the arguments of the FCC expressed during the balancing related to the constitutionality of the constitutional amendment, since this part of the decision contains the elaboration of the essential content doctrine.

As I mentioned above, that FCC checks constitutional amendments whether they are compatible with the rules of Article 79 Section 3 of the GG, which lays down that "[a]mendments to this Basic Law affecting (…) the principles laid down in Articles 1 and 20 shall be inadmissible". For our purposes out of the principles laid down in these articles the most important is Article 1 Section 1 which protects human dignity. Thus the FCC had to adjudicate on the matter whether the constitutional amendment was unconstitutional or not, more specifically, whether it violated the right to human dignity or not. However, the FCC widened the scope of its inquiry. It stated that the inviolability of home is a concretization of the dignity right thus if this right is violated, human dignity is violated as well.[102] The FCC also checked the amendment from the perspective of an another right, which is the core area of private life (unantastbare Kernbereich privater Lebensgestaltung).

[101] BVerfGE 109, 279.
[102] BVerfGE 109, 279 p. 313.

This can be seen as activism, since the GG concretely prescribes which articles of the GG cannot be affected by an amendment. The FCC extended this list for the purposes of this case with Article 13 and the core area of private life.

The protection of this core area of private life is not enshrined in the GG, it emerged from the jurisprudence of the FCC.[103] The court derived this right from Article 1 Section 1 (human dignity) and Article 19 Section 2 (essential content doctrine).[104] In the following I will deal with the use of the inviolable core area of private life as an application of the essential content doctrine in the field of the constitutionality of secret surveillance.

The general rule elaborated in the decision is that secret surveillance of a dwelling is not unconstitutional *per se*.[105] However, the inviolable core of private life deserves absolute protection. By that the FCC accepted the absolute theory of essential content doctrine and ruled that no surveillance shall invade into this core area. The FCC emphasized strongly that in the core area there is no place for balancing the proportionality of the measure: no constitutional interference with this area is constitutionally permitted. [106]

In the following I will explain how the FCC circumscribed the essential content of the dignity right then I will enlighten the consequences required by the FCC, when this absolute protected core is about to be affected by secret surveillance.

There are three factors which lead us to the definition of the essential content of the dignity right. The FCC emphasized that it can be decided only case-to-case whether an expression is within the core area of human dignity or not[107], but gave some factors which can help making this decision. These factors are the content of the expression, the place where this expression is being made and the other person to whom this expression is directed.

[103] C. Löser, "Schutz der Privatsphäre und Kernbereich privater Lebensgestaltung" Available at: http://www.cloeser.org/ext/Schutz%20der%20Privatsph%E4re.pdf (accessed: 2017.03.27.) and also Dammann, *Der Kernbereich der privaten Lebensgestaltung*. p. 19.

[104] The relationship between the core area of the inviolability of home and the core area of the dignity right is not clarified in the decision. Ibid. pp. 112-113.

[105] BVerfGE 109, 279 p. 311.

[106] BVerfGE 109, 279 p. 314.

[107] BVerfGE 109, 279 p. 314.

In terms of content of the expression the FCC made it clear that the expression of inner processes is to be treated as being within the absolute protected core of the right. The FCC gave some examples to this inner processes, "such as impressions and feelings, as well as reflections, views, and experiences of a highly personal nature belongs to the free development of personality in the core area of private life".[108] Ilmer Damman lists three other categories which can be found in the decision and represent content matters that are within the core of private life according to the FCC. These are the expressions of sexuality, confession and the conversation with a defense counsel.[109] It should be noted that this list of the content matters that can be in the core area of private life is not complete. The FCC listed these content matters as examples of expressions that are in the core area of private life.

