

BEÁTA KOVÁTS*

The Protection of Fundamental Rights in Hungary

- **ABSTRACT:** *The analysis of Hungary's constitutional framework for fundamental rights protection primarily addresses how the constitution guarantees the fundamental rights and obligations (the fundamental rights catalogue, internal enforcement of international legal obligations regarding the protection of human rights and various limitation tests). Furthermore, issues related to the adjudication of fundamental rights are examined, such as which state organs protect the rights, particularly the role, competences and proceedings of the Constitutional Court (its powers, petitioners, success rate of petitions and details of the two most common types of procedures: the constitutional complaint and judicial initiative, the role of the president and the Constitutional Court, the role of the judge-rapporteur, consequences of unconstitutionality and acceptance of decisions). Furthermore, the role of the Commissioner for Fundamental Rights (CFR), as a National Human Rights Institution (NHRI) in Hungary, is analysed, discussing how the concepts of independence, pluralism, access, funding and broad mandate apply concerning the ombudsman.*
- **KEYWORDS:** *constitution, Constitutional Court, Commissioner for Fundamental Rights, fundamental rights protection, limitation of fundamental rights, constitutional complaint, judicial initiative*

1. The Protection of Fundamental Rights in the Constitution

■ 1.1. Phrasing

The term 'human right', which is derived primarily from international legal documents, is not alien to Hungarian law and legal literature. Nevertheless, the catalogue of fundamental rights in the second part (called 'Freedom and

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Responsibility') of the Fundamental Law of Hungary (*Alaptörvény*; hereafter: FL)¹ uses the term 'fundamental right'² that is primarily, but not exclusively, applied to 'man', that is, human beings.³ Moreover, the term 'constitutional right' includes the rights protected at the constitutional level. Broadly, it covers the rights derived from the FL's provisions by the Constitutional Court (*Alkotmánybíróság*; hereafter: CC); specifically, only rights that do not qualify as fundamental rights (in which case the test of limitation is different).⁴ Act CLI of 2011 of the CC (hereafter: CC Act) allows the filing of a constitutional complaint for the violation of the 'rights guaranteed in the FL'. In addition to the rights included in the catalogue of fundamental rights, this category covers the rights not included in the FL yet derived from it; however, not necessarily from the fundamental rights, such as freedom of contract,⁵ powers of local governments,⁶ the principle of non-retroactivity and the requirement of sufficient preparation time.⁷

■ 1.2. Enforcement of International Legal Obligations Concerning the Protection of Human Rights

In addition to the catalogue of fundamental rights, relevant international conventions cannot be ignored for the protection of human rights, since internal and international sources are in a legal symbiosis, in 'coexistence'.⁸ Para. (2) of Art. Q of the FL stipulates that Hungary shall ensure that Hungarian law is in conformity with international law to comply with its obligations under international law. According to para. (3), Hungary shall accept the generally recognised rules of international law, which include general principles of law and international customary law.⁹ Moreover, para. (3) provides that other sources of international law shall be incorporated into Hungarian law upon their promulgation by laws. Hence, for international human rights conventions to become a part of Hungarian law, a specific legal act is required, namely the promulgation of the convention in a domestic legal norm.

However, the obligation to ensure conformity with Hungarian and international law raises questions about hierarchy, control of conformity, and its

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- 1 According to Art. R para. (1) of the FL, the FL forms the basis of Hungary's legal system.
 - 2 The wording 'fundamental right' is repeated in the chapter entitled 'State' and in Art. 30 of the FL on the CFR.
 - 3 Art. I para. (4) of the FL states that '[l]egal entities established on the basis of an act of Parliament shall also have these fundamental rights, and they shall also be bound by those obligations which, by their nature, are applicable not only to human beings'.
 - 4 Decision 32/1991. (VI. 6.) AB, ABH 1991.159; Decision 3091/2016. (V. 12.) AB Reasoning [20]–[21]; Decision 25/2016. (XII. 21.) AB Reasoning [20]; Decision 19/2019. (VI. 18.) AB Reasoning [60] and [101].
 - 5 Decision 8/2014. (III. 20.) AB Reasoning [94].
 - 6 Decision 3311/2019. (XI. 21.) AB Reasoning [35].
 - 7 Decision 7/2024. (IV. 3.) AB Reasoning [48]; Naszladi, 2016, pp. 49–56.
 - 8 Decision 61/2011. (VII. 13.) AB, ABH 290, 320–321.
 - 9 Decision 16/2014. (V. 22.) AB, Reasoning [34].

jurisprudence. Theoretically, the obligation to ensure compliance with international law lies on domestic law, including the FL. However, this principle is not necessarily enforceable in practice. Nonetheless, the compliance of legal sources outside the FL with international law can be enforced. Any legal provision contrary to an international treaty can be overruled (removed from the legal system).¹⁰ In the event of failure to perform a legislative task arising from an international treaty, it is possible to establish the existence of a so-called ‘unconstitutionality caused by omission’.¹¹ The CC derived an interpretative requirement from para. (2) of Art. Q:

Hungary’s participation in the community of states imposes on the CC the obligation to adopt and enforce an interpretation of domestic legislation consistent with the generally recognised rules of international law or in the case of other sources of international law, with the obligations of international law promulgated in the law, as long as this interpretation is also compatible with the value system of the FL.¹²

However, the above-mentioned possibilities do not apply to the FL. Mechanisms have been introduced in Hungarian law that guarantee the primacy of the FL over international law. These include preliminary norm control procedure conducted before the recognition of the binding effect of an international treaty, preliminary review of the law promulgating an international treaty and *ex post* norm control procedure regarding the constitutionality of the norm promulgating an international treaty.¹³

Hence, international law cannot be enforced by domestic legal means to the detriment of the FL because no institution, including the CC, has the competence to review the FL’s content.¹⁴ Therefore, to resolve potential conflicts, the CC has developed a ‘doctrine of interpretation’ according to which if the FL,

formulates the essential content of a fundamental right in the same way as an international treaty [...], the level of fundamental rights protection provided by the CC may in no case be lower than the level of international legal protection (typically expanded by the Court of Human Rights in Strasbourg). It follows from the principle of *pacta sunt servanda* [...] that the CC must therefore follow the Strasbourg

10 Arts. 32 and 42 of the CC Act. Examination of a conflict with an international treaty is a competence, which the CC may exercise *ex officio* in proceedings already initiated.

11 Art. 46 paras. (1)–(2) a) of the CC Act.

12 Decision 34/2013. (XI. 22.) AB Reasoning [25].

13 Art. 23 paras. (3)–(4); Art. 24; Art. 40 para. (3) of the CC Act.

14 Decision 61/2011. (VII. 13.) AB, ABH 290, 310–314, 319–324; Art. 24 paras. (5)–(6) of the FL.

case law, and the level of fundamental rights protection laid down therein, even if it would not necessarily follow from its own previous ‘precedent decisions’.¹⁵

This issue arises in a similar way concerning the law of the European Union (EU), albeit in a different legal context. Hungary is a Member State of the EU and para. (3) of Art. E of the FL states that the general binding rules of conduct may be laid down by the EU legislation. Thus, some parts of European law have a direct effect, while others, similar to international law, require an incorporation into national legislation. The CC has acknowledged that the EU law has primacy over national law,¹⁶ however, its enforcement is within the jurisdiction of the Court of Justice of the EU (CJEU). Hence, the CC only decided the constitutional limits of EU legislation, stating that EU law cannot overrule the provisions of Art. E of the FL, as it serves as the constitutional basis for EU competence.¹⁷ Moreover, to ensure the alignment of the FL and EU law, when interpreting the FL’s provisions, the CC follows the requirement for an interpretation of the FL consistent with the EU law.¹⁸

■ 1.3. *Entities Bound by Fundamental Rights and Holders of Fundamental Rights*

Para. (1) of Art. I of the FL concerns respect for the fundamental rights in general and para. (2) of Art. R of the FL and other laws are binding on everyone. However, the FL explicitly states that the protection of fundamental rights is the primary ‘obligation of the state’.¹⁹ In contrast to the vertical approach, the horizontal approach does not appear *expressis verbis* in the FL.²⁰ Per the FL, anyone is entitled to invoke the fundamental rights. In addition to ‘natural persons’ (‘man’, as referred to in Art. I. para. (1)),²¹ ‘legal entities established by law’ – e.g., companies,

15 Decision 61/2011. (VII. 13.) AB, ABH 290, 321.

16 Decision 2/2019. (III. 5.) AB Reasoning [25].

17 Decision 32/2021. (XII. 20.) AB.

18 Zakariás, 2022, p. 120.

19 Art. I para. (1) of the FL.

20 In practice, the requirement of constitutional interpretation applies in horizontal legal relations, for instance, Decision 6/2018. (VI. 27.) AB, Reasoning [28]–[29]. On the issue of the horizontal effect of fundamental rights in general, see: Decision 3312/2017. (XI. 30.) AB; Naszladi, 2016, p. 50; Zakariás, 2022, pp. 71–74.

