CENTRAL EUROPEAN JOURNAL OF
COMPARATIVE LAW

CENTRAL EUROPEAN JOURNAL OF COMPARATIVE LAW

VOLUME VII ▪ 2026 ▪ 1

CEA PUBLISHING

Central European Journal of Comparative Law HU ISSN 2732–0707 (Print)
HU ISSN 2732–1460 (Online) DOI prefix: 10.47078

Publisher:
Central European Academic Publishing
1122 Budapest (Hungary), Városmajor St. 12.
E-mail: publishing@centraleuropeanacademy.hu
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The Journal was established in 2020 by the Budapest-based Ferenc Mádl Institute of Comparative Law. Volume 1, Volume 2, Issue 1 of Volume 3 were published by the Ferenc Mádl Institute of Comparative Law.

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ARTICLES

BYELOV DMYTRO*

National Human Rights System in Ukraine

ABSTRACT: *This article provides a comprehensive analysis of the national human rights system in Ukraine, focusing on three main aspects: constitutional protection of fundamental rights, fundamental rights adjudication, and human rights institutions. The study examines the complex relationship between human rights, fundamental rights, and constitutional rights within Ukraine's legal framework, highlighting their differentiation and interrelation. The 1996 Constitution of Ukraine established a robust mechanism for protecting human rights, with its Section II being dedicated to "Rights, Freedoms and Duties of Person and Citizen" and serving as the cornerstone of human rights protection at the national level. The constitutional mechanisms for protecting various groups are examined, including children, persons with disabilities, and vulnerable social groups, while probing into the guiding principles of human rights protection (e.g. human dignity, equality, and non-discrimination). Special attention is given to the Constitutional Court of Ukraine's role in protecting fundamental rights through judicial review and constitutional complaints. The interaction between national and international law in human rights protection is also investigated, particularly focusing on the implementation of international treaties and European Court of Human Rights jurisprudence. Another matter of interest is the effectiveness of Ukraine's national human rights institution, namely the Ombudsman's Office, with a thorough analysis of its compliance with the Paris Principles through six main pillars: independence, pluralism, cooperation, access, funding, and broad mandate. The chapter concludes by identifying current challenges in human rights protection in Ukraine, particularly in the context of the Russian military aggression, and suggests potential areas for improvement in the constitutional protection of rights.*

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https://doi.org/10.47078/2026.1.9-47

■ **KEYWORDS:** *Constitutional rights protection, Ukrainian Ombudsman institution, Constitutional Court of Ukraine, Fundamental rights adjudication, Human rights implementation, Paris Principles compliance*

1. The Protection of Fundamental Rights in the Constitutions of Ukraine

In the legal system of Ukraine, there is a certain differentiation and interrelation between the terms "human rights", "fundamental rights", and "constitutional rights", although they are often used similarly. The Ukrainian legislation, in particular the Constitution of Ukraine (hereinafter, just the Constitution), the Civil Code, and other regulatory legal acts, demonstrate peculiarities in the use of these concepts. *Human rights* is the broadest category, including the entire spectrum of rights recognised by the international community and enshrined in international treaties, conventions, and declarations.[1] *Constitutional rights* is a narrower category, encompassing those rights directly enshrined in the Constitution and with the highest legal force in the national legal system. They constitute the core of the legal status of a person and directly determine the relationship between the state and the citizen. *Fundamental rights* are often considered as synonymous to constitutional rights, although in some scientific works they may have slightly different interpretations. For example, as rights that are fundamental to ensuring a person's dignity and freedom.[2]

The Ukrainian judicial practice, especially that of the Constitutional Court, demonstrates a comprehensive approach to the interpretation of these concepts. The courts consider not only the letter of the law but also international human rights standards and the practice of the European Court of Human Rights. This means that the meanings of terms "*human rights*", "*fundamental rights*", *and* "*constitutional rights*" are considered in a dynamic context and while taking into account the evolution of legal norms and the needs of society. Such an approach ensures law enforcement flexibility and the adaptation of the legal system to modern challenges and citizen needs.[3]

The Constitution of Ukraine, adopted on June 28, 1996,[4] is a key document that enshrines human rights and freedoms of the highest social value. Section II of the Constitution, entitled "Rights, Freedoms and Duties of Person and Citizen", contains an exhaustive list of fundamental rights, covering a wide range of civil, political, social, economic, and cultural rights. This Section is a unique structural

1 Бєлов [Byelov], 2003, pp. 33–34.
2 Антонович [Antonovych], 2000, pp. 51–52.
3 Фулей [Fulei], 2015, p. 20.
4 Konstytutsiia Ukrainy.

part of the constitutional text – which holistically and systematically enshrines human rights. It does not simply contain a list of rights, but provides a complex mechanism for legal regulation of a person's status at the state level. The placement of human rights in a separate section emphasises their fundamental importance and priority in the Ukrainian legal system, demonstrating a fundamental difference between the domestic constitutional model and the previous[5].[6]

The structure of Section II of the Constitution is extremely detailed and comprehensive, covering from fundamental personal rights (e.g., the right to life, respect for dignity, and freedom and personal integrity) to complex socio-economic and cultural rights (e.g., the right to work, education, social protection, and healthcare). Each article both proclaims a certain right and establishes basic guarantees for its implementation, making the constitutional provisions directly applicable norms instead of declarative statements. Importantly, Section II's fundamental novelty lies in its conceptual structure, which reflects modern international legal standards of human rights, in that the articles proclaim the rights of any person, regardless of citizenship. Key are the provisions on the impossibility of narrowing the content and scope of existing rights, the direct effect of constitutional norms, and the responsibility of the state to man. These characteristics make this separate section on human rights in the Constitution a powerful legal instrument for the protection of individual freedom and dignity of the person in this democratic state.[7]

The Constitution establishes a unique mechanism for the interaction of national law with international law, especially for human rights. Article 9 of the Constitution stipulates that international treaties in force, the consent to be bound by which has been granted by the Verkhovna Rada of Ukraine, are part of national legislation. This means that international human rights treaties ratified by Ukraine have the same legal force as domestic regulatory legal acts and are mandatory for execution by all state authorities, courts, and officials.[8] An important feature of Ukrainian constitutionalism is the priority of international treaties for human rights over national legislation in the event of conflicts. If an international treaty establishes broader rights and guarantees than the national legislation, then the norms of the international treaty apply. This provision directly follows from the constitutional principle of ensuring human rights and freedoms as the highest social values, and the approach is fully correlated with the practice of the European Court of Human Rights, contributing to the implementation of international human rights standards in the Ukrainian legal system.

The constitutional mechanism of interaction with international law provides both for the formal recognition of international treaties and their active use

5 Бєлов [Byelov], 2023, p. 12.
6 Бєлов [Byelov], 2023, p. 14.
7 Олійник [Oliinik], 2018, pp. 33–35.
8 Денисов [Denysov], 2002, pp. 41–42.

in law enforcement practice. Accordingly, the Constitutional Court of Ukraine and courts of general jurisdiction increasingly refer to international treaties as a source of law when interpreting constitutional provisions and resolving specific cases. Ukraine has also undertaken to comply with and actively implement international human rights standards, as reflected in the processes of the country's legal reform, the approximation of national legislation to European standards, and the consistent judicial practice in the protection of human rights.[9]

The mechanism for the protection of human rights in Ukraine configures a complex, multi-level system of interconnected state institutions and legal procedures aimed at ensuring, protecting, and restoring citizens' rights and freedoms. This mechanism includes both domestic (e.g. administrative, judicial, and constitutional) and international methods of protection (e.g. appeals to international judicial institutions, such as the European Court of Human Rights), and provides for a comprehensive approach to human rights implantation through regulatory regulation, law enforcement, judicial protection, and state control.[10] According to the Constitution, the following are responsible for the protection of rights and freedoms: 1) the President of Ukraine; 2) the Verkhovna Rada of Ukraine; 3) the Cabinet of Ministers of Ukraine; 4) Bodies of General Jurisdiction(local courts, courts of appeal, Supreme Court); 5) Bodies of Special Jurisdiction (Constitutional Court of Ukraine, administrative courts, commercial courts); 6) the Ombudsman of Ukraine; 7) Local self-government bodies.[11]

Importantly, the Constitution provides for both a vertical and horizontal concept of the functioning of human rights. This is expressly enshrined in Articles 3 and 22 establishing that human rights and freedoms should be realised in state–individual relations and in relations between private individuals, hence recognising the universality and indivisibility of human rights.

The Constitution provides for the protection of the rights of the following groups and individuals (albeit some are not directly mentioned in the text of the Constitution, their protection is also provided for indirectly). First, children[12], including orphans, those deprived of parental care, those with disabilities, and gifted children. The Constitution guarantees the state protection of childhood, determining that any violence against a child or its exploitation must be prosecuted by law. The state fully ensures the maintenance and upbringing of orphans at the expense of budget funds. Second, persons with disabilities[13], including those with physical and with intellectual disabilities. The Constitution prohibits discrimination based on disability and guarantees social protection, the establishment of state pensions, other types of social payments, and assistance for persons

9 Мартиненко [Martinenko], 2000, pp. 110–112.
10 Suchasni mekhanizmy zakhystu prav liudyny, 2020, pp. 45–46.
11 Павлик [Pavlik], 2014, pp. 35–37.
12 Arts. 51–52 of the Constitution.
13 Arts. 24 and 46 of the Constitution.

with disabilities. Third, vulnerable social groups[14], encompassing large families, single mothers, war veterans, combatants, and older adults. The Constitution also establishes that all have the right to social protection, including the right to security in the event of full, partial, or temporary loss of working capacity. Fourth, special categories of citizens[15], like those internally displaced, refugees and stateless persons, and victims of the Chernobyl disaster. The Constitution guarantees for foreigners and stateless persons the rights, freedoms, and obligations on an equal basis with Ukrainian citizens, with exceptions established by law. Furthermore, it guarantees everyone's right to an adequate standard of living for themselves and their families.

The Constitution therefore establishes that human rights and freedoms are universal and cannot be limited or abolished, as well as delivers additional guarantees and mechanisms of social protection are provided for certain groups of the population, in consideration of their specific needs and life circumstances.[16] This means that some of the features of constitutional protection in Ukraine are the actual declaration of rights and these special mechanisms for right implementation in vulnerable groups. Accordingly, the Constitution emphasises the inadmissibility of discrimination on any grounds and ensures equality of rights and opportunities for all persons, regardless of social status, physical abilities, age, or other characteristics.

According to the Constitution, the guiding principles of the status of a person in the state are as showcased in the numbered list below.

1. Person as the highest social value (Article 3): human rights and freedoms and their guarantees determine the content and direction of the state's activities; the state is responsible for all persons in relation to its activities; the establishment and provision of human rights is the main duty of the state.

Thus, the Decision of the Constitutional Court of Ukraine particularly states:

> 'The Constitutional Court of Ukraine believes that the state's guarantee of the right to early retirement for elderly citizens was aimed at protecting these citizens from such social risks as unemployment due to circumstances beyond their control and ensuring favourable conditions for their full and dignified life in old age.'[17]

2. The principle of equality and non-discrimination (Article 24): a constitutional provision on the equality of all people regarding their rights; a prohibition of

14 Arts. 24, 46, and 49 of the Constitution.
15 Arts. 26 and 47 of the Constitution.
16 Букач [Bukach], 2001, pp. 44–45.
17 Rishennia Konstytutsiinoho Sudu Ukrainy, 22 May 2018, No. 5-p/2018.

restrictions on any grounds, be it race, skin colour, political, religious and other beliefs, gender, ethnic and social origin, among others.

Thus, the Decision of the Constitutional Court of Ukraine particularly states:

> '[...] equality and non-discrimination of a person are not only constitutional principles of the national legal system of Ukraine, but also fundamental values of the world community, as emphasized in international legal acts on the protection of human and civil rights and freedoms, in particular in the International Covenant on Civil and Political Rights of 1966 (Articles 14, 26), the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Article 14), Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Article 1), ratified by Ukraine, and in the Universal Declaration of Human Rights of 1948 (Articles 1, 2, 7). The equality of all people in their rights and freedoms guaranteed by the Constitution of Ukraine means the need to provide them with equal legal opportunities of both a material and procedural nature for the implementation of rights and freedoms that are equal in content and scope. In a state governed by the rule of law, an appeal to the court is a universal mechanism for protecting the rights, freedoms and legitimate interests of individuals and legal entities.'[18]

3. The principle of inalienability and inviolability of human rights (Articles 21–22): rights and freedoms are inalienable and inviolable; the narrowing of the content and scope of existing rights and freedoms is not allowed; constitutional rights are not exhaustive.

Thus, the Decision of the Constitutional Court of Ukraine particularly states:

> '[...] understanding of law does not give grounds for its identification with the law, which can sometimes be unjust, including limiting the freedom and equality of a person. Justice is one of the basic principles of law, is decisive in defining it as a regulator of social relations, one of the universal dimensions of law. Usually, justice is considered as a property of law, expressed, in particular, in an equal legal scale of behavior and in the proportionality of legal responsibility to the offense committed. In the sphere of the implementation of law, justice is manifested, in particular, in the equality of all before the

18 Rishennia Konstytutsiinoho Sudu Ukrainy, 12 April 2012, No. 9-рп/2012.

> law, the correspondence of crime and punishment, the goals of the legislator and the means chosen to achieve them.'[19]

4. The principle of guarantee of rights and freedoms (Article 55): rights and freedoms are protected by the court; everyone is guaranteed the right to appeal in court decisions, actions, or in the case of the inaction of state authorities.

Thus, the Opinion of the Constitutional Court of Ukraine particularly states,

> '[...] that a person must be guaranteed the right to have his case reviewed by a court of appeal; after the appellate review of the case, the parties to the trial may be granted the right to appeal court decisions of the first and appellate instances to the court of cassation in cases specified by law, which will contribute to ensuring the implementation of the principle of the rule of law.'[20]

5. The principle of the direct effect of constitutional rights (Article 8): the Constitution has the highest legal force; the norms of the Constitution are norms of direct effect.

Thus, the Decision of the Constitutional Court of Ukraine particularly states:

> 'The Constitution of Ukraine has the highest legal force; laws and other regulatory legal acts are adopted on the basis of the Constitution of Ukraine and must comply with it; the norms of the Constitution of Ukraine are norms of direct effect; an appeal to the court to protect the constitutional rights and freedoms of a person and a citizen is guaranteed directly on the basis of the Constitution of Ukraine; constitutional rights and freedoms are guaranteed and cannot be canceled (parts two, three of Article 8, part two of Article 22 of the Constitution of Ukraine).'[21]

The axiological basis of rights in the Constitution is universal in nature and based on the human values of dignity, freedom, equality, and justice. The Constitutional Court of Ukraine consistently emphasises that human rights have an internal subordination, such that the right to life, human dignity, and personal integrity occupy the highest place in the hierarchy of constitutional values. This axiological paradigm of human rights in the Constitution hence reflects a deep civilizational

19 Rishennia Konstytutsiinoho Sudu Ukrainy, 2 November 2004, No.15-рп/2004.
20 Rishennia Konstytutsiinoho Sudu Ukrainy, 20 January 2016, No. 1-в/2016.
21 Rishennia Konstytutsiinoho Sudu Ukrainy, 12 April 2012, No. 9-рп/2012.

choice in favour of democratic values, European human rights standards, and humanistic principles. It is formed under the influence of international legal documents, in particular the Universal Declaration of Human Rights, the European Convention on Human Rights, and philosophical concepts of natural law, considering human rights as an integral attribute of the individual derived from his/her nature and dignity. The constitutional axiology of human rights in Ukraine also has a distinctly transformative character, reflecting the complex path of the formation of a democratic legal state. That is, this constitutional axiology acts as a legal construct and a symbol of the cultural and political rebirth of society; as a mechanism for overcoming the totalitarian legacy of the past and establishing the principles of individual freedom, respect for the individual, and the individual's inalienable rights.[22]

The rights and freedoms of the person and the citizen are systematised in Section II of the Constitution, wherein we can distinguish those articles pertaining to personal rights[23], which are the right to life, respect for dignity, freedom and personal inviolability, inviolability of private life, secrecy of correspondence, telephone conversations, inviolability of home, freedom of movement, and right to citizenship. We can also distinguish those pertaining to political rights[24], which are the right to freedom of thought and speech, information, peaceful assembly, association, participation in the management of state affairs, to elect and be elected, and right to appeal. There are also socio-economic rights[25], including the right to work, strike, social protection, housing, healthcare, and education. Moreover, there are cultural rights[26], including right to freedom of creativity, education in the native language, and to cultural heritage, and environmental rights[27], encompassing the right to a safe environment and compensation for environmental damage.[28]

Among the rights and freedoms contained in the Constitution that are particularly important in the political, social, and economic system of the country, the following rights can be distinguished.

The right to work[29]: this right is key to the socioeconomic stability of the state, ensuring the economic independence of citizens and providing the grounding for social protection and individual and collective economic capacity. This right is especially critical in transitional societies for overcoming poverty and ensuring social mobility.

22 Problemy realizatsii prav i svobod liudyny ta hromadianyna v Ukraini, 2007, pp. 42–43.
23 Arts. 27–29 of the Constitution.
24 Arts. 34–36 of the Constitution.
25 Arts. 43–49 of the Constitution.
26 Arts. 53–54 of the Constitution.
27 Art. 50 of the Constitution.
28 Бєлов [Byelov], 2003, pp. 32–35.
29 Art. 43 of the Constitution

The right to freedom of thought and speech[30]: this right is crucial for the democratic development of Ukraine, being the basis for political pluralism, authoritarian tendency prevention, and providing the opportunity for authorities to be criticised and public opinion to be formed. The right creates space for social dialogue and consolidation.

The right to social protection[31]: this right is central to ensuring social justice and solidarity, especially in conditions of economic instability, war, and significant social transformations in Ukraine. The law prevents the marginalisation of vulnerable groups of the population and provides minimum social guarantees.

The right to education[32]: this right determines the potential for the country's long-term development, providing a social lift, securing the intellectual development of society, and the competitiveness of the state at the global level. This law is critical for the formation of human capital and overcoming social inequality.[33]

The Constitution provides a systematic approach for providing any restrictions to constitutional rights and freedoms, reflecting the balance between individual rights and public interests. Article 64 of the Basic Law of Ukraine establishes the fundamental principles of such restrictions, determining that '*constitutional rights may be restricted only in cases expressly provided for by the Constitution*'. Of particular importance is the provision that during a state of emergency or martial law, temporary restrictions on certain rights may be introduced, but it is absolutely forbidden to restrict a number of rights, including the right to life, respect for dignity, and freedom of religion.[34]

The Constitution contains both universal and differentiated mechanisms for acting on general and special provisions on the restriction of rights. General restrictions are defined in Article 64 and serve as basic principles applicable to all categories of rights. Special provisions relate to specific types of rights. For example, first, there are those pertaining to personal rights[35], for which restrictions are permitted for the purposes of protecting the rights of other persons, ensuring national security, and protecting public order. Second, regarding political rights[36], restrictions are possible in the interests of national security, prevention of unrest, and protection of the rights and freedoms of other persons. Third, regarding socioeconomic rights[37], where restrictions are allowed for purposes of economic feasibility, state guarantees of social protection, and ensuring economic stability. These special constitutional restrictions are more objective in nature and depend on the specifics of a particular group of rights. For instance, political

30 Art. 34 of the Constitution.
31 Art. 46 of the Constitution.
32 Art. 53 of the Constitution.
33 Бєлов, Сідак [Byelov and Sidak], 2008, pp. 208–210.
34 Dahova, 2018, pp. 18–19.
35 Arts. 27–29 of the Constitution.
36 Arts. 34–36 of the Constitution.
37 Arts. 43–49 of the Constitution.

rights may be restricted during martial law, the right to peaceful assembly for reasons of public security, and the right to work in cases provided for by labour legislation.[38]

We draw attention herein to some of the Decisions of the Constitutional Court of Ukraine concerning the restriction of human rights.

The Decision of the Constitutional Court of Ukraine dated 2 November 2004 No. 15-рп/2004 establishes the fundamental principle of the impossibility of narrowing the content and scope of existing constitutional rights. The Court clearly determined that when adopting new laws or making amendments to existing legislative acts, the scope and content of existing rights and freedoms shall not be reduced. This decision is fundamental in the context of ensuring the inviolability of constitutional guarantees and protecting human rights from unjustified restriction.[39]

The decision of the Constitutional Court of Ukraine dated 22 May 2018 No. 5-р/2018 concerns the social rights of internally displaced persons and reveals the mechanisms for protecting their rights in special circumstances. The Court confirmed the need to ensure the full scope of social guarantees for persons displaced as a result of temporary occupation or armed conflict, establishing that the status of an internally displaced person cannot be a basis for restricting constitutional rights and freedoms.[40]

The decision of the Constitutional Court of Ukraine dated 8 September 2016 No. 6-рп/2016 details the rules for restricting the right to peaceful assembly and establishes clear criteria for the admissibility of such restrictions. The Court determined that any restrictions on the right to peaceful assembly must be proportionate, pursue a legitimate aim, and be necessary in a democratic society. The decision introduced a comprehensive proportionality test when assessing the possibility of restricting the right to peaceful assembly.[41]

The decision of the Constitutional Court of Ukraine dated 25 December 2003 No. 22-рп/2003 reveals the mechanisms of judicial protection of rights and the interpretation of the right to appeal. The Court confirmed that the right to appeal court decisions is a fundamental constitutional guarantee of human rights protection. The Court established that legislative provisions cannot narrow nor limit the right of a person to full judicial protection.[42]

The decision of the Constitutional Court of Ukraine dated 12 April 2012 No. 9-рп/2012 focuses on issues of equality of the rights of men and women and establishes the inadmissibility of any forms of discrimination. The Court clearly defined that the principle of equality goes beyond formal identity to include fair

38 Сущенко [Sushchenko], 2012, pp. 30–31.
39 Rishennia Konstytutsiinoho Sudu Ukrainy, 2 November 2004, No. 15-рп/2004.
40 Rishennia Konstytutsiinoho Sudu Ukrainy, 28 December 2014, No. 76-VIII.
41 Rishennia Konstytutsiinoho Sudu Ukrainy, 8 September 2016, No. 6-рп/2016.
42 Rishennia Konstytutsiinoho Sudu Ukrainy, 25 December 2003, No. 22-рп/2003.

treatment by considering the individual characteristics and needs of different groups of the population.[43]

Worthy of note is that the "proportionality test" in the constitutional law of Ukraine is a complex multicomponent mechanism for assessing the legality of restrictions on rights and freedoms. It is formed by the practice of the Constitutional Court on the basis of European human rights standards, with the main elements of this test including four consecutive criteria, as outlined hereinafter: 1) legitimacy of the purpose of the restriction, which assumes the presence of a constitutionally significant basis for the restriction; 2) suitability of the chosen measure, which assesses the ability of the chosen measure to achieve the set goal 3) necessity of the intervention, which determines whether there are no milder, alternative ways to achieve the goal; 4) proportionality between the purpose of the restriction and its consequences, which requires that the negative consequences of the restriction do not outweigh the positive results.

Moreover, the practical application of the "proportionality test" in Ukrainian constitutional jurisdiction involves a detailed analysis of each element of the restriction of rights from the point of view of compliance with the principles of the rule of law, justice, and democracy. The Constitutional Court of Ukraine consistently emphasises that any restriction of constitutional rights must be minimally burdensome for the individual, not violate the essence of the right, and comply with the general principles of the constitutional order. The proportionality test is actually a legal instrument that ensures a balance between the public interests of the state and the individual rights of the individual, preventing unjustified interference in the private sphere and guaranteeing compliance with fundamental human rights.[44]

The way freedoms and rights are regulated in the Constitution entails significant advantages and significant challenges in modern days. The 1996 Constitution was certainly a progressive document for its time, enshrining European human rights standards and democratic values. However, dynamic changes in society, especially after the revolutions of 2004 and 2014, as well as the beginning of the full-scale invasion of the Russian Federation into the territory of independent Ukraine in February 2022, put forward new requirements for the constitutional regulation of rights and freedoms.

Modern challenges require a significant adaptation of the constitutional provisions to new social realities. Particular attention is necessary to the issues of digital rights, protection of personal data, rights of internally displaced persons, ensuring rights in conditions of hybrid war, and information conflicts, which remain insufficiently regulated. The Constitution needs clearer mechanisms for

43 Rishennia Konstytutsiinoho Sudu Ukrainy, 12 April 2012, No. 8-рп/2012.
44 Євтошук [Yevtoshuk], 2015, p. 41.

protecting rights in the digital space, regulating the status of virtual communication, and ensuring the information security of the individual.[45]

At the same time, despite certain gaps, the current Constitution demonstrates significant potential for adaptability and flexibility. The mechanisms of interpretation by the Constitutional Court allow for a dynamic interpretation of constitutional norms in accordance with modern challenges. Still, it remains especially important that the constitutional principles of the rule of law, the priority of human rights, and their inalienability and inviolability remain fundamental and can absorb new challenges. Therefore, further improvement of the constitutional regulation of rights and freedoms requires not so much revolutionary changes as evolutionary renewal and adaptation of existing constitutional mechanisms.[46]

Section VIII of the Constitution on "Justice" is a fundamental part of the Fundamental Law of Ukraine, establishing the basic principles for the organisation and functioning of the judicial system in the country. This section defines the judiciary as an independent and autonomous branch of state power that administers justice on the basis of the rule of law. Its constitutional provisions enshrine the principles of independence of judges, their immunity, prohibition of influence on judges, and guarantee the right of everyone to a fair and impartial trial.[47] The Constitution regulates in detail the right to access to justice and effective legal protection in several key articles, which are explored below.

Article 55 on the basic constitutional provision on the right to judicial protection: guarantees everyone the right to appeal in court decisions; to appeal about the actions or inactions of state authorities; establishes that everyone has the right to apply to court if their rights are violated; prohibits the denial of judicial protection.

Article 124 establishes the basic principles of the administration of justice: justice is administered exclusively by courts; the delegation of court functions is prohibited; the independence and impartiality of the judiciary are guaranteed.

Article 129 defines the basic principles of judicial proceedings: equality of all participants in the trial before the law and the court; adversarial nature of the parties and freedom in providing the court with their evidence; publicity of the trial; ensuring appeal and cassation appeal of court decisions.

Additional guarantees: the right to free legal aid[48], presumption of innocence[49], and prohibition of the retroactive effect of the law in time regarding the liability of a person.[50]

45 Забужко [Zabuzhko], 2013, pp. 51–55.
46 Мироненко [Myronenko], 2011, p. 45
47 Konstytutsiine pravo Ukrainy, 2020, pp. 80–82.
48 Art. 59 of the Constitution.
49 Art. 62 of the Constitution.
50 Bygun, 2020, pp. 71–72.

The Constitutional Court of Ukraine consistently emphasises in its decisions that the right to judicial protection is fundamental and cannot be limited, providing a real opportunity to restore violated rights through an independent and impartial judicial system. The paragraphs that follow deliver examples of several key decisions of the Court of Ukraine on the right to judicial protection.

The decision of the Constitutional Court dated of 25 November 2009 No. 33-рп/2009 confirmed the absolute nature of the right to judicial protection, establishing that no circumstances can be a basis for restricting a person's right to apply to court. The decision emphasised that the right to judicial protection is universal and guaranteed regardless of the category of the case, the status of the person, or other circumstances. The Court determined that the state is obliged to create mechanisms for real and effective judicial protection of citizens' rights.[51]

The decision of the Constitutional Court dated of 14 December 2011 No. 19-rp/2011 concerns the interpretation of the right to appeal and cassation appeal of court decisions. The Constitutional Court emphasised that the right to appeal a court decision is a component of the right to judicial protection, establishing that legislative restrictions on appeals must be proportionate and justified, and must not violate the essence of the right to judicial protection.[52]

The decision of the Constitutional Court dated of 20 January 2016 No. 1-рп/2016 defines mechanisms for ensuring the right to a fair trial. The Court emphasised the inadmissibility of narrowing the content of the right to judicial protection by establishing legislative barriers that complicate access to justice. The decision outlined that the court must ensure full and effective protection of violated rights.[53]

The decision of the Constitutional Court dated of 11 March 2010 No. 7-рп/2010 concerns the right to free legal aid as a component of the right to judicial protection. The Constitutional Court determined that the state is obliged to ensure a real opportunity to receive legal aid to persons who do not have sufficient funds to pay for legal aid.[54]

The decision of the Constitutional Court dated of 12 April 2012 No. 8-рп/2012 reveals the principles of judicial independence and inadmissibility of interference in judicial activities. The Court confirmed that the right to judicial protection provides the formal possibility of applying to court and a guarantee of receiving independent and impartial justice.[55]

The Constitution also provides international legal mechanisms for the protection of human rights. Article 55 particularly enshrines the right of a person, after exhausting all national legal remedies, to apply to international judicial

51 Rishennia Konstytutsiinoho Sudu Ukrainy, 14 December 2011, No. 19-рп/2011.
52 Rishennia Konstytutsiinoho Sudu Ukrainy, 14 December 2011, No. 19-рп/2011.
53 Rishennia Konstytutsiinoho Sudu Ukrainy, 20 January 2016, No. 1-рп/2016.
54 Rishennia Konstytutsiinoho Sudu Ukrainy, 11 March 2010, No. 7-рп/2010.
55 Rishennia Konstytutsiinoho Sudu Ukrainy, 12 April 2012, No. 8-рп/2012.

institutions, in particular to the European Court of Human Rights. This provision implements international legal standards for the protection of human rights and correlates with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The mechanism provides that a person may appeal the decisions of Ukrainian courts at the international level only after he/she has exhausted all domestic means of protecting his/her rights, that is, after having gone through all instances of the national judicial system (i.e. the local court, the courts of appeal, and the courts of cassation). This approach ensures the subsidiarity of international justice and provides additional guarantees for the protection of human rights outside the national legal system.[56]

The Constitution establishes a system of duties in Section II, particularly in the articles devoted to such duties.[57] These articles establish the fundamental constitutional duties of citizens of Ukraine, which are of a public–legal nature and are aimed at ensuring national security, social solidarity and preserving statehood. Duties are universal in nature and cover a wide range of relations: from defence of the Homeland and respecting state symbols to paying taxes, observing the Constitution and laws, and preserving nature and the cultural heritage. Constitutional duties are formal prescriptions and also reflect deep social values and mechanisms of interaction between the individual, society, and the state.[58] Among the various duties, the following can be distinguished.

Duties for citizens of Ukraine: defence of the Homeland' its independence, and territorial integrity[59]; respect for state symbols[60]; payment of taxes and fees[61]; strict observance of the Constitution and laws of Ukraine[62]; preservation of nature and cultural heritage.[63]

Limited duties for foreigners and stateless persons: observance of the Constitution and laws of Ukraine[64]; respect for state symbols[65]; preservation of nature and cultural heritage.[66]

Collective duties: for parents, maintenance and upbringing of children[67]; for adult children, maintenance of incapacitated parents.[68]

56 Наливайко [Nalyvaiko], 2014, pp. 101–103.
57 Arts. 51, 55 and 65–68 of the Constitution.
58 See Oboviazky liudyny i hromadianyna [Online]. Available at: https://ccu.gov.ua/storinka-knygy/4416-pravo-znaty-svoyi-prava-i-obovyazky (Accessed: 20 April 2026).
59 Art. 65 of the Constitution.
60 Art. 65 of the Constitution.
61 Art. 67 of the Constitution.
62 Art. 68 of the Constitution.
63 Art. 66 of the Constitution.
64 Art. 68 of the Constitution.
65 Art. 65 of the Constitution.
66 Art. 66 of the Constitution.
67 Arts. 51 and 55 of the Constitution.
68 Art. 55 of the Constitution; Молдован [Moldavan], 2012, pp. 54–55.

2. Fundamental Rights Adjudication in Ukraine

Ukraine has created a comprehensive system of state bodies that ensure the protection of the fundamental rights and freedoms of person and citizen. This system includes specialised bodies of constitutional control and parliamentary supervision, along with an extensive system of courts of general jurisdiction, law enforcement agencies, and other institutions, each performing its own functions in the field of protection of rights in accordance with its competence. Let us consider in more detail the main bodies of this system and their powers.

The Constitutional Court of Ukraine exercises control over the compliance of laws and other legal acts with the Constitution; considers constitutional complaints of citizens regarding the violation of their constitutional rights; provides an official interpretation of the Constitution.

The Ombudsman of Ukraine exercises parliamentary control over the observance of human rights; receives and considers citizens' appeals regarding the violation of their rights; monitors the state of observance of human rights; has the right to submit constitutional submissions to the Constitutional Court of Ukraine.

The Supreme Court is the highest court in the judicial system of Ukraine; ensures the unity of judicial practice; considers cases as a court of cassation; has the right to appeal to the Constitutional Court of Ukraine on the constitutionality of laws.

The system of administrative courts considers disputes between citizens and subjects of government authority; protects the rights of citizens from unlawful actions or inactions of state authorities; is headed by the Supreme Court.

General courts (courts of general jurisdiction) consider civil, criminal, administrative cases; ensure the protection of violated rights in specific legal relations; act as courts of first and appellate instance.

The Prosecutor's Office of Ukraine supports public prosecution in court; represents the interests of the state in court in exceptional cases; supervises compliance with laws in the execution of court decisions in criminal cases.

The National Police ensure the protection of the rights and freedoms of citizens; prevents and investigates offenses; maintains public safety and order.

The State Bureau of Investigation investigates crimes committed by senior officials; prevents violations of citizens' rights by law enforcement officers.

The distribution of functions between these bodies is carried out according to the following principles: specialisation, as each body has its own sphere of responsibility; independence, as each body acts independently within the limits of its powers; interaction, as bodies can cooperate for the effective protection of

rights; subsidiarity, as higher bodies complement the activities of lower ones; jurisdiction, as the decisions of lower bodies can be appealed to higher ones.[69]

The Constitutional Court of Ukraine occupies a special place in the system of state authorities, being the only body of constitutional jurisdiction that ensures the supremacy of the Constitution, decides on the compliance of laws and other legal acts with the Constitution, and provides an official interpretation of the Constitution. The status of the Constitutional Court of Ukraine is determined by a set of regulatory legal acts, the main of which are the Constitution and the Law of Ukraine "On the Constitutional Court of Ukraine".[70] The main powers of the Court are as outlined herein: 1) Resolving issues of constitutionality[71]: laws and other legal acts of the Verkhovna Rada of Ukraine; acts of the President of Ukraine; acts of the Cabinet of Ministers of Ukraine; legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea; international treaties submitted to the Verkhovna Rada of Ukraine for consent on their binding nature; 2) official interpretation of the Constitution[72]; Consideration of constitutional complaints regarding the constitutionality of laws[73]; 3) providing conclusions on[74] compliance of draft laws on amendments to the Constitution with the requirements of Articles 157 and 158 of the Constitution; 4) compliance of the constitutional procedure for investigating and considering the case of the removal of the President of Ukraine from office by impeachment; 5) compliance of issues proposed for submission to an all-Ukrainian referendum with the Constitution; 6) resolving issues on violations by the Verkhovna Rada of the Autonomous Republic of Crimea of the Constitution or laws of Ukraine[75].

The procedural aspects of the activities of the Constitutional Court of Ukraine are additionally regulated by the Regulations of the Constitutional Court of Ukraine (approved by the Resolution of the Constitutional Court of Ukraine dated 22 February 2018 No. 1-ps/2018)[76] and internal acts regulating the organisation of the work of the Constitutional Court of Ukraine (regulations on the Secretariat, on permanent commissions, etc.). The Constitutional Court of Ukraine also has the right to: request documents, materials, and other information related to the case from state authorities, local self-government bodies, and their officials[77]; appoint an expert examination and get specialists involved in constitutional

69 Бисага [Bysaha] et al., 2003, p. 12.
70 Pro Konstytutsiinyi Sud Ukrainy: Zakon Ukrainy, 13 July 2017, No. 2136-VIII.
71 Art. 7 of the Law on the Constitutional Court of Ukraine.
72 Art. 7 of the Law on the Constitutional Court of Ukraine.
73 Arts. 55–56 of the Law on the Constitutional Court of Ukraine.
74 Art. 7 of the Law on the Constitutional Court of Ukraine.
75 Art. 7 of the Law on the Constitutional Court of Ukraine.
76 Postanova Konstytutsiinoho Sudu Ukrainy pro Rehlament Konstytutsiinoho Sudu Ukrainy, 22 February 2018, No. 1-ps/2018.
77 Art. 54 of the Law on the Constitutional Court of Ukraine.

proceedings[78]; summon officials, experts, specialists, witnesses to meetings, and plenary sessions[79]. The decisions and conclusions of the Constitutional Court of Ukraine are binding, final and cannot be appealed[80].

The Constitutional Court of Ukraine implements the protection of fundamental rights through two main forms of constitutional control, namely general control over the compliance of regulatory acts with the Constitution (control over norms) and consideration of constitutional complaints from individuals and legal entities. These mechanisms provide both a collective protection of constitutional rights through the verification of regulatory acts, and an individual protection of the rights of specific individuals through the institution of a constitutional complaint. Let us consider in more detail each of these mechanisms and their features.

1. Judicial control (control over norms)

Preliminary control (ex ante) includes the verification of the constitutionality of draft laws on amendments to the Constitution[81]; verification of the compliance of international treaties with the Constitution before their ratification[82]; verification of issues submitted to an all-Ukrainian referendum[83].

Subsequent control (ex post) involves the verification of the constitutionality of current laws and other acts[84]; the verification of the constitutionality of laws upon constitutional complaints[85].

Abstract control is carried out regardless of the specific case and is possible to be initiated by the President of Ukraine, at least 45 people's deputies, the Supreme Court, and the Ombudsman of Ukraine[86].

Specific control is related to a specific case; is initiated through a constitutional complaint or upon the application of a court of general jurisdiction; concerns the law applied in a specific case.[87]

In the context of a specific constitutional review, the factual circumstances of the case in which the disputed legislative provision was applied, as a rule, do not play a decisive role in assessing its constitutionality. Rather, the Constitutional Court of Ukraine carries out an abstract normative review, examining the compliance of the disputed provision with the Constitution regardless of the specific circumstances of the case. The court focuses on analysing the content of the norm,

78 Art. 54 of the Law on the Constitutional Court of Ukraine.
79 Art. 54 of the Law on the Constitutional Court of Ukraine.
80 Art. 151-2 of the Law on the Constitutional Court of Ukraine.
81 Arts. 158–159 of the Constitution.
82 Art. 7 of the Law on the Constitutional Court of Ukraine.
83 Art. 151 of the Constitution.
84 Art. 150 of the Constitution.
85 Art. 151-1 of the Constitution.
86 Art. 52 of the Law on the Constitutional Court of Ukraine.
87 Моніч [Monich], 2022, pp. 34–36.

its correlation with constitutional principles and provisions, and not on how this norm was applied in a specific situation.

Nonetheless, the factual circumstances of the case may have an indirect impact on constitutional proceedings, as they help to identify problematic aspects of legislative regulation and formulate the subject of constitutional review. In addition, the practice of applying the disputed norm by courts may indicate systemic problems of legal regulation and influence the conclusions of the Constitutional Court regarding the need for legislative changes. However, this does not mean that the constitutionality of a norm depends on the circumstances of a specific case; rather, it is assessed solely through the prism of its compliance with the Fundamental Law of Ukraine.

2. Constitutional complaint

The subject of the complaint in accordance with Article 55 of the Law on the Constitutional Court of Ukraine may be the law of Ukraine (its individual provisions) that was applied in the final court decision in the case of the subject of the right to a constitutional complaint. The subjects of the right to a constitutional complaint, in accordance with Article 56 of the Law on the Constitutional Court of Ukraine, may be an individual or a legal entity of private law. The conditions for the admissibility of a constitutional complaint are defined in Article 77 of the Law on the Constitutional Court of Ukraine: all national legal remedies must be exhausted; no more than three months have passed since the date of entry into force of the final court decision; the appealed law was applied in the final court decision in the case of the complainant. Procedural aspects include requirements for the form and content of the complaint[88], the procedure for consideration[89], and the possibility of an interim order[90].

Importantly, the peculiarities of the appeal are that only the law can be appealed, not the court decision, while the constitutionality of the substantive or procedural law that was applied in the case is being appealed, and subordinate regulatory legal acts are not subject to appeal.[91]

Both forms of control (control over norms and constitutional complaint) are regulated by the Constitution (Section XII), the Law of Ukraine "On the Constitutional Court of Ukraine", the Regulations of the Constitutional Court of Ukraine, and internal acts of the Constitutional Court of Ukraine on the organisation of the consideration of cases. The decisions of the Constitutional Court of Ukraine based on the results of both types of proceedings are binding, final, and cannot be appealed[92].

88 Article 74 of the Law on the Constitutional Court of Ukraine.
89 Law on the Constitutional Court of Ukraine, Chapter 9.
90 Article 78 of the Law on the Constitutional Court of Ukraine.
91 Селіванов, вграфов [Selivanov and Yevhrafov], 2003, pp. 80–82.
92 Art. 151-2 of the Constitution.

In the Ukrainian legal system, the protection of fundamental rights is carried out by the Constitutional Court of Ukraine and by courts of general jurisdiction, which have their own specific powers and mechanisms for such protection. Although courts of general jurisdiction do not have the right to independently declare laws unconstitutional (this is the exclusive competence of the Constitutional Court of Ukraine), they play an important role in ensuring the constitutional rights of citizens through various procedural mechanisms and by the direct application of the norms of the Constitution. For example, a court of general jurisdiction may apply to the Supreme Court to resolve the issue of a submission to the Constitutional Court of Ukraine on the constitutionality of a law or its individual provisions. The Supreme Court, having considered such an application, may apply to the Constitutional Court of Ukraine with a submission on the constitutionality of the law, or refuse to apply to the Constitutional Court of Ukraine by providing appropriate legal justifications.

The role of courts in the direct application of the norms of the Constitution[93] is also important. Courts apply the norms of the Constitution as norms of direct action, and when considering cases, they assess the content of any law or other regulatory legal act from the point of view of its compliance with the principles of human rights protection. Courts of general jurisdiction mays also apply the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the ECHR as a source of law. Additionally, courts of general jurisdiction ensure the protection of constitutional rights by doing the following: considering cases of administrative offenses that infringe on constitutional rights; considering civil claims for compensation for damage caused by violations of constitutional rights; exercising judicial control over compliance with human rights when conducting operational-search activities and pre-trial investigations; reviewing court decisions in connection with the establishment by an international judicial institution of a violation of Ukraine's international obligations.

When administering justice, these courts are obliged to consider the decisions of the Constitutional Court of Ukraine, apply laws and other legal acts in a manner that does not contradict the Constitution, and in the event of inconsistency of a regulatory legal act with the Constitution, apply the norms of the Constitution as norms of direct action.[94] Still, the application of the norms of the Constitution as norms of direct action – instead of unconstitutional provisions of regulatory acts – is a complex legal mechanism that requires a careful approach from the courts. In cases where a constitutional norm contains sufficiently specific instructions to resolve a legal issue, such application is justified and lawful. For example, if a law provides for a restriction of a fundamental right in a manner that contradicts

93 Art. 8 of the Constitution.

94 Зубенко [Zubenko], 2014, pp. 13–15.

the Constitution, the court may directly apply the relevant constitutional norm that guarantees this right. However, the problem arises in situations where constitutional provisions are of a general, declarative nature and do not contain a specific mechanism of legal regulation. In such cases, the direct application of constitutional norms may indeed approach judicial lawmaking, especially if the court is forced to specify abstract constitutional principles or fill legal gaps. This problem is complicated by the lack of a clear mechanism for reviewing court decisions after recognising laws as unconstitutional, which creates legal uncertainty. The courts are faced with a dilemma here: on the one hand, they are obliged to ensure the supremacy of the Constitution; on the other, they cannot go beyond their powers, replacing the legislator in the creation of legal norms.

The optimal solution to this problem could be the introduction of a clear legislative mechanism that would regulate the procedure for the application of constitutional norms of direct effect, and provide for a system that enables the reviewing of court decisions in cases where the applied laws are recognised as unconstitutional. This would allow the courts to effectively ensure the constitutionality of law enforcement without resorting to dubious practices of judicial lawmaking from the point of view of the separation of powers.

To understand the effectiveness of constitutional proceedings in Ukraine, it is important to analyse statistical data on the Constitutional Court of Ukraine as it implements its powers. An analysis of quantitative indicators for various types of proceedings allows us to assess the real burden on the Court and determine areas of priority for its activities. According to the official website of the Court and annual reports, the statistics for cases on constitutional submissions (abstract control) show the following results: in 2021, 18 constitutional submissions were considered; in 2022, 12 constitutional submissions; in 2023, 3 constitutional submissions. Regarding constitutional complaints, statistics show significantly higher numbers, as in 2021, 484 constitutional complaints were received; in 2022, 111 constitutional complaints; in 2023, 412 constitutional complaints. Among all constitutional complaints, about 75% do not meet the admissibility requirements, about 20% are accepted for consideration, and only 5% of complaints are concluded with a decision on the merits.

In the field of prior control (ex ante), the Constitutional Court of Ukraine considers an average of 2–3 cases per year on the review of draft laws on amendments to the Constitution, 1–2 cases per year on the review of international treaties, and cases on the review of referendum issues are rare (1–2 in several years). Subsequent control (ex post) makes up the bulk of the work of the Constitutional Court of Ukraine, including an average of 15–20 cases per year on constitutional submissions and 8–10 cases per year on constitutional complaints.

In the structure of the workload of the Constitutional Court of Ukraine, the largest weight is given to the consideration of constitutional complaints (about 60% of the total workload), consideration of constitutional submissions on the

constitutionality of laws (about 30%), and prior control and other types of proceedings (about 10%).

Importantly, the Constitutional Court of Ukraine does not consider the so-called "true" constitutional complaints that directly challenge court decisions, as this is not provided for by Ukrainian law. A constitutional complaint can only concern the constitutionality of the law that was applied in the final court decision in the complainant's case.[95]

Regarding constitutional complaints, among all submitted applications, about 40% are rejected at the preliminary examination stage; in about 35% of cases the initiation of proceedings is refused; only about 25% of cases are considered on the merits and are fully or partially satisfied. Regarding constitutional complaints, the situation demonstrates an even stricter selection, whereby about 75% of complaints are rejected due to non-compliance with formal requirements or the initiation of proceedings is refused after preliminary examination; only 20% are accepted for consideration; only 5% of the total number of submitted complaints is satisfied on the merits.

When carrying out prior control (ex ante), about 70% of draft laws on amendments to the Constitution are recognised as meeting constitutional requirements, almost 100% of international treaties are recognised as constitutional, and only about 50% of referendum issues are recognised as meeting the Constitution. In the area of subsequent control (ex post) and review of constitutional complaints, about 30% of cases considered on the merits result in the recognition of acts as unconstitutional in whole or in part, while about 70% of acts are recognised as constitutional. For the consideration of constitutional complaints on the merits, only about 15% result in the recognition of provisions of laws as unconstitutional, while in 85% of cases the complaint is rejected.[96]

Worthy of note is that the statistics provided here relate to different categories of cases within the framework of constitutional review. The first indicator (30% of recognition of acts as unconstitutional) covers all types of regulatory legal acts that may be subject to constitutional review on constitutional complaints, including by-laws, acts of local government bodies, and other lower-level regulatory acts. The second indicator (15% of recognition of provisions of laws as unconstitutional) relates exclusively to laws as acts of higher legal force, which traditionally have a higher level of constitutional presumption and undergo a more thorough legislative procedure. This difference in statistics reflects the objective reality: by-laws more often contain constitutional violations owing to their adoption following a less formalised procedure and their development paying less

95 Конституційний Суд України [Konstytutsiinyi Sud Ukrainy] [Online]. Availble at: https://heyzine.com/flip-book/fb8f6c4493.html?fbclid=IwY2xjawM40MdleHRuA2FlbQIxMABicmlkETEwT09oYU5vU1FWSzlNbUtuAR5MQ-hu7Hv7qYr0n8YGptRfZkBPt0tnFGNl7hYRh4lAdSE6lewCjO6ykuOmXg_aem_25llnuLjwmFdNXgBfnCCfg#page/8 (Accessed: 20 April 2026).

96 Ibid.

attention to constitutional compliance, while laws adopted by parliament usually undergo more thorough legal examination.

The role of the President of the Constitutional Court of Ukraine can be defined as *"first among equals" (primus inter pares)*, which is enshrined in the Constitution and the Law of Ukraine "On the Constitutional Court of Ukraine". In accordance with Article 33 of the Law of Ukraine "On the Constitutional Court of Ukraine", the President of the Constitutional Court of Ukraine has the following powers: 1) exercises general management over the organisation of the work of the Court and the Secretariat of the Court; 2) convenes meetings and special plenary sessions of the Court, as well as meetings and plenary sessions of the Grand Chamber; 3) presides over meetings and special plenary sessions of the Court, as well as meetings and plenary sessions of the Grand Chamber; 4) is a member of one of the senates and presides over its meetings; 5) disposes of budget funds for the maintenance and support of the Court's activities in accordance with the budget approved by the Court, and controls the effectiveness of the use of these funds by the Secretariat of the Court.

According to Article 66 of the Law on the Constitutional Court of Ukraine, a decision is considered adopted if at least 10 judges of the Constitutional Court of Ukraine voted for it. In the event of an equal distribution of votes in making decisions, the Chairman of the Constitutional Court of Ukraine does not have the right to cast a casting vote. Thus, the role of the Chairman of the Constitutional Court of Ukraine is more administrative and organisational than dominant in the decision-making process of the Court.

In the structure of constitutional proceedings, the role of the judge-rapporteur and the interaction with the advisory staff are of great importance for the quality and efficiency of the consideration of cases in the Constitutional Court of Ukraine. Thus, the role of the judge-rapporteur is regulated by the Law "On the Constitutional Court of Ukraine" (Article 59), and includes the following: studying the case materials and preparing them for consideration; requesting the necessary documents and materials; involving experts and specialists, if necessary; preparing a draft decision or opinion of the Court; reporting on the case at a plenary session. According to Article 30 of the Law "On the Constitutional Court of Ukraine", a judge of the Constitutional Court has two scientific consultants and an assistant, whose positions belong to the positions of the patronage service. As for interaction with the advisory staff, practice shows that legal positions and draft decisions are initially prepared by the scientific consultant and assistants to judges; the judge-rapporteur has complete freedom to accept or reject the proposals of the advisory staff. Accordingly, the advisory staff provides analytical and technical support, but does not determine the content of the decision. In practice, the extent to which the advisory staff's position is considered depends largely on the professional authority of individual staff members, the complexity of the case, and the personal working style of the judge-rapporteur.

In the Ukrainian legal system, the interactions between courts of general jurisdiction and the Constitutional Court of Ukraine follow clearly defined forms and mechanisms regulated by the Constitution and relevant laws. The main forms of interaction are as follows: the mechanism of appeal of courts to the Constitutional Court of Ukraine through the Supreme Court occurs in the event that a court of general jurisdiction, when considering a case, comes to the conclusion that a law or other legal act contradicts the Constitution of Ukraine; courts of general jurisdiction are obliged to apply the decisions and conclusions of the Constitutional Court of Ukraine as a source of law. All decisions of the Constitutional Court of Ukraine are mandatory for execution by all courts of Ukraine; the Constitutional Court of Ukraine cannot interfere in the process of justice in courts of general jurisdiction and cannot review their decisions; in the event of a constitutional complaint, the Constitutional Court of Ukraine may declare the law that was applied in the final court decision unconstitutional, but cannot cancel the court decision itself; the decision of the Constitutional Court of Ukraine on the unconstitutionality of a law is the basis for reviewing court decisions in connection with exceptional circumstances in the manner established by procedural legislation.

These delineations showcase that the relations between courts of general jurisdiction and the Constitutional Court of Ukraine are built on the principles of delimitation of competence, bindingness of the Constitutional Court of Ukraine's decisions, and procedural interactions through mechanisms established by law.[97]

Today, in Ukraine, various circumstances affect the effectiveness of the protection of fundamental human and civil rights and freedoms. Some of the main problems that create obstacles to the full implementation of these rights are discussed below: in the context of the military aggression by Russia and its occupation of parts of the territory of Ukraine, it is impossible to provide judicial protection in the occupied territories, there are difficulties with the execution of court decisions under martial law, and there are also objective restrictions on certain rights under martial law; in the field of execution of European Court of Human Rights decisions, there are problems with the payment of just satisfaction, insufficient implementation of general measures to eliminate systemic violations, and long terms of execution of decisions owing to budgetary restrictions; in the institutional sphere, contradictions periodically arise between the positions of the Constitutional Court of Ukraine and the Supreme Court, there is an uneven application of the legal positions of the Constitutional Court of Ukraine by courts of different instances, and there are also cases of non-execution or delay in the execution of Constitutional Court of Ukraine decisions by the authorities; some systemic problems of the judicial system include the excessive length of court

97 Єзеров [Yezerov], 2019.

proceedings, insufficient staffing of courts with judges, and problems with the execution of court decisions; legislative gaps are manifested in the absence of a clear mechanism for reviewing court decisions after recognising laws as unconstitutional, the imperfection of the constitutional complaint procedure, and limited access to constitutional justice; resource constraints are manifested through the insufficient financing of the judicial system, limited opportunities for improving the qualifications of judges, and technical problems with access to justice in certain regions; political influence is manifested in attempts to pressure judges, delay the process of renewing the composition of courts, and the ineffectiveness of mechanisms to ensure judicial independence; in the area of legal culture, there is insufficient awareness among citizens about the mechanisms for protecting rights, a low level of trust in the judicial system, and insufficient legal certainty in some areas.[98]

Decisions of the Constitutional Court of Ukraine on the unconstitutionality of legal acts have significant legal consequences for the entire legal system of the state. They affect the validity of specific legal norms and may also require systemic changes in legislation and revisions of court decisions. Let us consider in detail the main legal consequences of such decisions of the Constitutional Court of Ukraine.[99]

According to Article 91 of the Law of Ukraine "On the Constitutional Court of Ukraine", laws and other acts recognised as unconstitutional shall lose their validity from the date of adoption of the Constitutional Court of Ukraine decision on their unconstitutionality, unless otherwise established by the decision itself, but not earlier than the date of its adoption. In the event of recognition of a law as unconstitutional, the legal norm loses its validity and is not subject to application. Such a decision of the Constitutional Court of Ukraine opens up the possibility of reviewing court decisions in exceptional circumstances. The authorities are obliged to bring the legislation into line with the Constitution.

Additionally, if the Constitutional Court of Ukraine identifies a legislative gap, it may indicate the need for the legislative regulation of the relevant legal relations. In such a case, the Constitutional Court may also provide recommendations on the method of temporary regulation until the necessary changes are made. The Constitutional Court has the right to establish the procedure for applying other legal norms until the gap is eliminated.

Regarding the possibility of reviewing court decisions, persons whose court decisions were based on an unconstitutional law have the right to review the case. Such review is carried out according to the rules of the relevant procedural code. In the system of courts of general jurisdiction, after the Constitutional Court's decision, the court of first instance reconsiders the case taking into account the

98 Голодник [Golodnyk], 2023, pp. 56–57.
99 Білоусов, Івановська [Bilousov and Ivanovska], 2006, pp. 34–35.

Constitutional Court's decision. Importantly, the right to review a court decision after the decision of the Constitutional Court of Ukraine on the unconstitutionality of a law is not automatic, but rather conditioned on the presence of exceptional circumstances in the understanding of procedural legislation. Exceptional circumstances in this context are the decision of the Constitutional Court of Ukraine on the recognition of the law or its individual provisions as unconstitutional, on the basis of which the court decision was adopted.

According to the provisions of the procedural codes of the Criminal Procedure Code of Ukraine (CPC) and the Code of Administrative Procedure of Ukraine (CAPU), exceptional circumstances are those that could not have been known to the person filing the application at the time of consideration of the case and which, by themselves or together with previously established circumstances, prove the incorrectness of the court decision. The decision of the Constitutional Court of Ukraine on the unconstitutionality of the norm applied by the court creates a legal basis for such a review. Thus, the right to review arises if there is a set of conditions: 1) the existence of a final court decision; 2) its adoption on the basis of a norm subsequently recognised as unconstitutional; 3) compliance with procedural requirements regarding deadlines and procedure for applying. It is important to note that in Ukraine, the Constitutional Court does not have the authority to directly overturn court decisions, since a constitutional complaint can only be filed regarding the constitutionality of a law, and not regarding the court decision as such.[100]

3. Human Rights Institutions in Central and Eastern European Countries, Also Known As National Human Rights Institutions

In Ukraine, the Commissioner of the Verkhovna Rada of Ukraine for Human Rights (Ombudsman of Ukraine) is the main National Human Rights Institutions. The Ombudsman's Office has the "A" status from the Global Alliance of National Human Rights Institutions (also known as GANHRI), confirming its full compliance with the Paris Principles. Other institutions in Ukraine are engaged in the protection of human rights, but they do not have the formal status of National Human Rights Institutions in accordance with the Paris Principles. These include the Commissioner of the President of Ukraine for the Rights of the Child, the Government Commissioner for Gender Policy, and the Commissioner for Persons with Disabilities. Therefore, the Ombudsman is the only official National Human Rights Institution in Ukraine that fully complies with the criteria of the Paris Principles, in particular regarding: independence from government (independence); a broad mandate to protect human rights (pluralism); sufficient funding; an inclusive

100 Мартинюк [Martyniuk], 2008, pp. 4–5.

(access) and transparent appointment process (broad mandate); the ability to collaborate with civil society and international organisations (cooperation). Lets look at these six main pillars in more detail.[101]

■ *3.1. Independence*

3.1.1. In Law

The status of the Ombudsman of Ukraine is enshrined in the Constitution (Article 101),[102] and the activities are regulated by a special Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights".[103] The principle of non-interference by state authorities in the activities of the Ombudsman is enshrined in law. The Ombudsman has immunity from criminal prosecution, detention, or arrest without the consent of the Verkhovna Rada.

3.1.2. In Leadership

The Ombudsman of Ukraine is appointed by the Verkhovna Rada of Ukraine by secret ballot. Nominations may be submitted by the Chairman of the Verkhovna Rada or by at least 1/4 of the people's deputies. The term of office is five years with the right to reappointment. There are clear qualification requirements, which are being aged of 40 years or older, having experience in human rights activities, and a high moral character. However, the process does not provide for direct public participation in the nomination of candidates.

3.1.3. In Operation

The Ombudsman of Ukraine independently determines the areas of his/her work, has the right to open proceedings on his/her own initiative, forms his/her own secretariat and appoints representatives, develops the structure of the office and approves work plans, and may create advisory councils and expert groups.

3.1.4. In Policy

The Ombudsman of Ukraine has the right to appeal to the Constitutional Court; submits annual and special reports to the parliament; provides independent recommendations to government bodies; has the right of unhindered access to all institutions and documents; is not obliged to coordinate his/her conclusions with any bodies.[104]

101 Бурлак [Burlak], 2010, p. 8.
102 Konstytucia Ukrainy.
103 Pro Upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny: Zakon Ukrainy, 23 December 1997, No. 776/97-BP.
104 Цісар [Tsisar], 2019, p. 188.

3.1.5. Financially
The Ombudsman of Ukraine is funded from the State Budget of Ukraine under a separate budget item. He/she independently manages funds within the approved budget, and may receive international technical assistance. However, of course, the level of funding depends on the decision of the parliament, which may create certain risks to independence.[105]

■ *3.2. Pluralism*

3.2.1. To Reflect Society
The structure of the Office of the Ombudsman of Ukraine includes representatives from various areas of human rights protection. Specialised departments have been created to deal with the rights of children, people with disabilities, national minorities, and internally displaced persons. However, the mechanism for ensuring pluralistic representation of different social groups needs to be improved.

3.2.2. Among Leaders and Staff
The Secretariat of the Commissioner is staffed by both men and women, including in management positions. However, there are no clear quotas or requirements regarding gender balance and representation of different ethnic, religious, or disabled groups. The statistics on staff diversity are not publicly available.

3.2.3. In Legislation
The Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights" does not contain any special provisions on ensuring pluralism in the staff formation. There are no legislative requirements for the representation of different social groups among the institution's employees nor criteria for assessing such representation.

3.2.4. In Appointment Processes
Appointments to positions in the Secretariat are made according to the general legislation on civil service. Information about vacancies is published on the official website and the civil service vacancies portal, but no special measures are envisaged to encourage diversity among candidates.

3.2.5. In Consultations
The Ombudsman has advisory councils and expert groups that include representatives of public organisations of various orientations. Regular consultations are held with civil society organisations representing the interests of different social

105 Марцеляк [Martseliak], 2004, pp. 55–58.

groups. The Ombudsman has regional representatives to better cover different territorial communities.[106]

■ *3.3. Cooperation*

3.3.1. With the Parliament

The Commissioner submits annual reports to the Verkhovna Rada on the state of human rights observance in Ukraine; participates in parliamentary hearings; provides opinions on draft laws in the field of human rights; has the right of legislative initiative; may apply to the Constitutional Court regarding the compliance of laws with the Constitution.

3.3.2. With the Government

The Ombudsman provides recommendations to the Ukrainian Government on the national implementation of international obligations in the field of human rights, as well as participates in the preparation of national reports to international monitoring bodies and monitors the implementation by Ukraine of decisions of the European Court of Human Rights.[107]

3.3.3. With Civil Society

The Ombudsman has a Coordination Council for Interaction with Public Organizations and holds regular consultations with human rights organisations. The Ombudsman also implements joint projects for monitoring compliance with human rights observance, and supports the activities of public monitors.[108]

3.3.4. With the Judicial System

The Commissioner has the right to represent the interests of citizens in courts, submit constitutional submissions, and participate in legal proceedings as a third party. He/she also provides opinions on the observance of human rights in judicial practice and cooperates with the High Council of Justice.[109]

3.3.5. With International Human Rights Mechanisms

The Ombudsman interacts with United Nations treaty bodies, special procedures of the United Nations Human Rights Council, and the Council of Europe. He/she also partakes in the preparation of alternative reports and provides information on human rights violations to international organisations.[110]

106 Тенебаум [Tenebaum], 1999, pp. 101–103.
107 Пирога, Кадебська [Pyroga and Kadebska], 2023, pp. 21–23.
108 Ozel, 2020, pp. 100–101.
109 Косюта [Kosiuta], 2002, p. 10.
110 Konstytucia Ukrayny.

3.3.6. With Other Human Rights Bodies

The Ombudsman cooperates with the Commissioners for the Rights of the Child, on gender policy issues, and on cases of persons with disabilities. There is also cooperation with the National Preventive Mechanism and other specialised institutions in the field of human rights.[111]

3.3.7. Partnership

The Ombudsman is a member of the European Network of National Human Rights Institutions (also known as ENNHRI) and the Global Alliance of National Human Rights Institutions (also known as GANHRI). He/she has memorandums of cooperation with leading universities, the National Bar Association of Ukraine, and media organisations, as well as implements joint projects with the Office of the United Nations High Commissioner for Human Rights and other international organisations.[112]

■ *3.4. Access*

3.4.1. Financial Access

Applying to the Ombudsman is free of charge, and the office provides basic legal advice to applicants. However, the limited funding does not allow for full legal assistance in all cases. The Ombudsman cooperates with the free legal aid system to ensure the legal protection of vulnerable groups.

3.4.2. Physical Access

The Ombudsman's central office and regional offices are partially equipped for access by people with disabilities (e.g. with ramps and elevators). However, not all premises fully comply with accessibility standards, and there are no specially equipped toilets and other elements of universal design in some offices.[113]

3.4.3. Geographic Access

A network of regional offices of the Ombudsman operates in different regions of Ukraine, where regional public relations coordinators are engaged. Field visits of citizens in remote settlements are carried out, and under the current war conditions, additional access points have been created for internally displaced persons.

111 Косінов [Kosinov], 2015, pp. 5–6.
112 Майданник [Maidannyk], 2010, pp. 14–15.
113 Марцеляк [Martseliak], 2003, pp. 66–67.

3.4.4. Through Staffing

The Secretariat employs representatives from different regions of Ukraine, and gender balance is ensured among employees. However, there are no clear quotas for the representation of national minorities and other social groups, and there is a shortage of employees who speak the languages of national minorities.

3.4.5. Through Communication

The Ombudsman's hotline is operational. Applications are accepted via e-mail and the website, with information being provided in Ukrainian and partly in English. However, there are no materials in the languages of national minorities and in formats accessible to people with visual and hearing impairments. Online services and mobile applications are underdeveloped.[114]

■ *3.5. Funding*

3.5.1. Adequate Funding

The Ombudsman is funded from the State Budget of Ukraine, albeit the level of funding often does not meet the real needs of the institution. Budgetary allocations do not fully consider the expansion of the Ombudsman's functions and the increase in the number of citizens' appeals, especially in times of war.

3.5.2. Allocations For Activities

Despite the assignment of additional functions (e.g. as a national preventive mechanism), a corresponding increase in funding has not been provided, limiting the possibilities of conducting monitoring visits, training events, and information campaigns.

3.5.3. Staffing and Recruitment

The limited funding affects the possibility of attracting highly qualified specialists owing to the uncompetitive level of salaries. There are also problems with training and advanced training of personnel, and the staffing does not correspond to the real workload of employees.

3.5.4. Accessible Premises and Communication System

The funding does not fully ensure the creation of a barrier-free environment in the office premises. There is a lack of funds for the modernisation of communication systems, the development of online services, and ensuring the accessibility of information for different population groups.

114 Yurydichna enciklopedya, 2004, p. 61.

3.5.5. Autonomy
Although the expenses for the activities of the Commissioner are determined by a separate line in the state budget, there are problems with the timeliness of the funding and restrictions on the redistribution of funds between expenditure items. The financial dependence on parliamentary decisions may affect institutional independence.

3.5.6. Accountability
The Ombudsman reports annually to the parliament on the use of budget funds, and an external audit of the financial activities is conducted. Information on the use of funds is published on the official website. However, the format of the financial reporting is not always sufficiently detailed and understandable for the public.[115]

■ *3.6. Broad Mandate*

3.6.1. Powers of the Ombudsman of Ukraine
The powers of the Ombudsman are enshrined in the Constitution and the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights".[116] The mandate covers the protection of the entire spectrum of human rights, being them civil, political, economic, social, and cultural rights. The Ombudsman exercises parliamentary control over the observance of constitutional rights and freedoms.[117]

3.6.2. Raising Awareness
The Ombudsman has the right to conduct educational activities on human rights, as well as organise educational programs and trainings. He/she also carries out publishing activities to disseminate information on human rights, conducts information campaigns, and can do so in cooperation with educational institutions.

3.6.3. Monitoring and Reporting
The Ombudsman constantly monitors the state of observance of human rights, prepares annual and special reports, provides recommendations to authorities on eliminating identified violations and improving legislation, and monitors the implementation of recommendations.[118]

115 Instytiut ombucmena.
116 Pro Upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny: Zakon Ukrainy, 23 December 1997, No. 776/97-BP.
117 Ткаліч [Tkalich], 2010, pp. 201–202.
118 Марцеляк [Martseliak], 2002, pp. 32–33.

3.6.4. Review of Actions

The Ombudsman has the authority to review human rights violations by both state bodies and private entities, may initiate proceedings on his/her own initiative and respond to individual complaints, and monitors business activities regarding compliance with human rights.

3.6.5. Inspections

The Commissioner has the right to visit places where there is alleged deprivation of liberty, and state institutions and local government bodies without prior notice. He/she is also granted access to any documents and materials necessary for inspections and may get experts and public monitors involved in inspection visits.

3.6.6. Investigation

The Ombudsman has the right to investigate human rights violations (e.g. actions by law enforcement agencies, military, and special services), may demand explanations from officials, receive necessary documents and materials and is not limited by departmental barriers when conducting investigations.[119]

119 Барабаш [Barabash], 2004, p. 8.

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OLGA DORUL* – CAROLINA CAZACIUC**

National Human Rights System in the Republic of Moldova

ABSTRACT: *This paper analyses the national mechanism for the protection of human rights in the Republic of Moldova. It examines the constitutional provisions governing fundamental rights and freedoms and provides an in-depth analysis of the institutional framework for the protection of human rights established by the Constitution of the Republic of Moldova. In a global context, the Republic of Moldova has ratified the most important human rights instruments. Its Constitution reiterates the list of fundamental human rights and freedoms adopted from the Universal Declaration of Human Rights and the International Human Rights Covenants. Following completion of the screening process for accession to the European Union (EU), Moldovan authorities have undergone both internal and external evaluations of the effectiveness of the national human rights protection mechanism. It generates continuous initiatives to align the national legal framework with the requirements of the EU's acquis.*

The research is based on a questionnaire containing clear guidelines for a comprehensive approach to the national human rights protection system. The article was developed to support a comparative analysis of national human rights protection systems by examining constitutional frameworks, the definition and implementation of fundamental rights, and the institutional and procedural mechanisms that ensure their protection.

KEYWORDS: *Constitution, fundamental freedoms, human rights, human rights system, Republic of Moldova*

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https://doi.org/10.47078/2026.1.49-82

1. The Protection of Fundamental Rights in the Constitution of the Republic of Moldova

■ *1.1. Terminological Distinctions: Human Rights, Fundamental Rights and Constitutional Rights*

Human rights have increasingly been analysed as a fundamental prerequisite for maintaining international peace and security, forming a cornerstone of modern international law. An initial acknowledgment of human rights and fundamental freedoms is enshrined in Article 4 of Moldovan Constitution. However, notably, Article 4 does not regulate fundamental rights and freedoms, as these are addressed in Title II, organised across three chapters. Instead, it governs the relationship between international legal instruments concerning fundamental human rights and the national legislation, specifying the application of national laws in alignment with key multilateral international agreements and other treaties to which the Republic of Moldova is a party.[1]

Additionally, the Civil Procedure Code[2] and the Criminal Procedure Code[3] reiterate the constitutional guarantee of the4 direct applicability of international norms in cases of conflict between international human rights treaties and domestic legislation. These constitutional provisions recognised fundamental human rights and freedoms as principles of public international law at the time of the Republic of Moldova's establishment and the adoption of its Constitution.

Such rights are enshrined in numerous universal and regional legal instruments. The constitutional provisions on fundamental human rights and freedoms are simply fundamental human rights and freedoms, which, at the time of the formation of the Republic of Moldova and the adoption of the Constitution of the State, were unanimously recognised as a fundamental principle of public international law enshrined in a large number of legal instruments of universal and regional character.[4] The rule of law upholds and safeguards the rights of all individuals, without discrimination. These rights are inherent to human beings by virtue of their nature, forming an integral part of their essence; hence, they are often referred to as natural rights. Natural human rights exist objectively and independently of any legal framework or individual, requiring no formal legal codification for their validity.[5] Therefore, human rights are binding components of human dignity, giving the prerogative to act as a human being.

1 Negru et al., 2012, p. 33.
2 Article 2 paragraph 3 of the Civil Procedure Code of Republic of Moldova of 30 May 2003.
3 Article 7 paragraph 2 of the Criminal Procedure Code of Republic of Moldova.
4 Negru et al., 2012, p. 33.
5 Buga and Bujor, 2013, p. 19.

Human rights and freedoms are frequently categorised based on their constitutional arrangement. The first category encompasses inviolable rights, which include fundamental protections that safeguard an individual's life, freedom of movement, physical integrity, personal security, and home. The second category comprises social, economic, and cultural rights, which facilitate the material and cultural development of individuals, enabling their active participation in societal life. The third category consists exclusively of political rights, empowering citizens to engage in the governance of the state and participate in political decision-making processes. The fourth category pertains to socio-political rights, which citizens may exercise either to support their material development or contribute to state governance. Lastly, the fifth category includes guaranteed rights, such as the right to petition and seek redress. This allows individuals, whose rights have been violated by an unlawful act of a state body, to request annulment of the act and claim compensation for damages, as prescribed by law.[6]

Hence, human rights constitute the subjective rights of individuals, essential for life, dignity, and the free development of the human personality, as enshrined in the Constitution and international treaties. Notably, while fundamental human rights are enshrined as a supreme value, the state is constitutionally obliged to uphold and guarantee all rights and freedoms, whether or not they are explicitly recognised as fundamental.[7] Like several nations, the Republic of Moldova adheres to the doctrine of the rule of law, which prioritises the individual and their rights above other social values and emphasises the supremacy of law. In legal scholarship, the 'protection of human and citizens' rights' is interpreted both narrowly and broadly. Narrowly, it is a procedural mechanism; broadly, it is a constitutional obligation of the state and encompasses the systematic activities of human rights protection institutions.[8] Hence, we conclude that there is no legal distinction between the terms 'human rights', 'fundamental rights', 'constitutional rights', as all refer to rights anchored in the Constitution, interpreted in light of international treaties. The Moldovan legal framework does not draw separate categories or hierarchies among them.

■ *1.2. The Constitutional Framework for the Protection of Human Rights and Freedoms*

The Constitution of the Republic of Moldova addresses the issue of human rights and freedoms. A wide range of freedoms and rights, including the right to life, freedom of expression, and equality before the law and in the ownership of property, are guaranteed. By the constitutional provisions on human rights and freedoms, we must understand the fundamental rights and freedoms contained in

6 Ibid., p. 21.
7 Turcan, 2015, p. 28.
8 Guceac, 2017.

Title II, Chapter I 'General Provisions' - Articles 15–23, and Chapter II 'Fundamental Rights and Freedoms' –Articles 24–54. Additionally, the Constitution mandates that all state authorities respect and protect these rights.