The place of the expression also plays a role in determining whether the conversation can be categorized within the core of private life or not. The FCC grants a strong protection to the home. Although the court applies a restrictive home-concept. The court made a distinction between rooms serving a professional purpose (Betriebs- und Geschäftsräume) and private rooms. Rooms falling to the first category are not treated as home.[110] Furthermore, the FCC determined the function of home as "the person's private refuge" and stressed that rooms that serve this function either regularly or in the concrete case are also relevant from the perspective of the core area of private life.[111]

The last criterion is the person towards whom the expression is directed. The determining condition here is the personal trust of the speaker in his/her interlocutor. "Particular protection is afforded to non-public communication with persons enjoying the highest level of personal trust, conducted under the reasonable assumption that no surveillance is taking place, as is the case, in particular, in a private home. This group of persons includes, in particular, spouses or partners, siblings and direct relatives in ascending or descending line, in particular if they live in the same

[108] BVerfGE 109, 279 p. 313. Hereinafter I use the translation of excerpts embedded in the English version of the following decision of the FCC: BVerfG, 20. 4. 2016, 1 BvR 966/09, 1 BvR 1140/09: Online-investigation of computers.
[109] Dammann, *Der Kernbereich der privaten Lebensgestaltung*. pp. 52-54.
[110] BVerfGE 109, 279 p. 320.
[111] BVerfGE 109, 279 p. 321.

household, and can also include defense counsel, doctors, the clergy and close personal friends."[112] The protection is triggered especially when these persons enjoying the highest level of trust are living together in the same home with the person who speaks to them.[113]

When the demonstrated criterion related to places and persons are present than there is a presumption that the content of the speech is within the core of private life. Although presumption is refutable if "specific indications suggest that certain conversations are (…) directly related to a criminal offence (…)."[114]

When such a presumption cannot be refuted than no secret surveillance should be authorized. If an ongoing secret surveillance starts to interfere with the core area of private life, the surveillance should be stopped immediately and the recorded material must be deleted. This material should not be forwarded to any authorities or persons and should not be used in any procedures.[115]

The above demonstrated concept of the use of the essential content doctrine has been extended to areas other than the secret surveillance of the dwelling. Since 2004, when the Large Eavesdropping decision was delivered such a tendency can be observed that complainants try to extend the Large Eavesdropping standards to other methods of secret surveillance.

The FCC refused to extend the doctrine to secret surveillance through GPS, since according to the court's assessment the use of GPS secret surveillance does not reach the extent and intensity of the core area of private life.[116]

The first application of the findings of the Large Eavesdropping Case was in the field of secret surveillance of telephone conversation.[117] It must be born in mind that telephone conversation is protected not by Article 13 (inviolability of home), but by a separate provision, Article 10 (privacy of correspondence, posts and telecommunications). Although – since there is a

[112] BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. 121; referring to the Large Eavesdropping Case.
[113] BVerfGE 109, 279 p. 322.
[114] BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. 198; referring to the Large Eavesdropping Case.
[115] BVerfGE 109, 279 p. 324.
[116] BVerfGE 112, 304 p. 318.
[117] BverfGE 113, 348. Note again that I analyze just the decisions listed in footnote 65.

strong relationship between the dignity right and Article 13 – inviolability of home affords a stronger guarantee, in Article 10-issues the core area of private life must be respected as well.[118] Content of conversations that have a highly personal nature is within the core area of private life. The one exception is when the conversation has a direct relation to a criminal offence.[119] The court declared the concept of the core area of private life with all of their above described legal consequences applicable to the interception of telephone conversations.

The next extension of the Large Eavesdropping decision's findings about the inviolable core area of private life concerned online investigation of computers.[120] The FCC argued that two types of data deserve protection. First, written expressions of the person that are stored in the computer, secondly, conversations running through the computer. The FCC drew an analogy between the decision about the surveillance of telephone conversation and gave weight to the fact that in the modern word a great part of our communication is going online.[121] According to the FCC the content of this communication should be protected as the telecommunication. Of course protection of these data granted just in case the core of private life is affected. The decision set up a two-stage protection. The core area of private life should be protected before the authorization or during the carrying out of the online investigation. If this is impossible (because of the high amount of data gathered from a computer), then during the elaboration of data, those contents that are within the core area of private life must be deleted immediately. Their passing on or usage in any procedures is prohibited. The legislature should ensure by the means of procedural guarantees that the data collected contains the minimum amount of such a data that is within the core area of private life.[122]