21 Regarding the protection of foetal life and the protection of fundamental rights post mortem, see Decision 64/1991. (XII. 17.) AB.; Kováts, 2021a, pp. 22–23; Zakariás, 2019, pp. 105–114.

associations – have rights under para. (4) of Art. I, which by their nature, apply not only to human beings.²²

Nevertheless, certain rights are linked to nationality.²³ Considering their special position and needs, the FL contains provisions concerning legal entities, groups or persons with special characteristics. For instance, the FL specifically mentions the following: Religious communities and established churches²⁴; Political parties²⁵; Trade unions and other representative organisations²⁶; The Hungarian nation and national, ethnic, racial or religious communities²⁷; Scientists²⁸; The Hungarian Academy of Sciences, the Hungarian Academy of Arts and higher education institutions²⁹; Families, children, women, the elderly and those living with disabilities³⁰; Parents³¹ and persons raising children³²; Employees³³ and employers³⁴; Young people³⁵; Persons in need because of maternity, sickness, invalidity, disability, widowhood, orphanhood and involuntary unemployment or other persons in need³⁶; Elderly people³⁷; Homeless people³⁸; Refugees³⁹ and those lawfully residing in Hungary⁴⁰; National minorities.⁴¹

Holding fundamental rights entails ‘self-responsibility and the responsibility of the individual for the community’, as stated in Art. O of the FL, according to which everyone is responsible for themselves and is obliged to contribute to the performance of the state and community tasks according to their abilities and possibilities. This is because individuals live in social coexistence. Thus, while exercising their rights, including constitutional rights, they are responsible for

22 With a debatable approach from a fundamental rights dogmatic perspective, the CC has previously held that state bodies may have the right to submit constitutional complaints, primarily if they acted as private entities in the underlying legal relationship (Decision 3091/2016. (V. 12.) AB Reasoning [8]–[24]). However, with effect from 1 June 2023, the amended CC Act states that public authorities are not entitled to lodge constitutional complaints against judicial decisions (see from recent practice: Order 3357/2024. (X. 8.) AB).

23 Art. XI para. (1); Art. XIV para. (2); Art. XIX. paras. (1)–(2); Art. XXIII paras. (1)–(2) and (8); Art. XXVII para. (2); Art. XXIX para. (1) of the FL.

24 Art. VII of the FL.

25 Art. VIII para. (3) of the FL.

26 Art. VIII para. (5) of the FL.

27 Art. IX para. (5) of the FL.

28 Art. X para. (2) of the FL.

29 Art. X para. (3) of the FL.

30 Art. XVIII para. (1) of the FL.

31 Art. XVI paras. (2) and (4); Art. XVIII para. (2) of the FL.

32 Art. XXX para. (2) of the FL.

33 Art. XVII paras. (2) and (4) of the FL.

34 Art. XVII para. (2) of the FL.

35 Art. XVIII para. (2) of the FL.

36 Art. XIX paras. (1)–(2) of the FL.

37 Art. XIX paras. (4) of the FL.

38 Art. XXII para. (2) of the FL.

39 Art. XIV para. (4) of the FL; Art. XXIII para. (3) of the FL.

40 Art. XXVII para. (1) of the FL.

41 Art. XXIX paras. (1)–(2) of the FL.

themselves and other members of the community, with an obligation to cooperate. Simultaneously, society is responsible for the individuals. The exercise of constitutional rights must be balanced with the responsibilities of individuals for the community as its members. The most important obligation arising from this social coexistence is the inviolability of human dignity, which is the basis of every freedom in society.⁴²

■ 1.4. *The System of Fundamental Rights*

The catalogue of fundamental rights is found in the second chapter of the FL (Freedom and Responsibility), which lists the protected rights (freedoms) without classification, and the related state obligations and objectives: Art. II: Right to life and human dignity; Art. III: Prohibition of torture and inhuman or degrading treatment or punishment, servitude, medical or scientific experimentation on human beings, practices aimed at eugenics and the use of the human body or its parts for financial gain and human cloning; Art. IV: Right to freedom and personal security; Art. V: Right to repel; Art. VI: Right to private and family life, home, communications, good reputation, protection of personal data, and access and dissemination of data of public interest; Art. VII: Right to freedom of thought, conscience and religion; Art. VIII: Right to freedom of peaceful assembly and association; Art. IX: Right to freedom of expression and freedom of the press; Art. X: Freedom of scientific research and artistic expression, learning and teaching; Art. XI: Right to education; Art. XII: Right to freely choose a job and profession and conduct a business; Art. XIII: Right to property and succession; Art. XIV: Non-expulsion and asylum; Art. XV: Non-discrimination and equal opportunities; Art. XVI: The right of a child to the protection and care necessary for their proper physical, intellectual and moral development and self-identity, and the right of parents to choose the form and method of rearing their children; Art. XVII: Right of employees and employers to negotiate with each other, conclude collective agreements, strike, working conditions which respect health, safety and dignity, daily and weekly rest periods and a period of annual paid leave; Art. XVIII: Protection of children, young people and parents under labour law; Art. XIX: Social security; Art. XX: Right to physical and mental health; Art. XXI: Right to a healthy environment; Art. XXII: Protection for homes, decent housing conditions and access to public services, accommodation for persons without dwelling; Art. XXIII: Right to vote and to be voted, participate in national referendums and hold public office; Art. XXIV: Right to a fair administrative procedure and compensation for damage caused in administrative capacity; Art. XXV: Right to petition; Art. XXVII: Right to move freely and choose the place of residency, and right to

⁴² Decision 19/2019. (VI. 18.) AB Reasoning [61] and [103]; Decision 32/2013. (XI. 22.) AB Reasoning [88]. This concept should be approached critically, because it likely applies to the detriment of vulnerable individuals, such as imposing sanctions on homeless people (Decision 19/2019. (VI. 18.) AB).

protection abroad; Art. XXVIII: Right to a fair trial, presumption of innocence, the right to defence, *nullum crimen sine lege, nulla poena sine lege, ne bis in idem*, right to legal remedy; Art. XXIX: Rights of national minorities.

Due to its importance, the right to human dignity stands out, which has served as the basis for several decisions of the CC, with a high social impact (e.g., the abolition of the death penalty).⁴³ Moreover, this is a right at the heart of the FL's value system, which underpins and permeates the entire system of fundamental rights.⁴⁴ Individual fundamental rights must be interpreted specifically in connection with, together with and concerning human dignity as the parent right.⁴⁵ Dignity is one of the formulations of the so-called general personality right, which is a subsidiary fundamental right to protect the autonomy of the individual if none of the specific fundamental rights can be applied in a given case.⁴⁶ Hence, the CC has derived from dignity, for instance, the right to self-determination and the general autonomy of action.⁴⁷

The significance of freedom of expression, which can be considered the parent right of so-called communication rights, can be explained primarily by the historical circumstances of Hungary and its limited nature before the regime change in 1989. During authoritarian regimes throughout the 20th century, independent media were banned in Hungary and individuals faced persecution for expressing views contrary to official ideology. Therefore, the freedom of expression's primary function for the service of democracy has come to the fore: a democratic society can only emerge and survive if it is possible for different (often opposing) opinions to shape society.⁴⁸

In Hungarian constitutional law, the recognition of the right to property as a fundamental right, and the declaration of the equality of property forms, is linked to the regime change, as previously emphasis was placed on the primacy of state and social property. Property is protected as the 'traditional material basis of individual autonomy of action'.⁴⁹ The economic freedom of the individual creates a free citizen independent of state power and is, in general, a prerequisite for the market economy.

43 Decision 23/1990. (X. 31.) AB, ABH 1990, 89, 92.

44 Decision 19/2019. (VI. 18.) AB Reasoning [102].

45 Decision 37/2011. (V. 10.) AB ABH 2011, 225, 245.

46 Decision 8/1990. (IV. 23.) AB, ABH 1990, 42, 44–45; Decision 25/2012. (V. 18.) AB Reasoning [44]; Decision 7/2014. (III. 7.) AB, Reasoning [24], [43], [60]; Decision 2/2015 (II.2.) AB Reasoning [64]; Decision 13/2020. (VI. 22.) AB Reasoning [46]. Regarding subsidiarity, see Decision 8/2014. (III. 20.) AB Reasoning [93].

47 See for details: Kováts, 2021a, pp. 18–30.

48 Decision 3322/2019. (XI. 26.) AB Reasoning [17]–[18]; Cf. also Decision 7/2014. (III. 7.) AB Reasoning [9]–[12], [39]; Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 170–171.