■ *1.3. The Constitutional Approach to International Human Rights Treaties*

As noted, Article 4 does not directly regulate fundamental rights and freedoms. Instead, its first paragraph stipulates that the constitutional provisions concerning human rights and freedoms are to be applied in accordance with the Universal Declaration of Human Rights, the Covenants, and other international instruments to which the Republic of Moldova is a party. Consequently, the provisions of Article 4 paragraph (1) clarify that, in all instances of conflict or inconsistency between the domestic legislation of the Republic of Moldova, arising from constitutional provisions due to misinterpretation or misapplication, priority shall be given to international legal instruments. These instruments take precedence over the national legislation.[9] The second paragraph of Article 4 of the Moldovan Constitution confirms the priority of international regulations in the field of human rights.

Article 8 enshrines, as a constitutional principle, one of the core tenets of international law – the principle of *pacta sunt servanda*, which obliges states to fulfil their commitments under international law in good faith. Furthermore, the Republic of Moldova's commitment to adhere to the principles and universally recognised norms of international law grants these norms supremacy over domestic legislation, including organic and ordinary laws and subordinate legal acts. However, this provision should not be construed as conferring primacy upon general international law over the Constitution. Only international human rights norms stemming from covenants and treaties to which the Republic of Moldova is a party are afforded priority under the Constitution, as stipulated in Article 4, paragraph (2).[10] The second paragraph of Article 8 reaffirms the state's obligation to cooperate with other states based on unanimously recognised international principles and norms. These are to be understood as rules of conduct of utmost generality that are universally valid and legally binding on the subjects of international law. They are mandatory rules and protect values fundamental to the international legal order: international security and cooperation and fundamental rights and freedoms.[11]

We note a textured relationship between the Constitution and international law, particularly concerning human rights treaties. While the Constitution of Republic of Moldova affirms the supremacy of international human rights norms over domestic legislation. This framework reflects Moldova's commitment to

9 Negru et al., 2012, p. 36.
10 Ibid., p. 56.
11 Ibid., p. 55.

international cooperation and the rule of law, ensuring that fundamental rights and freedoms are upheld in accordance with domestic and international legal standards. To elucidate the provisions outlined in the aforementioned norms, the Constitutional Court of the Republic of Moldova (CCM) issued a judgment concerning the interpretation of specific provisions of Article 4, in Decision No. 55 of 14 October 1999. In this judgment, the CCM affirmed that competent legal authorities, including the CCM and the judiciary, are authorised to apply international law norms within the scope of their respective jurisdictions, following the relevant legislative framework, during the adjudication of individual cases. In the resolution section of the judgment, it concluded that Article 4 guarantees the fundamental human rights and freedoms enshrined therein and the universally recognised principles and norms of international law, as referenced in Article 8. The term 'generally recognised principles and rules of international law' refers to principles and rules of universal applicability.

The CCM further emphasised that these principles, along with international treaties ratified by the Republic of Moldova, form an integral part of the country's legal system and are incorporated into domestic law. Concerning any conflicts between domestic legislation and international human rights protections, it ruled that where discrepancies arose between international covenants and Moldova's domestic laws, national legal bodies were required to apply international standards. Specifically, universally recognised norms of international law (*jus cogens*) and international human rights law were directly applicable within Moldova's legal order. International instruments safeguarding human rights held particular significance for the jurisdiction of national courts.[12] The CCM accords due regard to the interpretations of the European Court of Human Rights (ECtHR), recognising its case law as an integral part of national law. Consequently, the constitutional provisions concerning fundamental human rights and freedoms are interpreted by the CCM in accordance with the ECtHR's jurisprudence. There is no hierarchy of rights in the analysis of the Constitutional Court. If the Court finds the existence of an interference with the applicable fundamental right, it will proceed with the analysis of its proportionality, applying the stages of the proportionality test.[13]

■ *1.4. Constitutional Protection of Human Rights: Institutions, Beneficiaries and Fundamental Principles*

In the Republic of Moldova, all state authorities are mandated to uphold and safeguard human rights and freedoms. However, Article 59[1] of the Constitution

12 Constitutional Court Decision No. 55 of 14 October 1999.

13 Forms and Limits of Judicial Deference: The Case of Constitutional Courts National Report: Republic of Moldova. XIXth Congress of the Conference of European Constitutional Courts, p. 10 [Online]. Available at: https://cecc.constcourt.md/pages/congress/questionnaire/Questionnaire_Republic%20of%20Moldova_EN.pdf (Accessed: 17 March 2026).

explicitly mentions the responsibility of People's Advocate to protect human rights and freedoms.

The Constitution *expressis verbis* does not explicitly use the terms 'vertical' and 'horizontal' regarding human rights. However, both concepts are included in the constitutional provisions. For example, the equality before the law enshrined in Article 16 guarantees equality for all individuals before the law and the right to non-discrimination, available to the state (vertical) and individuals (horizontal) in relation to each other. The right to a healthy environment, provided by Article 37 of Constitution, merges into vertical and horizontal concepts. On the one hand, the state is obliged to ensure a healthy environment and free access to accurate information regarding environmental conditions, living and working standards, and the quality of food and appliances. On the other hand, from a horizontal perspective, private individuals and legal entities are accountable for any harm caused to an individual's health or property due to ecological infringements, establishing a reciprocal duty to respect others' environmental rights.

Under the Constitution, individuals with disabilities[14], foreign nationals[15], children[16], including orphan children[17], mothers[18], unaccompanied minors[19], and young people[20] are identified as vulnerable social groups requiring special protection.

The supreme values of the state are enshrined and protected by the Constitution, which constitutes the legal basis for the state's organisation and functioning, determining its content and purposes, being the 'identity card of a state'.[21] Title II of the Constitution (Fundamental Rights, Freedoms and Duties) lists the fundamental rights and freedoms safeguarded by the Constitution. This title comprises three chapters. Chapter I. General Provisions, covering Articles 15–23, Chapter II. Fundamental Rights and Duties, covering Articles 24–54, and Chapter III. Fundamental Duties, covering Articles 55–59.

The Constitution affirms in Chapter I Article 1 that human dignity, fundamental rights and freedoms, the unimpeded development of the human personality, justice and political pluralism are paramount values, recognised and safeguarded. Simultaneously, principles such as universality, equality, free access to justice, the presumption of innocence and the non-retroactivity of the law are enshrined in other sections of the Constitution. Although Moldovan legislation (hard law) does not explicitly define the concept of the rule of law, it has been shaped and refined through the jurisprudence of the CCM. The rule of law has

14 Art. 51 of the Constitution.
15 Art. 19 of the Constitution.
16 Art. 50 of the Constitution.
17 Art. 49 of the Constitution.
18 Art. 50 of the Constitution.
19 Art. 50 of the Constitution.
20 Art. 50 of the Constitution.
21 Turcan, 2015, p. 25.

emerged as a principle encompassing formal legality, ensuring consistency and regularity in establishing and maintaining democratic order, and a conception of justice grounded in the recognition and full affirmation of human personality.[22]

As noted, the rule of law entails the structuring and execution of state authority in full adherence to legal norms, with emphasis on constitutional provisions. In this context, the state operates under the supremacy of the Constitution and is defined by several key attributes: the recognition and effective safeguarding of human rights and freedoms, the constitutional establishment and controlled application of the principle of separation of powers among the branches of government, the accountability and sanctioning of public authorities exceeding their constitutional mandates, the formation of government exclusively through democratic elections, the establishment and functioning of an independent and impartial judiciary, the assurance of the rule of law as an expression of the general interest, the proper implementation of market economy mechanisms and the active combat against corruption.[23]

Democracy is codified in Article 5 and is understood as being exercised under conditions of political pluralism. As an integrative concept and phenomenon, democracy embodies the moral, political and legal values of society, shaped by its socio-historical context.[24] Democracy, as a political system expressed through the organisation and exercise of state authority, is founded on the principle of popular sovereignty and is committed to advancing the general interest. Pluralism within society functions as a prerequisite and safeguard for democracy, fostering cooperation and maintaining balance within the political system. Accordingly, the interests of citizens must take precedence in the establishment of public authorities, ensuring the regular, free and fair conduct of elections, and the prioritisation of governance programs, achieved through consulting citizens on the most critical issues affecting the state and society.[25] This principle is reaffirmed in Article 38(1), which declares that the will of the people is the basis of state power. Thus, the people constitute the sole source of political authority, possessing, through their sovereignty, the right to determine their destiny, define the state's political direction, shape the composition of its governing bodies and exercise oversight over their activities.[26]

The Constitution recognises justice and the free development of human personality as supreme values. Justice is understood as a moral and legal principle,

22 Report of the Constitutional Court of the Republic of Moldova to the XVIIth Congress of the Conference of European Constitutional Courts Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles, 2017, p. 4 [Online]. Available at: https://www.confeuconstco.org/reports/rep-xvii/moldova_EN.pdf (Accessed: 17 March 2026).

23 Turcan, 2015, p. 26.

24 Negru et al., 2012, p. 37.

25 Turcan, 2015, p. 27.

26 Stamati, 2017, p. 56.

demanding that individuals receive what is due to them and their rights, freedoms and legitimate interests be upheld. The free development of human personality, as a guaranteed value, serves as a guiding principle for the interpretation of all constitutional provisions concerning liberty, representing the fundamental purpose for which these freedoms are enshrined. The recognition of the free development of the human personality as a constitutional value is, in part, a response to the potential imposition of a system of formal values by the state that could restrict the individual's ability to freely shape their identity.[27]

Most fundamental rights and freedoms are closely linked to the free development of the human personality, which is inherent to human dignity. Dignity forms the foundation of human rights. It is a fundamental, synthesising right, without which other rights lose their guarantee. No fundamental right may be exercised in a manner that undermines the dignity of another, as human dignity is intrinsic to human rights. Consequently, human dignity cannot be violated, even when fundamental rights are restricted.[28] The concept of human dignity as a legal institution has evolved over time. Initially, it focused on the physical protection of dignity. However, presently, it encompasses the safeguarding of personal identity and mental inviolability. Some scholars argue that human dignity is an institution that plays a crucial role in guaranteeing fundamental rights and freedoms. Broadly, all fundamental human rights and freedoms can be viewed as safeguards through which human dignity is upheld. This concludes that human dignity is a supreme value, transcending fundamental rights and freedoms.[29]

The recognition of human dignity before the law is strengthened by the principle of equality, enshrined in Article 16. Concerning constitutional provisions, the principle of equality encompasses the equal enjoyment of rights and freedoms by all citizens, alongside the equal fulfilment of fundamental duties, irrespective of their legal basis. Article 16, as the primary source of the principle of equality, is interconnected with other constitutional articles that serve as the foundational pillars of equality. This principle comprises three key components: respect for the individual, equality and non-discrimination. Article 16 paragraph (1) asserts that respect for and protection of the individual represent a fundamental duty of the state. This underscores the centrality of the human being within the hierarchy of values safeguarded by the state. By obligating the state to uphold and protect the individual, the Constitution affirms that these principles are paramount.[30] The principle of equality before the law is a formal equality of rights, requiring that all individuals exercise their existing rights without exception, irrespective of the personality or identity of the individual. The core principle is that citizens, regardless of the authority they engage with or their personal status,

27 Turcan, 2015, p. 29.
28 Ibid., p. 28.
29 Puscas, 2005, p. 45.
30 Negru et al., 2012, p. 86.

must receive non-discriminatory treatment from public authorities and their representatives. The provision guarantees equality without distinction, prohibiting any legal treatment that places an individual in a subordinate or superior position. Hence, discrimination is an illegitimate and arbitrary distinction that is expressly prohibited.[31]

The Constitution enshrines human dignity, justice, equality and democracy as supreme values that guide the individual's status within the state. Human dignity serves as the cornerstone of the legal framework, ensuring the coherence and protection of all rights and freedoms. While these rights are applied equally in principle, their interpretation may vary based on context, prioritising the protection of dignity and identity. Equality reinforces this by mandating non-discriminatory treatment, while the rule of law and democracy, grounded in popular sovereignty and pluralism, ensure justice and the centrality of the individual in the state's political and legal system.

■ *1.5. Constitutional Catalogue of Fundamental Rights and Freedoms*

The freedoms and rights in the Constitution are organised in catalogues: Title I. General principles, Title II. Fundamental Rights, Freedoms and Duties, containing Chapter I. General Provisions, Chapter II. Fundamental Rights and Duties and Chapter III. Fundamental Duties. Particularly, Chapter II includes right to life and to physical and mental integrity[32], right to individual freedom and security[33], right to defence[34], the right to freedom of movement[35], the right to private and family life[36], the right to the inviolability of residence[37], the right to the confidentiality of correspondence[38], the right of freedom of conscience and religion[39], the right to freedom of expression and opinion[40], the right to freedom of creation[41], the right to information[42], the right to education[43], the right to healthcare[44], the right to a healthy environment[45], the right to vote and be elected[46], the right to administra-

31 Ibid., p. 87.
32 Art. 24 of the Constitution.
33 Art. 25 of the Constitution.
34 Art. 26 of the Constitution.
35 Art. 27 of the Constitution.
36 Art. 28 of the Constitution.
37 Art. 29 of the Constitution.
38 Art. 30 of the Constitution.
39 Art. 31 of the Constitution.
40 Art. 32 of the Constitution.
41 Art. 33 of the Constitution.
42 Art. 34 of the Constitution.
43 Art. 35 of the Constitution.
44 Art. 36 of the Constitution.
45 Art. 37 of the Constitution.
46 Art. 38 of the Constitution.

tion[47], the right to assembly[48], the freedom of parties and other social-political organisations[49], the right to create and to join trade unions[50], the right to work and to labour protection[51], the prohibition of forced labour[52], the right to strike[53], the right to private property and its protection[54], the right to social assistance and social security[55], the right to family[56], family protection and protection of separated children[57], the mother, children and young people protection[58], the protection of people with disabilities[59], the right to petition[60] and the right of person injured by a public authority[61].

■ *1.6. Key Fundamental Rights in the Constitutional System of the Republic of Moldova*

The Republic of Moldova's integration into the European Union (EU) has prompted a series of political and socio-economic transformations. As a member of the Council of Europe (CoE), Moldova has ratified the European Convention on Human Rights (ECHR), committing to uphold the right to a fair trial and ensure the independence of the judiciary as part of its European integration process. Accordingly, the Justice Sector Reform and Anti-Corruption Strategies were implemented to enhance the judicial system. These strategies guarantee access to justice through transparent procedures, supported by independent and impartial courts. Access to justice is a right and a principle that must be upheld under all circumstances, including during armed conflicts, by an effective, well-organised and independent judicial system.

The freedom of expression, enshrined in Article 32, represents a fundamental pillar of democracy. The Moldova-EU Association Agreement reinforces the country's commitment to developing policies that safeguard freedom of expression, including press freedom. The National Media Development Strategy enhances the independence and the quality of information provided by the media. Pluralism of opinion, which is a key element of an independent press, is vital for fostering an informed electorate, particularly in the voting process. Similarly,

47 Art. 39 of the Constitution.
48 Art. 40 of the Constitution.
49 Art. 41 of the Constitution.
50 Art. 42 of the Constitution.
51 Art. 43 of the Constitution.
52 Art. 44 of the Constitution.
53 Art. 45 of the Constitution.
54 Art. 46 of the Constitution.
55 Art. 47 of the Constitution.
56 Art. 48 of the Constitution.
57 Art. 49 of the Constitution.
58 Art. 50 of the Constitution.
59 Art. 51 of the Constitution.
60 Art. 52 of the Constitution.
61 Art. 53 of the Constitution.

freedom of assembly, guaranteed in Article 40, is essential for political pluralism and is intrinsically linked to the right to free expression. Beyond these constitutional provisions, the National Action Plan for the Protection of Human Rights is another strategic document through which the Republic of Moldova commits to strengthening civil society and the political system, ensuring transparency and the democratic participation of citizens in political and decision-making processes.

The right to information, under Article 34, is significant as a catalyst for the development and reinforcement of other political rights. The exercise of this right is intrinsically linked to the enjoyment of other political and socio-economic rights. Consequently, the extent to which the right to information is exercised within a society may serve as an indicator of the level of democratisation attained. In its Judgment No. 19, dated 16 June 1998, the CCM provided an interpretation of Article 34. It regarded this right as inherent to human dignity, emphasising that, by affording citizens access to information regarding social, political, economic, scientific and cultural affairs, the state ensures the possibility for individuals to fully realise their freedom of thought, opinion, creation and public expression, whether by word, image or other means. Furthermore, the right to information legally ensures an individual's entitlement to access public interest information. Hence, the adoption of Law No. 148 on 9 June 2023, concerning access to public information, represents the state's initial step to safeguard this fundamental right.

■ *1.7. Constitutional Limitations on Fundamental Rights and Freedoms*

Article 54, titled 'Restrictions on the Exercise of Certain Rights or Freedoms', sets the conditions under which interference with the rights and freedoms protected by the Constitution may occur. Paragraph (2) of this article stipulates that the exercise of these rights and freedoms may only be subject to limitations as prescribed by law. Such restrictions must comply with universally recognised principles of international law and be deemed necessary in the interests of national security, territorial integrity, the economic welfare of the nation, public order, the prevention of mass unrest and crime, the protection of the rights, freedoms and dignity of others, the prevention of the disclosure of confidential information or the safeguarding of the authority and impartiality of the judiciary.

Consequently, any state interference in the limitation of a right must be carried out in strict adherence to the principle of legality and must be enacted through an organic law. Such interference must conform to universally recognised principles of international law. Hence, the restriction must align with the provisions of the most significant universal instruments for the protection of human rights to which the Republic of Moldova is a party. Furthermore, interference must be justified by a pressing social need, making it a necessary measure. Additionally, the interference must be proportionate to the intended objective; that is, it should serve the general interest, and there must be circumstances in which the

limitation benefits the public good. In the absence of legal provisions defining the limits of proportionality, the issue must be assessed based on specific facts and circumstances, which should be carefully examined by the relevant authority (e.g., a court) before any claim of disproportionality is upheld. For instance, the right to privacy cannot be restricted solely on the grounds that individuals exercising it are conspiring against national security.[62]

Regarding the CCM's interpretation of restrictions on the right to freedom of expression, the right to private life and freedom of religion, it affirmed that the freedom of expression guaranteed by the Constitution was protected under the ECHR. Consequently, it considers the interpretations of the ECtHR when evaluating any interference with these rights. In the case law of both the CCM and the ECtHR, there is no discernible difference in the level of protection afforded to these rights.[63] Regarding Article 16 (Equality), the Republic of Moldova has not ratified Protocol No. 12 to the ECHR. Thus, it does not function as an independent provision and complements other provisions of the Constitution. To assess whether the right to equality may be restricted, the CCM must determine if the alleged discrimination concerns rights or freedoms guaranteed by the Constitution. If such rights or freedoms are applicable, it must evaluate whether the alleged violation of the right meets the conditions outlined in Article 54. A determination of a violation of Article 16 does not automatically indicate a breach of other constitutional rights or freedoms. In assessing infringements on the prohibition of discrimination, the CCM takes into account the case law of the ECtHR in applying Article 14 of the ECHR.[64]

■ *1.8. Adaptation of Fundamental Rights in the Constitution of the Republic of Moldova to Contemporary Needs*

The Republic of Moldova has made significant strides towards the democratisation of the state, aligning itself with European and international standards. By acknowledging the supremacy of the rule of law and democratic principles, and enshrining these in the Constitution, it has made notable progress in socio-economic development. However, these advances remain insufficient when confronted with persistent challenges, such as corruption, discrimination, political immaturity, external political pressures on the judiciary and authoritarian influences.

62 Negru et al., 2012, p. 221.

63 Questionnaire for the XVIIIth Congress of the Conference of European Constitutional Courts, 2020, Chapters II.II; II.III; II.IV, p. 4 [Online]. Available at: https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/English/Moldova_-_Questionnaire_XVIII_Congress_of_CECC_eng.pdf (Accessed: 11 December 2024).

64 Questionnaire for the XVIIIth Congress of the Conference of European Constitutional Courts, 2020, Chapters II.V, p. 6 [Online]. Available at: https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/English/Moldova_-_Questionnaire_XVIII_Congress_of_CECC_eng.pdf (Accessed: 11 December 2024).

Given the significant demographic shifts in Moldova, such as rising divorce rates and an increasing number of children in single-parent households, there is a pressing need to reassess and strengthen the constitutional provisions related to family life and child protection. The changing social structure, influenced by factors such as emigration and evolving cultural norms, highlights the importance of ensuring that the Constitution offers robust protection for diverse family forms. While the right to family and the protection of children are enshrined in the Constitution, the current legal framework does not fully address the challenges posed by demographic changes. It is crucial to adapt these rights to reflect modern realities, particularly by ensuring adequate support for children in single-parent households and clarifying the responsibilities of both parents in child-rearing. Furthermore, since Moldova has ratified the Convention on the Rights of the Child, which outlines key principles for protecting children's rights, these principles should be explicitly proclaimed in the Constitution to ensure that they are reflected and enforced at the national level.

Given the complex and evolving migration patterns in Moldova, it is essential to reconsider and strengthen the regulation of citizenship rights and the status of foreigners within the Constitution. The increasing number of immigrants, coupled with the potential for multiple citizenships, highlights the need for a comprehensive legal framework to manage migration effectively. Since 2013, Moldova has witnessed a shift where the number of immigrants exceeds emigration authorisations, exacerbated by its alignment with the EU and the liberalisation of its visa regime.[65] Furthermore, the influx of migrants due to the armed conflict in Ukraine underscores the urgency of addressing the status of foreigners and ensuring that legal provisions related to citizenship are flexible enough to accommodate these new realities. The current constitutional provisions may not be sufficient to address the complexities of modern migration flows. Therefore, there is a need for constitutional reform to regulate citizenship rights, streamline the naturalisation process and establish a framework for the status and rights of foreigners, ensuring their protection and integration into Moldovan society. Strengthening these constitutional regulations would provide a more robust and adaptable migration management system, better aligned with Moldova's demographic changes and international commitments.

In light of the increasing interconnection between environmental quality and public health, it is crucial to strengthen the regulation of the right to a healthy environment and the right to health within the Constitution. While the Constitution acknowledges the right to a healthy environment as a fundamental human right and outlines the state's responsibility to protect it, the rapid impacts of climate change and environmental degradation on public health, particularly for vulnerable groups, such as children and the elderly, highlight the need for

65 BMA, 2022, p. 18.

robust legal provisions. The Constitution currently frames the right to health as an individual right, with collective protections being inferred from international agreements. However, given the shared nature of environmental challenges, there is a compelling need to regulate these rights in a way that reflects individual and collective responsibilities. This would ensure that Moldova's legal framework comprehensively addresses the link between environmental protection and public health, fostering a sustainable and healthier future for all citizens. Therefore, constitutional reform should explicitly integrate the collective right to a healthy environment and public health, ensuring stronger safeguards against the impacts of environmental harm and climate change.

Given the rapid global trend towards digitalisation and the increasing reliance on information technologies, it is crucial to update the Constitution to better regulate the protection of private life and personal data. The current constitutional framework does not adequately address the challenges posed by modern digitalisation, leaving gaps in the protection of privacy and data security. To ensure that citizens' rights are safeguarded in an increasingly digital world, the Constitution must include comprehensive provisions that specifically address privacy rights and data protection. This would align Moldova with international standards and strengthen its legal framework for the security of personal data, ensuring robust protection of human rights in the digital age.

■ *1.9. Access to Justice and the Right to an Effective Remedy: Constitutional Provisions*

Article 20 proclaims the right to free access to justice, whereby 'everyone shall have the right to an effective remedy before the competent courts against any acts infringing upon their rights, freedoms, or legitimate interests'. Paragraph (1) of the article establishes its scope of application by addressing 'any person', which, through semantic interpretation, encompasses all citizens, foreign nationals and stateless individuals. This broad definition confirms that the article applies universally. The wording of Article 20 explicitly highlights the active duty of the State to guarantee the right to effective legal redress. The term 'effective' is pivotal in outlining the extent of the state's obligations, emphasising the need for meaningful access to justice. The reference to 'competent courts' implies a positive obligation of the state to establish an adequate number of courts and regulate their operations to meet minimum standards for justice. The connection between 'effective satisfaction' and 'competent courts' underscores that human rights protection must be accessible through well-functioning judicial institutions.

Paragraph (2) of the article reinforces the guarantee of free access to justice and ensures the uniform application of constitutional and legislative provisions across the country, stipulating that 'no law may restrict access to justice'.[66]

66 Negru et al., 2012, pp. 101–102.

The imperative to ensure the effective protection of guaranteed rights necessitates adherence to certain procedural obligations. While Article 20 guarantees free access to justice, this right, as a cornerstone of a fair trial, lacks a contextual finality, namely, the assurance of a fair trial. Although Article 4 can be relied upon, which stipulates that constitutional provisions on human rights must be interpreted and applied according to the international instruments to which Moldova is a party, it would be more advantageous to explicitly regulate the right to a fair trial. Such regulation should be clear, accessible and predictable, within the Constitution and the organic laws, to ensure comprehensive protection and a robust framework for the effective exercise of this fundamental right.

Broadly, to guarantee fair and complete access to justice, the state bears specific obligations. These include establishing courts with unlimited jurisdiction to hear and adjudicate cases based on factual and legal grounds, and providing all reasonable means, legal and practical, for individuals to access the courts. To ensure full respect for the right of free access to justice, states must imbue this right with two essential characteristics: effectiveness and accessibility. Effectiveness ensures that the judicial system delivers meaningful outcomes, while accessibility ensures that all individuals, regardless of their circumstances, can reach the courts without undue barriers.

Some scholars argue that free access to justice in the Republic of Moldova is an absolute fundamental principle, applicable to constitutional rights and freedoms, which cannot be restricted by the state. This allows any individual to defend their rights, freedoms and legitimate interests as guaranteed by the Constitution and existing state legislation, with the right to freely appeal for ordinary and constitutional justice. Consequently, individuals should have unrestricted access to all procedural means within ordinary and constitutional justice systems to ensure the fair dispensation of justice.

The case law of the Court of Justice of European Union (CJUE) has established that the right of access to justice is not absolute. It may be subject to restrictions within the margin of appreciation afforded to each state, provided that these restrictions do not undermine the essence of the right. Similarly, the CCM has addressed the admissibility of such limitations. It affirmed that the requirement for prior out-of-court settlement of disputes constitutes a specific condition for exercising the right to bring a case before the court, which applies in particular circumstances, depending on the nature of the dispute. It disagreed with the reference's assertion that these legal provisions violate Article 20, which guarantees free access to justice, by conditioning access to the courts on completing a preliminary procedure that may delay resolution. The CCM clarified that ensuring effective access to justice does not preclude the introduction of legal conditions for admissibility, such as rules concerning jurisdiction, claim time limits, procedural

forms and court fees. Such conditions do not constitute restrictions, provided they are proportionate to the intended purpose and the purpose is legitimate.[67]

To give practical effect and substance to the absolute principle of free access to justice, the legislator developed constitutional norms through organic laws, such as the Code of Civil and Criminal Procedure. These laws provide the detailed legal framework necessary to ensure that the right of individuals to access justice is fully realised, outlining the procedures and mechanisms through which citizens can seek legal redress and have their rights protected. However, although the title of Article 20, 'Free Access to Justice', may be interpreted broadly to encompass access to ordinary and constitutional justice, its paragraph (1), which refers to 'the right to effective satisfaction by the competent courts', pertains solely to ordinary justice. Hence, the CCM is not considered a part of the national court hierarchy. It stands as the sole body of constitutional jurisdiction, autonomous and independent from the legislature, executive and judiciary. Its primary role is to uphold the supremacy of the Constitution, ensure the separation of powers and guarantee the responsibilities of the state towards the citizen and vice versa.[68]

However, Article 53 enshrines the fundamental right of any person harmed by a public authority to seek recognition of their rights, the annulment of abusive administrative acts and reparation for the damage caused. The constitutional basis for challenging acts of public authorities and holding such authorities accountable for violations of legitimate rights and freedoms is supported by Article 52 (the right to petition), and is expressly provided for in Article 53. This right constitutes a constitutional guarantee for the protection of other fundamental rights and freedoms and serves as a legal foundation for exercising various forms of control over the activity of public authorities.[69] The legality of administrative acts is a direct expression of the principle of legality that governs public administration. The exercise of discretionary power by administrative authorities is subject to legal constraints, which require adherence to the principles of legality, impartiality, non-discrimination, proportionality, objectivity and consistency in decision-making.

Administrative acts adopted under discretionary power are not exempt from judicial review. On the contrary, they must be subject to legality control, either *ex post* by administrative courts or, complementarily, through preliminary administrative oversight. Article 53(1) enshrines the fundamental right of individuals to obtain recognition of a violated right. This constitutional norm applies to all legal subjects, natural and legal persons, and concerns that any right may be affected by actions or inactions of public authorities. Notably, the inaction of a public authority is equated with an administrative act capable of producing

67 Constitutional Court Decision No.14 of 15 November 2012, paragraphs 66–69.
68 Carnat and Panchiv, 2019.
69 Negru et al., 2012, p. 209.

negative effects on an individual's rights. The injured person may request, cumulatively or separately, the recognition of the claimed right, the annulment of the act and the compensation for damage, whether material or moral. Recognition of the right and annulment of the act constitute prerequisites for the reparation of damage. In such proceedings, the burden of proving the harm and the existence of the right lies with the petitioner, while the public authority must justify the legality of its act or omission. In other words, the petitioner must demonstrate the causal link between the act of the public authority and the damage suffered.[70]

To implement the constitutional provision, the Law on Administrative Litigation No. 793-XIV was adopted on 10 February 2000. This law was subsequently repealed upon the entry into force of the Code of Administrative Procedure, adopted on 19 July 2018 and effective as of 1 April 2019. Currently, the judicial oversight of public authorities is governed by the Code of Administrative Procedure,[71] following Article 53(1); however, within a modernised procedural framework. In its Decision No. 46 of 21 November 2002,[72] the CCM provided a new interpretation of certain provisions of the now-repealed Administrative Code, maintaining the validity of the underlying constitutional principles while applying the mechanisms established by the new administrative procedural framework.

Within Article 53, conflicts arising from administrative acts may be resolved through several avenues, such as a gracious or hierarchical appeal submitted to the issuing or superior authority; that is, through administrative means, or by judicial means before administrative courts, or through special procedures via constitutional litigation before the CCM.

In the CCM's jurisprudence, a doctrine has emerged regarding administrative acts that are exempt from judicial review.[73] For example, material damage encompasses actual losses and the loss of potential gains, while moral damage includes the suffering caused by violations of a person's non-pecuniary rights. In its Decision No. 46 from 21 November 2002, the CCM acknowledged this broad interpretation, which served as the basis for the subsequent understanding of the notions of moral and material damage, correlating them with the necessity of ensuring effective protection of the individual concerning public authorities. Nevertheless, a legal issue examined in the context of the CCM's Decision No. 46 of 21 November 2002 concerns the constitutionality of Article 13(1) of the Administrative Law No. 793-XIV, as amended by Law No. 726-XV, which limited the exception of illegality solely to administrative acts of a normative nature, excluding those of an individual nature. Hence, the dissenting opinion in the Decision of 21 November 2002[74] criticised this legislative solution on the grounds that it restricted access

70 Ibid., p. 212.
71 Law No. 116 from 19 July 2018 on approval the Administrative Code of Republic of Moldova.
72 Constitutional Court Decision, 2002.
73 Constitutional Court Decision No. 5 of 11 February 2014.
74 Constitutional Court, 2002.

to justice guaranteed by Article 20 by excluding individual administrative acts from the scope of legality control exercised incidentally. The author draws an essential distinction between the 'exception of unconstitutionality' and 'exception of illegality', arguing that excluding individual administrative acts from the scope of the latter is unconstitutional, as it infringes the right to an effective remedy against actions of public authorities, regardless of their normative or individual character.

■ *1.10. Constitutional Duties of Individuals in the Republic of Moldova*

The Constitution outlines five fundamental duties: Exercise of Rights and Freedoms (…without any infringement of the rights and liberties of the others) (Article 55), Faithfulness to the Country (Article 56), Defense of Motherland (Article 57), Financial Contributions (Article 58), Protection of the Environment and Monuments (Article 59). The fundamental duties outlined in Chapter III reflect the principle that individuals, by virtue of being members of society, are obligated to perform certain actions. These duties, inherently linked to the rights and freedoms afforded to individuals, acquire their status as fundamental duties due to their correlative nature with these rights. The reciprocal relationship between duties and rights is logically sound and crucial to the functioning of a legal system. No individual or legal entity can solely claim rights without assuming the corresponding duties.

Title II enshrines both fundamental rights and freedoms and fundamental duties, signifying that the supreme law gives equal consideration to both. Just as rights and freedoms are essential for the individual, fundamental duties are equally vital for the state. For citizens to effectively enjoy the rights granted by the Constitution and the laws, it is necessary to establish certain basic duties that safeguard the state and serve as the guarantor of the rule of law. Consequently, Article 55, entitled 'Exercise of Rights and Freedoms', underscores the importance of this balance. The exercise of constitutional rights and freedoms is conditioned on two key dimensions: good faith and respect for the rights of others.[75] As a constitutional principle, good faith carries significant theoretical and practical implications within public law. Respect for the rights of others serves as an external constraint, preventing the abuse of one's rights and ensuring that the rights of others are not infringed upon.

75 Negru et al., 2012, p. 203.

2. Fundamental Rights Adjudication in the Republic of Moldova

■ *2.1. Bodies Responsible for the Protection of Fundamental Rights*

The Constitution of the Republic of Moldova, adopted on 27 July 1994, expressly stipulates that respecting and protecting the person constitutes a primary duty of the state (Article 16, paragraph (1)). The state ensures the right of every person to know their rights and duties. It publishes and makes accessible all laws and other normative acts (Article 23). Hence, any person has the right to effective satisfaction from the competent courts against acts that violate his rights, freedoms and legitimate interests. No law can limit access to justice (Article 20).

Regarding the *judicial control of the protection of fundamental human rights and freedoms*, the Constitution provides in Article 115 that justice is carried out through the Supreme Court of Justice (SCJ), appeal courts and district courts. According to the law, specialised judges can work for certain categories of cases. The establishment of extraordinary courts is prohibited.

These constitutional provisions were developed through the Law on Judicial Organization,[76] which stipulates, as the courts' duties, the administration of justice for defending and realising the fundamental rights and freedoms of citizens and their associations, enterprises, institutions and organisations. The courts judge shall hear all the civil, administrative and criminal cases, and any other cases for which the law does not provide another competency (Article 4). Every person has the right to effective satisfaction from the competent courts against acts that violate their rights, freedoms and legitimate interests. Citizens' associations, enterprises, institutions and organisations have the right, as established by law, to take action in court for the defence of their legitimate rights and interests that have been violated (Article 6).

The powers of the SCJ of the Republic of Moldova are summarised as follows: a) Examining, as a first instance, the categories of cases established by law; b) Examining, as an appeals court, cases of social and legal importance, and those that reveal particularly serious violations of the law and human rights; c) Examination of review requests in the cases established by law; d) Raising the exceptions of unconstitutionality of the normative acts to be applied to the resolution of a concrete case; e) Solving other types of requests and legal problems provided by law.[77]

To ensure the uniform interpretation and application of legislation in the justice system, the SCJ develops guidelines regarding the application of procedural legislation and the individualisation of criminal penalties and administrative sanctions, issues, at the courts' request, advisory opinions regarding the

76 Law No. 514 of 6 July 1995 on judicial organisation.
77 Law No. 64 of 30 March 2023 on the Supreme Court of Justice.

application of the legislation and decides on the procedure in the interest of the law. The documents issued in this regard are of a recommendation nature and are published on the SCJ's official web page.

Notably, on 9 June 2014, the Plenum of the SCJ adopted the decision regarding the application by the courts of some provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[78] Through this decision, the plenary reiterated that the primary responsibility to ensure respect for the fundamental rights and freedoms provided for by the European Convention, according to the principle of subsidiarity, rests with the state. This principle presupposes that, before appealing to the institutions of the Convention, the claimant must have addressed his complaint to all national institutions that could offer an effective and adequate remedy, since the respondent state 'must first have the opportunity to rectify the situation referred to by its own means and within the national legal system'. The decision of the Plenum offered a series of explanations for the application of the provisions of the European Convention on Human Rights in the domestic legal order. a) *The People's Advocate (Ombudsman)* ensures the respect of human rights and freedoms by public authorities, organisations and enterprises, regardless of the type of property and legal form of organisation, and by persons holding positions of responsibility at all levels. The Ombudsman contributes to the defence of human rights and freedoms by preventing their violation, monitoring and reporting on the way of respecting fundamental human rights and freedoms at the national level, improving the legislation related to human rights and freedoms, international collaboration in this field and promoting human rights and freedoms and their defence mechanisms.[79]
b) *The Equality Council*

The adoption of Law No. 121 on 25 May 2012 concerning the assurance of equality serves to implement the Council of the European Union Directives,[80] creating the legal framework for the prevention and combating of discrimination, while establishing the responsible institutions, including the Equality Council. The Council is an extrajudicial mechanism for the protection of individuals' rights of non-discrimination. According to Article 11(1) of the aforementioned Law, the Council operates as an autonomous budgetary authority, comprising five politically unaffiliated members appointed for a term of five years. Three of these members represent civil society and at least three Council members must hold a law degree.[81] Pursuant to Article 11(3), any individual who is a citizen of the

78 Plenary Session of the Supreme Court of Justice Decision No. 3 of 9 June 2014 on the application by courts of law of certain provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms [Online]. Available at: https://jurisprudenta.csj.md/search_hot_expl.php?id=181 (Accessed: 31 December 2024).

79 Law No. 52 of 3 April 2014 on the Ombudsman.

80 Council of the European Union, 2000a; Council of European Union, 2000b; Council of the European Union, 2004.

81 Art. 11 para. 2 of the Law No. 121 of 25 May 2012 on equality.

Republic of Moldova, possesses higher education, has an impeccable reputation, demonstrates tolerance towards minority groups and has at least five years of recognised activity in human rights protection may apply to become a Council member. Additionally, the individual must not have a negative integrity record over the past five years, must not have failed a professional integrity test and must not be prohibited from holding public office or positions of public dignity.[82] The Council President must notify the Parliament three months before the expiration of the Council members' mandates. For appointing new candidates to the Council, the Parliament establishes a special commission, which organises a public competition. This competition must be held at least 30 days before the expiration of the outgoing members' mandates.[83] The process adheres to the principles of open and transparent competition, equal treatment and diversity.[84] Candidates are interviewed by the special commission, which issues reasoned opinions regarding each selected candidate and presents them to the plenary session of Parliament. Candidates are appointed by a majority vote of the elected deputies.[85]

The Council President is elected by a majority vote of the Council's membership and operates permanently.[86] The status of a Council member ceases upon the expiration of their mandate, resignation, revocation or death. A Council member may be revoked by the Parliament in circumstances that prevent the fulfilment of their mandate or at the request of the Council, adopted by a majority vote of its members, in case of non-performance or improper fulfilment of their duties. A new Council member exercises their role until the expiration of the revoked, resigned or deceased member's mandate.[87] The status of a Council member is suspended by the Parliament if they are formally accused of committing a criminal offence during their duties or an offence related to any form of discrimination.[88] Council members, except the Council President, are convened for meetings by the President and receive a remuneration amounting to 10% of the average national salary for each meeting attended.[89] In its activity, the Council is supported by an administrative staff, and the Council President is entitled to employ staff within their office.[90]

The responsibilities of the Equality Council include analysing the compliance of national legislation with international standards on discrimination

82 Art. 11 para. 3 of the Law No. 121 of 25 May 2012 on equality.
83 Art. 11 para. 4 of the Law No. 121 of 25 May 2012 on equality.
84 Art. 11 para. 6 of the Law No. 121 of 25 May 2012 on equality.
85 Art. 11 para. 8 of the Law No. 121 of 25 May 2012 on equality.
86 Art. 11 para. 11 of the Law No. 121 of 25 May 2012 on equality.
87 Art. 11 para. 9 of the Law No. 121 of 25 May 2012 on equality.
88 Art. 11 para. 10 of the Law No. 121 of 25 May 2012 on equality.
89 Art. 11 paras. 11–12 of the Law No. 121 of 25 May 2012 on equality.
90 Art. 11 paras. 13–131 of the Law No. 121 of 25 May 2012 on equality.

and the right to submit proposals for improving legislation in this regard.[91] The Council contributes to raising awareness and educating society to eliminate discrimination and cooperates with international bodies that have responsibilities in this field.[92] For protection against discrimination, the Council examines related complaints, conducts fact-finding visits regarding the subject of complaints or the implementation of its prescriptions/recommendations, identifies and investigates administrative offences following the provisions of the Code of Administrative Offences and notifies the criminal prosecution authorities in cases of discriminatory acts that meet the elements of a crime.[93] However, the Council can amicably resolve conflicts arising from discriminatory acts.[94]

The Council's budget is developed, approved and managed following the principles, rules and procedures established by legislation on public finances and fiscal-budgetary accountability.[95] Furthermore, the law allows activities for preventing and combating discrimination to be funded from other sources not prohibited by law.[96] The law on equality does not explicitly specify whether complaints submitted to the Council are exempt from state fees. However, it states that individuals who bring court actions related to discriminatory acts are exempt from paying the state fee, with only the stamp duty being applicable, as stipulated by the State Fee Law No. 213/2023.[97]

Any person, regardless of their legal status, and representatives with a legitimate interest in combating discrimination concerning an individual, group or community, may file a complaint with the Council.[98] The complaint can be submitted within one year from the date of the discriminatory act or from the date the complainant became aware or should have become aware of the discriminatory act. In cases of ongoing or prolonged discriminatory acts, the time limit starts from the date of the last action/inaction.[99] Submitting a complaint to the Council does not constitute a mandatory preliminary procedure for bringing the matter before a court. The examination of the complaint by the Council ceases if a similar complaint is filed with the court.[100] The time limit for examining the complaint is 90 days; however, it may be extended by up to 60 days, if additional consultations are required. The burden of proof regarding the absence of discrimination lies with the defendants.[101] Following the examination of the complaint, the Council

91 Art. 12 para. 1 points a)–c) of the Law No. 121 of 25 May 2012 on equality.
92 Art. 12 para. 1 points g)–h) of the Law No. 121 of 25 May 2012 on equality.
93 Art. 12 para. 1 points i)–l) of the Law No. 121 of 25 May 2012 on equality.
94 Art. 12 para. 1 point m) of the Law No. 121 of 25 May 2012 on equality.
95 Art. 11 para. 11 of the Law No. 121 of 25 May 2012 on equality.
96 Art. 22 para. 2 of the Law No. 121 of 25 May 2012 on equality.
97 Art. 21 of the Law No. 121 of 25 May 2012 on equality.
98 Art. 13 para. 1 of the Law No. 121 of 25 May 2012 on equality.
99 Art. 13 para. 3 of the Law No. 121 of 25 May 2012 on equality.
100 Art. 13 para. 4 of the Law No. 121 of 25 May 2012 on equality.
101 Art. 15 para. 1 of the Law No. 121 of 25 May 2012 on equality.

adopts a reasoned decision based on the majority vote of its members. Its decision may include recommendations for ensuring the victim's reinstatement of rights and preventing similar acts in the future. The decision is communicated to the parties within 15 days and takes effect from the date of communication. The defendant is obliged to inform the Council of the remedial measures taken within 30 days.[102] The decisions are published on The Council's website, while ensuring compliance with data protection regulations.[103]

■ *2.2. The Constitutional Court of the Republic of Moldova: Structure, Competences, and Sources of Law*

The development of the draft Constitution in 1994 was conditioned by the need to create a legal framework for evolution towards a state of law and democracy, sovereign and independent, unitary and indivisible. The need to create an independent constitutional authority was expressed by the representatives of the autochthonous doctrine, taken over and implemented by the parliamentary committees and the Commission for finalising the draft Constitution, by introducing a separate title in the Constitution than that of 1994. Thus, Title V of the Constitution conferred that the CCM was the sole authority of constitutional jurisdiction in the territory of the Republic of Moldova, independent from any other public authority and subject only to the Constitution, as a guarantor of the supremacy of the Constitution (Article 134). Simultaneously, the Supreme Law expressly regulates its attributions (Article 135), the status of constitutional judges (Articles 137, 138 and 139) and the legal value of the acts of the CCM (Article 140). Thus, on 23 February 1995, the CCM was created as the first and only authority of constitutional jurisdiction in the history of the Republic of Moldova.[104]

The CCM's activity is currently regulated by the Law on the CCM[105] and Regulations on the Procedure for Examining Petitions Submitted to the CCM[106]. For exercising constitutional jurisdiction, the CCM shall perform the following functional duties: a) Upon referral, it exercises constitutional review of laws and decisions of the Parliament, decrees of the President of the Republic of Moldova, decisions and ordinances of the Government and international treaties to which the Republic of Moldova intends to become a party; b) Interprets the Constitution; c) Delivers opinions on initiatives to revise the Constitution; d) Confirms the results of republican referendums; e) Confirms the results of the election of Parliament and the President of the Republic of Moldova, validates the mandates of Members of Parliament and the President of the Republic of Moldova; f) Determines the

102 Art. 15 para. 5 of the Law No. 121 of 25 May 2012 on equality.
103 Art. 15 para. 7 of the Law No. 121 of 25 May 2012 on equality.
104 Curtea Constituţională a Republicii Moldova, n.d.
105 Law No. 74 of 10 April 2025 on the Constitutional Court.
106 Regulations on the Procedure for Examining Petitions Submitted to the Constitutional Court.

circumstances that justify the dissolution of the Parliament, the dismissal of the President of the Republic of Moldova, the interim in the office of the President or the impossibility of the President of the Republic of Moldova to exercise their duties for more than 60 days; g) Settles exceptions of unconstitutionality of the normative acts mentioned under point a), upon referral by the courts of law; h) Rules on matters regarding the constitutionality of a political party.

■ *2.3. Roles of the Constitutional Court in Fundamental Rights Protection*

The CCM, being the authority of constitutional jurisdiction in human rights, is most often called upon to express itself on the exceptions of unconstitutionality, which is a procedure initiated by ordinary courts, at the initiative of the parties or *ex officio,* of the control of compliance of a law or another normative act with the constitutional norms. It reflects the existence of the triangular relationship between the party in the process, the court, in front of which the unconstitutionality is invoked, and the CCM, called to resolve the exception of unconstitutionality. The exception constitutes a constitutional guarantee of the rights and freedoms conferred on citizens for their defence against possible deviations of the legislator by establishing norms contrary to the Constitution. The CCM, as the guarantor of the supremacy of the Constitution, becomes the guarantor of these rights and freedoms.

Hence, by the Decision No. 2 of the CCM of 9 February 2016, for the interpretation of Article 135 paragraph (1) lit. a) to lit. g) of the Constitution, the method of application of the institution of the exception of unconstitutionality was explained.[107] The CCM acknowledged the possibility of limited *ex ante* constitutional review under certain circumstances. Although it generally exercises review after the adoption of legal acts, it may intervene before their entry into force, provided a timely challenge is filed and it issues a suspension to prevent unconstitutional effects. This protective mechanism was exemplified in the 2020 ruling on the loan agreement with Russia.[108]

■ *2.4. Role of the Supreme Court and Ordinary Courts in Fundamental Rights Protection*

In the Republic of Moldova, the SCJ and other ordinary courts do not have the authority to review norms or rule on constitutional complaints. This jurisdiction is exclusively vested in the CCM. However, the CCM may be seized with an exception of unconstitutionality by judges/panels of judges from the SCJ, the courts of appeal and the courts of first instance. Thus, while ordinary courts do not directly rule on constitutional complaints, they play a crucial role in identifying potential constitutional issues and referring them to the CCM.

107 Curtea Constituţională a Republicii Moldova, 2016.
108 Constitutional Court Decision No. 12 of 7 May 2020.

Under the provisions of the Law on the SCJ, adopted on 30 March 2023, the court has the following responsibilities: a) Examines, as the first instance, the categories of cases established by law; b) Examines, as an appellate court, cases of social and legal importance, and those that reveal particularly serious violations of the law and human rights; c) Examines requests for revision in cases established by law; d) Raises exceptions of unconstitutionality of normative acts to be applied in the resolution of a specific case; e) Resolves other types of requests and legal issues provided by law.

■ *2.5. Exercise of Powers by the Constitutional Court and Other Bodies: Annual Statistics*

The statistical data presented by the CCM shows that 293 referrals were recorded in 2021, 234 in 2022 and 282 in 2023. In 2024, the CCM received 331 referrals. Additionally, 77 referrals were carried over from 2023 and 180 referrals were transferred to be reviewed in 2025. Most of the referrals submitted in 2024 originated from the courts of law (296 referrals), followed by members of Parliament and parliamentary factions (20 referrals). In the same year, the CCM issued 26 decisions, including 1 decision on the interpretation of constitutional provisions, 8 decisions on the constitutional review of normative acts, 7 decisions concerning exceptions of unconstitutionality, 7 decisions on the validation of parliamentary mandates, 1 decision confirming the results of the republican constitutional referendum, 1 decision confirming the results of the presidential election and validating the President's mandate and 1 decision approving the Court's annual report.

In the majority of the 2024 rulings, the Court declared the contested normative provisions unconstitutional. A comparative dynamic analysis of the Court's activity shows that, as in previous years, exceptions of unconstitutionality prevailed among the submitted referrals. In 2024, they accounted for 89% of the total referrals. By subject matter, most referrals submitted in 2024 concerned normative provisions related to political rights, followed by administrative, civil and criminal law, and social, economic and cultural rights. Furthermore, the number of referrals submitted to the CCM in 2024 was higher than the previous year. While 282 referrals were registered in 2023, 331 were registered in 2024.[109]

In 2024, the CCM adopted 26 judgments, 1 advisory opinion, 9 decisions rejecting requests to suspend the application of certain provisions, 160 inadmissibility decisions, 1 decision admitting a request for suspension and 1 decision to discontinue proceedings. Overall, this activity reflects the CCM's continued focus on constitutional review and the filtering of unsubstantiated claims.

109 Constitutional Court Decision on the Approval of the Report Regarding the Exercise of Constitutional Jurisdiction in 2024.

■ *2.6. Role of the President of the Constitutional Court of Moldova*

Regarding the Court's judicial activity, the duties of the President of the CCM include, among others, convening and presiding over the sessions of the Court and assigning referrals for examination. The decision to suspend the application of a contested act is adopted by the plenary of the CCM, with the majority vote of the judges present. If convening the plenary is not possible, the suspension decision may be issued by an order of the President of the CCM, subject to mandatory subsequent confirmation by the plenary. In other cases, within the context of the CCM's judicial activity, there are no provisions establishing a dominant role for the CCM President in the event of a tie vote.

■ *2.7. Role of the Rapporteur Judge and Advisory Staff*

After the CCM decides to accept a referral for examination and includes it on the agenda, its President designates a judge as the rapporteur, sets the deadline for examining the referral and presenting the report. The rapporteur judge examines the submitted referral and drafts a decision about its (in)admissibility. In examining the referral, the rapporteur judge may be assisted by other CCM staff members. The draft decision on (in)admissibility is sent via the CCM's official email to the constitutional judges for examination in the plenary.

The rapporteur judge drafts the proposed constitutional jurisdiction act and submits it to the CCM's plenary. The examination of the case begins with a brief presentation of the essence of the referral by the rapporteur judge. The President gives the floor to the parties. The author of the referral is the first to present their position, followed by the representatives of the authorities present. The judges of the CCM deliberate in the deliberation room, which is kept a secret. After the deliberations are concluded, the President of the session puts the proposals of the rapporteur judge and those of the other judges to vote. Judges are not allowed to abstain from voting. The acts of the CCM are adopted by a majority vote of the judges.

From a legal sociology perspective, the advisory staff, particularly judicial advisors, in the CCM provide essential professional and technical support to judges, including the rapporteur judge. Their role is advisory, not binding; the rapporteur judge may be assisted by them in examining the case and drafting decisions; however, the judge retains full discretion in presenting and defending their proposals before the plenary. The advisory staff ensures high-quality reasoning, yet does not dictate judicial outcomes.

■ *2.8. Relationship Between Ordinary Courts and the Constitutional Court*

The procedure of raising the exception of unconstitutionality allows ordinary courts, either at the initiative of the parties or on their own motion, to review the compatibility of a law or other normative act with constitutional principles. The process reflects a triangular relationship between the party involved in the

proceedings, the court hearing the case and the CCM, which is tasked with adjudicating the constitutionality of the challenged legal provision. In the CCM, the decision clarified the procedure for applying the exception of unconstitutionality. This decision provided important guidance on how ordinary courts should handle the review of laws or normative acts when their conformity with constitutional provisions was questioned, establishing a framework for invoking the exception of unconstitutionality within the legal system.[110] Thus, in situations where there is uncertainty regarding the constitutionality of a normative act to be applied in the resolution of a case, the court may, of its own accord, or the parties involved in the proceedings, including their representatives whose rights and interests could be affected by the application of an unconstitutional rule, raise the issue of unconstitutionality. This allows for the legal scrutiny of the contested normative act, ensuring that any potentially unconstitutional provisions are addressed before the case is resolved.

The exception of unconstitutionality can be raised in the event of uncertainty regarding the constitutionality of laws, decisions of the Parliament, decrees of the President of the Republic of Moldova and decisions and ordinances of the Government, which are to be applied to the settlement of a case before the court. The exception of unconstitutionality can be raised by: a) The court *ex officio*, which, respecting the principle of the supremacy of the Constitution, is not entitled to apply a norm regarding which there are uncertainties of constitutionality; b) The parties in the process, including their representatives, whose rights and interests may be affected by the application of an unconstitutional rule.

The ordinary judge does not rule on the merits of the referral or the conformity with the Constitution of the contested norms, limiting themselves exclusively to verifying the meeting of the following conditions: a) The object of the exception falls under the category of the documents mentioned above; b) The exception is raised by one of the parties or its representative or indicates that it is raised by the court *ex officio*; c) The challenged provisions are to be applied to the settlement of the case; d) There is no previous decision of the Court regarding the contested provisions.

The verification of the constitutionality of contested norms is the exclusive competence of the CCM. Thus, the ordinary judges are not entitled to deny the parties the referral to the CCM, except in case of failure to meet the mentioned conditions for raising the exception of unconstitutionality. In case of uncertainty regarding the constitutionality of the rules, the court is obliged to refer the matter to the CCM. The referral regarding the control of the constitutionality of some rules to be applied to a case is submitted directly to the CCM by the judges/SCJ judgments, the appeal courts and the courts before which the case is pending.

110 Constitutional Court Decision No. 2 of February 9 2016.

The party that raised the exception of unconstitutionality cannot directly refer the matter to the CCM.

From the moment the court issues a conclusion regarding the lifting of the exception of unconstitutionality and until the adoption of the CCM's decision, the examination procedure of the case is suspended. For the broad examination of all the circumstances, the notification regarding the exception of unconstitutionality is presented to the CCM together with the case file, in which the exception was raised. The examination procedure goes through the following stages: a) Examination of the admissibility of the referral; b) Preparation of the case for examination in the public session of the Court; c) Examination of the case in the public session of the Court.

The referral is supported at the public meeting of the CCM by the judge who raised the exception of unconstitutionality when resolving a case pending before him and the party to the dispute (its representative) if there was an exception raised by the latter. If the exception of unconstitutionality is raised by a panel of judges, the referral will be supported at the public session of the CCM by a judge delegated from the panel. After examining the referral, the CCM declares the challenged norm (un)constitutional. Upon declaration of the unconstitutional norm, it becomes null and void from the moment of adoption of the decision.[111]

■ *2.9. The Impact of ECtHR Jurisprudence and Domestic Constraints on the Protection of Fundamental Rights*

On 9 July 2014, the Plenum of the SCJ adopted the Decision on the application by the courts of certain provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Decision explicitly states that, following the principle of subsidiarity, the primary responsibility for ensuring the respect of the fundamental rights and freedoms provided by the European Convention lies with the state. This principle presumes that, before resorting to the Convention's institutions, claimant must have brought the complaint to all national institutions that could provide an effective and adequate remedy, as the respondent State 'must first be given the opportunity to remedy the situation referred to by its own means and within the framework of the national legal system'.

Hence, the primary responsibility for applying the provisions of the European Convention rests with the national courts. Thus, when adjudicating cases, the courts must verify whether the law or act to be applied, providing for rights and freedoms proclaimed by the European Convention, is compatible with its provisions. In case of incompatibility, the courts shall directly apply the provisions of the European Convention, as noted in the operative part of the judicial decisions issued. Furthermore, the Decision indicates that the courts must take into account

111 Curtea Constituţională a Republicii Moldova, 2016.

that decisions, actions (or inactions) of state authorities, local public administration authorities, persons in positions of responsibility, judges, including criminal investigators and prosecutors, and state or municipal officials, must comply with the legislation of the Republic of Moldova and the universally recognised general principles, norms of international law and international treaties ratified by the Republic of Moldova, including the European Convention and its Protocols, as interpreted by the European Court of Human Rights.

In this field, we find it appropriate to express our views on a category of cases initiated at the ECtHR by applicants from the Republic of Moldova against the actions of the self-proclaimed authorities in the Transnistrian region. Starting with the first case examined by the ECtHR, we follow how the ECtHR admits the applications submitted against the governments of the Russian Federation and the Republic of Moldova, declaring them admissible, as they concern violations of the rights guaranteed by the Convention. Simultaneously, in establishing the jurisdiction of the Republic of Moldova under Article 1 of the Convention, the reasoning established in the case of *Ilașco and Others v. Moldova and Russia*[112] is repeated, namely the Court considers that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, does not exercise authority over part of its territory, which is under the effective control of the 'Moldavian Republic of Transdniestria'. Hence, the Russian Federation was held responsible in the case of *Ilașcu and Others* and the cases subsequently submitted to the ECtHR's jurisdiction, where the applicants invoked violations on the left bank of the Dniester River of the right to education,[113] illegal detention and inhuman and degrading treatment in coercive contexts within detention facilities in Transnistria,[114] the right to life,[115] protection of property,[116] etc.

Regarding the execution of ECtHR judgments by the Republic of Moldova, in 2023, the Committee of Ministers received 29 cases against the Republic of Moldova from the ECtHR for supervision of their execution (compared to 37 in 2022 and 54 in 2021). The cases in which the Russian Federation was held responsible for human rights violations in the Transnistrian region (particularly, *Catan and Others, Mozer*) have not been executed by that state and the situation is being monitored by the Committee of Ministers of the CoE.

112 Case of Ilaşcu and Others V. Moldova and Russia, Application No. 48787/99, Judgment 8 July 2004.

113 Case of Catan and Others v. the Republic of Moldova and Russia, Application Nos. 43370/04 and others, Judgement 19 October 2012.

114 Case of Mozer V. the Republic of Moldova and Russia, Application No. 11138/10, Judgment 23 February 2016.

115 Case of Pisari v. the Republic of Moldova and Russia, Application No. 42139/12, Judgment 21 April 2015.

116 Case of Turturica and Casian v. Moldova and Russia, Application Nos. 28648/06 and 18832/07, Judgment, 30 January 2017; Case of Pădureț v. Moldova and Russia, Application No. 26626/11, Judgment 13 November 2017.

■ ***2.10. Legal Consequences of Constitutional Court Decisions in Moldova***

The *erga omnes* opposability of the decisions of the CCM implies the constitutional obligation of all authorities to apply the decisions of the Court to the situations in which the rules declared unconstitutional have incidence. The decisions are opposable to the parties *in concreto* in the process in which the exception of unconstitutionality was raised and the third parties *in abstracto*.[117]

3. Conclusion

The national human rights protection system essentially resides in the provisions of the international treaties ratified by the Republic of Moldova. Its Constitution enshrines the primacy of international law, particularly concerning fundamental human rights and freedoms, as outlined in the treaties to which the state is a party. Although the normative and institutional frameworks largely address the contemporary challenges in human rights, we cannot say the same about the process of implementing these normative provisions. Moreover, 'access to justice' continues to be a goal for a significant part of the state's population due to poverty and the lack of effective government control in the Transnistrian region.

The recent completion of the screening process for accession to the European Union, reflected in the European Commission's Report on the Republic of Moldova published in November 2025, highlights that, despite the reforms undertaken in the field of fundamental rights, significant shortcomings persist in the protection of children, persons with disabilities, women, and minorities. In this context, the European Commission put forward a series of targeted recommendations aimed at addressing these deficiencies. The Moldovan authorities have demonstrated a considerable degree of openness and responsiveness to these recommendations, which in turn reflects the State's clear intention to align its national legal order with the high standards of human rights protection required by the European Union.

117 Curtea Constituţională a Republicii Moldova, 2016.

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ZSOLT FEGYVERESI*

Human Rights from a Central and Eastern European Perspective: Romania's Country Report

ABSTRACT: *This study explores the structure and effectiveness of Romania's national human rights system within the broader context of Central and Eastern Europe. The study examines the constitutional foundations of human rights, the role of key institutions such as the Constitutional Court, the People's Advocate, and the Romanian Institute for Human Rights (IRDO), and their impact on fundamental rights adjudication. While Romania has made significant progress in aligning its legal framework with international human rights standards, challenges remain in the enforcement and practical implementation of these rights. The absence of an individual constitutional complaint mechanism, political influences on national human rights institutions, and inefficiencies in law enforcement mechanisms continue to hinder the full realisation of human rights protections. To this end, enhancing institutional autonomy, improving judicial enforcement, and strengthening the integration of international human rights obligations are imperative for the advancement of human rights protection in Romania.*

KEYWORDS: *human rights, Romania, constitutional law, national human rights institutions, fundamental rights adjudication*

1. Introduction

Human rights represent the foundation of any democratic society and an essential pillar of the rule of law. Within the Romanian constitutional framework and in international treaties to which the state is a party, these rights are enshrined, reflecting a firm commitment to protecting and promoting human dignity, freedom, equality, justice, solidarity, the rule of law, and respect for human life,

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https://doi.org/10.47078/2026.1.83-113

as well as physical and moral integrity. The fundamental rights and freedoms of individuals are set out in Title II of Romania's Constitution,[1] providing a solid legal framework for the protection of essential values, such as the right to life, liberty, freedom of expression, and a fair trial. This constitutional enshrinement delineates the limits and obligations of the State, as well as the guarantees to ensure effective respect for fundamental rights.

The perception of human rights in Romania is shaped by historical developments and the dynamics of the post-communist transition to a democratic state. Social and legal transformations since 1989 have emphasised the importance of respecting fundamental rights and civil liberties. However, public perceptions of human rights are also influenced by factors such as the level of legal education, economic and cultural challenges, and the manner in which state institutions handle complaints about violations. While progress has been made, challenges persist regarding discrimination, access to justice, and equal opportunities.

National human rights institutions (NHRIs) play a key role in promoting and enforcing human rights. Both the People's Advocate Institution (Instituția Avocatul Poporului) and the Romanian Institute for Human Rights (Institutul Român pentru Drepturile Omului, IRDO) have mandates in the general field of human rights, but their competences differ. The People's Advocate, an ombudsman-type institution, possesses extensive powers to investigate cases of violations of fundamental rights and make recommendations to remedy such situations, whereas the IRDO contributes to the dissemination of information and human rights education, promoting a culture of respect for human dignity. Collectively, these institutions, together with other governmental and non-governmental organisations, establish a comprehensive mechanism for monitoring and protecting fundamental rights in Romania.

The Romanian Constitutional Court (Curtea Constituțională a României), as the guarantor of the supremacy of the Constitution, plays a pivotal role in protecting fundamental rights. Through its duties, the Court contributes to the correct interpretation and application of constitutional provisions on fundamental rights and freedoms. In this capacity, it analyses the constitutionality of laws and other normative acts, preventing the application of provisions that might violate rights guaranteed by the Constitution. The Court's decisions have a direct impact on the protection of fundamental rights, setting standards of interpretation that are binding on all public authorities and courts. Furthermore, the Constitutional Court plays an active role in aligning domestic legislation with international human rights standards by applying the provisions of Art. 20 of the Constitution, which provide that international treaties on fundamental rights prevail in the

1 The Constitution of Romania (republished in 2003), published in the Official Gazette, Part I No. 767 of October 31, 2003 [Online]. Available at: https://www.cdep.ro/pls/dic/site.page?id=339 (Accessed: 15 January 2025).

event of conflict with domestic law. The Court has repeatedly emphasised the significance of Romania's international obligations and has advocated interpretations that align with international norms, thereby contributing to the harmonisation of domestic legislation with European and international standards.

This analysis aims to examine how human rights are reflected and protected in Romania, commencing with constitutional provisions and concluding with the role of institutions dedicated to this field. The discussion focuses on the Constitutional Court's role in ensuring the supremacy of fundamental rights within a dynamic national and international legal framework. It concludes with an assessment of the progress achieved and the obstacles that remain in fully implementing human rights standards in Romanian society.

2. The Protection of Fundamental Rights in the Constitution of Romania

In the context of Romanian law, the terms 'human rights', 'fundamental rights', and 'constitutional rights' may possess distinct meanings, despite referring to interconnected concepts. Without delving into the intricate historical progression of these concepts, it is imperative to delineate their fundamental meanings.

Human rights are understood as a limited set of prerogatives belonging to individuals by virtue of their status as human beings. These rights, both moral and legal in nature, are based on human dignity and primarily aim to protect individuals against state abuses while ensuring freedom of participation in social and political life. The extant literature asserts that the scope of human rights is narrower than the totality of rights recognised to individuals, implying that not every subjective right qualifies as a human right. These rights are characterised by a dual nature, being both moral and subjective, and are founded on recognition of the inherent dignity of every person, who merits treatment befitting their human condition.[2]

In Romanian law and legal doctrine, the term 'human rights' is frequently employed to denote public freedoms, a concept that encompasses both freedoms and human rights. It is also pertinent to note that human rights are intricately interwoven with public law. Expressions such as 'human rights' and 'fundamental rights' appear frequently in legal doctrine.[3] The Constitution employs the term 'fundamental rights' when discussing essential human rights – such as the right to life, the right to defense, and the right to vote[4] – and 'fundamental freedoms'

2 Varga, 2019, p. 183.
3 Iancu, 2003, p. 3; Muraru and Iancu, 1992, pp. 5–6.
4 Spătaru-Negură, 2024, p. 6.

when regulating individual liberty, freedom of conscience, freedom of expression, and similar rights.[5]

A question arises as to whether there is a legal distinction between the concepts of rights and freedoms. The prevailing opinion, in accordance with Hans Kelsen's legal theory, asserts the absence of any legal distinction between the two terms, positing that they collectively denote a singular legal category, namely rights.[6] In contrast, an alternative viewpoint asserts substantial differences between rights and freedoms. Rights pertain to negative obligations imposed on individuals to refrain from actions that might impede their exercise, whereas freedoms encompass both negative and positive obligations, including correlative actions by other individuals or the state. The content of a right is clearly regulated by law, defining the prerogatives of the holder and the corresponding obligations, whereas freedom is more open-ended and less delimited. Freedom is considered prior to law, being a natural condition, while law serves as a form of limitation and regulation of freedom. While rights are subject to legal limitations, absolute freedoms – such as freedom of thought and conscience – cannot be restricted.[7]

From a terminological perspective, a distinction must be made between human rights and citizens' rights. Human rights refer to universal prerogatives inherent to all human beings, while citizens' rights indicate that an individual, within a national legal system, becomes part of a political community. This status entails integration into a structured framework of legal principles and public institutions designed to protect and facilitate the exercise of these rights.[8] It is also important to distinguish between citizens' rights and fundamental human rights. While fundamental rights are recognised for all individuals within a state's territory, irrespective of nationality, citizens' rights pertain primarily to political and participatory rights available exclusively to citizens of that state.[9]

The term 'constitutional rights' refers to the set of fundamental rights and freedoms enshrined and guaranteed by the Constitution. In legal literature, it is also used as a synonym for fundamental rights, though it represents a broader concept. Constitutional rights include all subjective rights based on the Constitution, including those that do not fall under fundamental human rights.[10] They may therefore encompass both fundamental rights and other rights specific to the domestic constitutional order. Constitutional rights have a binding nature and enjoy the highest form of legal protection. They are defended through domestic constitutional mechanisms, particularly through the Constitutional Court,

5 Iancu, 2003, p. 2.
6 Muraru and Tănăsescu, 2002, p. 162; Iancu, 2003, p. 2; Bîrsan, 2005, p. 13; Safta, 2023, p. 227.
7 Dabu and Gusanu, 2013, pp. 288–290.
8 Safta, 2023, p. 226.
9 Halmai and Tóth, 2003, p. 29.
10 Varga, 2019, p. 184.

which ensures that legislation and normative acts comply with constitutional principles and provisions.

The Romanian Constitution dedicates a separate title to the fundamental rights, freedoms, and duties of citizens. Chapters within Title II of the Constitution, in addition to enumerating these rights, freedoms, and duties, also delineate the underlying principles that govern their exercise and guarantee, along with the mechanisms to ensure their respect. The Constitutional Court has ruled that Arts. 21–52 of the Constitution enumerate fundamental rights and freedoms exclusively, without implying that these rights and freedoms are confined to this catalogue. These rights and freedoms are defined as fundamental, i.e., those explicitly enumerated or nominated. Consequently, when a constitutional text encompasses a supreme value of a constitutional nature, which is itself a guiding principle and/or a fundamental right or freedom, as defined by the Constitutional Court, the catalogue stipulated in Title II of the Constitution is correspondingly shaped.[11] This Title also defines the limits and conditions under which these rights may be restricted, in accordance with Art. 53, which regulates the limitation of the exercise of certain rights or freedoms. The concluding chapter of this Title delineates the role, powers, and mechanisms through which the People's Advocate contributes to the protection of citizens' fundamental rights and freedoms.

The relationship between international and domestic law is established by two constitutional provisions. Art. 11 of the Constitution stipulates that the Romanian state is bound by the terms of treaties to which it is a party, and that such treaties, once ratified by Parliament in accordance with the law, become an integral component of domestic law. Moreover, the Constitution stipulates that if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, it can be ratified only after the Constitution has been revised. Another constitutional text, Art. 20, on international human rights treaties, states that citizens' rights and freedoms must be interpreted and applied in accordance with the Universal Declaration of Human Rights and the international covenants and treaties to which Romania is a party. In instances where discrepancies arise between these international covenants and treaties on fundamental human rights and domestic legislation, the international provisions take precedence, unless the Constitution or domestic legislation provides more favourable provisions.[12] With regard to Romania's ratification of the European Convention on Human Rights, the Constitutional Court, in a decision fully consistent with Art. 20,

11 Decision No. 464 of July 18, 2019, published in the Official Monitor of Romania, Part I, No 646 of July 18, 2019.

12 Constitution of Romania (republished in 2003), published in the Official Journal of Romania, Part I, No. 767 of October 31, 2003, Arts. 11 and 20.

established that this Convention is part of domestic law, so references to any of its texts are subject to the same regime as the provisions of the Basic Law.[13]

In accordance with Art. 58 of the Constitution, the function of the People's Advocate is to ensure the protection of the rights and freedoms of individuals against any form of abuse by public authorities.[14] Notably, the constitutional text is not limited to the protection of Romanian citizens' rights and freedoms; it extends this protection to all natural persons, including foreign citizens and stateless persons residing in Romania.[15] The Constitution primarily reflects a vertical conception of the functioning of fundamental rights, protecting individuals in their relations with the State. The normative, institutional, and jurisdictional guarantees provided by the State ensure the protection of these rights in the event of abuses by authorities or other public agents. Concurrently, the Basic Law permits a horizontal approach, whereby the State functions as an impartial arbiter between individual subjects of law. This function is primarily executed through the courts, which oversee disputes arising between holders of fundamental rights. As documented in the relevant literature, conflicts between fundamental rights, whether vertical or horizontal, require resolution, given that all these rights possess equivalent legal value.[16]

The Constitution of Romania guarantees fundamental rights and freedoms to all persons within its territory, regardless of citizenship, nationality, gender, religion, ethnic origin, or political orientation. This comprehensive protection is enshrined in provisions such as the principle of equality before the law and public authorities without privilege or discrimination (Art. 16 para. (1)), and the right of foreign citizens and stateless persons to benefit from the general protection of persons and property (Art. 18 para. (1)).

In addition to this general protection, the Constitution explicitly mentions certain groups that benefit from special protection. Children and young people are particularly protected, with rights to education, social assistance, and conditions enabling their physical and moral development (Art. 49). Persons with disabilities

13 Decision No. 146 of July 14, 2000, published in the Official Journal of Romania, Part I, No. 566 of November 15, 2000.

14 According to the Constitution, the People`s Advocate is not the only institution specifically entrusted with the protection of fundamental rights and freedoms. There are direct constitutional provisions in this respect, as is the case of the Public Prosecutor's Office (Art. 131), but also indirect ones, deriving from specific powers to ensure compliance with the Constitution (e.g., the President of Romania, Art. 80 para. (2), and the Constitutional Court, Art. 142 para. (1).

15 Niculescu, 2023, p. 54.

16 Muraru and Tănăsescu, 2008, p. 563. Two other constitutional provisions are essential for protecting fundamental rights and freedoms. The first is Article 115 para. (6) which prohibits the government from adopting emergency ordinances affecting the rights, freedoms, and duties set out in the Constitution. The second is contained in Art. 152 para. (2), which states that 'No revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof.'

are to be protected by special measures designed to guarantee their social and professional integration. The State is obligated to implement a national policy of equal opportunities, prevention, and treatment of disability, with a view to the effective participation of persons with disabilities in community life. This policy must respect the rights and duties of parents and guardians (Art. 50). In a ruling by the Constitutional Court, this special protection is required to be adequate, real, effective, and concrete, not theoretical or illusory.[17]

The Constitution also stipulates measures of social protection for employees while establishing special protection measures for women, young people, and persons with disabilities (Art. 41 para. (2)). These specific measures are further delineated in the Labor Code and various special laws. National minorities are also beneficiaries of special protection measures, with the right to preserve, develop, and express their cultural, linguistic, and religious identity recognised (Art. 6).

