Chapter III

Interpretation of Fundamental Rights in Hungary

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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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List of selected decisions

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