49 Decision 64/1993. (XII. 22.) AB, ABH 1993, 373, 380; Decision No. 20/2014. (VII. 3.) AB Reasoning [189].

The FL does not contain an eternity clause and does not establish a ‘ranking’ among rights.⁵⁰ However, a ranking can be deduced from practice. This follows implicitly from the various fundamental rights limitation tests (discussed later), because the protection of rights that can be restricted according to stricter standards is higher. Nonetheless, the CC has developed a ranking regarding fundamental rights. At the top of the hierarchy stands the right to life and human dignity, an inviolable, absolute and indivisible right, because the core of human quality is inaccessible, untouchable for the law.⁵¹ This is followed by the rights protecting the guarantees of communication on which society is founded (e.g., freedom of expression, freedom of the press and right to assembly). Their privileged character is manifested in the fact that although these are rights subject to limitation, they yield only to a few other fundamental rights and any legal limitation must be interpreted in a restrictive manner.⁵² Furthermore, the CC has set up detailed, step-by-step tests for their restriction. This is followed by the rights that serve to limit the strongest manifestations of state violence (e.g., the presumption of innocence and the prohibition of retroactive criminal law).⁵³

■ 1.5. Limitation Tests

The fundamental rights limitation tests determine whether a restriction of a fundamental right is constitutional or a violation, therefore, unconstitutional. The FL specifies only one test for fundamental rights’ limitations; however, the CC, in its practice, has developed several tests.

1.5.1. Necessity-Proportionality Test

According to the general fundamental rights limitation test in para. (3) of Art. I of the FL:

A fundamental right may only be restricted in order to enforce another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary and proportionate to the objective pursued, and with respect to the essential content of the relevant fundamental right.

50 Former CC judge, László Kiss, argued in favour of the so-called implicit perpetuity clause in his concurring opinion to Decision 61/2011. (VII. 13.) AB, ABH 2011, 290, 345–362.

51 Decision 30/2013. (X. 28.) AB, Reasoning [23]; Decision 7/2014. (III. 7.) AB Reasoning [24]; Decision 11/2014. (IV. 4.) AB Reasoning [31].

52 Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 178; Decision 3145/2018. (V. 7.) AB Reasoning [58].

53 Sólyom, 2014, pp. 8–10. This approach has been reiterated in the latest practice developed under the FL. Regarding the right to human dignity, see Decision 3047/2013. (II. 28.) AB Reasoning [48]; Decision 32/2021. (XII. 20.) AB Reasoning [39]; regarding freedom of expression, see Decision No. 7/2014. (III. 7.) AB Reasoning [23] and [42].

As a formal requirement, since the rules governing fundamental rights are laid down by law, a law is required for direct and significant limitations of fundamental rights. However, regulations issued as decrees related to fundamental rights, yet only indirectly or remotely affect them, and are technical in nature, rather than limiting, do not constitute an FL violation.⁵⁴

The substantive examination of limitations consists of four elements: 1) Is there a legitimate, constitutionally acceptable purpose for the restriction?; 2) Is the restriction necessary?; 3) Is the restriction suitable for achieving the objective pursued?; 4) Is the restriction proportional to the objective pursued?

Regarding necessity, it must be evaluated whether the legitimate goal can be achieved by other means or if the restriction is absolutely and unavoidably necessary.⁵⁵ Regarding proportionality, the question is whether the importance of the objective pursued and the harm caused to the fundamental right are in proportion to each other. In other words, the weight of the intervention, that is, the gravity of the fundamental right's violation, must be compared to the desired goal. In this context, the requirement for the least restrictive solution applies, that is, the restriction must not exceed the level absolutely required to achieve the constitutionally justifiable objective.⁵⁶

1.5.2. *Public Interest Test*

This test, which has less stringent requirements than the necessity-proportionality test, was developed by the CC concerning the right to property. It can be attributed to the consideration that, since public interest is sufficient to expropriate property, no stricter standard is justified in the case of property restrictions. The public interest test does not concern the absolute necessity of the legislature's choice. Instead, it determines whether the public interest is justified and whether the solution does not infringe on another constitutional right. However, when examining public interest and the proportionality of the restriction, the CC may define the special criteria that determine the constitutionality of the interference. For instance, a restriction of property may be disproportionate if its duration is not predictable and, in some cases, compensation may be necessary to ensure the restriction's proportionality.⁵⁷

54 Decision 30/2021. (XII. 1.) AB Reasoning [21] and [23].

55 Decision 30/2021. (XII. 1.) AB Reasoning [39]; Decision 3484/2022. (XII. 20.) AB Reasoning [49].

56 Decision 3378/2023. (VII. 27.) AB Reasoning [44].

57 Decision 64/1993. (XII. 22.) AB, ABH 1993, 373, 381–382; Decision 20/2014. (VII. 3.) AB Reasoning [154]; Decision 34/2015. (XII. 9.) AB, Reasoning [46]; Decision 3042/2021. (II. 19.) AB Reasoning [90]–[91].

1.5.3. Reasonableness Test

According to the test developed by the CC, which primarily applies to discrimination cases, discrimination is examined by determining whether there has been a difference in treatment, whether the different treatment is disadvantageous and whether the discrimination relates to persons belonging to a homogeneous group or in a comparable situation. Thus, the distinction identified may be regarded as ‘unreasonable’ and, consequently, unconstitutional, if it has no reasonable justification based on objective assessment, that is, it is arbitrary.

The assessment of the rationality (arbitrariness) of the reasons for the differential treatment is carried out in three steps. First, the legitimate aim of the measure must be identified, that is, whether it has a constitutionally permissible purpose. Second, it is necessary to assess whether the measure is suitable for achieving this legitimate aim. Third, whether the group of persons targeted by the measure coincides with the group designated by the legitimate aim, since the rule is optimal if it applies to all those designated by the legitimate aim of the measure. Notably, the assessment does not include a value judgement or a stance on the expediency and effectiveness of the contested measure.⁵⁸ Furthermore, the reasonableness test is applicable in the case of constitutional rights that are not considered fundamental rights.⁵⁹

1.5.4. Non-Deprivation Standard

This test applies only to non-fundamental rights that exist within the framework of the law, such as municipal competences (municipal autonomy), which enjoy constitutional protection against the state. The essence of this test is that these rights (protected competences) can be limited yet not completely hollowed out.⁶⁰

1.5.5. Test of Equally Balancing

When a conflict of fundamental rights arises in a horizontal relationship between persons, which means that the fundamental right of an individual is threatened by the exercise of the fundamental right of another individual, the state must play a mediating and balancing role in accordance with its active protection obligation – the essential content of any fundamental right shall not be restricted and efforts must be made to ensure that competing fundamental rights are balanced gently and fairly following the principle of proportionality.⁶¹

58 See: Kováts, 2021b, pp. 187–196.

59 Restrictions on contractual freedom should be measured by the reasonableness test, Decision 3298/2014. (XI. 11.) AB Reasoning [29].

60 Decision 8/2021. (III. 2.) AB Reasoning [161]–[162]; Decision 3135/2023. (III. 27.) AB Reasoning [98]–[101]; Decision 3518/2023. (XII. 14.) AB Reasoning [50].

61 Decision 3312/2017. (XI. 30.) AB Reasoning [30].

1.5.6. *Special Legal Order*

During the special legal order, the functioning of the CC may not be restricted, which means that permanent constitutional control is guaranteed. However, according to para. (2) of Art. 52 of the FL, the exercise of fundamental rights, except those laid down in Art. II (right to human dignity), Art. III (prohibition of torture and inhuman or degrading treatment or punishment, etc.) and paras. (2)–(6) of Art. XXVIII (presumption of innocence, the right to defence, *nullum crimen sine lege*, *nulla poena sine lege* and *ne bis in idem*), may be suspended or restricted beyond the extent specified in para. (3) of Art. I (the necessity-proportionality test).

This neither authorises the introduction of limitations of fundamental rights unrelated to the elimination of the danger, nor does it allow any limitation that exceeds what is justified by the exceptional circumstances. The measure must be necessary to avert the danger, proportionate to the danger and must exist only during the period of special legal order; even then, only for the period necessary. It must be reviewed periodically.⁶²

■ 1.6. *Fundamental Obligations*

In addition to rights, the FL sets out obligations (partly in the chapter on fundamental rights and partly in other chapters of the FL), most of which apply to everyone. The most common is Art. O, according to which everyone is responsible for themselves and is obliged to contribute to the performance of state and community tasks according to their abilities and possibilities.⁶³ A related provision is para. (1) of Art. XII of the FL, which stipulates that everyone is obliged to contribute to the enrichment of the community through their work according to their abilities and potential. para. (1) of Art. P of the FL contains a special provision on environmental protection, which obliges everyone to protect, maintain and preserve natural resources and cultural artefacts, while para. (2) of Art. XXI of the FL stipulates that anyone who causes damage to the environment is obliged to restore it or bear the cost of restoration (polluter pays principle). Special obligation applies to parent-child relationships. Parents are obliged to take care of their minor children and educate them, while adult children are obliged to take care of their parents if needed⁶⁴. In contrast, the obligation to defend the country (Art. XXXI of the FL) applies to only Hungarian citizens and performing military service applies only to adult male citizens residing in Hungary.