The status of the individual in the state is defined by a set of constitutional principles governing the fundamental rights, freedoms, and duties of citizens. The Constitution places significant emphasis on human dignity as a paramount value, as articulated in Art. 1 para. (3), which stipulates that Romania is a democratic and social State governed by the rule of law, founded on respect for human dignity, fundamental rights, and freedoms. This value constitutes the foundation of the legal protection afforded to the individual and underpins the system of fundamental rights.[18] In a 2010 ruling, the Constitutional Court determined that the free development of human personality and human dignity, values enshrined in Art. 1 para. (3), cannot be conceived without respect for and protection of privacy.[19]

Art. 15 para. (1) of the Constitution stipulates that citizens are entitled to the rights and freedoms set out therein and in other laws, along with the corresponding obligations. This constitutional provision expresses the principle of the universality of rights and freedoms, which also implies the universality of duties. Legal scholarship has emphasised that Art. 15 underscores the inextricable linkage between rights, freedoms, and duties, highlighting their interdependence. The concept of duties as guarantees of rights underscores the necessity of exertion, creation, and participation to fully enjoy the rights enshrined in the Constitution.[20]

Another constitutional principle relating to fundamental rights, freedoms, and duties is the principle of non-retroactivity of the law, enshrined in Art. 15 para. (2). In its judicial practice, the Constitutional Court has held that this principle has

17 Decision No. 906 of December 16, 2020, published in the Official Monitor of Romania, Part I, No. 79 of January 25, 2021.

18 Muraru and Tănăsescu, 2008, p. 17.

19 Decision No. 415 of April 14, 2010, published in the Official Monitor of Romania, Part I, No. 294 of May 5, 2010.

20 Muraru and Tănăsescu, 2008, pp. 137–138.

particularly important implications, which is why it is rarely found in other constitutions. Its elevation to the status of a constitutional principle is fully justified, as it contributes significantly to ensuring legal certainty and enhancing citizens' confidence in the legal system. The principle of non-retroactivity also prevents violations of the separation of powers by prohibiting interference between legislative, judicial, and executive functions, thereby strengthening the rule of law.[21] It is important to note that this principle applies not only to the Constitution but also to substantive and procedural law.[22]

In accordance with the principle of equal rights, as enshrined in Art. 16 paras. (1)–(2), all citizens are entitled to equal treatment before the law and public authorities, and any privilege or discrimination is prohibited. The principle also underscores the notion that no individual is above the law. The Constitutional Court has established that a violation of the principle of equality and non-discrimination occurs when differential treatment is applied to equal cases without an objective and reasonable justification or when there is a disproportion between the aim pursued by the unequal treatment and the means used to achieve it.[23]

Art. 21 of the Constitution establishes the principle of free access to justice. Every individual has the right to seek recourse to justice for the protection of their rights, freedoms, and legitimate interests, without restriction by any law. Furthermore, the right to a fair trial, including the right to have cases decided within a reasonable timeframe, is recognised. This principle is reinforced by international regulations guaranteeing free access to justice, as evidenced in the literature. Following the 2003 revision of the Constitution, new guarantees were introduced in line with international standards, including Art. 6 of the European Convention on Human Rights, which enshrines the right to a fair trial and to have cases decided within a reasonable time.

The Constitutional Court has held that free access to justice is not only a constitutional principle but also a right inherent in every individual.[24] In a decision on the exception of unconstitutionality of a provision of the Code of Civil Procedure, the Court determined that free access to justice implies access to the procedural means by which justice is done. In addressing the compatibility of special procedures or procedural particularities for exercising the parties' procedural rights with the principle of free access to justice, the Court held that the establishment of rules governing the conduct of proceedings before the courts is an exclusive prerogative of the legislature.[25]

21 Decision No. 9 of March 7, 1994, published in the Official Journal of Romania, Part I, No. 326 of November 25, 1994.

22 Toader and Safta, 2013, p. 4.

23 Decision No. 107 of November 1, 1995, published in the Official Journal of Romania, Part I, No. 27 of March 12, 1996.

24 Safta, 2023, pp. 256–257.

25 Decision No. 1 of February 8, 1994, published in the Official Journal of Romania, Part I, No. 69 of March 16, 1994.

In a separate, pertinent ruling, the Court determined that the right to access justice, as enshrined in Art. 21 of the Constitution, ensures that every individual may approach the courts when they believe that their rights, freedoms, or legitimate interests have been violated. However, this principle does not imply unconditional access to justice; the legislature retains the prerogative to establish the regulations governing the conduct of proceedings before the courts.[26]

It is also imperative to emphasise the fundamental principle that limitations on the exercise of specific rights or liberties may only be imposed in exceptional circumstances. The Constitution explicitly and comprehensively delineates the circumstances that justify such restrictions. As articulated in Art. 53, restrictions are permissible solely through legislative means and exclusively when necessary to safeguard national security, maintain public order, promote public health or morals, protect citizens' rights and liberties, conduct criminal investigations, or mitigate the consequences of natural calamities, disasters, or particularly grave events.

Such restrictions are permissible only if deemed indispensable, and the measures imposed must be proportionate to the situation that necessitated them, applied in a non-discriminatory manner, and without prejudice to the existence of the right or freedom itself. The Constitutional Court has established that, according to the principle of proportionality, any measure must be: appropriate – objectively capable of leading achieving its aim; necessary – indispensable for accomplishing the aim; and proportionate – designed to balance competing interests in relation to the goal. The Court emphasised that each element must be examined in sequence; if a measure does not satisfy any of the three requirements, it is deemed unconstitutional, and further examination of the remaining elements becomes unnecessary. Consequently, the proportionality test must commence by ascertaining whether the legislature's objective is legitimate, as the test only applies to legitimate aims.[27]

The legal reasoning employed by the Constitutional Court for the proportionality test aligns with the case law of numerous European constitutional courts, with the Federal Constitutional Court of Germany serving as a prevailing benchmark. In 2020, in the context of the pandemic, the Constitutional Court ruled in several decisions that impairment or restriction of fundamental rights and freedoms may only be effected by law, formally adopted by Parliament, within

26 Decision No. 573 of September 20, 2018, published in the Official Monitor of Romania, Part I, No. 959 of November 13, 2018.

27 Decision No. 266 of May 21, 2013, published in the Official Monitor of Romania, Part I, No. 443 of July 19, 2013.

reasonable limits, and that the principle of proportionality must be analysed on a case-by-case basis.[28]

As previously stated, the Romanian Constitution dedicates a separate title to the fundamental rights, freedoms, and duties of citizens. A thorough examination of the constitutional provisions reveals a catalogue of fundamental rights and freedoms enjoyed by Romanian citizens. This catalogue includes the right to life and to physical and mental integrity (Art. 22), individual freedom (Art. 23), the right to defense (Art. 24), the right to freedom of movement (Art. 25), the right to protection of family and private life (Art. 26), inviolability of the home (Art. 27), the right to education (Art. 32), access to culture (Art. 33), the right to healthcare (Art. 34), the right to a healthy environment (Art. 35), the right to work and to social protection of work (Arts. 41–42), the right to strike (Art. 43), the right to property (Art. 44), the right to inheritance (Art. 46), economic freedom (Art. 45), the right to a decent standard of living (Art. 47), the right to marry (Art. 48), the right of children and young people to protection and assistance (Art. 49), the right of persons with disabilities to special protection (Art. 50), the right to vote (Art. 36), the right to be elected (Art. 37), freedom of conscience (Art. 29), freedom of expression (Art. 30), the right to information (Art. 31), freedom of assembly (Art. 39), the right of association (Art. 40), freedom of correspondence (Art. 28), the right to petition (Art. 51), the right of persons injured by a public authority (Art. 52).

In Romanian legal doctrine, these fundamental rights and freedoms are categorised according to their content as follows: inviolability rights (right to life, right to physical or mental integrity, individual liberty, etc.); social-economic and cultural rights and freedoms (right to education, right to private property, economic freedom, etc.), exclusively political rights (right to vote, right to be elected); socio-political rights and freedoms (freedom of conscience, freedom of expression, right to information); and guarantee rights (right to petition, right of an individual aggrieved by a public authority).[29]

The establishment of a clear hierarchy among fundamental rights and freedoms is arduous, if not wholly impossible, due to their inherent interdependence and the significance of each in maintaining democratic balance. Nevertheless, certain rights can be regarded as pivotal to the rule of law, particularly because of their impact on the functioning of the state, the safeguarding of human dignity, and the preservation of social cohesion. The right to vote, for instance, is intrinsic to sustaining a functional democratic system, empowering citizens to engage actively in decision-making and to contribute to the legitimacy of public authorities. Likewise, the right to private property serves as a cornerstone of economic

28 Decision No. 152 of May 6, 2020, published in the Official Monitor of Romania, Part I, No. 387 of May 13, 2020. Decision No. 157 of May 13, 2020, published in the Official Monitor of Romania, Part I, No. 397 of May 15, 2020.

29 Safta, 2023, pp. 240–242; Bădescu, 2023, pp. 202–203; Iancu, 2003, pp. 52–53; Muraru and Tănăsescu, 2001, pp. 178–180; Duculescu, 2008, pp. 175–179.

stability, ensuring the protection of private initiative and underpinning economic freedom. Education is recognised as a vital component of social progress, preparing citizens to participate fully in the democratic and economic life of the state. Similarly, the right to health protection contributes directly to the general well-being of society, serving as an indicator of the state's capacity to ensure adequate living conditions for all citizens.

These rights illustrate the manner in which fundamental rights interrelate to underpin the political, social, and economic stability of the state. However, it should be noted that this is not an exhaustive list of fundamental rights and freedoms. Each right performs a distinct function within the legal system, contributing to the strengthening of the rule of law and the protection of its foundational values.

Subjective rights are inextricably intertwined with legal obligations, as both elements constitute the substance of any legal relationship. Fundamental duties are closely linked to fundamental rights and freedoms, reflecting the principle that no individual may invoke rights without also assuming corresponding duties. These duties contribute to the realisation of rights and the achievement of societal aims and are thus essential to social life. They are regarded as fundamental due to their unique significance and are formally recognised in numerous legal instruments, including constitutions. Consequently, fundamental duties are deemed crucial obligations for citizens, the fulfilment of which may be facilitated through both persuasive and coercive measures by the state.[30]

The fundamental duties of citizens are delineated in Chapter 3 of Title II of the Constitution, which stipulates the following: the duty of loyalty to the country (Art. 54), the duty to defend the country (Art. 55), the duty to contribute to public expenses (Art. 56), and the duty to exercise rights and freedoms in good faith (Art. 57). It is imperative that all Romanian citizens, without exception, adhere to these fundamental duties. Additionally, a particular obligation is imposed on both Romanian citizens and foreign nationals residing in the country: the duty set out in Art. 1 para. (5), which stipulates the obligation to respect the Constitution, its supremacy, and the laws.

The regulation of fundamental rights and freedoms in the Romanian Constitution establishes a robust framework that aligns with international standards and is generally sufficient to address contemporary challenges. The Constitution is notable for articulating fundamental principles such as human dignity, equality, access to justice, and the protection of social and economic rights. These principles reflect universal values and correspond to the essential needs of a democratic society. However, in the contemporary context, characterised by digitalisation and global crises, the efficacy of these principles necessitates adaptable interpretations and implementations. While the constitutional framework remains adequate,

30 Bădescu, 2023, p. 191.

its effectiveness is ultimately contingent on the rapid adaptation of legislation and its practical application to emerging realities.

3. Fundamental Rights Adjudication in Romania

The adjudication of fundamental rights in Romania, as well as their defense and guarantee through jurisdictional means, is an essential element of the constitutional and legal framework. Jurisdictional guarantees fall within the category of organised or institutional guarantees, which are designed to protect the fundamental rights and freedoms of citizens.[31] The Constitutional Court of Romania plays a pivotal role in this process by ensuring the supremacy of the Constitution and adjudicating on the constitutionality of laws and ordinances. This contributes directly to the protection of the fundamental rights enshrined in the fundamental law. The constitutionality of laws is reviewed in accordance with Arts. 146-147 of the Constitution and Law No. 47/1992 on the Organisation and Functioning of the Constitutional Court.[32] According to this law, the Constitutional Court is the sole authority in Romania with jurisdiction over constitutional matters. It is autonomous from any public authority and is bound only by the Constitution and the law governing its organisation and functioning.[33]

Concurrently, the ordinary courts are responsible for adjudicating concrete cases involving violations of fundamental rights and freedoms. These courts oversee the interpretation and application of national and international law, with particular emphasis on ensuring that the principles of a fair trial, freedom of expression, property rights, and other fundamental rights are upheld. The High Court of Cassation and Justice plays a pivotal role in this system, as enshrined in Law No. 304/2022 on Judicial Organisation. The Court's primary responsibility is to provide a unifying interpretation and application of the law for all other courts, thereby ensuring that legal principles are uniformly upheld. The High Court's role encompasses the protection of rights through its case law, including appeals in the interest of the law and preliminary rulings.

The ordinary courts – namely, the courts of first instance, tribunals, and courts of appeal – are responsible for protecting fundamental rights by resolving disputes between different parties, including those involving public

31 Iancu, 2003, p. 341.

32 Law No. 47/1992 on the Organisation and Functioning of the Constitutional Court (republished), published in the Official Gazette of Romania, Part I, No. 807 of 3 December 2010.

33 After the 1989 revolution and before the adoption of the 1991 Constitution, which brought the Constitutional Court into the Romanian institutional landscape, the Plenum of the Supreme Court of Justice had the power to review the constitutionality of laws. Following the 2003 revision of the Constitution, the name of the supreme court was changed to the High Court of Cassation and Justice. Puskás and Benke, 2014, pp. 8–9.

administration. These courts, through their administrative litigation divisions, adjudicate complaints against administrative acts.

The Constitution also provides for the establishment of the institution of the People's Advocate, as outlined in Arts. 58–60. The People's Advocate was one of the new institutional structures created by the 1991 Constitution, alongside the Constitutional Court. According to Art. 59 of the Constitution, the People's Advocate exercises their powers ex officio or at the request of persons whose rights and freedoms have been infringed, within the limits established by law. The institution operates on the basis of Law No. 35/1997 on the Organisation and Functioning of the People's Advocate.[34]

The People's Advocate functions as a guarantor of the fundamental rights and freedoms of individuals, with the primary objective of protecting them in their relations with public authorities. The institution draws inspiration from the tradition and experience of the classical Western European Ombudsman model, while adapting it to the national legal and social context. Its primary functions, as delineated in its legal framework, encompass: adjudication of petitions lodged by individuals whose rights or freedoms have been violated by public administration authorities; formulation of perspectives at the behest of the Constitutional Court; submission of requests for summons to court or criminal complaints; referral to the Constitutional Court regarding the unconstitutionality of laws prior to their promulgation; and direct referral to the Constitutional Court of exceptions of unconstitutionality of laws and ordinances.

In order to comprehend the function of the Constitutional Court in ensuring the supremacy of the Constitution, it is necessary to examine the tasks assigned to the institution by Art. 146 of the Constitution. In the field of specialised literature, the Court's powers are classified into two broad categories according to their content. The first category comprises powers to review the constitutionality of certain legislative acts, such as laws and government ordinances. The second category comprises powers relating to the constitutionality of certain activities (legal conflicts of a constitutional nature between public authorities), procedures (presidential elections, referendums), and behaviours or attitudes (the relationship of the President of Romania with the fundamental law).[35]

According to Art. 146 of the Constitution, the Constitutional Court has the following attributions: (a) to rule on the constitutionality of laws before their promulgation, at the request of the President of Romania, one of the Presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the People's Advocate, at the request of at least 50 deputies or at least 25 senators,

34 Law No. 35/1997 (republished) on the organisation and functioning of the People's Advocate Institution, published in the Official Gazette of Romania, Part I, no 181 of 21 February 2018 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocument/11200 (Accessed: 15 January 2025).

35 Safta, 2023, p. 133; Varga, 2019, pp. 124–125; Toader and Safta, 2020, p. 75.

and ex officio on initiatives to revise the Constitution; (b) to rule on the constitutionality of treaties or other international agreements, at the request of one of the Presidents of the two Chambers of at least 50 deputies or at least 25 senators; (c) to rule on the constitutionality of Parliament's Rules of Procedure, at the request of one of the Presidents of the two Chambers, a parliamentary group, or at least 50 deputies or at least 25 senators; (d) to rule on objections of unconstitutionality concerning laws and ordinances raised before the courts of law or commercial arbitration; exceptions of unconstitutionality may also be raised directly by the People's Advocate;

(e) to resolve legal conflicts of a constitutional nature between public authorities, upon request by the President of Romania, one of the Presidents of the two Chambers, the Prime Minister, or the President of the Superior Council of the Magistracy; (f) to ensure that the procedure for the election of the President of Romania is observed and to confirm the results of the vote; (g) to ascertain the existence of circumstances justifying the interim exercise of the office of President of Romania and to communicate its findings to Parliament and the Government; (h) to issue an advisory opinion on the proposal to suspend the President of Romania from office; (i) to ensure compliance with the procedure for organising and holding referendums and to confirm their results; (j) to verify the fulfilment of the conditions for the exercise of legislative initiative by citizens; (k) to render rulings on appeals concerning the constitutionality of a political party.

The constitutional amendment of 2003, stipulated in Art. 146 l (l), introduced the possibility for the organic law – i.e. Law No. 47/1992 on the Organisation and Functioning of the Constitutional Court – to establish other attributions for the Constitutional Court, in addition to those expressly provided for in the constitutional text. This measure was conceived as a more flexible solution for adjusting the regulations to the continuously changing social reality, allowing the Court's powers to be adapted by amending its organic law, without the need for a new revision of the Constitution.[36]

To illustrate this point, the Constitutional Court's powers were expanded through an amendment to Law No. 47/1992 in 2010, which subjected all decisions issued by the Parliament, including those of the plenary of the Senate, the Chamber of Deputies, and the joint chambers, to constitutional review. Under the previous regulation, the Court only ruled on the constitutionality of Parliament's regulations under Art. 146 of the Constitution. This legislative amendment has been the subject of considerable controversy and has sparked widespread debate among legal specialists.

In 2012, an amendment was made to Law No. 47/1992 by the legislator, with the intention of removing the Court's authority to adjudge the constitutionality of Parliament's decisions. In its subsequent ruling on the unconstitutionality of

36 Bădescu, 2023, p. 66; Muraru and Tănăsescu, 2008, pp. 1417–1418.

the aforementioned amendment, the Court determined that the exclusion of all Parliament's decisions from constitutional scrutiny was not founded upon the principles of the rule of law. Instead, it was potentially predicated upon considerations of expediency – a principle that, by its very nature, engenders subjectivity, interpretation, and arbitrariness. The Court further established that interpreting Art. 146 (l) of the Basic Law to mean that the legislature has the possibility of limiting, eliminating, or reducing the powers of the Court, to the detriment of other fundamental provisions, would amount to emptying it of its content – diverting it from the aim of perfecting constitutional democracy, which was pursued by the constituent legislature itself when it revised the Constitution in 2003 – an outcome deemed absolutely unacceptable. Consequently, no amendment to the powers of the Constitutional Court under Art. 146 para. (l) of the Constitution may be made if it has the effect of abolishing, in any circumstances and in breach of fundamental rules, one of those powers.[37]

The Constitutional Court has been known to exercise powers that are not explicitly provided for in formal sources of law; rather, these powers have developed in practice. To illustrate this point, the Court has established a doctrine of 'inadmissibility cases', which precludes it from adjudicating on the merits of certain cases. This doctrine has evolved over time and reflects the Court's interpretation of its own jurisdiction, making a clear distinction between its jurisdiction and that of the legislature or other courts. Furthermore, the Court has established its own limitations in the exercise of constitutional review, including the review of the constitutionality of laws and ordinances as interpreted by the High Court of Cassation and Justice, despite the absence of explicit conferment of this power. This practice has given rise to situations in which the Court itself analyses the constitutionality of legal rules interpreted by the High Court of Cassation and Justice, thus raising questions about the limits of its own jurisdiction.[38]

These two examples demonstrate how the Court has shaped its powers through case law, effectively creating a 'law in action' that goes beyond the strict framework of formal sources of law.

One of the most significant tasks of the Constitutional Court is to guarantee the supremacy of the Constitution by reviewing the constitutionality of normative acts. This fundamental activity of the Court is instrumental in protecting the fundamental rights and freedoms of citizens, maintaining the balance between the powers of the State, and ensuring respect for the principles of the rule of law. The constitutionality of laws may be reviewed in two ways: *a priori*, carried out before the enactment of the legislative act, and *a posteriori*, carried out after it has entered into force, as part of a mechanism for *ex post* verification of compliance

37 Decision No.727 of July 9, 2012, published in the Official Monitor of Romania, Part I, No. 477 of July 12, 2012.

38 Safta, 2022a, pp. 103–106.

with constitutional provisions (exception of unconstitutionality). The normative acts that fall within the competence of the Constitutional Court under Art. 146 (a)–(d) and (j) are: laws adopted by Parliament, international treaties or agreements, Parliament's regulations, legislative initiatives to revise the Constitution, ordinances issued by the Government, and citizens' legislative initiatives.

The *a priori* review of constitutionality is an abstract and direct review, the purpose of which is to verify normative acts that have been adopted by the legislature but not yet promulgated. Law No. 47/1992 on the organisation and functioning of the Constitutional Court, Art. 2 para. (3), provides that the Constitutional Court shall rule exclusively on the constitutionality of the acts referred to it, without the power to amend or supplement the provisions under review. The Constitution stipulates that the President of Romania, the Presidents of the two Chambers of Parliament, the Government, the President of the High Court of Cassation and Justice, the People's Advocate, or a group comprising at least 50 deputies or 25 senators may initiate *a priori* review of the constitutionality of laws. The Court exercises its jurisdiction *ex officio* on initiatives to amend the Constitution.

The jurisdictional procedure for reviewing the constitutionality of laws prior to their promulgation is governed by Arts. 15-18 of Law No. 47/1992. In order to exercise the right to refer a matter to the Court, five days before it is sent for promulgation, the law is communicated to the Government, the High Court of Cassation and Justice, and the People's Advocate, and is deposited with the Secretary General of the Chamber of Deputies and the Secretary General of the Senate. In instances where the law has been adopted through the emergency procedure, the aforementioned deadline is reduced to two days. Once a law has been lodged with the Secretaries-General of the Chambers of Parliament, it is brought to the attention of the plenary of each Chamber within 24 hours, provided that the Chambers of Parliament are in plenary session.

Upon receipt of the notification, the President of the Constitutional Court is required to appoint the judge-rapporteur and the assistant magistrate by means of a resolution, and to set the date on which the debates are to take place. Until the date of the debates, the Presidents of the Chambers, the Government, and the People's Advocate may submit their views in writing, and the Government's views must be submitted under the signature of the Prime Minister. The debate is conducted in the plenary session of the Constitutional Court, with the participation of the Court's judges, and is based on the referral, the relevant documents, and the views received. The analysis focuses not only on the provisions explicitly challenged in the complaint but also on those which are necessarily and obviously indissolubly linked to them. The Court's decision is determined by a majority vote of the judges and communicated to the President of Romania. In the event that the law is deemed unconstitutional, the judgement is conveyed to the Presidents of the two Chambers and the Prime Minister. In instances where the constitutionality of laws is contested prior to their promulgation, the Parliament is obligated to

re-examine the provisions in question, ensuring their alignment with the Constitutional Court's decision.

Following the revision of the Constitution in 2003, the Court, in accordance with Art. 146 (b), was granted the authority to assess the constitutional legitimacy of treaties or other international agreements. Prior to this revision, the Court's capacity to oversee the ratification of international treaties or agreements was constrained by the two forms of constitutional control, namely preventive and subsequent.[39] This is an *a priori* abstract constitutionality review, and referral to the Court is reserved for the Presidents of the two Chambers of Parliament or for at least 50 deputies or 25 senators. Art. In the event that a treaty or international agreement is deemed unconstitutional, it may not be ratified. Furthermore, if its constitutionality has been confirmed, it may not be the subject of an objection of unconstitutionality. This provision establishes the relationship between international treaties and the Constitution, thereby guaranteeing the supremacy of the Constitution. In this context, the constitutionality review is intended either to prevent the ratification of a treaty that contravenes constitutional provisions or to initiate the procedure for revising the Constitution to bring the treaty into line with the fundamental law.

The *a posteriori* review of normative acts, or the resolution of the exception of unconstitutionality, is regulated by Art. 146 (d) of the Constitution and Arts. 29–33 of Law No. 47/1992. Under this type of review, the Constitutional Court adjudicates on objections of unconstitutionality relating to laws, ordinances, or their provisions in force, which are brought before courts of law or commercial arbitration. Additionally, the Court addresses exceptions of unconstitutionality lodged directly by the People's Advocate in the exercise of their constitutional prerogatives.

It is important to note that an objection of unconstitutionality may be raised indirectly by the parties to a dispute before the court, *ex officio* by the court of law or commercial arbitration, by the public prosecutor in cases in which they are a party, and directly before the Constitutional Court by the People's Advocate. It is therefore evident that the Constitutional Court can only be approached in instances where the objection of unconstitutionality has been raised by the court or commercial arbitration tribunal before which it was lodged, or by the People's Advocate. The case may be brought before the Court by a judgement of the court or commercial arbitration tribunal, or by a reasoned address by the People's Advocate.

Legal provisions previously declared unconstitutional by the Constitutional Court in a prior decision may not be subject to an objection of unconstitutionality. Furthermore, decisions handed down within the framework of constitutional review that reject an objection of unconstitutionality do not prevent its repetition

39 Safta, 2022b, p. 391.

by other parties on grounds different from those previously examined. In such cases, the new objection does not fall within the scope of the earlier rejection. Consequently, a potential decision to uphold the objection would not contradict the earlier judgement but would instead reflect the evolution of the constitutional framework of society over time.[40]

Should the objection be deemed inadmissible, the court is required to reject the request to refer the matter to the Constitutional Court by means of a reasoned judgement. The judgement may be appealed only to the immediately higher court within 48 hours of its delivery, and the appeal must be heard within three days.

In a recent decision, the Court analysed the exception of unconstitutionality of the provisions of Art. 29 para. (5) of Law No. 47/1992 on the Organisation and Functioning of the Constitutional Court. It determined that the provisions in question

> are procedural rules which the court before which the objection of unconstitutionality has been raised is obliged to apply in order to select only those objections of unconstitutionality which, according to the law, may be subject to constitutional review by the Constitutional Court, the sole authority of constitutional jurisdiction. This procedural mechanism serves to ensure that adjudication on the application to the Constitutional Court is confined to the specific circumstances in which it has been initiated, thereby fulfilling the court's role as a filter for the objection of unconstitutionality raised by the parties.[41]

By this decision, the Court reaffirmed the role of the courts as a procedural filter in matters concerning exceptions of unconstitutionality, emphasising that the provisions of Law No. 47/1992 are purely procedural. The courts are obliged to apply these rules to select only those exceptions that meet the legal conditions for constitutional review. This procedural step does not affect the exclusive competence of the Constitutional Court to exercise constitutional review; rather, it ensures the efficient sorting of raised exceptions and prevents misuse of this legal mechanism.

The objection of unconstitutionality must demonstrate a direct connection with the case under consideration by the court, thereby distinguishing it from abstract review and bestowing upon it the characteristics of a concrete review of the rules.[42] Following the referral, the President of the Constitutional Court is responsible for appointing the Judge-Rapporteur and notifying the Presidents of

40 Muraru and Vlădoiu, 2019, p. 170.
41 Decision No. 201 of April 20, 2023, published in the Official Monitor of Romania, Part I, No. 725 of August 7, 2023.
42 Varga, 2019, p. 127.

the two Chambers of Parliament, the Government, and the People's Advocate of the date by which they may submit their views. The Judge-Rapporteur must take the necessary measures for the taking of evidence by the date of the trial, which takes place within the time limit set, based on the documents in the case file. The attendance of the public prosecutor at the trial is mandatory, and the parties may be represented by lawyers. If an objection is upheld, the Court is obligated to deliver a ruling on the constitutionality of other provisions of the contested act that cannot be dissociated from those referenced in the application.

Decisions rejecting an objection of unconstitutionality are to be notified either to the court that referred the matter to the Constitutional Court or to the People's Advocate, as applicable. Conversely, decisions by which the Constitutional Court declares a law, ordinance, or provision already in force to be unconstitutional shall be communicated to the two Houses of Parliament, to the Government, and to the referring court. In instances where the case is pending before another judicial authority at the time of communication, the court to which the case is referred must transmit the decision to the relevant judicial body. The decision must also be notified to the public authorities concerned to ensure compliance of the rules with constitutional provisions.

The Court's decision is final, irrevocable, and binding. In accordance with Art. 147 para. (1) of the Constitution, the provisions of laws and ordinances deemed unconstitutional shall cease to have legal effect 45 days following the publication of the Constitutional Court's decision, unless Parliament or the Government, as applicable, brings the unconstitutional provisions into alignment with the Constitution within this period. During this period, the provisions found unconstitutional shall be suspended *by operation of law*. The judgements of the Constitutional Court delivered in the *a posteriori* review of the rules do not merely impact the parties involved in the proceedings; they possess *erga omnes* effect and are binding on all.

In the context of the protection of fundamental rights at the individual level, it is important to note that in Romania, the individual constitutional complaint does not exist in the form enshrined in other legal systems. For example, in the German or Spanish legal systems, an individual has the ability to challenge a violation of their fundamental rights directly before the Constitutional Court, as a result of an administrative act or a court judgement.

An indirect mechanism by which an individual can obtain constitutional review of a rule applicable in a lawsuit is the procedure of the exception of unconstitutionality. This procedure is distinct from an individual constitutional complaint in that it does not permit the direct challenge of a judgement, but rather the legal rule underpinning the resolution of a particular case. It is imperative to note that the objection of unconstitutionality must be raised before a court of law, which possesses the authority to determine whether it is necessary to refer the matter to the Constitutional Court.

An analysis of the statistical situation of the acts of the Constitutional Court, pronounced in the exercise of its powers under Art. 146 (a)–(d) and (j) of the Constitution, from its establishment until 31 December 2024, reveals a significant increase in the Court's jurisdictional activity over time. This consolidation of the Court's role as a guarantor of the supremacy of the Constitution and the protection of fundamental rights is of particular significance.

During the period under review, the Constitutional Court delivered a total of 24,163 decisions, judgements, and opinions, the majority of which concerned the constitutionality of laws and ordinances (22,926 decisions corresponding to *a posteriori* review). *A posteriori* review (exercised after the promulgation of laws) resulted in 595 decisions, while the constitutionality of parliamentary regulations led to 52 decisions. Furthermore, the Court resolved 46 legal conflicts of a constitutional nature between public authorities and analysed nine citizens' legislative initiatives.

A salient trend is the gradual escalation in the number of decisions rendered, particularly after 2007, when the Court's activity reached its zenith, maintaining a consistent level of over 1,000 acts adopted annually. The most prolific period was observed in 2009, with a total of 1,751 decisions, reflecting an intense phase of constitutional review.

With regard to the type of solutions, the Court admitted 1,033 exceptions of unconstitutionality, of which 638 were reviewed *a posteriori* and 314 *a priori*. Concurrently, 23 parliamentary regulations were validated and 21 legal conflicts between public authorities were resolved. A meticulous statistical analysis of the Court's acts thus reveals a marked increase in its role in protecting the constitutional order, with a major focus on the *a posteriori* review of laws and ordinances.[43] The substantial number of decisions recognising the unconstitutionality of normative acts is indicative of the Court's proactive intervention in rectifying legislative dysfunction, thereby contributing to the consolidation of the rule of law and the protection of fundamental rights in Romania.

The President of the Constitutional Court performs an indispensable function within the framework of the Court's organisation and operations. The President's duties encompass the coordination, representation, and administration of jurisdictional activities. Despite his distinct status within the Court, the President of the Constitutional Court does not wield direct influence over the decisions adopted. Instead, they operate on the principle of *primus inter pares*, working in conjunction with the other eight judges. The duties of the President of the Court are set out in Art. 9 of Law No. 47/1992 on the organisation and functioning of the Constitutional Court.

43 Judicial activity of the Constitutional Court [Online]. Available at: https://www.ccr.ro/statistica-activitate-jurisdictionala/ (Accessed: 15 January 2025).

A fundamental responsibility of the President is to coordinate the work of the Constitutional Court, thereby ensuring that the decision-making process functions efficaciously and that the legal framework within which the Court exercises its powers is respected. The President is furthermore charged with the responsibility of convening and chairing the Court's sittings, moderating debates, and maintaining procedural balance during deliberations. With regard to jurisdictional powers, the President is tasked with appointing the Judge-Rapporteur[44] in cases as stipulated by law and determining the timeframe for the hearing of cases.

In addition to the administrative and jurisdictional functions outlined above, the President serves as the primary representative of the Constitutional Court in its dealings with public authorities and various organisations, both nationally and internationally. In the event of the termination of a judge's term of office, the President is empowered to ascertain the situation and to refer the matter to the competent public authority with a view to filling the vacancy. In the performance of their duties, the President also carries out other responsibilities laid down by law or by the Rules of Organisation and Functioning of the Constitutional Court, thus ensuring respect for constitutional principles and the proper functioning of the constitutionality review mechanism.

Given that the number of judges of the Constitutional Court is odd (nine) and that abstention from voting is not allowed under Art. 64 (c) of Law No. 47/1992, a situation of an equal vote cannot arise. This particular institutional configuration serves to eliminate the necessity for a decisive vote by the President of the Court, as any deliberation will invariably result in the formation of a majority.

In the following discussion, we aim to provide a concise synopsis of the intricate relationship between the courts and the Constitutional Court of Romania. This relationship has been characterised by a dynamic interplay between cooperation and institutional tension. As emphasised in the relevant literature,

> As the Constitutional Court is not part of the judiciary, but an independent authority with a political-jurisdictional character, there have often been tendencies for it to delimit its competence in an authoritarian manner, excluding the courts from any involvement in the activity of constitutionality control, which is not entirely in line with the letter and spirit of the Constitution.[45]

44 An important role in the decision-making process of the Constitutional Court is played by the Judge-Rapporteur, who is appointed by the President of the Court and is responsible for analysing the case and preparing a written report on it. The Judge-Rapporteur may seek expert advice from individuals or institutions with the prior approval of the President of the Constitutional Court.

45 Selejan-Gutan, 2015, p. 168.

As previously mentioned, the courts have an essential role to play in triggering constitutionality review, as they have the possibility to raise *ex officio* a plea of unconstitutionality of a law or ordinance, or to verify the admissibility of such a plea and refer the matter to the Constitutional Court (filtering role).[46] Nevertheless, the primary source of discord between the courts and the Constitutional Court pertains to the implementation of the Constitutional Court's rulings. While the *erga omnes* effects of the Court's decisions are clarified in case law,[47] the courts have been reluctant to apply them directly, invoking the need for further legislative amendments to implement the Court's rulings.

They argue that the courts are obliged to apply the law, not the Constitution directly, as the legislator is the only one obliged to comply with the constitutional provisions. This approach has been the subject of numerous condemnations of Romania at the ECHR for violations of fundamental rights, as the courts did not directly apply the Constitution and the case law of the Court. There was a gradual improvement in the situation after 2000, particularly following the revision of the Constitution in 2003, when Art. 147 clarified the binding nature of the Court's decisions. In 2012, the introduction of disciplinary liability for judges in the event of non-compliance with these decisions marked a significant development. Nevertheless, there have been, and continue to be, instances of conflict at the jurisprudential level between the Constitutional Court and the courts, most notably the High Court of Cassation and Justice.[48] It is evident that a delicate balance exists between constitutional and ordinary jurisdiction, whereby the courts are obliged to respect and apply the Court's decisions while retaining their own independence in interpreting and applying legal rules.

4. Human Rights Institutions in Romania (NHRI)

In the following discussion, a concise overview of the institutions in Romania that play an essential role in the protection and promotion of human rights will be provided. The ensuing analysis will focus on three institutions that fall into the category of NHRIs, two of which have initiated accreditation procedures within the Global Alliance of National Human Rights Institutions (GANHRI) as national institutions for the protection and promotion of human rights.

In Romania, the main human rights institutions are the People's Advocate and the Romanian Institute for Human Rights (Institutul Român pentru Drepturile Omului, IRDO). Among the specialised bodies of the central public administration, the National Council for Combating Discrimination (Consiliul Național

46 Puskás and Benke, 2014, p. 12.
47 Safta, 2023, p. 135.
48 Selejan-Gutan, 2015, pp. 168–178.

pentru Combaterea Discriminării, CNCD) is worthy of mention, as it is the body responsible for promoting equality. It is important to note that Romania does not yet have an accredited NHRI that complies with the UN Paris Principles.

In accordance with Art. 58 of the Constitution, the role of the People's Advocate is to protect the rights and freedoms of individuals against abuses by public authorities. The constitutional provisions concerning this institution (Arts. 58-60) are detailed in Law No. 35/1997 on the Organisation and Functioning of the People's Advocate Institution. According to Art. (2) of the Law, the People's Advocate Institution is defined as a national institution for the promotion and protection of human rights, within the meaning established by United Nations General Assembly Resolution No. 48/134 of 20 December 1993, which adopted the Paris Principles.[49] Furthermore, as outlined in Art. 2 of Law No. 35/1997, the institution is defined as an autonomous public authority operating independently from any other public authority, within the parameters established by law.

In exercising its functions, the People's Advocate does not take the place of public authorities, cannot be subject to any mandatory or representative mandate, and no one may compel it to comply with any instructions or provisions. The institution has its own budget, which forms an integral component of the state budget. The draft budget is subject to approval by the People's Advocate, who provides an advisory opinion on the matter based on the advice of the Ministry of Public Finance. The People's Advocate's draft budget is then submitted to the Government for inclusion in the draft state budget. It is submitted that this mode of financing is dependent on political decisions, which may affect the independence of the institution.

The People's Advocate is a judicial office held by an individual appointed by Parliament in a joint session of the Chamber of Deputies and the Senate for a five-year term. The purpose of this office is to defend the rights and freedoms of individuals. The position of People's Advocate is open to any Romanian citizen who meets the criteria for appointment as a judge at the Constitutional Court. These criteria include holding a higher legal education, demonstrating high professional competence, and a minimum of 18 years' experience in legal practice or higher legal education. The Advocate's deputies are specialised by field of activity. It is important to note that the Advocate and his deputies are not legally responsible for any opinions they express or actions they perform in compliance with the law during the execution of their duties. Neither the Constitution nor Law No. 35/1997 stipulates any diversity criteria in the composition of the staff or in the appointment of the People's Advocate. The People's Advocate is selected by Parliament, albeit not through a process open to civil society.

The People's Advocate's accountability is limited to Parliament, as evidenced by the obligation to submit annual reports. However, these reports are

49 Niculescu, 2023, pp. 40–41.

not subject to proper debate, thereby diminishing the institution's influence on public policy. The People's Advocate is empowered to propose amendments to legislation or other measures designed to protect the rights and freedoms of individuals. In accordance with Art. 24 of Law No. 35/1997, through recommendations, the People's Advocate notifies public administration authorities of the illegality of administrative acts or facts, which must take all necessary measures to remove the identified illegalities, repair the damage, and eliminated the causes that generated or favoured the violation of the rights of injured persons.

In cases involving illegal administrative acts or deeds by the central public administration or prefects, the People's Advocate is empowered to refer the matter to the Government. If the Government fails to adopt the necessary measures to remedy the reported illegal acts or deeds within 20 days, the situation is reported to Parliament. It is imperative to emphasise that the People's Advocate possesses the prerogative to refer matters directly to the Constitutional Court in instances where laws are found to contravene fundamental rights.

Petitions addressed to the People's Advocate are exempt from stamp duty and thus incur no fee. The institution is headquartered in Bucharest but operates a network of 15 territorial offices, each exercising jurisdiction over two or three counties. The institution also maintains an official website through which it disseminates information about its activities, publishes reports, recommendations, and decisions, and provides guidance on how to submit petitions.

The Romanian Institute for Human Rights (Institutul Român pentru Drepturile Omului, IRDO) is an independent organisation with legal personality, established by Law No. 9/1991 on the establishment of the Romanian Institute for Human Rights.[50] It is the first national institution dedicated to human rights created in Romania after 1989. The IRDO is an associate member of the European Network of National Human Rights Institutions (ENNRHI). The Institute's stated objectives are the promotion and protection of human rights in Romania. According to the founding legislation, the IRDO undertakes a range of activities intended to contribute to the promotion and protection of fundamental rights at both the national and international levels.

The organisation's primary areas of activity include the promotion of a more profound understanding of human rights issues, achieved through meticulous analysis of the manner in which human rights are guaranteed within the member states of the UN, OSCE, Council of Europe, and the European Union. Furthermore, it plays a role in disseminating information to international institutions regarding the practical ways in which Romania promotes and respects human rights. In support of the legislative process, the IRDO is able to formulate points of view on human rights issues at the request of parliamentary committees,

50 Law No. 9/1991 on the establishment of the Romanian Institute for Human Rights, published in the Official Journal of Romania, Part I, No. 24 of January 30, 1991.

thereby contributing to the strengthening of the regulatory framework in this area. Research activity constitutes an essential component, encompassing studies on emerging rights, the right to happiness, recent human rights violations, and key issues related to human rights protection and respect, both domestically and internationally. In accordance with Law No. 9/1991, the Institute is responsible for the organisation and implementation of training and educational programmes in the field of human rights, with a focus on the exploration of innovative methodologies that contribute to raising awareness and improving training processes. Furthermore, the Institute provides support and promotion for initiatives launched by the UN and other international or regional organisations, including those concerning the relationship between business and human rights.

In addition to the aforementioned activities, the IRDO provides advisory services and publishes recent human rights regulations, documents, studies, and research at both international and national levels. With regard to academic and institutional cooperation, the Institute organises conferences, workshops, and symposia in collaboration with parliamentary committees and universities, thus contributing to relevant debates and the exchange of best practices in the field of human rights. The IRDO's stated aim is to diversify its work by creating a Documentation Center, with the intention of strengthening it as an essential resource for researchers, practitioners, and the public interested in fundamental rights issues.

Notwithstanding the fact that Law No. 9/1991 grants the IRDO the status of an autonomous institution, certain issues enumerated below give rise to questions regarding the extent of its actual autonomy. The procedure for the appointment of leadership is not clearly delineated and does not provide for transparent selection or consultation with civil society. Art. 5 of the Law stipulates that the IRDO is to be governed by a General Council, comprising representatives of parliamentary groups, members of the Senate's Committee on Human and Citizens' Rights and the Chamber of Deputies' Committee on Human Rights, Religious Cults, and National Minorities' Affairs, as well as scholars and representatives of human rights non-governmental organisations, appointed by the permanent offices of the two chambers of Parliament and validated by them. The General Council then appoints a Steering Committee from among its members, composed of seven individuals: parliamentarians, scientists, representatives of non-governmental organisations, and the Executive Director, who represents the Institute. The Executive Director is selected by the General Council through a competitive selection process. Furthermore, the IRDO is not in a position to investigate individual complaints or issue binding recommendations, which limits its impact on the effective protection of human rights. Additionally, the financial independence of the IRDO is contingent upon its funding, which is derived from the Parliament's budget. Consequently, its operational independence may be subject to the influence of political decisions.

As with the People's Advocate Institution, there are no explicit criteria to ensure diversity in the staff or management structure of the IRDO. The absence of mechanisms within the founding law, as well as the Rules of Procedure, hinders the capacity to ensure balanced representation of diverse social groups, which may consequently limit the institution's perspective on human rights issues. Additionally, the absence of an open selection process and formal mechanisms for ongoing consultation with civil society may impede the degree of pluralism within the institution. The IRDO engages in collaborative endeavours with non-governmental organisations, academic institutions, and international bodies, participating in joint projects and initiatives. However, it cannot be claimed that the institution plays an active role in monitoring human rights or acts as a central actor in institutional dialogue with the Government or Parliament. In contradistinction to analogous institutions in other countries, the IRDO is not endowed with the capacity to evaluate the implementation of fundamental rights legislation, to intervene directly in situations of human rights violations, or to issue binding recommendations to public authorities.

The IRDO offers free access to its publications and online resources. However, its work is concentrated in Bucharest, with no regional offices to facilitate direct access for citizens in other parts of the country. Furthermore, there is a paucity of information regarding the availability of materials in formats accessible to people with disabilities or in multiple languages for ethnic minorities. Consequently, the institution's accessibility remains geographically and digitally constrained.

In March 2024, the People's Advocate Institution and the Romanian Institute for Human Rights, in consideration of Art. 6 para. (3) (i) of the Rules of Procedure of the GANHRI Accreditation Subcommittee, concluded a protocol of cooperation with a view to ensuring the unified and coherent representation of Romania in international forums. The protocol stipulates the accreditation of both institutions and their subsequent assessment. The GANHRI Sub-Committee on Accreditation has provisionally included in its timetable the examination of the accreditation of both the IRDO and the People's Advocate. The Sub-Committee communicated to the two institutions that their invitation to submit an application for accreditation would be made only upon the fulfillment of all the requirements set out in Art. 6 para. (3) of the Rules of Procedure of the GANHRI Sub-Committee on Accreditation.

The UN Committee on Economic, Social and Cultural Rights concluded that the introduction of additional legislation would be a prerequisite for the two institutions to meet the accreditation criteria. In its report, the Committee recommended that Romania adopt legislative measures, in particular with regard to Law No. 9/1991 on the Establishment and Functioning of the Romanian Institute for Human Rights, to bring the Institute into full compliance with the Paris Principles, including by further strengthening its independence and providing it

with adequate financial and human resources to fulfil its mandate effectively and independently.

Following its country visit to Romania, the ENNHRI expressed concern about the lack of a conducive environment for the functioning of the IRDO and recommended that urgent steps be taken to remedy this situation. The ENNHRI expressed particular concern regarding the financial challenges faced by the IRDO, which have been attributed to inadequate state funding. These challenges have resulted in a vacancy rate of 60%, thereby impacting the capacity of specialised staff. Furthermore, the ENNHRI highlighted the institution's weak legal framework, asserting that it has a detrimental effect on the institution's functionality and its capacity to adhere to the UN Paris Principles.[51]

The third institution presented is the National Council for Combating Discrimination (Consiliul Național pentru Combaterea Discriminării, CNCD), a national authority responsible for the implementation of non-discrimination policies in Romania. The CNCD functions as a specialised body of the central public administration, with legal personality, according to Government Ordinance No. 137/2000[52] and Government Decision No. 1194/2001.[53] The Council exercises its powers in the following areas: (a) prevention of acts of discrimination by carrying out information campaigns, raising awareness on human rights, the effects of discrimination, and the principle of equality, and by conducting training courses, information sessions, projects, and programmes at the local, regional, and national levels, as well as studies and reports; (b) mediation of the parties involved in cases of discrimination, in the presence of representatives of the CNCD; (c) investigation, ascertainment, and sanctioning of acts of discrimination; (d) monitoring of cases of discrimination through subsequent supervision of the parties involved; (e) provision of specialised assistance to victims of discrimination by explaining relevant legislation through CNCD legal advisors and by offering guided assistance in the filing of petitions and in obtaining additional information arising from this procedure.

In accordance with the prevailing normative acts, the independence of the CNCD is legally guaranteed. The institution functions independently from other public authorities, without the Government exerting any influence on its operations. Nevertheless, the CNCD remains subject to the Government, a circumstance that may give rise to questions regarding the extent of its genuine autonomy. With regard to the appointment of the management, the CNCD's Board of Directors

51 European Commission, 2024, pp. 32–33.

52 Ordinance No. 137/2000 on the prevention and sanctioning of all forms of discrimination, published in the Official Journal of Romania, Part I, No. 166 of March 7, 2000 [Online]. Available at: https://legislatie.just.ro/public/detaliidocument/24129 (Accessed: 23 January 2025).

53 Decision No. 1194/2001 on the organisation and functioning of the National Council for Combating Discrimination, published in the Official Journal of Romania, Part I, No. 792 of 12 December 2001.

is appointed by decision of the Prime Minister, a process that may raise concerns regarding political dependence and its impact on the objectivity of decisions made. Furthermore, the President of the CNCD, who holds the rank of State Secretary, is also appointed and dismissed by the Prime Minister.

The CNCD's Board of Directors is composed exclusively of Romanian citizens who meet specific criteria. These criteria include being domiciled in Romania, holding a law degree, having no criminal record, being of good repute, and being proficient in Romanian. Furthermore, the appointment of members representing national minorities or disadvantaged groups is to be encouraged. It is important to note that, upon appointment, these individuals no longer represent the public authorities that nominated them.

The CNCD, in accordance with Art. 2 of Government Decision No. 1194/2001, cooperates with public institutions, non-governmental organisations, and international partners to prevent and combat discrimination. The CNCD is furthermore responsible for harmonising domestic legislation with international standards, endorsing draft legislation, and collaborating with public authorities to eliminate all forms of discrimination. At the international level, the CNCD has established partnerships with analogous bodies in other countries and with international organisations for the exchange of experience and best practices. The Council provides an accessible mechanism for filing petitions and complaints and offers assistance to victims of discrimination. It also maintains an official website through which it disseminates information regarding its activities, adopted decisions, and complaint procedures. However, the CNCD's presence is limited to two territorial offices, which may constrain individuals' access to anti-discrimination counsel and protective services.

In 2020, the Senate approved a draft law proposing the merger of the IRDO with the CNCD. The draft law's proponents emphasised in the explanatory memorandum that the absorption of the IRDO by the CNCD was opportune, given that the IRDO's tasks most closely overlap with those of the CNCD among all entities in a situation of institutional parallelism. It was acknowledged that this integration would enhance the institutional capacity of the CNCD, thereby enabling it to fulfil its assigned tasks. These tasks encompass conducting studies and research, promoting and public communicating in the field of combating discrimination, and affirming human rights. The integration was further expected to be accompanied by an increase in the number of specialists and financial resources. Ultimately, the draft law on the merger by absorption of the IRDO by the CNCD was not adopted, resulting in the two institutions maintaining their respective identities.

5. Conclusion

Romania's human rights framework is robust yet in a state of flux, with constitutional provisions and institutional mechanisms designed to ensure the protection of fundamental rights. Nevertheless, challenges persist in the practical implementation of these rights due to institutional conflicts, political influences, and inefficiencies in law enforcement mechanisms.

A significant shortcoming in Romania's human rights adjudication system is the absence of an individual constitutional complaint mechanism, which prevents citizens from directly challenging fundamental rights violations before the Constitutional Court. Instead, the sole available recourse is the exception of unconstitutionality, which must be raised before an ordinary court. This indirect approach not only hinders access to constitutional justice but also significantly slows the resolution of human rights violations.

Furthermore, Romania has integrated international human rights obligations into its legal system, with treaties taking precedence over domestic laws in cases of conflict. However, implementation gaps persist, as evidenced by delays or resistance in executing European Court of Human Rights (ECtHR) rulings, particularly in cases requiring legislative amendments. Despite these shortcomings, Romania has made progress in consolidating its human rights system, particularly through the increased activity of the Constitutional Court in reviewing laws and the strengthening of anti-discrimination policies.

Nevertheless, achieving full compliance with international human rights standards depends on several factors, including greater independence of NHRIs, stronger mechanisms for addressing fundamental rights violations, the introduction of an individual constitutional complaint, and improved implementation of international human rights rulings.

In conclusion, while Romania's legal framework for human rights protection rests on a stable foundation, institutional conflicts, political interference, and procedural barriers hinder its full effectiveness. Enhancing judicial independence, facilitating institutional collaboration, and ensuring the practical enforcement of human rights protections are pivotal steps towards consolidating a genuinely effective human rights system.

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National System of Human Rights and Constitutional Review in Georgia

ABSTRACT: *This article examines the structural characteristics and doctrinal logic of the national human rights system in Georgia, understood as a complex synthesis of Soviet legacy, post-Soviet transformation, and the reception of European legal standards. It is primarily informative in nature and employs a hermeneutical method to analyse the constitutional foundations of fundamental rights protection, their realisation in domestic law, and the role of constitutional review in preventing and remedying rights violations. The study maps the architecture of Chapter Two of the Constitution, emphasising the Constitution's treatment of rights as directly applicable law and as value norms operating throughout the legal order. It analyses the subject and addressee of rights, the predominantly vertical concept of fundamental rights (with limited horizontal effect), and the constitutional design of permissible interferences. Special attention is given to the Constitutional Court's interpretive and adjudicative methodology, including legal certainty review, proportionality analysis, and equality assessment through strict scrutiny and rational differentiation. The article further addresses the separation of jurisdictions between the Constitutional Court and common courts, procedural specificities of constitutional proceedings, and doctrinal innovations such as review of a norm's normative content. It concludes that the Constitutional Court functions as a pivotal institutional guarantee of constitutional supremacy and human rights protection in Georgia.*

KEYWORDS: *Georgia, Constitutional Court, Human Rights, strict scrutiny, rational differentiation, Constitutional Review*

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https://doi.org/10.47078/2026.1.115-138

1. Introduction

Human rights are part of universal law. While each state has its own national legal system with unique accents, priorities, and perspectives on human rights, no democratic society can be isolated or exist in a vacuum. Legal systems influence each other; states participate in international relations, affecting each other's legal frameworks. In this regard, Georgia is no exception – it represents a complex synthesis of heavy Soviet legacy, post-Soviet traumas, and a peculiar reception of European law. This structure plays a positive role on one hand, as diverse experiences enable future planning and predictability, but on the other hand, contains negative elements and poses numerous challenges to the national human rights system.

The constitution of Georgia, similar to other post-communist countries, places special emphasis on human rights and provides for both classical and new-generation fundamental rights, which is a merit of several constitutional reforms. This is supported by the Constitutional Court of Georgia, whose nearly thirty-year rich and diverse practice has played an incredibly significant role in assessing the content of fundamental rights and their limitations as well as the prevention of violations.

This study reviews the main characteristics and peculiarities of the national human rights system in Georgia, describes the legal regulation of fundamental human rights and their realisation, and examines constitutional review and constitutional proceedings as the main mechanisms for human rights protection and the role of the Constitutional Court of Georgia in this process. The paper is less focused on problems and challenges of the Georgian human rights system; it is primarily informative in nature and hermeneutically analyses the statutory foundations of fundamental rights protection and relevant case-law of the constitutional review.

2. Human Rights in Georgian Law

■ *2.1. Fundamental Rights, Freedoms, and the Constitution of Georgia*

The second chapter of the Constitution of Georgia is dedicated to human rights. It encompasses not only specific fundamental rights but also regulates related matters, such as the Public Defender, state objectives,[1] and the so-called objective rights in the form of principles. The chapter is relatively unsystematic, making it difficult to identify a clear structure or thematic order in the numbering and sequencing of provisions. It begins with the inviolability of human dignity (Art. 9),

1 Loladze and Phirtskhalashvili, 2023, p. 30.

followed by the right to life and physical inviolability (Art. 10), the right to equality (Art. 11), the right to freedom of development of personality (Art. 12), human liberty (Art. 13), freedom of movement (Art. 14), the right to inviolability of private and family life (Art. 15), the rights to fair administrative proceedings (Art. 18), and procedural rights (Art. 31).

The Constitution also devotes special attention to the freedom of faith, religion, and conscience (Art. 16); freedom of thought, information, mass media, and the internet (Art. 17); and freedom of creativity and cultural heritage (Art. 20). Political rights are extensively regulated, including the freedom to assemble (Art. 21), freedom of association (Art. 22), freedom of political parties (Art. 23), the right to elections (Art. 24), and the right to occupy an official position (Art. 25). Economic, cultural, and social rights are also addressed, such as the right to property (Art. 19), freedom of labour and freedom of entrepreneurship (Art. 26), the right to education and academic freedom (Art. 27), the right to the protection of health (Art. 28) and environmental protection (Art. 29), and the right to marry and rights of mothers and children (Art. 30).

The placement of a norm in this chapter does not automatically imply that it establishes a fundamental right and someone can defend themselves through court based on it.[2] During the 2017-2018 constitutional reform, there was an attempt to remove the so-called objective rights and norm-principles from the second chapter; however, many such norms still remain.[3] The basic law does not categorise or classify human rights, but its pathos and attitude are reflected in the beginning of the fundamental rights chapter with the right to dignity and continuing with the right to life, equality, and free personal development. It presents human rights from a positive perspective, without imposing corresponding obligations on the rights-bearing individual.

The Constitution recognises human rights as directly applicable law, which determines their direct effect and enforcement without their specification in current legislation. Fundamental rights, as legal norms, establish a system of values, which is why they claim to operate throughout the legal order, in all spheres and directions of law.[4]

The foundation of the Georgian system of human rights and freedoms is human dignity, which serves as the defining principle for all other rights. The Constitution of Georgia regards human dignity as inviolable, and both the practice of the common courts and the Constitutional Court recognise it as the essential cornerstone for the functioning of the entire human rights framework. Nevertheless, according to the interpretation of the Constitutional Court, the Constitution

2 Decision N2/1-392 of the Constitutional Court of Georgia, 31 March 2008, para. II-19.
3 See: Gegenava, 2019, p. 113.
4 Izoria et al., 2005, pp. 5 and 14.

of Georgia does not establish a hierarchy among constitutional norms,[5] nor does it provide for so-called permanent or unamendable provisions.[6] All rights are normatively of equal significance.

The Constitution of Georgia refers to fundamental rights as 'universally recognised human rights and freedoms'.[7] 'Universal recognition' naturally does not add content or status to human rights,[8] but indicates their importance and the Constitution's special attitude towards rights. The basic law does not substantially differentiate between 'rights' and 'freedoms'; they are essentially used as semantically equivalent without establishing any rational difference. The constitution mentions 'fundamental constitutional human right' in only one instance, in the context of prohibiting referendums aimed at restricting it.[9] 'Fundamental human rights' is mentioned in the constitutional norm regulating the Constitutional Court's authority to review individual constitutional complaints,[10] and also in the article about general principles of rights protection.[11] Most importantly, the second chapter is called 'Fundamental Human Rights'.

While the Constitution enumerates human rights quite comprehensively, it simultaneously leaves room for other relevant rights that exist beyond the constitutional text and inherently derive from constitutional principles.[12] This general regulation is provided in the current redaction of the fundamental law, although it was in the second chapter in 2017-2018, which allowed for the protection of human rights and appeals to the Constitutional Court through it. Currently, the possibility of interpreting and applying implied rights is entirely entrusted to the Constitutional Court's goodwill and interpretation, as individual constitutional complaints based on constitutional norms beyond the second chapter are inadmissible in constitutional proceedings.[13]

Georgian legislation must comply with universally recognised principles and norms of international law,[14] which at a practical level determines the place of international human rights treaties in the hierarchy of legal acts. International treaties are subordinate to the Constitution of Georgia, constitutional law, and the Constitutional Agreement in terms of normative force,[15] while enjoying supremacy

5 Ruling N2/2/486 of the Constitutional Court of Georgia, 12 July 2010; Ruling N1/3/523 of the Constitution Court of Georgia, 24 October 2012; Decision N1/1/549 of the Constitutional Court of Georgia, 5 February 2013.
6 See: Gegenava, 2014, pp. 398–399.
7 Constitution of Georgia, 24 August 1995, Art. 4(2).
8 Tugushi et al., 2013, p. 594.
9 Constitution of Georgia, 24 August 1995, Art. 52(2).
10 Constitution of Georgia, 24 August 1995, Art. 60(4)(a).
11 Constitution of Georgia, 24 August 1995, Art. 34.
12 Constitution of Georgia, 24 August 1995, Art. 4(2).
13 See: Gegenava and Javakhishvili, 2017.
14 Constitution of Georgia, 24 August 1995, Art. 4(5).
15 Organic Law N1876 of Georgia "On Normative Acts", Art. 7(3).

over and exceeding other acts in effect.[16] Although the Constitutional Agreement between the Apostolic Autocephalous Orthodox Church of Georgia and the State of Georgia supersedes international treaties, there is a reservation that it must comply with universally recognised principles and norms of international law in the field of human rights and fundamental freedoms.[17] This ensures the primacy of international human rights law over the agreement regulating church-state relations while maintaining the principle of constitutional supremacy.[18]

3. Actual Rights and Modern Trends in the Constitution of Georgia

Basic human rights are relevant in any state and society, regardless of their priorities or level of development. Some rights enjoy greater 'popularity' in specific spaces and among peoples. This can be due to various factors, such as the socio-economic background, level of development and education, quality of life, political regime, and public governance. Rights manifest themselves in the environment and reveal their true nature in relationships with others.

The number of constitutional disputes regarding fundamental rights and freedoms depends on the specifics of individual constitutional complaints. As individuals can only challenge restrictive normative acts or parts thereof in relation to Chapter Two of the Constitution, it is logical that the rights-based statistics of judicial practice differ significantly from the practice of the European Court or states with the German model of constitutional review. There are particularly many constitutional disputes regarding the right to free personal development, dignity, property, freedom of expression, privacy, fair trial, and equality. During the first decade of the Constitutional Court's activity, many complaints concerned the right to property, social rights, and freedom of expression, which is logical as in a developing post-Soviet country, most legal problems were related to socio-economic issues. Gradually, the topics of privacy and procedural rights also became more concrete. Regarding the fundamental right to life and dignity, the Constitutional Court has operated and continues to operate with a limited mandate, as interference in these protected spheres often occurs through actions of public authority representatives rather than at the normative act level. However, the practice has changed since 2015, when the right to dignity was linked to imprisonment as punishment for marijuana use, and it was declared unconstitutional. The continuation of this judicial policy was the use of the right to free personal development as a universal means for rights protection. Freedom of expression and the right to privacy have become particularly relevant in the last decade.

16 Constitution of Georgia, 24 August 1995, Art. 4(5).
17 Organic Law N1876 of Georgia "On Normative Acts", 22 October 2009, Art. 7(4).
18 Gegenava, 2016, pp. 160–161.

Procedural rights and access to justice deserve special mention, to which one of the most extensive provisions in the Constitution is dedicated.[19] This is due to the fact that fair trial is a measure of the implementation of the rule of law and encompasses the possibility of judicial protection of all legal goods that inherently belong to the rights category.[20] The right to apply to court and access to justice includes the possibility of addressing both common courts and the Constitutional Court[21] and ensures prevention of unjustified limitation of rights.[22] Article 31 encompasses a broad spectrum of guarantees, among which the following are particularly important in the context of the right to a fair trial: the right to access a court and to have one's case examined by a court with jurisdiction; the right to defence (both personally and through a representative); the right to obtain and examine evidence; the principles of equality of arms and adversarial proceedings; the presumption of innocence and the prohibition of self-incrimination; the prohibition of retroactive application of law; the standard of reasonable doubt; the requirement that a conviction must be based on irrefutable evidence; the inadmissibility of evidence obtained in violation of the law; and the principle of ne bis in idem.

The 2017–2018 constitutional reform also affected Chapter Two of the fundamental law. Besides regrouping rights and making structural, linguistic, and substantive updates, so-called new generation rights also appeared in the Constitution, making it more adequate and responsive to contemporary challenges and trends. Alongside fair trial, the rights to fair administrative proceedings and compensation for damage caused by public authorities (right to effective remedy) were introduced.[23] Although these were already present in current legislation (in the General Administrative and Civil Codes), their recognition at the constitutional level brought their importance to the forefront. The Constitution of Georgia established the obligation of full compensation through courts for damage caused by the state (at the national level), autonomous republic, and municipal bodies and officials.[24] In the context of freedom of information, the document introduced the right to internet access and free use of the internet.[25] Academic freedom and autonomy of educational institutions were explicitly established.[26] In terms of procedural rights, both the individual right to unimpeded practice of advocacy and lawyers' right to self-organisation were separately distinguished,[27] which at least formally granted the Georgian Bar Association an almost constitutional status.

19 Constitution of Georgia, 24 August 1995, Art. 31.
20 Decision N1/466 of the Constitutional Court of Georgia, 28 June 2010, para. II-14.
21 Decision N3/5/768,769,790,792 of the Constitutional Court of Georgia, 29 December 2016.
22 Decision N1/1/403,427 of the Constitutional Court of Georgia, 19 December 2008, para. II-1.
23 Constitution of Georgia, 24 August 1995, Art. 18.
24 Constitution of Georgia, 24 August 1995, Art. 18(4).
25 Constitution of Georgia, 24 August 1995, Art. 17(4).
26 Constitution of Georgia, 24 August 1995, Art. 27(3).
27 Constitution of Georgia, 24 August 1995, Art. 31(3).

4. Subject and Addressee of Fundamental Rights and Limitation of Rights

■ *4.1. Subject and Addressee of Fundamental Rights*

The primary addressee of fundamental rights is the state. The Constitution of Georgia directly indicates that in exercising power, both the people and state are limited by rights and freedoms.[28] The governmental body is bound even when exercising authority through delegation, via private persons.[29] The fundamental law identifies two main obligations regarding human rights: to recognise and protect, which implies, on one hand, declaration of something, and on the other hand, the obligation to protect and ensure it.[30] In both cases, the proper addressee is public authority. According to the Constitutional Court of Georgia, the primary function of a state based on the rule of law is not only the passive protection of human rights and freedoms but also facilitating their realisation.[31] The Constitution establishes a vertical concept of human rights, whereby fundamental rights primarily restrict public authorities. A horizontal concept has been developed only in the context of the right to equality, as in this case, the fundamental right operates indirectly, imposing obligations not only on the state but also on legal entities and individuals, who are required to uphold equality in accordance with anti-discrimination legislation.

The subject of fundamental rights is primarily a natural person, though considering specifics, also a legal entity.[32] The constitution distinguishes between universal human rights and citizens' rights. The former applies to everyone (with right to life, property, freedom of belief and religion, etc.),[33] while citizens' rights typically ensure participation in public authority and politics and are explicitly expressed by including 'citizen' in the constitutional norm (e.g. freedom of political parties, electoral rights, right to hold public office).[34]

The Constitution of Georgia also identifies several special subjects, particularly in the context of the right to equality. The founding norm of equality emphasises formal justice, giving special importance to ensuring equal rights and opportunities for women and men.[35] The state establishes persons with disabilities as special subjects, creating special conditions for the realisation of their rights

28 Constitution of Georgia, 24 August 1995, Art. 4(2).
29 Izoria et al., 2005, pp. 10–11.
30 Decision N1/466 of the Constitutional Court of Georgia, 28 June 2010, para. II-3.
31 Decision N1/466 of the Constitutional Court of Georgia, 28 June 2010, para. II-14.
32 Constitution of Georgia, 24 August 1995, Art. 34(1).
33 See: Constitution of Georgia, 24 August 1995, Arts. 10, 16, 19.
34 Constitution of Georgia, 24 August 1995, Arts. 23–25.
35 Constitution of Georgia, 24 August 1995, Art. 11(3).

and interests.[36] The fundamental law declaratively emphasises the importance of mothers' and children's rights[37] and also establishes constitutional foundations for the legal regime of foreigners and stateless persons.[38]

■ *4.2. Limitation of Fundamental Rights and Its Justification*

4.2.1. Limitation of Fundamental Rights

The human rights protection standard includes maximally explicit determination of the boundaries for interference with and restriction of fundamental rights. However, from a practical standpoint, the constitution may also provide for implicit boundaries for rights restriction, which is entirely natural because it is impossible to regulate everything with absolute precision – the fundamental law must leave room for logic and systematisation in favour of human rights. The constitution of Georgia contains four types of grounds for restricting fundamental rights: (1) specific statutory reservation; (2) judicial decision reservation; (3) direct constitutional limit; and (4) internal constitutional limit. Among these, the last one is implicit, while the others are explicitly provided in constitutional norms. Some rights may simultaneously have several grounds for restriction.

The specific statutory reservation is quite frequently used in the constitution of Georgia as a boundary for interference with rights.[39] Constitutional norms regarding the freedom of movement, inviolability of private life, freedom of expression, and property rights, for example, indicate the possibility of limitation in cases determined by law.[40] The judicial decision reservation is used almost as frequently. It typically appears alongside statutory reservation, particularly concerning rights where assessment by general standards could be harmful. According to the Constitutional Court of Georgia, defining judicial reservation as an additional formal standard for rights limitation is determined by the nature of the respective right or its individual components and the risk of executive power arbitrariness; its mandatory nature ensures correct application of the law.[41] Therefore, they need an additional mechanism. For example, judicial decision reservation appears in constitutional norms concerning human liberty, property rights, and freedom of association.[42]

Direct constitutional limits explicitly define the grounds for restricting fundamental rights directly in the constitutional text, in specific norms. For example, Article 23(3) of the constitution indicates circumstances under which the creation

36 Constitution of Georgia, 24 August 1995, Art. 11(4).
37 Constitution of Georgia, 24 August 1995, Art. 30(2).
38 Constitution of Georgia, 24 August 1995, Art. 33.
39 Loladze and Phirtskhalashvili, 2023, p. 55.
40 See: Constitution of Georgia, 24 August 1995, Arts. 14(2), 15(1), 17(5), 19(2).
41 See: Decision N2/4/665,683 of the Constitutional Court of Georgia, 26 July 2018, paras. II-109-111.
42 See: Constitution of Georgia, 24 August 1995, Arts. 13(2), 19(3), 22(2).

of political associations is prohibited. Internal constitutional limits are clearly implicit phenomena, as in this case, the specific circumstances of intervention are not defined at the normative level in the basic law; however, based on systematic interpretation of norms, intervention is presumed possible. For example, Article 12 of the constitution establishes the right to free personal development. While the norm is only one sentence and is declarative in nature, it implies that its restriction is possible considering the general principle – to protect the rights of others.

4.2.2. Assessment of Limitation of Fundamental Rights

The Constitutional Court of Georgia evaluates the constitutionality of interference with fundamental rights through several tests. Depending on the statutory content, it may employ an assessment of legal certainty, evaluate the constitutionality of restrictive measures in relation to rights generally through the principle of proportionality, and consider a slightly different approach when assessing discrimination. The principle of proportionality requires that a restrictive act be a suitable and necessary means for achieving a legitimate public aim, and that the intensity of the rights restriction be proportional to the aim to be achieved.[43] These elements are cumulative and must exist together for public authority interference with fundamental rights to be constitutionally justified.[44]

According to the Constitutional Court of Georgia, the legitimate aim must have the ability to justify the restriction, and the aim itself must derive from the democratic values on which the state and society are based.[45] The restrictive norm must be a suitable means for achieving the legitimate public aim,[46] and there must be a logical connection between the mechanism established by the norm and the public aim.[47] When assessing necessity, the Constitutional Court considers the specifics of the fundamental right, intensity of restriction, consequences, and the number of persons subject to restriction.[48] The court examines whether there is a means of achieving the legitimate aim using a less restrictive measure.[49]

In constitutional disputes concerning the right to equality, the Constitutional Court of Georgia employs two types of approaches: strict scrutiny and rational differentiation. The court applies the strict scrutiny test in cases of (1) classical grounds of differentiation and (2) high intensity of interference with rights.[50] It termed the grounds listed in the constitutional equality provision (Article 11) as 'classical grounds', though the scope of grounds later expanded

43 Decision N3/1/512 of the Constitutional Court of Georgia, 26 June 2012, para. II-60.
44 Phirtskhalashvili, 2016, p. 19.
45 Decision N2/4/570 of the Constitutional Court of Georgia, 4 August 2016, para. II-17.
46 Decision N1/1/539 of the Constitutional Court of Georgia, 11 April 2013, para. II-30.
47 Decision N3/3/600 of the Constitutional Court of Georgia, 17 May 2017, para. II-48.
48 Decision N2/2/558 of the Constitutional Court of Georgia, 27 February 2014, para. II-52.
49 Decision N1/4/557,571,576 of the Constitutional Court of Georgia, 13 November 2014, para. II-31.
50 Eremadze, 2020, p. 53.

beyond the constitutional provision.[51] Despite not being mentioned in the constitutional norm, the Court considered sexual orientation as sufficient grounds for applying strict scrutiny, considering the degree of vulnerability of the persons concerned.[52] The degree of differentiation intensity is the determining factor in deciding which assessment test should be applied.[53] High-intensity treatment is evident when it focuses on the person rather than objective circumstances.[54] In practice, the strict scrutiny test involves evaluating the restrictive norm through the principle of proportionality, assessing how necessary the state's intervention was, and whether there exists a 'compelling state interest'.[55]

The Constitutional Court applies the rational differentiation test when (1) differentiation is not based on so-called classical grounds; and (2) the intensity of interference is not high.[56] Under this test, differentiated treatment must be (1) maximally realistic, inevitable, and necessary; and (2) there must be a real and rational connection between the objective reason for differentiation and its effect.[57] In any case, regardless of which test the Constitutional Court applies, the restriction defined by the disputed norm must have a legitimate public aim, and the chosen means must have a logical and rational connection to the aim.[58]

A norm may also be invalidated for lack of certainty. According to the Constitutional Court, the legislator is obligated to adopt precise, clear, and unambiguous norms; otherwise, human rights will be violated.[59] A norm must be sufficiently defined not only in terms of content but also in terms of subject matter, purpose, and scope of regulation.[60] It must meet qualitative requirements and not provoke its own violation.[61]

5. Protection of Fundamental Rights through Court

■ *5.1. Judicial Mechanisms for the Protection of Fundamental Rights*

The protection of human rights is an obligation of all state bodies; rights bind public authorities and thereby ensure the implementation of directly applicable law. The Constitution of Georgia distinguishes between judicial and non-judicial

51 Ibid.
52 See: Decision N2/1/536 of the Constitutional Court of Georgia, 4 February 2014.
53 Loladze and Phirtskhalashvili, 2023, p. 174.
54 Ibid., p. 175.
55 Decision N1/1/493 of the Constitutional Court of Georgia, 27 December 2010, para. II-6.
56 Eremadze, 2020, p. 60.
57 Decision N1/1/493 of the Constitutional Court of Georgia, 27 December 2010, para. II-7.
58 Decision N3/2/767,1272 of the Constitutional Court of Georgia, 14 December 2018, para. II-40.
59 See: Decision N1/3/407 of the Constitutional Court of Georgia, 26 December 2007.
60 Decision N2/3/406,408 of the Constitutional Court of Georgia, 30 October 2008, para. II-36.
61 Decision N1/1/625,640 of the Constitutional Court of Georgia, 14 April 2016, para. II-69.

institutions for the protection of fundamental rights. Judicial power is exercised by common courts and the Constitutional Court.[62] Common courts are judicial bodies, and their authority focuses on the legality of public authority acts (both individual and normative) and actions (real acts). Article 59 of the constitution of Georgia provides for the possibility of establishing specialised courts within the common courts system; however, no such practice exists, and according to Georgian legislation, justice is fully concentrated in the unified system of common courts.

