Constitutional Reasoning and Constitutional Interpretation

Analysis on Certain Central European Countries

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Edited by

Zoltán J. Tóth

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Contents

Notes on the Contributors

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Chapter I

Interpretation of Fundamental Rights in Central and Eastern Europe: Methodology and Summary

Zoltán J. Tóth

Fundamental rights have become increasingly important since the emergence of modern constitutionalism. The states of Central and Eastern Europe, as third-generation countries of concentrated constitutional adjudication, and in leaving behind the legacy of state socialism, have faced challenges owing to the specificities of their recent history and the problems of transitioning to a democracy governed by the principle of the rule of law. These are substantially different from the problems that countries with first- and second-generation constitutional courts once had to solve, although they have many points in common. One such commonality is that, typically, new constitutions (or constitutions that can be considered new in substance) have been adopted immediately after the end of a dictatorial regime, which, in contrast to the previous situation, already provided for a wide range of human rights. The enforcement of these rights was guaranteed everywhere in these states; however, the different historical situations had given rise to different responses.

The starting point of our research is the hypothesis that the constitutional courts established in the Central and Eastern European legal systems after 1990 started to enforce human rights enshrined in their constitution in a different context, with different historical experiences, and under different social and economic circumstances, legal, and political conditions. Thus, these systems approached fundamental rights differently from their Western and Southern European counterparts. Our hypothesis was that a specific Central and Eastern European system of fundamental rights protection could be detected, with a particular system of interpretation of fundamental rights specific to Central and Eastern European countries but not necessarily to the

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European constitutional tradition as a whole. The latter was explored not through the jurisprudence of the constitutional courts of Western or Southern European countries but through the practice of the European Court of Human Rights (ECtHR). This investigation provided an opportunity to detect general features of European constitutional culture (and to compare these with the features of Central and Eastern European constitutional culture) and to assess the specific legal problems of each Central and Eastern European country in light of the ECtHR's practice.

On the basis of the research design detailed in the first chapter, we expected our research, on the one hand, to shed light on whether our hypothesis is correct and whether there is indeed—at least with regard to the methodology of interpreting fundamental rights (i.e. the procedural-formal issues that constitute the framework for solving substantive legal problems)—a specific Central and Eastern European conception of fundamental rights, and if so, how it differs from the common European constitutional tradition of countries outside this region. On the other hand, we hoped to explore the similarities and differences between the constitutional jurisprudence and interpretation of fundamental rights (and, more generally, the typical modes of constitutional reasoning) of the various Central and Eastern European countries (specifically, the six countries under study).

1. Research design

At the end of 2020, a research group was established within the Mádl Ferenc Institute of Comparative Law in Budapest. The group was formed with the purpose of studying the practice of constitutional courts in six Central and Eastern European countries (including the decisions related to international law) and the relevant decisions of the referred international fora. As part of it, the Research Group aimed to present 1) the features of the common interpretation practice of fundamental rights in the V4 and the North Western Balkan (hereinafter, with allowance for a certain geographical imprecision: Central and Eastern European)[1] countries and of the main differences; 2) the similar European legal practice regarding the concerned countries (i.e. the relevant legal practice of the ECtHR) and the European Court of Justice (hereinafter: ECJ); and 3) the similarities and differences between the countries studied in the two previous points and the regional/transnational fora. For this purpose, highly respected experts of the legal system, one from each of the countries (namely, the Czech Republic, Hungary, Poland, Serbia, Slovakia, and Slovenia), were invited for the analysis thereof. Their

1 All examined countries are in the central part of Europe, i.e. Central Europe, and in its eastern half (Eastern-Central Europe). None of them are states of Eastern Europe in a geographical sense. However, as the countries in this region are traditionally referred to as the states of Central *and* Eastern Europe, we also follow this definition. Nonetheless, we consider it necessary to point out that it is geographically not precise and these are actually not the states of Central *and* Eastern Europe but of Eastern-Central Europe.

task was to analyse the relevant national practice of the constitutional court in their own country and to compare it with the practice of the European fora (ECtHR, ECJ) pertinent to the given country. Accordingly, the basic methods of the research are the analytical (in case of the countries) and comparative method (regarding the comparison of the characteristics of the activities carried out by the given fora).[2]

The practice of each concerned country was examined by one researcher, thereby producing 'national reports' to which the chapter titles in the volume also refer. Each national researcher had the following task: to define the most important 30 cases in which, in the last ten years, the constitutional court of the given country made a decision on the merits and which contained a substantive reference to ECJ or ECtHR decisions. In the first main phase of the research, these 30 cases had to be analysed according to a certain methodology for determining which methods of interpretation are preferred by the constitutional court of the country in cases with international relevance, what argument style describes its decisions, and what the most important issues with constitutional relevance are in the given country.

After this, in the second main phase, researchers had to study what methods of interpretation the ECtHR or the ECJ used in their (also 30) cases that were referred to in the decisions of the constitutional court. These decisions of the ECtHR and the ECJ had to be assessed according to the same methodology, as the national constitutional court's decisions were analysed and according to some further aspects. We expected to be able to determine directly how the reasoning style and decision-making pattern of a given national constitutional court differ from the ones applied in decisions of referenced 'international' courts.

Criteria for selecting the 30 decisions of the domestic constitutional courts were defined as follows. The selected cases had to be 'important' ones and had to be from the last ten years (2011–2020), i.e. the decision in the given case was made in this period. As the research attempted to focus on the *contemporary* interpretation of fundamental rights in Central and Eastern European countries, it seemed unreasonable to include former decisions in the sample because the results would not have been timely. However, we could not specify a much narrower examination period owing to the risk that enough 'important' cases worthy of analysis did not exist in the given country. Thus, the ten-year period was the result of a practical compromise. When determining the number of sample items (30 domestic cases), we attempted to ensure to have as many cases as enough to draw scientifically useable conclusions and, at the same time, to be processed (together with other 30 ECtHR or ECJ decisions invoked by the constitutional court's decisions) during the period of the research.

As for the 'importance' of the cases, we understood that we could only define rough criteria. We relied heavily on the individual convictions of the researchers involved. A case could be considered 'important' if it established a new dogmatic

2 The comparative method has several scientific forms that, regarding comparative constitutional law, were distinguished and classified into nine different groups by Ran Hirschl. Hirschl, 2019, pp. 18–19. The present research mainly belongs to the categories 8 and 9.

construction in constitutional law or applied a new legal doctrine; fundamentally changed the system of domestic law (e.g. criminal law, civil law); had outstanding economic relevance; affected a wide range of citizens; or took a position on substantial public or social policy issues. It was neither possible nor necessary to define this criterion more precisely; the authors of each chapter provide the reader with information on the aspects they considered. Nevertheless, since the subject of the research is the interpretation of constitutional rights, any decision that did not directly address an issue of fundamental rights had to be ignored (e.g. a problem regarding the 'political constitution', namely, issues regarding the state structures, the extent of competency of state bodies, the legal status of constitutional bodies).[3]

Consequently, all of the 30 selected decisions of the national constitutional court referred to ECJ or ECtHR decisions. It was essential that the decisions of 'international' courts[4] were considered on their merits in the selected domestic decisions, notwithstanding the national constitutional court's agreement. The constitutional court could bring up an ECtHR judgment to decide a case on the basis thereof or by using its arguments. Alternatively, the national constitutional court could refer to this decision to declare explicitly deviation or agreement. For our research, both attitudes were deemed equally interesting, as were the most characteristic attitude of the given constitutional court and, of course, the specific arguments used.

Regarding the selection criteria for the 30 ECJ/ECtHR decisions, we ensured conciseness in the research. One ECJ/ECtHR decision (considered the most characteristic in relation with the given legal issue or considered by the national constitutional court to be the most important) had to be selected in case of each constitutional court decision.

3 'Political constitution' and 'political constitutionalism' mean neither, in the narrow sense, the political institutions of a given legal system, the political practice regarding the constitutional rights in the given country, differentiating those from ideal-typical 'legal' constitution or constitutionalism as Bellamy or, taking it further, Gee and Webber did (see Bellamy, 2009, p. x; Gee and Webber, 2010, pp. 273–299); nor, in the broad sense, a cross-border regionalisation or globalisation process in which the political constitutionalism (a critical view of which is given by Hirschl, 2006, pp. 721–754), together with 'economic' (Teubner, 2015, pp. 219–248) and 'societal' constitutionalism (Teubner, 2004, pp. 3–28), unify the different jurisdictions but the organisational provisions and provisions on competency of the national (act of) constitution having necessarily legal nature. Thus, the political constitution, as the modern successor of the former German *Staatsrecht*, includes the constitutional (already *legal*) norms determining the organisational structure of the state and the functioning of state organs, principally in Germany and the continental legal systems under German influence. According to Murkens, '*Staatsrecht* claims that the existential and homogeneous state is identified and protected by public law, *Verfassungsrecht* claims that it is illegitimate for public law doctrine and scholarship to base constitutional argument on the extra-legal, pre-constitutional substance of the state' (Murkens, 2013, p. 188.). Pokol described the same process as the duplication of constitutional law (cf.: Pokol, 2019, No. 2.), which, in addition to traditional organisational norms, will also contain the constitutional rights and the even more abstract constitutional values (Pokol, 2019, p. 16).

4 The ECtHR is not a 'truly' international court (Goudie, 2004, pp. 6–7); for reasons of simplification and to follow the common vocabulary (Lemmens, 2018, p. 94), we call it 'international court' in this work.

For example, the ECtHR, as a quasi-precedent court,[5] cites its own previous practice at length[6] (and the same is true of several constitutional courts in Central and Eastern Europe).[7] Thus, in the same case, the national constitutional court itself may quote several mutually reinforcing ECtHR decisions that are built on each other and, in fact, contain the same arguments. In this case, it would not have made any sense to analyse all of them in the second phase of the research. Especially, these cases typically feature a characteristic decision (a leading case) that contains all the substantive arguments of the ECtHR regarding the particular legal problem. If, however, the national constitutional court referred to several independent decisions that could be considered 'in their own right', then the author of the chapter was free to decide which of them was the most important. The authors took into consideration only the judgment of the Grand Chamber if both chamber and Grand Chamber judgments were rendered by the ECtHR.

As such, there were 30 analysed constitutional court decisions and 30 'international' court decisions (made by the ECtHR or the ECJ), on the basis of which each

5 '[A] precedent is a judicial decision which serves as a rule for future determination in similar or analogous cases. A decision is to be regarded as a precedent when it furnishes rules which may be applied in settling the rights of parties in other cases' (Jones, 1904, pp. 159–160). Originally, the precedent is the decision of the supreme court formed in the course of English legal development that has to be applied, followed in decisions made in later judicial procedures with the same facts (*stare decisis*), or, from the late modern period, in case of which the *ratio decidendi*, the essential elements of the decision, the legal findings extracted from the case are legally binding (cf. Goodhart, 1945, pp. 493–525). Beyond other conditions, a decision qualifies as a precedent if it is made on the basis of facts *similar* to the ones of the case to be decided. This similarity means the similarity of not only the mere facts but of the legally relevant facts (cf. Schauer, 1987, pp. 577–579) and presumes the identicality of the normative judgment and always contains evaluative elements. The lower courts are always bound by the precedent (e.g. 'vertical precedent') but other courts are bound by earlier decisions only as a general rule (e.g. 'horizontal precedents'; see Barzun, 2013, pp. 1632, 1661, 1663). With the development of comparative law, jurisprudence started to use the concept of 'precedent' also for decisions of supreme courts in such legal systems (continental legal systems) where they do not formally bind the courts deciding later cases (courts of lower instance) but where, owing to the appeal system, they have decisive influence on these later decisions. Similarly to the Bielefelder Kreis, we use the concept of precedent in this 'expanded' sense, which is different from the one developed in Anglo-Saxon system of law. We also observe the consideration of linguistics, which says that the concepts, during their use, go through change in meaning, pick up new meanings, or lose older ones—meaning changes. We always examine the concept of precedent in its *legal* meaning. For the philosophical meaning of precedent, see Kronman, 1990, pp. 1029–1068.

6 Although neither the ECtHR nor the ECJ recognises formally (and officially) the binding force of its own previous decisions, according to prior experiments, they consider them as guidance, in aiming for the *consistency* of the judgments and the persuasive power of the propriety of the examined legal issues (and, consequently, 'to help legitimize their decisions to external audiences') and *usually* make decisions taking them into significant consideration. See Pelc, 2014, p. 549; Lupu and Voeten, 2012, pp. 416–417.

7 The techniques used by the ECtHR to change legal considerations (reasons for differing from previous decisions) are the same as of a classical precedent court: *distinguishing* and *overruling*. In the former case, the reason for the deviation is that the legally relevant fact of the new case is not (fully) identical to the one of the previous case. In the latter case, the court (entitled to set precedent) expressly recognises the similarity but does not maintain the binding force of the previous decision (including *ratio decidendi*, legal argument serving as basis of the decision, reason for decision) because it considers it to be incorrect or (more often) no longer adequate owing to the changed circumstances (Duxbury, 2008, pp. 113–122).

national researcher had to determine the nature, style, typical or characteristic interpretation pattern, and reasoning of the constitutional court decisions interpreting fundamental rights, and the extent to which the same considerations reveal a different picture in ECtHR[8] or ECJ decisions on the legal problems of the given country.

Each chapter consists of the following main parts. A brief introduction delineates the constitutional court of the given country, including information on its position within the system of state institutions (role within the system of the separation of power, constitutional 'mission', and function), its structure, the basic rules of its operation, and its powers. All analyses the researcher considers to be important regarding the given country's constitutional court or essential for understanding the methods of the examination or the conclusions reached can be read here.

In the substantive decision analysis, the authors present the criteria for selecting the 30 constitutional court decisions. This is followed by the analysis thereof, including the fulfilment of an actual research goal, the determination of the characteristics of the constitutional reasoning, and the practice of interpreting fundamental rights of the given national constitutional court. The analysis discusses only the (majority) decision itself and not the separate opinions (dissenting and parallel or concurring opinions).[9,10] The reason for this methodological solution is that a separate

8 The analysis of ECtHR and ECJ and comparison of their practice with that of the certain national constitutional courts may be useful because they have similar functions. Although we do not accept the simplifying statement that the ECtHR or ECJ has the function of a constitutional court (and, thereby, that the Convention or the Charter has a constitutional role in the Council of Europe or the EU), we recognize that this analogy has explanatory power and relevant statements regarding the function of both the domestic law, and the supranational conventions may be made from that. Nevertheless, the view according to which ECtHR or ECJ is 'a kind of constitutional court' is becoming more influential in international law. The ECtHR is a 'transnational constitutional court' (Sweet, 2009, pp. 923–944. For the same regarding ECJ, see Brenninkmeijer, 1994, pp. 103–117).

9 In a *dissenting opinion*, one member of the given decision-making college disagrees with the majority as regards the operative part because they consider another decision on the merit to be correct. In a *concurring opinion*, the member of the decision-making college agrees with the operative part, i.e. the merit of the decision, but would have used different reasons to reach such conclusion. Here, 'dissenting opinion' refers to the *strict sense* of the concept defined by Kelemen. We differentiate it from the 'concurring opinions' in the above sense. As an overall category of the two concepts, we use the expression 'separate opinions' (contrary to Kelemen's 'dissenting opinion in abroad sense' by this comprehensive content). 'A "dissenting opinion" means "a separate opinion that diverges from the opinion of the majority of a group. […] [T]he expression "dissenting opinion" can be used in a broad or a strict sense. In the broad sense a dissenting opinion is any separate opinion of a member of a judicial panel. A dissenter, however, may disagree with the majority only in part. He may "concur" in the outcome of the case but indicate different reasons for reaching such conclusion. In this case her/his separate opinion is called, more technically, "concurring opinion". A dissenting opinion in the strict sense, on the other hand, disagrees with the majority also as regards the ruling. A dissenting judge would have decided the case differently. Conversely, a concurring judge would have simply written the judgment differently, without changing the outcome of the case. Thus, a concurring opinion generally offers an alternative reasoning to the decision, but it may also simply add further arguments (supplementary reasoning) or aim to explain better the opinion of the court (explanatory reasoning)'. Kelemen, 2018, p. 5.

10 The judges of the constitutional courts may present a dissenting or concurring opinion in all examined countries. According to the Polish Act of 30 November 2016 on the Organisation of the

opinion is not the opinion of the constitutional court as a college, since the opinion of the college is held by the adopted decision. No matter how interesting, exciting, or persuasive the reasoning of the separate opinions, they cannot be considered as the 'officially' accepted arguments or opinions of the given constitutional court since they do not imply the adopted viewpoint of the college. Consideration thereof could jeopardise the goals of research: the separate opinion of a judge of the constitutional court who accepts a strong but 'disruptive' point view far from that of the majority or prefers applying 'exotic' methods used rarely by the college could have distorted the entire sample and given results not reflecting the actual approach of the college.

Within the frames of the substantive decision analysis, the author of each chapter delineates, as the main results of the research, the following: a) the methods of interpretation the national constitutional court used in its decisions; b) the style of reasoning and decision-making of the given constitutional court; c) the characteristics, which can be of interest to the scientific community, of the decision-making of the constitutional court or the relation with the decisions of the international court.

Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, 'A judge of the adjudicating bench who disagrees with the majority of the bench voting in favour of a ruling may, before the delivery of the ruling, submit a dissenting opinion, providing a written statement of grounds for his/her dissent; the dissenting opinion shall be mentioned in the ruling. The dissenting opinion may also refer only to the statement of reasons for the ruling'. (Article 106 para. 3). The Czech Constitutional Court Act (182/1993 Sb.) has similar provisions: 'A Justice who disagrees with the decision of the Plenum or with its reasoning, has the right to have their dissenting opinion noted in the record of discussions and appended to the decision with his name stated' (14. §). 'A Panel member who disagrees with the Panel's decision in a matter, or with its reasoning, has the right to have his differing opinion noted in the record of discussions and appended to the decision with his name stated' (22. §). The Slovak Constitutional Court Act (Act No. 38/1993 on the Organizational Structure of the Constitutional Court of the Slovak Republic and on the Proceedings brought to the Court and on the Position of Its Judges) says, 'Any judge, who does not agree with a decision of the General Assembly or the Trial of the Constitutional Court is entitled to require that his distinct standpoint will be briefly mentioned in the records on the vote' (32. § 1). In Hungary, Act CLI of 2011 on the Constitutional Court regulates the rights of the constitutional judges. According to section 66 (2)–(3), 'If a Member of the Constitutional Court who opposed the decision in the course of the voting does not agree with the decision of the Constitutional Court, he or she shall have the right to attach his or her dissenting opinion – along with a written reasoning – to the decision'. Moreover, 'a Member of the Constitutional Court who agrees with the merits of the decision shall have the right to attach his or her reasons in the form of a concurring opinion if they differ from those of the majority'. In Slovenia, the Constitutional Court Act Article 40 para. (3) says that 'A judge who does not agree with a decision or with the reasoning of a decision may declare that he will write a separate opinion'. The Constitutional Act on the Constitutional Court of the Republic of Croatia also provides for the minority opinion: 'The judge of the Constitutional Court who voted against the majority may, within a reasonable time from the day the decision or ruling was written, give reasons for his/her opinion in writing, and publish it' (Article 27 para. 5). 'The judge of the Constitutional Court shall not abstain from voting, except in the case when he/she has participated in passing the law, some other regulation or decision which are the matter of the decision in hand' (Article 27 para. 6). Finally, in Serbia, not the Law on the Constitutional Court but the Rules of procedure regulates this issue: 'A judge shall have the right to a dissenting opinion, based on his or her arguments offered during the deliberations on the proposed decision, if the Court renders a decision or ruling, the ording or reasoning of which, in their entirety or in part, are opposed by the judge' (Article 60).

In this respect, the subject of interpretation is the constitution (applicable constitutional provisions, fundamental rights) and not statutory law, even if, for example, in a norm control case, the constitutional court *also* interprets the latter.[11] Thus, statutory law was irrelevant to the present research; the members of the research group ignored it. The only relevant aspect was how, and using what other sources (beyond the relevant international law), the given national constitutional courts interpreted the applied constitutional norms (constitutional rights) and what arguments they used to justify their decisions.

The (possible) interpretation of the international treaties carried out directly by the constitutional court is important only if such treaties had a constitutional rank in the given legal system (e.g. a norm control procedure exists in the course of which the constitutional court can assess the compliance of domestic legal norms with international legal provisions). Failing that, the referred international treaties could only be considered as sources used for the interpretation of the constitution. In the former case, the international treaty, such as the European Convention on Human Rights (hereinafter: ECHR) is the subject of interpretation that is carried out by the constitutional court applying a teleological method or systemic arguments. In the latter case, international treaties themselves are merely sources for the interpretation of another subject, namely, the constitution (fundamental rights). The latter analysis has been essential for research; the former, only in case the norms of international law have a constitutional rank in the given legal system.

Subsequently, each chapter contains an analysis of the 30 'international' court decisions selected by the author according to the criteria described above and on the basis of the already analysed constitutional court decisions that had references to these 'international' court decisions on the merits. In this context (as another main line of research), the authors present the following (similarly to the evaluation of the case law of the national constitutional court): 1) what methods of interpretation the ECtHR or the ECJ used in their decisions; 2) what style of reasoning and decision-making characterises these regional decision-making fora; 3) what characteristics, which can be of interest to the scientific community, the decision-making of the ECtHR or the ECJ has.

Both a statistical-quantitative analysis (delineating, in particular, the percentage of occurrences of the methods and arguments used by the constitutional court, ECJ, and ECtHR) and a qualitative-analytical analysis were necessary. In the frames of the

11 'Statutory and constitutional interpretation share commonalities. Both involve the construction of legally authoritative texts. […] Although statutory and constitutional interpretation resemble each other in many respects, typical instances of the two forms of interpretation differ significantly. The differences concern the authority of constitutional and statutory provisions, the political legitimacy of the bodies enacting them, the generality of the textual language, the age of the provisions, and the ease with which political bodies can override what the courts decide. Any analysis of the two forms of interpretation must attend to these differences' (Greenawalt, 2012, pp. 194–195).

former, we obtained answers on the frequency of the used arguments, whereas in the frames of the latter, on the role perception of the given decision-making forum and basic features of constitutional reasoning.

Finally, the authors close their chapters with a brief summary, including the most important conclusions, the comparison of the judicial practice, reasoning style, and applied key terms of the national constitutional court and the ECJ/ECtHR, as well as the explanations for the possible or probable reasons for the similarities and differences.

2. Legal and constitutional reasoning

2.1. Theoretical principles

2.1.1. Introduction

There is a difference between the concepts of legal interpretation and legal argumentation (legal reasoning). Legal interpretation is the exploration of the meaning and/or the reason of a legal norm in a specific case. Legal argumentation is a subsequent attempt to justify the application of the norm (in a given way and with a given meaning); essentially, it is a probabilistic reasoning to prove that the premises sought for the conclusion are correct, and *also* the correctness of the conclusion can be rationally deduced therefrom.[12] Interpretation 'is a particular form of practical argumentation in law, in which one argues for a particular understanding of authoritative texts or materials as a special kind of (justifying) reason for legal decisions'.[13] Interpretation is a "rational" activity,[14] whereas argumentation is a "rationalising"[15]

12 In this sense, argumentation has a practical purpose: to persuade the readers of the reasoning of the sentence that it is proper. 'Legal interpretation should be understood within the framework of an account of argumentation, in particular, of practical argumentation. In this framework, it turns out that interpretation can only be a part of legal argumentation, and can only be finally elucidated within a wider view of normative constitutional and political theory, which themselves belong within a broader view of practical argumentation' (MacCormick, 1993, p. 16).

13 MacCormick, 1995, pp. 467–480. For the issue of interpretation as a part of argumentation, see, additionally, Gebauer, 2000, p. 683; Scallen, 1995, p. 1731 and footnote 119 in p. 1734; Jakab, 2013, pp. 1215–1278.

14 'The interpretation of statute law is based on the assumption that the legislator is rational. Statute law is deemed to be a reflection of coherent and logical thought. […] A rational approach to the interpretation of statutes involves constructing and weighing arguments against one another' (Devenish, 1991, p. 225).

15 'Legal reasoning does not only involve purely rational arguments, but also the evaluation of conflicting interests and the making of value judgments which depend on prevailing legal and moral values and very often on common sense' (Devenish, ibid.).

one. In case of the latter, the focus is on the power of persuasion rather than on logic, and all arguments suitable for this persuasion are acceptable.[16]

According to Wróblewski, legal interpretation can be considered at three levels. In the broadest sense (*largissimo sensu*), it covers the understanding of all 'cultural objects' (i.e. things or phenomena created by humans). In the broad sense (*sensu largo*), this concept includes only the interpretation of expressions of the written or spoken language or any manifestation thereof. Finally, in the strict sense (*sensu stricto*), we use this concept for exploring the meaning of a text only if we have doubts about the 'correct' meaning thereof and we wish to explore this 'correct' but not immediately obvious meaning.[17] Below, we use the latter the strict sense of the concept of 'interpretation',[18] which can be divided into subcategories on the basis of the relation to the text and literal meaning thereof[19] (but

16 'While argumentation theory partly encompasses the interpretation theory, it is broader, because it covers all acceptable argumentation strategies outside statutory interpretation, such as references to the authority of court decisions, of doctrinal writers, of sources from foreign legal systems, or of non-legal persons or sources (e.g., religious or political ones). It also covers the argumentation as regards personal evaluations and normative standpoints […]. In all these cases, the underlying paradigmatic theory determines which kind of arguments and which argumentational strategies are considered to be acceptable within legal reasoning' (Hoecke and Ost, 1998, p. 198).

17 Cf. Wróblewski, 1969, p. 45.

18 Based on Wróblewski's theory, MacCormick understands this concept similarly. According to his illustrative example, a problem of interpretation (and an interpretation situation) regarding the 'No smoking' sign occurs when doubts arise regarding the meaning of the sign. 'If I see a >>No Smoking<< sign and put out my cigarette in response, I evince simple understanding of the sign, and compliance with it, without any element of doubt or resolution of doubt; I immediately apprehend what is required, and thus interpret the sign in this broad sense of >>interpretation<<. There might be a particular occasion when I see a >>No Smoking<< sign while wearing a formal dinner jacket (a >>smoking<< as they call it in French), and pause for a moment to ask myself whether the notice requires me to change into less formal attire, rather than to abstain from tobacco. To think over this doubtful point, and to resolve one's doubt by opting in a reasoned way for one rather than another view of what the text requires is to >>interpret<< it in this stricter sense of the term. By >>interpretation in the stricter sense<<, I thus mean entertaining some doubt about the meaning of proper application of some information, and forming a judgment to resolve the doubt by deciding upon some meaning which seems most reasonable in the context' (MacCormick, 1993, pp. 19–20).

19 Goldsworthy, in his reflection to the methodological concept of Jakab, differentiates 'clarifying interpretation' ('revealing or clarifying a law's pre-existing meaning') and 'creative interpretation' ('supplementing that meaning in order to resolve indeterminacies' or 'changing that meaning in order to correct or improve the law') (Goldsworthy, 2013, pp. 1279–1295). This classification is nothing but the well-known differentiation between the *secundum legem*, *praeter legem*, and *contra legem* interpretations, the differentiation among which is based on the realization or non-realization of law application's boundness to the text of the legal norm. On the basis of the German terminology, we can call the two latter interpretations (differentiating them from the simple interpretation /Auslegung/, i.e. from *secundum legem* interpretation) (judicial) law development *(/ richterliche/ Rechtsfortbildung*). While *praeter legem* law development means the filling of a legal gap (*gesetzesergänzende Lückenfüllung*), *contra legem* law development is the 'correction' of the act (*Gesetzeskorrektur*). See Krey, 1978, p. 364). In a further approach, the differentiation between formal and substantive reasons by Robert Summers leads to the same result. The 'interpretive formality' in Summers's approach ultimately means the adherence to the literal interpretation (cf. Summers,

we see it as an issue of *result* of the interpretation[20] and not consider as a purely *methodological* question; in the present study and the underlying research, we do not add or did not add any consequences to the fact that such subcategories can be distinguished).

Judges basically carry out legal argumentation instead of pure legal interpretation in practice. They do not try, 'with [a] fresh start', to provide the norm proposition with some correct meaning; they want to make a correct and justifiable decision (appropriate to their sense of justice and worldview) in light of a specific case with specific circumstances. They seek arguments of this already made (intuitive) decision that can also be accepted as appropriate by outsiders and, therefore, 'can be defended'.

Demonstration means a special reasoning that leads from certainly true premises to definitely correct conclusions,[21] which is atypical, and even impossible,

1992, p. 147), which has priority over the substantive reasons as long as its application would not lead to absurd results. Then, substantive reasons, that is, essentially, all reasons other than formal ones (literal language) (e.g. 'moral, economic, political, institutional or other social consideration[s]', cf. op. cit., p. 138) may supersede the literal meaning and then (but only then) the legal solutions provided by formal reasons may be overstepped. Therefore, in a different way, Summers reaches the same conclusion as the jurisprudence as a whole: in certain cases, the use of extensive or restrictive interpretation (and, thereby, the *praeter legem* or *contra legem* interpretation, even if he uses other terms)—the alteration to the text of the existing norm—is possible. According to the example of Summers, if a statute prescribes that 'No vehicles may be taken into the park', it does not prohibit to bring a World War II jeep into the park and place it on a pedestal as a war memorial (op. cit., p. 147).

20 Traditionally, we can classify and determine the types of interpretation according to three aspects: 1) Classification according to the *subjects* differentiate the interpretations based on the entity *that* performs it. 2) By classification according to the *methods*, we differentiate the interpretations on the basis of the *techniques* or the *sources* used. Most of the present chapter discusses this issue. 3) Finally, classification according to the *result* is based on what meaning compared with the grammatical one (i.e. to the literal meaning of the text of the norm) we will have when we use other methods. This means the *quasi checking of the literal meaning*, which can result either that the grammatical meaning can be used on its own or that it has to be corrected. There can be three results (cf. Walton, Macagno, Sartor, 2021, p. 35). 3/A) It is possible that the literal meaning is correct, that is, it can be used on its own since the use of other methods or sources would lead to the same result as the grammatical interpretation (this is the so-called declarative interpretation or *interpretatio declarativa*). 3/B) It is also possible that, by using other methods, we conclude that the grammatical meaning is too strict: the legal regulation does not apply to all cases it should have. In that case, the literal meaning has to be expanded, i.e. the subject matter of the norm has to be extended to the cases not covered by the grammatical meaning. This is called extensive interpretation (*interpretatio extensiva*). 3/C) Finally, using methods other than grammatical interpretation, we can conclude that the grammatical meaning is too broad: the literal meaning also applies to cases to which it should not (because it would be contrary to the intention of the legislator, the purpose of the statute, etc.). The grammatical meaning has to be restricted, i.e. certain exceptions have to be defined under the subject matter of the norm to which the given norm cannot apply, despite the clarity of the literal meaning. This is the so-called restrictive interpretation (*interpretatio restrictiva*).

21 Demonstration is 'developed from statements or propositions of which we can ask whether they are true or false' (Perelman, 1965, p. 4).

according to some, in the field of law.[22] Demonstration is, therefore, a logical operation by which one can come to a true conclusion from true premises. Meanwhile, argumentation is a rhetorical practice during which one, on the basis of plausible but not assuredly true premises, can come to a probable conclusion, aimed at compelling the audience to accept the speaker's statement.[23] Thus, 'in argumentation, contrary to what happens in demonstration, we do not justify anything'; the theory of argumentation does no more than to study 'the discursive techniques which make it possible to evoke or further people's assent to the theses presented for their acceptance'.[24] Similarly, '[t]he aim of argumentation is not to deduce consequences from given premises; it is rather to elicit or increase the adherence of the members of an audience to theses that are presented for their consent'.[25]

The concept of *legal reasoning*[26] is identical to that of legal argumentation. Others say that it includes argumentation, interpretation, and demonstration. The present research cannot decide this legal theoretical debate; however, we use the concepts of legal reasoning and legal argumentation alternatively for similar relations and accept that the *par excellence* interpretation is also a part of it. Hence, when legal consequences are mentioned, the use of all concepts (i.e. argumentation, reasoning, interpretation) may be considered correct in the sense that all of them try to say *something* about the actual meaning of fundamental rights. As the subject of the present research is specifically the constitution and not simply the law, we often use the concept of constitutional interpretation instead of legal interpretation and constitutional reasoning (or argumentation) instead of legal reasoning (or argumentation).

22 Demonstration belongs to mathematics and the natural sciences where, within a given set of axioms, conclusions can be reached by the rules of deductive reasoning, which means that the truth of premises cannot be questioned. Therefore, if the logical deduction is formally correct, then the correctness of the conclusion's content will also be doubtless. However, there are no such axioms in law (or in any other *dialectical situation*). Thus, sooner or later, we will, in the regression chain, get to a point from which the correctness of the conclusion cannot rationally be deduced (Rescher, 1998, p. 317).

23 As premises in law are principles suitable to justify the decisions, and there are always *several* of them, it is unavoidable to *choose* from these principles, 'because a plurality of such [acceptable general] principles is always possible, it cannot be demonstrated that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice' (Hart, 1997, p. 205).

24 Perelman, 1963, p. 155, 157.

25 Perelman, 1982, p. 9.

26 Reasoning is an activity when a person acts on the basis of *reasons*. Reasons have two types: one means the 'inner', mental-spiritual *motives* of the activity; the other refers to reasons that serve as the *justification* of a decision, i.e. as an attempt to *persuade* other persons that the decision made is correct. The first type is irrelevant to argumentation theory. Thus, by the concept of reasons, we understand only the so-called justificatory reasons. For differences between motivating reasons and justificatory reasons, see Dyevre and Jakab, 2013, p. 983).

2.1.2. Legal interpretation as the element of process of application of law

Application of law is decision-making by the institutions of the state (e.g. courts, public administration bodies) enforcing the positive, written legal norms[27] stated in legal regulations. The *application of law* has four main parts (phases, elements): 1) *determination of the facts of the case* [including the selection of the relevant (i.e. to be proved) facts and the defining and proving thereof]; 2) *defining the legal norms* (including the finding of applicable legal norms and the *interpretation* thereof); 3) *decision-making* [first, deciding, on the basis of the found and interpreted legal norms, whether the determined and proved facts fit into the hypothesis of the legal norm, i.e. whether the norm is applicable in the certain case; second, making the specific decision on the basis thereof (e.g. conviction or acquittal of the accused, dismissal of the claimant's claims, or ordering the defendant to fulfil)]; 4) *justification of the decision*, i.e. the *legal reasoning* itself: proving subsequently that the rendered decision is correct, or at least defensible (it covers, in particular, the wording of the judgment's reasoning, including either interpretation conducted with a 'fresh start' or presentation of the legal arguments making the decision defensible).

27 Throughout most of history, such norms have not been made. Henry Sumner Maine, one of the pioneers of comparative law science, pointed out in *Ancient Law* (1861), which is also known and accepted as a foundation of legal anthropology, that most legal systems developed in history are of a 'stationary society'; and even 'progressive societies' established 'legislation' only in the last part of their development. The development of 'progressive societies' has two phases following each other in time and being built on each other: spontaneous evolution and conscious developing. Spontaneous evolution is the formation of the judicial judgement of which religion was the basis. In the second stage, customary law was formed from the increasing volumes of judicial decisions in the course of the aristocracy's monopoly of the knowledge of law (Maine, 1861, p. 15). However, the law often allowed arbitrariness; hence, the citizens enforced, by strengthening popular movements, the disclosure of legal regulations. This is how, in the third stage, the first 'ancient codes', collections of customary law that included the more important legal provisions in writing (e.g. the 'Twelve Tables of Rome'), came into existence. In the second major phase, in the period of progressive societies, law does not develop on its own, requiring creative human activity. Conscious developing has three instruments (created in this chronological order): legal fictions, equity, and legislation. Contrary to spontaneous evolution, these tools can be found only in progressive societies. These societies have the feature of their relations being always more developed than the law of the given era. Therefore, social development always comes before the development of law. To keep up with the social changes and to meet the constantly changing demands and social needs, law has to be renewed regularly. The adjustment of legal relations to social needs was achieved by means of *legal fictions*. 'Now employ the expression "Legal Fiction" to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified' (op. cit., p. 26). By means of legal fiction, the desired alteration may be reached without formal change of law—the text is not modified (thereby, it meets the needs of ones adhering to traditions) but the unchanged text is *interpreted* in light of the changed social circumstances. It is renewed regarding its content. In contrast, equity modifies openly the former law, although by means of judicial decisions ('I call Equity, meaning by that word anybody of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles', op. cit., p. 28.). Legal codes not only openly undertake the altering of the law but also leave it, in a general and abstract manner, to an entity separated from the law appliers (op. cit., pp. 28–30).

The above parts or elements of the application of law are not (or not necessarily) processes or phases following each other in time but logical steps forming an integral part thereof. These elements can coincide or be carried out in parallel, or can also be carried out several times in real-world procedures.[28] Depending on our approach to these actions of application of law, different models can be elaborated regarding the actual practice thereof.

The classical model of application of law is (1) the so-called *subsumption syllogism*: *subsuming the fact of life under the hypothesis of a legal norm*. According to this model, we find out what happened (we take evidence), search for the legal provision applying to the given fact, and, finally, determine whether the particular fact of life is identical to the abstract fact in the hypothesis of the legal norm. If it is, we apply the norm; if it is not, we do not apply it. Overall, according to this model, we compare the fact of life with the statutory fact and, in case they are identical, we impose the sanction provided for the violation of the statutory fact against person realising the fact of life (violating the legal norm).[29] It is a syllogistic conclusion, a formal action, where we have two premises: the major one is a norm proposition (text of a norm) and the minor one is a fact of life (events that occurred). The conclusion of these premises is the sentence of the judge.[30] According to the classical model of application of law, the major and minor premises are not only the starting points of the narrower process of application of law (decision-making process) but also the result of the legal interpretation and the process for establishing facts obtained through the chain of other syllogistic conclusions.

This model of application of law does not work in real-world procedures,[31] since it would be necessary to establish (prove) all facts of the case and to seek the applicable

28 See Szilágyi, 2003, p. 307.

29 A decision includes only solutions for disputed issues of proof, namely, for matters of fact. When a given legal case is decided by determining whether a fact of life, which unequivocally falls within the scope of an unambiguous legal norm, happened or not, that is clear norm logic syllogism or *subsumption syllogism* (cf. Wróblewski, 1974, pp. 43–44). In these cases, there is no legal interpretation *sensu stricto*. The norm logic syllogism does not belong to the classical logic since it is not the use of formal rules but the assessment of premises (cf. Szabó, 2001, p. 216). Because the constitutional courts mostly do not decide individual *cases* but, even upon the request of the concrete parties, carry out the abstract interpretation of constitutional norms, such subsumption syllogism cannot take place in the course of constitutional reasoning.

30 This procedure can lead to actual conclusions if the underlying premises are true. The most famous example is if it is true that 'all men are mortal' and it is also true that 'Socrates is a man', then it is necessarily true that 'Socrates is mortal'. It requires phenomena to be assigned to the proper class of things. The syllogistical conclusion will make sense as logical operation only in that case. However, it is not a requirement to assign these categories to anything occurring in reality. The purely formal conclusion can be illustrated with this example: 'Suppose we say: All gostaks are doshes, all doshes are galloons: […] we do not know what we are talking about, but […] we can by the strictes of logic draw the inference that all gostaks are galloons' (Cook, 1993, p. 244).

31 This can also be seen. It may be one reason for a certain degree of distrust that legal entities, in general, feel against judicial decisions. However, other reasons may apply. The causes of dissatisfaction with the administration of justice, as for the causes of dissatisfaction with any system of law, are the following: '(1) The necessarily mechanical operation of rules, and hence of laws; (2) the inevitable

legal norm only afterwards. However, to make the judicial decision-making operational in practice, only facts *relevant* to the application of the norm need to be established and proven, i.e. a norm is needed in advance to select from the infinity of facts.[32] Establishing facts cannot be otherwise than that the judge is *a priori* aware of what norm (or at least what range of norms) to apply and endeavours to determine and prove the relevant facts in the light of this. For that, however, the judge needs to know which norm's application is relevant—which is not possible without knowing at least the most elementary facts.[33]

Furthermore, it could be another mistake to assume that not the facts but the norms are given (we have norms for all facts and if we find the relevant facts, the norm 'itself will also come', and we only have to use it depending on the concrete facts). Principles behind the norms lead to objective results; hence, a single right answer could exist in conflicts between human rights or in other value-based conflicts, as a moral category.[34] Given that human rights are also morally based, moral answers regarding human rights become legal answers; it is not clear, as in any other case, which to apply. The person (personality) of the one who evaluates these answers basically defines which they will choose and, on the basis thereof, what scope of facts they will take into account (consequently, what the outcome of the case will be).[35] Introducing the dichotomy of easy and hard cases will not take us much further. Since not only the law must be interpreted but also the facts (they are not 'ready for use' for the judge), then all cases are actually 'hard cases' or may become that, any time, through raising new questions or introducing new aspects.[36] Escaping this *circulus vitiosus* is possible by applying two models. The common feature of these models is that they consider the classical subsumption syllogism to be naïve and mechanical and to disregard the actual nature of the judicial application of law.

According to one of these models, (2) *establishing facts and searching for legal provision take place as the elements of a process that are interlocking, as cogwheels, and inspiring each other*, i.e. neither establishing facts nor seeking the meaning of the legal norm; the exploration of its applicability in the particular case is separated

difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent, and (4) popular impatience of restraint' (Pound, 1906, p. 3).

32 'In their interpretive activities, judges participate – to a greater or lesser extent – in the process of creating the law. [F]irst, however, there must be a law to interpret' (Marmor, 1990, p. 62).

33 'The judge is interested in establishing facts only in so far as they may have legal consequences in the case before him; to do so they must be *qualified* […]' (Perelman, 1966, p. 376).

34 Dworkin, 1996, pp. 87–139.

35 The approach of Alexy seems to be more persuasive; the judge does not subsume but balances between the values behind legal norms and they do not make a decision on the basis of either but define the scope so that the principles could prevail with the least restriction (cf. Schlink, 2001, p. x]. There is an assumption of a necessarily individual evaluation and, therefore, subjectivism in legal practice (cf. Alexy, 2003, pp. 433–449).

36 Bengoetxea, 1993, p. 194.

mechanically (or in time) but the processes co-occur and building on one another.[37] Pursuant to the other recent model, (3) *application of law is not (only) logical but (also) evaluating and intuitive activity*, the process is reversed: the conclusion (the sentence considered to be correct) comes first and, for this, the judge seeks the premises from which they can get to the sentence found intuitively to be correct basing on their life experience, legal and other (sociological, psychological) knowledge, and morality or general habit. Thus, in this model, the judge sets up a hypothesis and from that moment, they insist on it relying, basically, on their sense of law and intuition.[38]

Although the first model is simpler than the second and third ones, by accepting it, we would sacrifice the reality on the altar of the easy (but false) modelability. Judges are also humans who are influenced by their own prior experience, values, preferences, education, bias,[39] and certain professional and other customs that help make decisions and justify the rendered judgement. Thus, the judges' behaviour in practice can be described by models (2) and (3) (or a combination thereof). As a result, the legal (constitutional) reasoning will contain not only impartial, objective legal conclusions but also efforts for subsequent justifications that underpin the judge's conviction adopted intuitively or determination that is previously based on their incomplete factual knowledge (supporting either of the views of the necessarily biased and concerned parties).[40] These are, accordingly, probabilistic arguments that justify that the decision is not arbitrary but do not support the fact that it is the only possible right decision. Such reasoning will contain unbiased, impartial interpretations blended, in a tangled manner, with the subsequent efforts for justification. Since it is not possible

37 The adjudicator concludes to the applicable norms from the facts, and then back from those to the facts to be proved and again to the applicable norms from the facts proved in that way until they achieve their persuasion formed in the final judgement. Hence, the blink of the judge wanders continuously back and forth between the facts and norms (Engisch, 1943, p. 15).

38 'Judicial reasoning […] constitutes a model of practical reasoning, aimed at justifying a decision, a choice or a claim, and establishing that they are neither arbitrary nor unjust: the judicial ruling is justified if the conclusion following its reasons conforms to the law' (Perelman, 1966, p. 373). The authors of the movement (and not school) of Legal Realism also emphasize the judges' possibilities to choose, which cannot be eliminated, where the decision is only apparently based on legal arguments. The judge chooses from many legal arguments (and achieves a version of judgement) considering which conclusion is compatible with their values, i.e. they get back from the desirable result to the selection of categories, which can serve as base for their legal conclusion (Radin, 1993, pp. 195–198). The fabled bon mot of Oliver Wendell Holmes may be its summary: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law' (Holmes, 1897, pp. 461).

39 Judges (and jury members) are characterized by unconscious biases, hidden traits, and predispositions that influence even establishing facts, e.g. on that whether they believe a witness or not (Frank, 1973, p. 152). This is affected by several stimuli, including the personality of the given person, which 'is a product of numerous factors, including his parents, his schooling, his teachers and companions, the persons he has met, the woman he married (or did not marry), his children, the books and articles he has read' (ibid.). Thus, 'the decision will depend on the peculiar personality of the particular trial judge who happens to be sitting' (Frank, op. cit., p. 154). In sum, '[w]e must eliminate the myth or legend that judges are more – or less – than human' (Frank, op. cit., p. 147).

40 MacCormick, 1993, p. 20.

to untangle these interpretations (this would require getting into the judge's mind), the present research studies not only the methods of pure legal interpretation but also all instruments of legal (constitutional) reasoning. We determine which, in the practice of the concerned constitutional courts and regional decision-making fora, is more characteristic and which is less from the methods or sources mentioned by the court in the reasoning of its decision to make and/or justify it.

2.2. Development of jurisprudential thinking on methods of interpretation

2.2.1. Formation and impact of Savigny's interpretation canon

The theory of interpretation as scientific discipline is, basically, the product of German pandectism. In the Middle Ages and in Modern Times, several handbooks and maxim collections of topics were published.[41] These works did not have a system (unless we consider the generally accepted opinion according to which we, during application of legal norms, have to insist on literal meaning [*ius strictum*] or, for practical reasons [e.g. its use would be unfair or maybe expressly absurd], we deviate from it, a 'system'). This method was called *duplex interpretatio* and, in the strict sense, it did not mean a *methodological* categorisation but a classification according to the *results* of interpretation.[42] The impact of the Roman-law tradition re-discovered from the eleventh century and the respect for the legal categories of the Middle and Early Modern Ages were so strong that prestigious legal academics used the *duplex interpretatio* as a starting point even long after Savigny's well-known classification. For example, Bernhard Windscheid differentiated two interpretation methods: the grammatical (*grammatische Auslegung*) and the logical (*logische Auslegung*).[43]

Another pandectist, Ferdinand Regelsberger, expressed a similar opinion.[44] He also thought that, basically, two types of interpretation existed: the grammatical and

41 See more important ones in England: Holdsworth, 1938, pp. 188–191.

42 All these may be traced back to the axiological and ontological questioning whether only righteous law can be law. It is rooted in Roman law where this problem manifested in the opposition of *ius strictum* and *ius aequum* (for the relations between the two conceptions and their consequences regarding the applicability of the positive law, see Tóth, 2016, pp. 119–120). Its general legal theoretical consequences materialized in the contradiction between natural law and positive law and later in the appearance of human rights and constitutional rights above statutory law.

43 The interpretation called 'logical' helps apply a given norm even if it has no reasonable meaning or, on the contrary, has more reasonable meanings and one must be chosen from them (Windscheid, 1873, p. 51) or if the grammatically correct (understandable) expression is substantively incorrect (Windscheid, op. cit., p. 53). 'Logical interpretation' (which does not have too much to do with formal logic) has two princpal means: the examination of historical circumstances of creating the given statute and the determination and application of the purpose the legislator wished to achieve with the given statute (Windscheid, op. cit., p. 52). 'Logical' interpretation is a synonym of 'non-grammatical' interpretation, which has the techniques of 'historical' and 'teleological' as its main methods.

44 Regarding the true nature of analogy, there was a substantial conceptual difference between them. Windscheid considered it as an independent *operation* of interpretation (and not as a method) but Regelsberger did not (cf. Windscheid, op. cit., pp. 54–58; Regelsberger, 1893, pp. 155–161).

the logical. While the former one (which has to be the starting point of all interpretation) explores the meaning of the words used by law on the basis of ordinary or special legal language (if any),[45] the latter one controls this meaning and extends or tightens it if necessary.[46] In the course of that are the following considerations: 1) the comparison between the meaning and the law as a whole, the law on similar subject ('related' law), all legal norms regarding a legal institute, or the moral and social tasks of the law (*die sittliche und soziale Aufgabe des Rechts*); 2) the purpose of law (*der Zweck des Gesetzes*, *ratio legis*); 3) the 'higher principles' (*höhere Prinzips*, *ratio juris*); 4) the historical basis or *geschichtliche Grundlage* (i.e. the contemporary social reason for the legislation) of the given legal regulation; and 5) the (subjective) will of the legislator (*der Willen des Gesetzgebers*).[47]

Duplex interpretatio, the method of Donellus, prevailed not only in the German- but also in the English-speaking world.[48] This is proved by the fact that even the summarising work (not affected by the theories of Savigny, Jhering, Heck, or their followers) of the Englishman Thomas Erskine Holland[49] published long after the turn of the century knew only two types of methods in the course of *doctrinal interpretation* regarding both private and public law: grammatical and logical interpretation;[50] and, similarly to the German pandectists and legal philosophers of the Modern Ages, he defined the latter as the reference of literal meaning.[51]

The common feature of all these theories was that they had no coherent hermeneutical methodology but, in fact, enumerated, similarly to the classical period of the Roman law, the possible methods of interpretation of legal texts in an incidental and arbitrary manner. They also reduced the interpretation to the analysis of whether the literal meaning of the written norm is identical to any meaning that moved away from the text (to a meaning extractable from the text or even independent from that,

45 Regelsberger, op. cit., pp. 145–146.

46 *Ausdehnende Auslegung* (*interpretatio extensiva*) and *einschränkende Auslegung* (*interpretatio restrictiva*) (cf. Regelsberger, op. cit., pp. 152–154).

47 Regelsberger, op. cit., pp. 147–151. We can see from the enumeration that Regelsberger also considered 'logical' interpretation (*logische Auslegung*) covers all procedures that did not expressly aim to explore the grammatical meaning—systematic-contextual, teleological, historical, and substantive interpretation according to our conception today.

48 From the early Modern Age, to counteract the growing legislative work of the parliament, the English courts, which applied the norms of common law existing as case law, attempted to interpret the statutes literally. This was also aimed to push the statute law back—this was the so-called *literal rule*. Adherence to the literal meaning of the text of statutes was broken only by the *Golden Rule* (according to which, this meaning may not be used if the application of the statute produces an inconsistency or absurdity) crystallized at the end of the nineteenth century. The mischief rule formulated in Heydon's case (1584) meant the effectiveness of reasonableness (which corresponds with the 'logical' side of *duplex interpretatio*). For narratives of judicial application of law in English legal history, see Goodrich, 1986, pp. 54–55.

49 Holland, 1916.

50 Cf. Holland, op. cit., pp. 425 and 432.

51 He also differentiated, depending on the possible result of this comparison, between extensive and restrictive interpretation (ibid.).

or 'external' meaning). Until the middle of the nineteenth century, and for a while after Savigny, there was no outstanding theory that would endeavour to explore regularly and delineate the different methods of legal interpretation used in legal practice. Friedrich Carl von Savigny was the first who attempted to define, distinguish, and systematise the four main methods of interpretation: grammatical, logical, systematic, and historical.[52] Grammatical interpretation (*interpretatio grammatica*,[53] *das grammatische Element der Auslegung*) explores the general meaning of the words, expressions, sentences, texts, and conjunctions attributed to the given word, expression, etc. by an ordinary person who knows the given language well. Logical interpretation (*interpretatio logica*, *das logische Element [der Auslegung]*) uses the formal rules and logical principles of thinking to determine what the text of a legal norm means (or does not mean). By systematic interpretation[54] (*interpretatio systematica*, *das systematische Element [der Auslegung]*), conclusion regarding the meaning of a legal provision can be drawn from its position in the system of legal norms, and the type and function of the surrounding legal norms. In the course of historical interpretation (*interpretatio historica*, *das historische Element [der Auslegung]*), we determine the actual meaning of the legal norm with the help of the (probable) intention of the contemporary legislator creating the legal norm.[55]

Later, a fifth method, the so-called teleological interpretation, joined the canons of Savigny. The basis of its use in law was the idea of Jhering: law is not a self-contained system to be examined for its own sake[56] but contains norms that have tasks to be carried out and functions, i.e. (social) *purposes*, which have to be enforced also by judges.[57] This 'goal idea' was further developed by Philipp Heck, who assigned the judges to apply the results of the (also social) balance of interest of the legislator.[58]

52 Savigny, 1840, pp. 213–214.

53 Savigny did not use the Latin names in the course of delineation of the methods (elements) of interpretation.

54 Savigny did not discuss the interpretation methods in the order considered today as 'conventional' (and also followed in this research). He studied the historical 'element' of interpretation as the third method and defined systematic interpretation only after that as the fourth one.

55 These methods do not compete with but complement each other, i.e. in a certain case, we do not apply *either the one or the other* (choosing the best method to apply) but *all of them* have to be applied because they can authentically determine the meaning of the text only together (op. cit., p. 125). Furthermore, the meaning of the text cannot always be determined exactly; we only have to try to get the closest as possible to the true meaning of the text in the rich range of its meanings (op. cit., p. 216).

56 In his early works, Jhering says exactly the opposite thereof. This statement does not characterise the entire work of Jhering but only his works following his dogmatic-centric, concept analyser period.

57 '… das Recht kennt nur eine Quelle: den Zweck' (Jhering, 1877, p. XIII). The content of the statute can be determined only through its purpose, i.e. the 'teleological further development' (*teleologische Entwicklung*) of the (merely written) law (cf. Jhering, op. cit., p. 426).

58 The judge has the task to seek for the will of the legislator ('*Forschung nach dem Willen des Gesetzgebers'*)—exploring what social needs the legislator took into consideration when creating the legal norm. However, this is not the search for the psychological will (*subjective* intention) of the 'real' legislator but for the causal factors creating the law, namely, determining what was (could be) the original (*objective*) purpose of the statute in light of the historical circumstances of the creation thereof (cf. Heck, 1914, p. 64).

The gradual disintegration and slow expansion of the traditional canon began in the second part of the twentieth century, primarily in the German-speaking world. Former methods were renamed; new interpretation techniques and sources of reasoning of application of law were discovered. In his five-volume, large methodological summarising work,[59] Fikentscher took the four plus one division as a basis and added one method, the so-called evaluative interpretation, using the prior results of jurisprudence.[60] Bydlinski recognised reasoning funds that he did not call as 'methods of interpretation' but by the thematising thereof, he anticipated the ideas of the Bielefelder Kreis.[61]

59 Fikentscher, 1975.

60 Fikentscher deviated from the traditional canon regarding two aspects: he did not consider the logical and systematic interpretation to be two independent methods but a uniform, coherent interpretation technique; he recognised evaluative interpretation but only as a tool used to control the practical accuracy of the meaning determined on the basis of other methods. Hence, in his view, the following were the methods of 'the Canon': interpretation on the basis of the text, i.e. literal interpretation (*Auslegung nach dem Wortlaut*) as the necessary starting point of all interpretation of legal norms; logical and systematic interpretation (*Auslegung nach Logik und System*), in which logic, according to him, did not principally mean the application of the rules of formal logic but, similarly to the perception of the 'system', the consideration of the legal context of the text of the norm; historical interpretation (*historische Auslegung*) as the use of legislative history related to the concrete norm to explore the intended meaning of the text of the norm; 'interpretation' based on the 'value of the result' (*der Wert des Ergebnisses*), which, contrary to others, is not a method 'in its own right' but merely a technique to control the meaning determined by other methods; and teleological interpretation or 'interpretation according to the purpose' (*teleologische Auslegung*, *Auslegung nach dem Zweck*) (cf. Fikentscher, 1975, pp. 668–681).

61 Among interpretation techniques expressly called 'interpretation methods', Bydlinski differentiated the literal (grammatical), systematic-logical, historical (based on the legislator's intention), and objective-teleological. Bydlinski used *wörtliche Auslegung* (*grammatische Auslegung*), *systematische-logische Auslegung*, *historische Auslegung* (*Auslegung nach der Absicht des Gesetzgebers*), *objektiv-teleologische Auslegung* (Bydlinski, 1982, pp. 437–453) and divided the last type into five further subtypes. Hence, according to him, the following belong here: teleological-systematic interpretation as the method for determining the objective meaning (independent from the legislator) of the statute (*ratio legis*); interpretation of the text of legal rules consistent with the constitution; *argumentum ad absurdum*; interpretation according to the 'nature of the thing' (*Natur der Sache*), which may provide assistance on how to interpret certain obvious, self-evident life relations, even with content that opposes the meaning determined by some other methods, or may serve as a regarding reference; finally, comparative law arguments in the course of which concrete foreign legal rules or legal solutions generally applied in other (mainly similar or the most advanced) legal systems can be used for interpretation of domestic law (cf. op. cit., pp. 453–463). Bydlinski also analysed techniques that he did not call 'legal interpretation methods' but which, regarding their functions, are close to them. Hence, he recognised also the principle *lex specialis derogat legi generali* being intended to resolve the (apparent) contradictions of positive law. Regarding 'supplementary legal development' among the procedures being able to fill 'statutory gaps', he specified both types of analogical conclusion (statutory and legal analogy) and the inverse thereof, the technique of 'teleological reduction' or 'restriction', the principles *a contrario* and *a fortiori* (*Umkehrschluß* and *Größenschluss*) together with the involvement of universal ('natural') legal principles into interpretation. He also mentioned law application based on the case law or judicial practice and 'legal thinking'.

2.2.2. Methodology of the Bielefelder Kreis

By the 1980s, it became apparent that the canon of Savigny was outdated. The variable interpretation techniques and reasoning tools of the modern application of law cannot be inserted therein. A group of distinguished law scholars, the so-called Bielefelder Kreis,[62] was formed to examine the actual practice of modern courts. It decided to conduct, under the guidance and direction of Robert Summers, a remarkably detailed international research covering all substantial segments of administration of justice that enables practitioners to determine, inter alia, what interpretation methods and reasoning techniques are applied by the courts in those countries belonging to the European legal culture.[63] A total of eleven arguments were differentiated and classified in four main categories:[64] *linguistic arguments*, *systemic arguments*, *teleological/evaluative arguments*, and the method called *argument from intention* that belongs to none of the previous three groups, i.e. this is a *trans-categorial* argument over the three other categories.

Two specific methods belong to linguistic arguments forming the first category: the argument from ordinary meaning and that argument from technical meaning. When applying the first one, we try to explore the 'obvious meaning' that would be attributed, on the basis of the everyday meaning of ordinary words, to the norm in question by a person speaking the given language at an ordinary level. If the everyday meaning would allow interpretations leading to several results, then the most generally accepted—the most obvious—must be applied. If it is not possible to decide it, the given provision must be understood with the meaning that, as a result of the use of other methods, is probably considered to be the most appropriate to the wider

62 The prelude to the group's formation was the IVR World Congress in Philosophy of Law and Social Philosophy in Helsinki in 1983 where some participants proposed to map the condition of the contemporary judicial law application. In 1986, following three years of *ad hoc* research, these legal scholars decided to carry out a systematic research regarding certain aspects of adjudicating by examining the operating features of the justice systems in their own country (cf. MacCormick, 1991, pp. XI–XIII). Finally, the legal scholars of nine countries (Argentina, the US, the UK, Germany, France, Italy, Sweden, Finland, and Poland) performed the empirical study of their countries in this respect (until 1990), including the study of the arguments applied during interpretation of legal norms (op. cit., pp. 1–2). Although, in the course of the latter, they researched the methods of 'statutory interpretation' but by 'statutes' they also meant all normative actions that were created by any public body entitled to make abstract norms mandatory for citizens and applicable during judicial law application (op. cit., pp. 10–11, 25). Constitutional interpretation (where a constitutional court was at all) was not included since it was not considered to be an adjudicating activity in terms of the subject of the research. The elaborated methodological classification could serve as guidance for researchers of constitutional interpretation methods. The concept 'interpretation', as the subject of the result, was understood in *sensu stricto*, and meant the determination of the actual meaning of ambiguous legal norms (op. cit., pp. 12–13).

63 'European legal culture' refers to jurisdictions with European origin, based on European grounds, i.e. with the terminology of Zweigert and Kötz, the members of the 'Romanistic', 'Germanic', 'Anglo-American', and 'Nordic' legal families (cf. Zweigert, 1998, pp. 74–285) and, in the classification of David, of the 'Romano-Germanic' and 'common law' legal families (cf. David, 1985, pp. 22–25).

64 Cf. op. cit., pp. 21 and 512–515.

context.[65] On the contrary, the latter argument uses a special technical meaning instead of the ordinary one; in this case, we attribute a meaning to a given word, to which meaning would be attributed by a person of a particular (legal or other) profession, as *terminus technicus*, a special professional meaning.[66]

Six methods of interpretation (3–8) were determined in the range of the 'systemic arguments'[67] belonging to the second category: the argument from contextual harmonisation, the argument 'from precedent', the argument from analogy, the logical-conceptual argument, the argument from general principles of law, and the argument 'from history'. In arguments from contextual harmonisation, the meaning of a given legal provision is explored on the basis of its position in the legal[68] system. [69] The argument 'from precedent' does not mean merely the consideration of precedents in the course of interpretation, which is typical for the *common law* system, but, in general, the statutory interpretation achieved by the reasonings of previous court decisions.[70] In arguments from analogy (also called '*arguments based on statutory analogies*'[71] but, actually, meant to be a systematic-contextual based extensive argumentation as the *result* of interpretation),[72] we interpret a(n existing) legal norm in the light of a relevant legal norm regulating an other but similar subject matter so that the meaning of the latter would also cover the case regulated by the former norm.[73] In logical-conceptual argumentation, we apply the meaning of a given legal concept generally accepted and elaborated by the jurisprudence in the given system in all cases when that legal concept appears in a legal regulation.[74] In arguments from general principles of law (according to the Bielefelder Kreis), to explore the

65 Cf. op. cit., pp. 464 and 512–513.

66 Cf. op. cit., pp. 464 and 513.

67 Arguments other than linguistic (also the systematic ones) have three functions: they can confirm the everyday or technical (i.e. literal) meaning of the words used by the legal rule; underpin the accuracy of the application of another meaning against this grammatical meaning (i.e. can 'deteriorate' literal meaning); clarify the actual meaning of the words, expressions, sentences with obscure linguistic-grammatical meaning (cf. op. cit., p. 465).

68 As we can see, it is identical to the systematic interpretation in Savigny's classification.

69 Cf. op. cit., pp. 464–465, 466–467, 513.

70 Often, these do not use a concrete previous relevant judicial decision to explore the meaning of the legal norm with obscure text but a *set* of such decisions; i.e. they refer not (only) to 'precedents' in the strictest sense but to the entire case law regarding the legal provision in question. The essence of the argument in both is the same: the courts interpret the given norm as other courts did when they decided previous cases with similar facts, i.e. the adjudicating bodies making decisions in latter similar cases use, as a sample, previous judicial decisions to decide the given legal interpretation problem (cf. op. cit., pp. 467, 487–490, 513).

71 Cf. op. cit., pp. 465.

72 Accordingly, this argument covers all others because any other argument can be used to determine the 'significant' similarity of the meaning of two statutory provisions.

73 Cf. op. cit., pp. 467, 513–514.

74 Cf. op. cit., pp. 465, 467, 514. Through the operation of interpretation, we strive towards conceptual coherence in the legal system. We do not use formal logical (or quasi-logical) arguments to explore the implied but not explicit meaning of the text (as we would do using *interpretatio logica* defined by Savigny).

'correct' meaning of a certain provision, we use either substantive moral principles that serve as (partial) basis for previous court decisions and enable 'correct', interpretative decisions or general principles determining the entire legal system (and usually recognised also at the constitutional level); or widely used rules of a branch of law characterised as having general clauses.[75] Finally, in 'historical' (in fact, customary law) interpretation, the meaning of the legal norm in question can be determined on the following grounds: regarding the circumstances of the process of legislation, what purpose and function the created legal regulation has[76] and what meaning or what understanding (solidified and accepted by lawyers) has been subsequently attached to this legal provision during the long years of its use (including the meaning attributed by courts, the conventional doctrinal understanding, and the fact that the meaning created in such a manner is appropriate for the legislator, who would have otherwise changed the text of the norm in question).[77]

The third category contains the teleological and evaluative arguments: the argument from (statutory) purpose and the argument from substantive reasons. The former orders to apply the one from the potential meanings (determinable by other methods) of the legal norm to be interpreted, which is oriented mostly to the goal, social purpose, and function of the given norm, and (regarding also the expectable factual consequences) serves them the most.[78] The latter requires, in the course of legal interpretation, the direct use of values that have or had influence on the legal provision in question and, generally, on the formation and structure of the legal system.[79]

Finally, the fourth large category is the argument from intention that itself is, as a transcategorial technique over the arguments of the other categories, the eleventh interpretation method. It seeks the will of the legislator: what it wanted to achieve when creating the norm with such text. It is considered to be 'above' the arguments of other categories because it covers all of them. When applying this method, the judge has to ask what meaning the legislator wanted to attribute to the words and expressions included in the statute, into what legal context it wanted to place the provision in question, whether it wanted to rely on the prior results of court interpretation, whether it wished if the law created by it was interpreted and applied analogously, and so on.[80]

75 Cf. op. cit., pp. 465, 467–469, 514.

76 The placement of this argument is confusing because it also belongs to interpretation number 10, argument from (statutory) purpose.

77 Cf. op. cit., pp. 465, 469, 514. It is a considerably diffuse, diverse argument that combines the elements of teleological, historical (based on the determination of the legislator's intention), substantive, legal conceptional, and other arguments.

78 Cf. op. cit., pp. 469, 514. This method is the teleological interpretation formed during doctrinal development after Savigny's classification of four categories.

79 They may include certain direct moral, political, economic, or social considerations: aspects that serve as the theoretical basis of a given legal norm or the entire legal system (cf. op. cit., pp. 469–470, 514–515).

80 Cf. op. cit., pp. 21, 470–471, 515, 522–525.

2.2.3. Recent attempts in classification of methodology of argumentation theory

The methodological classification of the Bielefelder Kreis provided the development of argumentation theory with a significant impetus. It had such a huge impact that, from the 1990s, this classification has been the standard of methods of interpretation and argumentation, which the legal academics wanted to either use without changing (mainly during legal sociological research) or exceed methodologically or, maybe, complete or specify (its use in favour of legal sociological examination and the purpose for development of argumentation theory are occasionally present at the same time in the same research). Eventually, all research (even if their methodologies are not exact matches to the one used by Bielefelder Kreis) started from this classification.[81] However, some new methodological classifications must be highlighted from the further development of history of argumentation theory, whose classifications proved to be determinative, either on their own (doctrinal importance) or as a result of their use during the empirical legal sociological research, and also inspired the methodology of the present research.

In his legal sociological research analysing 600 decisions of the Hungarian Supreme Court, Pokol applied a methodological classification differentiating ten specific arguments[82]: '1. Interpreting the legal text in view of the meaning of the words in everyday language; 2. Interpreting the legal text in view of the special/technical meaning of the words, provided that a given word or phrase has such a meaning either in addition to its everyday meaning or has no other than such a meaning; 3. Contextual interpretation means the type of interpretation of the legal text where the words of each provision are construed in compliance with the meaning attributed to them when fitted in the entirety of the law or a complete body of related laws; 4. Interpreting the legal text on the basis of law logistics maxims; 5. Interpreting the legal text through analogy; 6. Interpreting the legal text on the grounds of precedents set at the time of previously enforcing the given law; 7. Interpretation on the grounds of legal dogmas and doctrines; 8. Interpreting the legal text in the light of implied ethical values of law or certain branches of law; 9. Interpreting the legal text in the light of the aims of the given statute; 10. Interpreting the legal text on the grounds of the will of the legislator'.[83]

Pokol (mostly) followed the division of Bielefelder Kreis when studying statutory interpretation. Later, Jakab laid down his own methodology in the course of researching on constitutional reasoning. Jakab presumed, as we have also done above, that argumentation and interpretation are different (he also used the concepts of

81 We do the same in the course of the present comparative law examination.

82 In his later work in French language, he identified eleven arguments, adding interpretation in light of fundamental constitutional rights and principles (cf. Pokol, 2007, p. 397). In his work in Hungarian, he broadened it to twelve arguments (cf.: Pokol, 2005, pp. 227–228), also recognising 'interpretation referring to legal principles' (an individual, specific type of interpretation on the grounds of legal dogmas and doctrines) as a new independent method (op. cit., p. 227).

83 Pokol, 2001, p. 465.

'argumentation' and 'reasoning' as synonyms) and considered 'interpretation' as a specific kind of argumentation.[84] He noted that 'most arguments in constitutional reasoning aim to interpret the constitution'.[85] However, there are types of argumentation that do not aim at interpretation. These include analogies (including, in the broader sense, teleological reduction[86]); establishing the (valid) text of the constitution; and arguments on application of the text of the constitution (briefly: arguments on the applicability of the constitution).[87] In addition to these 'rare exceptions', there are interpretation methods[88] themselves (the majority of arguments) that can be divided into three argument types (and two more methods outside these). The first argument type is the 'ordinary or technical meaning of the words', which is identical to the classification of Summers since it covers the plain meaning of the words and the legal and non-legal professional meaning.[89] The second argument type is called 'systematic arguments' within which the 'harmonizing arguments',[90] the 'referring to precedents which interpret the constitution',[91] the interpretation 'in the light of doctrinal concepts or principles',[92] and the 'linguistic-logical formulae based on silence'[93] can be distinguished. The third argument type is the 'evaluating arguments',[94] to which the 'relying on the objective purpose of the norm',[95] 'relying on the intention of the constitution-maker'[96] (also including 'argumentum ad absurdum'),[97] and 'sub-

84 '[A]rgumentation […] is used as synonymous […] with reasoning. Interpretation […] means determining the content of a normative text. […] Consequently, what is traditionally called "a method of interpretation" is in fact a type of argument used to interpret a text' (Jakab, 2013, pp. 1219–1220).

85 Jakab, op. cit., p. 1220.

86 Cf. Jakab, op. cit., p. 1221.

87 Jakab, op. cit., p. 1220.

88 '[T]he vast majority of arguments are interpretive in their nature' (op. cit., p. 1223).

89 Jakab, op. cit., pp. 1231–1233.

90 It practically corresponds to 'argument from contextual-harmonization', the method of classification by Summers (Jakab, op. cit., pp. 1233–1235).

91 Jakab, op. cit., pp. 1235–1239.

92 Jakab, op. cit., pp. 1239–1240.

93 Jakab classified here not only *argumentum a contrario* but also *argumentum a maiori ad minus*, *argumentum a minori ad maius*, and other maxims (which can be classified to *a contrario*) (cf. Jakab, op. cit., p. 1240).

94 These are arguments that help 'beyond the legal context' to interpret the (constitutional) norm (Jakab, op. cit., p. 1241).

95 Jakab, op. cit., pp. 1241–1243.

96 Jakab, op. cit., p. 1246. He distinguished it from objective teleological arguments by calling it 'subjective teleological arguments', which focuses on the 'intention' of the entity creating the norm (also including the use of legislative history or *travaux préparatoires* as source). It tries to explore its will definitely. It is somewhat surprising that during writing, together with Fröhlich, the Hungarian chapter in the legal sociological research based on this methodology, the CONREASON Project, he already dissolved the difference between objective and subjective types of teleological interpretation and, regarding both, he used the word 'purpose'. The two authors expressed the latter with terminus 'purpose of the constitution-maker (including *travaux préparatoires*)' (Jakab, 2017, p. 415), blurring the analysed clear distinction between the two methods, while the original classification even included this clear line.

97 Jakab, op. cit., p. 1249.

stantive arguments' (interpreting norms in the light of non-legal [e.g. moral] aspects) belong.[98] Further interpretation methods, which cannot be classified to any of the three groups above, are the 'referring to scholarly works'[99] and 'arguments from comparative law'.[100] The above classification served as basis of the Project CONREASON launched in 2015, which had the ambitious aim 'to develop the most comprehensive and most systematic analysis of constitutional reasoning that has ever been produced'.[101] For this purpose, in the course of the actual research, the research participants analysed, on the basis of the methodology described, a total of 760[102] leading cases of the constitutional or supreme courts of sixteen countries,[103] of the ECtHR, and the ECJ, and sought to define the contemporary characteristics of 'constitutional reasoning' and the similarities and differences between countries or legal systems.[104]

98 These can be only exceptionally applied, e.g. 'where no other arguments can help, or other arguments lead to interpretations contradicting one another and one has to choose' (Jakab, op. cit., p. 1250).

99 Jakab, op. cit., pp. 1251–1252.

100 Jakab, op. cit., pp. 1252–1254.

101 Jakab, Dyevre, Itzcovich, 2015, p. 3.

102 Cf. Jakab, Dyevre, Itzcovich, 2017, p. 30. The number 760 is obtained from the substantial changes regarding the Hungarian constitutional system between 2010 and 2011. The analysis of the cases before 2010 was completed subsequently by the authors analysing the Hungarian practice with constitutional decisions between 2012 and 2013, which already (partly) reflected the results of such changes. Jakab and Fröhlich compared the results coming from 40 decisions between 1990 and 2010 with the results coming from 40 other decisions made on the basis of the new rules of competency and with the interpretation of the new constitutional norms, after the entry into force of the new constitution (the Fundamental Law), in 2012 and 2013. For the latter, see Jakab and Fröhlich, op. cit., pp. 430–434). The constitution, named after the German *Grundgesetz Alaptörvény*, i.e. (correctly) Basic Law or (incorrectly but more often used in English translations) Fundamental Law, also changed the text of the constitutional norms (including fundamental rights), the relevant codified interpretation principles, and the contextual frame of the constitution. Regarding the latter, the appearance of the new interpretation frames serving as preamble, the National Avowal, must be emphasized (see Horkay-Hörcher, 2012, pp. 39–42; Trócsányi, op. cit., p. 10). Furthermore, the new Fundamental Law substantially amended the competencies of the Constitutional Court, as a consequence of which, instead of the previously typical norm control procedures, constitutional complaints became the main procedure thereof (taken also from the German legal system, cf. Hartmann, 2008, pp. 59–166): between 1990 and 2011, posterior abstract norm control represented 50% of the procedures of the Constitutional Court; between 2012 and 2017, more than 90% of the submitted motions were related to constitutional complaints (and the rate of the cases regarding abstract norm control fell below 1%) (cf. Tóth, 2018, pp. 100–101). For all these reasons, the situations before and after 2011 are, in fact, essentially different. Hence, it was a right and justified decision of the authors 'to take a second sample'.

103 These were the following: the High Court of Australia, the Austrian Constitutional Court, the Supreme Federal Tribunal of Brazil, the Supreme Court of Canada, the Czech Constitutional Court, the French Constitutional Council, the German Federal Constitutional Court, the Hungarian Constitutional Court, the Irish Supreme Court, the Supreme Court of Israel, the Italian Constitutional Court, the Spanish Constitutional Tribunal, the Constitutional Court of South Africa, the Constitutional Court of Taiwan, the Supreme Court of the United Kingdom, the Supreme Court of the United States. Cf. Jakab, Dyevre, Itzcovich, 2017, p. 26.

104 We cannot undertake to delineate the results of this comparative legal research. For that, see Jakab, Dyevre, Itzcovich, 2017, pp. 761–797.

2.3. On constitutional reasoning in general

2.3.1. Characteristics of constitutional reasoning

The subject of the present research is the examination of the practice of the constitutional courts in six Central and Eastern European countries and of the ECtHR and the ECJ regarding the application of fundamental rights, particularly the analysis of the application frequency and reasoning weight of the methods used by these fora. The research, therefore, enumerates the arguments applied by these fora and compares the practice thereof. Since this type of reasoning is not related to the application of inner positive law by ordinary courts but to the practice of constitutional courts and regional fora regarding the interpretation and application of constitutional fundamental rights, the techniques of the methodology serving as basis for the present research (i.e. constitutional interpretation) also differ from the ones of statutory interpretation. Consequently, the methodology of the constitutional reasoning will also be somewhat different from the general methodology of legal reasoning, owing to the nature of the text of the norm to be interpreted.

The constitution is a special normative text[105] different from the 'ordinary' statutes owing to its political significance, typical content, function, position in the hierarchy of norms, language, context, mode of creation, enforcement, and many further features.[106] Thus, constitutional interpretation (interpretation of constitutional fundamental rights by the constitutional courts or the ECtHR/ECJ) also differs from traditional statutory interpretation. Constitutional reasoning will also be different

105 This is not quite accurate. Schmitt recognised a difference between constitution and constitutional law (Schmitt, 2008, p. 75). Although the latter contains the rules on making plain legal regulations, state structure, and the rights and obligations of political unity, it is does not 'establish itself' but depends on the previous choice and political decision of the given political unity as facts (Schmitt, op. cit., p. 77). 'The constitution in the positive sense originates from an act of *constitution-making power*. The act of establishing a constitution as such involves not separate sets of norms. Instead, it determines the entirety of the political unity in regard to its peculiar form of existence through a single instance of decision. This act *constitutes* the form and type of the political unity, the existence of which is presupposed. […] The constitution in the positive sense entails only the conscious determination of the particular complete form, for which the political unity decides. This external form can alter itself. Fundamentally new forms can be introduced without the state ceasing to exist, more specifically, without the political unity of the people ending. […] On the contrary, *constitutional laws* are valid first on the basis of the constitution and presuppose a *constitution*. For its validity as a normative regulation, every statute, even constitutional law, ultimately needs a political *decision* that is prior to it, a decision that is reached by a power or authority that exists politically' (Schmitt: op. cit., pp. 75–76). In this legal theoretical sense, the text of the constitution, which (and the interpretation of which) we are talking about in this chapter, is not the decision of the political unity itself, nor the constitution with the meaning defined by Schmitt, but only constitutional law. Since this content is traditionally meant as 'constitution' and we, in a work of comparative law, must follow the constitutional wording of national legal systems, then the present work understands the main rules of the political unity (written and historical constitution) when we talk about constitution.

106 Cf. Goldsworthy, 2006, pp. 1–4.

from legal reasoning in general. Despite the overlaps between the two, constitutional reasoning (carried out by constitutional courts in the course of interpretation and application of the constitution) is, on the one hand, conducted based on the sources and methods other than statutory interpretation (carried out by ordinary courts in deciding legal disputes), and, on the other hand, the use of traditional expressions would be misleading owing to the subject of the interpretation. For this reason, it is appropriate to use a separate methodological classification.[107] An obvious example is as follows: while the interpretation of statutes, in the course of ordinary legal argumentation and in light of the provisions of the constitution, justifies to be differentiated from the further types of contextual interpretations (e.g. interpretation of statutes on the basis of other statutes), interpretation of constitutional rights based on the constitution requires the consideration of further provisions of norms on *their own* level, which, thereby, becomes 'simple' contextual interpretation.[108] The situation is more specific in case of international fora because, for example, the inner law of contracting states is 'foreign' law for the bodies applying international conventions, while their prior case law acts as precedent in their subsequent decisions. For this reason, independent separate classifications may be set based on the special features of constitutional reasoning that can cover a wide range of arguments (methods and sources) specifically used (or useable) by constitutional courts, on the one hand, and by supranational judicial for a, on the other. In the frame of the present research, the starting point was the classification described in point 2.3. The application frequency of these arguments in the practice of constitutional and regional courts has been examined.

2.3.2. On the concept of constitution[109]

Formal constitution means the legal regulation(s) and the specific legal norms regulated thereby that were given the name constitution or constitutional norm (e.g. act) by the constitutional power. These norms are at the top of the system of legal norms; hence, any other (logically lower-level) legislation or legal norm included thereby cannot be against them. *Material constitution* is a much broader category

107 Jakab, for example, takes the opposite view; he thinks that despite the fact that the constitution is 'substantially different from other norms of non-constitutional rank' and that 'the norms of the constitution are much more abstract and/or value-laden than the rather concrete statutory norms', '[t]here is no need to draw a sharp distinction between these two types of interpretation' (Jakab, 2013, p. 1224).

108 It means that the method of'constitutional interpretation' (*verfassungskonforme Auslegung*) developed in German jurisprudence is not only inapplicable but also incomprehensible in the interpretation of constitutional provisions. For more details on the German practice and principles of *verfassungskonforme Auslegung*, see Denninger, 1984–1985, pp. 1013–1031; Bydlinski, 1982, pp. 455–457.

109 We repeat and emphasise that, by the concept of 'constitution', we understand its constitutional and not legal theoretical meaning. For the legal theoretical concept of constitution, see the previously cited work of Schmitt.

that covers both the constitution (act(s) of constitution) and all legal regulations, and the legal norms included thereby, which contain more detailed rules of the most important aspects of the legal institutions found in the formal constitution.

All centrally organised human co-existence with sovereignty (society)—that is, all states—have a constitution. It is a feature of modern age that the constitution means one (or a few) highlighted norms (so-called basic norms) adopted under particular rules in a special procedure defined previously for this purpose and which can be amended or repealed in the same way (*codified constitution*). Some states have not formulated such expressly specified (one or a few) act(s) of constitution; instead, the constitutional norms are contained by several (many) acts (occasionally even lower-level rules) highlighted for their subject matter (not their adopting procedure) and by non-written constitutional customs and conventions. This type of constitution (*historical constitution*) exists in the UK.

These two types are often differentiated by the terms 'written and unwritten constitution'.[110] The codified constitution is (necessarily) written but so is the historical constitution. *Historical constitution differs from codified constitution*, firstly, in that the former has unwritten elements (based on constitutional customs, conventions, and traditions formed during hundreds of years and respected unanimously but not involved in written legal source, i.e. the constitutional culture); and, secondly (and principally), in that neither the constitutional customs nor the pool of written legal norms under the concept of constitution can be determined exactly. Therefore, historical constitutions have parts on which there is broad agreement in that they belong to the constitution of the given state, whereas the classification of other norms is controversial. Consequently, a historical constitution is never closed (unless a codified constitution is adopted subsequently) but is developing in an organic way. Occasionally, there are consensuses regarding more new norms on the fact that these are also the parts of traditional constitution that may modify the meaning or the application of old-time constitutional norms and may expressly derogate their application and lay down new requirements.

In the present research, all examined countries *have* a codified constitution (even the Czech Republic where the constitutional norms are included in two specifically defined written formal legal sources with the rank of constitution).[111] Thus, it was not necessary to consider the legal theoretical consequences of how to find out in a borderline case whether a norm to be interpreted qualifies as a constitutional norm. The present research considered all legal norms in the act of constitution (in case of the Czech Republic, in one of the acts of constitution but, owing to the fundamental

110 Cf. Wade, 1993, pp. 4–8. For the use of the concept consider to be correct (regarding not only the English legal system), see Allison, 2007.

111 Apart from the Constitution (which contains provisions on state structure), the Charter of Fundamental Rights and Freedoms is also a constitutional source that includes human and civil rights and is appended to the Constitution.(For the content of these two legal sources, see Glos, 1994, pp. 1058–1069.

rights being the subject matter of the research, in practice mainly in The Charter of Fundamental Rights and Freedoms) as constitutional provisions.

2.3.3. On the concept of constitutional rights

Rights laid down in the constitution and applied factually were originally formulated as human rights during the Enlightenment, to a lesser extent in the seventeenth and mostly in the eighteenth century. Human rights refer to the rights arising from the human nature of people and granted to every person at birth as they belong to the philosophical essence of the human. All in all, human rights are natural or moral rights related to the biological and moral status of humans and provide the conditions and guarantees of recognition, respect, and protection of their personality and of their position (equal to others by birth) in society. Without human rights, people could merely be described by their biological existence and physiological features. As humans are moral beings who are able to place themselves in the world and in society and to differentiate between good and bad, proper and improper, fair and unfair (and to evaluate their own situations and the actions of others in light of all of these), who have desires, expectations, and self-image, the modern constitution must provide protection for this moral status.

Human rights become constitutional rights through their recognition by the constitution of a given state. At the end of the eighteenth century, the first French constitution, in September 1791,[112] and later, based on the French example,[113] the constitution of the US (with the first ten amendments to the Constitution, the Bill of Rights), in December 1791, defined constitutional rights. The actual realisation of these rights took place only later (in the US from 1803[114] and in Europe only from the twentieth century, in most countries only immediately after World War II or even later) and the sphere of operation of constitutional rights, principles, and values was established, via constitutional review, only from this time.

Human rights serving as a basis for constitutional rights, according to the classification by Karel Vašák,[115] traditionally have three generations. First-generation human rights mean the political[116] and civil[117] rights recognised and determined in the course of the Enlightenment, mainly from the end of the eighteenth century (but, regarding their foundations, required from the beginning of the seventeenth

112 Mitchell, , 1988, p. 2.

113 Lebovitz, 2017, pp. 1–50.

114 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For the concrete background and circumstances of decision-making of this case, see Nelson, 2018, pp. 90–106.

115 For the first time, this classification was published in the journal of UNESCO in 1977. Vašák, 1977, p. 29.

116 For example, right to vote, access to public office.

117 These are the so-called classic freedoms: freedom of speech, freedom of the press, freedom of assembly, freedom of association, freedom of movement, personal security, right to property, right to life, right to bodily integrity.

century). These rights are 'negative' in the sense that they oblige the state to refrain from violating them and not to intervene in the sphere of freedom protected by them. Second-generation human rights are the so-called social, economic, and cultural rights, which, from the end of the nineteenth and the beginning of the twentieth century, guarantee the freedom of individuals yet not in a negative way, namely, immunity from the state's interference; these rights also require the state to take actions to establish the possibility of living, employment, and active participation in social life.[118] Finally, third-generation human 'rights' are the so-called rights of solidarity, which, from the end of the twentieth century, define requirements not recognised as subjective rights. The individual protection and application of these rights are impossible owing to the nature of the interests to be protected. The cooperation of the states is required to protect the interests of humankind as a whole.[119]

Most constitutional rights have two sides: a subjective and an objective side. The *subjective* side means that the given constitutional right may be invoked as individual right, i.e. on the basis of the given constitutional right, personal legal protection may be granted to any person whose fundamental right is violated. This individual nature of constitutional rights generates two types of duties of the state: a negative (obligation to refrain) and a positive (active) obligation. *Negative obligation* means that the state is obliged to refrain from the violation of individual fundamental rights: the state may not interfere in the personal sphere guaranteed by a subjective right (unless the interference is based on constitutional reasons; various tests and measures are elaborated by constitutions or constitutional courts for this purpose).[120] In contrast, *positive obligation* means that the state is not only obliged to refrain from violating these individual constitutional rights but also to guarantee actively that such freedoms of individuals could not be violated even by other(s). It means that the state is obliged to prohibit such intervention by others in the sphere of freedom and to operate a procedural system that can sanction and thereby prevent others from restricting individual freedom.[121] Finally, the *objective* side of fundamental rights means that the obligations of the state do not end

118 These are right to work, right to safe and healthy working conditions, right to rest and leisure, right to social security, access to culture, freedom of scientific research, right to education, etc.

119 In Vašák's words, these rights 'can only be implemented by the combined efforts of everyone: individuals, states and other bodies, as well as public and private institutions' (Vašák, op. cit., p. 29). 'Such rights include the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind' (Vašák, ibid.). The collective rights of nationalities, consumer rights, and, most recently, the right to healthy food and water are also recognised as rights of solidarity.

120 Arising from this obligation to refrain, the state may not violate the people's freedom of movement, freedom of assembly, freedom of religion, private sphere, etc. because fundamental rights protect these individual needs arising from the moral being of a human even against the state. Moreover, such constitutional rights, historically, were established precisely to restrict the state.

121 The sanctions can be civil (compensation, restitution), administrative, misdemeanour penalty, and, in the most serious case, criminal penalty.

with safeguarding individual legal protection (the subjective side); the state is also obliged to maintain an institutional system that protects the value itself, which serves as basis for the given fundamental right, i.e. independently from the impairments of individual rights.[122]

Based on whether a constitutional right 1) ensures the subjective (individual) legal protection or 2) imposes only an institutional protection obligation on the state or, maybe, 3) expresses, only symbolically, its commitment to achieving certain goals without defining any specific accountable obligations, we can differentiate *three types of constitutional norms*:[123] individual rights, constitutional provisions on objective (institutional) obligations of the state to ensure basic values, and state objectives. *Subjective rights* are constitutional entitlements that protect individuals in their person. The *constitutional provisions* on objective (institutional) obligation of the state are constitutional norms, the violation of which cannot be individually referred to but to which the state cannot be indifferent; therefore, for their protection, the state has to establish regulations that can guarantee the values intended to be protected by such provision.[124] Finally, *state objectives* are declarations that record the social policy concerns that the state considers to be important but does not have any specific obligation to realise.

The present research was not limited to the first- or second-generation rights. All rights approved as constitutional rights by the legal system (constitution) of the certain state have been taken into consideration if they generated the obligation of the state to restrain (obligation of non-interference), to enforce the violated rights, or to guarantee the criteria necessary for exercising the rights individually or for making it easier (e.g. legal and institutional system recognising the values that serve as basis for the given right). Hence, the subjective rights and constitutional norms determining the objective (institutional) obligations of the state fell under the scope of our research. Meanwhile, we did not examine the interpretation aspects of constitutional provisions (aims of the state) that did not define either direct obligation of the state to safeguarding the rights of individuals or task of the state regarding the building of the law system for guaranteeing indirectly the rights of individuals.

122 The state is obliged to set the conditions among which this value, already completely independently from the state, can be guaranteed or supported. This is the obligation of objective *institutional protection* of the state. Such obligation, e.g. can be concerning freedom of religion, according to which the state has to allow churches to operate ideologically committed social institutes (e.g. retirement homes) that carry out religious activity in addition to their social tasks.

123 Using the expression ”aw’ would not be precise since this implies that these constitutional provisions have the nature of individual rights; owing to terminological rudimentarity, the use of this word can be justifiable.

124 The ‘right’ to a healthy environment, for example, implies such an obligation of the state to protect institutions without a substantive legal side: nobody has the individual right to request, by direct reference to the violation of their right to a healthy environment, the action of the state in order to prohibit, e.g. the operation of a polluting plant or to reduce car traffic in downtown. The state may not be indifferent to the conditions of the healthy environment; hence, it is obliged to establish the system of conditions that takes it into account.

Decisions of constitutional courts interpreting constitutional principles and values were considered only if any constitutional entitlement could be derived from them or if, in the course of defining the restriction aspects of constitutional rights by the constitutional court, they had influence on the interpretation of constitutional rights or on their extent and scope as determined by the constitutional court. We also excluded the examination of the provisions on the structure of the state and of other constitutional norms.[125]

2.4. Particular methods of constitutional reasoning

The methods of constitutional reasoning, including the ones of constitutional interpretation, have several similarities with methods of ordinary legal reasoning but, compared with them, the former are special in certain aspects.[126] Therefore, it is reasonable to talk about independent constitutional interpretation separate from ordinary statutory interpretation and about constitutional reasoning (including methods and other sources).[127]

125 A constitution may contain the following. It may regulate the form of the state; the formation, structure, operation, relations, tasks, and competencies of the bodies with a public function in the given state (part of the structure of the state, political constitution); the constitutional rights conferred on citizens or on people residing in the given country, the way of granting and enforcing these rights, the possibilities and conditions of limiting and the guarantees of them and (possibly) the obligations of these persons (part of fundamental rights); the transparent principles determining the structure and operation of the state (rule of law, popular sovereignty, separation of powers, and the unitarian or federal nature of the state); the symbols of the state (e.g. flag, coat of arms, anthem); the types, order, and termination conditions of the special legal order together with the rules and decision-making process prevailing during that; and all issues considered to have great significance by the constitution-maker (e.g. rules of public finance, name of the capital, eternity clauses, denomination of state church, conditions of starting a war or making peace). In the course of the present research, we examined only the constitutional court decisions interpreting the provisions regarding fundamental rights.

126 The research of Bielefelder Kreis delimited statutory interpretation from constitutional interpretation, which (mostly in the US) 'has long been deemed a topic quite distinct from general statutory interpretation' (MacCormick and Summers, op. cit., p. 11).

127 In a previous research regarding the interpretation practice of the Hungarian supreme courts, the author of the present chapter used a partly different methodological classification regarding statutory interpretation, precisely owing to the differences between statutory and constitutional interpretation (cf. Toth, 2016, pp. 173–201). The source of inspiration in case of that division regarding the methods of statutory interpretation was also the classification of the Bielefelder Kreis (case of methodological division serving as basis for the present research). The aforementioned research was only completed with some recent, subsequently spread or appreciated methods (e.g. comparative and some other methods) and clarified, chiselled borders between these techniques (with the employed division not the only one and not necessarily the best way to separate the methods of argumentation and sources of interpretation). The same is true also for methodological classification serving as basis of the present research. A unified methodology was necessary to compare the results of the countries concerned and to perform this task efficiently. This division seemed to be, methodologically, the best and the most appropriate.

2.4.1. Grammatical (textual) interpretation

Legal texts are (supposed to be) written for ordinary people. As such, it is important that ordinary people understand them as easily and smoothly as possible. Law can fulfil its function to influence behaviours only to the extent that people understand the legal requirements. Hence, it is absolutely necessary to start from the linguistic-grammatical meaning in the course of interpretation of legal texts. Accordingly, this is the elementary method of legal interpretation that can be modified or further developed[128] but cannot be eliminated.[129]

The (codified) constitution (which is the common type in all the countries studied here) is also a written legal normative text. Grammatical interpretation as an elementary way of interpreting law comes into play when exploring the meaning of constitutional rights. The most trivial method of interpretation is *grammatical interpretation*.[130] It can be *semantic* (lexical), on the one hand, when we explore the meaning of the words and expressions of the norm in question within the given language. On the other hand, it can be *syntactic* (related to syntax), when we determine the relations between certain parts of the text by interpreting, for example, the conjunctions. Interpretation based on syntax is always the part of ordinary grammatical interpretation, whereas semantic interpretation can either belong to the

128 We cannot avoid at least to correct the *scrivener's errors* and to overstep the literal meaning even if we respect the text of the act (Grey, 1999, p. 18; Scalia and Garner, 2012, p. 234).

129 The contemporary theoretical ground thereof has been developed and led to the final conclusion by the textualist approach. When exploring the meaning of written legal norms, textualism starts primarily from the text. For textualists, law is what appears in the text of the statute. It is not possible to explore the meaning of a legal text on the basis of other than what is explicitly written in the statute. They believe that the text is objective and is also served by the adherence to the 'ordinary meaning' of the words and expressions used by the statute. This term, in this sense, was first used by Antonin Scalia, the most famous textualist and founder and the 'face' of the school. For the functioning of the interpretation principle, see Scalia and Garner, op. cit., pp. 69–77. Since the ordinary meaning of a word is the same for everyone, textualists say, if we also order the judges to perceive the expressions used by statutes in this sense, then we can eliminate judicial subjectivism. In this way, no judge may interpret the given legal text differently than an average person would. Thereby, the predictable jurisdiction would become possible and the law could get closer to the people and to society. The main problem with textualism, or the unconditional adherence to the text, is that ordinary meaning does not actually exist, since even dictionaries do not necessarily define the same expressions in the same way (Colinvaux, 1997, p. 1146). Against textualism, it is also often mentioned that it cannot take into consideration the changes of the relations in society: if we unreasonably insist on the original text even when the social relations change and we do not modify the statute, then we will be controlled by the 'dead hand of the past' (Redish, 1996, p. 530).

130 This method is generally the starting point. '[W]e can hardly doubt, that there must be principles of statute law enabling us to supplement the literal words in various ways and for various purposes; but, subject to this, the English theory requires the court to try to interpret statutory provisions in accordance with the literal or plain meaning, and without regard to policies or rationales, unless the statute itself is first determined to be unclear' (Atiyah and Summers, 1987, p. 102). This statement is true not only for the English but for continental legal theory and judiciary practice, and not only for statutory interpretation and statutory texts but for constitutional interpretation and constitutional texts as well.

method exploring the ordinary meaning of the words or an interpretation based on the meaning of a *terminus technicus* used in a profession.

Syntactic interpretation draws conclusions from the elements of the structure of the sentence and their relations (i.e. subject–predicate agreement, singular and plural terms, use of suffixes, modality of the sentence, conjunctions) regarding the meaning of the text in light of the relation between these elements.[131] The most important of these is to define the meaning of conjunctions and, thereby, the relation between the elements of the norm hypothesis, which can be of three types. In case of logical conjunction, *all* elements, without exception, in the enumeration of the hypothesis, disposition, or sanction must be fulfilled for the applicability of the legal provision. In case of alternation (alternative options), the norm is applicable if *at least one* of its application conditions is fulfilled, in which case only one element of the hypothesis is enough to invoke the applicability of the legal provision. Finally, disjunction (excluding options) means that *exactly one* from the elements contained in the hypothesis can come true, which excludes the materialisation or the verifiability of the other elements.

As far as *semantic* (lexical) interpretation is concerned, *ordinary grammatical semantic interpretation* (or simply, 'ordinary interpretation') is the method of interpretation by which the meaning of a given word or phrase is determined on the basis of the meaning that an ordinary person who speaks the language well at an average level would attribute to it. The grammatical semantic interpretation based on professional terminology (or simply, *professional interpretation*) indicates the method by which we determine the meaning of words and expressions with consideration to the meaning that would be attributed to them by a person experienced in a given profession and 'speaking the special language thereof'.

The words of the text of a legal norm may also have a meaning within the terminology of considerably different professions. The terminology of the legal profession as the linguistic base mostly used during legislation is, necessarily, paramount. In the course of *legal professional grammatical semantic interpretation*, the judge makes their decision, in order to solve an interpretation dilemma, only on the basis of the legal technical words, technical expressions with legal meaning, or the meaning (different from ordinary and expressly used in legal profession) of legal *termini technici* having particular legal meaning. It is, in fact, *legal dogmatic interpretation*: the special legal meaning, unanimously accepted and recognised by lawyers, of the words is used to solve the interpretation problem raised in certain cases.

Interpretation based on legal principles of statutes or branches of law also belongs to the legal professional grammatical interpretation (i.e. legal dogmatic interpretation). Since the legal principles expressly specified by legal norms are, in effect, dogmatic categories (with especially broad sense), i.e. linguistic elements (used by

131 'Syntax aids construction by looking beyond the lexical meaning of a word to its meaning within a sentence and specifically within the correct construction of a sentence according to the basic rules of syntax and grammar' (Goodrich, 1986, p. 111).

legal profession), they must also be included by the legal professional/dogmatic grammatical interpretation.

Finally, the *further (non-legal) professional interpretation* is also the part of grammatical interpretation. In this case, the meaning of a word or an expression is determined not on the basis of ordinary or legal meaning but of the terminology of a profession other than the legal one.

2.4.2. Logical interpretation

Logical interpretation is a particular argumentation that is, most often, applied tendentiously when wishing to reach an interpretation result (which, regarding its genesis, is merely *felt* to be proper in an intuitive manner) *opposing* the unambiguous literal meaning of the text. Therefore, the use of (quasi) formal logic[132] typically provides a rational solution that can be 'figured out' by common sense (in this sense, the maxims of quasi-formal logic as universal laws of human rationality and the aspects of common sense are the same). A further feature of logical interpretation is that its application is often not explained; thus, logical arguments are mostly used in practice so that the formula invoked to interpret the text is not expressly referred. Whether, however, the logical arguments are referred to or not, they have outstanding importance in the administration of law, not even primarily in terms of their application frequency but rather of the *weight* of their arguments. Thus, regarding formal logic, the rules cannot be questioned or refuted, which, therefore, are objective (if their application conditions can be clearly defined),[133] generally applicable, and valid

132 Logical interpretation *is not* formal logic since it always refers to concrete cases, the classification of which (for example, determining what is 'bigger' and what is 'smaller') is necessarily subjective. However, the applied thinking *schema* has logical *origin*, which explains the label 'logical interpretation', in accordance with the main part of the scholarly literature. The view according to which 'legal logic' is not formal logic is not definitely endorsed; hence, for example, Kalinowski explicitly accepted legal logic as formal logic. Cf. Kalinowski, 1959, p. 53). Perelman, partly arguing also with Kalinowski, enlightened the lack of the logical nature of maxims, as follows: '[Legal logic] is not a logic of formal demonstration but a logic of *argumentation* which uses, instead of analytical proofs which are compelling, dialectical proofs (in the Aristotelian sense of this distinction) which aim at convincing or at least persuading the audience (in this case: the judge) to arrive at a solution of and determine a legal controversy. Judicial decisions, with their findings and grounds, constitute ideal texts the analysis of which will provide the arguments proper to legal logic. A moment's thought is enough to establish that here is not a case of theoretical reasoning, where starting from true premises one reaches, by means of the laws of logic a conclusion equally true, but a *decision* which the judge justifies on stated grounds, including the reasons which have enabled him to set aside the parties' objections to his findings' (Perelman, 1968, p. 3)

133 If the fulfilment of these application conditions is not clear because, for example, the previous assessment of the nature of the given situation is needed, then, of course, even logical formulae cannot help determine in an objective manner what the text in question could mean (or often instead: does not [surely] mean).

anywhere and anytime (in all legal systems).[134] Accordingly, in cases when reference to them is well-founded, they typically count as the *strong arguments* of solving an interpretation dilemma.

The most often used logical formulae are the *argumentum a minore ad maius*, *argumentum a maiore ad minus* (these two are collectively called *a fortiori*), *argumentum a contrario*, *argumentum a simili*, and *argumentum ad absurdum*. The *argumentum a minore ad maius* is an inference from the smaller entity to the bigger one. On the one hand, it applies to prohibitive legal norms: if the smaller, i.e. less serious conduct (conduct with a lower impact) is prohibited, or if the smaller value is legally protected, then the bigger, i.e. more serious conduct (conduct with higher impact) is even more prohibited, and the bigger value is even more protected, even if the latter is not literally included in the text of the legal regulation. For example, if a person with limited legal capacity is not allowed to do certain things, then an incapacitated person is, obviously, even less entitled to do the same. On the other hand, the same maxim applies to the expressed exemption from the fulfilment of obligation granted by law: if an act states that the smaller is not the obligation of someone, it obviously also means that the bigger (including the smaller) is not their obligation as well.

Argumentum a maiore ad minus is an inference from the bigger to the smaller entity. This principle states that if the bigger is allowed, permitted, or legally not prohibited, then the smaller is even more allowed, permitted, and even less prohibited

134 It does not (cannot) mean that logic is able to provide solution to all 'hard cases'. It is possible that, on the contrary, it provides several, mostly equally plausible solutions from which we cannot choose objectively. These solution directions, principles, and guidances are called 'meta-norms' (Wright, 1991, p. 277). The function of these 'meta-norms' is to help in law application and to allow a decision to be made on the questions being regulated by ambiguous or contradictory norms or not being regulated at all. They serve the legal certainty and foreseeability of administration of law. However, there are cases in which more of these 'meta-norms' are usable. For example, the arguments *a contrario* and *a simili* may lead, in the course of deciding the same legal interpretation dilemma, to contradicting conclusions. To reduce (or, in a case which is ideal but in its purity is quite rare in practice, to eliminate) the uncertainties arising from legal gaps and the contradictions of positive law, we also need a rule for choosing from the several potentially applicable 'meta-norms'—we need a 'meta-meta-norm' that says when and which one from the several 'meta-norms' the court has to call for help. However, this guidance goes to infinity, since even 'meta-meta-norms' cannot avoid conflict that would need a 'meta-meta-meta-norm' to be resolved, and so on. We can break free from this *regressus ad infinitum* if we admit that law cannot be perfectly objective and absolutely predictable. It means that there necessarily have to be cases when it is unknown which (positive) norm to apply. According to von Wright, we have to accept that a decision can be arbitrary (cf. von Wright, op. cit., p. 278). Agreeing with Wright's 'acquiescent' position, we have to admit that there is an element of uncertainty in the law that no interpretation of the law can completely eliminate. The correctness of the judgement of law enforcers can only be based on probability. At least in 'difficult cases' (which may occur, inevitably, even in legal systems having the most detailed provisions), legal interpretation (the precondition of law application) is, to some extent, based on value judgement, which unavoidably brings subjectivity to judicial activity and, for this reason, the decision will also be, to a certain extent, subjective. In law, this subjectivity can be limited (excluding arbitrary, indefensible decisions from the possible result of law application) but not entirely eliminated.

legally. For example, if an assaulted person, under certain conditions, is allowed to take, lawfully, the assailant's life in case of justifiable defence, then, in the same circumstances, they may also cause battery. If certain things can be done even by an incapacitated person (e.g. even an eight-year-old child can conclude contracts of minor importance aimed at satisfying their everyday needs), then the same is also allowed for a person with limited legal capacity (e.g. a fifteen-year-old child). Furthermore, if a legal norm specifies the bigger as an obligation for someone, then the smaller included by the bigger obligation also occurs as the obligation of the certain person. This might be absolute formal logic: if statement *n* is true for a set, then this statement *n* must also be true for any subset of that set.

According to the maxim of *argumentum ad absurdum*, if conclusions resulting from the application of the meaning establishable on the basis of a certain interpretation method would lead to absurd, impossible, contradictory, or obviously undesirable legal practice or case judgments,[135] then this meaning must be rejected as obviously groundless. For example, if a provision on child protection does not protect but, on the contrary, makes children more vulnerable, then this meaning cannot be applied. Through other methods, a meaning, different from the grammatical one, has to be sought. This is a purely negative method: it does not say what a given provision means but can say what it definitely does not mean.

Argumentum a contrario is inference from the opposite. It considers complementary life situations, where two life situations are possible but one excludes the other. In this case, if a rule exists for one of the complementary life situations but does not for the other one, then the rule being contrary to the regulated life situation would apply to the other (literally not regulated) one, even if it is not included in the text of the legal norm. For example, if two categories (adults/minors, legal capacity/incapacity, capacity to bring legal proceedings/lack of capacity to bring legal proceedings) exist in a legal system, and legislators define only one of them, then with that, *a contrario*, the other one will also be subject of regulation, since the second category covers the situations not belonging to the first. If only the concept of minors is defined, then those not meeting set conditions would be adults. If only the cases of incapacity are defined by the regulation, then it follows, *a contrario*, that in all other cases, people have legal capacity.[136] This maxim also covers *argument from silence*. In practice, this primarily concerns the interpretation of taxative enumerations, i.e. the conclusion that, in relation to the life circumstances not included in the exhaustive list (or understood as such by the judge), the legal practitioner concludes that the provision applicable to the life circumstances included in the taxative list is not applicable to the life circumstances not included in the list. For instance, when a law defines and prohibits a specific conduct, it also provides, without stating this in the text, that conduct not covered by this prohibition is permitted, i.e. recognised as lawful.

135 Regarding the cases of absurdity, see Scalia and Garner: op. cit., pp. 234–239.
136 This formula does not apply to non-complementary (mutually exclusive, disjunctive) life situations.

Argumentum a simili (or *argumentum a pari ratione*)[137] is inference from similarity. This means that if there is a legal rule for a given life situation, then this legal rule will also govern (be extendable) to a life situation that is similar in its relevant factual elements to this life situation but which is not literally regulated. The key question regarding the applicability of this formula is the assessment of relevance: in what case can we consider, in some respect, the similarity of two facts to be relevant in the course of interpretation. There is no guidance; it depends on the perception of the judge and inevitably brings a subjective element to the process of adjudication (the same principle applies to the previous maxims).

Analogy (*argumentum per analogiam*) is a theoretically important case of the argumentum *a simili* (but rarely used in continental law systems). We do not consider interpretation by analogy (which is legislation in fact) as a separate method of interpretation but as part of *a simili* argument.[138] We apply analogy if we have to make a decision but there is no specific rule matching the given fact (i.e. a legal gap), so the rule has to be created by the court on the basis of a similar existing fact.[139] *Legal gap* is seen when legislators regulate a life situation as a whole (presence of legal norm regarding the relation and its substantial parts) but, accidentally, forget to regulate a segment thereof. It causes literally 'gap' in the system of legal norms: no rules exist regarding the considered one, but the other segments of the life situation are regulated.

It is an important criterion that a legal gap can occur accidentally; if the legislator intentionally leaves a sub-area unregulated, this cannot be considered a legal gap but rather deliberate permission, where the entities are free to act (that which is not unlawful is allowed). The legislator, as can be determined from the regulatory environment, may want to regulate the whole of the life situation in question but regarding a segment does not even draw up a rule. This gap may occur at the adoption of regulations (i.e. original legal gap) or later because of the impact of social-economic-technical changes (i.e. derivative legal gap).

Analogy is the method of filling legal gaps. In case of analogy, therefore, there is no regulation of a life situation, unintended by the legislator. Therefore, the judge must establish it in the course of applying the law to decide the case in question. Analogy is thus nothing more than filling the legal gap, a quasi-judicial legislation

137 Also known as *argumentum a simili ad simile* and *argumentum a similibus ad similia*.

138 We understand *a simili* as the 'base case' of *argumentum per analogiam* (cf. Szabó, 1999, p. 171).

139 The opposite of the analogy is teleological reduction, where there is a rule which should not be. There can be 'legal lacuna' (*rechtliche Lücke*) not only if no regulation exists but also if legal expectations would result from a general principle contrary to the existing rule. In this case, the meaning and purpose (*Sinn und Zweck*, together 'Telos') of the legal regulation (*Regelung*) have to be taken into consideration and, on the basis thereof, the existing rule cannot be applied. At this time, the legal lacuna is hidden (*Verdeckte Lücke*) and the technique of teleological reduction (*teleologische Reduktion*) has to be applied to eliminate it, i.e. on the basis of the general principle (the purpose of the regulation) the concrete legal norm opposing which has to be ignored (Cf. Larenz and Canaris, 1995, p. 210–211).

remedying the legislator's omission.[140] Notably, there is no legal gap or legal lacuna if the legal regulation exists but is not unambiguous; in this case, the ambiguous norm has to be interpreted. Depending on the basis of which the judge creates the missing norm, we can distinguish statutory and legal analogy.

In case of statutory analogy (*analogia legis*), there is no regulation on a given life situation but a rule exists regarding a similar one. In such case, the judge fills the gap of regulation using the other existing legal norm as an aspect, and decides the case before the court on the basis of the norm found (made) this way. It is the task of the judge to step into the legislator's shoes and to make a decision that the legislator, according to the judge, would also have made (which norm the legislator would have incorporated into the statute) if it had not forgotten to regulate the given life situation. That is, the judge does not fill the legal gap on the basis of their own values or legal concept but in the way, according to them, the legislator would also have filled it if the latter had recognised the gap. For this purpose, the judge does not apply the norm of other but similar life situation, i.e. the decision is not made on the basis thereof (that would be a simple extensive interpretation of that other norm, which would be conducted by any of interpretation methods except grammatical) but considers the justificatory principles of the other norm and the legal policy reasons of the creation thereof and, considering all of these, makes a hypothetical regulation that would have been made also by the legislator.

Meanwhile, legal analogy (*analogia iuris*), which is no longer imaginable, would be applicable if the given legal system does not contain any regulation on relation(s) of life similar to one accidentally not regulated. The judge should then deduce from the general principles of the legal system and characteristics of the legal culture

140 It is interesting that there are, as exceptions, regulations in (continental) Europe where the legislator, in a given legal norm, provides explicit authorisation to judges to fill the possible legal gaps during law application if otherwise the decision-making is not possible. The best known example is the Swiss Civil Code of 1907 that is still in force (Schweizerisches Zivilgesetzbuch, ZGB). Article 1 of ZGB declares, as principle of interpretation, that the court is entitled and obliged to decide, in the absence of legal provision or customary law applicable in the case, in accordance with the rule that it would make as a legislator. This authorisation is, as the possibility to apply analogy in general, not limitless since the court is bound by the prevailing doctrine and case law determining Swiss law regarding the given issue. 'The law applies according to its wording or interpretation to all legal questions for which it contains a provision. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. In doing so, the court shall follow established doctrine and case law'. Swiss Civil Code of 10 December 1907, Art. 1. In original language: Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält. Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde. Es folgt dabei bewährter Lehre und Überlieferung. Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907 (Stand am 1. Januar 2021).

that reflect, supposedly, how the legislator would have regulated the life situation of concern.[141]

Finally, there are also *other formulae*. An example is the principle of *implied powers*, according to which, if a given legal regulation prescribes a task for an organ, then this organ has to be considered as authorised with the necessary power even if neither the norm regulating such task nor other norms in the legal system specifies it expressly.[142] Another example is the principle of *eiusdem generis*, by which the range of cases of an exemplary enumeration covered by the legal norm can be broadened beyond the factual elements specified exhaustively in the list, by a factual element, but only with ones that are, regarding their relevant characteristics, similar to the specified elements.[143] (The principle of implied powers seems intended to serve the avoidance of the absurd application of law; hence, it can be considered as a part of *argumentum ad absurdum*. Meanwhile, the principle of *eiusdem generis* is, essentially, a special type of *argumentum a simili*).

These formulae are not purely logical ones, since preliminary (subjective) assessment of the interpretation situation is required for their application, including

141 In modern legal systems, it is hard to imagine that no legal regulation exists not only regarding a given life situation but even regarding another one being similar in any way. Thus, it is not possible to apply *analogia iuris*. However, *analogia legis* exists, and judges practically carry out law-making activity when they apply it (with the filling of the legal vacuum, replacement of the missing norm). Since judges have decision-making obligation (they cannot say that they do not decide the case before them), *analogia legis* may be applied even in legal systems having the most accurate legal regulation. If it is applied, the judge carries out quasi-legislation activity, namely, further developing the existing legal system. At the legislative level, the denial of justice was first explicitly prohibited by section 4 of the French Code Civil in 1804: 'Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice'. Translated as 'a Judge who refuses to decide a case on the pretext that the law is silent, obscure or insufficient, may be prosecuted as being guilty of a denial of justice' (Elliott, 1956, p. 83). The classical translation by Wright includes 'does not cover the case' instead of 'insufficient', and on the basis of its commentary, according to the reference of Pound, '[t]his Article abolishes the old practice of the judges of refusing to decide a case on the ground that the law was obscure, and referring the case to the legislature so that it might elucidate the particular law by laying down a general rule for its interpretation' (Pound, 1914, p. 17).

142 According to the principle developed in constitutional law, primarily that of the US (cf. Skubiszewski, 1989, p. 855), and introduced into international law, into the practice of international and supranational law enforcement bodies and is now also upheld in the practice of the ECJ (cf. Eeckhout, 2012, pp. 70–119), 'in international organizations the doctrine of implied powers means that the organization is deemed to have certain powers which are additional to those expressly stipulated in the constituent document. These additional powers are necessary or essential for the fulfilment of the tasks or purposes of the organization, or for the performance of its functions, or for the exercise of the powers explicitly granted' (Skubiszewski, op. cit., p. 856). 'Implied powers are, by definition, supplementary to those expressly granted' (Skubiszewski, op. cit., p. 857; see also op. cit., p. 858). Implied powers is a principle of interpretation developed by legal doctrine for practical purposes. 'The theory of implied powers serves as a rule of interpretation of the constituent instruments of international organizations' (Gadkowski, 2016, p. 46).

143 'The eiusdem generis rule applies when there is a clearly ascertainable class or category or genus, at least two particular words, having a common characteristic or quality, or common and dominant feature, followed by general words which on their own are not clear and unambiguous words' (Samuels, 1984, p. 180).

the judging of the characteristics of the situation to be regulated, the attempt to determine *ratio legis*, and the moral and other non-legal aspects leading to the 'proper' decision. The interpreting person's legal concept, values, attitudes, and preferences unavoidably affect all of these elements. It is also necessary to *choose* from the (quasi) logical formulae, and this choice is not a logical but an evaluating operation that, depending on the chosen interpretation technique, can result in legal solutions being different from one another (and equally defensible).[144]

2.4.3. Domestic systemic arguments

Legal norms (principles and rules) constitute a system in which all legal norms have a regulatory environment in relation to which the given principle or rule takes place. Not a single norm is isolated; all of them form an integrate part of the norm system (the entirety of the positive legal regulations), and their meanings can be determined in accordance with the other norms. This is why the need for considering the context may arise in any case of determining the meaning of a norm. It is particularly true in the case of constitutional norms and fundamental rights, as their highly abstract nature often requires contrasting them with other (constitutional or other) norms to find their specific content.

The first group of domestic systemic arguments contains the methods of contextual interpretation. Contextual interpretation has a narrow and a broad sense: we either refer to the place occupied in the constitution by the constitutional provision, norm, or fundamental right to be interpreted or we contrast them with other constitutional provisions[145] or fundamental rights. *In a broad sense*, this includes when the Constitutional Court determines the meaning of a given constitutional provision on

144 Citing the example of Pierre-André Côté, Devenish asked how we can interpret, in case of a cheetah, the by-law according to which 'dogs [must] be held on a leash in public places'. The reasoning set out is as follows: 'Firstly […] it can be argued that the cheetah must be leashed because the reason justifying the rule for dogs (protection of person and property) applies equally to cheetahs. This is reasoning by analogy or *a pari* argument. Secondly it could be argued that the cheetah must be leashed because it is more threatening than a dog to persons and property and thus the justification is even greater for the application of the by-law. This *a fortiori* reasoning (with stronger reason or more conclusively). Thirdly it could be argued that the cheetah need not be leashed, because the by-law applies only to dogs. This is *a contrario* argument (by way of contrast or in the opposite sense)' (Devenish, op. cit., p. 227).

145 This includes not only the normative text of the constitution but also its (possible but, in new ones, already typical) preamble. The constitution of each examined country contains a preamble that may fulfil several tasks (specifying the source of sovereignty; establishing historical narratives; outlining a society's supreme or fundamental goals; statements on national identity; references to God or religion. Cf. Orgad, 2010, pp. 716–718). Preambles may have three functions: ceremonial-symbolic, interpretive, and substantive (cf. Orgad, op. cit., p. 715). Since the preamble is an 'accessory' of the normative text of the constitution, it always 'says something' about the intention of the constitution-maker or the political or social circumstances serving as basis for the making of the constitution the interpretive function as necessary. If the positive norms of the constitution may (or, sometimes, must) be interpreted in the light of the preamble, that will necessarily be contextual interpretation (because the preamble is also a *written text* included in the constitution).

the basis of, in conjunction with, with respect to, and in conformity with other specific constitutional provisions. *In a narrow sense*, however, we talk about contextual interpretation only in cases where we explore the meaning of the constitutional norm on the basis of its purpose, which is merely the result of its place in the system of the legal norms. (*Par excellence* contextual interpretation in the narrow sense covers the case where we attempt to determine the meaning of the fundamental right to be interpreted on the basis of the constitutional charter, part, chapter, or title of the constitution that contains it, without its comparison to other specific provisions.)

The often-used maxims of contextual interpretation in the broad sense comprise the *derogatory formulae*, which provide guidance for resolving contradictory provisions of the constitution (the constitutional norm collision). In practice, courts use three of such important formulae. According to *lex superior derogat legi inferiori*, a rule higher in the hierarchy derogates a lower one.[146] The maxim *lex specialis derogat legi generali* states that a special rule derogates a general one. The formula *lex posterior derogat legi priori* means that a later rule derogates an earlier one.

Constitutional norms may also be interpreted on the basis of domestic statutory law being lower than the constitution (acts, decrees): it is not typical and, normally, goes against the principle of the supremacy of the constitution[147] but it can happen that the constitutional court interprets the meaning of a constitutional provision (fundamental right) on the basis of statutory source (particularly, in case of constitutional principles regarding criminal law or criminal procedure law when the constitutional court interprets the principles *nullum crimen/nulla poena sine lege*, presumption of innocence, or *ne bis in idem* referring to the internal act on criminal proceeding or the criminal code).

The constitution (and the included norms; hence, also the fundamental rights) may also be interpreted on the basis of the case law of the constitutional court: for example, by reference to the constitutional court's decisions made previously in certain cases (as 'precedents'), to its 'practice', or to the abstract norms created thereby (e.g. organisational and operational rules). The constitution may also be interpreted based on the case law of ordinary courts. It covers the interpretation by reference to judicial practice, interpretation by reference to judicial decisions made in individual cases,[148] and interpretation by reference to the abstract norms and principled acts of judicial interpretation of higher courts.

146 Practically, this formula is not applicable in the course of constitutional interpretation since there is no hierarchy between constitutional-level norms (if so, it may raise the question of whether the subordinated ones are not constitutional-level norms).

147 The most important consequence resulting from this feature of the constitution is that '[t]he supremacy of the constitution means the lower ranking of [the] statute' (Limbach, 2001, p. 1).

148 The 'real' and 'not real' precedent systems are distinguished by the fact that in a 'real' precedent system, only one previous judicial decision is enough to constitute reference. In a 'not real' precedent system, a series of judicial decisions, set of judgements rendered in similar cases and providing the same legal interpretation, have persuasive enough power to give reason to follow. In a 'real' precedent system, it is absolutely not 'more conclusive to have a series of decisions than a single one' because 'the law of precedent has less relation to mere numbers than to the decisive nature of the

Either normative or individual decisions of other law enforcement bodies also belong to the legal system in a broad sense. Thus, constitutional provisions (fundamental rights) may be interpreted also based on the (typically) normative instruments of other public bodies. The constitutional courts may also use such arguments even if they cannot be expected to do so regularly. Moreover, theoretically, the interpretation of fundamental rights by the constitutional courts can be supported by the decisions of administrative bodies (e.g. tax office's resolution on questions of financial law, resolution of the election commission on disputes regarding election), by the ombudsman's recommendations, and other instances.

Furthermore, the interpretation of the state constitution based on the federal constitution (or vice versa) in federal states would also belong partly here and partly to the following method; it was not relevant in the present research since the examined states are not federations.

2.4.4. External systemic and comparative law arguments

Domestic (based on national law and legal practice) and external context may serve as a base for the interpretation of fundamental rights. Contrary to an ordinary court, which is more exposed to domestic law, a constitutional court, owing to the specific characteristics of fundamental rights, is freer to use substantial aspects from non-domestic positive law or judicial practice that it considers to be necessary to explore the meaning of constitutional rights, which have a more uniform international content. Since the constitutions of states mainly contain fundamental rights with international relevance (i.e. included also in international conventions), the use of *international treaties* for defining similar aspects can naturally play a role in the interpretation of 'internal' fundamental rights during the argumentation of the constitutional court. Furthermore, since most international treaties have some enforcement mechanism (at least in case of the ECHR and the Treaties of the EU, the most important ones at the European level), fundamental rights may be interpreted also on the basis of *individual decisions or judicial practice of the international fora*. In

conclusions announced' (Wells, 1878, p. 535). Regardless, we can differentiate, also in the classical precedent system, 'declaratory precedents', which are compulsory but do not qualify as 'new law' or 'new rule' (and there can be many of these in a certain type of case) and 'original precedents', which are not only compulsory but, by creating new law, also have a greater importance for the development of law. For differentiation, see Salmond, 1902, pp. 159–161. Ződi defined two subtypes of the 'unreal' or 'non-classical' precedent systems: the 'written' precedent system, in which a brief, abstract legal document is interpreted by a body expressly assigned to it; and the 'decisional systems', in which the supreme courts carrying out ordinary judicial activity rely on their own previous decisions and the following thereof is, informally, expected also from inferior courts. Ződi, 2021, available at: http://ijoten.hu/szocikk/precedens (Accessed: 11 April 2021). The constitutional court practice analysed in the present research belongs to the former group in each country, whereas the ordinary court's practice taken into account by the constitutional court typically does to the latter. Hence, we hypothesised that, in general, the 'coherent and settled' *case law* of a given organ (if any) will have significance.

the course of the present research, a selection criterion of constitutional court decisions to be analysed is that they contain references to ECJ or ECtHR decisions; their decisions and judicial practice or the ECHR and (presumably) the Treaties of the EU (at least one of them) are naturally parts of all decisions examined. In this regard, therefore, it is especially necessary to examine what *other* international or supranational sources are referred to by national constitutional courts.

In addition to the use of the 'traditional' sources of international law, the interpretation of fundamental rights may have further sources, namely, *par excellence comparative law arguments*. If, for example, the constitutional court refers to a norm or a law application instrument, such as constitution, statute, or decision of (constitutional) court, of a particular foreign legal system (in case of the latter, references to the German *Bundesverfassungsgericht* or the Supreme Court of the United States may typically be such, in Central and Eastern Europe), then it establishes the meaning of the domestic norm (fundamental right to be interpreted) with the assistance of the positive legal norm or judicial practice of that foreign legal system. Although in this case questions regarding sovereignty may arise, according to the hypothesis of the research, such arguments cannot be considered, in general, as 'strong arguments' applied by the given constitutional court. Hence, they generate no sovereignty problem. Finally, it also can happen that the national constitutional court refers to the 'European practice', the 'principles followed by democratic countries', and similar non-specific justifying principles in a general manner; however, the reasoning weight thereof is even more doubtful.

Finally, constitutional courts may also use *further* external sources of interpretation as well, such as the norms of customary international law and *ius cogens*.

2.4.5. Interpretation based on the intention of the legislator ('historical' interpretation) and teleological interpretation

In *teleological interpretation*, the law enforcement bodies (the constitutional court, in our research) explore the meaning of the legal regulation (codified constitution or act of constitution in the examined countries) based on its objective goals and social purpose. Most often, the law enforcement body takes into account the regulation's title, preamble, or the social function implied by the text of the act (constitution) that the regulation intends to fulfil. Irrespective of the wording, it covers all arguments in case of which the constitutional court refers to the purpose of the constitution, reason for its existence, function, or goals thereof.

By means of *historical interpretation*, we attempt to determine the subjective will or inner intention of the legislator (constitution-maker) regarding the given legal norm. In this case, we can use ministerial (proposer's) justification, draft materials (*travaux préparatoires*, *Materialen*, *legislative history*), or, without citing any external sources, general references to the 'intention of the legislator (constitution-maker)', its ('obvious' or 'probably') 'will', or reasons based on the circumstances of making or

modifying the legal provision (the text of the fundamental right in the constitution) to be interpreted.

It is disputed in legal theory whether objective and subjective teleological interpretation (i.e. interpretation based on the purpose of the norm and on the intention of the legislator, respectively) are two separate methods.[149] If we think they are not, we have to decide which method 'actually' exists—whether the decision-making of the law applier takes place considering the legislator's will in the psychological sense or the objectified function expressed in the legal norm. This leads us to the basic question of what the subject of the interpretation is: *what we interpret*. Basically, two answers are possible.

According to *subjective theory*, we search for the assumable intention of the legislator in the course of the legal interpretation: what the legislator probably wanted to reach with the given legal regulation, what idea they had with making the regulation, what they intended to achieve. In this case, the detected will of the legislator would be the meaning of the text.