62 Decision 15/2021. (V. 13.) AB Reasoning [33] and [35]; Decision 23/2021. (VII. 13.) AB. For details on the test, see Decision 3128/2022. (IV. 1.) AB Reasoning [163]; Decision 3004/2024. (I. 12.) AB Reasoning [57]. If a regulation, whose constitutionality can only be justified by the transitional period of the special legal order, is certain to continue to have an effect for decades, the requirement of proportionality in time is not met (Decision 9/2024. (IV. 30.) AB, Reasoning [54]).

63 For its interpretation in connection with homelessness, see Decision 9/2019. (VI. 18.) AB.

64 Art. XVI paras. (3)–(4) of the FL.

Among the obligations, Art. XXX of the FL on the general, equal and proportional contribution to covering common needs (tax burden sharing) is important, considering that the revenue of the state budget is provided by tax revenues based on this article. Without this, ‘the functioning of the democratic rule of law would become unsustainable because the necessary financial resources would not be available to perform public tasks’.⁶⁵ However, the tax burden is excessive (disproportionate) if it no longer serves the purpose related to the sharing of public burdens and leads to the taxpayer’s insolvency or has a confiscatory character.⁶⁶

2. Fundamental Rights Adjudication

■ 2.1. State organs protecting fundamental rights

The protection of fundamental rights is the primary obligation of the state and, consequently, all state organs are obliged to protect these rights.⁶⁷ The following organs, directly or indirectly, are assigned to the protection of fundamental rights.

2.1.1. CC (Alkotmánybíróság)⁶⁸

The CC is an independent constitutional body, the principal organ for the protection of the FL. Upon petition, the CC may examine the restriction (infringement) of any fundamental right. It cannot initiate proceedings *ex officio*; however, in ongoing proceedings, it may exercise certain powers *ex officio*. Its powers include, among others, the interpretation of the FL, the *ex ante* and *ex post* norm control review of legislation (either abstract or specific) and the examination of the conformity of judicial decisions with the FL.

The CC can annul any law or legislative provision contrary to the FL and any unconstitutional judicial decision. It may impose an individual or a general prohibition on the application of the annulled law and, in exceptional cases, order the review of proceedings concluded with final judgment. Moreover, it may establish the existence of unconstitutionality resulting from legislative omission (which creates an obligation to legislate). Furthermore, the CC may annul judicial decisions or the decisions of other authorities reviewed by the given ruling. It may establish constitutional requirements with which the application of the reviewed legislation in court proceedings must comply.

The CC’s decision has an *erga omnes* effect. If the parliament chooses to amend the FL, which it has the right to do, instead of respecting and complying

65 Decision 25/2020. (XII. 2.) AB Reasoning [27].

66 Regarding the potentially confiscatory nature of land tax, see Decision 7/2023. (VI. 6.) AB; Decision 27/2022. (XI. 3.) AB.

67 Art. I para. (1) of the FL.

68 Art. 24 of the FL; CC Act.

with the CC's decision to protect the FL, this sends the message that state power may exceed constitutional limits. Such a situation could undermine the CC's authority and signal that the rule of law and the constitutional order are not respected. Furthermore, it could weaken the stability and predictability of the legal system, leading to legal uncertainty, especially if the amendments are driven by political considerations.

2.1.2. *Commissioner for Fundamental Rights (Alapvető jogok biztosa)*⁶⁹

The Commissioner for Fundamental Rights (hereafter: CFR) is a constitutional organ, independent in its procedure, subordinate only to the law, cannot be instructed regarding its activities and is responsible only to the Parliament by submitting an annual report of its activities. One of its two deputies is responsible for protecting the interests of future generations ('advocate for future generations') and the other for protecting the rights of nationalities living in Hungary ('defender of nationality rights').

On the one hand, the CFR is a classic 'ombudsman-type' organ, which is entitled to investigate the activities (omissions) of authorities or organs performing public services concerning the so-called 'improprieties' related to fundamental rights. At the end of the procedure, the CFR may make a non-binding initiative or recommendation to the organ. The CFR examines the practice of handling public interest disclosures (primarily serving anti-corruption purposes) and police complaints. It performs the tasks related to the National Preventive Mechanism pursuant to Art. III of the Optional Protocol of the Convention against Torture and other Inhuman or Degrading Treatment or Punishment, promulgated by Act CXLIII of 2011 (hereafter, OPCAT) and ensures the fulfilment of the tasks of the independent mechanism under the Convention on the Rights of Persons with Disabilities, promulgated by Act XCII of 2007 (hereafter, Disability Convention), with the help of the Disability Advisory Council that represents civil society. On the other hand, the CFR is an 'administrative authority', taking over the tasks of the former Equal Treatment Authority. It examines complaints based on violations of equal treatment more broadly than ombudsman-type procedures.⁷⁰

2.1.3. *National Authority for Data Protection and Freedom of Information (Nemzeti Adatvédelmi és Információszabadság Hatóság)*⁷¹

It is an independent, autonomous state administration organ deriving from the FL, responsible for monitoring and promoting the implementation of the right to personal data protection and the right to access to and dissemination of data of public interest and data accessible on public interest grounds. It conducts

⁶⁹ Art. 30 of the FL; Act CXI of 2011 on the CFR.

⁷⁰ Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities.

⁷¹ Art. VI para. (4) of the FL, Arts. 38-71/D of Act CXII of 2011 on Informational Self-Determination and Freedom of Information.

ombudsman-type investigations upon notification or *ex officio*, making a non-binding recommendation. Furthermore, it carries out authority procedures for data protection, supervision of data classification, transparency, registration and supervision. Additionally, it carries out control-type activities.

2.1.4. Courts

It is the state's duty to provide judicial channels for the adjudication of rights and obligations, meaning that the affected party should have the opportunity to turn to the court, and the court should be entitled (and its procedure should be suitable) to decide on the case's merits. The right of access to the courts guaranteed by para. (1) of Art. XXVIII of the FL consists of two components. First is to ensure 'access to the courts', which means that one may initiate court proceedings if their rights or obligations become disputed. Taking the case to court must be a real and substantive possibility, and the persons are subjects, not objects, of the court proceedings. Second is the 'effective judicial protection', which is fulfilled when the court can make a substantive, enforceable and final decision on the merits of the case before it.⁷²

According to para. (7) of Art. XXVIII of the FL, the right to legal remedy in judicial and administrative proceedings guarantees access to ordinary remedies in judicial and administrative procedures concerning substantive, final decisions. Recourse to another body or a higher forum within the same organisation means the right to a second decision or review; however, it does not guarantee the reversal of the contested decision. There is no requirement regarding the number of levels in the appeal system.

In public administration, the right to appeal is ensured by judicial review, even in cases where an appeal may be excluded. The effectiveness of the remedy requires that it be real and substantive. This entails that the affected party is informed of the decision, its content, reasoning and the documents and other evidence on which the decision is based. Moreover, a fundamental and inherent element of every remedy is the possibility of redress, which is achieved if the second decision can fully review the contested decision and provide a remedy for the violation of rights with a retroactive effect.⁷³

The courts do not directly adjudicate on fundamental rights and their decisions cannot be based on the FL contrary to the law. However, they are obligated to identify fundamental rights or other constitutional aspects of the case and interpret the applicable law in their judicial decisions in conformity with the fundamental rights (Art. 28 of the FL).⁷⁴ Furthermore, if in an individual pending case, a judge should apply a law that he perceives to be unconstitutional or which

⁷² Kováts, 2021c, pp. 322–326.

⁷³ Ibid., pp. 354–360.

⁷⁴ Decision 3/2015. (II. 2.) AB Reasoning [17].

has been declared unconstitutional by the CC, the court proceeding must be suspended and a judicial initiative for norm control must be submitted to the CC.⁷⁵

2.1.5. *National Media and Infocommunications Authority (Nemzeti Média- és Hírközlési Hatóság)*⁷⁶

The Media Council is an autonomous body of the National Media and Infocommunications Authority (hereafter, NMIA) under the supervision of the Parliament, which, among other tasks, monitors and ensures the enforcement of press freedom. It has both authority and non-authority powers regarding media services and press products, similar to the Office of the NMIA. Their tasks concern, for instance, ensuring the protection of human dignity, consumer protection and the protection of children and people with disabilities.

The Media and Infocommunications Commissioner, operating within the NMIA, is an ombudsman-like institution, without authority powers. He detects conduct that does not violate a law and does not fall within the competence of any other body of the NMIA, yet harms or may harm the legitimate interests of users, subscribers, consumers, viewers, readers or listeners using media services, press products or electronic communications services. In such cases, he may start proceedings leading to a non-binding recommendation.