Regarding human rights protection, the Constitutional Court's jurisdiction is limited to reviewing the constitutionality of normative acts.[63] In this respect, the Constitutional Court of Georgia does not follow the German model of constitutional review and does not oversee the constitutionality of common courts' decisions.[64] Moreover, from a formal perspective, only normative acts fall under its jurisdiction. However, through precedential practice, the court has expanded its jurisdiction and constitutional review to individual acts of a normative nature (which, although individually formatted, are normative in content and pose an increased risk from a human rights perspective).[65]

6. Human Rights and Constitutional Review in Georgia

■ *6.1. Responsibilities of the Constitutional Court of Georgia and Human Rights*

The Constitutional Court of Georgia is a special constitutional institution that officially belongs to the judicial branch,[66] although it does not administer justice in the conventional sense. It is a judicial body of constitutional control,[67] exercising judicial power through constitutional proceedings.[68] This ensures its extraordinary nature and somewhat determines its political character:[69] it serves as an organ of compromise and reconciliation between branches of government, guaranteeing political peace and stability in the state.[70] Since its establishment, the Constitutional Court has developed dynamically, with its powers changing in line with constitutional reforms.[71] Initially, its activities were regulated by both the Constitution as well as the organic law 'On the Constitutional Court of Georgia' and the special law 'On Constitutional Proceedings'. These laws contained

62 Constitution of Georgia, 24 August 1995, Art. 59(1).
63 Constitution of Georgia, 24 August 1995, Art. 60(4).
64 Javakhishvili, 2017, p. 264.
65 See: Ruling N1/4/1691 of the Constitutional Court of Georgia, 23 February 2023.
66 Constitution of Georgia, 24 August 1995, Art. 59(1).
67 Constitution of Georgia, 24 August 1995, Art. 59(2).
68 Constitution of Georgia, 24 August 1995, Art. 60(1).
69 See: Gegenava, 2012, pp. 32–42.
70 Gegenava et al., 2016, p. 299.
71 Javakhishvili, 2024, pp. 27–28.

duplications and overlapping legal norms, but in 2018, the Parliament of Georgia abolished the law 'On Constitutional Proceedings' and incorporated its norms into the organic law.[72] In this regard, the legislation governing the Constitutional Court has been formally refined, with the systematisation of norms resulting in the consolidation of material and procedural regulations related to constitutional review in one act: today, the organic law regulates both the court's structure and powers and the status of the judges and their indemnity and immunity, as well as matters related to the consideration of constitutional complaints/submissions, and the adoption and enforcement of court decisions and other judicial acts. These topics are practically defined by the Rules of the Constitutional Court, which are approved by the plenum.[73] the Rules of the Constitutional Court is a supplementary document that regulates many important aspects of the Constitutional Court's daily operations.

The powers of the Constitutional Court of Georgia are enumerated in the Constitution,[74] with several additional powers defined by the organic law.[75] Based on these two acts, the powers are established by the *numerus clausus* principle, and appeals to the court are permissible within these limits.[76] Several directions of the Constitutional Court's activities can be distinguished: 1) control of constitutionality of norms/acts; 2) competence disputes between state bodies; 3) mandatory participation in impeachment procedures of constitutionally defined officials regarding determination of constitutional violations or elements of crime in their actions; 4) control of constitutionality of political parties' establishment and activities; 5) assessment of recognition or termination of status of a Member of the Parliament (MP); and 6) control of violations of the constitutional law governing autonomous republics and compliance of normative acts of the Supreme Council of autonomous republics with this constitutional law. However, in terms of human rights protection, the most important remains the control of constitutionality of norms/acts, which it exercises based on complaints/submissions from various initiators/plaintiffs according to procedures established by law.

■ *6.2. Concrete and Abstract Constitutional Review*

The Constitutional Court of Georgia does not have the right of self-initiative; constitutional proceedings are always based on a constitutional complaint or submission initiated by an appropriate subject.[77] Concrete constitutional control

72 See: Organic Law N3265-რს of Georgia "On Amending Organic Law on the Constitutional Court of Georgia", 21 July 2018.

73 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 54.

74 Constitution of Georgia, 24 August 1995, Art. 60(4).

75 See: Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 19(1).

76 Gegenava and Goradze, 2021, p. 254.

77 Javakhishvili, 2024, p. 66.

is the most common and primary form of constitutional dispute in Georgia. The range of plaintiffs in disputes related to fundamental rights is not restricted:[78] any natural person or legal entity, as well as the Public Defender of Georgia, can file a constitutional complaint.[79] Initially, all legal entities did not have the right to file constitutional complaints, but with the 2002 legislative amendments, legal entities registered in Georgia officially gained this opportunity,[80] and in 2010, the Constitutional Court of Georgia expanded the range of potential plaintiffs through its own decision, allowing any legal entity to initiate constitutional disputes.[81]

In constitutional proceedings, the plaintiff must justify a genuine interest in initiating the dispute: the contested norm either restricts or is highly likely to restrict their rights in the foreseeable future.[82] A constitutional complaint must address a specific article or provision in Chapter Two of the Constitution; complaints referring generally to the human rights chapter are inadmissible and will not be considered by the Constitutional Court.[83]

The Public Defender's constitutional complaint represents an indirect form of individual access to constitutional justice and essentially serves the same purpose as an individual constitutional claim.[84] However, there is a significant difference between them: the Public Defender's constitutional claim does not require proving that someone's rights have been violated or that violation is inevitable in the future.[85] It is the Ombudsman's exclusive authority to challenge a norm on the assumption that the rule is unconstitutional and thus hypothetically poses a threat. Constitutional disputes initiated by the Public Defender have significantly contributed to the development of the Georgian Constitutional Court's practice regarding human rights and improved the standard of rights protection.

The Constitutional Court of Georgia implements abstract constitutional control. From a formal perspective, this involves verifying the compliance with procedures for adopting and issuing legal acts by public authorities (signing, publication, and enactment), while in terms of material control, the court examines the compliance of the content of the norm with the Constitution.[86]

78 Gegenava and Goradze, 2021, p. 256.
79 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 39(1).
80 Javakhishvili, 2024, p. 272.
81 See: Decision N1/486 of the Constitutional Court of Georgia, 28 June 2010.
82 See: Decision N1/2/1447 of the Constitutional Court of Georgia, 22 February 2024, para. II-2, II-4.
83 See: Ruling 3/7/831 of the Constitutional Court of Georgia, 28 December 2016, para. II-2; Ruling N1/4/644 of the Constitutional Court of Georgia, 14 April 2016, para. II-2; Ruling N1/2/541 of the Constitutional Court of Georgia, 27 February 2013, para. II-2; Decision N1/1/413 of the Constitutional Court of Georgia, 1 March 2007, para. 8.
84 Javakhishvili, 2024, p. 274.
85 Decision N2/6/418 of the Constitutional Court of Georgia, 4 December 2007.
86 Gegenava and Goradze, 2021, p. 258.

This form of control is connected to the practical realisation of the rule of law and constitutional supremacy.[87]

Owing to the specifics of abstract control, the exercise of this authority is not tied to specific court disputes or the protection of a plaintiff's rights.[88] Only designated subjects can initiate it, and consequently, they bear the burden of proof: they must indicate both the demand and relevant norms and argumentation.[89] The main plaintiffs can be the President of Georgia, the Government of Georgia, and no less than one-fifth of the Members of Parliament.[90] However, there are special cases: disputes regarding violations of the constitutional law 'On the Autonomous Republic of Ajara'; issues of compliance of normative acts of the Supreme Council of the Autonomous Republic of Ajara with the Constitution of Georgia and the Constitutional Law 'On the Autonomous Republic of Ajara'; constitutional disputes initiated by local self-government; and disputes initiated by the High Council of Justice.[91]

Within the framework of individual constitutional complaint, as well as in cases of abstract control, the Constitutional Court exercises *a posteriori* constitutional review,[92] meaning that regarding human rights, only enacted and active normative acts can be subject to constitutional control,[93] and the Georgian Constitutional Court lacks the ability to review the constitutionality of draft laws.[94] Abstract constitutional control is also only *ex post*.[95] The Constitutional Court exercises *a priori* constitutional review only over international treaties that require ratification.[96] In this case, constitutional submissions can be filed before the ratification of the treaty.[97] International treaties that do not require ratification are subject to *ex post* or *a posteriori* constitutional review.[98]

87 See: Decision N3/5/768,769,790,792 of the Constitutional Court of Georgia, 29 December 2016, para. II-111; Decision N1/466 of the Constitutional Court of Georgia, 28 June 2010, para. II-18; Khetsuriani, 2020, p. 38.
88 Gegenava and Goradze, 2021, p. 257.
89 Ruling N3/2/602 of the Constitutional Court of Georgia, 4 July 2014, para. II-4, II-11.
90 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 33(1).
91 See: Javakhishvili, 2024, pp. 302–311.
92 Ibid., p. 269.
93 Ruling N1/494 of the Constitutional Court of Georgia, 28 December 2010, para. II-9.
94 Javakhishvili, 2024, p. 270.
95 Ibid., 289.
96 Ibid.
97 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 38(2).
98 Javakhishvili, 2024, p. 328.

7. Particular Issues of the Constitutional Proceedings

Constitutional proceedings are highly specific proceedings through which the Constitutional Court of Georgia implements constitutional review.[99] They resemble legal processes from various fields of law, where a person enjoys procedural rights and obligations – essentially the full procedural spectrum granted by the organic law.[100] Constitutional proceedings are based on the principles of legality, equality of parties, and adversarial process;[101] however, simultaneously, owing to the idea of constitutional control, great importance is attached to public interest and the idea of constitutional supremacy, which in some cases, grants the Constitutional Court broad judicial discretion. For example, the Constitutional Court is authorised to continue legal proceedings and decide on the constitutionality of a disputed normative act that has been abolished or declared void if the court considers its resolution important for ensuring human rights and freedoms.[102] The court can also, on its own initiative, request evidences, obtain necessary information from relevant institutions, invite specialists, etc.[103] The Constitutional Court of Georgia has exercised such authority multiple times.[104]

■ *7.1. Suspension of the Disputed Norm*

Decisions of the Constitutional Court of Georgia do not apply to legal relationships that arose before their adoption, which is why the mechanism for suspending the operation of a disputed norm is particularly important and may be the only means for responding to rights violations or preventing inevitable and irreversible violations.[105] The norm suspension mechanism was introduced into legislation in 2002, empowering the Constitutional Court to suspend the operation of a disputed act or part thereof until a decision is made or for a shorter period, and also to review the suspension decision during the proceedings either at a party's request or on its own initiative.[106]

99 Gegenava and Javakhishvili, 2022, p. 12.
100 Gegenava and Goradze, 2021, p. 267.
101 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 2.
102 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 29(7).
103 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 24(2).
104 See: Decision N2/1/370,382,390,402,405 of the Constitutional Court of Georgia, 18 May 2007, para. I-3; Decision N1/3/1263 of the Constitutional Court of Georgia, 18 April 2019, para. II-18.
105 Decision N3/2/577 of the Constitutional Court of Georgia, 24 December 2024, para. II-31-32.
106 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 25(5).

While the power to suspend the operation of a norm is granted to the Constitutional Court by legislation,[107] the specific cumulative circumstances under which the court uses this instrument have been determined through case-law.[108] Within the framework of constitutional proceedings, the following prerequisites must exist for suspending a disputed norm: 1) a real and immediate threat of irreparable damage to fundamental rights and freedoms or public interest; 2) the suspension must be capable of preventing irreparable consequences for the plaintiff; and 3) the suspension must not risk unjustifiably restricting third-party rights or public interests.[109]

The Constitutional Court of Georgia does not use the norm suspension mechanism very actively: there are relatively few instances in constitutional proceedings where the court has granted a plaintiff's motion and suspended the operation of a disputed norm.[110]

■ *7.2. Declaring a Norm Unconstitutional*

A norm or act declared unconstitutional by the Constitutional Court annuls from the moment of publication of the respective decision, unless the court itself sets a different, later date.[111] It may link the enforcement of its decision to specific circumstances or legal interests that ensure the prevention or reduction of damage to the state and individuals.[112] Publication of the decision is considered to be its posting on the official website of the Constitutional Court of Georgia.[113] The Court's decision is final[114] and cannot be appealed, and a failure to comply with it is punishable by law.[115] It is prohibited to adopt any legal act that contains the content of a norm already declared unconstitutional by the Constitutional Court.[116]

■ *7.3. Distributing Cases, the Procedural Role of the Chairman of the Constitutional Court, and the Reporting Judge*

The chairman (president) of the Constitutional Court of Georgia not only formally leads the court but is also vested with significant administrative and

107 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 25(5).
108 Javakhishvili, 2024, p. 191.
109 Decision N3/2/577 of the Constitutional Court of Georgia, 24 December 2024, para. II-31-35.
110 See: Javakhishvili, 2024, pp. 190–191.
111 Constitution of Georgia, 24 August 1995, Art. 60(5).
112 Javakhishvili, 2022, p. 49.
113 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 25(6).
114 Constitution of Georgia, 24 August 1995, Art. 60(4).
115 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 25(1).
116 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 25(4).

procedural powers.[117] The judges themselves elect the chairman from among the Constitutional Court judges for a term of five years.[118] The chairman exercises full administrative authority regarding Constitutional Court personnel, apparatus operations, management of budgetary allocations, etc. The president distributes cases, appoints reporting judges for plenary sessions, leads the plenum, presides over its sessions, and so forth.[119] He, as a judge, participates in the consideration of cases that fall under the plenum's jurisdiction. In such cases, the president not only presides over the session but also directly participates in the legal proceedings.

The chairman distributes complaints and submissions among the chambers by resolution, and if a case is to be considered by the plenum, transfers it to the plenum and appoints a reporting judge.[120] The court operates an automatic, electronic system that selects reporting judges in alphabetical order after a case is distributed to the relevant chamber/plenum,[121] after which the respective chamber chairperson (or the chairman in case of the plenum) issues a resolution appointing the selected person as the reporting judge.[122] The electronic system is not used if the dispute relates to a case already transferred to a chamber/plenum and it is expedient to appoint the same person as reporter for the new complaint/submission.[123] A reporting judge may be changed if at any stage of the proceedings, the person is removed from case consideration, or if different cases are consolidated (in this case, the judge who was appointed as reporter for the earliest of the consolidated complaints/submissions will be appointed as reporter).

Georgian legislation does not explicitly define the rights and duties of a reporting judge in constitutional proceedings through a single detailed norm. However, through systematic interpretation of various norms, several important functions can be identified. The substantive hearing of a case begins with the reporting judge's presentation, which covers the initiation of proceedings in the Constitutional Court, the grounds for substantive consideration, and the content of case materials; additionally, they are obligated to answer questions from the judges reviewing the case.[124] The reporting judge is responsible for preparing and presenting drafts of judicial acts (both interim and final decisions);[125] however, this does not automatically mean that the reporting judge writes the decision in every

117 Gegenava et al., 2014, p. 301.
118 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 10(1)-10(3).
119 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 12(1), Rules of the Constitutional Court of Georgia, 6 March 2020, Art. 8(1).
120 Rules of the Constitutional Court of Georgia, 6 March 2020, Art. 13(2).
121 Rules of the Constitutional Court of Georgia, 6 March 2020, Art. 14(1).
122 Rules of the Constitutional Court of Georgia, 6 March 2020, Art. 14(2).
123 Rules of the Constitutional Court of Georgia, 6 March 2020, Art. 14(3).
124 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 276(1)(a).
125 Rules of the Constitutional Court of Georgia, 6 March 2020, Art. 36(3).

case – if the draft presented by the reporting judge is not supported, the majority judges write an alternative draft in agreement with each other.[126] The Rules of the Constitutional Court retain the possibility for the chairperson of the chamber/plenum to assign the preparation of a judicial act draft to another judge involved in the case review.[127]

8. Relationships between the Constitutional Court and Common Courts

■ *8.1. The Constitutional Court and Common Courts: Separation of Responsibilities in the Protection of Human Rights*

The jurisdictions of common courts and the Constitutional Court are strictly separated. The Constitutional Court is vested with exclusive authority of constitutional review; it is the guardian of the Constitution, the guarantor of its supremacy, and the primary state body responsible for constitutional legality in Georgia. In terms of human rights protection, its jurisdiction extends to reviewing and deciding on the constitutionality of normative acts or parts thereof.

Individual acts, real acts, and common courts' decisions are beyond constitutional review. There is one exception to this: according to the established case-law of the Constitutional Court of Georgia, it will accept for consideration complaints regarding the constitutionality of an individual act if the act is of a normative nature[128] and substantively carries the same risk and potential for rights violations.

Common courts have jurisdiction over all other disputes concerning fundamental rights where the subject matter is not the constitutionality of a normative act, but rather the formal and material legality of acts or actions (real acts).

■ *8.2. Constitutionality of the Normative Content of the Norm*

In 2011, the Constitutional Court first expanded the scope of constitutional review and declared not the norm itself but the normative content of a provision unconstitutional,[129] effectively granting itself new authority and, to some extent, beginning to exercise constitutional control over the actual administration of justice.[130] The separation of a provision from its normative content was prompted by the fact that the norm itself was formally constitutional, but its practical application and the meaning assigned to it by its authentic interpreter contradicted the

126 Rules of the Constitutional Court of Georgia, Art. 36(7).
127 Rules of the Constitutional Court of Georgia, Art. 36(12).
128 See: Ruling N1/4/1691 of the Constitutional Court of Georgia, 23 February 2023.
129 Decision N1/1/477 of the Constitutional Court of Georgia, 22 December 2011.
130 See: Javakhishvili, 2017.

Constitution.[131] Along with the general constitutional norms, the legal basis for establishing control over the normative content of the norm can be considered the organic law provision, according to which the Constitutional Court, when reviewing a normative act, considers both the literal content of the disputed norm as well as its purpose and practical application.[132]

The Constitutional Court decided to create better guarantees for protecting fundamental rights by maximising the use of its mandate.[133] By exercising constitutional review over the normative content of norms, it also prevents the practice of incorrect, unconstitutional application of norms.[134] In many cases, the normative content of a provision is determined by common courts; thus, by reviewing the constitutionality of norm application, the Constitutional Court only indirectly reviews the application of norms by common courts,[135] which does not imply direct constitutional control over the administration of justice.

Until 2015, the normative content of a provision was declared unconstitutional only once; however, in the last decade, there have been almost two dozen such cases in the practice of constitutional proceedings.

■ *8.3. Constitutional Submission of the Common Courts*

When hearing a case in a common court, if the court considers that a norm to be applied in resolving the dispute may be unconstitutional, it can suspend the proceedings and refer to the Constitutional Court requesting a review of the constitutionality of the norm.[136] The constitutional submission must directly arise from the case under consideration; otherwise, the Constitutional Court will not accept it for review.[137]

Beyond their formal placement in the same chapter of the Constitution and their attribution to judicial power, the constitutional submission institution is what actually connects the Constitutional Court and common courts.[138] It represents a special form of dialogue between the courts.[139] Constitutional submission allows common courts to verify the constitutionality of norms on which they must base their decisions,[140] effectively preventing case resolution based on unconstitutional norms.[141]

131 See: Gegenava, 2017, pp. 90–91.
132 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 26(3).
133 Eremadze, 2018, p. 389.
134 Javakhishvili, 2017, p. 226.
135 Javakhishvili, 2022, p. 89.
136 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 19(2).
137 Gegenava and Goradze, 2021, p. 258.
138 Zoidze, 2007, p. 188.
139 Davituri and Davitashvili, 2021, p. 13.
140 Javakhishvili, 2022, p. 50.
141 See: Ruling N3/7/1286 of the Constitutional Court of Georgia, 15 December 2023, para. II-14.

The Constitutional Court of Georgia has been operating since 1996,[142] and in 1997, it reviewed its first constitutional submission.[143] To date, the number of constitutional submissions from common courts has reached several dozen. However, it is noteworthy that this dynamic has not been uniform. Between 2004 and 2014, no common court judge utilised the possibility of constitutional submission.[144] The practice resumed in the following period. The majority of submissions concerned drug-related crimes[145] and became particularly relevant after the Constitutional Court declared imprisonment for marijuana use unconstitutional.[146] Most constitutional submissions in the last decade were connected to the legal reality created by various Constitutional Court decisions, and almost all of them, except one, addressed fundamental human rights and Chapter Two of the Constitution.[147]

■ *8.4. Effect of the Constitutional Court on Common Courts*

The effect of the Constitutional Court's decision is *erga omnes* and is not limited only to parties participating in the constitutional dispute.[148] The binding nature of its decision implies both its direct legal effect and the consideration of the decision's content and argumentation by common courts in their practice.[149] The Constitutional Court's process of interpreting constitutional norms is of particular importance for common courts.[150] While constitutional review only has indirect legal force over Georgia's common courts,[151] as not only legal norms but also their interpretations must comply with the Constitution,[152] it is logical that common courts are obligated to interpret the current legislation they use in proceedings in accordance with the Constitution.[153]

The Constitutional Court is vested with *ex tunc* constitutional review responsibility. Its declaration of a norm as unconstitutional cannot automatically nullify decisions made by common courts based on the same norm;[154] it will only suspend the enforcement of the common courts' act.[155]

142 Khetsuriani, 2022, pp. 448–449.
143 See: Ruling N2/49/1 of the Constitutional Court of Georgia, 27 May 1997.
144 Davituri and Davitashvili, 2021, p. 14.
145 Ibid., p. 15.
146 See: Decision N1/4/592 of the Constitutional Court of Georgia, 24 October 2015.
147 Davituri and Davitashvili, 2021, p. 20.
148 Javakhishvili, 2022, p. 47.
149 Ibid., p. 50.
150 Gegenava, 2013, p. 106.
151 Javakhishvili, 2022, p. 84.
152 Zoidze, 2007, p. 63.
153 Decision N1/1/428,447,459 of the Constitutional Court of Georgia, 13 May 2009, para. II-17.
154 Organic Law N95 of Georgia "On the Constitutional Court of Georgia", 31 January 1996, Art. 20.
155 Case of Apostol v. Georgia, Application No. 40765/02, Judgement 28 February 2007, para. 43.

9. Conclusion

The Constitution of Georgia serves as the foundational framework for human rights protection. Its second chapter is comprehensively dedicated to fundamental human rights. Furthermore, Article 4(2) of the Constitution encompasses a pivotal provision stipulating that the Constitution does not renounce universally recognised human rights and freedoms not explicitly enumerated within its text, but which inherently derive from constitutional principles.

The Georgian legal architecture provides specialised human rights protection institutions designed to safeguard constitutionally guaranteed rights and facilitate the remediation of rights violations. Preeminent among these is the Constitutional Court, to which both natural and legal persons retain the right of appeal upon perceiving a fundamental rights infringement. It plays a pivotal role in the national system of human rights protection. This is due to its broad competences in both abstract and concrete constitutional review, as well as its exclusive authority to declare a normative act unconstitutional – thereby performing the function of a negative legislator. Over the years, the Court has developed a range of doctrinal approaches that have expanded and clarified the substance of constitutional norms and rights, including the permissible scope of interferences with those rights. Particularly noteworthy is the Court's review of a norm's normative content, which operates as an effective mechanism.

While constitutional adjudication and human rights protection in Georgia continue to face significant challenges, the Constitutional Court's accumulated experience and diverse case law indicate that – under appropriate legislative and political conditions – the Court can realistically ensure the high level of human rights protection that follows from, and is expected by, the Constitution's underlying rationale and purpose.

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The Constitutional Design and Practical Implementation of Human Rights in North Macedonia

ABSTRACT: *The paper examines the constitutional design and practical implementation of human rights in the Republic of North Macedonia, with a particular focus on the normative framework established by the Constitution of 1991 and its interaction with international human rights law. The Constitution enshrines the protection of human rights and fundamental freedoms as one of the core principles of the constitutional order, reflecting the democratic and liberal foundations of the state. Human rights are positioned at the center of the constitutional framework and are conceived as an essential element of the country's legal and political identity. Moreover, the Constitution guarantees a broad spectrum of civil, political, economic, social, and cultural rights, while simultaneously affirming the principles of equality and non-discrimination and establishing specific safeguards for the protection of minority rights.*

Beyond the normative recognition of rights, the study also analyses the constitutional guarantees and mechanisms established for their effective protection in the country, including access to judicial remedies and constitutional review. These mechanisms aim to ensure that human rights are not merely declaratory but practically enforceable within the domestic legal order.

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https://doi.org/10.47078/2026.1.139-156

Furthermore, the study explores the relationship between constitutional norms and international human rights instruments. Article 118 of the Constitution provides that generally accepted principles of international law and ratified international treaties form an integral part of the domestic legal system and are directly applicable by national institutions and courts. While international human rights treaties enjoy a privileged legal status, the Constitution retains its position as the supreme legal authority, prevailing in the event of a normative conflict. This constitutional model reflects a deliberate balance between openness to international human rights standards and the preservation of constitutional sovereignty. Overall, the paper argues that the 1991 Constitution represents a coherent framework that integrates international human rights norms within a constitutionally anchored system of democratic governance and the rule of law.

■ **KEYWORDS:** *Constitution, human rights, freedoms, duties, citizen, protection*

1. Human Rights in the Macedonian Constitutional Order: Normative Structure and Legal Meaning

The 1991 Macedonian Constitution[1] is instrumental in laying the legal groundwork for protecting human rights. It embraced a broad range of civil, political, social, economic, and cultural rights, while also recognising the rights of national minorities. Despite the limitations of certain rights during exceptional circumstances, the Constitution emphasised judicial protection and equality before the law. Article 8 of the Macedonian Constitution enshrined fundamental values of the constitutional order of the country, where the basic freedoms and rights of individuals and citizens, recognised in international law, are set down in the first paragraph.

The Constitution includes a specific Chapter II dedicated to the "Fundamental Freedoms and Rights of the Individual and the Citizen", which lists a wide range of rights that form the foundation of the state's legal order. This chapter highlights the priority assigned to human rights within the Macedonian legal system.

Basic Freedoms and Rights of the Individual and Citizen are further divided into civil and political freedoms and rights, and economic, social, and cultural rights. In Macedonia's legal system, the terms "human rights", "fundamental

1 *Constitution of North Macedonia*, Official Gazette of the Republic of Macedonia, No. 52 [Online]. Available at: https://www.slvesnik.com.mk/content/pdf/USTAV-eng.pdf (Accessed: 30 November 2024).

rights", and "constitutional rights" are related but are understood and used in different contexts.

"Human Rights" refer to the basic rights and freedoms that all individuals are inherently entitled to simply because they are human. These rights are universal, inalienable, and protected under the Constitution and international law. Human rights are grounded in international law and protected through international treaties and conventions, understood predominantly through the lens of these international instruments. The Macedonian Constitution acknowledges and upholds the protection of human rights. The country is a signatory to many international human rights treaties that ensure the protection of individual freedoms and dignity.

"Fundamental rights"[2] are defined as core rights that are guaranteed and protected by a country's Constitution or fundamental legal documents. These rights are often derived from human rights but are recognised as essential to the functioning of the state and society. Fundamental rights are explicitly outlined in the Macedonian Constitution as rights that the state must guarantee to all its citizens.[3] Fundamental rights in the country are a subset of human rights, but they are those specifically guaranteed within the national context, typically more closely linked to the Constitution.

The term "constitutional rights" is used to enumerate rights explicitly defined and guaranteed by the Constitution of the country. These rights represent the highest form of legal protection within the domestic legal system and are essential for the state's framework. In North Macedonia, constitutional rights are enshrined in the Constitution as part of the nation's commitment to the rule of law and democracy.[4]

The Chapter II of the Constitution constitutes the core framework for the protection of individual rights and freedoms and guarantees these rights to all citizens as a foundation for dignity, equality, and freedom in both public and private life. Among the key constitutional guarantees are the inviolability of human dignity and the right to life[5], the human right to physical and moral dignity is irrevocable, any form of torture, or inhuman or humiliating conduct or punishment, is prohibited. Forced labour is prohibited, and equality before

2 The ECtHR's point of departure is that the definition of fundamental rights must be the same for all individuals living in the Council of Europe. The notion of a shared and uniform minimum standard of fundamental rights protection expresses the idea of universal human rights, which need to be recognised and protected throughout Europe. Differences in national fundamental rights standards become relevant only in the stage of the assessment of limitations. It is well known that restrictions on most Convention rights can be justified by the need to protect public interests or the rights and interests of others, provided they meet certain conditions. See: Gerards, 2018, pp. 495–515.

3 Jordanova and Kotevska, 2020.

4 Karakamisheva-Jovanovska, 2025a, pp. 145–190.

5 Art. 10 of the Constitution.

the law coupled with the prohibition of discrimination. The Constitution further guarantees freedom of thought, conscience, and religion, freedom of expression, freedom of assembly and association, and freedom of movement.

Judicial guarantees form an essential part of this catalogue. The Constitution ensures the right to a fair trial and judicial protection, including procedural safeguards such as the right to defence and public hearings. The right to privacy is protected through the inviolability of the home, correspondence, and personal data, while the right to property is guaranteed subject to conditions and procedures prescribed by law. Political rights are also enshrined, including the right to vote, stand for office, and participate in political life.

A separate and particularly significant catalogue concerns the rights of national minorities, set out in Article 48 of the Constitution. This provision guarantees minorities the right to preserve and express their cultural, linguistic, and religious identity, to receive education in their own language, to use their language in public life, and to participate in public and political affairs. Minorities are also entitled to establish associations and institutions aimed at preserving their cultural and social identity.[6] The Constitution recognises environmental rights in Article 43, affirming the right of individuals to live in a healthy environment and imposing a duty on the state to protect nature and ensure sustainable development for present and future generations.

The Constitution stipulates and protects many economic, social, and cultural rights, some of which are as follows: property and inheritance rights; rights to work; the obligation to pay taxes; the right to social security and social protection of citizens in accordance with the principle of social justice, particularly the social security rights of veterans of the Anti-Fascist War and of all Macedonian national liberation wars, war invalids, and those expelled and imprisoned for the ideas of the separate identity of the Macedonian people and of Macedonian statehood; the right to establish trade unions; the right to strike; the right to health care, particularly care and protection for the family, and special protections particularly for mothers, children, and minors; the right to a healthy environment to live in; the right to education; freedom of scholarly, artistic, and other forms of creative work; and protection of the ethnic, cultural, linguistic, and religious identity of the nationalities on national territory. The Republic cares for the status and rights of persons belonging to the Macedonian people in neighbouring countries, as well as Macedonian expatriates; assists their cultural development; and promotes links with them.

The Constitution provides mechanisms for how citizens can enforce basic freedoms and rights, allows for the incorporation of international law into its legal system, giving ratified international treaties and agreements

6 Council of Europe, 2022.

significant legal standing, provided they do not conflict with the Constitution itself.[7] The relationship is one in which international obligations are respected, but they must align with national constitutional principles. It affirms that the state respects the international law on human rights and that international instruments guide the country's policies and practices in their respect and protection.

Taken together, these catalogues demonstrate that the Macedonian Constitution establishes a comprehensive, structured, and value-oriented system of rights protection, integrating civil, political, social, minority, and environmental dimensions within a unified constitutional framework.

The Constitution adopts a predominantly monist approach to international human rights law, whereby ratified international treaties and conventions automatically become part of the domestic legal order without the need for additional implementing legislation. In accordance with constitutional provisions, ratified international treaties – including those relating to human rights – are directly applicable by domestic courts and public authorities. This framework ensures that international human rights standards are binding within the national legal system upon ratification. At the same time, the Constitution maintains its position as the supreme legal authority of the state. While ratified international human rights instruments enjoy a privileged legal status and take precedence over ordinary legislation, they cannot override constitutional provisions. In the event of a normative conflict, constitutional norms prevail, thereby preserving constitutional supremacy while ensuring openness to and effective integration of international human rights law.[8]

2. Vertical and Horizontal Protection of Human Rights in the Macedonian Constitutional System

The Macedonian Constitution adopts both vertical and horizontal conceptions of the functioning of human rights. It explicitly envisions the protection of human rights, both in the relationship between the individual and the state (vertical) and in relations between individuals (horizontal).[9] Specifically, Article 9 of the Constitution includes provisions that allow for human rights to be upheld not only in dealings with the state but also in private relationships. According to the Constitution, the **judiciary** (particularly the courts) is responsible for protecting human rights in cases brought before them. Further, 27 basic courts, four appellation courts, two administrative courts, and one Supreme Court are required to ensure that domestic laws are in accordance with the country's Constitution and

7 Karakamisheva-Jovanovska and Saveski, 2022, pp. 315–349.
8 Trajkovska and Trajkovski, 2016, pp. 266–288.
9 Karakamisheva-Jovanovska, 2025b, pp. 191–238.

international human rights treaties, to which the Macedonian state is a party. Citizens can seek judicial remedies for the protection of their rights.

The Constitutional Court is not a regular court, but a separate organ of the Republic that plays a central role in protecting the constitutional rights and freedoms of citizens.[10] It is responsible for reviewing laws and other legal acts to ensure that they align with the Constitution. If a law or legal act is found to be in conflict with the Constitution, the Court has the power to annul it. The Constitutional Court also hears cases involving the protection of fundamental rights and freedoms when individuals claim that their rights have been violated by legal acts.

The Ombudsman is an independent institution responsible for protecting citizens' rights and freedoms from maladministration or violation by public authorities. The Ombudsman investigates complaints regarding violations of rights by government bodies and other state institutions, offering recommendations for corrective actions. The Assembly also plays a role in protecting freedoms and rights by enacting laws that respect and protect them. It is responsible for adopting legislation that aligns with the Constitution and international human rights standards. Moreover, the Assembly can monitor government actions to ensure compliance with the protection of rights.

The Constitution also provides special protection to certain groups explicitly mentioned in the Constitution; for example, protection of children, stating that children have the right to special care, protection, and assistance. It specifically mentions the protection of children from abuse and exploitation. Regarding citizens, the Constitution guarantees the rights and freedoms of all citizens with a special emphasis on equality before the law. However, it also outlines certain protections for ethnic communities and ensures their rights, such as the right to preserve their identity, language, and culture, as well as the rights to use their language in public life and to participate in public affairs. Regarding persons with disabilities, the Constitution ensures their rights, providing for their protection and guaranteeing their rights to full participation in social, political, and cultural life. The Constitution also protects vulnerable marginalised groups as well as foreigners.

3. Axiological Foundations of Individual Rights under the Macedonian Constitution

The Macedonian Constitution articulates a set of guiding principles governing the status of the individual within the state, grounded in the foundational values

10 See more: https://www.confeuconstco.org/reports/rep-xii/Macedonia-EN.pdf (Accessed: 30 November 2024).

of human dignity, freedom, and equality. These principles constitute the axiological core of the constitutional order and shape both the interpretation and application of individual rights and freedoms. Human dignity occupies a central position within the constitutional framework. The Constitution emphasises the inviolability of human dignity as a fundamental principle, framing the protection of individual rights around respect for the inherent worth of every person. Human dignity thus functions as the normative cornerstone of the Macedonian legal order and as a guiding value for the protection of fundamental rights. Equality before the law represents another key constitutional principle. The Constitution guarantees equal treatment of all individuals, irrespective of ethnicity, gender, religion, political beliefs, or other personal characteristics. This principle serves as the basis for the prohibition of discrimination and ensures that all persons enjoy rights and freedoms under equal conditions. Freedom is likewise a foundational constitutional value. The Constitution guarantees a broad range of freedoms, including freedom of expression, assembly, religion, and association. These freedoms are recognised as essential prerequisites for the functioning of a democratic society, enabling individuals to participate freely in public life and to develop their personal and collective identities.

Closely linked to equality is the principle of non-discrimination[11], which provides protection against unequal treatment on grounds such as ethnicity, gender, age, disability, or political affiliation. Together with the rule of law, these principles ensure that the exercise of state power is subject to legal constraints and effective checks and balances. The rule of law guarantees access to legal remedies and judicial protection whenever individual rights and freedoms are violated.

The axiological foundations of the Macedonian Constitution are strongly influenced by universal human rights and democratic values enshrined in international legal instruments, notably the UN Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and other human rights documents. which sources reflect a commitment to justice, equality, and the protection of human dignity, consistent with liberal democratic ideals. Notably, the Constitution does not establish a formal hierarchical ordering among human rights and freedoms. All rights are presented as fundamental and equally protected under the law. Nevertheless, certain groups – such as ethnic minorities, children, mothers, and persons with disabilities – benefit from specific constitutional safeguards, reflecting an awareness of historical marginalisation and particular vulnerability. While judicial practice may, in specific cases, accord greater weight to certain rights, the constitutional text itself endorses a comprehensive and egalitarian framework of rights protection grounded in democratic and humanistic values.

11 Kotevska, 2020.

Several freedoms and rights are particularly important for the political, social, and economic system of the country. These rights are essential to ensure the functioning of democracy, social cohesion, and economic development. The right to vote and to be voted, as a political right, is crucial for the democratic governance of the country. It ensures that citizens can participate in the political process by choosing their representatives in the Assembly and other government positions. This right is fundamental in promoting the political and institutional stability and legitimacy of the government, as it ensures that elected officials are accountable to the people. In a democratic society, political participation is the cornerstone of legitimacy. The Constitution guarantees universal suffrage (for all citizens of voting age), which helps ensure that the government is representative of the will of the people. Freedom of speech and expression is central to the democratic functioning of the country, particularly in terms of promoting political and social pluralism and public debate. Citizens and media outlets are free to express opinions, criticise government actions, and engage in open discussions on national issues. Free press and open public discourse are critical for transparency, accountability, and the prevention of corruption. This freedom supports the development of a modern civil society and helps maintain the power of government officials and institutions. The right to work and social security (economic and social rights) is fundamental for economic development and social stability in the country. It ensures that individuals have the opportunity to contribute to the economy and access decent employment. Along with the right to work, the right to social security ensures that citizens are protected from economic hardship through welfare programs, unemployment benefits, and social assistance. The right to property is central to the Macedonian market economy and the development of private sector businesses. This right guarantees that individuals can own and control their property and assets, which is essential for entrepreneurship and investment in the economy. Strong property rights also provide individuals with a sense of security, enabling them to make long-term investments and secure their financial futures. All human rights and freedoms in the Constitution are interconnected and essential for the political, social, and economic stability of the country.

4. Limitations on Constitutional Rights and Freedoms and Stipulated Duties under the Macedonian Constitution

The Macedonian Constitution contains limitations so-called *"clauses"* that limit the exercise of certain constitutional freedoms and rights primarily designed to balance individual freedoms with public interests, national security, public order, and the protection of others' rights. The Macedonian Constitution provides for

certain general limitations that apply to the exercise of freedoms and rights.[12] These "clauses" are generally framed to ensure that rights are exercised within a framework preserving social order, national security, and public welfare. The Constitution allows limitations on certain rights, provided that these limitations are prescribed by law, necessary in a democratic society, and respect the essence of the right or freedom. For example, Article 16 of the Constitution addresses general limitations on rights and freedoms, stating:

> 'The freedom of personal conviction, conscience, thought and public expression of thought is guaranteed. The freedom of speech, public address, public information and the establishment of institutions for public information is guaranteed. Free access to information and the freedom of reception and transmission of information are guaranteed. The right of reply via the mass media is guaranteed. The right to a correction in the mass media is guaranteed. The right to protect a source of information in the mass media is guaranteed. Censorship is prohibited.'

Some rights in the Constitution are specifically subject to limitations, often due to their interaction with other social, economic, or political interests: the right to assembly (Article 21) – the Constitution guarantees freedom of assembly, but the right may be limited in situations where public order is at risk. Authorities can regulate the time, place, and manner of assemblies to ensure that they do not disrupt public order. These rights may be subject to regulations to balance them with the needs of society, such as national security, public health, and the rights of others. The proportionality test is a key principle when applying limitations to rights and freedoms. The Constitution does not explicitly outline the proportionality test in detail, but it is implied in general "limitation clauses".[13] According to the proportionality test, the limitation must be necessary to achieve a legitimate aim (e.g. national security, public order), and it must be the least restrictive means to achieve that aim. This ensures that restrictions on freedoms are not excessive, and that the limitation must be proportionate to the severity of the issue it is trying to address. In practice, this means that any limitation on a constitutional right must be carefully justified and balanced against the potential harm to an individual's rights.

The Constitution also addresses the exceptional circumstances under which freedoms and rights can be restricted, most notably during a state of emergency. The Constitution allows for the declaration of a state of emergency under exceptional circumstances, such as war or natural disasters, which may affect the normal

12 Karakamisheva, 2009, pp. 151–166.
13 Feiertag, 2025.

functioning of the state. In such a state of emergency, the government has the authority to temporarily restrict certain rights. However, even during a state of emergency, the Constitution stipulates that there are certain inviolable rights that cannot be limited, such as the right to life (except in cases of lawful armed conflict), prohibition of torture and inhuman or degrading treatment, prohibition of slavery and forced labour, and judicial protection of rights. These inviolable rights cannot be suspended under any circumstance, even during a state of emergency. In a state of emergency, other rights can be restricted, but the restrictions must be proportional and based on a law designed to address the crisis while respecting the core principles of the Constitution.

The Macedonian Constitution provides a solid framework for protecting freedoms and rights, reflecting the fundamental principles of democracy, equality, and human dignity. However, to evaluate whether this regulation is appropriate for the challenges of modern times, we must consider both the strengths and potential areas for improvement based on contemporary issues such as digital rights, global security concerns, and social changes. The Constitution is grounded in universal human rights principles, emphasising democracy, the rule of law, and the protection of individual freedoms. It guarantees civil, political, social, and economic rights that are aligned with international norms. The limitation clauses are flexible and allow restrictions on rights for reasons such as public safety, national security, morality, and the protection of others' rights. This flexibility is essential for adapting to changing global security threats and societal dynamics while preserving the essence of the rights. The proportionality principle ensures that any restrictions on rights are necessary and proportional to achieving legitimate aims such as national security or public health. This offers a framework for balancing individual freedoms with the common good, a vital feature of modern democratic governance.

In the modern era, the rapid development of technology presents significant challenges related to digital rights, including data privacy, surveillance, and freedom of expression online. The Constitution addresses freedom of speech and privacy; however, these provisions may require further clarification in the digital age. For instance, the regulation of personal data and how they are collected, processed, and protected needs to be better defined, especially with the rise of big data, artificial intelligence, and surveillance technologies; the boundaries of free speech online, including issues such as hate speech and online misinformation, require careful regulation to ensure that freedom of expression is protected without compromising public order or security. While the Constitution provides a framework for limiting rights in the interest of national security, modern security challenges – such as cyber security threats, terrorism, and global pandemics – have made it necessary for states to balance security measures with individual privacy and freedoms.

In the age of global terrorism and cyber attacks, governments often implement surveillance measures that could infringe on privacy. The Constitution includes broad clauses that allow for restrictions on rights; however, more specific safeguards may be needed to prevent excessive state surveillance and ensure that individual privacy is not compromised. The ability to declare a state of emergency is also crucial in times of crisis (*e.g.* pandemics, war). However, modern crises may require more precise guidelines for the suspension of rights to ensure that any restriction is necessary, proportional, and temporary. While the Constitution ensures the protection of rights through the judicial system, the independence of the judiciary is crucial for ensuring that human rights are effectively safeguarded.[14]

Challenges surrounding judicial corruption or political influence in the judicial process may hinder the effective enforcement of constitutional rights. The COVID-19 pandemic and the rise of global health crises have highlighted the importance of balancing individual freedoms with public health needs. While the Constitution includes provisions on the protection of health, there is a need for clearer guidelines on how public health measures (*e.g.* quarantine or vaccination mandates) can be implemented without unduly restricting rights, especially in situations that may require temporary restrictions on freedoms for public health reasons. Although the Macedonian Constitution provides a strong foundation for protecting individual rights and freedoms, its provisions must evolve to address modern challenges, particularly in the areas of digital rights, security, discrimination, and public health. The general limitations on rights provide flexibility, but there is a need for clearer definitions and more specific protections in areas such as AI, data privacy and surveillance. Furthermore, judicial independence and strong enforcement mechanisms are critical for ensuring that the Constitution can effectively protect freedoms and rights in the face of contemporary global challenges. Overall, while the Constitution is well-structured for the protection of rights, modern legal reforms and policy adjustments are necessary to ensure that it remains fully effective in the 21st century.

The Macedonian Constitution imposes certain duties on individuals. These duties are generally framed to ensure the functioning of a democratic state, respect for the rights of others, and the well-being of society as a whole. Respect for the Constitution and Laws (Article 51) – individuals are required to respect the Constitution and the laws of the country; duty to defend the homeland (Article 28) – citizens are obligated to defend the country in case of war or national defence needs. This duty applies to all citizens. The payment of taxes (Article 33) – citizens are required to pay taxes and contributions in accordance with the law. This duty applies to all citizens. In addition to general duties, public officials (such

14 Guide to Law Online: North Macedonia [Online]. Available at: https://guides.loc.gov/law-north-macedonia/legislative (Accessed: 29 November 2024).

as government employees, members of parliament, etc.) have specific responsibilities related to public office, including serving the public interest and adhering to ethical standards in exercising their duties. In general, the duties listed above apply to all citizens, with some specific obligations for public officials and military personnel in particular circumstances.

5. Access to Justice and the Right to an Effective Remedy under the Macedonian Constitution

The Macedonian Constitution provides for the right of access to justice and the right to an effective remedy, ensuring that individuals can seek legal protection for their rights and freedoms through an accessible and fair judicial process.[15] These rights are embedded in the Constitution and are key to upholding the rule of law and protecting individuals from violations of their rights. The right to access to justice is generally implied through various provisions in the Constitution that guarantee the right to a fair trial and the right to judicial protection.

Specifically, Article 8 of the Constitution provides that the basic freedoms and rights of the individual and citizen are recognized in international law and set down in the Constitution with meaning that everyone is equal before the law and that the rights and freedoms of individuals and citizens can be protected through legal means. Article 50 guarantees that every citizen may invoke the protection of freedoms and rights determined by the Constitution before the regular courts, as well as before the Constitutional Court of Macedonia, through a procedure based upon the principles of priority and urgency. Judicial protection of the legality of individual acts of state administration, as well as of other institutions carrying out public mandates, is guaranteed. A citizen has the right to be informed on human rights and basic freedoms as well as actively to contribute, individually or jointly with others, to their promotion and protection. This guarantees that individuals can access justice through the judicial system and ensures that their cases will be heard by a court that is independent and impartial. The Constitution also ensures the right to an effective remedy, which is the right to seek redress and appropriate legal protection if one's rights or freedoms are violated. This is particularly important in cases where individuals feel that their constitutional or legal rights have been infringed upon by public authorities or other individuals. Article 15 further reinforces this right and stipulate that citizen has a right to appeal against individual legal acts issued in a first instance proceedings by a court, administrative body, organization or other institution carrying out public mandates and that this right is constitutionally guaranteed. This provision guarantees that access to

15 Saveski, 2018, pp. 625–638.

the courts is available for individuals whose rights are violated and it ensures that legal protection is not just a theoretical right but also a practical one.

The Constitution also safeguards judicial independence, which is vital for the effective exercise of access to justice. Article 98 provides the framework for the judiciary's independence - judiciary power is exercised by courts. Courts are autonomous and independent. Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. There is one form of organization for the judiciary. Emergency courts are prohibited. The types of courts, their spheres of competence, their establishment, abrogation, organization and composition, as well as the procedure they follow are regulated by a law adopted by a majority vote of two-thirds of the total number of Representatives. Judges are independent, subject only to the Constitution and the law. Judges cannot be removed from office except in cases defined by law, ensuring that they can perform their duties without external interference. The Constitution guarantees the right to legal aid for those who are unable to afford legal representation, which is important to ensure that the right to access justice is not hindered by financial constraints. The Constitution addresses the right to legal aid, ensures that individuals who cannot afford a lawyer still have the means to seek justice and an effective remedy in cases of legal disputes. If constitutional rights or freedoms are violated, the Constitution guarantees the possibility of legal recourse and remedies. Article 110 allows individuals to apply to the Macedonian Constitutional Court to protect their constitutional rights. The Constitutional Court can assess the constitutionality of laws and acts, and it has the authority to annul any laws or provisions that violate the Constitution. This provides a remedy for individuals who believe that their constitutional rights have been violated by the legislative or executive branches of the government.

6. Fundamental Rights Adjudication in North Macedonia

The protection of fundamental rights in the country is overseen by several state bodies and institutions. These institutions play a crucial role in ensuring that individual rights and freedoms are respected in accordance with the Constitution and international human rights standards. The Macedonian Constitutional Court plays a primary role in ensuring the protection of fundamental human rights. Chapter IV (Article 108-113) of the Macedonian Constitution deals with the Constitutional Court,[16] which is defined as a state institution responsible for protecting the state's compliance with the Constitution and the law (Article 108). With regard to the scope of the Court, the Constitutional Court's duties are as follows: decides on the conformity of laws with the Constitution; decides on the

16 *Constitution of North Macedonia*, Official Gazette of the Republic of Macedonia, No. 52.

conformity of collective agreements and other regulations with the Constitution and laws; protects the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation; decides on conflicts of competency among holders of legislative, executive and judicial offices; decides on conflicts of competency among Republic bodies and units of local self-government; decides on the answerability of the President of the Republic; decides on the constitutionality of the programmes and statutes of political parties and associations of citizens; and decides on other issues determined by the Constitution.

Based on Article 113 of the Constitution, the Constitutional Court exercises its duties according to an internal act, that is, the Act of the Constitutional Court. The court is also responsible for ensuring the harmonisation of national laws with the Constitution, which guarantees a broad range of human rights and freedoms.

The Ombudsman is an independent institution tasked with protecting individuals' rights and freedoms against violations by public authorities.[17] The Ombudsman investigates complaints related to the violation of human rights, inequality, or abuse of power by state authorities and public institutions. The institution has the power to issue recommendations, propose measures to resolve complaints, and provide legal advice to citizens regarding their rights.[18]

The judicial system, including the Supreme Court and lower courts, is a central institution for protecting human rights. Citizens can seek judicial redress if their fundamental rights are violated, and courts can declare laws or actions that are incompatible with the Constitution or international human rights standards. The judiciary is responsible for interpreting and applying laws in a manner consistent with constitutional rights and international agreements.

The Ministry of Justice plays a role in ensuring that human rights are protected within the legal framework of the country. It is responsible for advancing reforms to improve the rule of law, and it oversees the implementation of judicial decisions pertaining to human rights. The ministry also works on improving the legal framework related to fundamental rights and engages with international human rights bodies.

The Agency for the Protection of the Right to Free Access to Information ensures citizens' right to access information held by public authorities, as

17 See more: Ombudsman of the Republic of North Macedonia [Online]. Available at: https://ennhri.org/our-members/north-macedonia/ (Accessed: 4 December 2024).

18 Law on the Ombudsman of 2018 [Online]. Available at: https://www.refworld.org/legal/legislation/natlegbod/2018/en/122684 (Accessed: 4 December 2024).

guaranteed by the Constitution and laws on freedom of information.[19] It safeguards transparency and accountability in government actions, which are crucial elements in protecting civil rights.

The Commission for Protection against Discrimination (CPAD) is responsible for combating all forms of discrimination, including discrimination based on race, gender, ethnicity, disability, religion, or other characteristics.[20] It investigates complaints and can issue decisions and recommendations to address discriminatory practices.

The State Commission for the Prevention of Corruption plays an important role in protecting citizen rights by preventing corruption, which may undermine the protection of fundamental rights and public trust in institutions.[21]

The National Human Rights Committee (Advisory Body), established under the United Nations (UN) framework, advises the government on issues related to the protection and promotion of human rights. It engages with international human rights bodies, such as the UN Human Rights Council. These bodies work together to ensure that fundamental rights are respected, and they can intervene when individuals' rights are infringed. Additionally, the country is a signatory to various international human rights conventions, and these bodies also collaborate with international organisations to protect human rights within the country.

7. Conclusion

The study has examined the constitutional design and practical implementation of human rights in the Republic of North Macedonia, with particular emphasis on the normative architecture established by the 1991 Constitution and its interaction with international human rights law. The analysis demonstrates that the Constitution places human rights and fundamental freedoms at the core of the constitutional order, embedding them within a comprehensive catalogue of civil, political, economic, social, cultural, minority, and environmental rights. Through Chapter II and the fundamental values enshrined in Article 8, the Constitution reflects a clear commitment to human dignity, equality, freedom, and the rule of law, positioning human rights as a constitutive element of the state's democratic and legal identity. The study further shown that the Macedonian constitutional system adopts an integrated model of rights protection, combining vertical and horizontal applicability of human rights with a predominantly monist approach

19 See more: Agency for Protection of the Right to Free Access to Public Information [Online]. Available at: https://aspi.mk/en/home-en/ (Accessed: 5 December 2024).

20 See more: Commission on Prevention and Protection Against Discrimination [Online]. Available at: https://kszd.mk/?lang=en (Accessed: 5 December 2024).

21 See more: State Commission for the Prevention of Corruption [Online]. Available at: https://dksk.mk/en/ (Accessed: 6 December 2024).

to international law. Ratified international human rights treaties form an integral part of the domestic legal order and guide the interpretation and application of constitutional rights, while constitutional supremacy is preserved in cases of normative conflict. The institutional framework for rights protection – encompassing the judiciary, the Constitutional Court, the Ombudsman, and specialised independent bodies – provides multiple avenues for access to justice, effective remedies, and constitutional adjudication. At the same time, the Constitution establishes carefully circumscribed limitation clauses, grounded in legality, necessity, and proportionality, and identifies a core of non-derogable rights that remain inviolable even in states of emergency.

Overall, the Macedonian Constitution offers a coherent, value-oriented, and largely complex framework for the protection of human rights, aligned with international standards and liberal-democratic principles. Nevertheless, as the analysis suggests, the effectiveness of this framework ultimately depends on its interpretation, institutional practice, and adaptability to contemporary challenges such as digitalisation, public health crises, security concerns etc. By mapping the constitutional foundations, axiological commitments, and institutional mechanisms of human rights protection, the paper provides a necessary groundwork for further examination of constitutional practice, judicial interpretation, and compliance with international human rights obligations, issues that will be explored in greater depth in the second part of this study

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ŁUKASZ KIERZNOWSKI*

Should Exams Conducted by Public Administration Bodies Be Subject to Judicial Review? Case of the Polish Matriculation Exam[1]

ABSTRACT: *The legal systems of various states establish a range of examinations conducted by public administration authorities, administrative institutions, professional self-governing bodies and other entities in public administration. However, the existence of various examinations within administrative law raises questions regarding the judicial review of such examinations. This problem appeared in Polish law, which was addressed very inconsistently; judicial review was allowed for some exams, while control over others was excluded. The article addresses the issue of judicial review of examinations in Polish administrative law, focusing on the controversial example of the matriculation examination (matura) in the context of the admissibility of challenging examination procedures before the administrative courts.*

KEYWORDS: *state exams, public administration exams, judicial review, matriculation exam, university admission*

1. Introduction

The legal systems of various states establish a range of examinations conducted by public administration authorities, administrative institutions, professional self-governing bodies and other entities in public administration. Depending on the examination, its administration and assessment may either constitute the primary task of a body, specifically established for this purpose, or may be carried out

1 Acknowledgments: This work was financed by the National Science Center under Grant number 2019/33/N/HS5/02635.

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https://doi.org/10.47078/2026.1.157-173

by an authority along with the performance of its main tasks and competencies. 0The procedures for administering and assessing such examinations are regulated by administrative law provisions. The outcome (result) of an examination generates defined consequences for the examinee, most often of a public law nature (e.g., access to subsequent levels of education, acquisition of qualifications to practice a particular profession or hold a specific position, eligibility to obtain citizenship, driving vehicles, etc.).

However, the existence of various examinations within administrative law, which are used by public administration to assess knowledge, skills or competencies and derive specific legal consequences prescribed by statutory provisions, raises questions regarding the judicial review of such examinations, regarding the correctness of the result and the legality of the examination procedures. Since the result produces legal effects for the examinee, the legal system must ensure the possibility of reviewing the actions of public administration in this area, regarding their compliance with the law, by independent courts.

The article addresses the judicial review of examinations in Polish administrative law conducted by public administration bodies or other entities in public administration, focusing on the controversial example of the matriculation examination (*matura* – one of the external examinations in the Polish education system) and the general admissibility of challenging examination procedures before the administrative courts. This has scarcely been discussed in the literature; however, it raises significant theoretical and practical challenges. Therefore, addressing it will fill an important gap in the current body of scientific knowledge. The research employs the dogmatic-legal and historical-legal methods. Additionally, it draws upon Polish case law (particularly administrative court rulings) and relevant Polish and English scholarly literature.

2. The Scope of Judicial Review of Public Administration in Poland

The substantive scope of judicial review of public administration is a matter present in several legal systems and is addressed differently across countries, depending on the prevailing model, system and the jurisdictional powers of courts overseeing administrative actions.[2] In judicial review models for public administration, where only specific types of administrative acts or actions, explicitly enumerated in legal provisions, are subject to review, concerns arise due to specific, atypical or entirely new and previously unknown forms of administrative actions. These actions give rise to interpretative uncertainties regarding whether they would be included or excluded in the catalogue of acts/actions subject to judicial review. These uncertainties become particularly significant when the given

2 See: Asimow, 2015, pp. 3–31; Spanou, 2020.

administrative action exerts a substantial (direct or indirect) impact on the legal situation of an individual.

In Poland, the administrative courts exercise judicial review over specific acts and actions undertaken by public administration authorities, as specified in the Act of 30 August 2002 – Law on Proceedings Before Administrative Courts.[3] Notably, separate special provisions may regulate the judicial review of certain decisions or actions performed by public administration bodies. The subject-matter scope of judicial-administrative control in Poland covers various manifestations of public administration activity. These include e.g. administrative decisions and resolutions in individual cases (orders made in administrative proceedings, subject to interlocutory appeal, or those concluding the proceeding, and orders resolving the case on its merit); acts or actions other than decisions and resolutions (orders) in administrative proceedings by public administration bodies, concerning rights or obligations arising from the provisions of law; inactivity of public administration bodies and the protraction of proceedings by them; acts passed by bodies of territorial agencies of government administration, local government units and their associations and acts of supervision over activities of local government authorities.[4]

Polish administrative courts, pursuant to legal provisions, adjudicate exclusively based on the criterion of legality.[5] Therefore, in every case brought before an administrative court, the determination of whether a particular public administration activity can be subject to judicial review is of key importance. This often raises interpretative doubts, especially in the case of atypical or novel forms of public administration activity. In practice, such interpretative challenges frequently arise concerning 'acts or actions other than decisions and resolutions (orders) taken in administrative proceedings by public administration bodies, concerning rights or obligations arising from the provisions of law'. This category encompasses a range of highly diverse public administration activities, which are interpreted primarily through case law. Furthermore, this issue arises in the context of judicial review of various examinations because the conduct of public administration authorities can have a diverse and often legally atypical character. For instance, if the examination result is not determined through an administrative decision in an individual case, rather through a series (or sequence) of material-technical actions, questions arise regarding whether the specific examination actions or the final action (establishing the result) can be classified as 'other acts or actions'. Consequently, doubts emerge as to whether any element of the examination procedure would fall within the scope of judicial review by administrative courts.

3 Journal of Laws of 2002, No. 153, item 1270 with further amendments.

4 Gut, 2024, pp. 1–16; Lemańska, 2017; Skoczylas and Swora, 2007, pp. 116–125.

5 For more about a model of judicial review of public administration in Poland, see: Gut, 2024, pp. 1–16; Szyszka, 2022, pp. 134–148; Wiącek, 2021, pp. 526–539.

The issue of the legal regulation of examinations and the examination-related activities of public administration bodies is not new and, in the coming decades, it may gain greater significance. However, the judicial review of procedures for conducting and assessing examinations administered by public administration bodies, which carry public-law implications, has become highly problematic and controversial in Poland, primarily due to the matriculation (*matura*) exam. The admissibility of challenging the *matura* in administrative courts has sparked a significant controversy in legal scholarship and judicial case law. It has become a major issue in administrative and educational law for individuals seeking admission to higher education and raised broader questions about systemic and unified solutions for judicial review of all state (public) examinations under Polish law, particularly when they can produce legal effects for examinees.

3. The Significance of the Matriculation Examination in Poland

For a comprehensive discussion of the admissibility of judicial complaints regarding the correctness of the matriculation exam results, it is necessary to outline its role in Poland, educationally and legally. Although the secondary school leaving examination exists in many countries, especially in Europe, it can play completely different roles. In Poland, the matriculation exam is part of a broader examination system. It is one of the so-called external examinations in education,[6] which, since 2005 (due to the 1999 reform),[7] have been conducted and assessed by examination boards independent of schools and students. These examinations are administered using standardised nationwide examination sheets and assessment criteria under double anonymity, ensuring result comparability and objectivity.[8] Moreover, uniform standards for conducting examinations allow the results to provide informational or educational insights (e.g., the quality of education provided by different schools)[9] and legal consequences for individual examinees, such as using the results as a recruitment tool for higher education.[10]

This function of external examinations is strongly evident in the *matura*. This examination is taken by graduates. The *matura* is optional, can be taken multiple times (annually) and has no bearing on the completion of secondary education. However, its result determines access to higher education, as it is, in the

6 See: Kellaghan and Greaney, 2020; Kellaghan and Madaus, 2003; Kierznowski, 2021, pp. 35–72.

7 See: West and Crighton, 1999, pp. 271–289; Jakubowski et al., 2010; Jakubowski, 2015; Jakubowski et al., 2016, pp. 557–572.

8 Jakubowski, 2015; Jakubowski et al., 2016, pp. 557–572; Jakubowski, 2021; Kierznowski, 2024, pp. 151–170.

9 See: Hesse-Gawęda, 2016, pp. 418–423.

10 For more about models and functions of external examinations systems, see: Kellaghan and Madaus, 2003; Kellaghan and Greaney, 2020.

majority of cases, the only legally permissible criterion for selecting candidates for university admission. Passing the *matura* is a prerequisite for enrolling in a university; however, when the number of applicants exceeds the number of available spots, the best scores in additional (advanced) subjects of the *matura* become crucial.

Universities cannot conduct entrance examinations in subjects covered by the *matura* (it covers almost all the subjects taught in general schools). Therefore, there is no other way to obtain higher education than passing the exam. Consequently, the *matura* is important in realising the constitutional right to education (at the higher level). This is especially true in highly competitive elite metropolitan universities and less competitive regional public universities (only in their tax-based or tuition-free modes of study), where strict meritocratic criteria (based on the *matura*) are used to select the best candidates.[11] However, it is expected that, due to demographic reasons, the significance of the *matura* may decline, prompting the state to adopt a different public policy regarding university admissions.[12] Regardless of the potential change in the significance of the *matura* in the future, currently, its results and the correctness of the procedure of their determination carry significant educational and legal implications.[13]

4. Judicial Review of the Matriculation Examination

As noted, the current model of the *matura* has been in place since 2005. A few years after its introduction, the issue of judicial review over its administration gained significant importance, particularly concerning the correctness of the assessment rules. The admissibility of judicial review of the *matura* is tied to incorrect assessment practices, which have escalated over the years, sparking social controversy. The report of the Supreme Audit Office (NIK), published in 2015, was a breakthrough event in the official 'disclosure' of the incorrect assessment of matriculation exams in Poland. The audit revealed that, in 2009-2013, exam paper access was granted to 40,266 high school graduates, while 10,065 were reassessed on grounds of graduate petitions. The results were changed in 2,596 cases, that is, 25.8% of the exams being reassessed were assessed incorrectly by the first examiner.[14]

This issue was further compounded as the regulations did not provide for an administrative appeal mechanism regarding the results. All the result changes were made without a clear legal basis, based on 'good practises'. Literature has noted that the persistence of inaccurate assessment of *matura* in Poland was, among

11 Kwiek, 2013, pp. 553–576.
12 Kwiek, 2014, pp. 266–280.
13 Kierznowski, 2024, pp. 151–170; Kierznowski, 2025, pp. 125–126.
14 Najwyższa Izba Kontroli, 2015.

other factors, attributable to the absence of a reliable administrative procedure for challenging the results.[15] Hence, such a possibility was introduced into Polish law in 2016. However, before this change, due to the lack of an administrative appeal process before examination boards, these cases were resolved through complaints submitted to administrative courts, which determined whether such matters fell within their jurisdiction, as the law did not directly regulate this issue.

In the initial years, the case law of administrative courts regarding the admissibility of complaints against *matura* results or other acts or actions of examination committees (e.g., invalidation of the examination) was inconsistent. While a predominant line of case law rejected the possibility of such judicial review, isolated judgments, albeit only from provincial administrative courts, allowed for judicial oversight of the *matura*. The prevailing line of case law rejecting judicial review of the *matura* evolved into an almost uniform view. Most judgments excluding judicial review of the *matura* became a strong reference point for adjudicating panels in subsequent cases of this nature.[16]

In the rulings that form this case law, the administrative courts, when addressing the legal status of the procedure for conducting and assessing the *matura* and the related actions and acts, stated:

'The *matura* examination constitutes a form of assessment of the level of general education, checking knowledge and skills established in the standards of requirements underlying the conduct of the *matura* examination, as specified in separate regulations. This means that the *matura* examination is a form of committee-based assessment of the general education level of secondary school graduates in subjects defined by the regulations. The *matura* score is solely the result of checking the knowledge of the examined person by determining the correctness of the answers provided. When the examination board determines the result of the written part of the exam, it merely confirms a specific factual state, to which it has no direct influence, and establishes the number of correct answers. It thus does not create any legal relationship. As a result, it must be concluded that the points obtained in individual subjects are not issued within the administrative procedure and are not administrative decisions. The *matura* certificate itself also does not constitute an administrative decision, as it is not an authoritative determination of the rights and obligations of the party'.[17]

Similarly, the Supreme Administrative Court ruled:

> 'The action of determining the result of the *matura* examination (conducting the examination) and the result itself, as they merely confirm a specific factual state, do not constitute an administrative decision

15 Kierznowski, 2023, pp. 88–89.

16 See: Tobor and Zeifert, 2018, pp. 191–204.

17 Judgment of the Provincial Administrative Court in Gorzów Wielkopolski of April 25, 2012, II SA/Go 213/12.

> or an authoritative determination of the rights and obligations of the party, and are not subject to administrative court review [...] When the regional examination board determines the *matura* exam score, it does not make an authoritative decision about granting a specific right. It does not create a new legal relationship but rather assesses knowledge and skills'.[18]

Similar opinions were held by the courts regarding the recognition of examination activities and the determination of the result as "acts or actions other than decisions and resolutions (orders) taken in administrative proceedings by public administration bodies, concerning rights or obligations arising from the provisions of law". For example, the case law stated:

> 'It cannot be considered that the grade awarded for the *matura* exam is issued within administrative proceedings, as the *matura* certificate itself does not constitute an administrative decision in the above-mentioned sense. This characteristic of the assessment determines that it cannot be regarded as an action within public administration. [...] An act or action must concern a right or obligation arising from the provisions of law. Therefore, it is necessary to relate such an act or action to a provision of law that is generally applicable and defines the right or obligation. This means that there must be a close link between the legal provision defining the right or obligation and the act or action concerning such a right or obligation. The *matura* assessment, as well as the *matura* certificate, do not fall within the scope of this concept and do not constitute an act of a public-law nature. Since the assessment in the *matura* exam does not constitute an administrative decision or an action within the scope of public administration, it follows that the refusal to amend the score, apart from the lack of normative regulation allowing for the change of the assessment, cannot be considered an administrative decision. The issue of determining the grade from the *matura* exam, as not subject to administrative jurisdiction, simultaneously prevents the administrative court from controlling any letters or statements made by the regional examination board regarding the grades obtained in the *matura* exam'.[19]

After several years, all interpretative doubts were resolved through an amendment to the law, which explicitly closed the judicial route in *matura*-related matters.

18 Judgment of the Supreme Administrative Court of September 12, 2012, I OSK 1901/12.
19 Judgment of the Provincial Administrative Court in Warsaw of 28.07.2006, I SA/Wa 2027/05.

The regulations provided that the examination result was final and could not be appealed before the administrative court. Hence, the interpretation of judicial rulings was 'transferred' into the content of the law. Notably, this rule applies to the matriculation exam and all other external examinations, such as the vocational exam or the eighth-grade exam. While this approach is inconsistent, it does not have as drastic legal consequences as other exams. This is because its results do not significantly impact examinees' access to further education and the realisation of their constitutional right to education. An analogous view has been consolidated in case law regarding the examination result, the actions determining it and other examination-related decisions, such as the decision to invalidate the *matura*. This went through all court instances, all the way to the Polish Constitutional Tribunal. In 2015, the Constitutional Tribunal made a controversial (five *votum separatum*) ruling in which it found that the inability to appeal the invalidation of the exam to an administrative court was consistent with the Constitution of the Republic of Poland.[20]

In 2016, a new administrative appeal procedure was introduced, establishing the Examination Arbitration Board to provide examinees with the opportunity to contest their results (only within the framework of the administrative appeal process) in cases of suspected errors by examiners appointed by the examination board.[21] However, to ensure a coherent and self-contained system, the decisions issued within the administrative appeal procedure concerning *matura* results (like the original results) were not subject to review by administrative courts. To eliminate any future interpretative ambiguities, the procedure for verifying the correctness of the results was accompanied by provisions which explicitly closed all judicial recourse in such matters, analogous to the initial examination results. The inadmissibility of judicial review by the Examination Arbitration Board was later confirmed in case law.[22]

Hence, the *matura* in Poland (including all decisions and resolutions regarding its administration and assessment, such as exam admission, result determination, consideration of appeals against results and invalidation of the exam) remains outside the jurisdiction of Polish administrative courts. This is a practical application of the principle that 'everyone has the right to access the courts, but not in all kinds of cases'. For nearly a decade, individuals have had the right to request a review of their examination papers by the relevant examination board and, subsequently, to appeal the review results to the Examination Arbitration Board. However, there is no judicial recourse if they believe that the public

20 Judgment of the Constitutional Tribunal of June 22, 2015, SK 29/13; see also: Jackowski, 2017, p. 58.

21 Kierznowski, 2025; Kierznowski, 2023, pp. 41–52.

22 Decision of the Supreme Administrative Court of 26 November 2019, I OSK 1346/19.

administration bodies (examination boards) violated the law while conducting and assessing their *matura*. This is strongly criticised in legal academic literature.[23]

As some authors pointed out, this creates a paradox. The *matura* is evidence in the university recruitment process (an administrative procedure). However, the possibility of reviewing the legality of this evidence has been excluded. Meanwhile, as P. Dańczak indicated, judicial review in this area is possible, as it concerns the assessment of the correctness of the examination, rather than the court engaging in substantive review of the answers provided in the examination paper.[24] Furthermore, the issue of judicial control over the administration and the constitutional right to a court encompasses various forms of public administration activities in education, as emphasised in the literature.[25] Therefore, this issue extends beyond external exams (*matura*).

5. Other State Examinations in the Polish Legal System and Their Judicial Review

The lack of judicial review of the Polish matriculation exam results, although significant due to the examination's considerable legal and educational importance and the systemic issue of frequent grading errors, prompts reflection on a broader issue – the judicial review of all examinations conducted and assessed by public administration bodies. The results of such examinations often determine critical matters, such as eligibility for further education, the right to practice a particular profession, the ability to hold specific positions or roles and the acquisition of other public-law entitlements. Within the Polish legal system, alongside external examinations in education, the following examinations can be considered: a) Professional qualification examinations (e.g., for medical doctors or tax advisors); b) Entrance examinations for specific professional education (e.g., entrance exams for attorney or judicial apprenticeships); c) Civil service examinations (e.g., the examination concluding preparatory service in the Civil Service or for local government employees); d) Entrance examinations for higher education (conducted in exceptional cases as a substitute for the *matura*); e) Examinations during education (e.g., exams during university studies or classification exams in schools); f) Examinations for granting scientific degrees and titles (e.g., PhD examinations); g) Physical or fitness tests (e.g., for service in uniformed agencies); h) Examinations granting driving privileges and language competency assessments (e.g., for

23 Jakubowski, 2011, pp. 62–70; Króliczek, 2016, pp. 397–406; Kierznowski, 2016, pp. 33–46; Bąkowski and Kornberger-Sokołowska, 2017, pp. 154–158; Flisek, 2017, pp. 201–207; Kierznowski, 2023, pp. 55–62; Kierznowski, 2023, pp. 41–52.