149 The most significant of the contemporary (or near contemporary) disputes is the American trend of originalism and the opposition within it between intentionalism and purposivism. For a demarcation of the two trends, see Colinvaux, op. cit., p. 1133; Fruehwald, 2000, pp. 976–977). According to advocates of purposivism, a judge, in the course of their interpretation of a statute, is obliged to examine its social purpose in the broad sense. This examination may be carried out with respect to 'legislative history' ('records of congressional consideration of a bill that ultimately becomes a statute, including committee reports and debates on the floor', Dworkin, 1985, p. 320), but even more by examining the particular provisions in the text of the legal norm itself, which refer to the aim thereof. This interpretation is towards the exploration of the objective social aims of the legal norm. In contrast, advocates of intentionalism start from an examination of the subjective intent of the legislator and try to determine what the legislator intended to achieve by the law. To do this, intentionalists also make extensive use of legislative history, but they look for references to personal motivations in these materials. Intentionalism has two further subgroups: archaeological and hypothetical intentionalism (cf. Fruehwald, op. cit., p. 977). The former examines the text of the statute and its legislative history to determine the probable will and intention of the legislator when they created and adopted it. The latter examines how the legislator would decide today if it had to decide about the legal regulation applicable to the changed social relations. Hypothetical intentionalism seeks the probable standpoint of the then legislator regarding today's social relationships. This approach is called 'imaginative reconstruction' (Posner, 1983, p. 817). Sunstein called the latter 'hard originalism' and rejected it, since then legislators created rules in light of then circumstances and they would obviously have created other rules in changed (today's) social situations. Purposivism and archaeological intentionalism as part of 'soft originalism' are more applicable (Sunstein, 1996, pp. 312–313). Campos defined a further type of originalism, namely, 'strong intentionalism'. The first stage is that we have to read the text to interpret it; the reading is an activity that always aims to reveal the semantic intention of the author. This intention of author is identical to the semantic meaning of the text. If we determine *what the author wanted to say*, then, we also determine *what the author said*. Therefore, the author's intention and the meaning of the text are identical. Legal actors should not only try to reveal the intention of the author, too, but recognise that there is *no other way at all than that* for the law enforcement entity to interpret (Campos, 1996, pp. 327–330). This assumption (as with any subtype of originalism) is based on an idealistic image. When we interpret actual legal texts, we cannot ignore the possible deficiencies and ambiguous or unclear wording of either the text itself or the author's expressed intention.

The first problem regarding this question is that there is not a 'legislator' (a person or a body that can be identified as the particular entity creating the law), not even in the case of ministerial law-making, nor legislation by a body. In case of an act, for example, an idea, proposal, or conception may go through several phases until it finally becomes an act, and the same is true for constitutional provisions. Acts are (constitution is) normally drafted by a codification committee. Its members make proposals for certain provisions, which are amended by other members, and finally, the committee votes on it. The ministry responsible for the given area often proposes, on the initiative of any of its officers and with the approval of the minister, amendments (either on political or professional grounds) to the draft version of the text accepted in this way. The ministry of justice submits further proposals for the amendment of the same point. It will be discussed by a preparatory forum subordinated to the government and placed, in a structured form, on the agenda of the government's session, where the members of the government make their own further proposals to modify the text. Some of these proposals are accepted by the government; others are not or given different wording. The bill submitted by the government will be further modified with respect to the proposals of the members of the parliament or the parliamentary committees. Finally, the text of the norm developed in this way will be adopted by the majority of the parliament. The question arises: who is *the* legislator in this case?[150] Probably, everyone at the same time but, thus, no one.

The second problem regarding subjective theory is that even if we could define the legislator, the question arises whether it is possible for the legislator (the 'constitution-maker') to have any will. Law is made by collegiate bodies and, *a priori*, a body may not have any 'will'. Even in case of law-making where one person bears the responsibility (e.g. if a minister makes a decree), we cannot talk about one-person law-making since the minister does not draft the ministerial decree; it is drafted by several people within the ministry's specialised apparatus. The minister only defines the (political/legal-political) aspects of the legislation, and in the end, by signing the decree, assumes political responsibility for its content. Only a particular person may have 'will' and not a body (or all the persons who take part in the preparation).

The third problem is in determining the 'will of the legislator' if it were to exist. We cannot draw a clear conclusion on the subjective (i.e. in its entirety conceptually undiscoverable) intention either from ministerial justification or draft materials or other sources. The will of the legislator (constitution-maker) (even if it existed) cannot be determined in its actual reality.

150 The codification committee? Its member responsible for wording the text? The members who approved the proposal? The minister responsible for the given area? The ministry's officer who initiated the proposed amendment? The minister of justice? The preparatory body of the government? The government? The member of the government voting for the bill? The Parliament as a whole? The members of the parliament voting for the proposal? All members of the parliament who voted in any way? All members of the parliament?

According to objective theory, meanwhile, the object of legal interpretation is the text as such (independent of the author). Concerning the meaning of the text, it is irrelevant who made it; the text stands alone and its meaning can be determined by grammatical techniques. The meaning of the text would then be the consensus of the 'interpretive community'. The problem with this aspect is that no text has, in fact, (entirely) objective meaning (being the same for everyone) on which people speaking the given language could reach a consensus. Each person has different attitudes and values, not to mention their interests, which also have impacts on their relation to the meaning of the text of the norm.[151] Objective meaning, which is the same for everyone, can never come into existence.

However, both sources are *used* in the interpretation: the proportion and frequency of these references can be measured, and they have a *real impact* on the way the law is applied. For this reason, it is justified to measure the occurrence of both the subjective and objective teleological interpretation and to differentiate these methods.

2.4.6. Other arguments

In addition to the above, there are further methods and sources which the examined constitutional courts may use in the course of the determination of the meaning of fundamental rights. These methods are not typical but their occurrence is possible; thus, it is certainly justified to enumerate them and measure the frequency of the application thereof as part of the research methodology. Even if they were not used by some law enforcement bodies, there would be no reason not to use them, since research can not only show the extent to which certain methods are used by certain bodies but also whether they are used at all.

It covers *arguments based on jurisprudence*—references to scholarly works in the course of interpretation of constitutional rights. In this case, the constitutional court solves the arising interpretation problem based on a particular jurosprudential work, including monographs, textbooks, articles, commentaries, already expired former constitutions, and draft constitutions that have not yet entered into force.

In the course of *interpretation in light of general legal principles*, principles and values determining the provisions of constitution are used, which, though not expressed in the constitution or in any part of positive law (hence, contrary to the principles of positive law as dogmatic categories, their grammatical interpretation is out of the question), determine the functioning of the legal system (*ignorantia juris neminem excusat*,[152] 'everything which is not forbidden is allowed', *nemo plus iuris ad alium transferre potest quam ipse haberet*').[153]

151 It is normal that the defendant and the plaintiff of a litigation interpret the same legal text completely oppositely.

152 Ignorance of the law excuses no one.

153 No one may transfer more rights than he actually has.

Finally, by *substantive interpretation*, the law enforcement body (the constitutional court in our research) refers directly to generally accepted non-legal values. Such values may include certain moral principles with cardinal nature, aspects of justice, social policy considerations, the idea of equality, utility criteria (e.g. economic considerations), and enforcement of public interest. All moral, economic, environmental, statistical, social, scientific, or other similar expressly non-legal arguments belong to this method.

2.4.7. Summarising classification of methods regarding argumentation to be researched

1. Grammatical (textual) interpretation
1/A. Interpretation based on ordinary meaning
a) Semantic interpretation
b) Syntactic interpretation
1/B. Legal professional (dogmatic) interpretation
a) Simple conceptual dogmatic (doctrinal) interpretation (regarding either constitutional or other branches of law)
b) *Interpretation on the basis of legal principles of statutes or branches of law*
1/C. Other professional interpretation (in accordance with a non-legal technical meaning)

2. Logical (linguistic-logical) arguments
2/A. Argumentum a minore ad maius: inference from smaller to bigger
2/B. Argumentum a maiore ad minus: inference from bigger to smaller
2/C. Argumentum ad absurdum
2/D. Argumentum a contrario/arguments from silence
2/E. Argumentum a simili, including analogy
2/F. Interpretation according to other logical maxims

3. Domestic systemic arguments (systemic or harmonising arguments)
3/A. Contextual interpretation
a) In narrow sense
b) In broad sense (including 'derogatory formulae': *lex superior derogat legi inferiori*, *lex specialis derogat legi generali*, *lex posterior derogat legi priori*)
3/B. Interpretation of constitutional norms on the basis of domestic statutory law (acts, decrees)
3/C. Interpretation of fundamental rights on the basis of jurisprudence of the constitutional court
a) References to specific previous decisions of the constitutional court (as 'precedents')
b) Reference to the 'practice' of the constitutional court
c) References to abstract norms formed by the constitutional court
3/D. Interpretation of fundamental rights on the basis of jurisprudence of ordinary courts
a) Interpretation referring to the practice of ordinary courts
b) Interpretation referring to individual court decisions

c) Interpretation referring to abstract judicial norms
3/E. Interpretation of fundamental rights on the basis of normative acts of other domestic state organs

4. External systemic and comparative law arguments
4/A. Interpretation of fundamental rights on the basis of international treaties
4/B. Interpretation of fundamental rights on the basis of individual case decisions or jurisprudence of international fora
4/C. Comparative law arguments
a) References to concrete norms of a particular foreign legal system (constitution, statutes, decrees)
b) References to decisions of the constitutional court or ordinary court of a particular foreign legal system
c) General references to 'European practice', 'principles followed by democratic countries', and similar non-specific justificatory principles
4/D. Other external sources of interpretation (e.g. customary international law, *ius cogens*)

5. Teleological/objective teleological interpretation (based on the objective and social purpose of the legislation)

6. Historical/subjective teleological interpretation (based on the intention of the legislator):
6/A. Interpretation based on ministerial/proposer justification
6/B. Interpretation based on draft materials
6/C. Interpretation referring, in general, to the 'intention, will of the constitution-maker'
6/D. Other interpretation based on the circumstances of making or modifying/amending the constitution or the constitutional provision (fundamental right) in question

7. Interpretation based on jurisprudence (references to scholarly works)

8. Interpretation in light of general legal principles (not expressed in statutes)

9. Substantive interpretation referring directly to generally accepted non-legal values

2.5. Methodological particularities of the analysis of ECJ and ECtHR decisions

In the course of the analysis of the 30 EctHR and ECJ decisions, we pay attention to the appearance, the frequency and the actual importance of the methods described above, except that the *subject of interpretation* is not the constitution but the ECHR and the Protocols, as well as the EU Treaties (and, of course, the interpreter is not the domestic constitutional court but the ECtHR and the ECJ, so their perception

of law and style of adjudication are subject to examination). Certain methods are not relevant owing to the subject of interpretation, but most arguments are identical to the ones described above (apart from the obvious differences defined by the subject of interpretation). Thus, methods 1, 2, 5, 6, 7, 8, and 9 can be used without any problems and along with all their specific arguments. From the arguments of group number 3, type 3/A can be used; and, for interpretation of ECHR, etc., the following are usable as systematical arguments: 3/B as references to the case law of the ECtHR and the ECJ: a) previous decisions ('precedents'), b) judicial practice of the forum, c) principled statements made by the forum (e.g. its own operational rules); 3/C: the interpretation of the ECHR on the basis of other materials of the Council of Europe (e.g. Venice Commission); interpretation of EU Treaties on the basis of the decisions, resolutions, etc. of other EU bodies; 3/D as references to the law of member states. Amendments to the arguments of group number 4: type 4/A can be used with references to other international agreements; 4/B as references to individual decisions or judicial practice of other international legal fora; arguments 4/C and 4/D can also be used without problems with the abovementioned.

2.6. Characteristics and style of reasoning

The statistical frequency of argument types, in itself, does not tell us everything about the practical role thereof. Hence, the present research would have not been complete if we, apart from the methodological particularities, had not taken into consideration what weight these methods have during the decision-making and what other features the argumentations of the decisions of the constitutional courts regarding constitutional rights and the ones of the European fora regarding human rights have. For this, it was necessary to determine which arguments appear typically in the practice of the given constitutional court (or of the ECtHR/ECJ): a) decisive arguments, b) defining arguments, c) strengthening arguments, or d) simple illustration with marginal significance.

a) *Decisive arguments* are those that themselves, even without other arguments, would have led to the given conclusion. It is possible that the decision of the constitutional court, the ECtHR, etc. contains several decisive arguments. It can happen if the same conclusion could have been grounded by any of these arguments separately, without the others. Obviously, the legitimacy of a conclusion is enhanced if it is supported by several arguments being conclusive in themselves but it has no effect on the outcome: if only one of the arguments had been available, the same decision would have been made.

b) *Defining arguments* are those that played a significant role in finding a certain conclusion in the course of deciding the case and making the decision, but none of them would have provided *per se* a basis for the decision—they were strong enough to ground the given decision only together.

c) *Strengthening arguments* are those without which the decision in question could have been made with the same content; such arguments merely strengthen the

legitimacy of the decision but can be omitted because the same result would have been reached even without them.

d) *Illustrative arguments* are those that do not play a role in grounding the decision's reasoning. These are virtually a kind of parenthetical comments, references merely for the sake of completeness. Their main function is that the forum could prove that it is aware of this information, which does not play a role in reaching the conclusion. Typically, these are comparative arguments in which the constitutional court (ECtHR / ECJ) delineates the existing solutions to a particular problem in the world or in other countries, or where the forum refers to the statements of the parties but refutes their relevance or validity.

If a type of argument or method appears more than once in the same decision, it counts statistically as one; however, it can be assumed that the given argument is important in terms of its weight (multiple occurrences may indicate that the concerned body insists on certain methods; hence, respect of multiple occurrences may contribute to the assessment of the role perception of the concerned body).

However, the extent to which different types of arguments play a decisive role in decision-making and reasoning cannot be determined on a quantitative basis alone. In each case, this required an evaluative statement by the author of the chapter, according to their own professional convictions. Beyond the establishment of mere statistical rates, the evaluation of the practice of a national constitutional court and scientific benefit of our research depend fundamentally on whether we manage to explore which arguments are used as decisive ones in the practice of law enforcement bodies. Thus, we have to look at what is behind the text and to be familiar with the entire case law of the given organ (in addition to the examined 30 decisions) to fulfil successfully the mission of our research. To this end, the researcher of the given country, according to their own professional conviction, established, on a qualitative basis, what weight the types of arguments (arising with respect to the given organs) have in the course of decision-making and interpretation of fundamental rights.

Apart from the specific *arguments and methods* applied, the analysis of the *judicial style* of the examined organ was also the subject of our research. It is also a qualitative feature and, at the same time, an issue that requires professional evaluation and cannot be judged mechanically. In this respect, the researchers judged, on the basis of their outstanding professional experience and knowledge, in their own discretion, how the practice of the given body can be evaluated. At least the following were examined in this regard:

a) *Style of reasoning*: It can be *enunciative* in case the constitutional court (ECJ/ ECtHR) makes quasi *ex cathedra* statements (without careful consideration and comparison of arguments and counter-arguments); and it can be *discursive arguing* in case the decision is made with awareness of arguments and counter-arguments, by analysing the arguments of the petitioners and providing a legal answer to them;

b) *Key concepts* (fundamental rights, principles of state organisation, principles determining the functioning of the legal system, dogmatic categories, legal doctrines, etc.) that the given organ respects and accepts, i.e. which have a decisive

influence on the body's conception of law, constitutional self-interpretation, and role perception;

c) The fundamental rights or other constitutional *tests and standards* applied by the given constitutional court (e.g. to resolve substantive contradictions between competing fundamental rights or to designate a hierarchy), and how close it is, for example, to the tests and standards applied by the ECtHR or the ECJ);

d) The *'addressee' of the decisions and the reasoning*; to whom the constitutional court (ECtHR/ECJ) 'speaks' (e.g. lawyers in general, judges, law-makers, all citizens, educated intellectuals, international fora, constitutional judges in the minority, petitioners, etc.).

Finally, all other findings relevant to the practice of the constitutional court of a given country were welcomed in our research. However, their enumeration or previous determination was impossible since these are situational features. The assessment thereof became the task of the researcher of the given country. Although even an exemplificative list of these is unreasonable, here are a few examples: whether the Judge-Rapporteur (or the specific panel appointed to decide) is a determinant to the outcome of the case or the style of the reasoning of the decision; whether the same is affected by the designation order or the staff members who prepare the case for decision-making; whether there is a significant difference between the style and nature of the arguments related to the proceedings carried out and the decisions made in the exercise of different powers; how the given constitutional court resolves priority issues (e.g. between the constitution, ECHR, EU law); whether there are rules of interpretation in the constitution (and if so, how the constitutional court applies them); how long the justifications/reasonings are (and whether there are differences between the length, thoroughness, or structure of reasoning for each case type); and whether there are parallel arguments between majority and minority/separate opinions. Regarding the decisions of ECJ/ECtHR, the extent to which, in certain national cases, they refer to each other's decisions or underlying conventions (e.g. ECtHR to EU Treaties or Luxembourg case law; ECJ to ECtHR case law, ECHR, or other sources of the Council of Europe) was also deemed interesting.

3. Results

3.1. Legal interpretation activity of the constitutional courts in Central and Eastern Europe

To evaluate the legal interpretation activity of the constitutional courts in Central and Eastern Europe, we paid attention to the powers that provide frames for constitutional adjudication. Hence, a college basically performing norm control activity may consider different aspects from one mostly judging constitutional complaints.

The petitioners (e.g. whether *actio popularis* exists in cases regarding norm control) also play a role, including their habits. The constitutional culture impacting these habits may also affect the features of law application manifested in constitutional adjudication and of the legal interpretation activity of the constitutional court. In the present research, these differential impacts were reduced by the fact that, according to the research design, only the constitutional court decisions interpreting and applying fundamental rights were examined. It did not affect the sampling base related to constitutional complaint cases but did the one of norm control cases, since we excluded the examination of cases that raised issues concerning purely the state structure, competences, or basic principles (not related to fundamental rights). The requirement that the selected cases must include references to the decisions of supranational courts also narrowed the range of cases to be examined, which could also have affected the types of the fundamental rights within the cases examined.

The concentrated constitutional courts functioning in all Central and Eastern European legal systems examined in our research had five (plus one) typical main activities: norm control (both with abstract and concrete manner), individual (direct) protection of fundamental rights (fundamental right adjudication), adjudication on competence disputes, adjudication regarding the functioning of the state (charges against public officers, banning of political parties, etc.), and adjudication on election disputes. Furthermore, courts undertake the interpretation of the constitution in connection with all these and also as separate competence. All indicated that constitutional adjudication is an activity separated (institutionally and, mostly, functionally) from ordinary adjudication and cannot be considered as a part of the justice system in the classical division of powers by Montesquieu.[154]

The most traditional function of the constitutional judiciary is norm control: checking the constitutionality of legislation. If, in the exercise of this power, the constitutional court finds that a statute or statutory provision is unconstitutional, it annuls the statute (statutory provision), so that it cannot produce legal effects once the annulment has taken effect. Therefore, it is a necessary condition of the concentrated constitutional adjudication that the constitutional court functioning independently could examine the constitutionality of any legal regulation or the compliance thereof with the provisions of the constitution and could annul these provisions if they were found to be unconstitutional, i.e. it could, formally, take them out from the existing legal system. There are two types of norm control: abstract and concrete. Abstract norm control means that, on the motion of the entitled person, the constitutional court examines the compliance of a norm with the constitution in a general manner (independently of a specific case or procedure). In the case of

154 It is the Polish Constitutional Tribunal that may be mentioned as the only partial exception from this. In a slightly doubtful manner, Mirosław Granat expressly wrote, '[i]t belongs to the judiciary' (cf. Granat, 2018, p. 133). This institution was regulated by Chapter VIII of the Polish Constitution of 1997 together with, but not as a part of, the 'courts and tribunals' and 'the Tribunal of State'. It cannot be stated that the Constitutional Tribunal 'would belong' to the judiciary.

concrete norm control, there is a main case (procedure) in which the possibility of the unconstitutionality of a given statute (statutory provision) arises. Most constitutions give the right to the former to a few precisely defined public actors (parliament or a certain number of members of parliament, government, higher courts, etc.), whereas the latter can be initiated by a public body defending public interest (e.g. prosecutor's office, ombudsman, public authority also responsible for the protection of fundamental rights), the court seized of the specific case (and otherwise required to apply the rule), or (typically) the person concerned in the specific case (a party to the legal proceedings or a person with another role, or a person directly affected by the rule), whose rights have been or, if applied in the future, would be affected by the legal provision they consider unconstitutional.

The typical form of fundamental rights adjudication is the constitutional complaint and, in particular, its form developed in the German constitutional law, as 'real constitutional complaint' (*Urteilsverfassungsbeschwerde*). Any natural or legal person concerned in a judicial process can go to the constitutional court even if it is not the legal regulation applied by the court that the person considers to be unconstitutional but (recognising the constitutionality of the legal regulation) the court's decision itself or the legal procedure leading to that decision, i.e. the unconstitutional application of the otherwise constitutional norm (including not only procedural mistakes but, first and foremost, the unconstitutional interpretation of the given norm). The activity of the constitutional court in the field of fundamental rights interpretation examined in the framework of the research meant mainly the examination of the decisions of the constitutional court in constitutional complaint proceedings, and secondarily, the analysis of the reasoning of decisions in norm control cases. These mainly contain interpretations related to the meaning of constitutional rights.

Nevertheless, fundamental right aspects may occur, in a complementary manner, even in the exercise of other constitutional court competences. It may be the least probable in the adjudication on competence disputes, which is also the part of the original model of Kelsen and in the course of which the constitutional court settles the disputes between other constitutional bodies regarding their competence (i.e. if the constitutional bodies disagree[155] on which of them may proceed and make a decision in certain cases, the constitutional court will decide it with the interpretation of the relevant provisions of the constitution[156]). It is more likely that the application and interpretation of fundamental rights occur in the course of the adjudication regarding the functioning of the state (because persons performing public functions may also have fundamental rights) and of the adjudication on election disputes (when, mainly, the interpretation of the so-called political fundamental rights, such

155 The constitutional court delivers judgement on only the conflicts between *different types* of public bodies. Conflicts within a given organisational system (e.g. disputes on competence of courts) will be resolved by the 'key organisation' of the given system.

156 The conflict of competence may be 'positive' if two or more bodies wish to proceed in a given case or make a certain type of decision; and may be 'negative' if no organisation wants to resolve a task resulting from the constitution.

as the right to stand as a candidate at elections and the access to public office, may occur). Beyond these, constitutional courts may have several other concrete tasks assigned to them by the constitution-maker; however, most constitutional courts basically perform the mentioned ones (or some of them). Finally, it must be pointed out that, with *erga omnes* effect, only the constitutional court is entitled to interpret the constitution (within the concentrated constitutional adjudication). It necessarily performs the same when exercising any of its other concrete competences. It is also entitled to perform such adjudication, to protect the unity of constitutional order, in abstract manner, independently from concrete cases.

The institution of constitutional complaint (including – except for Poland – the possibility for challenging the judicial decision owing to the violation of constitutional rights, ie., real constitutional complaint) and the abstract and concrete norm control exist in all the six countries concerned. The other competences reveal a high degree of variation. A common feature of almost all legal systems is that apart from the constitutional review of legal regulations, even the examination of their conflicts with international conventions may be initiated (by certain petitioners), which is a particular type of norm control beyond the Kelsenian model of constitutional adjudication (but which is generally used in the countries applying concentrated constitutional adjudication).

In our research, the majority of the decisions of the six examined Central and Eastern European constitutional courts were made in constitutional complaint procedures and the smaller part thereof in norm control procedures; decisions made during exercising other competences were exceptional. The ECtHR decisions defined as a criterion for selection were made in fundamental rights cases and, hence, the constitutional court decisions that referred to those were also made in cases regarding constitutional rights—its typical form (making up the majority of the cases in practice) is the constitutional complaint. Interpretation of fundamental rights may occur in norm control cases; hence, we also expected that the selected cases would include, beyond complaints, cases initiated for judging the constitutionality of legal regulations.

As for the general methodological lessons learned from the research, the following must be pointed out. In each country, the reference to previous constitutional court decisions is the basic argumentation method. In this context, it is typical of all examined countries that they do not simply refer to previous practice but to concrete constitutional court decisions that serve as bases for the decision-making in the given later case. Since all examined constitutional courts had started functioning long before 2011 (the earliest date of decisions which could be included in the sample), all of them had already rendered several decisions regarding most issues that raise constitutional problems even if not in the same legal matters. However, because colleges of a later composition maintain the principles already elaborated regarding certain fundamental rights, the interpretative terms and findings in interpreting fundamental rights are, obviously, used in later similar decisions for judging, in other respects, the same fundamental rights. This would actually be the case even if they did not refer to those decisions explicitly; but they do. It can be assumed that they do not start with

a clean slate when deciding a constitutional problem; rather, they weave the net of constitutionality that had been started by their predecessors (even if, exceptionally in some partial questions, they change their opinion). Accordingly, the constitutional courts become quasi-precedent courts. They are not formally bound by their earlier decisions; these ones provide a good basis to obtain a similar result in a later similar constitutional question, for a college of a different composition.[157]

We can find several plausible explanations for this. On the one hand, fundamental rights do not change quickly; their denominations remain the same (mainly in case of first-generation human rights functioning as real fundamental rights) and the underlying content has a minimum of several decades or, often, several hundreds of years of tradition. Most of these fundamental rights have matured scope and meaning. Even if there is dispute on partial questions among the members of the constitutional court, there are always preliminary questions or substantial starting points on which there is a consensus in the college. Thus, the college (or its current majority) can find previous decisions to be used as starting point of its later decision-making. Since it is also typical that constitutional courts, mentioning as many aspects arising in the given case as possible, refer to several (by as many as more than ten) previous decisions in one case, there will always be precedent decisions on the content of which no serious debate exists among constitutional court judges. Even if there is no consensus among them on what particular constitutional decision in the concrete case comes from those, certain principles mean the minimal safeguards of constitutionality, without which the protection of fundamental rights would make no sense (and these principles are typically in the basic decisions made in the first few years of the functioning of the given constitutional court).

The fact that it can increase the legitimacy of their current decisions can also encourage constitutional courts to use more previous precedent decisions. It can be realistically expected that a decision that follows directly from earlier practice already accepted and recognised by society and the legal community can expect fewer professional and social critiques compared with a decision of a novum nature made for the first time on a given issue. Finally, incorporating previous decisions into reasoning is also effective in terms of labour savings: the always busy colleges need to invest less time and energy in the constitutional reasoning since most of it has already been done by previous constitutional court decisions. Thus, it is no coincidence that in almost all 180 constitutional court decisions examined, i.e. (with one exception) in all six countries, the decisions of almost all (or actually all) examined

157 The longer a constitutional court (or other body empowered with constitutional adjudication) functions, the more often it cites decisions as precedents. This is typical not only of Central and Eastern European countries: Goldsworthy formulated the following as general experience in case of six countries (the US, Canada, Australia, Germany, India, South Africa) having different legal cultures, being located in different regions but equally having a written constitution: 'Precedents naturally play a much larger role in the interpretations of older constitutions, simply because there are more of them. When constitutions are young, courts have a greater need to seek guidance elsewhere, which diminishes as they build up their own stock of indigenous precedents' (Goldsworthy, 2006, p. 342).

cases in each country contained reference to at least one, but in the bigger part, several, previous constitutional court decisions. The only exception is Serbia, where only 14 cases contained reference[158] to previous constitutional cases; here, instead, international sources are taken into account by the constitutional court. The role of the latter is more significant here than in the other countries. The use of this manner of reasoning was decisive or at least defining in several cases. Thus, the constitutional courts of Central and Eastern European countries can be considered as *quasi-precedent courts* (using the concept of one of the precedent types of Ződi, 'charter precedent courts' or, our own slightly more precise definition, *case law courts*).

As for the further interpretation methods, the practice of the constitutional courts in certain Central and Eastern European countries was varied. Some methods were more typical of certain colleges and less typical of other ones. Primarily, the contextual interpretation in the broad sense was employed.[159] The constitution and fundamental rights included thereby must form a coherent system; hence, the tension between fundamental rights appearing to contradict at text level must be eliminated: fundamental rights must be interpreted in relation to each other and their scope must be defined in that way. Defining which fundamental right has primacy in a borderline case requires the application of measures and tests with the use of which the constitutional court performs (necessarily) contextual interpretation. In most cases, this use is necessary and inevitable to implement the principle of unity and coherence of the constitution (being obviously fictional but practically essential). At the same time, the contextual interpretation in the narrow sense, i.e. establishing the meaning of a fundamental right merely on the basis of the part of the constitution it was placed in by the constitution-maker, was not typical in any of the examined countries. They either did not occur at all in the 30 decisions examined (from which it cannot be concluded that such an interpretation does not exist at all in the legal system in question, but that it is at least not common), or only exceptionally. Similarly, further types of domestic systemic arguments appeared also only exceptionally in the examined constitutional court decisions of the given countries. Thus, while the earlier constitutional court practice, in the scope of this method, was defining (in almost every case of every country), the contextual interpretation in the broad sense (interpretation of fundamental rights referred to or reflected in each other or other constitutional provisions) was typical, the interpretation of fundamental rights on the basis of domestic statutory law was rarely used (in more or less than half of cases).[160] The case law and judicial practice of domestic ordinary courts occurred in the analysed decisions at most only during the delineating of the facts of

158 It occurred also in case of the Slovakian college that, in several (a total of five) cases, no previous constitutional court practice was used as basis for interpretation or reasoning.

159 The exception is the Czech Republic, where this interpretation occurred in less than half of the cases. In Serbia and Slovakia, one could find relatively moderate occurances with two-thirds (20 cases) and slightly more than half (16 cases) of the 30 analysed items.

160 This method was used in 18 cases in Slovenia, 15 in Slovakia, and 11 in Serbia. It was detectable in six cases in Hungary, three in the Czech Republic, and none in Poland.

constitutional complaint cases (the background of the underlying case; and, in the course thereof, in the analysis of the consistency between the judicial practice and judicial decision challenged with the complaint) and barely in the interpretation of fundamental rights, if at all.[161] Finally, the interpretation on the basis of normative acts of other domestic state organs was also barely used (not exceeding one-fifth of the cases) by the constitutional courts of Central and Eastern Europe, even then only as strengthening arguments or simple illustration.[162]

At the beginning of our research, we hypothesised that, apart from the reference to the practice of the constitutional court, grammatical (textual) interpretation would be the most decisive method. This was proved only partly by the results: while dogmatic interpretation proved to be the frequently used method if considers with the simple conceptual dogmatic interpretation and interpretation on the basis of legal principles of statutes or branches of law (at least either of them was used in all countries and in all cases or in the majority thereof), the attempt to explore the everyday meaning of words was either absent from most of the decisions of the constitutional courts analysed, or was present in only a few cases.[163] The explicitly referred consideration of dogmatic meaning may obviously be due to the fact that the normative text of the constitution is a legal text, and the legal meaning of legal terms (dogmatic categories related to constitutional law or other positive law, or the principles of branches of law) is, on the one hand, relevant and, on the other hand, often ambiguous in the course of judging the concrete constitutional problem to be decided. Hence, the explicit interpretation appearing in the reasoning is inevitably necessary. On the contrary, the exploration of the ordinary meaning may be less frequently applied because it is unambiguous or at least the constitutional court assumes that it is well known, and therefore unproblematic. Thus, its explicit interpretation is, according to the constitutional court, not necessary in most cases (*interpretatio cessat in claris*). Even in its limited occurrence, textual interpretation based on ordinary meaning of the text almost always (with four exceptions) meant semantic interpretation; syntactic interpretation occurred in only three Polish and one Hungarian Constitutional Court decision out of the 180 analysed constitutional court decisions. The total absence of other professional interpretations is worth noting; this kind of interpretation never appeared in the sample.

In the examined constitutional courts, external systemic arguments were applied to a significant extent but slightly less frequently than domestic systemic arguments or grammatical interpretation. Since it was a selection criterion regarding all constitutional court decisions to be analysed to have reference to ECtHR or ECJ decisions,

161 Only in Hungary has this method been used by the domestic constitutional court in more than 25% of the cases analysed.

162 The exception is Slovakia, where such an argument was used in 11 cases.

163 Thus, no interpretation based on ordinary meaning (at least not explicitly referred to) occurred in the practice of the Czech Constitutional Court we analysed. It occurred occasionally in the jurisprudence of the Polish (15 cases), Slovenian (10 cases), Serbian (8 cases), Slovak (6 cases), and Hungarian (3 cases) Constitutional Courts.

no conclusion may be drawn from the fact that all decisions included at least one of these; such 'conclusion' would mean replacing the consequence with the cause. This is particularly true given that regarding the five-year period (between 2016 and 2020) defined in the original research design as the selection criterion for the period of making constitutional court decisions (which have references to ECtHR or ECJ decisions and have importance regarding the given legal system, legal practice, or society as a whole), the researchers of several countries noted the difficulty that, during this period, there was simply not enough relevant constitutional court decisions made that would allow them to choose 30 decisions meeting the conditions and to be analysed. For this reason, we were forced to partly modify the research design and to define a ten-year period for the examination instead. This fact alone may give rise to the assumption that reference to concrete decisions of supranational courts is not typical of the reasoning practice of constitutional courts in Central and Eastern Europe but rather exceptional; and references of this type are typical of a small part of the cases (but presumably of the cases among the most important ones).

For the same reason, the relatively high number of ECtHR or ECJ decisions outside the given ECtHR (or ECJ) decision should be treated with caution, because of the way the selection criteria were defined. Indeed, it is common experience (and we have not found otherwise in the course of the present research) that constitutional courts often treat ECtHR decisions as a 'package'; that is, if they decide to cite sources of international relevance in the case, they typically do not do so by referring to a single source but rather by using several such sources to strengthen the argument.Thus, merely from the fact that, apart from the concrete ECtHR decisions that served as bases for the selection (and later were examined also independently to define the interpretation and reasoning practice of the ECtHR), references to further ECtHR decisions were also found in the given analysed constitutional court decisions. The constitutional courts in Central and Eastern Europe may not actually refer to international sources to the extent found in the sample examined in this research. It is also true in case of further ECtHR (or ECJ) sources beyond the selected ones (the particular decisions of the ECtHR and its general 'jurisprudence') and of international conventions and supranational documents on human rights (the European Convention on Human Rights before the ECtHR and the Charter of Fundamental Rights based on the catalogue of rights[164] guaranteed in ECHR before the ECJ).[165] Thus, the decisions of the ECtHR rarely stand alone because these are (theoretically) interpretations and applications of the provisions on human rights of the Convention. If a constitutional court decision contains a reference to an ECtHR decision, there will be a good chance, at least in the significant part of the cases, to find a reference

164 Hoffmeister, 2015, p. 196.

165 Reference to decisions or practice in international fora are typically accompanied by reference to underlying international conventions (exceptionally so for other international conventions). This is most prevalent in Slovenia (21 cases) and Hungary (18 cases). In Slovakia (14 cases), Serbia (12 cases), and Poland (12 cases), it occurs in only a minority of decisions. In the Czech Republic, however, the use of this source is almost non-existent.

to an underlying provision of the Convention (and to several further ECtHR decisions interpreting that provision). At the same time, the exploration of these references is not without any importance: even if we cannot conclude from it (contrary to other methods examined) how widespread the use of international sources is in the practice of the examined constitutional courts in Central and Eastern Europe, we can conclude the types of international sources these constitutional courts use, *if* they do.[166]

In this respect, the result of the research, based on the selection of the constitutional court decisions in question, is that it is much more common in the practice of the national constitutional courts of Central and Eastern Europe to refer to the practice and case law of the ECHR than to include the practice or individual decisions of the ECJ in the argumentation of fundamental rights (and this is the case not only in non-EU member Serbia but also in EU member states). The six researchers intended to assess the reasoning practice of the national constitutional courts and found more decisions referring to ECtHR decisions in their reasonings than ones referring to ECJ decisions. However, even together, their number is small. In most constitutional court decisions *out* of the sample, no sources with international relevance were used; the plausible reason may be that most cases before the constitutional courts do not actually have such relevance, in any country. Where it exists at all, the constitutional courts refer to the ECtHR's practice and only barely to that of the ECJ.[167] However, it was also surprising that other international sources, if not often but with perceptible regularity, were used by national constitutional courts; almost all of them referred to one of these (except the Constitutional Court of Slovakia) in an extremely varied form.[168]

166 The hierarchy of the particular sources and the possible conflicts between sources to be followed by ordinary courts are issues that digress from our focus. They cannot be discussed in detail in a methodological volume. Since different legal documents (e.g. internal constitution and different international conventions) may contain human rights, it matters which body has the primacy to determine the content thereof and what procedure shall be followed in case of their conflicts. This question has been defined in the conception of 'multi-level constitutionalism', which 'is understood as limited national sovereignty by virtue of membership in the European Union and other international organizations rather than a shared constitutional space that no longer espouses a clear hierarchy of constitutional norms. In a multi-level constitutional world order there are various centers of law-making and interpretation that are mutually dependent and interrelated' (Pap and Śledzińska-Simon, 2019, p. 71.).

167 The ECJ is an independent organisation in its territory but its judgments may be applied and enforced only with *inter partes* effect and have only an orienting nature for national law-appliers (until an ECJ decision is made in that case). Regarding the certain countries examined, see Sehnálek, 2020, pp. 125–153; Stumpf, 2020, pp. 35–46. Rregarding family law, see Mostowik, 2017, pp. 79–94. For a critical approach, see Śledzińska-Simon and Ziółkowski, 2019, pp. 243–267).

168 The Hungarian sample contained the vast majority of such references: the Constitutional Court of Hungary invoked, usually only as strengthening arguments or illustrations, such 'other' external sources (e.g. decisions or recommendations of international organisations) in 15 of 30 cases. In the other countries (with the exception of Slovakia, where no such reference was made), the number of cases was between 1 and 4.

Similar direct relation regarding the comparative law arguments does not exist. The selection of the decisions included was not affected by references to legal regulations, constitutional court decisions, or other concrete legal sources of particular foreign legal systems. Thus, their determined proportion (regarding cases with 'significance') reflects the actual situation, which can be summarised as follows: the occurrence of comparative law arguments is not common in Central and Eastern Europe but nonetheless remarkable. However, their role is only illustrative; they do not affect, either alone or together with other arguments, the merits of the decision and they do not determine it.[169] As an example, they serve the judges of the constitutional courts to prove that their reasoning is not unique, not individual, and may occur in other countries. The decisions of the German *Bundesverfassungsgericht* are

169 After 2010, the frequency and role of the references to foreign precedents in the practice of the given national bodies were examined in a larger research covering the Central and Eastern European legal systems, including Hungary (and 15 other bodies performing constitutional adjudication from five continents). The results regarding the Constitutional Court of Hungary showed experiences similar to the ones concluded in our research in that regard. There were references to foreign sources (i.e. classical references of comparative law) in 19 of 1,016 decisions examined between 1999 and 2010 (1.8%). Without counting the cases regarding the legislating activity of local governments and the objections of referenda being not relevant in this regard, the Constitutional Court of Hungary used such arguments in 3% of cases in this period (cf. Szente, 2013, pp. 259–260). These arguments appeared often in cases when the complexity of the case required the foundation with foreign examples that often overlapped the references to ECtHR decisions. If references to ECtHR judgements had not been a selection criterion in our research, the number of references to foreign law would have been much lower among all examined constitutional court decisions. The determination of reasoning weight of references is more interesting. Szente set up five reasoning patterns to determine the actual reasoning role or purpose of foreign court or constitutional court decisions. Of these, the fifth ('adaptation of complete interpretative doctrines or legal construction') is considered a theoretical category but did not actually play a role in any of the decisions examined (Szente, op. cit., p. 269), while of the other four he considered the most decisive, the 'formal, illustrative citation': 'in most cases they [foreign judicial cases] are mentioned only in a very formal way, without being used for establishing a view or an argument […]. Therefore, in general, foreign precedents are mentioned out of habit, in order to demonstrate that the [Hungarian Constitutional] Court took account of the most meaningful foreign law, and to report that a comparative analysis in any given case was implemented' (Szente, op. cit., p. 266). It is not odd that the Constitutional Court of Hungary uses the foreign court decisions 'to increase the legitimacy of its own decision' (Szente, op. cit., p. 267). The foreign pattern has no considerable influence on decision-making even in this case. The same is true for the third type (which could be considered as a subtype of the second one) when the decision is already made and only arguments supporting it are sought subsequently. Szente called it the 'selective mode' of foreign references (p. 267), which is halfway between the illustrative and the authoritative application of the foreign cases used (p. 268). The fourth argumentation purpose, albet barely observable, is finding new ideas or arguments—to borrow foreign legal patterns (p. 268). Eventuality may be observed regarding the references to foreign case law, at least in Hungary, on the basis of the examined decisions: 'there is no consensual interpretative doctrine to determine in which cases an international comparison should be given nor do general guidelines exist for choosing the method of comparison. […] There is no rule when and in which cases foreign precedents should be cited, as these references have no clear function in legal reasoning' (Szente, op. cit, pp. 271–272).

referred to[170] but foreign sources used in this field show extreme diversity (it is surely not independent from the qualifications and knowledge of the Judge-Rapporteur of the case or of their co-counsel in preparing the decision[171]). This method is the most widespread in Slovakia, Hungary, and the Czech Republic: of the decisions examined, 21 contained such argument in Slovakia, 18 in Hungary, and 15 in the Czech Republic. This is less typical of Slovenia (8 cases) and Poland (1 case). No comparative law argument occurred in the sample in Serbia.[172]

The examined constitutional courts applied, to varying degrees, the logical arguments, teleological interpretation, interpretation based on jurisprudence, and that in light of general principles. Historical (subjective teleological) and substantive interpretation barely (almost never) occurred. The use of logical (quasi-logical) arguments was typically rare in the sample analysed (the Serbian organ used logical interpretation two times, the Slovenian three times, the Polish five times, and the Hungarian seven times). The Slovak and Czech Constitutional Courts, meanwhile, made greater use of this method: the Slovak Constitutional Court invoked *a minore ad maius* in nine cases, *a maiore ad minus* in five, *ad absurdum* in three, *a contrario* in one, *a simili* in five, and other logical maxims in six. The Czech Constitutional Court used the same arguments in 1, 1, 4, 2, 4, and 3 cases, respectively.

The use of (objective) teleological interpretation, i.e. explicit reference to the purpose of the constitution or constitutional provisions, varied widely in the samples analysed, ranging from very limited use (in Slovakia and Poland) to almost half

170 Szente reached the same result in his cited research, cf. Szente, op. cit., p. 262. The situation is similar in case of the Austrian *Verfassungsgerichthof* [not examined in this research but important in the course of enumerating the region's countries (Gamper, 2013, p. 226.)]. The reasoning weight is also similar; the Austrian college also uses it for its strengthening and not decisive or defining nature: it 'has never yet really decided a case on account of foreign case law. At best, its function is that of a non-binding by-argument in order to support a legal opinion that already derives from applying domestic law' (ibid.).

171 The co-workers writing the text of the decision (e.g. advisers, law clerks, référendaires, assistants, legal officers, judicial assistants, assistant-magistrates, research consultants, rapporteurs, research judges, state advisers) have a decisive role: it varies by constitutional court to what extent they have influence on substantive decision-making but their role is important in all legal systems. For the thorough and informative enumeration of the role of the legal staff supporting the decision-making of judges substantively, and covering the constitutional courts or supreme courts of 27 countries and the ECJ (and, as a strange exception, the Venice Commission), see Zegrean and Costinescu, 2016.

172 The international comparative law research coordinated by Groppi and Ponthoreau produced interesting findings regarding this. Although there was no research in the countries examined by us, except the Constitutional Court of Hungary, it could be found in the other countries of the wider region that invoking of foreign law (or the decisions of constitutional courts or of courts) is less typical (and can be observed only in case of landmark decisions, if any). Thus, apart from the rate of 1.8% (3% if we exclude irrelevant cases) found regarding the Constitutional Court of Hungary, a rate of 0.45% could be determined in case of the Austrian *Verfassungsgerichthof* (60 cases out of 13,251, or hardly 0.1% in cases referred by the college itself, or 16 cases if we exclude complainant references). The German *Bundesverfassungsgericht* used foreign references to an extent similar to Hungary (32 decisions out of 1351 cases; 2.4%); the comparative law argument is almost completely missing in the practice of the Russian (6 cases of 11,000) and Romanian constitutional court (14 cases of 13,250). Cf. Groppi and Ponthoreau, 2013, p. 412).

of the decisions (in Serbia).[173] The reference to the purpose of the constitution is relatively rare even in the country where, pursuant to the provisions of its constitution, this interpretation would be a compulsory element (in Hungary).[174] The main reason for the relative 'underutilization' of this argument is not the irrelevance of the content of the purpose but that the purpose of a legal regulation is often obvious thus needs no explicit reference unless other interpretation methods do not lead to unequivocal results. In this case (but only in this case), it is necessary to expressly invoke, beyond the text of the constitution, the dogmatic aspect of fundamental rights and the constitutional court practice (which interprets the former and partly forms the latter) and the purpose of the constitutional provisions (or the entire constitution as a coherent system of rules and principles). Thus, objective teleological arguments function as the 'crutches' of the interpretation of the constitution, which, therefore, are necessary only if, in a different way, the establishing of the meaning does not seem to be possible or the legitimate interpretation of the text of the constitution does not seem to be sufficiently convincing.

The use of subjective teleological arguments was not typical. Reference to the intent of the constitution-maker or to the (social-political) circumstances of constitutive process that seem to support this intention either does not appear in the decisions examined at all (in Serbia and the Czech Republic) or only exceptionally. In Hungary, the historical argument was invoked in three cases (twice on the grounds of ministerial justification, once on the grounds of the will of the constitution-maker in general); in Slovenia, once (on the grounds of the constitution-maker's will in general); in Poland, four times (twice on the grounds of the proponent's justification, twice on the grounds of the intention of the constitution-maker in general). Only in Slovakia was there a relatively higher number of such references, namely, nine in total (twice to the proponent's justification, twice to the *travaux*, twice to the constitution-maker's intention in general, and three times to historical circumstances).

Perhaps the most interesting, and certainly the most controversial, of all the arguments is the use of references to jurisprudence, i.e. when the Constitutional Court refers to the works of specific scholars, by author and title, in its interpretation. In some countries, references to these scholarly works barely appear (for example, in Hungary, it appeared in four cases of the examined sample; in Serbia, it was employed only once), while in other countries it belongs to the common, frequently used methods. Slovenia, as one of the six countries examined, belongs to the latter group of legal systems, where the majority of the examined decisions (25 of 30) referred to concrete scholarly works, mainly to monographs, on average of four times per decision (where this argument appeared). The use of this argument is almost as

173 The national constitutional courts invoked the explicit purpose of the constitution four times in Poland, five time in Slovakia, seven times in Hungary and the Czech Republic, nine times in Slovenia, and fourteen times in Serbia.

174 The Hungarian Fundamental Law, in its Article R) (3) states: 'the provisions of the Fundamental Law shall be interpreted in accordance with their *purposes*, the National Avowal contained therein and the achievements of our historic constitution'.

common in Slovakia, where the constitutional court referred to concrete results of scholarly literature in 23 cases. Finally, Poland occupies an intermediate position in this respect, with the Polish Constitutional Tribunal using jurisprudential works in eight cases, explicitly defining the decision, and the Czech Republic, where jurisprudential works were referred to in half of the cases.[175] Regarding the latter, the approach is more differentiated; most of these references cover the works published in the (co-)authorship of the Judge-Rapporteur. Hence, this relatively high number of references does not mean the efforts made in favour of scientific grounding but rather the intention to propagate their own works. In these cases, it is obvious that the references to jurisprudence have only ornamental nature; the Judge-Rapporteur obviously would have proposed a draft decision based on their own view even without that reference.

The practice regarding the reference to general legal principles is similarly diffuse. It is not typical in Serbia; even if these principles are used, they do not appear in the reasoning, presumably because they represent methods of law accepted by all and trivial for the lawyer community and because they are fundamental elements of the legal system, the explication of which could be considered unnecessary or redundant. Meanwhile, the practice in the Czech Republic is on the other end; reference to general legal principles appeared in 70% of cases, though, mainly only with an illustrative nature. The other countries lie between these two extremes, with a prevalence of between 4 and 10 (but this argument is only significant in Hungary, given its weight and role in decision-making).[176]

Finally, substantive arguments are among the rare methods used in the Central and Eastern European countries studied: in Slovenia, three decisions (eight times in total); in the Czech Republic, also three decisions; in Serbia, two decisions; in Hungary, five decisions; and in Slovakia, ten decisions. Poland is the country with the least use of this argument, with none in the sample analysed. These references show remarkable diversity even in their scarcity; in the constitutional court decisions in Central and Eastern Europe, different non-legal decision bases appear as arguments, from the medical expert opinion in case of epidemiological restrictions (Slovenia) to professional consensus on life science (Serbia), and, in other cases, from equity (the Czech Republic), to public interest (Hungary, Slovakia) and good morals (the Czech Republic), to common sense (Slovakia). Although we could have expected that a constitutional court, which works with human rights at the border of law and morality, grabs more often the moral aspects and other non-legal arguments, our findings belie the same: substantive references are rather exceptions than general rules. This most probably is because human rights are indeed morally motivated rights with direct moral relevance but they are, since their enshrining in the constitution, also the part of positive law and, as such, their interpretation and application

175 In five of these cases, the Czech Constitutional Court did not refer to domestic but foreign works.

176 In Slovenia, Slovakia, and Poland, such an argument was used in 4 of the 30 decisions analysed, and in Hungary, in 10.

as positive law, also considering the creative methods of legal development (often disguised as legal interpretation), are, in most cases, enough for the given constitutional case to have not only lawful but also moral and fair result—'proper' social and legal outcome.

3.2. Legal interpretation activity of the European Court of Human Rights

3.2.1. General characteristics of the European Court of Human Rights and its case law

The Council of Europe (CoE), established in 1949, is the most important regional human rights organisation on the continent of which almost every country in Europe is a member.[177] With the accession, the 47 member states of CoE committed themselves not to violate and to enforce[178] the most important human rights. A non-exhaustive catalogue of these rights is contained in the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereinafter: ECHR or, simply, the Convention), which entered into force in 1953 and to which all CoE members have (had) to accede. From 1950, 16 additional protocols have been attached, the latest of which, surprisingly at first sight, is Protocol No. 15. It entered into force on 1 August 2021 and shall apply in subsequent procedures. The state parties to the Convention have (had) to confirm or ratify all these protocols. All 16 protocols have been confirmed by almost all member states of CoE. Currently, only ten Protocols, namely, Protocol Nos. 1, 4, 6, 7, 11, 12, 13, 14, 15, and 16, are in force. Protocol Nos. 2, 3, 5, 8, 9, and 10 have been replaced and repealed by Protocol No. 11.[179] The rights included by the Convention and its additional protocols are enforced by the ECtHR, i.e. named after its registered office, the Strasbourg Court. Until the entry into force of Protocol No. 11 adopted in 1998, it was possible to accede to the convention and the protocols without accepting the jurisdiction of the ECtHR. Since then, accession to these also means submission to the jurisdiction of the Strasbourg Court, including a commitment that the contracting states pay awarded compensation if the ECtHR convicts them in breach of convention.

177 Belarus, Kazakhstan (also having some European territory), the Vatican, and Kosovo (not yet recognised by several states) are not members of this organisation.

178 The contracting states accepting the jurisdiction of the ECtHR do not simply commit themselves not to violate the fundamental rights covered by the ECHR but also to support their enforcement with state measures even in relations between non-state entities (Cf. Flander and Tičar, 2019, p. 424).

179 Protocol No. 15 clarifies the aspects of the principle of subsidiarity and margin of appreciation of the member states; it could enter into force only after the ratification by *all* member states of CoE. Protocol No. 16, which allows the courts of the member states to request, with the suspension of the procedure before the court of the member state, a non-binding *advisory opinion* regarding the interpretation of fundamental rights and freedoms covered by the Convention or the Protocols thereto, entered into force on 1 August 2018 because the ratification of ten states was enough thereto. However, it applies only to states that have ratified it. At the time of writing (in August 2021), 16 member states (including Slovakia and Slovenia) have ratified it, but the majority of the states have not. The Czech Republic, Hungary, Poland, and Serbia have not ratified nor even signed it.

The ECtHR is basically entitled to act in two types of legal disputes: those between states and those between natural persons/legal entities and states. The former ones are not relevant for the present research since violation of *individual* human rights may not occur in such cases. Moreover, such legal disputes take place extremely rarely (once in a period of several years); hence, they are of negligible interest in other respects as well.

Until 1998, a procedure in Strasbourg had two levels: the European Commission of Human Rights assessed the complaints at first (but often also at last) instance; and the ECtHR decided, at second instance, major cases assessed by the Commission. This system has changed from 1 November 1998 with the entry into force of Protocol No. 11: the Commission was abolished (but its decisions made before 1998 can still be referred and applied if they still have relevance) and the Court was reformed.[180] At present, the procedure of the Court, theoretically, has two phases: the assessment of admissibility and, in case of admissibility, the decision on the merits. However, owing to the increasing caseload and to speed up the procedure, the decision on the merits (if positive) is made together with the assessment of admissibility (if the application is admissible) in most cases. The Court could hold a hearing to decide the merits of the case (and occasionally to declare its admissibility), but it mostly makes decisions on the basis of the documents and written applications and observations of the parties to the procedure (the applicant and the state accused of breach of the convention).

Single-judge formations or committees of three judges may declare an application inadmissible. In 2010, the latter ones were empowered to decide cases in which well-grounded case law is available on the merits (e.g. in cases regarding unreasonable delay of judicial procedures). In other cases, decisions on the merits are made by five chambers of seven judges each and, in cases with particular importance or in matters of principle (if the chamber decided on the merits, but not in the case of the chamber's decision declaring the application inadmissible), the decision of the Grand Chamber consisting of 17 judges may be requested (but it is not possible to bring a case before the Grand Chamber if a committee made a decision on the merits, which could be made only unanimously). If a single judge, a committee, or a chamber declares an application inadmissible, there is no remedy against the decision. The Grand Chamber accepts the requests against the chambers' decisions on merits only in the rarest cases, especially when it wants to decide fundamental interpretation questions or set a precedent with taking a position regarding an unresolved issue or deviate from previous case law.[181]

For the chambers (committees, in certain cases) to examine the application on the merits and make a decision on the content regarding the violation of a fundamental

180 The court consists of a number of judges equal to that of the parties; all parties are entitled to delegate one member (who are elected by the Parliamentary Assembly of the CoE).

181 A panel of five judges of the Grand Chamber decides whether to accept the request; there is no remedy against this decision.

right by a governmental organisation, the application must not be inadmissible. There are nine main reasons for inadmissibility: 1) material reasons (*ratione materiae*), i.e. the applicant stated the violation of a right that was not subject to the Convention (e.g. right to work, right to citizenship); 2) personal reasons (*ratione personae*), i.e. the application was not submitted by a person entitled to it (e.g. not the victim of the presumed violation),[182] and the entitled person submits the application not against the appropriate government body (court, prosecution, police, public administration body); 3) temporal reasons (*ratione temporis*), i.e. the rights under the Convention and the protocols thereto may be judged by the ECtHR only if the violation occurred after the respondent state had ratified the Convention and the given protocol ensuring the given right; 4) the applicant's failure to exhaust the so-called effective legal remedies, which provide a chance for substantial modification of the decision, available in the legal system of the respondent state. In general, the ordinary means of remedy (e.g. appeal against administrative or judicial decisions, and judicial review of administrative decisions) qualify as effective, whereas the revision qualifies as non-effective means of legal remedy. Regarding the review of final decisions by the supreme judicial forum and regarding the constitutional complaint, the practice of Strasbourg is divergent. In the case of the latter, the opinion seems to be crystallising that these are effective; hence, their exhaustion is required from the applicant. 5) If, in case of applications before 1 August 2021, more than six months or, in case of applications after that date, more than four months have passed from the delivery of the decision made as a result of the last effective remedy to the party until posting the application to the ECtHR. 6) If the application is manifestly ill-founded. 7) If the violation occurred outside the jurisdiction of the respondent state or the territory effectively controlled by it. 8) If the case is substantially the same as one already examined by the Court (*res iudicata*).[183] 9) If the applicant has not suffered a significant disadvantage (*de minimis non curat praetor*). For the case law of Strasbourg (and for its development or conventional assessment of the laws of the contracting states), the most important of these is the manifest illfoundedness because the ECtHR conducts substantive assessment and defines the content of the rights under Convention.

182 It can a case related to the freedom of conscience and religion, e.g. if the concrete victim is a natural person but the application is submitted to the ECtHR not by them but by the church of which the victim is a member. Similarly, if spouses submit an application in each other's cases, that, as a general rule, will be inadmissible owing to personal reasons. An exception to the latter, in a special case, is possible: in the *Dalban* case (*Dalban v. Romania* [GC], no. 28114/95, 28 September 1999), the process initiated in 1995 could be continued on the request of the widow in 1999, i.e. after the death of the late applicant. The ECtHR considered that, according to the interpretation in favour of the applicant, the late applicant qualified as a 'victim' as long as the national courts or authorities had not remedied the injustice suffered. Since it did not happen in that case, the ECtHR accepted the widow's request to consider her, as the procedural successor of her late husband, the 'victim'.

183 For the procedural dogmatic role of *res iudicata* and its relations with fair trial and legal certainty (independent from general, concrete legal systems), see Köblös, 2017, p. 80.

The ECtHR (in contrast, for example, to the constitutional court of the Central and Eastern European countries) does not perform norm control—it cannot annul any legal regulation of the contracting states and, except for interim measures, it cannot oblige either the bodies, authorities of the states, or the states themselves (their governments) to take any measures (to repeal or amend judgments or decisions, to oblige the body that made the complained decision to conduct a new procedure, to legislate). It cannot even sanction the failure to implement judgments; for this, the CoE may only use diplomatic pressure of the Committee of Ministers monitoring the implementation. The Court may do two things: establish that the contracting state violated the Convention (or any protocols thereto already ratified by the given state), or, in case of violation of the Convention, award the applicant compensation and oblige the state to pay the applicant's costs.[184]

Finally, to understand the practice of Strasbourg, we have to be aware that the ECtHR is basically a court of case law (a precedent court) that uses the text of the Convention only regarding the subject matter to be judged (i.e. when it determines in which types of cases it has competence and in which, not). It forms and develops the aspects regarding the merits of the case before it, case by case, using individual cases. It uses two procedural techniques also formed in *common law*, namely, the *distinguishing* and the *overruling*, to deviate from previous decisions. *Distinguishing* means that if two cases are different from each other regarding a relevant fact, it is possible to deviate from the decision made in the former case (i.e. the former case does not qualify as precedent regarding the later case). *Overruling* means that if it is justified by changed circumstances (social, economic, legal, political), the former case law may be revised and, in later cases, only the judicial decisions made after the revision, in accordance with the new practice, serve as precedents to be followed. Since particular facts of the concrete case are extremely important for the ECtHR, and these facts, owing to the specificities of the given case, will never be completely the same, it is relatively simple to amend its practice with the technique of *distinguishing*, if necessary, or to define exceptions from the general rule in the concrete cases. It is rarely necessary for the Court to express explicitly that it, consciously and admittedly, ends its previous practice and lays new foundation for its judging activity.

184 In addition, the Court is entitled to apply, in case of strict conditions, an interim measure before the judgment and to oblige the member state (or its acting bodies) to act or refrain from acting. It is used mostly in cases regarding extradition and expulsion to prohibit a contracting state of the ECHR from extraditing or expelling a person who would be threatened with death or torture in that country. Hungary, for example, has been obliged several times with interim measures by the ECtHR in recent times to give the asylum seekers staying in the previously established transit zones food even in the period after the final administrative decision until the judging of the judicial review against the authority's decision.

3.2.2. Legal interpretation activity of the European Court of Human Rights: general findings

By far the most important, most frequently used and most influential method of interpretation of the ECtHR in terms of the weight of its reasoning is its own past practice. All analysed ECtHR decisions contained reference to previous jurisprudence and not only the Court's own practice is referred in general but also the given legal question is decided with reference to concrete judgments.[185] Theoretically, the ECtHR is a precedent court. On the basis of interpretation methods used and sources of arguments, the same can be clearly demonstrated empirically. Thus, the legal practice of the Court always manifests in concrete sources (in precedent cases cited exactly), which also means that, for deciding the same cases, its judges can use and refer to previous cases. This hypothesis was also confirmed by our empirical survey of the data: the later a decision is made, the more concrete precedent cases are referred to, not only in different but also in the same legal questions.

In most cases, there is a basic decision (an ancient source shaping the practice and deciding the essential questions related to human rights to be interpreted, included by the Convention). As *leading case*, it affects all later ECtHR decisions interpreting the given fundamental right and on which the later decisions judging the particular problems of the given fundamental right may build. These special decisions in these special cases also function as precedents and are (along with the original basic decision) referred to in all similar cases by chambers judging later cases. Thereby, a kind of pyramid system is built with a *leading case* at the top, which can affect all later decisions interpreting and using the given human right; below that are decisions defining overall considerations regarding certain subareas; and, at the bottom, the more specialised decisions concentrating on a particular legal relation or legal problem. Hence, a multi-level precedent system has to be taken into consideration in the course of making an ECtHR decision, whose system is built further by the judges' decisions that may be or, in certain cases (if the given decision did not only use but also developed the legal guidance of the previous precedent), must be referred in a later case together with the ones already available. This internal urge stems from the self-understanding of the ECtHR that, for uniformity, legal equality, legal certainty, and foreseeability, expects its judges (or apparatus preparing judicial decisions) to resolve cases of the same nature in the same manner.

In addition to previous practice, contextual interpretation in the broad sense is a method used in a significant part of the cases, appearing in the vast majority (almost all) of the analysed decisions. Contextual interpretation in the narrow sense was

185 Since there were very few ECJ decisions in the examined sample, we cannot make well-grounded statements regarding that. However, there was a comprehensive examination (based on the statistical analysis of 5,578 ECJ decisions made between 1992 and 2011) which found that the reference by ECJ to its own decisions as precedents is case-dependent: it is typical in (successful) infringement proceedings but in case of preliminary rulings, it mainly occurs in cases that relate to internal free market, i.e. competition law or fundamental freedoms (Derlén, 2015, p. 1073–1098).

completely missing from the ECtHR's practice, applied in none of 180 decisions examined. The *credo* of the ECtHR is that certain provisions of the Convention cannot be interpreted in themselves but with respect to and in harmony with each other (*harmonious interpretation*).

Grammatical interpretation, within which the dogmatic interpretation dominates (within this, interpretation on the basis of legal principles is more important than the simple conceptual dogmatic interpretation), and teleological interpretation are also frequently used methods. Within grammatical interpretation, the ordinary meaning of the words and the expressions rarely appears because the problematic words and concepts requiring interpretation of the Convention are basically legal concepts or, if not, they, in the context of declaring the violation of the Convention, become that. Legal meaning always covers the legal sense reflecting the ECtHR's own convictions. The Court does not use the legal concepts of the contracting states but the conceptual meaning on the basis of the dogmatics created by it (*autonomous interpretation*). It is also interesting in comparison that ordinary semantic interpretation barely appears in decisions (in only one-tenth of cases) and only in two of these were the interpretations of the text (of the Convention) by ECtHR based expressly on the dictionary meaning. Interpretation according to other professions appeared also only in two cases; syntactic interpretation did not even occur in the sample of 180 elements analysed.

Finally, the last of the regularly used methods is teleological interpretation. Such reference occurs roughly in a half or a third of the cases; the exact proportion cannot be determined because the interpretation according to the purpose typically appears only with another method, integrated in a further argument, as an additional finding. Ultimately, the judges, in the course of all interpretations, consider the purpose and function of the Convention and the human rights included thereby. Often, it affects the decision only as background knowledge; the subject, purpose, function, or the meaning of the given fundamental right are explicitly referred to only in a part of the cases.

The reason these methods, not inluding the references to precedents, dominate in the course of the interpretation of the Convention by the ECtHR may be that these have been the methods declared to be taken into consideration by ECtHR from 1975. The ECtHR declared in *Golder*[186] in 1975 that provisions of the Vienna Convention of 1969 on the Law of Treaties concerning interpretation of treaties must also be applied in the course of interpretation of the Convention. Although the Vienna Convention did not even enter into force at the time (only in 1980), the ECtHR could, without infringing the principle of non-retroactivity, declare the application of relevant provisions on legal interpretation rules thereof because, according to its reasoning, these legal interpretation norms are the generally accepted principles of international law. That is, according to the ECtHR, these rules of interpretation are binding not because the Vienna Convention is binding but because they are general

186 *Golder v. the United Kingdom*, application no. 4451/70, 21 February 1975.

principles of international law that would bind the court even if they were not laid down in writing anywhere.[187]

The text, being relevant in the course of interpretation of the Convention and to be interpreted with appropriate derogations, of Articles 31 to 33 of the Vienna Convention invoked by the ECtHR in 1975 and, being basis for the interpretation of the ECHR owing to the settled practice of the ECtHR, is given as follows.[188] Under 'General rules of interpretation', Article 31 declares that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[189] Under the title 'Supplementary means of interpretation', Article 32 defines, not exhaustively, other methods and sources: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of

187 'The Court is prepared to consider […] that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention, account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization"—the Council of Europe—within which it has been adopted […]'. *Golder v. the United Kingdom*, para 29.

188 The full text is as follows:
Article 31 (General rule of interpretation) '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: *(a)* Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; *(b)* Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: *(a)* Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; *(b)* Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; *(c)* Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended'.
Article 32 (Supplementary means of interpretation) 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: *(a)* Leaves the meaning ambiguous or obscure; or *(b)* Leads to a result which is manifestly absurd or unreasonable.'
Article 33 (Interpretation of treaties authenticated in two or more languages) '1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree. 3. The terms of the treaty are presumed to have the same meaning in each authentic text. 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'.

189 Paragraph 1, Article 31.

article 31, or to determine the meaning when the interpretation according to article 31: *(a)* Leaves the meaning ambiguous or obscure; or *(b)* Leads to a result which is manifestly absurd or unreasonable'. Finally, according to Article 33 (Interpretation of treaties authenticated in two or more languages): '1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.' The other rules of interpretation are not relevant regarding an international convention (including ECHR).

It is questionable how well a system of rules prepared for the interpretation of texts of treaties may be applied to interpret the provisions of an international convention, especially that of a multilateral international human rights document. However, certain interpretation methods may be common because both include *legal texts*, the detection of which is possible in identical or very similar ways. Important interpretation sources, at least, indicate a significant overlap. The choice of the ECtHR in 1975, according to which Articles 31 to 33 of the Vienna Convention of 1969 on the Law of Treaties must be applied to interpret the Convention, seems to be proper.

These methods are not of equal importance, which is strengthened both by the titles of relevant Articles of theVienna Convention and by the ECtHR decisions made in concrete cases and the interpretations included thereby. Both the Vienna Convention and the ECtHR, as we have seen, consider the methods of interpretation listed in Article 31 of the Vienna Convention, i.e. textual interpretation (establishing the *ordinary meaning*, especially the legal semantic meaning compared with everyday meaning), contextual interpretation, and (objective) teleological interpretation (detection of meaning according to *object and purpose*), to be primary methods. Meanwhile, the maxim of *argumentum ad absurdum* [Article 32 *(b)*] may be applied as *supplementary meaning.* Other means may also be used for the avoidance thereof (i.e. the 'manifestly absurd or unreasonable' result), for confirming the meaning established with the main methods and for exploring the proper meaning of ambiguous provisions. These means are not exhaustively enumerated in Article 32 of the Vienna Convention. In addition to the maxim of *argumentum ad absurdum*, only one further method, the technique of subjective teleological interpretation (preparatory work of the treaty) is mentioned. It includes all possible sub-methods of historical interpretation. Moreover, there is a reference to all of them in the practice of the ECtHR, even if only rarely.

The findings of our research partly confirmed the declared practice of the ECtHR: that the ECtHR interprets the different rights included by the Convention in the manner determined in Articles 31 to 33 of the Vienna Convention and applies them in concrete cases with the meaning established in that manner. The ECtHR's most frequently used method is the interpretation based on its own precedent and not the grammatical, contextual, or objective teleological interpretation may presumably be because it had to use directly the main methods under the Vienna Convention mostly in the early years and decades of its judicial activity when it developed its

increasingly consolidating jurisprudence regarding the given fundamental rights and the main field of application thereof. Subsequently, it was enough to refer to its decisions performing these interpretations as precedents, but it was not necessary to perform the same type of interpretation repeatedly. The newer the case, or the older the practice of a given legal problem, the less the ECtHR refers to direct, primary legal interpretation methods (because the less necessary it is) and the more sufficient it was to refer to previous precedent decisions that have performed these interpretations.

As for the further 'supplementary' means, they occur in the ECtHR's decisions at a considerably lower rate. In addition to the references to its own case law (occurring in all cases), the contextual meaning (appearing in the vast majority of the cases), the (mainly legal) semantic grammatical interpretation (occurring approximately in the half of the cases and including references to legal principles), and objective teleological interpretation (occurring in a half or a third of the cases but regularly related to other methods and, therefore, the rate of which can be determined only with approximate accuracy), and arguments with the nature of international law are interpretation sources used relatively often (roughly in a third of the examined decisions). It should also include further international treaties (other than the Convention), whose argument type itself occurs in nearly one-third of the cases and not only as ornamental or illustration but as strengthening or even defining arguments. The reason for the international treaties' importance in the practice of the ECtHR may be that the ECtHR itself is also an 'international' (supranational) court and the legal source applied is an international convention. Hence, it respects international sources and, to develop and avoid derogating the meaning of the provisions of the ECHR, uses and refers to them. In this regard, the ECtHR expressly recognises not being bound to applying only other international treaties to which the member states of the CoE or the concerned state itself acceded since it says that minimum common expectations (the sources of which may be any other international convention with similar subject) form the content of human rights. Thus, the ECtHR refers to the provisions of other regional conventions on human rights (e.g. American Convention on Human Rights, African Charter on Human and Peoples' Rights) or to other international conventions (e.g. Universal Declaration of Human Rights) several times, most often, not surprisingly, to the Vienna Convention of 1969 on the Law of Treaties. It also refers to judicial practice or individual decisions of different international or supranational fora (e.g. Inter-American Court of Human Rights, African Court on Human and Peoples' Rights) intended to enforce these conventions (the catalogue of human rights) if it considers them to be relevant in the certain case. International conventions and decisions of international judicial for a, together with other possible sources of international law, form a coherent reference base of 'international law' in almost a third of the examined cases. Regarding the latter, the ECtHR most often (approximately in 10% to 20% of the cases) refers to different documents of the institutions of the CoE (Venice Commission,

Parliamentary Assembly).[190] The *ius cogens*, the general principles of international law or customary international law also occur (in a few cases) among substantial decision sources.

Logical interpretation appears relatively rarely. There is no outstanding method among the individual arguments. In their rare appearance, almost all (quasi-)logical arguments are used by the ECtHR, but their role in the reasoning could not be determined owing to the ECtHR's decision-making style. They are present as subsidiary arguments in the text of ECtHR decisions, alongside references to precedent decisions, but it is not known to what extent they played a role in the ECtHR's upholding of, rather than deviation from, the precedents cited. The ECtHR refers to national law as a source of reasoning with roughly similar frequency, perhaps even less frequently. The alleged domestic legislation on which the applicant's alleged violation of the Convention is based is always involved in the ECtHR's fact finding, but in this case, domestic law is invoked as part of the facts on which the finding of a violation of the Convention is based (as a statement of the nature of the domestic legislation) rather than as a source or argument for interpreting the Convention. The latter arises only in a small part of the cases when the ECtHR invokes, as strengthening argument or as illustration to the detecting of the content of the rights under the Convention, the 'consistent' practice of the contracting states of ECHR. The ECtHR delineates the national regulations of some member states as an example. The classical comparative law argument is even rarer and commonly appears as reference to the European practice or a kind of democratic consensus regarding rule of law and, mostly, it has only a strengthening or ornamental nature. The ECtHR does not refer to sources of domestic organisations (e.g. decisions of national constitutional courts).

The reference to general legal principles only exceptionally occurs. Most of the referred legal principles are dogmatic legal concepts or legal values that can be found in the text of the Convention (or of its preamble). In addition, the ECtHR refers to key concepts formed by its judicial activity and that mean the generalisation of the purposes of the ECtHR than the wording of 'sublimated' legal principles existing outside of positive law. The same is true for substantive arguments: the ECtHR barely refers to those; instead, it focuses on the meaning and function of the ECHR as a whole and on the purpose generalised from the individual provisions and human rights. Thus, determination of the Convention's purpose and the 'united meaning' of the context of the given rights under that 'from within the Convention' (and the related determination

190 Regarding this, Varga (former member of the Venice Commission) pointed out that the difference between soft law and binding law begins to relativise, especially in cases when either the ECtHR expects (and sanctions the non-compliance) or the EU institutions requests (and has legal and political consequences in case of deviation from the 'opinions' of the Venice Commission) the content of these documents (especially, of the opinion of the Venice Commission). See Varga Zs., 2016, p. 196. It complicates the situation that not only the EU Member States are members of the Council of Europe (the advisory body of which is the Venice Commission) but also the European Union itself. Cf. Sehnálek, 2017, pp. 337–338.

of the key concepts partly found in the ECHR and partly deduced therefrom) practically replaces the substantive arguments (or make their use unnecessary).

The procedure pursuant to Article 33 of the Vienna Convention is a special interpretation method according to which it is possible to compare the different authentic versions of the Convention's provisions: to interpret the authentic texts in English and French with respect to each other, if it is helpful. Although this technique is extremely special, the Court applied it (as a defining argument) in some cases.

Subjective teleological interpretation also appears rarely in the practice of the ECtHR. It explicitly referred, a few times, to the *travaux*, i.e. the documents related to the creation of the ECHR or the protocols thereto, occasionally to the (social or legal) circumstances of formation thereof and sometimes to the proposer's justification.

However, the ECtHR makes no reference to academic works: in the sample examined, not once did the judges cite any specific work of jurisprudence attributable to a particular author, even as illustrations. This is certainly because the ECtHR reserves to itself alone the right to determine the meaning of the provisions of the Convention in the context of the 'autonomous' meaning of concepts. This autonomy, this independence, would be seen to be surrendered if recourse were to be had directly to an external source, external to the ECtHR, which has no specific (international) legal legitimacy.

The ECtHR considers only its own practice to be relevant (this is the main basis for all decisions), which has a significant importance regarding consistency (legal certainty, predictability). In addition to its own jurisprudence, contextual interpretation (in broad sense) is the other significant method serving an indispensable aspect in the practice of the ECtHR. The main methods of the Vienna Convention on the Law of Treaties (except the just-mentioned contextual interpretation), which have comprised the wide range of interpretation methods recognised officially from 1975, were used only in half of the cases (in case of legal dogmatic interpretation towards the establishment of the autonomous or legal meaning, declared by the ECtHR, of ordinary meaning) or even less (in case of objective teleological interpretation). In about a third of the cases, the ECtHR used arguments of an international law nature (but often these were used simultaneously, reinforcing each other), and it referred to the domestic legal norms of the Member States in less than a third of the cases (usually purely as a 'legal outlook') and (quasi-)logical formulas. Often, the ECtHR does not even refer explicitly to the latter ones (and to the meaning seeking the 'object and purpose' of provisions). Hence, the use of these arguments can often be determined only through in-depth analysis of the text (or it cannot be decoded and its use can only be guessed).

The same may also occur for other arguments. In parallel with the formation of its judicial practice activity, the ECtHR refers increasingly less to content aspects determining the decision and replaces these by invoking its own previous decisions. In this way, it hides the grounds of its decisions, which are not recognisable with a reading of only the given decision but with that of the referred precedent decisions (or with knowing the even earlier decisions that had been referred by the referred decision, and so on, until the leading case, the first decisive decision made in the given case). Legal certainty is, however, declared to be an important aspect in the

judicial practice of the ECtHR intended to be served by references to previous decisions. With this technique, the actual grounds of the given decision often remain hidden or can only be inferred through studying the referred precedent decisions. Although the wording style of ECtHR decisions is open, and the text of the decisions contains pros and cons examined by the ECtHR before making its decision (and their validity or unfoundedness as a result), for this, the ECtHR delineates its own precedent decisions as 'display windows', although its consideration could hardly be more than searching for and referring to relevant decisions from its own practice. This may be the reason the ECtHR used subjective teleological arguments (mainly referring to *travaux*), substantive arguments, and arguments from the law of the member states only in some cases.

Finally, the ECtHR used, as a rare exception, the establishment of the ordinary meaning of words (e.g. dictionary definition), interpretation arising from the bilingualism of the Convention, and other professional interpretations as semantic methods. It rarely used general legal principles and did not use either syntactic or contextual interpretation in the narrow sense or classical comparative law arguments and did not refer to legal scholarly works at all.

The text of the judgements is extremely rich in various legal aspects developed by the ECtHR, which it uses either instead of recalling the substantive arguments outside the text of the Convention and certain provisions (human rights) therein or the purpose of the Convention as a whole, or perhaps to support its previous practice. The legal aspects serve to demonstrate that the ECtHR considers the Convention to be a complex source, the text of which is only a starting point, but whose meaning lies in the subject matter protected—the human rights it guarantees. For this reason, the ECtHR interprets the Convention as provisions that are intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[191] For this effectivity to prevail actually, the ECtHR should consider that 'the Convention is a living instrument which […] must be interpreted in the light of present-day conditions'.[192] The ECtHR connected the doctrine of 'living instrument' with the European consensus:[193] 'the Court cannot but be influenced by the developments and commonly accepted standards […] of the member States of the Council of Europe'.[194] This

191 *Airey v. Ireland*, application no. 6289/73, 9 October 1979, para 24.

192 *Tyrer v. The United Kingdom*, application no. 5856/72, 25 April 1978, para 31.

193 For a *moral* critique of consensus-based adjudication (and for apologetics of moral or evolutive decisions) and inevitable moral choice of judges in general, see Letsas, 2004, pp. 279–305.

194 Ibid. 'The Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved' (*Chapman v. The United Kingdom*, application no. 27238/95, 18 January 2001, § 70.) For the same but with 'evolving convergence' instead of 'emerging consensus', see *Christine Goodwin v. The United Kingdom*, application no. 28957/95, 11 July 2002, § 74.) Although the European consensus does not automatically mean the unconventionality of a member state legislation that deviates from the European majority position, it merely makes a presumption that the given member state legislation is outdated but the concerned member state may prove that its specific social and historical conditions justify the challenged legislation (and make it consistent with the Convention). Cf. Dzehtsiarou, 2011, p. 1733.

became the base of the so-called *evolutive or dynamic interpretation*, which allows the Convention to have (with changes in social conditions, development in legal regulations of the member states, alteration in political and economic circumstances) an up-to-date meaning that can solve effectively the human rights problems of the given age (and which is roughly uniform across Europe).[195] Finally, all these move towards the formation of European constitutional law is acknowledged by the ECtHR itself when it considers the Convention as 'a "constitutional instrument of European public order" in the field of human rights'.[196]

For the evolutive interpretation not to be arbitrary and for the regulation of the member states not to be replaced by a legal regulation created by judges, the ECtHR accepts the particular (often very different) solutions of the member states to certain social problems that are marked by the doctrine of margin of appreciation of member states.[197] According to this doctrine, a member state of the CoE is free to decide what legal regulation it introduces as long as it remains within the frames of the field specified by the ECHR and its 'dynamic interpretation'. However, the ECtHR reserves the right of deciding how wide this latitude can be. Overall, it has complete control over the functioning of human rights under the Convention and, by evolutive interpretation, it can always develop and redefine it, at any time, in light of changed social conditions or other relations. Thus, this doctrine is nothing but the enforcement of the principle of subsidiarity (used also in federal states and in the EU) with the condition that the marking of the limits and, therefore, the convention-compliant assessment of the legal regulations of the member states (more precisely, administrative or judicial decision-making based thereon) depend solely on the judgment of the ECtHR, which raises similar sovereignty concerns, such as the relation between national constitutional courts (and ordinary courts) in the member states of EU and the ECJ.

195 In the mentioned *Tyrer* case, the ECtHR found that corporal punishment is contrary to the prohibition of degrading punishment pursuant to Article 3 of the Convention. In the concrete case, a 15-year old child was sentenced, for the assault of a schoolmate, to three strokes of birch and it was enforced.

196 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], application no. 45036/98, § 156. All these encourage many commentators to talk about the Convention as a 'complementary constitution' or 'ancillary constitution' (Grabenwarter, 2015, p. 259).

197 This expression, transferred from the French administrative law to the practice of the ECtHR, was formulated in a concrete case *(Handyside v. The United Kingdom*, application no. 5493/72, 7 December 1976) related to the freedom of expression (ECHR Article 10 para 2) (according to which, this article 'leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force') but, in a different form, the Court referred to the states' margin of manoeuvre even earlier (already at the end of the 1960s) in a special case ('*Relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium*, application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, better known as: 'Belgian Linguistic Case (No. 2)'). Later, the doctrine became general principle accepted in the use of all articles of the Convention.

3.3. National constitutional courts and the ECtHR: similarities and differences

The most important similarity in the practice of the Central and Eastern European constitutional courts and the ECtHR in interpreting fundamental rights is the very similar standard of limitation of fundamental rights. Although criteria regarding certain fundamental rights (e.g. procedural rights in general and the right to a fair trial in particular) are used by all adjudicating fora (moreover, certain partial rights thereof are often considered as absolute rights), it is also a common feature that, in case of collision of constitutional rights, all of them use the proportionality test for the restriction of fundamental rights.[198] These tests, apart from having small differences between certain types, have at least four common assessment criteria. These steps are general specifications that are valid before all fora.[199] In addition to the formal criteria (e.g. the requirement that the restriction of a fundamental right must be made by acts),[200] the following substantive conditions are necessary for a restriction of a fundamental right (if it is not an absolute right, because they are not subject to restriction):[201] 1) There must be a constitutional objective (typically another fundamental right or constitutional value), the protection of or need to enforce which justifies the restriction of the right in question (*legitimacy*). 2) The restriction of the fundamental right in question must be capable of achieving this legitimate objective—it must be possible to ensure or promote the enforcement of the other fundamental right (or constitutional value) by restricting the fundamental right in question (*suitability*). 3) It must not be possible to protect this other fundamental right (or constitutional value) in any other way than by restricting a fundamental right or by restricting precisely this fundamental right (and not a less-important fundamental right)—the conflict of fundamental rights or constitutional objectives (restriction of a given fundamental right to achieve a legitimate aim) must be unavoidable (*necessity*). 4) Even if the preceding conditions are met, a restriction of a fundamental right may only be imposed if the restriction of the fundamental right in

198 This is also true for other countries; its advantage is its flexibility, which allows for changing constitutional law in changing circumstances, and its 'popularity' is due to this. Szente and Gárdos-Orosz, 2018, p. 304.

199 For the functioning of proportionality test before the national constitutional courts, see Sonnevend and Jakab, 2015, pp. 80–82.

200 The requirement of the level of acts is not a purely formal criterion. Since acts are more transparent (their text and content are more easily accessible to the people), and since the requirement of democratic legitimacy requires that decisions must be traceable to the will of the citizens (and the more interference in people's fundamental rights is involved, the more necessary it is to trace decisions to the will of the people), the requirement of the level of acts also serves substantive purposes.

201 In itself, in order for those conditions to be examined, it is necessary to fulfil some preconditions (e.g. to prove whether the referred right of the applicant or petitioner was affected by the challenged regulation or action of state). As 'step zero', the ECtHR examines whether the state action affected the article referred by the applicant, i.e. whether the interference by public authority impaired the applicant's right ensured by the given article. After this, it determines whether the restrictive action of the state (e.g. a court decision) was prescribed by law. The proportionality test regarding the restriction will be conducted only if the answer is yes in both cases.

question would cause less harm to the fundamental right than the benefit which the other fundamental right (or constitutional value) could provide—the benefit of the restriction of a fundamental right must outweigh the harm caused or to be caused by the restriction (*proportionality*).[202]

The fora examined also have in common the most important key concepts they employ. Both for the national constitutional courts and the ECtHR, the idea of the rule of law and the principle of democracy, which can be found both in the documents of domestic public law and international law to be applied by these fora (in the national constitutions and the Convention), are of great importance. All human rights mean the realisation of the material rule of law, the main depository of which is a judicial body (in case of national constitutions, these are the constitutional courts of the Central and Eastern European countries, or maybe other bodies empowered with similar powers, such as supreme courts, in other legal systems,[203] and the ECtHR in case of the Convention). Where substantive fundamental right adjudication exists, there the rule of law may be realised as a background concept and as a final requirement to which the efficiency of enforcement of fundamental rights can be attached and which can be formulated for constitutional courts (and the ECtHR) as an ultimate objective to be attained.[204] Democracy is a principle safeguarding the rule of law (and, thereby, the enforcement of human rights) that must be protected for itself and its 'service' provided for guaranteeing the rule of law

202 The requirement to respect the essential content of a fundamental right often appears among the requirements of proportionality as an additional standard, but this is *part* of proportionality. Restricting the essential content of a fundamental right is disproportionate in any comparison, since in this case the given fundamental right (also restricted in its essential content) would become practically empty, functionless.

203 States having constitutional adjudication may have 'diffuse' or 'centralise' review. All states examined by us belong to the latter group while the Supreme Court of the United Kingdom, of Canada, and of the United States to the former one. Saunders, 2019, pp. 414–440.

204 Historically, the *rule of law* (*Rechtsstaat*) meant two basic things. At the beginning, this covered the *formal rule of law* at the end of the 18th century and in the 19th century. This meant that state bodies could not proceed either against the laws (*contra legem*) or without the laws, i.e. without a statutory basis (*praeter legem*). Thus, the key point was predictability, i.e. clear and unambiguous laws should be enforced in a manner that can be pre-planned. This purely formal system of criteria contained expectations, such as the chance to learn the legal regulations, i.e. their public announcement to avoid too quick changes, clear and easy-to-understand legal regulations, and their actual enforcement. This was not trivial even in the 18th century; for instance, France ran the legal institute of the *lettre de cachet*, which covered the French absolute monarchy's subsequent legislative right, e.g. the possibility for the monarch 'to terminate a prosecution or, without relying on the judges, convict or imprison an individual without a trial and without even an offence having been committed' (Elliott, 2011, p. 5). However, this formal rule of law was given a lot of criticism, especially between the two world wars, and later, after World War II, it became evident that it could not be maintained in itself because, for instance, even Nazi Germany could be treated as a state governed by the 'rule of law', at least in its formal sense. For this reason, there was clear consensus after World War II that the term 'rule of law' had to be filled with proper contents. The most famous statement was Radbruch's well-known formula. Radbruch, 1946, pp. 105–108.

(and which must be reconciled with the rulew of law;[205] these two have a complex relation system).[206]

All special principles or doctrines other than the key concepts employed by the examined bodies are only intended to concretise the latter; they are aspects arising from the jurisprudence of the ECtHR and of the constitutional courts to be taken into account. Such comprise the *test of impartiality*[207] used in the case of the right to a fair trial, principles of predictability and foreseeability serving as justification of decisions based on previous practice, equality before the law, and the legal certainty covering all these.[208] Furthermore, the fiction of uniformity and consistency of legal documents to be interpreted that serves as necessary basis for interpretation in case of all must be recognised. Hence, particular fundamental rights are consistent and not in conflict with one another other—they form a uniform and consistent system and, if it is not true at the level of the text, it is necessary to give an interpretation of the particular fundamental rights that allows this harmony to be achieved.

Finally, a common feature of the practice of each forum is that they pay special attention to their own previous practice. As regards the ECtHR and several constitutional courts we analysed, this is the case without exception. Even in the case of

205 It is no coincidence that these principles are often defined in one provision by the constitutions.

206 For this relation system, see Toth, 2021, pp. 77–97. If we consider constitutionalism as the institution serving the implementation of the rule of law, the situation is even more complicated because 'material constitutionalism' may serve substantial principles and also formal aspects of popular sovereignty, which, in certain cases, may collide with each other. Schütze called the former (with some simplification) 'liberal constitutionalism' and the latter 'democratic constitutionalism' (cf. Schütze, 2019, pp. 54–60.), which attributes too much role to the drafting of a constitution, to its pedigree in a broad sense, thereby making the differences appear greater than those that, in principle, follow from the division (with the operation of adequate rule of law guarantees, or more precisely, the recognition of the rule of law guarantees of democracy).

207 Impartiality has two measures: the subjective and the objective test of impartiality. According to the Court, '[t]he existence of impartiality for the purposes of Article 6 para. 1 […] must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect' (*Hauschildt v. Denmark*, application no. 10486/83, 24 May 1989, para 46.) 'Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality' (*Hauschildt v. Denmark*, para 48).

208 'It is true that […] the Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions' (Cossey v. The United Kingdom, application no. 10843/84, 27 September 1990, § 35.). 'The Court considers that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases' (*Chapman v. The United Kingdom*, application no. 27238/95, 18 January 2001, § 70).

the other constitutional courts, almost all decisions of these bodies referred to their own previous decisions. This means that decisions of their own previous practice served as precedent for practically all fora. Although the ECtHR never considers the decisions of the particular constitutional courts, it is not true conversely: the decisions of the ECtHR, a supranational forum intended to enforce an international convention, namely, the ECHR, enjoy particular attention in the course of the adjudication of national constitutional courts. The phenomenon can be observed everywhere, to varying extents. The one extreme is Hungary, where, in the past years, an expressly ECtHR-sceptic attitude could be observed—decision-makers tried to pay less attention to the practice of the ECtHR and to refer as few decisions thereof as possible. The other extreme is the practice in Serbia where, according to the Constitution, the decisions of the ECtHR must be taken into account. The Serbian constitutional court considers these decisions to be binding and uses them as precedent, attributing an even more important role to them than to its own previous constitutional court decisions. Although with varying intensity, the constitutional courts (not only in these countries)[209] make their decisions based on the knowledge that the same case may be brought before the ECtHR, which cannot oblige the domestic constitutional court to change its decision. This constitutional court would still lose prestige if the latter were to be obliged to change a Strasbourg decision interpreting fundamental rights differently and protecting them more strongly than the constitutional court.[210] Even if they do not confess, constitutional courts always avoid this situation (maybe the slightest effort in this direction is available at the Constitutional Court of Hungary) and to follow the judicial practice of the ECtHR

209 Based on the statistical analysis of caseload data of the courts by Hofmann, the ECtHR held, regarding the examined Central and Eastern European countries, that there was a violation of Convention rights mostly concerning Poland (at least until 2012) if we see the absolute numbers, and concerning Hungary, if we see the rate of violations regarding judgements (cf. Hofmann, 2015, pp. 277–278). As for the entire region (Central and Eastern Europe, including the countries of the Balkan and Baltics), it cannot be stated that the number or the rate of violations of the Convention would be higher; and it is also true for the EU-member Central and Eastern European countries (i.e. the subcategory including also the states examined by us) and also for Serbia: these states 'do not show apparent differences concerning either the type of violation judgements or the general subject matter of Court decisions as compared to other contracting parties' (Hofmann, op.cit., p. 278).

210 Krisch used three aspects to analyse the basis of the domestic courts (also including the constitutional courts in this motivation system) to be ready to follow the expectations and decision-making aspects of the ECtHR (or of the ECJ). The first category contains the attitudes of judges, e.g. a judge on the 'activist' side of the 'activism–restraint' line will treat the decisions of Strasbourg with greater respect than a judge being an advocate of voluntary restraint of judges. This difference may finally be placed on the *ius aequum–ius strictum* line on comprehensive legal theoretical basis. The second aspect consists of the 'normative commitments', which stem from the notion of the autonomy of law as an institutional system vis-à-vis politics: the more autonomous a judge thinks the law is, the more they will refrain from overruling specific (domestic) law. The third aspect consists of 'strategic considerations', which are influenced by extra-legal and extra-jurisprudential factors (e.g. whether the judge wishes to be re-elected or to preserve his or her position and autonomy) (cf Krisch, 2010, pp. 146–148).

in advance,[211] with which, even unintentionally, they contribute to the convergence of the national and supranational interpretation of human rights,[212] to the predictability of the law and, finally, through to legal certainty.

The disadvantage of this approach is that national particularities and specific problems in individual countries may require a different approach, and the doctrine of margin of appreciation may be helpful for this different approach. Given that the ECtHR itself decides on its limits, there is a real risk of uniformity and of national particularities being ignored. A solution that also considers aspects of member states and the idea of human rights and their common content regarding rule of law, the doctrine of margin of appreciation may be an adequate basis. This doctrine, as an aspect focusing on the core of fundamental rights, may, in addition to recognition of the room for manoeuvre in member states, serve the protection and enforcement of fundamental rights. Substantive convergence (with its advantages and disadvantages) has been an already known existing phenomenon. The present research empirically proved that methodological convergence also exists.

211 It is true as a general European trend. Only the *Conseil constitutionnel* in France hesitates to refer to the provisions of the ECHR and the decisions of the ECtHR and to consider their content in the six Western and Southern European legal systems examined by Davide Paris. In the other countries (Austria, Belgium, Germany, Italy, and Spain), although the ECHR is not recognised as a source of constitutional law, 'constitutional courts resort to various techniques to incorporate [the ECHR] in their constitutional yardsticks, thus enabling themselves to review the compliance of domestic acts with the ECHR' (Paris, 2017, p. 624)

212 In fact, the relationship is more complex. Masterman drew attention to the fact that the relationship is two-way. On the one hand, international legal sources undoubtedly influence the internal constitutional system of individual states, but, on the other hand (and this is also observed in the case of the ECtHR), the internal constitutional provisions and constitutional development of the state parties also influence the ECtHR's judgements (if there is a consensus in the constitutional principles and values of these states). Thus, the two levels (in our case, the national constitutions and the constitutional courts applying them, on the one hand, and the ECHR and the ECtHR intended to enforce it, on the other hand) are characterised by symbiosis and circularity. Cf. Masterman, 2019, p. 491–492.

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Chapter II

Interpretation of Fundamental Rights in Slovenia

Benjamin Flander

1. A Brief Summary of the Content

This chapter introduces an analysis of the interpretation of fundamental rights in the practice of the Slovenian Constitutional Court and the European Court of Human Rights. A brief overview of the status and powers of the Constitutional Court is followed by a record of the common features of the constitutional adjudication and style of reasoning in fundamental rights cases. Then the application of fundamental rights will be analysed and the practice of interpreting them by the Slovenian Constitutional Court will be explored. In this main segment of our research we analysed 30 important cases of the last 10 years in which the Constitutional Court brought a final decision, and in which it made a substantive references to the judgements of either the European Court of Human Rights (ECtHR) or the European Court of Justice (ECJ). Among the selected cases, 19 decisions were issued in the constitutional complaint procedure and 11 decisions concern the review of the constitutionality of laws and other general acts, however in some decisions, these two types of constitutional judicial decision-making are both involved. The selected decisions refer to important aspects of the implementation of fundamental rights in the areas of criminal law and criminal procedure, civil law, administrative law, anti-discrimination law, family law, asylum law, European Union law and other areas of law. For different reasons, the majority of these decisions have been of outstanding relevance in Slovenia.

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The selected cases will be analysed according to the common methodology of the monograph, aimed at comparing the interpretation of fundamental rights in the case law of the constitutional courts of the countries of the Eastern Central European region, the ECtHR and the ECJ. Carefully scrutinizing them, we discovered that the Constitutional Court – while using different methods of legal interpretation – addressed a wide range of constitutional provisions and rights. The Constitutional Court's interpretation of the constitutional provisions on fundamental rights contained in the selected decisions has had precedent effects on the legal order of the Republic of Slovenia. In substantive terms, in these cases, the Constitutional Court has taken a position on important aspects of the implementation of fundamental rights and determined their scope and limits. Furthermore, it has addressed the substantive meaning of important parts of the so-called constitutional material core (i.e., of principles of democracy, the rule of law and the separation of powers, of human dignity, personal liberty and privacy in a democratic state, etc.) and took decisions that have led to amendments in different areas of the Slovenian legal order.

Following the analyses of the features of constitutional adjudication and reasoning in Slovenia, we will then proceed with exploring the judicial practice of the ECtHR and, to a much lesser extent, the ECJ, the two very important international courts. 28 cases of the ECtHR and 2 cases of the ECJ referenced by the Slovenian Constitutional Court will be scrutinised. The selected decisions of both international courts were considered on the merits in the decisions of Constitutional Court which were included in our study. Our survey in the section concerning ECtHR aims primarily at providing a record of the common features of the interpretation by the Court of fundamental rights enshrined in the European Convention on Human Rights (hereinafter Convention). We will try to determine main differences in the decision-making and reasoning style of the Slovenian Constitutional Court and the ECtHR, while the comparison with the adjudication practice of the ECJ and interpretation of the rights contained in the Charter of Fundamental Rights of the European Union is of lesser importance for this study.

2. An overview of the Status and Powers of the Slovenian Constitutional Court

2.1. The Status

The Republic of Slovenia is a young country, which gained independence from the communist Yugoslavia on June 25, 1991, adopted new democratic Constitution on December 23, 1991, and joined the European Union on May 1, 2004. Coming into force six months after the declaration of independence, the new Constitution of the Republic of Slovenia (hereinafter the Constitution) defines Slovenia as a democratic

state based on principles of popular sovereignty, separation of powers and the rule of law.[1] It introduces an extensive catalogue of human rights and fundamental freedoms and regulates the status and powers of the most important state and independent bodies including the Constitutional Court, which was introduced in Slovenia by the 1963 Constitution. With the new Constitution, it has acquired new important competences and a stronger position in the judicial branch of power.[2]

As the highest body of judicial power for the protection of constitutionality, legality and human rights, the Constitutional Court is regulated in the Constitution in an independent chapter (Articles 160–167), separate from the chapter on state regulation as well as from the chapter on the judiciary. The Constitution determines the powers of the Constitutional Court and the position of its judges. The Constitutional Court's powers are determined in more detail in the Constitutional Court Act (hereinafter the CCA), adopted in 1994, which also regulates the financing of the Constitutional Court and the position of the President, the Secretary General, judges and advisers, and, in its largest section, the proceedings before the Constitutional Court (see below).[3] In order to independently regulate its organization and to determine in more detail the rules governing its proceedings, in 2007 the Constitutional Court adopted its Rules of Procedure.[4]

The Constitutional Court is an autonomous and independent state authority in relation to other state bodies and public authorities. Such position of the Constitutional Court is necessary due to its role as a guardian of constitutional order and enables an independent and impartial decision-making in protecting constitutionality as well as human rights of individuals and the constitutional rights of legal entities in relation to any authority.[5] Also important for its independent and autonomous status is that the Court determines independently its internal organization and mode of operation, and retains the budgetary autonomy and independence. Funds for the work of the Constitutional Court are determined as a part of the state budget by the National Assembly (e.g. the Parliament) upon the proposal of the Court itself. While the Court decides on the use of the funds autonomously, the supervision of the use of

1 The Constitution of the Republic of Slovenia (*Ustava Republike Slovenije* [Constitution]), Official Gazette of the Republic of Slovenia No. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13, 75/16, 92/21.

2 Constitution, Art. 160-167; Kaučič and Grad, 2011, pp. 333-350; see also The Constitutional Court of the Republic of Slovenia – An Overview of the Work for 2019, p. 9.

3 The Constitutional Court Act (*Zakon o ustavnem sodišču* [CCA]), Official Gazette of the Republic of Slovenia No. 64/07 – official consolidated text, 109/12, 23/20, 92/21.

4 The Rules of Procedure (*Poslovnik Ustavnega sodišča Republike Slovenije* [Rules of Procedure]), Official Gazette of the Republic of Slovenia, No. 86/07, 54/10, 56/11, 70/17 and 35/20. Adopted at the administrative session held on 17 September 2007 and amended at the administrative session held on 8 July 2010 and 4 July 2011, the Rules of Procedure entail detailed provisions on the representation, organization, operation and the public nature of the work of the Constitutional Court, as well as on the position of the judges, consideration and deciding.

5 The Constitutional Court of the Republic of Slovenia – An Overview of the Work for 2019, pp. 11-14.

these funds is performed by the Court of Audit.[6] The work of the Constitutional Court is public, according to the criteria set out by the CCA.

The Constitutional Court consists of nine judges who are elected on the proposal of the President of the Republic by secret ballot by a majority vote of all members of the National Assembly. They are elected for a term of nine years and may not be re-elected. Any Slovenian citizen who is a legal expert and has reached at least 40 years of age may be elected a Constitutional Court judge.[7] The manner of electing constitutional judges is regulated in more detail by the provisions of Articles 11 to 14 of the CCA. The President of the Republic publishes a call for candidates in the Official Gazette. Proposed candidatures must include a statement of reasons and the written consent of the candidates that they accept their candidature. While the President of the Republic proposes candidates for vacant positions from among the proposed candidates, he may additionally propose other candidates. If the President of the Republic proposes more candidates than there are vacant positions on the Constitutional Court, the order of candidates on the ballot is determined by lot. If none of the candidates receives the required majority or if an insufficient number of judges are elected, those candidates who received the highest number of votes are voted on again. If, even after a repeated election, an insufficient number of candidates are elected to the Constitutional Court, the President of the Republic conducts a new call for candidates in the Official Gazette and a new election is held on the basis of new candidatures.[8] Upon the proposal of the President of the Republic, the Parliament dismisses a Constitutional Court judge before the expiry of his or her term of office if the judge him or herself so requests, if the judge is punished by imprisonment for a criminal offence, or due to permanent loss of capacity to perform the office.[9]

The office of a Constitutional Court judge is incompatible with any office or work in public or private entities, with membership in management and supervisory bodies and the pursuit of occupation or activity, except for the position of higher education teacher or researcher. An elected Constitutional Court judge takes office after taking the oath of office and enjoys the same immunity as deputies of the National Assembly. The Constitutional Court has a President who is elected by secret ballot by the judges for a term of three years.[10]

2.2. The Powers

The Slovenian Constitutional Court exercises extensive jurisdiction intended to ensure effective protection of constitutionality and legality, as well as to prevent violations of fundamental rights.[11] While the majority of its powers are determined

6 CCA, Art. 6 and 8; see also Mavčič, 2000, pp. 82-93 and 98-100.
7 Constitution, Art. 162 and 163.
8 CCA, Art. 11-14.
9 Constitution, Art. 164; CCA, art. 19; see also Mavčič, 2000, pp. 124-125.
10 Constitution, Art. 163, 165, 166 and 167; CCA, Art. 9, 14, 16 and 17; Rules of Procedure, Art. 5-9.
11 Krivic, 2000, p. 47.

by the Constitution, they are regulated in more detail in the CCA. The competences of the Constitutional Court include deciding on (a) the constitutionality of laws and of the constitutionality and legality of other general acts, (b) the constitutionality of the international treaties prior to their ratification, (c) constitutional complaints regarding violations of fundamental rights, (d) disputes regarding the admissibility of a legislative referendum, (e) jurisdictional disputes, (f) the impeachment of the President of the Republic, the President of the Government, and individual ministers, (g) the unconstitutionality of the acts and activities of political parties, (h) disputes on the confirmation of the election of deputes of the National Assembly, and (i) the constitutionality of the dissolution of a municipal council or the dismissal of a major.[12] The Constitutional Court also decides on several other matters vested in it by the CCA and other laws.[13]

In terms of their significance and share of the caseload, the most important powers of the Slovenian Constitutional Court are the review of the constitutionality of laws and of the constitutionality and legality of other general acts (e.g. sub-statutory acts) and the power to decide on constitutional complaints regarding violations of fundamental rights.

2.2.1. The Proceedings for the Review of the Constitutionality of Laws

Article 161 of the Constitution stipulates that if the Constitutional Court establishes that a law is unconstitutional, it abrogates such law in whole or in part. Such abrogation takes effect immediately or within a period of time determined by the Constitutional Court. The Constitutional Court annuls *ab initio* (*ex tunc*) or abrogates (*ex nunc*) government's regulations or other sub-statutory general acts that are unconstitutional or contrary to laws. The Constitutional Court may, up until a final decision, also suspend in whole or in part the implementation of an act whose constitutionality or legality is being reviewed. According to the CCA, the proceedings for the review of the constitutionality of laws and the constitutionality and legality of other general acts adopted by state and other public authorities (e.g. norm control proceedings) can be initiated by the submission of a written request by the National Assembly[14], one third of the deputies of the National Assembly[15], the National Council, the Government, the Ombudsman (if he deems that a law or executive regulation

12 Constitution, Art. 160; CCA, Art. 21.

13 For example, the Referendum and Popular Initiative Act (*Zakon o referendumu in ljudski iniciativi* [ZRLI], Official Gazette of the Republic of Slovenia No. 26/07 – official consolidated text, 52/20) stipulates in Article 5č that if the National Assembly decides to not call the referendum, the proposers of the request may, within eight days of the decision of the National Assembly, request that such decision be reviewed by the Constitutional Court. If the Constitutional Court establishes that the decision of the National Assembly is unfounded, it shall abrogate it.

14 The National Assembly shall adopt its decision on the submission of a written request by a majority of votes cast by those deputies present.

15 In Slovenia, normally, the parliamentary opposition holds at least one third of the seats in the National Assembly. Accordingly, it often uses the possibility to initiate norm control proceedings.

interferes with fundamental rights), the Information Commissioner, the Bank of Slovenia, the Court of Audit and the State Prosecutor General (provided that a question of constitutionality or legality arises in connection with a case or procedure they are conducting), local councils (provided that a law or any other general act interferes with the constitutional position or constitutional rights of a local community), and representative trade unions (provided that the rights of workers are threatened).[16] The Protection Against Discrimination Act, adopted in 2016, provided for such a competence also for the Advocate of the Principle of Equality.[17] Additionally, when a court of general jurisdiction deems an act or its individual provisions, which it should apply to be unconstitutional, it stays the proceedings and by a request initiates proceedings for the review of their constitutionality.[18] The above listed applicants, however, may not submit a request to initiate the procedure for the review of the constitutionality or legality of general acts if these acts were adopted by them.

The proceedings for the review of the constitutionality of laws and sub-statutory general acts can also be initiated by a Constitutional Court order on the acceptance of a petition to initiate a review procedure which may be lodged by anyone – be it natural or legal person – who demonstrates legal interest. Pursuant to the CCA, the legal interest is deemed to be demonstrated if a law, executive regulation or other general act whose review has been requested by the petitioner directly interferes with his/her rights, legal interests or legal position. A petition must contain, *inter alia*, information from which it is evident that the challenged law or other general act directly interferes with the petitioner's rights, legal interests, or legal position, and proof of the petitioner's legal status in instances in which the applicant is not a natural person. The petitioner must also submit the relevant documents to which he refers to support his/her legal interest.[19] In norm control proceedings, each participant bears his own costs, unless the Constitutional Court decides otherwise.

The CCA distinguishes between the procedure for examining a petition and the preparatory procedure. A petition is first examined by the Constitutional Court judge determined by the work schedule (e.g. judge rapporteur), who collects information and obtains clarifications necessary for the Constitutional Court to decide whether to

16 CCA, Art. 22 and 23a.

17 The Protection Against Discrimination Act (*Zakon o varstvu pred diskriminacijo* [ZVarD]), Official Gazette of the Republic of Slovenia No. 33/16 – unofficial consolidated text, 33/16 and 21/18 – ZNOrg. Article 38 of the ZVarD stipulates that if the Advocate of the Principle of Equality assesses that a law or other general act is discriminatory he or she may, by a request, initiate the proceedings for the review of constitutionality or legality of such an act.

18 The CCA also stipulates that if by a request the Supreme Court initiates proceedings for the review of the constitutionality of an act or part thereof, a court which should apply such act in deciding may stay proceedings until the final decision of the Constitutional Court without having to initiate proceedings for the review of the constitutionality of such act by a separate request. Furthermore, if the Supreme Court deems a law or part thereof which it should apply to be unconstitutional, it stays proceedings in all cases in which it should apply such law or part thereof in deciding on legal remedies and by a request initiates proceedings for the review of its constitutionality (see Art. 23).

19 CCA, Art. 22-24b.

initiate a procedure. The Constitutional Court may reject a petition unless all formal and procedural requirements regarding legal interest are met or dismiss a petition if it is manifestly unfounded or if it cannot be expected that an important legal question will be resolved. At the centre of the preparatory procedure, which follows the procedure for examining a petition, is the communication between the parties (i.e., the adversarial principle). The Constitutional Court sends the request or petition to the authority which issued the general act (e.g. to the opposing party), and determines an appropriate period of time for a response or for a supplementary response if a response has already been submitted in the procedure for examining the petition.[20]

When the preparatory procedure is completed, the Constitutional Court considers a case at a closed session or a public hearing where a majority of all Constitutional Court judges must be present. Until its final decision, the Constitutional Court may suspend in whole or in part the implementation of a law, executive regulation or other general act adopted by a public authority, if harmful consequences that are difficult to remedy could result from the implementation of those acts. If the Constitutional Court suspends the implementation of a general act, it may at the same time decide in what manner the decision is to be implemented. An order by which the implementation of a general act is suspended must include a statement of reasons. The suspension takes effect the day following the publication of the order in the Official Gazette of the Republic of Slovenia, and in the event of a public announcement of the order, the day of its announcement.[21]

The Constitutional Court decides on the merits by a decision by a majority vote of all judges.[22]

It may in whole or in part abrogate a law which is not in conformity with the Constitution. When deciding on the constitutionality and legality of government's regulations or other sub-statutory general acts adopted by public authorities, however, the Constitutional Court may either abrogate or annul them. It may annul unconstitutional or unlawful sub-statutory general acts when it determines that it is necessary to remedy harmful consequences arising from such unconstitutionality or unlawfulness. Such an annulment has retroactive effect (*ex tunc*) and if harmful consequences occurred as a result of a regular court decision or any other individual act adopted on the basis of the annulled general act, entitled persons have the right to request that the authority which decided in the first instance annul such individual act. If such consequences cannot be remedied, however, the entitled person may claim compensation in a regular court of law.[23]

In other instances, when the Constitutional Court abrogates general acts that are unconstitutional or unlawful[24], the abrogation takes effect on the day following

20 CCA, Art. 27 and 28.

21 CCA, Art. 39. See also Mavčič, 2000, pp. 211-216.

22 Other issues are decided by an order adopted by a majority vote of the judges present.

23 CCA, Art. 46 § 1. See also Mavčič, 2000, p. 262-270.

24 The Constitutional Court may also extend the review to a review of the conformity of the challenged acts with ratified international treaties and with the general principles of international law.

the publication of the Constitutional Court's decision on the abrogation, or upon the expiry of a period of time determined by the Constitutional Court (*ex nunc*).[25] A different situation arises when laws or other general acts are found unconstitutional by the Constitutional Court because they do not regulate a certain issue which they should regulate or they regulate it in a manner which does not enable annulment or abrogation. In such cases a so-called declaratory decision is adopted by the Constitutional Court. Furthermore, the Constitutional Court also adopts a declaratory decision when deciding on the constitutionality of general acts that have ceased to be in force.[26] In these cases, the legislature or the authority which issued the unconstitutional or unlawful general act must remedy the established unconstitutionality or unlawfulness within a period of time determined by the Constitutional Court.[27]

During proceedings before the Constitutional Court, a situation may occur that a law or other general act ceased to be in force as a whole or in the challenged part or was amended. In such circumstances, the Constitutional Court decides on its constitutionality or legality if an applicant or petitioner demonstrates that the consequences of the unconstitutionality or unlawfulness of such law or other general act were not remedied.[28] In its case law however, the Constitutional Court determined an additional condition for taking the challenged law into consideration if it ceased to be in force during the proceedings. It will take such a law or other general act into consideration and decide on its constitutionality if the initiative for a norm control relates to particularly important constitutional issues of a systemic nature and if a precedent decision is to be expected.[29]

In the Slovenian consttutioal system the Constitutional Court cannot initiate any procedure ex officio. However, there is a narrow and conditioned exception as Article 30 of the CCA stipulates that in deciding on the constitutionality and legality of general acts, the Constitutional Court is not bound by the proposal of a request or petition. The Constitutional Court may also review the constitutionality and legality of other provisions of the same or other laws or sub-statutory general acts for which a review of constitutionality or legality has not been proposed, if such provisions are mutually related or if such is necessary to resolve the case at hand.[30]

25 CCA, Art. 43-45; see also Mavčič, 2000, p. 238-260. For a comprehensive study on the different types of the Slovenian Constitutional Court's decisions and their consequences, see Krivic, 2000, pp. 47-211.

26 CCA, Art. 47 and 48 § 1. By adopting a so-called declaratory decision, the Constitutional Court does not annul or abrogate an unconstitutional act. Instead, it determines a time limit by which the legislature or other authority that issued an act must remedy the established unconstitutionality or illegality. See Mavčič, 2000, pp. 270-273. For a comprehensive study on the declaratory decisions see Nerad, 2007.

27 CCA, Art. 48 § 2.

28 CCA, Art. 47.

29 See, for example, U-I-50/21, dated 15 April 2021.

30 CCA, Art. 30. See also Krivic, 2000, p. 131.

2.2.2. The Constitutional Complaint

Another important power of the Slovenian Constitutional Court is the power to decide on constitutional complaints regarding violations of fundamental rights. A constitutional complaint in the Slovenian legal order is generally considered to be neither a regular nor an extraordinary legal remedy, but a special legal remedy for the protection of human rights and fundamental freedoms.[31] A constitutional complaint may be lodged to claim a violation of rights and freedoms determined by the Constitution as well as those recognised by applicable international treaties. Under the conditions determined by the CCA, any natural or legal person may file constitutional complaint if he/she/it deems that his/her/its fundamental rights have been violated by an individual act of state authorities, local community authorities, or other bearers of public authority. A constitutional complaint may also be lodged by the ombudsman in connection with an individual case which he/she is considering with the consent of the person whose fundamental rights he/she is protecting. A constitutional complaint may be lodged only when all regular and extraordinary legal remedies have been exhausted, and no later than within 60 days from the day of service of the individual act against which a constitutional complaint is possible.[32]

A constitutional complaint is not admissible if the alleged violation of fundamental rights did not have serious consequences for the complainant. In connection with this, the CCA stipulates that there is no violation of fundamental rights which would have serious consequences for the complainant, when (a) an individual act is issued in small-claim disputes, (b) if only a decision on the costs of proceedings is challenged by the constitutional complaint, (c) in trespass to property disputes and (d) in minor offence cases. Notwithstanding this legal presumption, the Constitutional Court may, in specially substantiated cases, also decide on constitutional complaints against such individual acts if the case addresses an important constitutional issue that exceeds the significance of the concrete case.[33]

Furthermore, the Art. 55b, § 1 of the CCA determines the instances in which in the procedure for examining a constitutional complaint a panel of three judges[34] sitting in a closed session shall reject a constitutional complain. Among these are the following ones:

31 Ude, 1995, p. 515 cited in Fišer, 2000, pp. 278-279.

32 CCA, Art. 50-52. The Constitutional Court may exceptionally decide on a constitutional complaint before the exhaustion of extraordinary legal remedies, if the alleged violation is obvious, if the regular legal remedies are exhausted and if the execution of an individual legal act would have irreparable consequences for the complainant. In specially justified cases, as an exception, a constitutional complaint may also be lodged on the expiry of the prescribed time limit (see Art.51 § 2 and Mavčič, 2000, pp. 326-330.

33 CCA, Art. 55a.

34 The Constitutional Court has three panels for the examination of constitutional complaints: the panel for constitutional complaints in the field of criminal law matters, in the field of civil law matters and in the field of administrative law matters (se below).

- if the complainant does not have a legal interest for a decision on the constitutional complaint;
- if all legal remedies have not been exhausted;
- if the challenged act is not an individual act by which a state authority, local community authority, or any other bearer of public authority decided on the rights, obligations or legal entitlements of the complainant;
- if a constitutional complaint was lodged by a person not entitled to do so, if it was not lodged in time and in other instances determined by the CCA.

However, the constitutional complaint is accepted for consideration by a panel if a violation of fundamental rights could have serious consequences for the complainant or if it concerns an important constitutional question which exceeds the importance of the concrete case.[35]

Regarding the decision-making on the acceptance or rejection of the constitutional complaint for consideration, the relevant provisions on the procedure for examining a constitutional complaint are very unique. According to the Rules of Procedure, the panel of three judges decides whether the conditions for the acceptance and consideration of a constitutional complaint determined by the Article 55b of the CCA are fulfilled. If the members of a panel do not agree whether the reasons referred to in the CCA exist, the constitutional complaint is submitted to the Constitutional Court judges who are not members of the panel in order to decide thereon. The constitutional complaint may be either rejected (i.e., if any five Constitutional Court judges decide in favour of rejection in writing within 15 days) or accepted for consideration (i.e., if any three Constitutional Court judges decide in favour of acceptance in writing within 15 days).[36]

Once a constitutional complaint is accepted, as a general rule it is considered by the Constitutional Court at a closed session, or a public hearing may be held (see below). The panel of three judges or the Constitutional Court at the plenary sitting may suspend the implementation of the challenged individual act at a closed session if harmful consequences that are difficult to remedy could result from the implementation thereof. Following consideration on the merits of a case, the Constitutional Court dismisses as unfounded the constitutional complaint or it grants the complaint and annuls or abrogates, in whole or in part, the challenged individual act and the matter is returned to the authority competent to decide thereon.[37] However, if it is necessary to remedy the consequences which have already arisen, or if the nature of the constitutional right so requires, the Constitutional Court can decide on the constitutional right by itself. This decision must be implemented by the authority competent to implement the individual act which the Constitutional Court abrogated or annulled. Las but not least, if the Constitutional Court finds that a repealed

35 CCA, Art. 55b § 2.
36 CCA, Art. 55c.
37 CCA, Art. 57-59.

individual act is based on an unconstitutional general act, it may annul or abrogate such an act in accordance with the provisions of the CCA on the proceedings regarding the review of constitutionality and legality of laws and other general acts.[38]

2.3. Conclusion

The Slovenian Constitutional Court decides by decisions and orders. Participants in proceedings before the Constitutional Court have the right to inspect the case file at all times during the proceedings, while other persons may do so if the President of the Constitutional Court allows them to do so. As a general rule, the cases are deliberated and decisions are taken in closed sessions. In some cases, however, a public hearing is held (see below, subsection 2.1.1).[39] The Constitutional Court ensures that the public is informed of its work in particular by publishing its decisions and orders in the Official Gazette of the Republic of Slovenia, on its website, and in a collection of decisions and orders of the Constitutional Court, which is periodically published in a book form. In cases that are of more interest to the public, the Court issues a special press release in order to publicize its decisions. The work of the Court is presented to the public also through the publication of annual reports on its work and decisions.

Since the establishment of the new Constitutional Court of an independent and sovereign Slovenia, its influence on the personal, family, economic, cultural, religious, and political life of the Slovenian society has been of extreme importance. From a substantive perspective, decisions on the merits, by which the Constitutional Court adopts precedential standpoints regarding the standards of protection of constitutional values, especially fundamental rights, are of particular importance for the development of law in general and constitutional law in particular. This is due to the fact that the actual content of the constitutional norms/rights is, to a large extent, the result of the Court's interpretation of individual provisions and the Constitution as a whole. The decisions of the Constitutional Court breathe substance and meaning into the Constitution and its provisions on fundamental rights, thus making them a living and effective legal tool that can directly influence people's lives and well-being. As a result of the deployment of different types of interpretative arguments and methods, the case law of the Constitutional Court relating to fundamental rights extends to all legal fields and touches upon various dimensions of individual existence and of society as a whole.[40]

38 CCA, Art. 59 § 2.

39 In deciding on an individual case, the Constitutional Court may disqualify a Constitutional Court judge by applying, *mutatis mutandis*, the reasons for disqualification of judges in a regular court proceedings. Pursuant to Art. 31 of the CCA, the following are not reasons for disqualification of a judge of the Constitutional Curt: (a) participation in legislative procedures or in the adoption of other challenged regulations or general acts issued for the exercise of public authority prior to being elected a Constitutional Court judge, and (b) the expression of an expert opinion on a legal issue which might be significant for the proceedings.

40 The Constitutional Court of the Republic of Slovenia – An Overview of the Work for 2019, pp. 9-10.

3. The Interpretation of Fundamental Rights in the Case Law of the Constitutional Court

In the following subsections, a picture will be drawn of the characteristics of the constitutional decision-making process and adjudication, the style of reasoning of the Constitutional Court and the frequency of methods and arguments used by it when interpreting constitutional provisions on fundamental rights. The insight into the interpretative practices detected in the 30 selected decisions of the Slovenian Constitutional Court will be followed by an analysis of the selected judgements of the ECtHR (accompanied with a few judgments of the ECJ) referred to in the Constitutional Court's case law. In the concluding section of the chapter, a comparison between the Constitutional Court and the ECtHR/ECJ will be made in terms of characteristics of their adjudicating and reasoning style and of the methods of legal interpretation used by them.

3.1. The characteristics of the Constitutional Court's decision-making and style of reasoning

In the first place we will shed some more light on the normative framework of considering and adjudicating cases by the Constitutional Court and take a closer look at the way decisions are taken and at the characteristics and style of the constitutional reasoning in cases involving interpretation of constitutional provisions on fundamental rights. More particularly, we will try to clarify how the constitutional decision-making is conducted and what fundamental rights and constitutional tests and standards are employed in the course of constitutional reasoning and adjudicating in each main type of cases.

3.1.1. The normative framework[41] of considering cases and decision-making

As a general rule, the Constitutional Court considers cases in accordance with the order of their receipt, however, it may decide to consider certain types of cases as priority cases, while certain cases shall be considered by the Court as such *ex lege*.[42]

41 As indicated in the introduction to this chapter, the general normative framework of considering cases and decision-making by the Constitutional Court is determined by the CCA and the Rules of Procedure. Also relevant for the operation of cases and decision-making of the Constitutional Court are standards formulated by the Constitutional Court itself in its case law.

42 The Constitutional Court may decide to consider the following types of cases as priority cases: (a) cases which the court must consider and decide rapidly in accordance with the regulations that apply on the basis of the CCA; (b) cases in which a court has adjourned proceedings and required the review of the constitutionality of a law; (c) cases for which a law determines a time limit within which the Constitutional Court must consider and decide a case and (d) jurisdictional disputes (Rules of Procedure, Art. 46).

If a participant in proceedings motions for priority consideration, the Constitutional Court decides thereon if so proposed by the judge rapporteur or another Constitutional Court judge.

The assignment of cases to Constitutionla Court judges and schedule of sessions are determined by the Constitutional Court by means of a work schedule adopted at an administrative session. Cases are as a general rule assigned to Constitutional Court judges according to the alphabetical order of their last names. Constitutional complaint cases are assigned to Constitutional Court judges, with consideration of which panel they have been assigned to, according to the alphabetical order of the last names of the members of the panel.[43] The method of assigning cases to the Constitutional Court judges, the division of work between the panels of the Constitutional Court and their composition as well as the shedule of sessions are also published in the Official Gazette and on the website of the Constitutional Court.[44]

The Constitutional Court decides on a case which is the subject of proceedings at a session on the basis of the written or oral report of the judge-rapporteur[45] or on the basis of a submitted draft decision (or order). If the judge rapporteur assesses that a case is more demanding or if such is required by any Constitutional Court judge at a session, a written report of the case is drawn up. The report comprises whatever is necessary for the Constitutional Court to decide, i.e., a review of whether the procedural requirements have been fulfilled, a presentation of previous relevant constitutional case law, a comparative survey of relevant constitutional reviews or reviews by international courts, other comparative-law information, a presentation of foreign and domestic legal theory, selected preparatory materials for the Constitution and the challenged regulations, and arguments in favour and against possible solutions.[46] The judge-rapporteur may obtain necessary clarifications also from other participants in proceedings and from state authorities, local community authorities, and bearers of public authority.

In the stage of preparation of the material for the session, the advisers to the Constitutional Court have an important role as they prepare a draft decision (or

43 As explined in the section on the Constitutional Court's powers, the Court has three three-member panels for the examination of constitutional complaints. The division of work among the panels and the composition thereof is regulated by the Constitutional Court according to the work schedule.

44 Rules of Procedure, Art. 10-12.

45 While the President of the Constitutional Court decides when the case is ready for voting, the judge-rapporteur is the key person for the text of the draft decision. Since the latter is often coordinated in a session, it can be amended only with his consent. Sometimes judges submit their motions (e.g. their proposals of the decision for consideration at a session) in writing before the session. If these are such that they cannot be accepted by the judge-rapporteur, then, as a rule, he proposes that a new judge-rapporteur be appointed to prepare a new draft decision. In some cases, a preliminary vote is taken on the whole decision or only on parts of the decision, in order to verify the support, the draft prepared by the judge-rapporteur enjoys. New rounds of discussion then take place in order to see if consensus can be reached. Where this is not possible, the case is adjourned, with the judge-rapporteur and the adviser seeking to prepare a draft acceptable to the majority of judges.

46 Rules of Procedure, Art. 47.

order) and report for the judge-rapporteur. The judge-rapporteur may either sign and send the prepared material to the secretary-general for admission to the session, or reject it and give the adviser instructions on how to amend or supplement the material. Sometimes this process of consultation between the judge-rapporteur and the adviser takes place earlier in informal or formal communication, but not necessarily in all cases. In formal communication, it takes place when the adviser first prepares a report only for the judge-rapporteur, to which he responds. Once the judge-rapporteur and the adviser have reconciled the text, the latter prepares the material for the session which should be signed by the judge-rapporteur before the submission. In the absence of such communication, when the judge-rapporteur merely signs the material, the adviser has a great influence on the draft decision or order. However, although in some cases the author of the text of a draft decision (or order) may be the adviser, the text of the decision or part of the decision is often prepared by the judge-rapporteur alone or together with other judges or advisers. In practice, on the one hand, judges often give advisers a chance to speak and give their opinion significant weight. On the other hand, there is no doubt that the responsibility and therefore also a final word is always with the judge him/herself.