2.1.6. *Ministerial Commissioner for Education Rights (Oktatási jogok biztosa)*⁷⁷

The Office of the Ministerial Commissioner for Education Rights is an independent, internal organisational unit of the Ministry of Education, which, as an ombudsman-like institution, contributes to the promotion of the education-related civil rights of children, students, researchers, teachers, educators, parents and their communities by examining the decisions or the failure to decide an individual case affecting them. He conducts a procedure that does not qualify as an authority procedure, whereby he may take a non-binding initiative or recommendation.

2.1.7. *Election Commissions*⁷⁸

As part of their activities, election commissions supervise compliance with the provisions regarding the right to vote and the right to a referendum as fundamental rights and participate in their enforcement through binding decisions based on complaints.

75 Art. 25 of the CC Act; see in detail: Kováts and Sulyok, 2016, pp. 75–82.

76 Act CLXXXV of 2010 on Media Services and Mass Media; Act CIV of 2010 on Freedom of the Press and Fundamental Rules of Media Content.

77 Regulation 40/1999 on the tasks and operating rules of the Office of the Ministerial Commissioner for Education Rights (X. 8.) OM.

78 Act XXXVI of 2013 on Election Procedure, Act CCXXXVIII of 2013 on the initiation of referendums, the European citizens' initiative and the procedure for referendums.

■ 2.2. *The Role of the CC in Protecting Fundamental Rights*

2.2.1. *Powers of the CC*

The CC is the principal organ for the protection of the FL in Hungary.⁷⁹ The tasks and competences of the CC are defined in the FL and in Art. 23–68/A of the CC Act. The detailed procedural rules are determined by the CC's plenary session⁸⁰, mainly contained in Art. 25–68, and some exceptional procedural rules contained in the FL.⁸¹

The competence of the CC includes: 1) *Ex ante* examination of the constitutionality of laws adopted yet not promulgated (preliminary review). The procedure may be initiated by the Parliament and, in the case of an adopted but not yet promulgated law, the President of the Republic. Concerning the Rules of Procedure of the CC, the Parliament may initiate a preliminary review. For an international treaty, the President of the Republic or, if the international treaty is promulgated by a government decree, the Government can file a petition. The FL and the amendment to it may be challenged by the President of the Republic; however, only in relation to the compliance with procedural requirements.⁸² 2) *Ex post* review of laws regarding their conformity with the FL. The procedure may be initiated by the Government, one-quarter of the Members of Parliament, the President of the Curia, the Prosecutor General or the CFR.⁸³ 3) Adjudication of a judicial initiative based on a motion by a judge (court clerk).⁸⁴ 4) Adjudication of constitutional complaints seeking norm control.⁸⁵ 5) Adjudication of constitutional complaints against judicial decisions.⁸⁶ 6) The examination of conflicts with international treaties *ex officio* or upon petition filed by one-quarter of the Members of Parliament, the Government, the President of the Curia, the Prosecutor General, the CFR or by a judge.⁸⁷ 7) Interpretation of the FL at the request of the Parliament or its standing committee, the President of the Republic, the Government or the CFR.⁸⁸ 8) Examination of Parliament resolutions related to ordering a referendum.⁸⁹ 9) Giving an opinion regarding the dissolution of a representative council of municipal and national governments operating contrary to the FL.⁹⁰ 10) Opinion on the functioning of religious communities regarding compliance with

79 Art. 24 para. (1) of the FL.

80 Decision 1001/2013. (II. 27.) AB Tü. on the Constitutional Court's Rules of Procedure; hereafter: Rules of Procedure of the CC.

81 The deadline for deciding a judicial initiative is regulated in Art. 24 para. (2) b) of the FL.

82 Art. XXIV para. (2) a) of the FL; Arts. 23–23/A of the CC Act.

83 Art. XXIV para. (2) e) of the FL; Arts. 24–24/A and 37 of the CC Act.

84 Art. XXIV para. (2) b) of the FL; Arts. 1 b), 25 and 37 of the CC Act.

85 Art. XXIV para. (2) c) of the FL; Arts. 26 and 37 of the CC Act.

86 Art. XXIV para. (2) d) of the FL; Art. 27 of the CC Act.

87 Art. XXIV para. (2) f) of the FL; Art. 32 and Art. 37 para. (2) of the CC Act.

88 Art. 38 of the CC Act.

89 Art. 33 of the CC Act.

90 Art. 34 of the CC Act.

the FL.⁹¹ 11) Removal of the President of the Republic from office.⁹² 12) Resolving conflicts of competence between state organs or public bodies and between public and self-government bodies.⁹³ 13) Deciding on appeals by the National Judicial Council.⁹⁴ 14) Giving a preliminary EU interpretative opinion.⁹⁵

Only the FL or a cardinal Act may define further tasks and competences for the CC. Exceptionally, the CC may interpret for itself powers which are not expressly specified, such as the power to initiate preliminary ruling proceedings before the CJEU.⁹⁶

The competences of the CC can be classified in various ways. Based on subject matter, there are norm control type powers. These can be *ex ante* or *ex post*, abstract, such as *ex ante* and *ex post* norm control, or concrete or individual, such as constitutional complaints and judicial initiatives. Norm control procedures further include the examination of conflicts with international treaties. Moreover, there are procedures aimed at examining individual cases (e.g., constitutional complaints against judicial decisions) and interpretative competences and special procedures (e.g., resolving conflicts of competence). Based on the type of petitioner, procedures can be distinguished as those initiated by state bodies, non-state bodies or individuals.

According to the type of decision, there are rule/right-shaping and advisory decisions.

In addition to the CC, the Curia carries out norm control, albeit in a limited scope. Its competence is limited to the annulment of local government decrees that are contrary to other laws and the establishment of the failure of local governments to comply with their legislative obligations.⁹⁷ The norm control powers of the CC and the Curia are complementary, since the CC examines the conformity of local government decrees with the FL only when the review pertains solely to the compatibility with the FL, without addressing conflicts with other laws.⁹⁸

Every quarter and at the end of each year, the CC publishes detailed case-traffic and statistical data on its website. Accounting for the specific caseload data for 2021-2023, which correspond to the data since the entry into force of the FL on 1 January 2012,⁹⁹ 80-85% of all cases were constitutional complaints. These included cases completed during the preparatory procedure of the Secretary General of the CC, closed by a single judge decision, assigned to a CC rapporteur judge and completed by the CC. Taking into account only cases assigned to the rapporteur judge,

91 Art. 34/A of the CC Act.

92 Art. 13 of the FL; Art. 35 of the CC Act.

93 Art. 36 of the CC Act.

94 Art. 36/A of the CC Act.

95 Art. 38/A of the CC Act.

96 Decision 26/2020. (XII. 2.) AB Reasoning [24]–[26].

97 Art. XXV para. (2) of the FL.

98 Art. XXXVII para. (1) of the FL.

99 Nasztladi, 2016, pp. 124–128.

this proportion is higher, at 92-95%. Furthermore, 80-90% of the constitutional complaints were seeking the annulment of judicial decisions.

Apart from constitutional complaints, judicial initiative was the second most frequently occurring case category. However, its proportion was significantly smaller, accounting for only about 1.5% of all completed cases (even if we only consider cases assigned to the rapporteur judge, this proportion is not more than 5%). Much less frequently, yet regularly, abstract *ex post* norm control initiatives and initiatives for examination of conflicts with international treaties were received. However, since 2012, there have been only a few examples of motions for preliminary norm control and interpretation of the FL. In the absence of a petition, there are nearly no examples of the exercise of other powers. Thus, the vast majority of cases brought before the CC are constitutional complaints, including those seeking the annulment of judicial decisions, and also judicial initiatives are more frequent than other types of proceedings.¹⁰⁰

No success rate can be determined, partly because decisions sometimes contain more than one provision and these are indicated separately in the statistics. However, depending on the circumstances of the given case, even a rejection of a petition can be considered a success (e.g., establishing a constitutional requirement may justify the position of the initiating judge even if his initiative seeking the annulment of a legal provision is rejected). Therefore, it is not possible to calculate a success rate, yet the proportions are well illustrated by the fact that out of the 1543 cases completed in 2021, only 106 were closed with substantive decisions, of which 23 were judicial decisions, in 6 the challenged legal provision was annulled, the CC established 10 constitutional requirements and in 6 cases unconstitutionality caused by omission was established. In 2022, 1619 cases were closed, of which 115 were decisions on the merits. The CC annulled judicial decisions in 32 cases, found legal provisions unconstitutional in 9 cases and 5 constitutional requirements and 3 unconstitutionality caused by omission were established. In 2023, out of 1438 completed cases, 102 were substantive decisions, of which 21 involved the annulment of judicial decisions and 8 contained the annulment of legislative provisions. In 2023, 2 constitutional requirements and 5 legislative omissions were established.