24 Dańczak, 2015, p. 236.

25 Salachna and Ostrowska, 2023, pp. 125–150.

citizenship purposes); i) Examinations authorising individuals to sit on boards of state-owned companies.

This enumeration is merely illustrative and highlights that examinations are a widespread form of public administration activity. They are not limited to education and affect a wide range of citizens' rights and obligations across domains.

In the Polish legal system, the regulation of all examinations conducted by public authorities is fragmented. Various examinations are established by individual laws (acts) within administrative law, tailored to its specific branches. In some cases, they are established by executive acts or internal regulations. Furthermore, in addition to the variety of examinations, there is a significant divergence in the procedures for conducting and assessing them. There are no uniform provisions for all examinations conducted by public authorities. Hence, the Polish administrative law establishes separate legal regulations for the conduct of each examination. At most, a group of related examinations may be regulated, either in whole or in part, by common provisions, particularly when they are governed by the same statute (e.g., external examinations in Polish education, regulated by the Education System Act).[26]

The lack of unified legal foundations for conducting and assessing state exams in Poland is due to the lack of uniform regulation for their judicial review. In some cases, the legislator explicitly allows an appeal to the administrative court (e.g., on the resolution regarding the bar exam results), while in others it is excluded (e.g., in the case of the *matura*). In several cases, this issue is not regulated at all (e.g., exams conducted during university studies; recent case law has allowed judicial review of the conformity of the exam procedures with the syllabus if failure to pass was the basis for a student's removal from the university).[27]

However, if the admissibility of an appeal to the court regarding a particular exam is not explicitly regulated, the dilemma of whether such exams should be subjected to judicial review comes down to the assessment of whether specific examination activities were 'other acts or actions…'. In such cases, the admissibility of subjecting the exams, not directly regulated by legal provisions, to judicial review is then decided by administrative courts in case law – so strongly that one might even speak not only of legal interpretation but rather judicial law-making. In practice, in some cases, the courts decide on the admissibility of the judicial path. The example of the *matura* shows that views developed in jurisprudence are subsequently transferred to statutory law and adopted by the legislator.

However, a lack of statutory regulation and leaving this issue solely to the interpretation of case law leads to a significant systemic inconsistency, as the case

26 Act of September 7 1997 on the education system, Journal of Laws of 1991, No. 95, item 425 with further amendments.

27 Judgment of the Provincial Administrative Court in Cracow of December 3, 2024, III SA/Kr 1372/24.

law is not uniform, treating various exams differently, even though they have an analogous (public law) nature. Legally, this causes exams with an analogous character to be treated differently; some are subjected to judicial review, while others are excluded. This systemic inconsistency is deeply perplexing, given that all such examinations share certain common features. These examinations are conducted and assessed within the administrative law framework by competent public administrative authorities or other bodies entrusted by law or under administrative agreements for the performance of public administration duties (e.g., professional self-governing bodies). Furthermore, their results directly or indirectly produce legal consequences for the examinee. Thus, each examination is an authoritative, unilateral and doubly binding act or action of public administration, sharing analogous characteristics and deserving of analogous treatment within a legal system.

Moreover, every examinee prepares for the examination with the trust that it will be conducted and assessed in accordance with legal provisions (the principle of trust in the state and its laws). Consequently, the examinee, like in any other action of public administration, has the right to expect that, in the event of any violation, judicial protection of their rights will be available. Individuals have the right to expect consistency from the legislature; thus, examinations should be subject to judicial review (based on the criterion of legality), regardless of the type of examination or the administrative authority conducting it.

However, despite the persistence of this issue, no objective criteria have been established to resolve the dilemma of which state examinations should be subject to judicial review. At present, subjecting or excluding a given examination from judicial oversight is likely a matter of coincidence or the prevailing opinions or sentiments within the judiciary or legislative bodies at the time of enacting specific provisions. The differing objectives of the examinations (such as professional examinations for attorneys and external examinations within the education system) do not constitute a sufficient argument for differentiation. Each examination enables an individual, directly and concretely, to exercise certain constitutional rights and freedoms. Consequently, what is of primary importance is the fact that the examination directly affects the individual's legal situation; hence, it should be subject to judicial review. The social significance of the legal effects of an examination and its nature and purpose should be of secondary importance.

However, the cause of such disparate treatment of examinations within the legal system may lie in practical and organisational concerns, such as the potential volume of cases that could burden the courts. Perhaps this is why mass examinations in Poland, such as nationwide external educational exams conducted simultaneously for a large number of individuals, are excluded from judicial review. Nonetheless, Polish legislators have no issue permitting judicial oversight for niche exams, which involve relatively few participants or are not

concentrated within a specific timeframe (such as those qualifying individuals for regulated professions, e.g., legal professions). Hence, while such subjective and inconsistent exclusions of certain exams are unacceptable theoretically and constitutionally, they might reflect the practical reality.

6. The Usefulness of Judicial Control of Exams in Practice

Beyond the legal admissibility of judicial review of examinations, there remains the issue of the practical utility of such a review due to the duration of judicial procedures. This problem is evident in the case of every secondary-school-leaving examination, Polish *matura*, or university entrance exams. Candidates taking these exams often aim to use the results immediately after passing to begin their university studies in October of the same year (in Poland, the results are announced in July, followed by the university admission process). This maintains the continuity of the educational process, which translates into earlier entry into the labour market, obtaining professional qualifications sooner or contributing to pension schemes for a longer period. Thus, the lack of judicial review, beyond impairing the right to education, may have repercussions on the implementation of a broader spectrum of social, economic and cultural rights.[28]

In this context, a multi-year judicial procedure (first the provincial administrative court and then the Supreme Administrative Court) means that, for individuals, a judgment, even if favourable, will not be optimal for their legal and educational interests due to the passage of time. The candidate would have enough time during this period to retake the exam multiple times to improve their score to the level necessary for admission to a particular program. This would render the judicial review illusory and useless, as the court would be reviewing the legality of a result that could have already changed several times in subsequent examinations. Similar problems arising from the duration of judicial procedures may occur in the case of any state exam.

This is supported by the fact that the protracted nature of Polish judicial procedures is a significant issue, long recognised and extensively discussed in academic literature. J. Lemańska pointed out that in practice, the deadlines for issuing administrative courts' decisions in Poland were considerably long, especially before the Supreme Administrative Court. Poland has constantly been among the countries with the greatest number of complaints concerning the excessive length of judicial proceedings. In the Polish legal system, there are, for certain categories of cases, deadlines for setting the date for a trial or hearing by the court. However, for several cases, such deadlines do not exist. This is because of the principle that

28 For more information on the incorporation process of the social, economic and cultural rights into the Polish legal system, see: Czepek, 2025, pp. 60–61.

a case before an administrative court should conclude as swiftly as possible.[29] If judicial review of state examinations, particularly in education, is to be meaningful, it would be necessary to establish a 'fast-track procedure' dedicated to such cases. However, it is doubtful that the Polish legislator would adopt such a solution, as there are numerous other categories of cases in which the introduction of an expedited judicial review could be justified on similar grounds.

7. Conclusion

The issue of judicial review of exams conducted by public administrative authorities, outlined in this article, is about the protection of citizens' legal positions and the realisation of the right to a court. Since the legal status of an individual depends on the result of an exam, the legality of the exam (both conduct and assessment) cannot be excluded from judicial review. This is an authoritative and unilateral action by an administrative body, which, although not always as an administrative act, affects the legal position of the individual taking the exam, who, based on the result, would pursue certain legal or factual interests. Therefore, the individual has the right to expect that, in a democratic state governed by law, these exams will be conducted in accordance with the law, like any other action of public administration, and, in the event of a violation, the individual will obtain legal protection before the court.

However, the lack of judicial review indicates complete discretion in the application of exam regulations by public authorities. This leads to the illusory nature of the obligation of public authorities to act based on and within the limits of the law. However, since there is no court overseeing the administrative actions, the duty to act in accordance with the law is impossible to execute. This contradicts the fundamental constitutional principles and violates the principle of a democratic state governed by law and of legality, leading to a 'circumvention' of the right to a court and good administration.[30] This represents a breach in a system where the actions of public administration bodies should be subject to independent judicial oversight whenever they affect the legal position of an individual. This is part of a broader issue, which is the scope of judicial review of public power.[31] The literature notes that 'a broad range of acts falling under judicial review gives better and a more complete legal protection in a democratic state ruled by law'.[32]

However, concerns about the role of administrative courts in reviewing exams in fields where judges lack specialised knowledge (such as technical,

29 Lemańska, 2017.
30 For a broader context, see Wrońska and Dubowski, 2023, pp. 221–243.
31 See: Jackowski, 2017, p. 58.
32 Skoczylas and Swora, 2007, pp. 116–125.

medical or professional expertise in a specific area) are unfounded. This is because judicial review is consistent with the model of the Polish administrative judiciary. Hence, the review is based solely on the criterion of legality, instead of the substantive assessment of exams from areas of knowledge. Therefore, within the current model, the review of such exams is feasible and would not require any systemic reforms. Based on these considerations, one can conclude that acts and actions related to exams, in cases where exams produce or may produce legal consequences for the examinees, should be subject to judicial review following the model prevailing in the legal order of the respective state. Although such a solution entails certain risks (for instance, the potential overburdening of administrative courts with a large number of complaints or the inflation of examination results by administrative bodies and examiners fearing judicial proceedings), it appears necessary considering the standards of a democratic state governed by the rule of law.

Nevertheless, a question remains regarding the procedural framework under which this review should be carried out. On the one hand, depending on the procedure for conducting and assessing the exam, the acts and actions related to the exam could be regarded as an administrative decision or 'other act or action…'. On the other hand, considering the increasingly prevalent and expanding exam-related activities of public administration in a knowledge-based society, a new category of administrative actions may emerge and be regulated. These actions would not be administrative decisions or 'other acts or actions' currently subject to judicial review. Such actions by administrative bodies, involving the assessment of knowledge or skills through exams established by administrative law, would result in statements of knowledge (as opposed to statements of intent, typical of classic administrative acts), which should be subject to judicial review. Regardless of the chosen model, such reviews should be exercised by the administrative courts based on the criterion of legality, irrespective of the existence of an administrative path to challenge the exam result.

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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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https://doi.org/10.47078/2026.1.175-203

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

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 churches[24]; Political parties[25]; Trade unions and other representative organisations[26]; The Hungarian nation and national, ethnic, racial or religious communities[27]; Scientists[28]; The Hungarian Academy of Sciences, the Hungarian Academy of Arts and higher education institutions[29]; Families, children, women, the elderly and those living with disabilities[30]; Parents[31] and persons raising children[32]; Employees[33] and employers[34]; Young people[35]; Persons in need because of maternity, sickness, invalidity, disability, widowhood, orphanhood and involuntary unemployment or other persons in need[36]; Elderly people[37]; Homeless people[38]; Refugees[39] and those lawfully residing in Hungary[40]; 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 needed[64]. 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 CXXV 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 session[80], 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 Naszladi, 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 unconstitutionalities 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 fundament al 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 t he 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.

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National Human Rights Systems: Bulgaria

ABSTRACT: *The new democratic Constitution of the Republic of Bulgaria, adopted in 1991, established a framework for integrating fundamental rights into national law and aligning them with international standards. The constitutional provisions regarding human rights and liberties do not follow a strict hierarchical order; instead, they are generally regarded as holding equal weight, regardless of their placement or the irrevocability clause. However, the limited indirect access of Bulgarian citizens to the Constitutional Court has primarily positioned it as a guardian of the constitutional framework with a limited role in protecting human rights.*

Since the 1990s, Bulgaria's judicial system has incorporated not only judges but also prosecutors and investigating magistrates, reflecting a shared responsibility for protecting rights. Over the years, it has become evident that the courts play a crucial role in safeguarding fundamental rights. In 2006, a constitutional amendment established the position of Ombudsperson to protect citizens' rights and freedoms and to serve as the National Prevention Mechanism. In the early 21st century, the parliament also created several National Human Rights Institutions (NHRIs) through legislation, including the Commission for Protection against Discrimination, the Commission for Protection of Personal Data and the State Agency for Child Protection. In subsequent years, the government formed various advisory and monitoring bodies. However, Bulgaria's NHRIs lack a unified framework and do not fully adhere to the six pillars outlined in the Paris Principles of 1993 – independence, pluralism, cooperation, accessibility, funding, and broad mandate.

The tension between national and supranational interpretations of human rights underscores the need for further reforms and a commitment to consistently upholding these rights. The success of Bulgaria's human rights protection will depend on ongoing engagement with both national and international frameworks to promote justice and equality.

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https://doi.org/10.47078/2026.1.205-239

■ **KEYWORDS:** *1991 Constitution of the Republic of Bulgaria, fundamental rights, human rights, Constitutional court, judiciary, ombudsperson, NHRIs*

1. Introduction: Key Concepts of Human Rights in Bulgarian Law

Since the 1950s, Bulgarian legal doctrine has predominantly used the term 'fundamental rights' within a domestic context,[1] while 'human rights' has been employed in ideological[2] and international[3] contexts from the late 1970s onwards. This distinction remains relevant today,[4] largely due to the consistent inclusion of the title 'Fundamental Rights and Obligations of the Citizen' in the respective chapters of the socialist constitutions of the People's Republic of Bulgaria (1947 and 1971) and the democratic Constitution of the Republic of Bulgaria of 1991. The term 'constitutional rights' is often used in case law in reference to specific provisions of the current Bulgarian Constitution, yet it is not clearly linked to or distinguished from the concept of human rights.

In the 1990s, Neno Nenovski, a professor of legal theory and a constitutional judge from 1991 to 1994, began to explore the theoretical aspects of the concept of human rights[5] within the new democratic constitutional framework. He emphasised the 'rights of the individual'[6] and advocated for their protection by the Constitutional Court (Конституционен съд).[7] Subsequently, some constitutional theorists continued to examine the interconnection between the international and constitutional dimensions of human rights,[8] leading to the emergence of the term 'fundamental human rights'[9] in the early 21st century.

Following Bulgaria's accession to the European Union in 2007, the concept of 'fundamental rights' began to gain prominence at the intersection of international and national contexts, particularly in relation to the application of the Charter of Fundamental Rights of the European Union. As a result, the terms 'human

1 Чобанов [Chobanov], 1948; Янев, Цонев[Yanev and Tsonev], 1952; Вълканов [Vylkanov], 1990.
2 Кожаров [Kozharov], 1977; Захаров [Zaharov] et al., 1979; Цеков [Tsekov], 1982; Михайлова [Mihaylova], 1987.
3 Векилов [Vekilov] et al., 1982.
4 Contemporary studies in international public law in Bulgaria primarily employ the term 'human rights' – see Белова-Ганева [Belova-Ganeva], 2013; Йочева [Yocheva], 2020. Research in constitutional law and national protection tends to favor the notion of 'fundamental rights' – see Златарева [Zlatareva], 2007; Янкулова [Yankulova], 2020.
5 Неновски [Nenovski], 1994.
6 Неновски [Nenovski], 1995.
7 Неновски [Nenovski], 2000.
8 Друмева, Каменова, [Drumeva, Kamenova], 2000.
9 Танчев, [Tanchev], 2002.

rights' and 'fundamental rights' have increasingly been used synonymously and interchangeably in both doctrine[10] and jurisprudence.

At the same time, legal scholars in Bulgaria began to explore the relationship between the two concepts, asserting that they were drawing on Robert Alexy's discursive theory[11] and the notion that the material substance of fundamental rights encompasses criteria beyond the mere constitutional mention and protection of those rights.[12] It is not entirely clear how, from this starting point, Boyka Cherneva developed her central thesis, which asserts that 'the ontological essence of human rights lies in their existence as fundamental subjective rights.'[13] She further posits that 'through legal institutionalisation, natural rights are transformed into fundamental rights.'[14] Cherneva distinguishes between the two terms, noting that 'human rights' are 'used in an absolute sense' and apply to all individuals regardless of specific context, while 'fundamental rights' are described as 'open and supple,' encompassing not only the concept of human nature but also the principles of equality under the law and the rule of law.[15] However, such an approach overlooks decades of jurisprudence and case law from the European Court of Human Rights, which connect human rights to specific contexts and tie effective remedies for their protection to the principle of the rule of law.

This tendency within Bulgarian doctrine to reduce human rights to a purely theoretical concept, coupled with the endorsement of the term 'fundamental subjective rights' as a distinct legal category, represents a shift that undermines the importance of the supranational dimension of human rights. This conceptual framework has contributed to the perception that supranational and international protection of human rights is separate from national protection mechanisms, which rely on the procedural institutionalisation of certain subjective rights within Bulgarian legislation. Consequently, some judges have come to believe that rights under the European Convention on Human Rights – such as the right to personal and family life under Article 8 – do not automatically confer rights upon individuals or impose corresponding obligations on the state without relevant national legislation.[16]

10 Чернева [Cherneva] et al., 2023.
11 Alexy, 1996, 2006.
12 Чернева [Cherneva] 2016, p. 82.
13 Ibid., p. 86.
14 Ibid. This is a reformulation of Alexy's original thesis: 'Human rights are institutionalised by means of their transformation into positive law. If this takes place at a level in the hierarchy of the legal system that can be called 'constitutional,' human rights become fundamental rights' (Alexy, 2006, p. 22.). Cherneva has oversimplified the relationship between human rights and positive law and has failed to capture the nuanced distinction that Robert Alexy made regarding the constitutional elevation of human rights to fundamental rights.
15 Чернева [Cherneva], 2016, p. 86.
16 See: Interpretative Decision No. 2/2023 by the General Assembly of the Civil College of the Supreme Cassation Court.

2. The Bulgarian Constitution's Approach to Human Rights

■ *2.1. Constitutional Framework for Human Rights in a Dedicated Chapter*

The 1991 Constitution, enacted in the aftermath of the collapse of the communist regime, outlines the 'Fundamental Rights and Obligations of Citizens' in Chapter Two, positioned immediately after the basic provisions, which also contain certain human rights. Similar catalogues were enshrined in the earlier constitutions of 1947 and 1971; however, those provisions were ultimately hollow and devoid of genuine content under totalitarian rule.[17] The democratic Constitution of 1991 sought to transform this approach by granting its provisions immediate effect[18], allowing individuals to directly invoke them to safeguard their fundamental rights in any administrative or judicial proceedings.

■ *2.2. Incorporating International Human Rights Standards into the Domestic Legal Hierarchy: Positioned Below the Constitution and Above Parliamentary Legislation*

Another paradigm shift was introduced in Article 5, paragraph 4, by incorporating all ratified, promulgated, and enforced international instruments as part of domestic law, giving them precedence over parliamentary legislation. The 1991 Constitution also emphasises the significance of international human rights treaties by granting the Constitutional Court the authority to assess whether national laws conform to 'universally accepted international norms and treaties to which Bulgaria is a Party'.[19]

Integrating self-executing international standards into Bulgaria's domestic legal framework marked a radical change in the country's approach to human rights. In the 1980s, Bulgarian legal doctrine maintained that international norms did not confer direct rights on individuals, asserting that 'the specific content and implementation of individual rights and freedoms' fell 'within the exclusive domestic competence of states.'[20] Consequently, international and domestic law were viewed as two independent legal orders without primacy for either system,[21] leading to ambiguities in the application of international law, particularly regarding human rights. Under the 1971 Constitution, the People's Republic of Bulgaria applied the concept of 'abiding' by international treaties,[22] ensuring the application

17 Dolapchiev, 1953.
18 Art. 5 para. 2 of the Constitution.
19 Ibid., Art. 148 para. 1 point 4.
20 Векилов [Vekilov] et al., 1982, p. 266.
21 Радойнов [Radoynov], 1971, p. 72.
22 Decree No. 1496 on the participation of the People's Republic of Bulgaria in international treaties (Prom. SG 62 of 12.08.1975) was repealed in November 2001 by International Treaties of the Republic of Bulgaria Act (Prom. SG 97 of 13.11.2001).

of international norms through explicit statutory referral.[23] In contrast, the 1991 Constitution integrated the standards of international treaties into the domestic normative hierarchy, prioritising them over parliamentary laws and thereby laying the groundwork for national mechanisms for human rights protection on an entirely different foundation.

■ *2.3. Vertical and Horizontal Protection of Human Rights*

Bulgarian constitutional theory firmly establishes that human rights are essential and intricately woven throughout the entire text of the 1991 Constitution of the Republic of Bulgaria, reflecting a comprehensive commitment to individual liberties and dignity.[24] The Constitution encompasses both vertical protection, which safeguards individuals from state infringement, and horizontal protection, which ensures respect for rights in private relationships.[25] This dual approach aims to nurture a human rights culture within society, encouraging not only legal safeguards but also a collective responsibility among citizens to uphold the rights of others.

The Constitution primarily provides vertical protection by placing explicit obligations on the state to respect, safeguard, and guarantee life, dignity, and individual rights.[26] Parliament is tasked with electing an ombudsperson who advocates for the rights and freedoms of citizens.[27] The judiciary is responsible for safeguarding the rights and legitimate interests of all citizens.[28] The Constitutional Court has the authority to declare unconstitutional any laws that violate fundamental rights and freedoms, upon referrals not only from traditional entities[29] but also from the ombudsperson and the Supreme Bar Council.[30]

The Bulgarian Constitution extends the protection of fundamental rights to relationships between private individuals, thereby incorporating horizontal effects and promoting a culture of respect for human rights beyond the state's obligations. For example, Article 58, paragraph 1 mandates that citizens must respect the rights and legitimate interests of others. Fundamental rights are considered irrevocable[31] and must not be abused or exercised to the detriment

23 Тодоров [Todorov], 2000, p. 316.
24 Танчев [Tanchev], 2002, p. 36.
25 Цонева [Tsoneva], 2019, p. 159.
26 Art. 4 para. 2 of the Constitution.
27 Ibid., Art. 91a para. 1.
28 Ibid., Art. 117 para. 1.
29 Art. 150 para. 1 of the Constitution outlines the entities authorised to initiate proceedings before the Constitutional Court. Specifically, it states that the Constitutional Court may act upon a request from at least one-fifth of all Members of the National Assembly, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, or the Chief Prosecutor.
30 Art. 150 paras. 4–5 of the Constitution.
31 Ibid., Art. 57 para. 1.

of the rights or legitimate interests of others[32]. Moreover, certain constitutional provisions explicitly incorporate the horizontal dimension of human rights protection. For instance, the exercise of the right to express opinions (Article 39) and the right to seek, receive, and disseminate information (Article 41) is restricted in the Bulgarian Constitution, as these rights cannot be used to harm the rights or reputation of others.

■ *2.4. Groups that Enjoy 'Special Protection' under the Bulgarian Constitution*

The 1991 Constitution provides specific human rights protections for certain vulnerable groups, including children, mothers, persons with disabilities, and older adults.

In its foundational provisions, the Constitution places the family, motherhood, and children under the protection of the state and society (Article 14). It recognises that raising and nurturing children is both a right and a responsibility of parents, with the state offering assistance[33]. Abandoned children are entitled to protection from the state and society[34], and the Constitution ensures that children born out of wedlock enjoy the same rights as those born within marriage. Mothers receive special protections, including guaranteed prenatal and postnatal leave, free obstetric care, improved working conditions, and various forms of social assistance.[35]

Article 51, paragraph 3 extends special protection to older adults without relatives who cannot support themselves, as well as to persons with physical and mental disabilities. The state is also mandated to create conditions that enable individuals with disabilities to exercise their right to work[36].

Furthermore, the Constitution ensures enhanced protection for Bulgarian citizens by birth,[37] stating that they cannot be deprived of their Bulgarian citizenship under any circumstances[38]. All Bulgarian citizens abroad are entitled to the protection of the Republic of Bulgaria[39], and the Constitution affirms that all citizens, regardless of their location, possess the same rights and obligations[40].

32 Ibid., Art. 57 para. 2.
33 Ibid., Art. 47 para. 1.
34 Ibid., Art. 47 para. 4.
35 Ibid., Art. 47 para. 2.
36 Ibid., Art. 48 para. 2.
37 According to Art. 25 para. 1 of the Constitution, Bulgarian citizenship by birth is granted to anyone with at least one parent holding Bulgarian citizenship, or to anyone born on the territory of the Republic of Bulgaria, provided they are not entitled to any other citizenship by virtue of their origin. Alternatively, Bulgarian citizenship may also be acquired through naturalisation, as established by law.
38 Art. 25 para. 3 of the Constitution.
39 Ibid., Art. 25 para. 5
40 Ibid., Art. 26 para. 1.

■ *2.5. Guiding Principles of the Status of the Individual*

The guiding principles of the status of the individual in the Bulgarian Constitution are primarily anchored in the protection of 'the rights, dignity, and security of the individual', which the Preamble identifies as its 'highest principle.'

The Constitutional Court has consistently emphasised the importance of these values when assessing the constitutionality of laws or interpreting constitutional provisions.[41] The principle of human dignity and individual rights guides the Court in evaluating the compliance of amendments and additions to the Constitution with its foundational principles and the balance of constitutional values:

> It is no coincidence that the preamble of the Constitution declares our allegiance to the common human values of freedom, peace, humanism, equality, justice, and tolerance, while elevating the principle of the rights of the individual – his dignity and security – to the rank of supreme principle. The primary criterion for assessing any and all amendments to the Constitution is whether they, individually and collectively, facilitate or impede respect for individual rights. The constitutionality of any change is not determined by how 'cosmetic' or 'radical' it may be, as that would be a judgement of form rather than substance. For a substantive assessment of any and all amendments to the Constitution, the overriding consideration is their direction – whether they strengthen or undermine the rule of law, the separation of powers and their balances and interaction in a republic with parliamentary government, and the independence of the courts and other bodies in the judiciary; respectively, whether they promote or hinder access to an independent and impartial tribunal and an independent, impartial, and effective investigation.[42]

The Bulgarian Constitution also connects the principle of the rule of law[43] with the state's commitment to 'guarantee the life, dignity, and rights of the individual' and to foster conditions that promote the free development of individuals and civil society.[44]

Another key principle regarding the status of the individual under the 1991 Constitution is expressed in Article 6, which asserts that 'all individuals are

41 For instance, Decision No. 6, issued on 18 November 2005 by the Constitutional Court of the Republic of Bulgaria in Case No. 7/2004; Decision No. 10, issued on 29 May 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 4/2017, among others. All decisions and cases of the Constitutional Court are available in Bulgarian at the following database: https://www.constcourt.bg/bg/search (Accessed: 18 May 2025).

42 Decision No. 13, issued on 27 July 2024 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2024.

43 Art. 4 para. 1 of the Constitution.

44 Art. 4 para. 2. This connection is discussed in the jurisprudence of the Constitutional Court. See Decision No. 3, issued on 17 May 1994 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/1994; Decision No. 7, issued on 4 June 1996 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/1996; Decision No. 20, issued on 14 July 1998 by the Constitutional Court of the Republic of Bulgaria in Case No. 16/1998, among other.

born free and equal in dignity and rights' (paragraph 1) and that 'all citizens shall be equal before the law' (paragraph 2). The tenet of equality before the law also applies to all foreigners residing in Bulgaria, as the Constitution grants them all rights and obligations derived from it, except for those specifically requiring Bulgarian citizenship[45].

The axiological foundations of these guiding principles – human dignity, individual rights and freedoms, the rule of law, and equality before the law – are deeply rooted in and influenced by Bulgaria's experiences with totalitarianism from 1944 to 1989. The constitution-makers of 1990-1991 sought to embed the values of democracy, the rule of law, and human rights into the very foundations of the 1991 Constitution.

At the beginning of Chapter Two, the framers differentiate between the rights and duties of Bulgarian citizens and those of foreigners residing in Bulgaria. The first paragraph of Article 26 establishes that all citizens of Bulgaria, regardless of their location, possess all rights and duties conferred by the Constitution. The second paragraph extends these constitutional rights and duties to foreigners residing in the Republic of Bulgaria, 'except those rights and duties for which Bulgarian citizenship is required by this Constitution or by another law.' The reference to 'another law' suggests that specific legal statutes may further clarify the rights and obligations of foreigners. This allows for a more nuanced approach to foreign residency, where additional rights may be granted or specific duties imposed based on legal status.

Thus, Article 26 strikes a balance between inclusivity for foreigners and the exclusivity of certain rights for citizens. It acknowledges the contributions of foreign residents while maintaining the primacy of citizenship in the exercise of specific, mainly political, rights. In summary, Article 26 of the Bulgarian Constitution serves as a foundational provision that delineates the rights and duties of both citizens and foreigners, reflecting principles of universality, inclusivity, and the significance of citizenship within Bulgaria's legal framework.

■ *2.6. The Catalogue of Fundamental Rights in the Bulgarian Constitution*

2.6.1. Individual Rights and Liberties in the Basic Provisions of the Constitution

The constitution-makers strategically placed certain individual rights and liberties in the first chapter, titled 'Basic Provisions,' rather than in the dedicated second chapter of the Constitution. This choice highlights their importance within the political, social, and economic systems of Bulgaria's emerging democratic constitutional framework, which began to take shape in the last decade of the twentieth century.

45 For instance, active electoral rights (Art. 42 para. 1); Art. 26 para. 2.

Following the establishment of republican government and parliamentarism, the 1991 Constitution enshrines the political right to universal, equal, and direct suffrage through secret ballot (Article 10). This provision is crucial for facilitating free and fair elections and for ensuring political pluralism[46] – cornerstones of democracy.

Article 12 of the Constitution establishes the civil right to free association, vital for fostering a robust civil society. It empowers citizens to unite in addressing common concerns, promoting a sense of community and collective action. Organisations formed under this right can serve as a counterbalance to government power, holding authorities accountable and ensuring adherence to the law and democratic principles.

The foundational provisions also affirm respect for private property rights, closely linked to individual freedom and autonomy, particularly in the context of establishing a market economy after the fall of the communist regime. Article 17, paragraph 1 explicitly declares private property inviolable, incentivising individuals to make resource choices, invest, innovate, and engage in economic activities essential for wealth creation and economic growth.

The inclusion of universal suffrage, free association, and private property in the first chapter of the 1991 Constitution reflects a core commitment to democratic governance and a free economy. These interconnected rights are crucial for the stability and success of Bulgaria's transition from a totalitarian regime to a democratic society.

2.6.2. No Hierarchical Order, but Classification of Fundamental Rights Based on the Constitutional Clause for Revocability

The constitutional provisions concerning human rights and freedoms in Bulgaria do not follow a strict hierarchical order; instead, they are generally regarded as holding equal weight. The Constitutional Court underscores the importance of equal respect for fundamental rights as a key factor in their balancing.[47]

In cases assessing the compliance of parliamentary laws with the Constitution, the Court has examined certain legislative approaches that could be interpreted as steps towards establishing a hierarchical order of fundamental rights.[48] In this context, the Court has emphasised that such a hierarchy contradicts international treaties and the national constitutions of modern democratic legal

46 Art. 11 of the Constitution explicitly establishes the principle of political pluralism in paragraph 1 and defines the role of political parties in the formation and expression of citizens' political will in para. 3.

47 Decision No. 8, issued on 15 November 2019 by the Constitutional Court of the Republic of Bulgaria in Case No. 4/2019.

48 Ibid. 'Essentially, such an approach by the legislator is a step towards creating a hierarchical order of fundamental rights, in which freedom of expression may end up being considered less important than dignity, reputation, or the protection of public order and morals.'

states, which affirm the equivalence of rights and do not permit the permanence of restrictive measures, as this would effectively amount to their rejection.

Nonetheless, certain rights may be viewed as particularly significant due to their foundational nature and irrevocability. The 1991 Constitution outlines the nature and limitations of citizens' fundamental rights, encapsulating three key principles: irrevocability, prohibition against abuse, and conditions for limitation.

To begin with, Article 57 paragraph 1 clearly states that fundamental rights are irrevocable, stressing that these rights are inherent to individuals and cannot be revoked or invalidated by the state or any other entity.

Second, paragraph 2 of Article 57 prohibits the abuse of rights, asserting that they must not be exercised in ways that harm the rights or legitimate interests of others. This provision establishes a crucial balance in the exercise of fundamental rights, helping to prevent conflicts and maintain social order. Therefore, lawmakers must recognise that this balancing approach is integral to the Constitution and must comply with the limitations on fundamental rights outlined in Article 57 paragraph 2.[49]

Lastly, paragraph 3 of Article 57 allows for the temporary curtailment of individual civil rights during times of war, martial law, or a state of emergency. However, it specifically protects certain rights from such limitations, including the right to life (Article 28); the prohibition of torture and cruel, inhuman, or degrading treatment (Article 29); the right to be brought before a court within the legally established timeframe for anyone charged with a crime[50]; the right not to be compelled to confess guilt or to be convicted solely based on a confession[51]; the presumption of innocence until proven guilty[52]; the right to individual protection against unlawful interference in private or family affairs and encroachments on honor, dignity, and reputation[53]; and freedom of thought, conscience, and religion (Article 37). The Constitutional Court categorises these fundamental rights as 'absolute rights,' indicating that they may never be restricted.[54] This classification constitutes the first group of rights in its jurisprudential framework.

The second group comprises rights that may be temporarily restricted by law during times of war, martial law, or a state of emergency. According to the Constitutional Court, these include, among others, the right to legal counsel and confidential communication[55]; the right of Bulgarian citizens to return to the

49 Ibid.
50 Art. 31 para. 1.
51 Art. 31 para. 2.
52 Art. 31 para. 3.
53 Art. 32 para. 1.
54 Decision No. 10, issued on 29 May 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 4/2017.
55 Art. 30 paras. 4–5.

country[56]; the right of citizens whose mother tongue is not Bulgarian to study and use their language alongside the compulsory study of Bulgarian[57]; the right to express opinions[58]; the right to a free press and media not subjected to censorship (Article 40, paragraph 1); and the right to seek, obtain, and disseminate information from public bodies (Article 41). The Court emphasises that this list is exemplary and not exhaustive.

The third group consists of fundamental rights that may be restricted not only during times of war, martial law, and states of emergency but also for other specified reasons, following particular conditions and procedures established in either the Constitution or parliamentary law. These restrictions align with the balancing principle, which allows for the limitation of human rights when they infringe upon the rights or legitimate interests of others[59]. Consequently, this group is further categorized by the Constitutional Court into two subgroups, based on whether the specific grounds for restriction are explicitly outlined in the Constitution[60] or in parliamentary law.[61]

2.6.3. The Right of Access to Justice in the Bulgarian Constitutional Framework

The 1991 Constitution of the Republic of Bulgaria does not explicitly include a provision for the right of access to justice. However, the fundamental importance of this right has been repeatedly emphasised in the jurisprudence of the Constitutional Court, which recognises it as a key criterion upholding the principle of the rule of law:

Judicial review for legality, as an essential element of the rule of law and the principle of separation of powers, necessarily implies that access to justice must always be open [...] Consequently, access to court, both as a possibility and a

56 Art. 35 para. 2.
57 Art. 36 para. 2.
58 Art. 39 para. 1.
59 Art. 57 para. 2.
60 For example, Art. 34 para. 2 of the Constitution permits exceptions to the freedom and confidentiality of correspondence only with judicial authorisation, and solely for the purpose of preventing or investigating serious crimes. Art. 40 para. 2 provides that injunctions or confiscations of press materials may be imposed only by judicial act in cases of public decency or incitement to violence. Moreover, any such injunction must be followed by confiscation within 24 hours in order to remain in effect.
61 For example, Art. 25 para. 6 of the Constitution stipulates that the conditions and procedures for acquiring or losing Bulgarian citizenship shall be established by law. The Constitution also refers to parliamentary laws concerning the expulsion or extradition of foreigners against their will (Art. 27 para. 1) and the conditions and procedures for granting asylum (Art. 27 para. 2). Additionally, Art. 30 para. 2 states that no one may be detained or subjected to inspection, search, or any other infringement of personal inviolability except under conditions and in a manner established by law.

necessity, is vital for the normal functioning of the rule of law and the separation of powers.[62]

The Court explains that the fairness of judicial procedures encompasses multiple dimensions, one of which is access to court. This access is influenced by various factors, including the geographical proximity of the court to the individual seeking judicial protection and efforts to minimise obstacles to court proceedings.[63] If justice is to protect and guarantee human rights, it must create conditions that ensure the highest possible level of realisation for these rights.[64] Furthermore, the right of access to court 'does not have an abstract content' and is not granted 'abstractly and without address.'[65] It is specifically available only to those individuals whose legally recognised interests are affected.[66]

Constitutional jurisprudence also emphasises that the right to defense and access to court should be understood as 'the opportunity for meaningful, real, and effective participation in the process, including the possibility of appealing judicial acts rendered in one or more subsequent instances.'[67]

The Constitutional Court rarely employs the concept of the right to an effective remedy, primarily in discussions related to the case law of the European Court of Human Rights. A notable exception occurred during the recent review of the constitutionality of amendments to the Electoral Code and their alignment with the principle of the rule of law. In this context, the Court connected the application of this principle to the provision of effective legal remedies:

The legislator has established a legal framework that meets contemporary constitutional standards for conducting fair, transparent, and lawful elections, along with legal guarantees for their implementation in accordance with the principles of universal, equal, and direct suffrage with secret voting. This framework

62 Decision No.1, issued on 1 March 2012, by the Constitutional Court of the Republic of Bulgaria in Case No. 10/2011.

63 Decision No.5, issued on 19 April 2019, by the Constitutional Court of the Republic of Bulgaria in Case No. 12/2018.

64 Decision No.11, issued on 4 October 2016 by the Constitutional Court of the Republic of Bulgaria in Case No. 7/2016: 'This understanding aligns with the fundamental views of the Constitutional Court, which, in developing its practice, has also concluded that the constitutional right to defense can be fully realised only if the path to the court is not closed, as only a competitive, public judicial process with equality between the parties, in the sense of Article 121 of the Constitution can ensure the revelation of the truth and the accurate application of the law.'

65 Decision No.6, issued on 14 June 2016, by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2016.

66 Decision No.13, issued on 13 October 2012, by the Constitutional Court of the Republic of Bulgaria in Case No. 6/2012.

67 See: Dissenting Opinion of Constitutional Judge Tanya Raykovska regarding Decision No.6, issued on 14 June 2016, by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2016.

aims to mitigate the risks of electoral manipulation and ensures effective legal remedies before an independent and impartial body.[68]

■ *2.7. Proportionality Test in the Bulgarian Constitutional Jurisprudence*

In its review of the constitutionality of restrictions on fundamental rights, the Constitutional Court adopts different approaches depending on whether the restrictions concern civil and political rights or social and economic rights.

In its jurisprudence, the Court explains that civil rights are characterised as 'defensive' and 'negative,' serving to protect individuals from the intrusion of public authority. In contrast, social rights are deemed 'positive' and rooted in 'solidarity,' requiring the state to take proactive measures to establish the conditions necessary for their realisation.[69] For social rights, the legislator has the discretion to amend regulations – including the repeal of existing legal texts – after evaluating the needs of those in need and the capabilities of society.[70] Social rights are based on concepts such as 'suitable working conditions,' 'protection of human health,' and 'accessible medical care,' which do not provide information on the extent to which they have been violated or realised, and consequently, how they should be protected.[71]

The Constitutional Court further emphasises that a defining characteristic of social rights enshrined in the Constitution is that 'they are not universal and do not apply to all citizens.'[72] Instead, these rights are tailored to certain groups, such as mothers, children without caregivers, older adults, and those in need of healthcare. Moreover, a notable aspect of constitutional social rights is their lack of direct judicial protection, which distinguishes them from the 'classic type' of rights.[73] This distinction supports the notion that the principle of proportionality is applied differently to 'classical' and 'social' rights, focusing on the reasonableness of restrictions and granting the legislator broader discretion.[74]

Although the division of fundamental rights implies a varying scope of assessment for the legislator by the Constitutional Court, there has yet to be a specific analysis on this matter, nor has a clear test for the applicability of limitations been established for the different generations of rights. Recently, this issue

68 Decision No.9, issued on 2 July 2021, by the Constitutional Court of the Republic of Bulgaria in Case No. 9/2021.

69 Decision No. 2, issued on 4 April 2006, by the Constitutional Court of the Republic of Bulgaria in Case No. 9/2005.

70 Decision No. 13, issued on 15 July 2003, by the Constitutional Court of the Republic of Bulgaria in Case No. 11/2003.

71 See: the Dissenting Opinion of the Constitutional Judge Blagovest Punev regarding Decision No. 5, issued on 10 July 2008, by the Constitutional Court of the Republic of Bulgaria in Case No. 2/2008.

72 Decision No. 2 issued on 22 February 2007, by the Constitutional Court of the Republic of Bulgaria in Case No. 12/2006.

73 Ibid.

74 Димитрова [Dimitrova], 2024, p. 184.

has been addressed for the first time in Bulgarian legal doctrine by Maria Dimitrova, who examines and compares the theoretical models developed by Robert Alexy and Aaron Barak.[75] She concludes that the proportionality test in any case encompasses a judicial analysis based on four rules: the legitimacy of the aim, the appropriateness and necessity of the measures for achieving that aim, and a balancing test that weighs the benefits of achieving the legitimate aim against the harms inflicted on the rights being restricted.[76] Dimitrova asserts that all these rules apply only to the first generation of civil rights.[77] In contrast, for subsequent generations of social, economic, and cultural rights, a broader discretion should be granted to the legislator, and the state's intervention should be assessed with a more expansive understanding of its reasonableness. Consequently, regarding these rights, courts tend to apply the principle of reasonableness when evaluating legislative limitations, resulting in a more reserved approach.

■ *2.8. Constitutional Duties of Citizens*

The provisions located at the end of Chapter Two of the 1991 Constitution establish a comprehensive framework outlining the duties of citizens that balances individual rights with responsibilities, promoting a sense of community and national identity. These provisions reflect a commitment to civic responsibility, legal equality, and the collective welfare of society.

Article 58 sets forth the general duties of citizens to adhere to the Constitution and the laws of Bulgaria while respecting the rights and legitimate interests of others. This provision promotes a culture of mutual respect and social responsibility, reinforcing the idea that citizenship comes with certain obligations. Moreover, these constitutional duties take precedence over personal beliefs, ensuring that all citizens are held to the same legal standards regardless of their personal convictions.

In terms of national security, the Constitution recognises the importance of citizen participation in safeguarding the state. By designating national defense as 'a duty and a matter of honor for every Bulgarian national,' it emphasises the collective responsibility of citizens to protect their country. The provisions regarding high treason and betrayal highlight the gravity of this duty, reflecting a broader understanding of citizenship that encompasses not just rights but also active involvement in national defense.

The framework of fiscal responsibility is articulated in Article 60, which mandates that citizens pay taxes and duties established by law, proportionate to their income and property. This provision underscores the principle of fairness in taxation, ensuring that all citizens contribute to the funding of public services and

75 Alexy, 2002; Barak, 2012.
76 Димитрова [Dimitrova], 2024, pp. 75–76.
77 Dimitrova, 2024, p. 185.

the overall functioning of the state. Moreover, the requirement for any tax concessions or surtaxes to have a legal basis ensures transparency and accountability in fiscal matters, reinforcing the rule of law.

Finally, Article 61 addresses the duty of citizens to assist the state and society during natural disasters or emergencies. This provision reflects a sense of collective responsibility and solidarity within the community, emphasising the role citizens play in supporting each other and the state during crises. It highlights the expectation that citizens will contribute to the common good, particularly in times of need.

■ *2.9. The Constitutional Framework of Fundamental Rights in the Face of Modern Challenges*

In Bulgaria, it is widely recognised that the provisions in the second chapter of the Constitution, titled 'Fundamental Rights and Duties of Citizens,' closely align with the European Convention on Human Rights.[78]

However, it was not the provisions of the 1991 Constitution that significantly advanced human rights protection and propelled the Bulgarian legal system forward; rather, it was the influence of the European Court of Human Rights, known for its broad scope and progressive jurisprudence.[79] Tension has begun to emerge between the case law of the Strasbourg Court and that of Bulgarian judges, many of whom have resisted the supranational court's interpretations regarding the fundamental rights of individuals with mental disabilities,[80] those with homosexual orientations,[81] transgender individuals,[82] and the right of association for the Macedonian minority,[83] among others.

In recent years, this tension has become increasingly evident in the jurisprudence of the Constitutional Court, which ruled in 2018 that the Istanbul Convention was unconstitutional, citing the terms 'gender' and 'gender identity' as ambiguous and unacceptable.[84] In its decision, the Court departed from its prior practice of cautiously interpreting fundamental rights by strictly adhering to the

78 Марчева [Marcheva], 2024, p. 108.
79 Keller and Stone, 2008, p. 3; Christoffersen and Madsen, 2011.
80 See: *Stanev v. Bulgaria*, No. 36760/06, ECtHR [GC], Judgment of 17 January 2012 among others.
81 See: *Koilova and Babulkova v. Bulgaria*, no. 40209/20, ECtHR, Judgment of 5 September 2023 among others.
82 See: *P.H. v. Bulgaria*, no. 46509/20, ECtHR, Judgment of 27 September 2022 among others.
83 See: *United Macedonian Organisation Ilinden and others v. Bulgaria*, no. 59491/00, ECtHR, Judgment of 19 January 2006 among others.
84 Decision No. 13, issued on 27 July 2018 by the Constitutional Court of the Republic of Bulgaria in Case No. 3/2018.

text of the Constitution,[85] instead adopting an ideologically driven activist stance in defense of 'traditional values.'[86] Three years later, this anti-gender doctrine was reiterated in an interpretative decision, which asserted that the term 'sex' in the anti-discrimination clause of the Constitution[87] was 'to be understood solely in its biological meaning.'[88] Notably, the terms 'traditional values' and 'traditional society' did not appear in the Constitutional Court's jurisprudence prior to the landmark 2018 decision declaring the Istanbul Convention unconstitutional.[89]

This ideological shift in Bulgarian constitutional jurisprudence has been met with well-founded scholarly criticism from Velina Todorova, who concludes that the Constitutional Court has undermined its legitimacy as a court for human rights.[90] A notable example of this is Interpretative Decision No. 2/2023 by the General Assembly of the Civil College of the Supreme Court of Cassation,[91] which marked a significant reversal of over 30 years of Bulgarian case law that previously allowed transgender and intersex individuals to legally change their sex on ID documents upon providing sufficient medical evidence. In this decision, a majority of 28 civil judges prevailed over 21 dissenting judges. The Supreme Court of Cassation referenced the constitutional jurisprudence and asserted that an individual's sex was determined at birth and could only be lost upon death, thus denying the existence of intersex and transgender persons. Furthermore, the Supreme Court concluded that the incorporation of the European Convention on

85 A notable example for such practice is Decision No. 7, issued on 4 June 1996 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/1996, which interprets Articles 39, 40, and 41 of the Constitution. The Court clarifies 'the right to freely express opinions and to disseminate them; the right to seek, receive, and disseminate information; and the definition and meaning of the limitations on these rights as provided in the constitutional texts.'

86 Smilova, 2020.

87 Art. 6 para. 2.

88 Decision No. 15, issued on 26 October 2021 by the Constitutional Court of the Republic of Bulgaria in Case No. 6/2021.
In Bulgarian, the term is 'пол.' It appears only once in the 1991 Constitution, specifically in Art. 6 para. 2, which contains the anti-discrimination clause. This clause states: 'All citizens shall be equal before the law. There shall be no privileges or restrictions of rights based on race, national or social origin, ethnic self-identity, sex, religion, education, opinion, political affiliation, personal or social status, or property status.'

89 It is important to note that the term 'traditional' is used only once in the 1991 Constitution of the Republic of Bulgaria, specifically in Art. 13 para. 3, which states that 'the traditional religion in the Republic of Bulgaria is Eastern Orthodox Christianity.' This constitutional provision was cited for the first time by the Court in Decision No. 15, issued on 26 October 2021 in Case No. 6/2021, which fully articulated the Court's anti-gender doctrine.

90 Тодорова [Todorova], 2023, p. 169..

91 Interpretative Decision No. 2, issued on 20 February 2023 by the Supreme Court of Cassation on Interpretative Case No. 2/2020, General Assembly of the Civil College of the Supreme Court of Cassation. The interpretative decisions issued by the General Assembly of the Civil College of the Supreme Court of Cassation are available in Bulgarian at the following database [Online]. Available at: https://www.vks.bg/talkuvatelni-dela-osgk.html (Accessed: 18 May 2025).

Human Rights, particularly Article 8, into the national legal order did not mean that all its provisions were directly applicable or 'self-executing.' In essence, this indicates that the ECHR does not automatically confer rights upon citizens or impose obligations on the Republic of Bulgaria without corresponding national legislation.

All these trends indicate that the regulation of fundamental rights and freedoms in the 1991 Constitution does not offer a stable foundation for addressing the challenges of modern times and the impacts of globalisation. This includes developments in the concepts of individual freedom, gender identity and recognition, as well as the tension between protecting and respecting the autonomy of vulnerable individuals.

3. State Bodies for the Protection of Fundamental Rights in Bulgaria

■ *3.1. Judiciary*

The 1991 Constitution assigns the judiciary[92] the responsibility of protecting the rights and legitimate interests of all citizens[93]. However, Bulgaria's judicial system is structured to include not only judges but also prosecutors and investigating magistrates. This integration reflects the legacy of previous totalitarian constitutions, which conferred upon the prosecution office the same constitutional status as the courts, resulting in a unified constitutional framework.[94]

During the constitution-making debates in 1990–1991, the justification for this unconventional design within democracies was that all judges, prosecutors, and investigating magistrates shared the responsibility of protecting rights. However, some voices expressed concerns about this rationale, pointing out that if this logic were applied consistently, the police would also share a similar responsibility, yet they were part of the executive branch rather than the judiciary.[95]

Over the following decades, it became evident that the courts played a crucial role in safeguarding fundamental rights within the justice system by adjudicating disputes and ensuring the fair application of the laws. In the 2023 constitutional reform, an amendment to Article 117, paragraph 2, underscored that the court was the central entity in the judiciary. By providing a mechanism for legal recourse and accountability, the judiciary serves as a vital check against abuses of power, thus reinforcing the rule of law.

92 In the 1991 Constitution, the term 'judiciary' (съдебна власт) encompasses not only the court system but also the systems of prosecutor's offices and investigating magistrates, all of which fall under the judiciary's authority.

93 Art. 117 para. 1.

94 Refer to the titles of the respective chapters in the 1947 Constitution, which includes Chapter Six, 'People's Judges and Prosecutorial Supervision,' and the 1971 Constitution, which features Chapter Eight, 'Court and Prosecutor's Office.'

95 Марчева [Marcheva], 2024, p. 58.

■ *3.2. Ombudsperson*

In 2006, an amendment to the Bulgarian Constitution created the position of Ombudsperson (Омбудсман), elected by the National Assembly to protect citizens' rights and freedoms (Article 91a).

Subsequent parliamentary legislation further formalises the role, granting the Ombudsperson authority primarily through recommendation powers.[96] This includes investigating complaints, mediating between citizens and authorities, and advising on policies and legislative reforms. Although the Ombudsperson does not have the final say or the ability to enforce resolutions, access to institutions and effective communication channels allows for influence over the human rights landscape.

In 2012, the Ombudsperson was appointed as the National Prevention Mechanism, tasked with monitoring places of detention and ensuring compliance with international standards for the treatment of individuals in such facilities, thereby preventing torture and inhumane treatment.

■ *3.3. Constitutional Court*

The Constitutional Court is established as the guardian of the Constitution, and in this capacity, it is supposed to ensure the protection of fundamental rights and freedoms outlined in its second chapter. It is composed of 12 judges, each serving a term of nine years.

The constitutional judges elect a President of the Constitutional Court by secret ballot for a term of three years.[97] The President is responsible for administering constitutional cases by assigning a case number, designating one or more rapporteur judges, and setting a date for review.[98] The constitutional judges are supported by legal experts and administrative secretaries.[99] However, there are no existing rules governing draft decisions prepared by the legal staff, and such drafts, if they exist, do not bind the rapporteur judge or the panel.

In most cases, the Constitutional Court renders its rulings and decisions by a majority of more than half of all judges.[100] The President of the Constitutional Court in Bulgaria serves as *primus inter pares* and does not have the authority to cast a deciding vote in the event of a tie. A request that fails to secure the necessary majority for approval during its substantive constitutional review is subject

96 Стоилов [Stoilov], 2001, p. 185.
97 Art. 147 para. 4 of the Constitution.
98 Art. 18 para. 1 of the Constitutional Court Act.
99 Art. 7a of the Rules for the Organization of the Activities of the Constitutional Court. This rule was introduced in 2016.
100 Art. 151 para. 1 of the Constitution. An exception to the two-thirds majority requirement is stipulated by the Constitution in certain cases – for instance, the removal of immunity or the establishment of factual impossibility of a constitutional judge (Art. 148 para. 2 of the Constitution).

to rejection.[101] Consequently, a challenged legislative provision is not deemed unconstitutional, as the request to establish its alleged unconstitutionality did not achieve the necessary majority.

The core competencies of the Court are defined in Article 149 paragraph 1, which grants it the authority to issue binding interpretations of the Constitution, rule on the constitutionality of laws, and resolve jurisdictional conflicts among the National Assembly (Народно събрание), the President (Президент), and the Council of Ministers (Министерски съвет), as well as between local and central authorities. Additionally, the Court assesses whether international treaties signed by Bulgaria comply with the Constitution prior to their ratification[102] and whether domestic laws align with ratified international treaties. It also adjudicates the constitutionality of political parties and associations, the legality of presidential and parliamentary elections, and rules on accusations brought by the National Assembly against the President or Vice President.

Other constitutional provisions empower the Court to adjudicate disputes related to the termination of office for Members of Parliament in cases of ineligibility or incompatibility[103]; for the President or Vice President in instances of resignation or permanent inability to exercise their powers due to serious illness[104]; and for any constitutional judge in circumstances of resignation, removal of immunity, or determination of incompatibility or factual inability to perform duties for more than one year.[105]

Article 149 paragraph 2 of the Constitution explicitly states that the powers of the Constitutional Court cannot be granted or revoked by law. Consequently, its authority is firmly anchored in the Constitution itself, and no form of 'law in action' can legally arise within this framework. Both parliamentary legislation[106] and Rules[107] merely outline the procedures and actions for exercising the powers of the Constitutional Court. The procedure before the constitutional jurisdiction consists of two phases: the first phase addresses the admissibility of the request, while the second phase involves a decision on the merits.

The current constitutional framework for fundamental rights and freedoms in Bulgaria has a significant flaw: it lacks provisions for individual constitutional

101 Ruling No. 5, issued on 9 October 2007 by the Constitutional Court of the Republic of Bulgaria in Case No. 6/2007.

102 Only two such treaties underwent preliminary constitutional review: the Framework Convention for the Protection of National Minorities in 1997, which was deemed constitutional, and the Istanbul Convention in 2018, which was ruled unconstitutional.

103 Art. 72 para. 1 point 3 of the Constitution.

104 Ibid., Art. 97 para. 2.

105 Art. 148 para. 1 points 2, 4, and 5, in conjunction with paragraph 2 of the Constitution.

106 Constitutional Court Act (Prom. SG. 67/1991).

107 According to Paragraph 1 of the Supplementary and Concluding Provision of the Constitutional Court Act, the Constitutional Court is responsible for adopting its own Rules. The Rules for the Organization of the Activities of the Constitutional Court were published in SG 106/1991 and have been amended over the years.

complaints and direct access to constitutional justice and remedies within the national human rights protection system.

Under the 1991 Constitution, access to the Constitutional Court was initially limited to a specific set of institutions – including one-fifth of the Members of Parliament, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, and the Chief Prosecutor[108].

In 2006, the Ombudsperson was granted the right to challenge laws before the Constitutional Court[109], and in 2015, this right was extended to the Supreme Bar Council[110]. However, their ability to take action is restricted to situations in which the laws are claimed to infringe upon the constitutional rights and freedoms of citizens. Remarkably, they cannot contest parliamentary legislation based on inconsistencies with international human rights instruments ratified by Bulgaria. Furthermore, neither the Ombudsperson nor the Supreme Bar Council has active standing to request the Court to provide binding interpretations of the Constitution or to exercise any competencies beyond rulings on the unconstitutionality of laws.

The 2023 constitutional reform expanded access by permitting judges from all court levels[111] to refer cases to the Constitutional Court regarding unconstitutional legislation. Before 2023, Bulgarian judges primarily depended on the European Convention on Human Rights and its superior legal status over conflicting national laws to safeguard individual rights and liberties. However, this approach proved inadequate for overturning problematic domestic legislation. The absence of individual constitutional complaints has greatly constrained citizens and legal entities in their capacity to directly contest the constitutionality of laws and actions that impact them, thereby limiting their access to constitutional remedies.

While the broadening of indirect access to the Constitutional Court holds promise for strengthening human rights protections, it remains uncertain how national judges will implement this new avenue. The current constitutional provision, referred to as the 'indirect individual complaint' during the 2023 reform debates, is framed more as an expansion of judges' powers rather than as a means of empowering citizens.[112] The decision whether to refer a case to the Constitutional Court is left entirely to the judge's discretion, without any constraints or

108 Art. 150 para. 1.

109 Ibid., para. 4.

110 Ibid., para. 5.

111 Until 2023, Art. 150 para. 2 of the Constitution restricted the referral of unconstitutional legislation to the Constitutional Court solely to panels of judges in the Supreme Court of Cassation and the Supreme Administrative Court.

112 Art. 150 para. 2 of the Constitution: 'Any court, upon the request of a party involved in the case or on its own initiative, may refer a request to the Constitutional Court to determine whether a law applicable to the specific case is inconsistent with the Constitution. The proceedings will continue, and the court that issues the final decision will render its judicial act after the proceedings before the Constitutional Court have concluded.'

requirements, when considering a referral request made by the parties involved in the litigation. Thus, the individual protection of fundamental rights and freedoms in Bulgaria, even after the introduction of the indirect individual complaint at the end of 2023, largely depends on how effectively the courts administer justice.

De lege ferenda, it would be beneficial to amend the Constitution or relevant legislation to mandate that judges refer individual complaints to the Constitutional Court, provided these complaints meet specific criteria.[113] By instituting such requirements, the legal system could enhance the efficiency and effectiveness of the Constitutional Court, ensuring that it addresses cases of substantial constitutional significance while alleviating the burden of frivolous or inadequately substantiated claims. This approach would not only uphold the integrity of the judicial process but also reinforce the Court's role in safeguarding constitutional rights.

An analysis of the transcripts from the constitution-making debates at the Seventh Grand National Assembly (Седмо Велико народно събрание) in 1991 reveals that the Constitutional Court was primarily viewed as a guardian of the constitutional design,[114] with limited recognition of its role in the protection human rights. It is established in both theory[115] and the jurisprudence of the Constitutional Court[116] that *ex post* normative control is its primary authority, reflecting the direct effect of constitutional norms.[117]

The Constitution delineates two types of norm control: abstract and concrete.[118] In the case of abstract control, the Constitutional Court determines a law's conformity with the Constitution or a ratified international treaty, independent of any specific case. This type of control is conducted without a specific legal dispute as a basis, and its rulings have a binding effect on all future disputes. It can be initiated by any of the entities outlined in Article 150, paragraph 1, listed above, including the Supreme Court of Cassation and the Supreme Administrative Court, which may act either through their plenary assemblies or the general assemblies

113 Typically, such complaints must pertain to a law that is applicable to the case at hand, with the individual arguing that the law violates specific provisions of the Constitution. The constitutional question must be relevant to the outcome of the case being adjudicated. Additionally, the individual generally must have exhausted all available legal remedies within the ordinary judicial process before raising the constitutional question. The complaint should also be submitted in a timely manner, usually at the stage in the judicial process when the law becomes pertinent to the case.

114 Белов, Димитрова [Belov, Dimitrova], 2021.

115 Танчев [Tanchev], 2012.

116 Decision No. 4, issued on 14 May 2020 by the Constitutional Court of the Republic of Bulgaria in Case No. 9/2019; Ruling No. 7, issued on 24 July 2023 by the Constitutional Court of the Republic of Bulgaria in Case No. 9/2023.

117 Art. 5 para. 2 of the Constitution.

118 Decision No. 4, issued on 14 May 2020 by the Constitutional Court of the Republic of Bulgaria in Case No. 9/2019.

of their respective chambers.[119] Conversely, concrete control entails the Constitutional Court assessing a law's conformity[120] with the Constitution within the context of an ongoing legal dispute before the referring court. Before the 2023 constitutional reform, only judges from the Supreme Court of Cassation and the Supreme Administrative Court could initiate concrete constitutional control. Following the constitutional amendments, any judge or panel of judges can now raise the issue of a law's unconstitutionality regarding the specific case at hand.

In general, the Constitutional Court's decisions are published in the *State Gazette* within 15 days of their adoption and take effect three days after publication. Regardless of the grounds for referring a matter to the Constitutional Court, its decisions always carry an *erga omnes* effect. According to Article 151 paragraph 2 sentence 3 of the Constitution, a law declared unconstitutional does not apply from the day the Constitutional Court's decision takes effect. The Court has clarified that the phrase 'does not apply' imposes a prohibition on the future application of the law, and this prohibition is 'unconditional, imperative, and permanent.'[121] As a result, the law declared unconstitutional 'ceases to operate and regulate social relations,' losing its legal effect and no longer existing as a normative act.[122] Thus, declaring a legislative norm unconstitutional is equivalent to its non-applicability in the future rather than its annulment[123] or repeal. It is the responsibility of Parliament to repeal or amend the unconstitutional norm.

In Interpretative Decision No. 4 of 14 May 2020, the Constitutional Court shed light on the legal consequences of declaring various acts unconstitutional.[124]

119 See the interpretative Decision No. 3 issued on 5 April 2005 by the Constitutional Court of the Republic of Bulgaria in Case No. 2/2005: 'The authority to refer cases to the Constitutional Court under Art. 150 para. 1 of the Constitution is vested in the plenary sessions of the Supreme Court of Cassation and the Supreme Administrative Court, comprising all judges, as well as the general assemblies of their respective chambers.'

120 The 1991 Constitution does not establish constitutional control over judicial decisions, meaning there is no provision for a constitutional complaint regarding any act or decision made by a judicial authority in the administration of justice.

121 Decision No. 22, issued on 31 October 1995 by the Constitutional Court of the Republic of Bulgaria in Case No. 25/1995.

122 Ibid.

123 It is important to note that the term 'annulment' is not used in Bulgarian law. Instead, the law refers to declaring an act void or invalid, or to its repeal due to illegality.

124 Decision No. 3, issued on 28 April 2020 by the Constitutional Court of the Republic of Bulgaria in Case No. 5/2018.

First, non-normative acts – such as "laws in the formal sense,[125] resolutions of the National Assembly,[126] and decrees of the President' – are considered invalid from the moment of their adoption or issuance.

Second, the Court clarified that an unconstitutional law does not apply to ongoing legal relationships that have not been concluded by the time the Constitutional Court's decision takes effect, as well as to relationships that are subject to pending judicial proceedings.

Third, the Court revised its previous jurisprudence[127] regarding the consequences of declaring unconstitutional a law that amends or repeals an existing law, stating that it does not have a retroactive effect. Consequently, the old law will not be reinstated in its prior form as a result of declaring the new law unconstitutional. However, this does not encompass the parliamentary laws through which the National Assembly amends or supplements the Constitution. Some of these laws may be declared unconstitutional if Parliament exceeds its constitutional powers of amendment or supplements the Constitution in a manner that contradicts its principles and balance of values. In such cases, the unconstitutional law amending or supplementing the Constitution is rendered invalid from the date it takes effect, and the amended provisions will be restored to their original text.[128]

With respect to constitutional omissions, jurisprudence firmly maintains that such omissions may exist, but it is not within the competence of the Constitutional Court to address them while fulfilling its role of issuing binding interpretations of the Constitution.[129] Otherwise, the Court's interpretative authority would effectively become a constitution-making power.[130] In the event of any constitutional or legislative gaps, the principle of the rule of law remains

125 The classification of a law as a 'law in the formal sense' is articulated in the reasoning of Decision No. 17, issued on 3 October 1995 by the Constitutional Court of the Republic of Bulgaria in Case No. 13/1995. The Court defined the legal characteristics of the 1995 budget law, as approved by the National Assembly, along with any annual budget law, recognising it as a 'formal law' because it does not contain legal norms that regulate social relations. Additionally, it noted that budget laws are managerial (administrative) acts that, while retaining their legal characteristics, are issued in the form typical of acts of the National Assembly (laws) and according to the procedures established by the legislative body.

126 The National Assembly adopts binding resolutions in various instances, including the election of members to other public bodies and the acceptance of reports, among others.

127 Decision No. 22, issued on 31 October 1995 by the Constitutional Court of the Republic of Bulgaria in Case No. 25/1995: 'When the Constitutional Court declares a law unconstitutional that repeals or amends an existing law, the latter restores its validity in the version prior to the repeal or amendment from the date the court's decision takes effect.'

128 See: Decision No. 13, issued on 26 July 2024 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2024.

129 Ruling No. 8, issued on 22 November 2016 by the Constitutional Court of the Republic of Bulgaria in Case No. 17/2016.

130 See also: the Dissenting Opinion of Constitutional Judge Filip Dimitrov regarding Ruling No. 8, issued on 22 November 2016 by the Constitutional Court of the Republic of Bulgaria in Case No. 17/2016.

paramount.[131] It is essential to interpret existing laws in a way that upholds justice, protects fundamental rights, and maintains the integrity of the legal system. The rule of law serves as a guiding framework for addressing these omissions, ensuring that any actions taken to fill these gaps align with constitutional principles and democratic values.

4. The Dynamics of the Relationship Between the Constitutional Court and Ordinary Courts as National Human Rights Mechanisms

The impact of constitutional control over legislation is vital for reinforcing the primacy of the Constitution and ensuring the protection of human rights in Bulgaria. The Constitutional Court has determined that failure to comply with its rulings constitutes a violation of the Constitution.[132] It holds exclusive jurisdiction over the constitutional review of parliamentary laws in Bulgaria. While all other courts are authorised to directly apply constitutional norms instead of those found in parliamentary laws or secondary legislation enacted by the government, they cannot adjudicate the unconstitutionality of laws.[133]

In any case, ordinary courts uphold the normative hierarchy to strengthen the rule of law and safeguard fundamental rights and freedoms. Only the Supreme Administrative Court has the authority to repeal secondary legislation enacted by the central government bodies, thereby adjudicating its conformity with higher normative acts, including the Constitution.[134] For issues concerning the constitutionality of regulations issued by local governments and their repeal when they conflict with higher laws, the corresponding administrative courts within the relevant municipality are responsible.[135]

Over the past 30 years since its establishment in 1991, the primary focus of the Bulgarian Constitutional Court has been on the posterior constitutional

131 Decision No. 3, issued on 28 April 2020 by the Constitutional Court of the Republic of Bulgaria in Case No. 5/2019.

132 Decision No. 1, issued on 12 March 2013 by the Constitutional Court of the Republic of Bulgaria in Case No. 5/2012.

133 Art. 15 para. 3 of the Normative Acts Act states: If a decree, regulation, ordinance, or instruction conflicts with a normative act of higher authority, the judicial bodies shall apply the act of higher authority.

134 According to Art. 132 para. 2 point 1 of the Administrative Procedure Code, the Supreme Administrative Court is authorised to adjudicate all challenges to secondary legislation, except for those adopted by municipal councils.

135 Art. 8 of the Normative Acts Act grants each municipal council the authority to issue ordinances regulating issues of local significance, in accordance with higher normative acts, where such matters have not already been addressed. All such municipal ordinances can be challenged for their conformity with the Constitution and parliamentary laws before the relevant administrative courts in the region that includes the respective municipality (Art. 45 para. 3 of the Local Government and Local Administration Act).

review of parliamentary laws. A brief overview of the number of all the cases before the Constitutional Court indicates that, in general, the caseload is relatively modest.

In the 1990s, shortly after the Court's establishment, its caseload peaked at 37 initiated constitutional cases in both 1992 and 1998. In its first year, 1991, the majority of requests were submitted not by authorised entities but by political parties, leading the Constitutional Court to decline to rule on these requests, rejecting 24 out of a total of 30 submissions. Gradually, the number of declined requests significantly decreased,[136] reaching zero in both 1995 and 1998. In 1995, the Constitutional Court achieved a significant milestone by delivering a total of 29 decisions, marking it as a record year in its history.[137]

In the first decade of the 21st century, the volume of the Constitutional Court's caseload decreased by approximately 30% on average.[138] Notably, 2008 saw a record low for the Court, with only five requests submitted – a 50% decrease from the 10 requests received in 2007. In both 2004 and 2005, the annual number of cases was 11, while in 2003 and 2006, it was 12 cases per year. In other years, the volume varied between 17 and 23 cases annually.[139]

In the second decade of the 21st century, the caseload was lowest in 2012, with only seven cases, while it peaked in 2010 and 2013, reaching 22 cases in both years.[140] In 2021, 2022, and 2023, the Constitutional Court received the same number of requests – 21 in each year. Following the 2023 constitutional reform that empowered courts of all instances to refer unconstitutional parliamentary laws to the Constitutional Court, the caseload in 2024 saw a significant increase, effectively doubling.[141]

Between 1991 and 2023, out of 551 constitutional cases, 123 requests were rejected without examination, accounting for approximately 22% of all submissions to the Constitutional Court. There have been no in-depth statistics to compare the annual frequency of abstract and concrete review procedures in

136 In 1992, among 37 requests, 9 were declined for various reasons, 3 cases were terminated due to lack of subject matter (for instance, the allegedly unconstitutional law had been repealed by Parliament), and 19 decisions were issued. In the subsequent years, the number of requests to the Constitutional Court initially decreased, with 22 requests in 1993 and 18 in 1994. However, it then increased by 50%, reaching 32 requests in both 1995 and 1996, and peaking at 37 cases in 1998. The caseload dropped to 20 cases in 1997 and further declined to 14 cases in 1999.

137 In 1995, out of 32 cases, 3 were consolidated with others, resulting in 29 decisions being issued.

138 The average annual number of cases from 1991 to 1999 was 19.44, while the average annual number of cases from 2000 to 2009 was 13.80.

139 In 2000, there were 18 cases; in 2001, 17 cases; in 2002, 23 cases; in 2009, 19 cases; and in 2010, 22 cases.

140 In 2011, 16 requests were submitted; in 2014 and 2015, there were 13 cases each year; in 2016 and 2018, 17 cases per year; in 2017, 14 cases; and in 2019 and 2020, 15 cases annually.

141 The register indicates 42 requests to the Constitutional Court in 2024.

Bulgaria. Nevertheless, there is no doubt that the Constitutional Court primarily exercises its powers within the framework of abstract constitutional control.

It cannot be said that the Constitutional Court predominantly approves or denies requests for declaring laws unconstitutional, as there is often a balance between the two outcomes in most years. The years 2002, 2003, 2006, and 2017 stand out as exceptional, as most decisions during these years denied requests for declaring legislative provisions unconstitutional. Conversely, in 2006 and 2008, the majority of submissions for unconstitutionality to the Constitutional Court were upheld.

What fundamentally sets the Bulgarian Constitutional Court apart from similar jurisdictions in Europe is the frequent referral for the interpretation of the Constitution. In the early years, requests for constitutional interpretation were comparable to those for establishing unconstitutionality, with 1993 and 1994 seeing a notably higher number of requests. Specifically, there were seven submissions for constitutional interpretations in both 1992 and 1993, while 1995 marked a peak with eight requests. In most subsequent years, such requests fluctuated between two and three, with some years recording none at all.[142]

The Constitutional Court has clarified that its binding interpretations of the Constitution are 'abstract' and not tied to any specific constitutional legal dispute.[143] Additionally, two key functions of its interpretative authority were emphasised: the primary function of the Court in fostering a clear and coherent system of effective norms, and the related preventive function, which helps avert the use of the Court's sanctioning powers, particularly in declaring a specific law unconstitutional.[144] Regarding the potential for the same constitutional provision to be interpreted multiple times, the Constitutional Court has stated that it is permissible to request a new interpretation of the same provisions, provided the requests address different interpretative questions.[145]

The analysis of constitutional jurisprudence in Bulgaria reveals a lack of independent or autonomous requests for the Court to exercise its powers to assess the conformity of national laws with universally accepted international norms and treaties ratified by Bulgaria. Such requests are typically made to support and reinforce challenges to the constitutionality of parliamentary legislation. In most of the Court's decisions, the assessment of constitutionality aligns with the evaluation of conformity with international instruments, likely due to the approach

142 For example, in 2006, 2008, 2009, 2011, 2015, and 2018, no requests for constitutional interpretation were submitted to the Court.

143 Decision No. 8, issued on 1 September 2005 by the Constitutional Court of the Republic of Bulgaria in Case No. 7/2005.