The Constitutional Court considers a case either at a closed session or a public hearing where a majority of all Constitutional Court judges must be present. Closed sessions are called in accordance with the work schedule of the Constitutional Court. In addition to the President and judges of the Constitutional Court, the Secretary General, the advisors of the Constitutional Court who have been assigned a case and other advisors who are selected by the President or the judge rapporteur are present at closed sessions. At the beginning of the consideration of each item on the agenda, the President allows the judge rapporteur to speak, and then other Constitutional Court judges, moving clockwise, such that the judge sitting to the left of the judge rapporteur follows first. The President speaks after all other judges have stated their opinion on the matter. The President may then allow the Secretary General and, upon the proposal of the judge rapporteur, the Advisor present at particular items of the agenda to speak. After the discussion of an item on the agenda is concluded the President submits the proposed decision to a vote. While the vote may be either preliminary or final, a final vote may be carried out only on a draft decision (or a draft order) which includes the operative provisions and its full reasoning, except in cases when the Constitutional Court pronounces its decision orally, immediately after the conclusion of a public hearing (see below). However, if the conditions for reaching a decision are not fulfilled, the Constitutional Court may decide by a majority vote of the judges present to adjourn the decision on such to a later session.[47]

47 Rules of Procedure, Art. 55-63. If the judge-rapporteur does not propose otherwise, proposals for the temporary suspension of the implementation of laws and other general acts are considered by the Constitutional Court in a correspondence session, in such a manner that the judge rapporteur submits a report and a draft decision to the other Constitutional Court judges. If none of the Constitutional Court judges declares his opposition to the draft decision within eight days or within a time limit determined by an order of the Constitutional Court, such decision is adopted. The

A public hearing may be called on the initiative of the President of the Constitutional Court or upon the motion of the participants in proceedings. A proposal that a public hearing be called or a proposal on the partial or complete exclusion of the public from a hearing may also be contained in a report prepared by the judge-rapporteur (see *supra*). Upon the proposal of three judges, however, a public hearing is obligatory. The deliberation and voting on the decision of a case that is considered at a public hearing is carried out at a closed session and only those Constitutional Court judges who were present at the public hearing cast votes.[48]

The Constitutional Court's decisions (and orders) shall contain the statement of the legal basis for deciding, the operative provisions, the statement of reasons, and the statement of the composition of the Constitutional Court which reached the decision. The operative provisions contain the decision on the commencement of proceedings, the decision on the review of the general or individual act that was the subject of the review, the decision on the manner of the implementation of the decision or the order, and the decision on the costs of proceedings, if such were claimed by a participant in proceedings. The most interesting and important obligatory component of a decision (or an order) is, in the context of this chapter, the statement of reasons (e.g. the reasoning). It contains a summary of the allegations of the participants in proceedings and the reasons for the decision of the Constitutional Court. A decision (or an order) also includes a statement on the results of the vote and the names of the Constitutional Court judges who voted against the decision, the names of the Constitutional Court judges who submitted separate opinions, and the names of the Constitutional Court judges who were disqualified from deciding.

3.1.2. The characteristics of decision-making and style of reasoning

The characteristics of decision-making of the Constitutional Court are largely dependent on the type of a case. As explained in the introductory section on the Constitutional Court, norm control proceedings can be initiated by the submission of a written request by the applicants determined by the CCA and other laws or by a petition to initiate a review procedure which may be lodged by anyone who demonstrates legal interest. If the latter is the case, the legal interest is considered to be demonstrated if a law or other general act to be reviewed directly interferes with a petitioner's rights, legal interests or legal position. In this type of cases, prior to adjudicating on the merits of a case, the Constitutional Court examines in the preparatory procedure the petition, determining whether the petitioner has demonstrated

Constitutional Court may decide that it will also decide other types of cases in this manner (Rules of Procedure, Art. 56). Decisions and orders which contain reasoning are always considered in a regular session (e.g. not in a correspondence session) for a more detailed discussion of the content and deliberation.

48 Rules of Procedure, Art. 51-53 and 55.

legal interest. Pursuant to the CCA, the Constitutional Court dismisses a petition if it is manifestly unfounded or if it cannot be expected that an important legal question will be resolved. It decides on the acceptance or dismissal of a petition by a majority vote of judges present. The order adopted by the Constitutional Court to dismiss a petition must include a statement of reasons.[49]

In its judicial practice, the Slovenian Constitutional Court determined more precisely the content of the provision of the CCA on the legal interest and tightened the conditions to be met by a petitioner. It has taken a position that as a general rule legal interest in filing a petition is demonstrated if the petitioner is involved in a concrete legal dispute in which he/she has exhausted all regular and extraordinary legal remedies and if a petition is filed together with a constitutional complaint against an individual legal act. Although this is not a general rule and it does not apply to all petitions in general, according to the criteria set up in the case law of the Constitutional Court a petition must be such as to raise particularly important precedential constitutional questions of a systemic nature. The stricter standard applies only in specific circumstances in specific cases.[50]

A good illustration of the application of strict criteria for examining a petition and determining whether the petitioner has demonstrated legal interest can be found in the Constitutional Court's decision number U-I-83/20. In this case, the Constitutional Court reviewed the constitutionality of two ordinances adopted by the Government in order to contain and manage the risk of the COVID-19 epidemic. The question at issue was whether the prohibition of movement outside the municipality of one's permanent or temporary residence determined by the challenged executive ordinances was consistent with the first paragraph of Article 32 of the Constitution, which guarantees freedom of movement to everyone.[51] An important circumstance in this case was that the petitioner has not been involved in a concrete legal dispute (i.e., he was not convicted of a misdemeanour for violating the government's ordinances) and has not filled, together with his petition for the review of the two ordinances, a constitutional complaint against an individual legal act. In its order which was issued in the procedure for examining the petition and preceded the final/substantive decision, the Constitutional Court referred to its previous decisions in similar matters and held that it is not possible to require the petitioner to violate the allegedly unconstitutional or illegal provisions of the ordinances and initiate misdemeanour proceedings in order to substantiate the legal interest for filling a petition. The judges also assessed that in the present case, the petition for the review of the constitutionality and legality of government's general acts raises a particularly important precedential constitutional question of a systemic nature on which the Constitutional Court had not yet had the opportunity to take a position and which could also arise in connection with possible future acts of the same nature. On the

49 CCA, Art. 26 § 2 and 3.
50 See Mavčič, 2000, pp. 172-189.
51 U-I-83/20, dated 27 August 2020.

basis of these arguments, the Constitutional Court ruled that the petitioner succeeded to demonstrate the legal interest.[52]

In norm control proceedings, a petitioner is entitled to propose to the Constitutional Court to issue a temporary injunction on and suspend the implementation of the challenged general acts until the final decision. Such proposals are based on the first paragraph of Article 39 of the CCA, which stipulates that the Constitutional Court may suspend the execution of a general act in whole or in part until the final decision, if its implementation could result in harmful consequences that are difficult to remedy. For cases involving the temporary injunction proposals, the Constitutional Court developed in its case law a special argumentative formula. When employing it, the Court weighs between the harmful consequences that would be caused by the implementation of possibly unconstitutional provisions of the challenged general act and the harmful consequences that would arise if the challenged provisions, which could possibly be recognized in the Court's final decision as compliant with the Constitution, were not temporarily implemented. In cases where the Constitutional Court finds that both the further effect of the challenged provisions and their temporary suspension could lead to comparable harmful consequences that are difficult to remedy, it rejects the motion for temporary suspension. Notably, in in the procedure for examining the petition in the aforementioned case number U-I-83/20, the petitioner's motion to suspend the provision prohibiting the movement outside the municipality of one's permanent or temporary residence has been rejected. In the then present circumstances of the COVID-19 pandemic, the majority of the Constitutional Court's judges considered consequences that would arise for the public health and preservation of people's lives, if the challenged provisions were not implemented until the Constitutional Court's final decision, more harmful than the consequences that would be caused by the implementation of possibly unconstitutional provisions of the government's decrees for the implementation of the right to free movement.[53]

In the reasoning of its final decisions in norm control proceedings, the Constitutional Court first provides a summary of the allegations of petitioners/applicants and of the opposite participant (e.g. the authority which issued the challenged general act)[54] and then gives reasons for the decision on the (un)constitutionality of the challenged provisions of laws or other general acts. In most cases which concern fundamental rights, the Court carries out the review of constitutionality on the basis of the test of legitimacy and the strict test of proportionality. While the former entails an assessment of whether the legislature or other law-giving entity pursued a constitutionally admissible objective, the latter comprises an assessment of whether the

52 U-I-83/20-10, dated 27 August 2020.

53 See U-I-83/20-10. The temporary injunction proposal by the petitioner was rejected by six votes to three.

54 In cases where – not the sub-statutory general acts but – the law has been challenged by the petitioner, beside the National Assembly also the government may give its opinion.

interference was appropriate, necessary, and proportionate in the narrower sense. In its case law, the Constitutional Court determined in general terms under what conditions an interference (e.g. a measure limiting a fundamental right) is appropriate, necessary, and proportionate. Firstly, the assessment of the appropriateness of a measure includes the assessment of whether the objective pursued can be achieved at all by the intervention or whether the measure alone or in combination with other measures can contribute to the achievement of this objective. According to the Constitutional Court, a measure is inappropriate if its effects on the pursued goal could be assessed as negligible or only accidental at the time of its adoption. Secondly, an interference with a human right or fundamental freedom is necessary, according to the Constitutional Court, if the pursued goal cannot be achieved without interference or with a milder but equally effective measure. Finally, an interference with a fundamental right is proportionate in the narrower sense if the severity of that interference is proportionate to the value of the objective pursued or to the expected benefits that will result from the interference.[55]

When taking a final decision in the COVID-19 case about prohibition of movement outside the municipality of one's residence, the Constitutional Court assessed that the Government pursued a constitutionally admissible objective, i.e., containment of the spread of the contagious disease COVID-19 and thus the protection of human health and life, which this disease puts at risk. In its assessment of the proportionality of the interference with freedom of movement, the Constitutional Court held that the prohibition of movement outside the municipality of one's permanent or temporary residence was an appropriate measure for achieving the pursued objective. The Court held that there existed the requisite probability that – according to the data available at the time of the adoption of the challenged ordinances – it could have contributed towards reducing or slowing down the spread of COVID-19, primarily by reducing the number of actual contacts between persons living in areas with a higher number of infections and consequently at a higher risk of transmission of the infection. In the review of the necessity of the interference, the Constitutional Court deemed it crucial that the previously adopted measures (i.e., the closure of educational institutions, the suspension of public transport and the general prohibition of movement and gatherings in public places and areas) did not in themselves enable, at the time of the adoption of the challenged government's ordinances, the assessment that they would prevent the spread of infection to such an extent that – with regard to the actual systemic capacity – adequate health care could be provided to every patient. In such conditions, according to the Court, further measures to prevent the spread of infection and thereby the collapse of the health care system were necessary. Last but not least, the Constitutional Court assessed that the challenged restriction on movement was also proportionate in the narrower sense, which means that the demonstrated level of probability of a positive impact of the measure on the protection of human health and life outweighed the interference with the freedom of movement.

55 See U-I-83/20, items 47-55.

In its assessment that the interference was proportionate in the narrower sense, the Constitutional Court deemed it important that the measure included several exceptions to the prohibition of movement outside the municipality of one's residence.[56]

In the constitutional complaint cases, the characteristics of decision-making depends on the features and peculiarities of proceedings in this type of cases. As explained in the section on the Constitutional Court's powers, prior to taking a decision on the merits of a case, the Court examines a constitutional complaint and decides in a panel of three judges at a closed session whether to initiate proceedings. The panel decides on the acceptance or rejection of the constitutional complaint in a fashion and according to criteria determined by the CCA. When deciding on the merits of a case, the Constitutional Court either dismisses a constitutional complaint as unfounded or grants it and in whole or in part annuls or abrogates the individual act, and remands the case to the authority competent to decide thereon (see above).

In the reasoning of its orders concerning the admissibility of a constitutional complaint, the Constitutional Court summarizes the proceedings before the courts of general jurisdiction, lists the decisions that are challenged by the constitutional complaint, presents the complainant's allegations and gives reasons for the decision regarding the admissibility of a constitutional complaint. It also clarifies the reasons for suspension if in the procedure for examining the constitutional complaint the challenged individual act has been temporary suspended.

In the reasoning of its final/substantive decisions, however, the Constitutional Court first summarizes once again the proceedings before the courts of general jurisdiction, lists the decisions that are challenged by the constitutional complaint and presents the complainant's allegations and arguments in more detail, while also referring to the challenged decisions and their statements. In these parts of the decision, understandably, the Constitutional Court's style of reasoning is predominantly illustrative and descriptive. The Constitutional Court then adjudicates on the merits of the case and provides a detailed argumentation of its decision. In order to decide on the matter, the Constitutional Court must first have the clear factual basis, which is then connected to the relevant law that has to be applied in the process of subsumption. In this part of the decision-making process, the Constitutional Court deploys different methods of interpretation of fundamental rights and other constitutional provisions and uses a broad range of arguments in order to substantiate its decision on the merits of a case. Here the style of reasoning of the Constitutional court becomes predominantly prescriptive and normative in its nature. Besides applying different methods/techniques of constitutional interpretation and argumentation, one of the main characteristics of the Constitutional Court's style of reasoning is the application of the proportionality and several other tests, standards and argumentative forms of review, depending on the case at hand. The aim of such reasoning is

56 U-I-83/20. The decision was adopted by five votes to four. The four judges who voted against the majority decision gave dissenting opinions. Four out of five judges who voted for the majority decision gave concurring opinions.

to provide a convincing justification for the decision and to demonstrate the rationality of the decision-making process. Similar characteristics and style of reasoning can be observed in norm control proceedings.[57]

The common course of considering a constitutional complaint by the Constitutional Court is well illustrated, for example, in the decision number Up-879/14. In this »case of all cases« in the Slovenian judicial practice, the Constitutional Court decided on the constitutional complaint of Mr Janez Janša, the current Slovenian prime minister, who was at that time the leader of the strongest oppositional political party. The Ljubljana Local Court found Mr Janša guilty of the commission of the criminal offence of accepting a gift for unlawful intervention under the first paragraph of Article 269 of the Criminal Code. It sentenced him to two years in prison and imposed an accessory penalty of a fine in the amount of EUR 37,000.00, and required him to pay the costs of the criminal proceedings and the court fee. After the Higher Court dismissed the appeal of the complainant's defence counsels, Mr Janša's defence counsels filed a request for the protection of legality against the final judgment which was dismissed by the Supreme Court. Finally, in proceedings to decide on the constitutional complaint of Mr Janša, the Constitutional Curt abrogated judgements of the three courts of a general jurisdiction and remanded the case to a different judge of the Ljubljana Local Court for new adjudication.[58] In the reasoning of the decision, the Constitutional Court summarized the proceedings before the courts of general jurisdiction, listed the decisions that were challenged by the constitutional complaint, presented the complainant's allegations and arguments and gave reasons for both, the decision regarding the admissibility of the constitutional complaint and decision regarding suspension of the challenged judgements of the regular courts. In the main section of 26 pages of final decision's reasoning, the Constitutional Court repeated the key allegations and statements of the complainant, adjudicated on their merits and provided a detailed argumentation of the decision.

3.2. Methods of interpretation

Our review of the selected case law of the Constitutional Court was based on a modified standard classification of interpretive methods and arguments developed by the theory of legal argumentation, adapted according to the common methodology of the research project.[59] We searched for typical examples of methods and their subtypes and for each of them we tried to determine the frequency of their use. The study revealed that, when reasoning its decisions and determining the meaning of the constitution in cases regarding fundamental rights, the Constitutional Court uses

57 The length of the Constitutional Court's final decisions and their reasoning depends on the substance and complexity of each individual case. The majority of final decisions of the Constitutional Court comprise on average between seven and fifteen pages.

58 Up-879/14, dated 20 April 2015.

59 See the introductory chapter to this monograph, pp. 41–59. See also Tóth, 2016, pp. 175-180 and Pavčnik, 2000, 2013. 2013a.

a wide range of different methods/techniques of legal interpretation. We also found that sometimes the Constitutional Court combines different methods or their sub-types and that some methods and their sub-types typically appear as decisive ones, while others most commonly appear as defining and strengthening ones supporting the Constitutional Court's decisions.

3.2.1. Grammatical (textual) interpretation

The grammatical (textual) interpretation is a method of interpretation quite frequently used in the Slovenian constitutional judicial practice. In total, this method can be found in one form or another in all decisions from our sample of case law and has been deployed 105 times in total, which amounts to 11 % of all identified instances of deployment of methods of interpretation (see Table 1, 1). We found that among different forms and types of this method, the Constitutional Court resorted most often to legal professional (dogmatic) interpretation and the interpretation based on ordinary meaning.

As a form of **legal professional (dogmatic) interpretation**, a *simple conceptual dogmatic interpretation* of the Constitution is contained in 27 decisions from our sample of case law, and altogether the Constitutional Court used this method 85 times (in 9 % of all identified instances of deployment of methods) (see Table1, 1/B/a). By deploying this method of interpretation, the Constitutional Court uses a special legal meaning of words that is uniformly accepted and recognized by lawyers.[60] An example of deploying this method of interpretation while directly interpreting the Constitution was found in the decision number U-I-40/12 where the Constitutional Court determined the possibility to establish a legal entity as one of the aspects of the freedom of association:

> "In addition, one of the aspects of the freedom of association determined by the second paragraph of Article 42 of the Constitution is that individuals have the possibility to establish a legal entity in order to enable collective functioning in a field of common interests."[61]

Occasionally, this method of interpretation is used by the Constitutional Court to determine the meaning of general legal terms or principles which are not contained or at least not directly expressed in the Constitution. In the same decision, for example, the Constitutional Court used a simple conceptual dogmatic interpretation by referring to a special legal meaning of words "legal entities" and determined their substance:

> "/…/ Legal entities are an artificial form within the legal order. Their establishment and functioning are derived from the human right to establish legal entities in order

60 See the introductory chapter to this monograph, p. 43.
61 U-I-40/12, item 17.

> for natural persons to exercise their interests. However, it is also important for the existence of legal entities and for the normal performance of their activities for which they were established that they enjoy a certain inner circle that is protected and sheltered to a reasonable extent from outside intrusions. In this circle, members of their human substratum (partners, members, employees, management, etc.) can peacefully carry out the activities directed at the purpose for which the entity was established." [62]

A simple conceptual dogmatic interpretation was identified also in the case number U-I-155/11, where the Constitutional Court reviewed the constitutionality of several provisions of the International Protection Act, which regulate the national safe third country concept and the safe European country concept. Referring to the right to judicial protection, the Constitutional Court stated that:

> "From the right to judicial protection (the first paragraph of Article 23 of the Constitution) it follows that parties must have the possibility to submit the dispute to the court and that the court also decides on the merits in that dispute by a binding decision."[63]

Less frequently used type of legal professional (dogmatic) interpretation is *interpretation on the basis of legal principles*. It was found in 7 decisions from our sample of case law and deployed 10 times in total (see Table 1, 1/B/b). The most picturesque example of deployment of this method of interpretation can be found in the decision number U-I-24/10 where the Constitutional Court took a position on important aspects of minor offence proceedings *vis-à-vis* criminal procedure. According to the Constitutional Court, a criminal court may not adopt a second decision on the merits against the same person for a criminal offence regarding which there already exists a final judicial decision (*res iudicata*) and it may not punish the same person for the same criminal offence twice. In principle, this safeguard must also be guaranteed when minor offence proceedings were already initiated and concluded with legal finality before the initiation of criminal proceedings. In item 17 of the reasoning of this decision, when interpreting the meaning of the principle of legal certainty as a component of the constitutional principle of the rule of law, the Constitutional Court referred to the general legal principles of *res iudicata* and *ne bis in idem*:

> "According to the ECtHR, ensuring legal certainty requires respect for the principle of *res iudicata* or finality of court decisions, from which it follows that a party cannot, in the absence of special circumstances, request re-examination of such decisions /…/."[64]

62 U-I-40/12, dated 11 April 2013, item 20.
63 U-I-155/1, dated 18 December 201, item 37.
64 U-I-24/10, dated 19 April 2012, item 10.

> "/…/ it is evident that the challenged statutory provision can be constitutionally interpreted only in such a way that its application is admissible in cases when a misdemeanor procedure has been finalized against an individual, while in criminal proceedings with regard to the same historical event the court will find that it does not follow from facts that are identical or essentially the same as those which were the basis for the misdemeanor procedure. It will therefore be possible to conclude that both procedures are two different legal issues. A different interpretation of that statutory provision would constitute a breach of the *ne bis in idem* principle."[65]

This type of legal professional (dogmatic) interpretation was also used in the decision number Up-108/16, where the Constitutional Court established the legal meaning of the constitutional principle of application of a more lenient law, which is integrated in the principle of legality in criminal law (here, by referring to its own judicial practice, the Constitutional Court simultaneously deployed the method of *interpretation of the Constitution on the basis of its case law*):

> "In accordance with the established constitutional review, the essence of the second paragraph of Article 28 of the Constitution lies in the enforcement of the principle of application of a more lenient law (*lex mitior*), which binds the court in interpreting laws if there are legal changes in determining criminal offense."[66]

In contrast to other types of grammatical (textual) interpretation, the **other professional interpretation** was not used by the Constitutional Court in decisions from our sample of case law (see Table 1, 1/C).

As a form of the **interpretation based on an ordinary meaning**, a *semantic interpretation* was found in 10 decisions. It was used 12 times in aggregate, which amounts to 1 % of all identified instances of deployment of methods (see Table 1, 1/A/a). When using this technique of interpretation, the Constitutional Court applies the generally accepted meaning of the words and expressions of the constitutional norm in question within a given language.[67]

In the decision number Up-1006/13, for example, the Constitutional Court explained the substance of (the right to) privacy as provided for in Article 35 of the Convention by giving the generally accepted meaning to the notion of privacy:

> "The right to privacy determines the area of an individual's own activity in which he or she is the one who decides which intrusions he or she will allow."[68]

65 U-I-24/10, item 17.
66 Up-108/16, dated 6 December 2017, item 6.
67 See the introductory chapter to this monograph, p. 42.
68 Up-1006/13, dated 9 June 2016, item 11.

Similarly, in the decision number Up-444/09, the Constitutional Court determined the limits of freedom of expression vis-à-vis the right to respect for private and family life. The Constitutional Court discovered, *inter alia*, the generally accepted meaning of the words and expressions of the constitutional provision on the freedom of expression of thought by stating the following:

> /…/ In the first paragraph of Article 39, the Constitution guarantees the freedom of expression of thought, speech and public appearance, the press and other forms of public information and expression. Everyone is free to collect, accept and spread conscience and opinions. /…/[69]

In the selected decisions we have not found a single case where the Constitutional Court would use a *syntactic interpretation* (see Table 1, 1/A/b).

3.2.2. Logical arguments

As a method of interpretation, logical arguments were not used very often in the selected case law of the Slovenian Constitutional Court. They were identified in 3 decisions where they were deployed 6 times altogether (see Table 1, 2). In 2 decisions from our sample of case law the Constitutional Court used ***argumentum a maiore ad minus,*** having made an inference from more to less (see Table 1, 2/B).

For example, when determining the level of the constitutional protection of legal entities, the Constitutional Court held, *inter alia*, the following:

> "/…/ As legal entities are artificial forms which are constitutionally protected in order for the sphere of individuals' freedom to be widened and protected, the level of their protection can from the outset be lower than the level of protection of natural persons."[70]
> "Such is due to the legal nature of legal entities. In the wider, outer circle of the expected privacy, the legal entity cannot expect privacy which in terms of its quality would correspond to the privacy that, under the first paragraph of Article 36 of the Constitution, is provided, with regard to its spatial aspect, to natural persons. In the inner, narrower circle of such privacy, also a legal entity can expect the same constitutional protection of spatial privacy as a natural person."[71]

Another type of logical interpretation, which was identified in one decision from our sample of case law, is ***argumentum a contrario*** (see Table 1, 2/D)**.** The Constitutional Court deployed this argument explicitly in its decision number U-I-109/10.

69 Up-444/09, item 6.
70 U-I-40/12, item 20.
71 U-I-40/12, item 21.

Defining the essence of the constitutional principle of democracy in connection with fundamental rights, the Constitutional Court stated:

> "The principle of democracy (with which other constitutional principles /…/ are most closely connected), goes beyond the definition of a state as merely formal democracy where laws and regulations are adopted by a majority rule. On the contrary, the principle of democracy defines the Republic of Slovenia as a constitutional democracy, i.e., as a state in which the conduct of authorities is legally limited by constitutional principles and human rights and fundamental freedoms, precisely because individual and his or her dignity are at the heart of its existence and operation."[72]

3.2.3. Domestic systemic arguments

Domestic systemic arguments are the most frequently used interpretative tool in our sample of Constitutional Court's decisions. Altogether, different types and sub-types of this method can be found in all decisions from our sample of case law and have been deployed 494 times in total, which amounts to 50 % of all identified instances of deployment of arguments and methods of constitutional interpretation (see Table 1, 3).

The most frequently deployed method among domestic systemic arguments was the **interpretation on the basis of case law of the Constitutional Court** (see Table 1, 3/C). Regarding this method of interpretation, the most frequently used are *references to specific previous decisions of the Constitutional Court as precedents*. This interpretative tool was found in all decisions from our sample and has been deployed 280 times in total, which amounts to 28 % of all identified instances of deployment of methods (see Table 1, 3/C/a).

In our sample of case law, the Constitutional Court made the highest total number of references to its specific previous decisions in the decision number Up-879/14. In this decision, the Constitutional Court decided on the constitutional complaint of the Bar Association of Slovenia against Ljubljana District Court Orders issuing house search of the offices of three attorneys. The Constitutional Court held that the investigative measures conducted on the basis of the district court orders violated the rights determined by Article 35 (the rights to privacy and personality rights), the first paragraph of Article 36 (inviolability of dwellings), and the first paragraph of Article 37 (the right to privacy of correspondence and other means of communication), as well as the rights determined by the first paragraph of Article 23 (the right to judicial protection) and Article 25 (the right to legal remedies) of the Constitution. The Constitutional Court prohibited further interferences with the privacy of attorneys on the basis of the orders referred to in this decision. Also, the investigative measures may not be conducted without the attendance of a representative of the Bar Association of Slovenia or without observing the safeguards that follow from

72 U-I-109/10, item 10.

the Constitutional Courts' decision. According to the Constitutional Court, the complainants against whom investigative measures have been conducted, their attorneys or representatives, and a representative of the Bar Association of Slovenia must immediately be granted access to all objects, data, documents, and documentation that have been seized during investigative measures against the complainants. Also, the complainants and the representative of the Bar Association of Slovenia have the right to object to their seizure in the manner and according to the procedure determined by the Constitutional Court.[73] Additionally, the Constitutional Court ruled that Criminal Procedure Act and the Attorneys Act are inconsistent with the Constitution and that the National Assembly must remedy the unconstitutionality within one year.[74]

In this decision alone, there are references to more than thirty previous decisions of the Constitutional Court. For example, while defining a person's privacy as »the sphere of a person's existence formed by a more or less complete whole of his or her conduct and engagements, feelings, and relations, for which it is characteristic and essential that the person shapes and maintains it alone or together with those close to him or her with whom he/she lives in an intimate community, for example with a spouse, and that he/she lives in such community with a sense of being safe from intrusion by the public or any other undesired person«, the Constitutional Court makes reference to its previous decision number Up-32/94. And while stating that the duty to protect the confidentiality of what a client has entrusted to them establishes not only attorneys' obligation to protect confidentiality, but also attorneys' right to be free from interferences with the privacy of attorneys, and that this right is reflected in the obligation of others, primarily the state, to abstain from such interferences, the Constitutional Court makes reference to its previous decision number U-II-1/09.[75]

While in some occasions, the Constitutional Court referred to specific previous decisions by citing them in the main text of the reasoning, in other occasions it did so by citing them in footnotes. Here are some examples which illustrate how the Constitutional Court used one or another "technique" of citing its previous decisions:

73 In the reasoning the Constitutioal Court stated that the decision of a judge rejecting the exclusion of data contained in documents or other storage media from the scope of an investigative measure may be appealed within three days of the service of the judge's decision. The appeal may be lodged by the attorney or the representative of the Bar Association of Slovenia, who requested the exclusion during the execution of the investigative measure in order to protect the privacy of attorneys. The appeal may invoke complaints regarding the constitutionality or legality of the court order authorising an investigative measure and request protection against the review and disclosure of data that are protected by the privacy of attorneys and therefore the review of such data and the seizure of the media on which it is stored are inadmissible. The competent higher court shall decide on the appeal within three days of its receipt by means of an order served on the complainant and the investigating judge, as well as the police if the investigating judge authorised the police to execute the investigative measure. The appeal suspends the effect of the judge's decision rejecting the exclusion of data from the scope of the investigative measures. See Up-879/14.

74 Up-879/14.

75 Up-879/14.

> "Already in Decision No. U-I-425/06, dated 2 July 2009 (Official Gazette RS, No. 55/09, and OdlUS XVIII, 29), wherein it compared the position of a spouse and the position of a registered partner with regard to inheritance in the event of their partner's death, the Constitutional Court clearly defined the criteria for the review of allegations of discriminatory treatment, which are also applicable in the case at issue."[76]
> "Referring to the aforementioned provisions of the Constitution and international instruments for the protection of human rights, the Constitutional Court has alrea decision No. Up-134/97 of 14 March 2002 stated that the essence of the privilege against self-incrimination in connection with the prohibition of extortion of confessions is that law enforcement authorities in the broadest sense must leave the defendant completely passive, so that he or she can consciously, reasonably and above all voluntarily decide whether to cooperate with them or not."[77]
> "The first paragraph of Article 14 of the Constitution prohibits discrimination in ensuring, exercising, and protecting human rights and fundamental freedoms regarding an individual's personal circumstances. In order to establish a violation of the constitutional prohibition of discriminatory treatment, the determination of the existence of inadmissible discrimination in the enjoyment of any human right suffices, whereby it is not necessary to demonstrate an interference with this human right in and of itself [*footnote*]."[78]
> "The Constitutional Court has repeatedly established the incompatibility of the former communist regime with European standards for the protection of human rights and fundamental freedoms, to which the Republic of Slovenia is also bound [*footnote*]."[79]

In 16 decisions from our sample, the Constitutional Court made *references to its own judicial practice in a general manner* (i.e., without making references to specific previous decisions).

This interpretative technique has been deployed 25 times in total, which amounts to 3 % of all identified instances of deployment of interpretative methods in the selected case law of the Slovenian Constitutional Court (see Table 1, 3/C/b). For example, in its decisions number Up-457/09, U-I-292/09, Up-1427/09 and Up-450/15, the Constitutional Court, when interpreting the constitutional provisions, made references to its previous judicial review in a general manner in the following fashion:

> "/…/ In the constitutional review, a position on the specially protected position of denationalization beneficiaries was established. Their rights derive from their constitutionally protected specific civil legal entitlements to their former property, arising

76 U-I-212/10, dated 14 March 2013, item 7.
77 Up-1293, item 31.
78 Up-1293, item 38. In a footnote the Constitutional Court referred to its previous decisions No. U-I-146/07, dated 13 November 2008 and U-I-425/06 dated 2 July 2009.
79 U-I-109/10, dated 26 September 2011, item 17. In a footnote the Constitutional Court referred to its previous decisions No. U-I-69/92, dated 10 December 1992, No. U-I-158/94, dated 9 March 1995, No. Up-301/96, dated 15 January 1998 and No. U-I-248/96, dated 30 September 1998.

> from Article 33 of the Constitution. Any subsequent interference with the right to denationalization is an interference with the human right to private property and inheritance from Article 33 of the Constitution."[80]
>
> "/…/ According to the established position of the Constitutional Court, this article prohibits that a person in respect of whom there is a real danger that he or she would be subjected to inhuman treatment in the event of return to the country of origin, would be extradited to that country."[81]
>
> "/…/ According to the established constitutional review, a violation of a human right from Article 26 of the Constitution occurs when the court bases its decision on a legal position which is unacceptable from the point of view of this right."[82]

In all the above examples, the Constitutional Court combined the use of the interpretative technique of referring to its own judicial practice in a general manner with the use of the contextual interpretation in a narrow sense (see below).

In the decisions contained in our sample, the Constitutional Court, when interpreting constitutional provisions on fundamental rights, did not make *references to its rules of procedure or other abstract norms* formed by itself (see Table 1, 3/C/c).

In comparison with the interpretation of the constitution on the basis of case law of the Constitutional Court, the frequency and weight of other types of domestic systemic arguments and methods of constitutional interpretation is significantly smaller. To be precise, even though a **contextual interpretation** (in a narrow and broad sense) occurs in nearly all decisions from our sample (e.g. in 29 out of 30), this method was applied three times less often than references to specific previous decisions of the Constitutional Court. In total, this method was used in 89 occasions, which amounts to 9 % of all identified instances of deployment of methods and arguments (see Table 1, 3/A). When used in a broad sense, this domestic systemic argument is deployed when a constitutional court determines the meaning of a given constitutional provision with respect to other specific constitutional provisions. It includes references to and comparison with fundamental rights stipulated in the constitution or other constitutional provisions. In a narrow sense, however, contextual interpretation is used when a constitutional court explores the meaning of the constitutional provision on the basis of its purpose which merely follows from its place in the system of legal norms, without comparing it with other specific constitutional/legal provisions.[83] It is used in order to materially concretize, specify and "fill in" often very vague constitutional provisions.

Our review revealed that in the selected cases the Constitutional Curt deployed a contextual interpretation in a broad sense more frequently than in a narrow sense. Here are some examples of the use of one or another:

80 See Up-457/09, dated 28 September 2011, item 9.
81 U-I-292/09, Up-1427/09, dated 20 October 2011, item 13.
82 U-I-292/09, Up-1427/09, item 6.
83 See the introductory chapter to this monograph, p. 51.

"/…/ In Article 35, the Constitution guarantees the inviolability of a person's physical and mental integrity, and the inviolability of his privacy and personality rights. In addition to this general provision on the protection of privacy, it also includes three special provisions which specifically protect the inviolability of dwellings (the first paragraph of Article 36 of the Constitution), the privacy of correspondence and other means of communication (the first paragraph of Article 37 of the Constitution), and the protection of personal data (the first paragraph of Article 38 of the Constitution)."[84]
"/…/ The legal entities to which the constitutional assessment at issue applies are established for the purpose of exercising an economic activity. The Constitution expressly prohibits that the economic activity is exercised contrary to the public benefit (the second sentence of the second paragraph of Article 74 of the Constitution), and equally expressly prohibits acts of unfair competition, as well as acts which contrary to law limit competition (the third paragraph of Article 74 of the Constitution). These constitutional prohibitions, which are also the basis for limitations of the right to free economic initiative (the first paragraph of Article 74 of the Constitution), require appropriate action by the legislature. In certain instances, they can be joined by other constitutional requirements, such as the authorisation of the legislature to determine the conditions and manner of exercising economic activity so as to ensure a healthy living environment (the second paragraph of Article 72 of the Constitution)."[85]
"/…/ In addition to Article 35 of the Constitution, it is especially the first paragraph of Article 37 of the Constitution that protects the communication aspect of privacy."[86]
"The reasoning of a court decision is an independent and autonomous element of the right to a fair trial, which – within the framework of the right to equal protection of rights - is guaranteed by Article 22 of the Constitution."[87]

In the case number Up-1056/11, the Constitutional Court has taken a precedent position on the issue of submission, by a national court, of a case to the ECJ for a preliminary ruling. According to the Constitutional Court, the Supreme Court must take a sufficiently clear position with regard to the question of interpretation of European Union law and/or the validity of secondary European Union law, which entails that it must adopt a position with regard to the party's motion to submit the case to the Court of Justice of the European Union for a preliminary ruling. This reasoning must be such as to enable an assessment from the viewpoint of the first paragraph of Article 23 of the Constitution and thus an assessment [by the Constitution Court] whether [the Supreme Court] respected or disregarded the conditions for the submission of the case to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union. In this decision, the Constitutional Court deployed contextual interpretation in a broad sense by determining the meaning of a

84 See U-I-40/12, item 13.
85 U-I-40/12, item 22.
86 U-I-40/12, item 26.
87 Up-613/16, dated 28 September 2016, item 19.

particular constitutional provision with respect to other specific constitutional provisions (and provisions of the Treaty on the Functioning of the European Union):

> "Respect for the first paragraph of Article 23 of the Constitution in relation to the third paragraph of Article 3a of the Constitution and the third paragraph of Article 267 of the TFEU presupposes that the Court of Justice of the European Union is a court in the sense of the first paragraph of Article 23 of the Constitution and that the Supreme Court was obliged, as a court in the sense of the third paragraph of Article 267 of the TFEU, to submit the case to the Court of Justice of the European Union, under the presumption that the question regarding the interpretation of European Union law is essential for the decision, with regard to which the case law of the Court of Justice of the European Union has not yet delivered an answer thereon. Consequently, the Constitutional Court first had to assess whether the mentioned conditions are fulfilled."[88]

In one of the cases included in our sample, the Constitutional Court deployed a ***"derogatory formulae"***, albeit not for the purpose of a direct interpretation of the Constitution. When applying provisions of laws and other legal acts, this interpretative tool provides guidance for choosing the applicable stipulation from contradictory ones. Resolving conflict of norms stipulated in the Criminal procedure Act and Protection of Documents and Archives and Archival Institutions Act, the Constitutional Court has applyed a *derogatory formulae* (i.e., the argument of speciality):

> "The wording of the first paragraph of Article 154 of the Criminal Procedure Act forces to the conclusion that the results of covered investigative measures can only be kept by a "court", and never by another body, organization or individual. Despite the fact that the first paragraph of Article 40 of the Protection of Documents and Archives and Archival Institutions Act could lead to a different interpretation for those findings of covered investigative measures that might correspond to the definition of archival material, (*footnote*) the contradiction between it and the first paragraph of Article 154 of the Criminal Procedure Act can be resolved by the argument of specialty (lex specialis derogat legi generali). The Criminal procedure Act is an older and more special law. (*footnote*) Therefore, Protection of Documents and Archives and Archival Institutions Act, as a younger and more general law, cannot in this case repeal the prohibition from the Criminal Procedure Act to keep sensitive material obtained through measures that secretly and covertly infringe on human rights and freedoms somewhere other than in court /…/."[89]

The **interpretation of constitutional norms on the basis of domestic statutory law** as another type of domestic systemic arguments occurs in 18 decisions

88 Up-1056/11, dated 21 November 2013, item 8
89 U-I-246/14, dated 24 March 2017, item 37.

from our sample of case law (see Table 1, 3/B). The weight of this interpretative tool, however, is even smaller than the one of the contextual interpretation in a narrow and/or broad sense. According to our statistical survey, this interpretative technique has occurred in 7% of all identified instances of deployment of methods (e.g. 50 times in total, while the contextual interpretation in a narrow and/or broad sense appeared 89 times). In the decision U-I-152/17, the Constitutional Court interpreted the constitutional provisions on the right to protection of personal data in light of statutory norms, i.e., in light of the provisions of the Personal Data Protection Act.

> "From the CPIAPPD, Directive 2016/680, and the Personal Data Protection Act (Official Gazette RS, No. 94/07 – official consolidated text – hereinafter referred to as the PDPA-1), all of which adopted a broad, all-inclusive definition, it follows that personal data are any information regarding a determined or determinable individual; a determinable individual is someone who can be determined either directly or indirectly.[*footnote*] Accordingly, the challenged regulation envisages the processing of personal data. Namely, licence plate data (together with the date, location, and time when a photograph was taken) [*footnote*] entail personal data because they refer to information regarding the vehicle of a determined or determinable individual. Since the purpose of the measure inter alia also includes the elimination of persons from traffic who do not fulfil the conditions to use roads and the search for persons, it is obvious that licence plate data is intended precisely to identify individuals and thus entails personal data, in conformity with the definition mentioned above."[90]

Another example of interpretation of constitutional norms on the basis of domestic statutory law was found in the decision number Up-1006/13. In this case, the meaning of the constitutional provision on equal protection of rights was interpreted by the Constitutional Court with a reference to provisions of the Criminal Procedure Act on the right to a reasoned court order:

> "/…/ However, the right to a reasoned court order is not merely a statutory right, but is also a constitutionally determined and protected human right enshrined in Article 22 of the Constitution. The fact that the reasoning of an order authorising a search of premises is substantively empty constitutes not only a breach of the statutory requirement of a reasoned order determined by the first paragraph of Article 215 of the CrPA, but also a violation of the constitutional human right determined by Article 22 of the Constitution."[91]

While the **interpretation on the basis of normative acts of other domestic state organs** has not been used at all (see Table 1, 3/E), the Constitutional Court referred to the case law of ordinary courts in 6 decisions from our sample of case

90 U-I-152/17, dated 4 July 2019, item 25.
91 Up-1006/13, item 24.

law (see Table 1, 3/D).[92] As a method, the **interpretation on the basis of the case law of ordinary courts** (e.g. courts of general jurisdiction) was used 22 times in total, which amounts to less than 2 % of all instances of deployment of methods and arguments. Interestingly, the majority (14) of references to the case law of ordinary court was made in the case number Up-1006/13. Most references were made to specific individual decisions of ordinary courts. In item 14 of the reasoning of this decision, the Constitutional Court, when determining the constitutional conditions for a lawful search of premises, drew inferences from the case law of the Supreme Court by making a footnote where two Supreme Court judgements have been cited. The Constitutional Court held:

> "It follows from the case law that an order authorising a search of premises must also contain information on the person against whom the search is to be conducted and it must identify the suspect and the premises that will be searched (*footnote*)."[93]

Similarly, in item 20 of the same decision, the Constitutional Court addressed the right to privacy and determined the conditions of the constitutional admissibility of issuing an order authorising a search of premises by referring to the Supreme Court's decision cited in a footnote:

> "As stated in Paragraphs 11 and 12 of the reasoning of this Decision, a search of premises entails a severe interference with the human right to privacy determined by the first paragraph of Article 36 of the Constitution. Therefore, the court must review in advance, i.e. before issuing an order authorising a search of premises, whether the conditions for a search of premises are fulfilled. A judge's consideration of a case is reflected in the reasoned order authorising a search of premises, in which the judge must clarify on what basis he or she deems that there exist reasonable grounds for the suspicion that a specific person committed a criminal offence as well as why he or she deems that it is likely that the objects sought will be found precisely in the possession of a specific person and at a specific address (*footnote*)."[94]

An example of interpretation referring to the practice of ordinary courts *en général* (e.g. without citing single case decisions) was identified in item 23 of the reasoning of the same decision where the Constitutional Court stated:

> "Although the Supreme Court held that the deficient reasoning undoubtedly entailed a violation of the first paragraph of Article 215 of the Criminal Procedure Act,

92 While in almost all decsions from our sample the Constitutional Court referred to the case law of ordinary courts when summarizing the proceedings before the regular courts and listing their decisions, it did so significantly less often when interpreting fundamental rights.

93 Up-1006/13, item 14.

94 Up-1006/13, item 20.

according to its position, this deficiency does not entail that the evidence produced by the search is inadmissible."[95]

3.2.4. External systemic and comparative law arguments

The second most commonly used interpretative tool in the Slovenian constitutional judicial practice are external systemic and comparative law arguments. In our sample of case law, this method has been found, in one or another form, in all decisions from our sample of case law and deployed in 24 % of all identified instances of deployment of main methods of constitutional interpretation (see Table 1, 4). It shall be noted however, that not all types of external and comparative law arguments are used with equal frequency and that they do not hold equal weight in the interpretative practice of the Slovenian Constitutional Court.

The most frequently deployed type is the **interpretation of fundamental rights on the basis of judicial practice of international courts**. Understandably, this method of interpretation is contained in all decisions from our sample of case law as references to the ECtHR and/or ECJ judgement(s) have been one of the main criteria for the selection of the Constitutional Court's cases included in the research. In overall, however, in the selected decisions references to judicial practice of international courts occurred 158 times, which amounts to 16 % of all identified instances of deployment of arguments and methods (see Table 1, 4/B). 81 % of all references to judicial practice of international courts were made to individual case decisions of the ECtHR and 19 % of references were made to the case law of the ECJ. In the decisions from our sample of case law, the Constitutional Court made no reference to judicial practice of other international courts.

The Constitutional Court's decision number Up-1056/11 contains 26 references to decisions of both the ECtHR and ECJ, however, most references were made to specific individual cases of the ECJ. In item 6 of the reasoning of the decision, for example, the Constitutional Court referred to the ECJ case law in general terms in the main text and made explicit reference to its judgement C.I.L.F.I.T., 283/81 in a footnote:

"When in proceedings it is conducting a national court is faced with a question whose resolution falls within the exclusive jurisdiction of the Court of Justice of the European Union, it must not decide thereon unless the Court of Justice of the European Union has already answered it or other conditions that allow the national court to adopt a decision are fulfilled [*footnote*]."[96]

When determining in length the legal nature of the ECJ in terms of the constitutional definition of an independent and impartial court constituted by law in item 9

95 Up-1006/13, item 23.
96 Up-1056/11, item 6.

of the reasoning, the Constitutional Court referred to several individual decisions of the ECJ in a footnote:

> "The Court of Justice of the European Union is a court in the sense of an independent, impartial court constituted by law as referred to in the first paragraph of Article 23 of the Constitution. With regard to extensive institutional provisions (especially Articles 13 and 19 of the Treaty on European Union, consolidated version, OJ C 326, 26 October 2012 – hereinafter referred to as the TEU; Articles 251 through 256 of the TFEU and Protocol (No. 3) on the Statute of the Court of Justice of the European Union), there cannot be any doubt that in terms of its characteristics, the Court of Justice of the European Union is a court in the sense of the first paragraph of Article 23 of the Constitution. Not even the fact that the procedure under Article 267 of the TFEU is an intermediary procedure [*footnote*] that the parties to original proceedings before the court of a Member State cannot initiate by themselves, nor the fact that the main purpose of such procedure is to (merely) interpret of European Union law and/or assess the validity of secondary European Union law, can influence such characterisation. The answer to a question regarding the interpretation of the Treaties and/or the validity and interpretation of legal acts adopted on their basis is of essential importance for the adoption of the final decision in a single judicial dispute, a part of which is also a motion for a preliminary ruling. The right of an individual who is party to original proceedings [before the court of a Member State] to judicial protection under the first paragraph of Article 23 of the Constitution refers also to the duty of a court to submit the case to the Court of Justice of the European Union on the basis of Article 267 of the TFEU, regardless of the type of original judicial proceedings."[97]

Another quite frequently deployed method among external systemic arguments is the **interpretation of fundamental rights on the basis of international treaties**. This method was identified in 21 decisions from our sample of case law and there are altogether 61 references to international treaties. This amounts to 6 % of all identified instances of deployment of arguments and methods of interpretation (see Table 1, 4/A). In the selected decisions, most references were made to the European Convention on Human Rights, while significantly less frequently the Constitutional Court referred to the Charter of Fundamental Rights of the European Union. In our sample of its case law, the Constitutional Court also made references to other international treaties.[98]

97 Up-1056/11, item 9.

98 In addition to the ECHR and the Charter, the Constitutional Court referred to the following international treaties and international and EU legal sources: Convention implementing the Schengen Agreement, Charter of the United Nations (1945), Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1976), International Covenant on Economic, Social and Cultural Rights (1976), United Nations Convention on the Rights of the Child, Geneva Conventions (1949), Convention on the Civil Aspects of International Child Abduction, European Convention on the Exercise of Children's Rights, Resolution 1481/2006 of the Council of Europe

In the above cited item 9 of the reasoning of the decision number Up-1056/11, for example, the Constitutional Court referred to the Treaty on European Union and the Treaty on the Functioning of the European Union as well as to the Protocol (No. 3) on the Statute of the Court of Justice of the European Union (see *supra*).

The **comparative law arguments**, i.e., references to norms or case decisions of foreign legal systems, were identified in 8 decisions from our sample of case law and there are altogether 12 references to either constitutions and other normative acts or court decisions of foreign legal systems. This amounts to less than 1 % of all identified instances of deployment of arguments and methods of interpretation (see Table 1, 4/C). For example, reviewing in the decision number U-I-83/20 the constitutionality of the COVID-19 measures (i.e., the prohibition of movement outside the municipalities of one's residence), the Constitutional Court referred to the decision of the German Federal Constitutional Court in Order No. 1 BvR 1021/20, dated 13 May 2020 and decision of the Bayerischer Verfassungsgerichtshof No. Vf.6-VII-20, dated 26 March 2020.[99]

3.2.5. Teleological interpretation

The teleological interpretation, in wider context, includes all arguments referring to the purpose, meaning, function, aim, etc. of the Constitution.[100] For this reason, in the case law of the Slovenian Constitutional Court, usually teleological interpretation is implied in or fused with other methods of interpretation and it is sometimes difficult to draw a line between the methods. In a narrow sense, however, this method is deployed by the Constitutional Court if and when it refers, either explicitly or implicitly, to the purpose of the Constitution and its individual provisions.[101]

Considering it in a narrow sense, the teleological interpretation was found in 9 decisions from our sample of case law. Altogether, it was deployed 24 times which amounts to 2 % of all identified instances of deployment of arguments and methods of interpretation (see Table 1, 5). Explicit references to the purpose of the constitutional

Parliamentary Assembly, Convention for the Protection of Individuals with Automatic Processing of Personal Data, Treaty on European Union and the Treaty on the Functioning of the European Union, Protocol (No. 3) on the Statute of the Court of Justice of the European Union, European Parliament resolution of 2 April 2009 on European conscience and totalitarianism, Council Regulation (EC) No. 343/2003, of 18 February 2003, Regulation (EU) No 604/2013 (Dublin III Regulation), Directive 2011/95/EU of the European Parliament and of the Council, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Asylum Procedures Directive, etc.

99 U-I-83/20, item 43.

100 See the introductory chapter to this monograph, p. 53.

101 Sometimes the goal of the Constitution is an explicit part of the text of the constitution.

provisions on fundamental rights and principles occurred in the decision number U-I-109/10 where the Constitutional Court held:

> "As a fundamental value, human dignity has a normative expression in many provisions of the Constitution, in particular it is concretized through provisions guaranteeing individual human rights and fundamental freedoms; these are intended precisely to protect various aspects of human dignity."[102]
> "/…/ the principle of democracy defines the Republic of Slovenia as a constitutional democracy, i.e., as a state in which the conduct of authorities is legally limited by constitutional principles and human rights and fundamental freedoms, precisely because individual and his or her dignity are at the heart of its existence and operation. In a constitutional democracy, an individual is a subject and not an object of the state action and his or her (self) realization as a human being is the fundamental purpose of a democratic order. Only such a state system is truly democratic, in which respect for human dignity is the fundamental guideline for the functioning of the state."[103]

As argued, the teleological interpretation may be deployed implicitly. Considering whether to review the constitutionality of the government's decree which during proceedings before the Constitutional Court ceased to be in force, the Constitutional Court held:

> "/…/The establishment of legal predictability of the actions of the competent state authorities and, above all, the concern for ensuring respect for constitutional values, in particular human rights and fundamental freedoms as a basis of the constitutional order (Preamble to the Constitution), therefore justify the public interest and shall be considered an exception to the second paragraph of Article 47 of the Constitutional Court Act."[104]

3.2.6. Historical interpretation

The historical interpretation is another method of interpretation which is not very common in the constitutional judicial practice in Slovenia. More precisely, in the selected decisions of the Constitutional Court, this interpretative tool was found in one decision (see Table 1, 6), in which the Constitutional Court made, implicitly, **a general reference to the intention, will etc. of the constitution-maker** (see Table 1, 6/C). In item 18 of the decision number U-I-109/10, stating that the reintroduction of a street named after Josip Broz Tito, a symbol of the Yugoslav communist regime, was contrary to the values on which the Constitution was based, the Constitutional Court stated:

102 U-I-109/10, item 9.
103 See U-I-109/10, item 10.
104 See U-I-83/20, item 28.

> "In Slovenia, where the development of democracy and free society based on respect for human dignity began with the break up with the former system, whereby this break-up is clearly evident also at the constitutional level (first with the amendments to the Constitution of the Socialist Republic of Slovenia and subsequently with the adoption of the BCC and the Constitution, as the fundamental constitutional documents), the glorification of the communist totalitarian regime by the authorities by naming a street after the leader of such regime is unconstitutional. Such new naming of a street no longer has a place here and now, as it is contrary to the principle of respect for human dignity, which is at the very core of the constitutional order of the Republic of Slovenia. Naming a street after Josip Broz Tito namely does not entail preserving a name from the former system and which today would only be a part of history. The challenged Ordinance was issued in 2009, eighteen years after Slovenia declared independence and established the constitutional order, which is based on constitutional values that are the opposite of the values of the regime before independence. Not only the victims or opponents of the former regime, but also other members of the public can understand such act of the authority at issue in the present time as newly emerged official support for the former communist regime. Such act is contrary to the values on which the Constitution is based."[105]

In the same decision, trying to determine the substance of human dignity as a fundamental constitutional value in the democratic Slovenia, the Constitutional Court held:

> "/…/ a firm and comprehensive a priori definition of human dignity is not possible, because in addition to constitutional and international legal standards, it is also filled with historical and ethical contents, which develop and upgrade over time."[106]

3.2.7. Arguments based on scholarly works

The third most frequently used interpretative arguments are those based on scholarly works. In the selected decisions of the Slovenian Constitutional Court, this main type method was identified in 25 decisions, and the Constitutional Court made 102 references of this kind in aggregate. The latter amounts to 10 % of all identified instances of deployment of arguments and methods (see Table 1, 7). While the largest share of references (52 %) were made to the scientific monographs, the Constitutional Court also made references to the scientific articles (22 %) and to the commentaries (26 %). Among these, 15 references (38 %) were made to the commentaries of the Constitution, 19 references (49 %) to the commentaries of statutory law and 5 references (13 %) to the commentaries of EU regulations and directives. No reference was made to the previous constitutions being no longer in force.

105 See U-I-109/10, item 15.
106 See U-I-109/10, item 11.

Explaining the essence of the privilege against self-incrimination in item 31 of the decision number Up-1293/08, the Constitutional Court referred in a footnote to a scientific monograph on the prohibitions of evidence in criminal proceedings:

> "/.../ Thus, this constitutional procedural guarantee prevents the state from forcing the individual to become a source of evidence against himself. The essence of the privilege against self-incrimination is to preserve the defendant's procedural subjectivity and thus a fair trial. [*footnote*]."[107]

In item 12 of the decision number U-I-292/09, Up-1427/09, the Constitutional Court referred in a footnote to a scientific article when addressing the international legal principle of non-refoulment as a component of the constitutional right of asylum:

> "/.../ The principle of non-refoulment to countries where they are in danger of persecution or where their life or personal integrity is otherwise threatened is a widely recognized international principle [*footnote*]."

A typical example of the Constitutional Court's reference to a commentary of the Constitution can be found in item 10 of the decision number Up-457/09:

> "Article 33 of the Constitution in itself guarantees confidence in a certain permanence, stability and immutability of the acquired property right. For the purpose of the present case, the principle of finality from Article 158 of the Constitution must also be emphasized. This principle stipulates that legal relations regulated by a final decision of a state body may be revoked, annulled or changed in cases and in accordance with the procedure determined by law. The provision ensures the invariability of legal relations regulated by individual administrative or judicial acts. The right acquired by an individual act or an obligation thus imposed should no longer be encroached upon, as this would undermine confidence in the legal order [*footnote*]."

3.2.8. Interpretation in light of general legal principles

As a method of legal interpretation, the interpretation in light of general legal principles includes legal principles which determine the functioning of the whole or part of legal system, while they are not expressed in the text of the Constitution. It was found in 4 decisions from our sample of case law. Altogether, it was deployed 11 times which amounts to 1 % of all identified instances of deployment of methods of interpretation (see Table 1, 8).

An example of deployment of this method of interpretation can be found in the decision number Up-879/14. As indicated earlier, in this decision the Constitutional Court overturned a criminal conviction of the current Slovenian prime minister.

107 Up-1293/08, dated 6 July 2011.

The decision has had (and still has) a significant impact on the prosecution of perpetrators of crimes of corruption in Slovenia. In items 20 and 21 of the decision, the Constitutional Court interpreted the Constitution in light of general legal principles of *lex scripta* and *lex certa*:

> "As in accordance with the *lex scripta* requirement criminal offences may be determined exclusively by the legislature by law, this constitutional requirement importantly supplements the general constitutional law relationship between the legislative power, which adopts the laws, and the judicial power, which interprets them (the second paragraph of Article 3 of the Constitution) /…/."[108]
> "The *lex certa* requirement entails that a criminal law must be definite, certain, clear, and predictable, which, on one hand, is a question of the objective semantic precision of the text in its objective meaning, and, on the other hand, of the subjective comprehension of that meaning in the sense that the perpetrator knows ex ante what c onstitutes criminal conduct. When the courts interpret the statutory elements of a criminal offence and extract the abstract statutory definition of the criminal offence, they naturally interpret the statutory elements with regard to the concrete facts of the given case (i.e. the past event) that are relevant from the perspective of the abstract definition of the criminal offence – they namely interpret the statutory definition of the criminal offence with regard to the legally relevant facts of a concrete case."[109]

3.2.9. Non-legal arguments

In the selected decisions of the Slovenian Constitutional Court, the non-legal arguments were identified in 3 decisions where they were deployed 8 times in total. Albeit not as as a tool for interpreting the constitutional provisions but an argument in the subsumption process, a deployment of non-legal arguments (i.e., opinions of non-legal experts) is very well illustrated in the decision number U-I-83/20. Reviewing the constitutionality of the COVID-19 measures (i.e., the prohibition of movement outside the municipalities of one's residence), the Constitutional Court referred to the opinions of the government's expert group for COVID-19 and the National Institute of Public Health:

> "/…/ Nor is it irrelevant for the assessment of proportionality in a narrow sense that measures can be applied only in areas where the existence of risks can be established on the basis of existing expert information. If these areas are scattered throughout the country, they may also cover the entire country. As already mentioned, the epidemic was declared to be spread on the territory of the entire country precisely in view of the epidemiological situation as established by the National Institute of Public Health."[110]

108 Up-879/14, dated 20 April 2015, item 20.
109 Up-879/14, dated 20 April 2015, item 21.
110 U-I-83/20, item 58.

Table 1: Frequency of methods of interpretation in the selected case law of the Constitutional Court

Methods			Frequency (number)	Frequency (%)	Main types frequency (number and %)	Weight (number)	Weight (%)	Main types weight (number and %)
1	1/A	a)	10	4%	29/30 (97%)	12	1%	107 (11%)
		b)	0	0%		0	0%	
	1/B	a)	27	11%		85	9%	
		b)	7	3%		10	1%	
	1/C		0	0%		0	0%	
2	2/A		0	0%	3/30 (10%)	0	0%	6 (1%)
	2/B		2	1%		5	1%	
	2/C		0	0%		0	0%	
	2/D		1	0%		1	0%	
	2/E		0	0%		0	0%	
	2/F		0	0%		0	0%	
3	3/A		26	11%	30/30 (100%)	89	9%	466 (50%)
	3/B		18	7%		50	5%	
	3/C	a)	30	12%		280	29%	
		b)	16	7%		25	3%	
		c)	0	0%		0	0%	
	3/D	a)	1	0%		1	0%	
		b)	5	2%		21	2%	
		c)	0	0%		0	0%	
	3/E		0	0%		0	0%	
4	4/A		21	9%	30/30 (100%)	61	6%	232 (24%)
	4/B		30	12%		158	17%	
	4/C		8	3%		12	1%	
	4/D		1	0%		1	0%	
5			9	4%	9/30 (30%)	24	3%	24 (2%)
6	6/A		0	0%	1/30 (3%)	0	0%	1 (0%)
	6/B		0	0%		0	0%	
	6/C		1	0%		1	0%	
	6/D		0	0%		0	0%	
7			25	10%	25/30 (83%)	102	11%	102 (10%)
8			4	2%	4/30 (13%)	11	1%	11 (1%)
9			3	1%	3/30 (10%)	8	1%	8 (1%)

Legend:

1. Grammatical (textual) interpretation
1/A. Interpretation based on ordinary meaning
a) Semantic interpretation
b) Syntactic interpretation
1/B. Legal professional (dogmatic/doctrinal) interpretation:
a) Simple conceptual dogmatic/doctrinal interpretation
b) Interpretation on the basis of legal principles
1/C. O*ther professional interpretation*
2. Logical (linguistic-logical) arguments
2/A. Argumentum a minore ad maius
2/B. Argumentum a maiore ad minus
2/C. Argumentum ad absurdum
2/D. Argumentum a contrario / arguments from silence
2/E. Argumentum a simili and, within it, analogy
2/F. Interpretation according to other logical maxims
3. Domestic systemic arguments
3/A. *Contextual interpretation, in a narrow and broad sense*
3/B. Interpretation of constitutional norms on the basis of domestic staturory law
3/C. Interpretation of the constitution on the basis of case law of the Constitutional Court
a) References to specific previous decisions of the Constitutional Court (as "precedents")
b) References to the "practice" of the Constitutional Court
c) References to abstract norms formed by the Constitutional Court (e.g., the rules of procedure)
3/D. Interpretation of the Constitution on the basis of the case law of ordinary courts
a) Interpretation referring to the practice of ordinary courts (not of single case decisions)
b) Interpretation referring to individual court decisions (as "precedents" in the judiciary)
c) Interpretation referring to abstract judicial norms (directives, principled rulings, law unification decisions, etc.)
3/E. Interpretation of constitutional provisions and fundamental rights on the basis of normative acts of other domestic state organs
4. External systemic and comparative law arguments:
4/A. Interpretation of fundamental rights on the basis of international treaties
4/B. Interpretation of fundamental rights on the basis of individual case decisions or case law ('judicial' practice) of international fora.
4/C. Comparative law arguments: e.g., references to norms or case decisions of a particular foreign legal system
4/D. Other external sources of interpretation (e.g., customary international law, ius cogens, etc.)
5. Teleological / objective teleological interpretation
6. Historical / subjective teleological interpretation (based on the *intention* of the constitution-maker):
6/A. Interpretation based on ministerial / proposer justification
6/B. Interpretation based on draft material: references to travaux préparatoires / Materialen / and legislative history
6/C. In general, references to the intention, will etc. of the constitution-maker
6/D. Other reasons based on the circumstances of making or modifying/amending the constitution or the constitutional provision in question
7. Arguments based on jurisprudence / scholarly works
8. Interpretation in light of general legal principles
9. Substantive interpretation / non-legal arguments

Frequency (number): Number of decisions in which a method appears
Main types frequency: Number of decisions in which main methods appear through their sub-types
Weight (number): Total number of occurrences of a method within a decision
Weight (%): Total number of occurrences of a method in %
Main types weight (number and %): Total number and % of occurrences of main methods through their sub-types

3.3. Decisive methods

Our survey revealed that it is often difficult to distinguish between arguments that have decisively contributed to a particular substantive decision of the Constitutional Court and those for which this cannot be said. Where the matter is more or less clear, in some cases there is only one argument that in itself and without other arguments has led to the given conclusion on the merits as the decisive argument, while in other cases there are several decisive arguments in the Constitutional Court's decisions. Additionally, the analyses of the selected case law discerned that in certain decisions decisive arguments are used in more than one occasion (i.e., they were deployed in the same decision in multiple occasions).

Most importantly, we found that in our sample of case law a *simple conceptual dogmatic interpretation* as a type of the **legal professional (dogmatic) interpretation** was most often used as a decisive method of interpretation. The Constitutional Court uses a special legal meaning of words that is uniformly accepted and recognized by lawyers as the decisive interpretative tool in 24 decisions from our sample of case law and was deployed 32 times in aggregate, which amounts to 46 % of all identified instances of deployment of decisive arguments (see Table 2, 1/B/a). Other types of grammatical (textual) interpretation such as **interpretation based on ordinary meaning** and **other professional interpretation**, however, were not used as methods which in themselves and without other arguments would have led to the given conclusion/decision of the Constitutional Court.

Frequently used as a decisive method is also the **contextual interpretation in a broad sense**. By deploying this argument, the Constitutional Court makes reference to the place of the constitutional provision to be interpreted in the Constitution. As noted in subsection 2.2.3, this domestic systemic argument is deployed in a broad sense when a constitutional court determines the meaning of a given constitutional provision with respect to other specific constitutional provisions by referring to fundamental rights stipulated in the constitution or to other constitutional provisions. We found that in our sample od case law this interpretative tool is contained as a decisive method in 13 decisions and was deployed 17 times altogether, which amounts to 24 % of all identified instances of deployment of decisive arguments (see Table 2, 3A).

In the decision number U-I-40/12, for example, the Constitutional Court deployed both methods of interpretation that are most frequently used as decisive ones, namely a simple conceptual dogmatic interpretation and a contextual interpretation in a narrow and/or broad sense. In this case, the Supreme Court of the Republic of Slovenia filed a request to review the constitutionality of several provisions of the Prevention of Restriction of Competition Act (PRCA-1). The Constitutional Court ruled that the first sentence of the first paragraph of Article 28 of the PRCA-1 is inconsistent with the Constitution. Additionally, the Court held that

the National Assembly must remedy the unconstitutionality within one year and that several other provisions of the same act are not inconsistent with the Constitution. In the reasoning of the decision, the Constitutional Court stated *inter alia* that in the case at hand the decisive legal circumstance is that the first paragraph of Article 28 of the PRCA-1 determines that the measures which interfere with the spatial privacy of companies are ordered by the Slovenian Competition Protection Agency, not a court, including when such measures are ordered and executed against the will of legal entities. This is, according to the Constitutional Court, inconsistent with the requirement under the second paragraph of Article 36 of the Constitution, which requires a prior court order in such instances. When exercising these authorisations, the Agency will – by the nature of the matter and with regard to the degree of their invasiveness, which allows the Agency to conduct a complete search of business premises and the objects thereon – also interfere with the narrower circle of the spatial privacy of the legal entity. Therefore, according to the Constitutional Court, it is necessary to concur with the applicant (e.g. the Supreme Court) that the challenged provision inadmissibly limits the constitutional right determined by the first paragraph of Article 36 of the Constitution and is thus inconsistent therewith.[111] – In this case, the Constitutional Court deploys two arguments as the decisive arguments for its decision that the first sentence of the first paragraph of Article 28 of the PRCA-1 is inconsistent with the Constitution: Firstly, it uses the simple conceptual dogmatic interpretation as a form of legal professional (dogmatic) interpretation. By deploying this method of interpretation, the Constitutional Court uses a special legal meaning of words that is uniformly accepted and recognized by lawyers. Secondly, the Constitutional Court deploys a contextual interpretation in a narrow sense by exploring the meaning of a constitutional norm on the basis of its point, which follows from its place in the system of legal norms. Here the meaning of the fundamental, right, which is stipulated in Article 36 of the Constitution (e.g. the right to spatial privacy and inviolability of dwellings), is determined without comparing it with other specific constitutional provision.

In our sample of case law, other methods of interpretation than those mentioned above appear as the decisive ones significantly less frequently. There are individual types and groups of arguments and methods that do not appear as the decisive ones at all. Among these are the historical interpretation and teleological interpretation as well as logical arguments. Last but not least, in this segment of the research our survey revealed that all types of methods of interpretation that are used by the Constitutional Court were deployed, more or less often, to support the Constitutional Court's substantive decisions, either as defining or strengthening arguments or as mere illustrations with marginal significance.

111 See U-I-40/12.

Table 2: Decisive arguments and methods of interpretation

Methods			Frequency (number)	Main types frequency	Weight (number)	Weight (%)	Main types weight (number and %)
1	1/A	a)	0	24/30	0	0%	32 (46%)
		b)	0		0	0%	
	1/B	a)	24		32	46%	
		b)	0		0	0%	
	1/C		0		0	0%	
2	2/A		0	0/30	0	0%	0 (0%)
	2/B		0		0	0%	
	2/C		0		0	0%	
	2/D		0		0	0%	
	2/E		0		0	0%	
	2/F		0		0	0%	
3	3/A		13	22/30	17	24%	27 (39%)
	3/B		4		4	6%	
	3/C	a)	3		4	6%	
		b)	2		2	3%	
		c)	0		0	0%	
	3/D	a)	0		0	0%	
		b)	0		0	0%	
		c)	0		0	0%	
	3/E		0		0	0%	
4	4/A		1	5/30	1	1%	5 (7%)
	4/B		4		4	6%	
	4/C		0		0	0%	
	4/D		0		0	0%	
5			0	0/30	0	0%	0 (0%)
6	6/A		0	0/3	0	0%	0 (0%)
	6/B		0		0	0%	
	6/C		0		0	0%	
	6/D		0		0	0%	
7			1	1/30	1	1%	1 (1%)
8			2	2/30	2	3%	2 (3%)
9			1	1/30	3	4%	3 (4%)

Legend: See Table 1

3.4. Conclusion

The study revealed that, when reasoning its decisions and determining the meaning of the constitution in cases regarding fundamental rights, the Constitutional Court uses and combines a wide range of different methods of legal interpretation. In our sample of the Constitutional Court's decisions, domestic systemic arguments are the most frequently used method of interpretation. In our sample of case law, they have been deployed in 50 % of all identified instances of deployment of main types of methods. Among them, the most frequently deployed type was the **interpretation on the basis of case law of the Constitutional Court**, and regarding this method of interpretation, the most frequently used are *references to specific previous decisions of the Constitutional Court as precedents*. This interpretative tool was also found in all 30 decisions from our sample and has been deployed in 28 % of all identified instances of deployment of interpretative methods and arguments. The frequency and weigh of other types of domestic systemic arguments and methods of constitutional interpretation is significantly smaller.

The second most commonly used main type interpretative method in the judicial practice of the Slovenian Constitutional Court are external systemic and comparative law arguments. This group of arguments has been deployed in 24 % of all identified instances of deployment of arguments and methods. However, not all types of external and comparative law arguments are used with equal frequency and they do not hold equal weigh in the interpretative practice of the Slovenian Constitutional Court. The most frequently deployed type is the **interpretation of fundamental rights on the basis of judicial practice of international courts**. Understandably, this method is present in all decisions from our sample of case law as references to the ECtHR or ECJ judgements have been among the criteria for the selection of Constitutional Court's cases. In overall, it was deployed in 16 % of all identified instances of deployment of arguments and methods. 81 % of all references to judicial practice of international courts were made to individual case decisions of the ECtHR and 19 % of references were made to the case law of the ECJ. The Constitutional Court made no reference to judicial practice of other international courts. Among other external systemic arguments, the **interpretation of fundamental rights on the basis of international treaties** amounts to 6 % and the c**omparative law arguments** to less than 1 % of all identified instances of deployment of arguments and methods of interpretation.

The third most frequently used interpretative arguments are those based on scholarly works. In the selected decisions of the Constitutional Court, this interpretative method was deployed in 10% of all identified instances of deployment of arguments and methods. While the largest share of references (52 %) were made to the scientific monographs, the Constitutional Court also made references to the scientific articles (22 %) and to the commentaries (26 %).

A method of interpretation quite frequently used in the Slovenian constitutional judicial practice is also the grammatical (textual) interpretation. It was deployed in

11 % of all identified instances of deployment of main type arguments and methods. Among different forms and types of grammatical interpretation, the Constitutional Court resorted most often to the **interpretation based on ordinary meaning** and **legal professional (dogmatic) interpretation.** As a form of legal professional (dogmatic) interpretation, a *simple conceptual dogmatic interpretation* of the Constitution takes place in 9 % of all identified instances of deployment of arguments.

The review discerned that in our sample of case law certain methods of constitutional interpretation and their (sub)types took place in only 1% (or less) of all identified instances of deployment of methods and arguments. Those are the **interpretation based on ordinary meaning** which is a type of grammatical (textual) interpretation, historical interpretation and interpretation in light of general legal principles. Less common are/is also logical arguments, teleological interpretation and substantive interpretation (non-legal arguments).

Our study also revealed that regarding international treaties in the selected decisions most references were made to the European Convention on Human Rights, while significantly less frequently the Constitutional Court referred to the Charter of Fundamental Rights of the European Union. When deploying logical arguments, the Constitutional Court used in several occasions *argumentum a maiore ad minus* and *argumentum a contrario*. Regarding teleological interpretation, we found that, usually, it is fused with other methods of interpretation and it is sometimes difficult to distinguish it from other tools of constitutional interpretation. In our review, we searched tor instances where the Constitutional Court refers, either explicitly or implicitly, to the purpose of the Constitution and its individual provisions.

Furthermore, our survey revealed that in our sample of case law *a simple conceptual dogmatic interpretation* as a type of **legal professional (dogmatic) interpretation** was most often used as a decisive interpretative method. Also, frequently used as a decisive method is **the contextual interpretation in a broad sense**. In our sample of case law, other methods of interpretation appear as the decisive ones significantly less frequently. Last but not least, there are individual main types methods or groups of arguments that do not appear as the decisive ones at all. Among these are historical interpretation and teleological interpretation as well as logical arguments.

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4. On the Interpretation of Fundamental Rights in the Case Law of the European Court of Human Rights

4.1. General Remarks On the Selected Judgements of the ECtHR (and ECJ)

We will now proceed with analysing 28 cases of the ECtHR and 2 cases of the ECJ referenced by the Slovenian Constitutional Court. A more detailed analysis of

individual cases will be focused on the more recent ones. The selected decisions of both international courts were considered on the merits in the decisions of Constitutional Court which were included in our study. In studying the selected decisions of the Constitutional Court on the one hand, and the ECtHR and ECJ case law on the other, we will use more or less the same methodology, but will have to adjust its application due to the differences between the two courts in their style of adjudication. Above all, in the subsection on methods of interpretation, a substantive/qualitative analyses of the selected case law of the ECtHR (and ECJ) will predominate. In other words, the statistical/quantitative analyses will not be as "plastic" as it was in the section on the methods used by the Slovenian Constitutional Court (i.e., regarding case law of the ECtHR and the ECJ, we will rely on a descriptive quantitative assessment). When referring to individual decisions/judgements, the style of our analyses will slightly differ from the one used in the section on the constitutional adjudication. Here, too, some adjustments seem sensible and necessary.

4.2. Arguments and methods of interpretation

Our analysis of the selected case law of the ECtHR and the ECJ revealed *inter alia* that, similarly to the Slovenian Constitutional Court, the Strasburg Court and the Luxemburg Court use a wide range of different interpretative methods and arguments when reasoning their decisions and determining the meaning of the rights stipulated in the Convention and the Charter. Both courts use certain interpretative methods more frequently than others. They often use a combination of different methods and arguments, while in some occasions it is difficult to distinguish between different methods and arguments used. Last but not least, the analyses also discerned that in our sample of the ECtHR and the ECJ case law some interpretative arguments and methods have proven to be more decisive than others.

4.2.1. Grammatical (textual) interpretation

The general impression is that, regarding different types of grammatical (textual) interpretation, the **interpretation of the Convention based on an ordinary meaning of words** was not used very frequently by the ECtHR. The use of *semantic interpretation* based on an ordinary meaning of words can be illustrated, for example, with the explanation of substance of the (right to) "liberty" as provided for in paragraph 1 Article 5 of the Convention, and the notion of impartiality in paragraph 1 Article 6 of the Convention.[112] The semantic interpretation based on an

112 "In proclaiming the 'right to liberty', paragraph 1 of Article 5 (art. 5-1) is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person." See Engel and others v. The Netherlands, § 58. See also Amuur v. France, § 42, and Guzzardi v. Italy, § 92. "The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways." See Morice v. France, § 73.

ordinary meaning of words is traceable also in the decisions of the ECJ, for instance in the field of the right to protection of personal data in the Charter.[113]

The grammatical (textual) interpretation is sometimes expressly referred to. The Court, for example, describes "the wording" or the meaning of the "letter" of the relevant provision:

> "The safeguards mentioned above are fundamental aspects of the right to a fair trial enshrined in Article 6 of the Convention. Neither the letter nor the spirit of Article 6 prevents a person from waiving them of his own free will, either expressly or tacitly."[114]

As in the sample of case law of the Constitutional Court, in the selected case law of the ECtHR and the ECJ too no *syntactic interpretation* has been identified.

However, it comes probably as no surprise that **legal professional (dogmatic) interpretation** is much more frequently used, both as a simple conceptual interpretation and as interpretation based on legal principles. The Court deployed a *simple contextual interpretation* by referring to a special legal meaning of words when determining their substance. For example, "the victim status of the applicant" for the purposes of the admissibility decision under the Convention cannot be interpreted with non-legal linguistic methods. Here, the word "victim"[115] is used as a special legal term that is much narrower than the generally accepted meaning. In contrast, the Court held that the notion of "home" in paragraph 1 Article 8 of the Convention is wider – a non-lawyer would probably not conceive it so broad at first sight.[116]

113 "In those circumstances, it must be considered that the right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual /…/" See Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen, § 52. Since the paragraph 1 Article 8 of the Charter stipulates that "everyone has the right to the protection of personal data …", the above cited interpretation of the ECJ can be understood as merely semantic, although it is also not completely foreign to the contextual interpretation.

114 See Scoppola v. Italy (no. 2), § 135. Another examples are: "The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence'." Ibid, § 97; "Besides, the applicant's way of life at the time, as disclosed by the documentary evidence filed, is in no way consonant with the ordinary meaning of the word 'vagrant', this being the meaning that has to be utilised for Convention purposes. /…/ at the hearing of 9 February 1978 before the Commission, their Agent described Mr. Guzzardi as 'a vagrant in the wide sense of the term', 'a monied vagrant' /…/ In addition to vagrants, sub-paragraph (e) (art. 5-1-e) refers to persons of unsound mind, alcoholics and drug addicts." See Guzzardi v. Italy, § 98.

115 »When declaring the case admissible, the Court considered the question whether the applicant could claim to be a victim of the alleged breaches of the Convention.« See Roşca v. Moldova, § 18.

116 "The Court would point out that, as it has now repeatedly held, the notion of 'home' in Article 8 § 1 encompasses not only a private individual's home. It recalls that the word 'domicile' in the French version of Article 8 has a broader connotation than the word 'home' and may extend, for example, to a professional person's office." See Petri Sallinen and Others v. Finland, § 70.

In the Court's reasoning of its decisions, specific legal meaning is attributed also to the words in other main articles of the Convention. For example, to "civil rights and obligations" and "criminal charge" in Article 6,[117] and to the notion of "private life" and "family live" in the Article 8 of the Convention.[118] The Court uses special legal terminology also when explaining the procedural aspects of the decision making.[119] In some cases, a phrase regularly used by the Court contains the special meaning exclusively in a legal sense, such as "a minimum level of severity".[120]

The *interpretation of the Convention based on the legal principles* as developed in the case law of the ECtHR is quite common and can be found in most of the selected judgments of the Court. An example is the interpretation of the Article 10 of the Convention. The Court has established different principles governing its review in cases where the expression contains statements of fact and value judgments.[121] Another example is the principle of impartiality of a tribunal in the light of Article 6 of the Convention, where the Court developed the subjective and objective test.[122]

In some cases, the Court uses legal principles to limit the scope of a right. Such is the case *Neumeister v. Austria*, where the principle of equality of arms is in the focus under Article 5 of the Convention. The reasoning contains a combination of legal interpretation based on legal principles and legal meaning of words.[123] In general, the

117 See Engel and others v. The Netherlands, § 79.

118 See P.B. and J.S. v. Austria, § 26, 30.

119 "In determining whether substantial grounds have been shown for believing the existence of a real risk of treatment contrary to Article 3 (art. 3) the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu* …" See Vilvarajah and Others v. the United Kingdom, § 107. "The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible." See Novaya Gazeta V Voronezhe v. Russia, § 32.

120 See Vilvarajah and Others v. the United Kingdom, § 107.

121 "In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see Lingens v. Austria, 8 July 1986, § 46, Series A no. 103)." See Novaya Gazeta V Voronezhe v. Russia, § 37.

122 "According to the Court's constant case-law, when the impartiality of a tribunal for the purposes of Article 6 § 1 is being determined, regard must be had to the personal conviction and behaviour of a particular judge in a given case – the subjective approach – as well as to whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect – the objective approach …" See Švarc and Kavnik v. Slovenia, § 37.

123 "Nor is it possible to justify application of the principle of 'equality of arms' to proceedings against detention on remand by invoking Article 5 (4) (art. 5-4) which, while requiring that such proceedings shall be allowed, stipulates that they should be taken before a 'court'. This term implies only that the authority called upon to decide thereon must possess a judicial character, that is to say, be independent both of the executive and of the parties to the case; it in no way relates to the procedure to be followed. In addition, the provision in question also lays down that such remedies must be determined 'speedily' (the French text uses the somewhat less expressive term 'à bref délai'). /…/ Full written proceedings or an oral hearing of the parties in the examination of such remedies would be a source of delay which it is important to avoid in this field." See Neumeister v. Austria, § 24.

Court recognizes the principle of equality of arms as a right stemming out of Article 6 of the Convention and associates it with the principles of adversarial procedure and fair trial.[124] This is an example how the Court interprets the Convention by contextualizing various legal principles.

Even more common, almost omnipresent example of interpretation based on legal principles is the principle of proportionality, which governs the review in cases where the interference with a right has been recognized to be prescribed by law and it follows a legitimate aim. The test of necessity in a democratic society, a pressing social need, and the proportionality of the interference in comparison to the legitimate aim pursued, are undoubtedly the expression of the principle of proportionality, as developed by the ECtHR.[125] Similarly, the positive obligations of the state stem out of the well-developed and often reiterated Convention principle that the rights must be effective in practice and not theoretical and illusory.[126]

In some cases, the difference between simple legal doctrinal interpretation and interpretation on the basis of legal principles is not evident *prima vista*. For instance, the phrase "margin of appreciation"[127] could be interpreted as a combination of words that have special legal meaning in the framework of the ECtHR case law. However, through tens and hundreds of the ECtHR decisions and judgments through decades the concept now includes a variety of general criteria and can be understood as a special legal principle under the Convention with significant importance. It has evolved as one of fundamental principles of interpretation for determining the level of stringency of review that has to be adopted by the Court regarding individual issues at hand.[128] Similar status could be ascribed to phrases "protected by law" and "in accordance with law", often reiterated in the Convention. The meaning of the latter, for example, exceeds the mere legal subsumption of the concrete state action to the law in question and, as a principle, requires also certain quality of such law.[129]

124 "The Court reiterates that the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial …" See Salov v. Ukraine, § 87.

125 See for example Novaya Gazeta V Voronezhe v. Russia, § 34; Buck v. Germany, § 44.

126 See for instance Scoppola v. Italy (no. 2), § 104.

127 »The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court." See Vajnai v. Hungary, § 43. See also Benediktsdóttir v. Iceland, *(ii) Application of these principles*.

128 See for example Arai, Yutaka: The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR, Intersentia, Antwerp, Oxford 2002.

129 "The expression 'in accordance with the law' in paragraph 2 of Article 8 (art. 8-2) requires, to begin with, that the interference must have some basis in domestic law. Compliance with domestic law, however, does not suffice: the law in question must be accessible to the individual concerned and its consequences for him must also be foreseeable …" See Leander v. Sweden, § 50. See also Niedbała v. Poland, § 79.

The Court resorts to the interpretation with the help of legal principles not only when interpreting material aspects of the Convention but also procedural as often procedural norms can be found indefinite and inexhaustible as well. An example of "procedural" legal principle is the *ratione temporis* principle, which determines the jurisdiction of the ECtHR.[130]

Significantly less common type of grammatical (textual) interpretation is **non-legal professional interpretation**. In the selected case law of the ECtHR, it has not occurred in the framework of direct interpretation of the text of the Convention (as a tool for determining the upper premise of judicial syllogism), but rather in the contextual interpretation or as part of legal subsumption.[131]

4.2.2. Logical arguments

The analyses of our sample of the ECtHR's case law revealed that the Court used the following two types of logical arguments for the interpretation of the Convention: *argumentum ad absurdum* and *argumentum a contrario*. Other logical arguments are not non-existent in the case law of the Court, however, as it will be briefly presented, they are rather applied in the process of subsumption (and not interpretation of the Convention itself).

Argumentum ad absurdum has been most often applied in order to demonstrate that certain hypothetical interpretation, if adopted or recognized by the Court, would lead to the untenable, unacceptable results. Examples can be found in cases

130 »The problem of determining the limits of its jurisdiction *ratione temporis* in situations where the facts relied on in the application fell partly within and partly outside the relevant period has been most exhaustively addressed by the Court in the case of *Blečić v. Croatia /…/*. In that case the Court confirmed that its temporal jurisdiction was to be determined in relation to the facts constitutive of the alleged interference /…/". See Šilih v. Slovenia, § 146.

131 For instance, regarding the consequences of sexual abuse, the Court noted: "For the Court, States have a positive obligation inherent in Article 8 of the Convention to criminalise offences against the person, including attempted offences, and to reinforce the deterrent effect of criminalisation by applying criminal law provisions in practice through effective investigation and prosecution /…/. Where the physical and moral welfare of a child is threatened, such injunction assumes even greater importance. The Court notes in this connection that sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives /…/." See K.U. v. Finland, § 46. Although this is a generally known and accepted position, the "debilitating effects" of sexual abuse on victims are primarily subject of other (non-legal) professions. Another example is the interpretation of the Court related to the medical issues: "Lastly, apart from the concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning death in a hospital setting. Knowledge of the facts and of possible errors committed in the course of medical care are essential to enable the institutions concerned and medical staff to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services /…/ See Šilih v. Slovenia, § 196. The methods used to remedy the medical deficiencies are certainly not part of legal profession.

Salov v. Ukraine[132] and *Engel and others v. the Netherlands*.[133] In the former case, the Court explains why Article 10 should be read in a way that it does not prohibit a certain type of expression – this is therefore an argument which elaborates the scope of a right under Article 10. If the former case widens the scope of a right by applying the *ad absurdum* argument, the latter case presents its application in function of narrowing the scope of a Convention right. The reasoning (see the footnotes) transparently displays the *ad absurdum* logic of interpretation. Last but not least, where the Court does not show explicitly to which unacceptable results would lead an undesired interpretation of the Convention, an implicit, milder form of this logical argument has been identified.[134]

Argumentum a contrario is identifiable for instance in cases where the Court emphasizes that the Convention does not offer the protection of a certain right since it is not written in the text itself. The legal consequences, which follow from the specific provisions of the Convention, are therefore not applicable to a situation or a right, demanded by the applicant. The ECtHR held:

> "In addition, neither the Convention nor its Protocols confer the right to political asylum /…/."[135]
>
> "Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation /…/."[136]
>
> "/…/ but the list of deprivations of liberty set out therein is exhaustive, as is shown by the words 'save in the following cases'. A disciplinary penalty or measure may in consequence constitute a breach of Article 5 para. 1 (art. 5-1)."[137]

132 "Furthermore, Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention." See Salov v. Ukraine, § 113.

133 "The Court considers that the words 'secure the fulfilment of any obligation prescribed by law' concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration /…/. It would justify, for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law." See Engel and others v. The Netherlands, § 69.

134 "Moreover, /…/ case-law, as one of the sources of the law, necessarily contributes to the gradual development of the criminal law /…/. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen /…/" See Scoppola v. Italy (No. 2), § 101.

135 See Saadi v. Italy, § 124.

136 See Saadi v. Italy, § 127.

137 See Engel and others v. The Netherlands, § 57.

In the following example from the case of *Scoppola v. Italy*, the Court emphasizes that in the sphere of criminal law the extensive interpretation should not be adopted. The silence of a law therefore dictates the interpretation with *argumentum a contrario*:

> "Article 7 § 1 of the Convention goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. /…/ While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy /…/."[138]

This interpretation could be attributed to the subsumption process as it affects the interpretation of domestic criminal law. However, it at the same time determines the scope and strictness of review under Article 7. It is possible to deduce that in this manner this reasoning contains also an interpretation of the Convention itself.

From the above-cited cases it can be seen that the *ad absurdum* and *a contrario* arguments can be important and influential interpretative tools. The Court relies to them when determining the very frontiers and substantial limits of individual rights guaranteed under the Convention. These reasonings have far fetching and often general (*erga omnes*) consequences since the Court determines the material scope of protection it offers when interpreting the Convention.

Other identified examples of reasoning with logical arguments were found in the subsumption part of decisions (and not where the Convention itself is being interpreted). ***Argumentum a minore ad maius***, for example, has been deployed at least implicitly;[139] For the case law of the courts which widely refer to their previous decisions (precedents), it is almost inevitable to frequently depend on the interpretation with ***argumentum a simili***. This argument functions in both directions: it can rely upon relevant similarities and thus seek the same legal consequence (analogy) or it can point out the relevant differences and therefore demand also the different treatment (distinguishing);[140] the Court has for instance dismissed the arguments put forward in the case in hand on the grounds that

138 See Scoppola v. Italy (No. 2), § 93.

139 "The Court would emphasise that search and seizure represent a serious interference with private life, home and correspondence and must accordingly be based on a "law" that is particularly precise." See Petri Sallinen and Others v. Finland, § 90.

140 The Court, for example, has stated: "The Court considers that the present application is to be distinguished from those relied on by the Government. It observes, particularly in Garaudy and Lehideux and Isorni (both cited above), that the justification of Nazi-like politics was at stake. Consequently, the finding of an abuse under Article 17 lay in the fact that Article 10 had been relied on by groups with totalitarian motives." See See Vajnai v. Hungary, § 24. Or: "For the reasons stated in its judgment in Blečić /…/ and noting that there is nothing that would lead it to reach a different conclusion in the present case, the Court finds that the Government are not precluded from raising *the ratione temporis* objection at this stage of the proceedings /…/." See Šilih v. Slovenia, § 139.

similar arguments have already been rejected in previous decision or judgment;[141] However, in some cases differentiation between reasoning with mere subsumption and with interpretation of the Convention is an uneasy task. Such is the case where the Court states that specific Convention requirement is stricter in specific legal areas;[142] The ***a simili argument*** can be found also in the selected ECJ judgments. The ECJ has evaluate the different degree of seriousness of the breach of the right to protection of personal data when legal persons and natural persons are concerned.[143]

Interestingly, the reasoning with ***argumentum a maiore ad minus*** has not been identified not as a part of judicial subsumption nor as a part of interpretation of Convention. In addition, in some cases, the Court explicitly resorts to "logic" when interpreting the provision of the Convention.[144]

4.2.3. Systemic arguments

Different types and forms of systemic arguments are deployed very frequently and can be found in almost every selected judgment of the ECtHR. Analysing our sample of the Court's case law, we found that in the majority of cases it uses **contextual interpretation either in a narrow or broad sense** and that in some cases, it also uses a "***derogatory formulae***".

Similar to the constitutional interpretation, the contextual interpretation of the Convention in a broad sense is deployed, for example, when the Court refers to other Convention provisions and compares them with the ones that are being interpreted in the first place. This may include references to substantive or procedural articles of Convention. The Court may compare the meaning of specific words in the provisions

141 See Saadi v. Italy, § 141.

142 In the part of the judgment, where the general principles on the requirement »in accordance with law« are presented, the Court held: »Compliance with domestic law, however, does not suffice: the law in question must be accessible to the individual concerned and its consequences for him must also be foreseeable /…/. However, the requirement of foreseeability in the special context of secret controls of staff in sectors affecting national security cannot be the same as in many other fields. /…/« See Leander v. Sweden, § 50, 51.

143 „/…/ the obligation to publish which follows from the provisions of the European Union rules the validity of which has here been brought into question does not go beyond the limits imposed by compliance with the principle of proportionality. The seriousness of the breach of the right to protection of personal data manifests itself in different ways for, on the one hand, legal persons and, on the other, natural persons. It is necessary to point out in this regard that legal persons are already subject to a more onerous obligation in respect of the publication of data relating to them." See Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen, § 87.

144 "The Convention is to be read as a whole and therefore, as the Commission recalled in its report, any interpretation of Article 13 (art. 13) must be in harmony with the logic of the Convention." See Leander v. Sweden, § 78. This argument could be in substance related to systemic arguments.

or, for instance, the structure of limitation/derogation clauses of various articles of the Convention.[145]

Contextual interpretation in a narrow sense of a specific Convention right often relates to the right's traditional and generally recognized structure, concept and function – at least as far as the main framework is concerned. Consequently, the differentiation between teleological and contextual interpretation in a narrow sense may be unclear since the concept of a right and intention behind it is usually highly correlated. Both interpretations (besides others) are used to gradually develop the case law, which gives the full substance and meaning to the fundamental rights and individual Convention provisions. Initially abstract and vague, the provisions of the Convention through time become materially concretized, specified and "filled in" (similar relates to interpreting constitutions).[146] Among contextual interpretation in narrow sense is, for instance, reasoning with setting the criteria of review under the certain article of the Convention,[147] setting the substantial characteristics of certain Convention right or a specific aspect of it,[148] or just ensuring the minimal standards under certain provision (e.g. right) in the Convention.[149]

As special form of contextual interpretation, s "*derogatory formulae*" has been applied in our sample of case law where the Court denied applicability of *lex posterior derogat legi priori* rule in the specific legal field.[150]

145 "In the Court's opinion, comparison of Article 5 par. 1 (a) (art. 5-1-a) with Articles 6 par. 2 and 7 par. 1 (art. 6-2, art. 7-1) shows that for Convention purposes there cannot be a 'condamnation' (in the English text: 'conviction') unless it has been established in accordance with the law that there has been an offence – either criminal or, if appropriate, disciplinary /…/." See Guzzardi v. Italy, § 100. "Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation /…/." See Saadi v. Italy, § 127.

146 Pavčnik, 2000, p.

147 "The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute /…/." See Švarc and Kavnik v. Slovenia, § 30.

148 "The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 (art. 10) does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual." See Leander v. Sweden, § 74.

149 "/…/ As the Court has stated on many occasions, Article 6 § 1 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation, but a State which does institute such courts is required to ensure that persons having access to the law enjoy before such courts the fundamental guarantees in Article 6 /…/, and this unquestionably includes the requirement that the court must be impartial." See Morice v. France, § 88.

150 "/…/ The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties." See Scoppola v. Italy (no. 2), § 108.

Another type of systemic arguments which can be used when the ECtHR interprets the Convention are **references to the law of the member states**, e.g. the (sub) statutory law and case law of regular courts of the member states against which in the case at hand a complaint has been lodged as well as of other member states. We found that this method has been deployed in our sample of case law of the ECtHR only in the framework of legal subsumption when the Court reviews the domestic legislation[151] and court decisions[152] affecting the rights as guaranteed by the Convention. Regarding the latter, the Court, for instance, has also referred to the practice of the ordinary courts of member states via analysing the criteria they apply.[153] This method of interpretation, however, has not been detected in those parts of reasoning where the Convention provisions themselves are being interpreted by the Court.

On the other hand, among the most frequently used systemic arguments is the method of **interpretation on the basis of the ECtHR's case law** which includes *inter alia references to specific previous decisions of the Court as "precedents"*. In our sample of case law, every single judgment of the ECtHR includes several references to the previous case law of the Court.[154] In the case of *Morice v. France* for example, the Court took the meaning of precedents to another level as it quoted (i.e., copied) the chosen paragraphs of the judgment's reasoning in full.[155]

The analysis of the case law from our sample also shows that the Court in some of these cases makes *references* – not to its specific previous decisions/judgements but – *to its own practice as such*.[156] However, in the judicial decision-making that recognizes the importance of precedents, it does not come as a surprise that the (non)departure from the established case law would be explicit:

> "While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases /…/"[157]

151 See for example Salov v. Ukraine, § 58, 96; Stubbings and others v. United Kingdom, § 52, 73.

152 "/…/ The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered. The English courts themselves have shown a similar concern in reviewing the decisions of the Secretary of State concerning the removal of asylum-seekers to allegedly safe third countries (see Relevant Domestic Law and Practice above, United Kingdom case-law)." See T. I. v. United Kingdom, p. 15. The emphasis added by the author.

153 "While it is true that there are limitations to the powers of the courts in judicial review proceedings (see paragraphs 89-92 above) the Court is of the opinion that these powers, exercisable as they are by the highest tribunals in the land, do provide an effective degree of control over the decisions of the administrative authorities in asylum cases and are sufficient to satisfy the requirements of Article 13 (art. 13)." See Vilvarajah and Others v. the United Kingdom, §126.

154 See for example Allan v. the United Kingdom, § 44.

155 See Morice v. France, § 124.

156 "/…/The Court has previously referred to the relevant international instruments, most notably the Data Protection Convention, in assessing data processing and protection practices in individual cases brought under Article 8 of the Convention." See Surikov v. Ukraine, § 74.

157 See Scoppola v. Italy (no. 2), § 104.

"The Court does not see any reason to depart from its established case-law. /…/."[158]

The judgments of the ECtHR in some cases also include citations of the case law of constitutional court(s). However, among the selected case law, there are no examples where a reference to the concrete decision of a particular Constitutional court would amount directly to the interpretation of the Convention itself. These references too are rather included in the process of legal subsumption.[159]

As argued, the systemic arguments belong to the most frequently deployed methods of interpretation. However, **references to abstract norms formed by the Court itself** (for instance, Rules of Court of the EctHR) were not identified in our sample of the Court's case law. The same stands for the **interpretation on the basis of other Council of Europe materials** (i.e., those of Venice Commission and similar) as yet another form of systemic arguments as this method too appeared – not in the process of interpretation of the Convention itself but – as part of the subsumption (e.g. the assessment of the present case).[160]

In principle, arguments of systemic nature are also arguments of the Court regarding its position and competences and the scope of review adopted in a case under the consideration.[161] The Court namely emanates from its international and subsidiary position, having in mind that it is not competent to conduct the review of constitutionality, but to check exclusively whether the domestic courts' reasoning in a particular case (dis)respects the requirements under the Convention. This reasoning determines the jurisdiction of the Court under the Convention and could be therefore regarded as a part of its interpretation in wider context.

The judicial review that is conducted systematically in specific order and steps, as the one regularly carried out by the Court, can also be understood as systemic arguments in material (substantial) sense. This kind of judicial review involves reasoning based on principles which are generally recognized under the Convention (i.e., they are not common just to one right) and stem out of the Convention system. Hereby various tests are taken into consideration, most notably the proportionality test.[162]

158 See Švarc and Kavnik v. Slovenia, § 16.

159 See for example Salov v. Ukraine, § 83; Surikov v. Ukraine, § 80.

160 "/…/ The Court also takes note of /…/ the relevant resolutions of the Council of Judges of Ukraine which criticised the lack of financial and legislative guarantees for the functioning of the judicial bodies /…/." See Salov v. Ukraine, § 83. See also Leander v. Sweden, § 82.

161 "At the same time, the Court is not called upon to assess the quality of the applicable data protection framework in the abstract and must rather confine itself as far as possible to examining the particular consequences of application of its provisions in the case before it /…/" See Surikov v. Ukraine, § 81.

162 "In addition to being lawful, the interference must also pursue a legitimate aim and be 'necessary in a democratic society'. In determining whether the impugned measures were 'necessary in a democratic society', the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and the measures were proportionate to the legitimate aims pursued /…/" See Surikov v. Ukraine, § 73.

A specific example is a subjective and objective test of impartiality for the purposes of Article 6 § 1 of the Convention.[163]

4.2.4. External systemic and comparative law arguments

This group of interpretative arguments includes the **interpretation of the Convention on the basis of other international treaties** and **on the basis of individual case decisions or case law ('judicial' practice) of other international or supranational courts,** and **other external sources of interpretation** (e.g. customary international law, etc.).

Several examples of interpretation of fundamental rights from the Convention on the basis of other international treaties have been detected in the selected case law.[164] Especially when the Court wants to change its course of interpretation, it often relies on the position of international law and consensus of member States.[165] Such analysis is then used as a basis for dynamic interpretation of the relevant Convention provisions.[166] Another example is:

> "The Court considers that a long time has elapsed since the Commission gave the above-mentioned X v. Germany decision and that during that time there have been important developments internationally. In particular, apart from the entry into force

163 "/…/ According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality /…/" See Morice v. France, § 73.

164 For example: "This is an established principle in the Court's case-law /…/ based on the general rule of international law embodied in Article 28 of the Vienna Convention /…/." See Šilih v. Slovenia, § 140. See also M. S. S. v. Belgium and Greece, § 251, where the Geneva Convention is considered in an asylum-seeker case.

165 In the case of *P.B. and J.S. v. Austria* the Court deployed *comparative law arguments*, i.e., references to norms of a particular foreign legal system, in this case of both the international and national legal systems: "The Court notes that since 2001, when the decision in Mata Estevez was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of 'family' (see paragraph 26 above)." See P.B. and J.S. v. Austria, § 28, 29.

166 "To date, a certain level of consensus on the international level and, in particular, between the Council of Europe member States has been achieved as regards the fundamental data protection principles and the corresponding basic procedural safeguards to be included in the national legislative frameworks in order to justify the necessity of any possible interference. These principles were formulated in a number of treaties and other legal instruments, including the Council of Europe Data Protection Convention no. 108 and other documents /…/. At each stage, appropriate and adequate safeguards which reflect the principles elaborated in applicable data protection instruments must be put in place in order to justify the necessity of interference under Article 8 /…/." See Surikov v. Ukraine, § 74.

> of the American Convention on Human Rights /…/, mention should be made of the proclamation of the European Union's Charter of Fundamental Rights. The wording of Article 49 § 1 of the Charter differs – and this can only be deliberate /…/ – from that of Article 7 of the Convention in that it states: /…/. Lastly, the applicability of the more lenient criminal law was set forth in the statute of the International Criminal Court and affirmed in the case-law of the ICTY /…/."[167]

Also, the ECJ's interpretation of the EU Law, i.e., the Charter, on the basis of other international treaty has been identified – namely on the basis of the Convention. The ECJ "returns the favor" to the ECtHR, so to speak, and cites its case law.[168] In general, the effort of both Courts, the ECJ and ECtHR, to recognize each other's jurisprudence is clearly visible. The process of EU integration into the Convention system is one aspect and harmonized interpretation of the Convention and the relevant EU law is another. The latter is most likely a substantial precondition for the former and could be understood as a tool paving the way for making the integration possible.

However, the Court cites also the case law of other courts or tribunals. For example in *Scoppola v. Italy* and *Šilih v. Slovenia*, the Court interpreted Article 7 of the Convention with a reference to case law of the ICTY,[169] the United Nations Human Rights Committee and Inter-American Court of Human Rights.[170] Also, a reference to the generally recognised rules of international law has been detected in the procedural part of the decision – i.e., when interpreting the Article 35 of the Convention.[171] When interpreting the Convention, the Court does on the other hand not refer only to the cogent law or law in the traditional sense. In several cases it interpreted

167 See Scoppola v. Italy (no. 2), § 105.

168 "Finally, according to Article¬52(3) of the Charter, in so far as it contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights are to be the same as those laid down by the Convention. Article 53 of the Charter further states that nothing in the Charter is to be interpreted as restricting or adversely affecting the rights recognised inter alia by the Convention." See Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen, § 51. „The European Court of Human Rights has held on this point, with reference to the interpretation of Article 8 of the Convention, that the term 'private life' must not be interpreted restrictively and that 'there is no reason of principle to justify excluding activities of a professional … nature from the notion of 'private life'' (see, inter alia, *Amann v. Switzerland*, § 65, and *Rotaru v. Romania*, § 43)." *Ibid*., § 59.

169 "The Court considers that a long time has elapsed since the Commission gave the above-mentioned X v. Germany decision and that during that time there have been important developments internationally. /…/ In the case of Berlusconi and Others, the Court of Justice of the European Communities, whose ruling was endorsed by the French Court of Cassation /…/, held that this principle formed part of the constitutional traditions common to the member States /…/ Lastly, the applicability of the more lenient criminal law was /…/ affirmed in the case-law of the ICTY /…/." See Scoppola v. Italy (no. 2), § 105.

170 "This approach finds support also in the jurisprudence of the United Nations Human Rights Committee and, in particular, of the Inter-American Court of Human Rights, /…/." See Šilih v. Slovenia, § 160.

171 "/…/ In addition, according to the 'generally recognised rules of international law', there may be special circumstances which absolve applicants from the obligation to exhaust the domestic remedies at their disposal. See Scoppola v. Italy (no. 2), § 70.

the Convention also with the reference to the soft law or the documents with the international policy character.[172]

4.2.5. Teleological interpretation

The analysis of the selected case law shows that the ECtHR uses the teleological interpretation quite often and in various manners. It may rely on its structural or procedural arrangement and its internationally and thus subsidiary position, where the general purpose of the procedure before the Court and the protection of human rights on the European level is in the centre of interpretation. This is important for example when the Court does not want to be too activist, too strict in the relation to the domestic courts' findings and their interpretation,[173] or even depart from legal arguments and to decide upon the state's policy.[174] This indeed influences the strictness of the ECtHR's scrutiny, which have direct effects for the level of stringency of the Convention's substantial requirements.[175]

An example where the Court interpreted the procedural aspects of the Convention with the teleological arguments is the following one:

> "The Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court /…/. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights /…/."[176]

However, the Court refers to the object and purpose of the Convention also when it interprets substantial provisions. Here are two examples of teleological reasoning when interpreting substantial rights under the Convention (teleological interpretation can be identified by phrases "essential element", "object and purpose", "the Court's task", etc.):

172 "Moreover, that conclusion is in line with points IV and XII of the guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism /…/." See Saadi v. Italy, § 138.

173 "As to compliance with procedural time-limits, the Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that it will not substitute its own interpretation for theirs in the absence of arbitrariness /…/." See Salov v. Ukraine, § 95.

174 "/…/ However, since the very essence of the applicants' right of access was not impaired and the restrictions in question pursued a legitimate aim and were proportionate, it is not for the Court to substitute its own view for that of the State authorities as to what would be the most appropriate policy in this regard." See Stubbings and others v. United Kingdom, § 56.

175 This is the reason we believe that such reasoning also relates to the interpretation of the Convention – even though it is at first sight closer to the part of the decision where judicial subsumption is carried out.

176 See Scoppola v. Italy (no. 2), § 68.

> "The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection /…/. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment /…/."[177]
> "The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation /…/."[178]

In some cases, the teleological interpretation can be deemed as only implicit.[179]

4.2.6. Historical interpretation

When resorting to a historical interpretation, in their selected case law the Court and the ECJ deployed **interpretation based on draft materials**, **on the intention, will etc. of the convention or charter-maker** and **on reasons based on the circumstances of making or modifying the Convention or Charter or their provisions in question**. However, the occurrence of these forms of historical interpretation is pretty rare. Also, we did not identify cases where the Court would resort to the **interpretation based on proposer justification**.

For example, in the case of *Šilih v. Slovenia*, the ECtHR indirectly referred to the general intention and framework of the Convention drafters:

> "/…/ The Court reiterates in this connection that Article 2 together with Article 3 are amongst the most fundamental provisions in the Convention and also enshrine the basic values of the democratic societies making up the Council of Europe /…/."[180]

An example where the Court cites the specific circumstances that existed during the preparation and subsequent conclusion of the Convention is given in the case of *Engel and others v. The Netherlands*.[181]

177 See Scoppola v. Italy (no. 2), § 92.
178 See Salov v. Ukraine, § 106.
179 "/…/ The same applies to Article 2 cases concerning medical negligence. The State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice and that requires a prompt examination of the case without unnecessary delays /…/." See Šilih v. Slovenia, § 195.
180 See Šilih v. Slovenia, § 147.
181 "During the preparation and subsequent conclusion of the Convention, the great majority of the Contracting States possessed defence forces and, in consequence, a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians. The existence of such a system, which those States have retained since then, does not in itself run counter to their obligations. Military discipline, nonetheless, does not fall outside the scope of Article 5 para. 1 (art. 5-1)." See Engel and others v. The Netherlands, § 57.

4.2.7. Arguments based on scholarly works

This method of interpretation is extremely rare in the analysed case law. It occurs in the case of *Stagno v. Belgium*, where the jurisprudence is mentioned both with a concrete reference and abstractly – however, not for the purposes of direct interpretation of the Convention.[182]

4.2.8. Interpretation in light of general legal principles

When interpreting the Convention, the ECtHR does not merely evolve the principles and legal standards that would be Convention-specific, but also relies on general legal principles. The content of these legal principles is not written in the text of the Convention. However, their recognition in modern law is so wide and omnipresent that they in fact represent the very foundation of law. It is hard to imagine that, for instance, the Convention would be interpreted in a way that would produce retroactive effects for member states, which would be held responsible for actions before ratifying the Convention.

General principles are inherent to law regardless of substance that is covered by particular legal sources. Their disrespect would necessarily lead to untenable, unacceptable results. Therefore, the Court takes into account the inherent general legal principles even if they are not explicitly written in the text of the Convention.

The reference to the rule of law could be regarded as the interpretation in light of general legal principles. In the case of *Petri Sallinen and Others v. Finland*, for example, the Court stated:

> "/…/ the absence of applicable regulations /…/ deprived the applicants of the minimum degree of protection to which they were entitled under the rule of law in a democratic society /…/."[183]

Similarly, the principle of legal certainty can also be regarded as a general legal principle. The Court referred to this principle in the case of *P.B. and J.S. v. Austria*:

182 "La doctrine belge précise que le législateur a prévu un délai relativement bref afin d'éviter la disparition des preuves et des moyens de vérification. Pour l'assureur, une bonne gestion technique s'accompagne mal de litiges prolongés (M. Fontaine, « Droit des assurances », Précis de la Faculté de l'Université Catholique de Louvain, Bruxelles, 1975, no 26, p. 108). L'action en paiement de l'indemnité d'assurance est soumise à la prescription triennale, celle-ci répondant au souci du législateur de tenir compte des exigences de l'économie des compagnies d'assurance lesquelles doivent être à même de clôturer de prévisions dans un délai relativement court (Répertoire pratique du droit belge, complément III, verbo Assurances terrestres (Contrat en général), no 392)." See Stagno v. Belgium, § 16. "Elles se sont fondées pour cela sur les travaux préparatoires de la loi du 11 juin 1874, la doctrine commerciale et la jurisprudence dominante qui privilégient les intérêts des compagnies d'assurance afin de leur épargner les litiges prolongés et la disparition des preuves et des moyens de vérification." *Ibid*., § 29.

183 See Petri Sallinen and Others v. Finland, § 92.

"In this context, the Court notes its case-law according to which the principle of legal certainty, which is necessarily inherent in the law of the Convention /…/."[184]

4.2.9. Non-legal arguments

The Court does not explain the substance of the Convention exclusively with legal arguments as non-legal arguments end up in legal reasoning too. In some cases, it refers to the non-legal reasons, such as public policy or sociological reasons. Sometimes these remarks can be a bit surprising and awkward. Unsurprisingly, the probability to encounter such arguments enlarges with age of the decision. In such cases we should consider that the dynamic interpretation is called dynamic precisely because the position of society on certain issues has evolved or changed for good. An example of such Court's argumentation involves a statement that all drug addicts are socially maladjusted and occasionally dangerous:

"/…/ In addition to vagrants, sub-paragraph (e) (art. 5-1-e) refers to persons of unsound mind, alcoholics and drug addicts. The reason why the Convention allows the latter individuals, all of whom are socially maladjusted, to be deprived of their liberty is not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention."[185]

The judges of the Court are not isolated and cut off of the world's large-scale events of processes. Thus, the Court often connects the interpretation of the Convention with specific societal circumstances and events. It then explains how this affects (or not) the interpretation of the Convention:

"The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence /…/. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3."[186]

4.3. The frequency of arguments and methods of interpretation

As explained in the introduction to this section, our approach to presenting the statistical overview of the methods and arguments used by the ECtHR and the ECJ differs from the one applied in the section on the Constitutional Court. Here a descriptive approach to the frequency and weight of the used arguments and methods of interpretation (instead of "counting" exact frequency and occurrences of methods)

184 See P.B. and J.S. v. Austria, § 49.
185 See Guzzardi v. Italy, § 98.
186 See Saadi v. Italy, § 137.

was considered to be a more appropriate choice. However, each identified method of interpretation was assigned into the one of five groups on the ground of frequency: **non-occurrence** (the method has not occurred neither in any case or has occurred in less than 10 % of cases); **rare occurrence** (the method occurs in the lower third share of cases – less than apx. 33 %); **moderate occurrence** (the method occurs in roughly half of cases; it may occur a bit less often or a bit more; however, it does not extend to more than two thirds share of cases); **common occurrence** (the method occurs in the higher third share of cases – more than apx. 66 %); **constant occurrence** (the method occurs in almost every case or in more than 90 % of cases).[187]

The most frequently used method of interpretation of the Convention by the ECtHR is interpretation based on the precedents (i.e., references to specific previous decisions of the ECtHR). In every single judgment or decision considered in the analysis one could found more than one reference to the precedents (*constant occurrence*). Usually, there are more than 5 or even 10. However, the method of interpretation by citing the precedents is not by itself a substantive method of the interpretation of the Convention. It only takes us to what the Court previously has stated and the question, which method of interpretation led the Court to acquire a particular stance, remains unanswered.

Among the most frequently used methods of interpretation are also contextual interpretation in both narrow and broad sense and can be found in almost every selected decision (*constant occurrence*). However, these are very often combined with the method of citing the precedents. As already pointed out, the systemic interpretation in general and the contextual interpretation in particular is used in order to materially concretize and specify vague provisions of the Convention. As the vagueness of the Convention's provisions is not a rare phenomenon, these methods of interpretation are consequently not an exception either. On the other hand, the systemic judicial review that is conducted in specific order and steps, with the application of various tests (for example a subjective and objective test of impartiality for the purposes of Article 6 § 1 of the Convention) is of *common*, if not *constant* occurrence.

The analysis of the selected case law discerned a *moderate occurrence* of the teleological interpretation. The Court for example stresses its internationally and thus subsidiary position or a purpose of protection under the Convention in general. In some cases, it is not easy to draw a line between contextual and teleological interpretation. The teleological interpretation in broader sense, also implicitly, could reach the *common occurrence* threshold.

The frequency of the application of individual methods of interpretation depends also on the subject matter. For instance, in the cases where the refugees' rights were concerned, the Court more frequently cites other international treaties (and EU law) and uses them as an interpretive tool. However, in general it is not used frequently

187 The classification is not necessarily numerical, statistical correct. The presented percentages are merely of orienting purposes.

in the selected case-law (*rare–moderate occurrence*), at least not for purposes of direct interpretation of the Convention. The Court cites also the case law of other international courts or tribunals, for example the ICTY, the United Nations Human Rights Committee and Inter-American Court of Human Rights (less than 10 % of cases, *non-occurrence*).

It is a bit surprising that textual interpretation is relatively rare. The interpretation of the Convention based on an ordinary meaning of words reaches less than 10 % cases (*non-occurrence*) and no *syntactic interpretation* has been identified. However, legal professional (dogmatic) interpretation is much more frequently used. Perhaps not so much in a form of simple conceptual interpretation, but as interpretation based on legal principles. The latter is quite common and can be found in most of the selected judgments of the Court (*common–constant occurrence*). On the other hand, non-legal professional interpretation is virtually non-existent in the selected case law of the ECtHR as it has not occurred in the framework of direct interpretation of the text of the Convention (as the upper premise of judicial syllogism), but rather in the contextual interpretation or as part of legal subsumption (for the purposes of our research therefore the *non-occurrence* grade applies).

Logical arguments are rather rare or even non-existent as well. The analyses of our sample identified examples of *argumentum ad absurdum* and *argumentum a fortiori* (less than 10 %, *non-occurrence*). Among the logical arguments the most frequently used is *argumentum a contrario* (however, still of *rare occurrence*). Other logical arguments are not non-existent in the case law of the Court. However, they are rather applied in the process of subsumption (and not interpretation of the Convention itself). *Argumentum a maiore ad minus* has not been identified neither as a part of judicial subsumption nor as a part of interpretation of the Convention.

A variety of interpretational tools have not been detected to be applied when interpreting the Convention and are therefore of *non-occurrence* for the purposes of this research. However, they may be deployed in the subsumption to the facts of the case in hand. For example, the interpretation with the reference to and analysis of the constitutional tradition or constitutional arrangements of various State Parties to the Convention with an addition of final evaluation on whether there is a (wide) consensus on the specific issue, is among the methods with a higher frequency. Similar can be said for the interpretation of the Convention on the basis of the statutory law and judicial practice of (other) member states. No direct interpretation of the Convention with references to abstract norms formed by the Court itself (e.g. the rules of procedure) or on the basis of the practice of the ordinary and constitutional courts of member states have been identified either. In our sample of case law, the Court has not resorted to the interpretation referring to abstract judicial norms, such as directives, principled rulings, law unification decisions, etc. or to the normative acts of other domestic state organs (systemic arguments). The same stands for the arguments based on scholarly works. All of the above tools of legal interpretation has been nevertheless identified in the subsumption part of reasoning.

4.4. The characteristics of the decision-making and style of reasoning

4.4.1. The characteristics and style of the ECtHR's (and ECJ's) reasoning and adjudicating

Generally, in the first parts of the judgments and decisions (hereinafter: decisions), the ECtHR makes an overview of the procedure and circumstances of the case ("Procedure" and "The Facts"), and of the "Relevant domestic law and practice", which may include also the applicable international texts and the case law of domestic and other international fora. The Court obviously evades reviewing or commenting the presented content in these parts of the decisions. Therefore, the style of reasoning hereby is exclusively illustrative. However, the Court often does cite these initial paragraphs in the later text of the decisions, where the style of reasoning is not only illustrative, descriptive, but more of a prescriptive, normative nature. After the initial parts follows the "As to the law" / "The Law" part. This part is divided into the applicant's complaints ("Alleged violation of Article …"). Individual complaint part begins with the presentation of the applicant's position, which is followed firstly by the procedural aspects of the complaint ("Admissibility") and secondly with the "Merits". The merits part starts with the presentation of positions of the parties to the procedure ("The parties' submissions"), which is followed by the most important part of the decision besides the operative part: "the Court's assessment" part, which contains the ratio decidendi reasoning. The Court's review is further divided into the "Relevant principles" and the "Application of the principles to the facts of the case" parts. So-structured reasoning concludes with the operative part of the decision. The decisions are not always subdivided to the same number of sections with the exact same titles. However, the main logic of the structure persists.

One of the main characteristics of the judicial reasoning could be in short described with: "*da mihi facta, dabo tibi ius*" (give me the facts, I will give you the law). Namely, in order to any court to decide on the matter it must first have the clear factual basis, which is then connected to the relevant law that has to be applied in the process of subsumption.[188] However, the specialty of the constitutional courts and the international court as the ECtHR or ECJ (especially when the fundamental rights are concerned) lies in the fundamental focus on the construction of the upper premise of the judicial decision-making. Fact-finding part of the judicial procedure happens before the domestic courts and the ECtHR is in general bind by the established facts (as often in law, there are also important exceptions; for example, in the refugees cases the Court stated that it can obtain relevant information also *proprio motu*). The focus before the Court is therefore on the applying relevant law to the given facts of the case. However, the facts are in general considered broader before the Court as they include also legal arguments of domestic courts.

188 See for example Pavčnik, 2008, pp. 557–572.

The very structure of the decisions of the ECtHR reveals these and other characteristics and styles of reasoning. The process of subsumption is, for example, rather clearly recognizable in the following subtitles of the parts of decisions:

"2. The Court's assessment

a) Relevant principles
/…/
b) Application of the principles to the facts of the case".[189]

The above-described initial parts of the decision, such as "Relevant domestic law and practice", is not the only occasion where the Court uses the illustrative style. It is quite frequent also in the later "As to the law" / "The Law" part of the decisions, where the points of the applicant and the government are presented. As the summary of these must be as accurate as possible, any other style of reasoning (than the one we named hereby as illustrative) would be inappropriate. However, in the parts that contain the Court's assessment, the Court often polemicizes with the presented government's and applicant's position by serving the reasons why it follows them or depart from them.[190] This style of reasoning is highly discursive and dialectical.

An example of highly discursive style of reasoning is the one where in reviewing the issue of whether the measure had a sufficient basis in domestic law, the Court first found that none of the concrete legislative provisions was explicitly referred to in the domestic court's judgments. Then it stressed: "However, in the light of the available materials, and notably, the Government's observations, the Court is prepared to accept that collection, storage, and other use of the applicant's mental health had some basis in domestic law."[191] The cited text demonstrates that it was not the Court's review of the reasoning of the domestic court's judgments from the point of view of the Convention which has been decisive but the presented materials and Government's position in the procedure before the ECtHR. These arguments were deemed as decisive by the Court.

An example of highly discursive style of reasoning is also the finding of the Court that there is no dispute regarding a certain issue between the applicant and the Government. This is more so since such finding of the Court substitutes the reasons which would be given if there would be a dispute, which are in fact the only valid reasons vis-à-vis the Convention.[192]

189 See for example Płaza v. Poland, § 70–75.

190 "The Court finds that the Government have not submitted any convincing arguments in the instant case which would require the Court to distinguish it from its established case-law." See Švarc and Kavnik v. Slovenia, § 22.

191 Surikov v. Ukraine, § 79.

192 The example would be: "The Court notes at the outset that it is not in dispute between the parties that the applicant's criminal conviction constituted an interference with the exercise of his right to freedom of expression, as guaranteed by Article 10 of the Convention. That is also the Court's opinion." See Morice v. France, § 141.

The discursive reasoning is not in all cases connected with the material (i.e., substantial) arguments. Sometimes, it can be linked to rather procedural aspects of the reasoning. Such example is a question regarding the burden of proof and whether this requirement has been fulfilled.[193]

The Court's reasoning is on the other hand not always discursive and detailed. Rarely it resembles more of quasi-ex cathedra statements. However, in most such cases, this style of argumentation is used when the stated is obvious or seems to be generally accepted/known and therefore needs no further explanation.[194] Where the Court's statement is obvious and therefore comprises only a sentence or two, this is expressed by, for example, citing "the very nature" of the issue at hand.[195] In some instances, however, the very concise reasoning evokes the impression that not all the criteria have been presented in detail and transparently.[196]

Besides citing the precedents, one of the main characteristics of the Court's reasoning is the application of several tests,[197] standards and argumentative forms of review. The aim of such reasoning is clear: to achieve the objectivity, foreseeability and generality (as the opposition to casuistic adjudicating) and to demonstrate the rationality of the decision-making process. Turning to various, more or less complicated forms and assessment steps of the review, also contributes to the structure and systematicity of the reasoning. It comes as no surprise that often these arguments have a decisive weight in the reasoning of the decisions. These tests are not only formal forms that would be applicable to any right and issue. They are often content-specific and

193 "In this connection, the Court notes that the Government failed to adduce any case-law of the domestic courts to show that a civil action for the protection of personal rights brought against the State Treasury or an action for compensation for non-pecuniary damage under Article 448 of the Civil Code could be successfully invoked /…/." See Płaza v. Poland, § 56.

194 For example: „In view of the submissions of the applicant in the present case and of the grounds on which it has found a violation of Article 8 of the Convention, the Court considers that there is no need to examine separately the complaints under Article 13 of the Convention." See Petri Sallinen and Others v. Finland, § 110.

195 "The Court notes that the information at stake in the present case concerned an indication that in 1981 the applicant had been certified as suffering from a mental health related condition. The Court concludes that such information by its very nature constitutes highly sensitive personal data regardless of whether it was indicative of a particular medical diagnosis.« See Surikov v. Ukraine, § 75. "However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State." See Stubbings and Others v. the United Kingdom, § 50.

196 "The Court observes that the impugned sets of proceedings lasted, respectively, one year and ten months before two judicial instances and two years and two months, also before two judicial instances.
Having regard to the criteria referred to above and to the circumstances at issue, the Court is of the view that the length of the proceedings concerned did not exceed what could be considered reasonable, due regard being had to the fact that parent-child proceedings require to be handled expeditiously." See Płaza v. Poland, § 49, 50.

197 For example, the objective and subjective test of impartiality; the well-known test of proportionality (the pressing social need; necessary in a democratic society; the proportional interference in comparison to the legitimate aims pursued), the legitimate aims test, the standard of quality of law (in the framework of "in accordance with law" requirement) and many others.

linked with developed substantial legal standards. Therefore, they are not merely the tool for subsumption, but also a method for interpretation of Convention's provisions.

The Court often adds also other, strengthening and defining arguments and reasons to the decisive ones. And often does it explicitly with the conjunctions as "moreover", "lastly", "ln addition",[198] "furthermore", "it should also be borne in mind"[199] etc. An example of a complete strengthening argument goes as follows: "This approach finds support also in the jurisprudence of the United Nations Human Rights Committee and, in particular, of the Inter-American Court of Human Rights, which, though under different provisions, accepted jurisdiction *ratione temporis* over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction /…/."[200]

The above-mentioned aim to achieve the foreseeability and generality in some cases remains unattainable as the strong casuistic element is present. For example, in the following case the Court explicitly stated:

> "The Court takes the view, however, that the very singular context of the case cannot be overlooked. /…/."[201]

The Court in some cases explicitly relativizes the strict standards of review. The purpose of such reasoning must be taken into account. It is welcoming that this is transparent. However, it could in the extreme lead to the detriment of the foreseeability of the Convention interpretation and decision-making. Such an approach seems to be less problematic when it is aimed to wider the access to the court or to guarantee a wider scope of the protection.[202]

Lastly, in the analysis the examples of rather non-legal and/or to some extent unconventional (unusual) style of reasoning has been detected as well:

> "In any event, it is hard to understand how the decision to declare the application admissible could "prejudice the assessment" of the Grand Chamber."[203]
> "What strikes one first when examining the circumstances surrounding Neumeister's second detention is that /…/. Lastly, it is indeed disappointing that the trial was not able to commence before /…/, and even more disappointing that, following such a long investigation, /…/. Neither does the Court believe that the course of the investigation would have been accelerated, if it had been allocated to more than one judge, even supposing that this had been legally possible."[204]

198 See for example Scoppola v. Italy, § 71, 76, 142.
199 See Leander v. Sweden, § 55, 84.
200 See Šilih v. Slovenia, § 160.
201 Morice v. France, § 84. The emphasis added by the author.
202 »The rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism.« See Scoppola v. Italy, § 69.
203 See Scoppola v. Italy, § 59. Emphasis added by the author.
204 See Neumeister v. Austria, § 8, 20, 21. Emphasis added by the author.

> "The Court is of course aware that the systematic terror applied to consolidate communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. /…/ Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of communism, such emotions cannot be regarded as rational fears. /…/."[205]

3.4.2. Concluding on the characteristics of the decision-making of the ECtHR (and ECJ)

The methods of the interpretation, the reasoning style and characteristics of decision-making clearly resonate the international-law / supranational-law position of the ECtHR (and ECJ). The ECtHR often sails between Scylla and Charybdis of the status quo regarding the level of international protection of human rights on the one hand and the too progressive and therefore self-endangering adjudicating that would be labelled by some as judicial activism.[206]

The choice of the methods of the interpretation of the Convention and the style of the reasoning is often affected by the above presented challenge: the Court regularly reviews the broader consensus among the Convention parties and also refers to their constitutional traditions and other relevant legal sources. On the basis of the comparative arguments it then determines, for example, the strictness of the review on the case-by-case basis (this is mostly done by using the margin of appreciation concept) as it would try to find out how high it is capable to push the bar of protection of human rights at stake in order not to overstep the Rubicon.[207]

The fundamental interpretative tool of the Court are the precedents, which can be seen already from the structure of the decisions. Precedents are of the decisive importance especially in the parts of the decisions where the general principles are presented and construed, which are then applied to the facts of the case in hands. However, the decisive arguments are not delivered by the Court only via the precedents, but often also through the reasoning with the well-established legal standards, tests and principles.

The finding that the decisive reasons are delivered via the precedents and argumentative forms of reasoning leads also to the conclusion on the style of reasoning

205 See Vajnai v. Hungary, § 57.

206 This challenge is illustrated by the following reasoning of the Court: "While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I). Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved /…/ A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Stafford,* cited above, § 68, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI)." See Scoppola v. Italy, § 104.

207 The telling is in our view the case of Stubbings and Others v. the United Kingdom, see § 54–56.

pursued by the Court. There is no doubt that the values of objectivity, rationality, coherence, foreseeability and generality of the adjudicating are being pursued.

5. Conclusion

As emphasized, our approach in studying the selected decisions of the Slovenian Constitutional Court on the one hand, and the ECtHR (and ECJ) case law on the other, was based on a common methodology, but we had to adjust its application due to the differences between the two courts. Indeed, the research has revealed significant differences between both courts regarding characteristics of their decision-making and their style of reasoning and adjudicating. However, there are also important similarities in the adjudication of both courts which are primarily a consequence of the fact that they both decide upon fundamental rights violations.