In its decision on telecommunication traffic data preservation the FCC came to the conclusion that a 6-months preservation of the traffic data does not violate either the dignity right or its core

[118] BVerfGE 113, 348 p. 391.
[119] BVerfGE 113, 348 pp. 390-391.
[120] BVerfGE 120, 274.
[121] BVerfGE 120, 274 pp. 335-336.
[122] BVerfGE 120, 274 pp. 338-339.

area.[123] Thus here – as we could see in the decision on GPS surveillance – the court did not find the legal provisions to be a violation of the core area of private life.

The last analyzed decision is a recent one. In 2016 the FCC decided on the constitutionality of investigatory powers of the Federal Criminal Police Office for Fighting International Terrorism (hereinafter: Bundeskriminalamt or BKA). The FCC expressed several concerns – among other reasons – because the law regulating the BKA fell short in providing adequate safeguards to ensure the inviolability of the core area of private life.

The first and maybe the most significant ruling of the decision concerning the use of the essential content doctrine is that it required protection to the core area of private life against surveillance outside the home. The FCC stressed that even outside the home this core area can be interfered with, for instance when the surveilled person conducts conversation with family members or other "persons enjoying the highest level of personal trust".[124]

Furthermore, the FCC made it clear that not just acoustic surveillance (eavesdropping) but also optical surveillance can threat the core area of private life. Thus a muted video recording can also bring the core area of private life into danger.[125] Its protection through legal provisions is therefore necessary. The FCC found also the regulations of accessing information technology (hereinafter: IT) systems and interception of telecommunication partly unconstitutional. Concerning automatic recording of telecommunication and the access of IT systems, the court emphasized the importance of the assistance of the judiciary in the selection of the gathered information on the ground of whether they clasp data from the core area of private life.[126] This is particularly important because by these means a high amount of data is collected without effective human control during the process. Therefore, it is important to give an independent authority the power to control this information after it has been collected.

[123] BVerfGE 125, 260 p. 322.
[124] BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. 28.
[125] BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. 29.
[126] BVerfG, Urteil des Ersten Senats vom 20. April 2016 - 1 BvR 966/09 - Rn. 30 and 61.

To sum up the above analysis it is worth to recall that the FCC stressed in its Large Eavesdropping Case the importance of the protection of the core area of private life in the field of secret surveillance regulation. The protection is manifested on the one hand in the prohibition of gathering information from the core area of private life and, on the other hand, if such information has been collected, they must be deleted and it is prohibited to use them in any procedures.

Information that are within the core area has the highest personal nature. There is a presumption if someone is speaking at his/her home or with "persons enjoying the highest level of personal trust", that this conversation is classified as being within the core area of personal life. This presumption is rebutted if there are factual grounds that the conversation is directly connected to a criminal offence.

The legislator was required to ensure all of these requirements in the legal regulation of eavesdropping/interception.

Further on the FCC required the application of these requirements in the regulation of surveillance of telephone conversations, the online investigation of computers and – extending the scope of these requirements from criminal procedure to national security and counter-terrorism – in the regulation of the investigatory powers of the BKA: not only in the regulation of acoustic but also optical surveillance and not only inside but outside the home as well.

In the last subchapter I will demonstrate the possible application of the constitutional protection of the core area of private life as a concretization of the essential content doctrine in the Hungarian secret surveillance regulation.

2.3 The possible application of the doctrine in Hungary on the basis of the German example

The Hungarian regulation of secret information gathering lacks any guarantees in terms of the content of the information gathered. The only restriction is the goal-bound nature of the secret

surveillance: only such information can be gathered which leads to the goal indicated in the authorization of the use of the surveillance method.[127]

Apart from that, all guarantees are procedural, not substantial; they do not refer to the content of the surveilled situation or conversation. The existing guarantees do not exclude the surveillance of the core area of private life, the most intimate situations or conversations of a person.