2.2.2. *The Constitutional Complaint*

There are three main types of constitutional complaints in the Hungarian legal order: two of norm control and one of constitutional complaint against judicial decisions. In cases of a constitutional complaint seeking norm control, the petitioner may, as a rule, claim the unconstitutionality of the law (or a public law

100 The number of petitions depends on the regulation of the right to submit petitions. For instance, before the FL came into force, the dominance of *ex post* abstract norm control proceedings, which could be initiated by anyone (*actio popularis*), was evident. Following the restriction, this procedure has become quite rare.

regulatory instrument or a uniformity decision of the Curia) applied in court proceedings (whether in force or repealed). Therefore, this is a specific *ex post* norm control. A complaint may be submitted by the affected individual or organisation, or by the Prosecutor General, if the person concerned is unable to defend their rights or if the violation of rights concerns a larger group of people. The motion may be submitted within 60 days of delivery of the decision, and only the violation of a right guaranteed in the FL may be invoked. All ordinary legal remedies available must be exhausted.¹⁰¹

Constitutional complaints about the violation of the right guaranteed in the FL occur directly, without any judicial decisions, as a result of the application or entry into force of a provision of an unconstitutional law. Notably, there should be no legal remedy procedure or the petitioner should have exhausted all available remedies (the so-called exceptional or direct constitutional complaint). In such cases, the complaint may be submitted within 180 days of the entry into force of the legislation.¹⁰²

Constitutional complaint against a judicial decision (the so-called genuine constitutional complaint) can be filed against a decision on the merits of the case or against any other decision adopted in conclusion of the court proceedings.¹⁰³ The prerequisites for this complaint are the petitioner's involvement in the case (exceptionally, involvement may be determined for individuals not participating in the procedure)¹⁰⁴ and the exhaustion of all available ordinary legal remedies. Organisations exercising public authority are not entitled to file this type of complaint.¹⁰⁵ In this procedure, the CC examines the conformity of the judicial interpretation of the law with the FL, determining whether the court, in applying the law, recognised the constitutional relevance of the case and ensured the enforcement of the constitutional content of the rights guaranteed by the FL.¹⁰⁶

A constitutional complaint must meet several substantive and formal requirements, such as containing a definite request.¹⁰⁷ In addition to alleging that a right guaranteed by the FL has been violated, it is necessary to explain how and why this right was violated. The complaint must be supported by the fundamental rights arguments; it is not enough to contest the correctness of the court's interpretation of the law or the assessment of the evidence.¹⁰⁸ Deficiencies of the petition can be remedied. The procedure is free of charge and legal representation is not mandatory. Art. 29 of the CC Act states that the CC accepts constitutional

101 Art. 26 paras. (1) and (3); Art. 30; Art. 37 para. (2) of the CC Act.

102 Art. 26 para. (2); Art. 30 para. (4) of the CC Act.

103 The decision on pre-trial detention (Order 3002/2014. (I. 24.) AB Reasoning [24]) or decisions on enforcement proceedings (Order 3179/2013. (X. 9.) AB, Reasoning [9]).

104 Order 3075/2017. (IV. 19.) AB Reasoning [10].

105 Arts. 27 and 30 of the CC Act.

106 Decision 3/2015. (II. 2.) AB Reasoning [18].

107 Art. 52 para. (1b) of the CC Act.

108 Art. 52 para (1b) e) of the CC Act; Order 3370/2024. (X. 8.) AB Reasoning [26].

complaints if a conflict with the FL significantly affects the judicial decision or the case raises paramount constitutional issues, which enables the CC to filter complaints (which, considering the statistics described above, often makes use of this possibility).¹⁰⁹

2.2.3. *The Judicial Initiative*

A judicial initiative serves as means of specific *ex post* norm control, whereby judges (judicial clerks), lacking the authority to set aside legislation on their own, are obliged to request the CC to examine the conformity of applicable law (or public law regulatory instrument and uniformity decision of the Curia) or any provision thereof with the FL or international treaties. Court proceedings are suspended until the decision of the CC. If the CC had declared the law unconstitutional in another case; however, did not impose any/general prohibition on the law's application, it would need to apply the unconstitutional norm in the current case. The judge may request the exclusion of the application of the norm in the case pending before him (standalone prohibition of application).¹¹⁰ Any substantive legal provision on which the decision on the merits of an individual case depends can be challenged by a judicial initiative and procedural rules that significantly affect the procedural position of the parties.¹¹¹

Both the constitutional complaint against norms applied in judicial decisions and the judicial initiative serve as tools to challenge the applied or applicable law. However, the judicial initiative offers certain advantages over the constitutional complaint. It allows for the remedy of fundamental rights violations at an earlier stage of the proceedings, while the case is pending, effectively preventing such a violation from occurring. It results in faster adjudication due to procedural deadlines.¹¹² Furthermore, unlike a constitutional complaint, a judge can request a standalone prohibition of application.¹¹³ According to Section 29 of the CC Act, it is only possible to filter the admission of constitutional complaints.

¹⁰⁹ Art. 29 of the CC Act.

¹¹⁰ Arts. 25, 32 and Art. 37 para. (2) of the CC Act.

¹¹¹ Decision 3016/2016. (II. 2.) AB Reasoning [14]; Decision 3049/2016. (III. 22.) AB Reasoning [19].

¹¹² The judicial initiative must be dealt with as a priority; however, no later than within 90 days. This deadline cannot be extended, and the time of judicial recess of the CC is included in the deadline. However, in case of constitutional complaints, the admissibility of the motion must be decided within 120 days and the first draft must be prepared by the judge-rapporteur within 180 days of its admission. These deadlines may be extended, and the time of judicial recess is excluded from the deadline. Furthermore, there is no final deadline, as the CC Act requires to make a decision within a reasonable time limit (Art. XXIV para. (2) b) of the FL, Arts. 52–53 and Art 55. para. (4) of the Rules of Procedure of the CC).

¹¹³ 'Following the publication of a decision declaring the FL to be unconstitutional, containing annulment and prohibiting its use in pending cases, the CC Act may only be requested on judicial initiative for a new prohibition of application which deviates from that contained in the decision' (Decision 34/2012. (VII. 17.) AB, Reasoning [51]).

The judicial initiative does not serve exclusively the protection of fundamental rights, it can be based on any kind of violation of the FL (e.g., violation of the hierarchy of norms).

2.2.4. *President of the Constitutional Court*

The CC makes its decisions either through a single judge or as a body (deciding in plenary sessions or in panels). In the latter case, the decision depends solely on the voting ratio and each member, including the President of the CC, has one vote. However, the presence of the President (or the Vice-President) is essential for the quorum of the plenary session. The President's vote has a special significance in the event of a tie at the plenary session; the President has a casting vote. This occurs in exceptional cases, as the court consists of 15 members and abstention is not allowed during the voting process.¹¹⁴

Nevertheless, the President possesses several powers related to the allocation of cases and the coordination of the CC's activities, sessions and operations, which may indirectly influence the outcome of the cases. These powers include, for instance, the assignment of cases to the judge-rapporteur (the President may assign any case to himself) and the reassignment of cases, supervising the Office of the CC, the extension of the deadline for preparation of draft decisions, proposing the composition and presiding of panels, ordering an accelerated procedure, ordering issues on the agenda of the panel to be presented for decision-making to the plenary session, ensuring that the law is applied uniformly by the CC, determining the agenda of plenary sessions, presiding over plenary sessions and deciding whether a case is ready for voting.¹¹⁵ The use of these tools depends to a large extent on the President's perception of his role. The more the President sees himself as *primus inter pares*, the more likely he is to consider the powers as merely technical. Nevertheless, the introduction of certain automations, such as automatic case assignment, could have significant advantages, including ensuring independence, increased time efficiency, transparency and prevention of overload of judges.

2.2.5. *Role of the Judge-Rapporteur*

The President of the CC appoints a rapporteur judge to present every case (assigning). The judge-rapporteur carries out extensive preparatory work regarding the assigned cases. Before the procedure by the body, the rapporteur may take all measures and make all decisions referred by the law to the CC's scope of competence, except for passing a decision on the merits of the case, ordering interim measures, suspending the procedure, transferring or rejecting the case, terminating the procedure and ordering the holding of a personal or public hearing.

114 Art. 48 paras. (4)–(5) of the CC Act.

115 Art. 17 and Art. 49 para. (6) bb) of the CC Act.

If necessary, the judge-rapporteur may order rectifications of deficiencies, request documents from the court, conduct a consultation procedure, request the court to suspend the enforcement of the contested decision and order the joint or separate judging of cases.

If the judge-rapporteur considers the case to be sufficiently prepared, he submits a draft decision. Based on the written comments of other judges and the panel/plenary session discussion, the judge-rapporteur may prepare a new, amended draft. He may return the case, particularly when he remains in the minority regarding the holdings or the reasoning of the draft and is unwilling to prepare a draft reflecting the majority position. He may attach a concurring opinion to the decision prepared by him; however, he may not submit a dissenting opinion.¹¹⁶ Each judge of the CC is supported by a permanent legal staff of three members, who participate in the preparation and revision of drafts reflecting the judge's stance.