For example, there are considerable differences between the Constitutional Court and the ECtHR in the type of cases they decide upon and the way they deal with the cases as well as in the structure of their decisions, which is a consequence of the differences in their jurisdiction. Commonly, the Constitutional Court's decisions and orders contain the statement of the legal basis for deciding, the operative provisions, the statement of reasons and, at the very end, the statement of the composition of the Constitutional Court which reached the decision. A decision also includes a statement on the results of the vote and the names of the Constitutional Court judges who voted against the decision, the names of the Constitutional Court judges who submitted separate opinions, and the names of the Constitutional Court judges who were disqualified from deciding.

The characteristics of decision-making of the Constitutional Court largely depend on the type of a case. A norm control proceeding may be initiated by the submission of a written request by the applicants determined by the Constitutional Court Act or by a Constitutional Court order on the acceptance of a petition to initiate a review procedure, which may be lodged by anyone who demonstrates legal interest. In the latter type of cases, prior to adjudicating on the merits of a case, the Constitutional Court examines the petition, determining whether the petitioner has demonstrated legal interest. In the reasoning of its final/decisions in norm control proceedings, the Constitutional Court first provides a summary of the allegations of petitioners or applicants and then gives reasons for the decision on the (un)constitutionality of the challenged provisions of laws or other general acts. The Court carries out the review of constitutionality on the basis of the test of legitimacy, which entails an assessment of whether the legislature or other law-giving entity pursued a constitutionally admissible objective, and on the basis of the strict test of proportionality, which comprises an assessment of whether the interference was appropriate, necessary, and proportionate in the narrower sense.

In the constitutional complaint cases, the characteristics of decision-making of the Constitutional Court depend on the characteristics and peculiarities of proceedings in this type of cases. Prior to deciding on the merits of a case, the Constitutional Court decides in a panel of three judges at a closed session whether to initiate proceedings. The panel decides on the acceptance or rejection of the constitutional complaint in a fashion and according to criteria determined by the Constitutional Court Act. When deciding on the merits of a case, the Constitutional Court either dismisses a constitutional complaint as unfounded or grants it and in whole or in part annuls or abrogates the individual act, and remands the case to the authority competent to decide thereon. In the reasoning of its orders concerning the admissibility of a constitutional complaint, the Constitutional Court summarizes the proceedings before the courts of general jurisdiction, lists the decisions that are challenged by the constitutional complaint, presents the complainant's allegations and gives reasons for the decision regarding the admissibility of a constitutional complaint. It also clarifies the reasons for suspension if in the procedure for examining the constitutional complaint the challenged individual act has been temporary suspended. In the reasoning of its final/substantive decisions, however, the Constitutional Court first summarizes once again the proceedings before the regular courts and lists the decisions that are challenged by the constitutional complaint. It then presents the complainant's allegations and arguments in more detail, while also referring to the challenged decisions and their statements. In the main section(s) of the final decision's reasoning, the Constitutional Curt reiterates the key allegations of the complainant, adjudicates on their merits and provides a detailed argumentation of its decision.

In its judgments, the ECtHR first makes in sections called "Procedure" and "As to the Facts" an overview of the procedure and circumstances of the case and of the "Relevant domestic law and practice", which may include also the case law of domestic and other international fora. After the initial parts follow the "As to the law" part and the part titled "Alleged violation of Article /…/" where the applicant's position is presented. This is followed firstly by the procedural aspects of the complaint ("Admissibility") and secondly with the "Merits". The merits part starts with the presentation of positions of the parties to the procedure ("The parties' submissions") and continues by "the Court's assessment", which contains the reasoning. Although the decisions are not always subdivided to the same number of sections with the exact same titles, commonly, the Court's review in this part is further divided into the "Relevant principles" and the "Application of the principles to the facts of the case" parts. So-structured reasoning concludes with the operative part of the decision (in contrast to the Constitutional Court's decisions, the operative provisions are at the end of a judgement).

The reasoning style and characteristics of decision-making clearly resonate the supranational-law position of the ECtHR. In the decision-making process, the fundamental focus of the ECtHR seems to be in the construction of the upper premise of the judicial decision-making, which is also characteristic of decision-making of the Constitutional Court. Fact-finding part of the judicial procedure happens before the

domestic courts. Generally, the ECtHR is bind by the established facts, but, as often in law, there are also important exceptions. The focus before the Court is therefore on the applying relevant law to the given facts of the case. However, the facts are considered broader before the Court as they include also legal arguments of domestic courts.

While the Court's style of reasoning is similar in the individual and state complaints proceedings, it differs in the different parts of a judgement. While in the initial part of the judgement the style of reasoning is illustrative and descriptive, in the later parts it becomes more of a prescriptive and normative nature. This is also characteristic of the Constitutional Court. Namely, in order to decide on the matter the both courts must first have the clear factual basis, which is then connected to the relevant law that has to be applied in the process of subsumption. In the part of a judgement that contain the Court's assessment, the ECtHR often polemicizes with the presented government's and applicant's position by serving the reasons why it follows them or depart from them. Here the style of reasoning is highly discursive and dialectical, which, in our view, applies – perhaps to a slightly lesser extent – also to the main part of the reasoning in the Constitutional Court' decisions (i.e., in both main types of cases).

The length of the decisions and their reasoning depends on the substance and complexity of each individual case. While the majority of final decisions of the Constitutional Court comprise on average between seven and fifteen pages, in most cases judgements of the ECtHR are slightly longer. Occasionally they may have thirty or even forty pages.

Regarding the frequency and weight of the used interpretative tools we found some important similarities in the case law of both courts. When reasoning their decisions and determining the meaning of the Constitution/Convention, the most frequently deployed method is the *interpretation on the basis of case law of each court.* Regarding this method of interpretation, the most frequently used by both courts are *references to specific previous decisions as precedents*. The frequency and total number of deployments of other types of domestic systemic arguments and methods of interpretation is significantly smaller in the case law of both courts.

Another systemic interpretative technique frequently used by both courts is *a contextual interpretation in a narrow and/or broad sense*. In the selected case law of the Constitutional Court and the ECtHR this method was found in almost every decision. However, in the case law of both courts, this method is often combined with referring to specific previous decisions as precedents. This is no surprise as both the systemic interpretation in general and the contextual interpretation in particular are used in order to substantially concretize and specify vague provisions of the Constitution/Convention.

In general, the *interpretation of fundamental rights on the basis of international treaties* (other than the Convention) has been deployed very rarely by the ECtHR and not very often by the Constitutional Court, at least not for purposes of direct interpretation of the Constitution/Convention. However, in the cases where the refugees'

rights were concerned, both courts have made numerous references to other international treaties and EU law and used them as an interpretive tool. This led us to a conclusion that the frequency of the application of individual methods of interpretation depends also on the subject matter.

Among different types of grammatical (textual) interpretation, no *syntactic interpretation* has been identified and the *interpretation based on an ordinary meaning of words* was deployed relatively rarely in the selected case law of both courts. Similarly, the *non-legal professional interpretation* has not been identified in our sample of the Constitutional Court's case law and is virtually non-existent in the selected case law of the ECtHR (it has not occurred in the framework of direct interpretation of the text of the Convention). The *legal professional (dogmatic) interpretation*, however, has been much more frequently used by both courts.

Somewhat surprisingly *logical arguments* are rather rare or even non-existent in the selected case law of both courts as well. Among these arguments, although very rarely, both courts have used *argumentum a contrario*. The analyses of the ECtHR's selected judgements identified examples of *argumentum ad absurdum* and *argumentum a fortiori*, which were not identified in the decisions of the Constitutional Court. While *argumentum a maiore ad minus* has been used several times by the Constitutional Court, it has not been identified in the judgements of the ECtHR, not even as a tool of judicial subsumption.

The study of the selected case law of both courts revealed a moderate occurrence of the *teleological interpretation*, if considered in a narrow sense. The analyses also discerned that in some cases it is not easy to distinguish between contextual, historical and teleological interpretation, since the latter, in a broad sense, includes all arguments referring to the purpose, meaning, function, aim, etc. of the Constitution/Convention.

Altogether, some interpretational tools in some cases have not been detected to be applied for the purpose of a direct interpretation of the Constitution/Convention, however, they have been deployed in the subsumption to the facts of the case in hand. This, for example, refers to the interpretation by the ECtHR of Convention on the basis of domestic statutory law and citations of the ECtHR of the case law of Constitutional courts. Last but not least, perhaps the most significant difference between the two courts concerns the use of arguments based on scholarly works. While being the third most frequently used interpretative technique in the selected decisions of the Slovenian Constitutional Court, this method is virtually non-existing in the selected judgements of the ECtHR.

Besides using different methods/techniques of interpretation and argumentation, one of the main characteristics of the reasoning style of both courts is the application of several tests, standards and argumentative forms of review. By deploying them, both courts try to achieve the objectivity, foreseeability, generality and rationality of the decision-making process. Interestingly, both courts in some cases explicitly relativize the strict standards of review. Such approach to reasoning is aimed to wider the access to the courts or to guarantee a wider scope of the protection. However, it

could in the extreme lead to the detriment of the foreseeability of the Constitution/ Convention interpretation and decision-making of the courts. In other words, both courts often sail between Scylla and Charybdis of the status quo regarding the level of national and international protection of human rights on the one hand and the too progressive adjudicating that could be labelled as judicial activism.

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List of selected decisions

1.	Decision Up-1293/08 of the Constitutional Court, dated 6 July 2011	Allan v. UK, judgement of 5 November 2002
2.	Decision U-I-109/10 of the Constitutional Court, dated 26 September 2011	Vajnai v. Hungary, judgement of 8 October 2008
3.	Decision Up-457/09 of the Constitutional Court, dated 28 September 2011	Roşca v. Moldavia, judgement of 22 March 2005
4.	Decision U-I-292/09, Up-1427/09 of the Constitutional Court, dated 20 October 2011	Vilvarajah and others v. the United Kingdom, judgement of 30 October 1991
5.	Decision Up-570/09 of the Constitutional Court, dated 2 Februar 2012	Novaya Gazeta V Voronezhe v. Russia, judgement of 21 December 2010
6.	Decision Up-444/09 of the Constitutional Court, dated 12 April 2012	Benediktsdóttir v. Iceland, judgement of 16 June 2009
7.	Decision U-I-24/10 of the Constitutional Court, dated 19 April 2012	Engel and others v. Netherland, judgement of 8 June 1976
8.	Decision Up-21/11 of the Constitutional Court, dated 10 October 2012	Amuur v. France, judgement of 25 June 1996
9.	Decision U-I-212/10 of the Constitutional Court, dated 14 March 2013	P. B. and J. S. v. Austria, judgement of 22 July 2010
10.	Decision Up-336/13 of the Constitutional Court, dated 16 May 2013	Neumeister v. Austria, judgement of 27 June 1968
11.	Decision U-I-40/12 of the Constitutional Court, dated 11 April 2013	Buck v. Germany, judgement of 28 April 2005
12.	Decision Up-383/11-26 of the Constitutional Court, dated 18 September 2013	Petri Sallinen and others v. Finland, judgement of 27 September2005
13.	Decision Up-1056/11 of the Constitutional Court, dated 21 November 2013	Płaza v. Poland, judgement of 25 January 2011

14.	Decision U-I-155/11 of the Constitutional Court, dated 18 December 2013	T. I. v. United Kingdom, judgement of 7 March 2000
15.	Decision Up-540/11 of the Constitutional Court, dated 13 February 2014	M. S. S. v. Belgium and Greece, judgement of 21 January 2011
16.	Decision U-I-115/14, Up-218/14-45 of the Constitutional Court, dated 21 January 2016	K. U. v. Finland, judgement of 2 December 2008
17.	Decision Up-1177/12, Up-89/14-15 of the Constitutional Court, dated 28 May 2015	Stagno v. Belgium, judgement of 7 July 2009
18.	Decision Up-879/14 of the Constitutional Court, dated 20 April 2015	*Švarc and Kavnik v. Slovenia*, judgement of 8 February 2007
19.	Decision U-I-122/13 of the Constitutional Court, dated 10 March 2016	Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen, C-92/09 and C-93/09, dated 9 November 2010
20.	Decision Up-680/14 of the Constitutional Court, dated 5 May 2016	*Šilih v. Slovenia*, judgement of 9 April 2009
21.	Decision Up-450/15 of the Constitutional Court, dated 2. June 2016	Stubbings and others v. United Kingdom, judement of 22 October 1996
22.	Decision Up-1006/13 of the Constitutional Court, dated 9 June 2016	Salov v. Ukraine, judgement of 6 September 2005
23.	Decision Up-217/15 of the Constitutional Court, dated 7 July 2016	Švarc and Kavnik v. Slovenia, judgement of 8 May 2007
24.	Decision Up-402/12, U-I-86/12 of the Constitutional Court, dated 6 July 2016	Niedbala v. Poland, judgement of 4 July 2000
25.	Decision Up-613/16 of the Constitutional Court, dated 28 September 2016	Saadi v. Italy, judgement of 28 February 2008
26.	Decision U-I-246/14 of the Constitutional Court, dated 24 March 2017	Leander v. Sweden, judgement of 26 March 1987
27.	Decision Up-108/16 of the Constitutional Court, dated 6 December 2017	Scoppola v. Italy (No. 2), judgement of 17 September 2009

28.	Decision Up-793/15 of the Constitutional Court, dated 10 October 2018	Morice v. France, judgement of 23 April 2015
29.	Decision U-I-152/17 of the Constitutional Court, dated 4 July 2019	Surikov v. Ukraine, judgement of 26 January 2017
30.	Decision U-I-83/20 of the Constitutional Court, dated 27 August 2020	Guzzardi v. Italy, judgement of 6 November 1980

Methods			Frequency (number)	Frequency (%)	Main types frequency (number and %)	Weight (number)	Weight (%)	Main types weight (number and %)
1	1/A	a)	10	4%	29/30 (97%)	12	1%	107 (11%)
		b)	0	0%		0	0%	
	1/B	a)	27	###		85	9%	
		b)	7	3%		10	1%	
	1/C		0	0%		0	0%	
2	2/A		0	0%	3/30 (10%)	0	0%	6 (1%)
	2/B		2	1%		5	1%	
	2/C		0	0%		0	0%	
	2/D		1	0%		1	0%	
	2/E		0	0%		0	0%	
	2/F		0	0%		0	0%	
3	3/A		26	###	30/30 (100%)	89	9%	466 (50%)
	3/B		18	7%		50	5%	
	3/C	a)	30	###		##	###	
		b)	16	7%		25	3%	
		c)	0	0%		0	0%	
	3/D	a)	1	0%		1	0%	
		b)	5	2%		21	2%	
		c)	0	0%		0	0%	
	3/E		0	0%		0	0%	
4	4/A		21	9%	30/30 (100%)	61	6%	232 (24%)
	4/B		30	###		##	###	
	4/C		8	3%		12	1%	
	4/D		1	0%		1	0%	
5			9	4%	9/30 (30%)	24	3%	24 (2%)
6	6/A		0	0%	1/30 (3%)	0	0%	1 (0%)
	6/B		0	0%		0	0%	
	6/C		1	0%		1	0%	
	6/D		0	0%		0	0%	
7			25	10%	25/30 (83%)	102	11%	102 (10%)
8			4	2%	4/30 (13%)	11	1%	11 (1%)
9			3	1%	3/30 (10%)	8	1%	8 (1%)

Legend:

1. Grammatical (textual) interpretation
1/A. Interpretation based on ordinary meaning
a) Semantic interpretation
b) Syntactic interpretation
1/B. Legal professional (dogmatic/doctrinal) interpretation:
a) Simple conceptual dogmatic/doctrinal interpretation
b) Interpretation on the basis of legal principles
1/C. O*ther professional interpretation*
2. Logical (linguistic-logical) arguments
2/A. Argumentum a minore ad maius
2/B. Argumentum a maiore ad minus
2/C. Argumentum ad absurdum
2/D. Argumentum a contrario / arguments from silence
2/E. Argumentum a simili and, within it, analogy
2/F. Interpretation according to other logical maxims
3. Domestic systemic arguments
3/A. *Contextual interpretation, in a narrow and broad sense*
3/B. Interpretation of constitutional norms on the basis of domestic staturory law
3/C. Interpretation of the constitution on the basis of case law of the Constitutional Court
a) References to specific previous decisions of the Constitutional Court (as "precedents")
b) References to the "practice" of the Constitutional Court
c) References to abstract norms formed by the Constitutional Court (e.g., the rules of procedure)
3/D. Interpretation of the Constitution on the basis of the case law of ordinary courts
a) Interpretation referring to the practice of ordinary courts (not of single case decisions)
b) Interpretation referring to individual court decisions (as "precedents" in the judiciary)
c) Interpretation referring to abstract judicial norms (directives, principled rulings, law unification decisions, etc.)
3/E. Interpretation of constitutional provisions and fundamental rights on the basis of normative acts of other domestic state organs
4. External systemic and comparative law arguments:
4/A. Interpretation of fundamental rights on the basis of international treaties
4/B. Interpretation of fundamental rights on the basis of individual case decisions or case law ('judicial' practice) of international fora.
4/C. Comparative law arguments: e.g., references to norms or case decisions of a particular foreign legal system
4/D. Other external sources of interpretation (e.g., customary international law, ius cogens, etc.)
5. Teleological / objective teleological interpretation
6. Historical / subjective teleological interpretation (based on the *intention* of the constitution-maker):
6/A. Interpretation based on ministerial / proposer justification
6/B. Interpretation based on draft material: references to travaux préparatoires / Materialen / and legislative history
6/C. In general, references to the intention, will etc. of the constitution-maker
6/D. Other reasons based on the circumstances of making or modifying/amending the constitution or the constitutional provision in question
7. Arguments based on jurisprudence / scholarly works
8. Interpretation in light of general legal principles
9. Substantive interpretation / non-legal arguments

Frequency (number): Number of decisions in which a method appears
Main types frequency: Number of decisions in which main methods appear through their sub-types
Weight (number): Total number of occurrences of a method within a decision
Weight (%): Total number of occurrences of a method in %
Main types weight (number and %): Total number and % of occurrences of main methods through their sub-types

Chapter III

Interpretation of Fundamental Rights in Hungary

Adél Köblös

1. The Constitutional Court

1.1. The Constitutional Court and its members

The Constitutional Court is a fifteen-member body, operating separately from the legislature, the government, and the judiciary. It is defined in Article 24 of the Fundamental Law as the principal organ for the protection of the Fundamental Law. The basic provisions concerning its members, tasks, powers, and procedure can be found in the Fundamental Law itself, whereas the detailed rules are regulated in Act CLI of 2011 on the Constitutional Court (Act on the CC) and in the Rules of Procedure[1] adopted by the plenary session of the Constitutional Court in the form of a resolution.

The Members of the Constitutional Court are elected by a two-thirds majority of the Members of Parliament for a term of twelve years,[2] and the same person cannot be re-elected. The person to be elected as Justice of the Constitutional Court is proposed by a nominating committee consisting of Members of Parliament.[3] Eligibility

1 Decision 1001/2013 (II. 27.) of the plenary session of the Constitutional Court of Hungary on the Constitutional Court's Rules of Procedure.

2 Article 24 (8) of the Fundamental Law.

3 See Decision 14/2019 (V. 28.) of the Hungarian National Assembly on setting up the ad hoc committee for the nomination of members of the Constitutional Court. Even before the entry into force of the Fundamental Law, the composition of the body had changed significantly, with the number of members being increased from 11 to 15 by the legislature. As a result of the two-thirds

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for election includes reaching the age of 45 years, a degree in law, and being a scholar of jurisprudence of outstanding knowledge (university professor or doctor of the Hungarian Academy of Sciences) or having at least twenty years of professional work experience in the field of law.[4] A majority or two-thirds of the votes of the Members of Parliament isauto-comp required to elect the president from among the members of the Constitutional Court.[5]

Justices of the Constitutional Court may not be members of political parties and may not engage in political activities.[6] Justices are independent, subordinate only to the Fundamental Law and the Acts of Parliament.[7] The mandate of the Justices of the Constitutional Court is incompatible with any other position or mandate in state or local government administration, in society, or with any political or economic position, except for positions directly related to scientific activity or work in higher education, provided that such positions do not interfere with their duty as Members of the Constitutional Court. With certain narrow exceptions, a Member of the Constitutional Court may not engage in any other gainful occupation.[8]

1.2. Powers of the Constitutional Court

The Constitutional Court's powers are diverse.[9] The Constitutional Court's competence is restricted by Article 37 (4) of the Fundamental Law, which states that, as long as government debt exceeds half of the total gross domestic product, the Constitutional Court may review only in a very narrow scope—in the procedures of judicial initiative, constitutional complaint, or abstract posterior normative control—the Acts on the central budget, implementation of the central budget, central taxes, duties and contributions, customs duties, and central conditions for local taxes.[10]

parliamentary majority of the ruling party alliance, the Constitutional Court is now composed exclusively of justices who were supported by that party alliance, i.e. who 'tended to sympathise with the ruling parties'. The change in the composition of the body had an impact on interpretation methods even before 2010. See Jakab and Fröhlich, 2017, pp. 397, 431. With regard to the changes taking place as from 2010, see Szente, 2015, pp. 153–159; Halmai, 2015, pp. 105–109.

4 Section 6 of the Act on the CC. In the past, university professors formed the majority of the body; at present, there tend to be more lawyers with other professional experience (judges, attorneys-at-law, professionals in public administration).

5 On the 'traditionally strong position' of the president, see Gárdos-Orosz, 2016, p. 445.

6 Article 24 (8) of the Fundamental Law.

7 Section 5 of the Act on the CC.

8 Section 10 of the Act on the CC.

9 See Gárdos-Orosz, 2016, p. 448.

10 Such review may be based on the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, as well as the compliance with the procedural requirements laid down in the Fundamental Law and applicable to adopting and promulgating Acts of Parliament. See Decision 29/2017 (X. 31.) of the Constitutional Court on the 'budgetary' turn.

The Constitutional Court typically proceeds on the basis of a petition[11] by those entitled to submit one, and exceptionally it acts *ex officio* (e.g. to examine whether a law is in conflict with an international treaty).

On the one hand, on the initiative of the bodies and persons defined in the Fundamental Law, the Constitutional Court carries out abstract norm control (i.e. it examines Acts of Parliament adopted but not promulgated for their conformity with the Fundamental Law, as ex-ante review)[12] and reviews the conformity of laws with the Fundamental Law (abstract ex post review).[13] On the other hand, the Constitutional Court also has powers relating to specific cases (specific norm control). Thus, on a judicial initiative, it examines whether the law applicable in a specific case is contrary to the Fundamental Law or an international treaty.[14]

Persons affected by a violation of a right guaranteed by the Fundamental Law[15] may also initiate proceedings before the Constitutional Court. On the basis of a constitutional complaint, the body examines, on the one hand, conformity with the Fundamental Law of the law applied in the judicial decision (Section 26 (1) of the Act on the CC) and, on the other hand, conformity with the Fundamental Law of the judicial decision itself (Section 27 of the Act on the CC).[16] The Court may switch from one procedure to the other.[17] The Constitutional Court's procedure may exceptionally be initiated by the affected party if—attributable to the application of a provision of the law contrary to the Fundamental Law, or when such provision becomes effective—their rights have been violated directly, without a judicial decision. In such cases, the constitutional complaint may be lodged within 180 days of the entry into force of the provision of the law challenged.

For any type of constitutional complaint, a precondition is the absence of procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy. Another condition is that the law or judicial decision violates the affected party's rights guaranteed in the Fundamental Law. The scope of rights guaranteed by the Fundamental Law is broader than fundamental rights (the Freedom and Responsibility section of the Fundamental Law), including the prohibition of retroactive legislation[18] and application of the law

11 Legal representation is not mandatory in the procedure.

12 Article 6 of the Fundamental Law, Sections 23-23/A of the Act on the CC. The Fundamental Law or an amendment to the Fundamental Law that has been adopted but not yet promulgated may also be subject to *ex ante* review to determine whether the procedural requirements of the Fundamental Law have been complied with.

13 Sections 24-24/A of the Act on the CC.

14 Section 25 of the Act on the CC.

15 In addition to the affected parties, the Act of Parliament also empowers the Prosecutor General to submit a constitutional complaint, if the person concerned is unable to defend their rights or if the violation of rights affects a larger group of persons. This has been unprecedented so far.

16 A constitutional complaint pursuant to Section 27 of the Act on the CC may be filed only against a judicial decision on the merits of the case or other judicial decision terminating the proceedings.

17 Section 28 of the Act on the CC.

18 Decision 3062/2012. (VII. 26.) of the Constitutional Court.

derived from the principle of the rule of law, or the freedom of contract[19] in relation to fair economic competition.

Further powers of the Constitutional Court include the following: examining the conflict of laws with international treaties;[20] examining the decision of the Parliament in connection with the ordering of a referendum;[21] giving an opinion in connection with the dissolution of a body of representatives operating in conflict with the Fundamental Law;[22] giving an opinion in connection with the operation of a religious community with legal personality in conflict with the Fundamental Law;[23] removing the President of the Republic from office;[24] resolving conflicts of competences;[25] examining local government decrees, public law regulatory instruments,[26] and decisions on the uniformity of the law;[27] and interpreting the Fundamental Law.[28]

With the entry into force of the Act on the CC (i.e. from 2012), the *actio popularis* associated with abstract posterior norm control ceased to exist, whereas the Constitutional Court was given the power to examine and annul judicial decisions that are contrary to the Fundamental Law. This has led to a significant reduction in the number of motions for abstract norm control,[29] which used to account for the largest share of cases.[30] At present, the vast majority of petitions are for constitutional complaints,[31] with most being for the review of the constitutionality of judicial decisions.[32]

19 Decision 3192/2012. (VII. 26.) of the Constitutional Court.
20 Section 32 of the Act on the CC.
21 Section 33 of the Act on the CC.
22 Section 34 of the Act on the CC.
23 Section 34/A of the Act on the CC.
24 Article 13 of the Fundamental Law, Section 35.
25 Section 36 of the Act on the CC.
26 Section 37 of the Act on the CC. According to Act CXXX of 2010 on Legislation, the normative decision and normative order are public law regulatory instruments. Bodies (e.g. the National Assembly, the Government, the Constitutional Court) may regulate their organisation and operation, activities, and programme of action by normative decisions. Single-person state leaders (e.g. President of the Republic, Prime Minister, Prosecutor General) may regulate in a normative order the organisation, operation, and activity of the organs managed, directed, or supervised by them.
27 The Curia guarantees the uniformity of the administration of justice by the courts, and it adopts uniformity of law decisions binding for the courts. In the uniformity of the law decision, the Curia interprets a legal provision, irrespective of the specific dispute or procedure. Uniformity of the law decisions are binding upon the courts.
28 Section 38 of the Act on the CC.
29 Between 2012 and 2020, over 100 abstract posterior norm control procedures were launched.
30 'Whereas previously the relationship between the executive and the legislature, i.e. between the legislature and the Constitutional Court, was more intense, the current legislation provides for a steady deepening of the relationship between the ordinary courts and the Constitutional Court.' Gárdos-Orosz, 2015, p. 449.
31 Between 2012 and 2020, approximately 700 constitutional complaints were filed under Section 26 (1) of the Act on the CC, while almost 2,500 constitutional complaints were filed against judicial decisions.
32 For a more detailed breakdown of cases, see Tóth, 2020, pp. 94–109; Tóth, 2018, pp. 99–106; and the website of the Constitutional Court: http://hunconcourt.hu/statistics.

The legal consequences that the Constitutional Court may apply are in accordance with their exercised powers. A provision found to be contrary to the Fundamental Law may not be promulgated in the event of a preliminary review. If the Constitutional Court examines a law that has already been promulgated, it annuls the provision that is contrary to the Fundamental Law, with the consequence that the annulled rule ceases to have effect on the day following the publication of the decision in the Official Gazette (if it has not entered into force, it cannot enter into force) and is not applicable from that day. The Constitutional Court may also decide on repealing a law or on the inapplicability of the annulled law in general, or in concrete cases, by departing from the above (i.e. retroactively, *ex tunc*, or from a future date, *pro futuro*), provided that the same is justified by the protection of the Fundamental Law, by the interest of legal certainty or by a particularly important interest of the entity initiating the proceedings.

Regardless of its power actually exercised, the Constitutional Court must order a review of criminal or misdemeanour proceedings that have been finally terminated if the nullity of the legal provision applied in the proceedings would result in a reduction or omission of the penalty or measure. In other cases, if, on the basis of a successful constitutional complaint, the Court excludes the application of a rule found to be contrary to the Fundamental Law (and annulled) in a specific case, the same can be enforced through an extraordinary remedy procedure.

For the sake of saving the law in force, the Constitutional Court may establish constitutional requirements enforcing the provisions of the Fundamental Law, with which the application of the examined law must comply. In doing so, it essentially establishes, with *erga omnes* effect, the scope of the constitutional interpretation of the provision of the law concerned. If the Constitutional Court establishes, in the course of its proceedings conducted, that the conflict with the Fundamental Law results from an omission on the part of the legislation, it shall establish the existence a conflict with the Fundamental Law resulting from an omission by the law-maker and call upon the organ that committed the omission to perform its task, by setting a time limit for the same.

If the Court finds that a judicial decision challenged in a constitutional complaint is in conflict with the Fundamental Law, it annuls the decision and, under the discretion of the Court, any other judicial or administrative decision that has been reviewed by that decision. Following the annulment, the procedure before the ordinary courts (authority) must be repeated to the extent (degree) necessary[33], in which case the constitutional issue must be dealt with in accordance with the decision of the Constitutional Court. If the decision of the Constitutional Court, including its

33 In civil and administrative cases, the Curia decides on further steps in non-litigious proceedings, e.g. ordering the court of first or second instance to conduct new proceedings and adopt a new decision (Sections 427 to 428 of Act CXXX of 2016 on the Code of Civil Procedure, Section 123 of Act I of 2017 on the Code of Administrative Procedure). In criminal cases, the case is automatically returned to the competent forum for repeating the procedure (Sections 632 to 636 of Act XC of 2017 on the Criminal Procedure).

reasoning, is not followed, then the new decision will be annulled by the Constitutional Court on the basis of a new constitutional complaint.[34]

There is no legal remedy against the decision of the Constitutional Court. The decision of the Constitutional Court is binding for everyone.

1.3. Main characteristics of the Constitutional Court's procedure

The Constitutional Court delivers its decisions in the plenary session, in panels, or acting as a single judge.

The Secretary General of the Constitutional Court examines in advance whether the petition received is suitable to initiate the Constitutional Court's proceedings, whether it complies with the requirements on the format and content of petitions, and whether there are no obstacles to the proceedings. If not, the single judge shall, on a proposal from the Secretary General, reject the application without considering the merits.[35]

Motions that have passed the first screening are assigned by the President to the rapporteur Justice of the Constitutional Court. Such assignment is not done according to a predefined automatism but at the discretion of the President, the criteria for which are not regulated by law (Rules of Procedure). In practice, the selection of the rapporteur is also influenced by the type of cases the relevant Justice of the Constitutional Court has dealt with in their professional career and the field of law they had worked in at an academic level. For example, constitutional complaints in criminal cases are often assigned to a Justice of the Constitutional Court who was formerly a criminal judge or a professor of criminal law.[36] A similar selection criterion can also be demonstrated where the Justice of the Constitutional Court does not have the relevant expertise in the case but their adviser does.

After assignment, the rapporteur Justice of the Constitutional Court submits the draft decision to the competent body.[37] Typically, the draft is not written by the Justices of the Constitutional Court themselves but by one of their advisers[38] according to their instructions. Although there is a uniform standard for the structure, form,

34 Decision 16/2016. (X. 20.) of the Constitutional Court.

35 Section 55 of the Act on the CC.

36 Among the selected decisions, this can be seen, for example, in Decision 4/2013 (II. 21.) of the Constitutional Court, the rapporteur of which was a professor of criminal law; Decision 28/2017 (X. 25.) of the Constitutional Court, the rapporteur of which had formerly been the deputy of the Commissioner for Fundamental Rights in charge of protecting the interests of future generations.

37 'The rapporteur Justice of the Constitutional Court has a particularly strong influence on the way the decision takes shape and the final content of the decision'. Gárdos-Orosz, 2016, p. 445.

38 Each Justice of the Constitutional Court is assisted by three permanent legal advisers, each with a law degree, who assist them in the work as determined by the Justice. The advisers are not selected through a competition, an exam, or any other similar procedure, but on the recommendation of the Justice of the Constitutional Court. It is common for advisers of a Justice of the Constitutional Court to be assigned to another Justice of the Constitutional Court after the expiry of the term of the first one. See Orbán and Zakariás, 2016, pp. 108–115.

and certain turns of phrase of the draft, the logical structure, wording, scope, and level of detail of the reasoning primarily reflect the style of the person drafting the document (the Justice of the Constitutional Court and/or the adviser). In light of what has been said in the body's discussion, the rapporteur will, if necessary, submit a new draft to the body, incorporating the proposals. This rarely implies rewriting the entire reasoning. However, changes may affect several important parts. If the rapporteur remains in a minority in the body with their draft, they may give back the case and the President shall assign it to another Justice of the Constitutional Court.

The plenary session shall be the principal body of the Constitutional Court, consisting of all the Members. The plenary session has a quorum if attended by at least two-thirds of the Members of the Constitutional Court, including the President or, if the President is prevented, the Vice President. Its decisions are passed by open ballot without abstention, requiring the majority of votes. In case of a tie vote, the President has the casting vote.

Only the plenary session may make decisions in the areas specified in the Act on the CC[39] and Rules of Procedure[40], such as the annulment of an Act of Parliament or a uniformity of law decision of the Curia, interpretation of the Fundamental Law, establishment of a conflict with the Fundamental Law manifested in an omission or a constitutional requirement, as well as in all cases where a decision by the plenary session is required owing to the social or constitutional importance or complexity of the case, the maintenance of the unity of constitutional jurisprudence, or another important reason.

Three panels composed of five members are in operation at the Constitutional Court. Their task is, on the one hand, to decide on the admissibility of constitutional complaints. In doing so, they examine whether the requirements for filing a constitutional complaint are met, such as the time limit for filing, petitioner's involvement, exhaustion of remedies, and absence of any 'adjudicated matter'.[41] They also take a position on the actually substantive question of whether the complaint conflicts with the Fundamental Law that is materially affecting a judicial decision, or an issue of constitutional law of fundamental importance. The panel acts on other matters that do not fall within the remit of the plenary session. The five-member panel itself, or the President of the Constitutional Court (upon or after case assignment), or five Justices of the Constitutional Court who are not members of the panel concerned, may request that the case be discussed by the plenary session, including the decision on admission in the case of a complaint, taking into account its constitutional importance, complexity, unity of the case law of the Constitutional Court, or other important reasons. The panel has quorum, with some exception, when all of its

39 Section 50 of the Act on the CC.
40 Rules of Procedure, Section 2.
41 See Bitskey and Török, 2015, pp. 131–154, 158–185, 192–216.

members are present, and its decisions are taken by open ballot, with majority vote deciding, without abstentions.

Any Member of the Constitutional Court who opposes the decision in the course of the voting, who does not agree with the decision of the Constitutional Court, may attach their dissenting opinion, along with a written reasoning, to the decision.[42] If the Justice of the Constitutional Court agrees with the holdings of the decision, but not with its reasoning, the Justice may attach to the decision their reasons that differ from those of the majority in the form of a concurring reasoning.

As a general rule, the proceedings of the Constitutional Court are not open to the public and are conducted in writing, without a personal hearing. The possibility of an oral hearing provided by law is rarely used by the Court; indeed, there has not been a public hearing. The Constitutional Court may invite organs and authorities concerned in the motion, and request courts, authorities, other public organs, institutions of the European Union (EU), or international organs that may be important for the adjudication of the petition to make a declaration, send documents, or give an opinion. Public bodies, social organisations, foundations, or churches may submit their views on the case in writing (*amicus curiae* submissions) without being asked to do so, at their request, and on the basis of a decision of the judge-rapporteur or panel. The Constitutional Court may also obtain an expert opinion, but this is exceptional in practice.

After a judicial procedure, the constitutional complaint must be submitted to the court of first instance, which forwards it to the Constitutional Court together with the contested court decision but without the court file. Although the Constitutional Court may request the court file, this file is relatively rarely used in practice.

2. Interpretation methods and style of the Constitutional Court of Hungary

2.1. Set of criteria for selecting the Constitutional Court decisions examined

In the present study, the primary criterion for selecting the decisions was that the relevant decision of the Constitutional Court (in its reasoning on the merits) should contain a significant reference to a judgement of the European Court of Human Rights (ECtHR). The research included only decisions of the plenary session[43]

42 Justices of the Constitutional Court often make use of this possibility. They have attached dissenting opinions and/or concurring reasonings to all the selected decisions.

43 The Constitutional Court decides on the merits of the case by means of a decision. It issues a ruling if it rejects the petition (including if it finds the constitutional complaint inadmissible) or if it refers the case to another authority or terminates the proceedings.

because of the decisive role played by this body in interpreting the Constitution. On average, around ten to fifteen decisions complied with these criteria on any given year. Another important point was the publication in the Magyar Közlöny (Hungarian Gazette): most of the decisions examined were published in this way.[44] Only two decisions not published in the Hungarian Gazette were included in the selection—as a curiosity.

A further criterion was that there should be at least one or two decisions from each year from 2012, when the Fundamental Law came into force, which should be the subject of study, and preferably relate to different fundamental rights and different types of cases. The latter aspect could only be applied to a limited extent, because the Constitutional Court has been keen on referring to a wide range of ECtHR judgements in the context of certain fundamental rights (e.g. right of assembly, fair trial, freedom of expression) but not in others.

Nineteen of the thirty Constitutional Court decisions selected were based on constitutional complaints. In fifteen cases, the decision of the court was challenged; in six cases, the law applied by the court was challenged; and in one case, the procedure was based on a direct complaint. Thus, there were cases where two complaints were made in a single motion. In six cases, the Constitutional Court ruled on a judicial initiative. One of these was a preliminary one and five were posterior norm control procedures. Two decisions were taken on the request for interpreting the Fundamental Law, with a single petition initially submitted by the Commissioner for Fundamental Rights. The Constitutional Court answered the questions raised in two sets, with the procedure being separate. The numbers indicated above by type of motion added up to more than thirty because there were decisions in which the Court decided on more than one type of motion, following a merger. As demonstrated, the selected cases were also dominated by constitutional complaints because, overall, the Constitutional Court receives significantly more complaints than any other petition.

Of the decisions, five were related to criminal cases, two to misdemeanours, seven to civil law, one to labour law, eleven to public administration (this category being mixed: social security, assembly, tax, competition), one to electoral law, and one to environmental law (i.e. either the underlying court proceedings were on such a subject or the legislation under examination fell into a relevant field of law). The interpretation of the Fundamental Law relates to the right of asylum, relations between Hungary and the EU, and transfer of competences.

In the selected decisions, the analysis did not solely rely on a specific fundamental right as basis. The scope also included decisions relating to the rule of law

44 Some of the decisions are obligatory to be published in the Hungarian Gazette under the Act on the CC (e.g. annulment of a law, interpreting the Fundamental Law). The Constitutional Court may order the publication of others for their importance. All the decisions of the Constitutional Court, with the exception of the decisions of the single judge, are published in the 'Az Alkotmánybíróság határozatai' *[Decisions of the Constitutional Court]*, the official journal of the Constitutional Court published once or twice a month.

[Article B)], the environment [Article P)], and the exercise of joint powers with the institutions of the EU [Article E)]. However, even in these decisions, there was a substantive relation with and relevant argumentations concerning fundamental rights.[45] The findings and conclusions drawn were therefore not limited to the interpretation of fundamental rights.

2.2. Role of grammatical interpretation in the decisions of the Constitutional Court

In its decisions, the Constitutional Court typically examines the text of the Fundamental Law to determine whether it can use in new cases its previous decisions delivered under the Constitution. This will be elucidated in details below. Once usability has been verified, the text has little role to play. Words had some significance in twelve decisions in total.

Such an example can be found in Decision 1/2013 (I. 7.) of the Constitutional Court, where it argued that 'the *text* of Article XXIII of the Fundamental Law also supports the interpretation that the scope of conditions of the right to vote set out herein constitutes a closed system'. From this, it concluded that exclusion from the right to vote is possible only in the cases expressly mentioned in Article XXIII of the Fundamental Law. Another example is Decision 2/2019 (III. 5.) of the Constitutional Court: the Constitutional Court, in relation to the exercise of its powers, underlined the following: 'as referred to in the *wording* of Article E) (2) of the Fundamental Law, the founding treaties are considered as international undertakings made by Hungary'.

The everyday meaning of words is rarely referred to by the Constitutional Court. It was not explicitly applied in any of the thirty decisions examined.[46] Ordinary interpretation can be inferred, for example, in the following cases: the Fundamental Law lays down respect for the inviolable and inalienable fundamental rights of humans ('of MAN' according to the Fundamental Law).[47] 'According to Article I (1) of the Fundamental Law, it shall be the primary obligation of the State to protect the inviolable and inalienable fundamental rights of humans. As the protection of

45 In support of its reasoning, the Constitutional Court also refers, for example, to the ECtHR's judgement where the basis of the examination is not a fundamental right. Thus, in Decision 28/2017 (X. 25.) of the Constitutional Court, the Constitutional Court sought to justify the applicability of the precautionary principle by arguing, among other things, that this principle is recognised and applied in international case law (ECtHR case Tătar v. Romania). Regarding the undeveloped methodology, see Jakab and Fröhlich, 2017, p. 421.

46 Although the Constitutional Court referred to the everyday meaning of the concept 'expressing one's opinion' contrasting it with its legal meaning, the argumentation is based on the latter. See below, Decision 1/2019. (II. 13.) of the Constitutional Court. In none of the thirty decisions did the Constitutional Court rely on the everyday meaning of the words explicitly.

47 Decision 6/2018. (VI. 27.) of the Constitutional Court, Decision 28/2017. (X. 25.) of the Constitutional Court.

fundamental rights is a primary obligation of the State, everything else can only be enforced afterwards'.[48]

Consideration of the legal meaning of words is important, although the Constitutional Court rarely mentions it by this name. In six decisions among the thirty, the legal meaning was explicitly used as a method of interpretation (e.g. on the freedom of expression or the protection of property rights, the right of assembly, or the concept of family[49]). In comparison, in three other decisions, the Constitutional Court took the strict legal meaning of terms used in the constitutional text as a basis.[50]

Thus, in the context of the freedom of expression, for example, the Constitutional Court stressed that the concept of expressing one's opinion is normative in nature, that its boundaries are not defined by speech itself in the everyday sense, and that the ordinary and constitutional meanings of the word do not overlap.[51] In defining the concept of family,[52] the Constitutional Court also drew on an earlier decision delivered under the Constitution, which distinguished between family in the blood and non-blood, i.e. one 'only' in the sociological and legal sense, although the relation between the sociological and legal sense was not clarified. At present, Article L) of the Fundamental Law provides a significant contribution to the concept of family in the (constitutional) legal sense.[53] With regard to the protection of property, case law is consistent in stressing that the sphere and means of constitutional protection of property does not necessarily follow the legal concepts of civil law[54], although it is built on these concepts, too.[55] The Constitutional Court has also attached the term 'criminal' with an 'autonomous' constitutional (fundamental rights) meaning, incorporating cases of tax law, competition law, and misdemeanours.[56]

Bearing in mind that grammatical interpretation also includes the use of legal doctrine[57], the legal meaning of words plays a greater role in interpretation than it

48 Decision 22/2016 (XII. 5.) of the Constitutional Court. On the importance of reasoning based on normative text, see Kéri and Pozsár-Szentmiklósi, 2017, p. 11.

49 Decision 20/2014. (VII. 3.) of the Constitutional Court, Decision 28/2014. (IX. 29.) of the Constitutional Court, Decision 5/2016. (III. 1.) of the Constitutional Court, Decision 29/2017 (X. 31.) of the Constitutional Court, Decision 1/2019. (II. 13.) of the Constitutional Court, Decision 13/2020. (VI. 22.) of the Constitutional Court

50 Decision 1/2013. (I. 7.) Of the Constitutional Court of the Constitutional Court, Decision 28/2017. (X. 25.) of the Constitutional Court, Decision 2/2019. (III. 5.) of the Constitutional Court.

51 Decision 1/2019. (II. 13.) of the Constitutional Court.

52 Decision 13/2020. (VI. 22.) of the Constitutional Court.

53 The family relationship is based on marriage and the parent–child relationship.

54 Decision 20/214 (VII. 3.) of the Constitutional Court. The above interpretation is taken from a much earlier decision of the Constitutional Court and is in line with the consistent case law of the Constitutional Court.

55 For example, property's partial rights under civil law. See Decision 5/2016. (III. 1.) of the Constitutional Court.

56 Decision 38/2012. (XI. 14.) of the Constitutional Court, Decision 8/2017. (IV. 18.) of the Constitutional Court.

57 Toth, 2016 p. 176.

would be apparent from the above. However, doctrinal bases often take the form of a reference to previous Constitutional Court decisions.[58] Doctrinal interpretation is also permeated by contextual interpretation in the broad sense, given that the system is often based on the Constitutional Court's juxtaposition and correlation of the applicable provision with other provisions of the Fundamental Law and the construction of a system of various fundamental rights and other constitutional rules[59] without contradictions[60] as much as possible.

The right to freedom of expression, for example, is considered by the Constitutional Court to be the 'mother right' of the so-called communication rights. This gives freedom of expression a prominent place among the fundamental rights: it is not an unlimited fundamental right, but the laws limiting it must be interpreted restrictively. Freedom of the press is a special case of the freedom of expression, to which the same principles apply as to the restriction of freedom of expression[61]. The right of assembly also enjoys a prominent communication function in the field of debating public affairs that can also be interpreted as a manifestation of direct democracy in addition to being a special fundamental right within the freedom of expression. There are only a few rights to which it must give priority.[62] The right of assembly is therefore part of the freedom of expression in a broader sense. Freedom of information is one of the specific fundamental communication rights. The right of access to information, especially the right to access information of public interest, essentially precedes and facilitates the formation of an opinion, but the right to disseminate information of public interest can be considered as part of the right to express an opinion.[63]

58 Thus, Szente's statement is valid for the current practice, according to which the centralised constitutional courts have also generally tried to establish their own case law, which, by organising the norms of the Constitution into a doctrinal unity, ensure a predictable, logical order of the constitution's enforcement. Szente, 2013, p. 46.

59 This does not always work. Sometimes new cases stretch the previous framework. For example, the rights to life and human dignity were such rights in previous cases, the indivisibility of which was found to be untenable in euthanasia decisions, even if this was not explicitly recognised by the Constitutional Court. See Tóth, 2005, available at: http://jesz.ajk.elte.hu/tothj21.html (Accessed: 28.04.2021).

60 This view is reflected in an early decision from the early 1990s: 'The Constitutional Court interprets the Constitution not only in proceedings specifically aimed at it, but in every procedure reviewing the constitutionality of laws. Thus, the meaning of specific provisions of the Constitution emerges only in the process of ever newer interpretations in which the Constitutional Court considers both the unique features of the case at hand and its own previous interpretations. The propositions formed on the basis of individual interpretations – such as the requirements of affirmative action or the limits of the restrictions of fundamental rights – are further interpreted and refined by the Constitutional Court in the process of their application. The focus of the interpretation of a given constitutional provision may shift but the interpretations must give rise to a system without contradictions'. Decision 36/1992. (VI. 10.) of the Constitutional Court.

61 Decision 7/2014. (III. 7.) of the Constitutional Court.

62 Decision 13/2016. (VII. 18.) of the Constitutional Court.

63 Decision 13/2019. (IV. 8) of the Constitutional Court.

Freedom of expression recurrently involves a distinction between statements of fact and value judgements, and a related different standard of fundamental right limitation.[64]

Mention may also be made of constitutional criminal law, which is partly composed of the principle of the rule of law (as form) and the conditions for the restriction of fundamental rights (as content): the relevant statements of principle in the context of the constitutional limits of criminal law, as expressed in the decisions of the Constitutional Court.[65]

About half of the decisions, seventeen in total, contained a reference to a legal principle. Examples include the non-derogation and precautionary principles[66] in the field of environmental protection, the principle of data transparency,[67] the principle of *in dubio pro libertate*,[68] the principle of popular sovereignty,[69] the principle of social publicity,[70] the principle of *favor testamenti*,[71] the principle of prosecution and *ne bis in idem*,[72] the procedural principles of verbality, publicity, and immediacy,[73] the principle of *nullum crimen sine lege*,[74] the principle of non-refoulement,[75] and the principle of judicial independence.[76] In addition, the principle of the rule of law, or some aspect of it, is also reflected in several decisions. Some of these principles have been formulated in the Fundamental Law (e.g. the rule of law, *nullum crimen sine lege*, *ne bis in idem*, judicial independence); others correspond to principles of the various branches of law, derived from statutory rules or not even formulated in positive concrete law (e.g. indirectness).

In the selected decisions, there were no cases in which the Constitutional Court interpreted a word or a phrase according to a different (non-legal) professional meaning.

Similarly, syntactic interpretation is of little relevance to the interpretation of the Fundamental Law. One may find an example of it in the context of the prohibition of discrimination: the Constitutional Court shall decide on the petition based on Article

64 Decision 7/2014. (III. 7.) of the Constitutional Court, Decision 34/2017. (XII. 11.) of the Constitutional Court.
65 Decision 38/2012. (XI. 14.) of the Constitutional Court, Decision 4/2013. (II. 21.) of the Constitutional Court.
66 Decision 28/2017. (X. 25.) of the Constitutional Court.
67 Decision 13/2019. (IV. 8.) of the Constitutional Court.
68 Decision 24/2015. (VII. 7.) of the Constitutional Court, Decision 30/2015. (X. 15.) of the Constitutional Court.
69 Decision of 1/2013. (I. 7.) of the Constitutional Court.
70 Decision of 7/2014. (III. 7.) of the Constitutional Court.
71 Decision of 5/2016. (III. 1.) of the Constitutional Court.
72 Decision of 33/2013. (XI. 22.) of the Constitutional Court.
73 Decision of 3064/2016. (IV. 11.) of the Constitutional Court.
74 Decision of 38/2012. (XI. 14.) of the Constitutional Court.
75 Decision of 2/2019. (III. 5.) of the Constitutional Court.
76 Decision of 36/2014. (XII. 18.) of the Constitutional Court.

XV (2) if fundamental rights are affected *and* the alleged violation of the individual's protected characteristics, and in other cases, based on Article XV (1).[77]

On the basis of the decisions examined, a conclusion is that, within the grammatical interpretation method, the Court mostly uses only the legal (doctrinal) interpretation of words and expressions, and in most cases, this is achieved through interpretation based on previous Constitutional Court decisions. Neither the everyday meaning of the words nor the *terminus technicus* of other professions is significant. This is consistent with the view in the legal literature that grammatical interpretation is of limited effectiveness in the case of constitutions.[78]

In this respect, the fact that the Fundamental Law expresses a number of fundamental rights in a rather abstract and concise manner cannot be neglected.[79] For example, human dignity is inviolable, and every human being shall have the right to life and human dignity. Other examples are as follows: everyone has the right to freedom of peaceful assembly; everyone has the right to freedom of expression; everyone has the right to property and inheritance; property implies a social responsibility. As demonstrated, some words of the Fundamental Law are philosophical in themselves. Therefore, their true meaning is difficult to grasp with everyday thinking.

2.3. Logical interpretation

Logical interpretation is used in a small number (seven out of thirty) of cases. Six of the decisions contain *argumentum ad absurdum* arguments. In a decision on the publication of photographs of police officers as illustrations for press releases, the Constitutional Court stated that without a certain degree of freedom in using images, modern mass media could not exist,[80] and in another, that it would be incompatible with this fundamental right if only photographs (images of police officers) documenting 'obvious breaches of procedural rules' could be published in the press without consent.[81] With regard to Article P) on the protection of the environment, the Constitutional Court stressed that the State's obligation to do so would be voided if the State could fulfil its obligation to protect the environment by 'handing over' natural resources in a degraded state, regardless of the state of

77 Decision of 6/2018. (VI. 27.) of the Constitutional Court.

78 Csink and Fröhlich, 2012, p. 71.

79 According to the view expressed in the legal literature, to fulfil its purpose, a constitution must contain theoretical, abstract rules, and must therefore necessarily have a sufficiently abstract language. See Csink and Fröhlich, 2012, p. 69–70. Some authors point out that the Charter of Fundamental Rights, as the most recent human rights document, has a clearly demonstrable impact on the 'Freedom and Responsibility' section of the Fundamental Law. See Balogh et al., 2014, p. 5. Others point out that many provisions of the Fundamental Law are a textual imprint of international human rights conventions, in particular the ECHR. See Uitz, 2016, p. 174. Kovács, 2013, pp. 73–84, 74.

80 Decision of 28/2014. (IX. 29.) of the Constitutional Court.

81 Decision of 16/2016. (X. 20.) of the Constitutional Court.

the heritage of future generations.[82] In examining the misdemeanour rule on the infringement of the prohibition of habitual residence in public areas, the Constitutional Court emphasised, with reference to a previous decision, that abstract constitutional values concerning public order and public peace cannot, in themselves, justify the creation of such a preventive misdemeanour rule. Otherwise, the vast majority of activities in public places would be punishable, since they often have a disturbing effect on the townscape and well-being of the inhabitants and are often noisy.[83]

Some classical logical methods (*argumentum a contrario*, *argumentum a simili*) are rarely used, probably because, as mentioned above, the formulation of fundamental rights is very short and concise such that (taxative) listings are not typical but rather exceptional. Article XV (2),[84] which contains an open taxative list, is among the exceptions, where the Court has found the *argument a simili* method applicable.[85]

Analogy, serving the purpose of filling a legal vacuum, is not used in any of the thirty decisions examined. This may suggest that the Constitutional Court respects the fiction of the denial of having any legal vacuum in the constitution.[86]

The application of analogy is explicitly mentioned in Decision 2/2019 (III. 5.) of the Constitutional Court, where the Constitutional Court was faced with the challenge of interpreting the phrase 'not be entitled' in the second sentence of Article XIV (2) of the Fundamental Law. According to this provision, a non-Hungarian national shall *not be entitled* to asylum if they arrived in the territory of Hungary through any country where they were not persecuted or directly threatened with persecution. For the sake of the enforcement of the principle of coherent interpretation of the constitution, the Constitutional Court reviewed in what sense are the phrases 'entitled' and 'not entitled' used in the Freedom and responsibility section of the Fundamental Law, and it made an attempt to draw a consequence from it regarding the content of Article XIV (2). The method was less logical than grammatical, or showed a contextual interpretation in the broad sense.

82 Decision of 28/2017. (X. 25.) of the Constitutional Court. One can find other decisions, too, where the Constitutional Court argues that another interpretation of a provision leads to empty the constitutional rule/fundamental right. See Decision 7/2014. (III. 7.) of the Constitutional Court, Decision 24/2015. (VII. 7.) of the Constitutional Court.

83 Decision of 38/2012. (XI. 14.) of the Constitutional Court.

84 Hungary shall guarantee fundamental rights to everyone without discrimination and in particular *without discrimination on the grounds of* race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth *or any other status*.

85 Decision of 6/2018. (VI. 27.) of the Constitutional Court. This part of the decision is a reference to a previous decision of the Constitutional Court.

86 See in this regard the concurring reasoning of Stumpf for Decision 45/2012 (XII. 29.) of the Constitutional Court not examined in the study. Maintaining the fiction of denying the existence of any legal vacuum in the constitution is the key to effective constitutional judiciary.

2.4. Systematic interpretation

2.4.1. Contextual interpretation in the narrow and broad sense

Contextual interpretation in the narrow sense plays a marginal role in the interpretation of fundamental rights in the thirty decisions selected.[87] This may be because the violation of all the fundamental rights examined by the Constitutional Court can be found in a specific part of the constitutional rules (Freedom and responsibility) incorporated in a single Act of Parliament.[88] However, the Freedom and responsibility section has no further chapters or groupings. Contextual interpretation in the broader sense (i.e. interpretation based on comparison with other provisions of the Fundamental Law) is of even greater importance. In only two out of thirty decisions has the Constitutional Court not used this method.

The starting point for frequent use is the principle of coherent constitutional interpretation. According to its essence, the Constitutional Court in the exercise of its powers (e.g. preliminary and posterior norm control procedure, examination of constitutional complaints, interpretation of the Fundamental Law), as the principal organ for the protection of the Fundamental Law [Article 24 (1) of the Fundamental Law] shall continue to interpret and apply the Fundamental Law—in accordance with its aims—as a coherent system and will consider and measure against one another every provision of the Fundamental Law relevant to the decision of the given matter.[89] This may be where the provisions of the Fundamental Law on the interpretation of the Fundamental Law can best fit into the present system of analysis.

Article R) of the Fundamental Law provides that the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein, and the achievements of our historic constitution. The National Avowal can be seen as the preamble of the Fundamental Law[90] but has no normative force in practice. The achievements of the historical constitutional

87 In Decision 5/2016. (III. 1.) of the Constitutional Court, the Court emphasised the relevance of the right to inheritance being guaranteed by the Fundamental Law in the same article as the right to property. In Decision 2/2019. (III. 5.) of the Constitutional Court, the structure of the Fundamental Law contributed to the conclusion that there is a connection between Article E) (1) and (2).

88 The case law of the Constitutional Court distinguishes between fundamental rights and rights guaranteed in the Fundamental Law. The question of the fundamental legal status of a right did not arise in the selected decisions. It seems almost self-evident that the rights found in the Freedom and responsibility section of the Fundamental Law are fundamental rights, and those outside are rights guaranteed in the Fundamental Law, the standard for limiting which is different from that for fundamental rights. See Csink and Fröhlich, 2012a, 75; Balogh, Hajas and Schanda, 2014, p. 4.

89 Decision 12/2013. (V. 24.) of the Constitutional Court.

90 The national avowal is nothing more than a political declaration, whose fundamental flaw is the rejection of the republican tradition. See Antal, 2013/, pp. 7–8. Other authors emphasise that there is no legally relevant element of the National Avowal that is not elaborated in the constitutional text in an unambiguous legal manner, and that the treatment of the preamble as normative text is alien to the Hungarian constitutional judiciary. See Berkes and Fekete, 2017, p. 25. On the interpretation of certain phrases of the National Avowal, see Patyi, 2019.

interpretation in accordance with it pertain, in many respects, to a concept calling for interpretation,[91] the content of which has not been unravelled by the Constitutional Court.[92] However, as an achievement of the historical constitution, the Court recalled, for example, the Act on the Press of 1848 in the context of the freedom of the press and freedom of expression.[93] Three decisions refer explicitly to the national avowal and five to the constitution.[94] The role of both is clearly limited to illustration. Thus, practice has confirmed the scenario envisaged in the legal literature: the actual interpretation of the constitution ignores the National Avowal's declarations referring to the achievements of the historical constitution and the Holy Crown, and at most, a few general, declarative references are made to it in its decisions. Szente's prediction in his study published in 2011 seems to be a reality today: Article R) (3) has become a dead letter of the Fundamental Law from its birth.[95]

Regarding teleological interpretation, Article 28 of the Fundamental Law states that in the interpretation of the Fundamental Law, one should assume that the provision of the Fundamental Law serves a moral and economic purpose, which is in line with common sense and the public good. Of the decisions examined, only one referred to this provision,[96] but without attempting to elaborate its content. In the practice of the Constitutional Court, this aspect has not influenced interpretation.

One of the derogation formulas, the *lex specialis derogat legi generali*, is mentioned in Decision 2/2019 (III. 5.) of the Constitutional Court, when it pointed out that EU law as internal law has a *sui generis* character, distinct from international law. EU law is subject to Article E) of the Fundamental Law, which is *lex specialis* compared with Article Q)[97] in terms of being applicable to international law. The relation between freedom of expression and freedom of the press can also be mentioned here, with the Constitutional Court tending to emphasise the common elements in an

91 It is all the more interesting in the legal literature. See Varga, 2016, pp. 83–89; Vörös, 2016, pp. 44–57; Zétényi and Tóth, 2015, p. 216; Horváth, 2019, pp. 361–383; Rixer, 2018, pp. 285–297; Schanda, 2017, pp. 151–159; Balogh, 2014, pp. 23–44; Csink and Fröhlich, 2012, pp. 9–15.

92 Rixer found the following on identifying the achievements and applying them as arguments in a given case: (a) it is rare, occurring almost randomly; (b) it is not very consistent, as can be seen from the fact that in several cases, instead of appearing in the reasoning of decisions, the reference to it appears only in concurring reasonings or dissenting opinions; (c) it appears, in most cases, only as a reference, in the form of brief statements, rather than as part of a well-founded, detailed reasoning; (d) it is not of decisive nature in any of the relevant cases; (e) the Constitutional Court has not so far made any attempt to create a catalogue, even of a general nature, of the possible scope of the achievements, the historical sources, and sources of law to be identified as possible places where such achievements could be found. Rixer, 2018, pp. 74–75.

93 Decision 28/2014. (IX. 29.) of the Constitutional Court.

94 They occur much more frequently in dissenting opinions and concurring reasoning.

95 Szente, 2011, p. 10.

96 Decision 29/2017. (X. 31.) of the Constitutional Court.

97 (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law. (3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in laws.

explicit manner in its decisions. However, given that the function of the press is also taken into account in the weighing, freedom of the press is, in some respects, subject to a different assessment than freedom of expression in general.

2.4.2. Interpretation based on domestic statutory law

Constitutional Court decisions regularly contain references to or interpretations of provisions of law laid down in Acts of Parliament or decrees. This is indispensable to the conduct of a review of the law,[98] especially if, for example, it is necessary to examine the clarity of the legal wording of conducts to be punished[99] or whether there is a conflict of laws alleged by the petitioner that infringes legal certainty.[100] This is therefore an indispensable element of the system of reasoning, in the course of which the Constitutional Court applies the methods of interpreting the law that form the basis of the present analysis. This, however, remains out of the present study's scope.

Interpretation based on lower-level sources of law is inappropriate, in principle, as it may undermine fundamental rights' protection. Nevertheless, in the case of the fundamental right of access to data of public interest, the Constitutional Court stated that, in accordance with the constitutional purpose of Article VI (3) of the Fundamental Law and its function in a democratic society, it is *customary* to limit the scope of the data concerned according to the relevant provisions of the Act on Informational Self-Determination and Freedom of Information.

Statutory and decree-level regulations have also received considerable attention in matters relating to the right of assembly. The Constitutional Court also sought to justify the importance of the Act on Assembly (Act III of 1989) by stating that it 'has public historical significance as an emblematic achievement of the regime change'.[101] The main line of argumentation is to show a violation of the law by the party applying the law (for example, the fact that the grounds for prohibition set out in the Act on Assembly are of taxative nature, and that the assembly cannot be prohibited for any other reason, *a contrario*). This may have been a reflection on the police and judicial practice that had developed because of the laconism of the Act on Assembly. The Constitutional Court pointed out that, in accordance with Article I (3) of the Fundamental Law, the causes of prohibition related to the right to peaceful assembly may be determined by the lawmaker in an Act of Parliament, in line with the standard of necessity and proportionality. However, within the existing regulatory environment and range of its interpretation as determined by the Constitutional Court, the parties applying the law are powerless to act in defence of certain fundamental rights or

98 On the role of legal interpretation in the application of the so-called necessity-proportionality test, see Pozsár-Szentmiklósi, 2017, p. 105–119.

99 Decision 4/2013. (II. 21.) of the Constitutional Court.

100 Decision 16/2013. (VI. 20.) of the Constitutional Court.

101 Decision 30/2015. (X. 15.) of the Constitutional Court.

constitutional values.[102] Thus, by referring to the changed culture of protest compared with the period of regime change, it finally found two breaches of the Fundamental Law attributable to omission and called on lawmakers to introduce statutory regulations that essentially restrict the right of assembly in some way.[103] Otherwise, the statutory rules play only an affirmative role in interpretation (in five decisions) and are typically invoked by the Constitutional Court to show that the constitutional content is reflected in lower-level sources of law.

2.4.3. Interpretation based on the case law of the Constitutional Court

In all the selected Constitutional Court decisions, this method of interpretation appears, always with reference to specific decisions and the paragraph of reasoning, often with verbatim quotations. This is the most definitive method of interpretation.[104] In this respect, it is necessary to refer to the situation that arose with the enactment of the Fundamental Law and the resulting arguments that have been regularly raised in Constitutional Court decisions.

Prior to the adoption of the Fundamental Law, the basic provisions on the organisation of the State of the Republic of Hungary and fundamental rights were laid down in the Constitution enacted in Act XX of 1949. Although formally an amendment to the socialist-era constitution, it ensured a peaceful political transition to a multi-party system, parliamentary democracy, and the rule of law based on a social market economy. Thus, the content of this law reflected the ideology and compromises of regime change after 1989. The new preamble introduced by Act XXXI of 1989 expresses the provisional nature of the 'regime-changing' Constitution.[105] Nevertheless, the adoption of the Fundamental Law had to wait for about twenty years.

The Fundamental Law differs from the Constitution in many respects, both in form (e.g. the name itself) and in content. There are also many similarities, especially with regard to the foundations of the state—society system (e.g. rule of law, multi-party system, parliamentary democracy) and many fundamental rights (freedoms).

In 2012, the Constitutional Court ruled that it may use in new cases the arguments contained in its decisions adopted before the entry into force of the Fundamental Law, provided that this is possible on the basis of specific provisions and rules of interpretation of the Fundamental Law having the same or similar content as the

102 See Hajas, 2016, p. 523.

103 However, the problem was not a new one: the Constitutional Court had already faced the problem of the laconism of the Act on Assembly in 2013, and in concurring reasoning, this and the need to establish the omission were also mentioned. See Decision 3/2013. (II. 14.) of the Constitutional Court. Csőre, 2013, pp. 3–11.

104 Fröhlich, 2019, available at: https://ijoten.hu/uploads/alkotmnyrtelmezs.pdf (Accessed: 28.04.2021).

105 'In order to facilitate a peaceful political transition to a constitutional state, establish a multi-party system, parliamentary democracy and a social market economy, the Parliament of the Republic of Hungary hereby establishes the following text as the Constitution of the Republic of Hungary, until the country's new Constitution is adopted'.

previous Constitution.[106] This was followed by the Fourth Amendment to the Fundamental Law, according to which the decisions of the Constitutional Court taken before the entry into force of the Fundamental Law were repealed. Notably, however, this provision did not affect the legal effects of these decisions. The content[107] and legal implications of this provision are puzzling, which could be why the Constitutional Court does not bother much with it.

It stated that it would base the analysis on the relevant provisions of the Fundamental Law and their interpretative framework under Article R) (as shown above, he considered the latter to be optional). The use of statements of principle expressed in decisions based on the previous Constitution requires a comparison and consideration of the content of the relevant provisions of the previous Constitution and that of the Fundamental Law. As a result of this comparison, the use of arguments contained in decisions taken before the entry into force of the Fundamental Law must be justified in sufficient detail. Meanwhile, disregarding the legal principles mentioned in the previous Constitutional Court decision has become possible even in the case of the substantive matching of certain provisions of the previous Constitution and the Fundamental Law, and the change in the regulation may entail a reassessment of the constitutional problem raised.[108] In the course of reviewing the constitutional questions to be examined in the new cases, the Constitutional Court may use the arguments, legal principles, and constitutional relations elaborated in its previous decisions if the application of such findings is not excluded on the basis of the identical contents of the relevant section of the Fundamental Law and the Constitution, the contextual identification with the whole of the Fundamental Law, the rules of interpretation of the Fundamental Law, and by taking into account the concrete case, and it is considered necessary to incorporate such findings into the reasoning of the decision to be passed. By indicating the source, the Constitutional Court may refer to or cite the arguments and legal principles developed in its previous decisions. In a democratic state governed by the rule of law, the reasoning and sources of constitutional law must be accessible and verifiable for everyone, and the need for legal certainty requires that the considerations in decision-making be transparent and traceable.[109]

Practice shows that decisions may automatically take over previous arguments (without any examination). A simple formal reference to the above principles and a

106 Decision of 22/2012. (V. 11.) of the Constitutional Court.

107 This provision can only be interpreted in relation to the decisions of the Constitutional Court that perform abstract constitutional interpretation. Erdős, 2014, p. 309.

108 The above arguments are assessed differently in jurisprudence. According to one of them, the Constitutional Court has here established a rebuttable presumption: in the case of substantive matching, it may disregard taking over the earlier principles if it provides a sufficient reason for doing so. See Antal, 2013, p. 8. According to another view, in this decision the Constitutional Court reversed the obligation to state reasons: a rebuttable presumption can be found even in the case of departing from previous decisions. Thus, it should justify the following of the practice based on the Constitution, rather than the departing from it. See Erdős, 2014, 300.

109 Decision 13/2013. (VI. 17.) of the Constitutional Court.

summary statement on the possibility of taking further account of the practice may suffice. Other times, there is an actual examination.[110] The ambiguity surrounding the 'repealing' of previous constitutional court decisions may also have led some Justices of the Constitutional Court not only to cite previous constitutional court decisions to strengthen arguments but also to increase the use of other, particularly external, comparative methods. On the whole, reference to the case law elaborated under the previous Constitution is widespread and not always justified in detail.[111]

Regardless of the above problem, the criteria for referring to or derogating from earlier decisions are not nearly as clear as in common law countries, and are essentially limited to the requirements that derogations must be justified. Even with the considerations regarding principle (legal certainty, equality of rights), it is economical and reasonable to resolve new cases on the basis of previous decisions. It is also clear that its use could be too extensive ('compulsive'[112]) and that it could function only as an illustration. Its use also often incorporates other types of methods of interpretation: other methods used in an earlier decision are reflected in more recent decisions, by means of a reference or citation, as an interpretation based on earlier Constitutional Court decisions.

2.4.4. Interpretation based on the case law of ordinary courts

In total, ten of the thirty decisions refer in some way to the case law of the courts. In some cases, this is presented in general terms, and in other cases, by reference to a specific judgement or ruling, a uniformity of law decision, or an opinion (usually published in some way). The latter is considered more typical.

There are no examples where the interpretation had been clearly and exclusively determined by interpretation of the case law of the courts. However, there is an example of the Constitutional Court emphasising that the interpretation of the law by the Constitutional Court and by the judiciary are consistent and have the same content.[113] Four other decisions cite judicial case law as confirmation.[114] In addition, the Constitutional Court has referred to judicial case law in connection with the interpretation of statutory rules, partly in decisions where the constitutionality of

110 Téglási, 2014, pp. 325–326.

111 The Constitutional Court assessed the amendment of the Fundamental Law [Article IX (4): 'the exercise of this right shall not be directed to the violation of the human dignity of others'] as a confirmation of the existing practice [Decision 7/2014. (III. 7.) of the Constitutional Court, 16/2013. (VI. 20.) of the Constitutional Court], despite the fact that, according to the justification of the amendment, it was necessary because of the interpretation of the constitution, and the derogation from it. See Téglási, 2015, p. 25–47; Téglási, 2014, pp. 323–324.

112 Szente, 2013, p. 48.

113 Decision 1/2019. (II. 13.) of the Constitutional Court, Decision 13/2019. (IV. 8.) of the Constitutional Court.

114 Decision 34/2017. (XII. 11.) of the Constitutional Court, Decision 5/2016. (III. 1.) of the Constitutional Court, Decision 2/2017. (II. 10.) of the Constitutional Court.

the statutory rule is at issue,[115] and in other cases, to map how judicial case law has developed beyond the challenged decision.[116]

2.4.5. Interpretation based on normative acts of other domestic state organs

Similarly, the proposals and positions of other state bodies do not play a decisive role in the interpretation of the Fundamental Law by the Constitutional Court. In six of the cases examined, the Constitutional Court sought the opinion of other public bodies or other organisations: the minister concerned, the commissioner for fundamental rights, the Hungarian Academy of Sciences, the National Authority for Data Protection and Freedom of Information, and the Hungarian Competition Authority. In one of these, however, the decision does not mention the request; the latter is only apparent from the concurring reasoning and dissenting opinions.[117] In two other cases, the Constitutional Court did not refer in its reasoning to the positions obtained. In only three cases did the Constitutional Court use the reply to the request to support its arguments.[118] Beyond these, the reasoning refers in one decision to the report of the commissioner for fundamental rights as confirmation.[119] In three other cases, the prosecutor general's instruction and the ombudsman's guidance or report are mentioned as comments. The National Framework Strategy for Sustainable Development and the National Biodiversity Strategy, adopted by Parliament in the form of a resolution, are included as illustrative elements in the case relating to Article P) of the Fundamental Law.

2.5. External systemic (comparative) interpretation

2.5.1. International treaties

The selection of decisions adhered to the primary criterion of containing a significant reference to ECtHR judgements. This also implies that, through the ECtHR

115 E.g. Decision 33/2013. (XI. 22.) of the Constitutional Court, Decision 4/2013. (II. 21.) of the Constitutional Court, Decision 16/2013. (VI. 20.) of the Constitutional Court.

116 Decision 28/2014. (IX. 29.) of the Constitutional Court. The practice identified was not uniform and therefore not suitable to confirm the interpretation by the Constitutional Court. It is unclear what purpose the Constitutional Court had with this part, because it was silent on the uniformity of law decision adopted in the subject matter, the content of which contradicted the Constitutional Court's conclusion. Following the decision of the Constitutional Court, the Curia annulled the uniformity of law decision in question. The situation was examined in Decision 16/2016 (X. 20.) of the Constitutional Court, highlighting that the Constitutional Court's decision is binding for everyone, including the courts, as a consequence of the Act on the CC. Nevertheless, under the Fundamental Law, uniformity of law decisions is also binding on the courts.

117 Decision 2/2017. (II. 10.) of the Constitutional Court.

118 Decision 28/2017. (X. 25.) of the Constitutional Court, Decision13/2019. (IV. 8.) of the Constitutional Court, Decision 20/2014. (VII. 3.) of the Constitutional Court.

119 Decision 13/2016. (VII. 8.) of the Constitutional Court.

judgements, the Constitutional Court also considers the provisions of the European Convention on Human Rights (ECHR). However, the emphasis is always on the concrete decisions of the ECtHR and the interpretation they give, because the decisions can serve as a reference for the interpretation of fundamental rights by their concreteness in relation to life situations, compared with abstract convention norms.[120] This is true despite the fact that, in many cases, the ECHR[121] defines the essence or limits of a fundamental right (e.g. the right to assembly) in more detail compared with the Fundamental Law.

A recurrent argument of the Constitutional Court is that it accepts the level of legal protection provided by international legal protection mechanisms as the minimum standard for the enforcement of fundamental rights. For this reason, the Constitutional Court also takes into account the ECHR and the framework of interpretation developed by the ECtHR. In eight of the decisions examined, this approach appears although the Court referred to a convention in all cases, if only because of the selection criterion.

In Decision 2/2019 (III. 5.) of the Constitutional Court on abstract constitutional interpretation, the Constitutional Court states that in the interpretation of the Fundamental Law, it considers the obligations as binding for Hungary on the basis of its membership in the EU and under international treaties. By referring to the importance of the constitutional dialogue, the decision explained in its reasoning that 'the creation of the European unity', the integration, is setting a target not only for political bodies but also for the courts and the Constitutional Court, for which the harmony and coherence of legal systems is deducible from 'European unity' as a constitutional objective. To achieve the above, the laws and the Fundamental Law should be interpreted such that the content of the norm complies with the law of the EU.

In eight out of thirty decisions, the reasoning refers to international conventions: the Convention on the Rights of the Child that was signed in New York on 20 November 1989, the Universal Declaration of Human Rights, the Geneva Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the Treaty on the Functioning of the European Union, the United Nations Charter, the Convention on Biological Diversity, and the Convention implementing the Schengen Agreement. The references serve confirmation or illustrative purposes.

In Decision 28/2017 (X. 25.) of the Constitutional Court, the Court considers the wording of Article P) (1) 'common heritage of the nation' to be a concretisation of the phrases 'common cause of [hu]mankind' under the Convention on Biological Diversity, the 'heritage of the European peoples' under the Bird Protection Directive,

120 This was formulated by the Constitutional Court in Decision 4/2013 (II. 21.) by arguing that the meaning of the rights guaranteed in the ECHR is reflected in the decisions of the ECtHR in individual cases, which promotes a uniform understanding of the interpretation of human rights.

121 According to a former Justice of the Constitutional Court, in view of the dualist system, the Convention is not considered in Hungarian law as a source of binding legal force evidently applied by domestic courts. Although the Convention has been promulgated as an Act of Parliament, its provisions cannot be invoked as a subjective right before a Hungarian court. Bragyova, 2011, p. 88.

and 'natural heritage' under the Habitat Protection Directive, thus paving the way to interpretation according to international legal instruments.

2.5.2. Case law of international courts

We have discussed the specific approach of the Constitutional Court, according to which it accepts the level of legal protection provided by international legal protection mechanisms as a minimum standard for the enforcement of fundamental rights, which also includes the framework of interpretation developed by the ECtHR. Derived through the constitutional rule on the fulfilment of international commitments (currently Article Q) of the Fundamental Law), alignment was originally conceived as an obligation, but the decisions under examination have tended to favour the picture of an option.[122] The Constitutional Court has an ambivalent attitude towards the ECtHR's decisions:[123] while the argumentation that the international legal protection mechanisms are accepted as a minimum standard for the enforcement of fundamental rights appears in eight decisions, the role of the ECtHR case law in the constitutional reasoning is not clear at all in other decisions, and in one decision, the Constitutional Court consciously disregards the European interpretation of the fundamental right affected. This ambivalent attitude may be due to the fact that some members of the Constitutional Court respect the 'minimum standard' approach, while others do not. One Justice has heavily criticised the European forum and its judgements.[124] Tensions within the body can be alleviated by masking the specific role of ECtHR decisions foreseen in the interpretation of the Fundamental Law.

There is no decision among those selected where the Constitutional Court has explicitly stated that the ECtHR decision is the decisive basis for interpretation. In some cases, the ECtHR case law is only 'particularly taken into account'[125] by the

122 A valuable lesson can be drawn from a study on the dialogue between the ECtHR and the Constitutional Court (Sándor, 2020, p. 31–36): in the same fundamental rights investigations, the Constitutional Court, acting later, did not deviate from the ECtHR's criteria on limiting fundamental rights in any case, which is in line with the requirement of Article Q) of the Fundamental Law (this actually meant two cases, 34). Two out of seven ECtHR decisions had an orientational force on the subsequent Constitutional Court decision. That is, the forum acting later in time considers and adopts, at least in part, not only the result of the decision of the forum acting earlier but also its reasoning and criteria for the limitation for fundamental rights.

123 For a similar conclusion and analysis, see Uitz, 2016, pp. 186–187. In 2011, Bragyova (former Justice of the Constitutional Court) admitted in his academic work that it is undeniable that the Constitutional Court's interpretation of the constitution has been greatly influenced by the case law of the Convention and the ECtHR. The case law of the ECtHR has no legal binding force on the Constitutional Court, although the Constitutional Court never disregards, if not always follows, the position of the Court. Most constitutional courts and other national courts do not feel bound by the Court's interpretation of the Convention. In most cases, directly or indirectly, they retain for themselves the ultimate interpretative power of the Convention. Bragyova, 2011, p. 83.

124 See the concurring reasoning of Justice Pokol to Decision 7/2019. (III. 22.) of the Constitutional Court.

125 Decision 34/2017. (XII. 11.) of the Constitutional Court.

Constitutional Court. The situation is similar when the Constitutional Court says that the ECtHR's case law is 'in line with this'; the former is more of a confirmation. The phrase 'reviewed with the intention of taking a view of' the case law of the ECtHR can be regarded as an illustrative argument.[126] In contrast, elsewhere, ECtHR decisions may have been given the same weight as the Constitutional Court's own case law, particularly when a reference to an earlier ECtHR decision is made by citing the reasoning of an earlier Constitutional Court decision.[127] However, there are also decisions where the Constitutional Court has explicitly interpreted the Fundamental Law contrary to the case law of the ECtHR, and called on the judiciary to act according to the interpretation of the ECtHR for the sake of expediency (to prevent Convention violation).[128]

One may become confronted with the specific application of the 'minimum standard' in Decision 2/2017 (II. 10.) of the Constitutional Court on the completion of criminal proceedings within a reasonable time. The Constitutional Court has taken over the argument from the ECtHR's case law that taking the passing of time as a mitigating circumstance in the course of imposing the sentence of the accused can remedy this injury. It stipulated as a constitutional requirement that the court must state in its reasoning the fact that the proceedings are prolonged and, in this context, the mitigation of the sentence and the extent of the mitigation. Despite the fact that the ECtHR assesses the existence of a legal remedy in the admissibility of the application (i.e. in the application of Article 34 of ECHR), the Constitutional Court's decision has led to shifting this circumstance into the examination of the merits (in the specific case, it found no unconstitutionality because of the reduction of the sentence, despite the excessive delay in the proceedings).

Decision 29/2017 (X. 31.) of the Constitutional Court is noteworthy because it is the only case among the thirty in which both the ECtHR and the Constitutional Court proceeded with respect to the alleged injury on the basis of the same fundamental rights.[129] Indeed, the latter had to examine not only the compatibility with the Fundamental Law but also the conflict with an international convention (ECHR). The Constitutional Court suspended the proceedings pending before it until the delivery of the final judgement of the ECtHR. However, it did not take the ECtHR judgement into account when interpreting the Fundamental Law; it only did when examining the violation of the international convention in the context of interpreting

126 Decision 5/2016. (III. 1.) of the Constitutional Court.

127 Decision 2/2017. (II. 10.) of the Constitutional Court, Decision 8/2017. (IV. 18.) of the Constitutional Court.

128 The Curia should hold a hearing in the review procedure of a tax penalty case even if the parties do not request it, but the (re)weighing of the evidence may take place. Decision 3064/2016. (IV. 11.) of the Constitutional Court.

129 There are two decesions among the selected thirty delivered in so-called common cases. The other is Decision 4/2013. (II. 21.) of the Constitutional Court in which the Court, contrary to the ECtHR, based its reasoning primarily on the violation of the rule of law principle (legal certainty) and not that of the freedom of expession.

the ECHR. Even in this respect, the ECtHR judgement was not in itself decisive: in addition to the ECtHR's decision in the individual case, the Constitutional Court also found it important that the reasoning of this decision did not fundamentally depart from the interpretation given by the Constitutional Court in its examination of the conflict with the Fundamental Law.

The Constitutional Court referred to the judgements of the Court of Justice of the European Union (CJEU) in six decisions. One of these[130] related to the presentation of the law under examination, and two to the abstract interpretation of the constitution, which dealt with the exercise of joint powers with the EU, the relationship between the Fundamental Law and the Union. In the other three decisions,[131] the CJEU's judgements are present as a reinforcing or illustrative element.

In one decision, also a decision of the Inter-American Court of Human Rights, appeared as an illustrative element,[132] most probably owing to a similar reference made in the ECtHR judgement referred to, whereas the decision of the UN Commission on Human Rights appeared as a confirmation.

2.5.3. Interpretation according to foreign legal systems, judicial decisions

In a total of seventeen decisions, the Constitutional Court refers to the constitution, a decision of a constitutional court (equivalent court), a statutory provision, or the judicial case law of another state. In most cases, the reference is specific (in some decisions, there is both a specific and a general reference[133]); in one decision, there is only a general reference.[134]

The two most frequently cited foreign constitutional courts are the German Federal Constitutional Court (in eight decisions, the subject matter of the cases is mixed) and the US Supreme Court, which has a similar function (in six decisions, some are on the right of assembly and others on criminal law). The German constitutional court has always had a strong influence on Hungarian constitutional jurisprudence,[135] particularly in the early years, when the principles expressed by the German body were heavily relied upon in interpreting the provisions of the Constitution,[136] sometimes without even indicating the sources. The two decisions that contain abstract interpretations of the constitution also refer to decisions of the

130 Decision 3025/2014. (II. 17.) of the Constitutional Court, which examined domestic legislation connected to the European Arrest Warrant.

131 Decision 6/2018. (VI. 27.) of the Constitutional Court, Decision 8/2017. (IV. 18.) of the Constitutional Court, Decision 33/2013. (XI. 22.) of the Constitutional Court.

132 Decision 33/2013. (XI. 22.) of the Constitutional Court.

133 In cases relating to freedom of expression, for example, the 'commonly held tenets of advanced democracies' has appeared as an unidentified turn of phrase. The decisions also contain references to specific decisions. Decision 7/2014. (III. 7.) of the Constitutional Court; Decision 1/2019. (II. 13.) of the Constitutional Court.

134 Decision 28/2014. (IX. 29.) of the Constitutional Court.

135 See Decision 29/2017 (X. 31.) of the Constitutional Court.

136 Jakab and Fröhlich, 2017, pp. 428–429. Szente, 2013, 235.

constitutional courts of other states. Decision 22/2016 (XII. 5.) of the Constitutional Court has many of them.[137]

In three decisions, the Constitutional Court refers to the constitutions of foreign states; in five decisions, it refers to the legislation of other countries. One of the thirty decisions also draws heavily on the case law of foreign ordinary courts (partly with reference to a specific decision, partly in general) in the context of the immunity of international organisations (its historical development and evolution).[138] The presentation of the topic indicates that the direct source is legal literature, which is not directly presented in the decision.

In the context of comparative argumentation, Decision 1/2013 (I. 7.) of the Constitutional Court deserves mentioning, in which the Constitutional Court emphasises that it cannot consider the example of single country as a determining factor in itself in the examination of the conformity with the Constitution (Fundamental Law).[139] Outlooks[140] are therefore used more for illustration or confirmation in the reasoning of decisions.

2.5.4. Other sources of international character in the interpretation of the constitution

Fourteen decisions consider other sources or documents outside the scope of international law. A minority of these have normative force, and the rest are recommendations.

There are references to certain documents of the Council of Europe (five decisions refer to a recommendation or position of the Venice Commission, one to a recommendation of the Committee of Ministers of the Council of Europe, one to a resolution of the Parliamentary Assembly of the Council of Europe), the UN (statute of the ad hoc UNSC tribunals, UN environmental resolutions), and the OSCE (three resolutions). A small number of EU legal sources are also used, such as the Charter of Fundamental Rights, the Framework Decision of the Council of the European Union,

137 The structure of the decision is peculiar. The reasoning first takes stock of the decisions of foreign constitutional courts or bodies performing similar functions, and then states that it has established the content of the constitutional law, which also appears in the holdings of the decision, *on the basis of a review* of these (abstract interpretation). This is followed by a further explanation of the interpretation, which also draws on the text of the Fundamental Law and uses other methods. According to a review published in legal literature, 'unfortunately the detailed presentation of Member States' practices does not support the substantive arguments, but merely plays a complementary role'. Kéri and Pozsár-Szentmiklósi, 2017, p. 11. Thus, the relation between the arguments is far from clear in the case law of the Constitutional Court, and the wording and content are not necessarily consistent.

138 Decision 36/2014. (XII. 18.) of the Constitutional Court.

139 Decision 4/2013. (II. 21.) of the Constitutional Court.

140 Bodnár (2013, p. 10) pointed out the background and the purpose of the outlook. According to this, the Constitutional Court was responding to an issue not raised in the petition, which was crucial in the political debates preceding the adoption of the law under review: how can something (voter registration on request), which is in operation in stable, centuries-old democracies, such as the US, the UK, and France, be unconstitutional.

and EU directives. In general, two decisions[141] refer to international 'practice' or customary international law, or principles accepted by international law. As demonstrated above, the Constitutional Court draws relatively often on international documents, most notably the resolutions of the Venice Commission, although only in an illustrative or confirmatory manner.

2.6. Objective teleological interpretation

As discussed above in the context of a broader contextual interpretation, Article R) (3) provides that the provisions of the Fundamental Law must be interpreted in accordance with their purpose. According to Article 28 of the Fundamental Law, in the interpretation of the Fundamental Law, one should assume that they serve a moral and economic purpose, which is in line with common sense and the public good.

In a total of seven decisions, the Constitutional Court has attributed importance to the objective[142] purpose (function, role) of a fundamental right or other provision. An example of this is the argument concerning the dual justification of the fundamental right in the decisions on freedom of expression: the democratic functioning of political communities on the one hand, and individual self-expression on the other.[143] In decisions concerning the freedom of assembly, the Constitutional Court emphasises the strong (dogmatic) relation to the fundamental right of expression. In this regard, the Constitutional Court has stressed that (along with the right of expression and freedom of association) the very essence of the right of assembly is the prerequisite of the democratic social practice: citizens can give an opinion on a matter of public affairs between two elections.[144]

In nine decisions relating to the freedom of assembly, freedom of expression, right to vote, and constitutional criminal law, the arguments relating to the objective purposes of constitutional provisions appear by reference to the case law of the Constitutional Court. No specific conclusions are drawn directly in the particular cases. References to the purpose is rather a part of a summary of the case law relating to the relevant fundamental right (provision) than an independent element of the reasoning.

2.7. Historical/subjective teleological interpretation

Leaving aside the constitutional command laid down in Article R) (3)—the content of which has not yet been clarified—stating that the provisions of the Fundamental Law must be interpreted in accordance with the achievements of the

141 Decision 36/2014. (XII. 18.) of the Constitutional Court, Decision 13/21020. (VI. 22.) of the Constitutional Court.

142 Decision 29/2017. (X. 31.) of the Constitutional Court, after laying down interpretation according to the purpose and quotes from the minister's reasoning of the draft Fundamental Law. It belongs to the subjective teleological interpretation.

143 Decision 7/2014. (III. 7.) of the Constitutional Court.

144 Decision 3/2013. (II. 14.) of the Constitutional Court.

historical constitution, historical interpretation appears in a very small number of decisions. In two[145] cases, which do not draw any decisive conclusions, the Constitutional Court cites the ministerial reasoning of the Fundamental Law or the draft Act of Parliament amending it. In one case, the decision refers to the 'will of the lawmaker adopting the constitution'—in a general way, after making a comparison with the previous constitutional provision—although the Constitutional Court derives it from the text of the Fundamental Law itself, and therefore does not add to the interpretation. In fact, the Constitutional Court refers to this, by quoting its own previous decision, to support that the Fundamental Law not only maintains but also develops further the environmental value structure and attitude of the Constitution and the Constitutional Court.[146]

2.8. Role of legal literature in the interpretation of fundamental rights

Legal literature and commentaries play a minimal role in the interpretation of fundamental rights, and are given only a decorative or, at most, a confirmatory role: in only two decisions[147] are specific academic works mentioned as sources, and in one decision,[148] only 'legal literature' is mentioned in general terms as being in line with the case law of the Constitutional Court. None of these is a work of constitutional law but rather of specific branches of law (criminal, civil, administrative). One decision refers to the commentary literature, but specifically in the context of exploring the content of the criminal law at issue. In the latter case, the Constitutional Court ruled on whether the wording of the statutory definition is sufficiently clear and in line with the principle of legal certainty.[149] Finally, also in relation to a rule of (civil) law, the Constitutional Court refers to the legal literature but tied specific judicial decisions to it.[150]

The dissenting opinions and concurring reasonings feature considerably more references to academic and specific works. The genre of concurring reasonings and dissenting opinions is more informal compared with the reasoning of the majority decision, and can 'handle' considerably more. This suggests, however, that Justices of the Constitutional Court are also likely to rely on sources of legal literature in cases where this is not explicitly reflected in the majority reasoning. One may have reason to assume this in the case, for example, of comments on the history of ideas or historical development of a legal institution.

145 Decision 29/2017. (X. 31.) of the Constitutional Court, Decision 2/2019. (III. 5.) of the Constitutional Court.
146 Decision 28/2017. (X. 25.) of the Constitutional Court.
147 Decision 5/2016. (III.1.) of the Constitutional Court, Decision 33/2013. (XI. 22.) of the Constitutional Court.
148 Decision 8/2017. (IV. 18.) of the Constitutional Court.
149 Decision 4/2013. (II. 21.) of the Constitutional Court.
150 Decision 28/2014. (IX. 29.) of the Constitutional Court.

2.9. Role of general principles of law in the interpretation of fundamental rights

There are legal principles that appear in several branches of law. One is the *pacta sunt servanda* principle, which is also used in civil and public international law. In the selected decisions, the public international law side has been given a role in the interpretation of the Fundamental Law, namely, in relation to EU accession treaties. The prohibition of abuse of rights, which is essentially a principle of civil law, is invoked in four decisions. The Constitutional Court has also referred to it in the interpretation of certain fundamental rights, such as in the context of freedom of expression (press) on the one hand and the right of access to data of public interest on the other.[151]

The application of the *ultima ratio* principle appears not only in the field of criminal law[152] but also in the field of the right of assembly,[153] in the context of the prohibition of assembly as the greatest restriction. The following has also been given a role in the abstract constitutional interpretation decision, as a limit to the Constitutional Court's review: the Constitutional Court may examine with *ultima ratio* character whether the exercise of joint competences with the EU violates human dignity, other fundamental rights, or Hungary's sovereignty or self-identity based on its historical constitution.

In a decision, the Constitutional Court has accepted the right to a judge—which is otherwise protected as a fundamental right in the Fundamental Law and international conventions, and even recognised as a generally accepted principle of international law and customary international law—as a 'general principle of law' offering protection against denial of justice.[154] Reference to the general principles of law occurs in a total of ten decisions. References are therefore not common, but they play an important role in the argumentation.

2.10. Non-legal values and aspects in the argumentation

'Public interest', as the purpose of the restriction of the constitutional right to property, is an express provision of the Fundamental Law to be taken into account. From a practical point of view, the accepted constitutional basis for the (prior) prohibition of assembly is 'public interest' in the order of traffic.[155]

151 E. g. Decision 16/2013. (VI. 20.) of the Constitutional Court, Decision 28/2014. (IX. 29.) of the Constitutional Court; Decision 13/2019. (IV. 8.) of the Constitutional Court.

152 Decision 8/2017. (IV. 18.) of the Constitutional Court, Decision 4/2013. (II. 21.) of the Constitutional Court.

153 Decision 14/2016. (VII. 18.) of the Constitutional Court, Decision 13/2016. (VII. 18.) of the Constitutional Court

154 Decision 36/2014. (XII. 18.) of the Constitutional Court.

155 Decision 13/2016. (VII. 18.) of the Constitutional Court. This long-established practice would now be more appropriate by stating that securing the fundamental right of others to free movement could be the object of the restriction.

In a social security case, the Constitutional Court considers the solidarity among past, present, and future generations.[156] In a decision on the interpretation of the constitution in matters of the environment, the reasoning refers to a wide range of sources, such as the Living Planet Index, statistical data, the encyclical of Pope Francis, and the ecological vision and initiatives of Ecumenical Patriarch Bartholomew, all of which are of illustrative character.[157] In decisions related to the freedom of expression, the Constitutional Court has attached importance in its deliberations to the justification of the fundamental right (which ultimately carries the purpose of freedom of expression) on the ground of the history of ideas, and, in the specific case of freedom of the press, to the function of the press in society, which strongly influence the direction of interpretation.

The Constitutional Court uses moral arguments in the context of the examination of the constitutionality of the statutory definition of a criminal offence,[158] when it states that the atrocities committed against humanity during the totalitarian regimes of 20th century in Europe are considered as unquestionable crimes, and are treated as evidence, not only by those directly or indirectly involved but by all citizens who accept and respect constitutional values. Other parts of the decision are infiltrated by moral considerations. In one decision dealing with the Hungarian statutory law implementing the rules on European arrest warrant, the Constitutional Court pays attention to the successful enforcement of criminal claims.[159]

Five decisions out of thirty refer to non-legal values, ignoring those in which the constitutional examination related to the conformity with the right to property. The Court has considered public interest based on the express rule of the Fundamental Law.

In the assessment of individual cases, it is always interesting to know what circumstances the court includes in its assessment. In similar cases, they can serve as a standard (or, if sufficiently elaborated, as a test). It is also an indication of how the Constitutional Court perceives actual reality.[160] It is worth shedding light on some of these elements. The Constitutional Court regularly highlights, for example, the function of the press and the major social impact of media services. It is an important element of the consideration that politicians acting as public figures have a wider and more effective use of the mass media to counter attacks on them, and that criticism and qualification of them is treated by the public as a necessary part of the democratic debate. Indeed, it is the public figures who generate and organise the interest of the press, which makes the press a vehicle for expression rather than an independent actor in the public debate. In a case on the integration of cooperative credit institutions, the Constitutional Court considers the current challenges of the

156 Decision 29/2017. (X. 31.) of the Constitutional Court.
157 Decision 28/2017. (X. 25.) of the Constitutional Court.
158 Decision 16/2013. (VI. 20.) of the Constitutional Court.
159 Decision 3025/2014. (II. 17.) of the Constitutional Court.
160 This includes how it adopts standards from, for example, the ECtHR or the case law of the US Supreme Court. Balogh, 2014, pp. 5–6.

global economy and European integration; the relations between the economic, financial, and legal subsystems within the social system as a whole; and the internationalisation of the economy. Although the Constitutional Court does not draw any specific conclusions, it offers a general background for its reasoning.

In decisions of the abstract interpretation of the constitution, constitutional dialogue appears as a dominant frame of interpretation, although it is precisely in this respect that the legal literature criticises the Constitutional Court for failing to engage in a professional dialogue in the European constitutional space.[161]

2.11. Relations between arguments put forward by the Constitutional Court, style of decisions

2.11.1. Relation between arguments, weight of methods of interpretation

Demonstrating which methods are typically used by the Constitutional Court in the selected thirty decisions as decisive, joint, strengthening, or illustrative arguments is not an easy task. One reason is that the fundamental rights test is embodied in a separate provision of the Fundamental Law. Therefore, the application of the test in relation to a fundamental right automatically implies contextual interpretation in the broad sense. In addition, the test can be seen as a 'reasoning framework in which each step of the test has an independent function, but they can only be used in close conjunction with each other.'[162] Different steps of the process may imply the decisive role of different interpretations.

Moreover, the wording of the decisions often renders the relation between the different methods unclear. In many decisions, owing to the method of drafting, the reasoning lists the various methods of interpretation one after the other, at times in separate point(s) (e.g. international conventions, ECtHR decisions, or other comparative methods, constitutional court decisions, statutory rules), followed by the phrase 'having regard to the foregoing' or other similar short term, and the consideration of the specific details of the case (i.e. the application of the content of the constitutional provision as revealed by the interpretation to the specific subject matter of the review, namely, law or judicial decision). The situation is the same when the reasoning uses the phrases '(furthermore) has taken into account' or 'it follows' in connection with multiple methods of interpretation, or when quotations from different sources provide the complete interpretation. These wordings suggest that the specific methods together led to the decision, but not the decisive aspect (method) used in elaborating the interpretation. Half of the decisions applies one of the above methods.

In comparison, the Constitutional Court provides more precise guidance when it explains that in deciding the case, it relies first and foremost on its precedents,

161 Kéri and Pozsár-Szentmiklósi, 2017, pp. 10–11.
162 Pozsár-Szentmiklósi, 2017, p. 105.

arguments, and requirements, but also '[takes] particular account' of the ECtHR's case law.[163] On this basis, the decisive arguments are derived from its own previous decisions, which are confirmed by the ECtHR judgements.

However, there is also a decision—and this is rather an exception—in which the Court has made clear by which method it reached its conclusion. For example, the Court has stated that its reasoning is determined primarily by the text of the Fundamental Law and secondarily by the case law of the Constitutional Court.[164] In this decision, for example, the Constitutional Court only 'took a view of' the case law of the ECtHR. The above statement may have been justified by the fact that the challenged judicial decision clearly deviates from the established case law—presented in great detail in the decision—and from the interpretation of the law developed in the commentaries of the branch of law, but the Court did not even want to give the impression that its decision was derived from these sources and not from the Fundamental Law.[165] In another decision, as already mentioned above, the Constitutional Court stated in relation to the comparative method that 'while recognising that the consideration of foreign experience may be helpful in assessing a regulatory solution, the Constitutional Court cannot consider the example of a foreign country as a decisive factor in determining the conformity of a regulatory solution with the Constitution (Fundamental Law). (…) in the present case, the Constitutional Court has assessed the conformity of the challenged legislation with the Fundamental Law on the basis of the relevant provisions of the Fundamental Law and the Constitutional Court's previous case law in this context, as well as the provisions of the petition, also taking into account Hungary's obligations under international law'.[166] This may be attributed to the fact that the Constitutional Court has not established a consistent interpretative practice for itself[167]: it has not defined which methods of interpretation it considers acceptable in interpreting the Fundamental Law and how they relate to one another. The lack of a clear statement in the decisions on methods of interpretation may be the result of the fact that there is no such consensus within the body; at best, it is partial and tacit.

The conclusion to be drawn from the present analysis is that the two major methods used by the Constitutional Court are interpretation based on previous Constitutional Court decisions and that based on comparison with other constitutional provisions (to varying intensity). From the decision on the abstract interpretation of

163 Decision 34/2017. (XII. 11.) of the Constitutional Court.

164 Decision 5/2016. (III. 1.) of the Constitutional Court.

165 The Constitutional Court did not draw any conclusions from the text; thus, the above statement ('self-limitation') is not more than a declaration. Although the constitutional complaint was lodged by the heir, the Constitutional Court based its decision not directly on the violation of the heir's right to inherit but on the violation of the testator's right to dispose of the property, and did not undertake to unravel the heir's right to inherit, which had already been recognised in previous case law but not elaborated.

166 Decision 1/2013. (I. 7.) of the Constitutional Court.

167 This has always been a feature of the Constitutional Court. See Szente, 2013, p. 227.

the constitution that during the interpretation of the Fundamental Law, the Constitutional Court takes into account the obligations binding Hungary on the basis of its membership in the EU and under international treaties. How this is done is, of course, not clear at all, especially with respect to the ECHR as interpreted by the ECtHR. The text plays a much smaller role, compared with precedents.

2.11.2. Tests used in Constitutional Court decisions, style of decisions

The fundamental rights test is set out in a separate provision of the Fundamental Law, Article I (3). According to it, the rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right.[168] The test quoted is partly taken from the previous Constitution and partly from previous Constitutional Court case law. The conditions of the restriction are not formulated in relation to individual fundamental rights, and in general terms in the first article of the section 'Freedom and responsibility' of the Fundamental Law. The Constitutional Court's practice connected to the formula of the fundamental rights test—as it is also pointed out in the legal literature[169]—is far from being without contradictions: the decisions are not uniform as to which and how many elements and steps the test is composed of, what is the content of these elements, and what is their relation to one another. The application of the test in the selected decisions does not follow a strict order.

Apart from the general rule above, there are also specific tests. In the case of the right to property (Article XIII), the lawmaker who formed the constitutional rules has also formulated a restriction system of lower level. According to it, property may only be expropriated exceptionally, in the public interest and in those cases and ways provided for by an Act, subject to full, unconditional, and immediate compensation. This test also applies to interventions with minor limitations. In the case concerning the integration of cooperative credit institutions, the Constitutional Court recognised as an acceptable objective of ownership restriction—owing to being in the public interest—the elimination of fragmentation in the cooperative credit sector, the reduction of risks in lending activities, and the increase of confidence in the more organised sector as a whole, protecting the interests of the cooperatives' shareholders and security of their shares, preserving the stability and viability of the cooperative credit sector, and screening cooperative credit institutions, thus revealing hidden risks and the actual situation.[170] In a later decision, it also set a standard for the

168 On the dogmatics of the test, see Pozsár-Szentmiklósy.

169 Blutman, 2012, p. 145–156; Pozsár-Szentmiklósi, 2014, p 1. 23.

170 Decision 20/2014. (VII. 3.) of the Constitutional Court. It is only Since then, this *sector* (as such) has essentially ceased to exist, as most of the cooperative credit institutions concerned have merged into a single credit institution in the form of a joint stock company.

public interest test, probably inspired by the ECtHR decision on the same subject matter: 'In assessing whether a restriction on property rights [has] a legitimate aim, the State enjoys the freedom to judge what is in the public interest. It is also up to the evaluation of the legislator whether the restriction of the right to property is necessary for the enforcement of public interest. However, the legislator's assessment in this respect is not entirely free: the line is drawn where there is clearly no *reasonable* basis for action in the public interest'.[171]

Practice has developed two tests for non-discrimination, depending on whether the discrimination arises in relation to fundamental (and according to certain personal characteristics)[172] or other rights. In the first case, the fundamental rights test can be applied. In the latter case, discrimination can be found to exist if the law discriminates without constitutional justification between subjects of law—belonging to a homogeneous group—who are in a comparable situation from the point of view of the regulation. From the point of view of constitutional law, a distinction is a matter of concern if—based on objective assessment—there is no reasonable justification for the distinction (i.e. it is arbitrary).[173]

There are two approaches to the right to a fair trial. On the one hand, the Constitutional Court applies the general test of fundamental rights to some of its partial rights (e.g. the right of access to justice).[174] On the other hand, the Constitutional Court considers the right to a fair trial to be a fundamental right of an absolute nature: fair trial is a quality factor that may only be judged by taking into account the entirety of the procedure and all of its circumstances.[175] The 'weighing' process is therefore carried out within the fundamental right. Nor does the Constitutional Court apply the general test to the constitutional prohibition of *ne bis in idem*.[176]

In the one-sided procedure before the Constitutional Court, the Constitutional Court must first and foremost reflect on its decision regarding the points in the petition. Because of the legal and practical requirements[177] for motions, a decision can be sufficiently persuasive if it responds with a proper explanation to the arguments put forward by the petitioner. Accordingly, the reasoning of the decisions is typically discursive in nature: it is either aimed at refuting the content of the petition or at supporting the violation of the Fundamental Law. However, responding to arguments

171 Decision 29/2017. (X. 31.) of the Constitutional Court.

172 According to Decision 6/2018 (VI. 27.) of the Constitutional Court, 'At the same time, in the case of fundamental rights, the fundamental rights' test according to Article I (3) of the Fundamental Law has to be followed with regard to their restrictability, and it is the primary guarantee for not applying any discrimination of this kind to the granting of fundamental rights. It means that any constitutional aim, which realises a discrimination shall not be acceptable as a necessary one, and any restriction leading to a discriminative situation shall not be considered as proportionate'.

173 Decision 13/2020. (VI. 22.) of the Constitutional Court.

174 Decision 36/2014. (XII. 18.) of the Constitutional Court.

175 Decision 2/2017. (II. 10.) of the Constitutional Court.

176 Decision 33/2013. (XI. 22.) of the Constitutional Court.

177 Motions must be reasoned, and the petitioner must present a substantive, logical connection between the fundamental right violated and challenged law or judicial decision.

beyond those raised in the petition, and enumerating and comparing pro and con arguments is not typical. In the cases of complaints against a judicial decision, the argumentation also takes into account the reasoning of the judicial decision. Nevertheless, *ex cathedra* statements can also be found.[178]

In addition to the petitioner, the addressee of the decision is the lawmaker in the case of an examination of a law, and the decision is addressed to the judicial authority in the case of an examination of a judicial decision. If a law is annulled, the decision will serve as a guide for future legislation. The same applies if the Constitutional Court finds a failure to act and calls on the lawmaker to comply with its legislative obligation within a specified period. When a judicial decision is found to be in conflict with the Fundamental Law, the court (authority) conducting the repeated procedure is the primary addressee. If it fails to comply fully with the Constitutional Court's decision, it will receive even more precise instructions in a new Constitutional Court decision.[179] The reasoning of the Court's decision is also addressed to those courts or authorities applying the law who are dealing with similar cases. This follows from the provision of the law that the decisions of the Constitutional Court are binding on everyone.

A peculiarity of the cases related to the right of assembly is that the Constitutional Court's decisions are issued much later than the planned date of the event. The Constitutional Court has pointed out that the annulment of a judicial decision can only provide moral satisfaction to the victims.[180] However, it does not dismiss such cases on formal grounds, the reason for which is precisely to orient the application of the law to deal properly with similar cases in the future and to prevent future violations of fundamental rights. On other occasions, it has sent a message to the courts in future assembly disputes, even after it has rejected constitutional complaints.[181] The two decisions that contain abstract interpretations of the constitution have a very peculiar scope of addressees. The interpretation of the constitution in the context of the tension between Hungary and certain institutions of the EU is

178 For example, Kéri and Pozsár-Szentmiklósi (2017, p. 11), in relation to the statement of the constitution-interpreting decision [Decision 22/2016 (XII. 5.) of the Constitutional Court] that the Constitutional Court 'cannot waive the *ultima ratio* protection of human dignity and the essential content of fundamental rights', emphasised that the quoted sentence is the most important independent statement of the decision. However, it has no justification; the Court has simply declared it. In one of the cases concerning the right of assembly (Decision 13/2016 (VII.18.) of the Constitutional Court), there is also no specific reasoning as to why, in the case of marching assemblies, the fact that in some places the persons concerned were able to hold their event, but in other places they could not because of the police ban, meets the proportionality criterion. (In the latter case, the police banned the gathering in some of the venues where it was planned to take place, such as the public square in front of the Prime Minister's house.)

179 Decision 16/2016. (X. 20.) of the Constitutional Court. A study on fundamental rights of communication shows a deliberate resistance on the part of the courts to follow the interpretation delivered by the Constitutional Court. Szilágyi, 2018, p. 15-17.

180 Decision 3/2013. (II. 13.) of the Constitutional Court, Decision 30/2015. (X. 15.) of the Constitutional Court, Decision 14/2016. (VII. 18.) of the Constitutional Court.

181 Decision 13/2016. (VII. 18.) of the Constitutional Court.

addressed to the Parliament, the Government, the EU institutions, and to the other Member States.[182]

In the holdings of the decision on the abstract interpretation of the constitution, and in the reasoning of other decisions, the Constitutional Court has made it clear that, on the basis of Article 24 (1) of the Fundamental Law, the genuine interpreter of the Fundamental Law is the Constitutional Court. The interpretation provided by the Constitutional Court cannot be derogated by any interpretation provided by another organ (be it a national one or that of the EU), the Constitutional Court's interpretation has to be respected by everyone. The latter turn of phrase expresses that its decisions are addressed to everyone. This is, of course, more a theoretical construct than a reality, or an actual intention to communicate constitutional values to the ordinary person. The language of the decisions, and their abstract nature, makes them unsuitable for this purpose.

The principle that most often permeates the decisions of the Constitutional Court is the rule of law and legal certainty, as seen in nineteen decisions with some relevant connection to the subject matter of the case, even if only as an illustrative argument. It is referred to by the Constitutional Court in relation to the right to a fair trial, constitutional criminal law, the right to vote, social security pensions, and the right of assembly. If not in all cases, the principle of the rule of law is considered to have a strong influence on the Constitutional Court's interpretation of the constitution.[183] Meanwhile, although it appears in only one decision, the statement on equality before the law is nevertheless an overarching one—that it is a fundamental value of the Hungarian constitutional system, which is a general requirement pervading the entire legal system.[184]

In comparison, principles and concepts that influence the thinking of the Constitutional Court can only be defined in a particular way. Thus, in matters relating to freedom of expression, freedom of the press, freedom of assembly, and the right to access public data, an interpretative background is emerging, with democracy as a common element. This is based on the so-called democratic theory serving as an instrumental justification of the freedom of expression, the essence of which is that participation of the citizens is indispensable for democratic self-government, presuming that the participants may express their views on matters that affect the community. Without freedom and diversity of social and political debate, there is no democratic public opinion or democratic rule of law.[185]

182 'Respect for and protection of Hungary's sovereignty and constitutional identity are binding on everyone (including the Parliament and the Government directly involved in the decision-making mechanism of the European Union), and the supreme guardian of its protection is the Constitutional Court, pursuant to Article 24 (1) of the Fundamental Law'. Decision 22/2016. (XII. 5.) of the Constitutional Court.

183 The importance of the rule of law within the Constitutional Court has been questioned by some Justices of the Constitutional Court in the light of the interpretative rule under Article R) (3) of the Fundamental Law. See Uitz, 2016, p. 185.

184 Decision 3/2020. (VI. 22.) of the Constitutional Court.

185 Decision 7/2014. (III. 7.) of the Constitutional Court.

3. ECtHR's methods and style of interpreting fundamental rights

3.1. Criteria for selecting the decisions examined

The thirty decisions include the ECtHR judgements referred to by the Constitutional Court in its own decisions. Where there was more than one such reference, the decision in which the applicant initiated proceedings against Hungary was chosen in the first place. If there were more of them, or if there were no cases with Hungarian reference at all, then the determining factor was which judgements received more attention from the Constitutional Court. If this was not a decisive factor either, then the selection was made at random from the multiple ECtHR judgements cited.

Twelve of the judgements selected in the manner described above were handed down in proceedings against Hungary. In these cases, with one exception,[186] the ECtHR has largely relied on its previous decisions in interpreting the ECHR; therefore, they cannot be considered as 'leading cases' for the purposes of case law. There is a single case related to Hungary[187] out of the twelve, in which the ECtHR and the Constitutional Court dealt with the same violation of rights (whether the suspension of pension benefits during the period of employment in the public sector violates the right to property or the prohibition of discrimination). In the case before the Constitutional Court,[188] in addition to examining conformity with the Fundamental Law, the petition also aimed to examine the violation of an international convention (ECHR), and in view of this, the Hungarian forum suspended its proceedings to await the judgement of the ECtHR and then issued its own decision on both issues. The judgement of the ECtHR and the decision of the Constitutional Court were the same in their outcome: there was no violation of fundamental rights, and the petition/application was dismissed.

3.2. Role of grammatical interpretation in decisions of the ECtHR

The ECtHR makes significantly more use of the ECHR text in its argumentation than the Constitutional Court makes use of the text of the Fundamental Law. The structure of the reasoning is linked to the 'phrases' of the fundamental rights provision, often grouped in separate paragraphs, and the title of the paragraph is the phrase used in the ECHR itself. This can be observed even when the content of the relevant phrase has already been supported by rich case law. Therefore, the main method of interpretation is not grammatical but contextual (i.e. reference to precedents). In many cases, the wording of a fundamental right and its limitations is more detailed than the corresponding provision of the Fundamental Law.

186 Magyar Helsinki Bizottság v Hungary.
187 Fábián v Hungary.
188 Decision 29/2017. (X. 31.) of the Constitutional Court.

The framework for the interpretation of the ECHR is provided by the Vienna Convention on the Law of Treaties of 23 May 1969; i.e. the provisions of the ECHR must be interpreted in the light of the rules of interpretation contained in Articles 31 to 33 of the Vienna Convention.[189] This includes that the treaty must be interpreted according to its 'ordinary meaning'. It would be beyond the scope of this paper to explore what is meant by 'ordinary' meaning under the Vienna Convention. Therefore, on the basis of the thirty decisions, it can be limited to the conclusion that 'ordinary' meaning is not in itself a decisive factor in the interpretation of the ECHR.[190] In four decisions[191] out of the thirty, the ECtHR has specifically dealt with the 'ordinary' meaning of the text in the context of the case.

Another method of interpretation that can be traced back to the Vienna Convention is the comparison of the different language texts of the Convention (English and French) as well as the terms and phrases used in them.[192] This is, of course, absent from the decisions of the Constitutional Court, since its legal texts have one authentic version written in a single language.

As with the Constitutional Court, the ECtHR is also characterised by system building (i.e. the establishment of principles and tests in concrete decisions that can be generally followed in subsequent cases).[193] Therefore, the meaning of each word has specific legal content. This legal content, owing to the very nature of the ECHR as an international legal instrument, does not follow from the law of the States Parties. On the contrary, legal qualification by national legislation (i.e. under national law) is, at most, only one of the factors in the interpretation. An autonomous[194] meaning may be attributed to words, which is specific to the scope of application of the Convention and independent of national laws. The resulting system and tests are more sophisticated than those of the Constitutional Court.

189 The use of the Vienna Convention for interpretation of the ECHR was not a consequence from the ECHR's provisions but from the decision in Golder case by the ECtHR. (Golder v. the United Kingdom, application no. 4451/70, judgement from 21 February 1975).

190 Öztürk v Germany. In Magyar Helsinki Bizottság v. Hungary, the UK government as intervener sought to persuade the ECtHR that ordinary meaning should be the primary means of interpreting the ECHR, but this was not confirmed by the ECtHR.

191 Öztürk v Germany, Marckx v Belgium, Sergey Zolotukhin v Russia, Magyar Helsinki Bizottság v Hungary.

192 The rules for the interpretation of conventions drawn up in different languages are laid down in Article 33 of the Vienna Convention, and the English and French texts are equally authentic under Article 59 of the ECHR. See Öztürk v Germany, Marckx v Belgium.

193 Earlier decisions seek to restrict the scope of interpretation, but the later decision removes this limitation. For example, in Öztürk v. Germany, the ECtHR pointed out that in the case Engel, which was treated as a precedent, the Court was careful to state that its attention was limited to the military service relationship. Nevertheless, the principles expressed therein are also relevant in the more recent case, *mutatis mutandis*. Among the thirty judgements, one case included a previous case law that was not crystal clear, giving rise to different conclusions, which had to be resolved. See A and B v. Norway

194 Kostovski v The Netherlands, Öztürk v Germany.

Legal principles, such as *ne bis in idem*,[195] the rule of law, the precautionary principle,[196] the concept of *implied limitations*,[197] the principle of *par in parem non habet imperium*,[198] universal suffrage,[199] and the doctrine of state immunity[200] have been mentioned in a smaller number of ECtHR decisions. For principles deriving from international law, the ECtHR seems willing to accept the content of international (customary) law, whereas for principles known in international and/or national law (e.g. *ne bis in idem*), it develops an independent meaning.

None of the thirty decisions selected contained any consideration for other technical meanings of the words.

3.3. Logical interpretation in ECtHR practice

This is a rather rarely used method of interpretation: the ECtHR has used it in only two of the thirty decisions. Two decisions were *argumentum a contrario*[201] and one was *argumentum ad absurdum*. With regard to the latter, the Court has pointed out that a specific interpretation would destroy the essence of the fundamental right.[202]

3.4. Systematic interpretation

3.4.1. Contextual interpretation in narrow and broad senses

Contextual interpretation in the narrower sense (i.e. where the law-applying party draws a conclusion from the place of the provision within the full norm) cannot be found in any of the thirty decisions. In this respect, the ECtHR does not attach any importance to the fact that the fundamental right in question is included in the Convention signed in 1950 or in its Additional Protocol.

Broader contextual interpretation (i.e. where the interpretation is made in light of another fundamental right or other provision regulated in the ECHR, such as Article 1 of the ECHR[203]), is a method applied quite commonly: it is used in seventeen decisions. The ECtHR has also stressed that it attributes the same meaning to identical or similar expressions found in specific provisions of the ECHR. Thus, the

195 A and B v Norway.
196 Tătar v Romania.
197 Gerorgian Labour Party v Georgia.
198 Cudak v Litvania.
199 Georgian Labour Party v Georgia.
200 Cudak v Litvania.
201 Marckx v Belgium, Alajos Kiss v Hungary. In the latter case, the ECtHR applied the *a contrario* argument, not on its own, but in conjunction with a broad contextual interpretation: unlike other provisions of the ECHR, Article 3 of the First Additional Protocol does not define or limit the purposes which the restriction must serve, and thus many purposes may be compatible with Article 3.
202 Magyar Helsinki Bizottság v Hungary.
203 Georgian Labour Party v Georgia.

content of the phrases 'in accordance with the law' and 'prescribed by law' found in Articles 9 and 10 is identical and—in addition to laying down that it complies with domestic law—requires the fulfilment of certain qualitative requirements, such as foreseeability, generality, and absence of arbitrariness.[204] It is also a commonly used method to construe the right of assembly together with the right to freedom of expression, since the protection of freedom of opinion and expression is one of the purposes of the freedom of assembly.[205]

In accordance with the case law of the ECtHR, the ECHR must be read as a whole and interpreted in such a way as to promote internal consistency and harmony across its various provisions.[206] Consistency of interpretation is also emphasised by the ECtHR in the case of A and B v. Norway, where it is revealed that there is a lack of uniformity in the established case law on the application of the *ne bis in idem* principle. The Court of Justice concluded that the *ne bis in idem* principle is mainly concerned with due process, which is the object of Article 6, and less concerned with the substance of the criminal law than Article 7. For this reason, the 'criminal' nature of the proceedings was assessed in accordance with the criteria developed under Article 6.

The ECtHR applies not only the interpretation of different rights contained in different articles but also the relative interpretation of several provisions within a single article. Thus, for example, the provision laid down Article 6 (1), as a general formulation of the right to a fair trial, is an essential interpretative reference point for the interpretation of the guarantees referred to in the other paragraphs that constitute a specific aspect of the same fundamental right.[207] The ECtHR compares specific provisions and their aims related to the permissible restrictions of the fundamental right within Article 5 that stipulates the prohibition of the deprivation of liberty.[208]

The role fulfilled by the preamble is not insignificant in the course of interpretation.[209] For example, the principle of the rule of law is shown as a common heritage of European countries. Beyond the 'legality' of the restriction of human rights, it is often invoked by the ECtHR in the context of the right to a fair trial, which incorporates—through legal certainty—the requirement of *res judicata*.[210] Democracy, which is also mentioned in the preamble and is part of the proportionality test for the restriction of rights, is also often mentioned in the argumentation. The ECtHR has not applied a derogation formula in the thirty decisions selected.

204 Rekvényi v Hungary.
205 E.g. Patyi v Hungary.
206 Magyar Helsinki Bizottság v Hungary.
207 Kostovski v the Netherlands.
208 Lokpo and Touré v Hungary.
209 This follows from Article 31 of the Vienna Convention on the Law of Treaties.
210 Sovtransavto Holding v Ukraine.

3.4.2. Interpretation under national rules

National legislation plays a role in the selected decisions in the context of the 'statutory' nature of the restriction of a specific fundamental right, on the one hand, and as an element of the criteria developed in the scope of the interpretation of the phrase 'penal' in the context of the interpretation of Article 6, on the other hand.

As regards the former, one of the conditions for the restriction of several fundamental rights is that the restriction must have a legitimate aim (i.e. 'prescribed by law'). This phrase has a specific meaning, and it is not limited to qualification under national law. However, the ECtHR examines whether there is any provision in the law of the requested country that imposes the restriction, and in doing so, it sometimes carries out an in-depth examination.

The latter are the so-called Engel criteria, the first step of which is to establish whether or not the norm, which constitutes the offence in question, falls within the scope of criminal law under the legal system of the defendant country.[211] The qualification under national law is not necessarily a decisive factor for the application of the ECHR. Even if the unlawful act is not a criminal offence under national law, it may be 'criminal' for the purposes of the ECHR on the basis of other criteria (nature of the act, level and severity of the penalty imposed).

In addition to the above, in ECtHR judgments, regulation under national law is repeatedly used as a comparative argument to show how the law of each country regulates a particular institution.[212] These reviews form an important part of the discursive argumentation, to be discussed below, under 'margin of appreciation' and evolutive interpretation, as well as when the ECtHR highlights an element of the respondent country's legislation or judicial case law in support of its arguments.[213]

3.4.3. Interpretation based on previous ECtHR decisions

As in the case of the Constitutional Court, the most important and most frequently used method in the ECtHR is referring to previous decisions, which is used in all the decisions examined. For the sake of predictable application, the ECtHR often develops tests and criteria to be used in subsequent cases. However, inconsistencies remain in case law, probably also owing to carrying out procedures in councils/chambers of different composition. Although the ECtHR refers to its 'consistent case law', it indicates the specific previous decisions on which it bases its reasoning, and there is no general reference to case law.

In Magyar Helsinki Bizottság v. Hungary, the ECtHR confirmed its earlier view that it is in the interest of legal certainty, foreseeability, and equality before the law that it should not depart from precedents laid down in previous cases without good reason.

211 Öztürk v Germany.
212 Öztürk v Germany, Fáber v Hungary, Magyar Helsinki Bizottság v Hungary.
213 Cudak v Litvania, Tătar v Romania.

3.4.4. Interpretation based on standards and proposals of other Council of Europe bodies

Of the thirty decisions selected, only six contained any document of a Council of Europe institution or body. Examples include the resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy,[214] the Venice Commission's recommendation, the Code of Good Practice in Electoral Matters, the Venice Commission's Report on Electoral Law and Electoral Administration in Europe,[215] the report of the European Commission against Racism and Intolerance,[216] resolution 1430 (2005) of the Parliamentary Assembly of the Council of Europe on Industrial Hazards,[217] Resolution (7) 15 of 15 May 1970 of the Committee of Ministers of the Council of Europe on the social protection of unmarried mothers and their children,[218] Committee of Ministers of the Council of Europe, and Recommendation Rec (2002) 2 on access to official documents.[219] These documents have been used by the ECtHR either as supporting or illustrative elements.

3.5. External systemic (comparative) interpretation in the case law of ECtHR

3.5.1. International treaties

The Vienna Convention on the Law of Treaties contains several provisions on the interpretation of international treaties, and which the ECtHR refers to and applies—occasionally explicitly or only in substance—in decisions under examination.[220] The application of the Vienna Convention in the interpretation of the ECHR—bearing in mind that the Vienna Convention is more recent than the ECHR and has no retroactive effect—derives from customary international law.[221] It is stressed in legal literature that the provisions of the Vienna Convention must be applied with caution in view of the special features of the ECHR.[222]

214 von Hannover v Germany.
215 Gerorgian Labour Party v Georgia.
216 Fáber v Hungary.
217 Tătar v Romania.
218 Marckx v Belgium.
219 Magyar Helsinki Bizottság v Hungary.
220 Articles 31–33.
221 The Place of the European Convention on Human Rights in the European and International Legal Order. Report of the Steering Committee for Human Rights (CDDH) adopted at its 92nd meeting (Strasbourg, 26–29 November 2019), p. 34. Available at: https://rm.coe.int/place-of-the-echr-in-the-european-and-international-legal-order/1680a05155 (Accessed: 28.04.2021). Jacobs and White, 2006, p. 38.
222 Jacobs and White, 2006, p. 40; Ulfstein, 2020, p. 918. As Bragyova (2011, p. 84) put it, human rights obligations in international law are essentially obligations on the content of each state's legal order. The basic purpose of human rights conventions is thus to provide a binding minimum common content of legal systems on various issues of mutual concern to the States Parties.

In nine of the decisions examined, the ECtHR carries out interpretation in conjunction with other international conventions. Whether the State Party concerned has signed or ratified the convention referred to is not necessarily decisive. The ECtHR applies the well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law, either 'codifying' it or forming a new customary rule.[223]

The direction of the trend observed[224] in international law is also important with regard to evolutive interpretation.[225] At the same time, this goes beyond the scope of international treaties to include the principles of international law and customary international law.

In the Sergey Zolotukhin case, the ECtHR compared the wording of international conventions containing the *ne bis in idem* principle to define the principle's scope of protection. However, among the conventions referred to, there was also one (American Convention on Human Rights) to which the States Parties of ECHR were not parties. The same approach was applied in Magyar Helsinki Bizottság v. Hungary (where the African Charter on Human and Peoples' Rights was also invoked).