144 Ibid.

145 Ibid. Interpretative questions serve two key roles: they help outline the framework of interpretation, including focal points and priorities for specific cases, and they act as a guideline to determine whether a provision has already been interpreted from that perspective, which may render further discussion of the issue inadmissible.

of interpreting the Constitution in harmony with international human rights treaties.[146]

It was not until 2001, a decade after the establishment of the Constitutional Court, that a panel of judges at the Supreme Administrative Court initiated concrete constitutional control for the first time. They challenged a provision in the State Property Act that restricted the right to private property and free economic initiative and violated the principle of the rule of law.[147]

From 1991 to 2023, a total of 28 constitutional cases concerning the constitutionality of laws were referred to the Constitutional Court by panels of supreme judges. Of these, only five challenges initiated by panels of judges at the Supreme Administrative Court were upheld, while the remaining 23 were denied. The infrequent initiation of concrete constitutional control can be attributed to two main factors. The first relates to the powers of the supreme courts, which can request abstract constitutional control through decisions made in plenary sessions or by the general assemblies of their respective colleges.[148] The second factor pertains to the authority of courts at all levels not to apply parliamentary legislation that contradicts norms in ratified international treaties or EU law. Bulgarian judges primarily rely on the direct applicability of international human rights instruments and the primacy of EU law, rather than on concrete constitutional control, to protect individual rights and uphold the rule of law.

The history of infrequent concrete constitutional control in Bulgaria, marked by the rejection of most requests from the supreme courts, reflects a lack of confidence in the constitutional jurisdiction as a human rights court. In 2024, the majority of requests to the Constitutional Court from first-instance judges were deemed inadmissible, further straining the relationship between the judicial system and the constitutional control body. However, there is no evidence of resistance from the courts in enforcing Constitutional Court decisions in Bulgaria. Instead, ordinary judges appear to be seeking additional remedies for the protection of human rights beyond those provided constitutionally.

146 This approach of aligning the interpretation of the Constitution with international treaties is explicitly established in many decisions of the Constitutional Court. See, for instance, among others: Decision No. 1, issued on 1 March 2012 by the Constitutional Court of the Republic of Bulgaria in Case No. 10/2011; Decision No. 6, issued on 14 June 2016 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2016; Decision No. 14, issued on 17 November 2022 by the Constitutional Court of the Republic of Bulgaria in Case No. 14/2022.
The alignment of the Constitution's interpretation with international treaties is also explicitly analysed in the constitutional doctrine. See: Цеков [Tsekov], 2021.

147 Decision No. 7, issued on 10 April 2001 by the Constitutional Court of the Republic of Bulgaria in Case No. 1/2001.

148 In 1994, the plenary session of the Supreme Court first challenged the constitutionality of an amendment to the Civil Procedure Code; however, the request to declare it unconstitutional was denied. See: Decision No. 2, issued on 7 April 1994 by the Constitutional Court of the Republic of Bulgaria in Case No. 2/1994.

5. Overview of National Human Rights Institutions in Bulgaria

Among the constitutionally mandated state bodies responsible for protecting fundamental rights, the Ombudsperson plays a crucial role in promoting and monitoring the effective implementation of international human rights standards in Bulgaria.

At the outset of the 21st century, the parliament established several National Human Rights Institutions (NHRIs) through legislation, including the Commission for Protection against Discrimination (Комисия за защита от дискриминация),[149] the Commission for Protection of Personal Data (Комисия за защита на личните данни),[150] and the State Agency for Child Protection (Държавна агенция за закрила на детето).[151] In 2013, the Council of Ministers adopted a decision to create the National Coordination Mechanism for Human Rights,[152] which was re-established by decree in March 2024,[153] further enhancing its competencies and responsibilities as a monitoring and coordination entity. In 2016, the National Assembly enacted legislation to promote gender equality through the formation of a National Council on Equality between Women and Men.[154]

However, these NHRIs in Bulgaria do not adhere to a unified concept or framework, let alone the six pillars – independence, pluralism, cooperation, accessibility, funding, and broad mandate – outlined in the Paris Principles of 1993,[155] which aim to ensure the effective protection of human rights through national mechanisms. They significantly differ in their mandates and scopes of competence, ranging from adjudicating complaints and conducting administrative supervision to performing predominantly monitoring and advisory functions.

Both the Commission for Protection against Discrimination (CPD), which adjudicates discrimination complaints, and the Commission for Protection of Personal Data (CPPD), primarily responsible for overseeing the administrative activities of personal data administrators, were established as independent monitoring bodies[156] with parliamentary involvement in their creation. By explicitly

149 Established in the Protection Against Discrimination Act (Prom. SG. 86/2003).

150 Established in the Personal Data Protection Act (Prom. SG.1/2002).

151 Established in the Child Protection Act (Prom. SG. 48/2000).

152 Resolution No. 796, dated December 19, 2013, adopted by the Council of Ministers, for the establishment of a National Coordination Mechanism for Human Rights.

153 Decree No. 59 of the Council of Ministers, dated March 21, 2024, on the establishment of a National Coordination Mechanism for Human Rights (Prom. SG. 26/2024).

154 Established in the Equality of Women and Men Act (Prom. SG. 33/2016).

155 United Nations General Assembly. (1993). Resolution 48/134: National institutions for the promotion and protection of human rights [Online]. Available at: https://undocs.org/en/A/RES/48/134 (Accessed: 15 December 2024).

156 See: Art. 40 para. 1 of the Protection against Discrimination Act, and Art. 6 para. 1 of the Personal Data Protection Act.

stating that these institutions are independent, the law implies that their operations – including investigations, inquiries, findings, and decisions – are conducted without any external direction. Together with the Ombudsman, these Commissions align most closely with the criteria for effective NHRIs. This alignment is likely due to their establishment following external recommendations from the United Nations, the Council of Europe, and the European Union.[157]

The National Assembly elects five of the nine members of the CPD (with the remaining four appointed by the President) and all five members of the CPPD. However, there are no legislative guarantees to ensure a clear, transparent, and participatory selection and appointment process for the members of these commissions, nor is there a broad search for applicants from diverse social groups. The principle of pluralism is somewhat applied in the case of the CPD, as the law mandates that its members be elected or appointed following the 'principles of balanced participation of women and men, as well as the inclusion of individuals belonging to ethnic minorities.'[158]

Access to both Commissions is generally well organised. Complaints can be submitted in written form at no cost. Their central offices are located in Sofia, the capital, and the Commission for Protection of Data also has regional offices to enhance geographical coverage. However, there are no mobile services or clinics available to assist individuals in remote areas. Complaints can be submitted in person on paper at either office, or they can be sent via email or through the Secure Electronic Delivery System maintained by the Ministry of Electronic Governance in Bulgaria.

The laws designate both Commissions as primary budget distributors, meaning they are directly responsible for planning, executing, and controlling the allocated budgetary funds. They possess significant autonomy in managing these resources and retain control over their budgets once funding is provided. Regarding the issue of 'adequate funding' and the necessary resources to fulfil their mandated activities – ensuring sufficient staffing, infrastructure, and institutional capacity – the chairpersons annually request budget increases to meet their basic needs.

157 The reasons for the draft of the Protection Against Discrimination Act explicitly stated the following: 'The establishment of anti-discrimination legislation, including a specialised body for its implementation, is outlined in the recommendations of the Commission against Racism and Intolerance of the Council of Europe and the United Nations High Commissioner for Human Rights to the UN member states. A similar requirement is included in Council Directives 2000/43 and 2000/78 of the European Union. The adoption of anti-discrimination legislation is a crucial condition for closing Chapter Thirteen, "Social Policy and Employment," in Bulgaria's negotiations for EU membership.'
The reasons for the draft of the Personal Data Protection Act highlight that this law 'concludes the phase concerning access to public information and protected information, which are integral to the administrative reform in Bulgaria,' and that it was developed in alignment with both Bulgarian and European legislation on human rights protection.

158 Art. 41 para. 3 of the Protection against Discrimination Act.

In contrast to the independent Commissions, the State Agency for Child Protection operates as a standard administrative institution within the hierarchy of central executive power, with its activities, structure, organisation, and personnel governed by rules established by the Council of Ministers.[159] The chairperson, elected by the Council of Ministers, is the specialised body responsible for guidance, coordination, and oversight in child protection.[160] The State Agency for Child Protection is a secondary budget distributor that does not independently plan its budget; it receives funds from the Ministry of Labor and Social Policy and spends them according to the guidelines and conditions set by the ministry. Access to the State Agency for Child Protection is similar to that of the independent Commissions. Furthermore, the Agency has regional offices and can also be reached through a national toll-free hotline for children, available 24 hours a day, seven days a week.

An advisory and coordination National Council for Child Protection is established within the State Agency,[161] consisting of representatives from various public bodies at both national and local levels, as well as non-governmental organisations (NGOs) focused on child protection. This National Council provides preliminary opinions on draft normative acts related to children's rights.

Similarly, the National Council on Equality between Women and Men serves as a platform for consultation, cooperation, and coordination among central and local executive bodies and civil society organisations on gender equality issues. The Minister of Labour and Social Policy organise its work and serves as its chairperson under rules enacted by the Council of Ministers.[162]

In 2013, the Council of Ministers established the National Coordination Mechanism for Human Rights,[163] which included representatives from key public bodies. Its primary task was to allocate responsibilities related to ongoing dialogue and periodic national reports to international human rights monitoring and control mechanisms among state bodies and institutions. At first, it was envisioned as an advisory body regarding the future signing or accession of the Republic of Bulgaria to international human rights treaties, as well as for recommending legislative or other measures to enhance the state of human rights in the country. Its competencies were further extended to include monitoring the implementation of recommendations from reports issued by international UN mechanisms, assisting relevant ministries in developing policies and practices to

159 Rules of the Structure of the State Agency for Child Protection, Appendix No. 1 to Article 1 of Council of Ministers Decree No. 38 of February 15, 2001, published in SG 17/2001.

160 Art. 17 para. 1 of the Child Protection Act.

161 Art. 18 of the Child Protection Act.

162 Rules for the Structure, Organization, and Activities of the National Council for Equality between Women and Men under the Council of Ministers, adopted by Council of Ministers Decree No. 302 on November 15, 2016 (Published in SG. 93/2016).

163 Resolution No. 796, dated December 19, 2013, adopted by the Council of Ministers, for the establishment of a National Coordination Mechanism for Human Rights.

fulfill commitments under international human rights treaties to which Bulgaria is a party, continuously developing specialised expertise on human rights issues, maintaining an open dialogue with the academic community and civil society, and improving transparency and accountability in the field.

The government established these advisory and monitoring bodies to foster cooperation among the various branches of national power – legislative, executive, and judiciary – as well as public institutions at both central and local levels and NGOs. However, they lack transparent funding mechanisms and clearly defined legal procedures that guarantee access to their operations. Consequently, they function more as façade structures intended to assure international bodies and EU partners that Bulgaria is committed to human rights, rather than serving as effective platforms for genuine human rights advocacy and improvement.

6. Conclusion

Bulgaria's journey towards establishing a robust human rights framework is marked by significant legal advancements and ongoing challenges. The 1991 Constitution laid the groundwork for integrating fundamental rights into national law and aligning them with international standards. However, Bulgarian citizens' lack of direct access to the Constitutional Court and the tension between national and supranational interpretations of human rights indicate a need for further reform and commitment to upholding these rights uniformly. While critical, the role of NHRIs requires strengthening to ensure their effectiveness and independence. As Bulgaria navigates modern challenges, particularly regarding marginalised groups, it must foster a culture of respect for human rights that transcends legal provisions and permeates societal norms. Ultimately, the success of Bulgaria's human rights protection will depend on continuous engagement with national and international frameworks to promote justice and equality

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National Human Rights Systems in the Slovak Republic

ABSTRACT: *The Constitution of the Slovak Republic provides a comprehensive foundation for safeguarding fundamental rights, integrating international human rights treaties and principles. The Constitutional Court plays a pivotal role in adjudicating human rights cases, ensuring constitutionality through both abstract and concrete reviews. Complementing this framework, national human rights institutions (NHRIs) such as the Public Defender of Rights and the Slovak National Centre for Human Rights promote equality and accountability. However, critical gaps persist, including overlapping mandates, insufficient independence of NHRIs, and inadequate funding. This study, on the one hand, presents an extensive overview of the regional human rights system of the Slovak Republic, but on the other hand, it identifies areas for improvement, such as enhancing institutional autonomy, addressing systemic human rights issues, and strengthening compliance with international standards. These reforms are essential to ensure a robust and inclusive human rights framework in the Slovak Republic.*

KEYWORDS: *National Human Rights Institutions (NHRIs), Constitutional framework, Fundamental rights adjudication, Slovak Republic, Human rights protection, Institutional reform*

1. Introduction

The Constitution of a state is the embodiment of the social contract, issued to maintain order and justice within a given society. Moreover, todays' constitutions inherently contain provisions on human rights and fundamental freedoms, thus extending constitutional law beyond the regulation of the powers of state bodies.

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https://doi.org/10.47078/2026.1.241-273

Human rights are essential to the dignity of every individual and form the bedrock of democratic governance.

The constitutional development of the Slovak Republic (SR) followed a natural pathway in its quest for independence and sovereignty, which culminated on September 1, 1992, with the approval of the Constitution by the Slovak National Council.[1] Since then, the Constitution has been upgraded and amended in accordance with the standards of the international and European communities it aspired to join.

The SR, as a member of the European Union and the United Nations, recognises the necessity of safeguarding these fundamental human rights. Since its creation, the SR has made significant strides in aligning its legal framework with international human rights standards. The commitment to universal human rights is reflected in its constitutional provisions, legal statutes, and participation in international human rights treaties.

The national system of human rights protection will be discussed through the exploration of three key fields, namely: the constitutional framework of human rights in the SR, the fundamental rights adjudication of the Constitutional and general courts of the SR, and finally, the work of the National Human Rights Institutions (NHRIs). The systematic general outline of these three pivotal objectives – combined with relevant regional developments, a critical approach, and insights into the future development of human rights in the SR – aims to engage the reader in exploring the multi-layered approach that the SR presents in safeguarding human rights.

2. The Protection of Fundamental Rights in the Constitution

The inherent source of fundamental rights and freedoms stems primarily from the Constitution, which was adopted on September 1, 1992, and came into effect on January 1, 1993. It consists of nine chapters and 156 articles, generally fulfilling the most important functions – legal, dynamic, stabilising, political, integrative, ideological, and cultural[2] – for the purpose of maintaining social order between individuals and the state, and vice versa. The Constitution gives precedence to all international treaties covering human rights and fundamental freedoms over national laws,[3] except the Constitution itself. Understandably, accession to these

1 The Constitution and constitutional laws concerning the creation of the SR as an independent democratic state became fully effective on January 1, 1993, when, in conjunction with Constitutional Act No. 542/1992 Coll. of the Federal Assembly of the Czech and Slovak Federative Republic on the dissolution of the Czech and Slovak Federative Republic, the Slovak Republic was established as an independent, sovereign, and democratic state.

2 Chovanec, 2021, p. 134.

3 Art. 7(5) of the Constitution of the SR.

international treaties must be in accordance with the approval and ratification procedures of the National Council.[4]

Regarding the terminology on human rights in the legal doctrine of the SR, the Constitution contains a specific section dedicated exclusively to the protection of fundamental rights, entitled *Fundamental Rights and Freedoms*, where all generations of human rights are enshrined.

Moreover, the term *constitutional rights and freedoms* is also mentioned in Art. 154c (1) of the Constitution, stipulating the scope of priority application of international treaties on human rights and fundamental freedoms to which the SR is a signatory. This constitutional amendment was designated to establish the priority status of international treaties on human rights and freedoms ratified by the SR prior to the introduction of this constitutional amendment.

The universally recognised principles of international human rights law are enshrined in Art. 12(1) of the Constitution, stating that: 'All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are inalienable, imprescriptible, and irreversible.' By this passage, regardless of the diverse use of terminology in Slovak jurisprudence regarding human rights, the Slovak legal order aligns with the generally accepted international interpretation of human rights law.

Thus, in its jurisprudence, the SR tends to use the terms *fundamental rights* or *fundamental human rights*. Although other terms, such as *human rights* and *constitutional rights*, are also frequently used interchangeably, there is no significant terminological distinction between them.

■ *2.1. Relationship With International Law*

The relationship between the Constitution and international law is defined in the Constitution through scattered provisions, as the interpretation and application of international law within national circumstances are of pivotal importance for human rights protection. The general rule on international treaties is stated in the Art. 1(2) of the Constitution, which provides that the Slovak Republic acknowledges and adheres to the general rules of international law, the international treaties by which it is bound, and its other international obligations.

For greater clarity regarding the precedence of international law in relation to international human rights treaties, Art. 7 of the Constitution specifies that only certain types of international treaties take precedence over national laws, and only under specific conditions. These include international treaties on human rights and fundamental freedoms, international treaties that do not require the enactment of a law, and international treaties that directly confer rights or impose duties on natural or legal persons.

4 Art. 7(4) of the Constitution of the SR.

Moreover, the Art. 154c constitutional amendment is of great importance, as it clarifies the status of international treaties by which the SR is bound. This amendment was necessitated by the country's accession to the European Union, which altered the status of international treaties – including those concerning human rights and freedoms – within the Slovak legal framework that were ratified before July 1, 2001 (i.e., before the constitutional amendment). These international treaties on human rights and fundamental freedoms are part of the Slovak legal order and take precedence over national laws if they provide a greater scope of constitutional rights and freedoms.[5] Other international treaties ratified and promulgated before the constitutional amendment also form part of the legal order, if specified by law.[6]

The horizontal and vertical conception of human rights functioning can be observed in the Constitution. Through interpretation of certain articles, it becomes evident that both state entities, private entities, and individuals are required to respect human rights and freedoms.

The Constitution holds a vital role in modern society, warranting both respect and protection. The foundation for upholding the Constitution in societal practice lies in its representation of a broad social consensus on the essential principles of state and societal functioning. In this context, both the state and individuals – including social groups and political forces – play a crucial role in ensuring the Constitution's effective implementation and safeguarding its authority.[7]

■ *2.2. Fundamental Rights in the Constitution*

The Constitution, in its part dedicated to fundamental rights and freedoms, provides specific chapters for certain groups within society that deserve particular protection due to their increased vulnerability.

First, an entire section is devoted to the rights and freedoms of national minorities and ethnic groups. Section 4 focuses on enhancing the right to equal treatment and the positive right to protection. The anti-discrimination clauses specify that no member of a national minority or ethnic group shall face disadvantage based on their identity. The simplicity of Art. 33[8] aims to convey the general purpose of minority protection – that no one shall be mistreated based on their national and ethnic identity in either private or public contexts – allowing room for broad interpretation (e.g., to prevent segregation, language or religious restrictions, disadvantages in public service, or persecution).

5 Art. 154c (1) of the Constitution of the SR No. 460/1992 Coll.

6 Art. 154c (2) of the Constitution of the SR No. 460/1992 Coll.; for further analysis see: Šmigová, 2023, p. 285.

7 Orosz, Svák and Balog, 2012, p. 122.

8 'Membership in any national minority or ethnic group may not be used to the detriment of any individual.'

Second, positive rights to protection are stipulated in Art. 34, which elaborates on the rights of national minorities and ethnic groups from the standpoint of practical cultural and political rights. These include rights to promote their culture, disseminate and receive information in their mother tongues, and establish associations and educational or cultural institutions. For centuries, the SR was part of various state entities[9], resulting in its territory being home to numerous minority and ethnic groups. It was not until the "rise of nation-states" in the 1840s that the inhabitants began to identify themselves more strongly as members of specific nations, fundamentally reshaping their sense of identity.

The use of minority languages is guaranteed, particularly with respect to their admissibility in education, official communication, and decision-making on issues related to national minorities and ethnic groups, provided that the conditions for minority language use are met under other laws. However, the rights of national minorities are balanced by a constitutional provision aimed at protecting the national unity and sovereignty of the Slovak state.[10]

Other specific minority or vulnerable groups are mentioned in the Constitution, jointly incorporated in Section 5, entitled *Economic, Social, and Cultural Rights*. Art. 38 stipulates that women, minors, and persons with disabilities are entitled to special protection in the fields of healthcare and employment. The articles of Section 5 concern the social security protection of these vulnerable groups, addressing anti-discrimination and additional safeguards. Moreover, the protection of the family structure, children, and pregnant women is articulated in Art. 41, which establishes special protection for these groups from a social security and welfare perspective, ensuring equal rights.

The Constitution, as the highest legal authority, defines fundamental human and political rights, the rights of national minorities and ethnic groups, as well as economic, social, and cultural rights. It also enshrines the right to environmental protection, the preservation of cultural heritage, and access to judicial and other legal protection. The term "human rights" refers to a set of rights guaranteed to citizens by the Constitution and international treaties ratified by the state. These rights establish the relationship between a democratic state and all its citizens, regardless of nationality, race, age, gender, religion, political beliefs, or any other potentially discriminatory distinction. This modern concept is rooted in natural law theories, emphasising that people, as social beings, possess inalienable rights that the state is obligated to uphold. These human rights ensure human dignity and the possibility of living freely in a just society.

9 The legal history of the SR is quite unique, considering the fact that its territory was part of different countries throughout history. Scholars mainly conduct research on the legal and state history of Czech and Slovak territories jointly. Most of the Slovak territories belonged to the Hungarian state entity in the 19th century, and to Czechoslovakia in the 20th century. See more in: Nagy, 2022.

10 Art. 34(3) of the Constitution.

The inclination towards the protection of fundamental rights, incorporated in the basic functions of the Constitution, contributes to its universal character through its axiological function, which reflects the value orientation of the state and society – i.e., it represents societal values shared within the community and with which society as a whole identifies.[11]

At first glance, however, the Constitution could be considered neutral, as Art. 1(1) stipulates that 'The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion.' Nevertheless, the quoted sentence strongly incorporates a value-based element aimed at preventing any particular ideology or religion from gaining a dominant position in the state or society. It expresses respect for and recognition of the natural plurality of opinions inherent in any democratically organised society.[12]

The Constitution establishes several guiding principles concerning the status of the individual within the state: sovereignty and democracy, the source of state power derived from citizens who exercise it through their elected representatives or directly[13], and the equality and non-discrimination of individuals' fundamental rights[14]. These principles draw inspiration from fundamental axiological values, including human dignity, freedom, equality, and the rule of law. Although the Constitution does not directly establish a hierarchical order, it follows the evolution of the generations of human rights.

Regarding the hierarchy of human rights and freedoms, the Constitution does not explicitly establish an order among them. However, certain rights – such as the right to life and human dignity – are often considered foundational, as they underpin the realisation of other rights. The Constitutional Court of the SR has emphasised that while all fundamental rights are protected, some may carry more weight in specific contexts, especially when balancing competing rights or interests.

The Constitutional Court has established the principle of constitutionally conforming interpretation as the primary method for interpreting fundamental rights. From the principle of the priority of constitutionally conforming interpretation, it follows that in cases where various interpretations of related legal norms are possible using standard interpretive methods, the interpretation that ensures the full or fuller realisation of constitutionally guaranteed rights of natural or legal persons must be preferred. In cases of doubt, all public authorities are constitutionally obligated to interpret legal norms in favour of the realisation of constitutionally guaranteed fundamental rights and freedoms, or human rights and fundamental freedoms stemming from a qualified international treaty.[15]

11 Orosz, Svák and Balog, 2012, pp. 57 and 60.
12 Ibid., p. 61.
13 Art. 2(1) of the Constitution of the SR No. 460/1992 Coll.
14 Art. 12 of the Constitution of the SR No. 460/1992 Coll.
15 PL. ÚS 110/2011 (3 July 2013) p. 21.

■ *2.3. The Catalogue of Fundamental Rights in the Constitution*

The Constitution of the SR organises freedoms and rights into specific categories, each encompassing various provisions. Among the fundamental human rights and freedoms, the Constitution lists the right to life, personal liberty, human dignity, privacy, property rights, freedom of movement, freedom of thought, conscience and religion, freedom of expression, the right to information, freedom of assembly, and freedom of association. Moreover, political rights include the right to participate in public affairs, to vote and be elected, to access public office, to petition, and to participate in referendums.

Another group of fundamental rights covers the core rights of national minorities and ethnic groups (the right to education in one's language, to use one's language in official communications, to cultural development, and to participate in addressing minority-related matters). Furthermore, economic, social, and cultural rights are incorporated in the Constitution (the right to work and fair remuneration, to rest and leisure, to social security, to protection of family, maternity, and parenthood, to education, and freedom of scientific research and artistic creation). The Constitution also includes rights related to environmental protection and cultural heritage (the right to a favourable environment, to timely and complete information about the environment, and the obligation to protect and enhance the environment and cultural heritage). Lastly, all elements of access to justice and a fair trial are incorporated to guarantee judicial and legal protection of individual human rights.

The SR has its own specific characteristics regarding the prioritisation and importance of certain fundamental rights and freedoms, reflecting its political, social, and economic context. The adjudication of fundamental rights cases involving the SR before the European Court of Human Rights is notable, as certain areas of human rights consistently appear before the Court, highlighting persistent issues with their protection. There are also emerging dynamic areas (e.g., environmental issues, medically assisted reproduction) where human rights protection must be further developed and complemented. From the author's own discretion, the right to a fair trial, the right to non-discrimination, and the right to a healthy environment are areas of law that could be of particular importance to the SR.

The right to a fair trial has been a constant concern; however, in recent years, the issue of the rule of law, judicial efficiency, and lengthy proceedings has become increasingly significant in the SR. If these challenges are insufficiently addressed, they could potentially undermine public trust in the judiciary, hinder

access to justice, and attract scrutiny from international bodies such as the European Court of Human Rights.[16]

Furthermore, non-discrimination rights in relation to national and ethnic minorities have been on the agenda since the establishment of the SR as an independent sovereign state.[17] The recent 2021 census indicates the relevant minority groups numerically, particularly the Hungarian and Roma minorities.[18]

An additional right should be mentioned, linked to the principle of non-discrimination and stemming from the Constitution – namely, the right to education for all children. This right became particularly essential during the pandemic period[19], when certain marginalised groups were positively discriminated against to ensure access to education.[20] Even before that, the problem of segregation in the school system had drawn the attention of international human rights organisations. The SR has been focusing on addressing such issues in recent years through national projects aimed at introducing good practices, as well as through legislative changes.[21]

Another issue concerns whether limitation clauses exist in the Constitution. Fundamentally, limitation clauses in any constitution embody a nuanced approach that emphasises the importance of balance and oversight to protect both public

16 The ECtHR has shown greater scrutiny of the SR's criminal procedures, reflecting potential systemic issues in judicial processes, including lengthy proceedings and pre-trial detention conditions. Moreover, the dismantling of the Special Prosecutor's Office has been acknowledged with regret by the European Commission, which expressed concerns about the effectiveness of investigations and the rule of law in the country. See more: Máčaj, 2023, pp. 23–34; Wong, 2024.

17 Regarding current legal issues related to non-discrimination and the controversial Beneš Decrees, see: Scheu and Pál, 2023, pp. 57–67.

18 The Slovak Statistical Office, for the first time, allowed the assignment of both a first and second nationality; thus, the results of the population census must be analysed with greater complexity and nuance. The absolute number of people of Hungarian minority is 456,154 (422,065 indicated Hungarian nationality as first; 34,089 as second), and the Roma minority is 156,164 (67,179 as first; 88,985 as second). For critical analysis, see: Harrach, 2023, pp. 7–33.

19 Regarding the derogation of human rights in cases of crises, see: Hassanová, 2023, pp. 15–27.

20 The Decision of the Minister No. 020/18259:2-A1810 focused on reopening regular in-person teaching for students from socially disadvantaged backgrounds who attended primary and secondary schools and lacked material and financial means to access distance online learning. These students were to be taught in person in small groups (five students and one teacher) under conditions specified by the decision. Such uplifting of students from these social backgrounds could be evaluated as an efficient, sensitive approach to the right to education under restrictive circumstances. See: Cenkner and Pavlíčková, 2021.

21 On December 22, 2023, the European Commission referred the SR to the Court of Justice of the European Union for its insufficient efforts in addressing the segregation of Roma children in education (Commission v. SR, Case C-799/23). The application underlined the urgent need to implement systemic changes in the school system to promote desegregation, to which the SR responded through initiatives such as the National Project 'Opportunity for All.'

welfare and constitutional integrity. The limitation of fundamental rights serves as a critical mechanism for crisis management in extraordinary circumstances that the state may face, which necessitates protecting public interests and welfare to the *detriment* of individual freedoms. Consequently, key principles of legitimacy, legality, and proportionality have to be assessed to ensure due diligence and prevent the erosion of fundamental rights under the guise of necessity.

The Constitution contains such clauses on both general and specific rights. The general clause is expressed in Art. 13(3): 'Legal restrictions on fundamental rights and freedoms must apply equally to all cases that meet the prescribed conditions.' Furthermore, Art. 13(4) highlights that 'When restricting fundamental rights and freedoms, their essence and purpose must be respected. Such restrictions may only be applied to achieve a specified objective.' These passages encompass the general norm on the limitation on fundamental rights and freedoms, stressing the uniformity of application and the need to respect the core essence and purpose of the restricted rights, with a clearly defined objective to be achieved through the limitation – thus still upholding the principles of the rule of law.[22]

Besides addressing limitations generally, the Constitution also recognises and specifies the exceptional circumstances under which fundamental rights can be restricted in Art. 51(2): 'The conditions and scope of the restriction of fundamental rights and freedoms, as well as the extent of obligations during times of war, a state of war, a state of emergency, and a state of crisis, shall be determined by a constitutional law.' The aforementioned constitutional law is Act No. 227/2002 Coll. on State Security in Times of War, State of War, State of Emergency, and State of Crisis, which specifically regulates the conditions and scope of restrictions on fundamental rights and freedoms, listing them for each type of crisis situation. Legitimate restrictions on fundamental rights and freedoms are typically repressive in nature and are designed to safeguard values acknowledged by society. However, if these limitations are not upheld, any interference with fundamental rights and freedoms is prohibited and, if carried out, deemed unconstitutional.[23]

Specific clauses in the Constitution stipulate which exact fundamental right may be limited, under what circumstances, and to what extent. These fundamental freedoms differ in character, usually applying to *relative* human rights – e.g., freedom of movement and residence, the right to peaceful assembly, the right to strike, the imposition of a work obligation, the right to education, the right to privacy, property rights, freedom of religion and belief, the right to health protection, and the right to judicial and other legal protection.[24]

22 Legality, legal certainty, prevention of abuse of power, equality before the law, non-discrimination, and access to justice. See: Venice Commission, CDL-AD(2016)007, Rule of Law Checklist.

23 Švecová, 2019, p. 26.

24 See the following Articles of the Constitution: Arts. 16, 17, 18, 20, 23, 24, 28, 35, 40, 42, 46.

In the history of the SR, a state of emergency[25] has been declared three times, the last two occasions necessitated by the global COVID-19 pandemic.[26] Understandably, the proportionality test had to be utilised as a fundamental tool to evaluate whether limitations on fundamental rights were justified. The proportionality test encompasses assessments of legitimacy (based on a legitimate objective), suitability (whether the restrictive measure is appropriate to achieve that objective), and necessity (measuring the level of intrusion caused by the restriction). Perhaps the most nuanced and problematic step is evaluating proportionality in the *narrow* sense – that is, whether the restriction was balanced in relation to the objective it sought to achieve. This step examines whether the benefits of achieving the legitimate objective outweigh the harm caused to the restricted rights, requiring a very complex analysis.[27]

Even though the legislator anticipated situations requiring the restriction of fundamental rights in various forms, the pandemic highlighted setbacks caused by surprise and lack of preparedness among the executive, legislative, and judicial bodies. The Constitutional Court was summoned multiple times to evaluate the constitutionality of decisions (mainly government resolutions) related to declaring a state of emergency or crisis and imposing restrictions on freedoms such as movement. Judicial activity during the pandemic provided an opportunity to reflect on vulnerabilities in the practical application of the proportionality test

25 The definition of a state of emergency is stipulated in Constitutional Act No. 227/2002 Coll. on State Security in Times of War, State of War, State of Emergency, and State of Crisis.

26 Government Resolution No. 114 of March 15, 2020, regarding the proposal to declare a state of emergency under Article 5 of Constitutional Act No. 227/2002 Coll. on State Security in Times of War, State of War, State of Emergency, and State of Crisis; Government Resolution No. 587 of September 30, 2020.

27 Ľalík, 2021, pp. 62–63.

for restricting fundamental rights, as well as the potential for misuse and overreaching legislation.[28]

■ *2.4. Right to Access to Justice and Fair Trial*

The right to access justice and to an effective remedy is a cornerstone of fair treatment under the law. These rights are deeply rooted in the principle of the rule of law, which becomes fully realised when individuals engage with judicial proceedings. By facilitating such access, the rule of law empowers individuals to expect a process marked by integrity, fairness, and equity in the evaluation of their matters by the judiciary or other competent state authorities. By evaluating the legal prerequisites of these rights, we can gain a deeper understanding of the effectiveness of their implementation in later chapters.

The essence of access to justice is intricately linked to the calibre of the legal process administered by the courts on behalf of the state. The qualitative standard of this process hinges on the degree to which legal principles are meaningfully integrated into judicial reasoning and decision-making. In their absence, the application of the law risks descending into rigid formalism, stripping it of justice and equity. Legal principles thus perform a pivotal function in embedding societal values within the legal order, safeguarding these moral and ethical standards through robust legal protection.[29]

There is no exact definition of the right to justice or effective remedy, but legal science usually understands these as substantive and procedural legal institutes addressing the right to a fair trial, the right to appeal, access to courts,

28 Through the analysis of the Court's decision in PL. ÚS 2/2021, where the legality, proportionality, and legitimacy of Government's Resolution No. 160 of March 17, 2021, to prolong the state of emergency in the country were reviewed, one can see an example of the balancing act necessary in decision-making regarding restrictions on fundamental rights and freedoms. The Government justified the prolongation due to the health risks posed by the British variant of the virus and, in order to protect public health, imposed limitations on free movement and assembly, with exemptions for vulnerable groups. The Court confirmed the resolution's constitutionality but emphasised the need for continuous re-evaluation of restrictions to prevent potential overreach. It highlighted the balance between public safety and fundamental rights, ensuring that measures are justified, proportionate, and time-bound.
It is interesting to examine the concurring opinion of Judge Peter Straka, who stated that the proportionality test was inadequate, as the majority of the Court did not duly analyse the necessity and balance of the restrictions and the intended objective. He argued that the Government did not adequately demonstrate that the restrictions were the least invasive means to achieve the objective of public health protection. The lack of substantial data to support the extension of the state of emergency seems to imply that the mere existence of the pandemic was considered suffficient justification; however, a state of emergency should be an exception, not a norm. Less restrictive measures, such as targeted pandemic legislation, could have been a better response in the name of proportionality in a narrower sense. See: Constitutional Court's decision (PL. ÚS 2/2021) and the concurring opinion of Judge Peter Straka.

29 Mrva and Krajovič, 2017, p. 96.

and ensuring an effective legal remedy. These "sub-rights" under the right to access to justice also prevail in the Constitution.

Namely, the right to access to justice is stipulated in Art. 46, guaranteeing that everyone may claim their rights in an independent and impartial court or, in specific cases, before another authority of the SR, and providing that anyone who claims their rights were violated by a decision of a public authority has the right to seek judicial review, unless otherwise stipulated by law. Paragraph 3 encapsulates the right to an effective remedy, as it ensures the right to compensation for damages caused by unlawful decisions or improper conduct by public authorities, including the judiciary.

From a broader perspective, some prerequisites to the right to access to justice are scattered throughout the Constitution. These are legal institutes that contribute to just proceedings, e.g., the presumption of access to legal assistance[30] and the opportunity to conduct proceedings in a minority language.[31]

3. Fundamental Rights Adjudication in the SR

The inclusion of the right to judicial and legal protection among the human rights safeguarded by the Constitution underscores the practical enforcement of legal protection. This applies not only to human rights but also to all rights derived from the Slovak legal system. Without effective mechanisms for judicial and legal protection, all other rights would depend solely on voluntary adherence, which is never fully achieved in any state.[32]

The protection of fundamental rights is vested in several state bodies, all of which can be characterised by their purpose to preventively or repressively ensure the protection of rights and freedoms.[33]

The concrete protection of fundamental human rights was initially carried out by the Constitutional Court, but under its influence, it has become increasingly vested in the general courts, which provide direct protection in individual cases.[34]

The Slovak framework for monitoring and enforcing human rights includes several key institutions: the Constitutional Court of the Slovak Republic, the Supreme Court of the Slovak Republic, the Supreme Administrative Court, the Public Defender of Rights (Ombudsman), the Ordinary Court System, and the Prosecutor's Office. These bodies are integral components of the SR's institutional

30 Art. 47(2) of the Constitution of the SR.
31 Art. 34(2) of the Constitution of the SR.
32 Svák and Cibulka, 2009, p. 927.
33 Svák, 1995, p. 7.
34 Orosz, Svák and Balog, 2012, p. 227.

human rights protection structure and are explicitly mandated by law to fulfil this role at the national level.

The Constitutional Court of the SR is an independent judicial body responsible for protecting constitutionality.[35] It oversees the constitutionality of laws and legal regulations, decisions by public administration or local government authorities, and their effective implementation. Moreover, it adjudicates individual complaints from natural or legal persons alleging human rights violations.[36] The Constitutional Court is empowered to exclusively interpret the Constitution or constitutional laws in cases of dispute, including matters related to fundamental rights and freedoms.[37]

The judicial system is composed of the Supreme Court of the SR and other courts.[38] The Supreme Court is the highest body of general judiciary, aiming to ensure uniformity in the interpretation of laws by lower-level courts. It publishes significant legally binding decisions in the *Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic*.[39]

The establishment[40] of the Supreme Administrative Court marked a significant step forward in restoring the judiciary's true function and regaining public trust in the independence and effectiveness of the justice system. It is the supreme judicial authority in matters of administrative justice, ensuring the uniformity and legality of decision-making in administrative matters. The Court has assumed some competencies previously held by the Constitutional Court, such as ruling on the constitutionality and legality of elections to local self-government bodies. Its role in adjudicating these matters has led it to be described as a "small constitutional court."[41]

The Public Defender of Rights was introduced in the Constitution in 2001 as an independent institution dedicated to safeguarding the fundamental rights and freedoms of individuals before public administration bodies and other public authorities.[42] The Office of the Public Defender of Rights is a typical "soft-law" institution, as it does not possess direct enforcement powers, although it plays a significant role in critiquing institutional malfunctions of public bodies. The initiation of public debate on societal issues also contributes to the promotion

35 Art. 124 of the Constitution of the SR.
36 Art. 127 of the Constitution of the SR.
37 Art. 128 of the Constitution of the SR.
38 Art. 143 of the Constitution of the SR.
39 Art. 8 of the Act No. 757/2004 Coll. on Courts.
40 The Supreme Administrative Court was established with effect from January 1, 2021, by Constitutional Act No. 422/2020 Coll., which amends and supplements the Constitution, as amended. Its activities commenced on August 1, 2021.
41 The Court's competencies are defined in Act No. 162/2015 Coll. on the Administrative Judicial Code, as amended, and Act No. 432/2021 Coll. on the Disciplinary Rules of the Supreme Administrative Court of the Slovak Republic and on the amendment and supplementation of certain laws (Disciplinary Judicial Code), as amended.
42 Art. 151a of the Constitution of the SR.

of human rights to a wider audience. Its functions are governed by the Constitution and Act No. 564/2001 Coll. on the Public Defender of Rights. A major new role of the Public Defender of Rights was introduced in May 2023: acting as a coordinating body for the National Preventive Mechanism under the Optional Protocol to the Convention against Torture.[43]

The Ordinary Court System in Slovakia was extensively reformed in 2020, aiming to achieve specialisation of judges, improve decision quality, and, in the long term, produce faster and more predictable court rulings. An additional benefit is reducing the risk of corruption by enlarging court districts. District and regional courts serve as the initial institutions individuals encounter in safeguarding human rights, directly applying protection mechanisms in line with the right to access to justice and effective remedy, thereby strengthening legal certainty.[44]

The Prosecutor's Office, as stipulated in the Constitution, protects the rights and legally protected interests of individuals, legal entities, and the state.[45] Its role, as defined by law, is that of a supervisory authority for the protection of rights, requiring it to take measures to prevent, identify, and rectify violations of legality, restore infringed rights, and hold responsible parties accountable.

■ *3.1. The Constitutional Court of the SR*

The Constitutional Court of the SR is an independent judicial body for the protection of constitutionality.[46] It represents the highest judicial authority for constitutional protection as well as for the protection of fundamental rights. Within the dual judicial system, the Constitutional Court's protection is invoked only when it is not ensured by another (general) court. Its principal role is to support the alignment of the democratic legal framework and to uphold the rights and freedoms of

43 Art. 151a of the Constitution of the SR empowers the Court to systematically inspect facilities where individuals deprived of their liberty are held or could be held by public authorities. These facilities include prisons, detention centers, police custody cells, asylum facilities, and immigration detention centers. The objective is to protect individuals from torture, inhuman treatment, or other forms of mistreatment.
See: Art. I of Act No. 110/2023 Coll., which amends and supplements Act No. 564/2001 Coll. on the Public Defender of Rights, as amended, and certain other laws.

44 'The general judiciary ensures that individuals and legal entities can enforce their rights, commits to providing them with effective protection against unlawful state interventions, and prioritises the protection and promotion of individual fundamental rights and freedoms. Relevant procedural codes guarantee the effectiveness of this legal protection and safeguard the lawful approach to exercising fundamental rights and freedoms.'
See: II. ÚS 13/2001 Resolution of February 14, 2001, Collection of Decisions and Resolutions of the Constitutional Court of the Slovak Republic 2001.

45 Art. 149 of the Constitution of the SR.

46 Art. 124 of the Constitution of the SR.

citizens. The Constitutional Court has diverse functions and powers, which are primarily regulated in several scattered legal sources.[47]

The Constitutional Court has versatile functions, including the review of constitutionality of various legal acts and international agreements[48]; resolution of competence disputes between state bodies and local governments[49]; adjudication on the legality of elections and referenda[50]; rulings on the vacancy or indictment of the President[51]; the protection of fundamental rights of natural and legal persons[52]; and the interpretation of the Constitution or constitutional laws in cases of dispute.[53]

The Constitutional Court has progressively expanded its interpretative authority concerning the Constitution, frequently rendering decisions of a proactive nature. This evolution reflects its assertion of informal powers through judicial law-making in interpreting constitutional provisions and safeguarding fundamental rights. The dynamic interplay between the executive and legislative branches has significantly influenced the development of the Court's competencies. During the politically turbulent 1990s, the Constitutional Court adopted a

47 Arts. 124–140 of the Constitution of the SR stipulate the competences of the Constitutional Court. These are further detailed in Act no. 314/2018 on the Constitutional Court of the SR, which specifies the position of judges, procedural rules, and the organisational and operational framework. Internal regulations, such as Regulation No. 500/2019, govern procedural specifics, internal functioning, and staff organisation (plenum, senates, judges, rapporteurs).

48 Arts. 125 (1) and (4) of the Constitution of the SR.

49 Arts. 126 and 127a of the Constitution of the SR.

50 Arts. 125b and 129 of the Constitution of the SR.

51 Art. 107 of the Constitution of the SR.

52 Art. 127 of the Constitution of the SR.

53 Art. 128 of the Constitution of the SR.

resolute and assertive stance in protecting constitutionality, actively fulfilling its role as the guardian of the constitutional system of checks and balances.[54]

As the primal protector of constitutionality, the Constitutional Court exercises this role through two means: first, through judicial review (proceedings on the conformity of legal regulations), and second, through proceedings on constitutional complaints. Both mechanisms ensure that fundamental rights are collectively and individually protected, thus upholding the constitutional order of the state.

Regarding the function of judicial review and the allocation of competencies between the two judicial systems (general and constitutional judiciary), the Constitutional Court alone is entrusted with determining the constitutional compliance of legal regulations throughout the entire vertical hierarchy.[55] This mechanism serves the collective protection of fundamental rights and is expressed through the following categorisation of the Court's jurisdiction: abstract constitutional review, concrete constitutional review, interpretative jurisdiction, authority related to the implementation of democratic governance, and the power to resolve disputes over jurisdictional competence.[56]

■ *3.2. Judicial Review and Constitutional Complaint*

Abstract constitutional review ensures that all laws and subordinate legal norms align with the Constitution. By enforcing the hierarchical structure of legal

54 A notable case illustrating the Court's approach is PL. ÚS 33/95, where it adopted an "activist" stance regarding the method of privatisation of state property following the transition from a socialist to a capitalist economic system. The government's modification of privatisation rules mid-process prompted parliamentary opposition, as the retroactive effect violated the principle of legal certainty and the rule of law (Art. 1 of the Constitution).
The Constitutional Court held that Section 24(10) of the challenged Act violated Articles 12(1), 13, and 20(1) of the Slovak Constitution. This provision compelled municipalities and housing cooperatives to accept state-issued bonds as payment for property transfers. The Court ruled that this unlawfully restricted property rights by forcing acceptance of bonds that were neither liquid nor equivalent to cash. Furthermore, the proportionality test revealed an unequal burden on municipalities and cooperatives. The Court clarified that citizens do not have a constitutional right to receive property from the state, and thus Parliament is free to alter privatisation methods, provided equality and fairness are maintained.
In the public eye, this decision established the Court as a courageous and independent institution among the three branches of power, capable of opposing political pressures in government economic policy. Although later scholarly critiques argued that, by modern standards, the proportionality test might not justify the municipalities' burden – given the primacy of public interest – the decision nonetheless positioned the Court as a critical and independent actor in strengthening democracy. For more see: Štiavnický and Steuer, 2020, pp. 185–186.

55 Čič et al., 1997, p. 415.

56 Svák and Cibulka, 2009, p. 876.

regulations, this mechanism upholds the supremacy of the Constitution, which embodies the will of the people as expressed in the social contract – the ultimate foundation of authority in the state.

The initiation of proceedings is governed by the principle of disposition, meaning that the Constitutional Court can only commence proceedings based on a formal proposal submitted by authorized subjects.[57] The procedural rules for initiating proceedings in abstract constitutional review are governed by the Constitutional Court Act and the Rules of Procedure, which specify that only state authorities may initiate such proceedings.[58] If the Constitutional Court rules that certain legal regulations are not in compliance with the Constitution, the respective regulations, their parts, or certain provisions lose their effect. The bodies that issued these laws are obligated to bring them into compliance with the Constitution, constitutional laws, and international treaties promulgated in accordance with the law, within six months of the Constitutional Court's ruling.[59] This form of norm control is often referred to as that of a 'negative legislator', as the Court has the competence to annul laws in part or in whole.

The legal basis for concrete constitutional review stems from Arts. 127 and 127a[60] of the Constitution. It aims to provide protection in specific cases where constitutional values have been violated, directly and immediately threatening an individual's constitutional rights or resulting in their violation. A constitutional complaint may be filed in such cases, serving as a control mechanism over state bodies to ensure respect for fundamental rights when interacting with natural persons.

An individual or legal entity is authorised to file a constitutional complaint if they allege a violation of their fundamental rights or freedoms, or of human rights and fundamental freedoms arising from an international treaty ratified by the SR and promulgated in accordance with the law.

Based on the principle of subsidiarity, the Constitutional Court can decide on a constitutional complaint only if no other court is competent to decide on the matter. This implies that the Constitutional Court's jurisdiction to decide on constitutional complaints does not replace the authority of other public bodies

57 'These entities do not include the petitioner as a natural person. The right to file a petition to initiate proceedings on the conformity of legal regulations cannot be granted to a natural person, even in light of Art. 152(3) of the Constitution. Art. 152(3) of the Constitution, as a procedural provision, regulates only the petitions of entities specified in Art. 130 of the Constitution. This provision refers exclusively to entities that are procedurally authorized to initiate proceedings on the conformity of legal regulations pursuant to Art. 130(1)(a) to (e) of the Constitution.'
PL. ÚS 1/1994 Resolution of the Constitutional Court from January 27, 1994.

58 Specified in Art. 41 of the Act No. 314/2018 Coll. on the Constitutional Court, and the Art. 130(1) of the Constitution.

59 Art. 125(3) of the Constitution.

60 A constitutional complaint is also available also to local self-government bodies – the so-called 'municipal complaints' – according to Art. 127a of the Constitution.

to adjudicate the rights and legally protected interests of individuals and legal entities or to provide protection for those rights and interests. The Constitutional Court serves the last "instance" of effective national authority to address violations of fundamental rights.

If the Constitutional Court accepts a complaint, it must determine whether the protected rights or freedoms have been violated by a valid decision, measure, or other action. If such a violation is found, the Court is required to annul the decision, measure, or action in question. In cases where the violation arises from inaction, the Constitutional Court may instruct the responsible party to take appropriate action. Additionally, the Court may remand the case for further proceedings, prohibit the continuation of the infringement of specific fundamental rights and freedoms, or, where feasible, order the responsible party to restore the status quo prior to the violation.[61]

The procedural specificities of the constitutional complaint are defined in Art. 123 of the Act on the Constitutional Court, highlighting the principle of subsidiarity and the casual link between the violation and the decision of the state authority.

The SR can be characterised by a model of concentrated constitutional judiciary, meaning that the Constitutional Court is the only specialised court with the authority to review constitutionality and it is not concerned with the tasks of ordinary courts. However, the ordinary court system is another pivotal body that carries out fundamental rights adjudication, while at the same time being part of an independent judicial system with the objective of protecting legality.[62] Art. 142(1) of the Constitution stipulates the competence of ordinary courts: they adjudicate civil and criminal cases and review the legality of decisions made by public administration bodies, as well as the legality of decisions, measures, or other interventions by public authorities, if provided for by law.

Individuals can, in the first instance, utilise the system of ordinary courts in cases of alleged violations of their fundamental rights, where an independent judicial authority applies the law on fundamental rights in a manner consistent with the Constitution. Art. 46 of the Constitution establishes the right to access to justice and the right to an effective remedy provided by the legal order.

Ordinary courts' judgments cannot be reviewed by another ordinary court, but the Constitutional Court has the authority to review such judgments. However, this review does not extend to reassessing the factual findings or legal conclusions of the ordinary courts. Instead, the Constitutional Court focuses on determining whether the interpretation and application of the law are compatible with the Constitution or with international treaties on human rights and fundamental freedoms.

61 Art. 127 of the Constitution.

62 II. ÚS 1/95 Resolution of the Constitutional Court dated January 10, 1995.

The Constitutional Court may intervene only in cases where the decision of an ordinary court demonstrates arbitrariness, lacks adequate justification, or violates constitutional principles. Even if the Constitutional Court disagrees with the legal interpretation of an ordinary court, it may replace the court's legal opinion only if the interpretation is found to be arbitrary, unjustified, or constitutionally incompatible.

Ordinary courts operate within a separate judicial system from the Constitutional Court; however, their roles are interconnected through the ability of ordinary courts to initiate a review of the constitutionality of laws they are required to apply in their decision-making. From this perspective, judicial initiatives play a significant role, as ordinary courts can act as "watchdogs" ensuring preliminary constitutional oversight of laws while respecting the Constitutional Court's exclusive authority to interpret and determine constitutionality.

■ *3.3. Statistics*

The annual statistics detailing the workload of the Constitutional Court are publicly accessible online, providing valuable insights into the most pressing issues concerning constitutional matters within the state and the safeguarding of fundamental rights. This analysis presents an overview of the most recent data from 2022, 2023, and the first half of 2024, offering a quantitative perspective on the workload of constitutional adjudication.[63] More comprehensive data are usually available in the published *Yearbook of the Constitutional Court*; however, the most recent publication contains processed data only up to 2023.

The most detailed statistics from 2022 provide an in-depth description of the types of proceedings before the Constitutional Court.[64] The majority of cases focused on the concrete review of constitutionality, particularly involving constitutional complaints. A total of 2,862 cases were submitted to the chamber for adjudication on fundamental rights. The number of decided cases reached 2,967, with 983 submissions still pending, including the oldest submission from 2018. The most frequent cases concerned the right to have one's case heard publicly without undue delay[65] and the right to have the matter resolved within a reasonable time[66] (383 violations), the right to legal protection and a fair trial[67] (189 violations), and the right to personal liberty and security[68] (24 violations).

63 At the time this article was written (May– December 2024), these statistics were made available by the official authorities.

64 See: Ústavný súd Slovenskej republiky, 2023.

65 Art. 48(2) of the Constitution of the SR.

66 Art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).

67 Art. 46(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).

68 Art. 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).

The abstract review of constitutionality (proceedings on the conformity of legal regulations under Art. 125 of the Constitution) was invoked in 15 initiated cases and decided in 19 cases. One review based on proceedings under Art. 125b (1) of the Constitution was also initiated and decided by the Court. Altogether, 2,876 submissions were made, and 2,995 judgements were delivered.

The official statistical data for 2023, provided in the *Yearbook of the Constitutional Court 2023*, indicated that the majority of cases involved alleged fundamental rights violations. The number of submitted constitutional complaints 3,116 with 3,172 resolved. These cases primarily concerned the right to have one's case heard without undue delay, the right to have the matter resolved within a reasonable time, the right to legal protection and a fair trial, and the right to personal liberty and security. The Constitutional Court found violations of these rights in 618[69] cases, including 431 judgements related to the right to have one's case heard without undue delay and resolved within a reasonable time, 190 judgements concerning the right to legal protection and a fair trial, and 19 judgements involving violations of the right to personal liberty and security. In 403 judgments, the Court awarded complainants financial compensation.

Proceedings concerning abstract norm control in 2023 were initiated under Art. 125(1) (a) and (b) in 13 cases, and under Art. 128 of the Constitution in one case. Altogether, 21 cases were decided, relating to proceedings on the conformity of legal regulations under Article 125(1) (a) and (b) of the Constitution. In total, 3,130 submissions were made, 3,193 judgements were delivered, and 939 cases remained pending as of December 31, 2023.

In 2023, the Constitutional Court received 254 more proposals and resolved nearly 200 (198) more cases compared to 2022. The number of pending cases requiring plenary jurisdiction was reduced from 27 to 20. On average, each judge handled approximately 246 cases during the year, approximately 16 more than in 2022. From October 1, 2023, the plenary of the Constitutional Court operated with an incomplete composition, consisting of 12 out of the total 13 judges.[70]

The most recent publicly available data, covering the first half of the year 2024 (January 1, 2024–June 30, 2024), show that the Court identified violations of fundamental rights in 323 cases. Of these, 242 judgments pertained to the right to have cases heard without undue delay and resolved within a reasonable time, 73 judgments addressed the right to legal protection and a fair trial, and 17 judgements found violations of the right to personal liberty and security. In total, the Court awarded financial compensation to complainants in 238 judgements. Moreover, the Constitutional Court delivered one resolution unifying the legal opinions of its chambers (ÚS 1/2024).

69 In 20 decisions, the Constitutional Court found violations of both Art. 48(2) and Art. 46(1) of the Constitution, and in 2 decisions, it found violations of both Art. 46(1) and Art. 17 of the Constitution. See: Ústavný súd Slovenskej republiky, 2024a.

70 Ibid.

As of the latest data, the number of submissions stood at 1,657, with 1,603 cases resolved and 954 cases remaining pending, of which 21 were plenary cases.[71]

These statistics demonstrate a consistent increase in the number of constitutional complaints, highlighting the Constitutional Court's pivotal role in fundamental rights adjudication. Although abstract reviews of constitutionality provide broader oversight of the state's adherence to constitutional principles, the data indicate that individual rights protection remains the Court's dominant function. Over the years, there has been a steady reduction in pending cases, despite the plenary operating with an incomplete composition since October 1, 2023; however, the trend also shows a continued increase in new submissions.

4. Human Rights Institutions in the SR (NHRI)

NHRIs are independent public bodies established by constitutional or legislative mandates to promote and protect human rights at the national level. They bridge the gap between the state and civil society, playing a vital role in monitoring and implementing international human rights standards domestically and facilitating social and scientific discourse on topical issues in human rights protection.

The SR has its fair share of independent public bodies, which can be categorically classified as control and advisory bodies for the protection of fundamental rights. Control bodies primarily use preventive measures to protect the law, which consist of detecting violations of the law and identifying their perpetrators.[72] The primary task of control authorities is to monitor whether the law is being violated, both in its application and enforcement. In contrast, advisory bodies perform professional, coordination, and consultative tasks, supporting the work of various ministries, councils, legislative bodies, and government commissioners.[73]

An important indicator of the quality and status of NHRIs is accreditation according to the criteria of the Paris Principles, endorsed by the UN General Assembly in 1993 (Resolution A/RES/48/134). This accreditation vouches for the credibility of these institutions and helps ensure their independence, pluralism, effectiveness, and accountability under the umbrella of the European Network of NHRIs.

In the following sections, we examine the official NHRIs of the SR, focusing on the most essential authority, namely the Slovak National Centre for Human Rights (SNCHR), highlighting its functions and mandates, and describing them under key pillars that have been subject to criticism and recent development.

71 Ústavný súd Slovenskej republiky, 2024b.
72 Svák, 1995, p. 7.
73 The analysis of other key advisory bodies is not included.

Additionally, we describe the Public Defender of Rights (PDR), the Commissioner for Children, and the Commissioner for Persons with Disabilities. Although these are not part of the Global Alliance of NHRIs (GANHRI) and are rather Ombudsman institutions, they are not NHRI institutions per se. However, it is still worth briefly reviewing some aspects of the Paris Principles through them to underscore their complementary importance and recent developments.

■ *4.1. Slovak National Centre for Human Rights*

The SNCHR was established under Act No. 308/1993 Coll. on the Establishment of the Slovak National Centre for Human Rights, as amended. It operates as an independent institution with dual mandates: serving as an NHRI and as a national equality body, based on Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination and on Amendments and Supplements to Certain Acts (Anti-Discrimination Act), which extended its competencies to intervene in cases requiring the application of equal treatment.[74]

Under Act No. 308/1993 Coll. on the Establishment of the SNCHR, its activities include monitoring and evaluating compliance with human rights; conducting research and surveys on human rights; disseminating information and providing library services; offering human rights-related services such as representation before courts (though the law does not specify the exact nature of these services); and publishing an annual report on compliance with human rights and the principles of equal treatment.[75]

Regarding compliance with the Paris Principles, GANHRI, through its Sub-Committee on Accreditation, determines the status of a given NHRI. The SNCHR is currently accredited with B-status, based on the results of its most recent re-accreditation in March 2014.

4.1.1. Independence, Mandate, and Pluralism

The pillars of independence and mandate, as outlined in the Paris Principles, have been in focus in recent years as the SNCHR has made efforts to enhance its compliance with these principles. It is essential to highlight the shortcomings, criticisms, and efforts towards ensuring the guarantees under these two principles in relation to the SNCHR.

The proposal to amend the founding Act was a response to the evaluation and recommendations carried out by the Sub-Committee on Accreditation of GANHRI. The independence and effectiveness of the SNHRC have been emphasised in discussions regarding its role in monitoring compliance with international human rights treaties. Concerns have been raised about the limitations imposed

74 The initial legal basis for the establishment of equality bodies was laid by Council Directive 2000/43/EC of June 29, 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

75 See in more detail: Art. 1 (2) of Act No. 308/1993 Coll. on the Establishment of the SNCHR.

by existing legislation, which restrict the Centre's ability to fully exercise its potential, as it primarily engages in tasks related to promoting equality.

Moreover, it has been highlighted that a transparent, participatory, and merit-based process for selecting board members should be formalised to ensure independence and diversity, with a focus on pluralistic representation across gender, ethnicity, and professional backgrounds. Governance reforms are necessary to remove voting rights for parliamentarians on the Administrative Board, safeguarding the Centre's operational autonomy. Functional immunity for board members should be established to protect them from liability for actions taken in good faith, while a transparent and objective dismissal process should ensure stability and independence. The SNCHR also requires adequate state funding through a dedicated budget line to support its activities, ensure accessibility, and maintain autonomy.[76]

The legislative proposal from 2019 followed a request to the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE), which assessed the proposed amendment, identified key issues, and offered recommendations to align it with international standards. While the amendment was ultimately not adopted, the recommendations remain a valuable reference for potential future legislative reforms aimed at achieving full compliance with the Paris Principles by strengthening independence, a broad mandate, and pluralism.[77]

The SNCHR is not established under the Constitution but through separate legislation, which is not the most preferable legal basis to ensure its independence in law. The independence of the SNCHR should be strengthened by amending its governance structure to ensure that members of Parliament do not have voting rights on the Administrative Board, thereby safeguarding the institution's independent functioning, as well by introducing provisions to ensure an objective dismissal process. Another strong safeguard for the independence of its leadership could be established through the introduction of functional immunity for its members for official actions undertaken in good faith.

These aspects proposed expanding the mandate to address human rights complaints more generally, similar to its role in discrimination cases, while avoiding overlap with the mandates of other NHRIs, mainly the PDR, and clearly defining their legal relationship. Its role in commenting on legislation should be strengthened by requiring that its annual human rights report be submitted directly to the National Council of the SR, which should be formally obliged to address it. Additionally, an explicit investigative function covering the Centre's human rights mandate should be included in the list of functions.[78]

76 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 2014, pp. 8–9.
77 Slovak National Centre for Human Rights, 2022, p. 2.
78 Ibid.

Moreover, pluralism in leadership and governance should be enhanced by embedding the principle of pluralistic representation in the selection criteria for board members; establishing clear legal grounds and processes for the removal of board members, with appeal mechanisms; introducing appropriate compensation for board members; and ensuring pluralism in the selection of the Executive Director.

Most recently, there has been no significant development since the 2019 efforts to amend the Centre's founding Act to align with the Paris Principles. However, a minor amendment in March 2023 (Act No. 110/2023 Coll.) clarified that the Centre's reports are independent, but it had little impact on the implementation of the Paris Principles. In January 2023, the Ministry of Justice acknowledged the need for legislative changes to enhance the Centre's independence, recognising the European Commission's proposed directives as an opportunity to restart these efforts.[79]

■ *4.2. The Public Defender of Rights (PDR)*

The Slovak PDR is an independent institution established under Constitutional Act No. 90/2001 Coll., as amended, by the inclusion of Art. 151a in the Constitution of the SR. Subsequently, Act No. 564/2001 Coll., a specific legislative act detailing its competencies, powers, and mandates, was adopted. The institution operates as a form of "soft power", relying on its moral authority and the respect of other state bodies for its effectiveness. It serves citizens by amplifying the voices of individuals affected by shortcomings in public administration, as it elevates discourse on systemic problems by actively advocating for the public.

The PDR's mandate covers state administration bodies, local governments, and legal or natural persons involved in administrative decision-making. It also acts as a national preventive mechanism under international treaties, aiming to protect individuals from torture, cruel, inhuman, or degrading treatment or punishment in prisons, detention centres, asylum facilities, and other locations where individuals may be deprived of liberty by public authorities, such as police custody cells or immigration detention centres.[80] However, it excludes institutions such as the National Council, the President, the Government, the judiciary (with some exceptions), intelligence services, and prosecutors.[81]

This NHRI plays a crucial role in ensuring accountability within government institutions and adherence to human rights standards, particularly those outlined in the Paris Principles.

The PDR has investigative powers, including access to premises and documents, the ability to interview individuals in custody or under state care, and the

79 Kluková, 2023, p. 57.
80 Art. 3 of the Act no. 564/2001 Coll. On the Public Defender of Rights.
81 Art. 3(4) of the Act no. 564/2001 Coll. On the Public Defender of Rights.

right to issue recommendations to address rights violations.[82] Public administration bodies are obligated to cooperate with the PDR and implement its proposals where feasible.[83] However, its recommendations are non-binding and lack enforceable sanctions. Its powers are designed to request remedies without the authority to alter the decisions of the relevant bodies, though it can initiate proceedings on conformity under Art. 125(1) of the Constitution.

The most recent amendment, Act No. 110/2023 Coll., amending and supplementing Act No. 564/2001 Coll. on the Public Defender of Rights, as amended, and other related laws, extended its competencies to include tasks as the coordinating body of the National Preventive Mechanism (NPM) under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.[84]

Although the PDR plays a vital role in the Slovak human rights framework, its effectiveness relies heavily on institutional cooperation and respect, given its lack of binding authority.

4.2.1. Paris Principles and the PDR

If we closely examine the determinants set by the Paris Principles, the PDR shows a fair degree of compliance, particularly regarding independence, accessibility, and funding. The PDR is established as an independent body under the Slovak Constitution and specific legal frameworks, ensuring operational autonomy from the government. By being democratically appointed – elected by Parliament – it gains an additional layer to independence. It can act without requiring prior approval from other state bodies, reinforcing its autonomous functioning and capacity for independent initiative.[85]

Moreover, access to its services is ensured through its empowerment to represent individuals or groups who believe their fundamental rights have been violated by public authorities. It also maintains a fairly adequate public outreach

82 Art. 17(1) of the Act no. 564/2001 Coll. On the Public Defender of Rights.

83 Art. 17(2) of the Act no. 564/2001 Coll. On the Public Defender of Rights.

84 To fulfil these responsibilities, the Public Defender of Rights (PDR) conducts systematic visits to locations where individuals are, or may potentially be, deprived of their liberty by public authorities. These visits, initiated either in response to a complaint or independently, aim to enhance the protection of such individuals from torture, cruel, inhuman, or degrading treatment or punishment, as well as other forms of mistreatment.

85 However, the previous PDR expressed reservations regarding de facto independence, noting that the nomination for the position is often determined by personal connections. In the SR, candidates can only be nominated by a group of at least 15 Members of Parliament; no other entities are allowed to submit nominations. Consequently, the current process de lege lata does not sufficiently support impartiality, independence, or legitimacy. To achieve these, the process should be based on a public call, and the selection should be transparent, grounded in demonstrated achievements in the field of human rights, objective, and governed by law. See: Patakyova, 2021, p. 14.

and communication strategy.[86] The PDR is financed through the state budget, with provisions ensuring that the allocated resources are sufficient for it to fulfil its mandate effectively, thereby securing adequate funding to maintain functional independence and operational effectiveness.

Some specific areas of its functioning, however, require qualitative development – particularly regarding pluralism, mandate, and cooperation. Reforms to align the PDR more closely with the Paris principles were clarified by the Ministry of Justice of the Slovak Republic in 2018 during the legislative process focused on amendments to the SNCHR, and their key observations remain complementary to this assessment.[87]

The scope of its mandate has room for development – for instance, to include monitoring the human rights situation in the SR, issuing recommendations and opinions on any human rights issue, and promoting human rights education and awareness. Its mandate should also be more clearly specified regarding its ability to operate on its own initiative and its exclusion from intervening in certain public authorities. Furthermore, the mandate does not explicitly mention monitoring, issuing recommendations, raising awareness, or facilitating education in the field of human rights.[88] Currently, it primarily acts as an 'investigative' initiator and representative of individuals when a malfunction in the actions of public authorities is alleged in a submitted complaint.

Cooperation between the PDR and both domestic and international stakeholders, including non-governmental organisations, is not established in the legislation. Communication is primarily focused between the PDR and the public authority under review, where it proposes measures to eliminate shortcomings and expects the authority to engage actively in corrective action.

The issue of pluralism is not necessarily implemented, as the composition of the PDR's office does not explicitly reflect Slovak society's diversity in terms of ethnicity, gender, or other social groups. Enhancing staff diversity and enabling the creation of advisory commissions would further strengthen its pluralistic and effective functioning.

By introducing changes in the above-mentioned aspects, the PDR could operate as an independent and effective human rights institution capable of addressing the evolving needs of Slovak society while meeting international standards.[89] Notwithstanding, following the developments of 2023, the PDR's position was elevated to function as a signalling system and preventive mechanism, with this additional competence placing specific focus on the protection of human dignity.

86 Improvements could also include extending materials to minority languages and enhancing regional accessibility through offices outside the capital city.
87 Ministerstvo spravodlivosti, 2018.
88 Ibid., p. 42.
89 Ibid.

■ *4.3. Commissioner for Children and Commissioner for Persons With Disabilities*

The prerequisite for the creation of the offices of the Commissioner for Children and the Commissioner for Persons with Disabilities was the ratification of the UN Conventions on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. With the establishment of these two ombudsman-like positions, the SR created independent and autonomous monitoring mechanisms to oversee the fundamental rights of children and persons with disabilities.

The scope, status, election, conditions for the performance of duties, and termination of the duties of the Commissioners are stipulated by Act. No. 176/2015 Coll. on the Commissioner for Children and the Commissioner for Persons with Disabilities. Their competencies are largely the same and often overlap, though they are governed by different objectives. These two functions may be viewed as specialized forms of the PDR, focusing on specific segments of human rights protection according to the UN Convention each is designated to uphold.

The Commissioners have a comprehensive mandate to monitor, advocate for, and enforce the protection of children's rights and the rights of persons with disabilities. They possess significant powers to gather information, communicate directly with children, and propose or enforce corrective measures. Additionally, entities under their jurisdiction are obligated to cooperate fully, provide access to premises, and support the Commissioners in ensuring the effective implementation of rights protection. The framework ensures that the Commissioners' work aligns closely with international treaties and national legal standards.[90] Their personal scope is further extended to include legal entities and natural persons – entrepreneurs – so that monitoring activities apply to the private sector as well.[91]

The 2023 reform of the Act on the PDR also benefited these two offices by enhancing the systematic prevention mechanism through visits to special facilities where children or persons with disabilities may be present and deprived of liberty by public authorities or as a result of dependence on care provision.[92]

4.3.1. The Commissioners and the Paris Principles

During the preparatory works for the bill, the legislative bodies underlined the importance of the Paris Principles, as expressed in the explanatory report accompanying the legislative proposals.[93]

90 Arts. 4–5 and Arts. 10–11 of the Act. No. 176/2015 Coll. on the Commissioner for Children and the Commissioner for Persons with Disabilities.

91 Arts. 3 and 9 of the Act. No. 176/2015 Coll. on the Commissioner for Children and the Commissioner for Persons with Disabilities.

92 Art. 4(2) b) and h); Art. 10(1) b) p. 2 of the Act. No. 176/2015 Coll. on the Commissioner for Children and the Commissioner for Persons with Disabilities.

93 National Council of the Slovak Republic, 2015.

The principle of independence is strengthened by the fact that national public authorities cannot interfere with the exercise of the Commissioners' powers or competencies.[94] Their mandate and powers are of a similar quality to those of the PDR, while the Commissioner for Children is encouraged to enhance the active participation of children in accordance with Art. 12 of the UN Convention on the Rights of the Child. Moreover, the mandate covers not only the possibility of acting in individual cases but also includes promoting awareness, monitoring compliance with fundamental rights standards, and addressing violations – whether in specific cases or systemic issues.

Their mandate further extends to awareness-raising, scientific contribution, and public advocacy. The Commissioners' mandates urge them to become representatives of the voices of those they are appointed to protect through preventive and control mechanisms directed towards public authorities. The role of the Commissioners requires compassionate advocacy and dedication to increasing the visibility of the most vulnerable. Although their mandates are narrower than those of other NHRIs, being limited to specific UN Conventions, this can create a more targeted and prompt mechanism, though it may also make cooperation with other human rights institutions more difficult.[95]

From the perspective of representing the most vulnerable groups in society, accessibility to their services is a fundamental element in fulfilling their tasks. The Commissioners must be readily available at all times. Beyond traditional means – such as personal visits, written correspondence, and electronic communication – a hotline has been established. Most importantly, ensuring that all affected individuals have appropriate means to reach out to the Commissioners enhances responsiveness and strengthens protection.

5. Conclusion

The Slovak constitutional framework for human rights protection is underpinned by the Constitution, which guarantees an extensive catalogue of fundamental rights and freedoms and prioritises the application of international human rights treaties. The Constitutional Court serves as the ultimate arbiter of constitutionality, employing mechanisms such as abstract and concrete constitutional reviews to safeguard both systemic and individual rights. Complementing this, ordinary courts and specialised bodies, like the Supreme Administrative Court, ensure judicial protection in day-to-day legal disputes, reinforcing access to justice and judicial fairness.

94 Art. 2(2) and Art. 8(2) of the Act. No. 176/2015 Coll. on the Commissioner for Children and the Commissioner for Persons with Disabilities.

95 Csudai, 2020, p. 41.

NHRIs play a critical complementary role in monitoring, promoting, and protecting human rights. The PDR acts as a guardian against violations by public authorities and serves as the coordinating body for the National Preventive Mechanism, while the SNCHR focuses on equality and human rights promotion. Additionally, specialised bodies such as the Commissioners for Children and Persons with Disabilities provide targeted advocacy for vulnerable groups.

Despite this robust framework, critical gaps persist. The Constitutional Court, while pivotal, faces challenges in handling an increasing caseload and ensuring efficiency. Overlapping mandates between institutions such as the PDR and SNCHR require clearer delineation to avoid redundancies. The PDR's lack of binding authority limits its effectiveness, as it relies heavily on voluntary compliance from public authorities. Similarly, the SNCHR's independence and operational capacity are hindered by insufficient funding, a lack of pluralistic representation in governance, and a narrow legislative mandate that does not fully align with international standards, such as the Paris Principles.

Areas for improvement include strengthening the compliance of NHRIs with the Paris Principles through constitutional or legislative amendments. Efforts to address systemic human rights concerns – such as delays in judicial proceedings, discrimination against marginalised groups, and limited access to education – must be intensified. Furthermore, the legislative framework should explicitly empower institutions to monitor and report on human rights violations comprehensively, including those within the private sector.

In conclusion, while the SR's constitutional and institutional mechanisms demonstrate a solid commitment to human rights, addressing these critical gaps is essential for their full realisation. Reforms that bolster institutional independence, enhance operational capacity, and ensure greater collaboration between NHRIs and judicial bodies would not only strengthen the country's human rights framework but also better align it with international standards, ensuring comprehensive protection of human dignity for all citizens.