2.2.6. *Acceptance of Fundamental Rights Decisions*

The acceptance of decisions regarding fundamental rights, particularly concerning the CC, arises from two perspectives: whether the CC applies the relevant international decisions, primarily that of the European Court of Human Rights (hereafter, ECtHR), and whether the decisions of the CC are applied by Hungarian institutions.

The CC's position regarding the decisions of the ECtHR is reflected in the approach that 'the CC must adhere to the Strasbourg case law and the level of fundamental rights protection defined therein, even if it would not necessarily follow from its own previous "precedent decisions"'.¹¹⁷ The CC declares that the ECtHR jurisprudence and the European Convention on Human Rights (hereafter, ECHR) only 'establish the minimum level of fundamental rights protection that each Member State must ensure, but national law may establish different, higher standards for the protection of human rights'.¹¹⁸ Moreover, the ECtHR's decision may result in an explicit revision of the earlier position of the CC.¹¹⁹ The CC further ruled that, pursuant to Art. Q of the FL, it must refrain from considering a legal solution, declared as a violation of the ECHR by the ECtHR, as compatible with the ECHR.¹²⁰ References to ECtHR decisions occur occasionally but not frequently in the CC's practice.¹²¹

116 Arts. 57–61 of the CC Act; Arts. 33–42 and 59 of the Rules of Procedure of the CC.

117 Decision 61/2011. (VII. 13.) AB; ABH 2011, 290, 321.

118 Decision 4/2013. of 21 December 2013 AB Reasoning [19].

119 Decision 4/2013. (II. 21.) AB.

120 Decision 32/2014. (XI.3.) AB Reasoning [52].

121 Based on his dissenting and concurring opinions, genuine objection of a former CC judge to the 'binding nature of the ECtHR's judicial practice on the judges of the CC' was expressed several times. Decision 34/2013. (XI. 22.) AB Reasoning [86]; Decision 3025/2014. (II. 17.) AB Reasoning [89]–[90]; Decision 3243/2014. (X. 3.) AB Reasoning [97].

In ordinary courts, several attitudes can be identified regarding the fundamental rights jurisprudence of the CC. Open opposition is not typical, in principle, but in addition to reception, both concealed and direct resistance appear in judicial decisions.¹²²

Since the obligation to exhaust legal remedies (as a condition for the submission of constitutional complaints) does not apply to extraordinary remedies, in some respects, it is a question of dominance of which body awaits the decision of the other. Originally, following the subject matter of the investigation, in case of constitutional complaints aimed at norm control, the Curia waited for the decision of the CC, while, in the case of constitutional complaints against judicial decisions, the CC held the last word. However, the amendment to the Rules of Procedure of the CC that entered into force on 23 June 2016 stipulates the rejection of the constitutional complaint and the possibility of resubmitting the complaint after the Curia procedure has ended, ensuring that the CC acts as a final forum in every case.¹²³

The CC has sought to assert its status as a ‘final forum’ against the Curia in other cases too, for instance, in cases related to the certification of the referendum questions. Regarding fundamental rights, the CC has, depending on interpretation, maintained or reclaimed its competence.¹²⁴ In areas not related to fundamental rights adjudication, similar issues do not arise. For example, the norm control of local government decrees, not related to fundamental rights, was transferred to the competence of the Curia without problems as of 1 January 2021.

2.2.7. *Legal Consequence of Unconstitutionality*

The legal consequences of unconstitutionality are regulated in a differentiated manner in the CC Act, aligning with the nature of the various competences, leaving room for the CC to assess which legal consequence best serves the protection of constitutionality.¹²⁵ In the case of preliminary norm control, the unconstitutional law (or amendment to the FL) may neither be promulgated nor can the recognition of the binding effect of the relevant international treaty take place. In other cases, the challenged norm must be annulled, in principle, with *ex nunc* effect (i.e., the annulled provision ceases to take effect on the day after the publication of the CC’s decision). However, it is possible to annul it with *ex tunc* effect (retroactive to the date of promulgation of the legal norm) or *pro futuro* (in case of annulment of the FL amendment, the annulment always has retroactive effect). The annulment may extend to provisions that have not been contested in a petition if such provisions

122 A graphic example of the courts’ unsuccessful resistance to the CC is described in Decision 21/2019. (VI. 26.) AB.

123 Art. 46 para. (2) of the Rules of Procedure of the CC in effect until 22 June 2016; current Art. 32 paras. (3)–(4) of the Rules of Procedure of the CC.

124 Order 3195/2014. (VII. 15.) AB Reasoning [9]–[13].

125 Arts. 40–46 of the CC Act; Art. 24 para. (4) of the FL; See detail: Zakariás, 2022, pp. 451–552.

are substantively related to the provisions contested. If the norm is no longer in force, no annulment is possible, and it can only be declared that its wording in force at the time under review was unconstitutional. In case of conflict with an international treaty, the legal consequence is adjusted to the position of the contested law and the law promulgating the international treaty in the hierarchy of legal sources.

When the CC annuls a law applied in an individual case based on a judicial initiative or a constitutional complaint, the annulled legislation cannot, in principle, be applied in the case underlying the proceedings of the CC (individual prohibition of application). This means that the legal provision must not be applied in the case being adjudicated: the court must disregard this provision during the proceedings. Annulment may be accompanied by a prohibition of application, which extends to all ongoing cases (general prohibition of application).

Generally, closed legal relations and previously completed proceedings are not affected by annulment, unless otherwise provided by the CC, except for closed criminal proceedings and misdemeanour proceedings, where annulment would result in the reduction or waiver of the punishment or measure, and an exemption from or limitation of criminal or misdemeanour liability.

A judicial decision that violates the FL must be annulled and other (lower) court or authority decisions reviewed by the annulled judicial decision may be annulled as well.

The procedural consequences of a successful constitutional complaint, whether regarding the unconstitutionality of a legal provision or judicial decision, are determined by the relevant procedural laws, such as civil, criminal, misdemeanour or administrative procedure laws. Different procedural laws offer different solutions; however, they share a common characteristic – they prescribe the re-evaluation of the case, whereby the procedure or the relevant stage of the procedure must be repeated.

Additionally, the CC can apply certain legal consequences *ex officio* that do not affect the existence of the challenged legal norm. In case of unconstitutionality caused by legislative omission, the CC calls upon the responsible body to fulfil its legislative obligation, specifying a deadline.

Legislative omission refers to the following situations: a) failure to perform a legislative task arising from an international treaty; b) failure to perform a legislative task arising from an explicit legislative authorisation; c) incompleteness of the essential content of the legal regulation where this content is derivable from the FL.

Additionally, the CC may lay down the requirements arising from the FL regulation, giving effect to its provisions, with which the application of the law examined must comply (constitutional requirement).

3. The Role of the CFR as a National Human Rights Institution in Hungary

In Hungary, following the abolition of the multi-commissioner model by the FL and the subsequent merger of the various institutions, the CFR serves as the NHRI.¹²⁶

■ 3.1. Independence

The CFR is an institution established by the FL, which, despite naming deputies responsible for the protection of the rights of future generations and nationalities and ethnic groups living in Hungary, is based on a single-commissioner model.¹²⁷ Though the selection process does not involve an open call or competition and the nomination and the election process is largely not public or transparent, on the whole, cooperation and consensus of constitutional institutions is required – nomination by the President of the Republic, a public hearing by the committee of Parliament competent in the tasks of the CFR and approval by two-thirds of all Members of Parliament, which generally necessitates broad political consensus. The Parliament may only vote (by secret ballot) on a person nominated by the President of the Republic; however, the candidate may be voted down. The process is autonomous as there is no need to consult the opinion of any other external body. Similar rules apply to the election of CFR deputies, except that the nomination of candidates is the task of the CFR and, in the case of the deputy commissioner for the protection of national minority rights, the opinion of national minority self-governments must be sought before the nomination is made.

The independence of the CFR guaranteed by law is supported by several safeguards, including rules on incompatibility, which cover a range of current and prior, mainly political, positions that would disqualify someone from holding the office. The CFR is irremovable from office, with dismissal or removal only possible if it fails or is unable to fulfil his duties for more than 90 days. Additionally, the CFR enjoys immunity, which contributes to his ability to act independently, particularly on politically sensitive issues. He is appointed for a fixed term of six years that spans a parliamentary term and may be re-elected once. The general prohibition on re-election is seen as a safeguard for operational independence,

126 Before the entry into force of the FL, there were four parliamentary commissioners for human rights: the Commissioner for Civil Rights, the Commissioner for Rights of National and Ethnic Minorities, the Commissioner for Future Generations and Commissioner for Data Protection and Freedom of Information (Art. 32/B. of the Act XX of 1949 on The Constitution of the Republic of Hungary and Act LIX of 1993 on the Parliamentary Commissioners). The tasks and competences of the Independent Police Complaints Board have been carried out by two Directorate-Generals of the CFR since 1 January 2021, and those of the Equal Treatment Authority since 1 January 2021.