The purpose of external systematic interpretation is to promote consistency in and prevent the fragmentation of international law. This facilitates the prevention of forum shopping and the predictability of states' obligations under the various international treaties.[226] More recently, consideration has been given to both universal conventions (e.g. UN Conventions) and other regional human rights conventions, such as the American Convention on Human Rights and the African Charter on Human and Peoples' Rights, including the related case law of the international courts. All this is part of the dialogue between the relevant fora.[227] Thus, international conventions—even if the states parties of the Council of Europe are not necessarily parties to such conventions—play a very important role in the interpretation of the ECHR and are more than mere reviews or illustrative elements in the argumentation.

3.5.2. Case law of international courts

In relation to international conventions, where available, the ECtHR also used to refer to the interpretation of the international convention by an international judicial forum (e.g. Inter-American Court of Human Rights, UN Commission on Human Rights, European Union/Community Court of Justice, and the related opinion of the Advocat Générale, International Court of Justice). In total, there are seven such decisions out of the thirty. These decisions are linked to international conventions

223 Cudak v Litvania.

224 See Article 31 (3) point c) of the Vienna Convention.

225 Marckx v Belgium, Magyar Helsinki Bizottság v Hungary.

226 The Place of the European Convention on Human Rights in the European and International Legal Order. Report of the Steering Committee for Human Rights (CDDH) adopted at its 92nd meeting 36.

227 Killander, 2010, p. 163.

and play a role similar to them in the interpretation of fundamental rights by the ECtHR.

3.5.3. Other sources of international law

In six of the selected decisions, other sources of international law are occasionally mentioned, such as customary international law, principles of international law,[228] and other documents of international law (e.g. draft of international conventions, the Charter of Fundamental Rights, the Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the General Assembly on the right to access information, the Rio Declaration adopted at the UN Conference on Environment and Development, and the Stockholm Declaration adopted at the UN Conference on the Human Environment). The case of the Georgian Labour Party v. Georgia is worth mentioning; in this case, the ECtHR relied heavily on the report of the Georgian Parliamentary Election Observation Mission on the Georgian electoral register and the conduct of the elections, which played an important role in assessing the specific situation in the country.

In exceptional cases, these sources are decisive on their own,[229] but in other cases, they are used in conjunction with other sources of international law or other methods of interpretation, as mentioned with regard to international conventions.

3.6. Interpretation according to purpose

It follows from the interpretative provision of the Vienna Convention that the ECHR must be interpreted according to its object and purpose. This occurs in nine decisions of the thirty selected. One of the consequences of interpretation according to purpose is that the fundamental rights protected by the ECHR are interpreted in relation to one another, namely, the protection of opinions and their expression is one of the aims of the right to peaceful assembly and association guaranteed by Article 11 of the ECHR.[230] Furthermore, the ECtHR has derived from the interpretation of the ECHR, as an instrument for the protection of human rights and according to its object and purpose, that its provisions must be interpreted and applied in a manner that renders its rights practical and effective, not theoretical and illusory.[231]

228 Cudak v Litvania, Sovtransavto Holding v Ukraine, Bensaid v United Kingdom.

229 With regard to temporal scope, the ECtHR applied a principle of international law and applied the first Additional Protocol only to the injurious acts, which are extended in time but interconnected, committed after the entry into force of the Protocol for the State concerned, while it only took into account the earlier acts for the purposes of the application as a whole. Sovtransavto Holding v. Ukraine.

230 Patyi v Hungary.

231 Matthews v United Kingdom, Magyar Helsinki Bizottság v Hungary.

3.7. Historical interpretation

Historical interpretation appears as a complementary method in the Vienna Convention followed by the ECtHR: it is used to reinforce the primary methods and may be invoked when the text of the convention is otherwise vague, irrational, or absurd. In particular, *travaux préparatoires* play a role in the interpretation of the ECHR. Probably also because of the accumulation of case law over the past decades, the ECtHR has found it necessary to refer to these documents in only a few cases. Only four of the examined decisions contain historical interpretation. In two cases,[232] it has a confirming role. In one case, the ECtHR chose an interpretation explicitly to the contrary.[233] The case of Magyar Helsinki Bizottság v. Hungary is interesting because some of the states involved in the proceedings attributed content to the *travaux préparatoires* different from the one the ECtHR read and used to support its arguments.

3.8. Reference to works of legal literature in ECtHR decisions

In none of the decisions examined did the ECtHR refer to any legal literature in support of its decision.

3.9. General principles in ECtHR practice

The ECtHR considers a number of legal principles when interpreting the ECHR, some of which are accepted principles of international law or rather can be considered as principles of branches of law. A legal principle of a general nature, as the one found in the case of the Constitutional Court, does not appear in the thirty decisions selected.

3.10. Non-legal values, aspects in arguments of the ECtHR

The ECtHR has developed a number of 'methods', or doctrines, according to the term used in the legal literature, that influence the interpretation of the ECHR's articles in general. However, these cannot be fully integrated into the above 'traditional' methods of interpreting the law and they 'overlap' with them. Therefore, it is worth giving an account of them here.

These methods, at least in principle, can also be traced back in some way to the Vienna Convention, although this origin is not always clear from the decisions examined. One such method is the doctrine of effectiveness, which can be traced back to a decision adopted in 1975.[234] The essence of it is that the object and purpose of

232 Marckx v Belgium, Sergey Zlotukhin v Russia.

233 A and B v Norway.

234 Golder v. United Kingdom, in which the ECtHR held that the right of access to a court is covered by Article 6 (1) ECHR.

the Convention, as an instrument for the protection of human rights, require that its provisions be interpreted and applied in a manner that renders its rights practical and effective, not theoretical and illusory. As the quotation shows, the original effective interpretation can be traced back to the rule of interpretation laid down in Article 31 of the Vienna Convention (object and purpose of the Convention). The above formula of effective interpretation occurs in four of the decisions examined.

Another specific method[235] used by the ECtHR is the 'living instrument' or evolutive or dynamic interpretation, which has its roots in a decision in 1978[236] and has since become a popular method of interpreting the articles of the ECHR.[237] Some sources trace the evolutive interpretation method back to Articles 31 to 32 of the Vienna Convention.[238] The essence of this method is that the Convention should be interpreted in the light of 'present day conditions'.

An important stage in the development of the 'living instrument' principle is the case of Marckx v. Belgium, also included among the thirty decisions selected, in which the ECtHR concluded, on the one hand, as confirmed by the changes observed in national laws and by two conventions ratified by only a few countries, that the Belgian legislation on the status of illegitimate children and the distinction between legitimate and illegitimate children are contrary to Articles 8 and 14 of the ECHR. Criticisms found in the dissenting opinions[239] and legal literature[240] suggest that the ECtHR has based its decision on a future development rather than on the actual situation. The other such decision among the selected thirty is the case of Magyar Helsinki Bizottság v. Hungary, in which evolutive interpretation has played

235 The ECtHR is not unique in applying this method: other regional international human rights courts also use it. See The Place of the European Convention on Human Rights in the European and International Legal Order. Report of the Steering Committee for Human Rights (CDDH) adopted at its 92nd meeting (Strasbourg, 26–29 November 2019) 33, Killander 149–152.

236 Tyrer v United Kingdom, Application no. 5856/72, judgement of 25 April 1978.

237 There have been many criticisms of this method in the literature, primarily because the conditions for its application are not entirely clear. For example, the ECtHR has stressed in several decisions that it is for the ECtHR to decide which international legal documents are relevant in a case and what weight it attaches to them. Moreover, the so-called 'European consensus' with regard to taking into account national laws does not necessarily mean application without exception, and the ECtHR seems willing to take into account practice as a consensus even if it can only be demonstrated by a majority of the State Parties (broad consensus) (see Magyar Helsinki Bizottság v. Hungary). However, there is an objective basis for the application of the doctrine (a conclusion to be drawn from the development of the law of national states), which makes the judgment more predictable and objective than if the decision were entirely within the discretion of the ECtHR. See Ulfstein, 2020b, p. 924.

238 See The Place of the European Convention on Human Rights in the European and International Legal Order. Report of the Steering Committee for Human Rights (CDDH) adopted at its 92nd meeting (Strasbourg, 26–29 November 2019) 34. See also the concurring opinion of Judge Sicilianos to Magyar Helsinki Bizottság v Hungary. Sicilianos, 2020, available at: https://rm.coe.int/interpretation-of-the-european-convention-on-human-rights-remarks-on-t/1680a05732 (Accessed: 23.04.2021).

239 Dissenting opinion of judges Matscher, Fitzmaurice, and Bindschedler-Robert.

240 Marochini 2014, year, available at: file:///C:/Users/User/Downloads/zb201401_063%20(4).pdf (Accessed: 28.04.2021).

a significant role in the ECtHR's inclusion within the scope of protection of Article 10, in certain cases, of the 'freedom to seek information' (i.e. the state's obligation to disclose upon request data of public interest processed by it). In support of this, the ECtHR cited a number of international conventions and other international legal instruments, based on Article 35 (3) (c) of the Vienna Convention, as well as developments in the domestic legal systems of the state parties (in the thirty-one states examined, with one exception, national law recognises as an independent right the right of access to information and/or documents containing data of public interest held by public authorities). The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

Evolutive interpretation emerges in six of the examined decisions. Effective and evolutive interpretation is related to another also specific ECtHR method: the 'margin of appreciation' doctrine, which is also present in seventeen of the decisions examined. The essence of this doctrine is that state parties enjoy a degree of freedom (at times an extensive one[241]) in the way they fulfil their obligations under the ECHR. Their freedom is greater when evolutive interpretation is not allowed by the development tendency in national or international law. One may find it in the case of Georgian Labour Party v. Georgia. This freedom is more limited if the ECtHR can identify such a tendency. This method of interpretation reflects the subsidiary role[242] of the ECtHR in the implementation of the Convention. Freedom is not unlimited, and this limit is set by the ECtHR.[243] 'Margin of appreciation' is not strictly a method of interpretation; its function is to share the interpretative competence between the ECtHR and national bodies (in particular national courts).[244]

241 A wide margin of discretion is observed concerning the right to vote. Georgian Labour Party v. Georgia, Alajos Kiss v. Hungary.

242 The principle of subsidiarity is reinforced by the so-called Brighton Declaration, available at: https://bit.ly/3uRByFd (Accessed: 21.04.2021) and by point 10 of the Copenhagen Declaration, available at: https://bit.ly/3DjrEiD (Accessed: 21.04.2021), which stresses that subsidiarity is not intended to limit or reduce the protection of human rights. Protocol No. 15 amending the ECHR has modified the preamble and added a new recital as follows: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention' (entered into force on 1 August 2021).

243 This doctrine has also been criticised in the literature for the lack of clarity on the conditions of application of the method, i.e. when and how it should be applied to a specific case. See Marochini, 2014, p. 74. In addition to reinforcing the principle of subsidiarity, the Brighton and Copenhagen Declarations have also encouraged the ECtHR to further develop the doctrine of 'margin of appreciation', to make judgements more consistent and clearer. Copenhagen Declaration, points 28 to 31.

244 Ulfstein, 2020.

3.11. Relation between arguments put forward by the ECtHR, style of decisions

3.11.1 Relation between arguments in the ECtHR's judiciary

Apart from those cases where no particular new consideration was required to answer the fundamental rights question raised, thereby enabling specific positions on the application on the basis of previous decisions, it is difficult to discern the interrelations between the methods of interpretation used and their decisive or cumulative nature, as in the case of the Constitutional Court. The Vienna Convention itself does not establish a hierarchy of the various methods, with the exception of complementary methods, nor does it follow from the case law of the ECtHR. The ECtHR considers the task of interpretation as a single complex operation, [245] and this is reflected in the decisions under consideration.

In this respect, the relatively recent case of Magyar Helsinki Bizottság v. Hungary, in which the ECtHR gave a detailed account of the interpretative methods it applied, is particularly noteworthy. It is based on the articles of the Vienna Convention referred to above. The ECtHR takes into account the subject matter and purpose of the ECHR, the context, as well as the ordinary meaning of the text. The ECtHR reads the ECHR in its entirety and interprets it in such a way as to promote internal consistency and harmony among its various provisions (broad contextual interpretation). It also takes into account the rules and international legal principles applicable to the relations between the state parties and their common international or domestic standards consisting of rules and principles accepted by the vast majority of European States. Finally, the ECtHR also makes use of the additional means of interpretation under the Vienna Convention, such as *travaux préparatoires*.

The ECtHR underpins the use of precedents with legal certainty, predictability, and equality before the law, which justify that precedents established in previous cases should not be departed from without good reason. However, evolutive interpretation compensates for its inflexibility. One may also conclude in the context of the ECtHR decisions that since the fundamental rights violation requires a multistage examination, and since at each stage, one or another, or several methods are used, it is not possible to take a position on the decisive or combined nature of the arguments.

3.11.2. Style of decisions, fundamental rights tests

It is also clear from the examined decisions of the ECtHR that some human rights are unlimited and others can be limited under certain conditions. An unlimited and, therefore, an absolute human right (or rather a prohibition) is the ban of torture in Article 3.[246] The right to liberty and security enshrined in Article 5, the right to

245 Jacobs and White, 2006, p. 40.
246 Bensaid v United Kingdom.

respect for private and family life protected by Article 8, the freedom of expression guaranteed by Article 10, and the right of assembly under Article 11 may be restricted. The protection of property under Article 1 of the First Additional Protocol and the right to free elections protected under Article 3 are also not absolute, as they are human rights that can be limited.[247]

In contrast to the Fundamental Law of Hungary, which regulates the conditions for the restriction of fundamental rights in a separate article, the ECHR gives separate definitions for each fundamental right. In the absence of such an express provision, the requirements for limiting the right of access to the courts, for example, have been shaped by judicial case law, since this right has already been extracted from Article 6 by case law. According to this case law, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relation of proportionality between the means employed and aim sought to be achieved

The test is otherwise similar to the test under the Fundamental Law, at least for fundamental rights, such as the protection of privacy (Article 8), freedom of expression (Article 10), and freedom of assembly (Article 11). However, the ECHR defines the purposes for which a restriction may be imposed differently, and these purposes are more directly linked to the nature of the fundamental right in question. In any case, the test under the Fundamental Law appears to be stricter, holding that a fundamental right can be restricted to enforce another fundamental right, and not generally to enforce the rights of others. Meanwhile, on the basis of the Fundamental Law, the restriction may be justified by a constitutional value, but there is no precise content in the case law of the Constitutional Court that would allow a thorough comparison of the two tests on the basis of the decisions under examination.

The test applied by the ECtHR is, however, more clearly set out—often demonstrated by the way the reasoning is structured—in the judgments than in the decisions of the Constitutional Court. The main steps are as follows: deciding whether the harm alleged in the application falls within the scope of protection of a human right, whether there has been interference with that right, and whether the interference is justified/necessary in a democratic society (i.e. whether it serves a legitimate aim defined by law, and whether the restriction is proportionate to the aim it seeks to achieve). With regard to the latter, the ECtHR makes an assessment taking into account all the circumstances of the case. In this respect, the margin of appreciation of the State Parties—which is broad or 'certain'[248]—takes significance, and the ECtHR itself is the ultimate assessor of this margin of appreciation. For individual human rights, the ECtHR has already developed a more or less traceable set of criteria that

247 Matthews v United Kingdom.
248 Feteris, 2020, p. 37.

allows state parties to assess in advance which of their measures are compatible with the ECHR and which are not, and what may fit within proportionality.

Interference by public authorities in the peaceful enjoyment of goods (as property) can only be justified if it serves a legitimate public interest. The concept of public interest is necessarily a broad one, and the Court respects the lawmaker's judgment as to what is in the public interest unless such a judgment is manifestly lacking any rational basis. In doing so, however, it does not assess whether the lawmaker has chosen the best solution.[249] The broad interpretation of public interest and its reasonableness limit are also reflected in the decision of the Constitutional Court.

Regarding the right to a fair trial protected by Article 6, the ECtHR has not stated in the judgments examined that it is an absolute right, although the assessment of fairness is made by weighing all the circumstances of the case, and the application of the proportionality test is not taken into consideration. In its weighing considerations, the case law also takes into account efficiency and economic needs (e.g. systematic holding of hearings would ultimately make adjudication within a reasonable time impossible).[250] In contrast, the ECtHR applies the proportionality test to the right of access to a court under Article 6.[251]

The ECtHR considers the prohibition of being tried or punished twice, guaranteed in Article 4 of Additional Protocol No. 7, to be close to Article 6. It therefore finds the so-called Engel criteria, originally developed under Article 6, to be applicable to this right. With regard to this human right, the proportionality test is not applied in the decisions examined.

The prohibition of discrimination under Article 14 applies only in relation to human rights guaranteed in the ECHR (its protocols) and to rights that fall within the general scope of a convention provision that the state concerned has voluntarily undertaken to ensure. Article 14 has no independent existence. The breach of the prohibition is found to exist if there is a difference in the treatment of persons in an analogous or similar situation in the relevant respect. The treatment can only be considered discriminatory if there is no objective and reasonable justification for it (i.e. it does not serve legitimate aims or there is no reasonable proportionality between the aim pursued and means employed).[252] The test is similar to the Hungarian one, but for the reasons given above, the ECtHR does not distinguish between discrimination in human rights and other rights, as the latter are not protected under ECHR. Hungarian law does not examine reasonableness in the case of discrimination with regard to fundamental rights, provided that they are linked to specific characteristics (e.g. gender, race, language, religion) but applies the proportionality test.

The reasoning of ECtHR decisions is, in many respects, structured differently from that of the Constitutional Court. One reason for this is that the proceedings

249 Fábián v Hungary.
250 Pákozdi v Hungary.
251 Cudak v Litvania.
252 Fábián v Hungary.

before the ECtHR are adversarial in nature, whereas those before the Constitutional Court are not. Thus, the ECtHR reacts not only to the points raised by the applicant but also to the replies of the respondent state and, again because of the specific nature of the procedure, also to the position of the Commission and, if the decision is taken in an appeal procedure, to the position of the chamber. Indeed, in major cases, it is common for several state governments or social organisations to intervene in the proceedings, and the ECtHR also refers to this in its reasoning for the judgment. Intervention is one of the tools of dialogue between the ECtHR and the states, which allows the ECtHR to obtain a more accurate picture of the state of national rights and the direction of their development. All this promotes a balanced application of evolutive interpretation and the 'margin of discretion' doctrine.[253]

The ECtHR basically decides based on the individual circumstances of the case before it whether an infringement has been committed. Nevertheless, the argument put forward may have further spill-over effects, particularly if the infringement arises directly from the provisions of the law, without any decision made by the parties applying the law. The ECtHR has always stressed that it is not in charge of the abstract examination of the provisions of the law. It is for the respondent State to take the measures it considers appropriate to ensure that its domestic law is coherent and consistent.[254]

Owing to the adversarial nature of the procedure, it is common in cases before the ECtHR that some of the steps of the fundamental rights test are not subject to further scrutiny by the ECtHR on the grounds that there is no conflict between the applicant's and the respondent's positions on this point, and that the ECtHR itself sees no reason to differ. This solution is obviously absent from the decisions of the Constitutional Court. Instead, the Hungarian body pays little attention to the obvious circumstances in its reasoning (e.g. whether there has been a restriction/interference with fundamental rights). Furthermore, in discrimination cases, the ECtHR also places the burden of proof on the parties. Thus, it is for the applicant to prove the existence of discrimination, while it is for the respondent state to prove that it was justified. Similarly, this is also an element not found in procedure of the Constitutional Court.

The judgments of the ECtHR are strongly permeated by the idea of the rule of law, as set out in the preamble, which has a decisive influence on the interpretation of human rights through interpretation of the object and purpose of the ECHR. A condition for the restriction of human rights is a legitimate aim regulated by law, whereas the measures of legal regulation are the criteria of the rule of law and legal certainty (particularly, predictability). The ECtHR has derived from the rule of law

253 See in this respect paragraph 39 of the Copenhagen Declaration, in which the Conference urged the ECtHR to support the intervention of third states, in particular before the Grand Chamber, by providing timely information on cases raising questions of principle and by making the issues raised available to the parties at an early stage of the proceedings. State parties were encouraged to cooperate to intervene (point 40).

254 Marckx v Belgium, Fábián v Hungary.

res judicata as an element of fair procedure. Democracy, also reflected in the preamble, plays an important role. It is particularly prominent in judgments relating to the right to vote[255] and freedom of expression[256] and assembly, but also in relation to the right to a fair trial.[257]

4. Summary

Based on the selected decisions, as regards the applied methods of interpreting the law, practices of the two courts share the primary and frequent reference to previous decisions (precedents). This is linked to the fact that the wording of fundamental rights is abstract, and at times intentionally vague. Both equality of rights and legal certainty (predictability) require courts to decide similar cases on the basis of similar principles and criteria. Any deviation from precedents shall require justification.

The feature that decisions do not simply provide adjudication of specific cases but also lay down principles – where the relevant case is appropriate for this purpose – is equally true for both courts. In this way, the courts anticipate the standards by which future cases will be judged upon. The criteria for individual consideration become doctrines through subsequent confirmations and repetitions. This is true even though legitimate criticisms may also be put forward on the inconsistency of the system, its erroneous ideas, and the purity of the tests.

Another common element is the treatment of the Fundamental Law and the ECHR (and its additional protocols) as a unit and the desire to create internal coherence, relying heavily on interpretation in conjunction with other provisions. However, an important difference arising from the fact that the source of the object of interpretation (fundamental right/human right) is different: the Fundamental Law is a charter constitution, whereas the ECHR is an international treaty. The framework of their interpretation is, therefore, different.

The Fundamental Law is restrictive in its guidance on the methods to be used for interpreting the constitution. Of these, only interpretation according to purpose is of practical relevance. Even if it can be argued that 'there is no legally relevant element of the National avowal that is not clearly elaborated in the constitutional text', and therefore, the National avowal cannot become the basis for legislation and

255 Effective political democracy, see Matthews v United Kingdom.

256 Freedom of expression is an essential element of a democratic society. See Magyar Helsinki Bizottság v Hungary.

257 Fair administration of justice has a prominent place in a democratic society and it cannot be sacrificed for the sake of expediency (in the relevant case, the fight against organised crime). See Kostovski v the Netherlands.

activist judgments, as in the preambles of the French or Polish constitutions[258], the fact remains that the Constitutional Court hardly ever relies on the National avowal in its interpretation, and even then, it does so only illustratively. By contrast, in the interpretation of the ECHR, reference to the preamble has a much more vivid and developmental effect. This does not, however, have a decisive influence on the outcome of the interpretation: rule of law and democracy are given a prominent place in the interpretation of both bodies, regardless of their specific location.

In the case law of the ECtHR, the framework for the interpretation of the ECHR is provided by the Vienna Convention on the Law of Treaties, which provides for the application of several methods, and from the combination of which the ECtHR has also developed specific 'methods'. Taking into account other international instruments and the case law of other international courts to prevent the fragmentation of international law is more pronounced in the interpretation by the ECtHR than in that of the Constitutional Court. Although the Constitutional Court has taken the position of interpreting the Fundamental Law in line with the obligations of Hungary under international law, the Constitutional Court is not fully committed to the interpretation developed by international courts.

The ECtHR's methods of interpretation are comprehensively and explicitly stated in its decisions, whereas this is only partially the case with the Constitutional Court, which does not have a well-elaborated system of interpretation. However, in both courts, it is not always clear from the reasoning how the different methods relate to one another, in particular owing to the fact that different methods may be used at the individual stages of the fundamental rights' argumentation.

Nevertheless, the fundamental rights tests applied by the two courts are similar in substance: i.e. fundamental rights may be restricted, with certain exceptions (so-called absolute rights), without affecting the essential content, in the interest of a lawful (statutorily regulated and legitimate) aim, in accordance with the (necessity/proportionality) requirement. Although the influence of the ECtHR on the interpretation of fundamental rights by the Constitutional Court can be clearly demonstrated, considering all the circumstances of the case does not necessarily lead to the same result.

For both bodies, an important aspect in the argumentation is the definition of their own role, which is formulated primarily in the relation between the legislative/law-applying/constitutional court bodies: the definition of what the role of former organs and of the Constitutional Court/ECtHR is. The powers of and the legal consequences applicable by the Constitutional Court are much broader, more direct, and more targeted than damages applicable under the ECHR,[259] despite the fact that in Hungarian law, the final legal remedy, the 'enforcement' of the Constitutional Court's

258 Berkes and Fekete, 2017, pp. 12–25.

259 There have been statements at government level that Hungary will not pay the compensation awarded by the ECtHR in certain types of cases (poor prison conditions). Available at: https://bit.ly/3BnoEkM (Accessed: 21.04.2021).

decision, is left to the judiciary or lawmaker. Nevertheless, it is demonstrated by the ECtHR judgments examined that the conclusions that can be drawn from individual decisions can have a significant impact on national legislation and the application of law, even in the absence of abstract norm control.

There is also a striking difference in the structure and style of the decisions. The procedure before the ECtHR is adversarial, whereas the one before the Constitutional Court is not. For this reason, and also because of the possibility of intervention, the ECtHR's decisions are able to channel and contradict various types of arguments, making its judgments even more discursive. In the proceedings of the Constitutional Court, the appearance of other standpoints is rare, even in spite of the Fundamental Law's provision to this effect,[260] and the decisions are more one-sided.

The interpretation, as well as its correct or incorrect methods, of both the constitution, the ECHR, or any other human rights document are popular topics in jurisprudence. Criticisms contribute to the ultimate function of the constitution itself and the human rights convention: the realisation of the protection of the rights recognised therein. 'The interpretation of the constitution has been called art more than once', said Sólyom in his inaugural speech at the academy.[261] Constitutional judiciary is 'a continuous balancing act between several, ever-changing partial elements, while the result must remain constant and consistent'.[262]

260 The Constitutional Court shall, as provided for by a cardinal Act, hear the legislator of the law, the initiator of the Act or their representative or shall obtain their opinions during its procedure if the matter affects a wide range of persons. This stage of the procedure shall be public. Article 24 (7).
261 Sólyom, 2002, p. 18.
262 Ibid.

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1.	Decision 38/2012. (XI. 14.) of the Constitutional Court	Öztürk v Germany, Application no. 8544/79., judgment of 21 February 1984.
2.	Decision 1/2013. (I. 7.) of the Constitutional Court	Georgian Labour Party v Georgia, Application no. 9103/04., judgment of 8 October 2008
3.	Decision 3/2013. (II. 14.) of the Constitutional Court	Bukta and others v Hungary, Application no. 25691/04, judgment of 17 July 2007
4.	Decision 4/2013. (II. 21.) of the Constitutional Court	Fáber v Hungary, Application no. 40721/08, judgment of 24 July 2012
5.	Decision 16/2013. (VI 20.) of the Constitutional Court	Rekvényi v Hungary, Application no. 25390/94, judgment of 20 May 1999
6.	Decision 33/2013. (XI. 22.) of the Constitutional Court	Sergey Zolotukhin v Russia, Application no. 14939/03, judgment of 10 February 2009
7.	Decision 7/2014. (III. 7.) of the Constitutional Court	Lingens v Austria, Application no. 9815/82, judgment of 8 July 1986
8.	Decision 3025/2014. (II. 17.) of the Constitutional Court	Lokpo and Touré v Hungary, Application no. 10816/10, judgment of 20 September 2011
9.	Decision 20/2014. (VII. 3.) of the Constitutional Court	Sovtransavto Holding v Ukraine, Application no. 48553/99, judgment of 25 July 2002
10.	Decision 28/2014. (IX. 29.) of the Constitutional Court	von Hannover v Germany, Application no. 9320/00, judgment of 26 June 2004
11.	Decision 36/2014. (XII. 18.) of the Constitutional Court	Cudak v Lithuania, Application no. 15869/02, judgment of 23 March 2010
12.	Decision 24/2015. (VII. 7.) of the Constitutional Court	Bensaid v United Kingdom, Application no. 44599/98, judgment of 6 February 2001
13.	Decision 30/2015. (X. 15.) of the Constitutional Court	Sáska v Hungary, Application no. 58050/08, judgment of 27 November 2012
14.	Decision 5/2016. (III. 1.) of the Constitutional Court	Marckx v Belgium, Application no. 6833/74, judgment of 13 June 1979
15.	Decision 3064/2016. (IV. 11.) of the Constitutional Court	Pákozdi v Hungary, Application no. 51269/07, judgment of 25 November 2014

16.	Decision 13/2016. (VII. 18.) of the Constitutional Court	Patyi and others v Hungary, Application no. 5529/05, judgment of 17 January 2012
17.	Decision 14/2016. (VII. 18.) of the Constitutional Court	Jersild v Denmark, Application no. 15890/89, judgment of 23 September 1994
18.	Decision 16/2016. (X. 20.) of the Constitutional Court	Goodwin v United Kingdom, Application no. 17488/90, judgment of 27 March 1996
19.	Decision 22/2016. (XII. 5.) of the Constitutional Court	Matthews v United Kingdom, Application no. 24833/94, judgment of 18 February 1999
20.	Decision 2/2017. (II. 10.) of the Constitutional Court	László Magyar v Hungary, Application no. 73593/10, judgment of 20 May 2014
21.	Decision 8/2017. (IV. 18.) of the Constitutional Court	A and B v Norway, Application no. 24130/11, judgment of 15 November 2016
22.	Decision 28/2017. (X. 25.) of the Constitutional Court	Tătar v Romania, Application no. 67021/01, judgment of 27 January 2009
23.	Decision 29/2017. (X. 31.) of the Constitutional Court	Fábián v Hungary, Application no. 78117/13, judgment of 5 September 2017
24.	Decision 34/2017. (XII. 11.) of the Constitutional Court	Bladet Tromsø v Norway, Application no. 21980/93, judgment of 20 May 1999
25.	Decision 6/2018. (VI. 27.) of the Constitutional Court	L. v Lithuania, Application no. 27527/03, judgment of 11 September 2007
26.	Decision 1/2019. (II. 3.) of the Constitutional Court	Murat Vural v Turkey, Application no. 9540/07, judgment of 21 October 2014
27.	Decision 2/2019. (III. 5.) of the Constitutional Court	Alajos Kiss v Hungary, Application no. 38832/06, judgment of 20 May 2010
28.	Decision 7/2019. (III. 22.) of the Constitutional Court	Kostovski v The Netherlands, Application no. 11454/85, judgment of 20 November 1989
29.	Decision 13/2019. (IV. 8.) of the Constitutional Court	Magyar Helsinki Bizottság v Hungary, Application no. 18030/11, judgment of 8 November 2016
30.	Decision 13/2020. (VI. 22.) of the Constitutional Court	Krisztián Barnabás Tóth v Hungary, Application no. 48494/06, judgment of 12 February 2013

Methods			Frequency number	Frequency % (30)		Frequency %
1.	1/A 3 1%	a)	2	7%	10%	1 %
		b)	1	3%		0 %
	1/B 27 12%	a)	23	77%	90%	9 %
		b)	18	60%		7 %
	1/C		0	0		0 %
2.	2/A		0	0		0 %
	2/B		0	0		0 %
	2/C		6	20 %		2 % 3%
	2/D		0	0		0%
	2/E		1	3%		0 %
	2/F		0	0		0%
3.	3/A		29	97%		12 % 13%
	3/B		6	20%		2 % 3%
	3/C 30 13%	a)	30	100%	100%	12 %
		b)	0	0		0 %
		c)	0	0		0 %
	3/D 11 5%	a)	4	13%	37 %	2 %
		b)	5	17%		2%
		c)	6	20%		2 %
	3/E		5	17%		2 %
4.	4/A		18	60%		7 % 8%
	4/B		30	100%		12% 13%
	4/C		18	60%		7 % 8%
	4/D		15	50%		6 % 7%
5.			7 16	23% 53%		3 %
6.	6/A		2	7%		1%
	6/B		0	0		0 %
	6/C		1	3%		0 %
	6/D		0	0		0 %
7.			4	13%		2 %
8.			10	33%		4 %
9.			5	17%		2 %

1. Grammatical (textual) interpretation
1/A. Interpretation based on ordinary meaning
a) Semantic interpretation
b) Syntactic interpretation
1/B. Legal professional (dogmatic) interpretation
a) Simple conceptual dogmatic (doctrinal) interpretation (regarding either constitutional or other branches of law)
b) Interp*retation on the basis of legal principles of statutes or branches of law*
1/C. Other professional interpretation (in accordance with a non-legal technical meaning)

2. Logical (linguistic-logical) arguments
2/A. Argumentum a minore ad maius: inference from smaller to bigger
2/B. Argumentum a maiore ad minus: inference from bigger to smaller
2/C. Argumentum ad absurdum
2/D. Argumentum a contrario/arguments from silence
2/E. Argumentum a simili, including analogy
2/F. Interpretation according to other logical maxims

3. Domestic systemic arguments (systemic or harmonising arguments)
3/A. Contextual interpretation
a) In narrow sense
b) In broad sense (including 'derogatory formulae': *lex superior derogat legi inferiori*, *lex specialis derogat legi generali*, *lex posterior derogat legi priori*)
3/B. Interpretation of constitutional norms on the basis of domestic statutory law (acts, decrees)
3/C. Interpretation of fundamental rights on the basis of jurisprudence of the constitutional court
a) References to specific previous decisions of the constitutional court (as 'precedents')
b) Reference to the 'practice' of the constitutional court
c) References to abstract norms formed by the constitutional court
3/D. Interpretation of fundamental rights on the basis of jurisprudence of ordinary courts
a) Interpretation referring to the practice of ordinary courts
b) Interpretation referring to individual court decisions
c) Interpretation referring to abstract judicial norms
3/E. Interpretation of fundamental rights on the basis of normative acts of other domestic state organs

4. External systemic and comparative law arguments
4/A. Interpretation of fundamental rights on the basis of international treaties
4/B. Interpretation of fundamental rights on the basis of individual case decisions or jurisprudence of international fora
4/C. Comparative law arguments
a) References to concrete norms of a particular foreign legal system (constitution, statutes, decrees)
b) References to decisions of the constitutional court or ordinary court of a particular foreign legal system
c) General references to 'European practice', 'principles followed by democratic countries', and similar non-specific justificatory principles
4/D. Other external sources of interpretation (e.g. customary international law, *ius cogens*)

5. Teleological/objective teleological interpretation (based on the objective and social purpose of the legislation)

6. Historical/subjective teleological interpretation (based on the intention of the legislator):
6/A. Interpretation based on ministerial/proposer justification
6/B. Interpretation based on draft materials
6/C. Interpretation referring, in general, to the 'intention, will of the constitution-maker'
6/D. Other interpretation based on the circumstances of making or modifying/amending the constitution or the constitutional provision (fundamental right) in question

7. Interpretation based on jurisprudence (references to scholarly works)

8. Interpretation in light of general legal principles (not expressed in statutes)

9. Substantive interpretation referring directly to generally accepted non-legal values

Chapter IV

Interpretation of Fundamental Rights in the Czech Republic

David Sehnálek

1. Brief Introduction of the Czech Constitutional Court

This chapter aims to describe the position of the Czech Constitutional Court (hereinafter, 'the CCC') in the system of public authorities of the Czech Republic, and highlight those aspects of its functioning that are relevant for the manner in which this authority interprets the law, how it argues, and what decisions it makes. The chapter will focus on those matters that are reflected in the formation of this authority's will and that affect the contents of its decisions.

The CCC is an institution independent of other authorities in the Czech Republic, in terms of both organisation and financing,[1] and performs the function of concentrated constitutional justice.[2] This competence is 'originary' in nature and relies directly on the Constitution, where it is also defined. It can be neither extended nor reduced by statutory (i.e. sub-constitutional) law. The Court's task is to ensure constitutional balance and serve as a safeguard of democratic functioning of the State and of citizens' constitutional rights. The Court is undoubtedly succeeding in this role. As a body of the judiciary, it should technically be apolitical, but it does somewhat engage in practical politics;[3] it is confident, assertive, and often not

1 Pl. US 11/02 (judgement on independence of judges – salaries).

2 This follows from the nature of the matter and is legally regulated.

3 In practice, the Court is at times referred to as the third chamber of the Parliament, Pl. US 1/08 and Pl. US 2/08. 7 Novak, 2001, p. 422.

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actually self-restrained in this regard.[4] When saying this, I refer especially to the way the CCC proceeds towards other authorities in the Czech Republic, especially the Government and the Parliament,[5] and also towards the Court of Justice (hereinafter, 'the ECJ).[6] It takes advantage in this regard of the fact that no remedy is available against its rulings, and the CCC also seeks to avoid any potential changes to the legislation that could ultimately restrict its reach. Its line of defence is twofold: it rejects any formalistic approaches to the functioning of public administration[7] and works with the 'material core' of the Constitution.

The CCC is competent to act in cases defined by the Constitution, and the applicable rules do not enable it to initiate proceedings without a motion (*ex officio*). The *locus standi* is defined separately and differently for each individual type of proceedings; in general, an application to initiate proceedings may be filed by private individuals, juristic persons,[8] and public authorities.[9] An *actio popularis* is not admissible.[10] The CCC cannot refuse to hear a case if the statutory conditions for hearing the case are met.

The CCC has traditional powers typical of constitutional courts. It plays the role of a negative legislature,[11] ensures *ex ante* control of international treaties, conducts proceedings in matters concerning elections and the Parliament, and has the power to rule on constitutional complaints. There are three types of such complaints, namely, general, municipal, and based on a motion filed by political parties. A general complaint is aimed against a final decision or other encroachment by public authorities interfering with constitutionally guaranteed fundamental rights and freedoms according to Art. 87 (1)(d) of the Constitution.

The CCC ensures the enforcement of fundamental human rights and freedoms in the Czech Republic, but it is not the only institution to perform this task. This protection is also and in fact primarily provided by the common courts. The consequence is that proceedings on constitutional complaints strictly adhere to the principle of subsidiarity.

4 See Pl. US 26/11 (Planned home births decision).

5 For further analysis, see Dumbrovský, 2013, pp. 69–70.

6 CCC was the first Constitutional Court in the EU to rule against the previous decision of the ECJ.

7 The CCC has prevented the constitutional legislature from modifying the constitutional order through a constitutional law despite lacking the competence to review constitutional laws. It circumvented this conundrum by stating that the regulation in question was a constitutional law only on paper but not in its substance. Pl. US 27/09 (shortening the term of the Chamber of Deputies by a one-off constitutional law judgement).

8 Both must be represented by a lawyer.

9 However, an administrative authority, whose decision has been successfully contested by an administrative action, lacks the standing (*locus standi*) to file a constitutional complaint against the decision rendered later by the administrative court, Pl. US-st. 9/99 no. 1; meanwhile, if the State and its bodies are in a position analogous to private individuals, i.e. in those cases where they are a party to a private-law dispute, they may file a constitutional complaint. III. US 651/05.

10 I. US 462/03.

11 A law (statute) that is contrary to the Constitution is annulled, and the CCC, therefore, does not declare it null and void. Annulment serves as the last resort; in practice, preference is always given to seeking an interpretation that conforms to the Constitution; Pl. US 45/04.

The CCC stands outside the system of common courts and is not authorised to supervise the decision-making of such courts or act as another instance within their structure.[12] However, the CCC does not always strictly adhere to this restriction, and one can thus encounter cases where a decision is made by the CCC on the merits of an individual case.[13] The CCC does not unify the Czech courts' case law—this is up to the two supreme courts.[14] Furthermore, unlike its predecessor—the Federal Constitutional Court of the Czechoslovak Federal Republic—the CCC lacks the power to provide legal interpretation of the law. Nonetheless, the way the CCC approaches the issue of the binding effects of its case law relativises the absence of this power.

The CCC's decision-making is significantly influenced by its internal structure. The CCC is composed of a total of 15 justices appointed by the President of the Republic; two of them serve as vice-presidents of the Court and one has the position of president. Professional judges and experts outside the judiciary may be appointed as justices of the Court. This, in turn, affects the Court's decisions because a former attorney-at-law or law professor would have specific views on occasion and they might rely on values that a professional judge would neglect.[15]

The CCC is always the one to pronounce rulings *vis-à-vis* third parties. It is distinguished, however, whether an individual decision is rendered by an individual panel or by the Plenum.[16] In cases where the Court rules in the Plenum, the decision is formed by all its justices. The Court has four three-member panels. Their composition changes regularly every two years according to a system of gradual rotation. This rotation of justices is relatively novel to the Czech Republic and helps align the potentially differing views of the individual panels. This setup contributes to a greater consistency in decision-making by the CCC as a whole,[17] while also enabling the individual judges to share their views and values. Overall, however, the CCC is a stable body, also because the justices are eligible for re-appointment. Given the term in office (10 years) and the fact that all the justices of the newly established CCC started their term at the same time after the inception of the independent Czech Republic, one can distinguish the individual 'generations' of CCC justices and discern the influence of the individual Presidents of the Czech Republic who appointed them.

The present work problematises the high number of small panels of justices in the context of the functioning of the CCC. Justices are personages with various opinions

12 I. US 481/04.

13 A clear example is the Consumer decision, II. US 2778/19.

14 I. US 272/02.

15 Former Justice Wagnerová and current Justice Šimáčková prove my point. Although they originally came from outside of the judiciary, both have been very influential justices and often made quite unorthodox decisions.

16 Certain cases may also be decided by individual justices. Indeed, the justice rapporteur has the authority to reject him/herself an application to initiate proceedings.

17 Those who are familiar with the internal affairs of the Constitutional Court can identify which justices share similar views and are thus able to effectively influence the rulings made by an individual panel.

and philosophical attitudes towards the law and politics.[18] The methods of work in individual panels, their lines of legal argumentation, as well as the ways they treat foreign sources, including the case law of the ECJ and the European Court of Human Rights (hereinafter, 'the ECtHR), differ substantially among the panels. [19] These differences are also clearly apparent in the wording of the individual decisions.[20] Even the legal conclusions of the individual panels can differ[21] in the sense that one can guess, with some degree of probability, how a certain panel will decide on certain questions, while knowing that another panel would most likely make a different ruling.[22] This is one of the main issues related to the functioning of the CCC. If the individual panels were composed of a higher number of justices, then their decision-making would probably be more consistent.

Each panel is managed in organisational terms by one of its justices, the presiding justice; however, this position entails no special influence on decision-making. The role of justice rapporteur is much more important in this regard. All members of a panel are completely equal; two judges agreeing on a certain decision is sufficient for such a decision to be upheld. This small number is not enough in view of the significance of the CCC's rulings. However, an argument pointing out the effectiveness of decision-making in small panels has prevailed.[23]

The drawbacks of small panels are offset by the fact that the most important types of proceedings are mandatorily conducted in the Plenum. The Plenum ensures primarily constitutional control of statutory and secondary laws, and may decide on the annulment of laws (statutes) and other legal regulations, as well as their individual provisions.[24] Furthermore, it may decide upon a constitutional charge

18 The President of the Republic can exercise an indirect influence on the Court's decisions, as he/she has the power to appoint justices for a term of 10 years (with the consent of the Senate). Therefore, the President's choice of justices pre-determines the opinions of the CCC in the coming period.

19 However, even inside a single panel, the person appointed as justice rapporteur in an individual case holds a position of importance, as he or she shapes the formal aspects of the ruling, i.e. determine how the decision will be viewed from the outside.

20 It has to be emphasized that the criteria based on which decisions were chosen for this study were set in such a way that not all the aspects of the CCC's decision-making could be fully revealed.

21 The Plenum plays the unifying role under Section 27 of the Act.

22 The general rule in the decision-making in panels is that they make decisions by a simple majority, i.e. it is sufficient if two judges agree on a certain solution. This is indeed quite inadequate in view of the importance of certain decisions for everyday life and given the political role of the CCC. The whole problem may be demonstrated in case II. S 3212/18, which was *de facto* decided by two justices in such a way that Pavel Rychetský, the President of the "CCC Cour"t (sic), declared this decision to be wrong. He also said that he is ashamed of it and, most importantly, that this decision should not be followed. Such criticism is exceptional and surprising, especially considering the position of its author and the fact that the decisions of the CCC are binding on both the common courts and the CCC itself. However, such fundamental disagreements between judges are rare and do not often occur. In terms of statistics, most decisions on constitutional complaints are taken unanimously. In any case, for me, the decisions of the CCC to have the widest possible consensus is a matter of fundamental importance.

23 Fast and cheap do not necessarily mean correct and generally acceptable in society.

24 Pl. US 24/94.

brought by the Senate against the President; a petition by the President seeking the annulment of a concurrent resolution of the Assembly of Deputies and the Senate; disputes over whether a decision to dissolve a political party or some other decision relating to the activities of a political party is in conformity with constitutional acts and with statutes; remedial actions from a decision of the President declining to call a referendum on the Czech Republic's accession to the EU; disputes over whether the manner in which the referendum on the Czech Republic's accession to the EU was held conforms with the Constitutional Act on the Referendum on the Czech Republic's Accession to the EU and with the statute issued in the implementation thereof; other matters if a panel has not resolved them in the case of a proposed resolution not receiving a majority of votes; the determination of the Court's position on a proposition of law that differs from a proposition of law announced by the Court in a previous judgement; petitions for rehearing of a proceeding and such reopened proceedings; and the regulation of its internal relations; the establishment of Panels and the rules for the distribution of the caseload among them. The Plenum may also reserve for itself cases that could otherwise be decided by a panel. The Plenum also decides on motions to assess conformity of an international treaty with the constitutional order.

The Plenum's decision-making may include up to three tiers to achieve a compromise; no such procedure is required in panels and is therefore not regulated. In principle, every justice (in the Plenum and in a panel) can present their own proposal of how a case should be resolved on its merits.[25] Vote is taken on the operative part, but not on the reasoning. The justice rapporteur's position is typically very strong as they can clearly influence the contents of a decision,[26] especially in terms of its reasoning.[27] At the same time, the practice is to vote on their proposal first. In regular cases, a decision is adopted by a majority of justices (the quorum is 10 justices); a qualified majority of nine justices is required in some more important cases.

Matters falling within the competence of the Plenum and panels are assigned automatically, according to fixed and predetermined rules. In the first assignment round, one case is assigned to each justice, including the officials of the Court, based on the date of receipt and in alphabetical order of the justices' surnames. The Court president and the two vice-presidents are then left out in the second assignment round.

The specific role played by the justice rapporteur has already been mentioned above. The significance of their role in proceedings before the CCC is described in more detail as follows. The justice rapporteur has a substantial influence over the decision-making of the CCC, as well as the form, contents, and reasoning of its

25 In disputes concerning individual rights, the specific right violated is identified (if a right is found to be violated).

26 Chmel, 2017, p. 757.

27 The justice rapporteur predetermines not only the reasoning but also the success of the complaint. For example, former Justice Eliška Wagnerová was known for her willingness to rule in favour of the complainant statistically significantly more than any other judge. Chmel, 2017, p. 740.

decision. What is important for this chapter is primarily their task to prepare a draft decision, together with substantiation of the solution chosen. If the rapporteur's proposal is adopted, they will also be asked to draw up the decision itself. The practice is that members of a panel often follow the opinions and conclusions of the justice rapporteur. This, *de facto*, amounts to an unofficial and informal authorisation of the judge to resolve the case, as the other judges accept the chosen solution without further considerations.[28] This is a matter of the judges' personal choice and confidence in the justice rapporteur's integrity and knowledge.

However, the justice rapporteur can also exert a substantial influence over the contents of a decision based on other factual reasons. Indeed, if their work is timed right, the other judges may be unable to interfere realistically and effectively with the contents of the decision. For example, in the recent case of annulment of the Elections Act (a decision of extraordinary importance, for a number of reasons), the justices received the first version of the decision on Thursday, 21 January 2021, and discussed the proposal (together with five other proposals) on Tuesday, 26 January 2021; the full judgement was then pronounced 19 hours after its adoption, without the justices having been provided with its final version. Therefore, there was little time to prepare quality objections against the reasoning or express a differing opinion, which the outvoted justices did not forget to mention in their dissenting opinions. Such settings should be changed.[29]

Invisible from the outside but nonetheless considerable influence over the functioning of the CCC can be wielded by assistants to individual justices ('assistants'). Three assistants support each justice in their work.[30] Based on the law, assistants perform tasks unrelated to direct decision-making. They may, for example, reject documents that objectively lack the nature of a pleading to the Court. However, their role is, in fact, more important than might seem. Reality thus considerably differs from what is cautiously defined in the law. Indeed, the scope of the assistant's work is *de facto* very broad. This will naturally depend on the given justice and on how much they are willing to delegate to their assistants. Constitutional justices are asked to perform a great amount of work, not to mention their possible parallel lecturing at universities. The assistants' role is thus significant and they are often the ones who draft decisions and formulate the reasoning in cases where the justice serves as the justice rapporteur.[31] Assistants' work may not be so apparent from the outside; they work for the justice while formally lacking the position of a judge. Justices make all their decisions in their own name, and are also responsible for them. Ideally, it should be the justice who sets the strategy in a case and pre-determines the decision. The result should then either be achieved based on what the assistants prepare for

28 Chmel, 2017, p. 744.

29 Such cases are not rare. In case Pl. US 26/11, the majority of judges (nine) were against the reasoning of the decision, yet they could only express their opinion via their concurring opinions.

30 This refers to a full-time equivalent; the number of assistants may be higher.

31 Wagnerová, 2007, § 8.

the justice, or the justice should directly specify what underlying documents the assistant should prepare so that these support the result at which the judge intends to arrive. Assistants and justices might influence each other, or the general concept of a decision might be drafted by an assistant[32] and then affirmed by the justice. It is also not unusual for assistants to hold high positions in academia. Some of them are associate or full professors of law and their qualifications are absolutely comparable to those of the justices. [33]

Justices may also informally involve student interns in their work. However, it is again up to each justice whether they will hire an intern and to what degree they will accept or let themselves be influenced by the results of the intern's work. It might seem that a student will lack the necessary qualifications and experience to be able to contribute significantly to the Court's decision-making. It is a fact, however, that interns are usually talented students who are chosen and addressed by a justice based on their results at school. The involvement of assistants and interns increases the plurality of opinions in proceedings before the CCC, which partially relativises the above objection to the inadequate number of justices in individual panels.

Finally, in terms of the institutional prerequisites for decision-making by the CCC, one should also recall the role of the analytical department. The Czech Republic is part of the Venice Commission. The analytical department makes use of this fact and, where relevant, prepares reports on the foreign legislation and case law. Its activities are not always discernible in the decisions of the CCC, but the factual influence of foreign laws is nonetheless considerable (in the Czech Republic, a key role is played especially by Austrian and German laws). Thus, what can actually be seen in the CCC's decisions does not fully reveal the background and all the reasons that lead to any given decision.

The plurality of views is further highlighted by a justice's right to express a differing opinion (both dissenting and concurring). A differing opinion on a case can be expressed both with regard to the operative part and to the reasoning of the decision. It can be attached to decisions of both a panel and of the Plenum. It has no legal consequences as such.[34] It reveals what discussions preceded the decision, what alternative arguments were presented, and what solutions were considered, and how 'firm' the decision actually is. It can also serve as a basis for further development of case law. [35] The ratio of votes for or against a certain decision need not be published.

32 The usual procedure is that the justice assigns a case to a certain assistant, who then draws up a draft decision; the justice reads it and presents it to his or her other assistants, who are asked to provide their opinions.

33 Moreover, it must also be emphasized that the justices themselves pick their assistants; it can be assumed that the proverb 'birds of a feather flock together' may apply here in terms of worldview.

34 Its form is also not prescribed in any way and thus differs significantly among individual justices. For example, Emeritus Justice JUDr. Balík was known for his original and unorthodox opinions, which were often very concise, and his reference to classical literature. His opinions did not comprise any legal analysis but, nonetheless, often indicated how he viewed the resulting decision.

35 Pl. US 42/2000.

However, the concept of differing opinions indicates what opinions the individual justices held.

From a procedural point of view, the CCC's activities correspond, in principle, to the procedures at common courts. There are some deviations, which ensue from the mission of the CCC as defined by the Constitution. In its decision-making, the CCC is bound by the relief sought in the application to initiate proceedings, rather than by its substantiation,[36] which gives the Court a broad space for assessing the given matter. Similarly, the CCC is not bound by the evidence adduced, and may take other evidence of its choice. Nonetheless, the CCC typically does not take evidence, as it is not considered a common court.[37] Therefore, evidence taken by common courts is not reviewed here. Where the CCC takes evidence, it does so basically only in specific proceedings, such as in the case of a constitutional complaint, to verify the complainant's assertion that their fundamental rights and freedoms have been violated. It is generally not necessary to take evidence regarding the merits of a case. Overall, the CCC deals with general, legal questions, where it would make no sense to take factual evidence.

For the purposes of this chapter, it is also essential to clarify the status of international treaties in Czech law and, in turn, the relation between the CCC and the two European courts, namely, the ECtHR and ECJ. According to the current regulation in Article 10 of the Constitution, the relation between Czech and international law is of mixed nature. It is a dualist relation with significant monist elements. While the two legal orders are separate and independent, the Constitution states that selected international treaties form a part of the laws applicable in the Czech Republic.[38] They are thus automatically directly applicable, taking priority over ordinary laws (statutes). However, as an external source of law, they have no greater legal force than Czech laws; the relation between them is merely one of application.

International treaties on the protection of human rights and freedoms have a special status in Czech law. They are considered a part of the constitutional order and serve as a benchmark in assessing the constitutionality of ordinary laws (statutes). Further, the Constitution provides in Art. I (2) that the Czech Republic shall observe its commitments resulting from international law. This provision is reflected in the area of interpretation; a line of interpretation that is generally consistent with the external commitments of the Czech Republic is strictly preferred. The Constitution does not provide for the relation between EU law and national law; this, however, is not considered an issue. In contrast, the principles of application of EU law are laid down by the EU law itself. The CCC is generally forthcoming towards EU law.

36 Pl. US 47/04.

37 Therefore, it is not a third instance in the structure of common courts; it does not deal with a violation of regular rights of natural or juristic persons protected by general laws, unless the case also involves a violation of a fundamental right or the freedom of these persons, guaranteed by a constitutional law or an international treaty, I. US 108/93.

38 This is why it is often stated, in simplified terms (but not entirely correctly), that the relation between international and national laws is monist in the Czech Republic.

One substantial difference can be inferred from the above in terms of how the CCC approaches interpretation of international treaties and that of EU law. The CCC does not hesitate to interpret international treaties providing for human rights, and has no problem admitting this. Meanwhile, it refuses to interpret EU law openly as according to the CCC, 'Community law is not part of the constitutional order and, therefore, the Constitutional Court is not competent to interpret it. Nevertheless, the Constitutional Court cannot entirely overlook the impact of Community law on the creation, application and interpretation of national law in the area of legal regulations whose creation, effect and purpose are directly linked to Community law (…) However, the two supreme courts are the ones within the system of ordinary courts that ensure the consistency of judicial decisions in the Czech Republic within the scope of their statutory competences'.[39] Consequently, while international treaties on the protection of human rights have a constitutional nature, EU law is sub-constitutional and thus outside the interest of the CCC.

In reality, however, even the CCC is forced to interpret EU law, as this is often a prerequisite for correct interpretation and application of Czech law.[40] The CCC has showed a relatively forthcoming approach, as apparent, for example, from the way it has construed the Charter and possibility of extraditing a Czech citizen abroad. Instead of a simple and restrictive linguistic approach to interpretation, the CCC prioritises Euro-conforming interpretation. The CCC also accepts the German doctrine of 'radiation'.[41] In this concept, EU law radiates into Czech law and thus influences its interpretation.[42]

As regards the 'judicial dialogue' and the role of the CCC in this dialogue, it is necessary to distinguish between the CCC's approach towards the ECtHR, on the one hand, and the ECJ, on the other hand. In summary, in the case of the ECtHR, one cannot speak of any dialogue in the true sense of the word. The CCC simply accepts its decisions and, where necessary, ensures their application. It does so even in cases where it has previously made a different decision. There are no discrepancies between the case law of the ECtHR and that of the CCC; there are no differences in opinions or, at least, no such differences are apparent. This probably also owes to the fact that the Charter protects rights that are also protected by the European Convention. There is not much room for conflict. The CCC's approach to ECtHR case

39 II. US 1009/08.

40 This is confirmed, e.g. by decision II. US 3432/17: '[t]he Constitutional Court's aim in these cases is not, however, to look for the correct application of [the] EU law or even to interfere with the competence of the Court of Justice by authoritatively interpreting the contents of the EU law, since the Constitutional Court examines exclusively whether the application of the EU law by common courts was arbitrary or unsustainable'.

41 In its *sugar quotas* decision, the Constitutional Court concluded that it would 'examine the legal key to distribution of production quotas in terms of national constitutional law interpreted in the light of Community law'.

42 This effect of the EU law on the national law is referred to as 'radiation' in judgements of the Constitutional Court and closely resembles the German notion of 'Drittwirkung'. See also Zemánek, 2016, p. 91.

law can be divided into several groups. First, ECtHR case law is used in some cases basically as a source of law and the case at hand is assessed on its basis. Second, it can be used to explain the contents of Czech law. Third, it is also used as a parallel supporting argument for resolving a certain matter. However, this is not to say that the CCC would always subject itself to ECtHR case law, and that it would decide each case identically as the ECtHR. For example the test of assessing for a violation of the right to privacy differs between the CCC and ECtHR.[43] In the marginal case of *Smatana*, the CCC failed to accept the European ruling[44] and stated its explicit disagreement with the conclusions of the ECtHR. [45] In general, the CCC is not showing any tendencies towards analysing and discussing ECtHR case law in greater detail, and mostly adheres to it.

The relation between the CCC and the ECJ is different. Indeed, the ECtHR is generally not viewed as a competing court. Such an attitude can, however, be seen on the part of the CCC towards the ECJ. Moreover, the ECJ often uses different criteria in its decision-making compared with the CCC and ECtHR, as its focus goes beyond the protection of human rights.[46] This is manifested in several ways. First, emphasis is placed, as already mentioned above, on the constitutional mission of the CCC and general perception of EU law as sub-constitutional law. Second, the CCC refuses to enter into a formal dialogue with the ECJ by requesting its preliminary ruling in a case. The CCC has not expressly excluded the option of making such a reference, but it has been systematically avoiding it. This does not mean, however, that it would generally adopt an anti-EU stance. Indeed, it consistently requires that the duty to refer questions for a preliminary ruling be adhered to by common courts, and construes a failure to do so as violation of Czech constitutional law. A dialogue with the ECJ is thus imperative, but has to be conducted by other courts, not by the CCC. No problems generally arise as regards the acceptance of the ECJ's case law and its interpretation of EU law. The only, albeit major, exception is the case of *Holubec*, where the CCC, as the first supreme court of a Member State, refused to accept the conclusions formulated in a prior judgement of the ECJ. The Czech Court assessed the case

43 The Czech national report to the XVIIIth Congress of the Conference of European Constitutional Courts, p. 15.

44 II. US 2395/09, where it was stated: 'In spite of the Court's disagreement with the conclusions made by the European Court of Human Rights in the case of Smatana v. the Czech Republic …, where the Constitutional Court was descried as a remand court (using this logic, the ECtHR itself could be considered a remand court), it can be agreed that all governmental authorities have the duty to ensure a defendant is not remanded in custody longer than reasonable (Section 102). In addition, it follows from settled case law of the Constitutional Court that, as a rule, all remand cases are dealt with preferentially and even without a motion, because of the quality of the fundamental freedom concerned in such a case, i.e. personal freedom limited by the remand in custody. There is no reason to change this practice and the case at hand was therefore found urgent and the constitutional complaint heard preferentially'.

45 However, there was no actual conflict in this case because the constitutional complaint was found unjustified.

46 See the Austrian decision.

and ruled in a different way than the ECJ previously did. However, this decision is an exception from the otherwise generally pro-European case law of the CCC.

The present work aims is to analyse, compare, and subsequently evaluate the manner in which national constitutional courts interpret fundamental rights. The analysis considers two aspects to be significant from this point of view. First, how does the CCC itself define the methods of interpreting the law (i.e. how should it be interpreted)? Second, we need to examine the reality (how the law is, in fact, interpreted). The aim of this chapter is to examine how the CCC carries out the application and interpretation of fundamental rights, as well as which methods of interpretation are preferred by this court. The chapter will also focus on its decision-making style. To objectify the conclusions and put them into a broader context, the research has selected decisions in which the court worked with ECHR and ECJ decisions (as the condition of the research design). In a second step, the decisions of these international courts are briefly analysed. The result will be a systematic comparison of the interpretative methods of these international courts with those generally used by the CCC in those cases that contain a substantive reference to ECJ or ECtHR decisions.

2. The CCC and its definition of the methods of interpreting the law

As regards interpretation of the law by the CCC, we have to bear in mind the special nature of the Constitution and the Charter. Both these sources of law contain general provisions rather than specific instructions and solutions. This implies that grammatical (textual) interpretation will have a limited weight in this field of law (legal basis). Emphasis must also be placed on the above-described position of the CCC as an authority that, in substance, is not subject to any external control and can only be limited by the case law of the ECtHR and, to some extent, of the ECJ. However, the CCC is not subordinate to any of these courts in terms of institutional basis. This fact implies a considerable freedom for legal considerations and decision-making. The CCC can take into consideration moral values, 'people's stories', political arguments, and further aspects that are out of reach for ordinary courts. The latter are bound primarily by hard law and the room for their discretion is limited. Finally, during the first decade of its existence, the CCC had to deal with the fact that a part of the Czech law had been adopted basically unchanged from the totalitarian era but nevertheless had to function in an environment based on different values (historical basis).[47]

Thus, the CCC itself shows a reserved attitude towards the grammatical (textual) method of interpretation. The CCC perceives the worth of this method only in the

47 II. US 2268/07.

initial examination of the legal norm being applied. For the CCC, it is only the starting point in explaining and clarifying its sense and purpose, which is also the aim of a number of other procedures, such as logical and systematic interpretation and interpretation *e ratione legis*.[48] The CCC has not specified any order in which these methods should be used; this will always depend on the circumstances of the specific case under scrutiny. What is apparent, however, is the great significance carried by teleological interpretation. As regards linguistic interpretation, the CCC has not hesitated to rule even *contra verba legis* in specific cases.[49] Along with teleological interpretation, considerable weight is attributed to comparative interpretation of constitutional law. The emphasis on these two approaches to interpretation is so apparent that some (influential) justices of the CCC have concluded that the interpretation of constitutional law is a specific discipline that differs from that of sub-constitutional norms. The CCC's decisions do not show that the Court would clearly distinguish between the procedure in interpreting Czech (i.e. national) law and international treaties on the protection of human rights and freedoms (although these are formally a source of international law and this law sets its own methods of interpretation). This is quite paradoxical because differences tend to be highlighted inside a single system of law and, at the same time, overlooked with regard to different systems.

3. Reality of interpretation of law by the CCC (2011–2020)

The choice of judgements is not completely representative and does not provide a comprehensive view of the work carried out by the CCC. There are several reasons behind this and they all closely relate to the conditions set by the research design and to the characteristics of the CCC's work and of the individual justices. Both these facts predetermined which decisions would be chosen for assessment. The following factors played a role in this regard.

First, the style of the CCC's work differs depending on the field where it is called on to make a decision. Differences are apparent especially in the area of human rights and freedoms, on the one hand, and in constitutional matters (in the narrower sense of the word), on the other hand. We shall look into these differences in more detail in the part dedicated to the individual methods of interpreting the law.

Second, this research was designed to reflect those decisions that cite rulings of the ECtHR or the ECJ. However, the willingness of individual justices to work with these decisions varies considerably.[50] As pointed out previously, the justice

48 Pl. US 33/97.

49 Pl. US 66/04 (European arrest warrant decision).

50 One can easily notice that Justice Kateřina Šimáčková most often use the case law of the ECtHR. She was a member of the panel in more than half of the 30 individual panel decisions that we selected.

rapporteur has considerable influence on the contents and substantiation of individual decisions. The research design thus better suited those justices who are more open to external influences and who reflect more on the case law of the ECJ and the ECtHR in their decision-making (or perhaps, more accurately, they admit openly that they employ these sources). Their rulings are thus more frequently represented among the 30 decisions chosen. This does not imply, however, that other justices would perhaps completely overlook the case law of the ECtHR or the ECJ. The fact is that we are unable to determine from the reasoning of their decisions whether or not their case law was considered. Thus, the influence of the ECJ and ECtHR and their decisions could be greater than might appear from the CCC's case law; we simply do not know.[51] Such an approach could be part of a strategy followed by this court. Silence is especially practical in cases where the conclusions made by the ECJ or ECtHR are not found satisfactory. Rather than acknowledging a conflict, it seems more appropriate to avoid it by not admitting its existence openly.

Third, the project aimed to choose the 30 most important cases over the past 10 years of the CCC's work. Admittedly, in view of the limitation to the area of human rights and the requirement of a substantive reference to ECJ or ECtHR decisions, the rulings chosen are a selection from a selection. The research attempted to render as objective the inherently subjective approach to the choice of the 30 most important decisions by intentionally opting for those that had caught the attention of the professional public. The selection thus focused on rulings dealing with socially important questions that resonated with professional publications or increasingly popular web blogs.

This selection of decisions yielded one substantial conclusion. Anyone who should perhaps expect the CCC's decisions chosen here to show state-of-the-art legal interpretation and legal arguments used in the Czech Republic will be disappointed. In fact, the opposite is true. Rather than a tribunal mastering the art of legal interpretation and using utmost diligence and precision, the CCC is primarily a political court. Interpretation of the law and its methods are somewhat sidelined in its work. They are not the primary instrument used by this tribunal to achieve its objectives. On the contrary, a number of decisions under scrutiny give the impression that interpretation of the law is merely an instrument retroactively justifying a pre-determined conclusion. It has to be admitted that this conclusion probably fits better the decision-making of individual panels but not the rulings devised by the Plenum.

The initial premise is that the methods of interpretation used by the CCC for interpreting the Charter and the Constitution should be the same as those used to interpret Czech sub-constitutional law. Indeed, there is nothing in Czech law that would indicate the opposite. What can differ, however, is the degree of consideration given to these methods in individual cases.

51 I am reluctant to infer simple conclusions along the lines of the ECtHR case law being neglected in a certain ruling just because it was not mentioned.

3.1. Grammatical (textual) interpretation

Unlike in cases dealt with by the CCC with regard to state organisation issues, competences of state bodies and the status of constitutional organs, grammatical interpretation is basically only a marginal method in the area of fundamental human rights and freedoms.[52] While the CCC itself calls it euphemistically a starting method, this often translates in practice into free discretion as to the contents of the relevant right or freedom.

The meaning of the words used by the Charter (interpretation based on ordinary meaning) is thus not examined in any way. Their substance is probably taken into consideration at some elementary level, but this is not explicitly admitted in the individual decisions. The entire process often probably takes place subconsciously.

Interpretation based on the ordinary meaning of words does not represent a frequent method of interpretation. On the contrary, from a purely statistical perspective, legal professional (dogmatic/doctrinal) interpretation is the frequently used type of legal interpretation in decisions of the CCC, deployed in 17 cases. The more frequent occurrence of this method does not change the fact that this method of interpretation is not a decisive one.

The reason for this restrained approach towards interpretation based on ordinary meaning lies in the general concept of the Charter, which creates a favourable environment for such an approach.[53] However, the CCC has no reason to defend its steps by means of grammatical reasoning (which is less questionable compared with other methods of interpretation) as its conclusions cannot be reviewed. Emphasis on the actual legislative text may be characteristic of the lowest instances of the Czech judicial system. Referencing the wording of the law is an intellectually undemanding exercise and, at the same time, relatively safe way of justifying one's decision. The risk that the appellate instance will overturn conclusions solidly based on grammatical interpretation is relatively marginal.

Meanwhile, such an approach would be beneath the Court's dignity. It can be stated with slight exaggeration that grammatical interpretation is not considered 'sexy' enough in the Czech Republic. Throughout the 1990s, the CCC repeatedly emphasised that sticking excessively to the wording of the law was formalistic, obsolete, and outdated. This was a response to mechanical approaches to interpretation forming a legacy of socialist law. The CCC came closer to courts serving as its role models in terms of the way of thinking, interpretation, and

52 Kühn also pointed out the practical non-use of this method of interpretation. In cases of fundamental rights, the CCC often does not recite the provision concerned; instead, it follows an existing case law, Kühn, 2017, p. 215.

53 The conclusions applicable to the interpretation of the Charter cannot be excessively generalised. Grammatical interpretation is important in the CCC's case law in competence matters regulated by the Constitution.

arguments.[54] Indeed, these courts issued a number of their decisions in cases where textual interpretation was only ancillary. The decisions selected here do not show any genuine search for a plain, literal, and ordinary sense of the terms used.[55]

The general approach to fundamental rights regulated by the Charter is that the CCC simply and plainly notes the existence of such a right and the possibility of its impairment in the case at hand. The contents of the right are then clarified using other methods of interpretation, and these contents are provided (complemented) especially through ECtHR case law or references to previous rulings of the CCC. Where several rights are affected at the same time, the CCC directs its intellectual capacity in the decisions under scrutiny, especially towards balancing these rights. Emphasis is generally placed on the test of proportionality or rationality.

Nonetheless, there is one case in the set under scrutiny where the Constitution offered no provisions whatsoever on which the CCC could rely in its conclusions.[56] The CCC thus made its decision without a legal basis. It simply devised a certain result and, in substance, filled a lacuna in applicable law; however, by doing so, it de facto assumed the position of legislature. It did not consider the fact that elements not regulated by the law would impede decision-making, although it cannot play the role of active legislature, and also despite the fact that this impaired the balance in the system of separation of powers in the State (Art. 2 (1) of the Constitution) as well as the principle that State power can only be exercised in cases within the limits and in the manners laid down by the law (Art. 2 (3) of the Constitution, Art. 2 (2) of the Charter of Fundamental Rights of Freedoms).

Finally, the set of decisions under scrutiny includes one where the CCC pragmatically and explicitly gave up on any attempt to interpret a certain relevant term. This was so in the case of electronic records of sales and the right affected was the right to protection of privacy. [57] Indeed, the CCC states that '[t]he role of the Constitutional Court is thus to assess whether the provisions contained in the Electronic Records of Sales Act can stand in confrontation with protection of a tax entity's privacy and its right to self-determination in terms of information, precisely in view of its own case law and case law of the Court of Justice of the European Union'. It goes on to note, however, that 'it is neither possible nor necessary to try and find an exact definition of "privacy" or "private life". This is true especially because, with regard to

54 While the ECtHR is openly regarded as such a role model, the ECJ's self-confident and assertive decision-making serves as a more concealed and less frequent source of inspiration; the CCC's considerations and methods of work are also clearly influenced by common-law courts and their approach to interpretation of the law and judicial law-making.

55 A certain exception is a case where the CCC compared two concepts and stated that 'public service has the nature of dependent work within the meaning of Section 2 of the Labour Code, and can thus, beyond any doubt, be subsumed under the broader term of "work or service" within the meaning of Art. 9 (1) of the Charter'.

56 Pl. US 36/17.

57 Pl. US 26/16.

certain occupations, it is basically impossible to determine whether the given entity is working or living a private life at any given moment'. Balancing is thus carried out against a value that is not specifically determined. What is such a concept actually good for? The decision as such was based, in substance, on some sort of *ad hoc* subjective and highly generalised assessment of the given situation, and the concept of privacy and its definition were already neglected at the level of grammatical interpretation.

The CCC tends to rely more on the political subtext and relevant values than on the text of the Charter. The term 'values' refers to values advocated by both the CCC and the State, and even by individual justices. The CCC does not employ any uniform approach to grammatical interpretation of the Constitution based on sub-constitutional law, either. This will be further analysed in the section dealing with domestic systemic arguments. It cannot be determined unambiguously based on the sample under examination whether there is any internal methodology, logic, and system in the linguistic interpretation carried out by the CCC (whether within the Charter or in relation to sub-constitutional law). This is in no way indicated in the CCC's decisions. There is no such internal methodology or it has yet to be systematically applied. Every decision is unique from this point of view. However, the values promoted by the individual justices often influence the contents of the law.

As regards interpretation of sub-constitutional law, the CCC exercises a much more restrained approach and works with the text of legal regulations. The grammatical method of interpretation is the first, basic, and common method of interpretation of the law. However, analysis of the selected cases was not supposed to focus on this aspect of the CCC's work.

3.2. Logical (linguistic logical) arguments

Arguments of this type have a considerable auxiliary significance in the interpretation of the law by the CCC but do not belong among arguments commonly used by the Court. This is also documented by the low individual occurrence in the set of 30 examined decisions. When expressed collectively, they may give the paradoxical impression of being frequent, as they have been used in 17 cases.

3.2.1. Argumentum a minore ad maius

Argumentum a minore ad maius plays an important role in a case concerning protection of privacy and family life with regard to the possibility of giving birth at home. The CCC has noted that, in view of its complexity and multi-layered reflection in the law, it cannot define exhaustively all the individual components of the right to protection of private life guaranteed in Article 8 of the Convention, let alone offer any specific individual procedural instruments for its protection. If such a situation occurs and a certain procedural remedy for the protection of the right to privacy is unknown in the law, then such a remedy must be provided *a minore ad maius* using a

more general institution of protection of the right to privacy—the through protection of personal rights.[58]

In the same ruling, the argument of *a minore ad maius* is used with regard to the need to reflect ECtHR case law in proceedings before Czech courts. The Constitutional Court concluded that public authorities have a general duty to take into account interpretation of the Convention provided by the ECtHR. ECtHR decisions represent an important interpretation guideline for application of the Convention. The courts are thus obliged to take case law of the ECtHR into consideration in cases where the lawsuit is directed against the Czech Republic and in matters concerning another Member State of the Convention if, in view of their nature, these cases are also relevant for the interpretation of the Convention in the Czech context. This is all the more true in a situation where such case law is invoked by a party to proceedings before a Czech common court. If the court concerned fails to deal with the case law of the ECtHR, this may constitute a violation of the right to a fair trial.[59;60]

3.2.2. Argumentum a maiore ad minus

In the set of selected decisions, the argument of *a maiore ad minus* is used for interpretation of both sub-constitutional[61] and constitutional law. The situation is complicated by the fact that the CCC directly uses either the Latin designation of the relevant argument or its Czech counterpart (… this applies all the more to …). This makes it difficult in some cases to distinguish the logic in the CCC's considerations and determine its direction, whether from the smaller to the larger, or the opposite. This was so in a situation where the CCC dealt with conditions under which interpretation of EU law is clear (*acte clair*).[62] ECJ case law requires uniform interpretation of the law by courts of various Member States. The CCC is asked to answer the question of whether this condition could be met in a situation where courts in a single country make different decisions. In this case, the CCC states as follows: '[i]f a considerable margin of discretion in assessing the obviousness of interpretation of EU law by a common court is acknowledged by the European Union law, then this should apply all the more to the Constitutional Court, operating in a different reference framework for review. Therefore, cases where a common court proceeded arbitrarily when assessing the existence of acte clair can be considered a violation of the fundamental rights to a fair trial or a statutory judge. This may include two

58 Pl. US 26/11.

59 A violation of the fundamental right to judicial protection pursuant to Art. 36 (1) of the Charter, Art. 6 (1) of the Convention, or the relevant fundamental right under the Convention, as the case may be. In any case, Art. 1 (2) of the Constitution is also affected.

60 Pl. US 26/11.

61 Based on the argument of *a maiore ad minus*, if an employee, whose employment is about to end and thus lives in uncertainty about his/her future, needs four hours a week to exercise the right described above, all the more that 20 or more hours a week will suffice in this regard, Pl. US 1/12.

62 US 3432/17.

situations, in particular: 1. the court itself had (apparent) doubts as to interpretation of the EU law and did not refer a question for a preliminary ruling; 2. although the Court of Justice had yet to resolve a similar problem of interpretation, the common court went beyond the margin of its discretion and interpreted the issue itself without referring a question for a preliminary ruling in the given case, in a manner that is clearly unsustainable'. This concept of interpretation of EU law and the role of the CCC in its interpretation implies that the CCC should not refer questions for a preliminary ruling in matters which it itself considers *acte clair.*

As regards the duty to refer a question for a preliminary ruling in case of different interpretations of EU law by various courts of instance in the Czech judicial system, the CCC considers two possible variants. First, a hierarchical approach will apply in the judicial system of one country and it is the court of last instance that will assess the obviousness of interpretation. Second, it can be stated *a maiori ad minus* that certain law cannot be *acte clair* if courts of the same country disagree on it. These clarify the direction of the Court's considerations. In the CCC's opinion, both these variants are possible and a mere linguistic interpretation is not sufficient to provide the answer. In the end, a solution based on the argument of *a maiori ad minus* was not applied; this was merely an alternative that was considered and was based on arguments presented by the parties to the proceedings. The CCC ultimately rejected it because the solution offered was not practical; there was another solution that was more cost-effective and efficient, and was also supported by ECJ case law.

In a decision concerning a general reduction of public prosecutors' salaries, the argument of *a maiori ad minus* serves the interpretation of the right to undisturbed discharge of public office under Art. 21 (4) of the Charter. Indeed, the CCC first dealt with the possibility of reducing the salaries of public administration staff in relation to the right to fair remuneration for work under Article 28 of the Charter. It then stated that if this specific right is not violated by the reduction of salary, then this certainly could not be true of the right to undisturbed discharge of public office.

3.2.3. Argumentum ad absurdum

This argument also appears only rarely in the set of decisions reviewed. The CCC refers to it in interpretations of sub-constitutional law, where it uses this interpretation to limit possible but constitutionally inadmissible conclusions,[63] and also in interpretations of constitutional law.

In a matter concerning the setting of transparent and pre-determined general rules for the assignment and reassignment of cases in the schedule of the common court's work, and thus, the right to a statutory judge, the CCC dealt with a situation where the composition of a panel of judges at a regional court had substantially changed during the proceedings. This had occurred in a specific case, and the changes were crucial because they pertained not only to the panel's composition (one

63 E.g. after the introduction of the 'solar tax' on profits from photovoltaic power plants.

of its members was replaced) but also to the roles played by the panel members (presiding judge and judge-rapporteur). The problem was that the changes were made within a court department that had no binding mechanism for reassigning cases. The composition of the panel was completely at the discretion of the head of the department and was changed based on the head's sole decision. The CCC likened this situation to a case where changes would be made at a lower, but not smaller, court by the court's president. It concluded that such a procedure was prohibited for the entire court. It would be equally unconstitutional if the court's president could reassign cases themselves. Using the same logic, it would be absurd, according to the CCC, if such a power were vested in the head of a court department, although this was not explicitly prohibited by the law.

An *ad absurdum* argument was also used in proceedings concerning the right to equal treatment under Article 14 of the Convention (and the corresponding provisions of the Charter) and Art. 1 and Art. 10 (1) of the Charter. According to these provisions, '[a]ll people are free and equal in their dignity and in their rights' and '[e]veryone has the right to demand that [their] human dignity, personal honour, and good reputation be respected, and that [their] name be protected'. The CCC thus concluded that the relevant provision of the Registered Partnership Act was unconstitutional, because it would be illogical to prohibit any of the registered partners from becoming an adoptive parent. This was because the same law envisaged that registered partners could care for a child and even bound the other partner to protect and raise the child.

In a case concerning the right to privacy and self-determination in terms of information pursuant to Art. 10 (2) and (3) and Article 13 of the Charter, the CCC dealt with the possibilities of and limits to the collection and use of traffic and location data on telecommunication operations.[64] The court noted that interference with privacy should be balanced in criminal proceedings by the duty to inform the persons concerned *ex post facto* that their data had been provided. However, this duty could not be applicable, *ad absurdum*, in the case of a missing person, as the person sought and found will learn that the police have been processing their data precisely when they are found. Consequently, this cannot constitute an excessive interference with the above-specified rights.

The CCC also used an *ad absurdum* argument in a case concerning its position in the structure of Czech institutions and the separation of powers. The case concerned a possible annulment of the provisions on a default judgement on the grounds of their variance with the principle of equality of the parties laid down in Art. 96 (1) of the Constitution, Art. 37 (3) of the Charter, Art. 6 (1) of the ECHR, and Article 14 of the International Covenant on Civil and Political Rights. However, the CCC inferred (or rather confirmed its earlier conclusion) that it should not annul legal regulations in cases where they can be interpreted in conformity with the Constitution. According to the CCC, the opposite approach would be absurd and unsustainable. It

64 Pl. US 45/17.

would amount to abandoning the principle of judicial self-restraint and would open the floodgates to the annulment of a wider range of legal regulations.

3.2.4. Argumentum a contrario */ arguments from silence*

This argument, too, only appears in several cases. It is used, for example, in the interpretation of Article 41 of the Charter, according to which the rights listed in that provision can only be claimed within the confines of the law. Article 38 of the Charter, concerning the right to a statutory judge, is not among them. Consequently, if this provision refers to a legal regulation, then it cannot be applied in that the right to a statutory judge is precisely defined by such a regulation. To the contrary, based on interpretation of Article 41 of the Charter, this provision can also be invoked beyond the scope of the laws implementing it.[65]

Within the set of decisions under scrutiny, an *a contrario* argument is also used in the interpretation of Art. 10 (3) of the Charter. This provision protects everyone against unauthorised collection, publication, or other misuse of personal data. The establishment of a 'negative register' of debtors (consumers) thus naturally interferes with this right. Nonetheless, the CCC concluded that from the wording of the cited provision *a contrario,* this right can be limited in an 'authorised' manner. This may refer to an individual interest of the sellers and the collective interest of society in preventing over-indebtedness of consumers. According to the CCC, a society-wide interest also includes an interest of the State, whose bodies are disproportionately burdened by efforts to deal with the already existing over-indebtedness.[66]

A special position in the current set of decisions belongs to a case of good-faith acquisition of the ownership title from a non-owner. In this case, the *a contrario* argument applies not with regard to constitutional law as such but rather with respect to the case law of the CCC that interprets it. At the same time, it is used as part of the judicial dialogue held between the CCC and the Supreme Court. The CCC deviated from the wording of the law (see above, for grammatical interpretation) in this case and inferred the possibility of acquiring the title from a non-owner if the acquiror does so in good faith. Nonetheless, the Supreme Court adhered to conservative interpretation based on the wording of the law and opinions prevailing among the professional public. It also noted, in an attempt to justify its decision, that the CCC had yet to formulate explicitly this option in its case law. The CCC countered by citing its previous case law and by pointing out that its interpretation was apparent based on the *a contrario* argument.[67]

65 I. US 2769/15.

66 Pl. US 10/17.

67 The given paragraph contains a passage that, in view of the way it is phrased, may also imply that although this was a decent dig at the Supreme Court, it was stingy. Indeed, the CCC noted, '[a]nd finally, even the Supreme Court's case law proves that the court understands the conclusions pronounced by the Constitutional Court in I. US 2219/12 of 17 April 2014'.

3.2.5. Argumentum a simili *and, within it, analogy*

Arguments relying on analogy are also rare in the set under examination. Its importance should not be underestimated, nonetheless. It represents a useful tool that can be utilised effectively by Czech courts in general (i.e. not only by the CCC) to overcome gaps in Czech legislation resulting from poor work of the legislature. Indeed, using an assertive application of analogy, the courts have managed to ensure the performance of the country's external commitments, typically towards the EU and European Union law.

In the set of decisions under assessment, the CCC has used analogy to infer the State's duty to provide effective access to legal aid to detained foreigners in proceedings on administrative expulsion. It first notes that the necessary legislation is lacking at sub-constitutional level. It then goes on to analyse the background and principles it had inferred in its case law in relation to the right to legal aid in criminal proceedings for persons deprived of personal liberty. The Court then provides a thorough comparison of the respective situations of the two groups[68] and states that they are comparable and the principles inferred thus also apply analogously to foreign nationals.[69]

The CCC's approach is not so diligent in its ruling concerning procedural succession and its limiting conception. Indeed, when defining the contents of the right of access to the court, the CCC follows, among other things, from its previous case law. In doing so, it notes that a specific ruling, to which it refers, could be used by analogy in the case at hand. However, unlike in that decision, the Court fails to lay out reasons that would explain and justify their analogous application. Nonetheless, this is not a genuine use of analogy as a method of interpretation. The said decisions are used as a supporting argument within a broader and unadmitted purposive interpretation of the right of access to the court, protected by Art. 36 (1) of the Charter.

Analogy is used in a very interesting manner in a decision concerning an amnesty granted by the President of the Republic and the subsequent review of whether or not the conditions under which the amnesty was announced are met. The CCC first notes that amnesty decisions are clearly issued in favour of the accused (the convict) and rendered by the executive branch. Later decisions issued within a review of the set conditions might already go against the accused. Therefore, the CCC considers it necessary to protect the procedural rights of the accused in this regard, and the

68 It concluded that '[b]oth groups of persons are deprived of personal liberty and the harm threatening a foreigner in case of his or her expulsion is comparable to or even greater than the harm threatening the accused in criminal proceedings. There is no practical difference between administrative expulsion and expulsion which can be imposed on a foreigner as punishment in criminal proceedings. Moreover, if a foreigner escaped from his or her country because he or she was at risk of death or torture or some other type of ill-treatment, then the harm he or she may suffer in case of expulsion to this country is greater than the harm threatening the accused in criminal proceedings'.

69 I. US 630/16.

decisions should thus be made by the judiciary, rather than the executive branch. The CCC supports this conclusion by referring to an analogous solution in criminal law. Indeed, all decisions regarding a violation of the conditions pertaining to a sentence are made by the Czech judiciary, and not by the executive branch.[70] This conclusion is logical at first glance. However, it neglects the fact that the use of analogy in criminal law has its limits. This limit was exceeded in the present case. By its decision, the CCC has inadmissibly established an entirely new decision-making power and, moreover, complemented sub-constitutional law.[71]

Analogy enables the CCC to overcome clear errors committed by the legislature. One such case is also included in our set of decisions. The Czech legislature has yet to adopt a law that would sufficiently regulate a *Francovich*-type liability in the Czech Republic. A problem lies in the fact that while this type of liability is enshrined directly in EU law, national law is supposed to set a number of individual conditions. These are not and cannot be laid down by EU law, in view of its limited scope. Regulation at both these levels is necessary to ensure satisfactory functioning of this legal institute. The Constitutional Court dealt with a similar issue in the past in relation to Czech law. Indeed, Art. 11 (4) of the Charter provides protection to the right of ownership against expropriation or forced restriction in public interest, but no follow-up provisions have been enacted. The CCC has inferred the need for an analogy with a regulation that would come the closest to this issue in terms of its contents and purpose—the Liability of the State Act.[72] Regarding the *Francovich*-type liability, it inferred that these were similar situations with the same possible solution. Ultimately, the common courts had the duty to apply the Liability of the State Act even to matters not expressly listed in the Act.[73]

The *a simili* argument is used only once within the set of decisions under scrutiny: in the case of provisions requiring job seekers to perform public service. In this case, the CCC adheres to international conventions that guarantee the right to reasonable security in unemployment.[74] Unemployed persons could be divided into three categories, specifically a) persons unable to work; b) persons capable of working, but unwilling to do so; and c) persons capable and willing to work. Further, only the last group benefits from protection. The CCC notes that refusal to accept a suitable job is one of the 'distinguishing' features of unwillingness. The CCC then concludes *a simili* that refusal of a public service offer is a similar feature, conforming to the Constitution. The Court properly justified all this by comparing the features of an offer of suitable employment to an offer of public service.

70 Pl. US 36/17.

71 Five justices, including specialists in criminal law, expressed a dissenting opinion. Four of them explicitly opposed the application of the analogy in the way the Constitutional Court had done so in the case at hand.

72 Act No. 82/1998 Coll., on liability for the damage caused during the exercise of public authority by a decision or an incorrect official procedure.

73 IV. US 1521/10.

74 The Social Security (Minimum Standards) Convention and the European Code of Social Security.

3.2.6. Interpretation according to other logical maxims

The set of decisions under examination also shows the effects of the principle of *ut res magis valeat quam pereat*. It does not appear here under this designation. Instead, the CCC speaks on the effectiveness and efficiency of legislation. The Court notes in an asylum case that the right to effective judicial protection under Art. 36 (2) of the Charter envisages the possibility of claiming new facts, which the applicant may have failed, for justifiable reasons, to present in proceedings before an administrative authority. Without this option, the rejection of an application for international protection would not be effective.[75] Similarly, it infers in another asylum case that the seven-day deadline for filing an application for international protection is insufficient if the foreigner lacks access to qualified legal aid during that period. No effective means of protection is available, either, if a foreigner is not sufficiently advised of the possible consequences throughout the EU of their failure to apply for protection. It follows from the above that the instruments for the protection of foreigners' rights must not be applied mechanically and automatically by Czech authorities, and that their actual impact must be considered.[76] A line of interpretation of fundamental rights that ensures actual protection has to be preferred. In contrast, an approach that attains the formally pursued goals (i.e. everything seems to be in order in terms of purpose) but does not work in practice must be rejected. Finally, the above-cited decision concerning the duty to refer a question for a preliminary ruling in a situation that is or may be *acte clair* merits mention here. In this case, too, the CCC has inferred the generally correct procedure for referring questions for a preliminary ruling by the courts of last instance, while invoking the principle of effectiveness.

All the cases described above exhibit a minimalist approach to this principle. Consequently, exactly in line with its own position, the CCC does not require the maximum possible but only a minimum of what is necessary for the effective attainment of the purpose followed by the relevant legislation.[77]

3.3. Domestic systemic arguments

3.3.1. Contextual interpretation in a narrow and broad sense (including the so-called 'derogatory formulae')

Contextual interpretation is usual in cases where the CCC infers a certain conclusion on the basis of a combination of several provisions of the Constitution and the Charter. This is typical of Art. 1 (2) of the Constitution, according to which the Czech Republic is to observe its obligations arising from international law. This provision is often used in combination with other provisions, especially of the Charter.

75 I. US 425/16.
76 I. US 630/16.
77 See Sehnálek, 2019, p. 125.

This is how interpretation is found that conforms either to international treaties binding on the Czech Republic or to decisions of international courts. However, this is not a matter of direct determination of the contents of one provision on the basis of another. The logic is that the second provision opens the door for reflecting an external source (typically a European convention), which in turn influences the interpretation of the first provision. As regards the interpretation of fundamental rights and freedoms and the determination of their meaning, the contextual interpretation is a common method used by the CCC, observed in 12 decisions (including one occurrence of 'derogatory formulae').

A specific instance that is not in the current set of 30 cases is a decision on consumer protection.[78] This case is so unique that it has to be mentioned at least *obiter dictum* in this research. Consumer protection is not directly enshrined in the Czech Charter. In EU law, it is safeguarded by Article 38 of the EU Charter. This article states merely that 'Union policies shall ensure a high level of consumer protection'. All the relevant legislation is provided by secondary law. In the mentioned ruling, the CCC states that a common court has to ensure a party's right to judicial protection under Art. 36 (1) of the Charter; in doing so, it has to proceed in conformity with Art. 1 (2) (respect for international obligations) in conjunction with Article 10a (possibility of transferring the exercise of certain powers to an international organisation) and Article 4 of the Constitution (fundamental rights and basic freedoms enjoy the protection of judicial bodies). Based on these provisions contained in the Czech Constitution and the Charter, the CCC infers its duty to promote Article 38 of the EU Charter and thus protect consumers, or else it would violate the relevant provisions of the Constitution and the Charter. However, it ultimately makes its decisions in the way prescribed by secondary EU law, because the EU Charter itself does not provide any guidance. Secondary EU law is subsequently reflected in the law protected by the Constitution and the Charter. This procedure is not necessary from the viewpoint of EU law and is, in fact, not required by it. It does not correspond to the principles of application of EU law as formulated by the ECJ, and is 'activist' in the light of these principles. This approach is also problematic in terms of Czech law and, above all, overly complicated. It is basically like scratching behind an ear with the wrong hand, because the EU Charter is binding in itself; nonetheless, the Constitutional Court would have to leave its comfort zone and change its view of the EU law as it did with regard to international law in its bankruptcy judgement.[79] It may somewhat excessive to infer, based on the right to a fair trial, that the consumer may withdraw from a distance agreement within a period of one year, and also that the consumer is not liable for a reduced value of goods, even if they handled such goods in a way other than necessary for becoming acquainted with the goods.

78 II. US 2778/19.
79 Pl. US 36/01.

As regards contextual interpretation in a narrow sense, this concept is observed in two cases concerning determination of the significance of a fundamental right protected by the Charter. The Charter envisages that its provisions will be further specified by statutory law in some cases, although the same is not anticipated in other instances. Furthermore, Article 41 of the Charter sets out which rights can only be asserted within the limits of laws adopted for their implementation. The CCC takes advantage of this in its interpretation of other rights not affected by this article. The Court thus obtains an argument that provides room for broader interpretation and also broader application of the relevant fundamental right. It is not limited by statutory law, even if such a law has been enacted and its enactment is envisaged by the Charter. Meanwhile, the current set of decisions does not include a case in which a fundamental right would be interpreted purely in view of its position in the structure of the Charter.

An illustrative example of contextual interpretation in a broad sense is a case where the CCC states that, unlike Art. 10 (2) of the Convention, Art. 17 of the Charter does not contain any explicit reference to obligations and responsibility (or liability). However, the Constitutional Court subsequently infers them from the Constitution itself and its provisions. Using a similar logic, the CCC further states that the number of legitimate objectives for restricting the freedom of expression in Art. 17 (4) of the Charter is smaller than in the case of Art. 10 (2) of the Convention. In contrast to its equivalent in the Convention, Art. 17 (4) of the Charter does not contain an explicit option of limiting the freedom of expression with a view to protecting impartiality and authority of the judicial branch. However, this has not given concern to the CCC because, according to its interpretation, these values are protected within protection of the rule of law under Art. 1 (1) of the Constitution. According to the CCC, they may serve as a legitimate objective for restricting the freedom of expression, as impartiality of the judicial branch is protected at the constitutional level through the right to an impartial court and by the Constitution as such, according to which no one may jeopardise the impartiality of judges.[80]

As regards *derogatory formulae*, the present research has not found any of the principles of *lex superior derogat legi inferiori*, *lex specialis derogat legi generali*, and *lex posterior derogat legi priori* in the set of decisions under scrutiny. They are relevant, however, in the context of the decision on home births, which has already been mentioned. In this ruling, the CCC quotes its earlier case law and points out the influence of international standards of human rights protection in Czech law. Interpretation cannot be used to reduce the level of protection of fundamental rights and freedoms that have already been achieved in Czech law, even if this occurs on the basis of international treaties (and the way they are interpreted by international courts).[81] This limits the potential scope of *derogatory formulae* in Czech constitutional law.

80 I. US 2617/15.
81 Pl. US 26/11.

3.3.2. Interpretation of constitutional norms per domestic statutory law (statutes, decrees)

The CCC is not bound by sub-constitutional law and is therefore not part of its reference framework. It further applies in interpretation of the Charter that the notions and concepts used in the Charter have autonomous contents. Their contents are therefore relatively independent of sub-constitutional law and its potential change need not affect them in any way.[82] The current set of decisions includes cases where the text of sub-constitutional law serves as an argument for some specific interpretation of the Constitution, as well as a case where the CCC has ignored the wording of sub-constitutional law altogether, even in a situation where the Charter explicitly refers to conditions laid down by the law.[83] That is, the CCC should have adhered to its wording, given that the CCC is primarily a value- and policy-oriented body rather than a classical tribunal. The CCC and its justices thus work in a value-laden environment, and if sub-constitutional law fits into this context, it is reflected. Otherwise, reasons are sought and highlighted on the exclusion of sub-constitutional law.

When determining the meaning of notions used by the Charter, the CCC is willing to follow their meaning defined in ordinary law and even interpret them based on the explanatory memorandum to a statute. However, this is not very frequent. This method is deployed in three cases in total, in two of which the CCC fully accepts statutory law for the purposes of interpreting a fundamental right; in one case, it does not.

A situation where the CCC takes sub-constitutional law into account and fully accept it for the purposes of interpreting a fundamental right is the case concerning kindergartens and the question of whether schools could refuse a child who had not been properly vaccinated or had no proof of immunity against infection, or could not undergo vaccination owing to permanent contraindications. In this case, the CCC interprets Article 33 of the Charter, which lays down that '[e]veryone has the right to education'. However, it remains silent on the scope of this education and what levels of the educational system are covered by this very concept. This is, nonetheless, specified in the Schools Act. The CCC notes that the latter Act is one of the laws implementing this provision of the Charter and, therefore, adopts the definition contained in that Act.[84]

Meanwhile, the CCC's decision concerning the possibility of acquiring the ownership title from a non-owner[85] shows little willingness to follow the text of sub-constitutional law. The right of ownership is protected by Article 11 of the Charter, but only in general. Specific protection is ensured at the level of statutory law. Until

82 Pl. US 1/12.

83 The Charter uses two approaches: some rights are complemented through statutory law (for example the Art. 7 of the Charter states that "The inviolability of the person and of her privacy is guaranteed. They may be limited only in cases provided for by law") while the same is excluded in other cases. The CCC's procedure in interpreting and applying rights falling within one group or the other should not be the same. Indeed, the space for review is substantially broader in the latter case.

84 Pl. US 16/14.

85 I. US 2219/12.

the 2012 recodification of Czech private law, it was not possible to acquire the ownership title from any person other than the owner. In contrast, the new law protects the new owner's good faith and thus permits this option in specific cases. In a case that was heard after the adoption of the new legislation, but still during the effect of the former regulation (which thus should have been applied), the CCC granted the level of protection afforded by the new regulation.[86] More accurately, the Court used it as an argument to support its concept of protection of the new owner's right of ownership. It did so despite the fact that the wording of the law (which governed the relevant legal relationship) had not changed and did not allow this, and that the Charter itself had not been changed either. Indeed, the Charter expressly referred to the statutory concept of the right of ownership. The exceptional nature of the situation is illustrated by the fact that this approach was opposed by a substantial section of the professional public as well as the Supreme Court. The CCC conducted an extensive judicial dialogue with the Supreme Court regarding acquisition of the title from a non-owner. Indeed, both these courts relatively vigorously opposed each other and were unable to find a common approach.

The CCC's approach of the wording of statutory law is likewise rather dubious, as well as that of the Charter in its decision concerning a hotel manager who had required Russian guests to sign a declaration condemning the conduct of their own country with regard to the annexation of Crimea.[87] In this ruling, the CCC addressed the prohibitions of discrimination enshrined in the Charter and in the Anti-Discrimination Act, which differ from each other. The Anti-Discrimination Act provides an exhaustive list of prohibited grounds. The CCC construed the Charter in the same way, although the list contained therein comprises not only a prohibition of discrimination on explicitly stated grounds but also a discrimination category based on 'another position'. This category makes it possible to apply further grounds unknown to the Charter. Consequently, if the CCC denied this 'invitation', it interpreted the provision with surprising restraint. This is not typical of the way it tends to interpret the Charter. Thus, rather than a methodologically correct interpretation process, this amounted to what could be described as 'situational interpretation' of the Charter. Although we can assume that a case will be decided in a certain way, we know that the same provision would be construed differently if the facts were different (not involving Russia, but some other country).

3.3.3. Interpretation of the Constitution per the case law of the Constitutional Court

This method of interpretation is very common and represents the basic *modus operandi* of the CCC. Basically all the rulings of the CCC include references to its previous case law. At the same time, a snowball effect is apparent in the CCC's decision-making. The conclusions of its previous decisions are repeated in new decisions,

86 Ibid.
87 II. US 3212/18.

which are added to the original ones and then quoted together. This ultimately creates the impression of a clearly and convincingly established law. Therefore, judgements of the CCC, strongly resembling the ECJ, lack any detailed analysis of facts in relation to the rule on the basis of which the decision is made. In substance, the CCC merely constantly repeats its general conclusions until it creates the impression of a precedent.[88] How could the interpretation be different if it has been confirmed so many times? The benefits of this approach are generally known and undisputed. Moreover, similar courts, especially the ECtHR and ECJ, operate in a similar way. Nonetheless, the approach gives the impression that the CCC occasionally steps on the very boundary of what is appropriate. The way it works with its previous decisions implies that it perceives them as precedents (although it has never stated this openly), which they are not. At the same time, it uses an authoritative and paternalist style, similar to a parent who does not explain a problem and simply dismisses their child's question by saying 'because I said so'. This creates the impression that the first and foremost imperative for the CCC is not the Constitution, and the constitutional and ordinary legislators' ideas enshrined in it, but rather its own ideas of how things should operate. The wording of the law and the manner in which it is interpreted are hidden under a load of case law. The Constitution and the Charter then serve merely as some sort of background scenery devoid of substantial meaning.

3.3.4. Interpretation of the Constitution per the case law of common courts

The approach to the case law of common courts is based on the CCC's position and also the way the latter perceives its position. The CCC has repeatedly emphasised that it is not a part of the system of common courts. It refuses to act as another court of instance and to apply 'simple law'. The CCC quotes decisions of lower courts for three principal reasons. First, it does so to illustrate the overall situation and better clarify the facts of a case. Second, the CCC works with them in cases where it conducts a judicial dialogue with common courts and opposes their conclusions. Third, and this happened only in several cases in the current set, the CCC used decisions of common courts as supporting argument for the conclusions it reached itself. Thus, the CCC clearly expects common courts to be loyal to it and follow its interpretation, which is understandable. Meanwhile, even the mentioned rare cases prove that the CCC is capable of recognising the authority of the two supreme courts, in the set of cases under assessment, this was true only when the CCC was

88 The CCC is generally not allowed to depart from its previous decision, as made possible after the adoption of Plenum's opinion (*stanovisko*). In this respect, its decisions resemble precedents. However, they are not precedents in a way that this term is understood in common law, since they do not constitute new general rules of law. They merely interpret existing rules, created by the rule-maker, for specific cases. The CCC requires that the same protection be granted in factually similar cases. The crux of the problem, however, is that facts are often not dealt with in the sophisticated way that the common law courts do in subsequent cases. Instead, the so-called 'legal sentences' gain importance. As a result, the individual context of each case loses its importance.

interpreting 'simple law'. Since common courts generally do not rule directly on the basis of the Constitution and therefore do not routinely interpret it, their decisions cannot form a common basis for the CCC's decisions. Despite this fact, the CCC refers to individual court decisions in three cases to strengthen and support its own conclusions.

3.3.5. Interpretation of constitutional provisions and fundamental rights based on normative acts of other domestic state organs

The present analysis found no decision in the set under scrutiny that could be directly subsumed under this point, as defined in the research design. Nonetheless, the influence of other governmental authorities on the CCC's decision-making is beyond dispute. Indeed, in matters related to the annulment of a statute or some other regulation, the Constitutional Court Act envisages that these authorities could intervene in the proceedings before the CCC. The CCC has thus requested an *amicus curiae* brief from the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, as well as from the Government and the Public Defender of Rights. The conclusions presented by these bodies are then used subsidiarily in the interpretation and substantiation of the CCC's conclusions. The CCC has also considered an opinion of the Committee for Human Rights and Biomedicine of the Czech Government Council for Human Rights.[89] A common practice is that the justice-rapporteur requests an opinion from individuals and institutions that can significantly contribute to the resolution of the problem at hand, although in some cases, their choice may be arbitrary.

3.4. External systemic and comparative law arguments

3.4.1 Interpretation of fundamental rights on the basis of international treaties

This section outlines the position of international treaties in the system of Czech law and the CCC's approach to them. In its 'bankruptcy judgement',[90] the CCC states that, in view of Art. 1 (2) of the Constitution, international treaties form a part of the constitutional order even if they are not included in the exhaustive list given in Section 112 (1) of the Constitution, which defines the constitutional order. Decisions are thus commonly made based on not only the Charter but also international treaties protecting fundamental rights.

What is noteworthy, however, is the way the CCC works with the text of international treaties in general and with the wording of the European Convention in particular. Only in a single decision in the set of cases under scrutiny is its international

89 Pl. US 16/14.
90 Pl. US 36/01.

origin considered and the impact of this fact on its interpretation emphasised.[91] In this specific case, the interpretation concerns the concept of 'property'. In its ruling, the CCC states that this term is subject to 'autonomous interpretation, i.e. interpretation independent of any potential definition of the concept in national legislation, and moreover, to relatively broad interpretation'. This aspect is not emphasised in any other decision. To the contrary, the Czech Charter and the rights it protects are interpreted in the context of the European Convention and other international treaties—more visibly and more apparently so in the case of the European Convention.

In this regard, the 'principle of homogeneity' can be considered to have become a part of Czech constitutional law as a result of the CCC's decisions. Indeed, the CCC interprets the same rights protected by the Charter and the Convention in the same way. If there is a difference in the wording of a right enshrined in the Charter and the same right protected by the European Convention, the difference tends to be neglected (not highlighted) and the right is still interpreted homogeneously, according to the European Convention.[92] The CCC itself has never designated this approach as such.

The situation described is somewhat paradoxical. The Convention and other international treaties should be subject to autonomous interpretation and be independent of Czech law. Moreover, public international law itself sets the methods of its interpretation. Meanwhile, the Charter, as part of the Czech Constitution, should be interpreted using a methodology inherent to and in the context of Czech law. There might be overlaps and areas of the same meaning, as well as cases where one and the other can be interpreted differently. Nonetheless, the influence of international treaties, including the Convention, has completely prevailed, and the CCC clearly has no interest in interpreting the Charter in a different way.

It must be emphasised at the same time that, in fact, the CCC does not provide interpretation of the Convention. Its contents are determined through ECtHR case law. Consequently, if the CCC's work were to be evaluated only on the basis of the 30 selected decisions, it could be stated that this party to the Convention (i.e. the Czech Republic) has given up on interpreting the Convention itself using the rules of public international law.

The approach to EU law (and the EU Charter) differs from the one taken to the Convention. Moreover, the conclusions described above concern situations involving parallel regulation of a certain right in Czech and international law. A specific instance (not included in the set of 30 cases) is the previously analysed decision on consumer protection,[93] which is not directly afforded by the Czech Charter. There is no regulation parallel to the external regulation. However, consumer protection is part

91 Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

92 This is clearly demonstrated by the interpretation provided in previously analysed ruling I. US 2617/15.

93 II. US 2778/19.

of EU law, specifically Article 38 of the EU Charter, and is put into practice through secondary law. While the CCC professes Article 38 of the EU Charter in its 'activist' decision, it applies secondary EU law and, on its basis, creates the standard for consumer protection in Czech law.[94] It is paradoxical that, in this specific case, a fundamental right is elaborated not against the backdrop of an international treaty as such but rather based on a regulation (directive) adopted on the basis of the treaty.

Subsidiarily and, in fact, without any link to the solution adopted in the case, the ruling further states (while recalling prior case law of the CCC) that, according to the CCC, the EU Charter is considered a part of the reference framework for review and a criterion for review, and Czech law emphasises the need to also approach interpretation of the law from the viewpoint of the EU Charter.[95] However, the position of the Charter is not so clear. The only certainty on the basis of the CCC's case law is that EU law as a whole is not a part of the reference framework for review (abstract or specific) of national law.[96]

A greater or lower willingness to take the EU Charter, as a highly specific source of EU law, into consideration can be found in the individual decisions of the CCC. This can be demonstrated in the interpretation of the right to protection of privacy under Article 10 of the Charter. Unlike the provisions enshrined in Article 8 of the EU Charter, the right to protection of privacy cannot be limited 'on some other legitimate basis laid down by law'; the CCC resolved this problem by using an interpretation conforming to this provision. It did so, however, in a situation where it could and should have applied the EU Charter directly in terms of EU law.[97] This is a recent decision, which thus reflects the continuing disjointed approach of the CCC to EU law and to the EU Charter.

The differences in the CCC's approach to the European Convention and the EU Charter are understandable. The Convention has an exceptional position among the sources of law used by the CCC; the EU Charter cannot match it in this regard. Indeed, its scope is limited based on the rule 'if [the] EU law applies, the Charter applies', which the CCC has embraced.[98] There is no similar limitation laid down in the Convention. The CCC thus treats it as a general instrument for interpreting the Charter. Furthermore, the CCC does not avoid further international or supranational sources either. The set of decisions examined includes rulings where the CCC accounts for the Convention on Human Rights and Biomedicine,[99] the Social Security (Minimum Standards) Convention and the European Code of Social Security, the Convention Concerning Forced or Compulsory Labour,[100] the Convention on Cybercrime,[101] the

94 Ibid.
95 Ibid.
96 See Justice Zemánek's dissenting opinion in Pl. US 10/17.
97 Pl. US 10/17.
98 II. US 2778/19.
99 Pl. US 1/12, Pl. US 16/14.
100 Pl. US 1/12.
101 Pl. US 45/17.

International Covenant on Civil and Political Rights,[102] and the Convention on the Rights of the Child.[103]

3.4.2 Interpretation of fundamental rights per individual case decisions or case law ('judicial' practice) of international fora

The present analysis found no decision that would be issued by another international court (other than ECtHR or ECJ, to be precise), save for one. This was the decision of the International Court of Justice regarding jurisdictional immunity (Germany v. Italy) dated 3 March 2012. It might be said somewhat poetically that no stars can be seen when the sun is shining. In the case of the CCC, the sun is the ECtHR. No debate whatsoever is pursued in the decisions being examined as to the nature of ECtHR's decisions, with the sole exception of dissenting opinions. This question has clearly been *de facto* resolved. What differs is the rhetoric that the CCC uses when approaching decisions of the ECtHR. Several basic approaches can be distinguished in this regard: first, the CCC mostly formulates its own opinion and refers to ECtHR case law in support of its arguments. It then uses the phrase 'the CCC, in conformity with…' or 'the CCC agrees with…'. Second, the CCC adopts a parallel approach, where it both interprets the Charter and repeats the conclusions following from ECtHR case law. The third approach could be described as borrowing or substitution, as seen in the citing of ECtHR case law without simultaneously considering Czech law, which is assumed to be the same.[104]

The CCC's approach to the Charter and the Convention, as interpreted by the ECtHR, can be likened to the DNA's double helix. DNA carries genetic information, which consists of two mutually intertwined strands. Similarly, the CCC defines the contents of fundamental rights based on the Charter and the Convention, both of which carry one piece of information as to the desired standard of protection in the Czech Republic. In some of the rulings, ECtHR judgements are also *de facto* treated in this manner. They intertwine with the Czech legislation and decisions of the CCC and form a single whole.

The position of ECtHR case law is fully-fledged and comparable to prior case law of the CCC. In this respect, it is incomparable with the decisions of common courts. ECtHR case law is not questioned; rather, it is adopted without further considerations. What is characteristic of these cases, however, is the limited attention paid to the facts of the cases dealt with by the ECtHR; this can lead to conflicts of opinions among the individual justices, which are, in turn, reflected in dissenting opinions. The subsidiary nature of the ECtHR's work is overlooked, as is the fact that its decisions lack effects *erga omnes*.

102 Pl. US 49/10.
103 I. US 3226/16.
104 For general examples, see Petrov, 2019, p. 175.

The described approach is practical. The CCC, as a young tribunal lacking its own history (and mythology), thus basically borrows another's mythology. Meanwhile, the tribunal supports its own authority, because a conclusion made by the ECtHR must inherently be correct.

The CCC's approach to the ECJ is different. On the one hand, the CCC acknowledges the ECJ's authority to interpret EU law, and thus also the EU Charter. On the other hand, the CCC is effective in circumventing it.[105] It emphasises that what it interprets is not EU law (which is up to the ECJ) but rather the Czech Constitution.[106] The CCC makes this abundantly clear as it provides different interpretations regarding the duty to refer questions for a preliminary ruling and also as regards the question of possible discrimination in a well-known case concerning Czechoslovak pensions, as the first constitutional tribunal in the EU to rule at variance with a prior decision of the ECJ.[107]

3.4.3. Comparative law arguments

Comparative interpretation is a frequent method of interpreting the CCC's case law.[108] A comparison or at least a reference to a foreign legislation or decision is present in 15 cases, which is a truly high number, exceeding any other methods of interpretation analysed thus far. This is also why the individual cases will not be described in any further detail. It must be emphasised, however, that comparative arguments, as used by the CCC, have nothing to do with comparison as a scientific method. These are two completely different categories. Indeed, comparison as carried out by the CCC never goes beyond a mere statement—the situation in another country is such and such, similar/the same as here. It is superficial, subject to two exceptions,[109] which are nevertheless limited to conceptual comparison (in the best case).

A characteristic of comparative interpretation is that it is not the crucial method. It does not form the axis of any given decision; it aims merely to support and emphasise the conclusions reached by the CCC in some other way. Moreover, none of the relevant decisions handles foreign law directly. Its contents are ascertained either from professional comparative literature[110] and via decisions rendered by foreign courts.

105 Hamuľák, 2011, pp. 288–308.
106 Sehnálek and Stehlík, 2019, p. 186.
107 See also Hamuľák, 2014, pp. 103–112.
108 This is true in general; see ibid., p. 96.
109 This was true of ruling *Pl. US 7/15*, where the CCC examined the Austrian law and decision of the Austrian Constitutional Court File No. G 119-120/2004. The CCC's decision III. ÚS 3457/14 is relatively close to the contents of foreign legislation. In that decision, the CCC noted a similarity of substantial features and thus inferred that the conclusions made by the BVerfGE could be transferred to the Czech legal environment. What helped in this regard was that the BVerfGE followed from the ECtHR's case law.
110 *I. US 425/16* – using a general reference to other laws via UNHCR, March 2010, p. 467; further, in *I. US 1434/17*, a comparative view of the question of the State's liability for damage was mediated by Van Damm, 2013, p. 537.

The comparison or references to foreign laws or decisions are typically concerned with Germany and Austria. This is understandable as the Czech Republic shares legal history with these countries. They also benefit from an uninterrupted legal tradition and the ensuing robust jurisprudence, as well as the conceptual wealth of their case law. A comparison with Slovakia is used only twice,[111] which is surprising in view of the long shared history and similarity in legal thought.

The objects of comparison are not limited only to the laws of other countries. In one case, the CCC has referred to the fact that the principles of legal certainty and protection of legitimate expectations also comprise EU law.[112] EU law is also taken into account in the interpretation of the institution of liability of the State for damage, where the CCC referred to the concept of this institution in the case law of the ECJ (*Francovich*). However, such an approach is rather paradoxical, leading to a circular definition, as it was the ECJ that inferred the concept of *Francovich*-type liability based on the very provisions governing liability of the State for damage in EU Member States.

In one case, the comparison is hinted at but not actually carried out because this was an argument used by a party to the proceedings. However, the CCC used it for a different purpose, noting that 'while the German, Austrian or First-Republic Czechoslovak concepts of judgement by default might be more suitable de lege ferenda, this does not imply that the current Czech concept […] does not follow a legitimate public interest and is unconstitutional'.[113] This, too, indicates the limits of comparison and also that the CCC is well aware of them.

3.4.4. Other external sources of interpretation

The well of information and arguments for CCC decision-making is truly rich and includes a number of external sources. The CCC has applied an analysis[114] carried out by the Office of the United Nations High Commissioner for Refugees (UNHCR).[115] It has also referred to the following: Parliamentary Assembly Recommendation 1317 (1997) on vaccination in Europe; Guidelines on the Role of Prosecutors; a statement of the UN Human Rights Committee, Communication N°521/ 1992, Vladimir Kulomin v. Hungary, UN document CCPR/C/56/D/521/1992;[116] the report of the Venice Commission on the European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service, adopted on 17–18 December 2010, Study No. 494/2008;[117] the decision of the Council of Europe's Committee of Ministers: Twenty Guidelines on Forced Return of 4 May 2005; and the resolution of the UN

111 Pl. US 10/17 and I. US 2769/15.
112 I. US 1434/17.
113 Pl. US 49/10.
114 UNHCR, March 2010.
115 I. US 425/16.
116 Pl. US 17/10.
117 Ibid.

General Assembly titled 'Territorial integrity of Ukraine' of 27 March 2014, referring to the declaration of the Ministry of Foreign Affairs on the 5th anniversary of the illegal annexation of Crimea of 16 March 2019;[118] and finally, General comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration by the Committee on the Rights of the Children.[119] These sources, too, play a supporting role and serve primarily to reinforce and increase the persuasiveness and clarity of the CCC's arguments.

3.5. Teleological/objective teleological interpretation

Teleological interpretation is an important method used by the CCC. However, similar to linguistic interpretation, it is only rarely expressly admitted. The CCC observes the purpose of the Charter and the Constitution, and this is true of all the decisions chosen. The opposite would be surprising, as the CCC itself has called on the common courts to move away from formalism associated with predominant use of linguistic interpretation. However, the set of decisions under scrutiny contains none where the CCC would use this method of interpretation openly, clearly, and systematically. Its use can be inferred, as this method has been deployed in seven cases. This conclusion might be unexpected. Indeed, one would expect more frequent and direct use of this method of interpretation. However, it can be explained by the choice of selected decisions. In particular, these were supposed to be recent decisions, and reflecting on the case law of the ECJ or the ECtHR. These preferences could have had a significant impact in this regard. The problem is that the CCC may refer to its previous case law and work with it, and thus need not revisit what has already been resolved. Moreover, it has passively referred to extensive case law of the ECtHR wherever possible. Consequently, the need for any deeper teleological analysis of the individual rights is substantially reduced. In contrast, the purpose is often considered in cases where sub-constitutional law is being interpreted. It is also taken into account in the tests of rationality and proportionality.

3.6. Historical/subjective teleological interpretation (based on the intention of the constitution-maker)

This method of interpretation is likewise not present in the selected decisions at the level of the Constitution (other than sub-constitutional law), even though the CCC has had the opportunity to use it. Historical interpretation suggests itself in the amnesty ruling analysed above, as the legislation in question has its origins in the Czechoslovak 'First Republic', from which the current Czech Constitution found inspiration, but this stone was eventually left unturned.[120] The CCC came closest to

118 II. US 3212/18.
119 I. US 3226/16.
120 Pl. US 36/17.

historical interpretation when it referred to the case law of its Czechoslovak predecessor, but this was not an instance of genuine use of this interpretation method.[121]

3.7. Arguments based on jurisprudence/scholarly works

The circle of Czech constitutional lawyers is relatively small and its members tend to know one another very well, as they often work together both at the Constitutional Court and at law schools. This is true of both justices and their assistants. It is by no means exceptional if a Constitutional Court's justice also has part time jobs at a couple of law faculties. This has several consequences. It can be stated in general that the relationships in the circle of persons dealing with constitutional law (and EU law) appear harmonious to people outside the community, following the spirit of co-operation and mutual understanding. Where critical voices are raised, this usually concerns situations where the question dealt with by the CCC is highly sensitive in nature (meaning that the CCC is forced to create the State's policy in its ruling, such as in the cases of home births, e-sales, and homosexuals) or situations where the Constitutional Court shows empathy in its decision-making ('listens to the stories of individual people') but fails to reflect on the consequences this approach might have in everyday life and functioning of sub-constitutional law. Close interconnection with the academia often prevents any meaningful criticism in the field of constitutional law; such a criticism is actually quite uncommon. The law is first 'made' through the CCC's decision-making, and then taught by those who *de facto* made the law in their decisions, and the same people reflect on it in the professional literature they publish. This literature then influences the functioning of the CCC and serves as an argument on certain decisions. The academia can hardly play its role of supervisor of the CCC.

Professional publications are often used in the CCC's case law. One half (15) of the cases examined included a reference to some professional publication; the numbers would be higher if the analysis accounts for literature pertaining to sub-constitutional law. In the vast majority of cases, the Court works with Czech literature, but a total of five decisions reference foreign sources as well. Surprisingly, German and Austrian commentaries are not used to a greater degree. Indeed, this would make sense in view of the CCC's willingness to use the comparative method. What is even more striking is that foreign literature dealing with the Convention is not used to an extent comparable to Czech literature. This would make perfect sense in a situation where the CCC works with the Charter as a fully comparable document. Indeed, it does refer to Czech commentaries regarding the interpretation of the Charter. This brings us to a relatively significant problem in the work of the CCC. Its decisions often refer to publications co-authored by one of its justices. This is quite understandable, on the one hand, as these people understand their work and it makes sense if they subsequently write a commentary or professional article. There

121 Pl. US 30/16.

is a rationale behind reflecting on such a publication. These works also undergo peer review and are published in high-impact magazines, which guarantees their quality. It can also be argued that they are often mere members of a collective of authors and have no influence over the other co-authors. This method of work is not good in systemic terms. It artificially creates the authority of the CCC's decisions. Although this institution needs no such support, it has taken advantage of it in more than a quarter of the cases in the set under scrutiny. A case where the justice-rapporteur refers to their own publication is then clearly wrong.[122]

3.8. Interpretation in light of general legal principles

General principles of law represent 'imaginary spice' in the CCC's case law, which is also illustrated by the frequency with which they are used. Their advantage lies in the fact that they are amorphous. Their contents are not precisely defined; the decisions do not actually work with their contents, but we still generally (even if vaguely) know what the CCC is trying to communicate. The principles that are (at times even repeatedly) referred to in our set of decisions include the following: legal certainty, predictability, and proportionality; equality; protection of the citizen's confidence in the law; the new owner's good faith; maintaining confidence of individuals in acts of a public authority; protection of acquired rights; predictability of judicial decision-making; *ne bis in idem*; and prohibition of retroactivity.

3.9. Substantive interpretation/non-legal arguments

The CCC does not avoid non-legal arguments in its decisions, although they are not that frequent (five decisions in the current set). Such an argument is especially apparent in the ruling concerning a hotel manager in Ostrava who required his Russian guests to sign a declaration concerning Crimea.[123] This decision has been mentioned above. It consists of two very specific arguments. The first is factual and quite problematic. Indeed, the CCC pronounced the described step as lawful because the same service had been available elsewhere in the city (i.e. it was substitutable). The question, however, is how the CCC would assess the given situation if it involved a small town where a Russian guest would have no such alternative. In the same ruling, the CCC relied on a book written by Karel Čapek and a decision made by one of his characters. The fact that this was a reaction to a ruling previously made by the Supreme Administrative Court, which had cited a different Czech author, further reinforces the human touch in the Court's decision-making. While such a procedure is certainly conceivable as a way to spice up and humanise a decision made by the CCC, it is questionable whether it is really suitable and necessary in terms of its

122 In one case, the cited material was still in print and yet to be published, which is downright ridiculous, Pl. S 26/11.

123 II. US 3212/18.

form. From this point of view, dissenting opinions are clearly an unproblematic place where a justice can better express their personality. This often happens and justices like to use this option.

In one of its decisions, the CCC made a certain conclusion because this was fair[124] and, in respect of the principle of data retention, it sought the 'lesser evil'; in another decision, in contrast, it highlighted the importance of good morals.[125] In the latter case, the CCC even expressly admitted the possibility of deviating from the results of legal interpretation and also from the wording of the law. The result is that the CCC asks the judge to decide *praeter legem* and even *contra legem*.

4. Reality of interpretation of law by ECtHR and ECJ

Most (26) of the decisions that are of interest are issued by the ECtHR. The 27th decision of this court was cited only indirectly through the scientific literature, without being specified. As such, it was not included in the research. Given the way the CCC approaches EU law, the influence of ECJ's case law in the field of human rights is negligible. Nonetheless, decisions of this court were part of the research. Out of three ECJ decisions to which the CCC referred, only one was dealing with fundamental rights, which are codified by the EU Charter.

The choice of decisions for examination followed the project's conditions. The task was to select those rulings that were used by the CCC in its decisions examined previously in section 3. of the present analysis.. The CCC quite regularly referred to several ECtHR rulings at once. Therefore, when choosing among several options, the present analysis preferred those decisions that concerned directly the Czech Republic or some other country included in the survey. Furthermore, priority was given to rulings that were cited repeatedly or where the context indicated that they could have a significant impact on the CCC's decision-making.

One interesting fact is that the decisions in this group pertained, in principle, to the same problems as those dealt with by the CCC. Nonetheless, the style of work at the ECtHR (and also the ECJ) clearly differed from the way the CCC operates.

4.1. Grammatical (textual) interpretation

As regards the individual methods of interpretation used by the three courts, grammatical (textual) interpretation serves them as the initial, basic method. This approach to interpretation is taken in most of the decisions of the ECtHR. The interpretation of the Convention based on an ordinary meaning of words is not used very

124 I. US 1860/16.
125 IV. US 3500/18.

frequently (only in three cases). In contrast, legal professional (dogmatic) interpretation is used much more frequently (in 25 cases). In three cases, the ECtHR took the advantage of interpretation based on legal principles.

While not sufficiently robust for deciding on the cases without exploiting other methods, textual interpretation did serve as the foundation on which interpretation could be built using other approaches. The importance of grammatical interpretation is substantially diminished because the ECtHR perceives the Convention as a 'living instrument'. Therefore, emphasis on its interpretation is not placed primarily (and only) on the actual text of the Convention but rather on the current social context of its functioning. Nonetheless, the text limits evolutive interpretation of the Convention and cannot be neglected. The ECJ refers to text of the EU Charter in its decisions.

As noted previously, the CCC is aware of the need for an autonomous interpretation of the Convention. In three cases, the ECtHR indeed expressly provides such autonomous interpretation of notions used in the Convention. The absence of emphasis on such interpretation in a majority of decisions does not imply that this approach would be marginal. Autonomous interpretation was deemed not necessary owing to the nature of these cases.

The bilingual nature of the Convention was reflected in two cases. In one, the second binding language version was taken into account subsidiarily. In the other case, the ECtHR directly compared the meanings commonly attributed to the terms used and preferred the broader one: 'It is true that the English word "labour" is often used in the narrow sense of manual work, but it also bears the broad meaning of the French word "travail" and it is the latter that should be adopted in the present context'. As a matter of fact, it used the text of the 'Forced Labour Convention' to support this approach. Meanwhile, the potential of the Convention's bilingual wording was not exploited at all in one other decision where the problem at hand could also have been resolved by a reference to the French term. Nevertheless, the ECtHR did correctly evaluate the substance of the slightly different phrases used in various provisions of the Convention and assigned them the same meaning. It stated specifically that the phrase 'in accordance with the law' used in Article 8 'alludes to the very same concept of lawfulness as that to which the Convention refers elsewhere when using the same or similar expressions, notably the expressions "lawful" and "prescribed by law" found in the second paragraphs of Articles 9 to 11'.

4.2. Logical (linguistic-logical) arguments

The set of decisions under scrutiny demonstrates no broader use of this method of interpretation. The *a contrario* argument is mentioned in a single case.[126] This, moreover, pertained to the Court's own prior decision, rather than the legislation. As such, the case does not fall in this category, strictly. It is not true, however, that the circumstances would not favour the use of this method. It is striking that a case

126 Magyar Helsinki Bizottság v. Hungary.

concerning adoption by a same-sex couple in Austria was not argued *a contrario*. Indeed, this argument would suggest itself in this case. The Court had to determine how individual countries and international law approached the possibility of child adoption by same-sex couples. While this area was covered by an international treaty (the Convention on the Adoption of Children), a number of contracting parties remained unconvinced at the time. The lack of consensus among various countries as to the resolution of this issue was clearly discernible from the following facts, in spite of the existence of the treaty: the number of State parties to the Convention on the Adoption of Children was low; many countries had no regulation on this subject in national law; and where such regulation existed, it varied fundamentally in the approach taken to the relevant issue. Thus, the solution adopted in the Convention on the Adoption of Children was not a suitable guideline for the interpretation of the Convention, as it did not reflect the state of general international law at the time.