As we have seen in the first chapter, some preferences of the Fundamental Law are against the liberty of individuals. I identified as a second hitch that the HCC upheld secret surveillance regulation – with the help of the argument of the renewed Menschenbild enshrined in the Fundamental Law – that fell short in terms of satisfying the ECHR human right standard. In my assessment these facts provide enough motivation to think about the improvement of comprehensive human right protection in the field of secret surveillance. A plausible method may be to use the absolute theory of the essential content doctrine in the HCC's future jurisprudence on secret surveillance.

The FCC elaborated the concept of the core area of private life of the ground of the dignity right and the essential content protection. Both values are protected by the fundamental law as well. Thus there are enough textual grounds in the Fundamental Law to protect the core area of private life in secret surveillance regulation.

Despite neither the essential content doctrine, nor – as its concretization – the protection of the core area of private life is being present in the HCC's secret surveillance jurisprudence, we still can detect in the HCC's jurisprudence the implicit application of human dignity protection in a slightly different topic, namely the constitutionality of closed circuit television (hereinafter: CCTV) cameras applied for security reasons. In its 36/2005 (X. 5.) AB határozat the HCC found the law regulating the application of CCTV cameras by private actors partly unconstitutional because "certain especially sensitive fields of privacy (intimate situations: e.g. being in fitting rooms, restrooms, changing-rooms, toilets) cannot be completely excluded from the scope of

[127] Act CXXV of 1995 on the national security § 43.

surveillance."[128] Here the HCC required a regulation that excludes "certain especially sensitive fields of privacy (…) from the scope of surveillance". This is practically the application of the absolute theory of the essential content doctrine: some, most intimate situations cannot be subject of surveillance. There can be no legitimate aim or interest that is strong enough to outweigh such a harm on the dignity right.

In a consequence of the above cited decision, the legislator changed the law concerned. The present text of § 30 Section (3) of the Act CXXXIII of 2005 on Security Services and the Activities of Private Investigators regulates currently that in Hungary "[a]n electronic surveillance system may not be used in a place where surveillance is likely to violate human dignity, such as in dressing rooms, fitting rooms, washrooms, toilets, hospital wards and in the living quarters of social institutions".[129]

This is basically an existing place-requirement that stops appliers of CCTV cameras to install those devices in places where it is likely to violate human dignity. The German logic is the same: the FCC argued that in a home and in situations where persons of the highest trust in each other have conversation, it is likely that a surveillance would violate the core area of private life, therefore it is reasonable to protect such situations by the means of a legal presumption.

One could argue that the analogy between CCTV and secret surveillance is flawed but if we look into the characteristics and differences of open and secret surveillance, it just strengthens my positions that if the legislator requires the exclusion of some situations from CCTV surveillance where the violation of human dignity is likely, it should also do so regarding to secret surveillance.

The first difference is the opposing constitutional rights/objects. In the Hungarian constitutional system "[a] fundamental right may only be restricted in order to enforce another fundamental right or to protect a constitutional value (…)". According to the HCC, a legislation which enables CCTV cameras, is the means by the state of the enhancement of the constitutional

[128] ABH 2005, p. 401. The English translation is available at: http://hunconcourt.hu/letoltesek/en_0036_2005.pdf (accessed: 2017. 03. 31.).

[129] I use the English translation of the law as it is in the legal database "Complex" of Wolters Kluver.

protection of the right to property.[130] This fits thus to the first category: the legislation enforces another fundamental right.

In decisions concerning secret surveillance the HCC makes it clear that the restriction of several fundamental rights happens not to enforce another fundamental right, but to protect constitutional values, namely the effectivity of law-enforcement and national security.[131] Accordingly, open surveillance defends a fundamental right (right to property), while secret surveillance furthers legitimate state objectives.

The second difference lies in the nature of the two types of surveillance. CCTV surveillance is open, the individuals subject to it know about the fact that they are surveilled. Secret surveillance is carried out secretly, so the persons concerned do not know that they are being surveilled.