127 Art. 30 of the FL; the detailed rules are contained in Act CXI of 2011 on the CFR.

which stems from the consideration that, without the hope of re-appointment, the individual holding the position is not under pressure to meet (political) expectations beyond his professional duties.

The CFR reports annually to the Parliament about his activities. However, the Parliament cannot dictate the conduct or outcome of the procedures. Furthermore, the possibility to initiate procedures *ex officio* allows the CFR to maintain his agenda. While the CFR does not have the authority to independently establish a budget, it remains autonomous concerning its management.

■ 3.2. *Pluralism*

Concerning the CFR or its staff, there is no explicit rule supporting the principle of pluralism except that staff members authorised to perform the tasks of the National Preventive Mechanism of the OPCAT must ensure that there is no significant gender imbalance, that is, the number of representatives of either sex may not exceed the other by one at the most. Vacancies within the CFR's Office can be filled without a formal application process, which suggests an informal and untransparent recruitment procedure.¹²⁸

■ 3.3. *Cooperation*

Regarding human rights protection, the CFR is connected to other state organs through his wide-ranging advisory, recommendation-making tasks and monitoring and awareness-raising activities, which may affect legislation, the internal functioning of other state organs, environmental lawsuits and the implementation of international treaties (particularly when fulfilling tasks under the OPCAT and the Disability Convention).¹²⁹ The involvement of civil society in the CFR's activities is institutionalised concerning the Disability Convention, through the Disability Advisory Board representing civil society. Entities examined by the CFR are not obliged to comply with the proposals and recommendations of the CFR yet must respond to them.

The CFR reports annually on its activities to the Parliament. He is a member of the European Network of NHRI (ENNHRI), the European regional organisation of the Global Network of NHRI (GANHRI) working alongside the Office of the UN High Commissioner for Human Rights, which brings together NHRIs and assists them in their work. The CFR has concluded various national and international cooperation agreements with universities, state bodies, international organisations, ombudsmen of other countries and NGOs, focusing on practical and research activities, conferences, seminars, and trainings to develop mechanisms for human rights activities at local, national and regional levels. These efforts are

128 Art. 10 para. (1) of the Instruction 4/2023. (XII. 21.) AJB of the Office of the Commissioner for Fundamental Rights on the Public Service Regulations.

129 Arts. 2–3 and 33–40 of the Act CXI of 2011 on the CFR.

aimed at promoting human rights knowledge, legal awareness and the development of democratic citizen competencies.

■ **3.4. Access**

The CFR's procedure can be initiated by any affected person in writing (either on paper or electronically, using a form available on the CFR's website, although authority procedures cannot be initiated via e-mail), after prior appointment, in person at the CFR's Complaints Office, or, since 2022, at six offices located at regional centres of the country. Temporary offices have been opened to provide legal and humanitarian assistance to those fleeing the war in Ukraine. The establishment of regional offices has enabled a wider implementation of fundamental rights protection activities, allowed more direct contact with affected individuals and improved accessibility. However, the presence in certain areas has decreased, as the Equal Treatment Authority had referents in every county before its integration into the CFR's office. Before lodging a complaint in person, individuals are informed about the CFR's competence and the course of the procedure. General information about the CFR's procedure is available on its website in an easily understandable format. Additionally, there is an online case finder that, by providing insight into past cases and information about the CFR's practice, may assist individuals in successfully filing their case.

■ **3.5. Funding**

The CFR's Office has a separate budget chapter in the Law on the State Budget of Hungary. Although the CFR is not entitled to establish its budget independently, it has operational autonomy regarding its financial management. The budget of the CFR's Office increases year-on-year in accordance with the growth of its responsibilities.

In connection with the integration of the Equal Treatment Authority in 2021, which led to an increase in staff numbers, a notable budget rise occurred. In 2022, additional costs arose from setting up the six regional offices' personnel and facilities, and the financing of their operation was completed in 2023. In the same year, a significant new task was introduced – the operation of the Disability Mechanism became one of its main duties. The distribution of available financial resources among various tasks is determined by the CFR. Since 2020, employees in public service employment at the CFR's Office have been subject to Act CVII of 2019 on special legal status organisations and the status of their employees, which has brought positive changes in remuneration.

■ **3.6. Broad Mandate**

The CFR's constitutional mandate is exceptionally broad, allowing it to act in relation to any fundamental right under its ombudsman powers (although not every state organ might be the subject of examinations). Its functioning is largely shaped

by its self-perception and approach. One possible attitude is to act as the ‘people’s advocate’, focusing on examining individual complaints swiftly and efficiently. In contrast, the ‘watchdog’ role focuses on the control of public administration, often through *ex officio* procedures and initiating norm control procedures, and the comprehensive monitoring of the executive power from a fundamental rights perspective. Both roles are integral to the CFR’s work, with the balance between them depending on the chosen focus.¹³⁰

Beyond traditional ombudsman activities, the CFR has several additional functions: examining the practice of handling public interest disclosures, examining police complaints, ordering and conducting the review procedure of the national security clearances, performing tasks under the OPCAT and the Disability Convention and handling cases of discrimination as an authority under the Equal Treatment Act, with oversight extending to private sector entities. As supplementary activities, the CFR engages in analysing the situation of fundamental rights in Hungary and preparing statistics on the infringements of rights in Hungary related to fundamental rights.

The CFR gives an opinion on the draft legislation affecting his tasks and competences and may make proposals for the amendment and drafting of legislation affecting fundamental rights and the expression of consent to be bound by an international treaty. He may initiate several CC procedures. Promoting the enforcement and protection of fundamental rights, the CFR may engage in social awareness raising and information activities and cooperate with organisations and national institutions for the protection of fundamental rights.

The investigation capabilities of the CFR are wide-ranging. It can carry out on-site inspections without prior notification, may review any documents and, as a general rule, access classified information as well. Examined entities are required by law to be cooperative during such investigations.

130 Csink, 2019, p. 606.

Bibliography

- Csink, L. (2016) 'Az Ombudsman' in Jakab, A., Gajduschek, Gy. (eds.) *A magyar jogrendszer állapota (The Status of the Hungarian Legal system)*. Budapest: Magyar Tudományos Akadémia, pp. 600–616 [Online]. Available at: https://jog.tk.hun-ren.hu/uploads/files/21_Csink_Lorant.pdf (Accessed: 15 January 2025).
- Kováts, B., Sulyok, T. (2016) 'A bírói kezdeményezés mint az egyedi normakontroll eszköze az Alkotmánybíróság gyakorlatában', *Alkotmánybírósági Szemle*, 2016/2, pp. 75–82.
- Kováts, B. (2021a) 'II. Cikk – Az emberi méltósághoz való jog' in Csink, L. (ed.) *Alapjogi kommentár az alkotmánybírósági gyakorlat alapján*. Budapest: Novissima, pp. 18–30.
- Kováts, B. (2021b) 'XV. Cikk – Egyenlőségi klauzula' in Csink, L. (ed.) *Alapjogi kommentár az alkotmánybírósági gyakorlat alapján*. Budapest: Novissima, pp. 185–199.
- Kováts, B. (2021c) 'XXVIII. Cikk – Tiszteséges eljáráshoz való jog' in Csink, L. (ed.) *Alapjogi kommentár az alkotmánybírósági gyakorlat alapján*. Budapest: Novissima, pp. 320–360.
- Naszladi, G. (2016) *Alkotmányjogi panasz a magyar alapjogvédelem rendszerében*. PhD Thesis. Pécs: University of Pécs [Online]. Available at: <https://pea.lib.pte.hu/bitstream/handle/pea/14545/naszladi-georgina-phd-2016.pdf> (Accessed: 15 December 2024).
- Sólyom, L. (2014) *Normahierarchia az Alkotmányban*. Budapest: Magyar Tudományos Akadémia [Online]. Available at: https://real-eod.mtak.hu/9773/1/Solyom_PRESS.pdf (Accessed: 15 December 2024).
- Zakariás, K. (2019) *Az emberi méltósághoz való alapjog – Összehasonlító jogi elemzés a német és magyar alkotmánybírósági gyakorlat tükrében*. PhD Thesis. Budapest: Pázmány Press [Online]. Available at: https://publikacio.ppke.hu/id/eprint/1499/1/Dokt_Ert_19_Zakarias.pdf (Accessed: 15 January 2025).
- Zakariás, K. (ed.) (2022) *Az alkotmánybírósági törvény kommentárja*. Budapest: Pázmány Press [Online]. Available at: https://jak.ppke.hu/storage/tinymce/uploads/old/uploads/articles/2751678/file/ABTV_komm_TELJES.pdf (Accessed: 15 January 2025).