The absence of a specific regulation in the Convention and its Protocols was noted with regard to the (non-)existence of a right of political asylum.[127] According to the ECtHR, the fact that this question was not explicitly regulated reinforced the conclusion that it was the individual States that had the power to control the entry, residence, and expulsion of aliens.

Analogy was used only once, with regard to the reasoning provided earlier by the ECtHR in the same decision, when interpreting and applying some other provision. This was therefore not a matter of interpreting the law on the basis of analogy but rather a shortcut used to save the Court's time. Consequently, this case cannot be counted either. Similarly, *argumentem ad absurdum* was used in only one case[128] to exclude the impossible and unacceptable result of interpretation.

4.3. Domestic systemic arguments

Contextual interpretation in a narrow and broad sense (including the so-called 'derogatory formulae') was mentioned in a majority of cases, always with a view to achieving internal 'consistency and harmony' in the interpretation and effects of the Convention or its provisions. From the qualitative point of view, the significance of contextual interpretation in a narrow and broad sense (including the so-called 'derogatory formulae'), and in fact, of all other methods of interpretation was completely outweighed by interpretation carried out on the basis of the existing case law of the ECtHR. In substance, this interpretation method formed the axis of interpretation in all the decisions of this Court, and was predominant in both quantitative and qualitative terms. It is clear that the ECtHR can benefit from its robust case law,[129] but it is thus ultimately bound by its previous conclusions. Meanwhile, it has

127 Jabari v. Turkey.

128 Salov v. Ukraine.

129 Even in more recent decisions, it also considers the conclusions of the ECtHR. See Magyar Helsinki Bizottság v. Hungary.

a foundation available for seeking effective solutions to existing and new cases, and it therefore need not rely on classical methods of interpretation. This conclusion, however, lessens the importance of contextual interpretation, which has been used quite frequently—in 20 decisions in total (in three of which, the court used the contextual interpretation in both a broad and narrow sense; in 11 cases, in a broad sense; and in six cases, in a narrow sense).

In all the cases under scrutiny, the ECtHR used its own previous rulings as pieces of a jigsaw puzzle to create an *ad hoc* overall image of the contents of the Convention. It is typical of its work that both interpretation and subsequent application are always conducted along a single line. In doing so, the Court works with its previous decisions in connection with the facts of the case (i.e. either to support a certain conclusion or to refute it). It was also characteristic of all the decisions assessed that they never yielded any new general and abstract rule. They ended up being yet another piece of a puzzle that might be used together with other pieces to build up a new case. The lack of effort to formulate general rules is not necessarily a problem—quite the contrary. The ECtHR thus plays its subsidiary role and reflects on the position that may be attributed to it by the Convention. It is supposed to provide protection to persons affected in individual cases, not to make the law. This fact is of great importance for the CCC and other national courts. Indeed, they should approach the rulings of the ECtHR in this spirit. They cannot be treated as general guidelines for dealing with specific matters. The facts of any given case and its overall context must always be carefully taken into account. This is where the CCC might have a perceivable main risk, as it may have knowingly overlooked this fact in some cases and inferred more from an ECtHR decision than was appropriate.

Ultimately, the way the ECtHR works with the Convention in the majority of the selected cases cannot be considered interpretation. The ECtHR does not present any general rule. It attempts to infer its meaning and impact on the specific case through individual methods of interpretation. However, the opposite was true in all the cases under scrutiny. Based on existing decisions, the ECtHR synthesises rules that it then applies in a specific case. Its approach is thus the opposite compared with standard decision-making by common courts. Nonetheless, two exceptions were found in the set of decisions under assessment where the above conclusions did not fully apply.

4.4. External systemic and comparative law arguments

When interpreting the Convention, the ECtHR reflects the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. These rules were explicitly mentioned only once in the set of cases under scrutiny. The contents of the decisions showed that interpretation of the Convention according to the rules of the Vienna Convention was not an exception but rather a standard. This is documented by the number of decisions referred to by the ECtHR when specifying the contents of the Vienna Convention. The ECtHR has an

elaborated and clearly defined methodology in its decisions, based on which it takes external sources of interpretation into consideration.[130]

The significance of the list of external authorities whose opinions or interpretation comprise a common part of a number of decisions in the set of cases under assessment, together with statements of the governments and parties to the proceedings, is unclear. Reference to these authorities might indicate that they are also considered and taken into account by the ECtHR. However, they were merely described and simply noted in a majority of the cases, without the ECtHR using them to interpret the Convention in any way. Even a mere statement that they were not relevant for some reason could have served as valuable information. Moreover, they could have affected the Court's considerations in all the cases, at least in the stage of pre-knowledge, where the judges individually and internally form their own opinions on the case at hand. As this influence was not visibly manifested in the decisions, these cases were not reflected in the qualitative and quantitative evaluation.

The effect of the rules of interpretation in the Vienna Convention is evidenced, among other things, by the clear effort of the ECtHR to provide harmonic interpretation of the Convention with respect to the other international treaties. The influence of specialised international instruments is apparent in this regard, as they have the potential to clarify the highly general Convention, to be applied in specific cases. The ECtHR works comprehensively with these international treaties. It does not limit itself only to their text, in the sense that it would interpret it itself, but also takes into account the case law of the courts responsible for their interpretation.[131] Common courts, however, have very limited options and means compared with the ECtHR.

To be specific, the decisions in the analysed set included the following documents: Forced Labour Convention, Inter-American Court of Human Rights' interpretation of Article 13 of the American Convention on Human Rights, as set out in the case of *Claude Reyes et al. v. Chile*; Declaration of Principles of Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights in 2002; International Covenant on Civil and Political Rights; the United Nations Human Rights Committee; Recommendation of the Committee of Ministers of the Council of Europe and of the The Parliamentary Assembly.[132] EU law and the European Union's Charter of Fundamental Rights as well as Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 were also taken into consideration.

However, the application of international treaties and other international authorities is not a matter of course, as one treaty was even explicitly rejected in one of the decisions included in the set under review. This treaty was the Convention on

130 Magyar Helsinki Bizottság v. Hungary.

131 One case reflected a ruling of the Inter-American Court of Human Rights (Magyar Helsinki Bizottság v. Hungary) and another, a judgement of the ECJ (Big Brother Watch and Others).

132 D.H. and others v. The Czech Republic.

the Adoption of Children, and the reason for setting it aside was that the number of Contracting States was insufficient and thus not representative. As such, the contents and the objective capacity of a certain authority to convey information on the legal approach taken by individual countries to a certain social problem are relevant for reflecting a certain external authority.

References to social reality and legislation in the Member States of the Council of Europe have repeatedly appeared in the set of decisions under scrutiny. A reference was made both to the legislation[133] and, together with it, to case law[134] or, in general, to the approach taken by national authorities to the issue.[135]

From among other sources, the ECtHR worked with conclusions of the Venice Commission[136] and Explanatory Report to the Council of Europe's Civil Law Convention on Corruption.[137] In one of its decisions, the ECtHR referred to 'well-established international law', which enables the State to control the entry, residence, and expulsion of aliens.[138] As regards non-legal, factual sources of information, the ECtHR invoked 'numerous scientific studies'.[139]

4.5. Teleological/objective teleological interpretation

Similar to the CCC, the ECtHR explicitly used the teleological method of interpretation only in a minority of cases in our set of decisions. The reasoning may indicate that the ECtHR did consider the purpose, but did not expressly admit this, nor did it reveal to what extent and in what specific way it did so. Arguments concerning the purpose of the Convention were frequently present implicitly or through the citation of the previous decisions of this court, in which this method had been used. The current analysis observed a clear reflection on the purpose of the legislation in a total of 15 of the 29 evaluated cases.

4.6. Historical/subjective teleological interpretation

The ECtHR took the *travaux préparatoires* into consideration in three cases. In one of these decisions, the ECtHR also worked with the concept of evolutive interpretation of the Convention. In quantitative and qualitative terms, the significance attached to the law-maker's intention was marginal in the cases examined. This method of interpretation was used exclusively as a supplementary means of interpretation (in conformity with the Vienna Convention).

133 Mennesson v. France.
134 Fretté v. France.
135 Leyla Sahin v. Turkey.
136 Baka v. Hungary.
137 Guja v. Moldova.
138 Jabari v. Turkey.
139 Fretté v. France.

4.7. Arguments based on jurisprudence/scholarly works

Two sources of recognition of the contents of fundamental rights enshrined in the Convention are completely missing among the scrutinised decisions of the ECtHR. The first are references to professional legal literature. This marks a clear difference from the practice of the CCC, which frequently uses professional literature, albeit often in a questionable manner. Similarly, the case law of the ECtHR under assessment lacks any references to the case law of the courts of the Council of Europe's Member States. As regards professional literature pertaining to the Convention, its absence is understandable. Silence enables the ECtHR to maintain a neutral stance and resolve legal questions independent of the opinions of experts.

4.8. Interpretation in light of general legal principles

The use of general legal principles was rare among the decisions reviewed. Nevertheless, six of these decisions demonstrated greater consideration for the principle of legal certainty and rule of law.

4.9. Substantive interpretation/non-legal arguments

The ECtHR paid no attention to non-legal arguments. In the selected case law of the ECtHR, this method has not occurred in the framework of direct interpretation of the text of the Convention.

5. Characteristics of the CCC's decision

The structure and language of the CCC's decisions are not completely uniform. They often also differ in graphic layout. The approach applied by the individual justices is inconsistent and leaves room for individual considerations; however, the differences are not fundamental. Differences in the structure and contents can be found especially in the case of decisions made by the Plenum, on the one hand, and those rendered by individual panels, on the other hand. Within the set of decisions under scrutiny, the Plenum's decisions are characterised by their greater length. This, however, does not necessarily imply that the parts devoted to actual interpretation and application would be longer. A substantial part of the Plenum's rulings consisted of statements of third parties who were either selected and approached by the justice-rapporteur or who intervened in the proceedings based on the law or even of their own volition. Their statements *de facto* complemented the court's own

activities. From this view, the decisions of the panels were better arranged and more clearly structured.[140]

The form of the decisions and arrangement of their individual parts are supposed to indicate that the CCC's thinking is logical, systematic, and syllogistic. This is indeed so in most cases. The Court proceeds from the text of the Constitution or the Convention, via its interpretation and subsequent application of the general rule, to the actual solution: the conclusion. The structure of legal interpretation and reasoning is simple, typically along a single line. However, one sometimes cannot avoid the impression that the decisions were written backwards: the conclusion (decision) was made first, followed by the search for the applicable legislation, and then the interpretation of the law to achieve the desired result. Such an approach is understandable, as it makes it possible to address specific human problems and stories. However, it also entails the risk of disrupting the whole system in other subsequent cases. These problems are avoided in practice using extra-legal means. Justices tend to consult informally other justices of the CCC who specialise in the relevant fields of law on the possible impacts of non-standard solutions on sub-constitutional law. The latter thus have the opportunity to talk their peers out of their well-meant intentions before any damage is done.

The language of the CCC's decisions creates a neutral, objective, rational, and logical impression of the way the Court makes its rulings. The CCC refers to itself as a third-party institution, while using authoritative phrases suggesting subconsciously that the CCC's conclusions are not open to debate. Should someone nevertheless want to argue, they are met with phrases such as '*the above-cited judgement […] clearly declared that…*', which are supposed to 'clearly' avoid any debate. This is unfortunate, especially if this approach is combined with the possibility of deciding a case based on an opinion held by only two justices (in a panel), the duty to follow earlier decisions, and certain unwillingness to change previous conclusions by presenting them to the Plenum. A small number of people—who are not asked to bear any political responsibility—also have an excessive space to influence life in society.

The intended addressees of decisions rendered by the CCC are difficult to define in view of the variety of styles used by the Court. Subjectively, the CCC stands out among the top Czech courts because of the clarity, clear structure, and comprehensibility of its decisions. Nonetheless, the ordinary citizen—the complainant—will not be their direct addressee or reader. Not that the citizen would be unable to grasp the meaning of the CCC's conclusions, but the language used by the CCC is relatively professional and sophisticated for a layman to be able to understand fully the way the CCC thinks and its individual conclusions. The style used by the CCC is often pseudo-academic, which probably owes to the fact that many of its justices and their assistants have an academic background. The academic character relates not only to the regular use of professional literature by the court but also to the layers of the individual arguments

140 See case II. US 2778/19, as some of its parts strongly resemble the typical structure and style of argumentation of MOOT court submissions that students wrote.

and the way they are explained. However, the use of professional literature is random and unscientific in that it serves as a shortcut to support and explain the CCC's conclusions and not as a basis for scientific discussion and evaluation.

Although the Court's decisions are addressed to experts in law, the CCC often, once again academically or even in a scholarly manner, explains its conclusions and certain phrases, especially those in Latin, and translates them into Czech or, on the contrary, provides a German or English equivalent along with a Czech term. Legal practitioners do not write this way—there is no sense in explaining such notions to experts who already know them well. A similar style of writing is characteristic of school textbooks and certain professional articles.

The target group of the CCC's decisions is relatively wide; along with the parties' lawyers, it also includes courts and other public authorities, including the legislature. The CCC's decisions are typical for their explanatory and persuasive style, which aims to explain the logic of the solution adopted by the CCC, especially in relation to courts. Nonetheless, despite the somewhat authoritative nature of this approach, the CCC seems willing to enter into a dialogue with other courts and respond to suggestions and ideas.

The formal academic style of the CCC's rulings is only occasionally disrupted by reflections on classical literature, used by the justices to bring the contents of their decisions closer to people. At the same time, they make it easier for external observers to understand the way the justices think and explain the values they believe in. They also serve as proof that justices and their assistants are erudite people. However, a real space for the presentation of the justices' own values and opinions are dissenting opinions, and the justices indeed like to use the options these channels provide.

6. Quantitative Assessment

6.1. Case law of the Czech Constitutional Court in numbers

The delimitation of the arguments and their quantitative assessment can only be relative as the methods often overlap in practice; occasionally, they are present but not apparent.[141]

The use of the grammatical method of interpretation based on the ordinary meaning of the Constitution and Charter was insignificant in the selected 30 decisions of the CCC. The CCC has not used this method explicitly in any of them. Simple conceptual dogmatic interpretation was deployed in 17 cases and interpretation on the basis of legal principles in two. Nevertheless, the CCC simultaneously and regularly used interpretation of the Constitution on the basis of its previous case law.

141 Tóth, 2016, p. 180.

Thus, the importance and significance of the grammatical method of interpretation (and of other methods as well) was lowered.

Logical *argumentum a minore ad maius* was used twice (6,66%), but only once to interpret a fundamental right (3,33%). A similar situation was with the *argumentum a maiore ad minus*, which was used only once (3,33%), to interpret a fundamental right. *Argumentum ad absurdum* appeared in four (13,33%) cases, and *argumentum a contrario* in two (6,66%) of them. Analogies were also rare, found in only four (13,33%) cases. The principle of effectiveness was deployed three times (10%). Meanwhile, contextual interpretation in a narrow sense was deployed in nine decisions (30%), and that in a broad sense, in 14 decisions (47%). Interpretation of constitutional norms on the basis of domestic staturory law was deployed in three (10%) cases in total.

At the other end of the spectrum are those methods that occur regularly in the case law of the CCC. Comparative interpretation occurred in 50% of cases. Argumentation based on jurisprudence was used in half of the cases (50%) as well, and interpretation on the basis of the case law of the CCC or the Convention (as interpreted by the ECtHR) both had 100% occurrence. Only once (3,33%) the CCC referred to any other international court than the ECtHR or ECJ. Similarly, the CCC referred only once (3,33%) to any other international treaty other than the European Convention on Human Rights or EU Charter in order to interpret the fundamental right as protected by the Charter. Meanwhile, in five (16,65%) cases, the CCC took into account other international treaties. Once, the EU Charter was reflected. Other external sources were used in three (10%) cases. In all the selected cases, the CCC had an intention to interpret the same rights protected by the Charter and the Convention in the same way. However, in one case (3,33%), it took into account the international character of the Convention and possible different meanings of the terms it uses.

When it comes to the interpretation of constitutional norms on the basis of domestic statutory law, the practice of the CCC is rather ambivalent. In two cases (6,66%), the CCC fully accepted statutory law for the purposes of interpreting a fundamental right; in one case, it did not. Three occurrences (10%) had the interpretation of the Constitution based on the case law of common courts. Meanwhile, teleological interpretation was deployed in seven cases (23,33%); nevertheless, the significance and importance of this method shall not be underestimated. Quite frequent was also the interpretation in light of general legal principles, found in 70% of the cases, although it was typically not a decisive one. Non-legal arguments were used in 16,66% of cases.

6.2. Case law of the the EctHR and ECJ in numbers

The use of the grammatical method of interpretation of the Convention and the Charter based on the ordinary meaning of words was significant in three decisions (10,34%). Simple conceptual dogmatic/doctrinal interpretation was used in 25 cases (86,20%) and interpretation on the basis of legal principles, in three decisions (10,34%), all out of the decisions of both the ECtHR and the ECJ.

Logical arguments were rather rare; they were used five cases (17,24%). Meanwhile, domestic systemic arguments were frequently used. Contextual interpretation in a narrow and broad sense was deployed in 20 decisions (68,96%). Interpretation based on the existing case law of the ECtHR or ECJ tended to be dominant, occurring in all 29 cases (100%). External systemic and comparative law arguments were also quite common as they were cumulatively used in eight cases (27,58%).

The objective teleological method of interpretation was used in 15 cases (51,72%), whereas subjective teleological interpretation appeared in three cases (10,34%). Arguments based on jurisprudence were not used at all, nor was substantive interpretation. Interpretation using general principles occurred in six cases (20,69%).

Only one of three decisions of the ECJ dealt explicitly with human rights. This court applied the grammatical and teleological methods of interpretation only once. It also referred to its previous case law as well as to the case law of the EctHR and reflected the principle of proportionality in only one case. In two cases, it adopted a rather dogmatic approach, simply stating the existence of a right without further analysis. This court also took a different perspective from the ECtHR. The human rights perspective is not the first priority. The context of the sub-constitutional law is also reflected; this law is in the centre of interest of the ECJ, whereas the ECtHR naturally does not take it directly into account. Therefore, the ECJ's interpretation in the field of human rights has not been nearly as sophisticated as it has been in the judgements of the ECtHR. However, the ECJ took into account the case law of the ECtHR and worked with it in a similar way to its own.

7. Conclusion

Although the total number of Constitutional Court decisions examined was relatively small and potentially unrepresentative, the statistics are broadly in line with what is reported in the literature. Kühn's study of the Constitutional Court's decisions reached the same conclusions and significantly differed only in the case of teleological interpretation. This difference could be easily explained. The selection of the present cases was quite specific because of the conditions set by the research design, whereas Kühn had a free choice over a longer period of time. As a consequence of the research design, the teleological method of interpretation has been *de facto* substituted by references to ECtHR decisions.[142]

Similarities and differences can be noted in the interpretation provided by the CCC and the ECtHR, and fundamental differences between the CCC and the ECJ. In the case of the ECJ, however, the number of decisions included in the present set was too small to allow for objective and general conclusions. As to similarities, it is

142 Kühn, 2017, pp. 199–235.

clear that the ECtHR relies in its decision-making on robust existing case law, which serves primarily as the starting point for its considerations. Prior decisions are an absolutely predominant means of identifying the contents of the law. All other methods of interpretation are only auxiliary in the decisions under scrutiny. The CCC, too, has reached a stage where it can work with a large body of its own case law; its work is similar to that of the ECtHR in this sense. The original differences between the two courts are gradually subsiding in this regard. However, the CCC more often draws on external sources, especially the case law of the ECtHR. The latter is like its older brother and thus has a considerable influence on the way the CCC makes its decisions. The ECtHR has no such close relation with any other court.

Minor differences can be observed in the approach of the two courts to prior case law. The ECtHR is aware of its subsidiary role and therefore uses its previous rulings with greater sensitivity towards the facts of the case and social, legal, and political reality in a state concerned. For this court, its judgements do not serve as means of broadening the impact of the Convention but rather as means of resolving new individual problems, always with all due respect to the states and their national identities. Thus, the margin of appreciation doctrine is frequently used by this court, a legal doctrine unknown to decisions of the CCC. Meanwhile, the CCC typically adopts an extensive approach to earlier case law (both its own and that of the ECtHR), to generalise it and, at the same time, take lesser consideration of the facts of the case, while being more willing to apply prior decisions to new, unresolved cases. This is undoubtedly also supported by the Czech tradition of 'legal sentences' or 'headnotes', which provide a general conclusion on each case. They are used as an extension of written law and, in Czech legal practice, are commonly applied without any greater link to the original facts of the case.[143]

Another difference lies in the greater willingness of the CCC to use other methods of interpretation. What the two courts have in common, however, are the rather marginal effects of logical (linguistic-logical) arguments and surprisingly also minor explicit use of objective or subjective teleological interpretation, which is downright typical of the ECJ. This difference between the CCC and the ECtHR probably owes to the fact that despite the mentioned robust case law of the two courts, a number of individual questions have yet to be expressly addressed, especially in the Czech Republic. More space is thus left for other methods of interpretation. Over time, the CCC may also become 'bound' by its previous case law, just like the ECtHR.

Of the two courts, it is the ECtHR that gives the impression of being a genuine court. In contrast, the CCC also plays a political role—along with its judicial function—in the sense that it actively influences the functioning of the State and society (i.e. also forms politics). In aggregate, some of the CCC's justices find inspiration in the way the ECtHR works and strive to follow it as much as possible.

143 Tvrdíková, 2020, pp. 587–612.

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2.	Decision Pl.ÚS 49/10 of the Constitutional Court	D.H. and others v. the Czech Republic, Application no. 57325/00, judgment of 13 November 2007
3.	Decision IV.ÚS 1521/10 of the Constitutional Court	Andrea Francovich and Danila Bonifaci and others v Italian Republic, C-6/90 and C-9/90, judgment of 19 November 1991
4.	Decision Pl. ÚS 26/11 of the Constitutional Court	Ternovszky v. Hungary, Application no. 67545/09, judgment of 14 December 2010
5.	Decision Pl.ÚS 1/12 of the Constitutional Court	Van der Mussele v. Belgium, Application no. 8919/80, judgment of 23 November 1983
6.	Decision .ÚS 2219/12 of the Constitutional Court	Sergey Glaser v. the Czech Republic, Application no. 55179/00, judgment of 14 October 2008
7.	Decision Pl.ÚS 16/14 of the Constitutional Court	Leyla Şahin v. Turkey, Application no. 44774/98, judgment of 10 November 2005
8.	Decision III. ÚS 3457/14 of the Constitutional Court	Financial Times ltd and others v. the United Kingdom, Application no. 821/03, judgment of 15 December 2009
9.	Decision Pl.ÚS 7/15 of the Constitutional Court	Fretté v. France, Application no. 36515/97, judgment of 26 February 2002
10.	Decision I. ÚS 2617/15 of the Constitutional Court	Guja v. Moldova, Application no. 14277/04, judgment of 12 February 2008
11.	Decision I. ÚS 2769/15 of the Constitutional Court	Miracle Europe kft v. Hungary, Application no. 57774/13, judgment of 12 January 2016
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13.	Decision Pl.ÚS 30/16 of the Constitutional Court	Zarb Adami v. Malta, Application no. 17209/02, judgment of 20 June 2006
14.	Decision .ÚS 425/16 of the Constitutional Court	M.S.S. v. Belgium and Greece, Application no. 30696/09, judgment of 21 January 2011

15.	Decision I. ÚS 630/16 of the Constitutional Court	Jabari v. Turkey, Application no. 40035/98, judgment of 11 July 2000
16.	Decision IV. ÚS 1378/16 of the Constitutional Court	Magyar Helsinki Bizottság v. Hungary, Application no. 18030/11, judgment of 8 November 2016
17.	Decision I.ÚS 1764/16 of the Constitutional Court	C. v. Finland, Application no. 18249/02, judgment of 9 May 2006
18.	Decision I.ÚS 1860/16 of the Constitutional Court	Schatschaschwili v. Germany, Application no. 9154/10, judgment of 15 December 2015
19.	Decision IV. ÚS 2326/16 of the Constitutional Court	R & L, s.r.o. and others v. the Czech Republic, Application nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09, judgment of 3 July 2014
20.	Decision I. ÚS 3226/16 of the Constitutional Court	Mennesson v. France, Application no. 65192/11, judgment of 26 June 2014
21.	Decision Pl. ÚS 36/17 of the Constitutional Court	Horváth and spo v. Hungary, Application no. 11146/11, judgment of 29 January 2013
22.	Decision Pl.ÚS 45/17 of the Constitutional Court	Big Brother Watch and others v. the United Kingdom, Application nos. 58170/13, 62322/14 and 24960/15, judgment of 5 September 2017
23.	Decision III.ÚS 1434/17 of the Constitutional Court	Dhahbi v. Italy, Application no. 17120/09, judgment of 8 April 2014
24.	Decision IV. ÚS 3359/17 of the Constitutional Court	Baka v. Hungary, Application no. 20261/12, judgment of 23 June 2016
25.	Decision II. ÚS 3432/17 of the Constitutional Court	Ullens de Schooten and Rezabek v. Belgium, Application nos. 3989/07 and 38353/07, judgment of 20 September 2011
26.	Decision III.ÚS 4071/17 of the Constitutional Court	Morice v. France, Application no. 29369/10, judgment of 23 April 2015
27.	Decision II. ÚS 819/18 of the Constitutional Court	Agrobet CZ, s.r.o. v Finanční úřad pro Středočeský kraj, C-446/18, judgment of 14 May 2020
28.	Decision II. ÚS 3212/18 of the Constitutional Court	Reference to the established case law of the ECHR without mentioning directly the exact source of the citation – the source is cited indirectly via several books

29.	Decision IV. ÚS 3500/18 of the Constitutional Court	Orlen Lietuva ltd. v. Lithuania, Application no. 45849/13, judgment of 29 January 2019
30.	Decision Pl. ÚS 6/20 of the Constitutional Court	X And others v. Austria, Application no. 19010/07, judgment of 19 February 2013

Methods			Frequency (number)	Frequency (number and %)	Main types frequency (number and %)
1	1/A	a)	0	0%	17 (57%)
		b)	0	0%	
	1/B	a)	17	9%	
		b)	2	1%	
	1/C		0	0%	
2	2/A		1	1%	15 (50%)
	2/B		1	1%	
	2/C		4	2%	
	2/D		2	1%	
	2/E		4	2%	
	2/F		3	2%	
3	3/A		12	7%	30 (100%)
	3/B		3	2%	
	3/C	a)	30	17%	
		b)	0	0%	
		c)	0	0%	
	3/D	a)	0	0%	
		b)	3	2%	
		c)	0	0%	
4	4/A		1	1%	30 (100%)
	4/B		30	17%	
	4/C		15	8%	
	4/D		4	2%	
5			7	4%	23 (4%)
6	6/A		0	0%	0 (0%)
	6/B		0	0%	
	6/C		0	0%	
	6/D		0	0%	
7			15	8%	15 (50%)
8			21	12%	21 (70%)
9			3	2%	3 (10%)

1. Grammatical (textual) interpretation
- *1/A. Interpretation based on ordinary meaning*
  - a) Semantic interpretation
  - b) Syntactic interpretation
- *1/B. Legal professional (dogmatic) interpretation*
  - a) Simple conceptual dogmatic (doctrinal) interpretation (regarding either constitutional or other branches of law)
  - b) Interp*retation on the basis of legal principles of statutes or branches of law*
- *1/C. Other professional interpretation (in accordance with a non-legal technical meaning)*

2. Logical (linguistic-logical) arguments
- *2/A. Argumentum a minore ad maius: inference from smaller to bigger*
- *2/B. Argumentum a maiore ad minus: inference from bigger to smaller*
- *2/C. Argumentum ad absurdum*
- *2/D. Argumentum a contrario/arguments from silence*
- *2/E. Argumentum a simili, including analogy*
- *2/F. Interpretation according to other logical maxims*

3. Domestic systemic arguments (systemic or harmonising arguments)
- *3/A. Contextual interpretation*
  - a) In narrow sense
  - b) In broad sense (including 'derogatory formulae': *lex superior derogat legi inferiori*, *lex specialis derogat legi generali*, *lex posterior derogat legi priori*)
- *3/B. Interpretation of constitutional norms on the basis of domestic statutory law (acts, decrees)*
- *3/C. Interpretation of fundamental rights on the basis of jurisprudence of the constitutional court*
  - a) References to specific previous decisions of the constitutional court (as 'precedents')
  - b) Reference to the 'practice' of the constitutional court
  - c) References to abstract norms formed by the constitutional court
- *3/D. Interpretation of fundamental rights on the basis of jurisprudence of ordinary courts*
  - a) Interpretation referring to the practice of ordinary courts
  - b) Interpretation referring to individual court decisions
  - c) Interpretation referring to abstract judicial norms
- *3/E. Interpretation of fundamental rights on the basis of normative acts of other domestic state organs*

4. External systemic and comparative law arguments
- *4/A. Interpretation of fundamental rights on the basis of international treaties*
- *4/B. Interpretation of fundamental rights on the basis of individual case decisions or jurisprudence of international fora*
- *4/C. Comparative law arguments*
  - a) References to concrete norms of a particular foreign legal system (constitution, statutes, decrees)
  - b) References to decisions of the constitutional court or ordinary court of a particular foreign legal system
  - c) General references to 'European practice', 'principles followed by democratic countries', and similar non-specific justificatory principles
- *4/D.* Other external sources of interpretation (e.g. customary international law, *ius cogens*)

5. Teleological/objective teleological interpretation (based on the objective and social purpose of the legislation)

6. Historical/subjective teleological interpretation (based on the intention of the legislator):
- *6/A. Interpretation based on ministerial/proposer justification*
- *6/B. Interpretation based on draft materials*
- *6/C. Interpretation referring, in general, to the 'intention, will of the constitution-maker'*
- *6/D. Other interpretation based on the circumstances of making or modifying/amending the constitution or the constitutional provision (fundamental right) in question*

7. Interpretation based on jurisprudence (references to scholarly works)

8. Interpretation in light of general legal principles (not expressed in statutes)

9. Substantive interpretation referring directly to generally accepted non-legal values

Chapter V

Interpretation of Fundamental Rights in Slovakia

Katarína Šmigová

1. Introduction

This chapter aims to analyze the jurisprudence of the Constitutional Court of the Slovak Republic (hereinafter the 'Constitutional Court') and related case-law of the European Court of Human Rights (hereinafter also 'the Court' or 'the ECtHR') within the framework of the Interpretation of Fundamental Rights in Europe project. It is divided into five subchapters. The first presents the position and competence of the Constitutional Court of the Slovak Republic and discusses basic features of its proceedings compared to ECtHR proceedings. The second subchapter explains the status of the Convention on Human Rights and Fundamental Freedoms within the Slovak legal order and the status of the Convention as an international treaty. Both issues are important in relation to the opinion of the Constitutional Court and the Court on the matter of interpretation as such that is analyzed and compared within the third subchapter. The fourth and fifth subchapters begin with a presentation of the selection criteria of decisions of the Constitutional Court and the Court, respectively, which are subsequently analyzed and compared in relation to the methods of interpretation. The conclusion summarizes the result that both courts use similar interpretative methods, but not to a similar extent. Moreover, there are certain differences that originate qualitatively from the position of these courts within the system of judicial bodies and quantitatively from the selection criteria since the selection of the decisions of the Court has been fundamentally influenced by the selected decisions of the Constitutional Court.

Katarína Šmigová (2021) Interpretation of Fundamental Rights in Slovakia. In: Zoltán J. Tóth (ed.) *Constitutional Reasoning and Constitutional Interpretation,* pp. 301–343. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing.

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2. Constitutional Court of the Slovak Republic

The Constitutional Court of the Slovak Republic was established on 1 January 1993 by the Constitution of the Slovak Republic no. 460/1992 Coll. (hereinafter also the 'Constitution'). According to the Constitution, the Constitutional Court is an independent judicial body for the protection of constitutionality.[1] It is a separate judicial body from the judicial system of the Slovak Republic. Its separate position is pointed out also by a separate section within the part of the Constitution upon judicial power. The judicial system as such is composed of the Supreme Court of the Slovak Republic and other courts.[2]

The organization and powers of the Constitutional Court and the position of judges of the Constitutional Court are regulated by Art. 124 to Art. 140 of the Constitution of the Slovak Republic and Act no. 314/2018 Coll. on the Constitutional Court of the Slovak Republic and on Amendments of Certain Acts (hereinafter also the 'Act on the Constitutional Court').

As for its organization, the Constitutional Court has its seat in Košice, the second largest city in Slovakia, situated in its eastern part. Its location might be considered to balance the location of most supreme bodies in the capital city of Bratislava. It consists of 13 judges appointed by the President of the Slovak Republic for a 12-year term on a proposal of the National Council of the Slovak Republic; this proposal shall consist of twice the number of candidates for judges that shall be appointed by the President of the Slovak Republic.[3] The President and Vice-President are appointed from among the judges of the Constitutional Court by the President of the Slovak Republic. The Constitutional Court decides in plenary or in three-member senates; the plenary session consists of all judges of the Constitutional Court.

The composition of the senates is regulated by the Work Schedule of the Constitutional Court of the Slovak Republic, and the Administration and Rules of Procedure of the Constitutional Court of the Slovak Republic regulated by Regulation No. 500/2019 Coll., which deals with details of the organization of the Constitutional Court of the Slovak Republic and proceedings before it, in particular with the preparation of proceedings and decisions, the position of the plenum, senates, judges, rapporteurs, and resolutions of the Constitutional Court of the Slovak Republic, and disciplinary proceedings against judges of the Constitutional Court.

Before presenting the competence of the Constitutional Court by introducing several areas it is authorized to deal with, it is important to note that the Constitutional Court acts and decides upon several legal questions, namely: on conformity of listed legal acts and negotiated international agreements with the Constitution, and

1 Art. 124 of the Constitution.

2 Ibid., Art. 143.

3 This fact is expressly pointed out here because there has been a decision adopted by the Constitutional Court that the authority of the President to make appointments is limited as well, although not expressly by the Constitution. See III. ÚS 571/2014, finding from 17 March 2015.

the same in relation to the subject and the result of a referendum or a declaration of the state of emergency. Moreover, it also decides upon complaints from individuals and local self-government bodies and upon electoral matters. It is also empowered to decide on the vacancy and the indictment of the President, and on competence disputes.

Keeping in mind the aim of this chapter, two basic matters are to be pointed out: First, the Constitutional Court of the Slovak Republic is authorized to give an interpretation of the Constitution or constitutional law if the matter is disputable, i.e., on fundamental rights and freedoms as well if there is a dispute.[4] The judgment of the Constitutional Court on the interpretation of the Constitution or constitutional law shall be promulgated in the manner laid down for the promulgation of laws; it is expressly set down that the interpretation is generally binding from the date of its promulgation.[5]

Second, the Constitutional Court is empowered to decide on complaints of natural persons or legal persons if they plead the infringement of their fundamental rights or freedoms, or human rights and fundamental freedoms resulting from an international treaty that has been ratified by the Slovak Republic and promulgated in the manner laid down by a law, save that another court shall decide on protection of these rights and freedoms.[6] If the Constitutional Court accepts a complaint, it has to decide whether the protected rights or freedoms were infringed by a valid decision, measure, or other action, and if so, it must cancel such a decision, measure, or other action. If the infringement of protected rights or freedoms emerges from inactivity, the Constitutional Court may order the party who has infringed these rights or freedoms to act in the matter. The Constitutional Court may at the same time remand the matter for further proceedings, prohibit continuing in the infringement of specified fundamental rights and freedoms, or if possible, order the party who has infringed the protected rights or freedoms to reinstate the status before the infringement.[7] As a consequence, the Constitutional Court may, by the decision by which it allows a complaint, award the party whose protected rights were infringed an adequate financial satisfaction.[8]

The Constitutional Court decides in plenary sessions if it is so provided by the Constitution or specified Acts.[9] Otherwise it adopts its decisions in a senate.

According to § 11 of the Act on the Constitutional Court, the senate of the Constitutional Court consists of three judges of the Constitutional Court, one of whom is the president of the senate of the Constitutional Court. The composition of the senates and the representation of their members is determined by the plenum of the Constitutional Court in the work schedule. The session of the senate of the Constitutional

4 Art. 128 of the Constitution.
5 Ibid.
6 Art. 127 of the Constitution.
7 Ibid.
8 Ibid.
9 Art. 131 of the Constitution.

Court is convened, its agenda is determined, and the meeting is chaired by the president of the senate of the Constitutional Court. The president of the senate is elected by the senate itself from among its members. The term of office of the president of the senate is 12 months, unless otherwise specified in the work schedule. The Constitutional Court is competent to act and pass resolutions in the senate if all its members are present at the proceedings and voting of the senate. All members of the senate are obliged to vote, and the senate decides by an absolute majority of its members.

A case is prepared for the decision of the Constitutional Court (either by its the plenary session or by the senate) and is referred to the session by the judge of the Constitutional Court to whom the case was assigned (hereinafter also referred to as the 'Judge-Rapporteur').[10] Members of the senate have a right to file a countermotion, which is voted on before the vote on the draft decision submitted by the Judge-Rapporteur.[11]

Since there are several senates working within the Constitutional Court, the legislator has adopted a procedure to secure promotion of legal certainty of its decision-making authority by a process of unification of legal opinions of the senates of the Constitutional Court.[12] If the senate of the Constitutional Court, in the course of its decision-making activity, reaches a legal opinion different from the legal opinion already adopted in the decision of another senate of the Constitutional Court, the Judge-Rapporteur shall submit to the plenum a proposal to unify the legal opinions. The plenum of the Constitutional Court shall decide on the unification of legal opinions by a resolution. It is important to note in this context that in further proceedings, all the senates of the Constitutional Court are bound by this resolution.[13] The situation is resolved the same way if it is found that the senate of the Constitutional Court has deviated by its decision from the legal opinion already expressed in the decision of one of the senates of the Constitutional Court. In such a case, the president of the Constitutional Court shall submit a proposal to the plenum to unify the legal opinions.

Cases are assigned to the Judge-Rapporteurs at random by technical and program means approved by the plenum of the Constitutional Court, so as to exclude the possibility of influencing the allocation of the case.[14] For proceedings in a matter falling within the competence of the senate of the Constitutional Court, the competent senate is the one of which the rapporteur is a member according to the work schedule, to whom the case has been assigned according to these technical means.[15]

10 § 6 of the Act on the Constitutional Court.
11 Ibid., § 10.
12 Ibid., § 13.
13 Ibid.
14 Ibid., § 46.
15 Ibid., § 47.

In general, the petitioner must be represented throughout the proceedings at the Constitutional Court by a lawyer.[16] Nevertheless, the Constitutional Court may appoint a legal representative for a petitioner who requests the appointment of a legal representative in proceedings before the Constitutional Court, if this is justified by the petitioner's property situation and it is not an obviously manifestly ill-founded exercise of the right of protection of constitutionality. Furthermore, costs of the appointed legal representative are borne by the state. Finally, also in case of the proceedings before the Constitutional Court, everyone has a right to act in one's own mother language or in a language he or she understands. In case it is necessary, the Constitutional Court shall recruit an interpreter.[17]

Proceedings of the Constitutional Court begin in general[18] upon a motion submitted by at least one-fifth of all Members of Parliament, the President of the Slovak Republic, the Government of the Slovak Republic, a court, the Attorney General, or what is the most relevant option in relation to the promotion and protection of human rights, by acts of individuals, i.e., by anyone whose right is to be adjudicated in a case as provided in Art. 127 of the Constitution according to which the Constitutional Court decides on complaints of natural persons or legal entities if they object to a violation of their fundamental rights or freedoms, or human rights and fundamental freedoms arising from an international treaty ratified and promulgated by the Slovak Republic, if another court does not decide on the protection of these rights and freedoms.[19]

To summarize the possible results of the decisions, if the Constitutional Court upholds the complaint, it then declares by its decision that the relevant rights or freedoms have been violated by a valid decision, measure, or other interference, and annuls such an act. If the claimed violation of rights or freedoms has arisen through inaction, the Constitutional Court may order the person who violated these rights or freedoms to act in the case. At the same time, the Constitutional Court may remand the case for further proceedings, prohibit the continuation of the upheld violation, or order restoration of the situation prior to the infringement. Similar to the proceedings in Strasbourg, Košice may, by its decision upholding the complaint, alike award a person whose rights have been violated adequate financial satisfaction.

16 Art. 134 of the Constitution.

17 Art. 38 of the Act on the Constitutional Court.

18 In some specific cases proceedings of the Constitutional Court are commenced if the motion is submitted by the ombudsman, Supreme Audit Office, or President of the Judicial Council.

19 Such a wording means that before a motion is submitted before the Constitutional Court, other local remedies have to be exhausted. A complaint upon violation of human rights before the Constitutional Court is the last to be exhausted before submitting a complaint at international bodies. Before amendment of the Constitution in 2001, a different system of motions was to be applied; however, as it was not considered an effective remedy by the ECtHR, it was therefore possible to reach the Strasbourg court even without filing a proposal at the Constitutional Court.

The following will similarly compare basic features of proceedings at the Constitutional Court and the European Court of Human Rights. Although these proceedings are different from the point of view of status since the former is held at the national level, and the latter at the international level, both were established to ensure a minimum standard of proceedings and human rights protection while avoiding a misuse of the system. Therefore, relevant jurisdictional issues are focused on, namely the time context, the status of the victim, and the authority to adopt provisional measures.

Similarly to the ECtHR, the Constitutional Court may proceed if a complaint is submitted by a person who claims that his or her fundamental rights and freedoms have been violated, i.e., they claim to be a victim.[20] Nevertheless, unlike the case of the ECtHR, a constitutional complaint may be filed only within two months of the entry into force of the act that is complained against, not six months after the exhaustion of domestic remedies, which has been shortened to four months within the Strasbourg system. Moreover, although the filing of a constitutional complaint has no suspensive effect,[21] the Constitutional Court may, unlike the ECtHR, at the request of the complainant, suspend the enforceability of the contested final decision, measure, or other intervention if the legal consequences of the contested act would threaten serious harm and the suspension of enforceability is not contrary to the public interest.[22] Furthermore, the Constitutional Court may, at the request of the complainant only, decide to adopt interim measures, if this is not contrary to the public interest and if the enforcement of the contested decision, measure, or other intervention would cause greater damage to the complainant than it may cause to other persons, and in particular it may order the state body that, according to the complainant, has violated their fundamental rights and freedoms to temporarily refrain from enforcing a final decision, measure, or other interference and order third parties to temporarily refrain from the legal entitlements granted to them by such an act.[23] Such a reasoning is important for provisional measures of the ECtHR as well, although those provisional measures might be adopted only vis-à-vis States.[24]

As has already been mentioned, if another court has jurisdiction to decide on the protection of the complainant's fundamental rights and freedoms in the matter to which the constitutional complaint relates, the Constitutional Court rejects the constitutional complaint for lack of jurisdiction to hear it. Moreover, a constitutional complaint is inadmissible if the complainant has not exhausted the remedies granted to him by law to protect his fundamental rights and freedoms. However, comparable to the judiciary of the ECtHR, the Constitutional Court will not refuse to accept a constitutional complaint on the grounds that it is inadmissible if the applicant proves

20 Compare Art. 122 of the Constitution and Art. 34 of the ECHR.
21 § 128 of the Act on the Constitutional Court.
22 Ibid., § 129.
23 Ibid., § 130.
24 Rule 39 of the Rules of Court.

that he or she has not exhausted all the granted remedies for reasons worthy of special consideration.[25]

As for the decision, if the Constitutional Court upholds the constitutional complaint, it states in the judgment which fundamental rights and freedoms have been violated, which provisions of the Constitution, constitutional law, or international treaty have been violated, and by which act the fundamental rights and freedoms have been violated. Nevertheless, as it will be presented below in this chapter, it is not always the case that the Constitutional Court includes the relevant case-law of the ECtHR in its reasoning.

To explain several forms of decisions of the Constitutional Court, as for the merits, the Constitutional Court decides by a finding. In other matters, the Constitutional Court decides by a ruling.[26] The Constitutional Court adopts a judgment only in the proceedings on a prosecution by the National Council of the Slovak Republic against the President of the Slovak Republic in matters of willful infringement of the Constitution or treason.[27]

A written copy of the decision of the Constitutional Court is prepared by the Judge-Rapporteur. If the Plenum of the Constitutional Court adopts a decision that differs significantly from the draft decision submitted by the Judge-Rapporteur, the written copy of the decision is prepared by the Judge of the Constitutional Court appointed by the President of the Constitutional Court instead of the Judge-Rapporteur. If the Senate of the Constitutional Court adopts a decision that differs significantly from the draft decision submitted by the Judge-Rapporteur, a written copy of the decision shall be prepared by the Judge of the Constitutional Court appointed by the President of the Senate of the Constitutional Court instead of the Judge-Rapporteur.[28]

In relation to the goal of the submitted research, it is important to point out the possibility of a judge of the Constitutional Court adopting a dissenting opinion. Such a dissenting opinion may relate either to a statement or reasoning of a decision. It is delivered in the same way as the decision.[29]

Regarding international standards of proceedings, an appeal cannot be lodged against a decision of the Constitutional Court. However, this does not apply if a decision of a body of an international organization established for the application of an international treaty by which the Slovak Republic is bound obliges the Slovak Republic to re-examine a decision of the Constitutional Court. We note, however, that not all the analyzed decisions, even some adopted in the second half of the analyzed period, have included this information at the end of the notice about no possibility of appeal.

25 § 132 of the Act on the Constitutional Court.
26 Ibid., § 64.
27 Art. 129 of the Constitution.
28 § 66 of the Act on the Constitutional Court.
29 Ibid., § 67.

3. Status of the Convention within the Slovak legal order

Before analyzing decisions selected on the basis of a factor of interpretation of fundamental rights, it is necessary to explain the position of the European Convention on Human Rights and Fundamental Freedoms (hereinafter also 'the Convention') within the Slovak national legal order, since this influences its interpretation on the national level.

For the general rule, Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations.[30] However, this constitutional article is just a statement that specifies the position and political orientation of Slovakia within international community. To be more precise regarding international treaties, one must consider Art. 7 of the Constitution that regulates the precedence of international treaties over laws.[31] Nevertheless, this authority is provided only under certain conditions and only for some types of international treaties. Precedence over laws is possible only for international treaties on human rights and fundamental freedoms, international treaties for whose exercise a law is not necessary, and international treaties that directly confer rights or impose duties on natural persons or legal persons. Moreover, all of them must be ratified and promulgated in the way laid down by law. Of course, Slovakia must be a contracting party of such a treaty.[32]

This article of the Convention has been included in the Convention on the basis of a so-called great amendment of the Constitution that was essential also in relation to the EU membership of Slovakia.[33] It has changed the position of international treaties within the Slovak legal order, which is especially important regarding the Convention since it was ratified by Slovakia (at that time a part of Czechoslovakia) in 1992, i.e., before the great amendment of the Constitution. Therefore, Transitory Article 154 c of the Constitution is the most important in relation to the Convention and other international treaties that were ratified by Slovakia before 1 July 2001. According to this article, international treaties on human rights and fundamental freedoms that the Slovak Republic has ratified and were promulgated in the manner laid down by law before the entry in force of this constitutional act shall be a part of its legal order and shall have precedence over laws if they provide a greater scope of constitutional rights and freedoms.[34] Other international treaties that Slovakia has

30 Art. 1 para. 2 of the Constitution.

31 However, this precedence does not include precedence over the Constitution.

32 Moreover, according to Art. 7 para. 4 of the Convention, the validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary, and international treaties that directly confer rights or impose duties on natural persons or legal persons require an approval of the National Council of the Slovak Republic before ratification.

33 Constitutional Act No. 90/2001 Coll.

34 Art. 154 c para. 1 of the Constitution.

ratified and that have been promulgated in a manner in accordance with law before the entry in force of this constitutional act have become a part of its legal order, if this is so provided in accordance with law.[35]

It is interesting, in relation to this different position of international treaties, to compare the basis of judicial decision making since the judges are constitutionally bound by the Constitution, by constitutional law, by international treaty pursuant to Article 7, paras. 2 and 5, and by law and on the basis of the oath taken by judges according to which they are bound by the Constitution, constitutional laws, international treaties ratified by the Slovak Republic and were promulgated in the manner laid down by a law, and by laws. The oath is thus determined in a broader sense.[36] To conclude, the Convention is adhered to by the judges, including judges of the Constitutional Court, and sometimes has precedence over laws. This could mean that a reference to it should be a part of their decisions. However, this is not always the case.

3.1. Rules of interpretation of the Convention determined by its status as an international treaty

Before analyzing selected decisions, it is also important to point out the position of the European Convention on Human Rights and Fundamental Freedoms as an international treaty in relation to the means of interpretation. As for the ECtHR, it is important to emphasize that the Convention is an international treaty concluded between States.

However, although the Vienna Convention on the Law of Treaties (hereinafter also 'the Vienna Convention')[37] did not enter into force until 1980, it was already in 1975 that the ECtHR decided the applicability of its articles upon means of interpretation, namely that

> *The Court is prepared to consider … that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to 'any relevant rules of the organization'—the Council of Europe—within which it has been adopted (Article 5 of the Vienna Convention).*[38]

According to the general rule of interpretation of Art. 31 of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary

35 Ibid., para. 2.
36 Comparable to the oath of a judge of the Constitutional Court.
37 Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, 1155 U.N.T.S. 331.
38 *Golder v. the United Kingdom*, application no. 4451/70, judgment from 21 February 1975.

meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It was the *Golder case* in which the ECtHR pointed out expressly that these rules are to be considered. Moreover, the Vienna Convention specifies that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty made between all the parties in connection with the conclusion of the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Furthermore, together with the context, there shall be considered any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties. Finally, the Vienna Convention allows a special meaning to be given to a term if it is established that the parties so intended.[39]

Nevertheless, although the Vienna Convention general interpretation rule is considered to be applied as one, i.e., all its elements together, the ECtHR has expressly stated in the same decision where it emphasized the applicability and unity of this rule that

> *Again, Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.*[40]

The Vienna Convention also determines supplementary means of interpretation, including the preparatory work of the treaty[41] and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.[42]

Articles of the Vienna Convention are norms of international positive law, i.e., legally binding rules. Nevertheless, it is clear that they themselves distinguish the general *rule* of interpretation and supplementary *means* of interpretation. The singular in Art. 31 emphasizes that it contains only one rule. Moreover, although individual paragraphs might appear to create a hierarchy at the first sight, this is not the

39 See, for example, the term 'alcoholic' in *Witold Litwa v. Poland*, application no. 26629/95, judgment from 4 April 2000, para. 60.

40 *Golder*, op. cit., para. 28.

41 *Travaux préparatoires* were important in *Johnston and others* v. Ireland, application no. no. 9697/82, judgment form 18 December 1986, para. 52.

42 Art. 32 of the Vienna Convention.

case; it simply verbalizes a logical process that leads the interpretation process, i.e., one naturally begins with the text and only afterwards examines the context and other materials available.[43]

As will be analyzed, the ECtHR has already used every single interpretation rule provided for by the Vienna Convention. Nevertheless, it might be submitted that the ECtHR prefers those interpretation rules that enable it to interpret the Convention like a living instrument. As a result, it is teleological interpretation that is most used, rather than grammatical or systemic interpretation. Of course, as the interpretation of documents is to some extent an art, not an exact science,[44] it is a complicated matter to count the number of methods used.

In relation to interpretation methods, it might be also submitted that every norm is either a rule or a principle.[45] If a rule is understood as a standard that is met or not, and a principle as a standard to be met to a maximum degree,[46] the difference between rules and principles stands out clearly where the application of one standard leads to a result that is incompatible with the requirements of the other standard. Indeed, if there is a conflict between norms at the level of rules, one rule must either be declared an exception to the other or be declared invalid.[47] In contrast, in the case of competing principles, one of the principles prevails over the other. The conflict of principles is thus not resolved at the level of validity, as in the case of rules, but at the level of weighting, i.e., on the basis of the principle of proportionality[48] that might be considered a basic interpretative rule in case of human rights protection.[49]

4. Opinions of the Constitutional Court and the ECtHR upon interpretation as such

The overall analysis must consider what interpretation is, not what it should be. Therefore, the first step after explaining the specific status of the Convention itself and the status of the Convention within the Constitution is to examine the understanding of the interpretation by the Constitutional Court and the European Court of Human rights within their jurisprudence. The following subchapter examines first the methods of interpretation expressly pointed out by both judicial institutions that are similar, and second the methods that were identified as specific because of a

43 Aust, 2007, p. 234.
44 ILC Commentary on draft Arts. 27 and 28, para. 4. Available online at http://untreaty.un.org/ilc/reports/reports.htm [last accessed 31 May 2021].
45 Alexy, 2010, p. 48.
46 Ibid.
47 Ibid., p. 49.
48 Ibid., p. 50.
49 *Soering v. the United Kingdom*, application no. 14038/88, judgment from 7 July 1989, para. 89.

different position of the examined institutions and because of the specificities of legal documents that have established these judicial bodies.

The Constitutional Court itself has taken several opportunities to declare its understanding of the issue of interpretation, especially in relation to the concept of legal certainty. It is in this context that it has stated that within the proceedings on motions or complaints where it is required not to decide upon a question of abstract protection of constitutionality but to apply a constitutional norm in accordance with principles of state of law guaranteed by Art. 1 of the Constitution, it has to apply this norm under the same conditions in the same way.[50] The Constitutional Court has since pointed out several times that a part of the principle of legal certainty is created by a requirement that if a legally relevant question is asked again under the same conditions, the same answer has to be provided.[51] According to the Constitutional Court, this is a proper approach toward an unambiguous, accurate, and understandable rule of the process of application of legal norms.

The Constitutional Court has emphasized that the interpretation of law and its concepts cannot be realized only in relation to the text of a norm, not even in a case where the text appears to be unambiguous and definite, but first of all according to the meaning and purpose of the norm, as well as in the interest of constitutional principles, including the protection of fundamental human rights. Textual interpretation can, in the sense of the settled case-law of the Constitutional Court, represent only an initial approximation to the content of a legal norm, the bearer of which is the interpretation of a legal regulation; to verify the correctness or incorrectness of the interpretation and respectively to support or clarify it, other interpretive approaches, especially teleological and systemic interpretation, including a constitutionally conforming interpretation, which are capable in the context of rational argumentation, constitute an important corrective in determining the content and meaning of the applied norm.[52]

Similarly, as will be pointed out *infra*, with regard to interpretation by other state bodies, the Constitutional Court has pointed out that an overly formalistic approach in interpreting the final provisions that leads to a manifest injustice cannot be tolerated in the case of public authorities. Moreover, according to the Constitutional Court, general courts are not absolutely bound by the literal wording of the law, but they can and must deviate from it if required by the purpose of the law, the history of its origin, a systemic connection, or certain constitutional principles. In the interpretation and application of legal regulations, it is therefore impossible to omit their purpose and meaning, which is not only expressed in the words and sentences of any final regulation, but also in the basic principles of the legal status.[53]

50 II. ÚS 80/1999, ruling from 18 August 1999, p. 639.
51 I. ÚS 236/06, finding from 6 June 2007, p. 234.
52 I. ÚS 351/2010, finding from 5 October 2011, p. 5.
53 I. ÚS 306/2010, finding from 8 December 2010, p. 1004.

The case law also elaborates the opinion of the Constitutional Court on the historical method. This applies to the protection of human rights as well, e.g., the history of the adoption of the Charter of Fundamental Rights and Freedoms might be considered crucial to the context.[54] Nevertheless, the Constitutional Court has expressly noted that the argument intended by the historical legislator has only a subsidiary place in the interpretation of the constitution. What matters in this context is not what the individual members of the Constituent Assembly intended by a particular constitutional provision, but what text they adopted after ongoing discussion.[55] Therefore, this subjective teleological interpretation is considered of less importance for the approach to the interpreted text.

Moreover, in relation to the interpretation of the Constitution, the Constitutional Court has applied several rules of interpretation that it has distinguished from methods of interpretation. Nevertheless, within this analysis, those concepts are examined interchangeably.

First is the rule of a causal link between legal norms. The Constitutional Court expressly pointed out already in the early years of its functioning that the Constitution represents a legal unit that must be applied in the mutual connection of all constitutional norms.[56] The Constitutional Court later also stressed that every constitutional norm should be interpreted and applied in conjunction with other constitutional norms, as long as there is a causal link between them.[57] This domestic systemic argument might be compared to the context element of the interpretation of international treaties as already explained; nevertheless, according to the Constitutional Court, this approach retains a preferred position vis-à-vis other approaches, unlike a context element, that is, one of elements to be applied as one rule.[58]

Another specific rule of interpretation applied by the Constitutional Court has been verbalized as determination of the purpose of the norm. Although the text of the Constitution does not include any express provision in this matter, the Constitutional Court has stressed that the basis for the interpretation and application of each legal norm in a state that is governed by the rule of law is the determination of the purpose of the legal regulation, the definition of its scope, and the identification of its content.[59] That such a rule is supplementary and not an element of the overall approach to understanding a legal norm has been proved by a decision of the Constitutional Court in which it upheld that interpretation and application of a legal norm, *if its normative text is not sufficiently clear* (emphasis added by the author), should meet the requirement of legal certainty and at the same time should be proportionate to

54 The Charter of Fundamental Rights and Freedoms was adopted on 9 January 1991 by the Czechoslovak Parliament.

55 PL. ÚS 12/2001, finding from 4 December 2007, pp. 57–58.

56 II. ÚS 128/95, ruling from 10 October 1995, p. 324.

57 II. ÚS 48/1997, finding from 7 January 1998, p. 288.

58 See *supra* comparison of Arts. 31 and 32 of the Vienna Convention.

59 II. ÚS 171/05, finding from 27 February 2008.

the content and purpose of the legal relations that should be regulated by it.[60] This might also be the reason that such an interpretation focusing on the purpose of the norm is not used by the Constitutional Court very often. It is a different approach from that taken by the ECtHR that considers the objective teleological interpretation as the leading one.

Moreover, keeping in mind the slightly different wordings of the Constitution and the Convention in relation to rights that do not include express limitations, e.g., a right to free elections, the interpretation has led to a comparable result, although using different terms. The Constitutional Court has started to use the term of the constitutional intensity of a violation of constitutional norms, while the ECtHR has introduced a concept of implied limitations:

> *The concept of 'implied limitations' under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 is not limited by a specific list of 'legitimate aims' such as those enumerated in Articles 8 to 11, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case. It also means that the Court does not apply the traditional tests of 'necessity' or 'pressing social need' that are used in the context of Articles 8 to 11. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people.*[61]

The result is an acceptation of a violation of a human right to a certain degree despite possible strict grammatical interpretative approach that would not allow limitations. Both institutions point out the aim of the protection of the spirit of relevant rights. In the case of the right to free elections, the ECtHR has elaborated and applied the test of essence, not the test of necessity in a democratic society:

> *However, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with. It has to satisfy itself that limitations do not curtail the rights in question to such an extent as to impair their very essence, and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim and that the means employed are not disproportionate… In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature—in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage … Any departure from the principle of universal suffrage risks*

60 III. ÚS 24/07, finding from 17 April 2007, p. 549.
61 *Yumak and Sadak v. Turkey*, application no. 10226/03, para. 109 iii.

undermining the democratic validity of the legislature thus elected and the laws which it promulgates.[62]

To compare, the Constitutional Court has taken the position that it understands a certain level of the violation of the constitution if it does not exceed a tolerated measure of gravity. It has therefore decided, taking into account that achieving a state of full compliance with the law upon the preparation and conduct of elections is practically impossible, that if dissatisfaction with the election results would lead to election complaints, this could call into question parliamentary democracy as such. According to the Constitutional Court, declaring an election invalid on the basis of a minor violation of the law can lead to a deliberate manipulation of the election. It has therefore decided to declare parliamentary elections invalid only if there has been a gross or serious or repeated violation of the right to free elections in a way that affects the free competition of political forces in a democratic society.[63]

If these terminologically different methods are compared, their driving motor is the essence of the democratic society that is a cornerstone of both the Convention[64] and the Constitution,[65] and as such might be presented as an example of substantive interpretation based on non-legal arguments. Another means or method of interpretation that might be considered in this context is teleologically, or more precisely axiologically oriented interpretation.

Finally, there is another specific rule that is used by the Constitutional Court, although rarely, that is only partially comparable to an interpretative approach of the ECtHR: the so-called rule of priority of a more constitutionally conforming interpretation. Again, it also might be described as an axiologically oriented interpretation that takes into account compatibility with the Convention.

This principle of the priority of a more constitutionally conforming interpretation also implies that in cases where, when applying standard methods of interpretation, different interpretations of related legal norms come into consideration, the one that ensures the full or fuller implementation of rights of natural or legal persons guaranteed by the Constitution is prioritized. In case of doubt, all public authorities are obliged to interpret legal norms in favor of the implementation of the fundamental rights and freedoms guaranteed by the constitution, or human rights and fundamental freedoms resulting from a qualified international treaty.[66]

62 Ibid., § 109 iv.

63 PL. ÚS 19/94, ruling from 2 November 1994, p. 261.

64 See the relevant part of the Preamble of the Convention: '… reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend…'

65 See the relevant part of the Preamble of the Constitution: '… endeavouring to implement democratic form of government, to guarantee a life of freedom, and to promote spiritual culture and economic prosperity…'

66 PL. ÚS 110/2011, finding from 3 July 2013, p. 104.

In comparison, as will be pointed out, the ECtHR has used all the methodological rules provided for by the Vienna Convention on the Law of Treaties. It has therefore already also used a supplementary means of interpretation; however, these means are used only in order to confirm the meaning resulting from the application of a general rule of interpretation, or to determine the meaning when the interpretation based on the general rule of interpretation leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.[67] It cannot be compared to an approach that is based on a choice between results of interpretation that are both in conformity with the Constitution.

Nevertheless, such interpretation might be compared to the rule of interpretation of treaties authenticated in two or more languages.[68] If it happens in such a case that the texts disclose a difference of meaning that cannot be removed by application on the basis of a general rule or supplementary means, and no text has been agreed upon as prevailing, the meaning that best reconciles the texts with regard to the object and purpose of the treaty is adopted.[69] This means that comparably to the rule of the priority of a more constitutionally conforming interpretation, the purpose of the promotion and protection of fundamental rights as effectively as possible is prioritized.

Finally, an even more thoughtful comparison in relation to the principle of the priority of a more constitutionally conforming interpretation would point out the practice of the ECtHR in relation to interpretation based on the margin of appreciation. In such a case, interpretation of the Convention by general or supplementary rules might lead to different results, all of them nonetheless in conformity with the Convention. Consequently, since the ECtHR presumes that the States interpret and apply their obligations under the Convention in good faith, it leaves them space for non-arbitrary discretion, since it should not simply reject their conclusion whenever it has a different opinion on the matter. Of course, this is possible only to a certain level, meaning unless it is such an incorrect interpretation that its application would exceed a specific margin of appreciation. However, despite the existence of different results of possible interpretations and the search for balance, the reasoning behind the concept of margin of appreciation is not a search for a better, or rather a fuller protection but for a level of protection that does not exceed a minimum level.[70] Therefore, it is more suitable to compare it to a specific rule that has already been mentioned and that accepts the violation of a human right to a certain degree.

67 Art. 32 of the Vienna Convention.
68 Ibid., Art. 33.
69 Ibid.
70 Harris, O'Boyle, Warbrick, 2009, p. 11 et seq.

5. Selection and analysis of decisions adopted by the Constitutional Court, focusing on interpretation

The criteria for selecting 30 decisions of the Constitutional Court of the Slovak Republic have been chosen on the basis of two sets of factors. First, the presented observations are a result of research based on the research design, and as such they must have followed standards that have been agreed upon. It has been decided at the beginning of the whole research process that the 30 most relevant decisions of national constitutional courts have to be identified, and moreover that they must have been adopted within the period from 2011 to 2020. Furthermore, it is specified that all the analyzed decisions must refer substantively to the ECtHR or CJEU case law. This has proved a highly limiting rule since several important and decisive decisions have been identified that have no reference to these international judicial institutions.[71] Nevertheless, taking into account the aim of the research, it is obvious that they must be omitted from analysis.

Second, the process of the identification and selection from the decisions of the Constitutional Court has been influenced by the author of the research, i.e., the subjective context must be considered as well. Moreover, the author has considered the customary annual choice by the Constitutional Court itself of its most important decisions. Finally, recommendations of other members of the academia have been included as well, especially from experts in the area of constitutional law.

To understand legally binding decisions, their reasonings are considered of fundamental importance in interpretation. Exactly these have been the object of analysis within this project. Before presenting the results, two general observations are submitted. The first concerns the timeline. The Constitutional Court of the Slovak Republic is a rather young institution. Its own way of reasoning has not yet been crystalized. One may see this, e.g., in the formal setting of decisions. The earlier are divided into sections and subparts, while to the latter numbers of paragraphs have been added to allow more specific reference to parts of decisions. Unfortunately, this is not a standard. Second is the composition of the senates and the Constitutional Court itself. The fact that some cases, even leading ones, do not include references to the ECtHR judiciary, not even to the Convention, despite its special position in the legal order of the Slovak Republic, mirrors the lag in legal education from the previous era when Slovakia was not a party to important international human rights treaties and referring to them was, as it were, only theoretical acknowledgement of their importance. Therefore, there are some differences that are considered important on a subjective level. Although no special survey has been realized to confirm or refuse such a claim, not all the judges of the Constitutional Court, probably identifiable by their age, have already become habituated to the fact that ECtHR is a

71 E.g. I. ÚS 397/2014-262, finding from 4 December 2014, II. ÚS 703/2014, finding from 18 February 2015.

source of law that the Slovak Republic observes and that under certain conditions has precedence over the Slovak national legal framework. Therefore, they do not refer to the Convention on a regular basis. On the other hand, some of them refer to it even if the *petit* does not include such a reference. That is perhaps also one of the reasons why domestic law and own case law have been much more important for the Constitutional Court in deciding a case. Third, although one must keep in mind all the differences that the relevant cases include, compared to the ECtHR, the Constitutional Court lacks an elaborated, general way of taking a decision. This not only concerns a systematic approach, i.e., the Constitutional Court first declares its decision and then explains it (unlike the ECtHR which declares its decision at the end of the reasoning); it is not common for a majority of the Constitutional Court decisions to follow a certain way of reasoning that is seen in the ECtHR decisions. Nevertheless, this might be explained by the first general observation, namely the young age of the Constitutional Court.

As has already been submitted, every Constitutional Court decision begins by stating the merit of the case and declaring whether there has (not) been a violation or by stating that a particular legal norm is (not) in accordance with the Constitution. The third possibility is a decision whereby the Constitutional Court decides not to proceed with a case since it is (generally) manifestly ill-founded. It is after this declaration that the Constitutional Court reasons its decision, which is where almost all the methods of interpretation from the research design are used. The arguments of a complainant and relevant state bodies are usually summarized, and the position of the Constitutional Court is then presented. It is obvious that the Constitution is not an international treaty. It is also true that it has been claimed that Constitutional Court reasonings in general miss generalized ways of coming to a decision. Nevertheless, as the analysis proves, the overall approach indicates a preference for textual and systemic argumentation that might be compared to the first part of the general rule of interpretation according to the Vienna Convention on the Law of Treaties.

As for *textual argumentation*,[72] three subcategories have been identified in the research design. The first one, interpretation based on an ordinary meaning, has been used only in 6 cases out of 30. Within these cases it was only in one case, although used twice, that the Constitutional Court referred to a dictionary.[73] The second one, argumentation based on legal interpretation, has been used more often, namely in 28 cases out of 30. To develop the previous example, arbitrariness has been explained by looking the word up in the dictionary; nevertheless, the Constitutional Court continued to interpret arbitrariness also in relation to its use in a particular area.[74] Other examples include the terms of law, or statements interpreted for a special use in relation to the speech of members of Parliament. While reading the decisions, the

72 For details of the methods of interpretation see Toth, 2016, p. 173 et seq.

73 Arbitrariness as a 'reckless exercise of one's will', 'The preference for one's own will … instead of law and justice', PL. ÚS. 7/2017, finding from 31 May 2017, p. 128.

74 Ibid.

author has taken notes for a special subcategory concerning textual argumentation since two words have been found to be of special importance. The terms that constitute, as it were, a special sub-subcategory are the following: discrimination (interpreted in 7 cases, although in the same manner) and proportionality (interpreted in 12 cases, usually in relation to the test of proportionality in either its strict or broad understanding). Originally, this sub-subcategory was considered unimportant since, e.g., the test of proportionality is almost of automatic use within the application of constitutional norms. Nevertheless, a special *aha*-moment occurred in relation to one case, where the interpretation of discrimination was decisive for the result of a case. Finally, regarding the last subcategory within textual argumentation, no instances of professional interpretation in the case of non-legal technical meaning have been identified.

The system of *logical argumentation* has been used often by the Constitutional Court, 29 times altogether, although it might not be considered so if we were to examine the numbers of instances of its use within individual subcategories separately. To give an example, argumentation *a minore ad maius* has been identified in 9 cases out of 30. The best case to show the argumentation of the Constitutional Court in this area concerns the protection of privacy in which the Constitutional Court has decided that conditions that have to be met in relation to the protection of privacy against the use of surveillance technologies by State bodies have general application, concerning anything used to limit any value of a private nature, including the protection of personal data against unauthorized activity by any public authority.[75]

It is interesting, however, that there have been cases in which the Constitutional Court has used the logical argumentation to explain that the reasoning of a certain approach of a state body has been lacking. For example, Parliament has submitted that since state property has been administered and not owned by particular subjects, state property could not be executed. The Constitutional Court has admitted that certain property is owned by the State and therefore not executable in some situations and that the system of administration of State property might function the same way; nevertheless, it found that Parliament had not provided any reasoning for this. Such an argumentation *a maiore ad minus* has been identified in 5 cases out of 30.

The logical argumentation *ad absurdum* has been found in 3 cases out of 30. As already noted *supra*, part of one Constitutional Court decision is of special importance, since it pointed out that in certain situations a too-strict formalism (exclusively textual interpretation) might lead to injustice, which would be an absurd result of a judicial decision, and therefore teleological argumentation is necessary:[76]

> *The Constitutional Court further states that the public authorities, and in particular ordinary courts, cannot tolerate an excessively formalistic procedure in interpreting legal*

75 I. ÚS 290/2015-36, finding from 7 October 2015, para. 49.
76 I. ÚS 155/2017, finding from 31 August 2017, para. 19.

provisions that leads to a manifest injustice. A general court is not absolutely bound by the literal wording of the law, but can and must deviate from it, if required by the purpose of the law, the history of its creation, a systematic connection, or one of the constitutional principles. In the interpretation and application of legal regulations, therefore, their purpose and meaning cannot be neglected, which is expressed not only in the words and sentences of a particular legal regulation, but also in the basic principles of the rule of law.

Two other examples of interpretation *ad absurdum* concerned the interpretation of a right to a reasoned judgment and a right to a fair trial. In both cases this argumentation aimed to point out an absurd result if values and purposes are not considered while interpreting the law. First, according to the Constitutional Court, the validity of a decision might be 'sufficient to contradict' by repeatedly raising the objection of a failure to give reasons for a judgment, which would always lead an appellate court to refer the case back to the court of the first instance for further proceedings. Such an application of the right to a reasoned judgment that in fact serves to misuse this fundamental right is incompatible with its purpose.[77]

Second, although the Constitutional Court has accepted that the ECtHR interpreted the Slovak Act on Offenses as belonging to the criminal law, it has upheld that the interpretation of the Slovak legal system cannot be so extensive as to conclude that the imposition of a sanction under any law is a criminal sanction and falls within the area of criminal law.[78]

The fourth type of logical argumentation, argumentation *a contrario*, has been identified in the research sample of the selected 30 Constitutional Court decisions only once, in a case dealing with so-called Mečiar amnesties in which the Constitutional Court had to interpret the substance of specific acts adopted by the legislative branch. Therefore, the Constitutional Court first pointed out that for acts of constitutional power, only those acts of Parliament may be included that undoubtedly have the character of a normative legal act, indicated by the fact of containing legal norms characterized by generality. Subsequently, if this starting point is applied *a contrario* to the legal acts listed in Art. 84 para. 4 of the Constitution, a resolution of Parliament declaring a referendum on the removal of the President, a resolution of the National Council on indictment of the President, and a resolution of the Parliament on declaring war cannot be considered acts of constitutional power.[79]

Argumentation *a simili* has been recognized five times, mostly in cases where the Constitutional Court has found that the reasons for declaring a certain right violated have been similar to those that are relevant for declaring another right violated as well. Similarly, the Constitutional Court compared reasonings of the applicant in different parts of an application and decided that it was sufficient to analyze them

77 Compare I. ÚS 290/2015, op. cit., para. 20.
78 Compare I. ÚS 505/2015, finding from 13 January 2016, para. 37.
79 See PL.ÚS. 7/2017, op. cit., p. 97.

only once. Interestingly, regarding the case on Mečiar amnesties, the Constitutional Court has refused to compare incomparables by pointing out different cultural and legal-political traditions and fundamentally different constitutional-political conditions. It has therefore emphasized that the exercise of public power based (also) on the use of violence against political opponents is an essential feature of military dictatorships. On the contrary, in democratic states the use of violent means in the exercise of public power applied in the context of a legitimate competition of political forces is absolutely unacceptable and incompatible with the essence of a democratic regime.[80]

Finally, for logical argumentation, it was very encouraging to identify use of interpretation according to other logical maxims (6 cases out of 30) in cases of true/false retroactivity,[81] *par in parem non habet imperium*,[82] *sui generis* substance of a legal act adopted by the Parliament,[83] implied powers (twice),[84] and the implicit material core of the Constitution. The last of these in particular has stimulated much discussion in the Slovak Republic, and not only in relation to the selected decisions. For some it has even become a tool of misinterpretation of the Convention since it may sound mysterious, scientific, and therefore attractive; contrariwise, to base the argumentation on the text of the law, it sounds bureaucratically insatiable.[85]

Taken overall, it is submitted that the most used means of interpretation has been *systemic argumentation*, both domestic and external. Domestic systemic argumentation has been used quite often in relation to contextual interpretation, appearing in 16 cases out of 30. Most of these cases concerned other constitutional provisions, especially provisions dealing with the rule of law, Art. 1 of the Constitution,[86] and separation of powers, Art. 2 of the Constitution.[87]

Although not expected that often, many cases included a reference to domestic law that was found relevant to interpreting the Constitution. Materially speaking, all the legal statutes that have been identified in relation to this way of interpretation were considered important for understanding specific situations, and included a range of legal statutes, most of them rather legal codes than simple statutes, such as the Criminal Code (2), Criminal Procedural Code (2), Administrative Law Procedure (2), Civil Code (2), Rules of Procedure of the National Council (1), Law on Electronic Communication (1), Labor Code (1), Law on Judges and Associates (1), Law on the Judicial Council (1), Law on Material deprivation (1), and Press Law (1). In relation

80 Ibid., p. 149 et seq.
81 PL. ÚS 3/2009, finding from 26 January 2011, p. 46, 51.
82 PL. ÚS 111/2011, finding from 4 July 2011, p. 63.
83 PL. ÚS 7/2017, op. cit., p. 96.
84 II. ÚS 29/2011, finding from 13 December 2012, p. 16, I. ÚS 290/2015, op. it., para. 42.
85 PL. ÚS 21/2014, 30 January 2019, dissenting opinion of Lajos Mészáros, para. 20.
86 Art. 1 para. 1 of the Constitution: 'The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion'.
87 Art. 2 para. 2 of the Constitution: 'State bodies may act solely on the basis of the Constitution, within its scope and their actions shall be governed by procedures laid down by a law'.

to the relevance of domestic law, the Constitutional Court has even explained its understanding of the interpretation of particular norms and general abstract norms. According to the Constitutional Court, generality in relation to the subject-matter of legislation means that a legal norm generally defines its material substance, which otherwise means that it could never solve a specific case. If a piece of legislation did so, such a provision would not be a legal norm, but would be issued as a legal act *per nefas*, e.g., as an individual administrative act.[88]

Systemic argumentation based on the Constitutional Court's own case-law has been found crucial for the process of decision making. The Constitutional Court has indicated in 25 cases out of 30 that it had already decided upon a relevant issue in a previous case, and the Court has declared openly that its previous approach in relation to the very conclusion about the non-compliance of the challenged law with certain provisions of the Constitution 'mechanically' perceived as its non-compliance with Art. 2 para. 2 of the Constitution was obsolete.[89] Interpretationally speaking, it could be described as tautological.[90]

It might be submitted that the Constitutional Court, by referring to its own decisions, might be considered as being within a *de facto* precedential system similar to the ECtHR referring to its previous case law. Nevertheless, a common understanding of this legal institute is missing in the judiciary and literature in the Slovak Republic. On the other hand, although not expressly a system of precedents, interpretation by the Constitutional Court is expected to respect the rule of law, and that is one of the required and expected consequences of deciding in accordance with previous decisions.[91]

It has been challenging to identify interpretations of the Constitution on the basis of the case law of ordinary courts. Most of the cases that have been recognized in this regard consider the judiciary of the Supreme Court of the Slovak Republic, which might not be considered as an ordinary court. Nevertheless, it is not the Constitutional Court, and moreover, it is a part of the ordinary court system. Nonetheless, it is only in 2 cases out of the 30 selected that the Constitutional Court has presented the argumentation of the Supreme Court or other courts of the ordinary court system and assessed it the same way.[92] On the other hand, it is a usual approach in cases where the final decision of the Constitutional Court means that it has found the submission manifestly ill-founded. The best example is a case where the complainant invoked his right to use his mother language in criminal proceedings. However, such a right is not guaranteed to the complainant by the Constitution nor the Convention, and this regulation of the fundamental right to an interpreter is the same in the Criminal Procedure Code, which contains a specific regulation of the

88 PL. ÚS 7/2017, op. cit., p. 97. Such an understanding of the interpretation of the Constitution was relevant in relation to the so-called Mečiar amnesties.

89 PL. ÚS 18/2014-97, ruling from 22 March 2017, para. 114.

90 Ibid.

91 Ľalík, 2013, pp. 36–65.

92 Compare IV. ÚS 57/2014-42, ruling from 30 January 2014, p. 20.

application of the relevant fundamental right in criminal proceedings.[93] The Constitutional Court has repeated the ordinary court argumentation and then assessed the applicant's submission as purposeful and therefore manifestly ill-founded.[94]

Finally, regarding domestic systemic argumentation, the Constitutional Court has presented and taken into account the acts of other domestic state bodies. It has done so in 11 cases out of 30. It is true that some cases concerned situations where Parliament has provided its interpretation of a situation under consideration that was initiated by a group of members of Parliament; however, the Constitutional Court has also taken into account the position of Parliament as a legislative body, not only that of its members. One case was quite specific, in that the Constitutional Court was asked to decide whether a particular act of Parliament was in accordance with the Constitution, although it was not an abstract statutory act.[95] The Constitutional Court decided, however, that it was an act adopted in accordance with the Constitution, since an amendment of the Constitution had been adopted. This reasoning was especially important, since a different legal foundation had been held by the Constitutional Court in a similar matter before the amendment.[96] This was one of the points emphasized by the position of Parliament. Other public bodies whose acts the Constitutional Court found relevant to interpreting the Constitution were the Broadcasting Council, the Judicial Council, Ministry of Interior, Ministry of Environment, Ministry of Health, Attorney General, and Association of Judges of Slovakia.

Turning to *external systemic and comparative law arguments*, we note in general that it has been the second most used means of interpretation in the research sample, especially the first three of the four means analyzed. Since the selection factor from the beginning of the research has been the presence of reference to ECtHR case law, which is based on the Convention, the Convention has not been considered in this part, nor has the EU primary and secondary legal sources in a case that was selected from the Court of Justice case law. However, if such an EU legal source has been referred to in other cases that have been selected under the condition of ECtHR reference, it has been counted in the research. Having said that, it is of interest, especially from the point of view of the international law commitments of Slovakia, that in 14 out of 30 cases other international treaties have been referred to. Most of these cases included reference to the International Covenant on Civil and Political Rights,

93 IV. ÚS 57/2014-42, op. cit. p. 19.

94 Part of the settled case law of the Constitutional Court is also the legal opinion (e.g. II. ÚS 12/01, IV. ÚS 61/03, IV. ÚS 205/03, I. ÚS 16/04, IV. ÚS 252/2013) according to which protection of a right to a fair trial, i.e. a fundamental right under Art. 48 para. 2 of the Constitution and of a right under Art. 6 para. 1 of the Convention, is provided in proceedings before the Constitutional Court only if at the time of application of this protection the violation of this fundamental right by designated public authorities could still persist. If, at the time when the complaint was delivered to the Constitutional Court, the alleged violation of this fundamental right could no longer take place, the Constitutional Court in principle rejects it as manifestly ill-founded (see § 25 para. 2 of the Act on Constitutional Court).

95 PL. ÚS 7/2017, op. cit., p. 97.

96 Ibid., pp. 99–100.

International Covenant on Economic, Social and Cultural Rights, International Convention on the Rights of the Child, International Labour Organisation conventions, the EU Charter and primary treaties, and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

Although the Convention was not mentioned in all the cases, the ECtHR was definitely referred to in every case, since that was a condition of selection. Nevertheless, there were other international bodies that were referred to in the research sample of the Constitutional Court decisions, precisely in 9 cases out of 30, namely the Inter-American Court of Human Rights, Human Rights Committee, Committee on the Rights of the Child, Council of Europe Committee of Ministers, Venice Commission for Democracy through Law, UNHCR, European Commission, Court of Justice of the European Union, and Consultative Council of European Judges.

Since no case has included argumentation based on other external sources of interpretation, such as customary international law, the last means of external systematic argumentation that has been used is reference to other foreign legal systems. This has been used by the Constitutional Court rather often, in 21 out of 30 cases. Most references pointed out the practice of the Czech Constitutional Court and then the German Constitutional Court. Other countries were referred to in three cases, most of them European countries—in some cases their statutes, and sometimes even their Constitutions. Apart from Europe, this example includes USA.[97]

Contrariwise, teleological argumentation has very weak representation in the selected case-law of the Constitutional Court. There were only five cases detected in the sample examined that included a reference to the objective teleological argumentation. The most interesting case in relation to this type of argumentation was a case that concerned interpretation regarding access to a judicial function.[98] Although there is no such right in the Convention, as there is a right to public function under the same conditions according to the Constitution,[99] it has been referred to in this way in the decision and therefore in this contribution as well. Moreover, legally speaking, the case concerned the status and related claimed arbitrariness of the decision-making process of an autonomous body in the area of the self-administration of judges and courts. The status and competence of the Judicial Council have been changed by several amendments of the particular legal act, and at the moment when the decision was taken not to nominate a claimant for a judicial function, the Judicial Council was authorized to decide in a secret ballot and without obligation to reason its decision. Within the decision, the Constitutional Court analyzed the purpose of the specifics of the process of the selection of a judge and also the substance of the

97 PL. ÚS. 7/2017, op. cit., p. 58.

98 II. ÚS 29/2011-64, op. cit.

99 Art. 30 para. 4 of the Constitution. Access to a judicial function is considered to be included in access to a public function.

decisions that are taken during this process.[100] While according to the later amended legal framework there would have been no violation, nevertheless, requirements of a reasoned decision were included in the amendment after the decision had been taken. In relation to the interpretation, this decision is noteworthy also vis-à-vis interpretation of the Constitution as a living instrument. The Constitutional Court has commented upon this interpretation, although in the opposite way, when it pointed out that

> *We have become accustomed to the evolutionary interpretation of law, the application of the theory of so-called living Constitution (see, for example, the interpretative prisms applied by the European Court of Human Rights) that changes legal norms without changing the legal text. In this case, on the contrary, and therefore perhaps even more surprisingly, we can talk partially about the situation when by changing the text of the legal regulation, the law (legal norm) does not change in principle (cf. already described amendment to the Judicial Council Act). When the legislator adopts an amendment to the regulation to 'make the implicit requirement visible' and to execute it (or rather to balance it), in our case the requirement of objectivity, it does not have to actually introduce a legal norm by changing the text, but 'only' to specify it. This is also related to the existence of legal principles which, when applied to specific situations, often factually turn into legal norms*.[101]

Other examples that included reference to the object and purpose of the Convention concerned already mentioned not recommending a too-strict formalism in the interpretation of the Constitution and also its material core. As for subjective teleological interpretation, it has been used rarely as well. Proposer justification of the Convention was identified only twice,[102] and draft materials of the Constitution only twice as well.[103] The same holds for the intention of the constitution-maker,[104] and other circumstances of the constitution making, which were identified in three cases.[105]

Contrariwise, interpretation based on scholarly works has been a very often used means of interpretation in the selected decisions of the Constitutional Court. It has been identified in 23 out of 30 cases. The scope devoted to academic literature has in some cases decided by the Constitutional Court been almost astonishing.[106] It was out of the ordinary expectation that in many cases there was much more reference to the output of scholars than to outcomes of the case-law of the ECtHR, although the interpretation by the ECtHR is to be given more weight.

100 II. ÚS 29/2011-64, op. cit., para. 7 et seq.
101 Para. 11.
102 PL. ÚS. 111/2011, op. cit., p. 32 et seq., PL. ÚS 7/2017, op. cit.
103 E.g. III. ÚS350/2014, op. cit.
104 E.g. I. ÚS 505/2015, op. cit.
105 E.g. historical survey of a right to reply, see III. ÚS 350/2014, op. cit., p. 15.
106 PL. ÚS 13/2012–90, finding from 19 June 2013.

Ex iniuria ius non oritur,[107] *pacta sunt servanda*,[108] prohibition of *reformatio in peius*[109] and *audiatur et altera pars*[110] have been the general legal principles that have been identified in the research sample, i.e., in 4 out of 30 cases. Moreover, substantive interpretation based on non-legal arguments has been identified as well, surprisingly even more often (in 10 out of 30 cases). Most of these identified uses referred to democracy, justice, public interest, and once even to the 'atmosphere' in society or common sense. The most important case has been selected from reasoning concerning the State Security Service, which aimed at the publication of the archive files of this special police body during the communist regime.[111] Although the reasoning has been elaborated using all the means of interpretation already mentioned, it is noteworthy to present its ending paragraph, according to which

> *… a specific tension arises between (i) the rule of law, which seeks to establish its legitimacy by acting directly to deal with the past on the one hand, and (ii) the constitutional rights on the other hand of the individuals concerned, to whom these rights are guaranteed by the rule of law. The legislator has attempted rationally and in a non-judiciable way to balance the interest in truly reflecting on history in connection with the protection of the rights of individuals by the already cited provisions of § 23 of the Act and § 19 of the Act on the Memory of the Nation. The Constitutional Court accepts that from the principle of substantive/material rule of law, more precisely from its strict version, which serves to deal with the era of non-freedom, a lower standard of protection of certain individual rights may result exceptionally in order to protect the principles of a democratic state formed after 1989 (cf. extension of limitation periods for perpetrators of crimes of communism.). Provisions of § 23 and also § 19 of the Act on the Memory of the Nation are, according to the opinion of the Constitutional Court, just such provisions that reflect the principle of the substantive/material rule of law in society's relationship to documents of the former State Security Service and a manifestation of discontinuity with the power in times of non-freedom.*[112]

To conclude this part, we note that the Constitutional Court has used almost all the means of interpretation that were supposed to be analyzed in the selected case law of this Court. Nevertheless, they were not used to the same extent, and, moreover, their position is not decisive in the same way. For the most decisive arguments, the textual and domestic systemic argumentation has been identified. Textual argumentation has not been used as often as e.g. references to the Court's own decisions; nevertheless, their common use has led to the adopted conclusion.

107 PL. ÚS 7/2017, op. cit., p. 137.
108 PL. ÚS 10/2014-78, finding from 29 April 2015, p. 33.
109 I. ÚS 505/2015, finding from 13 January 2016.
110 II. ÚS 285/2017-163, finding from 12 October 2017, p. 61.
111 II. ÚS 285/2017-163, op. cit.
112 II. ÚS 285/2017, op. cit., para. 26.

Logical arguments and external systemic argumentation together with comparative argumentation have been considered defining arguments, especially the case law of the Czech and German constitutional courts. It is challenging to find other decisions that have played a significant role in a decision of the Constitutional Court, not only an illustrative one. Nevertheless, regarding their quantity, one must bear in mind that the presence of the ECtHR case-law was a selection criterium for the search sample.

The overwhelming use of references to scholarly works has been identified as a form of strengthening arguments, together with teleological argumentation, which, however, has been used much less often. As presented in one dissenting opinion, academic works support the legitimacy of the decision. General legal principles and application of non-legal arguments have been recognized as strengthening arguments as well, since they were of great weight when used.

Finally, regarding illustrative arguments, the positions of other public bodies as a means of domestic systemic argumentation have been identified. It was these that the Constitutional Court presented, usually marking out their right or limited application. The following subchapter, however, shows a different methodological approach to the interpretation of human rights and fundamental freedoms regarding both its quantitative and qualitative aspects.

6. Selection and analysis of decisions adopted by the ECtHR and the EU Court of Justice, focusing on interpretation

Decisions of the European Court of Human Rights (29) and the Court of Justice of European Union (1) have been selected from the references in the decisions of the Constitutional Court of the Slovak Republic analyzed in the previous subchapter. First, several decisions were enlisted since reasonings of the relevant decisions of the Constitutional Court included several ECtHR decisions. The list of these ECtHR decisions was reduced while reading and analyzing the Constitutional Court decisions, as the most relevant decisions were identified, especially in relation to the subject-matter of the case. Moreover, although it was not an agreed condition, the choice was made to include mostly cases with the Slovak Republic as a party if there were such a case referred to in the CC decision. However, it is submitted that it has no influence on the methodology used by the ECtHR. Nevertheless, it has been observed that there are some general aspects that have influenced the methodology of interpretation used by the ECtHR, but since there were not a part of the agreed research process, they are only mentioned here and not analyzed.

The first issue to consider is the timeline. In years where there were two bodies within the European regional human rights protection system, the ECtHR took a slightly different approach than later, when it has been the only decisive body upon

human rights complaints. There were several cases where the Court has just taken the decision and methodology used by the Commission for granted and as not even needing comments.[113] Second is the composition of the chambers of the ECtHR. Although there might have been only a minor influence on the final outcome in relation to the voting ratio, it might be interesting to analyze—as in the case of the Constitutional Court of the Slovak Republic—how the composition of the Chambers and the Court as such has influenced the methodology used in the jurisprudence of the Court, especially after the accession of former communist countries. Third, the methodology used by the ECtHR has been observed as already showing several generalizing characters; however, this might be the result of a longer existence and practice. For example, the oldest chosen ECtHR decision, the Golder case, did not refer extensively to the previous case law of the Court, since there was little. Newer decisions refer to the previous case law much more, which is understandable. This point is not considered in the statistics, however, since it was enough that the ECtHR referred to its previous decisions only once to include it as the methodology based on external systemic argumentation.

The methodology used by the ECtHR is referred to and analyzed within the scope agreed upon by the research design. In general, it is submitted that the scope mirrors the methodology provided for by the Vienna Convention on the Law of Treaties, whereby a treaty is to be interpreted in accordance with ordinary meaning of the terms used in the treaty in their context and in the light of its object and purpose.[114] Moreover, as has already been quoted,[115] the Vienna Convention on the Law Treaties specifies what the context comprises, namely acts related to the conclusion of the treaty. Furthermore, subsequent practice and relevant agreements are to be taken into account as well. Finally, a special meaning is given to a term if it is so established by the parties.

As for the research design in relation to the ECtHR case analyses, it starts with *textual interpretation*. This group reflects the interpretation of the text within three subgroups. The first is precisely the interpretation based on ordinary meaning, i.e., if the meaning of a provision is recognizable in the context of a common language, that provision must be interpreted in accordance with the meaning that would be attributed to it by a regular speaker of that language. It is submitted that apart from domestic systemic arguments, namely reference to its own case law, this is the most used argument (19 out from 30 judgments). There would have been even more, except that decisions adopted later usually refer to the previous cases instead of explaining the ordinary meaning again.

113 This could be taken as either logical interpretation based on analogy or as a decisive external influence. The former has been chosen since the Commission and the Court were two bodies of the same system working on the same legal basis for interpretation. The Court has, as it were, aimed to save resources by not repeating what has already been reasoned properly in a way that the Court can agree upon.

114 Art. 31 para. 1 of the Vienna Convention.

115 Ibid., para. 2.

The *usual meaning*, i.e., the meaning that a regular speaker of the language in question would give to the word as an ordinary meaning, is determined by the ECtHR in two ways, first by using interpretive dictionaries that contain the definition of the interpreted word. The best example is provided in the Golder case, where the ECtHR explained that

> *The Government have emphasized rightly that in French 'cause' may mean 'procès qui se plaide' (Littré, Dictionnaire de la langue française, tome I, p. 509, 5 o). This, however, is not the sole ordinary sense of this noun; it serves also to indicate by extension 'l'ensemble des intérêts à soutenir, à faire prévaloir' (Paul Robert, Dictionnaire alphabétique et analogique de la langue française, tome I, p. 666, II-2o).*[116]

However, the use of interpretive dictionaries to determine the usual meaning of words has been identified only once in the research sample. Rather, the rule is that the usual meaning of the interpreted term is determined by the ECtHR without any justification or reference to other sources. That was the case in the rest of identified examples of interpretation based on ordinary meaning, namely in relation to its semantic interpretation,[117] and in one decision the ECtHR found it not important to decide what the meaning is, finding that it does not actually matter whether the person had refused or withdrawn his consent.[118]

The second subpart, namely *legal interpretation*, has been less used, but still appears in more cases than some logical arguments (10 out from 30). Although it has been proposed that legal interpretation might be used in case of a special legal meaning of words uniformly accepted by lawyers, this analysis has identified legal interpretation mostly on the basis of legal principles. The case of Al-Adsani was rich in interpretations as to why some concepts are applicable and others are not, starting with an explanation that the grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.[119] This form of giving terms a legal understanding has been identified especially in cases where it was interpreted by the ECtHR regarding what the law means, not as a formal requirement that is decisive but concerning other requirements flowing from the expression prescribed by law or in accordance with the law.[120] Again, it was

116 *Golder*, op. cit., para. 32.

117 E.g. 'any person' also means an insolvent person, *Pine Valley Developments LTD and others v. Ireland*, application no. 12742/87, judgment from 29 November 1991, para. 42. Family life, *Schalk and Kopf v. Austria*, application no. 30141/04, judgment from 24 June 2010, para. 94. Right to an interpreter, *Kamasinski v. Austria*, application no. 9783/82, judgment from 19 December 1989, para. 74. Impartiality, *Piersack v. Belgium*, application no. 8692/79, judgment from 1 October 1982, para. 30.

118 *Evans v. the United Kingdom*, application no. 6339/05, judgment from 10 April 2007, para. 76.

119 *Al-Adsani v. the United Kingdom*, application no. 35763/97, judgment from 21 November 2001, para. 48.

120 E. g. *Feldek v. Slovakia*, application no. 29032/95, judgment from 12 July 2001, para. 56, *Malone v. the United Kingdom*, application no. 8691/79, judgment from 2 August 1984, para. 67, *Amann v. Switzerland*, application no. 27798/95, judgment from 16 February 2000, para. 62.

identified as a legal interpretation only in cases where the ECtHR explained it in a deeper analysis, not in cases where it only referred to its previous case law relevant in this matter. Another typical example of legal interpretation is the explanation of the ECtHR of so-called autonomous meanings of terms that might be used differently in different national legal orders, such as 'criminal',[121] or 'victim'.[122]

The last subpart of textual interpretation refers to a methodology that considers the *professional interpretation* of particular profession. It was expected to be a rare type, and this has proved to be so. Even the one case that has been identified as including this type of interpretation might be found controversial since there was in fact no interpretation at the end, just the statement that there is no scientific definition of the beginning of life.[123]

Turning to *logical arguments*, it is to be explained that such an interpretation might sometimes be considered a part of grammatical interpretation arising from the text, since it is not only in cases when the text misses a particular regulation (and one can present an argument from silence) that one can interpret the text by use of logic. Nevertheless, as it has been agreed upon in the research design, linguistic-logical arguments have been analyzed separately.

Arguments *a minore ad maius* have been used rather often (10 out from 30), although in general they were not decisive, and sometimes were even opposite to the final decision. The best example is probably a decision upon vaccination, where the ECtHR, similarly to the decisions of domestic courts, has not found it significant that the vaccination was made outside the vaccination room, contrary to the regular procedure.[124] Similarly, the prohibition of torture as such has not supported the position that States are therefore not entitled to immunity in respect of civil claims for damages.[125] Another case that is determined to have used this methodology is the Michalko case. Here the ECtHR emphasized that it did not have the authority to decide upon the legal order of Slovakia in an abstract way and interpreted the legal background of the particular situation in relation to Art. 5 § 3 of the Convention. The ECtHR found it not compatible with the Convention that applicant's arguments had not received a proper judicial answer and therefore as such were not susceptible of review on account of a lack of reference to concrete facts and analysis. Lack of an opportunity to have a case reviewed was not in compliance with the Convention, and therefore there was also found a violation of Art. 5 § 3 of the Convention.[126]

As for other selected ECtHR decisions and the argument *a minore ad maius*, the Court has quite often found irregularities in the procedural parts of a specific right

121 *Engel and others v. the Netherlands*, applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment from 8 June 1976, *Lauko v. Slovakia*, application no. 4/1998/907/1119, judgment from 2 September 1998, para. 58.

122 *Klass and others v. Germany*, application no. 5029/71, 6 September 1978, para. 34.

123 *Evans*, op. cit., para. 54.

124 *Solomakhin v. Ukraine*, Application no. 24429/03, judgment from 15 March 2012, para. 38.

125 *Al-Adsani*, op. cit., para. 66.

126 *Michalko v. Slovakia*, application no. 35377/05, 21 December 2010, para. 143 et seq.

protection, and since, e.g., lack of objectivity or arbitrariness as such are not compatible with the Convention, it has decided that there was a violation of the substance of a particular article.[127] It is the same if there is a condition within an article that has already been decided in a clear way, but a State has nevertheless not complied with it.[128]

Interestingly, the Court of Justice has used this methodology to settle discussion of its jurisdiction to decide the case. Since case C-240/09 from 8 March 2011 is the only such case within the research sample in this chapter, it cannot be compared to others; nevertheless, we submit that the reasoning in this case was much more based on logical argumentation than most of the ECtHR cases. This case is in general based on all the subgroups of logical argumentation (apart from the argumentation according to other logical maxims) and on the teleological argument. In the analyzed case the argument of *a minore ad maius* has been used to hold that a specific issue that has not yet been the subject of EU legislation is part of EU law where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it.[129]

Another specific example of the applicability of EU-related norms is the Matthews case, which has been classified as a case based on arguments *a minore ad maius* since it was decided there that since legislation created organically with the European Parliament is applicable in Gibraltar, in particular in connection with all the legislative acts adopted by the UK—especially in relation to EU membership—the UK must secure the rights in Art. 3 of Protocol No.1.[130]

Furthermore, comments of the ECtHR upon the interpretation of parliamentary rules that might be vague but nonetheless foreseeable because of the professional status of parliamentarians are of interest.[131]

The final decision where the argument *a minore ad maius* has been used concerned, as it were, the issue of proportionality, since the ECtHR considered decisive that a transfer of land did not appear to have been realized against the will of the former owner, and therefore the fair balance required between the protection of private property and the demands of the general interest was not supported.[132]

Arguments *a maiore ad minus* have been used less often (5 out from 30); nevertheless, they have been identified more often than, e.g., teleological arguments. Most of the cases concern situations in which the ECtHR found it not compatible

127 *Podkolzina v. Latvia*, application no. 46726/99, judgment from 9 April 2002, para. 36.

128 *Fredin v. Sweden* (no. 1), application no. 12033/86, judgment from 18 February 1991, para. 63. *Lauko*, op. cit., para. 64.

129 C-240/09, Court of Justice, judgment from 8 March 2011, para. 36.

130 *Matthews v. the United Kingdom*, application no. 24833/94, judgment from 18 February 1999, paras. 34–35.

131 *Karácsony and others v. Hungary*, applications nos. 42461/13 and 44357/13, judgment from 17 May 2016, para. 126 et seq.

132 *Zvolský and Zvolská v. the Czech Republic*, application no. 46129/99, judgment from 12 November 2002, paras. 72–73.

with the Convention that a contracting Party had not taken into account specific circumstances, such as legal entry into a country and no other choice of minors,[133] or the content of the effective protection of rights within relevant articles.[134] On the other hand, the ECtHR has pointed out other specific circumstances that it took into account when deciding upon compliance with the Convention in relation to the substance of particular articles.[135]

The *ad absurdum* argument has been detected only twice, although in one case rather profoundly since, based on the effectivity, the Court of Justice has held that

> *if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.* [136]

The other case concerned arguments in relation to the storing of a card after reaching the conclusion that creation of a card was not in accordance with the law. Consequently, the ECTHR pointed out that it would seem unlikely that the storing of a card that had not been created 'in accordance with the law' could satisfy that requirement.[137]

Arguments *a contrario* or rather from silence have been identified also in more cases than expected. Leaving aside admissibility issues when the ECtHR sometimes declares admissibility by way of finding no ground for declaring inadmissibility,[138] there are three cases in the search sample that have used this argument. In the first, the ECtHR pointed out that a certain way of interpretation corresponded to the status quo in the case under consideration since the analyzed Constitution contained no provisions expressly permitting a presidential decision on amnesty to be quashed and there was no indication of any practice of the domestic courts or legal theory

133 *Ponomaryovi v. Bulgaria*, application no. 5335/05, judgment from 21 June 2011, para. 63: 'The Court, for its part, finds that in the specific circumstances of the present case the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified'.

134 *Taxquet v. Belgium*, application no. 926/05, judgment from 16 November 2010, para. 100: … the applicant was not afforded sufficient safeguards enabling him to understand why he was found guilty. Since the proceedings were not fair, there has accordingly been a violation of Article 6 § 1 of the Convention.

135 *Kamasinski*, op. cit., the right to legal aid, para. 65: 'It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Art. 6 § 3 (c) (art. 6-3- c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way'. *Fredin v. Switzerland*, application no. 12033/86, judgment from 18 February 1991, para. 54.

136 C-240/09, op. cit., para. 49.

137 *Amann*, op. cit., para. 78.

138 The best example: 'The Court notes that this complaint is not manifestly ill-founded within the meaning of Art. 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible'. *Solomakhin*, op. cit., para. 24.

that could allow a different conclusion to be reached.[139] The second case concerns interpretation covering not only written law but also unwritten law.[140] In the third case, the Court of Justice has admitted that

> *the European Community stated that the legal instruments in force do not cover fully the implementation of the obligations… , and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community… adopts provisions of Community law covering the implementation of those obligations. However, according to the Court of Justice, it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it.*[141]

Last but not least among the logical arguments are arguments *a simili* and by analogy. Such arguments have mostly been identified when the ECtHR has decided that the reasons for finding that there was no violation of one article also afford a reasonable and objective justification for another article and therefore that the result was the same (usually decisions about no violation in case of Art. 14).[142] It is rather often (in 6 of the 30 cases) that the ECtHR has declared that with regard to its decision on one article, it does not consider it important to rule on another issue.[143] Similarly (in 1 of 30), if the arguments presented by the applicant in relation to one article were essentially the same as those presented in relation to another article and the ECtHR decided that the requirements of the latter were less strict, the ECtHR did not consider it necessary to examine the case under that latter article.[144] While it is true that the phrase 'less strict requirements' and the circumstances of argumentation could count as an argument *a maiore ad minus*, nevertheless, we note that the comparative approach has prevailed. Moreover, when analogy is on the table, the Court also likened inherency of the right of access to its restrictions:[145]

> *Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.*

139 *Lexa v. Slovakia*, application no. 54334/00, judgment from 23 September 2008, para. 133.
140 *Malone*, § 66.
141 C-240/09, op. cit., para. 41.
142 *Evans*, op. cit., paras. 95–96.
143 Ibid. *Malone*, op. cit., paras. 89–91. *Bronda v. Italy*, application no. 40/1997/824/1030, judgment from 9 June 1998, para. 65. *Turek v. Slovakia*, application no. 57986/00, 14 February 2006, para. 117. *Lauko*, op. cit., para. 68. *Karácsony*, op. cit., para. 174.
144 *Kamasinski*, op. cit., para. 110.
145 *Al-Adsani*, op. cit., para. 56.

Finally we consider interpretation according to other logical maxims, such as implied powers. This category has been analyzed rather problematically since other arguments, namely external sources of interpretation, might have a similar understanding. Thus, we initially classified *ius cogens* as a logical maxim; nevertheless, after reconsideration this argument has been moved to the category of another external source of interpretation. As a result, only one case has been determined as an example of interpretation expressly according to other logical maxims. In the case of Podkolzina, the ECtHR has pointed out that the subjective rights to vote and to stand for election are implicit in Art. 3 of Protocol 1. The Court then reiterated that since Art. 3 of Protocol 1 recognizes them without setting them forth in express terms, let alone defining them, there is room for 'implied limitations'.[146] While there have been other ECtHR decisions identified in which implied or inherent restrictions have been pointed out, nevertheless, other interpretation methodologies prevailed and were therefore decisive for this research.[147]

As for *domestic systemic arguments*, this part of the research design must be modified when compared to the previous subchapter on the analysis of Constitutional Court decisions since domestic forum is basically the ECtHR and relevant sources related to the Council of Europe. Therefore, this part has considered the Convention itself, previous decisions of the ECtHR/Court of Justice or their internal rules, other Council of Europe/EU materials, and finally, decisions of specific Member States or their abstract judicial norms.

The interpretation of the Convention as a framework for contextual interpretation has been identified almost in all the cases, in 28 out of 30. Examples that might be pointed out include the reasoning where the ECtHR reiterated that the Convention is to be read as a whole and its articles should therefore be construed in harmony with one another.[148] Another judgment pointed out the basis of adoption of autonomous meaning by declaring in short that 'autonomy' operates one way only.[149]

The interpretation on the basis of the practice of the forum in question has been used in all the analyzed cases, i.e., 29 times in the case of the ECtHR, where the later the decision the more case-law is cited, and once in the case of the Court of Justice. Other Council of Europe/EU materials have been detected four times in Parliamentary Assembly resolutions, [150] once in the European Commission for Democracy through Law (the Venice Commission) material,[151] and once in the Rules of Procedure of the European Parliament[152] and several Council Directives.[153]

146 *Podkolzina*, op. cit., para. 33.
147 See e. g. *Al-Adsani*, op. cit., para. 56.
148 *Schalk and Kopf*, op. cit., para. 101.
149 *Engel*, op. cit., para. 81.
150 *Solomakhin*, op. cit., para. 19. *Ponomaryovi*, op. cit., para. 40. *Karácsony*, op. cit., para. 42. *Turek*, op. cit., para. 78.
151 *Karácsony*, op. cit., para. 48.
152 *Karácsony*, op. cit., para. 50.
153 C-240/09, op. cit., para. 5 et seq.

External systemic and comparative arguments have been modified as well to take into account the position and specificities of the ECtHR/Court of Justice decisions. Therefore, this line has analyzed references in nine cases to other international treaties (namely the Convention on Human Rights and Biomedicine,[154] European Convention on State Immunity,[155] Vienna Convention on the Law of Treaties,[156] EU Charter of Fundamental Rights[157] and its Commentary,[158] International Covenant on Economic, Social and Cultural Rights,[159] International Covenant on Civil and Political Rights,[160] Convention on the Rights of the Child,[161] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,[162] Convention against Torture,[163] Treaty on German Unification,[164] and Aarhus Convention[165]), case decisions and the practice of other international legal fora in four cases (the Steering Committee on Bioethics,[166] International Law Commission,[167] International Tribunal for Ex-Yugoslavia,[168] Venice Commission,[169] Human Rights Committee[170]), seven times the issue of general European practice,[171] one Peru case,[172] and the Kuwaiti constitution[173] and finally, other external sources of interpretation in relation to the term of *sui generis*,[174] rule of law[175] and *ius cogens*,[176] and two legally non-binding declarations, though partially presenting international custom, namely the Universal Declaration of Human Rights[177] and Universal Declaration on Bioethics and Human Rights.[178]

154 *Evans*, op. cit., para. 50.
155 *Al-Adsani*, op. cit., para. 22.
156 Ibid., op. cit., para. 55. *Golder*, op. cit., para. 29.
157 *Schalk and Kopf*, op. cit., para. 60. *Karácsony*, op. cit., para. 54.
158 Ibid.
159 *Ponomaryovi*, op. cit.
160 *Al-Adsani*, op. cit., para. 27, *Streletz, Kessler and Krenz*, applications nos. 34044/96, 35532/97 and 44801/98, 22 March 2001, para. 93.
161 *Ponomaryovi*, op. cit.
162 *Amann*, op. cit., para. 65.
163 *Al-Adsani*, op. cit.
164 *Streletz, Kessler and Krenz*, op. cit., para. 27.
165 C-240/09, op. cit., para. 1.
166 *Evans*, op. cit., para. 51.
167 *Al-Adsani*, op. cit., para. 23.
168 Ibid, op. cit., paras. 30–31.
169 *Karácsony*, op. cit., para. 48.
170 *Streletz, Kessler and Krenz*, op. cit., para. 41.
171 *Evans*, op. cit., paras. 79–81. *Al-Adsani*, op. cit., para. 64. *Schalk and Kopf*, op. cit., para. 24. *Ponomaryovi*, op. cit., para. 36. *Lexa*, op. cit., para. 88 et seq. *Taxquet*, op. cit., para. 43 et seq. *Podkolzina*, op. cit., para. 33. *Karácsony*, op. cit., para. 56.
172 *Lexa*, op. cit., para. 97.
173 *Al-Adsani*, op. cit., para. 25.
174 *Matthews*, op. cit., para. 48.
175 *Golder*, op. cit., para. 34.
176 *Al-Adsani*, op. cit., para. 23.
177 Ibid, § 26, *Streletz, Kessler and Krenz*, op. cit. para. 93.
178 *Evans*, op. cit., para. 52.

Although the ECtHR and the Court of Justice were expected to focus more on *teleological interpretation*, of the 30 selected decisions only 9 included the issue of the object and purpose of the Convention, out of which 2 emphasized the need to make the protection practical and effective. To summarize the rest of the agreed arguments, it was quite surprising that no decision included any reference to scholarly work. Moreover, regarding subjective teleological argumentation, only three times was an intent of the Convention maker used as a supportive argument,[179] and the same holds regarding arguments by general legal principles.[180] Finally, eight cases of argumentation by non-legal values have been identified.[181]

To conclude this part, it is true that some types of interpretation are used more often, i.e., own case-law has been referred to in every decision, while textual interpretation has been used more than logical. However, this does not mean that one or the other is much more decisive if the cases are considered separately. This is especially so in situations when the Court uses several types of interpretation. Most of them are used only to support the reasoning already presented, in some instances to explain why another decision has (not) been taken.

Nevertheless, we note that in the research sample the ECtHR uses textual interpretation as a decisive argument, together with logical argumentation as mostly defining. This is so not because of the high percentage of use, but because the ECtHR has already created a systematic approach within a reasoning, whereby it presents the facts and relevant domestic and international law and finally focuses on the Convention and its wording and practice—if relevant—so far. By such an approach the ECtHR decides not only a dispute but includes the arguments of the parties to the dispute as well. At the end of the day, it thus speaks not only to them but also to all potential petitioners.

To compare, systemic argumentation, either domestic or external, is rather strengthening, and on the other hand, it might be considered decisive in case there is no European consensus when the test of margin of appreciation is relied upon. Argumentation based on the object and purpose of a particular norm has usually been strengthening, as similarly has argumentation based on non-legal values. However, if we consider the ECtHR and its jurisprudence as a whole, it is submitted that object and purpose might be decisive, especially if the concept of the Convention as a living instrument is reiterated. If the Vienna Convention on the Law of Treaties is reconsidered, this whole approach makes sense, since all these rules of interpretation are to be used together as one means of interpretation; in the reasoning they are usually used one by one, depending on the complexity of the case that has to be judged and on the possible ambiguity of an analyzed norm.

179 *Matthews*, op. cit., *Bronda*, op. cit., *Karácsony*, op. cit.

180 E.g., *Lexa*, op. cit.

181 E.g., public order, substance of the effective functioning of the Parliament, best interest of a child, Radbruch Formula.

7. Conclusion

This chapter on the analysis of the case law of the Constitutional Court of the Slovak Republic and relevant case law of the European Court of Human Rights selected 30 decisions each, which were analyzed from the point of view of the interpretation used by the relevant judicial body.

The beginning presented the competence and position of the Constitutional Court of the Slovak Republic, together with the position of the European Convention on Human Rights and Fundamental Freedoms in the Slovak legal framework. This was found to be very important, since under some conditions this international treaty has precedence over national laws, though not over the Constitution.

None of the analyzed courts has adopted an official framework of interpretative procedure. Nevertheless, both have presented their opinion on interpretation as such several times, as was elaborated in this chapter before analyzing the decisions themselves. Since the Convention is an international treaty, it is no surprise that the ECtHR has upheld that it has considered and applied the interpretation rules set out in the Vienna Convention on the Law of Treaties, particularly the text, context, and object and purpose of the Convention. In comparison, the Constitutional Court has pointed out several methodological means to approach the interpretation of the Constitution. It has presented its view of the importance of not giving too much weight to formalism. Moreover, the principle of the constitutional intensity of violation of constitutional norms has been introduced as well. Finally, according to the Constitutional Court, the more constitutionally confirming interpretation is preferred where there is a variety of interpretation results.

However, the analysis of the selected decisions has shown a somewhat different result. As for the Constitutional Court, while it is true that it considers the purpose of the interpreted norms, nevertheless, textual and systemic argumentation is found to have been used more often and more decisively within the research sample. On the other hand, the European Court of Human Rights has been more systematic and comprehensive in using a general rule of interpretation according to the Vienna Convention and applying all its parts as necessary, especially its object and purpose element. Nevertheless, there have been some specific approaches of the ECtHR that have taken into account particularities of the European human rights protection system.

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List of selected decisions

1.	PL. ÚS 3/09, finding from 26 January 2011	*Pine Valley Developments LTD and others v. Ireland*, application no. 12742/87, judgment from 29 November 1991
2.	I. ÚS 408/2010, finding from 16 June 2011	*Handyside v. the United Kingdom*, application no. 5493/72, judgment from 7 December 1976
3.	IV. ÚS 302/2010, finding from 7 July 2011	*Feldek v. Slovakia*, application no. 29032/95, judgment from 12 July 2001
4.	I. ÚS 76/2011, finding from 20 April 2011	*Podkolzina v. Latvia*, application no. 46726/99, judgment from 9 April 2002
5.	PL. ÚS 111/2011, finding from 4 July 2012	*Al-Adsani v. the United Kingdom*, application no. 35763/97, judgment from 21 November 2001
6.	II. ÚS 29/2011, finding from 13 December 2012	*Taxquet v. Belgium*, application no. 926/05, judgment from 16 November 2010
7.	IV. ÚS 294/2012-69, finding from 7 February 2013	*Streletz, Kessler and Krenz v. Germany*, applications nos. 34044/96, 35532/97 and 44801/98, judgment from 22 March 2001
8.	II. ÚS 67/2013, finding from 5 June 2013	*Michalko v. Slovakia*, application no. 35377/05, judgment from 21 December 2010
9.	PL. ÚS 13/2012, finding from 19 June 2013	*Evans v. the United Kingdom*, application no. 6339/05, judgment from 10 April 2007
10.	PL. ÚS 1/2012, finding from 3 July 2013	*Engel and others v. the Netherlands*, applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment from 8 June 1976
11.	IV. ÚS 57/2014-42, ruling from 30 January 2014	*Kamasinski v. Austria*, application no. 9783/82, judgment from 19 December 1989
12.	I.ÚS 73/2014, ruling from 5 March 2014	C-240/09, Court of Justice, judgment from 8 March 2011
13.	I.ÚS 131/2014-22, ruling from 19 March 2014	*Piersack v. Belgium*, application no. 8692/79, judgment from 1 October 1982

14.	III. ÚS 236/2014-22, ruling from 1 April 2014	*Golder v. the United Kingdom*, application no. 4451/70, judgment from 21 February 1975
15.	PL. ÚS 11/2013, finding from 22 October 2014	*Ponomaryovi v. Bulgaria*, application no. 5335/05, judgment from 21 June 2011
16.	PL. ÚS 24/2014, finding from 28 October 2014	*Schalk and Kopf v. Austria*, application no. 30141/04, judgment from 24 June 2010
17.	PL. ÚS 10/2013, finding from 10 December 2014	*Solomakhin v. Ukraine*, application no. 24429/03, judgment from 15 March 2012
18.	II. ÚS 307/2014, finding from 18 December 2014	*Çetin and others v. Turkey*, applications nos. 40153/98 and 40160/98, judgment from 13 February 2003
19.	PL. ÚS 10/2014-78, finding from 29 April 2015	*Malone v. the United Kingdom*, application no. 8691/79, judgment from 2 August 1984
20.	PL. ÚS 8/2014-41, finding from 27 May 2015	*Fredin v. Sweden* (no. 1), application no. 12033/86, judgment from 18 February 1991
21.	I. ÚS 290/2015, finding from 7 October 2015	*Amann v. Switzerland*, application no. 27798/95, judgment from 16 February 2000
22.	I.ÚS 505/2015, finding from 13 January 2016	*Lauko v. Slovakia*, application no. 4/1998/907/1119, judgment from 2 September 1998
23.	III. ÚS 350/2014, finding from 24 January 2017	*Lingens v. Austria*, application no. 9815/82, judgment from 8 July 1986
24.	PL. ÚS 18/2014, ruling from 22 March 2017	*Matthews v. the United Kingdom*, application no. 24833/94, judgment from 18 February 1999
25.	PL. ÚS 7/2017, finding from 31 May 2017	*Lexa v. Slovakia*, application no. 54334/00, judgment from 23 September 2008
26.	I.ÚS 155/2017, finding from 31 August 2017	*Zvolský and Zvolská v. the Czech Republic*, application no. 46129/99, judgment from 12 November 2002
27.	II. ÚS 285/2017-163, finding from 12 October 2017	*Turek v. Slovakia*, application no. 57986/00, 14 February 2006
28.	PL. ÚS 6/2017, ruling from 9 January 2019	*Karácsony and others v. Hungary*, applications nos. 42461/13 and 44357/13, judgment from 17 May 2016

29.	PL. ÚS 21/2014, 30 January 2019	*Klass and others v. Germany*, application no. 5029/71, 6 September 1978
30.	II. ÚS 337/2019, finding from 26 May 2020	*Bronda v. Italy*, application no. 40/1997/824/1030, judgment from 9 June 1998

Table 1: The frequency of methods of interpretation in the selected case law of the Constitutional Court

Methods		Frequency (number)	Frequency (%)	Main types Frequency (number and %)
1	1/A	6	20%	28 (93%)
	1/B	28	93%	
	1/C	0	0%	
2	2/A	9	30%	13 (43%)
	2/B	5	17%	
	2/C	3	10%	
	2/D	1	3%	
	2/E	5	17%	
	2/F	6	20%	
3	3/A	16	53%	26 (87%)
	3/B	15	50%	
	3/C	25	83%	
	3/D	2	7%	
	3/E	11	37%	
4	4/A	14	47%	30 (100%)
	4/B	30	100%	
	4/C	21	70%	
	4/D	0	0%	
5		5	17%	
6	6/A	2	7%	3 (10%)
	6/B	2	7%	
	6/C	2	7%	
	6/D	3	10%	
7		23	77%	
8		4	13%	
9		10	33%	

1. Grammatical (textual) interpretation
1/A. Interpretation based on ordinary meaning
a) Semantic interpretation
b) Syntactic interpretation
1/B. Legal professional (dogmatic) interpretation
a) Simple conceptual dogmatic (doctrinal) interpretation (regarding either constitutional or other branches of law)
b) Interp*retation on the basis of legal principles of statutes or branches of law*
1/C. Other professional interpretation (in accordance with a non-legal technical meaning)

2. Logical (linguistic-logical) arguments
2/A. Argumentum a minore ad maius: inference from smaller to bigger
2/B. Argumentum a maiore ad minus: inference from bigger to smaller
2/C. Argumentum ad absurdum
2/D. Argumentum a contrario/arguments from silence
2/E. Argumentum a simili, including analogy
2/F. Interpretation according to other logical maxims

3. Domestic systemic arguments (systemic or harmonising arguments)
3/A. Contextual interpretation
a) In narrow sense
b) In broad sense (including 'derogatory formulae': *lex superior derogat legi inferiori*, *lex specialis derogat legi generali*, *lex posterior derogat legi priori*)
3/B. Interpretation of constitutional norms on the basis of domestic statutory law (acts, decrees)
3/C. Interpretation of fundamental rights on the basis of jurisprudence of the constitutional court
a) References to specific previous decisions of the constitutional court (as 'precedents')
b) Reference to the 'practice' of the constitutional court
c) References to abstract norms formed by the constitutional court
3/D. Interpretation of fundamental rights on the basis of jurisprudence of ordinary courts
a) Interpretation referring to the practice of ordinary courts
b) Interpretation referring to individual court decisions
c) Interpretation referring to abstract judicial norms
3/E. Interpretation of fundamental rights on the basis of normative acts of other domestic state organs

4. External systemic and comparative law arguments
4/A. Interpretation of fundamental rights on the basis of international treaties
4/B. Interpretation of fundamental rights on the basis of individual case decisions or jurisprudence of international fora
4/C. Comparative law arguments
a) References to concrete norms of a particular foreign legal system (constitution, statutes, decrees)
b) References to decisions of the constitutional court or ordinary court of a particular foreign legal system
c) General references to 'European practice', 'principles followed by democratic countries', and similar non-specific justificatory principles
4/D. Other external sources of interpretation (e.g. customary international law, *ius cogens*)

5. Teleological/objective teleological interpretation (based on the objective and social purpose of the legislation)

6. Historical/subjective teleological interpretation (based on the intention of the legislator):
6/A. Interpretation based on ministerial/proposer justification
6/B. Interpretation based on draft materials
6/C. Interpretation referring, in general, to the 'intention, will of the constitution-maker'
6/D. Other interpretation based on the circumstances of making or modifying/amending the constitution or the constitutional provision (fundamental right) in question

7. Interpretation based on jurisprudence (references to scholarly works)

8. Interpretation in light of general legal principles (not expressed in statutes)

9. Substantive interpretation referring directly to generally accepted non-legal values

Chapter VI

Interpretation of Fundamental Rights in Serbia

Slobodan Orlović

1. Introduction: An overview of the status and powers of the Constitutional Court

The Constitutional Court of Serbia is part of the European continental system of constitutional justice, whose beginnings trace back to the Constitutional Court of Austria (*Verfassungsgerichtshof, VfGH*), established in 1920. That system presumes the existence of a specific public body (centralized control of constitutionality), a constitutional court, or a constitutional council (*Le Conseil constitutionnel* in France), with the main power to review the constitutionality of legal acts. The constitutional court undertakes the review of constitutionality of a legal act (law) regardless of whether it should be applied in a particular judicial proceeding (abstract dispute on constitutionality). In the older dated American system of judicial review, there is no such specific body as a constitutional court; rather, constitutional disputes are settled by ordinary courts (decentralized control of constitutionality). In that system, the constitutionality of a law is reviewed in a concrete constitutional dispute, where the law to be applied in a concrete judicial proceeding is subject to validation.[1]

In Serbia, as a federal unit of former Yugoslavia, constitutional justice has been in place since 1963, but the system of constitutional review of legislation of socialist constitutionality conceptually developed at that time had rarely found

1 See: Marković, 2015, pp. 543–551.

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a law unconstitutional.[2] The 1990 Constitution of Serbia reinstated a system of division of powers and of multiple political parties, while vesting in the Constitutional Court 'the protection of constitutionality, as well as the protection of legality, in accordance with the Constitution' (Art. 9). However, even with the constitutional guarantees of independence, such as the permanence of the judicial function, the work of the Constitutional Court had been under some degree of political control by the ruling political party. Its work in that period has been criticized for adherence to the principle of political appropriateness, which practice had, to some extent, undermined constitutionality and democracy, the rule of law, division of power, independence of the courts, and freedoms and rights of citizens.[3]

The Serbian Constitutional Court under the 2006 Constitution fulfills almost all the legal conditions of the role of a guardian of constitutionality and legality. The Constitution defines it as an 'autonomous and independent state body, which shall protect constitutionality and legality and human and minority rights and freedoms' (Art. 166). Almost two decades later, however, it cannot be stated that it has fully secured the protection of human rights by way of constitutional complaint, although it has been achieving continued progress in this area. It is particularly susceptible to criticism regarding its power to review constitutionality and legality, because it failed to act with sufficient courage in dealing with cases with significant political weight (the Constitutional Court's activism there is modest). For this reason, the level of reputation, authority, and citizens' confidence in the Constitutional Court, which must be an uncompromising guardian of the Constitution, is still inadequate.

Deciding on important constitutional matters, which always carries political weight (from deciding on the 'Brussel's Agreement' of 2013 or 'pension cuts' to the review of constitutionality of the state of emergency during the COVID-19 epidemic),[4] seems to have been motivated by the desire to avoid confrontation with the political government. The Constitutional Court had failed to oppose the dominant political factor instead of working to build itself, through its independence in decision-making, into an institution important in the political system.[5] Hence the answer is still pending as to the question of the role, functioning, and decision-making of the Constitutional Court—Is judicial activism an integral part of the constitutional judicial function that the Constitutional Court uses to fight for its

2 Slavnić, 2003, p. 241. During the effective period of the 1963 Constitution of SR Serbia, not a single decision was rendered finding a law unconstitutional; the system never became operational. From the 1974 Constitution of SR Serbia up to 2003, a total of 74 decisions were rendered (39 under the 1974 Constitution) finding non-compliance of laws with the Constitution. *Ibid*., pp. 240–241.

3 Vučetić, 1995, p. 215.

4 About some of the most important Constitutional Court decisions, see: Papić, Djerić, 2016, pp. 24–48.

5 Tripković, 2013, p. 761.

own position, or are its efforts directed toward the protection of the Constitution and its values?[6]

Looking into the numbers, the Constitutional Court with its 15 judges—experienced and prominent lawyers having a fixed term of office of nine years (more than twice as long as the mandate of members of Parliament) and enjoying immunity—could and would have to respond to such broad powers that it has.

Of its powers, the one that stands out in terms of scope is deciding on the constitutional complaints, and in terms of broader social importance, the constitutional review of laws and other acts producing significant political consequences undoubtedly takes center stage. But one must not overlook the problem of justification of constitutional review nor its limits in political issues (acts), because the Constitutional Court could usurp the democratic process and the separation of powers.[7]

Here lies the reason why moral standing (integrity) and dignity of the Constitutional Court judges, as well as their inviolability (immunity) and objectivity (impartiality), are more relevant than in the political branches of power. These qualities would contribute to the citizens accepting the Constitutional Court as a guardian of the Constitution that enjoys the highest reputation and whose decisions are undeniably enforced.