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MARKO NOVAK*

The National Human Rights System of Slovenia

ABSTRACT: *Following the fall of communism in 1991, Slovenia committed itself to robustly protecting fundamental rights in its new Constitution. Fundamental rights not only form the starting points of the Constitution's Preamble, but are also, as a principle, directly enforceable. Their constitutional regulation has been relatively stable over more than thirty years, having been only rarely amended. Nevertheless, certain amendments have introduced some new rights and expanded the aspects of existing ones.*

Fundamental rights may be limited by the rights of others and in cases determined by the Constitution. Moreover, they can also be restricted in the public interest only if the principle of proportionality is secured. Fundamental rights can even be temporarily suspended, but only in the event of a state of war or emergency. In the event of their infringement, legal redress is provided by regular courts and the Constitutional Court. Access to the Constitutional Court is conditional upon the exhaustion of all available legal remedies. Although the Constitutional Court has the final word within the Slovenian legal system on the protection of fundamental rights, Slovenian law also provides for a general Human Rights Ombudsperson, as well as several specialised ombudspersons responsible for specific areas of human rights protection (e.g. health and children's rights).

KEYWORDS: *Slovenia, Fundamental Rights, Direct Effect, Constitutional Court, Constitutional Complaint, Regular Courts, Ombudspersons*

1. Introduction

To break with an undemocratic political system in which human rights were only declaratory, Slovenia has placed human rights protection very high on its political and legal agenda as an independent and sovereign state. This follows not only

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https://doi.org/10.47078/2026.1.275-298

from the Preamble to the 1991 Constitution but also from the Basic Constitutional Charter on Sovereignty and Independence of the Republic of Slovenia and its Preamble[1] – adopted in June 1991 – through which Slovenia legally broke its ties with the former Yugoslavia.

Despite some initial turbulence in human rights protection due to significant backlogs in Slovenian courts, the system gradually became a relatively well-functioning human rights protection system, largely because of the European Court of Human Rights finding violations of the Convention. Moreover, quite soon after its establishment, the Constitutional Court became a very sought-after institution, which caused an overflow of incoming cases, so it needed to shut its doors temporarily. Eventually, new human rights institutions were established, enabling better human rights protection at lower levels. In general, after more than thirty years of independence, the general awareness of human rights is much higher than it was at the beginning of the new system. Still, as the world and society are in constant flux with new social problems, new challenges are created for human rights protection.

Section 1 presents Slovenia's substantive mechanism for human rights protection, where the preamble of the Constitution is first discussed. Then, the catalogue of human rights in the Constitution is presented, in which all three generations of human rights are briefly explained. This is followed by a discussion of the amendments adopted in the Constitution relating to human rights throughout its existence. The section concludes with a discussion of the issues of exercise and limitation (Art. 15 of the Constitution), as well as the possibility of temporary suspension and restriction of human rights (Art. 16 of the Constitution). In Section 2, the procedural aspect of human rights protection, i.e., fundamental rights adjudication, is examined, focusing on the approach of Slovenian courts and the Constitutional Court to human rights protection. The last section, Section 3, presents institutions specialised for human rights protection, such as the Constitutional Court, the main Human Rights Ombudsperson, and other human rights ombudspersons. Finally, in such a comprehensive overview of the national system of human rights protection, the role of non-institutional stakeholders, i.e., various non-governmental organisations and civil society organisations, is also briefly mentioned.

1 Among other declarations, it was also stated in the Basic Constitutional Charter that the 'Socialist Federative Republic of Yugoslavia does not function as a state governed by the rule of law and that within it human rights, national rights, and the rights of the republics and autonomous provinces are grossly violated.' (Cerar et al., 2005, p. 19).

2. A Substantive Mechanism for Fundamental Rights Protection

■ *2.1. The Preamble and Catalogue of Human Rights*

In contrast with the ex-socialist constitutions, both federal (Yugoslav) and republican (i.e., of the Socialist Republic of Slovenia), where human rights were declared but not fully protected by an operative mechanism of judicial redress, the 1991 Constitution of the Republic of Slovenia[2] placed human rights protection on a pedestal.[3] This follows from its Preamble,[4] in which human rights are emphasised as one of the foundations of Slovenian constitutionalism.[5] One part of Slovenian constitutional theory considers the Preamble primarily as a symbolic and non-binding part of the Constitution[6]. Another part, however, sees it as having an important interpretative value, especially the part concerning human rights protection. In the event of a clash between different parts of the Constitution, for example, between fundamental rights and provisions on constitutional authorities in the chapter on state organisation, the former should prevail.[7] Even the Court has emphasised, by citing the Preamble, that human rights may prevail over a democratically adopted decision by a majority (U-I-111/04). Because the Preamble, as one of the starting points of the Constitution, determines human rights, it must be an interpretative tool of the entire normative part of the Constitution (U-II-2/09).

2 The citation to the original text, without subsequent amendments, is as follows: Official Gazette of the Republic of Slovenia, No. 33/91-I.

3 In all three drafts of the Slovenian Constitution, from 1988 until 1991, human rights protection was ranked very high. It is interesting to know that in the drafts, the sanctity of life and human dignity preceded human rights protection, but was eventually abandoned when the actual Constitution was forged (Jambrek, 2014).

4 'Proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, and from fundamental human rights and freedoms, and the fundamental and permanent right of the Slovene nation to self-determination; and from the historical fact that in a centuries-long struggle for national liberation, we Slovenes have established our national identity and asserted our statehood, the Assembly of the Republic of Slovenia hereby adopts.'

5 In fact, human rights protection was already enshrined in the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, which was the legal act by which Slovenia was created as an independent state. See para. 2 of Section III: 'The Republic of Slovenia guarantees the protection of human rights and fundamental freedoms to all persons in the territory of the Republic of Slovenia irrespective of their national origin, without any discrimination whatsoever, in accordance with the Constitution of the Republic of Slovenia and the treaties in force.'

6 Grad and Kaučič, 1997, p. 40.

7 Pavčnik, 2007, p. 303.

Moreover, that part should be understood as a tool for teleological interpretation of the entire normative part of the Constitution.[8]

In the normative part of the Republic of Slovenia Constitution, human rights protection is also one of the constitutional principles. Art. 5, which is part of the first section of the Constitution (General Provisions), provides that 'in its territory, the state shall protect human rights and fundamental freedoms.' The difference between human rights and fundamental freedoms in the Constitution is more descriptive than normative. Thus, human rights are rights that are guaranteed to every individual based on his or her human nature and refer to the protection and fulfilment of certain standards of living (the right to life, the right to security of person, the inviolability of human dignity, the right to privacy, etc.). Fundamental freedoms, on the other hand, are primarily linked to individual liberty and the rights to express oneself freely, to associate freely and to manifest one's religion or belief freely (e.g., freedom of expression, freedom of assembly and association and freedom of movement). Notwithstanding this descriptive difference, all constitutional rights can normatively be equally referred to as human rights. For the purpose of this chapter, fundamental rights and 'civil' rights can also be understood as synonymous. However, 'citizens'' rights are narrower than human rights, as they only pertain to citizens (e.g. of the Republic of Slovenia). In principle, from a normative standpoint, there is no hierarchy in their validity or importance. More crucial is their normative difference from statutory rights.[9]

The constitutional catalogue of human rights encompasses two sections, named 'Human Rights and Fundamental Freedoms' (Section II) and 'Economic and Social Relations' (Section III), covering three different generations of human rights: (i) those of the negative status (civil and political rights), (ii) the positive or active status (social and economic rights), and (iii) rights of the third generation (including environmental rights, personal data protection and other rights dealing with digital society).[10] The human rights from all three generations are often scat-

8 Jambrek, 2014, p. 17, in Avbelj 2019 II. During the Covid-19 pandemic, the Slovenian Constitutional Court found many executive regulations imposing restrictive measures on citizens to curb the pandemic unconstitutional and based the reasoning for this on the lack of sufficient grounding in the Infectious Diseases Act. Thus, the Court argued that the executive regulations violated the constitutional principle of legality in public administration. Art. 120 (Organisation and Work of the State Administration) of the Constitution stipulates that: 'Administrative bodies perform their work independently within the framework and based on the Constitution and Laws.' See, e.g., the following decisions: U-I-210/21 (mandatory vaccination for public servants), U-I-180/21 (PCT requirement and personal data processing), U-I-445/20 (unpublished government orders), and U-I-132/21 (mandatory mask-wearing and hand disinfection). However, in those cases, the Court failed to address the idea that some of the most important human rights, such as the right to life and the right to health, might have outweighed the principle of legality of public administration (See: Novak, 2021).

9 Novak, 2021.

10 Ibid., p. 197.

tered throughout these two sections and are usually not listed according to their historical civilisational development or specific content.

For example, the first human right listed in Section I is equality before the law, which is also considered a constitutional principle. Then follow human rights related to constitutional criminal procedural law (e.g., protection of personal liberty, orders for and duration of detention, presumption of innocence, principle of legality in criminal law, legal guarantees in criminal procedure). In the continuation of the same section, one finds some classical as well as political human rights, such as freedom of movement, inviolability of dwellings, freedom of expression, the right to assembly and association, and the right to vote. The section concludes with labour and social rights, such as freedom of work, the right to social security, the right to health care, and family rights (e.g. marriage and the family, rights and duties of parents, rights of children). At the very end of this section, special rights of autochthonous communities and the Romany community in Slovenia are set out. The next section deals with some labour (e.g. security of employment) and economic rights (e.g., free enterprise), as well as environmental rights (e.g., national assets and natural resources, the right to a healthy living environment). The section ends with some additional labour rights, freedom of trade unions, the right to strike, and the rights of aliens employed in Slovenia.

Not all of the above-mentioned rights are equally 'strong' in normative terms. In a liberal constitution, such as that of Slovenia, the classical civil and political rights are more directly legally protected than social rights, which can be considered weaker in this sense.[11] Some of them can even be exercised directly based on the Constitution. The latter was an ideal to be achieved in the new Constitution, due to their 'declarative' nature during socialism. This was, however, not possible in every case, which means that the Constitution or the very character of a particular right required their more precise implementation by statute. Even though there is a rich catalogue of social rights, they, as a rule, contain the so-called statutory proviso *(réserve de loi)*. This means that they are only generally protected, as their more detailed protection is determined by statute.[12]

■ *2.2. Amendments of the Constitution in the Area of Human Rights.*

From its adoption in December 1991, the RS Constitution has been amended eleven times, five of which concerned human rights. Between 1997 and 2021, the Slovenian Constitution was amended eleven times, affecting 16 different articles (13 were amended and 3 were added). However, 43 proposals to amend the Constitution were made: 30 by the National Assembly deputies, 12 by the Government, and only one by the citizens. All the amendments can be classified in three groups: (a)

11 Novak, 2008; Letnar Černič, 2019, pp. 130–134.

12 See e.g.: Art. 50.1 (Right to Social Security) that reads as follows: 'Citizens have the right to social security, including the right to a pension, under conditions provided by law.'

amendments due to Slovenia's joining the EU (Art. 3.a, 47, 68 and 148); (b) amendments to regulate better certain constitutional institutions that did not work well in practice (Arts. 80, 90, 97, 99, 121, 140, and 143); and (c) amendments mainly from the area of human rights through which the rights and freedoms of certain social groups were protected and some new human rights were adopted (Arts. 14, 43, 50, 62.a, and 70.a).[13]

In preparation for joining the EU, it was first amended in 1997 with respect to Art. 68 (Property Rights of Aliens). Its original text read as follows: 'Aliens may acquire ownership rights to real estate under conditions provided by law. Aliens may not acquire title to land except by inheritance, under the conditions or reciprocity.' That text was changed to:

> Aliens may acquire ownership rights to real estate under conditions provided by law or if so provided by a treaty ratified by the National Assembly, under the condition of reciprocity. Such law and treaty from the preceding paragraph shall be adopted by the National Assembly by a two-thirds majority vote of all deputies.

On the eve of Slovenia's accession to the EU in 2004, that article was finally amended, in 2003, to the following wording: 'Aliens may acquire ownership rights to real estate under conditions provided by law or a treaty ratified by the National Assembly.'

In order to join the EU, Slovenia had to amend, in the same year (i.e. 2003), another human rights provision – Art. 47 (Extradition) of the Constitution. In the original text, it stated: 'No citizen of Slovenia may be extradited to a foreign country. The extradition of aliens shall only be permitted in cases covered by treaties that are binding in Slovenia.' It was amended to include the following text:

No citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty by which, under the provisions of the first paragraph of Article 3a, Slovenia has transferred the exercise of part of its sovereign rights to an international organisation.

Indeed, the so-called EU article, i.e., Art. 3a, was adopted in the same pre-EU accession package of constitutional amendments in 2003.

Furthermore, only one year later, in 2004, three constitutional articles on fundamental rights were amended. On the insistence of various civil-society organisations of disabled persons, disability was added to Art. 14 (Equality before the Law) of the Constitution as one of the so-called personal circumstances based

13 Kaučič, 2021.

on which discrimination can never be constitutionally admissible.[14] In the same year, Art. 43 (Right to Vote) of the Constitution was amended to stimulate greater women's participation in standing for election to state authorities and local community authorities. In such a manner, a special para. 4 was added to the previous article.[15] Finally, part of the 2004 amendment bundle was also the change of Art. 50 (Right to Social Security). As a result of a political campaign by trade unions and some civil society organisations, the right to a pension was included in the Constitution, which entailed the amendment of Para. 1 of that Article.[16]

Last but not least, to prove that it is a country deeply dedicated to human rights protection, the National Assembly adopted two final amendments adding two internationally less protected human rights to the human-rights constitutional catalogue, namely the right to drinking water[17] and the right to use sign language.[18] Thus, Slovenia became one of the first countries to protect such rights in its constitution.

■ *2.3. The Fundamental Rights' Exercise, Limitation, Temporary Suspension, and Restriction*

Art. 15 of the Constitution (Exercise and Limitation of Rights) is one of the most crucial constitutional articles for a systemic understanding of the national human rights framework. First, it provides that 'Human rights and fundamental freedoms shall be exercised directly based on the Constitution.' The idea of this article was

14 Art. 14 of the Constitution: '(1) In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. (2) All are equal before the law.'

15 It now reads as follows: '(1) The right to vote shall be universal and equal. (2) Every citizen who has attained the age of eighteen years has the right to vote and be elected. (3) The law may provide in which cases and under what conditions aliens have the right to vote. (4). The law shall provide measures for encouraging the equal opportunity of men and women in standing for election to state authorities and local community authorities.'

16 It now reads as follows: '(1) Citizens have the right to social security, including the right to a pension, under conditions provided by law. (2) The state shall regulate compulsory health, pension, disability, and other social insurance, and shall ensure its proper functioning. (3) Special protection in accordance with the law shall be guaranteed to war veterans and victims of war.'

17 The text for this right is as follows: '(1) Water resources shall be a public good managed by the state. (2) As a priority and in a sustainable manner, water resources shall be used to supply the population with drinking water and water for household use and in this respect shall not be a market commodity. (3) The supply of the population with drinking water and water for household use shall be ensured by the state directly through self-governing local communities and on a not-for-profit basis.'

18 The new article reads as follows: '(1) The freedom to use and develop the Slovene sign language shall be guaranteed. In those municipalities where Italian or Hungarian is also an official language, the freedom to use the Italian or Hungarian sign language, respectively, shall be guaranteed. The use of these languages and the status of their users shall be regulated by law. (2) The freedom to use and develop tactile sign language shall be regulated by law.'

to break with the socialist tradition in which fundamental rights were not directly exercisable and were systematically violated. Therefore, the protection of human rights and fundamental freedoms is one of the basic reasons why the Slovenian Constitution was adopted.[19]

Accordingly, there are several constitutional rights that can be directly exercised on the basis of specific legal remedies in court and other legal proceedings. For example, if one establishes that they were discriminated against[20] by a public entity (i.e. vertical human rights protection) or a private person (horizontal human rights protection), they may file an action in court in civil proceedings. Equality is otherwise considered a personality right, which is also the subject of civil-law protection. A similar case of the possibility of a direct civil action at law being lodged in a civil court of first instance would be if Art. 26 of the Constitution (Right of Compensation)[21] was violated. Damage is a civil-law category, and its redress is in Slovenia provided in the Code of Obligations, which in the case of a dispute is adjudicated by civil courts.

Exceptions to the general principle determined in para. 1 of Art. 15 are provided in para. 2 of the same Art. It provides: 'How human rights and fundamental freedoms are exercised may be provided by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom.' Fundamental rights legal norms are similar to legal-principle norms: more abstract and general than legal-rule norms, and as such, not only defeasible but also vague and ambiguous.[22] Therefore, in several cases, the Constitution needed to prescribe how a statute was required to exercise such rights, or was necessary for a right to be exercised appropriately owing to its character.

The first example could be Art. 43 of the Constitution (Right to Vote), prescribing in para. 1 that 'The right to vote shall be universal and equal,' but stating in para. 3. of the same article that 'The law may provide in which cases and under what conditions aliens have the right to vote.' If the right to vote at state elections is only reserved for citizens of the Republic of Slovenia, aliens,

19 Jambrek, 2014, pp. 25 and 94.

20 As a result of the violation of Art. 14 of the Constitution (Equality before the Law), which provides: '(1) In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. (2) All are equal before the law.' Equality before the law is considered to be a personality right; civil courts have jurisdiction over the readdress of violations of this right.

21 '(1) Everyone has the right to compensation for damage caused through unlawful actions in connection with the performance of any function or other activity by a person or authority performing such function or activity within a state or local community authority or as a bearer of public authority. (2) Any person suffering damage has the right to claim, in accordance with the law, compensation also directly from the person or authority that has caused such damage.'

22 Alexy, 2002; Dworkin, 1987; Guastini, 2016.

if they are also residents, may vote at local elections, which is explicitly determined in the Local Self-Government Act. The second example of the detailed regulation of a constitutional right by statute could be the Right to Correction and Reply (Art. 40 of the Constitution),[23] which is bestowed on individuals and even public authorities to respond to incorrect or false news in the media. To make this right operative, it was necessary to determine further conditions, deadlines, and procedures for its implementation, as done in the Media Act.

Human rights and fundamental freedoms are not absolute but may be limited (a) either by the rights of others or (b) in cases determined by the Constitution. There are many, perhaps even numerous, possibilities of (a) in the Constitution, one example being when journalists' Freedom of Expression (Art. 39 of the Constitution) is limited by the protection of Privacy and Personality Rights (Art. 35 of the Constitution)[24] of individuals on whom they report. The second example (b) of explicit constitutional limitation of a human right would be para. 2 of Art. 32 of the Constitution (Freedom of Movement). The first part of this article provides for general freedom: 'Everyone has the right to freedom of movement, to choose his place of residence, to leave the country and to return at any time.' However, the second part sets out limitations for which the Constitution authorises legislation: 'This right may be limited by law, but only where this is necessary to ensure the course of criminal proceedings, to prevent the spread of infectious diseases, to protect public order or if the defence of the state so demands.' Accordingly, such limitations are determined in Slovenia in the Criminal Procedure Act, the Infectious Diseases Act, the Public Order and Peace Act, and the Defence Act.

Conflicts between constitutional principles and between human rights are resolved through balancing and by applying the principle of proportionality. Both the interpretative method of balancing and the principle of proportionality are said to be grounded in Art. 2 (State Governed by the Rule of Law) in conjunction with Art. 15 (Exercise and Limitation of Rights) of the Constitution. When constitutional principles are found to be in conflict, the Constitutional Court balances them to determine which one should prevail in a certain case (see, e.g, Decision No. U-I-18/93, which is considered the first decision in which the principle of proportionality was applied).[25]

Furthermore, every statutory interference with a human right needs to be constitutionally legitimate, which entails that it has to stand both the test of legitimacy (Art. 15.3 of the Constitution) and the test of proportionality (Art. 2 of the Constitution, as the principle of proportionality is considered one of the

23 'The right to correct published information which has damaged a right or interest of an individual, organisation, or body shall be guaranteed, as shall be the right to reply to such published information.'

24 'The inviolability of the physical and mental integrity of every person, his privacy and personality rights shall be guaranteed.'

25 See also: Wedam Lukić, 2008.

subprinciples of a state governed by the rule of law). The test of legitimacy entails reviewing whether the goal of interfering with a right is constitutionally admissible. The protection of another constitutional right always entails a constitutionally admissible goal. However, this does not always apply to the protection of public interests (in statutes) since not all of them are constitutionally admissible. For example, a violation of basic constitutional principles could not be a legitimate goal of statutory regulation even if the legislature defines that as a public interest. Moreover, it could also be unconstitutional if it is not clear which goal is pursued, such that its constitutional admissibility can be evaluated.[26]

Thus, from the above-mentioned, it follows that regarding the interference with human rights there are two kinds of balancing: (1) in the event of a direct or 'horizontal' clash between two constitutional rights belonging to two different natural persons or legal entities (e.g. a private person's right to privacy v. a journalist's freedom of expression), the Court similarly balances them than in the case of a conflict between two constitutional principles. However, (2) when the matter concerns an indirect or vertical clash between a private person's constitutional right (e.g., to personal integrity) and a public interest represented in a statute, such as safeguarding people's right to life or health by ordering mandatory vaccination, the Court will apply the principle of proportionality. According to that, it tests whether the measure is (a) necessary to achieve the goal, (b) appropriate for doing so, and (c) whether the benefit of the measure outweighs its costs or detrimental effects (proportionality in the narrow sense).[27] Unlike in some other Central European countries, where such a principle is said to have been borrowed from the German *Bundesverfassungsgericht* and the academic work of Robert Alexy,[28] in Slovenia it was reportedly taken from the case law of the European Court of Human Rights.[29]

The last paragraphs of Art. 15 of the Constitution provide that 'Judicial protection of human rights and fundamental freedoms, and the right to obtain redress for the violation of such rights and freedoms, shall be guaranteed.' (para. 4) and: 'No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted because this Constitution does not recognize that right or freedom or recognizes it to a lesser extent' (para. 5). Para. 4 will be discussed in more detail in the next section, while para. 5 signifies that the constitutional rights system is not exclusive because a treaty ratified by the Slovenian parliament may

26 Kerševan, 2019.

27 See, e.g., Novak, 2010, where the author claims that in addition to applying balance in resolving conflicts of constitutional principles and fundamental rights, courts also need to be consistent in following precedential effects in future cases.

28 Alexy, 2002, 2003.

29 Gabriš, Horvat and Novak, 2023. However, it was also referred to as the principle of 'practical concordance', taken from German legal theory, where a compromise ensured that the extent of protecting a right was limited to the extent necessary to exercise another right (Šturm, 2002, p. 195).

introduce a new constitutional right or further specify an existing one (e.g., as in the Convention on the Rights of the Child), which the Constitution also recognises. The same applies to the European Convention for the Protection of Human Rights, which was ratified by Slovenia and, according to the monist theory, became part of its internal legal system.[30] When parties cite its provisions in their complaints before the Constitutional Court, the Court most often continues to adjudicate on alleged human rights violations based on the Slovenian Constitution because it is generally considered that the latter offers broader protection of human rights than the Convention.[31] Moreover, the case law of the European Court of Human Rights (ECtHR) can be an important interpretative tool for the Constitutional Court, especially in the areas in which its case law has been highly developed, as in freedom of expression (see, e.g., Decision No. Up-407/14).[32]

The Slovenian constitutional rights system not only provides for their exercise and limitation, as we saw in the preceding section, but also for their temporary suspension and restriction. However, this is possible only when a war or state of emergency is formally declared by the National Assembly.[33] In over 30 years of the history of independent Slovenia, there has never been such a case. However, human rights and fundamental freedoms may be suspended or restricted only for the duration of the war or state of emergency, and only to the extent required by such circumstances and inasmuch as the measures adopted do not create inequality based solely on race, national origin, sex, language, religion, political, or other conviction, material standing, birth, education, social status, or any other personal circumstance. As an exception to the above-mentioned, the rights provided by Art. 17 (Inviolability of Human Life), Art. 18 (Prohibition of Torture), Art. 21 (Protection of Human Personality and Dignity), Art. 27 (Presumption of Innocence), Art. 28 (Principle of Legality in Criminal Law), Art. 29 (Legal Guarantees in Criminal Proceedings), and Art. 41 (Freedom of Conscience)

30 See: Art. 8 of the Constitution: 'Laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.' See also para. 2 of Art. 153 (Conformity of Legal Acts) of the Constitution: 'Laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general acts must also be in conformity with other ratified treaties.'

31 A similar approach to the human rights under the European Convention on Human Rights will also need to be taken concerning fundamental rights under the EU Treaty (of the Human Rights Charter), as they are also binding in Slovenia, pursuant to Art. 3a of the Constitution. See the relevant part of Art. 3.a: 'Legal acts and decisions adopted within international organizations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.' However, the Constitutional Court held that the EU Charter of Fundamental Rights is applicable in areas where EU law is applied by a Member State (see e.g.: the case of U-I-295/13; see also: Vatovec, 2024).

32 See also: Ribičič, 2004.

33 Art. 16 of the RS Constitution.

can never be restricted as they enjoy absolute protection even in most emergent situations. Absolute human rights constitute a minimum foundation of human dignity that cannot be violated under any circumstances. They are the foundation of the rule of law, humanism, and the civilised world. Respect for them is particularly important in times of crisis, when the temptation to restrict them is greatest. These absolute rights do not allow any exceptions, are exempted from the principle of proportionality, and hold a hierarchically higher constitutional position than other rights because the Constitution gives them priority protection over other rights. The legal character of these rights could be compared to *ius cogens* in international law.[34]

3. Fundamental Rights Adjudication in Slovenia

The Slovenian constitutional review system is, in contradistinction to the (original) American model of constitutional review that is diffused, a typical European model, in which constitutional review is concentrated.[35] However, this concentration of constitutional review does not apply to decisions on the violations of human rights, as every court in Slovenia is empowered to adjudicate in relation to such matters. The Constitutional Court is only the highest judicial authority for the protection of human rights,[36] having the highest position in Slovenia regarding the interpretation of human rights' constitutional provisions. Offering a final remedy for human rights violations in the national legal system, parties can bring their cases to the Court by filing a constitutional complaint after all other legal remedies have been exhausted,[37] both formally and substantively. 'Formally' means that all possible appeal instances available in the legal system must be exhausted before filing a constitutional complaint. Thus, typically, a party claiming a human rights violation initiates proceedings before a first-instance court and, if unsuccessful there, they may appeal to the court of appeal, and if needed from there to the Supreme Court. Most often, the Court adjudicates on human rights violations arising from Supreme Court judgments. However, in cases where the last instance of decision-making is vested in a court of appeal, the Court adjudicates on those decisions. Exceptionally, a constitutional complaint may be lodged

34 Letnar Černič, 2019a, p. 133.
35 Mavčič, 2013.
36 Art. 1 of the Constitutional Court Act (Off. Gaz. RS, No. 15/94 et seq.; hereinafter CCA).
37 Ibid., Art. 51.1.

before extraordinary remedies[38] have been exhausted if the alleged violation is obvious and severe consequences are likely to occur for the party if the challenged individual legal act is enforced.[39] Moreover, 'substantive' exhaustion of legal remedies entails that a particular human-rights violation must be claimed in all the proceedings prior to a decision from the Constitutional Court.

There is a 60-day deadline to file a constitutional complaint from the service of the judgement of the final instance court.[40] A constitutional complaint is not admissible if the violation of human rights or fundamental freedoms did not have serious consequences for the complainant. It is deemed that there has been no violation of human rights or fundamental freedoms having serious consequences for the complainant with regard to individual acts: (a) issued in small-claims disputes under the Civil Procedure Act that regulates civil procedure, or in other disputes if the value in dispute for the complainant does not exceed the amount defined for small-claims disputes under that Act; (b) if only a decision on the costs of proceedings is challenged in the constitutional complaint; (c) issued in property trespass disputes; and (d) issued in minor-offence cases. Irrespective of that, in especially well-founded cases, the Constitutional Court may exceptionally decide on a constitutional complaint against the mentioned individual acts. An instance of an especially well-founded case is a decision that concerns an important constitutional question going beyond the concrete case.[41]

A constitutional complaint is rejected[42] if it is not an individual act through which a state authority, local community authority, or bearer of public authority decides upon the rights, obligations, or legal entitlements of the complainant. Furthermore, it is rejected if the complainant does not have a legal interest in the Court's decision, if it is not admissible, if it was not lodged in time, or if all legal remedies were not exhausted. It is also rejected if it was lodged by a person not entitled to do so, if the complainant does not supplement the application in accordance with a call to do so from the Constitutional Court, or if it is so incomplete that the Constitutional Court cannot examine it.[43]

The constitutional complaint is accepted for consideration if there is a violation of human rights or fundamental freedoms having serious consequences for

38 The Slovenian legal system provides for (i) ordinary legal remedies, which are typically understood as appeals from a court of first instance to a court of appeal, where judgements become final once the appellate court delivers its decision. However, legal remedies submitted to the Supreme Court, as the highest court, from courts of appeal are typically considered (ii) extraordinary legal remedies, which are lodged against previously final decisions (Novak, 2021; Pavčnik, 2007).

39 Art. 51.2 of CCA.

40 Ibid., Art. 52.

41 Ibid., Art. 55.a. This article was added following a major reform of the procedure in 2007, when the Court had severe backlogs.

42 These are the so-call procedural prerequisites for deciding on a constitutional complaint.

43 Art. 52b.1 of CAA. There are certain exemptions to some of the listed requirements that I did not state explicitly, to make the text of these provisions more readable.

the complainant, or if it concerns an important constitutional question that goes beyond the concrete case.[44]

When screening applications (constitutional complaints) to determine whether procedural prerequisites have been met, the judges sit in three different panels of criminal law, civil law, and administrative law, respectively. If a constitutional complaint passes the procedural stage and is accepted for consideration on the merits, it is then decided by the full plenum of judges. Not many applications reach that step (about 3 percent of all applications lodged).

If the Court finds a human rights violation, it annuls the relevant decision and (a) remands the case for new proceedings, or (b) decides on the merits of the case itself if it has enough information about both the factual and legal elements of the case from the file. The latter option is less frequently used than the former since, as a court of last resort, the Court usually decides on cases *in camera,* and public hearings are rare, although they are possible. After all, it is not meant to be a fact-finding court, unlike courts of first instance and, exceptionally, courts of appeal.

Moreover, the Constitutional Court decides on the violations of human rights and fundamental freedoms also in the framework of 'abstract' constitutional review, where it reviews whether particular statutes or executive regulations, as general legal acts, violate the constitutional provisions governing human rights and fundamental freedoms. This power is granted to the Court in Art. 160 of the Constitution. Furthermore, when deciding on a human rights violation alleged in a constitutional complaint, the Court is empowered to extend, on its motion *(ex officio),* its review to relevant statutes if it deems them also unconstitutional. This is called the principle of connection of issues (connectivity) and is provided in Art. 59 of the Constitutional Court Act (hereinafter CCA).

Court decisions are final (in the Slovenian legal system) and legally binding.[45] Although Court decisions in the area of abstract constitutional review, i.e. constitutional review and the review of constitutionality and legality (of statutes and executive regulations), are considered formal sources of law (with *erga omnes* effect) resembling binding precedents in common law systems, Court decisions in constitutional-complaint cases generally do not enjoy the same authority. Although the Court has reiterated several times that this should be the case, lower courts have on several occasions pointed to the distinction that, in civil-law systems such as the Slovenian one, court decisions have only *inter partes* effect (except when the case law has been settled, which strengthens its normative effect).[46]

In addition to human rights protection implemented by ordinary courts and the Constitutional Court, the Judicial Review of Administrative Acts Act

44 Ibid., Art. 52b.2, which encompasses objective and subjective criteria for the acceptance of a constitutional complaint.

45 Ibid., Art. 1.3.

46 Novak, 2018.

(hereinafter the JRAAA) provides for the so-called subsidiary human rights protection by administrative courts under Art. 157.2 of the Constitution[47] (and more specifically Art. 4 of the JRAAA, which basically mirrors the constitutional provision). This applies only if no other human rights protection is provided by courts with general jurisdiction. Potential examples include interferences with personal freedom, such as unlawful arrest, detention, or restriction of free movement, the unlawful collection or processing of personal data, interference with privacy, such as investigation without appropriate legal grounds, or discrimination by authorities based on gender, race, age, etc.

4. Specialised Human Rights Institutions

■ *4.1. The Constitutional Court*

Within the Slovenian human rights protection system, the Constitutional Court is the highest authority.[48] The Court consists of nine judges, who are nominated by the President of the Republic and elected for a term of nine years by the National Assembly. With some exceptions, the usual profiles of judges elected to sit on the Court are senior university professors of law or Supreme Court judges.

The present Court was established in the 1991 Constitution of the Republic of Slovenia. The framers of the Constitution found inspiration for such a Court in the example of the German *Bundesverfassungsgericht*.[49] In comparison with other constitutional courts within the European model, the Slovenian Constitutional Court has a wide range of powers – considerably more than a typical court of this model – vested in it based on the Constitution and statutes. Typical Court powers are the following. According to the Constitution, it decides on jurisdictional disputes between different state authorities, and also state authorities versus local authorities. It also monitors whether statutes and lower legal acts are in compliance with the Constitution, and executive regulations in conformity

47 'If other legal protection is not provided, the court having jurisdiction to review administrative acts also decides on the legality of individual actions and acts which intrude upon the constitutional rights of the individual.'

48 Given Art. 127 of the Constitution providing that the Supreme Court is the highest court in the state, immediately after the adoption of the new Constitution, there was a dilemma as to which was in fact the highest court in Slovenia, the Supreme Court or the Constitutional Court. That issue was soon resolved; it was held that the Constitutional Court is the highest court for constitutional review (of constitutionality and legality) and human rights protection, while the Supreme Court is the highest court in other judicial matters (in 'regular' court jurisdiction).

49 Mavčič, 2000, pp. 17–43.

with statutes.[50] It can dissolve unconstitutional political parties and prohibit their activities. The Constitutional Court judges may also deliver an opinion on the conformity of a treaty that is to be ratified by the National Assembly, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly.[51]

The powers vested in the Court by statutes include, for example, deciding on the constitutionality of a decision by the National Assembly not to call a referendum,[52] on appeals against the National Assembly refusal to confirm the election of deputies from the Republic of Slovenia to the European Parliament,[53] on the constitutionality of a National Assembly decision to dissolve a municipal council or dismiss a mayor,[54] and requests by the Judicial Council of the Republic of Slovenia to review statutes concerning judicial organisation.[55] Practically, any statute may confer power on the Constitutional Court to review a specific matter under Art. 160 of the Constitution.

Moreover, the power to decide on human rights violations is vested in the Court by the Constitution. The relevant provision is Art. 160.2 of the Constitution which provides that [u]nless otherwise provided by law, the Constitutional Court decides on a constitutional complaint only if legal remedies have been exhausted. The Constitutional Court decides whether to accept a constitutional complaint for adjudication on the basis of criteria and procedures provided by law.

Even prior to the 1991 Constitution, Slovenia, as one of the six republics within socialist Yugoslavia, already had its own 'republican' constitutional court since 1963. A federal constitutional court was also established that same year. However, the then constitutional courts were much less powerful in the then non-democratic political system. The judges did not need to be lawyers and were limited to issuing non-binding advisory opinions on the constitutionality of statutes submitted to the assembly (i.e., parliament), which could choose whether or not to follow them.[56]

The Court reviews human rights violations in three possible ways: (1) based on constitutional complaints lodged by natural persons or legal entities against alleged violations by court decisions. The above part of this presentation mainly dealt with that kind of procedure. However, the other route for addressing human rights violations is through the so-called (2) abstract review, where the

50 Slovenia does not provide for a special administrative supreme court. Apart from administrative courts responsible for reviewing the legality of individual administrative acts, the Administrative Department of the Supreme Court performs appellate jurisdiction in those cases.

51 Art. 160 of the Constitution.

52 The Popular Initiative and Referendum Act.

53 The Election of Deputies from the Republic of Slovenia to the European Parliament Act.

54 The Local Self-Government Act.

55 The Judicial Council of the Republic of Slovenia Act.

56 Mavčič, 2000.

Court examines whether statutes, i.e., laws, violate the human rights provisions of the Constitution. That procedure is initiated by either a petition or a request. The first is lodged by private individuals (or private legal entities), who also need to demonstrate that their legal interest has been affected. That basically means that they need to have a certain legal proceeding already pending in which they claim a human rights violation. It is not enough that such a review is requested by mere 'taxpayers' as persons having only a general interest in the repeal of an allegedly unconstitutional statute due to a human rights violation. Furthermore, the request to review a human rights violation by a general legal act (statute) can also be filed by state and other public authorities (as provided in the CCA). They do not need to demonstrate their legal interest in the matter of an alleged human rights violation because that is legally presumed, and the Court is always required to decide on their applications without first examining their legal interest.

The third (3) route for deciding upon the constitutionality of a statute concerning the possible violation of a constitutional right is through the so-called concrete review, which is set out in Art. 156 of the Constitution. This provides the following:

> If a court deciding some matter deems a law which it should apply to be unconstitutional, it must stay the proceedings and initiate proceedings before the Constitutional Court. The proceedings in the court may be continued after the Constitutional Court has issued its decision.

However, not many requests from other courts are submitted annually to the Constitution Court in this manner – perhaps three or four in an entire year.

■ *4.2. The Human Rights Ombudsperson*

Art. 159 (Ombudsperson for Human Rights and Fundamental Freedoms) of the Constitution provides that

> (1) In order to protect human rights and fundamental freedoms in relation to state authorities, local self-government authorities and bearers of public authority, the office of the ombudsman for the rights of citizens shall be established by law. (2) Special ombudsmen for the rights of citizens may also be established by law for particular fields.

The Ombudsperson is independent from the government and the judicial system, ensuring impartiality when handling complaints and conducting investigations. The first statute in this area, the Human Rights Ombudsperson Act, was adopted in 1993. Since the Constitution is rather sparse regarding the regulation of this

institution, all major provisions on powers, term of office, election, etc., have been regulated in the statute. The Ombudsperson is appointed by the National Assembly for a term of six years. The majority prescribed for their appointment is constitutional (i.e., 'absolute qualified' or two thirds of all the National Assembly deputies), which is the highest in the Slovene legal system, and such is also prescribed for amending the Constitution. This signifies how symbolically important a role is this office plays in the Slovenian constitutional order. However, legally speaking, the symbolic power of the Ombudsperson cannot be compared with their normative powers. As such it is considered an informal institution of human rights protection.[57]

The Ombudsperson's crucial legal powers include the ability to file a request before the Constitutional Court to review the constitutionality or legality of a general legal act if it is deemed to inadmissibly interfere with a human right or fundamental freedom (the so-called *actio popularis)*.[58] Moreover, they can file a constitutional complaint concerning a case that is being dealt with.[59]

Other less formal powers of the institution include inquiries relating to alleged human rights violations and opinions, reports, and recommendations thereon provided to other state authorities on improving the exercise of human rights and amending legislation. The Ombudsperson may submit their opinion on human rights protection in a case under consideration to any authority irrespective of the type and procedure before such authorities.[60] They may investigate public institutions and government bodies on their own initiative or upon receiving a complaint. The office may request documents, call witnesses, and even visit public institutions. While the Ombudsperson has no direct enforcement powers to compel actions, they can make recommendations and issue proposals for resolving issues. These are often influential, as the institution's findings may be taken seriously by government bodies, courts, and other public institutions. The Ombudsperson also engages in educating the public about human rights, their legal rights and freedoms, and how to seek redress for human rights violations. The office provides accessible resources and guidance for individuals who may not be aware of their rights.

The Ombudsperson also issues recommendations for changes in legislation, government policies, and practices to ensure compliance with human rights standards. This can involve submitting reports to the Slovenian Parliament, government, and international bodies like the EU and the United Nations, particularly in relation to its role to coordinate the National Prevention Mechanism under Art. 3 of the Optional Protocol to the UN Convention Against Torture.[61]

57 Letnar Černič, 2019b, p. 432.
58 Art. 23.a.5 of CCA.
59 Ibid., Art. 50.2.
60 Art. 25 of the Ombudsperson for Human Rights Act.
61 Human Rights Ombudsperson, 2025.

The office is supported by a team of experts and staff who assist with investigations, research, and public outreach. The Ombudsperson is assisted by four Deputy Ombudspersons. The Ombudsperson reports annually to the National Assembly on the state of human rights in Slovenia, highlighting issues of concern and offering recommendations. The Human Rights Ombudsperson's Council is the Ombudsperson's advisory body for the promotion and protection of human rights and fundamental freedoms and the strengthening of legal certainty, acting with professional autonomy. Its establishment, tasks and objectives are defined in Art. 50a of the Ombudsperson for Human Rights Act. It is composed of a chairperson and 16 members. Seven members are representatives of civil society, three are representatives of science, and two are representatives of the Government of the Republic of Slovenia. The Equality Ombudsperson, the Information Commissioner, the National Assembly of the Republic of Slovenia and the National Council of the Republic of Slovenia each have one member.[62]

■ *4.3. Other Ombudspersons*

As already mentioned, Art. 159.2 of the Constitution provides that special ombudspersons for the rights of citizens may also be established by law for particular fields. Thus, the Ombudsperson for Human Rights Act-B[63] introduced ombudspersons for children. In the field of the protection of children's rights, the Ombudsperson organises and manages child advocacy within the framework of an internal organisational unit. Child advocacy is carried out by child advocates (hereinafter referred to as 'advocates') within the framework of a network of volunteers which ensures equal access to an advocate for all children. The purpose of advocacy is for the advocate to provide professional assistance to the child, to express his or her views in all proceedings and matters in which he or she is involved, and to communicate the child's views to the competent authorities and institutions that decide on his or her rights and best interests. The advocate is not the child's legal representative. Professional assistance includes psychosocial support for the child, discussing the child's wishes, well-being and opinions, familiarizing the child with the procedures and activities in a manner appropriate to him/her, seeking the most appropriate solution together with the child, and accompanying the child before the authorities and institutions that decide on his/her rights and best interests.[64]

Furthermore, the Equal Opportunities Ombudperson in Slovenia is an independent body responsible for promoting and protecting equal opportunities for all individuals, particularly with respect to gender, age, disability, sexual orientation, race, and other grounds of discrimination. The institution was established under

62 Human Rights Ombudsperson, 2025b.
63 Official Gazette RS, No. 54/17 of 9 September 2017 (hereinafter OHR).
64 Art. 25.a.1 and 2 of OHR.

the Equal Opportunities for Women and Men Act (2002) and the Protection against Discrimination Act (2007). It operates in accordance with international human rights standards, including the European Union's directives on equality and anti-discrimination. This Ombudsperson is tasked with overseeing the implementation of equality laws, promoting equal opportunities, and providing legal support and advocacy to individuals experiencing discrimination. It also engages in research, analysis, and education to raise awareness about discrimination issues in society. It can offer advice and recommendations to public authorities, employers, and others to ensure compliance with anti-discrimination laws. The office receives and investigates complaints from individuals who believe they have been victims of discrimination. It may assist individuals in pursuing legal remedies. If individuals face discrimination in various aspects of life – such as employment, education, or access to goods and services – they can approach the Equal Opportunities Ombudsperson for support, guidance, and sometimes mediation. The Ombudsprson addresses a wide range of equality-related concerns, including gender equality, combating violence against women, and addressing issues like pay gaps; supporting vulnerable groups such as persons with disabilities, ethnic minorities, and LGBTI+ individuals; and promoting equality in public and private spheres, including education, employment, and healthcare.

Moreover, patients' rights defenders are also an important part of the human rights protection system in Slovenia. Patients' rights defenders are institutions or individuals who work within the healthcare system and ensure the protection of patients' rights in healthcare. In Slovenia, patients' rights defenders are established by law, and their aim is to protect and enforce patients' rights, ensure access to healthcare, protect the right to information and privacy, and help resolve disputes between patients and healthcare institutions. In practice, patients' rights advocates are involved in various tasks, such as advising patients on their rights in relation to healthcare services, helping to resolve complaints, managing grievance procedures and disputes, defending the right to access to health services and fair treatment in healthcare, and educating patients about their rights. In Slovenia, the Patients' Rights Advocate is established at the level of individual healthcare institutions (hospitals, health centres) and is responsible for ensuring that patients' rights are enforced within these institutions. Patients' Rights Ombudsperson thus act as an important part of the rights protection system, specifically in the health sector, where they ensure that patients are not deprived of their basic rights, such as the right of access to healthcare, information about treatment, privacy and protection from abuse.

Last but not least, the Information Commissioner, although not a traditional ombudsperson, is also responsible for protecting the right to privacy and the protection of personal data. The office operates within the area of individual privacy and the control of the processing of personal data. In addition, the Ombudsperson for Access to Public Information works to ensure transparency and access to the

information citizens need to exercise their rights, such as the right to information and participation in public life.

In addition to institutional or state-organized bodies for human rights protection, non-institutional stakeholders in that area should also be mentioned. There are various non-governmental organisations and civil society organisations, such as Amnesty International Slovenia, the Legal Centre for the Protection of Human Rights and the Environment (PIC), the Peacebuilding Institute – Institute for Modern Social and Political Studies, Legebitra, Slovene Philanthropy, the Society for Non-Violent Communication, the SOS Telephone for Women and Children – Victims of Violence Society, etc.

5. Conclusion

As already pointed out at the beginning of this chapter, a departure point of Slovenian constitutional identity was human rights protection. In more than thirty years of its independence, Slovenia seems to have built a robust system for their protection, relying on both institutional and non-institutional stakeholders. A purely general and superficial view would claim that immense progress has been made in that period, but a critical mind would nevertheless ask whether enough has been done and where further potential for improvement remains.[65] And criticism is always welcome when it is supported by relevant data. Thus, let us see some fine-tuned opinions from two European bodies on the situation of human rights protection in Slovenia.

In 2023, the European Court of Human Rights (ECtHR) handed down 1,014 judgments, 892 of which found at least one violation of the European Convention on Human Rights. The highest number of judgments with at least one violation of the Convention were delivered against Russia (216), followed by Ukraine (123), Turkey (72), Romania (58) and Hungary (48). In relation to Slovenia, the Court handed down two judgments. Both found at least one violation of the Convention. These were violations of the right to a fair trial. A further 203 cases against Slovenia were dismissed or declared inadmissible by the Court. In addition, 978 new complaints were lodged against Slovenia in 2023, which represented the highest number per capita among Council of Europe member states.[66] Although the number of new complaints is high, Slovenia currently ranks among the countries with the fewest human rights violations found before the ECtHR.[67] The number of human rights violations identified has fallen significantly since 2006, as the adoption of the Law on the Protection of the Right to a Trial without Undue Delay has addressed this

65 For a quite critical view on the issue, see: Avbelj and Letnar Černič, 2020, pp. 78–85.
66 Reporter, 2024.
67 European Court of Human Rights, 2024.

issue at the systemic level. The Lukenda project, launched in 2005, which has increased the number of judges, has also contributed significantly to ensuring more efficient justice.[68]

Furthermore, the European Union Agency for Fundamental Rights (FRA) has highlighted a number of important issues regarding the protection of human rights in Slovenia in its annual report for 2024, with data from 2023. In its view, in 2023, Slovenia made progress in improving the quality of the justice system. Promising developments included proposed legislative changes aimed at strengthening judicial independence, including reforms to judicial appointment procedures. While measures have been taken to protect journalists and reduce political influence over the media, the report highlighted the need for further efforts to ensure the independence of the media and to protect journalists from threats and violence. The report also stressed the need to protect civic space and ensure the conditions for its smooth functioning. The report also emphasised the need for further efforts to protect the rights of minorities, including the LGBTIQ+ community, and to ensure equal treatment of all citizens. Although Slovenia was found to have made progress in the area of human rights protection, the FRA report highlighted the need for further efforts to protect the fundamental rights of all citizens, in particular vulnerable groups.[69]

From the above-presented documents, it follows that Slovenia has made significant progress in human rights protection in more than three decades of its sovereignty. However, it still has challenges to address, and the potential to ensure an even stronger system of protection

68 Supreme Court of Slovenia, 2023.
69 Ladić and Završnik, 2024.

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JASNA OMEJEC*

The Constitutional Framework for the Protection of Fundamental Rights in Croatia

ABSTRACT: *Croatia is one of the seven newly established states that emerged following the dissolution of the former Socialist Federative Republic of Yugoslavia (1991–2008). The Croatian Constitution, adopted in December 1990, defines the Republic of Croatia as a unitary and indivisible democratic and social state, founded, inter alia, on the democratic multiparty system, the rule of law, and the protection of human rights and fundamental freedoms (hereinafter 'fundamental rights'). The first part of this study examines the constitutional framework within which the liberal-democratic conception of fundamental rights has evolved in Croatia. It considers the axiological foundations and guiding principles governing the status of the individual in the Croatian constitutional order, as well as the catalogue of fundamental rights enshrined in the Constitution. This catalogue reflects a search for the values and political ideals that the Croatian state regards as essential to its legitimate functioning. The final part of the paper analyses the adjudication of fundamental rights in the Republic of Croatia. The Constitutional Court serves as the supreme judicial authority tasked with ensuring compliance with, and the application of, the Constitution. An overview of the historical development of the constitutional judiciary in Croatia is provided, followed by an examination of the model for the election of judges to the Court and the respective elected and appointed functions thereof. Moreover, the paper addresses the Court's jurisdiction, focusing in particular on its principal powers – most notably the abstract review of legislation and other regulations on the basis of actio popularis, and the protection of fundamental rights in individual cases brought forward by constitutional complaints.*

KEYWORDS: *Croatian constitutional state, Croatian Constitution, fundamental rights, constitutional rights, Croatian Constitutional Court*

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https://doi.org/10.47078/2026.1.299-331

1. Introduction

Croatia is one of seven newly formed states following the dissolution of the former Socialist Federative Republic of Yugoslavia (hereinafter 'the former SFRY') (1991–2008). Croatia declared its independence in 1991,[1] which was followed by a violent and protracted war lasting from 1991 to 1996.[2]

The Croatian Constitution (*Ustav Republike Hrvatske*) (hereinafter 'the Constitution') was adopted on 21 December 1990 and entered into force the following day.[3]

1 The first multi-party parliamentary elections in Croatia were held on 22–23 April 1990 (first round) and 6–7 May 1990 (second round). Following a referendum on sovereignty on 19 May 1991, the Croatian Parliament adopted the *Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia* on 25 June 1991, published in the *Official Gazette* (*Narodne novine*) (hereinafter 'OG') 31/91. Pursuant to the Brijuni Declaration, signed on 7 July 1991 by representatives of Slovenia, Croatia and Yugoslavia under the political auspices of the European Community, the Decision's entry into force was postponed for three months. While the Declaration concluded the so-called Ten-Day War in Slovenia by prompting the withdrawal of the Yugoslav National Army (hereinafter 'the JNA'), it had no alleviating effect on the armed aggression against Croatia. Accordingly, at its session on 8 October 1991, the Croatian Parliament adopted the *Termination Decision*, declaring that 'as of 8 October 1991 the Republic of Croatia has severed state and legal ties based on which it formed, together with the other republics and autonomous provinces, the former SFRY', and that it denies 'the legitimacy and legality of all the bodies of the former federation – the SFRY' (OG 53/91). Croatia received diplomatic recognition from the European Community member states on 15 January 1992, followed by recognition from the United Nations (hereinafter 'the UN'). For further details, see: Vukas, 2011, pp. 19 et seq.; Vukas, Tomljenović and Borbelj, 2022.

2 The dissolution of the former SFRY was accompanied by a military and armed attack on Croatia by the JNA and various Serb paramilitary groups. By the end of 1991, a high-intensity war was being fought along an extensive front, with Croatia maintaining control over approximately two-thirds of its territory. The Croatian Homeland War effectively concluded in August 1995 with a decisive Croatian military victory. Nevertheless, the Croatian Parliament determined that the Homeland War lasted from 17 August 1990 to 30 June 1996. In the remaining occupied territories, the UN established the *Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium* (UNTAES). These territories were peacefully reintegrated into Croatia in January 1998, pursuant to the *Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium* (Erdut Agreement) of 12 November 1995, which was acknowledged by UN Security Council Resolution 1023 of 22 November 1995.

3 Within the constitutional framework of the former SFRY, the Parliament of the former Socialist Republic of Croatia (SRC) adopted in February 1990 the *Decision Proclaiming Amendments LXIV to LXXV to the Constitution of the SRC* (OG 31/90). Amendment LXIV required the removal of the term 'Socialist' preceding 'Republic of Croatia' in the Constitution's title and provisions. Consequently, from 25 July 1990, the official name of the state has been the *Republic of Croatia*. The Parliament elected in spring 1990 (see footnote 1) promulgated the new Constitution on 22 December 1990 (OG 56/90).

To date, the 1990 Constitution has undergone five revisions.[4] The First Revision (1997) prescribed preventive measures to avert what Croatia feared most: the renewal of a Yugoslav state union or the formation of a Balkan state alliance.[5] It also clarified the constitutional guarantees of rights and freedoms in line with Croatia's obligations as a member of the Council of Europe. The Second Revision (2000) replaced the then semi-presidential system, which featured broad presidential executive powers, with a predominantly parliamentary government model, thereby preventing the concentration of authority and decision-making power within the presidency. The Third Revision (2001) primarily concerned the reorganisation of the then bicameral *Sabor* (hereinafter 'the Parliament'), providing instead for a unicameral legislature.[6] The Fourth Revision (2010) was chiefly related to the accession of the Republic of Croatia to the European Union (hereinafter 'the EU').[7] The Fifth Revision (2013) was adopted by a national constitutional referendum, following a popular initiative to amend Art. 62 of the Constitution.[8]

The Constitution defines Croatia as a 'unitary and indivisible democratic and social state' (Art. 1), where 'freedom, equal rights [*jednakost*], national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of its constitutional order and the basis for the interpretation of the Constitution' (Art. 3). It is founded on 'the principle of the separation of powers into the legislative, executive and judicial branches', which encompasses forms of mutual cooperation and reciprocal checks and balances. State power 'is limited by the constitutionally guaranteed right to local and regional self-government' (Art. 4).

4 Subsequent revisions to the 1990 Constitution were published in OGs 135/97, 113/00, 28/01, 76/10 and 5/14. The most recent official consolidated text was published in OG 85/10. However, that version altered the original article numbering without constitutional authorisation. Accordingly, this study references the CCRC's edited and consolidated version of the Constitution as of 15 January 2014 [Online]. Available at: https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf (Accessed: 9 February 2025).

5 Dimitrijević described these provisions as 'the provisions of fear', and the process that led to their adoption as 'constitutionalisation of fear', Dimitrijević, 2007, p. 27.

6 The House of Counties was abolished, and the provisions concerning the House of Representatives were replaced with those referring to the 'Croatian Parliament'.

7 For further details, see: Smerdel, 2014b; Goldner Lang, Đurđević and Mataja, 2019, pp. 1142–1145.

8 The Fifth Revision of the Constitution was adopted via a national constitutional referendum on 1 December 2013. For the first time, 'the people', as defined in Art. 1.3 of the Constitution, directly decided on a proposed constitutional amendment initiated by voters through a popular initiative. Art. 62 was amended by the addition of paragraph 2, which states: 'Marriage is a living union between a woman and a man'. By its Decision SuP-O-1/2014 of 14 January 2014 (OG 5/14), the CCRC declared that the Fifth Revision entered into force on 1 December 2013.

On 6 November 1996, Croatia became the 40th member of the Council of Europe. The European Convention on Human Rights (hereinafter 'the ECHR') entered into force in respect of Croatia on 5 November 1997. Protocols Nos. 1, 4, 6, 7, 12, 13, 14 and 15 to the ECHR were also ratified.

On 1 July 2013, Croatia joined the EU.[9]

This study examines the normative framework of the Croatian constitutional state since 1990 and its practical implementation regarding human rights and fundamental freedoms. For this study, human rights and fundamental freedoms are collectively referred to as 'fundamental rights'.

The study aims to provide essential information on the constitutional framework within which the liberal-democratic concept of fundamental rights in Croatia has developed (Chapter 1), and on the role of the Constitutional Court of the Republic of Croatia (*Ustavni sud Republike Hrvatske*) (hereinafter 'the CCRC') within that framework. The role of the Supreme Court of the Republic of Croatia (*Vrhovni sud Republike Hrvatske*), the highest ordinary court (hereinafter 'the Supreme Court'), is also considered, given that since 2022 this court has had jurisdiction to adjudicate violations of fundamental rights guaranteed by the Croatian Constitution (known as 'the constitutional rights') and the ECHR (known as 'the Convention rights') (Chapter 2).

This study may contribute to the ongoing debate regarding the best models and good practices for protecting fundamental rights in post-communist Central and Eastern European countries, which today are members of the EU.

2. Protection of Fundamental Rights in the Constitution of the Republic of Croatia

■ *2.1. Human Rights and Fundamental Freedoms in the Croatian Constitution*

2.1.1. Overview of Constitutional Framework

As of its Third Revision in 2001, the Constitution refers to 'human rights and fundamental freedoms'.[10] The entry into force of the ECHR directly influenced this terminological change in 2001.

The 1999 Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: 'the CA-CCRC') defines 'human rights or fundamental freedoms guaranteed by the Constitution' as 'constitutional rights'.[11] Accordingly, in

9 On questions concerning Croatian constitutional identity within the European Union, see: Smerdel, 2014a.

10 Until its Third Revision (2001), the Constitution predominantly referred to the 'freedoms and rights of man and citizen'.

11 Constitutional Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*), OGs 99/99, 42/02, 49/02 – consolidated text, Art. 62.1.

Croatia, the terms 'human rights and fundamental freedoms' and 'constitutional rights' share the same meaning, referring to the fundamental rights guaranteed by the Constitution.

The concept of constitutional rights was not entirely new to Croatia. The 1974 Constitution of the SFRY, as well as the 1974 Constitution of the Socialist Republic of Croatia (hereinafter: 'the former SRC'), contained comparable rights; however, these were elaborated within the framework of socialist law, which did not recognise the separation of powers nor the division of law into public and private branches. Furthermore, at that time, the legal system was dualistic, and international law, including provisions on fundamental rights, was not part of the Yugoslav internal legal order. By contrast, the 1990 Constitution introduced a monistic approach to international treaties. Art. 134 states:

> International treaties that have been concluded and ratified in accordance with the Constitution, published, and entered into force, shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.

Regarding the ECHR, once ratified and entered into force, it formally acquired sub-constitutional status under Art. 134 of the Constitution. However, in 2000, the CCRC for the first time reviewed the conformity of a domestic law directly with the ECHR rather than with the Constitution.[12] In doing so, the CCRC secured a quasi-constitutional status for the ECHR within the domestic legal order.[13]

The Constitution adopts a horizontal conception of the functioning of fundamental rights. Courts and other state bodies, as well as bodies of units of local and regional self-government (hereinafter 'the self-government bodies') and legal persons vested with public authority (hereinafter 'the public legal persons'), must respect the constitutional rights of parties when deciding on their legal rights and obligations. The CCRC is the central national institution competent to adjudicate on violations of constitutional rights.

As a general rule, the Constitution protects the constitutional rights of 'everyone'. Nevertheless, certain groups enjoy special constitutional protection, including the 'family', 'maternity, children and young people', 'children with physical and mental disabilities and socially neglected children', 'orphans and minors neglected by their parents', and 'persons with disabilities'. National minorities and

12 CCRC, Decision U-I-745/1999 of 8 November 2000 (OG 112/00), issued in proceedings of abstract constitutional review of the Expropriation Act. The Court repealed certain provisions, finding them incompatible with Art. 6 of the ECHR.

13 Turković and Omejec, 2016, p. 111; Omejec, 2016a, pp. 352–353; Omejec, 2016b, p. 354.

religious communities, as well as their members, are also under constitutional protection.

Some constitutional rights are reserved exclusively for Croatian nationals, such as the right to universal and equal suffrage in national elections and referenda (Art. 45). Further, military service and defence of the Republic of Croatia are duties exclusively incumbent upon Croatian nationals: '[m]ilitary service and defence of the Republic of Croatia shall be the duty of every capable citizen of the Republic of Croatia' (Art. 47). Conversely, the Constitution imposes specific duties on 'everyone'. For instance, '[e]veryone shall participate in the defrayment of public expenses in accordance with their economic capacity' (Art. 51.1).

2.1.2. Axiological Basis and the Guiding Principles of the Status of the Individual

In its case law, the CCRC repeatedly emphasises that 'the constitutional principles set the structure and constitute the essence of the Croatian state. The Republic of Croatia can remain what it is only if none of the structural constitutional principles are quashed or amended'.[14] On several occasions, it has highlighted that 'the Constitution, as the basic legal act of the Croatian state, is not neutral in the values it enshrines', concluding:

> Therefore, democracy founded on the rule of law and the protection of human rights is the only political model acknowledged by the Constitution and the only one it accepts. Moreover, human rights and the rule of law in the context of the Croatian Constitution are established so that they are primarily intended to express the moral commitment to the objective principles of liberal democracy.[15]

Today, the jurisprudential doctrine of the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), known as the *Lehre von der Grundrechten als System Objektiver Wertentscheidungen*, is the prominent determinant of Croatia's constitutional jurisprudence.[16]

In brief, the BVerfG has entrenched in fundamental rights a system of functional guidelines and binding standards for government actions. Consequently, within the German constitutional order, fundamental rights correlate with the legal validity of state acts.[17] The CCRC similarly examines the conformity of laws with the Constitution, 'starting from the structural integrity of the constitutional text [centering on the freedom of the human being to develop in the society], from which emerges the objective system of values that the Constitutional Court

14 CCRC, Decision U-VIIR-4640/2014 of 12 August 2014, OG 104/14, Art. 10.1.
15 CCRC, Decision U-I-3597/2010 *et al.* of 29 July 2011, OG 93/11, Art. 28.
16 For an analysis of the influence of German constitutional tradition on the CCRC's jurisprudence, see: Omejec, 2016a, pp. 353–357; Goldner Lang, Đurđević and Mataja, 2019, p. 1141.
17 For more details, see: Šarčević, 2010, pp. 54 and 66.

must protect and promote'.[18] Thus, its adjudication does not concern balancing policy choices, achieving compromises, or favouring ad hoc solutions; rather, it involves interpreting constitutional rights within a pyramidal, 'objective' system of values.[19]

The primary axiological basis of the status of the individual in the Croatian constitutional state is human dignity.[20] The CCRC's foundational position holds that 'human dignity is a fundamental value and an essence of positive European human rights law'.[21] The guiding principles for elaborating human personality and its dignity as a shared universal value are found in Art. 34 of the Constitution: 'Respect for and legal protection of each person's private and family life, dignity, and reputation shall be guaranteed'.

Furthermore, Art. 25 guarantees protection of human dignity to certain groups.[22] In its case law, the CCRC has extended protection of human dignity to members of other vulnerable groups not expressly mentioned in the Constitution,

18 CCRC, Decision U-I-3597/2010 *et al.* of 29 July 2011, OG 93/11.

19 Omejec, 2016a, pp. 353–354; Bomhoff, 2008, cited in Omejec, 2016a, p. 354.

20 It is well known that the protection of human dignity 'is anchored in the most prominent position of the German Basic Law'. Cf. Voßkuhle, 2010, p. 6. Barić described the CCRC's (in the author's wording: the CCC's) adoption of the German jurisprudential approach to dignity as follows: 'In order to define what "dignity" means, the CCC adopted the interpretation developed by the *Bundesverfassungsgericht*. The CCC then proceeds to locate this rather strong affirmation of dignity contained – implicitly – in a number of Croatian constitutional provisions. However, it never explains its starting point: invoking of the German case law. It only attempts to create a bridge between German and Croatian legal orders by invoking Protocol 13 of the ECHR, which refers to dignity, as well as the case law of the ECtHR. It stands to reason, however, that Germany was chosen because of its well-developed practice on dignity, a far more prominent concept in the Basic Law than is the case with the Croatian constitution' [Footnotes are omitted.]; Barić, 2016, p. 29.

21 CCRC, Ruling U-II-3170/2020 of 14 September 2020, Art. 9 (unpublished) [Online]. Available at: www.usud.hr (Accessed: 20 January 2025).

22 Art. 25 of the Constitution provides: 'Any arrested and convicted person shall be accorded humane treatment, and the dignity of such individual shall be respected'. The CCRC regards this provision as a functional guideline for governmental conduct. Cf. CCRC, Decision U-III-6559/2010 of 13 November 2014, OG 142/14, Arts. 26; 22.1.

such as children,[23] employees subjected to workplace abuse,[24] and members of same-sex unions.[25]

In the economic sphere, the CCRC has determined that 'a minimum of economic well-being is a precondition for human dignity'. Practically, the effective realisation of human rights requires that all employed persons receive the necessary minimum to meet their daily needs, that is, 'for their lives to be in keeping with human dignity'.[26]

The CCRC has also expanded the concept of human dignity to include the right to a fair trial.[27]

Regarding laws that elaborate on constitutional rights, all enjoy equal force. These are considered 'organic laws' and must be passed by a majority vote of all Members of Parliament.[28] The sole exception concerns the organic law regulating the rights of national minorities, which requires adoption by a two-thirds majority

23 CCRC, Decision U-III-1095/2014 of 21 September 2017, OG 104/17, Art. 19. In this case, the ordinary court rejected part of the claim concerning a violation of the right to personality, relying on the expert opinion of a psychiatrist and a psychologist, according to which a 12-year-old child lacked a developed understanding of personal dignity and honour. The CCRC found that the court had reached an arbitrary conclusion and affirmed that children are entitled to indemnification for violations of privacy, dignity, reputation, and honour. Such entitlement must not be made conditional upon the child's cognitive capacity or awareness of his or her own identity.

24 CCRC, Decision U-III-3519/2018 of 7 October 2020, Art. 27 (unpublished) [Online]. Available at: www.usud.hr (Accessed: 20 January 2025). In this case, the CCRC emphasised that victims must have effective legal protection of the right to dignity in the workplace even 'in cases where the violation is not such as to leave permanent psychological or physical consequences'.

25 CCRC, SuS-1/2013 of 4 November 2013, OG 138/13, Art. 7.2. The CCRC highlighted that 'in the Republic of Croatia sexual and gender diversity are protected by the Constitution. … These legal facts are today considered to be the permanent values of the Croatian constitutional state'. In Decision U-I-144/2019 of 29 January 2020, the CCRC examined the constitutionality of provisions of the Foster Care Act (FCA). It held that the contested FCA provisions, which omitted a particular social group ('tacitly omitted'), had general discriminatory effects on individuals of same-sex orientation living in life partnerships or informal partnerships, which is constitutionally impermissible, Art. 29.3 (unpublished) [Online]. Available at: www.usud.hr (Accessed: 21 January 2025).

26 CCRC, Decision and Ruling U-I-1625/2014 of 30 March 2015, OG 40/15, Art. 37.

27 CCRC, Decision U-III-4261/2012 of 28 May 2014, § 9 (unpublished, available at: www.usud.hr). In this case, the CCRC held: 'The obligation to justify a decision and the obligation to carefully examine claims made by a party are particularly important, not only in relation to the exercise of the right to an effective remedy, but also because this represents a confirmation of the honour and dignity of persons whose rights and obligations are being decided on'.

28 Art. 83.2 of the Constitution.

of all Members of Parliament and must be qualified as a 'constitutional act'.[29] These constitutional provisions derive from historically conditioned political reasons and exceed the scope of the general model of fundamental rights as laid down in the Constitution.

■ *2.2. Catalogue of Human Rights and Fundamental Freedoms in the Croatian Constitution*

The Croatian Constitution contains an extensive catalogue of constitutional rights, primarily located in Chapter III, entitled 'Protection of Human Rights and Fundamental Freedoms'. This chapter, comprising 55 Articles, is the most comprehensive in the Constitution and has been regarded as a central constitutional achievement from its inception. The catalogue reflects the values and political ideals that the Croatian state considers fundamental preconditions for its legitimate functioning. Furthermore, Art. 20 of the Constitution states: 'Whosoever violates the provisions of the Constitution concerning human rights and fundamental freedoms shall be held personally liable and may not be exculpated by invoking a higher order'.

The detailed catalogue of constitutional rights draws inspiration from international human rights instruments and encompasses the rights and freedoms of the first, second, third, and fourth generations. Chapter III is structured into three parts: 1. Common Provisions; 2. Personal and Political Liberties and Rights; and 3. Economic, Social and Cultural Rights.

Common Provisions (Arts. 14–20) govern the prohibition of discrimination; equality before the law; equality and protection of the rights of national minorities; the principle of proportionality in limiting 'freedoms and rights'; the principle of proportionality in limiting 'individual constitutionally guaranteed freedoms and rights' during states of war and other emergencies; the right to appeal; and the right to judicial protection against individual administrative acts.

Personal and Political Liberties and Rights (Arts. 21–47) include the right to life; the prohibition of capital punishment; inviolability of human liberty and personality; prohibition of ill-treatment, medical or scientific experiments without consent, and forced or compulsory labour; rights of arrested, detained or convicted persons; equality of Croatian nationals and foreigners before courts, state bodies, and public legal persons; the presumption of innocence; the right to a fair trial; *nullum crimen nulla poena sine lege*; *ne bis in idem*; exceptions to

29 Art. 83.1 in conjunction with Art. 15.2 of the Constitution. However, as early as 2000, the CCRC clarified that the 'constitutional law' on national minorities does not possess the legal force of constitutional acts. '[T]his kind of falsa *nominatio* does not change the legal nature of acts, does not make them legally different from what they are under the Constitution and by their content, and the Constitutional Court does not review them by their name but by their legal nature'. Accordingly, the CCRC holds jurisdiction to review the substantive provisions of the so-called Constitutional Act on the Rights of National Minorities. Cf., among others, Decision U-VIIR-4696/2010 of 20 October 2010, OG 119/10, Art. 16. Cf. in detail Omejec, 2010, pp. 22–24.

the statute of limitations; freedom of movement and the right to choose one's residence within the Republic of Croatia; the right of free movement for Croatian nationals (including the right to settle abroad and return at any time); the legal possibility of granting asylum to foreigners and stateless persons; the right to home, private and family life, dignity, and reputation; freedom and privacy of correspondence; safety and secrecy of personal data; freedom of thought and expression; the right of access to information; prohibition of incitement to war or violence, and of national, racial or religious hatred or intolerance; freedom of conscience and religion; various rights of religious communities; the right of public assembly and peaceful protest; the right to freedom of association; the right of Croatian nationals to participate in public affairs and to access public services under equal conditions;[30] the right to vote and to stand for election; and the right to submit petitions and complaints to state and other public bodies, along with the right to receive responses.

Economic, Social and Cultural Rights (Arts. 48–70) cover the right to property; the right to inheritance; guarantees of free enterprise and the free market, including equal legal status for all entrepreneurs; prohibition of laws diminishing rights acquired through capital investment; guarantees for the free repatriation of profits and invested capital for foreign investors; the right to compensation equal to market value in cases of property limitation or deprivation prescribed by law in the interest of the Republic of Croatia; the right to work and freedom of employment; various rights of employees, including remuneration, maximum working hours, weekly rest, paid annual leave, and participation in workplace decision-making; the right to social security and insurance; rights regarding childbirth, maternity, and child care; the right and freedom of parents to make independent decisions concerning the upbringing of their children; rights of vulnerable persons unable to meet basic subsistence needs to assistance; the right to health care; the rights of employees to form, join, and leave trade unions and associations; the right to strike; the right to equal access to education in accordance with aptitudes; guarantees of university autonomy; freedom of scientific, cultural, and artistic creativity and the right to moral and material interests arising therefrom; and the right to a healthy life.

Regarding comparable rights, the Constitution guarantees rights that correspond closely with those enshrined in the ECHR.[31]

Certain constitutional rights stand out prominently in the current phase of development of the Croatian constitutional state. Their significance arises

30 This provision (Art. 44 of the Constitution), applicable exclusively to Croatian nationals, places emphasis on 'under equal conditions'. Nationals of a member state of the European Economic Area (EEA) or of the Swiss Confederation, as well as nationals of third countries, may also be admitted to the civil service. The conditions governing such admissions are set out in the Civil Servants Act (OG 155/23, 85/24).

31 Turković and Omejec, 2016, p. 111.

from the case law of the CCRC, which identifies the areas where violations most frequently occur. This chapter focuses on two such 'court-connected' procedural rights.[32]

2.2.1. Right to a Fair Trial

Art. 29.1 of the Constitution provides: '[e]veryone shall be entitled to have their rights and obligations, or suspicion or accusation of a criminal offence, decided upon fairly and within a reasonable time by an independent and impartial court established by law'. The CCRC interprets both the civil and criminal aspects of Art. 29.1 broadly, applying it to all types of judicial proceedings, including those before tribunals not formally considered part of the judicial system, as well as, where appropriate, administrative proceedings, particularly at the appellate level.

Similar to Art. 6 of the ECHR, subsequent paragraphs of Art. 29 contain procedural guarantees for a fair trial in criminal proceedings. Beyond the rights recognised in Art. 6 of the ECHR, Art. 29 of the Constitution additionally guarantees: the prohibition of coercing an admission of guilt from a suspected, accused or indicted person; the prohibition of admission into court proceedings of evidence obtained illegally; and the guarantee that criminal proceedings may be initiated before a court only at the request of an authorised prosecutor.

The majority of violations currently occur in relation to the right to a fair trial. In particular, the right to a trial within a reasonable time has been the judiciary's weakest aspect, with profound consequences including a decline in public confidence in the national judicial system.