As we have seen earlier in this subchapter, some kind of essential content protection exists in the law regulating the application of CCTV cameras. Admittedly, procedural requirements of secret surveillance are out and away stricter than the regulations concerning CCTV cameras. This is why it is particularly striking that no substantive, content-based limits are existing regarding matters that cannot be surveilled in secret surveillance regulation. So if we consider just content-based limits, we have to conclude that the regulation of private CCTV cameras is stricter than secret surveillance regulation. In my opinion both distinctions between simple, open surveillance and secret surveillance are calling for more guarantees in the secret surveillance regulation than in open surveillance.

If we accept the constitutional need for a content-based guarantee in the Hungarian secret surveillance regulation, then I think that the German example could serve as a feasible model because it embraces both the places and persons where/among whom typically conversations with highly personal content happen. It gives flexibility to the regulation that it enables the presumption about the content of the conversation to be rebutted and thus to allow that crime-related situations be subject to surveillance. Therefore, it strikes a fair balance between extensive human right

[130] 36/2005. (X. 5.) AB határozat, ABH 2005, p. 398.
[131] 2/2007. (I.24.) AB határozat, ABH 2007, p. 86.

protection and the interests of security on the one hand, and national security and law-enforcement on the other.

Closing remarks

I cited in my introductory thoughts the wise opinion, – that were expressed among others by the HCC in 1995 – according to which there should be no unlimited power in a constitutional democracy. Secret surveillance is one of the particularly dangerous state activities. Because of its secret nature the risk of abuse is higher. Secret surveillance constitutes a serious threat to human rights, since by carrying out secret surveillance, the state sneaks into the private sphere of individuals. This should not happen in an unfounded, unjustified or uncontrolled way. Strict legal guarantees are indispensable in secret surveillance regulation.

In my present paper I addressed the question of human right protection in the field of secret surveillance. First, I compared the normative grounds of the Menschenbild of the Fundamental Law and the Grundgesetz and concluded that the Fundamental Law has miscellaneous values that may underpin even a paternalist approach of the state towards an individual. I demonstrated that both in the jurisprudence of the HCC and the FCC a communitarian Menschenbild has emerged which gives emphasis to the interests of the social coexistence besides granting a guarantee of the exercise of fundamental rights. However, I concluded that the HCC justified partly with the help of its own Menschenbild concept harsher human rights violations in the domain of secret surveillance than the FCC did.

Given the above mentioned setbacks in Hungarian constitutional law, I thought it useful to study how the FCC uses the essential content doctrine as a means of substantial human rights protection. I argue in favor of the absolute theory of essential content doctrine. In my opinion this doctrine should be used as a separate test before using the general limitation test of fundamental rights.

The essential content doctrine – as it appears in the German secret surveillance jurisprudence – looks into the substance of the content matter that is subject to surveillance and draws a red line before secret surveillance: the most personal, most intimate aspects of private life, the core area cannot be subject to surveillance.

Such a guarantee is completely lacking in the Hungarian secret surveillance regulation and the HCC was also reluctant to set a substantial limit as a constitutional requirement in terms of what should never be subject to surveillance. However, the HCC set up such a requirement concerning open surveillance carried out by private actors. I argued that on the basis of this precedent, it might be useful to consider integrating the example of the German jurisprudence protecting the core area of private life against secret surveillance.

If we accept the idea of András Sajó, that constitutions (and we could add: legislation as well) are creatures of fear from what happened before the adoption of the document,[132] then – bearing in mind the state security agencies' operation in socialist Hungary and in the German Democratic Republic – both Hungary and Germany have good reasons to set up a well-functioning system of human rights protection in the field of secret surveillance. Because of this miscellaneous nature of the text of the Fundamental Law, the HCC has the task to ensure the attained level of human right protection by relying on those textual references of the Fundamental Law that can foster human rights in Hungary. One of these is the essential content doctrine. I demonstrated a possible way of the application of the doctrine by the FCC. It is up to the Hungarian constitutional court judges whether they follow the example of their German colleagues or not. The model is there to build on.

[132] András Sajó, *Limiting Government : An Introduction to Constitutionalism* (Budapest : CEU Press, 1999). pp. 1-49.

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