Not only did the 2006 Constitution significantly increase the number of judges (from 9 to 15), but it also broadened the powers of the Constitutional Court and provided additional guarantees of independence and autonomy. Of equal importance is that the Constitutional Court was separated from all other branches of power, even the judicial. It can be said that this independent authority itself constitutes a separate branch, the constitutional judicial one. The influence of authorities from other branches on the Constitutional Court is, therefore, mostly exerted in the election of constitutional judges. Influence over the Constitutional Court can also be achieved by delaying the election of missing judges. Currently, of a maximum 15 judges, the Constitutional Court is working with 13. Also, at the time of formation of the Constitutional Court in accordance with the 2006 Constitution, the Court had worked with only 10 judges. The lack of engagement of the political powers in fulfilling these empty seats is a reflection of their relationship with this institution.

The same, however, cannot be concluded after an analysis of the Court's case law, particularly bearing in mind the decisions in the mentioned cases with significant political weight. On the other hand, the Constitutional Court has become not only the crucial protector of constitutional rights and freedoms by ruling on

6 Nenadić, 2014, pp. 81–82.

7 The judicial review of constitutionality of legislative and executive acts envisaged by the rule of law involves distinguishing between legal and 'political' matters—it reflects the contrasting functions of different state bodies and limits the powers of the court (Constitutional court, *note by S.O.*). See: Allan, 2005, p. 161.

the constitutional complaints, but also the authority that applies European legal standards, referring (almost without exception) to the jurisprudence of the European Court of Human Rights (ECtHR). Hence, the relationship with the ECtHR constitutes one key element in assessing the status of the Constitutional Court and its performance.

According to the Constitutional Court Act, the work of the Constitutional Court is public. In particular, the Constitutional Court publishes its decisions and holds public debates and hearings. In December 2013, the Court adopted new Rules of Procedure of the Constitutional Court, which, in accordance with the amended Constitutional Court Act, do not provide for the presence of the media at its regular sessions. There are differences of opinion among experts on this matter. While some claim that the public does not have a place when the judges contemplate disputed constitutional issues, others view this as unacceptable from the standpoint of securing the public nature of the Constitutional Court's work, as set forth by the Constitution. No one questioned that votes should be cast in camera.[8]

1.1. Jurisdiction

The Constitutional Court draws powers from the Constitution, and they are mostly grouped into a single article (167). Additionally, the Constitution allows it to perform other constitutionally and legally mandated duties and even be the initiator of laws (Art. 167, para. 2, item 6 of the Constitution).[9]

Two of the Constitutional Court's powers can be singled out: the review of constitutionality of laws and legality of regulations, as a core competence of constitutional courts in general, the other being the adjudication of constitutional complaints, chosen due to their frequency and the importance of human rights protection. In these cases, the Constitutional Court refers, as precedents, to the concrete ECtHR decisions and, incomparably less frequently, to those of the European Court of Justice (ECJ).

The constitutionality and legality review forms the basis of the legal order as it protects the systemic rule that lower-level regulations must be consistent with higher-level ones. With this power of the Constitutional Court, the hierarchical order of legal acts is established and maintained. The Constitution and generally recognized rules of international law rank highest in the constitutional system of Serbia, followed by the ratified international treaties, then laws, and below them the statutes, decrees, decisions, and all other regulations of general application.

8 Papić, Djerić, 2016, pp. 20–22.

9 Thus, the Constitutional Court, by law, 'notifies the National Assembly of the situation and problems of exercising constitutionality and legality in Serbia, provides opinions, and indicates the need for adopting and revising laws and undertaking other measures for the protection of constitutionality and legality' (Art. 105 of the Constitutional Court Act, *Official Gazette of RS*, No. 109/2007 and other).

The Constitutional Court can assess the constitutionality and legality of both the acts currently in force (posterior constitutionality review) and those that ceased to be effective. The constitutionality of laws (not also of other acts) can be assessed even earlier—after their being voted for in the National Assembly but before being promulgated (prior constitutional review) (Arts. 168–169 of the Constitution). All these constitutional disputes are 'abstract', meaning that the authorized subjects can institute them regardless of whether the respective general act should be applied in a particular case. On the other hand, a concrete constitutional dispute, although legally possible, does not exist in practice.[10]

One important question should be raised about this competence—Is it too broad, given that all general acts fall subject to constitutionality and legality review? Is it in fact relevance to the protection of the legal system that the Court assesses some rulebook of a local public utility enterprise? Or should that level of decision-making be delegated to another body, the administrative court, for example.[11]

Deciding on constitutional complaints (Art. 170 of the Constitution), by contrast to assessing constitutionality and legality, means a constitutional judicial review of individual acts. From an ultimate legal means of human rights protection, the constitutional complaint has become one type of 'ordinary legal remedy' against court judgments. By upholding a constitutional complaint, the Constitutional Court invalidates the judgment rendered by the court of the last instance.

The subjects of constitutional complaints are most often judgments violating the human rights guaranteed by the Constitution and the European Convention on Human Rights (ECHR). It is worth noting that this protection would never have even existed (after three years of practice, 2008–2011) if the Constitutional Court had not, on its own initiative, declared unconstitutional the legislative amendments intended to make court decisions exempt from review.[12] Having thus remained subject to constitutional judicial review, the court decisions violating fundamental human rights were the factor contributing most to the Constitutional Court practically becoming a general jurisdiction court of the last instance.[13]

10 The judge has the right to pause a trial and institute the proceedings for the review of constitutionality of the law that is to be applied in the trial (a concrete dispute on constitutionality, incidental review of constitutionality), but it is not being practised.

11 In 2020, in the total caseload, there were 414 such cases. See: *Overview of the Work of the Constitutional Court in 2020*, pp. 25–30. Available at: http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/%D0%9F%D1%80%D0%B5%D0%B3%D0%BB%D0%B5%D0%B4_2020.pdf (Accessed: 6 May 2021).

12 The Act amending the Constitutional Court Act (2011) was declared unconstitutional in the part 'except for a court decision', by the Constitutional Court's Decision No. IU ž-97/2012.

13 In the total number of newly formed cases in 2020, there are 13,164 cases of constitutional complaints, and 194 cases concerning other matters from the Constitutional Court's scope of jurisdiction. In the total caseload in 2020, there were 34,702 cases of constitutional complaints, of which 12,056 were decided (62.19% of these were solved by rejection). *Overview of the Work of the Constitutional Court in 2020*, pp. 4, 40.

A constitutional complaint can be lodged against the individual acts or actions of state authorities and organizations entrusted with public authorities. Reasons for its submission include infringement of a human right guaranteed by the Constitution, provided that other remedies have been exhausted or have not existed.

In addition to constitutional complaints, the Constitutional Court also decides other, complaint to the Constitutional Court (*žalba Ustavnom sudu*) filed by natural or legal persons. Judges, public prosecutors, and deputy public prosecutors have the right to appeal to the Constitutional Court against decisions on termination of office (this appeal excludes the possibility of lodging a constitutional complaint, which means that they are practically equal in terms of effect).[14] A selected candidate for a deputy in the National Assembly whose mandate has not been confirmed by the Assembly also has the right of appeal to the Constitutional Court (this appeal, however, does not exclude the possibility of also lodging a constitutional complaint). Autonomous provinces and local self-governments have the right to file a special appeal to the Constitutional Court for the protection of their constitutional and legal rights (Arts. 148 (2), 161 (4), 187 (1), and 193 (1) of the Constitution).

A competence typically having a political weight and a potential to cause political consequences is the participation of the Constitutional Court in the procedure for the dismissal of the President of the Republic.[15] 'The Constitutional Court shall have the obligation to decide on the violation of the Constitution, upon the initiated procedure for dismissal, not later than within 45 days' (Art. 118 of the Constitution). After that, the President of the Republic can be dismissed upon the decision of the National Assembly. The Constitutional Court, therefore, does not decide on the merits; rather, its decision constitutes a prior and mandatory but not also a sufficient requirement for the dismissal of the President of the Republic. To date, this competence has remained unpracticed. However, despite the dismissal procedure never having been put into play, it is concluded that the Constitutional Court's role is inappropriate because it does not decide but gives (a non-binding) opinion.

The Constitutional Court also decides on the prohibition of the activity of political parties (banning of political parties), trade union organizations, or citizens' associations, as well as religious communities. This competence has indeed been exercised, but the Court's practice has not been consistent regarding registered and unregistered organizations. Moreover, there are no clear criteria for banning an

14 In 2020, there were three cases in total. *Ibid.*, p. 36.

15 Here, the role of the constitutional court varies: In Montenegro, it decides whether or not there has been a violation of the Constitution (Art. 97 of the 2007 Constitution); in Russia, it confirms the legality of initiating the impeachment procedure (Art. 93 of the 1993 Constitution); in Italy, it establishes whether he/she has violated the Constitution or committed high treason (Art. 134 of the 1947 Constitution); in Hungary, it conducts the procedure and removes the head of state from office (Art. 13 of the 2011 Constitution). Available at: http://confinder.richmond.edu/ (Accessed: 7 May 2021). See: Dmičić, Pilipović, 2013, pp. 31–38.

organization.[16] As for banning a political party or a religious community, there had been no proceedings of this type before the Constitutional Court.

The Constitutional Court's competences further include resolving jurisdictional conflicts between the authorities at the same level of government—courts and other state authorities, as well as those between central and non-central authorities, republican, provincial, and local authorities at different levels. The number of these cases in 2020 amounted to 24.[17]

Finally, one Court's competence that stands by merely as a reserve is the resolution of election disputes. For its activation, there is one insurmountable negative requirement—the existence of electoral disputes not falling under the jurisdiction of courts. It is not clear what kind of electoral disputes these might be, and accordingly, this competence 'on paper' should be deleted.[18]

1.2. Constitutional judges

The Constitution of 2006 brought about an increase in the number of constitutional judges to 15 (from 9) and stricter professional requirements—having a minimum of 15 years of experience in practicing law and being a prominent lawyer of at least 40 years of age. The requirement 'prominent lawyer' has no formally specified criteria, which is considered a shortcoming.[19] This notion was left elastic, inexact, and even hollow, while in the judicial selection it should be crucial—only a Constitutional Court with prominent lawyers can protect the Constitution.

The judicial function is not permanent, but the term of office is long—it lasts 9 years, and with the potential re-election possibly a whole 18 years, which does constitute a guarantee of judicial independence. However, the possibility of re-election of judges does not offer the true guarantee of independence, because practice has shown that the first mandate can be used for the purpose of gaining the trust of the political powers and securing a second mandate.

16 See: Petrov, 2011, pp. 133–145. The Constitutional Court, in the decision 'National Front' No. VIIУ-171/2008 (*Official Gazette of RS*, No. 50/2011), established merely that this organisation is a secret society, the actions of which are banned by the letter of the Constitution, and that its registration with the appropriate register and the promotion and dissemination of its goals and ideas are prohibited. The Court has, however, in its Decision No. VIIУ-279/2009 (*Official Gazette of RS*, No. 26/2011), taken the view that registration with the appropriate register constitutes a necessary condition (*conditio sine qua non*) for exercising a constitutional guarantee of a political and any other form of organization, and that, accordingly, no registration means non-existence of the society in the formal and legal sense. Hence, the proposal to ban the 'extreme subgroups' was dismissed.

17 *Overview of the Work of the Constitutional Court in 2020*, p. 31

18 Since the adoption of the 2006 Constitution, the Constitutional Court has on several occasions passed the conclusion rejecting the application for election dispute resolution due to procedural reasons. Resolution of election disputes has *in totum* been transferred to the administrative justice. Stojanović, 2012, p. 37. In 2020, there was one rejected case. *Overview of the Work of the Constitutional Court in 2020*, p. 31.

19 It involves elite lawyers, consistent and brave. See: Petrov, 2013, pp. 46–50.

Another factor contributing to their independence is a 'shared' method of selection (based on the Italian model) by three branches of power: the President of the Republic, the National Assembly, and the Supreme Court of Cassation, each electing and appointing five judges.[20] However, this model of judicial selection can lead to the prevalent influence of the executive branch, that is, the Government,[21] notwithstanding that any relationship between the constitutional judge and his/her electing authority would have to terminate upon his/her assumption of the office. This point is also implied in the provision that the electing authority has no right to dismiss 'its own' judge, but the National Assembly can do so once the relevant legal requirements are met (Art. 174 of the Constitution).

Although this kind of appointment mechanism and the one-time renewable term have been established to strengthen political insulation, the non-transparent selection procedure has allowed Serbian politicians to discard the selection criteria. Instead of selecting prominent lawyers with a proven record of professional quality and integrity, politicians appointed mostly poorly qualified but 'amicable' judges who would not put the politicians' short-term interests at risk.[22] Probably also because of that, there are periods when the Constitutional Court does not operate at full membership.

Constitutional Court judges all have equal legal status, whereas the President of the Court (and the Vice-President in his/her absence) has the right to represent the Court, manage the work of the Court, etc.[23] The judge is a member of councils (Small Council and Grand Chamber) and has a leading role in the proceeding wherein he acts as a judge-rapporteur. He/she then conducts the proceeding and proposes a draft decision to other judges, which is adopted by simple majority vote. The practice has shown that the judge-rapporteur has a significant influence on the final decision-making, that is, that his/her proposal is in most cases accepted. As the cases, particularly the 'big' ones (politically and legally relevant), are decided by outvoting, judges remaining in the minority have the right to have their separate dissenting (but also concurring) opinion published along with the decision.

20 Marković, 2006, p. 55.

21 Thus, the 'government majority' in the National Assembly can formally propose for the Constitutional Court judges all 10 potential candidates, 5 of which are appointed by the President of the Republic; the Government also influences the selection of members of the High Judicial Council and the State Prosecutorial Council (the Assembly, read the government majority, selects eight elected members, including the competent minister), each of which bodies also propose 10 candidates for judges to the Supreme Court of Cassation, which suggests that two thirds of the Constitutional Court judges can in fact be appointed at the will of the Government. If we add to this fact that another authority from the executive branch, the President of the Republic, also proposes 10 candidates for the Constitutional Court judges, of which the National Assembly (once again, the pro-government majority) elects 5, we can conclude that the executive branch's decisive influence on the recruitment of staff in the Constitutional Court is inevitable. This is a line of politicization and derogation of the independence and autonomy of the Constitutional Court (at least while the political majority that participated in the judicial selection is in power), which this authority so modestly enjoyed under the 1990 Constitution.

22 Beširević, 2014, p. 973.

23 See Art. 8 of the Rules of Procedure of the Constitutional Court (*Official Gazette of RS*, No. 103/13).

Constitutional judges are not allocated cases by the type of constitutional-legal matter (as practiced in some constitutional courts),[24] neither do they administer merely some of the specific proceedings but are assigned with cases in order of their receipt by the court ('natural judge').[25] Proceedings have certain particularities related to the case—for example, proceeding on the conflict of jurisdiction differs from that on the constitutional complaint. Proceedings before the Constitutional Court can be instituted on a proposal of authorized proponents, whereas the constitutionality and legality review may also be instituted on an initiative by any legal or natural person. Public hearing, as a mandatory phase of the proceedings, is a common feature in some constitutional disputes (constitutionality and legality review, election disputes, prohibition of a political party, trade union organization, citizens' association, or a religious community), while it is optional in others.

Constitutional Court proceedings are more specifically regulated by the Constitutional Court Act and the Rules of Procedure of the Constitutional Court. The proceeding can be divided into preliminary procedure (examination of admissibility) and main (merits) procedure and it ends by a decision of three judges (Small Council),[26] eight judges (Grand Chamber), or all judges (Constitutional Court Session). The decisions of the Small Council and Grand Chamber are adopted only unanimously, while those of the Constitutional Court Sessions require at least eight votes for adoption. Exceptionally, at least 10 judges (two thirds) must vote for the self-initiation of the constitutionality and legality review procedure. The Constitutional Court's decisions are universally binding, enforceable, and final. The finality of the decision has, however, been relativized by recognition of the competence of the European Court of Human Rights, which can, upon application, render a decision that would amend even the Constitutional Court's decision in respect of a constitutional complaint alleging violation of human rights.

Like other constitutional courts, the Constitutional Court of Serbia would be assuming the role of a temporary 'positive lawmaker' based on the authority to determine the manner of enforcement of its decisions (Art. 104 of the Act).

24 The Federal Constitutional Court of Germany has two councils (senates), for constitutional disputes and for fundamental rights (Available at: http://www.bundesverfassungsgericht.de/EN/Richter/richter_node.html;jsessionid=578B3159C2EAE4DC688A25247B2B727D.2_cid370 (Accessed: 8 May 2021), Austrian Constitutional Court operates in the form of: A Great Assembly (plenum), consisting of the President of the Court, the Vice-President, and 12 judges; and a Small Assembly, for matters of minor importance, which consists of the President, Vice-President, and four judges (Available at: https://www.vfgh.gv.at/verfassungsgerichtshof/organisation/the_courts_bench.en.html, (Accessed: 8 May 2021).

25 Three committees are formed, though, each consisting of three judges: civil law committee, criminal law committee, and administrative law committee, which give opinions on the judge-rapporteur's proposal upon the received constitutional complaint from the specific legal area (Arts. 37–38 of the Rules of Procedure of the Constitutional Court).

26 About arguments for unconstitutionality of the Small Council's final decision-making on constitutional complains, see: Marković-Bajalović, 2017.

The issues concerning the Constitutional Court itself can be rectified by a legal norm when it comes to the composition and status of judges, jurisdiction, forms of work, and procedure. However, this possibility does not suffice for reaching the desired level of independence and reputation of the constitutional judicial power, as it would lack the unquestioned acceptance of its decisions by all the authorities, other political factors, the public, and citizens. It is only when its decisions are undeniably accepted, even by those power players whose interests they do not serve, that a social environment will be created wherein the Constitutional Court will enjoy a high reputation, which, for the 30 years of the multi-party system, has not been the case.

1.3. Relationship with European law and institutions

As an authority constitutionally defined as a human rights protector, the Constitutional Court also applies international sources of law (generally recognized rules of international law and confirmed international treaties, Art. 194 of the Constitution) protecting human rights. The Constitutional Court is the human rights protection organ in the last instance—in the first instance are courts providing judicial protection in cases of violation of constitutionally guaranteed rights and removing the consequences arising from those violations (Art. 22 of the Constitution). Finally, citizens can refer to the European Court of Human Rights, as an international institution, for 'the protection of their rights and freedoms protected by the Constitution' (Art. 22 of the Constitution). A prerequisite for the application to the ECtHR to be an efficient legal means is that ECtHR judgments are binding on a state. The enforcement of ECtHR judgments is an international obligation of every state that has ratified the Convention, and thus Serbia as well. Notably, the ECtHR may not modify or repeal a domestic court's judgment. It practically establishes that, in a particular case, a violation of some provision of the Convention had occurred and can thus order a just (monetary) satisfaction.[27]

Human and minority rights guaranteed by the Constitution are directly applied, and the Constitutional Court has even extended the scope of protected human rights (beyond the Constitution)—to those that have become part of the legal order by way of ratified international agreements.[28]

The international source most relevant to the human rights protection in Serbia is the European Convention on Human Rights (1950). Like the constitutional provisions on human rights, the Convention is directly applied by Serbian courts, including the Constitutional Court (see Art. 18 of the Constitution). The basis for this practice is found in the definition of Serbia as a state founded on the commitment to European principles and values, the latter being enshrined in the ECtHR decisions, as well as those of the European Court of Justice (ECJ). The adoption of European

27 Popović, 2016, pp. 450–451.

28 Constitutional Court's views in the proceeding for examining and deciding a constitutional complaint, Su No. I—8/11/09, 2 April 2009.

standards is further confirmed in the constitutional norm mandating that constitutional human rights provisions be interpreted, among others, following the practice of international institutions, which primarily includes the jurisprudence of the European Court of Human Rights.

Decisions of the European Court of Human Rights are regarded as part of the Serbian legal order and form an indispensable part of the rule of law. Moreover, there are views that the ECtHR decisions relating to the standards of deprivation of liberty, the right to a fair trial, or the 'hard core' of human rights (Arts. 2–4 and 7 and Art. 4 of Protocol No. 7 to the ECHR) constitute a confirmation of actual political democracy and observance of human rights.[29]

The importance of the ECtHR's judgments and views for the Constitutional Court's practice is immense, extending to a broad array of rights: the rights to life, freedom and security, a fair trial (length of detention, presumption of innocence, and others), respect for private and family life, human dignity and free development of personality, peaceful assembly, property, and others.

The Constitutional Court of Serbia has a long history of reliance on the ECtHR case law.[30] In hundreds of its decisions, the Constitutional Court has referred to the ECtHR jurisprudence. Adjudicating in various types of proceedings (normative review, constitutional complaints, proposals for banning political organizations, appeals by unelected judges) and intervening in the human rights matters (the principle of equality and prohibition of discrimination, civil rights, political rights, procedural rights), the Constitutional Court has applied the Convention as both a source (*res iudicata*) and a means (*res interpretata*). The Court has referred to the ECtHR not only as a matter of obligation, but also whenever it was necessary for filling legal gaps or strengthening its own legal viewpoint.[31] Sometimes, the relationship between ECtHR and Constitutional Court involved sharp communication resulting in the Constitutional Court accepting the position of the ECtHR. For example, the ECtHR began directly awarding full damages for unenforced judgments together with compensation for non-pecuniary damage, thus compelling the Constitutional Court to change its jurisprudence. After that, the ECtHR once again recognized the constitutional complaint as an effective local remedy.[32]

There are authors (Krstić and Marinković) who opine that the use of the European Court's jurisprudence by the Serbian Constitutional Court is twofold. In one set of cases, the Constitutional Court relies on the interpretative force of the ECtHR jurisprudence, whereas in the other, it treats the ECtHR cases as binding. Thus, the latter option comes as close as possible to the doctrine of precedent. It is possible to

29 Kolarić, 2018, p. 55.

30 Djajić, 2018, p. 235. See: Etinski, 2017 (1), Etinski, 2017 (2), Nastić, 2015, Popović, Marinković, 2016.

31 Krstić, Marinković, 2016, p. 271.

32 Djajić, 2018, p. 238.

discern different types of deference to the jurisprudence of the ECtHR by the Constitutional Court that exceeds habitual interpretative reference.[33]

Interestingly, the ECtHR changed its position about whether the constitutional complaint is an effective remedy. Following the first positive decision on a constitutional complaint (of 10 July 2008), the Constitutional Court established violations in several dozens of cases (concerning access to the court, detention, length of proceedings, and other matters relating to the right to a fair trial), which practice contributed to the ECtHR assessing the constitutional complaint as an effective legal remedy (in the case of *Vinčić and others v. Serbia,* 1st December 2009).

This shift in the ECtHR's view of the constitutional complaint as an effective remedy is best reflected in cases concerning non-enforcement of judgments rendered against companies with majority socially-owned capital. In those cases, the Constitutional Court changed its case law directly on the basis of the ECtHR judgments against Serbia. After the first decisions adopting constitutional complaints, the ECtHR emphasized a difference between the constitutional complaint's effectiveness in principle and its actual ineffectiveness in cases concerning the non-enforcement of judgments against companies with majority socially-owned capital (in the case of *Milunović and Čekrlić v. Serbia,* 17th May 2011), concluding accordingly that the constitutional complaint cannot be considered an effective remedy.

In response to this criticism, the Constitutional Court aligned its positions with the European Court's case law. Thus, in a case wherein the complainant sought indemnification for the non-enforcement of a final court judgment against a socially-owned company (Už - 775/2009, as of 19th April 2012), the Constitutional Court found a violation of the complainant's 'right to trial within a reasonable time' and 'the right to the peaceful enjoyment of property' and ordered the State to pay him the sum awarded in the judgment of the municipal court (it cited the ECtHR's positions in the cases of *R. Kačapor and others v. Serbia, Grišević and others v. Serbia,* and *Crnišanin and others v. Serbia*). However, the ECtHR concluded that the Constitutional Court failed to achieve full progress, as it exempted from such practice socially-owned companies undergoing restructuring. In those cases, the constitutional complaint could not have been considered effective.

Finally, in several subsequent cases (Už - 1712/2010 of 21 March 2013, Už - 1645/2010 of 7 March 2013, and Už - 1705/2010 of 9 May 2013), the Constitutional Court adapted its practice in respect of non-enforcement of judgements against socially/state-owned companies in restructuring. Hence, the ECtHR (in the case of *Fereizović v. Serbia,* 26th November 2013) found the Constitutional Court's approach fully harmonized with the relevant jurisprudence, and the constitutional complaint an effective remedy.[34]

Furthermore, the Constitutional Court changed its position about the interpretation of the Constitutional guarantee of the *ne bis in idem* principle (Art. 34(4) of the

33 Djajić, 2018, p. 235.

34 Krstić, Marinković, 2016, pp. 267–273.

Constitution) because the ECtHR relaxed the conditions for finding a violation of the *ne bis in idem* principle. The Constitutional Court accepted the understanding of the *ne bis in idem* principle on the basis of a particular judgment of the ECtHR, which served as the precedent. Specifically, the Constitutional Court opined that the *ne bis in idem* principle would not be breached despite both administrative and criminal punishments for the same act (the case of use of forged traffic documents) because different goals were to be achieved by those two proceedings.[35]

2. The interpretation of fundamental rights in the case law of the Constitutional Court

This part of the chapter will address the case law of the Constitutional Court of Serbia concerning the protection of human rights guaranteed by the Constitution, with a view to gaining an appropriate picture of the quality of human rights protection.

As the basis of this analysis, we will study 30 decisions of the Constitutional Court rendered upon constitutional complaints concerning human rights protection. They involve crucial Constitutional Court decisions that invoke the views from the 'exemplary decisions' rendered by the ECtHR.

This study covered several types of human rights decided by the Constitutional Court upon the received constitutional complaints, including the right to life, right to human dignity and free development of personality, prohibition of torture, right to a limited duration of detention, right to the presumption of innocence, right to a fair trial, right to an effective legal remedy, freedom of movement, prohibition of expulsion, rights of parents, right to respect for private and family life, and right to property. These rights and freedoms derive from different areas of law: criminal and criminal procedure law, civil law, property law, asylum law, family law, and anti-discrimination law.

It is important to emphasize that the Constitutional Court interprets the content of a given human right using the views and interpretations put forward by the ECtHR in its decisions, and it is the most common model of decision-making. Less commonly does the Serbian Constitutional Court invoke the case law of its own, that is, legal interpretations presented in its earlier decisions.

This part of the chapter will first outline the essential elements of the procedure before the Constitutional Court until the rendering of a decision as a final procedural step. Particularities of the procedure before the Constitutional Court are described in line with the norms of the existing Rules of Procedure. It will then, through an analysis of these Constitutional Court decisions, discuss the style characterizing the

35 Djajić, 2018, pp. 235–236.

Court in its decision-making. The decision-making involves assessing the facts and applying relevant law in specific cases.

It can undoubtedly be stated beforehand that the manner of explaining decisions and the style of the Constitutional Court reasoning vary depending on the type of constitutional dispute at issue (be it the review of the constitutionality of a law or deciding on a constitutional complaint). But the conclusion about the nature of the Constitutional Court's reasoning style can only be reached after recognizing the methods applied in its work (procedure) and the decision-making itself.

2.1 The characteristics of the constitutional decision-making and style of reasoning

2.1.1 The normative framework of considering cases and decision-making

The Constitutional Court conducts proceedings on the basis of the provisions of the Constitution, Constitutional Court Act, and the Rules of Procedure, these last being the most detailed.

The work of the Constitutional Court can take the following organizational forms: Session of the Court (all 15 judges), Grand Chamber session (eight judges), and Small Council session (three judges), and there is also a session of a working body of the Court. The President of the Court annually decides on the selection of judges for each council. As for the subject matter of this work, it is important to note that for deciding on constitutional complaints, the Court sets up constitutional complaint committees as standing working bodies. Those committees (in the fields of criminal law, civil law, and administrative law) consider and give opinions on the proposal for a decision of the judge-rapporteur before the merits of a constitutional complaint are decided.

One general characteristic of the Constitutional Court procedure to be noted is the publicity of work, which is ensured by publishing decisions, delivering communications, and in other ways. On issues falling within its jurisdiction, the Court decides at Court Sessions. For purposes of clarifying complex constitutional law matters, the Court may also hold a preparatory session (for which the judge-rapporteur prepares a report on disputed constitutional legal issues). The President of the Court may also convene a consultative meeting to discuss issues relevant to decision-making, to which it invites representatives of public authorities, and scientific and other experts as well.

Court cases are allocated according to the order of their receipt and case type to the judge-rapporteur who conducts the proceedings, and there is also an appointed case administration assistant who provides expert legal assistance to the judge-rapporteur.

Generally, proceedings before the Constitutional Court can have three phases: preliminary proceeding, public hearing, and the Court Session, also including the sessions of the Small Council and the Grand Chamber. The preliminary proceeding

involves examining the accuracy of the submissions, serving the documents, and gathering data and information. Public hearing occurs as a phase merely in some cases (for example, constitutionality and legality review), and it is where the opinions and facts of relevance for case resolution are presented. The President of the Court convenes the Court Session, where the judge-rapporteur first presents his proposal for the decision, which is then deliberated and voted. The decision is adopted by the majority vote of all judges (at least eight), with the possibility for a dissenting judge to deliver a separate opinion, which is published along with the Court decision.

In the proceeding on the constitutional complaint, the judge-rapporteur initially verifies whether the procedural presumptions for the Court to act are met (accurate application form, time limits, etc.) and then prepares a proposal for the decision. The Constitutional Complaints Committee gives its opinion on the judge-rapporteur's proposal. The proposal for the decision on the constitutional complaint, the Committee's opinion, and the associated documents are then delivered to the Court's President for decision-making at the Court Session. Constitutional complaint resolutions are issued in the form of decisions, while dismissals for not meeting the procedural presumptions are in the form of rulings.

The Constitutional Court may also render a partial decision when deciding a case involving multiple issues, of which only some are sufficiently resolved. Additionally, different claims can be decided in a single decision. The Redaction Commission determines the final wording of a decision, which is then signed and served on the parties to the proceeding. The Court may decide to have the decision published in the 'Official Gazette of the Republic of Serbia'. The decision is final, and the Court determines the manner of its enforcement. The Court decision can be subject to reconsideration, on a reasoned request of the President, a judge, or a working body of the Court, before being served. The same subjects can request reconsideration even of a previously taken position of the Court.

2.1.2. The characteristics and style of constitutional reasoning and adjudicating

There is no simple way to give an accurate account of the style that characterizes the constitutional reasoning of the Constitutional Court and its decision-making. Even if it would be possible to give a general assessment of the Court's style, one must always bear in mind that general and broad conclusions are often insufficiently accurate. It is a fact that there will typically be variations in the conduct and style of the Constitutional Court simply because the cases decided are diverse, not belonging to the same type. Thus, a style typical of reasoning and adjudicating constitutional complaints would constitute one separate whole; however, there, too, variations occur, given that the subject matters of the complaints are mutually different (right to privacy and right to property, for example). A completely different reasoning and adjudicating style is exhibited by the Court when it assesses the constitutionality of laws, undertakes other normative controls, or resolves jurisdictional conflict cases.

The Constitutional Court's decision-making style also depends on its position in the constitutional system, or who may address the Court and when. The question of who may address the Constitutional Court comes down, in fact, to who may institute or initiate constitutional court proceedings. Petitioners of different proceedings conducted before the Constitutional Court are determined in the Constitution. The very fact of their being recognized as subjects authorized to institute the proceeding implies that they have a legal interest in doing so. For some constitutional court proceedings, no time limits are imposed regarding their initiation. Thus, in the constitutionality and legality review procedure, the authorized subjects (25 Assembly deputies, state authorities, etc.) are free to institute proceedings before the Constitutional Court by virtue of being assumed to have a legal interest in it. All other parties may file an initiative, which will be accepted either by some of the authorized petitioners or by the Constitutional Court (also an authorized petitioner).

The Constitutional Court has thus received multiple initiatives to institute the review of constitutionality and legality of acts adopted during the COVID-19 epidemic. The initiatives against the Regulation on measures during the state of emergency ('Official Gazette of RS', No. 31/20 and other) and the Regulation on offences in violation of the Order of the Minister of the Interior Restricting and Prohibiting the Movement of Persons in the Territory of the Republic of Serbia ('Official Gazette of RS', No. 39/20) have been accepted and these acts declared partially unconstitutional. Specifically, the provisions of Art. 2 of the Regulation on offences (…) and those of para. 2 of Art. 4d of the Regulation on measures (…) provided that for certain offences for not observing the prohibition of movement, a misdemeanor proceeding may be instituted and completed despite the offender's already having been a subject to a criminal proceeding for a criminal offence comprising the elements of that misdemeanor. The Constitutional Court established that it violated the prohibition from para. 3 of Art. 8 of the Misdemeanor Act, the constitutional and legal principle of *ne bis in idem*, and the International Covenant on Civil and Political Rights and the ECHR (Art. 4 of Protocol No. 7).[36]

To lodge a constitutional complaint, there must, however, exist a legal interest of the submitter in it and several other preconditions satisfied for the complaint to be taken for decision-making. The legal interest requirement, under the Constitutional Court Act, assumes that the complainant's (not another person's) human right has been violated by an individual act or action of an entity exercising public authority. To lodge a constitutional complaint on behalf of another person, one needs a written authorization of that person. The procedural requirement for lodging a constitutional complaint is that all other legal remedies for human rights protection have been exhausted. It follows that the Constitutional Court constitutes the authority deciding in the last instance, which makes its position in the

36 See IUo-45/2020 (28.10.2020).

constitutional system correspond to that of the supreme legal authority that makes the final decision.

Another feature typical of the Constitutional Court's decision-making is that it is not limited by the request of the authorized petitioner (in the constitutionality and legality review procedure) in that, in case of its withdrawal, the Court can continue the procedure. During the procedure, it may decide to suspend further proceeding to give an opportunity to the enacting body of the challenged act to eliminate the noted unconstitutional and unlawful elements (deferred effect of the decision). In addition, in some proceedings, under legal conditions, it can also impose provisional measures. In the course of the procedure, the Constitutional Court can decide to suspend, until it makes its final decision, the enforcement of an individual act adopted based on the regulation the constitutionality of which is being under review (provisional measure). The Court can postpone entry into force of an autonomous province's decision, the constitutionality or legality of which is being assessed (provisional measure). The constitutional complaint, as a rule, does not preclude the application of the act it challenges. However, on the complainant's proposal, the Constitutional Court can suspend the implementation of that act if its further implementation would cause irreparable or considerable harm (provisional measure).[37]

Constitutional complaint decisions on the merits often invoke the views and opinions put forward in ECtHR decisions in their reasoning section, and not so often references to earlier decisions of the Constitutional Court itself. Reasoning statements may not exceed 15 pages (decisions on constitutionality and legality review may be significantly longer). The Constitutional Court has established a practice of consolidating similar applications into a single case, by which it reduced the total number of cases almost by half. Most of the constitutional complaints are dismissed (about 80%), while those judged on the merits usually receive upholding decisions (in three out of four cases). According to the type of case, the constitutional complaints filed most frequently involve the following violations: the right to a fair trial, the right to trial within a reasonable time, the right to property, the right to equal protection, the right to legal remedy, the right to legal certainty, and the right of access to court (more than 90% of the cases).[38]

The Constitutional Court has formed its views and approaches concerning the proceeding on the constitutional complaint. Against an act resolving a constitutional complaint (decision, ruling, conclusion), no legal remedy is allowed, except where the act is grounded on an obvious Court error that cannot be eliminated by a rectification conclusion. This view is complemented by the position that decisions on the compensation of non-pecuniary damages will be reconsidered if Serbia, in respect of the same violations, has a concluded a friendly settlement with the ECtHR. Another view the Court has established is that constitutional complaints protect all human rights guaranteed by the Constitution, regardless of whether they are explicitly

37 See Arts. 54–56, 67, and 86 of the Constitutional Court Act.
38 See Beljanski, 2019, pp. 7–9, Pajvančić, 2019, pp. 37–38.

enumerated in the Constitution or are inherent in the legal order enshrined in the ratified international agreements. A further view is that a constitutional complaint can be lodged against an individual act or action by the bodies of the three branches of power or holders of public authority. A complaint can be lodged by any natural or legal persons, provided that they are holders of the right protected by the constitutional complaint. Other established positions include those on the procedure for examining constitutional complaints, the permissibility of the revision, supplements to the constitutional complaint, and other procedural issues.[39]

Notwithstanding all these considerations, there are views that the efficiency of human rights protection using the constitutional complaint have become questionable given the growing number of unresolved cases. The dynamic of resolving constitutional complaints is slower than the inflow dynamic of such cases.[40]

The extent to which the constitutional complaint has influenced the decision-making style of the Constitutional Court is illustrated in the 'judicial reform' cases wherein the Court virtually overturned the decision of the High Judicial Council on the termination of judicial office. Under this decision, almost 1000 judges (937) were not re-elected to judicial office, and their judgeships were determined to terminate as of 31 December 2009.

The Constitutional Court assessed that regarding all complainants—unelected judges—the same disputed legal issues arose, which rendered it appropriate and rational to consolidate all complainants' case files and decide the submitted complaints in a single decision. The Court upheld the unelected judges' complaints and issued a decision (VIIIU-534/2011) establishing that in the process of deciding on the complainants' objections, the presumption that they met the requirements for election to a permanent judicial function had not been rebutted. It overturned the High Judicial Council decisions and ordered it to have, within 60 days of the receipt of the said Decision, the election of the complainants executed in line with the existing Rules ('Official Gazette of RS', Nos. 35/11 and 90/11). Moreover, before acting upon the Constitutional Court Decision, the High Judicial Council had to determine whether a particular complainant satisfied the statutory criteria for election to judicial office or whether, in respect of a specific complainant, there were grounds to terminate the judicial office by operation of law.

Deciding on constitutional complaints, the Constitutional Court utilizes various arguments and methods of interpretation, perhaps not so numerous and diverse as those of other constitutional courts included in this study. Usually, the methodological starting point of courts, by the very fact of applying positive law, is based on a dogmatic interpretation in which a base is an ordinary (textual) and legal meaning of a certain norm. Similarly, the Constitutional Court draws its arguments for the decision from the dogmatic (normative) meaning of the constitutional norm to be applied in a particular case. Between other methods of interpretations

39 Beljanski, 2019, pp. 5–6.
40 Pajvančić, 2019, p. 39.

in this jurisprudence of the Constitutional Court, we can point out interpretations of practice of international courts.

When it comes to the Constitutional Court's attitude toward ECtHR decisions, this basic methodology has been modified to some extent and is not so autonomous. Generally, once it applies the ECtHR jurisprudence in a particular case, it adheres to it in all future cases with similar facts. Nevertheless, this general consideration can be examined in more detail by distinguishing between three standards.

The Constitutional Court fully accepts the ECtHR case law, as *res iudicata*, not only in respect of requirements the constitutional complaint must meet to be an effective remedy, but also in other types of proceedings upon constitutional complaints when it decides on the merits. The Court applies the ECtHR jurisprudence in procedural issues, as well as *res interpretata*, but has not been consistent in this. On the one hand, it invokes the ECtHR case law to fill legal gaps and strengthen its arguments, and on the other hand, there are cases where references to the ECtHR judgments are purely 'decorative', unrelated to relevant legal issues in a particular case. The third standard of the Constitutional Court would involve non-application of the ECtHR approaches, whether those judgments concern Serbia or other states.[41]

This third standard is rarely applied, one of its forms being the departure from previously adopted ECtHR views. Thus, in a case concerning the protection of the right to property, No. Už-5214/2016, the Constitutional Court abandoned its previous practice, which was based on the ECtHR standards to be met to allow for the property (ownership) to be seized—that seizure is prescribed by law, that there is a reasonable and necessary public interest to deprive property rights, and that in depriving property rights, a fair balance is struck between the public interest and the interest of the individual whose property is being seized, taking into account the purpose and weight of the measure imposed (Už-367/2016). When making a decision, the Constitutional Court abandoned these standards and introduced new ones concerning 'the implementation of monetary and exchange rate policies, and thus the provision of the financial stability of the Republic of Serbia, public order protection or prevention against its breaches, and influencing the offender to never commit an offence again' (Už-5214/2016).

2.2.1. Grammatical (textual) interpretation (1)

Grammatical (textual) interpretation is one of the most common methods in the work of the courts and likewise of the Constitutional Court. We find it in almost all the studied Constitutional Court judgments. It has various forms that we find in the work of the Constitutional Court.

1/A/a. The interpretation based on an ordinary meaning, a *semantic interpretation,* starts from the general sense of a particular term in a language. The meaning

41 Marinković, 2019, p. 55.

of some legal term from the constitution is more closely determined or defined using the general (ordinary) sense of the word contained in the constitutional norm.

Thus, in the case of Už-2356/2009, a positive definition of detention is determined as a constitutional and criminal procedural institution deriving from the notion of liberty and its general meaning. '(…) detention constitutes *a particularly delicate measure of depriving a man of personal liberty* until the final judicial decision on guilt is rendered'.

In the same case, the Court also gives a negative definition of detention—what detention does not and must not constitute, deriving it from the usual meaning of the term punishment for existence. 'Detention is not a criminal sanction and *for a detainee it must not turn into a punishment*'.

In the case of Už-1823/2017, the Constitutional Court interprets the constitutionally guaranteed right to freedom (Art. 27 of the Constitution).

> 'The Constitutional Court points out that the right to freedom is one of the fundamental personal rights guaranteed by the Constitution; that the right to freedom *means physical freedom of an individual and guarantees protection in respect of all types of deprivations of liberty*'.

1/B/a. The legal professional (dogmatic) interpretation, a *simple conceptual dogmatic interpretation* of the Constitution, interprets particular legal terms in a way widely accepted by the legal community. This is the way the Constitutional Court, in its Decision No. Už-6300/2017, interprets the constitutional term 'protection of the family', or specifically, how one part of that protection—'protection against domestic violence', is exercised.

> '(…) given the particular importance of the protection the family enjoys under the Constitution (…), *primary protection against domestic violence is provided through civil law, while protection by criminal law is subsidiary,* particularly owing to the nature of the marital and family relations that belong to the private sphere of an individual, and thus render criminal law limited only to cases where other types of protection do not suffice'.

In the case of Už-1823/2017, the Constitutional Court interprets the right to inviolability of physical and mental integrity (Art. 25 of the Constitution) as an absolute right (*jus cogens*).

> 'The Constitutional Court initially finds that the right to inviolability of physical and mental integrity (…) constitutes an absolute right (*jus cogens*) and that by its substantive aspect, this right represents one of the fundamental values of a democratic society'.

1/B/b. The interpretation on the basis of legal principles enshrined in the Constitution means, in a practical sense, determining a more specific legal meaning of an abstract principle, be it by the Constitutional Court determining either what it is, namely, what it encompasses, or what it does not encompass. This closer determination is not only valid in the circumstances of a particular case but also applies to all other cases of human rights protection, regardless of their different facts and circumstances.

The Constitution of Serbia contains principles of law, mainly in the matter of criminal law (*res iudicata, in dubio pro reo, nullum crimen*, *nulla poena sine lege,* etc.). The interpretation on the basis of legal principles was identified in few of the judgments analyzed. In the case of Už-5057/2015, the Constitutional Court decided whether the principle of *ne bis in idem* was violated, while also applying in its argumentation the principle of *res iudicata*.

> 'Starting from the position that Art. 34 (4) of the Constitution aims to bar repetition of the proceedings ended by a decision having acquired the status *of res iudicata* and that the Constitutional Court established that the complainant had his charges initially dismissed, and, accordingly, that after the judgment of the Basic Court (…) had become final he was declared guilty of the crime referring to the same behavior and including essentially the same facts, the Constitutional Court concluded that the disputed judgments led to violation of the principle of *ne bis in idem*'.

In the case of Už-7676/2015, the Constitutional Court interprets the basic principle and starting point of human rights protection in all democratic constitutions—the prohibition of discrimination.

> 'The Constitutional Court notes that the provision of Art. 21 of the Constitution (prohibition of discrimination) does not guarantee any particular right or freedom but establishes the *prohibition of a discrimination principle,* under which all guaranteed rights and freedoms are exercised, therefore the violation of which is of accessory nature, meaning that *it can occur solely in conjunction with an established violation or denial of a particular right or freedom (…)'.*

In the case of Už-775/2009, the Constitutional Court defines the elements of the notion of a reasonable duration of a judicial proceeding in connection with the constitutional right to a fair trial (Art. 32 of the Constitution).

> '(…) the notion of a reasonable duration of a judicial proceeding (is) *a relative category dependent on a range of factors, and primarily the complexity of legal issues and the state of facts in a particular dispute, complainant's behavior, conduct by courts conducting the proceeding, as well as the relevance of the stated right to the complainant* (…)'.

2.2.2. Logical (linguistic-logical) arguments (2)

In the processed practice of the Constitutional Court, a logical (linguistic-logical) arguments, *argumentum a contrario* (2/D), was found in two decisions.

> '(…) the essence and aim of constitutional guarantee for the prohibition on lowering the attained level of human and minority rights lies in the peculiar self-restriction of a constitution-maker to the effect that even the changes to the supreme legal act cannot suspend some formerly guaranteed right or freedom. In the Court's view, this *a contrario* means that the legally prescribed manner of exercising a constitutionally guaranteed human or minority right or freedom cannot be regarded as the acquired right (…)' (IUz-48/2016).

2.2.3. Domestic systemic arguments (3)

3/A. The contextual interpretation in a narrow and/or broad sense is present in all the judgments subject to consideration in this text. Herewith, the Constitutional Court determines the meaning of a single constitutional norm (what it is or is not) through other constitutional norms, using their mutual relationship. Thus, applying the contextual interpretation in the broad sense leads to a more precise meaning of a particular constitutional provision. The Constitutional Court, in the cases of Už-367/2016, Už-1202/2016, Už-7676/2016, determined more closely the meaning and domain of application of the norm guaranteeing the right to the peaceful enjoyment of property, wielding the contextual interpretation in a broad sense.

> 'The Constitutional Court finds that the Constitution, in the first para. of Art. 58, guarantees the peaceful enjoyment of one's possessions and other property rights acquired by law. The Court further finds that the *right to property is not an absolute right, given that the Constitution, in the second para. of Art. 58, allows for deprivation or restriction of property rights*. Whether (…) depriving or restricting property rights is in line with guarantees established in the provision of Art. 58 of the Constitution must be assessed in each concrete case' (Už-367/2016).
>
> 'In reference to the cited violation of the right to human dignity (Art. 23 of the Constitution), the Constitutional Court emphasizes that guarantees from Art. 23 of the Constitution constitute fundamental values of a democratic society. In this context, the Court points that the Constitution, in the provision of Art. 25 (inviolability of physical and mental integrity), absolutely forbids torture, inhuman, or degrading treatment or punishment *and that at the core of degrading treatment lies violation of human dignity* (…)' (Už-7676/2016).

A contextual interpretation in a narrow sense is rare in the Constitutional Court practice in general, and hence in the decisions analyzed here. This interpretation defines the meaning of a particular human right from the Constitution without

references to other constitutional provisions. The meaning of a human right is established according to its own sense or, simply, the placement of that right in the Constitution or a part of it. This way of determining a more specific meaning of a human right also applies to closer defining that right's protection (as an element of that right), or specifically, what that protection entails (positive definition) or does not entail (negative definition).

In the case of Už-10061/2012, all the various types of conduct with potential to lead to violation of the right to a fair trial were established without the Court making references to other constitutional norms or its previous practice.

> 'The Constitutional Court finds that *any random and arbitrary application of the substantive or procedural law* to the detriment of the complainant can lead to *violation of the constitutionally guaranteed right to a fair trial*'.

Interestingly, in one of the selected cases, No. 1823/2017, in a single legal position, the Constitutional Court applied the contextual interpretation both in a narrow and in a broad sense, in that it interpreted violation of the right to inviolability of physical and mental integrity (Art. 25 of the Constitution) by relating it to the provisions of that article governing the prohibition of degrading treatment (a narrow sense), while interpreting the right to human treatment of a person deprived of liberty (Art. 28 of the Constitution) according to the provisions of Art. 25 of the Constitution (a broad sense).

> 'Starting from the point that guarantees in Art. 25 (inviolability of physical and mental integrity) and Art. 28 (treatment of a person deprived of liberty) of the Constitution constitute fundamental values of a democratic society, that the Constitution in the provisions of Art. 25 absolutely forbids torture, inhuman, or degrading treatment or punishment, and that at the core of degrading treatment lies violation of the human dignity protected by the provisions of Art. 28 of the Constitution, *the Constitutional Court has weighed the violations of rights from Arts. 25 and 28 of the Constitution against the stated violation of the right to inviolability of physical and mental integrity guaranteed by the provisions of Art. 25 of the Constitution'.*

3/B. The interpretation of constitutional norms on the basis of domestic statutory law is quite common in the Constitutional Court's decision-making on constitutional complaints. In many of the studied cases, the Constitutional Court also analyses the statutory law concerning a particular human right guaranteed by the Constitution. This method is frequent and necessary because a constitutional norm is further elaborated and made concrete by a legal provision governing the same issue (a human right). A statutory law, in fact, helps to apply an abstract constitutional norm in a particular case. The latter refers to both the constitutional principles aimed at human rights protection and the concrete human rights guaranteed by the Constitution.

In case no. Už-10061/2012, relating to the constitutionally guaranteed prohibition of discrimination, the Constitutional Court has established, by invoking the law, the requirements that must be met to award compensation for damage on the basis of discrimination.

> '(…) the complainant sought compensation for pecuniary and non-pecuniary damages allegedly caused to him by discrimination against him by the defendant. The Constitutional Court assesses that *neither the Anti-Discrimination Act nor the Act on the Prohibition of Discrimination of Persons with Disabilities contains specific rules on the notion of damage, types of damages, or a causal link between discriminatory act and damage, but in these respects apply the generally applicable provisions of the Contract and Torts Act*. This means that any discriminatory tort that causes specific damage directly creates liability for the damage. Therefore, the act by a discriminating party must be the cause of damage, and the discriminating party guilty of it, which is not the case here'.

3/C. The interpretation of the Constitution on the basis of case law of the Constitutional Court is a method commonly practised by the Court. It is much rarer than the interpretation of the Constitution in the light of the case law of ECtHR and the provisions of international conventions (primarily the ECHR). Moreover, even when the Constitutional Court invokes its previous practice (whether the specific previous decisions or abstract norms), the basis of those decisions is either in an international law norm or an ECtHR decision.

3/C/a. In the case of Už-1823/2017, the Constitutional Court refers to its specific decision as precedent, which, however, has as a basis a norm of international law (UN Convention) and the case law of ECtHR, when determining the meaning of terms within the inviolability of physical and mental integrity (Art. 25 of the Constitution).

> 'The Constitutional Court has, *in its earlier decisions (see the Constitutional Court Decision No. Už-4100/2011, item 5 of the Reasoning Statement), guided by the definition of torture from the UN Convention, as well as the ECtHR case law and autonomous concepts developed by that court,* defined the meaning of terms from Art. 25 of the Constitution, pointing to the distinction between the notions of torture, inhuman, or degrading treatment or punishing and found (…)'.

3/C/b. A specific reference to the 'practice' of the Constitutional Court is found in the case of Už-5057/2015, being reflected in the Court citing one of its previous decisions, but with it the ECtHR case law as well, thereby in fact reinforcing the reference to its previous practice.

> 'Reviewing the alleged violation of the principle of *ne bis in idem* (…), the Constitutional Court reminds that, *observing the ECtHR case law, in its Decision No. Už-1285/12,*

of 26 March 2014, it set the criteria according to which it assesses whether the violation has occurred of the right from Art. 34 (4) of the Constitution (*ne bis in idem),* namely: (…)'.

3/C/c. The Constitutional Court has made references to its own judicial practice in a general manner, for example, in its Decision No. Už-367/2016, when it invoked the guarantees of the right to a fair trial.

'The Constitutional Court points *that in its multiple decisions*, with the basis in the case law of the European Court of Human Rights, *it had established the guarantees of the right to a fair trial*'.

It is further stated what those guarantees include, without citing the specific previous decisions of the Constitutional Court that served as precedents: 'one particular guarantee of the right to a fair trial refers to the court's obligation to reason its decision (…). To assess whether in those cases the standards of the right to a fair trial have been met, it is necessary to consider whether the court of recourse has examined the decisive issues presented before it or has simply been satisfied by the mere affirmation of the lower court's decision'.

In the case of Už-10061/2012, the Constitutional Court makes general references to its previous practice in its determinations of what, regarding the content, the constitutionally guaranteed right to a fair trial includes.

'(…) in terms of the content of the constitutionally guaranteed right to a fair trial from para. 1 of Art. 32 of the Constitution, *the Constitutional Court points to its previously taken position* that it is not competent to review the conclusions and assessments made by ordinary courts regarding the established facts and application of law in the proceeding conducted to decide on the rights and obligations of the complainant'.

In the case of Už-10061/2017, the Constitutional Court refers to its previous case law, specifically an abstract norm, without explicitly citing its decision.

'Reviewing the presented reasons and allegations in the constitutional complaint in terms of the content of the constitutionally guaranteed right to a fair trial from Art. 32 (1) of the Constitution, the Constitutional Court *points to its previously taken position* that it is not competent to review the conclusions and assessments made by ordinary courts regarding the established facts and application of law in the proceeding conducted (…)'.

3/D/b. Interpretation by referring to individual court decisions is found in four examples from the studied Constitutional Court case law. In the case of Už-10061/2012, the Constitutional Court interprets the constitutionally guaranteed prohibition of discrimination according to the view of the Supreme Court of Cassation.

> 'The Constitutional Court points to the *provisions of Art. 21 of the Constitution* establishing that all are equal before the Constitution and law, that everyone has the right to equal legal protection, without discrimination, and that *any discrimination is prohibited*, direct or indirect (…). *The forms of discrimination against persons with disabilities—indirect and direct discrimination, are expressly explained by the Supreme Court of Cassation in its contested judgment* (Rev. 746/12)' (Už-10061/2012).

In the next example (Už-11707/2017), the Constitutional Court interprets the *right to a limited duration of detention* by way of establishing that there has been no violation of the constitutionally guaranteed rights to liberty and to limited duration of detention since the Higher Court in Belgrade—Special Department (…) found, *in constitutionally and legally acceptable manner, that in the concrete case, the ground (…) for extending the detention measure fell away* (prohibition on leaving the house, with the use of electronic surveillance).

Interpretations referring to the case law of ordinary courts (3/D/a) and interpretations by reference to abstract judicial norms (3/D/c) have not been found in the analyzed sample of judgments of the Constitutional Court.

3/E. The Constitutional Court referred to an act issued by a special body, UNHCR, which, although impossible to be categorized as a state organ, has been considered in the Constitutional Court's decision-making. Namely, deciding on the effectiveness of remedy regarding the right to asylum, in the case of Už-5331/2012, the Constitutional Court referred to the UNHCR act relating to the Republic of Serbia. This method was used to interpret the constitutional right to asylum (Art. 57 of the Constitution).

The Constitutional Court holds that *also relevant to the assessment of the effectiveness of remedies in the asylum seeking procedure is the practical implementation of the legal principles* (Arts. 7–18 of the Asylum Act). *'Attesting to this view are the data from the 'Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in the Republic of Serbia',* UNHCR, August 2012, according to which asylum-seekers (…) are provided with information on their rights and duties, and primarily the rights to stay, free interpretation assistance, legal aid (…), observance of the principles of anti-discrimination, preservation of family unity, gender equality, care for persons with special needs, and freedom of movement'.

In the same case, the Constitutional Court further refers to the established position of the Council of Europe's Parliamentary Assembly (Resolution No. 1471/2005) that 'the effective remedy in the matter of removal of foreign nationals means the right to appeal a negative decision and the right to suspend the enforcement of the imposed measure of removal until the domestic authorities make a decision on its compatibility with the Convention'.

As an example of the interpretation on the basis of normative acts of other domestic state organs there is case Už-3238/2011, in which the Court interpreted a right to respect for private and family life in regard to one legal issued by the municipality administration.

2.2.4. External systemic and comparative law arguments (4)

In the group of analyzed Constitutional Court decisions, referring to the provisions of international agreements, particularly those of the ECtHR, is quite common, whereby references made solely to the ECtHR case law (without referring to the provisions of ECHR) can be considered more frequent. When in its reasoning the Court refers to the ECHR provisions, it most often does so in parallel with its referring to the appropriate provision of the Constitution protecting the same human right. However, there are some human rights in the Constitution that are not at the same time contained in the ECHR, and vice versa. In this context, the Constitutional Court can practically expand the meaning of a human right guaranteed by the Constitution to include the one contained in the ECHR but not also in the Constitution, provided that they both documents protect similar values.

4/A. One example of the interpretation of fundamental rights on the basis of international treaties, especially ECHR, in the Constitutional Court case law, is its Decision No. Už-3238/2011 (the right to change gender), which, relying on the right to private life contained in the ECHR, expands and interprets the content of the constitutional right to dignity and free development of personality.

> 'The Constitution, in Art. 23, guarantees the inviolability of human dignity (…) and the right of every person to free development of personality (…). The Constitutional Court finds that free development of a person and one's personal dignity primarily refer to establishing and freely developing one's physical, mental, emotional, and social life and identity. *Although the Constitution lacks an explicit provision on the respect for the right to private life, in the Court's view, this right is an integral part of the constitutional right to dignity and free development of personality. Conversely, the European Convention makes a provision in the first para. of Art. 8 for the right of every person to respect for their private life'.* Further, the Constitutional Court found that 'the sphere of private life of a person undoubtedly includes, among others, his/her sexual affiliation (…)'.

Constitutional Court Decision No. Už-4395/2017 (parental rights) is another illustrative example of the interpretation of fundamental rights on the basis of international treaties in that in making a decision in the present case, besides the constitutional provision on the rights and duties of parents (Art. 65 of the Constitution), the ECHR provision aimed at protecting the same types of values was also applied.

> 'Also relevant in this constitutional judicial matter is Art. 8 of the European Convention (…) establishing that: *everyone has the right to respect for his private and family life*, home, and correspondence (para. 1); public authorities will not interfere with the exercise of this right except where such interference is lawful and necessary in a democratic society in the interests of national security, public safety, or economic

well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or *for the protection of the rights and freedoms of others* (para. 2)'.

The Constitutional Court further interprets Art. 8 of the ECHR, while also referring to the ECtHR case law, by ascribing to it a meaning that more closely relates it to the constitutional rights of parents (Art. 65 of the Constitution):

'Art. 8 of the European Convention *also requires an active role of parents* in procedures concerning children, with a view to achieving the protection of their interests. In a situation requiring the enforcement of a judicial decision, also to be considered is the *behavior of the parent* seeking enforcement, bearing in mind that it constitutes an equally important factor as the behavior of the court itself'.

4/B. In the analyzed Constitutional Court decisions, the interpretation of fundamental rights on the basis of judicial practice of international courts is most common in this analysis. In its human rights protection practice, the Constitutional Court refers to the established positions of the ECtHR and accepts them as precedent law, which means that in all analyzed cases of protection of human rights guaranteed by the ECHR and decided by the ECtHR, the Constitutional Court adopted the ECtHR's opinion and incorporated it into its decision. Even when rendering different decisions in cases with identical factual circumstances, the Constitutional Court made references to the ECtHR case law in each of them. This suggests that referral by the Constitutional Court to an ECtHR case is not always possible to assess as being based on the merits and substance; the reasons can also be of formal nature, just to quantitatively strengthen the legal arguments. References to the ECtHR case law are found where the Constitutional Court applies substantive law, and much more rarely where it rules on some procedural issues. The ECtHR practice is adopted in respect of constitutional complaint cases of criminal law and civil law nature, and from the areas of misdemeanor law and administrative law (classification by the Constitutional Court). Also typical of the analyzed Constitutional Court decisions is that each of them cites several ECtHR decisions, whether on the same issue or argument (likely to indicate the firmness of the ECtHR's position), while there has also been a practice of a single case containing references to the ECtHR views on different issues—various human rights and substantive and procedural law, and therefore on all issues the Constitutional Court decides in a particular case.

The analyzed cases concerning the protection of property rights, Už-367/2016 and Už-5214/2016, are precisely where we have the paradox of the Constitutional Court referring in both instances to the ECtHR judgments while deciding them differently, thus modifying its practice, although, factually and legally, it concerns the protection of the same human right.

The Constitutional Court assessed (Už-367/2016) the complete confiscation of the object of the offence, together with the imposed fine, as posing an excessive burden on the complainant, and the said protective measure (money seizure), as a measure aimed at protecting the public interest, as disproportionate to the protection of the complainant's right to the peaceful enjoyment of property. Examining whether, in the present case, a fair balance was struck between the public interest and that of the individual whose possessions were being confiscated, the Constitutional Court referred to several ECtHR judgments, including, among others, judgments in the cases: *Ismayilov v. Russia*, of 6 November 2008, para. 38; *Gabrić v. Croatia*, of 5 February 2009, para. 39; *Grifhorst v. France*, of 26 February 2009, para. 94; *Boljević v. Croatia*, of 31 January 2017, para. 41.

The conflicting decision was issued in the case of Už-5214/2016 although in determining, in this case, whether a fair balance was struck between the public interest and the interest of the individual whose possessions were confiscated, the Constitutional Court referred to the same ECtHR judgments (*Ismayilov v. Russia*; *Gabrić v. Croatia*; *Grifhorst v. France*; *Boljević v. Croatia*). The Court assessed that with imposing a fine, in the present case, the purpose of misdemeanor sanctions was attained and with the measure to confiscate the object of the offence (EUR 19,000) the purpose of imposing protective measures. Therefore, proportionality between sanctioning the infringement of the public interest reflected in bringing in the undeclared money (EUR 19,000) and the constitutionally guaranteed right of an individual to the peaceful enjoyment of property was not upset.

One particular form of interpretation of fundamental rights on the basis of the judicial practice of international courts is the Constitutional Court's making general references to the ECtHR case law without citing concrete decisions. Thus, in the case of Už-5214/2016, it is stated that the Constitutional Court, 'in making its decision*, considered the decisions of the European Court of Human Rights* but found that circumstances of this case differed from those of the *cases in which the same were rendered*, in that the complainant was indisputably aware of the duty to declare the money (…)'.

In the analyzed Constitutional Court decisions, we further find one reference to the European Court of Justice (ECJ). Being an exception, it only confirms the rule that international judicial practice, as the source of the established positions of the Constitutional Court in the matter of human rights, actually reduces to the ECtHR case law. Moreover, even in the concrete decision, Už-5057/2015, the Constitutional Court implicitly refers to the ECJ case law, invoking the ECtHR decision without closer identification of the ECJ case law.

> 'Examining (…) the existence (…) of the identity of the criminal offences of which the complainant was found guilty in the misdemeanor and criminal proceedings (*idem*), the Constitutional Court notes that the ECtHR, *observing the ECJ case law*, in the judgment (…) in *Zolotukhin v. Russia,* No. 14939.03, of 10 February 2007, paras.

79–81, assessed that *ne bis in idem* 'means prohibiting prosecution or trial against a person for the second offence (…)'.

As an illustration of other external sources of interpretation (4/D), we cite the decision of the Constitutional Court in case no. IUo-42/2020, in which the Constitutional Court even refers to the Report of the European Commission of Human Rights (dissolved 1998) in the 'Greek case' (4. October 1968), which contains a definition of 'public danger'.

2.2.5. Teleological interpretation (5)

5. Teleological (goal-based) interpretation of a legal norm is used in tandem with other legal methods for the norm to be applied correctly in a particular case. A constitutional norm usually does not have a stated goal it aims to achieve; the goal, and thus purpose of the norm, is identified by interpreting, primarily, the respective constitutional principles, but also other constitutional norms. Usually the goal of a constitutional norm is not explicit, in which case we must interpret the Constitution as a whole (or most important norms) to discover it. The Constitutional Court can use this method in interpreting what the goal is not only of a concrete constitutional norm but also of some other legal institution not necessarily contained in the Constitution. Thus, in the case of Už-1202/2016, the Court establishes what a protective measure means, notably through the goal aimed to be achieved by its imposing.

'Therefore, the Constitutional Court assessed that confiscation of the object of the offence in its entirety, together with the imposed fine, posed an excessive burden on the complainant, and that, accordingly, the imposed *protective measure, as a measure aimed at protecting the public interest,* was not proportionate to the protection of the complainant's right to the peaceful enjoyment of property'.

The case of Už-1823/2017 is another example where the Constitutional Court's position is not presented according to the goal and purpose of the Constitution as 'a document for the future' but the meaning of the constitutional concept—degrading treatment or punishment (Art. 25 of the Constitution)—is interpreted pursuant to the aim of this form of abuse.

'(…) when it comes to degrading treatment or punishment, the Court found *that this form of abuse requires the existence of an aim to degrade a particular person*, so it concerns a treatment that creates in a victim the feelings of fear, anguish, and inferiority'.

2.2.6. Historical / subjective teleological interpretation (6)

In the processed practice of the Constitutional Court no examples were found of historical/subjective teleological interpretation.

2.2.7. Arguments based on jurisprudence / scholarly works (7)

Among the considered Constitutional Court decisions on constitutional complaints, no instances are found of using arguments based on scholarly works. Nevertheless, an example demonstrating the Constitutional Court's practice of also invoking jurisprudence or scholarly works is the Constitutional Court decision, IUo-42/2020 on constitutionality and legality of the Decision on declaring the state of emergency during the COVID-19 epidemic, which undoubtedly affected fundamental human rights by its being the basis for their restriction (freedom of movement, freedom of religion, and other rights).

The Constitutional Court dismissed the initiatives to institute the review of the decision of state of emergency but nevertheless indulged judging on merits, thereby referring to the scholarly works regarding the decision to declare the state of emergency. The Constitutional basis for the decision on the state of emergency is the 'necessity, understood as the supreme need to safeguard the constitution and, therefore, also the source allowing the acceptance of regulations derogating from the formal constitutional text but aimed at preserving the essence of the constitution' (see Giuseppe De Vergottini, *Diritto constituzionale comparato*, Belgrade 2015, 403).

2.2.8. Interpretation in light of general legal principles (8)

In the processual practice of the Constitutional Court no interpretations were found in light of general legal principles.

2.2.9. Substantive interpretation / non-legal arguments (9)

In the selected decisions of the Serbian Constitutional Court, non-legal arguments were identified in decision no. IUo-42/2020, where they were deployed two times in total. Both non-legal arguments relate to the epidemic disease of COVID-19.

> '(…) The Constitutional Court finds that the *outbreak of the infectious disease COVID-19 and the threat of its uncontrolled spread (…) could be considered as a danger significantly jeopardizing* the health of the general population, thus calling into question the normal course of life in the country (…), and particularly the health system'.
> '(…) The Constitutional Court assesses that the infectious disease COVID-19 could be considered 'a public danger threatening the survival of the state or its citizens', within the meaning of Art. 200 (1) of the Constitution'.

I Table of frequency (in how many decisions) and weight (frequency of use) of arguments and methods of interpretation

Methods			Frequency (in how many decisions)	Weight (frequency of use)	%	Sum
1	1/A	a)	8	15	5%	43(15%)
		b)	0	0	0%	
	1/B	a)	14	18	6%	
		b)	8	10	3%	
	1/C		0	0	0%	
2	2/A		0	0	0%	2(1%)
	2/B		0	0	0%	
	2/C		0	0	0%	
	2/D		2	2	1%	
	2/E		0	0	0%	
	2/F		0	0	0%	
3	3/A		20	28	9%	97(32%)
	3/B		11	42	13%	
	3/C	a)	10	10	4%	
		b)	2	2	1%	
		c)	2	2	1%	
	3/D	a)	0	0	0%	
		b)	4	4	2%	
		c)	0	0	0%	
	3/E		4	4	2%	
4	4/A		12	20	7%	134(45%)
	4/B		30	112	37%	
	4/C		0	0	0%	
	4/D		2	2	1%	
5			14	18	6%	18(6%)
6	6/A		0	0	0	0(0%)
	6/B		0	0	0	
	6/C		0	0	0	
	6/D		0	0	0	
7			1	1	1%	1(1%)
8			0	0	0%	0(0%)
9			2	2	1%	2(1%)

Legend:

1. Grammatical (textual) interpretation
- *1/A. Interpretation based on ordinary meaning*
  - a) Semantic interpretation
  - b) Syntactic interpretation
- *1/B. Legal professional (dogmatic/doctrinal) interpretation*:
  - a) Simple conceptual dogmatic/doctrinal interpretation
  - b) Interpretation on the basis of legal principles
- 1/C. O*ther professional interpretation*

2. Logical (linguistic-logical) arguments
- *2/A. Argumentum a minore ad maius*
- *2/B. Argumentum a maiore ad minus*
- *2/C. Argumentum ad absurdum*
- *2/D. Argumentum a contrario / arguments from silence*
- *2/E. Argumentum a simili and, within it, analogy*
- *2/F. Interpretation according to other logical maxims*

3. Domestic systemic arguments
- 3/A. *Contextual interpretation, in a narrow and broad sense*
- *3/B. Interpretation of constitutional norms on the basis of domestic staturory law*
- *3/C. Interpretation of the constitution on the basis of case law of the Constitutional Court*
  - a) References to specific previous decisions of the Constitutional Court (as "precedents")
  - b) References to the "practice" of the Constitutional Court
  - c) References to abstract norms formed by the Constitutional Court (e.g., the rules of procedure)
- *3/D. Interpretation of the Constitution on the basis of the case law of ordinary courts*
  - a) Interpretation referring to the practice of ordinary courts (not of single case decisions)
  - b) Interpretation referring to individual court decisions (as "precedents" in the judiciary)
  - c) Interpretation referring to abstract judicial norms (directives, principled rulings, law unification decisions, etc.)
- *3/E. Interpretation of constitutional provisions and fundamental rights on the basis of normative acts of other domestic state organs*

4. External systemic and comparative law arguments:
- *4/A. Interpretation of fundamental rights on the basis of international treaties*
- *4/B. Interpretation of fundamental rights on the basis of individual case decisions or case law ('judicial' practice) of international fora.*
- *4/C. Comparative law arguments: e.g., references to norms or case decisions of a particular foreign legal system*
- *4/D. Other external sources of interpretation (e.g., customary international law, ius cogens, etc.)*

5. Teleological / objective teleological interpretation

6. Historical / subjective teleological interpretation (based on the *intention* of the constitution-maker):
- *6/A. Interpretation based on ministerial / proposer justification*
- *6/B. Interpretation based on draft material: references to travaux préparatoires / Materialen / and legislative history*
- *6/C. In general, references to the intention, will etc. of the constitution-maker*
- *6/D. Other reasons based on the circumstances of making or modifying/amending the constitution or the constitutional provision in question*

7. Arguments based on jurisprudence / scholarly works

8. Interpretation in light of general legal principles

9. Substantive interpretation / non-legal arguments

2.3. Decisive arguments

The general conclusion arising from the analyzed Constitutional Court judgments is that the arguments and interpretive methods deployed are not so diverse, but that the Constitutional Court (out of the nine major altogether) most often used just a few. As for decisive arguments, it is possible to recognize the decisive argument or arguments in each decision, but when it comes to others that should 'strengthen' the decisive argumentation—the defining, strengthening, and illustrative arguments—there were either none or few. Additionally, the reasonings of Constitutional Court decisions are articulated in a way not making it easy to distinguish these 'auxiliary' arguments from each other.

What is certain about the decisive argument, which we find in all Constitutional Court decisions, is its automatically being taken over from the cited ECtHR decisions. This means that a concrete decisive argument in the Constitutional Court decision-making is, in fact, the argument and the established position of the ECtHR. Another practice is that of using the ECtHR positions repeatedly in the reasonings of the Constitutional Court decisions, which means that even when presenting its views on issues not crucial for the final decision but merely ancillary thereto, the Constitutional Court still refers to the ECtHR established positions.

If a decision to protect a specific right depends on multiple preconditions constituting a complex structure of the decisive argument (as in the examples of property right protection), in assessing whether those necessary conditions are met, the Constitutional is also guided by established ECtHR positions. Where the Constitutional Court, however, cites some of the defining, strengthening, or illustrative arguments to bolster the decisive argument, the ECtHR case law, again, constitutes the most common source. Matters become more complex when the Court decides on multiple issues (seeking protection for more than one human right) in a single decision, in respect of which it then for each presents decisive arguments that differ from one another. In these examples, each of these specific decisive arguments can be supported by various defining, strengthening, or illustrative arguments.

This is not to mention that in judgments determining issues in respect of which the Constitutional Court had already invoked the ECtHR case law, the same references to the ECtHR decisions and positions are repeated, or specifically, the same arguments are cited over and over. The same is true of the decisive arguments cited in the previous Constitutional Court practice.

The issue of detecting decisive arguments in a concrete Court's case is easier in respect of less complex cases where, as a rule, there exists but one such argument. It also means that the given argument has a legal strength to the extent of making it unnecessary for the Constitutional Court to establish some additional arguments in its support (defining, strengthening, or illustrative). For a decision in such a case, they are not necessary or just, in the circumstances of that factual and legal state, not even possible to find.

Among the considered Constitutional Court judgments, the most used decisive arguments are grammatical interpretation as a legal professional (dogmatic) interpretation, domestic systemic arguments, and interpretation based on the judicial practice of ECtHR.

Dogmatic interpretation (1/B) was used 24 times in the examined decisions and in 10% of them we can assess it to be a decisive argument. Other methods in this group (1. grammatical or textual interpretations) used by the Constitutional Court did not have the capacity of a decisive argument for its concrete decision.

The Constitutional Court uses contextual interpretation in a broad sense (3/A) as a decisive argument in a way that it determines the real meaning of a constitutional norm by referring to other constitutional provisions. It occurs on 28 occasions, representing 5% of all cases with identified decisive arguments. Another two methods in this group (3. domestic systemic arguments) are identified as decisive arguments in a similar or smaller percentage 3/B—5%, 3/E—3%. Those methods in this group (no. 3) also bolster the decisive arguments or constitute illustrations of no specific significance.

In the analyzed cases, the most common decisive arguments are the views presented in the ECtHR decisions (4/B. interpretation of fundamental rights on the basis of judicial practice of international courts). Conversely, the utilized interpretation of fundamental rights on the basis of international treaties (4/B) does not in fact constitute a decisive argument but serves as illustrative arguments. Interpretation of fundamental rights on the basis of the judicial practice of the ECtHR occurs 112 times, representing more than 50% of all cases with identified decisive arguments.

Finally, teleological interpretation (no. 5) was identified as a decisive argument in 17% of all cases, and logical arguments (no. 2) were identified as decisive arguments in 2% of all cases with identified decisive arguments.

Other methods of interpretation (6. historical interpretation, 7. arguments based on jurisprudence or scholarly works, 8. interpretation in the light of general legal principles, and 9. substantive interpretation/non-legal arguments) were not identified as decisive arguments or were not identified at all. These methods we mainly find serving as strengthening and illustrative arguments.

II Table of decisive arguments and methods of interpretation

Methods			Frequency (in how many decisions)	Weight (frequency of use)	%	Sum
1	1/A	a)	0	0	5%	8(10%)
		b)	0	0	0%	
	1/B	a)	4	4	5%	
		b)	4	4	5%	
	1/C		0	0	0%	

Methods			Frequency (in how many decisions)	Weight (frequency of use)	%	Sum
2	2/A		0	0	0%	2(2%)
	2/B		0	0	0%	
	2/C		0	0	0%	
	2/D		2	2	2%	
	2/E		0	0	0%	
	2/F		0	0	0%	
3	3/A		4	4	5%	9(12%)
	3/B		4	4	5%	
	3/C	a)	0	0	0%	
		b)	0	0	0%	
		c)	0	0	0%	
	3/D	a)	0	0	0%	
		b)	0	0	0%	
		c)	0	0	0%	
	3/E		1	1	2%	
4	4/A		0	0	0%	43(59%)
	4/B		16	43	59%	
	4/C		0	0	0%	
	4/D		0	0	0%	
5			9	12	17%	11(17%)
6	6/A		0	0	0	0(0%)
	6/B		0	0	0	
	6/C		0	0	0	
	6/D		0	0	0	
7			0	0	0	0(0%)
8			0	0	0%	0(0%)
9			0	0	0	0(0%)

2.4. Concluding remarks on the characteristics of the decision-making of the Constitutional Court

From the examined body of work of the Constitutional Court of Serbia, it is possible to make several concluding remarks on the characteristics of its decision-making in the field of human rights protection. Deciding on constitutional complaints, the Constitutional Court usually deploys several different arguments and methods of legal interpretation. We can divide them into those frequently used (external systemic and comparative law arguments and domestic arguments) and other

arguments and methods (under the research design) found to either never have been used in decision-making or used only sparsely.

Pursuant to the general goal of this research, we can proceed from the external systemic and comparative law arguments (no. 4). This group of arguments is present in all Constitutional Court decisions used as the research sample. However, not all forms of arguments within this group are equally represented. Moreover, this analysis found no comparative law arguments and other external sources of interpretations (no. 4/C and 4/D). In contrast, in all the analyzed decisions, the Constitutional Court used the interpretation of fundamental rights on the basis of the judicial practice of international courts.

As for the practice of international courts, the Constitutional Court actually completely relies on the ECtHR case law, with only a single case found containing a reference, an implicit one, to the ECJ case law. References to the practice and approaches of international courts were found in all the selected Constitutional Court decisions, whereby the Court in a single case typically cites several (similar) ECtHR judgments in respect of multiple questions of law that it considers in its decision. Of the total applied arguments and methods, the judicial practice of international courts makes up 37%. Less than 1% of these arguments refer to the ECJ case law (in the case of Už-5057/2018, it cited both the ECtHR and ECJ case law), while the remaining part relates to the references to ECtHR cases. There is only one analyzed judgment where the Constitutional Court diverges in its decision from the ECtHR practice, namely, the ECtHR approach served as a non-binding illustrative example.

Against the background of these data, we conclude that the ECtHR represents to some extent the supreme legal authority for the Constitutional Court when it comes to human rights protection. While this practice can be criticized in terms of independence and autonomy in the work of the Constitutional Court, it must be noted that the Court herewith demonstrates opportune behavior—by adopting the ECtHR approaches in its decision-making, it avoids its decisions being overturned upon application to ECtHR.

Other methods frequently used by the Constitutional Court in its decision-making relate to the domestic law—domestic systemic arguments (no. 3). These arguments are identified in all the analyzed Constitutional Court decisions and make up 35% in the total methods and arguments identified (nos. 1–9 of the research design). Nowhere within this group of arguments and methods has there been equal representation of the subgroups of arguments and methods (no. 3/A-E). Between them, the contextual interpretation in a broad sense (3/A) is found in 20 Constitutional Court decisions, accounting for 9% of the total arguments and methods used within this group (3). Also used here is the interpretation of the constitution on the basis of case law of the Constitutional Court (3/C), accounting for 6%, and interpretation of the constitution on the basis of domestic statutory law (3/B), 13%; while other methods are used less often: interpretation of the constitution on the basis of the case law of ordinary courts (3/D), 2%; and interpretation of the constitution on the basis of other domestic normative acts of state organ (3/E), 2 %. These statistics point to the

conclusion that the domestic systemic arguments constitute an inevitable method of interpretation in the work of the Constitutional Court and that, along with the judicial practice of international courts, they are decisive for its practice. It further suggests that by applying this method, the Constitutional Court defends, in some way, domestic law against international law (although they are mainly compatible). This method is also a symbol of some degree of autonomy of the Constitutional Court from the ECtHR.

The third group of applied arguments and methods covers grammatical (textual) interpretation (no. 1), within which the Constitutional Court is found to have used in the examined practice semantic interpretation (no. 1/A/a) in 5% of all arguments and methods and legal professional (dogmatic) interpretation (no. 1/B) in 9% of all arguments and methods. The research found no evidence of syntactic interpretations (no. 1/A/b) or other professional interpretations (no. 1/C). As with previous domestic systemic arguments, here too, it is possible to conclude that by applying this method, the Constitutional Court 'defends', though with less intensity, domestic from international law.

All the remaining arguments and methods used we classified in the last group. All those methods: interpretation based on non-legal arguments (no. 9), arguments based on scholarly works (no. 7), teleological interpretation (no. 5), and logical (no. 2), have rarely been applied in the studied practice of the Constitutional Court (except teleological interpretation), namely, in 1% (no. 9), in 1% (no. 7), in 6 % (no. 5), and in 1% (no. 2) of all arguments and methods. We conclude that the application of these methods represents an exception in the Constitutional Court practice, with two remarks to be made thereon. Arguments based on scholarly works are more common in the separate opinions of Constitutional Court judges, while teleological interpretation is rarely expressed explicitly (for example, 'the aim of the constitutional norm is to…'); rather, it is assumed that the legitimate aim is incorporated in other herewith applied arguments and methods. Also to be noted is that the interpretation based on non-legal arguments (no. 9) is found in the Constitutional Court decision, which, however, merely implicitly refers to the human rights matter.

In respect of other arguments and methods of which no evidence is found (no. 6, historical; and no. 8, interpretation in the light of general legal principles), it is impossible to conclude that the Court does not use them at all in the matter of human rights protection but that they have just not been found in the studied sample. This indicates that, even if they have been in use, they do not constitute the key arguments and methods in the work of the Constitutional Court, or specifically, that their application is generally rare and their significance marginal.

Finally, it is among the arguments and methods most often used in the studied practice of the Constitutional Court and previously classified in three groups that we find the decisive interpretative arguments. Of all of them, in its intensity and impact on the Constitutional Court the most important is interpretation on the basis of the judicial practice of the ECtHR.

3. The interpretation of fundamental rights in the case law of the European Court of Human Rights (ECtHR)

3.1 General remarks of the criteria for the selected judgments of the ECtHR and methods of interpretation

Following the analysis of the case law of the Constitutional Court of Serbia, and particularly that of the methods of interpretation, we will attempt to analyze, in a similar fashion, the case law of the ECtHR. The European Court judgments that are the subject of this analysis are essentially the exemplary judgments referred to by the Constitutional Court of Serbia. We have seen that when it comes to the case law of the Constitutional Court of Serbia, reference to the ECtHR case law is, in fact, the most common method applied by the Constitutional Court of Serbia. Given that the Constitutional Court of Serbia embraces the legal views of the ECtHR, we conclude that these two courts similarly (sometimes even identically) interpret regulations guaranteeing fundamental human rights. Decisions on the merits that protect those human rights attest to the same legal views held by the Constitutional Court of Serbia and the ECtHR. Hence, our initial hypothesis is that there are similarities in the case law of these two courts in respect of the methods of interpretation used, but that a complete overlap is not possible because the ECtHR represents, in a sense, a precedent court for the Constitutional Court of Serbia, which is certainly not true in reverse.

Another common feature is that both courts use many types of methods of interpretation. Those various methods of interpretation do not carry the same weight for every adjudication—merely some of them are crucial. The decisive interpretative arguments have not been the same in the case law of the Constitutional Court of Serbia and ECtHR.

The difference in the practice of the two courts is partly influenced by the fact that the ECtHR predominantly applies the provisions of the ECHR, while the primary source of law for the Constitutional Court of Serbia is the Serbian Constitution. While the articles on some human rights in the Constitution match for the most part those of the ECHR, some differences also occur. Although there is no causal link, the ECtHR also founds the legal basis for interpretation of the ECHR in the Vienna Convention of the Law of Treaties (1969). The Vienna Convention is allied because the ECtHR decided to use it. Use of the Vienna Convention for interpretation of the ECHR was not a consequence of the ECHR's provisions, but from the decision in one case by the ECtHR (Golder v. the United Kingdom, application no. 4451/70, judgment from 21 February 1975). Herewith, we will not analyze the methods of interpretation of the ECJ because the Constitutional Court of Serbia makes almost no references to its case law.

The analyzed judgments from the ECtHR case law (30) were selected for the primary reason that the Constitutional Court of Serbia quoted or simply cited them in its decisions. They include some judgments rendered against Serbia and more cases with proceedings conducted against other states. Some among these ECtHR judgments

can be regarded as leading or crucial, but, essentially, many of them are not so because they invoke previous ECtHR practice. The auxiliary criterion for the selection of these ECtHR judgments was that they must protect different human rights.

Also helpful in this effort to identify the methods of interpretation in ECtHR decisions was the fact that judgments of ECtHR have a clear and logical structure (with enumerated paragraphs), which is common to all judgments: composition of the Chamber, procedure, the facts (circumstances of the case and relevant domestic law), the law (arguments before the Court, the Court's assessment), and final decision. The structure of the decisions of the Constitutional Court of Serbia differs to some extent from that of the ECtHR decisions, but it too has its logical sequence, wherein it initially presents the factual situation, followed by the legal arguments and finally the decision.

3.1.1. Grammatical (textual) interpretation (1)

This type of interpretation has several subtypes but has not been widely used in the ECtHR case law, with a similar state of affairs being true of the case law of the Constitutional Court of Serbia. Moreover, textual interpretation does not fall in the group of decisive arguments in making a judgment.

Grammatical interpretation concerns the ordinary meaning (1/A) of a word, term, or phrase from the ECHR. This 'ordinary meaning' is also mentioned in the Vienna Convention; however, what should be stressed at this point is that the true meaning of a term is not reached by merely interpreting its ordinary meaning but by applying with it the contextual interpretation of the given provisions, necessarily interpreting their aim. In the analyzed judgments, no evidence was found of *syntactic interpretation* (1/A/b), but we do have the instances of semantic interpretation (1/A/a).

The Court determines the ordinary meaning of property (possession) by defining it as a nominal value in the concrete case. The *'possession' at issue in the present case was* an amount of money in US dollars which was confiscated from the applicant by a judicial decision' (*Ismailov v. Russia*, para. 29).

The Court determines the ordinary meaning of the term 'respect' (respect for the right to a private life): 'The Court recalls that the *notion of 'respect'* as understood in Art. 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities *may be wider than* that applied in other areas under the Convention' (*C. Goodwin v. U.K*, para. 72). The Court also determines the ordinary meaning of the term 'court' (*O. Volkov v. Ukraine*, para. 88) and 'private life' (*C. v. Belgium*, para. 25; *Denisov v. Ukraine*, paras. 95–97, 120).

Considerably more common than the interpretation based on ordinary meaning is the legal professional (dogmatic/doctrinal) interpretation (1/B), with both of its sub-forms: simple conceptual dogmatic/doctrinal interpretation (1/B/a) and interpretation on the basis of legal principles (1/B/b).

Simple conceptual dogmatic/doctrinal interpretation (1/B/a) was found to be in use in ECtHR practice, with the terms being given a legal meaning not matching their ordinary meaning. With the use of the simple conceptual dogmatic interpretation, a term may obtain either a narrower or a broader meaning than its ordinary meaning, and if those two differ, the Court attaches importance to the dogmatic interpretation relative to the ordinary meaning.

The Court has determined the content of the term 'freedom of expression' and how broad a meaning it can have without affecting one legal principle—the presumption of innocence: '*The freedom of expression*, guaranteed by Art. 10 of the Convention, includes the freedom to receive and impart information. Art. 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if *the presumption of innocence* is to be respected (*Karakaş and Yeşilirmak v. Turkey*, para. 50).

Another judgment determines the domain of the expression 'the state of evidence': 'The expression "the state of the evidence" could be understood to mean the existence and persistence of serious indications of guilt. Although in general these may be relevant factors, in the present case they cannot on their own justify the continuation of the detention complained of' (*Mansur v. Turkey*, para. 56).

The same judgment designates the notion of 'the reasonableness of the length of proceedings': 'The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct, and that of the competent authorities' (*Mansur v. Turkey*, para. 61).

We further give examples of decisions wherein the Court defines the notions of 'personal autonomy' (*C. Goodwin v. U.K*, para. 90), 'family life' (*V.A.M v. Serbia*, para. 130, 136), 'inhuman treatment' (*Van der Ven v. Netherlands*, para. 51), 'minimum level of severity' and 'degrading' (*Wieser v. Austria*, para. 35, 36), 'victim' (*Kačapor and others v. Serbia*, para. 88-91), 'effective investigation' (*Kolevi v. Bulgaria*, paras. 192–194). 'possession as a legitimate expectation' (*Agrokompleks v. Ukraine*, para. 166), 'independent and impartial tribunal' (*O. Volkov v. Ukraine*, paras. 103–108), 'arbitrary decision (*ultra vires*)': '(…) decisions where the authorities have a purely discretionary power to grant or refuse an advantage or privilege (…)' (*Denisov v. Ukraine*, para. 46), and 'legitimate aim' (*Baka v. Ukraine*, para. 156).

Rule of law should count (if it does at all) as a general legal principle (method 8)—this is so in the other chapters as well. (Or, if it seems more suitable, only as a key concept for the interpretation.)

Interpretation on the basis of legal principles (1/B/b) is also represented in the analyzed the ECtHR case law. Among the represented principles are the traditional general principles (from the Roman Law onwards), such as *non bis in idem* and the presumption of innocence. The rule of law that we find in some decisions is not an element of this sort of interpretation; it is, above all, a key concept for the interpretation at all. Then again, the ECtHR can also be said to have established by its case

law some legal principles to which it adheres in its practice and the meanings of which are defined in each given case (for example, the principle of proportionality).

In assessing which interest is at risk and which is to be protected, the Court applies the principle of proportionality (fair balance). This is the most used legal principle in the analyzed judgments. 'However, the Court considers that, in the present case, the comparative duration of the restriction in itself cannot be taken as the sole basis for determining whether a *fair balance* was struck between the general interest in the proper conduct of the criminal proceedings and the applicant's personal interest in enjoying freedom of movement. This issue must be assessed according to all the special features of the case. The restriction may be justified in a given case only if there are clear indications of a genuine *public interest which outweigh the individual's right* to freedom of movement.' In view of the above, the Court considers that the restriction on the applicant's freedom of movement for a period of five years and two months was *disproportionate*, particularly given that he was forced to stay for all that period in a foreign country and was not allowed to leave even for a short period of time (Miazdzyk v. Poland, paras. 35, 41). Moreover, the Court also gives a negative definition of the principle of proportionality in a concrete case, namely that it cannot be consistent with proportionality: '(…) the Court of Justice of the European Union held that a fine equivalent to 60 % of the amount of undeclared cash did not seem to be proportionate' (*Boljević v. Croatia*, para. 21).

> 'The Court reiterates in the first place that the presumption of innocence enshrined in para. 2 of Art. 6 is one of the elements of a fair trial that is required by para. 1. The *presumption of innocence* will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty' (*Karakaş and Yeşilirmak v. Turkey*, para. 49).

The ECtHR acts in observance of the principle of equity when it admits applications and adjudges compensations for damages: 'making its assessment on an *equitable basis*, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on it' (*Ismailov v. Russia*, para. 45).

In the analyzed the ECtHR judgments, as an example of other professional interpretations (1/C), we marked the construing of the appropriate default interest level in the concrete case. Thus, the ECtHR 'considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points' (*Ismailov v. Russia*, para. 47).

3.1.2. Logical arguments in the practice of the ECtHR (2)

Logical interpretation (2) is little represented in the analyzed ECtHR decisions (CC of Serbia has not used this interpretation at all). Instances were found of the

following logical interpretations: *argumentum a contrario*, *argumentum a simili*, *argumentum ad absurdum*. By applying *argumentum ad absurdum* as a logical argument, the Court points out that the possible adoption of some claim would lead to absurd consequences, or specifically, to an unsustainable and unacceptable condition.

The ECtHR refers to its previous practice in respect of cases with similar factual circumstances, which makes it possible to conclude that in those cases, it applied the *argumentum a simili*.

> 'The Court notes that it has *examined similar grievances in the past* and has found a violation of Art. 6 § 1 (see, among other authorities, Özel v. Turkey, no. 42739/98, §§ 33–34, 7 November 2002 and Özdemir v. Turkey, no. 59659/00, §§ 35–36, 6 February 2003)' *Karakaş and Yeşilirmak v. Turkey*, para. 43).
>
> 'In the Government's submission, the judicial authorities could not be criticized for any delay in their handling of the case. Being conscious of their country's international responsibility in the prevention of drug trafficking, they could not adopt an expeditious procedure; *on the contrary*, they had a duty to look into all matters which might have a bearing on the judgment. (*Mansur v. Turkey*, para. 61).

An example of *argumentum ad absurdum* is found in the case where the ECtHR interpreted an illogical behavior of the state: 'Where a State has authorized the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (…), *it appears illogical to* refuse to recognize the legal implications of the result to which the treatment leads' (*C. Goodwin v. U.K*, para. 78).

3.1.3. Systemic arguments (3)

This group of arguments includes several methods of interpretation and can be said to be widely used in the analyzed ECtHR decisions, whereas not all enumerated methods of interpretation (from the research design) have been identified.

When it comes to contextual interpretations, no instances were found of contextual interpretation in a narrow sense, while contextual interpretation in a broad sense was identified in a more than half of the all analyzed the ECtHR decisions. This method involves the Court making references to Convention provisions to give the true meaning of the Convention norm to be applied in a concrete case.

Among the systemic arguments, the contextual interpretation in a broad sense (3/A) is a form widely used. This form of interpretation involves the Court assigning the meaning to a concept or a right by interpreting some other provisions, and above all, those of the ECHR. This interpretation means that the norms need to be interpreted together with other appropriate norms as part of a harmonized entirety.

Thus, the Court determines the scope of the right to life and the protection of life in the procedural sense. 'The Court has consistently held that the obligation

to protect life under Art. 2 of the Convention, read in conjunction with the State's general duty under Art. 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or by private individuals' (*Mladenović v. Serbia*, para. 51).

On the other hand, we found no examples of interpretation in the narrow sense in any of 30 analyzed international decisions, or of 'derogatory formulae'.

In the case *Mladenović v. Serbia* (para. 31), the Court applies the interpretation under national procedural law (3/B): 'Arts. 19 and 20 of the Code of Criminal Procedure (…) provide, *inter alia*, that formal criminal proceedings can be instituted at the request of an authorized prosecutor. In respect of crimes subject to prosecution *ex officio*, including murder, the authorized prosecutor is the public prosecutor personally. The latter's authority to decide whether to press charges, however, is bound by the principle of legality which requires that he must act whenever there is a reasonable suspicion that a crime subject to prosecution *ex officio* has been committed'. In the case *Boljević v. Croatia,* the Court further applies the contextual interpretation in broad sense, in responding to a procedural issue: 'The Court notes that this complaint is not manifestly ill-founded *within the meaning of Art. 35 § 3 (a)* of the Convention. It further notes that it is not inadmissible on *any other grounds*. It must therefore be declared admissible' (paras. 82, 83).

It even interprets the procedural law when it puts forward its view on the exhaustion of internal legal remedies and their effectiveness (*V.A.M v. Serbia*, para. 83, *Akdivar and others v. Turkey*, para. 69) or attitude of 'reasonableness of the length of proceedings' (*Agrokompleks v. Ukraine*, para. 155).

We find that the ECtHR refers in its judgments to the national law, and rarely to other pieces of subordinate legislation, without assessing their compliance with fundamental rights guaranteed in the ECHR. Legal and other domestic provisions are cited to gain a sense of how particular national legal institutions associated with human rights referred to in the concrete application to the ECtHR are regulated.

A right guaranteed by the ECHR (for example, in Art. 5) can be restricted in line with domestic law, in which case the ECtHR examines whether the national law of a given state contains the provisions on the restriction of that right. By interpreting the content of those internal norms, it, in fact, interprets the specific ECHR provision (for example, in the case *Miażdżyk v. Poland*, application No. 23592/07, judgment of 24 January 2012). The ECtHR also analyses the domestic law when it interprets the procedural issues regulated by the ECHR—for example, the issue of exhaustion of internal remedies under the domestic law or that of the effectiveness of remedies (Art. 13 of the ECHR) before national authorities (for example, *V.A.M v. Serbia*, application no. 39177/05, judgment of 13 March 2007; *Akdivar and others v. Turkey*, application no. 21893/93, judgment of 01 April 1998).

3.1.4. External systemic and comparative law arguments (4)

The Court is not formally bound to follow its previous judgments, but it is in the interest of legal certainty, foreseeability, and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. Thus, in all analyzed the ECtHR judgments, it is found to have repeatedly invoked its previous practice.

Like the Serbian Constitutional Court, the ECtHR employs, as the most frequently used method in its reasoning, its own practice, previous case law, as 'precedent law'. Additionally, analyzed judgments making references to the previous case law of the ECtHR are becoming, to some extent, 'precedents' for the subsequent judgments with similar factual circumstances. In this way, continuity is ensured in this type of interpretation. In the analyzed judgments, we rarely find a departure from the previous case law of the ECtHR, as, for example, in the judgment *C. Goodwin v. United Kingdom* in relation to the earlier judgment in the case *Rees v. United Kingdom* (17 October 1986).

The general legal source in all the analyzed ECtHR judgments, as an object of interpretation, are norms of fundamental rights based on the ECHR (4/A). In all analyzed judgments, the interpretation of these norms is crucial to the decision on the merits (together with the arguments invoked from previous ECtHR judgments). Less common are other international treaties, and primarily those adopted under the UN. Notably, in the analyzed ECtHR judgments, those other sources of law (beyond the ECHR) do not hold the status of decisive arguments.

Comparative law arguments (4/C) are not so common among the analyzed ECtHR decisions. Nevertheless, the ECtHR considers the relevant aspects of some legal systems.

> 'The following paras. describe the relevant aspects of several member States' legal systems, with the emphasis on the guarantees that exist to secure the effective and independent investigation of cases involving suspicion against high-ranking prosecutors. The report was prepared on the basis of an overview of the legal systems of Croatia, Cyprus, Estonia, France, Germany, Greece, Ireland, Italy, Malta, Russia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia and the United Kingdom (…)' (*Kolevi v. Bulgaria*, paras. 138–151).
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> 'A comparative law research report entitled 'Judicial Independence in Transition' was completed in 2012 by the Max Planck Institute for Comparative Public Law and International Law (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht), Germany (…)' (*O. Volkov v. Ukraine*, paras. 81–82).

A small number of analyzed judgments contain arguments and opinions of other bodies of the Council of Europe and other international organizations. As other external sources of interpretation (4/D), we cite the opinion of the Venice Commission: '(…) that the inclusion of the Prosecutor General as an ex officio member of the HCJ raises further concerns, as it may have a deterrent effect on judges and be perceived as a potential threat (…)' (*O. Volkov v. Ukraine*, para. 114).

3.1.5. Teleological / objective teleological interpretation (5)

Interpretation according to the purpose of the ECHR occurs in three decisions, being used when the ECtHR interprets the provisions of the ECHR, or specifically, the purpose of measures taken by state authorities in each concrete case. Thus, it is stated that '(…) *the confiscation measure that the failure to declare cash to the customs authorities incurs is a part of that general regulatory scheme* designed to combat those offences' and '(…) the *confiscation measure was not intended* as pecuniary compensation for damage—as the State had not suffered any loss as a result of the applicant's failure to declare the money—*but was deterrent and punitive in its purpose'* (*Ismailov v. Russia*, para. 29, 38, similar *Gabrić v. Croatia*, para. 39).

The Vienna Convention implies that the ECHR is interpreted according to its aim. Given that the use of the Vienna Convention in the process of interpretation is presupposed, the ECtHR does not often refer explicitly to the general aim of the ECHR, that is, to the purpose of a specific provision of the ECHR. '(…) *the object of the term 'established by law' in Article 6 of the Convention* is to ensure that the judicial organization in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament'. (*O. Volkov v. Ukraine*, para. 150).

3.1.6. Historical interpretation (6)

Among the analyzed judgments, the use of historical/subjective teleological interpretation (based on the intention of the ECHR-maker) is rare. As illustrative examples, we cite: '(…) the Court proposes therefore to look at the situation within and outside the Contracting State to assess *in the light of present-day conditions what is now the appropriate interpretation and application of the Convention*' and 'In the previous cases from the United Kingdom, this Court has *since 1986 emphasized* the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments' (*C. Goodwin v. United Kingdom,* paras. 75, 92).

3.1.7. Arguments based on jurisprudence/scholarly works (7)

Argumentation based on jurisprudence/scholarly works does not occur in the analyzed decisions of the ECtHR.

3.1.8. Interpretations in light of general legal principles (8)

This interpretation is not often used in the analyzed ECtHR judgments. More often, we find in the practice of the ECtHR the principles that apply to the particular branches of law (most often in criminal law). Here we cite the example of legal certainty as part of the rule of law. 'The Court reiterates that *legal certainty*, which is one of the fundamental aspects of the *rule of law*, requires that where courts have finally determined an issue, their ruling should not be called into question' (…) 'The

principle of *legal certainty* implies that no party is entitled to seek review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (…)' (*Agrokompleks v. Ukraine*, paras. 144, 148). (About legal certainty also see *O. Volkov v. Ukraine*, paras. 137, 145). The principle *affirmanti, non neganti, incumbit probatio* is stated in the case *Baka v. Hungary* (para. 143).

3.1.9. Non-legal arguments (9)

The only illustrative non-legal argument found occurs in this case out of all the ECtHR's processed decisions: 'the Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals' (*C. Goodwin v. U.K*, para. 83).

3.2. Concluding remarks on the characteristics of the decision-making and style of the ECtHR

From the studied case law of the ECtHR, one can observe not only some similarities but also differences in relation to the methods of interpretation of human rights used by the Constitutional Court of Serbia. The difference is found in the frequency of use of specific methods by the two courts (not that the methods were even expected to completely overlap), whereby it is possible to say that the methods used by the ECtHR are more diverse and frequent (comparing the analyzed decisions) than the methods of the Constitutional Court. The main similarity, however, as revealed by our research, is that both courts most often interpret by means of the ECtHR case law. On this basis, it could be concluded that both courts treat previous ECtHR decisions as precedent law, which they, in a notable number of cases, unofficially conceive of as binding.

Methods of interpretation used in the analyzed case law of the ECtHR could be divided by frequency of use into several groups. The first group comprises methods that are rare or not identified (0–20%); the second group includes methods used in less than half of the cases (20–50%); the third group refers to methods frequently used in more than half of the cases (more than 50 to 80 %); and the fourth group includes methods used regularly or nearly always (80–100%). This classification should give us an idea of the usage of the methods of interpretation and, in this connection, the style of the ECtHR, or, put differently, which legal reasoning of the ECtHR is most common, and which, conversely, is atypical of the ECtHR. In between are the methods of interpretation (second and third group) that the ECtHR mainly or generally applies.

Grammatical (textual) interpretation comprises several sub-methods that we classify, by their respective use frequency, into different groups. Interpretation based on ordinary meaning is included in the first group (rarely used methods) because the analyzed case law shows that the ordinary meaning of a term within a legal norm (usually that of the ECHR) is not relevant to the ECtHR. A similar result holds for other professional interpretations (for example, the interest calculation), only these occur even more rarely and are not norm interpretations that affect the *meritum*—protection

of a specific right. In contrast, legal professional (dogmatic) interpretation is classified into the fourth group—methods regularly (frequently) used, namely as semantic interpretations and interpretations on the basis of legal principles. From within this group of methods, we found no instances of using syntactic interpretation.

Logical arguments are not common in the analyzed methodology used by the ECtHR. We found merely a few examples of the use of logical arguments (see above), while the rest remained unidentified (*minore ad maius, a maius ad minore* and others), so we classify them among the rarely used methods (first group).

Systemic arguments—contextual interpretations in the broad sense fall in the second group of the applied methods. We find these interpretations used in the less than half of the analyzed judgments of the ECtHR. Simply put, the provisions of the ECHR concerning some human rights must be examined conjointly with other provisions of the Convention. Of other systemic arguments, contextual interpretations in the narrow sense were not identified among the analyzed cases. The analysis further revealed that the ECtHR rarely applies interpretations of norms of domestic statutory law, case law of national ordinary courts and constitutional courts, and interpretations of norms of constitutional law. These methods of interpretation do not have the power of decisive arguments for a final decision of the ECtHR. According to their rare frequency, we classify them in the fourth group.

As already mentioned, the interpretative method the ECtHR always uses (fourth group) is the case law of the ECtHR. In all analyzed judgments, in respect of substantive and procedural matters, merit-related or formal, the ECtHR uses the legal positions established in its previous judgments. They serve as a basis for the decision on the merits (on account of previous, factually similar cases being decided in the same way) or, even more frequently, as arguments in favor (support) of the final decision in a particular case. In instances where the previous case law directly relates to the final decision, the ECtHR neither emphasizes nor quotes the former; that connection can be inferred solely by a more in-depth analysis of the previous positions quoted. This point further confirms the foregoing statement that previous case law of the ECtHR mainly serves to strengthen the argumentation for the final judgment on the merits.

Generally, the ECtHR cites its previous positions in different parts of the reasoning statement of a decision. The cited previous positions concern the issues in connection with the human right being decided. The ECtHR also has a regular practice of invoking many of its previous decisions; in some cases, we found more than 10 references. In fact, throughout the analyzed cases, the ECHR constitutes the legal framework within which the ECtHR operates, while the true meaning of a norm of the ECHR is defined, in each specific case, using the methods of interpretation.

A further method the ECtHR uses is the interpretation of fundamental rights on the basis of other international treaties and external sources, but far less frequently than is the case with the ECHR norms. Here, essentially, the frequency of use of the interpretation of norms of international treaties depends on the nature of the human right to be protected and the subject whose right is being protected. Differences occur where the right at issue is the one exercised in the international sphere or

within a state, as well as in whether the holder of the right is a national, a foreigner, or a stateless person. For foreigners' rights, the interpretation of norms of international law is used.

The ECtHR, according to the analyzed case law, uses teleological interpretation in less than half of the cases (second group). According to the Vienna Convention, this means applying the goal-based interpretation of the ECHR, both as a whole and of its individual provisions, whereby the ECtHR has not always been explicit in doing so, which renders identification of the teleological interpretation in the ECtHR case law difficult.

The remaining four methods of interpretation: historical, jurisprudence, general legal principles, and non-legal arguments, we classify into the first group, rarely used methods.

As for the manner (style) of decision-making on the existence of a violation of a human right, the ECtHR starts from the concrete factual and legal circumstances. Examining the above-presented methods of interpretation—examples and frequency—we can conclude that the ECtHR adheres to a style characterized, on the one hand, by references to own former practice (which is not officially binding), and on the other hand, by a thorough review of previous proceedings and decisions in the light of applicable law. Both the characteristics, each in its own way, contribute to our determination of the decision-making style of the ECtHR as one of 'essentially free evaluation of evidence'.

Quite specifically, acceptance of factual description of a given case (evaluation of facts based on case files) and assessment of the law applied are entirely in the hands of the ECtHR, being the court of last instance. This authority gives the ECtHR the discretion to determine, in a particular case, according to own judgment, the meaning of a relevant norm and present its final position on whether the human right in the given case has been violated or the interference (by the state) has been lawful. Nevertheless, although there is no higher court above the ECtHR that could evaluate its case law and overturn a decision, its freedom to decide is certainly not absolute. It is limited by basic principles of democracy in the modern society in whose framework the ECtHR operates: the rule of law, division of power, individual freedoms, and other values of the democratic order in general.

Each 'free' decision on the merits delivered by the ECtHR is preceded by the steps also typical of the style of this court: verifying whether the assessment of a given behavior by the respondent state falls within the jurisdiction of the ECtHR, whether the behavior was in line with statutory reasons for limiting a human right (whether it is possible to limit a right at all), whether derogation from a right has been done to the least extent, and whether the aim of that derogation is acceptable in a democratic society. These steps take place in a contradictory procedure where both parties present their arguments to make it possible for the Court, applying the mentioned methods of interpretation, to finally decide on whether a fundamental human right has been violated.

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2.	Decision Už-775/2009 of the Constitutional Court	R. Kačapor and others v. Serbia, Aplications nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06), judgment of 15 January 2008.
3.	Decision Už-2356/2009 of the Constitutional Court	Mansur v. Turkey, Application no. 16026/90 , judgment of 08 June1995.
4.	Decision Už-4100/2011 of the Constitutional Court	Mađer v. Croatia, Application no. 56185/07, judgment of 21 June 2011.
5.	Decision Už-3238/2011 of the Constitutional Court	Goodwin v. the United Kingdom, Application no. 17488/90, judgment of 27 March 1996.
6.	Decision Už-4527/2011 of the Constitutional Court	Mladenović v. Serbia, Application no. 1099/08, judgment of 22 May 2012.
7.	Decision Už-10061/2012 of the Constitutional Court	Weiser v. Austria, Application no. 2293/03, judgment of 22 February 2007.
8.	Decision Už-5331/2012 of the Constitutional Court	Akdivar and others v. Turkey, Aplication no. 21893/93, judgment of 01 April 1998.
9.	Decision Už-10061/2012 of the Constitutional Court	Weiser v. Austria, Application no. 2293/03, judgment of 22 February 2007.
10.	Decision Už-2513/2014 of the Constitutional Court	Maresti v. Croatia, Application no. 55759/07, judgment of 25 June 2009.
11.	Decision Už-7014/2014 of the Constitutional Court	Milenković v. Serbia, Application no. 50124/13, judgment of 1 March 2016.
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13.	Decision Už-7676/2015 of the Constitutional Court	Van der Ven v. The Netherlands, Application no. 50901/99, judgment of 4 February 1999.
14.	Decision Už-4303/2015 of the Constitutional Court	Ilnseher v. Germany, Application no. 67021/01, judgment of 27 January 2009.

15.	Decision Už-367/2016 of the Constitutional Court	Boljević v. Croatia, Application no. 43492/11, judgment of 31 January 2017.
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17.	Decision Už-1202/2016 of the Constitutional Court	Gabrić v. Croatia, Application no. 9702/04, judgment of 5 April 2009.
18.	Decision Už-5214/2016 of the Constitutional Court	Ismailov v. Russia, Application no. 30352/03, judgment of 6 November 2008.
19.	Decision Už-6463/2016 of the Constitutional Court	Rohlena v. Czech Republic, Application no. 59552/08, judgment of 27 January 2015.
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21.	Decision Už-4395/2017 of the Constitutional Court	V.A.M v. Serbia, Application no. 39177/05, judgment of 13 March 2007.
22.	Decision Už-11707/2017 of the Constitutional Court	Lavents v. Latvia, Application no. 58442/00, judgment of 28 November 2002.
23.	Decision Už-2820/2017 of the Constitutional Court	Stanković v. Serbia, Application no. 41285/19, judgment of 19 December 2019.
24.	Decision Už-6300/2017 of the Constitutional Court	Miażdżyk v. Poland, Application no. 23592/07, judgment of 24 January 2012.
25.	Decision Už-5357/2018 of the Constitutional Court	Nejdet Şahin and Perihan Şahin v. Turkey, Application no. 13279/05, judgment of 20 October 2011.
26.	Decision Už-5108/2017 of the Constitutional Court	Letellier v. France, Application no. 12369/86, judgment of 26 June 1991.
27.	Decision Už-5677/2018 of the Constitutional Court	Bochan v. Ukraine, Application no. 22251/08, judgment of 5 February 2015
28.	Decision Už-13306/2018 of the Constitutional Court	Nankov v. N. Macedonia, Application no. 26541/02, judgment of 29 November 2007.
29.	Decision Už-12698/2019 of the Constitutional Court	Ignaccolo-Zenide v. Romania, Application no. 31679/96, judgment of 25 January 2000.
30.	Decision IUo-42/2020 of the Constitutional Court	Ireland v. the United Kingdom, Application no. 5310/71, judgment of 18 January 1978.

Methods			Frequency	Frequency of method (1-9)	Weight	%	Sum
1	1/A	a)	8	14(47%)	15	5%	43(15%)
		b)	0		0	0%	
	1/B	a)	14		18	6%	
		b)	8		10	3%	
	1/C		0		0	0%	
2	2/A		0	2(7%)	0	0%	2(1%)
	2/B		0		0	0%	
	2/C		0		0	0%	
	2/D		2		2	1%	
	2/E		0		0	0%	
	2/F		0		0	0%	
3	3/A		20	21(70%)	28	9%	97(32%)
	3/B		11		42	13%	
	3/C	a)	10		10	4%	
		b)	2		2	1%	
		c)	2		2	1%	
	3/D	a)	0		0	0%	
		b)	4		4	2%	
		c)	0		0	0%	
	3/E		4		4	2%	
4	4/A		12	30(100%)	20	7%	134(45%)
	4/B		30		112	37%	
	4/C		0		0	0%	
	4/D		2		2	1%	
5			14	14(47%)	18	6%	18(6%)
6	6/A		0	0(0%)	0	0	0(0%)
	6/B		0		0	0	
	6/C		0		0	0	
	6/D		0		0	0	
7			1	1(3%)	1	1%	1(1%)
8			0	0(0%)	0	0%	0(0%)
9			2	2(7%)	2	1%	2(1%)

1. Grammatical (textual) interpretation
1/A. Interpretation based on ordinary meaning
a) Semantic interpretation
b) Syntactic interpretation
1/B. Legal professional (dogmatic) interpretation
a) Simple conceptual dogmatic (doctrinal) interpretation (regarding either constitutional or other branches of law)
b) Interp*retation on the basis of legal principles of statutes or branches of law*
1/C. Other professional interpretation (in accordance with a non-legal technical meaning)

2. Logical (linguistic-logical) arguments
2/A. Argumentum a minore ad maius: inference from smaller to bigger
2/B. Argumentum a maiore ad minus: inference from bigger to smaller
2/C. Argumentum ad absurdum
2/D. Argumentum a contrario/arguments from silence
2/E. Argumentum a simili, including analogy
2/F. Interpretation according to other logical maxims

3. Domestic systemic arguments (systemic or harmonising arguments)
3/A. Contextual interpretation
a) In narrow sense
b) In broad sense (including 'derogatory formulae': *lex superior derogat legi inferiori*, *lex specialis derogat legi generali*, *lex posterior derogat legi priori*)
3/B. Interpretation of constitutional norms on the basis of domestic statutory law (acts, decrees)
3/C. Interpretation of fundamental rights on the basis of jurisprudence of the constitutional court
a) References to specific previous decisions of the constitutional court (as 'precedents')
b) Reference to the 'practice' of the constitutional court
c) References to abstract norms formed by the constitutional court
3/D. Interpretation of fundamental rights on the basis of jurisprudence of ordinary courts
a) Interpretation referring to the practice of ordinary courts
b) Interpretation referring to individual court decisions
c) Interpretation referring to abstract judicial norms
3/E. Interpretation of fundamental rights on the basis of normative acts of other domestic state organs

4. External systemic and comparative law arguments
4/A. Interpretation of fundamental rights on the basis of international treaties
4/B. Interpretation of fundamental rights on the basis of individual case decisions or jurisprudence of international fora
4/C. Comparative law arguments
a) References to concrete norms of a particular foreign legal system (constitution, statutes, decrees)
b) References to decisions of the constitutional court or ordinary court of a particular foreign legal system
c) General references to 'European practice', 'principles followed by democratic countries', and similar non-specific justificatory principles
4/D. Other external sources of interpretation (e.g. customary international law, *ius cogens*)

5. Teleological/objective teleological interpretation (based on the objective and social purpose of the legislation)

6. Historical/subjective teleological interpretation (based on the intention of the legislator):
6/A. Interpretation based on ministerial/proposer justification
6/B. Interpretation based on draft materials
6/C. Interpretation referring, in general, to the 'intention, will of the constitution-maker'
6/D. Other interpretation based on the circumstances of making or modifying/amending the constitution or the constitutional provision (fundamental right) in question

7. Interpretation based on jurisprudence (references to scholarly works)

8. Interpretation in light of general legal principles (not expressed in statutes)

9. Substantive interpretation referring directly to generally accepted non-legal values

Chapter VII

Interpretation of Fundamental Rights in Poland

Piotr Mostowik

1. The Polish Constitutional Tribunal: Introductory Remarks

1.1. The Constitutional Tribunal and judges

The first constitution (in the modern meaning) in Poland was issued on 3 May 1791, the second oldest such written document in the world.[1] It was adopted by the Polish–Lithuanian Commonwealth to ensure greater freedom and political equality on its territory and introduce a constitutional monarchical system. It was also the symbol of Poland's national identity after independence was lost (division and occupation by the Austrian, German, and Russian empires until 1918).

The next constitutions were adopted in independent Poland in the XXth century on 20 February 1919 (called the 'small' one), 17 March 1921 (called the 'March' one, with a division of powers modelled on the French constitution of 1875), and 23 April 1935 (called the 'April' one, delegating greater competence to the President). After World War II, during the period of the 'Peoples' Republic of Poland', the next constitutions were adopted on 19 February 1947 (called the 'small' one) and on 22 July

1 Translation into English by F. Bukaty (with foreword by A. Grześkowiak-Krwawicz). It is available at: http://agad.gov.pl/wp-content/uploads/2018/12/Konstytucja-3-maja_Eng-v4.pdf. See: Müsig, 2015, pp. 75–93. See also other constitutional materials published online by Polish History Museum in Warsaw and at: www.polishfreedom.pl/en/document/constitution-of-the-3rd-of-may-1791-the-government-statute.

Piotr Mostowik (2021) Interpretation of Fundamental Rights in Poland. In: Zoltán J. Tóth (ed.) *Constitutional Reasoning and Constitutional Interpretation,* pp. 401–467. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing.

https://doi.org/10.54237/profnet.2021.zjtcrci_7

1952 (modelled on the Soviet constitution of 1936). After the fundamental political changes in the years 1988–89, the last one was modified into the 'Constitution of the Polish Republic' (31 December 1989), followed by the act of 17 October 1992 (again called the 'small constitution'). Finally, on 2 April 1997, the current Constitution of the Republic of Poland was adopted by the National Assembly and accepted in a referendum.[2] It provides for the position of a Constitutional Tribunal in the Polish political and legal system.

The establishment of the Constitutional Tribunal in Poland was the content of proposals by the National Congress of the 'Solidarność' ('Solidarity') movement in 1981. In the fall of that year, the works of experts on its establishment (and the Tribunal of State) were undertaken, and on 26 March 1982 an amendment provided for the introduction of these two institutions. However, this body was not able to start functioning within a few months. The Act on the Constitutional Tribunal was passed on 29 April 1985 that stated the limited competences of this body. After the political breakthrough in 1989, the need to strengthen its position was widely accepted and legally introduced. Still, the Sejm's competence was—by a qualified majority—to reject the Tribunal's rulings on the unconstitutionality of a statute. In the last decades the Tribunal has created an extensive jurisprudence and gained considerable authority among the political elite, as well as representatives of legal doctrine. In particular, such constitutional clauses as the rule of law and the principle of equality have been developed, and many gaps and doubtful areas have been filled in the concept of the democratic rule of law.

As far as the composition and organisation is concerned—in light of Arts. 190(5) and 194–196—the Polish Constitutional Tribunal is composed of 15 judges, who should be persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.[3] Judges are chosen individually by the Sejm for a term of office of nine years. Judgments of the Tribunal shall be made by a majority of votes.

The general rule is that in the exercise of their office the judges shall be independent and 'subject only to the Constitution' (in the sense that only it binds them legally). In order that this rule be fulfilled, judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of the office and the scope of their duties. During their term of office, they shall not belong to a political party or a trade union or perform public activities incompatible with the principles of the independence of the courts and judges.[4]

2 The Constitution of the Republic of Poland, as adopted by the National Assembly on 2 April 1997, officially published in 'Dziennik Ustaw' 1997 no. 78, item 483; hereinafter 'the Constitution'. The translation into English published by Parliamentary Services that is the terminological basis for this paper. It is available at: https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm.

3 The President and Vice-President shall be appointed by the President of the Republic from candidates proposed by the General Assembly of the Judges of the Tribunal.

4 Moreover, judges shall not be held criminally responsible or deprived of liberty without prior consent granted by the Tribunal. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offense and in which his detention is necessary for securing the proper course of proceedings. The President of Tribunal shall be notified forthwith of any such detention and may order an immediate release of the person detained.

1.2. Powers of the Constitutional Court

As far as the system of division of power and constitutional function of the Tribunal is concerned, at present under Art. 10 (2) of the Polish Constitution of 1997, legislative power shall be vested in the Sejm and the Senate (i.e. the chambers of parliament), executive power shall be vested in the President and the Council of Ministers, and judicial power shall be vested in courts and tribunals, including the Constitutional Tribunal.[5] They shall, according to Art. 173, constitute a separate power and shall be independent of the other branches of power.

Thecharacteristic powers of the discussed constitutional court are ex-ante norm control, such that constitutional complaints and political matters (e.g. banning political parties). Arts. 188–189 and 191 of the Constitution state the most important competences of the Constitutional Tribunal. It shall adjudicate regarding the following matters:

- the conformity of statutes and international agreements to the Constitution;
- the conformity of a statute with ratified international agreements the ratification of which required prior consent expressed in the statute
- the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements, and statutes;
- the conformity to the Constitution of the purposes or activities of political parties;
- complaints concerning constitutional infringements;[6] and shall settle
- disputes over authority between central constitutional organs of the State.[7]

1.3. General characteristics of the procedure

It should be added that the following persons may apply to the Constitutional Tribunal regarding the abovementioned matters: 1) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 deputies of the Sejm, 30 senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control, and the Commissioner for Citizens' Rights; 2) the National Council of the Judiciary (to a limited extent); and—regarding matters relevant

5 See Garlicki, 2007, pp. 44–68. Author concludes that 'thus, for the constitutional court, dialogue and persuasion seem to be more effective than open conflicts and confrontations with other jurisdictions' (p. 68).

6 Art. 79 states, that everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

7 The following persons may, in light of Art. 192, make application to the Constitutional Tribunal in respect of this matters: the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Chief Administrative Court and the President of the Supreme Chamber of Control.

to the scope of their activity—3) the constitutive organs of units of local self-government; 4) the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations; 5) churches and religious organizations; and 6) bodies whose constitutional freedoms or rights have been infringed (to a limited extent). Additionally, any court may refer a question as to the conformity of a normative act to the Constitution, ratified international agreements, or statute, if the answer to such question of law will determine an issue currently before this court. This last situation is quite common in practice.[8] According to Art. 193, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act (including statutes and ratified international agreements) to the Constitution if the answer to such question of law will determine an issue currently before this court.

The other provisions of this chapter, as well as rules stipulated in other chapters complement these competences. Under Art. 122 (3) the President may, before signing a bill, refer it to the Constitutional Tribunal for adjudication. The President shall then not refuse to sign a bill that has been judged as conforming to the Constitution.[9] According to Art. 133 (2), before ratifying an international agreement the President may also refer it to the Tribunal with a request to adjudicate upon its conformity to the Constitution. The latter competence may also create interesting issues of interpretation regarding the interface between the Constitution and international law, as well as the application of the judgments of the ECtHR and the CJEU by the Tribunal.

The Constitution of 1997 also covers the effects of the Tribunal's rulings, as well the details of the composition and basis of operation of the constitutional court. Art. 190 stipulates that judgments shall be of universally binding application and shall be final. They generally shall be immediately published in the official publication in which the original normative act was promulgated.[10] The judgment shall take effect from the day of its publication; however, the Tribunal may specify another date for the end of the binding force of a normative act.[11] What is important for practitioners

8 Recent activities and basic information and reports in English are available at: https://trybunal.gov.pl/en.

9 Additionally, under Art. 131, when President is temporarily unable to discharge the duties of his office, he shall communicate this fact to the Marshal of the Sejm (a function comparable to speaker), who shall temporarily assume his duties. If President is not in a position to inform the Marshal, then the Constitutional Tribunal shall, on request of the Marshal, determine whether or not there exists an impediment to the exercise of the office by the President. If the Constitutional Tribunal so finds, it shall require the Marshal to temporarily perform the duties of the President. This provision was applied in practice after the tragic death of President Lech Kaczyński near Smolensk on 10 April 2010. This time Marshal of the Sejm Bronisław Komorowski temporarily took over the duties (and then was chosen in the general election for years 2010–15).

10 Mostly in 'Dziennik Ustaw'. If a normative act has not been promulgated, then the judgment shall be published in the second official gazette of the Republic of Poland: 'Monitor Polski'.

11 Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

is that the judgment stipulating non-conformity to the Constitution (or to an international agreement or statute) of a normative act on the basis of which a legally effective judgment of a court (or a final administrative decision or settlement of other matters) was issued shall be a basis for re-opening proceedings (or for quashing the decision or other settlement) in a manner and upon principles specified in provisions applicable to the given proceedings.

Further details of organization and of proceedings before the Tribunal are specified by statutes adopted by parliament in ordinary legislative procedure. In the last years, especially in connection with a legal and political dispute in the years 2015–2016 (focused on the procedure of appointment of new judges[12]), the statute law has been amended several times, which has in practice caused problems in determining the current content of the law and intertemporal issues. From the perspective of the legal status in 2021 and the current proceedings before the tribunal, the detailed provisions of following statutes (supplementary to the abovementioned constitutional principles) apply:

- the Act of 30.11.2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal,[13] and
- the Act of 30.11.2016 on the Status of the Judges of the Constitutional Tribunal.[14]

2. Reasoning of the Polish Constitutional Tribunal and relevant jurisprudence of the ECtHR and CJEU

2.1. Study approach and choice of the decisions examined, with special attention to external systemic (comparative) interpretation referring to international case law

This section covers the principal part of this study, which is the interpretation of the constitutional principles (not statutory ones)—i.e. applicable constitutional provisions and fundamental rights. The main content of this part is focused also on

12 The different legal approaches and interpretation are presented by: Team of Experts, 2016; European Commission for Democracy through Law, 2016.
See: Kustra, 2016, pp. 343–366; Radziewicz, 2017, pp. 23–40; Chmielarz-Grochal, Sułkowski, 2018, pp. 93–99; Szmulik, Szymanek, 2020, pp. 261–275.
See also the detailed presentation of the period from June 2015 to March 2016: Tuleja (ed.), 2017.

13 Officially Published in 'Dziennik Ustaw' of 19.12.2016, item 2072. Translation into English, prepared by Tribunal's services, is available at: https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act.

14 Officially published in 'Dziennik Ustaw' of 19.12.2016, item 2073. Translation into English, prepared by Tribunal's services, is available at: https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act.

the application of fundamental rights by Polish Constitutional Tribunal (PCT) with reference to the jurisprudence of the European Court of Human Rights (ECtHR, European Court) and Court of Justice of the European Union (CJ EU, EU Tribunal). The term 'reasoning' is, in the conceptions applied herein, used in the meaning of terms of argumentation, as concepts to be applied to similar relationships. The method of this research starts with a case study in combination with the comparative method.

In this context, not only reporting the reasoning but also statistical-quantitative and qualitative-analytical analyses may be helpful, in particular by determining the frequency with which the arguments are applied. Additionally, the role and perception of the decision-making bodies may be examined and the basic features of their constitutional reasoning and the style of their constitutional adjudication presented. This makes it possible to elaborate on domestic matters that may be of international interest from both the academic and professional points of view in greater detail.

The 30 most important Polish cases from the last 10 years that contain a substantive reference to CJ EU or European Court decisions were chosen for this study.[15] All of them directly address fundamental issues of rights and the jurisprudence of ECTHR or CJ EU, which is the matter of detailed study and remarks above. From the latter perspective, as well as to ensure the relative consistency of the judgments under examination, jurisprudence has been selected that concerns criminal, civil, and medical cases. These branches of law—because of both the domestic and international character of standards and relevance to the concept of fundamental rights—seem the best platforms to present the coexistence of methods of argumentation presented by the national constitutional court and the international tribunals in question.

As a consequence, the 30 international decisions (27 given by ECtHR and 3 by CJ EU) considered are referred to by the Polish Constitutional Tribunal in its reasoning. In case of more than one such reference, a case (and decision) was chosen as relevant and presented. In other situations, the determining factor for the choice was the substantive influence in the opinion of the researcher.

Both Polish and international rulings will be presented in detail to show:

a) the methods of interpretation by the constitutional court;
b) the style of reasoning and decision-making characterizing the given constitutional court; and
c) the characteristics of the decision-making of the PCT in relationship with decisions of the ECtHR and CJ EU.

15 All the below mentioned judgments given by Polish Constitutional Tribunal with its reasoning are published in the database: http://otk.trybunal.gov.pl/orzeczenia/.
They (with justifications) are published in Polish with the pleadings filed by the parties to the proceedings.
Press release on some of the judgments of the PCT are published in these internet resources also in English. Some of these published translations regard the discussed cases and have been used in this paper below to report the late decisions.

As far as the statistics and nature of the control are concerned, the discussed examples are mainly norm control cases and constitutional complaints. Sixteen of the examined constitutional court decisions were based on individual complaints concerning constitutional infringements (under Art. 79 of Constitution). Ten of the decisions were taken as the result of proceedings initiated by applications of entities generally legitimated for requesting a declaration of compliance with the Constitution (and indirectly—for interpreting the Polish Constitution of 1997), e.g. group of deputies. Finally, four of the presented cases were initiated by criminal and civil courts referring questions regarding the conformity of a normative act to the Constitution.

2.2. Methods of interpretation, decision-making style, and issues of constitutional relevance in the selected judgments of the PCT

2.2.1. Substantive criminal law

a. PCT judgment of 6 June 2011 and ECTHR case Janowski v. Poland of 21 January 1999 (criminal liability for public insult of the President of the Republic of Poland)

The Constitutional Tribunal in its judgment of 6 June 2011 (Ref. No. P 12/09)[16] examined whether the provision criminalizing the public insult of the President of the Republic of Poland was consistent with Art. 54(1) (freedom of expression) in conjunction with Art. 31(3) (the principle of proportionality) of the Constitution, as well as with Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).

The Tribunal used the following methods of interpretation: contextual interpretation and analogy (*argumentum a simile*) referring to similar regulations. It was combined with a historical interpretation based on the relevant previous decisions of the Constitutional Court (as 'precedents'), and one based on scholarly works. The Tribunal noted that a sense of dignity and authority are among the prerequisites for the effective performance of the constitutional duties assigned to the Head of State. The President in office does not act in his own name, but in the name of the State, as the 'Head' thereof; he embodies the majesty of the Republic of Poland, and for that reason he is entitled to respect.[17] What is more, the Tribunal ruled that this infringement of the freedom of expression is proportional and justified. First, the court has a wide range of non-custodial penalties for this crime. Second, freedom of expression is still guaranteed regardless of the examined provision. The right to criticize the President is preserved, and limited only in view of the specified form

16 See: https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/4766-odpowiedzialnosc-karna-za-publiczne-zniewazenie-prezydenta-rzeczypospolitej-polskiej.

17 See more: https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/5682-odpowiedzialnosc-karna-za-publiczne-zniewazenie-prezydenta-rzeczypospolitej-polskiej.

(in particular when the form is offensive or humiliating). The limitation is therefore form-based, not content-based.[18]

The Tribunal used the Court's standard stated in the judgment of the European Court of Human Rights of 21 January 1999, Janowski v. Poland (application no. 25716/94).[19] It was pointed out that the limits of freedom of expression should be formed strictly and enacted only when they are necessary, sufficient, and proportional.[20] The Court assessed that this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly. The Contracting States have a certain margin of appreciation in assessing whether 'a pressing social need' exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Art. 10.[21]

In the argumentation of PCT in favor of the constitutionality and conventionality of the regulation, the Tribunal directly applied the standards of freedom of expression formed by the European Court of Human Rights in the ruling on the abovementioned case. The Tribunal noted that according to the case-line of the Court, freedom of expression remains one of the foundations of a democratic society and deserves protection even if the content of the expression shocks or insults.

b. PCT judgment of 1 December 2016 and ECtHR case Zolotukhin v. Russia of 10 February 2009 (classifying the same act both as offense and as misdemeanor)

The provision controlled by the judgment of the Polish Constitutional Tribunal of 1 December 2016 (Ref. No. K 45/14[22]) governs the concurrence of provisions of the statutes: the Penal Code and the Code of Misdemeanors, i.e. a situation where a criminal act committed by a particular person meets the characteristics of both an offense and a misdemeanor. The Tribunal checked whether such regulation may stand in contradiction with the *ne bis in idem* principle, which prohibits conducting a trial and administering a penalty for the same act with regard to the same person twice, e.g. criminalizing a cause of disorder in a public place by shouting (a misdemeanor) and, at the same time, inciting others to commit a crime (an offense).[23]

18 See e.g. Górski, Klonowski, 2018, pp. 24–28.

19 http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-45946&filename=001-45946.pdf.

20 The ruling in case Janowski v. Poland referred to a situation in which the applicant was convicted for insulting the civil servants during and in connection with carrying out his official duties (calling them 'oafs' and 'dummies'). According to the applicant, this decision infringed his right to express the opinion.

21 See para. 30.

22 See: https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/9491-stosowanie-wobec-tej-samej-osoby-za-ten-sam-czyn-odpowiedzialnosci-za-przestepstwo-i-za-wykrocze.

23 See: https://bit.ly/3kq50OS.

The Tribunal stated that the provisions are consistent with the Polish Constitution as well as with Art. 4(1) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. According to the Tribunal applicant and the participants in the proceedings in the present case, sufficient attention was not paid to the rules of vertical systemic interpretation, which require that legal provisions should be interpreted in conformity with the norms of legal acts that are higher up in the hierarchy.[24]

The Tribunal in the procedure of judging used also the jurisprudence of the European Court of Human Rights, according to which in certain situations, reconviction or repetition of criminal proceedings for a certain criminal act does not lead to an infringement of the principle of *ne bis in idem*, expressed in Art. 4(1) of Protocol No. 7 to the Convention. In particular, the Tribunal focused on the judgment of 10 February 2009, Zolotukhin v. Russia (application no. 14939/03)[25] and the standard expressed in this case. The theses (paras. 82 and 84) of the last-mentioned Court judgment were used in the interpretation of the Polish Tribunal.

These parts of reasoning explain two dilemmas: when one may name the prosecution or trial 'second' in reference to the same offense; and what are the factors that the interpreter should take into account considering the *res iudicata* concerning the offense. The Court claimed that 'Art. 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offense" in so far as it arises from identical facts or facts that are substantially the same'.[26] The Tribunal used—following the Court—the method of interpretation based on the analysis of the general principle *ne bis in idem*. Second, the arguments were based on scholarly works. The main part of argumentation was based on the abovementioned interpretation of the European Convention.

c. PCT judgment of 12 February 2015 and ECtHR case Skałka v. Poland of 27 October 2003 (criminal liability for non-public insult of a civil servant)

The judgment of the Polish Constitutional Tribunal of 12 February 2015 (Ref. No. SK 70/13[27]) dealt with the problem of the infringement of an individual's freedom of expression in case of a non-public insult of the civil servant that causes criminal liability. This case—quite similar to the one referring to the constitutionality of the criminal liability for insult of the President of Republic of Poland—is important because the Constitutional Tribunal summed up its previous case law as regards the admissibility and rules of limiting the freedom of expression. It was pointed out that 'despite the exceptionally strong position of the freedom of speech in the constitutional axiology, the said freedom is not absolute in character and may be

24 Ibidem.

25 See: https://bit.ly/3ztjxNY.

26 Therefore, the interpreter should 'focus on those facts that constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings'.

27 See: https://bit.ly/39m4JGk.

subject to restrictions. When assessing the constitutionality of a regulation imposing a restriction on a constitutional right or freedom, it should be considered whether it meets formal criteria, i.e. whether it fulfils a premise that a restriction may only be introduced by statute; in the case of a reply in the affirmative to that basic question the so-called test of proportionality should be applied [including effectiveness, necessity, and proportionality in the strict sense]'.[28]

The main part of the interpretation referred to the significance of freedom of expression. The Tribunal used the interpretation of the Constitution on the basis of the case law of the Constitutional Court by referring to relevant previous decisions of the Constitutional Court. The Tribunal made use of the conventional standard pertaining to the protection of the freedom of expression, indicating the long list of case laws made by the European Court of Human Rights. One of the main aspects on which the Tribunal relied was expressed in the judgment of the European Court of Human Rights of 27 October 2003, Skałka v. Poland (application no. 43425/98).[29]

The following important part of the reasoning of Skałka v. Poland case—referring to the liability for insults about judges formulated in a letter—was a direct explanation of the borders of freedom of expression: 'The courts, as with all other public institutions, are not immune from criticism and scrutiny. Persons detained enjoy in this area the same rights as all other members of society. A clear distinction must, however, be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate punishment would not, in principle, constitute a violation of Art. 10 § 2 of the Convention'.[30]

The insults about the judges of the Penitentiary Division of the Katowice Regional Court were formulated in a letter to the President thereof, and the European Court deemed that due to their appearance in an internal exchange of letters of which no one in the public was apprised, the administered penalty was disproportionately severe.[31] At the same time—as the Polish Tribunal also observed—'the interference in question has to be "proportionate to the legitimate aims pursued" and the reasons adduced by the national authorities to justify it "relevant and sufficient"'.[32]

d. PCT judgment of 25 February 2014 and ECtHR case Handyside v. The United Kingdom of 7 December 1976 (criminal liability for 'incitement to hatred' and 'any other totalitarian system')

The Polish Constitutional Tribunal via the judgment of 25 February 2014 (Ref. No. SK 65/12)[33] stated that Art. 256 of the Criminal Code—criminalizing 'the in-

28 See: Human rights and fundamental freedoms: the relationship of international, supranational and national catalogues in the 21st century. Questionnaire for the XVIIITH Congress of the Conference of European Constitutional Courts.

29 See: https://bit.ly/39iEfFK.

30 para. 34.

31 Ibid.

32 para. 35.

33 See: https://bit.ly/2XyUtsh.

citement to hatred' as well as 'praising the Nazi, communist, or any other totalitarian system'—does not violate the Constitution. The constitutional problem was the use of vague expressions ('incitement to hatred' and 'any other totalitarian system') that could lead to breach of the *nullum crimen sine lege* principle.

The Constitutional Tribunal stated that Art. 256 of the Criminal Code does limit freedom of expression. However, this limitation fulfills the Constitutional criteria of proportionality, meaning that it is necessary in a democratic state in order to protect national safety and security as well as public order and citizens' rights. As the Tribunal pointed out, 'this limitation fulfills the legal requirements and is necessary in a democratic state. It has a strong justification on the basis of the Polish Constitution: It is grounded in the rule of the inherent and inalienable dignity of the human being (Art. 30 of the Constitution) and in the prohibition of political parties and any other organizations referring in their programs to totalitarian methods and practices of Nazism, fascism, and communism, but also those whose programs or activity allow racial and national hatred (Art. 13 of the Constitution)'.[34]

The Tribunal widely applied the interpretation of the Constitution on the basis of the case law of the Constitutional Court referring to the guarantees of personal liberty. What is more, the argumentation included the normative meaning of the general principle of *nullum crimen sine lege*. Additionally, the Tribunal—when weighing the values in the 'proportionality test'—used the notion of freedom of speech explained by the European Court of Human Rights in the ruling of the European Court of Human Rights of 7 December 1976, Handyside v. The United Kingdom (application no. 5493/72).[35]

The Court in this judgment defined the standard that should be observed to keep the regulation compliant with Art. 10 of the Convention. The 'restrictions' and 'penalties' limiting the freedom of speech must be: 'prescribed by law' and 'necessary in a democratic state'. Art. 10 para. 2 (Art. 10-2) leaves to the Contracting States a margin of appreciation. Nevertheless, it does not mean an unlimited power of appreciation. As the Tribunal found in this case, the protected freedom of speech is 'applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance, and broadmindedness without which there is no "democratic society". This means, among other things, that every "formality", "condition", "restriction", or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued'.[36]

34 Para. 7.9.
35 See: https://bit.ly/3tTuUh7.
36 Paras. 43–49.

2.2.2. Procedural criminal law

a. PCT judgment of 20 November 2012 and ECtHR case Kulikowski v. Poland of 19 May 2009 (extending of the pre-trial detention)

In the judgment of 20 November 2012 (Ref. No. SK 3/12),[37] the Polish Constitutional Tribunal found the provision of Art. 263(7) of the Code of Penal Procedure to be unconstitutional because it did not unequivocally specify the provisions for extending pre-trial detention following the issue of the first sentence by a court of first instance in the relevant case.[38] The constitutional control was based on Art. 41 para. 1 of the Constitution ('Personal inviolability and security shall be ensured to everyone'.)[39]

The Tribunal in this case had to specify the constitutional standard for extending the pre-trial detention. One of the main aspects of the judgment was the reference to the assessment of the application of pre-trial detention in Poland in the jurisprudence of the European Court of Human Rights. The Tribunal *expressis verbis* noted that is not bound by the judgments of the European Court. However, the Tribunal has to take into account, as part of its constitutional review, the norms and standards formulated by the Court in order to eliminate any possible collisions between them. The standards contained in the Convention and the jurisprudence of the Court may therefore be referred to as an element of argumentation and thus serve to maintain the relative uniformity of decisions of legal protection authorities adjudicating on the basis of the provisions of domestic and international law.[40]

In this context, the Tribunal pointed out the circumstances indicated in the jurisprudence of the Court as the reasons for Poland's violation of Art. 5 sec. 3 of the European Convention. In particular, the Tribunal referred to the judgment of the European Court of Human Rights of 19 May 2009, Kulikowski v. Poland (application no. 18353/03).[41]

The relevant aspect of this case was that used by the Polish Tribunal in the case commented above. The European Court noted that 'the reasonable suspicion against the applicant of having committed a serious offense could initially warrant his detention. Also, the need to secure the proper conduct of the proceedings, in particular the process of obtaining evidence from witnesses, constituted valid grounds for the applicant's initial detention. (…) [Nevertheless], with the passage of time,

37 See: https://bit.ly/2VVml8V.

38 See e.g. Wiśniewski, 2020, p. 176.

39 Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute in connection with the proportionality principle (Art. 31 para. 3 of the Constitution), as well as on the Art. 40 ('Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute') connected with Art. 41 para. 4 ('Anyone deprived of liberty shall be treated in a humane manner').

40 Para. 3.2 of the judgment.

41 See: https://bit.ly/3nLMa73.

those grounds became less and less relevant. The Court must then establish whether the other grounds adduced by the courts—namely, the severity of the anticipated sentence—were "relevant" and "sufficient"'.[42] The main conclusion of the Court in this aspect was that the gravity of the charges cannot by itself justify long periods of detention pending trial.

b. PCT judgment of 11 October 2016 and ECtHR case van der Valen v. Netherlands of 7 December 2006 (terms of taking samples of biological material from an accused person)

The Polish Constitutional Tribunal by the judgment of 11 October 2016 (Ref. No. SK 28/15)[43] held that the necessity of taking a cheek swab occurs when such evidence is a prerequisite for determining or identifying a perpetrator and for holding him/her criminally liable or for protecting an innocent person from being wrongly held criminally liable.[44] Hence, the controlled provision was found consistent with the right to privacy and the right to personal inviolability. The Tribunal stated that not only personal inviolability but also the right to privacy and informational self-determination do not have an absolute character and may be subject to restrictions in compliance with the rules of proportionality. In its judgment the Tribunal found that the regulation is not only useful, but also necessary and balanced.[45]

There were various methods of interpretation applied in the reasoning: from one based on precedents of the Polish Tribunal, to scholarly works from Poland, to the standard of personal rights in European states. The Tribunal used some case law of the European Court in this judgment, referring to many aspects, especially the right to avoid self-incrimination and the right to privacy in connection with gathering the DNA data.

It is worth emphasizing the explicit reference to the judgment of 7 December 2006, van der Valen v. Netherlands (application no. 29514/05).[46] The Court answered the question about the proportionality of the gains and loses concerning taking a cheek swab in the criminal procedure. The Tribunal—after the European Court's indicated ruling—noted that the intervention breaches personal inviolability minimally and does not entail suffering. What is more, the Tribunal followed the Court in stating that the procedure may be beneficial for the examined individual—protecting an innocent person from being wrongly held criminally liable.

The background of the case van der Valen v. Netherlands was similar to the Polish one. The applicant was convicted for certain crimes, and the public prosecutor ordered that cellular material be taken from him in order for his DNA profile to be determined. In reference to the severity of the measure imposed, the Court found

42 Paras. 45–47.
43 See: https://bit.ly/3hL5v4b.
44 See: https://bit.ly/39ACF2l.
45 About the issue of using DNA data in the constitutional perspective see: Wójcikiewicz, Kwiatkowska-Wójcikiewicz, 2017, pp. 207–222.
46 See: https://bit.ly/39l2l2B.

that the severity of the measure was not decisive. What is more, the Court accepted with no doubts that the compilation and retention of a DNA profile served the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others.

The importance of this case for the interpretation of Polish constitutional template is expressed in the following notes of the Court: 'it is to be noted that while the interference at issue was relatively slight, the applicant may also reap a certain benefit from the inclusion of his DNA profile in the national database in that he may thereby be rapidly eliminated from the list of persons suspected of crimes in the investigation of which material containing DNA has been found'.

c. PCT judgment of 25 November 2014 and ECtHR case Brennan v. United Kingdom of 16 October 2001 (lack of the possibility of telephone communication between a person detained and counsel for the defense)

In the judgment of 25 November 2014 (Ref. No. K 54/13),[47] the Polish Constitutional Tribunal held that an absolute prohibition against the use of a telephone by a person detained pending trial for the purpose of communicating with his/her counsel for the defense is inconsistent with Art. 42 para. 2 of the Constitution[48] in connection with the principle of proportionality.[49]

The Tribunal deemed that the complete exclusion of telephone communication between a person detained pending trial and his/her counsel for the defense restricted the right to defense and was not necessary, but might be justified by concern that the accused would urge that false testimony be given or would, in another unlawful way, obstruct criminal proceedings.[50]

The basic method of interpretation was interpretation on the basis of the case law (precedents) of the constitutional tribunal. What is more, numerous scholarly works of Polish doctrine were used in the arguments. The Tribunal discussed also the standard of guarantees in other European countries (comparative law arguments).

The Tribunal recalled the argumentation expressed in many rulings of European Court of Human Rights—underlining the case law on the right to defense and the right to private life. The Tribunal recalled in particular the judgment of the Court of 16 October 2001, Brennan v. United Kingdom (application no. 39846/98)[51] and emphasized that enabling the accused to communicate freely with his or her lawyer is a

47 See: https://bit.ly/2XFiZb3.

48 'Anyone against whom criminal proceedings have been brought shall have the right to defense at all stages of such proceedings. He may, in particular, choose counsel or avail himself—in accordance with principles specified by statute—of counsel appointed by the court'.

49 About the constitutional and conventional standard of defense rights see more e.g. Steinborn, 2019, pp. 38–46.

50 What is more, in its opinion, the complete deprivation of that form of contact in the case of a person detained pending trial undermines adherence to the principle of equality of arms in criminal proceedings.

51 See: https://bit.ly/3AuqY91.

condition for the effective exercise of the right to defense. Although this guarantee is not absolute, its limitations are considered admissible only if it is sufficiently justified and if it does not invalidate the right to a fair hearing.

The Court in the case of Brennan v. United Kingdom—in terms of the deferral of access to the applicant's solicitor—noted that the measures taken by the police concerning the applicant's access to his solicitor should be compatible with the rights of the defense. The Court recalled also its case law, according to which 'Art. 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation; this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing'.[52]

d. PCT judgment of 11 December 2012 and ECtHR case Rybacki v. Poland of 13 January 2009 (right to defense in the criminal proceedings)

In its judgment of 11 December 2012 (Ref. No. K 37/11),[53] the Polish Constitutional Tribunal held that the provision in the Criminal Proceedings Code referring to the right of the detained person to contact with an advocate to an extent that does not indicate a premise that entitles the detainee to be present at the interview with an advocate, is inconsistent with Art. 42 sec. 2 ('Anyone against whom criminal proceedings have been brought shall have the right to defense at all stages of such proceedings. He may, in particular, choose counsel or avail himself—in accordance with principles specified by statute—of counsel appointed by the court') in connection with Art. 31 sec. 3 of the Constitution of the Republic of Poland (the principle of proportionality.[54]

In the judgment of the European Court of Human Rights of 13 January 2009, Rybacki v. Poland (application no. 52479/99),[55] the applicant complained *inter alia* that for the over five months of his detention he could not communicate with his lawyer out of earshot of the prosecutor or a person appointed by him.[56] The Court noted that 'although not absolute, the right of everyone charged with a criminal offense to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial'. Hence, the right of the defendant to

52 See also judgment of 8.2.1996, John Murray v. the United Kingdom, paras. 54–55, 63; https://bit.ly/3tWQ8Le.

53 See: https://bit.ly/2XGwSFY.

54 About the access to the defense see more e.g. Sakowicz, 2019, pp. 47–54. In particular the comment: 'The European Court of Human Rights held that access to a defense lawyer should be the rule if the suspect's confession is to be used as evidence in the case. The above assumption was extended to apply also to vulnerable suspects. While analyzing ECtHR case law and provisions of the Polish Code of Criminal Procedure, an attempt is made to deduce a prohibition of using the suspect's statements as evidence if the suspect appears without a defense lawyer or when the defense lawyer is absent'. Ibid., p. 54.

55 See: https://bit.ly/3nJXoca.

56 Para. 50.

communicate with his advocate out of hearing of a third person—although perhaps subject to certain restrictions—is part of the basic requirements of a fair trial in a democratic society. The State should prove that there were sufficient grounds for the imposition of the measures complained of.[57]

In the discussed judgment of the PCT, the importance of the right to defense (at the beginning of the criminal trial) was underlined as demanding the use of the standard expressed by the European Court. According to the national tribunal, the Court explicitly assumes that one of the basic elements of the right to defense is the possibility of contact with a lawyer beyond the hearing of a third party—e.g. from the perspective of reasoning in the case Rybacki v. Poland. The Tribunal held—using *inter alia* the reasoning of the mentioned ruling, that the right to unhampered legal advice by a detainee at the initial stage of the criminal proceedings is crucial to ensuring an effective opportunity to defend himself at a later stage of the proceedings.

e. PCT judgment of 10 December 2012 and ECtHR case Silver and Others v. The United Kingdom of 25 March 1983 (terms of communication between a person detained and counsel for the defense)

The Constitutional Tribunal by the judgment of 10 December 2012 (Ref. No. K 25/11) adjudicated that Art. 73(3) of the Act of 6.6.1997, the Polish Code of Criminal Procedure, due to the fact that it indicated no premises whose occurrence would authorize a prosecutor to permit the monitoring of correspondence carried out between a suspect and his/her counsel for the defense, was inconsistent with Art. 42(2) in conjunction with Art. 31(3) of the Constitution.[58]

As may be noted, the relevant constitutional provisions in the case are the same as in the judgment commented upon above. The main problem with the controlled regulation of the criminal procedure was that it did not indicate the premises whose occurrence would authorize a prosecutor to permit the monitoring of correspondence carried out between a suspect and his/her counsel for the defense.

The Tribunal used arguments based on scholarly works—Polish monographs and articles. Furthermore, there were many aspects (e.g. the right to defense) where the Tribunal referred to the Polish constitutional precedents. The Tribunal—using the conventional standard derived from the jurisprudence of the European Court—found that correspondence between a detained person and his advocate should be particularly privileged due to the guarantee resulting from the right to obtain professional legal advice. The test of proportionality (statutory limitation, arbitrariness) of the regulation was not fulfilled according to the judgment of the European Court of Human Rights of 25 March 1983, Silver and Others v. The

57 Paras. 56 and 59.
58 See: https://bit.ly/3kodhms.

United Kingdom (application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75).[59]

The Court stated that, irrespective of the nature of correspondence, it should not be opened, except where there is a reasonable suspicion that the correspondence is being used for illegal purposes. As the judgment stated, 'the Court does not interpret the expression "in accordance with the law" as meaning that the safeguards must be enshrined in the very text that authorizes the imposition of restrictions. In fact, the question of safeguards against abuse is closely linked with the question of effective remedies'. Further, the phrase 'necessary in a democratic society' should be treated as: 1. not synonymous with 'indispensable'; neither does it have the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable', or 'desirable'; 2. leaves a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions; 3. the interference must, *inter alia*, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'; and 4. exceptions to a right guaranteed are to be narrowly interpreted.[60]

f. PCT judgment of 21 January 2014 and ECtHR case W.S. v. Poland of 19 June 2007 (terms of appointing a guardian for a minor who is the aggrieved party in criminal proceedings)

The next discussed judgment of the Polish Constitutional Tribunal of 21 January 2014 (Ref. No. SK 5/12)[61] stated that the risk of a conflict between the interest of a parent who wished to represent the child in proceedings pending against the other parent and the interests of the child would be minimalized only by introducing into criminal proceedings a guardian, as an unbiased representative of a minor. . Such a solution also guaranteed that decisions made to exercise the rights of the minor as the aggrieved party would be as unbiased as possible. In addition, the Tribunal mentioned risks posed by the necessity to evaluate—at the onset of preliminary proceedings—whether a given parent could represent the minor in a proper way.[62]

The right to a child's hearing must not lead to this very value being completely ignored. In weighing these values, the Tribunal pointed to the judgment of the European Court of Human Rights of 19 June 2007, W.S. v. Poland (application no. 21508/02).[63] In conclusion, it noted that from the point of view of international standards of human rights protection, the problem of the Polish criminal procedure turned out to be the defect in the defendant's right to defense, and not the regulation on hearings involving a child.

In the opinion of the Tribunal's ruling commented above, the crux of the case W.S. v. Poland concerned the accused's right to a fair trial in relation to his or her

59 See: https://bit.ly/2Xu86s7.
60 See para. 97.
61 See: https://bit.ly/2Z8bXvH.
62 See: https://bit.ly/2XzB8ao.
63 See: https://bit.ly/3ApVDEB.

right to defense in criminal proceedings. The Court found that 'in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defense'.[64] The main argument justifying the position of the European Court was the statement that the Polish court based the sentence of the father, accused of molesting his child, solely on the opinion of an expert psychologist interpreting the child's testimony.

The method used widely in this judgment was one referring to the arguments from scholarly works formulated following Polish doctrine. What was important in this ruling, in the view of the European Convention's standard, was the significance of the right of the accused to defend himself, even if the accused was one of the child's parents and the offense consisted in acting against the child.

2.2.3. Private law: Protection of property and personal data

a. PCT judgment of 23 October 2012 and ECtHR case Broniowski v. Poland of 22 June 2004 (compensation for immovable properties left outside the present borders of Poland after World War II)

In its ruling of 23 October 2012 (Ref. No. SK 11/12),[65] the Tribunal evaluated the terms of applying for compensation for immovable properties left outside the present borders of Poland after World War II. It was judged that the requirement that the right to compensation be granted on condition that the former owners of immovable properties located in the pre-WW-II eastern territories of the Second Republic of Poland resided in those territories on 1 September 1939 was inconsistent with the Constitution. The Tribunal adjudicated that Art. 2(1) of the Act of 8.6.2005 on exercising the right to compensation arising from leaving immovable properties outside the present borders of the Republic of Poland, insofar as it provided for the right to compensation to be granted on condition that the former owners of immovable properties resided in the pre-war eastern territories of the Second Republic of Poland on 1 September 1939, was inconsistent with Art. 64(2) in conjunction with Art. 31(3) of the Constitution.[66] The Court explained that the right to compensation for immovable properties located in the pre-WW II eastern territories of the Second Republic of Poland is a compensatory property right that falls within the scope of public law and is subject to protection on the basis of Art. 64 of the Constitution. The challenged requirement that the former owners of immovable properties located in these eastern territories of the Second Republic of Poland resided in those territories on 1

64 Para. 57.

65 See: https://bit.ly/39m0OcG.

66 The above provision ceased to have effect after the lapse of 18 months from the date of the publication of the judgment in the Journal of Laws. As to the remainder, the Tribunal discontinued the proceedings. The decision to defer the effects of the judgment was justified both by its potential financial consequences for the situation of the Restitution Fund as well as by the considerable degree of complexity of the matters under analysis.

September 1939 constitutes a restriction of that right that is subject to examination in the light of the principle of proportionality (Art. 31(3) of the Constitution).[67]

The Constitutional Tribunal emphasized that the legislator enjoyed considerable freedom as regards determining the terms of granting compensation and the forms thereof with regard to immovable properties located in the pre-war eastern territories of the Second Republic of Poland. However, this did not imply an automatic approval of every kind of criterion for access to such benefits that made it possible to adjust the said compensation to the capacity of the state budget. Indeed, even the smallest amounts of funds might, and should, be allocated on the basis of provisions that met constitutional standards.

In its justification, the tribunal referred expressly to the jurisprudence of European Court of Human Rights, in particular to the ruling of 22 June 2004, Broniowski v. Poland (application no. 31443/96[68]). The Court (Grand Chamber) held that there had been a violation of Art. 1 of Protocol No. 1 of Convention. It found that that violation had originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the 'right to credit' of Bug River claimants,[69] with the consequence that not only the applicant in this particular case but also a whole class of individuals had been or were still denied the peaceful enjoyment of their possessions.[70] In connection with this, the Court directed that the respondent State should, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress *in lieu*, in accordance with the principles of protection of property rights under Art. 1 of Protocol No. 1.[71]

The Polish Constitutional Court did strengthen its argumentation by reference to European Court stating that, in respect of the award to the applicant for any pecuniary or non-pecuniary damage resulting from the violation found in the present case, the Court held that the question of the application of Art. 41 of the Convention was not ready for decision and reserved that question as a whole, inviting the Government

67 In the opinion of the Tribunal, the requirement is excessively restrictive. The persons who left the pre-war eastern territories of the Second Republic of Poland due to the outbreak of the war in 1939, could not have predicted rationally that possible compensation for the lost immovable properties would be conditioned by residing in the former territories of the Polish State during a special and very brief period in the distant past (only one day—1 September 1939). Indeed, during the years of the Second Republic of Poland (the period between the wars), the scope of the protection of ownership as regards immovable properties was in no way conditioned by the place of residence, and the provisions that were binding at that time permitted having a few places of residence. Additionally, when enacting the challenged regulation, no analysis was carried out with regard to alternative solutions, followed by the choice of the one that was the most fair and that implemented the aim of the Act to the largest extent, and that introduced only necessary restrictions and differentiation.

68 See: https://bit.ly/39i7CYS.

69 Point 3 of the judgment.

70 Para. 189.

71 Point 4 of the judgment.

and the applicant to submit, within six months from the date of notification of the principal judgment, their written observations on the matter and to notify the Court of any agreement they might reach.[72]

In greater detail, with respect to Art. 41, the Court considered that that issue should be resolved, not only with regard to any agreement that might be reached between the parties but also in the light of such individual or general measures as might be taken by the respondent Government in execution of the principal judgment. Pending the implementation of the relevant general measures, the Court adjourned its consideration of applications deriving from the same general cause.[73] This argumentation was also directly applied by Constitutional Tribunal.

b. PCT judgment of 7 March 2018 and ECtHR case Beyeler v. Italy of 5 January 2000 (limitation to ownership caused by environmental protection)

In the judgment of 7 March 2018 (Ref. No. K 2/17),[74] the Constitutional Tribunal judged the case of limitation to proprietary rights *sensu largo*. The Tribunal adjudicated that Art. 129 (4) of the Act of 27.4.2001 on Environmental Protection was inconsistent with Art. 64(1) in conjunction with Art. 31(3) of the Constitution. During these proceedings, the arguments covering the interpretation of Art. 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms were presented and *de facto* granted by the tribunal. They included the principle of 'fair balance' presented in the jurisprudence of the European Court.

The Court in its judgment of 5 January 2000, Beyeler v. Italy (application no. 33202/96[75]) stated that, in order to be compatible with the general rule, an interference with the right to the peaceful enjoyment of 'possessions', apart from being prescribed by law and in the public interest, must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[76]

Polish Constitutional Court *de facto* used—as the argument in its reasoning—the observation that in the jurisprudence of ECtHR it has been pointed out that this rule does not prohibit even significant restrictions on the property rights, so long as they are accompanied by legal instruments that maintain a proper balance between public and private interests. Important factors creating this appropriate balance are: awareness of the introduced restrictions and the ability to predict their future effects, the size of the restrictions, the possibility of questioning the validity of the restrictions introduced, and the mechanism of compensation claims. On the

72 Point 5 of the judgment.
73 Para. 198.
74 See: https://bit.ly/3zjLV5e.
75 See: https://bit.ly/2Z4BqWU.
76 Paras. 107, 137.

other hand, the difficult, and in many cases even inaccessible, possibility of taking advantage of the provisions provided for in Art. 129 (1-3) of the Act was claimed not to strike a fair balance between public and private interests. Detailed practical examples of national solutions that were given in this European Court jurisprudence and that may update the negative assessment from the perspective of Art. 1 were also applied in the process of creating the national control standard.

c. PCT judgment of 24 April 2018 and ECtHR case Michał Korgul v. Poland of 21 March 2017 (exercise of ownership by convicted persons)

In the judgment of 24 April 2018 (Ref. No. SK 27/16),[77] the Constitutional Tribunal judged (with regard to a constitutional complaint) the exercise of the right of ownership by convicted persons serving prison sentences. The Tribunal adjudicated that Art. 126(10) of the Act of 6.6.1997—the Executive Penal Code—insofar as it does not allow a convicted person to use personal funds referred to in Art. 126(1) of the said Act to pay for a fine if the fine was not substituted with a prison sentence or with detention, is consistent with Art. 64(1) in conjunction with Art. 64(3) of the Constitution of the Republic of Poland.

The allegations raised in the constitutional complaint did not concern the entire category of so-called 'frozen funds' provided for in Art. 126 of the Executive Penal Code, but a certain element thereof.[78] Before the Tribunal assessed the validity of the allegation, it analyzed provisions on the keeping and disposal of funds belonging to a convicted person, as well as provisions regulating the replacement of a fine with a substitute penalty of confinement. First, the Tribunal held that money that is to be kept as 'frozen funds', due to the nature of that legal construct, does not in principle comprise all money belonging to a convicted person or all money obtained from the sources mentioned in Art. 126(2) of the Executive Penal Code—in every case, it is only a certain percentage of those funds.[79] Second, the Tribunal considered the fact that the mechanism regulated in the provisions of the Executive Penal Code was constructed in such a way that even if a convicted person's only money is the money accumulated as 'frozen funds', this does not rule out the payment of a fine imposed on that person. Indeed, in the case where the said person has no money for the enforcement of the fine to be carried out, a competent court orders the administration of a substitute penalty of the deprivation of liberty, which the convicted person may

77 See: https://bit.ly/2VTjugI.

78 The complainant challenged the solution that Art. 126(10) of the Code did not allow a convicted person to use his/her accumulated 'frozen funds' to pay a fine that had not be substituted with a prison sentence or with detention. According to the complainant, that restriction was too far-reaching, as the indicated provision should permit the use of a convicted person's 'frozen funds' for the payment of his/her fine, regardless of the fact whether the fine had been replaced with a substitute penalty.

79 Every incoming amount of money (except for an amount deposited by a convicted person at the time of being admitted to prison) is subject to a one-off reduction by an amount not higher than 4% of average remuneration of workers. Thus, convicted persons may use the remaining funds to pay for their fines, or this could be done by convicts' close persons.

object to by filing an application pursuant to Art. 126(10) of the Executive Penal Code.[80]

The Tribunal expressly accented—similarly to the reasoning presented by ECtHR—that the legislator had weighed the respective interests in the examined situation: First, the intention to provide convicted persons with basic financial means after their release from prison (by creating the legal construct of 'frozen funds', which serves rehabilitative goals and the protection of the public order); second, the avoidance of the further confinement of convicted persons, and hence the introduction of an exception that 'frozen funds' may be used for paying a fine if it substitutes for a prison sentence or detention (which constitutes a warranty measure with regard to convicted persons). Taking this into consideration, the Tribunal stated that the legislator had not exceeded the constitutional limits of admissible interference with the property rights of convicted persons, and that he had balanced the necessity to protect those rights with the need to protect public order and with the assumption that prolonging the confinement of convicts should be avoided.

In the mentioned judgment of 21 March 2017, Michał Korgul v. Poland (application no. 36140/11[81]) the applicant, a Polish national, was detained. The European Court of Human Rights stated that the state has the right to use such programs (systems) that it considers most appropriate for reintegrating prisoners into society after their release, including by securing a certain amount of money for them.[82] In this case the European Court expressly declared that the state has the right to use programs (systems) that it deems most appropriate for the reintegration of prisoners into society after their release, including by securing a certain amount of money for them.

It should be added that the Polish Constitutional Tribunal also noted that the institution of 'frozen funds' can be treated as an element of the implementation of Principle 6 of Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules[83] regarding facilitating the reintegration of persons deprived of liberty into a free society. Although this recommendation is

80 The Tribunal noted that the legislator's assumption was that a convicted person should pay his/her fine from money that had not been included in 'frozen funds'. Such an assumption is linked with the legal construct of 'frozen funds' as a certain savings (accumulated money) plan which is to provide convicted persons with financial means to travel home after their release from prison and to support themselves. When creating the legal construct of 'frozen funds', the legislator also provided for an instrument on the basis of which—and in compliance with certain requirements—convicted persons may pay their fines with money accumulated as 'frozen funds', but only after the enforcement of the fine proves ineffective or if it follows from the circumstances of a case that the said enforcement would be futile.

81 See: https://bit.ly/3hP1j3L.

82 The case essentially concerned his complaint about the high-security measures to which he had been subjected in the context of criminal proceedings brought against him for armed robbery. He was classified as a dangerous detainee and placed under a high-security regime for two periods covering nearly two years. These security measures were applied and extended on the ground that he had been aggressive and threatening to prison guards.

83 See: https://bit.ly/3EBhWcU.

not binding, the solutions contained therein are treated as determining the way of shaping penitentiary systems in the legal orders of individual member states of the Council of Europe.

d. PCT judgment of 30 Jul 2014 and CJ EU case Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Ireland; Kärntner Landesregierung v. M. Seitlinger and others of 8 April 2014; C-293/12, C-594/12 (information on the individual gathered in operational activities)

The PCT judgment of 30 July 2014 (Ref. No. K 23/11)[84] refers to technical (telecommunication) data retention and covert surveillance. PCT resolved the issue of granting access to telecommunications data retained by service providers and—what is important from the perspective of protection of personal data—retaining them. It was judged *inter alia* that some questioned provisions of acts on operational activities[85] were inconsistent with Arts. 42(2), 47, 49, 51(2), and 54(1) of the Constitution in conjunction with Art. 31(3) insofar as they did not provide for a guarantee that materials that contained information that was prohibited from being evidence should be subject to immediate, witnessed, and recorded destruction in a case where the court had not lifted professional confidentiality requirements.[86]

What is interesting is that the statute provisions under review were closely related to the scope of application of Directive 2006/24/EC[87] (although they did not implement this EU law). The issue of compliance of the provisions on telecommunications data retention with fundamental rights was in fact common to the many Member States. Similar regulations were assessed also by national constitutional courts and the CJEU. The jurisprudence of the ECtHR was also important in determining the standard of protection of fundamental rights. First of all, it should be noticed the decision of PCT was influenced by reasoning presented by EC EU that considered Directive 2006/24/EC invalid. PCT answered the legal question of the impact of the annulment of the directive on constitutionality of national provisions and review in the pending case. When declaring the unconstitutionality of the

84 See: https://bit.ly/3lDoRcY.

85 I.e. Police, Border Guard, tax audit, Military Police, Internal Security Agency and Foreign Intelligence Agency, Military Counter-Intelligence Service and the Military Intelligence Service, and the Central Anti-Corruption Bureau.

86 The freedom of privacy in the digital age is constitutionally protected and implies that individuals are at liberty to act within the scope of that freedom as long as a relevant statute does not delineate its scope. The Tribunal explained that protection arising from theses articles comprises all ways of transferring information in every form of communication, regardless of means used (e.g. conversations in person and on the phone, written correspondence, fax, SMS and MMS messages, email, exchanging messages via portals). The said protection pertains not only to the content of a communication but also to the circumstances of the communication.
See the detailed description in English: https://bit.ly/3tUVqXg.

87 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC; OJ L 105, 13.4.2006, pp. 54–56.

above-mentioned provisions on data retention, PCT referred also to the standard indicated in the CJEU judgment of 8 April 2014, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Ireland; Kärntner Landesregierung v. M. Seitlinger and others (C-293/12, C-594/12).[88] As a result, the standard of secret surveillance implemented by PCT is a kind of composition of requirements previously presented by CJ EU (and indirectly by the jurisprudence of ECtHR, taken into consideration by PTC and CJ EU) with additional domestic requirements.[89] This comes as no surprise, given the similar wording of the constitutional provisions and Arts. 7–8 of the EU Charter of Fundamental Rights (protection of private life and protection of personal data).

2.2.4. Private law: Civil liability and compensation

a. PCT judgment of 23 Jun 2015 and CJ EU case ACI Adam BV and others against Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding of 10 April 2014 (culpable infringement of copyright)

The issues of liability for infringement of copyright and the amount of damages were the subject of two pending proceedings before the national court in recent years.

For the first time, in judgment of 23 June 2015 (Ref. SK 32/14)[90] the Tribunal judged that Art. 79 (1.3.b in fine) of the Act of 4.2.1994 on copyright and related rights was partly inconsistent with Art. 64 (1-2) in connection with Art. 31 (3) and Art. 2 of the Constitution of the Republic of Poland. This concerned the extent to which the entitled, whose economic copyrights had been infringed, may request the person who infringed those rights to remedy the loss caused: on the basis of general principles, or—in the event of a culpable infringement—by payment of a sum of money corresponding to three times the amount of the appropriate fee that would have been due at the time it was sought if the rightholder had given permission for the work to be use.[91]

The abovementioned provision was based on a mechanism that 'distracted' the question of the infringer's liability from the damage caused by its actions and, moreover, made it possible to completely disregard the kind of 'unlawfulness' that

88 See: https://bit.ly/2Z3cgIb.

89 It is discussed in the legal literature that the issue at stake is common within the European case law and the PCT and the European courts create a standard for the protection of freedom of communication and privacy. See the detailed remarks: Podkowik, Zubik, 2021, pp. 155–173.

90 See: https://bit.ly/3ApsERi.

91 See more: Gęsicka, 2015, pp. 205–218. The author stresses that: 'it might be deduced that the Tribunal indirectly advocated an alternative damage claim that would refer to a single lump sum (royalty fee). Nevertheless, such an approach might turn out to become an obstacle for non-professional right holders, mostly the authors themselves, to be compensated for the entire damage. The judgment thus lacks consistency as well as proper justification and that is the reason for the Author's only partial approval of it' (pp. 217–218).

had emerged in this case.[92] In the opinion of the Tribunal, the legislator had disturbed the balance between the position of the copyright holder and the perpetrator of the damage.[93] Additionally, the Tribunal emphasized that a victim whose property rights have been violated may be granted various protective legal instruments. Nevertheless, he should not have at his disposal such instruments as would indicate that the legislator itself guarantees excessive interference with the property rights of the *ex delicto* liable. Since, as a rule, such a basic protective instrument is compensation determined within the limits of an adequate causal link, even the introduction of lump sum elements may not lead to a complete loss in legal provisions of the issue of proportion between the amount of damage suffered and that compensation.

As the justification of this ruling, the Polish Tribunal explicitly referred to the judgment of the Court of Justice of the European Union of 10 April 2014 (ACI Adam BV and others against Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding, C-435/12[94]). The reasoning of this ruling expresses *inter alia* the statements that the EU law 'must safeguard a fair balance between the rights and interests of authors, who are the recipients of the fair compensation, on the one hand, and those of users of protected subject-matter, on the other' (53) and 'satisfying the condition of the fair balance to be found between, on the one hand, the rights and interests of the recipients of the fair compensation and, on the other, those of those users' (57). These statements were recalled by the Tribunal to strengthen the grounds of the judgment given.

b. PCT judgment of 5 November 2019 and CJ EU case 'Oławska Telewizja Kablowa' w Oławie v Stowarzyszenie Filmowców Polskich w Warszawie of 25 January 2017 (compensation of infringement of copyright)

In the second case, the Tribunal in its judgment of 5 November 2019 (Ref. No. P 14/19)[95] ruled that the remaining part of Art. 79 (1.3.b in initio) of the Act of 4.2.1994

92 The court to which the entitled person referred his claim, applying the challenged regulation, examined only the conditions for liability for damages in the challenged provision, but did not take into account any further circumstances that could affect the scope of the applicant's liability. In particular, the court did not take into account the detailed context underlying the infringement, related to the negotiation of the amount of the license fee in the situation of rather limited freedom of contract.

93 While the entitled person has strong institutionalized protection, enjoys a whole catalogue of claims triggered in connection with infringement of author's economic rights, as well as procedural facilities (information claims), the legislator additionally equipped him with an instrument of protection consisting in demanding a flat-rate compensation that does not require establishing the amount of damage, or even completely detached from it. On the other hand, the perpetrator of the tort, which is held liable separately from the known from Art. 361 of the Civil Code the principle of adequate causation, he does not have any effective instruments enabling him to defend himself and minimize the incurred damage to property. Not only is his responsibility not limited to 'the normal consequences of the action (…) from which the damage resulted', but may exceed them several (three) times.

94 See: https://bit.ly/39mX2jm.

95 See: https://bit.ly/3lKKzMd.

on copyright and related rights is consistent with Art. 64 (1-2) in connection with Art. 31 (3) and Art. 2 of the Constitution of the Republic of Poland. This case concerned the scope within which a rightholder whose economic rights of copyright have been infringed may request the person who infringed those rights to remedy the loss caused: on the basis of general principles, or by payment of a sum of money corresponding to twice the amount of the appropriate fee that would have been due at the time it was sought if the rightholder had given permission for the work to be used.

The Polish Constitutional Tribunal argued *inter alia*—similar as to the merits but of an individual character—based on the jurisprudence of CJ EU. PCT accented that the judgment of the Court of Justice of European Union of 25 January 2017 had been given (Stowarzyszenie 'Oławska Telewizja Kablowa' w Oławie v Stowarzyszenie Filmowców Polskich w Warszawie; C-367/15[96]) and directly influenced the judging of the domestic case. CJ EU previously ruled—based on the aim of the legislator—that Art. 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as not precluding national legislation under which the holder of an intellectual property right that has been infringed may demand from the person who has infringed that right either compensation for the damage that he has suffered (taking account of all the appropriate aspects of the particular case), or—without him having to prove the actual loss—payment of a sum corresponding to twice the appropriate fee that would have been due if permission had been given for the work concerned to be used. This ruling of EU Tribunal was *de facto* positively evaluated and adopted as more general solution (*a minori ad maius*), as well as the element of reasoning presented by Polish Constitutional Tribunal.

2.2.5. Procedural civil law

a. PCT judgment of 22 September 2015 and ECtHR case Paykar Yev Haghtanak Ltd v. Armenia of 20 December 2007 (reopening a domestic proceeding after judgment of European Court)

In the judgment of 22 September 2015 (Ref. No. SK 21/14),[97] the Tribunal ruled on Art. 408 of Civil Procedure Code of 17.11.1964 to the extent of stating that, five years after the judgment becomes final, it is not possible to reopen civil proceedings (revision of a final and non-appealable judgment) due to violation of Art. 6 (1) of the European Convention. It was judged that this provision is partly inconsistent with Art. 77 (2) in connection with Art. 45 (1) of the Constitution of the Republic of Poland.

This case is an example not only in national jurisprudence and interpretation of the constitution of drawing from the models of interpretation adopted by international tribunals (here: ECtHR) regarding the interpreting of convention standards, but also an example of assessing statutory solutions constituting a 'bridge' between

96 See: https://bit.ly/3hK67Hx.
97 See: https://bit.ly/2XwtoFw.

the judgment of an international tribunal and the assurance of its general consequences for the future in a given country.

The complainant presented the opinion that the five-year time limit for the reopening of civil proceedings in Polish law would close the court to protecting her rights if the grounds for reopening were to result from a judgment of the European Court. Proceedings before such a tribunal are long and drawn out and do not necessarily end within five years of the conclusion of the domestic proceedings. Finally, the Constitutional Tribunal evaluated this solution as a disproportionate in the strict sense.

In the reasoning and argumentation, the European jurisprudence was recalled, in particular the judgment of the Court (Third Section) of 20 December 2007 (Paykar Yev Haghtanak Ltd v. Armenia; application no. 21638/03[98]). In the justification of the Polish Tribunal's decision, an important reference was expressly made to the following fragment: 'The Court notes in this connection that Art. 241.1 of the CCP allows the reopening of the domestic proceedings if the Court has found a violation of the Convention or its Protocols (see para. 25). The Court is in any event of the view that the most appropriate form of redress in cases where an applicant was denied access to court in breach of Art. 6 § 1 of the Convention would, as a rule, be to reopen the proceedings in due course and re-examine the case in keeping with all the requirements of a fair trial' (para. 58). This did strengthen the argumentation of domestic tribunal, whichreiterated that the right to a court, of which the right of access constitutes one aspect, is not absolute but may be subject to limitations. Nevertheless, the limitations applied—taking into consideration the contextual interpretation—must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation would not be compatible with Art. 6 § 1 if it did not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

b. PCT judgment of 8 November 2016 and ECtHR case Helmers v. Sweden of 29 October 1991 (binding character of legal assessment and indications of the second instance court)

Another provision of general character within the civil procedure was the matter of the judgment of the Constitutional Tribunal of 8 November 2016 (Ref. No. P 126/15).[99] It was judged that Art. 386 § 6 of the Code of Civil Procedure of 17.11.1964 is consistent with Art. 45 (1) and Art. 178 (1) to the extent that the legal assessment and indications as to further proceedings expressed in the justification of the judgment of the second instance court shall be binding on the court of first instance to which the case was referred.[100]

98 See: https://bit.ly/3lEFll4.

99 See: https://bit.ly/3AsndAP.

100 The given solution was evaluated as eliminating the risk of excessive length of the trial, caused by the fact that the court of first instance, which does not agree with the appeal decision, will issue a decision similar to the annulled one, and this decision will also be revoked in the future by the court of second instance after another appeal.

The Tribunal expressly stated that Art. 45 (1) of Polish Constitution takes into account the content of Art. 6 (1) of the Convention (the right to have a case examined by an independent court). Additionally, the jurisprudence of European Court was reported with the following conclusion strengthening the final decision: It did not prejudge the model of civil proceedings, including the model of appeal and even relations between the decisions of courts of different instances in the same case.

It was highlighted that application of Art. 6 (1) in relation to proceedings before courts of appeal depends on the particular nature of the proceedings in question. It was also stressed that the manner of application of Art. 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein. These conclusions were substantiated by the theses of the judgment of European Court of 29 October 1991, Helmers v. Sweden (Application no. 11826/85[101]). Hence, the last ruling directly influenced the way of interpretation of the control template, i.e. Art. 45 of Polish Constitution.

c. PCT judgment of 11 July 2018 and ECtHR case Levages Prestations Services v. France of 23 October 1996 (formal components of cassation)

By its judgment of 11 November 2018 (Ref. No. SK 3/17[102]), the Constitutional Tribunal evaluated the core components of cassation in the context of civil proceedings. It adjudicated that Art. 398^6 (2-3) in conjunction with Art. 398^4 (1,3), in conjunction with Art. 13(2) of the Civil Procedure Code of 17.11.1964 is consistent with Art. 45(1) in conjunction with Art. 2 and Art. 31(3) of the Constitution of the Republic of Poland.[103] The Tribunal emphasized that what constitutes a protected value that justifies the legislator's adoption of such a model of a cassation appeal (which also implies the division of defects into those that are barred from being rectified and those that are subject to elimination in restructuring proceedings) is the protection of certainty and security of legal transactions. Proceedings before the Supreme Court concern legally effective rulings. The possibility of revoking such rulings because of a public interest will always result in a state of uncertainty as to the situation determined by such a ruling.[104]

101 See: https://bit.ly/3klhjvU.

102 See: https://bit.ly/3lAJqqi.

103 As regards the pace of proceedings at this stage, a call for the elimination of any deficiencies concerning core components of a cassation appeal within the same (one-week) time-limit would not prolong relevant proceedings. Hence, the pace of proceedings does not justify shaping requirements as to the core components of cassation appeals. Consequently, the said pace does not justify depriving parties of the possibility to supplement the aforementioned deficiencies in the context of proceedings on restructuring a debtor's liabilities (hereinafter: restructuring proceedings).

104 The said possibility will also always interfere with the principle of certainty and security of legal transactions. Proceedings on cassation appeals constitute proceedings on extraordinary means of appeal—and are not third-instance proceedings, where, until the completion of all the stages of those proceedings, parties to the proceedings must take into account the possibility that the rulings delivered by the courts of lower instances in a given case may be revoked.

The Tribunal added that all subjects of legal rights and obligations whose legal and actual situations were shaped by a legally effective ruling should act in confidence as to the irrevocability of those determinations. In the event a cassation appeal is filed by the adversary party, the subjects of legal rights and obligations should have the possibility of predicting if there are any real chances of revoking such a ruling.[105] The Tribunal stated also that a different way of determining the effects of failure to include core components in a cassation appeal and the categorization of such deficiencies as formal defects subject to supplementation in restructuring proceedings would actually lead to a complete change of their nature. However, such considerable interference with the legislator's decision is not justified in the context of the present case. In the legal doctrine and the jurisprudence of courts, it is highlighted that core components constitute mandatory elements that make up an appeal and determine that a given submission by a party is a cassation appeal. Thus, core components determine the essence of a cassation appeal.[106]

The reasoning of the European Court adopted in judgment of 23 October 1996, Levages Prestations Services v. France (application no. 21920/93[107]), was of great importance for such an understanding of the constitutional template of control in the national tribunal's jurisprudence, and thus for the abovementioned decision, it was indirectly taken into consideration (§§ 44–48) via the reasoning in the recalled earlier judgments given by the Tribunal. As to the formalism—quite legitimately the conditions of admissibility of a cassation appeal may be more formal and limited than in the case of a normal appeal. Taking into account the special role played by the court of cassation, the procedure used by that court may be more formal, especially when the proceedings before the court of cassation take place after the case has been examined by a court of first instance and then by a court of appeal—each of them having a full range of jurisdiction. It also noted the special nature of the role of the cassation, which is limited to examining whether the law has been applied correctly.

105 The lack of formal requirements as to the content and form of a cassation appeal together with serious consequences of failing to meet them would constitute far-reaching interference with the principle of the protection of legal transactions. This would enhance the lack of certainty as to a situation shaped by a legally effective ruling. The necessity to ensure the certainty and security of legal transactions in a democratic state constitutes sufficient justification for introducing limitations to the right to a fair trial within the scope of shaping a procedure together with the serious effects of failure to meet the requirements of a cassation appeal.

106 Additionally, the lack of any of the core components entails that a given means of appeal constitutes a cassation appeal and hence the said deficiencies (primary deficiencies) are subject to elimination. The Tribunal emphasized that the high degree of formalization of cassation appeals is alleviated by the requirement that a cassation appeal be drafted by an advocate or a legal adviser. The requirement that a cassation appeal should comprise all its core components is not impossible to be met by a professional attorney. The incorrect drafting of a cassation appeal which consists in failing to meet the relevant requirements as to its core components may not be an argument for the change of the character of those elements and for the treatment of every submission as a cassation complaint.

107 See: https://bit.ly/3zpgRRA.

d. PCT judgment of 17 May 2016 and ECtHR case Podbielski and PPU Polpure v. Poland of 26 July 2005 (costs of court procedure)

The next three discussed judgments of Polish Constitutional Court regard the issues of costs of proceedings, in particular the amount and its reimbursement, as well as the general issue of access to the court.

With the judgment delivered on 17 May 2016 (Ref. No. SK 37/14),[108] the Tribunal stated that: 'The exemption of a losing party by a court from the obligation to reimburse the legal costs of a winning party in particularly justified instances, without burdening the State Treasury with the said costs, does not infringe the right to a fair trial, as regards a properly devised court procedure that complies with the principles of justice'. The Constitutional Tribunal adjudicated that Art. 102 of the Civil Procedure Code of 17.11.1964, insofar as it does not impose on the State Treasury the obligation to reimburse the legal costs of a winning party that were not adjudged to be paid by a losing party, is consistent with Art. 45(1) of the Constitution. Art. 102 was evaluated as constituting a purposeful departure, justified by the principles of equity, from the principle of liability for the outcome of a trial. According to the Tribunal, it is necessary to have a certain safety valve, i.e. in particularly justified instances, the possibility that a court may lift the obligation of a losing party to reimburse the legal costs of a winning party.[109]

In the opinion of the Constitutional Tribunal, the challenged Art. 102 of the Civil Procedure Code constitutes a justified exception to the principle of liability for the outcome of a trial, and it does not infringe a component of the constitutional right to a fair trial, namely the right to a proper court procedure that complies with the principles of justice. Art. 102 is thus a proper example of a departure—justified by particular circumstances of a case—from the principle of liability for the outcome of a trial.[110]

The Tribunal added that the principle of liability for the outcome of a trial is not, and should not, be absolute in character. There is no doubt that the legislator ought to provide for exceptions to that rule, such as the challenged Art. 102, that comply with the principle of equity. For this reason, it ought to be deemed that the challenged Art. 102 of the Civil Procedure Code not only causes no violation of a proper court procedure, which constitutes a component of the constitutional right to

108 See: https://bit.ly/3nO98u8.

109 Courts apply Art. 102 of code only by way of an exception, and the catalogue of recurring instances regarded as particularly justified is directly linked with the facts of a given case, and not merely with the financial situation of a losing party (as in the case in the context of which the constitutional complaint was submitted, where an allegation had been put forward effectively about the expiry of the claims of the petitioner, i.e. the losing party).

110 It was pointed also out that, in the consistent domestic jurisprudence, the right to a fair trial has been linked with the principle of payment for the administration of justice. This does not entail that the Tribunal departs from the view presented in its jurisprudence that, as a rule, legal costs should be adjudged to a losing party.

a fair trial, but actually manifests the conformity of said procedure to the principle of justice.[111]

The arguments relating to reasoning when judging this case were presented by the European Court (Fourth Section) judgment of 26 July 2005, Podbielski and PPU Polpure v. Poland (application no. 39199/98). The following ECtHR statements were taken into consideration by the Polish Constitutional Court when shaping the normative content of the applied standard of control: 'In the present case the applicant had to desist from pursuing his case before civil courts because his company was unable to pay the court fee (…); which it had been required to pay for proceeding with the appeal. It is true that no right to appeal in civil cases can be inferred from the Convention and that, given the nature of appeal proceedings and the fact that a person has already had his case heard before the first-instance court, the State would in principle be allowed to put even strict limitations on access to a court of appeal. It is also true that in the Tolstoy-Miloslavsky v. the United Kingdom case (application 18139/91),[112] the Court found that the requirement to secure a significant sum for the anticipated legal costs of the applicant's opponent in appellate proceedings had pursued a 'legitimate aim', especially given the poor prospects of success in the applicant's appeal. It also attached 'great weight' to the fact that the case had been heard for 40 days at first instance and, in that context, stressed that in cases where access to a court was concerned, the entirety of the proceedings had to be taken into account (paras. 61–67 of this case). However, restrictions that are of a purely financial nature and that, as in the present case, are completely unrelated to the merits of an appeal or its prospects of success, should be subject to a particularly rigorous scrutiny from the point of view of the interests of justice (paras. 63–64 above)'.[113]

111 The Tribunal found it necessary to emphasize that, from the point of view of a proper court procedure that is consistent with the principle of justice, it is vital that the principle of equity arising from Art. 102 of the Civil Procedure Code would be applied by way of an except and would not become a measure within the scope of the so-called 'poor law'. If this was the direction in which the jurisprudence of courts was headed, as regards complementing the content of the term 'particular justified instances', lacking sufficient specificity, as used in Art. 102 of the code, then the allegation raised in this constitutional complaint should be evaluated differently. Indeed, what we would deal with would not be the principle of equity—which permits a court to determine the issue of legal costs in a different way than in accordance with the principle of basic liability for the outcome of a trial—but actually the legal institution of 'poor law'.

112 See: https://bit.ly/3nQ4MCE.

113 Additionally the following fragment should be pointed out:
'66. The Court notes that, indeed, the courts at several instances heard Mr. Podbielski's case and that, eventually, the fee for lodging his company's appeal of 29 November 1996 was significantly reduced (…). Yet, in contrast to the Tolstoy-Miloslavsky case, the money that the applicant was obliged to secure did not serve the interests of protecting the other party against irrecoverable legal costs. Nor did it constitute a financial barrier protecting the system of justice against an unmeritorious appeal by the applicant. Indeed, the principal aim seems to have been the State's interest in deriving income from court fees in civil cases'.

Also in this case, the interpretation presented earlier by the European court was used by the national tribunal to strengthen the argumentation explaining the constitutional decision taken.

The Tribunal deemed that it was necessary to underline that the constitutional standard of the right to a fair trial—as provided for in Art. 45(1) of the Constitution in fact interpreted in line with ECtHR standards—does not require free-of-charge court proceedings where the State Treasury covers the whole financial burden of the pursuit of claims by parties before courts. Therefore, the legislator may—by respecting the principle of liability for the outcome of a trial, which is regarded in the jurisprudence of the Constitutional Tribunal as basic with regard to legal costs—determine rules for covering legal costs by parties to proceedings, taking account of certain axiological and functional considerations.[114]

e. PCT judgment of 4 April 2017 and ECtHR case Tiemann versus France and Germany of 27 April 2000 (costs of court procedure)

Then, in the judgment of 4 April 2017 (Ref. No. P 56/14),[115] the Constitutional Tribunal heard a case on exemption from costs and on court-appointed legal representation. It was judged that the legal obligation (imposed on legal entities) to prove the lack of sufficient means to cover, respectively, legal costs as well as the costs of legal representation by an advocate or a legal adviser is consistent with the Constitution.

The Tribunal adjudicated that Art. 117(3) of the Civil Procedure Code of 17.11.1964, insofar as it burdens legal entities with the legal obligation to prove their lack of sufficient means to cover the costs of legal representation by an advocate or a legal adviser as well as Art. 103 of the Act of 28.6.2005 on legal costs in civil cases, insofar as it burdens legal entities with the legal obligation to prove their lack of sufficient means to cover legal costs, are consistent with Art. 45(1) and Art. 32(1) of the Constitution.

The Tribunal indicated that the court's role is not to substitute a party in the fulfilment of its evidentiary obligation; nor is it to show in what way the said party is to prove its statements. Moreover, the possibility that the court admits evidence which has not been indicated by parties does not mean that the court is obliged to act in the event of the inaction of a party; the fact that the court admits evidence that has not been indicated by the party does not exempt the party from the necessity to take initiative, present true statements, and provide evidentiary submissions in support thereof. The principle of equality before the law prescribes the same

114 The Tribunal held also that, in the light of the constitutional right to a fair trial, there is no direct correlation between the court's exemption of a losing party from the obligation to reimburse legal costs and the obligation of the State Treasury to reimburse legal costs. Such a solution could be justified only, and exclusively, in a situation where the assumption about free-of-charge proceedings is adopted together with the principle of liability for the outcome of a trial, namely where a winning party would always have to be reimbursed for its legal costs, either by a losing party, or by the State Treasury, even if this breached the principle of equity.

115 See: https://bit.ly/3Ewan7c.

treatment with regard to similar subjects of rights and obligations, but it does not prohibit the adoption of different legal solutions with regard to the subjects that differ in respect of certain essential characteristics.[116]

The decision of EHCR (Fourth Section) of 27 April 2000, Tiemann versus France and Germany (application no. 47457/99, 47458/99[117]) has such an effect of constitutional control and was recalled. The European Court reiterated that it was not its task to substitute its own assessment of the facts and the evidence for that of the national courts, but to establish whether the evidence was presented in such a way as to guarantee a fair trial. In addition, Art. 6 (1) of the European Convention does not lay down any rules on the admissibility or probative value of evidence or on the burden of proof, which are essentially a matter for domestic law. This theological statement influenced the interpretation of the domestic constitutional standard. The constitutional issue in the case was the question whether, imposed on legal entities, the legal obligation to prove the lack of sufficient means to cover, respectively, legal costs as well as the costs of legal representation by an advocate or a legal adviser is consistent with the right to a fair trial as regards a properly devised court procedure and the principle of equality before law.

This led to the final detailed conclusion that applicants applying for exemption from legal costs and for the appointment of professional legal representation may prove that they lack sufficient means for that purpose by submitting any available evidence. However, the applicants may not limit themselves to filing a statement about the lack of such means or to indicating factual circumstances without presenting any appropriate documents.[118]

f. PCT judgment of 21 June 2017 and ECtHR case Weissman and Others v. Romania of 24 May 2006 (costs of court procedure)

The terms of determining rates for the services of advocates as well as the State Treasury's payment of the costs of unpaid court-appointed legal representation

116 It was also stated that individuals and legal entities are subjects of rights and obligations that share no common essential characteristic that would justify the necessity to treat them equally as regards the legal obligation to prove the lack of sufficient means to cover legal costs and the costs of legal representation by an advocate or a legal adviser.

117 See: https://bit.ly/2XwtNYy.

118 PCJ accented that the type of documents that make it possible to determine the financial situation of the applicants what is vital in the course of considering such applications. The type of the documents depends on the kind and character of a legal entity applying for the aforementioned exemption and it should be adjusted to the said entity. It was also added, that proving the lack of sufficient means falls within the scope of the evidentiary procedure. It is the legal entity's obligation not only to apply the procedure, but also to select evidentiary means. The type of evidentiary means should, in every case, be adjusted not only to a specific entity, but also to the current legal and factual situation—there should be a different way of proving the aforementioned lack of sufficient means by a capital company, a state-owned company or a local self-government legal entity. Were the legislator to enumerate all possible types of evidence that could be presented to determine the lack of sufficient means to cover the costs of proceedings or the costs of professional representation, this might prove excessive as well as could hinder a court's assessment of a specific situation.

in civil proceedings were the subject of the case judged on 21 June 2017 (Ref. No. SK 35/15).[119] The Constitutional Tribunal stated that: 'The choice of a method for determining the minimum rate for legal representation falls within the remit of the legislator, who—within the limits of the constitutional order—enjoys considerable regulatory discretion'. The Tribunal adjudicated that § 12(1)(1) of the Minister of Justice Regulation of 28.9.2002 as regards rates for the services of advocates as well as the State Treasury's payment of the costs of unpaid court-appointed legal representation—insofar as it specifies the minimum rate for the services of an advocate in a case concerning compensation for the ineffective termination of an employment agreement—is consistent with Art. 45(1) in conjunction with Art. 31(3) of the Constitution.[120] In the view of the complainant, the challenged provision makes it impossible to take account of actual work carried out by a lawyer and costs related thereto that are incurred by a party represented by the lawyer, and thus the provision rules out the possibility that the party will receive the fullest compensation for the necessary costs rightly incurred in the course of court proceedings.[121]

The Constitutional Tribunal disagreed with the complainant's stance that the non-inclusion of all incurred costs of legal representation in the category of the indispensable costs of the trial of a party represented by a chosen advocate disproportionately infringed the right to a fair trial. Indeed—the again interpreted—Art. 45(1) of the Constitution does not guarantee the reimbursement of any costs incurred by a party pursuing its claims or defending its rights. In its opinion, what may not be derived, in particular, from the said provision is the court's obligation to order the reimbursement of the costs of proceedings in the amount specified in an agreement entered into by a party winning a trial and its lawyer. Indeed, when adjudicating upon the costs of proceedings, the court is not bound by the provisions of an agreement between an advocate and his/her client in which the parties to the agreement may freely formulate the provisions of the agreement and a rate charged by the said lawyer.[122]

119 See: https://bit.ly/3lDzj45.

120 The issue presented in the aforementioned constitutional complaint was more general and concerned the calculation of the costs of court proceedings. The doubts of the complainant concerned the terms of allocating costs among the parties of proceedings from the point of view of a breach of the right to a fair trial. The complainant challenged a legal norm derived from § 12(1)(1) of the Regulation, in accordance with the minimum rate for the services of an advocate in a case concerning the ineffective termination of an employment agreement.

121 According to the complainant, the distribution of the costs of a trial in the way that the winning party may not receive the reimbursement of the costs of legal representation—in the amount calculated proportionately to the value of the subject of the dispute—incurred by paying the remuneration of a chosen advocate, constitutes an economic barrier that limits access to court.

122 In the reasoning it was stressed that when determining an amount of payment for the services of an advocate for legal representation, a court takes account of the degree of complexity of a case, the workload of the advocate and contribution to the explanation and determination of the case; the court assesses this within the limits of maximum rates specified in a relevant normative act concerning advocates' fees.

The Tribunal pointed also out that in cases concerning employees—due to the principle that employees have a somewhat privileged status, which arises from the assumption about their significantly weaker economic position in relation to their employers—minimum rates (which also affect maximum rates), in situations where employees lose at trials, are aimed at protecting the property interests of employees and preventing situations where they will give up on pursuing their claims, fearing high (or even exorbitant) costs of the legal representation of their opponent that they would have to reimburse if they lost at trial.

This reasoning is influenced by the arguments presented in the European Court's judgment of 24 May 2006, Weissman and Others v. Romania (application no. 63945/00[123]). Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasizes that a restriction on access to a court is only compatible with Art. 6 § 1 if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.[124]

Delivering its ruling, the Polish Constitutional Tribunal took into consideration para. 42 of the written reasoning of this judgment, which meant accenting the role of following elements: a restriction imposed at an initial stage of the proceedings, disproportion, and impairment of the very essence of the right of access to a court. Finally, in the Tribunal's view, the limitation of rates—explicitly arising from Art. 98(4) of the Civil Procedure Code—is justified by the need to predict the financial consequences of a trial as well as to protect the losing party against the winning party's excessive estimation of its advocate's fees (which concerns to an equal extent an employee as well as an employer, in cases pertaining to an appeal against the termination of an employment agreement).[125]

123 See: https://bit.ly/3zjMV9u.

124 In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the Court reiterates that the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired.

125 The Constitutional Tribunal stated also that the choice of a method for determining the minimum rate for legal representation (whether chosen by a party or appointed by a court) falls within the remit of the legislator, who—within the limits of the constitutional order—enjoys considerable regulatory discretion. The adoption of a fixed rate or a rate that is proportionate to the value of the subject of a dispute or allegation does not, in itself, determine the result of the test of constitutionality, as the decisive factor is not the set rate of remuneration (which translates into an amount of payment ordered to reimburse the costs of proceedings), but the impact of the entire 'regulation of fees' on the rights and freedoms guaranteed by the Constitution. Therefore, the Tribunal held that the legislator may devise a mechanism for calculating the minimum rate for legal representation (also the maximum rate) in various ways, by focusing on certain functions of the costs of proceedings in a given category of cases, by appropriately weighing up the public and private interest, as well as by implementing significant—from the point of view of the legislator's policy—rights or values.

g. PCT judgment of 14 January 2014 and ECtHR case Airey v. Ireland of 9 October 1979 (costs of questioning the public procurement)

The other important cases concerning Act of 28.6.2005 on Court Costs in Civil Cases related to the detailed issue of judicial questioning under public procurement. The first judgment of 14 January 2014 (Ref. No. SK 25/11)[126] concerned the method of calculating the costs of a proceeding. It was judged that Art. 34 (2) of this Act—insofar as it requires the payment of a relevant court fee for filing a complaint against a decision of the Polish National Appeal Chamber in an amount that may make it impossible for a party to resort to this legal remedy and for the case to be considered by a competent common court—is consistent with Art. 45(1) in conjunction with: Art. 31(3), Art. 77(2), and Art. 78 of the Constitution.

Among the European Court's rulings taken into consideration by the Polish Tribunal was the judgment of 9 October 1979, Airey v. Ireland (application no. 6289/73[127]). The European Court stated that the Convention is intended to guarantee, not rights that are theoretical or illusory, but rights that are practical and effective (par. 24).

h. PCT judgment of 15 April 2014 and ECtHR case Aït-Mouhoub v. France of 28 October 1998 (costs of questioning the public procurement)

The next judgment of the Polish Constitutional Tribunal in this matter was given on 15 April 2014 (Ref. No. SK 12/13).[128] In this procedure the Tribunal stated that Art. 34(2) of the Act of 28.6.2005 on Court Costs in Civil Cases in inconsistent with Art. 45(1) in conjunction with Art. 31(3), Art. 77(2), and Art. 78 of the Constitution. The opinion was expressed that the legislator could achieve the same goals by limiting access to court to a lesser extent, and thus adopt a regulation that was less severe for subjects of constitutional rights and freedoms.

The argumentation from judgment of Court of 28 October 1998, Aït-Mouhoub v. France (application no. 22924/93[129]) was expressly recalled by the national constitutional court. In its reasoning it can be read that the 'right to a court', of which the right of access constitutes one aspect, is not absolute but may be subject to limitations permitted by implication. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired, and they will not be compatible with Art. 6 (1) if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

This way of understanding the provisions of the Convention—similarly to the previously discussed private law provisions—influenced the interpretation of the content of the national constitutional standard of control by strengthening the given reasoning.

126 See: https://bit.ly/3Cv0zZe.
127 See: https://bit.ly/2XwtZqK.
128 See: https://bit.ly/3ExUgGc.
129 See: https://bit.ly/3hOHtFy.

i. PCT judgment of 2 December 2020 and ECtHR case Teltronic-CATV v. Poland of 10 January 2006 (costs of questioning the public procurement)

The third in this series of judgments was delivered by the Polish Constitutional Tribunal on 2 December 2020 (Ref. No. SK 9/17),[130] adjudicating as follows: Art. 34(1) of the Act of 28.7.2005 on Court Costs in Civil Cases—due to the fact that it introduces a disproportionately high fixed fee—is inconsistent with Art. 45(1) in conjunction with Art. 31(3) and Art. 77(2) of the Constitution. The Tribunal found that this provision introduces a disproportionately high fixed fee.

The jurisprudence of the European Court was directly referred to in support of this decision, in particular the judgment of 10 January 2006, Teltronic-CATV v. Poland (application no. 48140/99[131]). By the interpretation of Art. 45 of the Constitution it was recalled in the Court's reasoning that Art. 6 (1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, that provision embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect only; however, it is an aspect that makes it in fact possible to benefit from the further guarantees laid down in Art. 6 (1).[132]

j. PCT judgment of 16 November 2011 and ECtHR case Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland of 30 June 2005 (participation in civil procedure)

On 16 November 2011 the full bench of Constitutional Tribunal (Ref. No. SK 45/09) ruled on exclusion of a debtor from proceedings before the court of first instance, in the case where the proceedings regarded the enforceability of a ruling issued by a court from another EU Member State. The Tribunal adjudicated that Art. 41, second sentence, of the Council Regulation (EC) No 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was consistent with Art. 45(1) as well as Art. 32(1) in conjunction with Art. 45(1) of the Constitution. The Constitutional Tribunal stated that a fair judicial procedure should ensure that parties enjoyed procedural rights that were relevant to the subject of pending proceedings. The requirement of a fair trial implies that the principles of the trial are adjusted to the special character of particular cases under examination. Constitutional guarantees related to the right to a fair trial may not be regarded as a requirement to provide in every type of proceedings the same set of

130 See: https://bit.ly/3AqRVui.

131 See: https://bit.ly/3zvTeHe.

132 The requirement to pay fees to civil courts in connection with claims or appeals cannot be regarded as a restriction on the right of access to a court that is incompatible per se. However, the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed, are factors that are material in determining whether or not a person enjoyed that right of access and had 'hearing by tribunal'.

procedural instruments that would uniformly specify the position of the parties to proceedings and the scope of procedural measures available to them.

This case is an example not only of the impact of the interpretation adopted earlier in the jurisprudence of an international court on the way in which a domestic tribunal would interpret it later. What is more interesting, this case is an example of a very specialized legal argumentation that consists in an attempt to transfer the ECtHR acquis on the relationship between the content of EU law and standards resulting from the EctHR to the legal shaping of mutual relations among other fundamental normative sets, i.e. between EU law and the constitutional standards of national law.

Examining the constitutionality of the challenged provisions, PCT stated *inter alia*: 'Likewise, in the jurisprudence of the European Court of Human Rights, there is a presumption that EU law and the Court of Justice ensure the protection of human rights at a level that is equivalent to the level of protection required by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, the actions of the EU Member States are consistent with the Convention as long as the European Union protects human rights, by applying—for that purpose—appropriate guarantees of protection as well as control mechanisms that are at least equivalent to those guaranteed by the Convention. What follows from the above is that the European Court of Human Rights is competent, only in exceptional cases, to assess whether actions, or lack thereof, on the part of the EU bodies and institutions are consistent with the Convention; namely, i.e. when the presumption of equivalent legal protection is undermined, and the protection of human rights at the EU level is "manifestly deficient"'.

Similar reasoning can be found in the earlier European Court judgment of 30 June 2005, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland (application no. 45036/98).[133] The European Court in this case refused to review an EC regulation implementing a UN Security Council resolution, although the content of the EC regulation was restrictive of the applicant's property right. The decision was based on the presumption that EU law was not breached, as the European Court held that the system of safeguarding fundamental rights guaranteed at the EC level was comparable to that provided by the Convention.

In the opinion of the Polish Constitutional Tribunal, there are premises for adopting an analogical approach when examining the constitutionality of EU law in Poland. What justifies an analogical approach to that taken by other courts are the following aforementioned arguments: the great significance of fundamental rights in the EU legal order, the constitutional principle of favorable predisposition of the Republic of Poland toward the process of European integration, and the Treaty principle of loyalty of the Member States toward the Union.

133 See: https://bit.ly/3znUADF.

2.2.6. Bioethics and medical law

a. PCT judgment of 11 October 2011 and EctHR case X and Y v. Netherlands of 26 March 1985 (consent to medical treatment granted by a minor)

By its judgment of 11 October 2011 (K 16/10),[134] the Polish Constitutional Tribunal considered the constitutionality of the provisions of health-care services that grant underage patients the right to participate in decision-making as regards the course of medical treatment after they have reached the age of 16. The Tribunal had to examine whether the formal criterion (the age) used by the legislator does actually restrict the fundamental subjective rights of underage patients, enshrined in the Constitution, especially of personal inviolability and security, respect the degree of maturity of a child as well as his freedom of conscience and belief and his convictions, and the right to legal protection of his private and family life.

The Tribunal assessed the constitutionality of the regulations. According to the judgment, the Constitution does not require that the views of the minor considering health-care matters should have any direct legal effects. They also contain no detailed information about the minimum age at which the views and actions of the child should trigger legal consequences.

In this judgment the Tribunal applied an external argument derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms. What is more, the Tribunal referred to the domestic constitutional system, in particular relevant previous decisions of the Constitutional Court and arguments based on the jurisprudence of the Polish Supreme Court.

The Tribunal considered the infringement of the personal liberty and personal inviolability of a minor under 16 whose consent to medical treatment was omitted by the law. The mentioned liberty was understood by the Tribunal as 'the possibility of taking his/her own decisions by the individual in compliance with his/her will and making his/her own choices in public and private life that are unrestrained by other persons'.

The interpretation of freedom has been derived by the Tribunal *inter alia* from the ruling of the Polish Supreme Court, which—in accordance to the Art. 8 of the European Convention—in a democratic state 'is protected in a special way, including the freedom of private life and the autonomy to make choices, as one of the fundamental principles of the contemporary doctrine of human rights, which is to be particularly protected by the state'. Nevertheless, the Tribunal considered that this freedom should not be treated as an absolute value,[135] even though the regulation undeniably restricts the autonomy of the patient. Hence the regulations remain within the remit of the legislator. According to the judgment, leaving the assessment of the awareness of the patient at the discretion of medical personnel assigned to carry out core health care activities (admission to hospital, a procedure, examination) could

134 See: https://bit.ly/3nWSsAy.
135 For more, see Bosek, 2015, p. 21.

lead to much more serious infringements of patients' rights than those that—according to the applicant—occur in the context of currently binding provisions.[136]

Although the Polish Tribunal in this case did not recall by reference number any ruling of the European Court, it *de facto* referred to the normative content of Art. 8 of the European Convention adopted earlier in the ECtHR jurisprudence. One of the prominent cases where the European Court applied this content was the judgment of the European Court of Human Rights of 26 March 1985, X and Y v. Netherlands (application no. 8978/80).[137] It was stated there that 'although the object of Art. 8 (Art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (…). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves'.[138]

Such an understanding of the similar wording of the provision, which in both proceedings served as a model for review, was also used in the recitals explaining the adopted content of the national constitutional standard, and thus it was used as an argument for the decision made.

b. PCT judgment of 10 December2014 and ECtHR case Cha'are Shalom Ve Tsedek v. France of 27 June 2000 (ritual slaughter)

The judgment of the Polish Constitutional Tribunal of 10 December 2014 (Ref. No. K 52/13)[139] referred to the constitutional dilemma of whether the lack of permission to subject animals to slaughter in a slaughterhouse in accordance with special methods prescribed by religious rites, as well as criminal liability for subjecting animals to such slaughter, is consistent with Art. 53(1), (2), and (5) of the Constitution in conjunction with Art. 9 of the European Convention.

The background of the case was the legislator's decision to forbid, with criminal sanctions following, the slaughter of animals in accordance with special methods prescribed by religious rites. This ban was complete and without exceptions on carrying out ritual slaughter in a slaughterhouse. The constitutional problem was the compliance with regulations ensuring the protection of freedom of religion, which may be derived not only from Polish Constitution (Art. 53), but also from the European Convention (Art. 9). According to the Tribunal, the guarantee of the freedom of religion provided in Art. 53(1) and (2) of the Constitution, comprised the carrying out of any activities (practices, rites, or rituals) that are religious in character. These

136 Consent to medical treatment granted by a minor K 16/10—shortcut.
137 See: https://bit.ly/3ApXh9f.
138 See para. 23 of the judgment.
139 See: https://bit.ly/2XH8Zht.

also included unusual religious activities, or even those that might be unpopular with a majority of the public.[140]

At the same time, the Tribunal noted that freedom of religion is not an absolute value and it might be restricted. However, the restriction should be proportional.[141] The legislator may introduce restrictions, but only if such restrictions were necessary for the protection of national security, public order, health, morals, or the freedoms and rights of others. None of these constitutional values forejudge the possibility of introducing an absolute ban on the ritual slaughter. The Tribunal took into account weighing the freedom of religion with public morality and indicated that there was no infringement—taking into account the support for the slaughter in Poland and consistent with the moral view of Poles on the need to strongly protect religious activities.

The Tribunal used the method of interpretation of the constitution on the basis of case law of the Constitutional Court, including its previous decisions. What is more, the Tribunal referred to the teleological interpretation through an interpretation of the preamble and axiological sources of the Constitution.

The Tribunal also showed the incompliance of the regulation forbidding ritual slaughter to Art. 9 of the European Convention. In particular, the judgment of the European Court of Human Rights of 27 June 2000, Cha'are Shalom Ve Tsedek v. France (application no. 27417/95),[142] was widely mentioned in the ruling on the argumentation level. The Tribunal used the research made by European Court in this case—especially the findings of the European Court on the method of slaughter prescribed by Judaism and required by Jewish traditions, as well as specifying the requirements that need to be met by persons authorized to perform such slaughter (with quotations of, e.g. excerpts from Jewish religion rules). The Tribunal agreed with the European Court of Human Rights that 'subjecting animals to particular methods of slaughter prescribed by religious rites so as to obtain acceptable food constitutes an element (way) of manifesting the freedom of religion and is subject to protection under Art. 9 of the Convention'.[143]

The case Cha'are Shalom Ve Tsedek v. France also referred to the problem of ritual slaughter in view of the freedom of religion ensured in Arts. 9 and 14 of the European Convention. The Court found 'that an ecclesiastical or religious body may, as such, exercise on behalf of its adherents the rights guaranteed by Art. 9 of the

140 See: https://bit.ly/3Ezks3j.

141 About freedom in the view of Polish Constitution see more: Podkowik, 2017, pp. 42–61, especially: 'Therefore, being a social contract, the Constitution represents resolution of conflicts of fundamental value and/or social importance. These norms, by limiting natural freedom of every human being, determine the constitutional framework for the protection of freedom as a legal position (the so-called fundamental freedom). Thus understood freedom may be subject to further, proportionate restrictions imposed by an ordinary legislator'. Ibid., pp. 60–61.

142 See: https://bit.ly/3nQEPCX.

143 About the commented judgment see also: Łętowska, Grochowski, Wiewiórowska-Domagalska, 2015, pp. 53–66.

Convention'. Although the Court expressed the conviction that the government may establish rules regulating the practice of the ritual slaughter, it held that animal slaughter performed in accordance with the method prescribed by Judaism constitutes a rite covered by the right to manifest one's religion in observance, guaranteed in Art. 9 of the Convention.

c. PCT judgment of 23 November 2016 and ECtHR case M. v. Germany of 10 May 2010 (dealing with persons with mental disorders who constitute a threat to other persons)

The Constitutional Tribunal confirmed the compliance of almost all the regulations of the Act on Procedures for Dealing with Persons with Mental Disorders who Constitute a Threat to Other Persons' Life, Health, or Sexual Freedom with the Constitution[144] in its judgment of 23 November 2016 (Ref. No. K 6/14).[145] As indicated by commentators, this law 'was intended to be a remedy that provided the possibility of returning offenders who were perceived as particularly dangerous to society: Offenders against whom—on the strength of the above mentioned normative acts—a sentence of life imprisonment had not been handed down, but "merely" a penalty of 25 years' imprisonment'.[146] Such offenders were placed in a center for appropriate therapeutic treatment after serving their sentence. One of many constitutional dilemmas was the compliance of the regulation with the principles of *lex retro non agit* and *ne bis in idem*.[147]

The important part of the judgment was thus the interpretation of the above legal principles. The Tribunal referred *inter alia* to the decision of the European Court of Human Rights of 10 May 2010, M. v. Germany (application no. 19359/04),[148] concerning the permissibility of post-penal isolation. The Tribunal used this judgment *a contrario*. The Tribunal pointed out that the German provisions differed from the Polish ones. The Polish procedure—in opposition to the German one—seemed similar to isolation without consent of persons with mental disease rather than penal isolation.

The Tribunal showed the aspects of the regulation that focused on therapeutic aims, with the civil procedure regulating the judgment of such cases. Isolation according to these provisions is not connected directly with the prohibited act performed by the offender.

The case M. v. Germany referred to German provisions concerning the post-penal detention of persons who pose a threat to society. The Court claimed that such provisions—in compliance with Art. 5 and Art. 7 of the European Convention—should not infringe the *lex retro non agit* principle. The retroactive, 'preventive' isolation in the

144 Ibid.
145 See: https://bit.ly/3zphniu.
146 See more: Bocheński, 2016, p. 633.
147 See more: e.g. Kluza, 2018, pp. 59–74.
148 See: https://bit.ly/3zqwt7a.

applicant's case did not differ much from 'standard' penal detention. What is more, the aims of the punishment and the preventive measure seemed to be similar. The Court indicated that the German procedure concerning 'preventive isolation' is the same as a sentencing penalty, with the same courts deciding in both cases. An important reason to consider the isolation as having a penal character was the severity of sanction with its indefinite character.

d. PCT judgment of 7 October 2015 and ECtHR case Bayatyan v. Armenia of 7 July 2011 (medical conscience clause)

In the judgment of 7 October 2015 (K 12/14),[149] the Polish Constitutional Tribunal examined whether Art. 39 of the Medical Profession Act violated the freedom of conscience of physicians (Art. 53 para. 1 of the Polish Constitution) in that it obliged a physician quoting the conscience clause to provide a patient with information on the actual possibility of obtaining a given service from another physician.

The Tribunal held that the freedom of conscience enables invoking the conscience clause and—as a result—ensures the right to refuse to perform an act contrary to one's conscience.[150] What is more, the conscience clause allows not only refusal to provide medical treatment, but also to refuse to provide information about the possibility of obtaining such a treatment. In the judgment one may find the statement, according to which the duty to perform the conduct 'indirectly leads to an unacceptable ethical effect, [and] in particular [protection] from coercion to cooperate in achieving an immoral goal'.[151]

When reasoning, the Tribunal used the variety of methods in the judgment: from interpretation in the light of general principle (i.e. *salus aegregoti suprema lex esto*), through an interpretation based on the norms of other legal systems, axiological and teleological argumentation, and historical interpretation, to argumentation based on precedents of the European courts, including the abovementioned.

According to the Tribunal, that right stems directly from the concept of freedom of conscience and has been acknowledged internationally, including in the case law of the European Court of Human Rights.[152] The Tribunal followed the understanding of the European Court of Human Rights of the conscience clause. Recalling the judgment of the European Court of Human Rights of 7 July 2011, Bayatyan v. Armenia (application no. 23459/03),[153] the Tribunal found the 'conventional standard' according to which the democratic state should respect the interests of the individual, whose motivation was not arbitrary but religious. Accordingly, such an interest deserves protection also under the Polish Constitution.

149 See: https://bit.ly/2XqxWNH.
150 See more: Olszówka, 2019, pp. 376–377.
151 Ibid.
152 See more: Brzozowski, 2017, pp. 35–36.
153 See: https://bit.ly/2ZfZE0A.

In the case of Bayatyan v. Armenia, the Court considered that 'the applicant's failure to report for military service was a manifestation of his religious beliefs'. These—according to Art. 9 of the European Convention—are protected, especially in reference to minorities. The Court indicated that 'pluralism, tolerance, and broad-mindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: A balance must be achieved that ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position'.[154]

3. Statistical study of methods

3.1. Grammatical (textual) interpretation

3.1.1. Syntactic and semantic interpretation

Grammatical interpretation plays important role in judging by the PTC and in the corresponding decisions of ECtHR and CJ EU. It is a method applied 28 times in different forms and types, in particular taking into consideration the ordinary meaning and legal professional (dogmatic) interpretation. Legal provisions, also constitutional ones, are supposed to be linguistically formulated for non-lawyers, who should be able to understand them easily.

Generally speaking, syntactic interpretation (conclusion from the elements of the structure of the sentence and their relations), semantic (lexical) interpretation (meaning of a given expression, i.e. ordinary grammatical semantic interpretation), interpretation based on professional terminology (professional interpretation from the perspective of a person experienced in a given profession), and interpretation on the basis of legal principles of legal regulations or legal branches also belong to this category.

In the discussed decisions, this interpretation was used by PCT to determine the normative content both of the constitutional standard (template) and of the controlled provisions. The literal text and the grammatical context was a part of reasoning in 10 of the presented cases. For the purpose of this study, the grammatical interpretation includes also the application of the legal (defined in a given scope of application) meaning. Of course, explicit legal meanings (relevant definitions) were taken into consideration as a method of interpretation.

PTC quite often applies semantic interpretation (12 cases) and its own previous effects of interpretation of legal expressions and recent cases (7 cases). It often

154 Para. 126 of the judgment.

happens that the principles presented in the legal doctrine are taken into account (6 cases).

3.1.2. Legal principles

Generally speaking, reference to the codified principles of law occurs in six of the discussed decisions. It plays an important role in argumentation and reasoning. The principles are both of a general character (referring to whole legal system) and closely connected with the branches of law invoked by the PCT in its decisions.

The most important are the following: the effectiveness of access to court (in cases regarding the civil procedure) and special principles: *ne bis in idem*, *nullum crimen sine lege*, and *salus aegregoti suprema lex esto* (connected with criminal law cases). The PCT referred to the principles common for the domestic and international legislator, and in particular to the normative content of Art. 5 and Art. 8 of the European Convention. Interesting examples of such direct references with deeper analyses are the cases K 12/14 and K 54/13.

The role of grammatical interpretation in the decisions of the ECtHR presented above seems also to be important. The fragments (structure) of reasoning are directly linked to the examined expressions used in the European Convention. This 'compulsory' way of judging covers all the cases, as well as a situation where previous case law exists, and the main method can be evaluated as contextual.

ECtHR in the presented cases takes into account a number of legal principles when interpreting the European Convention. Some of them, as mentioned above, are principles of international law codified in the Vienna Convention. The important legal values protected by the Council of Europe, in particular the ECHR, is combined with the doctrine of effectiveness. Since 1975 it has been applied in cases—also in all of the examined ones—regarding access to a court under Art. 6(1) of European Convention.[155]

The explanation may be that the interpretation of the ECHR, as an international treaty, is regulated by Art. 31 et seq. of the Vienna Convention on the Law of Treaties of 23 May 1969. The important rule of interpretation provided for by this convention states that 'the provisions of a treaty should be interpreted according to its ordinary meaning'. According to the Vienna Convention, the European Convention should be interpreted according to its object and purpose.

It may also be noted that PCT obviously applies only the Polish version of constitutional provisions, while the comparison of the different official texts (English and French) may be an argument used by ECtHR.

Legal principles existing in given branches of law (criminal, private, procedure) that were mentioned above were not so often stipulated in ECtHR decisions. The Court was oriented rather toward law in action and its practical effectiveness than

155 See: Guide on Art. 6 of the European Convention on Human Rights Right to a fair trial (civil limb), updated to 31 December 2020. See: https://bit.ly/2XFnbHP.

on the principles within the branch of law (in its Latin terminology). The exception may be the *ne bis is idem* principle, which is internationally known and perceived similarly.

The role of general principles of law (non-explicated in legal texts) in the interpretation of fundamental rights will be presented below (see Section 3.8).

3.2. Logical arguments

Logical interpretation is also used in a large group of the studied cases before the PCT, and can be considered as comprising six types. The classical logical methods—*argumentum a contrario, per analogiam, a maiori ad minus* (inference from larger to smaller)—are de facto used, but not always mentioned directly by the judge-reporter. In many cases, the Court simply invokes the substantive effect of applying these rules and proceeds to further scrutiny rather than dealing with the formal question of naming the method of interpretation used.

The effects of the *lex specialis derogat legi generali* principle were mentioned by the PTC in five cases, both directly and indirectly (by drawing conclusions of the legal order 'built' in the given case by the content of *lex specialis*, but without showing its role in comparison to *lex generali* functioning in the given legal system).

In most of the justifications examined, this tended to build *explicite* or *per analogiam* to the content of the control model (standard). What is interesting is that in case K 6/14 the Tribunal used the ECtHR judgment *a contrario* (inference from the opposite).

Another interesting example is the case P 12/09, where PCT presented an *argumentum a simile*, referring to similar regulations (combined with contextual interpretation).

Another interesting argumentation presented in case 45/09 should be noted, in which the relationship between the standards resulting from the ECtHR and the standards of EU law assessed from this perspective (including a special presumption of conformity as a starting point for assessment) would also be the relationship between the standards of national constitutional law and the controlled provisions of EU law. This operation can be interesting in particular from a theory of law perspective: e.g. first, *analogia iuris* application of a given legal approach, and, second, the presumption of the conformity of EU law with the legal standards of the European Convention. Both were applied to deliberate *per analogiam* a similar presumption on other levels, i.e. the conformity of EU law with national constitutional standards.

This method of interpretation was expressly used by the ECtHR in six cases.

3.3. Systemic arguments

Legal principles and rules constitute a system in which all legal norms have a regulatory background. This large group of studied methods, which could be described as 'systematic interpretation', comprises several specific methods of legal interpretation.

As the most important we may list: contextual interpretation, interpretation on the basis of national statutory law, interpretation on the basis of the court's own previous case law or on the basis of the case law of ordinary courts (e.g. civil or criminal ones), and interpretation on the basis of normative acts of other domestic state organs. Their total use was estimated at 47 times.

3.3.1. Contextual interpretation

Contextual interpretation was identified often. It may be seen in a narrow or a broad sense. The first occurs when the constitutional court determines the meaning of a given constitutional provision on the basis of other specific constitutional provisions (e.g. comparing or according it with them). The second may be indicated when the meaning of the constitutional norm is constructed on the basis of its purpose, which is merely the result of its place in the system of the legal norms. Contextual interpretation in a narrow or broad sense plays a role in the interpretation in 28 of the abovementioned decisions.

Contextual interpretation in the narrower sense and drawing a conclusion from the placement of the provision (especially in the first chapter of the Constitution, 'Republic of Poland') can be found in three decisions.

One interesting example is case P 12/09, where PCT presented contextual interpretation (combined with *argumentum a simile*, referring to similar regulations).

This method was also important to determine the scope of Art. 31 of the Constitution, in particular to divide and to specify the scopes of application of the different chapters of the Polish constitution and their differing impacts on the content of fundamental rights (and more broadly, the content of constitutional standards and control templates).

Contextual interpretation, meaning that a conclusion is drawn from the placement of the provision within the full normative set of norms, was not presented directly in the abovementioned decisions of ECtHR and CJ EU. This should rather not lead to the conclusion that ECtHR does not attach any importance to the fact that fundamental rights were first included in the Convention of 1950 and then—e.g. the protection of proprietary rights—in the Additional Protocol.

The ECtHR did not apply a derogation formula in the 30 decisions presented above.

3.3.2. Interpretation on the basis of domestic statutory law

The interpretation on the basis of domestic statutory law plays a double role in the studied activity of the PTC. First, the constitutional court pays attention to the real (law in action) statutory law, i.e. to its content functioning in judiciary practice. Second, PTC may refer to the explanatory reports on drafts of statutory law and assume their interpretations of law.

Of course, the interpretation on the basis of statutory law (a lower-level source within the legal system) is in general irrelevant in this second situation. The constitutional principles, standards, and control templates have their own autonomous content (especially autonomous in relation to the lower-level provisions of national law). However, it may play a supplementary role, because the effect of the autonomous interpretation of constitution may lead (there is of course no prohibition) to the same substantive effects as the interpretation of similar provisions 'repeated' by the national legislator in other sources of law.

National legal systems are evaluated by ECtHR from a practical point of view—i.e. the real content of law in action and the issue of effectiveness. It plays an important role in the cases, where the context of the 'statutory' nature of the restriction of a specific fundamental right is discussed.

Taking the national legislation into account is of course needed when the 'margin of appreciation' provided for in some of the ECtHR provisions is presented and evaluated in a given case.

3.3.3. Interpretation on the basis on previous jurisprudence of the constitutional court or ECtHR

In all (30) of the studied cases of reasoning presented by PCT, the chosen cases referred in detail to this method of interpretation. The domestic legal tradition simply consists of previous rulings. This tradition is constituted not only by jurisprudence from the period after entry into force of the current Constitution of the Republic of Poland of 1997, but also the general principle of the democratic state of law that is read and interpreted under the former constitutional provisions after 1989 (e.g. legal certainty or requirements for the legislative process safeguarding the fundamental rights).

As presented above, fragments of the motives of the given judgments are included in the quotations. In practice this plays the role of the definitive method of interpretation. For example, on the level of argumentation, the case-law on Art. 9 of the Convention has been widely mentioned in cases: K 12/14 and K 52/13.

What is important for this study is that the case-law of the ECtHR was taken as the background for the interpretation of constitutional rights of the Polish Tribunal, which was significant, *inter alia*, in these discussed cases: P 12/09, K 45/14, SK 28/15, K 25/11, and SK 70/13.

Especially in SK 70/13, the Tribunal indicated a long list of case laws made by the European Court of Human Rights.

What is interesting is that in the process of applying the 'proportionality test' in case SK 65/12, the Tribunal expressly used the notion of freedom of speech presented by the European Court. Furthermore, in SK 5/12, the weighing of the interest of a parent who wished to represent the child in proceedings pending against the other parent and the interest of the child was carried out based on arguments derived from ECtHR cases.

The Tribunal underlined *expressis verbis* the necessity to take into account, as part of its constitutional review, the norms and standards formulated by the European Court in order to eliminate any possible collisions between them. The standards contained in the Convention and the jurisprudence of the European Court, according to the Tribunal, may be referred to as an element of argumentation (see more in the description of case SK 3/12). In case K 37/11, the Tribunal held that the importance of the right demands the use of the standard expressed by the European Court.

It can be also observed that when controlling civil law and judging such cases—both substantive law and procedure—the national constitutional court mainly refers to the case law and the interpretation previously presented by the ECtHR.

This serves primarily to strengthen arguments on the private law content of the constitutional control template. A similar purpose is served by the reference to interpretation adopted in the judicature by CJ EU. It occurs statistically rarely, which is likely due to the fact that in the field of civil law (as well as criminal law), the competences of the European Union and the scope of EU law (and then the scope of adjudication by the EU CJEU) are limited.

In all the judgments of ECtHR presented above, direct reference to previous ECtHR decisions may be observed. As in the jurisdiction of PCT, this method is very important and frequently used.

3.3.4. Interpretation on the basis of the case law of ordinary courts

A few of the studied decisions refer to the jurisprudence of the national courts, but this operation is aimed not directly to the interpretation of constitutional provisions, but rather to investigate how the controlled provisions function in practice and what their practical effects are (taking not only the literal meaning but also law in action into consideration). This method is counted in this research case only if used to interpret the Constitution but not when it concerns the statutes (law-in-action) regarding what was identified. From the latter perspective, the case law of ordinary courts was not applied to 'recover' the content of constitutional standard.

3.3.5. Interpretation on the basis of the normative acts of other domestic state organs

The legal activities of other domestic state organs were not mentioned in the studied cases as factors influencing the decisions, in particular the national ones. In one of the cases, a document issued by an international organization (Council of Europe) was highlighted as a kind of background of the presented main argumentation.

However, the documents of public bodies or organizations were often mentioned by the parties to the procedure before the PCT (for example, statements of commissioners for fundamental rights, governments, or ministers).

Similar conclusions may be drawn in reference to ECtHR and interpretation based on the standards and proposals of other Council of Europe bodies. Only a few of the presented decisions refer to non-binding documents of a Council of Europe system or other international body. These documents have been used by the ECtHR either as supporting (secondary) or illustrative elements. An example is case Michał Korgul v. Poland (application no. 36140/11) recalling principles of Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules.[156]

3.4. External systemic and comparative law arguments

The method described as external systemic (comparative) interpretation, as adopted in the study, is complex (comprising a set of sub-methods). It refers to the following external systemic factors: international treaties and the case law of international courts and foreign legal systems or judicial decisions. The base for interpretation of fundamental rights is not only national law and practice but also 'uniform international content'. In particular, international treaties may naturally play a role in the interpretation of constitutional fundamental rights (and vice versa).

3.4.1. International treaties and the case law of international courts

The most important perspective, adopted as the general starting point of this study, is the reasoning of the Polish Constitutional Tribunal relating to the jurisprudence of ECtHR (28 cases) and CJ EU (2 cases) based on international treaties. From this perspective, the 30 abovementioned judgments were chosen because they refer to individual judgments of international tribunals, which is why every case discussed can serve as an example of this method of interpretation.

The reasoning with reference to international courts means also that the Polish Constitutional Court referred via ECtHR and CH EU judgments to the provisions of the European Convention on Human Rights and EU law that were the legal ground of the decisions taken by these international courts. Such references cover in particular the meaning and essence of fundamental rights, as well as their limitations and resolutions of the collisions (conflicts) between them in given circumstances.

The details of every case and their specifics were presented above, with the highlights grounded by the specifics of their respective branches of law (in particular civil and criminal law).

There are two decision among those selected where the PCT Constitutional Court explicitly stated that a previous ECtHR decision was one of the decisive bases for the interpretation.

156 'All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.'

The Constitutional Court referred to the judgments of CJ EU to present the content of the controlled national law based on the EU directive interpreted by CJ EU. Such existing normative content (*in fact*—no restriction to it was presented by the EU Court) was presented as the argument for compliance with the Polish Constitution of 1997 (which might be questionable because of the primary role of national constitutional standards in the process of control conducted by PCT).

International treaties, the case law of international courts, and other sources of international law also play a role in the examined jurisprudence of ECtHR.

In particular, the Vienna Convention on the Law of Treaties of 1969[157] is mentioned in five cases. It contains several provisions on the interpretation of international treaties that should also be followed by the ECtHR.[158] In only three of the decisions examined did the ECtHR present an interpretation in conjunction with other international treaties (the United Nations system).

ECtHR also recalls in the process of interpretation the meaning of international conventions presented previously by international judicial fora (UN Commission on Human Rights, European Union Court of Justice, International Court of Justice). These decisions are linked to international conventions on fundamental rights (universal or regional).

The other sources of international law were not mentioned often, even as illustrative arguments. Customary international law and so-called general principles of international law seem to be over-general and abstract concepts from the perspective of the examined private and criminal law (substantive and procedural issues).

Under Arts. 188(2) and 193 of the Constitution, the PCT shall adjudicate on the conformity of normative acts to ratified international agreements as well. In such cases, the Tribunal applies the international standard directly to the assessment of domestic law. The standard stemmed from international law is therefore not only an inspiration for the interpretation of the Constitution but also plays an independent role. This raises, e.g. the question of the extent to which the PCT may interpret the international agreements on its own, and to what extent it is bound by the interpretation shaped earlier by international tribunals, e.g. the ECtHR (case P 12/09).[159]

An interesting issue, generally beyond this study but worth mentioning, is the role of the European Convention (an international agreement) as a separate template (standard) of constitutional control of national statutes. The international provisions are in practice often given as an alternative (to the domestic constitution) standard.

157 See: https://bit.ly/3lGrBpN.

158 It should be noted that the application of Vienna Convention for interpretation of the European Convention was adopted in the jurisprudence of ECtHR (see: judgment of 21 January 1975, Golder v. the United Kingdom, application no. 4451/70).

159 Another is the issue of divergent interpretations of binding international law by the Polish Tribunal and by the international court. In a dissenting opinion to the judgment in case P 12/09, Judge S. Biernat made the objection that the PCT had incorrectly interpreted the ECHR's standard. This issue deserves a more in-depth analysis, but here it can be observed that this Judge mentions this issue of the application of the Convention by the Tribunal (part II, 7.H).

It is interesting regarding the activities of the Polish Constitutional Tribunal that substantive non-compliance with the provisions of the Constitution often results in the formal discontinuation of the proceedings of examining compliance with the standard of the Convention. The statement of first non-compliance with national standards—in this solution—makes irrelevant the need to examine the latter (i.e. from the perspective of international standards). There is no such legal obligation to discontinue, but the Tribunal is guided by economy of proceedings and—as one may assume—by a reluctance to make direct statements about the compliance of the statute (domestic law) with the Convention (often similar provisions). Additionally, by doing so the PCT does not come into collision with the European courts' decisions.

It is also worth mentioning that the reasoning presented by PCT in the discussed case SK 45/09 included also a comprehensive study of the issue of the relation of national constitutional principles to the provisions and interpretation of EU law, as well as the control of the latter.[160,161]

3.4.2. Interpretation according to foreign legal systems or judicial decisions

In one case PCT presented arguments stemming from *foreign legal systems or judicial decisions*. In particular, foreign constitutions and decisions of similarly competent (equivalent) constitutional courts and their case law were referred to. It is noted in the Polish literature on constitutional law that the jurisprudence of the domestic tribunal is influenced by concepts presented by the German constitutional court,[162] and sometimes also by the French Constitutional Council and the American Supreme Court. Interpretations presented by the German constitutional court have had the greatest influence on Polish constitutional doctrine and jurisprudence. In one of the examined cases, there was a reference by PTC to the *Bundesverfassungsgericht* (case SK 45/09, points 2.8 and 8.2 of the reasons).

Such examples cannot be found in the abovementioned argumentation presented in this research in the corresponding cases before ECtHR and CJ EU.

3.4.3. Other sources of international character in the interpretation of the constitution

The reasoning in one studied case took directly into account a document of international genesis but not of binding character. This example is case SK 27/16, where PCT noted that the examined constitutional problem (institution of 'frozen funds')

160 In this judgment the Constitutional Tribunal called itself 'the court of the last word'. See Półtorak, Dudzik, 2012, pp. 225–258. The authors underline that: 'this self-determination characterizes well the whole hitherto delivered line of jurisprudence of the Tribunal in European matters. In spite of the persevering doubts as to the scope of its jurisdiction at the juncture between EU and Polish law'. See also: Kowalik-Bańczyk, 2005, p. 1355; Łazowski, 2007, pp. 148–162; Kabat-Rudnicka, 2014, pp. 95–106; Kustra, 2017, pp. 36–50; Kwiecień, 2019.

161 See also the comprehensive e-publication edited by Bureau of Tribunal, 2014;.

162 See also: Bainczyk, 2017.

can be treated as an element of the implementation of Principle 6 of Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules[163] (facilitating persons deprived of liberty in reintegrating into society; details presented above).

3.5. Teleological interpretation

It is assumed that a teleological interpretation means that the constitutional court (when applying constitutional law) identifies the meaning of legal regulations with reference to their objective goals and social purpose, which can be found, e.g. in the preamble or the social function implied by the provisions that the legislator intended to fulfill. It is not often used but is substantially important argumentation, including the main reasons for the codification, existence, and function or goals of the given legislative instrument.

This method was identified in four PTC cases. In case K 12/14, the Tribunal presented teleological argumentation when examining the freedom of conscience in regard to physicians,[164] and in deciding case K 52/13, this method was applied to recover the content of freedom of religion and its possible proportional restrictions. The references to the preamble were presented.

3.6. Historical interpretation

Applying historical interpretation means for the purpose of this part of study that the initial will and purpose of legislator (a kind of inner intention of the persons involved in law-making process of the given legal norm) is taken into consideration, such as drafts, explanatory reports, ministerial justifications, and parliamentary debates. It is worth emphasizing that the law-making process in recent decades in Poland can be easily reconstructed years later if desired for the purpose of discovering the real will of the legislator. The websites of both the lower house (Sejm) and the upper house (Senate) of Parliament provide access to electronic versions of documents from previous terms.[165]

Historical interpretation was used by PCT four times in the abovementioned cases. It was grounded by the role of both previous decisions of PCT and the details of the legislative process, including the explanatory reports on the amendments. An

163 See: https://bit.ly/3ApVYXz.

164 When reasoning the Tribunal presented a variety of methods—interpretation in the light of general principle (e.g. *salus aegregoti suprema lex esto*), axiological, historical interpretation, and argumentation based on precedents of the European courts.

165 Among them are bills (including later amended versions) with justifications, well-established debates in legislative and plenary committees, and legal opinions of central state institutions, the judiciary, and experts.
See: https://www.sejm.gov.pl/Sejm9.nsf/page.xsp/archiwum and https://www.senat.gov.pl/poprzednie-kadencje/.

interesting example is case P 12/09 and the relevance to PCT of previous precedents including such a method (noting that a sense of dignity and authority are among the prerequisites for effective performance of constitutional duties assigned to the Head of State).

Historical interpretation is not widely used by the ECtHR in the examined cases. It is mentioned in the abovementioned provisions of the Vienna Convention as the important method of interpretation of international treaties, i.e., the domain of ECtHR and CJ EU. In particular, *travaux préparatoires* and explanatory reports should play an important role in the interpretation of the European Convention.

The explanation why historical arguments were not widely used by the ECtHR in the examined cases may be the abovementioned observation that ECtHR widely references previous cases and judgments. The detailed arguments of *travaux préparatoires* and explanatory reports were likely presented in these older rulings in detail and there was no need to refer to all of them in the examined judgments, issued in the last decade.

3.7. Arguments based on scholarly works

Legal literature (articles, commentaries, monographs) plays a significant role in the interpretation and reasoning of PCT, not only in a kind of confirmatory role, but in 10 decisions as common opinions taken into consideration when shaping the limits of given fundamental rights *versus* other constitutional principles. In eight of the discussed cases, PTC referred to the legal literature, of which it gave its precise views and, if necessary, advocated one of the doctrinal positions.

What might be surprising from the domestic point of view (but not from the perspective of international tribunals) is that the legal literature was neither quoted not referred to (in support of the ruling) in the examined ECtHR and CJ EU decisions.

3.8. Interpretation in light of general legal principles

The role of principles of law (written ones explicated in legal texts) in the interpretation of fundamental rights was presented in detail above (see Section 3.1). This section refers to the general principles and values determining the provisions of the Constitution that are implicit in though not directly expressed in the Constitution. It should be noted that some general principles of law are in fact codified or may be interpretated from statutory provisions (in particular from general provisions of a given act) in which different words are used.

It may be argued that four of the decisions contain a reference to general legal principles: *ignorantia juris neminem excusat* and *in dubio pro libertate* (close to 'everything that is not forbidden is allowed'), as well as to the doctrine of effectiveness.

It may be added that in some cases the PTC did not use this 'more professional' method of interpretation, probably not due to its non-importance, but rather because of the assumption in a given case that written constitutional principles apply and

that *clara non sunt interpretanda,* as well as when in fact there is no alternative to the everyday meaning of the words making up the legal provisions.

The important legal values protected by the Council of Europe, in particular the ECHR, is combined with the doctrine of effectiveness. Since 1975 it has been applied in cases—also in all of the examined ones—regarding access to a court under Art. 6(1) of European Convention.[166]

ECtHR takes into account a number of legal principles when interpreting the European Convention. Some of them, as mentioned above, are principles of international law expressly non-codified in the Vienna Convention (but directly interpreted from it).

3.9. Non-legal arguments

Arguments that could be assessed as non-legal have not been explicitly indicated by PTC as motives that would affect one and not another understanding of, for example, constitutional principles. It seems that this is related to a very broad (in constitutional judiciary) perception of general principles,, which are co-formulated by a number of factors, as well as the legal effect of actual circumstances.

4. The relationship between the arguments

As the Constitution is a special normative text that differs from 'ordinary' sources of law (related to its political significance, its content and function, its place in the hierarchy of sources of law, its language and context, the way it was created, its enforcement, and many other features), the constitutional interpretation (of constitutional fundamental rights by the Constitutional Courts or the ECtHR/ECJ) may thus differ from the 'traditional' interpretation of statutory law. Although there are overlaps between the two, the constitutional reasoning presented by the constitutional court and the application of the constitutional content as standards (templates) is based partly on sources and methods other than the interpretation of the ordinary provisions of law by courts dealing typically with civil and criminal cases.[167]

As far as the relationship between the arguments and style of the decisions is concerned, we emphasize the tests used by the constitutional court in its judging. They are connected with the 'collisional' principle stated in Art. 31 of the Polish Constitution of 1997, stating that a constitutional (fundamental) right may be restricted only in order to allow the exercise of another fundamental rights, but respecting

166 See: Guide on Art. 6 of the European Convention on Human Rights Right to a fair trial (civil limb), updated to 31 December 2020. See: https://bit.ly/2VTFJ6b.

167 See more: Tóth, 2016.

(without prejudice to) the essential content, and proportionately to the objective and to the extent that is necessary. The test is often applied in former (older than last 10 years) constitutional case law.

Both the Polish Constitutional Tribunal and the European Court of Human Rights often present in their reasoning the method of 'weighing' fundamental principles and rights, in particular from the perspective of proportionality and the 'collisions' of given principles and standards with others, also of fundamental character.

The methods and effects of interpretation presented by the European Court are mainly directly often taken into account by the domestic Tribunal when considering cases. It sometimes happens, although on a smaller scale (because it deals with such cases less often due to its limited competences), that the rulings of the CJ EU play a similar role. They are very often used in arguments presented by the parties, and are also often used by the Constitutional Tribunal when adjudicating. This observation refers both to the arguments of the parties in the proceedings for compliance or non-compliance and the arguments of the Tribunal in favor of an alternative decision.

The very course of reasoning during adjudication (in both cases: conformity tests) is similar in the proceedings before the Constitutional Tribunal and the European Court. First, the content of the standard of control is explained (from the Constitution or the European Convention), and then the 'reference' to this content (template), in turn, of the content of the provision under review. This jurisprudential practice is important for both courts to determine this content.

The method used by PTC and the ECtHR is also an application of the 'living instrument' doctrine (an evolutive or dynamic interpretation). Since the famous decision of 1978 (Tyrer v. the United Kingdom, application No. 5856/72),[168] it has been widely applied in interpreting the European Convention.

5. Style of PCT decisions

The PCT's style of reasoning is partly 'enunciative', where the court presents quasi-ex cathedra statements (without a detailed consideration and comparison of arguments and counter-arguments), and partly 'discursive-arguing', where the ruling decision is based on balancing arguments and counter-argument, after analyzing and accepting or rejecting the arguments of petitioners (giving a legal answer).

In all the discussed examples, the subject of the interpretation was the normative content of the national constitution (including fundamental rights) as control templates (models, standards). The content of the latter have often been influenced by the interpretation of the European Convention delivered in rulings of the European Court that the national constitutional tribunal referred to on the merits.

168 See: https://bit.ly/39qgw6o.

A qualitative-analytical analysis allowed us to draw the abovementioned conclusions on the methods of interpretation used by the European Court or the CJ EU in their decisions, the style of reasoning and decision-making that characterizes these regional decision-making fora, and the characteristics of the decision-making of the European Court or the CJ EU that may be of interest to the scientific community.

Key concepts presented in reasoning are fundamental rights, principles determining the functioning of the legal system, and dogmatic categories. The most important are: proportionality, the legal democratic state, and legal certainty. These aspects have a preponderant influence on the tribunal's conception of law and interpretation. Several important fundamental rights and international standards have been identified above in the course of constitutional adjudication, in particular to resolve substantive contradictions between competing fundamental rights of the same hierarchy. They are very close, in most cases even quite similar, to the tests and standards applied by the ECtHR in the corresponding judgments.

A comparable, even similar, key stage in the constitutional review is the determination of the content of the control template (i.e., the standard interpretation of the Constitution), which results from the general provisions of the Constitution and jurisprudence to date. At this stage, the jurisprudence of the European Court, including the considerations contained in the justifications, also de facto shapes the content of the control template, or at least indirectly affects the interpretation of these templates for control (establishing their substantive content). Sometimes this happens indirectly when the Tribunal refers directly to its last line of jurisprudence, which had been formed with reference to case law and reasoning resulting from the decisions of the European Court. It should be added that some provisions of the Constitution are similar in substance (and even wording) to the provisions of the ECtHR. The abovementioned phenomenon is then more intense, and the possibilities of using the case law of the European Court are greater.

It can be also observed that the predominant direct or indirect use (recalling of justification) of theses and reasoning drawn from the judgments of the European Court leads in some cases to a kind of reinforcement of arguments. In effect, a kind of domestic reasoning in favor of an internationally harmonized interpretation of constitutional control templates may be observed.

The direct 'addressees' of the decisions and the statement of reasons presented by PTC are either petitioners: judges (courts) or lawmakers (bodies involved in the legislative process), depending on the type (procedure) of constitutional control and the way of initiating it (e.g. during the proceedings explained above or in an issue re-opened from one side, or as a part of the parliamentary legislative process with the impact of President from another side). The indirect 'addressees' are lawyers and in fact all citizens, because the judgments may generally influence their rights and obligations in similar cases. NGOs and international extrajudicial bodies may also be interested in taking into consideration the effects of the adopted interpretation, especially in their comments, statements in other proceedings before tribunals, or in future activities, including public comments.

6. Final conclusions

Summarizing this chapter, the main results of this examination of the jurisprudence of the Polish Constitutional Tribunal and the ECtHR or CJ EU may be presented, mainly regarding their methods of interpretation, including the style of reasoning and the key concepts applied. The detailed considerations presented above may be grounded in the following, mainly qualitative, general conclusions concerning the topic of this legal study from the Polish perspective.

The above detailed study presented, first of all, important judgments of the national constitutional court from recent years, which included an interpretation showing an unique interaction with the interpretation (and hence with argumentation methods) previously adopted by European international courts (ECtHR, CJ EU). Previously somewhat invisible work was done on such a review of national case law from the last 10 years and on the selection of national decisions to be accurately presented so that all of them contain references to international standards. Hence, as the figures were based solely on these selected cases, the statistical conclusion would not be valid that in all its domestic decisions, the Polish Constitutional Tribunal uses the methods of interpretation and their effects adopted by international tribunals when determining the content of control standards resulting from the legal system of the Council of Europe or European Union law.

On the other hand, the conclusion that such situations and interactions have occurred in some of the settled cases is certainly correct methodologically. To this should be added the observation that the parties' pleadings and the arguments presented therein often refer to the jurisprudence of European courts. It can even be said that in the last 10 years under study, such a mode of drawing up applications and letters addressed to PCT has greatly developed, sometimes even in exaggerated form due to a lack of international standards relating to the detailed circumstances of the case or the wide margin of freedom of national law resulting from the ECtHR (which the Court itself notes). This study shows that the interaction between the jurisdiction of the given national tribunal and the adjudication by European tribunals has also occurred within the scope of creating the content of fundamental standards of a legal order resulting from normative acts that are applied by a given institution.

Generally speaking, the reasoning style and decision template of a given national constitutional court in principle does not differ greatly from the reasoning style or decision template of the European Court in similar cases. The way the Polish Constitutional Tribunal assesses the constitutionality of domestic norms shows strong similarities with the manner in which the European Court assesses the conventionality of the domestic decisions of the States' courts. The main similarity is the process of 'weighing the values' (arising from constitutional or European Convention standards) and laying stress on the argumentation method of interpretation. The Polish Tribunal widely uses the case-law and way of reasoning of the European Court in similar cases.

As far as the details of interpretation are concerned, the main methods of interpretation used by the Tribunal and European Court in the analyzed cases were:

- contextual,
- grammatical (textual),
- logical (linguistic-logical), and
- teleological.

What was important, however, was the significant place occupied in all types of interpretation by the currently existing jurisprudential background. The case-law has usually taken the key place in the argumentation of the court. In the jurisprudence of the domestic constitutional court, arguments presented as legal doctrine are much more often used, and books and legal studies of the periodical literature are quoted.

I would argue that the statistical frequency of the argument types in the discussed group of cases (pre-chosen for relevant references between domestic tribunals and both European tribunals) may not match their practical role in the general jurisprudence of the PTC, but they do provide a qualitive and substantive perspective on its jurisprudence 'in action'. The types of arguments that play a decisive role in decision-making or reasoning cannot be assessed on a quantitative basis, but rather qualitatively: The decisive arguments leading to a particular conclusion were mainly based on previous PCC rulings and arguments that had been presented by this occasion. Also, the rulings of ECtHR in 'Polish individual cases' and CJ EU judgments played a decisive role. An approach that could be described as close to a *res iudicata* doctrine may be observed in such cases. Defining arguments that played a significant role in the reasoning of PCC and ECtHR or CJ EU, not alone but with another arguments, were identified in some cases. Their sum total justified the decision taken, or they played an accessory role to the decisive arguments. Strengthening arguments that in fact shape the decision taken are of great importance in the jurisprudence of PCT. They strengthen the legitimacy of the decision in many cases and often play a role similar to that of the defining arguments. Finally, illustrative arguments that theoretically do not directly affect the decision-making could be also observed. Examples include the bracketed comments and comparative remarks (e.g. on the ground of German constitutional law) presented additionally by the court to show that it was aware of them, but which did not play a role in reaching the conclusion.

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2.	Judgement of Constitutional Tribunal of 11.10.2011 (Ref. No. K 16/10)	Judgement of the European Court of Human Rights of 26.3.1985, X and Y v. Netherlands; (application no. 8978/80)
3.	Judgement of Constitutional Tribunal of 16.11.2011 (Ref. No. SK 45/09)	Judgement of the European Court of Human Rights of 30.6.2005, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland (application no. 45036/98)
4.	Judgement of Constitutional Tribunal of 23.10.2012 (Ref. No. SK 11/12)	Judgement of the European Court of Human Rights of of 22.6.2004, Broniowski v. Poland (application no. 31443/96)
5.	Judgement of Constitutional Tribunal of 20.11.2012 (Ref. No. SK 3/12)	Judgement of the European Court of Human Rights of 19.5.2009, Kulikowski v. Poland (application no. 18353/03)
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7.	Judgement of Constitutional Tribunal of 11.12.2012 (Ref. No. K 37/11)	Judgement of the European Court of Human Rights of Rybacki v. Poland (application no. 52479/99)
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30.	Judgement of Constitutional Tribunal of 2.12.2020 (Ref. No. SK 9/17)	Judgement of the European Court of Human Rights of 10.1.2006, Teltronic-CATV v. Poland (application no. 48140/99)

Methods			Frequency		Frequency of main types of arguments
1	1/A	a)	12	8%	24
		b)	3	2%	
	1/B	a)	7	5%	
		b)	6	4%	
	1/C		0		
2	2/A		1	1%	2
	2/B		0		
	2/C		2	1%	
	2/D		1	1%	
	2/E		1	1%	
	2/F		0		
3	3/A		28	18%	30
	3/B		0		
	3/C	a)	30	20%	
		b)	0		
		c)	0		
	3/D	a)	0		
		b)	0		
		c)	0		
	3/E		0		
4	4/A		12	8%	30
	4/B		30	20%	
	4/C		1	1%	
	4/D		1	1%	
5			4	3%	4
6	6/A		2	1%	3
	6/B		0		
	6/C		2	1%	
	6/D		0		
7			8	6%	8
8			4	2%	4
9			0		0

1. Grammatical (textual) interpretation
1/A. Interpretation based on ordinary meaning
a) Semantic interpretation
b) Syntactic interpretation
1/B. Legal professional (dogmatic) interpretation
a) Simple conceptual dogmatic (doctrinal) interpretation (regarding either constitutional or other branches of law)
b) Interp*retation on the basis of legal principles of statutes or branches of law*
1/C. Other professional interpretation (in accordance with a non-legal technical meaning)

2. Logical (linguistic-logical) arguments
2/A. Argumentum a minore ad maius: inference from smaller to bigger
2/B. Argumentum a maiore ad minus: inference from bigger to smaller
2/C. Argumentum ad absurdum
2/D. Argumentum a contrario/arguments from silence
2/E. Argumentum a simili, including analogy
2/F. Interpretation according to other logical maxims

3. Domestic systemic arguments (systemic or harmonising arguments)
3/A. Contextual interpretation
a) In narrow sense
b) In broad sense (including 'derogatory formulae': *lex superior derogat legi inferiori*, *lex specialis derogat legi generali*, *lex posterior derogat legi priori*)
3/B. Interpretation of constitutional norms on the basis of domestic statutory law (acts, decrees)
3/C. Interpretation of fundamental rights on the basis of jurisprudence of the constitutional court
a) References to specific previous decisions of the constitutional court (as 'precedents')
b) Reference to the 'practice' of the constitutional court
c) References to abstract norms formed by the constitutional court
3/D. Interpretation of fundamental rights on the basis of jurisprudence of ordinary courts
a) Interpretation referring to the practice of ordinary courts
b) Interpretation referring to individual court decisions
c) Interpretation referring to abstract judicial norms
3/E. Interpretation of fundamental rights on the basis of normative acts of other domestic state organs

4. External systemic and comparative law arguments
4/A. Interpretation of fundamental rights on the basis of international treaties
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