Nevertheless, the CCRC consistently identifies violations of the right to a fair trial and sets aside decisions by competent authorities that fail to respect the procedural guarantees afforded to the parties. In exercising constitutional supervision over adherence to these guarantees, the CCRC relies extensively on the case law of the European Court of Human Rights (hereinafter 'the ECtHR').

The CCRC places particular emphasis on protecting essential procedural guarantees, such as the right of access to a court. It repeatedly asserts that courts must ensure the exercise of this right, even in cases where they lack jurisdiction or where legislative regulation regarding court jurisdiction or admissibility of legal remedies is insufficient.[33]

32 Another prominent area in which constitutional rights are frequently violated concerns the right to protection of home, private life, and family life. Property rights also remain significantly affected. This domain is deeply intertwined with numerous unresolved legal relations stemming from the former socialist model of 'social ownership' and the accumulated legal challenges resulting from the transformation and privatisation of socialist property during the transitional period.

33 CCRC, Decision U-III-1310/2018 of 10 March 2020, Art. 9 (unpublished) [Online]. Available at: www.usud.hr (Accessed: 22 January 2025).

2.2.2. Right to an Effective Legal Remedy

The CCRC has long affirmed that '[t]he issue of ensuring an effective legal remedy is a fundamental procedural guarantee in all legal proceedings, and because of its special importance, the Constitution guarantees it as a fundamental human right'.[34] Art. 18 of the Constitution provides: 'The right to appeal against first-instance decisions made by courts or other authorities shall be guaranteed' (para. 1); and 'By way of exception, the right to appeal may be denied in cases specified by law if other forms of legal protection are ensured' (para. 2).

As a general rule, the denial of the right to appeal is associated with administrative proceedings, with many laws prescribing such denial. Nevertheless, judicial protection remains constitutionally guaranteed. Art. 19.2 states: 'Judicial review of individual acts made by administrative authorities and other bodies vested with public authority shall be guaranteed'.

The most persistent challenge in Croatia has been the provision of effective legal remedies against the excessive length of proceedings. The development of remedies addressing the length of proceedings began in 1999 and became more effective in 2002. Several models of these remedies have been adopted to date.[35] In 2024, the Parliament amended the Courts Act once again, aligning the 2013 legislative model with the case law of both the ECtHR and the CCRC.[36]

Furthermore, due to legislative delays in implementing general measures required by ECtHR judgments, the CCRC has begun creating new domestic legal remedies, specifically, 'binding legal standpoints', to prevent future violations of constitutional and Convention rights. For instance, one such binding legal standpoint has equalised, from the perspective of effective legal remedies, the previously insufficient legal protection afforded to detainees with the full protection accorded to prisoners' rights.[37]

Finally, the CCRC has also addressed specific issues regarding the right to an effective legal remedy, including the consequences of incorrect court directions on the right to appeal. The CCRC held that 'parties who take legal action based on an erroneous court direction on the right to appeal should not suffer harmful consequences'.[38]

34 CCRC, Decision U-III-1569/2001 of 9 December 2004, OG 187/04, Art 6.

35 The ECtHR outlined the evolution of Croatian legislative models for length-of-proceedings remedies up to 2024 in *Mirjana Marić v. Croatia*, judgment, No. 9849/15, 30 July 2020, Arts. 33–41, with further references.

36 The 2024 Amendments to the Courts Act (OG 36/24) entered into force on 2 April 2024. These Amendments stipulate that, if the president of the higher court of the next instance or the relevant court chamber finds the request to be well-founded, a deadline shall be set within which the lower court judge must decide the case. Simultaneously, appropriate compensation shall be awarded to the party for the violation of the right to trial within a reasonable time.

37 CCRC, Decision U-III-4182/2008 of 17 March 2009, OG 38/09, Art. 20.

38 CCRC, Decision U-III-2808/2007 of 13 February 2008, OG 26/08, Arts. 9–10.

2.3. Limitation Clauses in the Croatian Constitution

Art. 16.1 of the Constitution is a general clause stipulating that 'Freedoms and rights may only be limited by law in order to protect the freedoms and rights of others, as well as the legal order, public morals and health'.

In addition to this general clause, the Constitution contains specific provisions limiting particular constitutional rights. For example, it provides, among others, that: the freedom and privacy of correspondence and all other forms of communication may be limited if necessary for the protection of national security and the conduct of criminal prosecution in accordance with the law (Art. 36.2); the right to freedom of association is restricted by the prohibition of any violent threat to the democratic constitutional order and the independence, unity, and territorial integrity of the Republic of Croatia (Art. 43.2); 'free enterprise and proprietary rights may be exceptionally limited by law to protect the interests and security of the Republic of Croatia, nature, the human environment and human health' (Art. 50.2).

The constitutionally permitted limitations on individual rights and freedoms are intrinsically linked to the principle of proportionality. This principle is a fundamental constitutional standard both in legislative regulation and in adjudicating individual cases. Art. 16.2 of the Constitution mandates that 'Any limitation of freedoms or rights shall be proportionate to the nature of the need for such limitation in each individual case'.

Courts, particularly the CCRC, continue to perform proportionality tests. When determining whether the principle of proportionality has been respected, the CCRC applies 'step-by-step' tests analogous to those employed by the ECtHR.[39]

The Constitution requires compliance with the principle of proportionality even in exceptional circumstances such as a state of emergency. Art. 17.1 stipulates that individual constitutionally guaranteed freedoms and rights may be limited during a state of war, any clear and present danger to the independence and unity of the state, or in the event of a natural disaster. However, 'the extent of such limitations must be appropriate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, gender, language, religion, or national or social origin' (Art. 17.2). Furthermore, even in cases of a clear and present danger to the existence of the state, no limitations may be imposed on the provisions of the Constitution guaranteeing 'core rights', namely the rights to life; the prohibition of torture, cruel or degrading treatment or punishment; *nullum crimen nulla poena sine lege*; and the freedom of thought, conscience and religion (Art. 17.3).

39 For more details on proportionality tests in the case law of the ECtHR, see: Christoffersen, 2009.

3. Fundamental Rights Adjudication in the Republic of Croatia

In Croatia, fundamental rights are directly adjudicated by the CCRC and, since 2022, also by the Supreme Court.

The term 'ordinary courts' in this study refers to courts of general jurisdiction over all civil and criminal law matters, as well as specialised courts, such as administrative, financial, social, and employment courts, that constitute a regular part of the judicial branch in a given state. These are the so-called 'courts of law' or 'courts of justice'. By contrast, constitutional courts are neither appellate courts nor 'courts of third or fourth instance'; they do not adjudicate the merits of rights and obligations or determine criminal liability in individual cases. As Shapiro has observed, since constitutional courts 'decide only special questions of law, they usually operate by remand to the trial courts'.[40]

■ *3.1. Constitutional Court of the Republic of Croatia*

3.1.1. Overview of the Historical Development of the Constitutional Judiciary in Croatia

Croatia has a longstanding tradition of constitutional judiciary, dating back to the pre-democratic period. The development of Croatian constitutional justice may be divided into two historical phases.

The first period, from 1963 to 1990, coincided with Croatia's status as one of the six federal republics of the former SFRY. The 1963 federal and republican constitutions introduced a constitutional judiciary, establishing constitutional courts at both federal and republican levels. The Constitutional Court of the former SRC commenced operations in 1964.

The second period began in 1991, following the attainment of Croatian independence and sovereignty. However, the Court had already been renamed the CCRC by the Amendments to the Constitution of the former SRC on 25 July 1990.[41]

In 1991, the Croatian Parliament adopted the first CA-CCRC, followed by the second and current CA-CCRC in 1999.[42] Since 1990, no other legislation in the Croatian constitutional framework, apart from the CA-CCRC, has been enacted following the procedure prescribed for constitutional acts, which the Constitution endows with constitutional force.

The Court's jurisdiction was expanded by the Second Revision of the Constitution in 2000. This revision also introduced the procedure for nominating and

40 Shapiro, 1981, p. 40.
41 See: footnote 3.
42 See: footnote 11.

electing judges of the CCRC, assigning this responsibility to the Parliamentary Committee competent for constitutional matters.

As of the Fourth Revision of the Constitution in 2010, the CCRC has consisted of 13 judges elected by a two-thirds majority of all Members of Parliament from among distinguished legal professionals, particularly judges, state attorneys, attorneys-at-law, and university law professors, according to the procedure and method prescribed by the CA-CCRC. Judges serve for an eight-year term, which may be extended by up to six months in exceptional cases, such as when a successor has not yet been elected or assumed office upon the expiration of the incumbent's term.[43]

On 5 December 1991, the Parliament adopted the first Decision on the Appointment of Judges of the CCRC, electing nine of the 11 judges. These judges assumed office on 7 December 1991 after being sworn in by the President of the Republic. On 7 December 2024, the Parliament was reconvened, and the President of the Republic administered the oath to 10 newly elected judges of the CCRC. This event marked the fifth successive appointment of the majority of the Court's judges since 1991. To date, there has not been an instance in which a majority of judges were not elected on time. However, the election process has frequently been accompanied by intense political tensions and uncertainty concerning its timing.

3.1.2. Elected or Appointed Functions at the Croatian Constitutional Court

In accordance with Art. 127.3 of the Constitution, the CCRC adopted its Rules of Procedure.[44]

Judicial functions within the CCRC are elected by the Plenary Session, composed of all 13 judges (hereinafter 'the Plenary'), and may be renewed. These functions include the President of the Court (hereinafter 'the President'), the Deputy President, and the Presidents of Chambers. All judges, except the President, also act as judge-rapporteurs.[45]

Appointments for legal advisory positions include those in the Legal Advisers' Service, the Service for the Establishment of Procedural Requirements for

43 Art. 122.1 of the Constitution. Between 1991 and 1999, the CCRC was composed of eleven judges appointed by the House of Representatives upon the proposal of the House of Counties of the Parliament for an eight-year term. Judges were selected from among distinguished jurists, particularly judges, public prosecutors, attorneys, and university law professors. A candidate was considered elected upon receiving the support of a majority of all Members of Parliament.

44 Art. 127.3 of the Constitution provides that the internal organisation of the CCRC shall be regulated by its rules of procedure. See: Rules of Procedure of the CCRC (*Poslovnik Ustavnog suda*) [Online]. Available at: https://www.usud.hr/sites/default/files/dokumenti/Editorially_revised_and_consolidated_text_of_the_Rules_of_Procedure_of_the_Constitutional_Court_of_the_Republic_of_Croatia.pdf (Accessed: 25 January 2025).

45 Art. 9 of the Rules of Procedure.

Deciding on Constitutional Complaints, the Service for the Preliminary Examination Process, and the Records and Documentation Centre of the CCRC.

3.1.2.1. President and Deputy President of the Court

The President is elected for a four-year renewable term by secret ballot, requiring a majority of votes from all judges.[46] The Rules of Procedure prescribe the election process.

The President represents the CCRC before domestic and international institutions and is responsible for maintaining the Court's independence from all state bodies and external actors, including in matters concerning the allocation of resources within the State Budget, based on the Court's annual budget.

The President ensures the proper and efficient functioning of the Court's proceedings and undertakes the following tasks, inter alia, within the scope of the CCRC's constitutional jurisdiction: preparing, convening, and presiding over Plenary and Expert meetings of judges; ranting permission for television and radio broadcasts from the Court; scheduling and conducting public hearings following Plenary conclusions; signing decisions, rulings, and reports adopted at Plenaries.

All requests and proposals for the abstract review of legal norms are assigned to a judge-rapporteur by the President.

As the head of the CCRC's administration, the President oversees the work of the Secretary-General, who is directly accountable to the President for the management of organisational units. The President adjudicates appeals against decisions of the Secretary-General concerning legal advisers and civil servants.

The President issues most of the Court's internal general acts.[47] Although the President holds equal voting rights at Plenaries, being *primus inter pares* and unable to cast a deciding vote in the event of a tie, the President's influence on the Court's decisions is significant, owing to the scope of the assigned duties and the authority conferred by the judges who elected the President.

The Deputy President performs duties delegated by the President and acts as a substitute in the President's absence or incapacity.[48]

3.1.2.2. President of the Chamber

Chambers are permanent bodies of the CCRC composed of either six or three judges, depending on the nature of the applications under consideration. All constitutional complaints and appeals fall under their jurisdiction.

46 Art. 122.3 of the Constitution and Art. 12.2 of the Rules of Procedure.
47 Arts. 13–17 of the Rules of Procedure.
48 Arts. 18–19 of the Rules of Procedure.

The Plenary appoints the President and members of each Chamber following a proposal by the CCRC President, through a public majority vote of all judges.

The President of a Chamber prepares and proposes the agenda, convenes and conducts Chamber sessions, and signs decisions and rulings rendered in those sessions.[49]

3.1.2.3. Judge-Rapporteur

A judge who conducts proceedings acts as judge-rapporteur in that case and is responsible for its legal processing.

Judge-rapporteurs perform various tasks in case management, including: determining whether to exclude the public from proceedings; requesting documents and information necessary for the conduct of proceedings and proposing orders for seizure in cases of repeated failure to submit documents; commissioning expert reports from external scientific legal advisers; submitting a draft decision with a written brief of the case for discussion at the relevant session; presenting the draft orally at the session and, where necessary, providing additional explanations or authorising a legal adviser to do so.

In addition to these general responsibilities, judge-rapporteurs have specific competences depending on the type of application being adjudicated.[50]

3.1.2.4. Legal Advisers

Legal advisers play a vital role in ensuring the effective and proper functioning of the CCRC. They are responsible for the legal and technical preparation of assigned cases and must sign the draft decisions, rulings, and reports they help to prepare, assuming responsibility for their content and order.

If a legal adviser disagrees with a draft decision, ruling, or report prepared under the instruction of a judge-rapporteur, they have the right to submit a dissenting opinion. This must be provided in writing to the President of the CCRC or the competent Chamber, along with the draft. The dissenting opinion forms part of the case file.

Legal advisers attend Plenaries, Expert meetings of judges, and Chamber sessions, unless otherwise decided by the judges. When invited by judge-rapporteurs, they may introduce cases, explain drafts orally, and provide further reasoning if required. They participate in deliberations and may contribute opinions and proposals on matters under discussion.[51]

49 Arts. 24–29 of the Rules of Procedure.

50 Arts. 30–35 of the Rules of Procedure. Generally, parties to proceedings before the CCRC may submit requests, proposals, constitutional complaints, appeals, and initiatives. These are collectively referred to as 'applications'.

51 Arts. 74–83 of the Rules of Procedure.

■ *3.2. Overview of the Jurisdiction of the Croatian Constitutional Court*

Unlike in certain other European states (e.g. Germany), the CCRC does not form part of the judiciary. Rather, it constitutes a distinct component of the constitutional order, entirely independent of the three branches of government and other public legal entities. It exercises constitutional oversight over all of them. This institutional position derives from the formal structure of the Constitution and the Court's jurisdiction, which is based on the European-Continental Model of centralised and concentrated constitutional review, often referred to in the literature as the 'Austrian' (Kelsenian) Model of Constitutional Review.[52]

The CCRC operates on the basis of the Constitution, the CA-CCRC, and its Rules of Procedure.

The principal provisions governing the Court's jurisdiction are set out in Chapter V of the Constitution (Arts. 125, 125a and 126), entitled 'The Constitutional Court of the Republic of Croatia'. Under the 1990 Constitution, the CCRC is empowered to: decide on the conformity of laws enacted by the Parliament with the Constitution; assess the conformity of other regulations with the Constitution and statutory law; adjudicate constitutional complaints in individual cases concerning violations of fundamental rights; resolve jurisdictional disputes among the legislative, executive, and judicial branches; supervise the constitutionality of the programmes and activities of political parties, and may prohibit their work if their programme or activities threaten violence against the democratic constitutional order, independence, unity, or territorial integrity of the Republic of Croatia; monitor the constitutionality and legality of elections and referenda, and resolve electoral disputes that do not fall within the jurisdiction of the ordinary courts; at the proposal of the Croatian Government, determine whether the President of the Republic is permanently unable to discharge his duties (in which case the Speaker of the Parliament temporarily assumes the President's responsibilities); decide, in proceedings initiated by a two-thirds majority vote of all Members of Parliament, and by a two-thirds majority vote of all its judges, on the impeachment of the President of the Republic. If the impeachment is upheld, the President's mandate ceases by force of the Constitution.

Since the Second Revision of the Constitution in 2000, the CCRC has been vested with additional competencies, including: the power to review the constitutionality of a law, and the constitutionality and legality of other regulations that have lost legal force, provided that no more than one year has passed since their repeal and the initiation of proceedings; the obligation to report to Parliament on any unconstitutionality or illegality it identifies; the authority, upon the Government's proposal, to determine that the Speaker of the Parliament shall

52 As is well established, the evolution of constitutional jurisprudence has significantly altered Kelsen's definition of a constitutional court as a negative legislator. While constitutional courts retain the power to invalidate unconstitutional laws, certain structural features of Kelsen's model persist. For further detail, see: Carrozza, 2019, pp. 66 et seq.

temporarily assume the duties of the President of the Republic in the event of prolonged incapacity or illness; the provision of prior consent for the detention or initiation of criminal proceedings against the President of the Republic; the adjudication of appeals against decisions of the State Judicial Council concerning the dismissal of judges or their disciplinary liability (such appeals preclude the lodging of constitutional complaints);[53] notifying the Government if a competent authority has failed to enact regulations necessary to implement constitutional or statutory provisions; informing Parliament of any regulations that the Government should have issued, where the statutory deadline has expired.

Moreover, Art. 95 of the 1999 CA-CCRC provides that where 10% of the total number of Croatian voters call for a referendum under Art. 87.3 of the Constitution,[54] the CCRC shall, at the request of the Parliament, determine whether the referendum question complies with the Constitution and whether the constitutional requirements for calling a referendum have been satisfied.

In certain proceedings concerning the protection of individual fundamental rights, the CCRC has in its practice directly assumed jurisdiction from the ECHR.[55]

The CCRC issues decisions and rulings, as well as reports to Parliament (hereinafter 'the decisions'). Regarding their binding force, Art. 31 of the CA-CCRC provides:

> (1) The decisions and the rulings of the Constitutional Court are obligatory, and every individual or legal person shall obey them.
> (2) All bodies of the central government and the local and regional self-government shall, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Constitutional Court.

53 This competence of the CCRC has consistently been regarded as a 'deviation' from the Croatian model of constitutional adjudication. In such proceedings, the CCRC acts as the second-instance appellate body reviewing decisions of the State Judicial Council. The introduction of this arrangement was politically motivated, as it enabled resolution of the most sensitive matters concerning the appointment of ordinary court judges without provoking significant political conflict.

54 Art. 87.3 of the Constitution provides: 'The Croatian Parliament shall call referendums on the issues specified in paragraphs (1) and (2) of this Article in accordance with the law when so requested by ten per cent of the total number of voters in the Republic of Croatia'. A referendum may be called on proposals to amend the Constitution, a bill, or any issue within the remit of the Parliament (Art. 87.1). Additionally, a referendum may be called on any matter that the President of the Republic deems important to the independence, integrity, and existence of the Republic of Croatia, including constitutional amendments. In this latter case, the referendum shall be called by the President upon the proposal of the Croatian Government, with the countersignature of its President (Art. 87.2).

55 See Section 1.4.3., under the heading 'Individual Constitutional Complaint', concerning the constitutional complaint designated as 'U-IIIBi'.

(3) The Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and rulings of the Constitutional Court.
(4) The Constitutional Court may determine which body is authorised for the execution of its decisions or rulings.
(5) The Constitutional Court may determine the manner in which its decisions or rulings shall be executed.

From 22 December 1990 and 31 December 2024, the CCRC received a total of 146,006 cases of all types.[56] These may be categorised by principal designation as follows: a) 'U-I' and 'U-II' (abstract constitutional control of legal norms): 14,274 cases (9.8%); b) 'U-III', 'U-IIIA', 'U-IIIB', 'U-IIIBi', 'U-IIIVs' (constitutional complaints): 129,855 cases (88.9%); c) other designations: 1,877 cases (1.3%).

■ *3.3. Principal Powers of the Croatian Constitutional Court*

In Croatia, any person may propose, and certain state authorities may request, that the CCRC undertake an abstract review of a law or other regulation by means of an *actio popularis* (the so-called 'abstract constitutional control of legal norms'). Additionally, ordinary courts may request that the CCRC review a law or other regulation in connection with a specific case pending before them (the so-called 'concrete constitutional control of legal norms'). Finally, any individual may request that the CCRC review an individual act which determines their rights and obligations in any legal matter (the so-called 'individual constitutional control').

For this study, the analysis is confined to the constitutional review of legal norms and the adjudication of constitutional complaints.

3.3.1. Abstract Control of Legal Norms

A request for abstract control of legal norms, by which proceedings before the CCRC are instituted *ex lege* (hereinafter 'the request'), may be submitted by: one-fifth of Members of Parliament; a parliamentary committee; the President of the Republic; the Croatian Government (limited to issues of the constitutionality and legality of regulations); the Ombudsperson (only within the remit prescribed by the Constitution); the representative body of a unit of local or regional self-government (limited to laws concerning their organisation, competence or financing).[57]

The CCRC may also institute proceedings for abstract constitutional control on its own initiative.[58]

56 On 22 December 1990, the CCRC identified 180 pending cases dating from the socialist regime. For the designation of these cases, see Art. 54 of the Rules of Procedure.
57 Arts. 35 and 36 of the CA-CCRC.
58 Art. 38 of the CA-CCRC.

Furthermore, any natural or legal person has the right to propose that the CCRC initiate such proceedings (hereinafter 'the proposal'). Upon receipt of a proposal, the CCRC decides at its Plenary session whether to accept the proposal and institute proceedings or to deny it.

Where the Court deems it necessary, it may hold a consultative session involving the parties to the proceedings, government authorities, self-government bodies, associations, scholars and other experts prior to reaching a decision on the merits of the case. The Plenary may also decide the case on the basis of a public hearing.[59]

The CCRC may, prior to issuing a final decision, temporarily suspend the enforcement of individual decisions or actions taken on the basis of the legal norms under review if their enforcement could result in grave and irreparable consequences.[60] However, such interim measures are rarely imposed.[61]

Requests and proposals are adjudicated by the Plenary. Where the CCRC finds that a law enacted by Parliament is not in conformity with the Constitution, it shall repeal the law or the relevant provisions. In the case of other regulations, the CCRC is authorised to repeal or annul the regulation or particular provisions thereof.[62]

A decision by the CCRC to repeal an unconstitutional legal norm has direct legal effects on individual acts based on that norm. The CA-CCRC provides for the reopening of criminal, civil or administrative proceedings in such cases. It also provides for compensation where a final judgment in a criminal matter based on a repealed legal norm has already produced legal effects, or where the violation of the applicant's rights cannot be remedied by amending the final individual act.[63]

Compared to proposals, the number of requests submitted has been negligible and, therefore, they are not assigned a separate designation. As a result, the essential function of the request, namely, to serve as an effective instrument enabling a parliamentary minority to challenge and potentially remove constitutionally questionable legislation enacted by the majority, has not been fulfilled. Similarly, the number of proceedings instituted by the CCRC on its own initiative remains very limited. To date, the CCRC has exercised this power only in instances

59 Arts. 49–50 of the CA-CCRC.

60 Art. 45 of the CA-CCRC.

61 From 22 December 1990 to 31 April 2024, the CCRC issued a total of 103 interim measures in both types of proceedings, namely proceedings for abstract control of legal norms and proceedings instituted by constitutional complaints.

62 Art. 55.3 of the CA-CCRC reads, 'The CCRC may annul a regulation, or its individual provisions, taking into account all the circumstances important for the protection of constitutionality and legality, and especially bearing in mind how seriously it violates the Constitution or the law, and the interest of legal certainty: – if it violates human rights and fundamental freedoms guaranteed by the Constitution; – if, without grounds, it places some individuals, groups or associations in a more privileged or less privileged position'.

63 Arts. 58–59 of the CA-CCRC.

where it repealed legal provisions that extended its jurisdiction beyond the limits established by the Constitution.

From 22 December 1990 to 31 December 2024, the CCRC received 14,274 requests and proposals concerning the abstract control of legal norms and adjudicated 14,214 of them (99.6%).[64] The following breakdown reflects the categories of these cases: a) 'U-I' (constitutional control of laws passed by Parliament): 9,248 received; 9,109 adjudicated (98.5%). Of these, 587 laws or provisions thereof were repealed, and six laws or provisions were declared unconstitutional, representing 6.5% of all cases adjudicated in this category. b) 'U-II' (constitutional control of other regulations passed by other state bodies, and, until 1 January 2012, by self-government bodies and public legal persons):[65] 5,026 received; 5,105 adjudicated.[66] The CCRC repealed 299, annulled 18, and declared unconstitutional 543 regulations or provisions, representing 16.8% of all cases adjudicated in this category.

In 2024, the CCRC received 121 requests and proposals, which mark the lowest annual number of submissions since 1990.[67] The same year, it adjudicated 138 (114.1%) requests and proposals. Among these, the CCRC accepted seven requests and proposals, resulting in the repeal of certain laws and regulations or provisions thereof. It rejected 68 and dismissed 59 requests and proposals. In addition, in four cases, the CCRC terminated proceedings pursuant to Art. 61 of the CA-CCRC.[68] Notably, no interim measures were imposed in 2024.

3.3.2. Concrete Control of Legal Norms

A request for constitutional review of legal norms may also be submitted by the Supreme Court or any other ordinary court where a constitutional or legal issue arises during proceedings before that court. In such cases, the constitutionality of

64 In 2009, 110,587 cases were received for the review of the constitutionality of the 2009 Act on Special Tax on Earnings, Pensions and Other Income ('U-I'). All cases have been resolved. They are not recorded in the regular statistics of the CCRC nor are they included in the statistical analysis in this Chapter.

65 With the entry into force of the 2010 Administrative Disputes Act (OG 20/10) on 1 January 2012, all general acts of self-government bodies and public legal persons have been submitted to the jurisdiction of the High Administrative Court of the Republic of Croatia to control their legality. In accordance with Art. 125, indent 2 of the Constitution, the CCRC retained its jurisdiction in reviewing the constitutionality and legality of 'other regulations', that is, regulations of state bodies only.

66 The greater number of resolved than received 'U-II' cases results from the later re-designation of certain cases that were initially managed under other designations.

67 The CCRC received the highest number of requests and proposals in 2014 (2,812). Among these, 1,146 proposals related to the constitutionality of the 2014 Act on the Denial of the Right to a Salary Increase Based on Years of Service ('U-I'), and 1,122 cases related to the constitutionality of the Government Decree of the same name for the execution of the said Act ('U-II').

68 Art. 61 of the CA-CCRC reads, 'The Constitutional Court may end the proceedings if the applicant withdraws the request, or the proposal, and shall do so in cases when the requirements for the conduct of proceedings cease to exist'.

legal norms is assessed in relation to the specific circumstances of the case under adjudication.

The fundamental precondition for initiating this form of constitutional review is a determination by the ordinary court that the applicable law (or one of its provisions) is not in conformity with the Constitution, or that the applicable regulation (or provision thereof) is not in conformity with either the Constitution or the law.

In the first instance, where the court finds that a law is unconstitutional, the court must suspend the proceedings and submit a request to the CCRC for constitutional review of the relevant law or provision (the so-called *exceptio unconstitutionalis*).

In the second instance, where the court finds that a regulation contravenes the law and is therefore unconstitutional, it must apply the law directly in the case at hand and submit a request to the CCRC to assess the constitutionality and legality of the contested regulation or its provisions (the so-called *exceptio illegalis*).

Although these mechanisms are well-designed, they are seldom employed by the courts, to the extent that the CCRC does not maintain separate statistical records for court-initiated requests. The reasons for this underutilisation are multifaceted: they include a deeply entrenched view among ordinary courts that constitutional matters fall outside their jurisdiction, as well as the CCRC's failure to appreciate that court-submitted requests require a distinct approach from the standard abstract review of legal norms.

3.3.3. Individual Constitution Complaint

In Croatia, the 'ordinary' constitutional complaint, designated as 'U-III', satisfies all the criteria of a full constitutional complaint as defined by the Venice Commission.[69] Any individual may lodge a constitutional complaint with the CCRC if they consider that an individual act issued by a state authority, a body of local or regional self-government, or a public legal entity, concerning their rights and obligations, or regarding a suspicion or accusation of a criminal offence, has violated their fundamental rights or their constitutional right to local and regional self-government. Where another legal remedy is available in response to an alleged violation of constitutional rights, a constitutional complaint may only be lodged after such remedy has been exhausted. In administrative matters where an administrative dispute may be initiated, a constitutional complaint may likewise be submitted only after all remedies before administrative courts have been exhausted. The same applies to an appeal on points of law (a 'second appeal')

69 Venice Commission (2018) CDL-AD (2018)012-e, Georgia – Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases, Opinion No. 923/2018, Strasbourg, 25 June 2018, Arts. 25–26, pp. 6–7 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)012-e (Accessed: 29 January 2025).

as an extraordinary legal remedy in civil proceedings before the Supreme Court. The 'ordinary' constitutional complaint must be submitted within 30 days from the date the decision was received.[70]

In addition to the 'ordinary' constitutional complaint ('U-III'), the CCRC has introduced several other categories of these complaints with special designations: 'U-IIIA', 'U-IIIB', and 'U-IIIBi'.[71] These types constitute exceptions to the general rule of exhaustion of legal remedies prior to submission of the constitutional complaints.

'U-IIIA' complaints relate to the excessive length of proceedings before the ordinary courts.[72]

'U-IIIB' complaints are lodged before legal remedies have been exhausted when the impugned individual act (most commonly, an administrative act not yet subject to a final ruling by an administrative court) grossly violates constitutional rights.[73]

'U-IIIBi' complaints may be submitted prior to the exhaustion of remedies where the investigation of a criminal offence has either not been conducted or has been conducted ineffectively. These cases usually relate to Arts. 2 and 3 of the ECHR, specifically the right to life and the prohibition of torture. Given the self-executing nature and quasi-constitutional status of the ECHR and its Protocols within Croatia's legal system, the 'U-IIIBi' complaint reflects how the CCRC may derive jurisdiction directly from the ECHR, as interpreted by the ECtHR, in instances where constitutional or statutory provisions, such as CA-CCRC, do not offer adequate coverage for the protection of fundamental rights.

As a rule, a constitutional complaint does not stay the execution of the impugned individual act. However, upon the applicant's proposal, the CCRC may

70 Arts. 62 and 64 of the CA-CCRC.

71 From 2006 to 2010, there were also constitutional complaints designated as 'U-IIIVs'. They could be lodged against a ruling of the Supreme Court that decided on the appeal in the proceedings for the protection of the right to trial within a reasonable time. However, this category of constitutional complaints is not applicable after the entry into force of the 2009 Courts Act (OG 153/09), which prescribed that, as of 29 December 2009, the constitutional complaint 'U-IIIVs' was replaced by an appeal against the decision of the Supreme Court, which may be filed with the specialised Council of the Supreme Court as the second instance.

72 Art. 63 of the CA-CCRC prescribes that the CCRC shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the ordinary court did not hand down a judgment within a reasonable time. If the CCRC grants the constitutional complaint, it shall provide a deadline for the ordinary court to deliver the judgment. At the same time, the CCRC shall determine appropriate compensation for the applicant for this violation. The compensation shall be paid from the state budget within three months from the date the applicant lodged a request for its payment.

73 Art. 63.1 of the CA-CCRC provides that the CCRC shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the impugned individual act grossly violates constitutional rights and it is obvious that grave and irreparable consequences may arise for the applicant if proceedings before the CCRC are not initiated.

suspend execution of a judgment issued by an ordinary court pending its decision on the complaint, if enforcement would cause the applicant irreparable harm and such a stay would neither contravene the public interest nor result in greater harm to others.[74] These interim measures are rarely applied.[75] Notably, the CCRC has not imposed such a measure in the past three years (2022, 2023, and 2024).

The CCRC shall dismiss a constitutional complaint on procedural grounds (a 'procedural dismissal') by ruling that: it is not competent; the complaint was not submitted within the prescribed time limit; the complaint is incomplete, incomprehensible, or inadmissible.

A constitutional complaint is inadmissible if: the applicant failed to use an available and effective legal remedy in prior proceedings (with exceptions in cases where the complaint may be submitted prior to the exhaustion of remedies); it was lodged by a natural person not entitled to do so; it was submitted by an entity not recognised as a 'holder of constitutional rights', such as a state authority, self-government body, or public legal entity.[76]

The CCRC shall also dismiss a complaint on the merits ('dismissal on the merits') if it deems the claim manifestly unfounded; that is, lacking any constitutionally-grounded substance warranting further examination.

When adjudicating on the merits, the CCRC may issue a decision: granting the complaint, rejecting it, or merely declaring the violation of a constitutional right.

If the CCRC finds that the constitutionally grounded reasons for disputing the individual act do not exist, it rejects the complaint on the merits.[77]

If the complaint is granted, the CCRC quashes the impugned act that violated the applicant's constitutional rights. Moreover, the Court may determine that other acts issued within the same case also violated constitutional rights, and shall quash those acts either wholly or in part.[78] For example, the CCRC often quashes not only the judgment of the High Administrative Court, but also the judgment of the first-instance administrative court, as well as the administrative acts issued in the first and second instances of the preceding administrative procedure.

As a general rule, the CCRC shall remand the matter to the authority responsible for the quashed act for renewed proceedings. In doing so, the competent authority is obliged to adhere to the legal opinion expressed by the CCRC in its decision quashing the previous act.[79]

If the competent authority disregards the CCRC's legal opinion in its newly issued decision, the applicant may lodge a new constitutional complaint. In such

74 Art. 67 of the CA-CCRC.
75 See footnote: 61.
76 Art. 72 of the CA-CCRC.
77 Art. 75 of the CA-CCRC.
78 Art. 74 of the CA-CCRC.
79 Arts. 76.2 and 77.2 of the CA-CCRC.

instances, the CCRC shall initiate proceedings under the 'U-IIIB' designation (before the exhaustion of legal remedies). The CCRC shall then determine that the authority has grossly violated the applicant's constitutional rights by failing to implement its prior legal opinion. It will consequently quash the newly adopted act and remand the case once again.[80] However, such cases remain rare.

If the impugned act no longer produces any legal effect, the CCRC shall issue a declaration of its unconstitutionality and specify in the operative part of its decision which constitutional right was violated.[81] In its case law, the CCRC has mostly declared violations of the right to a fair trial, typically in cases where the infringement was minor[82] or irreparable,[83] albeit not decisive. In such instances, where necessary, the Court has ordered the award of fair monetary compensation to applicants.[84]

The Chamber of the CCRC, composed of six judges, decides on the merits of constitutional complaints, including dismissals on the merits. There are two such Chambers. A separate Chamber of six judges exists for urgent proceedings (commonly referred to as the 'Habeas Corpus Chamber'), which convenes as necessary, including outside regular working hours and on non-working days.

Procedural dismissals, such as those based on untimely submission, lack of standing, or inadmissibility, are decided by a Chamber composed of three judges. There are four such Chambers.

All Chambers must reach decisions unanimously and with the participation of all members. Where unanimity is not achieved, or the matter is considered of particular significance, the complaint is referred to the Plenary for a decision.[85]

From 22 December 1990 to 31 December 2024, the CCRC received a total of 129,855 constitutional complaints across all categories and adjudicated 124,135 of them, representing 95.6%. Of these, the CCRC upheld 7,798 complaints, amounting to 6.5% of all adjudicated cases.

The breakdown by category is as follows: a) 'U-III' (ordinary complaints): 121,889 received; 116,791 adjudicated (95.8%). The CCRC quashed individual acts in 4,457 cases and declared unconstitutionality in 290 cases (4.1% of adjudicated cases in this category). b) 'U-IIIA': 6,130 received; 5,647 adjudicated (92.1%).

80 Cf. CCRC, Decision U-IIIB-1005/2004 of 8 July 2004, OG 96/04.

81 Art. 76.3 of the CA-CCRC.

82 Cf. CCRC, Decision U-III-3141/2020 of 5 December 2024 (unpublished; available at: www.usud.hr). In this case, the CCRC declared a violation of the applicant's right to a fair trial committed by the failure to provide the applicant with the State Attorney's Office's response to his appeal against the first-instance judgment.

83 Cf. CCRC, Decision U-III-4107/2023 of 3 December 2024 (unpublished) [Online]. Available at: www.usud.hr (Accessed: 27 January 2025). In this case, the CCRC declared a violation of the applicant's right to a fair trial concerning the right to a public pronouncement of the judgment.

84 Cf. CCRC, Decision U-III-3053/2018 of 24 June 2020, OG 85/20, Art. 84.

85 Art. 68 of the CA-CCRC.

The Court found violations of the right to a reasonable length of proceedings in 3,223 cases (57.1% of adjudicated cases in this category). c) 'U-IIIB': 909 received; 880 adjudicated (79.9%). The Court quashed individual acts prior to the exhaustion of remedies in 16 cases and found a violation of constitutional rights in one case (1.9% of adjudicated cases in this category). d) 'U-IIIBi': 289 received; 177 adjudicated (61.3%). The CCRC quashed individual acts in 14 cases due to ineffective or absent investigations, and declared violations of the right to life or the prohibition of ill-treatment in 34 cases (27.1% of adjudicated cases in this category). e) 'U-IIIVs' (operational from 2006 to 2010): 638 received; 638 adjudicated (100%). The CCRC quashed appellate decisions of the Supreme Court regarding the right to a reasonable length of proceedings in 89 cases (13.9% of adjudicated cases in this category).[86]

Below is an analysis of the CCRC's work on constitutional complaints over one year. For illustration, the year 2024 has been selected. In this year alone, the CCRC received 5,516 constitutional complaints and adjudicated 5,989.

The CCRC granted 344 constitutional complaints as having merit, quashing the impugned individual acts in each case. This figure represents 5.7% of all constitutional complaints adjudicated that year. The distribution of these granted complaints by category is as follows: a) 'U-III': 197 cases; b) 'U-IIIA': 137 cases; c) 'U-IIIB': 1 case; d) 'U-IIIBi': 9 cases.

Additionally, in 59 cases, amounting to 1.0% of all complaints adjudicated in 2024, the CCRC granted constitutional complaints and declared that the applicants' constitutional rights had been violated, without quashing the impugned individual act(s). These cases were distributed as follows: a) 'U-III': 48 cases; d) 'U-IIIBi': 11 cases.

The CCRC rejected 468 constitutional complaints on the merits in 2024, which constitutes 7.8% of all adjudicated complaints. The number of rejections by category is as follows: a) 'U-III': 412 cases; b) 'U-IIIA': 41 cases; c) 'U-IIIB': 8 cases; d) 'U-IIIBi': 7 cases.

Further, the CCRC dismissed 4,946 constitutional complaints, whether through procedural dismissal or dismissal on the merits, which represents 82.6% of all adjudicated complaints in 2024. The breakdown by category is as follows: a) 'U-III': 4,813 cases; b) 'U-IIIA': 77 cases; c) 'U-IIIB': 43 cases; d) 'U-IIIBi': 13 cases.

Finally, the CCRC terminated proceedings initiated by constitutional complaints in 86 cases (1.4% of all proceedings instituted in 2024). Terminations were due to the applicant's death, the dissolution of a legal person, or the withdrawal of the complaint by the applicant.

86 CCRC, *Statistics* [Online]. Available at: https://www.usud.hr/en/statistics (Accessed: 3 February 2025).

4. Supreme Court of the Republic of Croatia

Art. 62.2 of the CA-CCRC provides: 'If another legal remedy is provided against violation of constitutional rights, the constitutional complaint may be lodged only after this remedy has been exhausted'. However, until 2022, the possibility of establishing such an alternative legal remedy, distinct from a constitutional complaint, for violations of constitutional rights had not been utilised.

On 1 July 2022, the Croatian Parliament adopted the Act on Amendments to the Civil Procedure Act (hereinafter 'the 2022 CPA Amendments'), which entered into force on 19 July 2022.[87]

In addition to ensuring the uniform application of the law, the 2022 CPA Amendments extended the public function of the Supreme Court by introducing additional grounds for appeal on points of law ('second appeal') based on alleged violations of 'fundamental human rights'. Specifically, the second paragraph of Art. 385a of the Civil Procedure Act (CPA),[88] as amended in 2022, states:

> The Supreme Court shall also grant leave to lodge an appeal on points of law if a party argues plausibly [in literal translation, 'has made it probable'] that in the first- or second-instance proceedings, owing to particularly serious breaches of the rules of civil procedure or an incorrect application of substantive law, there has been a breach of a fundamental human right guaranteed by the Croatian Constitution or the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the party, if possible, already referred to those breaches in the proceedings before the lower courts.

Following the changes introduced by the 2022 CPA Amendments to the statutory regulation of appeals on points of law in civil matters, the CCRC modified its practice on the admissibility of constitutional complaints concerning such appeals.[89] As of March 2023, applicants are now required to raise their arguments concerning alleged breaches of constitutional and/or Convention rights before the Supreme Court prior to lodging a constitutional complaint. The 30-day time limit for submitting a constitutional complaint begins upon receipt of the Supreme Court's judgment or decision. In line with the principle of subsidiarity, the CCRC will

87 Act on Amendments to the Civil Procedure Act (*Zakon o izmjenama i dopunama Zakona o parničnom postupku*), OG 80/22. The 2022 CPA Amendments completely abolished the private function of the Supreme Court in civil cases.

88 Civil Procedure Act (*Zakon o parničnom postupku*), Official Gazette of Yugoslavia 4/77 with subsequent amendments, and OG 53/91, with last amendments in 155/23.

89 Cf. CCRC, Decision U-III-207/2023 of 7 March 2023 (OG 30/23) and Decision U-III-7150/2022 of 7 March 2023 (OG 32/23).

examine the Supreme Court's decision, specifically whether and how the Supreme Court addressed the party's arguments concerning violations of constitutional or Convention rights, as well as the decisions of the lower courts that preceded it, provided the complainants had challenged those decisions.[90]

In light of this new legislative model of judicial protection of individual fundamental rights, it may be argued that, as of 2022, such protection in civil matters has been organised across two judicial instances. Consequently, in civil matters, the CCRC has relinquished its essential function as the exclusive bearer of centralised and concentrated constitutional review; that is, as the sole body authorised to quash a decision of an ordinary court, including the Supreme Court, when that decision has infringed constitutional or Convention rights. Instead, the CCRC now assumes a more appellate-like function in relation to the Supreme Court's first-instance decisions on violations of constitutional and/or Convention rights.

5. Concluding Remarks

Although the catalogue of constitutional rights was established as early as 1990, the regulation of fundamental rights within the Croatian Constitution remains attuned to the challenges of contemporary society. Nevertheless, this catalogue must always be evaluated in the broader historical and political context in which it was adopted. The 1990 Constitution incorporated elements reflective of an aspirational *model* of a future society, expressing a normative expectation, a forward-looking orientation towards values that characterised a society yet to exist, but which the populace aspired to realise.

However, this 'image of a well-ordered society', embodied in the 1990 Constitution, did not align with the lived reality of Croatian society at the time. This divergence can be attributed, in part, to the fact that 'the West constitutional democracy developed as the "superstructure" of a particular system of social relations'. In contrast, in Croatia, as in other post-communist European states, 'it must function as the "base", as the frame that will subsequently – if everything goes according to plan – be filled with the social contents of the open society'.[91] The pronounced gap between the 'ideal' and the 'real' (that is, the imbalance between normative values derived from the constitutional doctrine of a substantive law-based state and the actual legal rules and their application in administrative and judicial practice) emerged as a structural characteristic of the newly established Croatian state.

90 For more details, see the ECtHR's case *Zelenika v. Croatia*, decision, No. 39801/23, 21 May 2024. In this case, the ECtHR addressed the change in the practice of the CCRC after Art. 385a of the CPA, as amended by the 2022 CPA Amendments, entered into force.

91 Dimitrijević, 2007, p. 127.

From the inception of the modern Croatian state, the role of the CCRC has therefore been fundamentally transformative. Its jurisprudence, shaped by reference to the case law of the ECtHR, the Court of Justice of the EU (where relevant), and other national constitutional courts (primarily the German Federal Constitutional Court), has contributed to aligning the constitutional rights catalogue with European legal standards. Through its binding decisions, the CCRC endeavours to clarify these standards for national authorities, including the legislature, judiciary, and public administration, thereby facilitating a European approach to the interpretation and application of law.

Any criticism suggesting that the CCRC has become merely a repository of external legal doctrines ought to be dismissed, provided the Court incorporates into the national legal order only those elements of European jurisprudence that fall within the interpretative scope of the Croatian Constitution, and as long as such incorporation strengthens constitutional democracy, the rule of law, and the practical protection of fundamental rights.[92]

Nevertheless, segments of the public, the media, and even state officials continue to perceive the CCRC as a political institution, largely due to the method by which its judges are elected. Furthermore, because the Court reviews laws and other normative acts that are inherently political, there persists a perception that its decisions are similarly political in nature.

In this context, it is necessary to reiterate that the CCRC is a 'court', an institution exclusively entrusted with legal reasoning, employing legal methods. Its rulings must be grounded solely in constitutional law, rather than considerations of political, social, or economic expediency. Although institutionally connected to the legislative, executive, and judicial branches, it operates independently of them. In essence, it functions as a supreme judicial authority vested with exclusive competence in constitutional adjudication. It safeguards the constitutionality of the legal order, the rule of law, and the fundamental rights enshrined in the Constitution. It is mandated to protect these principles from potential infringement by the three branches of government. Accordingly, the CCRC is often regarded as the supreme guardian of the Constitution. Its judges occupy a distinct 'constitutional space', which is neither traditionally 'judicial' (concerned with the enforcement of pre-existing legal norms) nor 'political' (concerned with the creation of new norms), when viewed through the lens of classical continental legal theory.[93]

Art. 385a of the CPA, as amended by the 2022 Amendments, has altered the relationship between the Supreme Court and the CCRC in the adjudication of individual constitutional and Convention rights, effectively establishing a hierarchical relationship akin to that of first and second instance. Whether this new two-tier

92 Omejec, 2016a, pp. 357–358.
93 Stone Sweet, 2012, p. 818.

model of protecting constitutional and Convention rights will serve to diminish or exacerbate institutional tensions between the two courts remains to be seen.

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DŽENETA OMERDIĆ*

National Human Rights Systems: Bosnia and Herzegovina

ABSTRACT: *The provisions of the Constitution of Bosnia and Herzegovina (hereinafter: the Constitution of BiH), inter alia, regulate the catalogue of human rights and freedoms, as well as the right to access the exercise of rights through institutions whose primary task is to protect human rights in the country.*
The basic issue concerning the effective protection of human rights in Bosnia and Herzegovina is reflected in the legal nature of the Constitution of BiH; however, it is also reflected in the relationship between the Constitution of BiH and ratified international instruments for the protection of human rights – primarily the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention). In other words, the provisions of the Constitution of BiH address the effective institutional protection of human rights and freedoms in the material sense of the phrase.
In addition to the judicial authorities, which certainly represent the most important institutions in resolving disputes, the institution of the Ombudsman for Human Rights of Bosnia and Herzegovina, the Constitutional Court of BiH and the Ministry of Human Rights and Refugees of BiH play a key role in the process of protecting human rights and fundamental freedoms.
One particularly important issue is the trust of citizens in state institutions whose primary task is to protect human rights.

KEYWORDS: *Human rights protection system, Constitution of Bosnia and Herzegovina, European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitutional Court of BiH, the institution of the Ombudsman for Human Rights of Bosnia and Herzegovina*

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https://doi.org/10.47078/2026.1.333-368

1. Introduction

Bosnia and Herzegovina is a state with a complex constitutional structure. Namely, according to Article I 2. of the Constitution of BiH, Bosnia and Herzegovina consists of two Entities – the Federation of Bosnia and Herzegovina[1] and the Republika Srpska.[2] Through subsequent arbitration, it was also determined that the Brcko District of Bosnia and Herzegovina exists under the state's sovereignty and is subject to the responsibilities of its institutions, as those responsibilities derive from the Constitution of BiH.[3] Furthermore, the Federation of Bosnia and Herzegovina, as one of the two entities, consists of ten cantons, each with its own constitution containing provisions related to the protection of human rights. Therefore, a detailed analysis of every level of government in Bosnia and Herzegovina, along with an overview of its normative and institutional protection mechanisms, would exceed the scope of this analysis. Accordingly, this analysis will focus exclusively on the state-level system for the protection of human rights and fundamental freedoms.

The rights and freedoms of every individual in Bosnia and Herzegovina are stipulated in the Constitution, international treaties or conventions to which Bosnia and Herzegovina has acceded, as well as other relevant legal provisions.

The Constitution of Bosnia and Herzegovina is an integral part of the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter referred to as the Dayton Peace Agreement). The Dayton Peace Agreement, which was signed on 14 December 1995 in Paris, is the result of a political compromise reached with the aim of stopping the war, which is evident in its provisions.

The war against Bosnia and Herzegovina had, as its primary goals, "the disintegration of the state of Bosnia and Herzegovina and the violent tearing apart

1 The Constitution of the Federation of Bosnia and Herzegovina contains a separate chapter (Chapter II) dedicated to human rights and fundamental freedoms. See: the Constitution of the Federation of Bosnia and Herzegovina [Online]. Available at: https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/FBH/FBH%20CONSTITUTION%20FBH%201-94%20and%2013-97.pdf (Accessed: 12 January 2025).

2 The Constitution of the Republika Srpska contains a separate chapter (Chapter II) dedicated to human rights and fundamental freedoms. See: the Constitution of the Republika Srpska.

3 Brcko District is jointly owned by (a condominium of) the Entities and is a unit of local self-government with its own institutions, laws and regulations, with powers and status definitively prescribed by the awards of the Arbitral Tribunal for the Dispute over the Inter-Entity Boundary in the Brcko Area. See at: Parliamentary Assembly of Bosnia and Herzegovina (2009) 'Amendment I to the Constitution of Bosnia and Herzegovina' [Online]. Available at: https://www.ustavnisud.ba/public/down/Amendment_I_to_the_Constitution_of_BiH_(OHR_and_CC).pdf (Accessed: 4 January 2025).

of its social, political, cultural and ethnic fabric through crime, genocide, and massive violations of human rights."[4] Therefore, the Dayton Peace Agreement is

> imbued with the idea that democracy and human rights are precisely the factors of building the Bosnian state, the prerequisites for the restoration of that torn fabric, and the mechanism that leads the state of Bosnia and Herzegovina into European integration.[5]

The Dayton Peace Agreement contains 11 annexes, of which Annex 4 is the Constitution of BiH. For a more complete understanding of the Constitution of BiH, it is necessary to view it together with Annex 3 (Agreement on Elections),[6] Annex 6 (Agreement on Human Rights), Annex 7 (Agreement on Refugees and Displaced

4 Bakšić Muftić, 2002, p. 314.

5 Ibid.

6 In order to promote free, fair, and democratic elections and to lay the foundation for representative government and ensure the progressive achievement of democratic goals throughout Bosnia and Herzegovina, in accordance with relevant documents of the Organisation for Security and Cooperation in Europe (OSCE), the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska have agreed about conditions for democratic elections. Furthermore, according to Article V of Annex 3, the Federation of Bosnia and Herzegovina and the Republika Srpska have agreed to create a permanent Election Commission with responsibilities to conduct future elections in Bosnia and Herzegovina. See: The Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia (1995a) 'Annex 3 of The General Framework Agreement for Peace in Bosnia and Herzegovina' [Online]. Available at: https://www.osce.org/files/f/documents/e/0/126173.pdf (Accessed: 4 January 2025).

Persons),[7] and Annex 10 (Agreement on Civilian Implementation of the Peace Agreement).[8]

The Constitution of BiH must be viewed as a whole – the parts of which are closely interconnected – and individual provisions cannot be interpreted separately without the complementary meaning of other provisions. Although there can be no question of mutual supremacy of the individual constitutional provisions, the Constitution of BiH establishes the fundamental principles on which the state is based, which are, *inter alia*, expressed in the preamble to the Constitution of BiH.

Considering human rights protection mechanisms – in addition to judicial authorities, who certainly represent the most important institution in resolving disputes – the key role in the process of protecting human rights and fundamental freedoms is played by the institution of the Human Rights Ombudsman of Bosnia and Herzegovina, the Constitutional Court of BiH, and the Ministry of Human Rights and Refugees of BiH. Furthermore, in its foreign policy activities, the Ministry of Foreign Affairs of BiH[9] promotes the policy of protecting human rights and fundamental freedoms and advocates for the strengthening of democracy and

7 According to Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina, the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska have agreed that "all refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina." See more: The Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia (1995c) 'Annex 7 of The General Framework Agreement for Peace in Bosnia and Herzegovina' [Online]. Available at: https://www.osce.org/files/f/documents/e/0/126173.pdf (Accessed: 4 January 2025).

8 According to Annex 10 of The General Framework Agreement for Peace in Bosnia and Herzegovina, the Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia, the Federation of Bosnia and Herzegovina and the Republika Srpska have agreed that the implementation of the civilian aspects of the peace settlement will entail a wide range of activities including continuation of the humanitarian aid effort for as long as necessary; rehabilitation of infrastructure and economic reconstruction; the establishment of political and constitutional institutions in Bosnia and Herzegovina; promotion of respect for human rights and the return of displaced persons and refugees; and the holding of free and fair elections according to the timetable in Annex 3 of the General Framework Agreement. Furthermore, they have requested the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilise and, as appropriate, coordinate the activities of the organisations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution. See more: The Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia (1995d) Annex 10 of The General Framework Agreement for Peace in Bosnia and Herzegovina [Online]. Available at: https://www.osce.org/files/f/documents/e/0/126173.pdf (Accessed: 4 January 2025).

9 See more about the competences and foreign policy activities of the Foreign Affairs of BiH [Online]. Available at: https://www.mvp.gov.ba/en (Accessed: 4 January 2025).

the promotion of human rights. It is also important to note that the Human Rights Commission of the Constitutional Court of BiH is the successor to the Human Rights Chamber, which was originally established by Annex 6 of the Dayton Peace Agreement.

In addition to the above institutions, special bodies have been formed within the state administration system, aiming to further promote and improve the system of human rights protection. These include the Agency for Gender Equality, the Roma Committee, the Council for Persons with Disabilities, the Commission for Relations with Religious Communities, and others.

2. Norms and Protection of Human Rights in the Constitution of BiH

As previously indicated, human rights in Bosnia and Herzegovina are regulated by the provisions of the Constitution of Bosnia and Herzegovina, which contain several constitutional principles and elements of state organisation that are characteristic of modern democratic states.

The provision on the applicability of the European Convention and the other 15 international conventions, as set out in Annex 1, «constitutionalise» the entire package of human rights and fundamental freedoms of various types and scopes.

Furthermore, Article III/3.b) of the Constitution establishes that the general principles of international law are a key part of the legal order in Bosnia and Herzegovina and the Entities. In this regard, when interpreting the legal norms that make up the integrity of the legal order in Bosnia and Herzegovina, the applicable general rules of international law must not be ignored.

Given the fact that the applicable Constitution is simultaneously an integral part of an international treaty – which also determines its legal nature – in the following section, we will briefly review the most significant constitutional normative solutions related to human rights and freedoms and their protection.

■ *2.1. Preamble to the Constitution of Bosnia and Herzegovina*

As an integral part of the Constitution of BiH, the preamble has a normative character and is extremely important for understanding the subject of this analysis. Namely, 10 paragraphs in the preamble of the Constitution of BiH contain what have been described as «10 commandments for peaceful coexistence in a heterogeneous society.»[10]

The preamble of the Constitution of BiH mentions, among other things, the concepts of human dignity, freedom, equality, peace, justice, tolerance and reconciliation. From the preamble of the Constitution, as well as from the

10 Steiner and Ademović, 2010, p. 36.

instruments on human rights referred to by the constitution framers, the goal is clearly seen: «creating a legal framework for a state that has sovereignty, territorial integrity and political independence, which is based on democratic principles and in which human rights – civil, political, economic, cultural and social – should be respected.»[11]

Based on the first paragraph of the Preamble of the BiH Constitution, which reads: 'Relying on respect for human dignity, freedom and equality', it is evident that the basic and central constitutional values represent the assumptions and determinants of a democratic society. Namely, on the basis of Article II/6. of the Constitution of BiH, the state 'Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms'.

The second paragraph of the Preamble to the Constitution of BiH reads: "Dedicated to peace, justice, tolerance, and reconciliation"; it undoubtedly expresses the intention of the framers of the Constitution to stabilise and build the society of Bosnia and Herzegovina. In pluralistic societies, such as the Bosnian one, peace, justice and tolerance, as basic constitutional values, are of exceptional importance for the protection of human rights and freedoms. This is supported by paragraph 3 of the Preamble to the Constitution of BiH, which reads: "Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society." This also contributes to the definition of constitutional and legal values in Bosnia and Herzegovina. The practice of the Constitutional Court of BiH indicates that the Court often connects paragraph 3 with other constitutional provisions. As Steiner and Ademović state:

> The third paragraph of the Preamble to the Constitution of BiH reaches, in principle, the border of a guideline, the role of which is to specify and shape the multiethnic character of the state authority in Bosnia and Herzegovina in accordance with the relevant international rights listed in Annex 1 to the Constitution of BiH.[12]

This paragraph, among other things, regulates that the most adequate instrument for achieving a peaceful and pluralistic society is represented by state institutions.

In paragraph 4 of the Preamble to the Constitution of BiH, "Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy," the framers of the Constitution posited the concept of a social state (general welfare) as a constitutional principle, "declaring economic growth as a constitutional goal, and the protection

11 Bakšić Muftić, 2002, p. 316.
12 Ibid., p. 44.

of private property and the development of a market economy as a framework for an appropriate economic order."[13]

As a full member of the United Nations (UN), Bosnia and Herzegovina is obliged to act in accordance with the goals and principles on which the UN was founded. Namely, in accordance with Article I/1. of the Constitution of BiH,

> The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina', shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognised borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organisations within the United Nations system and other international organisations.[14]

In this regard, the obligation to respect the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, in accordance with international law, is also regulated. This is supported by paragraphs 5 and 6 of the Preamble to the Constitution of BiH.[15]

In the 1990s, during the aggression against Bosnia and Herzegovina, international humanitarian law did not prove to be effective in practice – it could not prevent genocide, ethnic cleansing, war crimes and crimes against humanity. In order to highlight the importance of the Geneva Conventions and the accompanying protocols, the constitution framers regulated the unlimited obligation of international humanitarian law in paragraph 7 of the Preamble to the Constitution of BiH, which reads: "Determined to ensure full respect for international humanitarian law."[16] The four Geneva Conventions and two Additional Protocols are also included in the catalogue of 15 instruments for the protection of human rights in Annex I to the Constitution of BiH, and as such, represent substantive constitutional law.

Paragraph 8 of the Preamble to the Constitution of BiH ("Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments"[17]) outlines the protection of human rights in accordance with relevant international instruments. Furthermore, some of the aforementioned international instruments are also

13 Ibid., p. 50.
14 Article I/1. of the Constitution of BiH.
15 See at: paragraphs 5 and 6 of the Preamble of the Constitution of BiH.
16 See at: paragraph 7 of the Preamble of the Constitution of BiH.
17 See at: paragraph 8 of the Preamble of the Constitution of BiH.

contained in Annex 1 to the Constitution of BiH, which further emphasises their binding force, as well as the obligation of Bosnia and Herzegovina, as a state, to protect human rights.

The tenth paragraph of the Preamble to the Constitution of Bosnia and Herzegovina – which reads: "Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows" – is of exceptional importance when it comes to the "realisation" of human rights in Bosnia and Herzegovina. Namely, if the provisions on human rights are viewed in the context of the specificities of Bosnia and Herzegovina, in terms of the existence of "constituent peoples" and consequently the protection of collective rights, it can be said that the necessary balance in respecting individual and protecting collective rights has not been established in an appropriate manner.

For example, according to the Constitution of BiH, only members of the constituent peoples can be elected to the Presidency of BiH. As the Constitution of Bosnia and Herzegovina, in certain places, established the proportional participation of the constituent peoples in the election of state bodies, the "quota" system was set up in the Presidency of BiH, along with the composition of the House of Peoples of the Parliamentary Assembly of BiH, when electing the Speaker and Deputy Speaker of the Houses. Furthermore, the provisions of the Constitution of BiH also regulate the manner of decision-making in the House of Peoples, which includes the conditionality of the minimum presence and representation of representatives of one of the constituent peoples. Finally, the provisions of the Constitution of BiH also institutionalise the protection of the vital interests of the constituent peoples, as well as the protection of the vital interests of the Entities.

In addition to the Preamble, the Constitution of BiH also contains other provisions on the protection of human rights and fundamental freedoms that refer to the principles and provisions of international law.

In the following part of the text, we will focus specifically on Article II of the Constitution of BiH.

■ *2.2. Article II of the Constitution of BiH*

Article II explicitly regulates the obligation of the state of Bosnia and Herzegovina and its Entities to ensure the highest level of internationally recognised human rights and fundamental freedoms.

Namely, Article II/1. regulates that:

> Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission

> for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.[18]

From the provisions of the Constitution of Bosnia and Herzegovina, it is clear that the constitutional legislator opted for the term *human rights and fundamental freedoms.*

The obligation to ensure the provision of legal protection at the highest level actually represents a guideline for the activities of the competent authorities in the process of protecting human rights and freedoms. The general clause contained in this paragraph is further elaborated in other articles of the Constitution of BiH.

Specifically, the obligation *to protect the covered rights* is contained in Articles I/4,[19] I/7.b),[20] II/2, II/3, II/4, II/5, II/7, III/2.c)[21] of the Constitution of BiH, as well as in Annex I. The issue of *subjects* who are obliged to provide protection is regulated in Articles I/4, II/6 and III/2.c) of the Constitution of BiH, while issues related to rights holders are regulated by Articles II/3, II/4 and II/5.[22]

In other words, the references in the Constitution to international instruments, particularly in relation to human rights and freedoms, not only allow and require BiH to attain the highest human rights standards but also build into the Constitution a certain dynamism enabling BiH to follow the development of human rights standards at the international level.

Furthermore, Article II/2. of the Constitution of BiH stipulates that:

> The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other laws.

18 Article II/1 of the Constitution of BiH.

19 There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede the full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.

20 'No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

21 'The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognised standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate.'

22 See at: Constitution of BiH.

Therefore, based on the constitutional provision, the European Convention in the legal order of Bosnia and Herzegovina is «above all other law.» This formulation positions the European Convention as a fundamental pillar of the constitutional order in Bosnia and Herzegovina.

With regard to the formulation on the direct applicability of the European Convention in Bosnia and Herzegovina, it is a provision that allows for the direct application of the rights contained therein by the courts in the country without the adoption of subsequent acts for their implementation. At the same time, the essence of the concept of direct applicability is to prohibit state bodies from preventing the application of these rights in any way or from transforming these rights into national law and concealing their true source and meaning.

According to the existing practice of the Constitutional Court of Bosnia and Herzegovina, direct application of the European Convention by regular courts is mandatory. In case number 269/10, the Constitutional Court found a violation of the right to a fair trial because the regular courts failed to apply the provisions of the European Convention directly:

> The Constitutional Court hereby recalls that, in accordance with the provisions of Article II/2 of the Constitution of Bosnia and Herzegovina, the rights and freedoms provided for in the European Convention and its protocols shall be directly applicable in Bosnia and Herzegovina and shall have priority over all other law. In this specific case, according to the Constitutional Court, the regular courts failed to apply the constitutional provisions indicating the priority of the application of the European Convention and its protocols over any other law. Therefore, the regular courts, when deciding on claims, have a constitutional obligation to apply international standards for the protection of human rights and freedoms, which was not done in this specific case.[23]

The obligation to directly apply the European Convention and the instruments from Annex I to the Constitution of BiH is often neglected in practice. This is supported by final judgments and decisions of domestic courts, as well as the European Court of Human Rights.

Article II/3. of the Constitution of BiH stipulates that all persons within the territory of Bosnia and Herzegovina shall enjoy human rights and fundamental freedoms, including:

23 Decision of the Constitutional Court of BiH in case AP 369/10, para. 34.

a) The right to life.
b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment.
c) The right not to be held in slavery or servitude or to perform forced or compulsory labour.
d) The rights to liberty and security of person.
e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.
f) The right to private and family life, home, and correspondence.
g) Freedom of thought, conscience, and religion.
h) Freedom of expression.
i) Freedom of peaceful assembly and freedom of association with others.
j) The right to marry and to found a family.
k) The right to property.
l) The right to education.
m) The right to freedom of movement and residence.[24]

Furthermore, Article II/4 of the Constitution of BiH also regulates the prohibition of discrimination. Namely, in accordance with Article II/4,

> The enjoyment of the rights and freedoms provided in the Constitution of BiH or in the international agreements listed in Annex I to the Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

However, in Bosnia and Herzegovina, while human rights are generally (formally) respected, the full enjoyment of guaranteed rights and freedoms is lacking. Namely, the enjoyment of guaranteed rights and freedoms, primarily political, is often conditioned by (non)membership of a particular constituent people. Therefore, the active and passive voting rights, as well as the principle of non-discrimination, of particular significance, since these rights highlight the challenges faced by Bosnian-Herzegovinian society. For instance, the Presidency of BiH consists of three members: one Bosniac and one Croat, each directly elected

24 Article II/3. of the Constitution of BiH.

from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.[25]

Article X/1 of the Constitution of BiH regulates the procedure for amending the Constitution, but Article X/2 establishes that: «No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.» Thanks to Article X/2 of the Constitution of BiH, Article II of the Constitution of BiH has become the only article that may not be amended in any way, and the human rights and freedoms regulated therein may not be reduced.

3. Institutions Responsible for the Protection of Human Rights in Bosnia and Herzegovina

The Dayton Peace Agreement established complex constitutional and political arrangements in Bosnia and Herzegovina, as well as a complex system of human rights protection, which was expected to respond to the challenges of the post-conflict transition.

As previously emphasised, when it comes to human rights protection mechanisms, in addition to judicial authorities – who represent the most important institution in resolving disputes – the key role in the process of protecting human rights and fundamental freedoms is played by the institution of the Ombudsman for Human Rights of Bosnia and Herzegovina,[26] the Constitutional Court of BiH, and the Ministry of Human Rights and Refugees of BiH.

In addition to the aforementioned institutions, a special role is also played by the Court of Bosnia and Herzegovina (which was not established by

25 For instance, citizens who do not belong to the constituent peoples cannot be elected to the Presidency. Likewise, a Serb from the Federation cannot be a candidate for a member of the Presidency, nor can they vote for a member of the Serb people. The European Court of Human Rights has ruled on these issues on multiple occasions. In this regard, see: the decisions of the European Court of Human Rights in the cases: *Case of Sejdić and Finci vs. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, Judgement 22 December 2009; *Case of Pilav vs. Bosnia and Herzegovina*, Application No. 41939/07, Judgement 9 September 2016; *Case of Zornić vs. Bosnia and Herzegovina*, Application No. 3681/06, Judgement 15 December 2014; *Case of Pudarić vs. Bosnia and Herzegovina*, Application No. 55799/18, Judgement 8 December 2020.

26 The Constitution of Bosnia and Herzegovina, as well as the provisions of Annex 6 of the Dayton Peace Agreement, established a rather unusual state institution for the protection of human rights – the Human Rights Commission, composed of the Human Rights Ombudsman and the Human Rights Chamber. The main difference between these two institutions is the following: while the Chamber was formed as a «judicial body» that issues final and binding decisions in cases of human rights violations of BiH citizens, the Ombudsman is an institution whose decisions have the character of authoritative but legally non-binding recommendations for government bodies at the state-level of BiH.

the Constitution of BiH),[27] as well as the constitutional courts of the Entities and other courts operating within the institutional framework of the country. At the state level, no Supreme Court has been established. Supreme Courts exist only at the entity level – in the Federation of Bosnia and Herzegovina and in the Republic of Srpska.[28]

■ *3.1. Human Rights Commission*

With the aim of fulfilling the obligations assumed by the signatory to Annex 6, Article II establishes the Human Rights Commission, consisting of the Office of the Ombudsman and the Human Rights Chamber.

3.1.1. Human Rights Chamber

The Human Rights Chamber, composed of 14 members during its existence, was competent to:

> receive, referred by the Ombudsman, on behalf of the complainant, or directly from any Party or person, non-governmental organisation, or group of individuals claiming to be victims of violence by any Party or acting on behalf of victims who are deceased or missing, for the purpose of resolving or deciding on applications relating to alleged or apparent violations of human rights.[29]

The Human Rights Chamber began its work in 1996, and its mandate expired on 31 December, 2003.[30] In that period, the Chamber received 15,169 different individual applications, in which it was claimed that one or more of the defendants

27 The Court of Bosnia and Herzegovina was established to ensure the effective exercise of the competencies of the state of Bosnia and Herzegovina and the respect for human rights and the rule of law within its territory. The Court has jurisdiction over criminal offenses established by the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina. The Court has jurisdiction to decide on: a) appeals against judgments or decisions rendered by the Criminal Department of this Court; b) appeals against judgments or decisions rendered by the Administrative Department of this Court; c) extraordinary legal remedies against final decisions issued by the Court's departments, except for requests for a retrial. Furthermore, the Court is also competent to: a) adjudicate complaints concerning violations of the election law and additional regulations and instructions issued by the Central Election Commission of BiH; b) decide in all other matters as provided by the laws of Bosnia and Herzegovina.
The Court has its own budget, which constitutes an integral part of the Budget of Bosnia and Herzegovina.

28 For a more detailed discussion, see: Šarčević, 2011.

29 Article VIII of Annex 6.

30 Based on Article XIV of Annex 6, which refers to the transfer of responsibility, it is stipulated that: «Five years after the entry into force of this Agreement, responsibility for the continuation of the Commission's activities should be transferred from the contracting parties to the institutions of Bosnia and Herzegovina, unless the parties agree otherwise.»

(Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republic of Srpska) violated human rights and freedoms guaranteed by Annex 6. However, during its mandate, the Chamber did not resolve all the cases received (approximately 9,000 cases remained pending). On January 1, 2004, the Commission for Human Rights was formed in the Constitutional Court of Bosnia and Herzegovina. As an independent body and the legal successor of the Human Rights Chamber, the Commission had the primary task of completing the work and making decisions in the remaining approximately 9,000 items. The Commission worked from 1 January 2004 to 31 December 2006; and, during this period, completed approximately 8,500 cases of the former Human Rights Chamber. Approximately 500 unfinished cases were taken over by the Constitutional Court in 2007 based on the Agreement between Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, in accordance with Article XIV of Annex 6 of the Dayton Peace Agreement, with the obligation to complete these cases by 30 June 2007.[31]

3.1.2. The Institution of the Ombudsman for Human Rights of BiH

The Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina (hereinafter referred to as: the Ombudsman)[32] is an independent institution established[33] for the purpose of promoting good governance and the rule of law, and protecting the rights and freedoms of natural and legal persons, and in accordance with the Constitution of BiH and international agreements contained in Annex I

31 For more details see: Completion of proceedings in cases of the former Human Rights Chamber of Bosnia and Herzegovina and the termination of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina [Online]. Available at: https://www.ustavnisud.ba/bs/okoncanje-rada-na-predmetima-bivseg-doma-za-ljudska-prava- bosne-i- hercegovine-i-gasenje-aneksa-6-uz-opsti-okvirni-sporazum-za-mir-u-bih (Accessed: 25 October 2024).

32 In addition to the Human Rights Ombudsman of BiH, since 1995, and 2000, such an institution has also existed at the level of the Federation of BiH and Republika Srpska. With the termination of the mandate of the Human Rights Chamber on 31 December 2003, the Ombudsman of BiH remained the only state institution for the protection of human rights at the state-level in BiH, while the Ombudsman of the FBiH and the Ombudsman of the RS continued to work on resolving cases of inadequate work of the public administration and violations of human rights of citizens at the entity level. The Ombudsman for Human Rights of Bosnia and Herzegovina began its work in 1996, when this function was performed by one person, a foreign citizen. At the beginning of 2004, the institution was taken over by citizens of BiH, and the number of ombudsmen were increased to three. In April 2006, amendments to the Law on the Ombudsman for Human Rights of BiH were adopted, based on which a single structure of ombudsman is established in the country, which also implies the termination of the work of such institutions at the entity level.

33 Article IV of Annex 6 establishes the Office of the Human Rights Ombudsman of BiH, sets out the criteria that members of the Office of the Human Rights Ombudsman must meet and explicitly states that the institution of the Ombudsman is completely independent in its work; no person or government body may influence its function in the implementation of its mandate.

to the Constitution of BiH. In this regard, the Ombudsman monitors the activities of government bodies throughout the territory of BiH, and no person or government body in BiH is allowed to interfere or influence the work and activities of the Ombudsman. The Ombudsman has broad investigative powers, including access to all information, documents and premises of public authorities.

The work and functioning of the Ombudsman for BiH is determined by Annex 4 and Annex 6 of the Dayton Peace Agreement.

With regard to the provisions of Annex 4 of the Dayton Peace Agreement, according to Article II/1 of the Constitution, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina, as provided for in Annex 6 to the General Framework Agreement.

On the other hand, Annex 6 of the Dayton Peace Agreement refers to the Human Rights Agreement, which ensures the highest level of internationally recognised human rights and fundamental freedoms to all persons on the territory of Bosnia and Herzegovina. This includes the rights and freedoms guaranteed by the European Convention and its Protocols, as well as other international agreements specifically listed in the Appendix to Annex 6.[34]

34 Appendix I of Annex 6 of the Dayton Peace Agreement lists international agreements for the protection of human rights and fundamental freedoms that have direct application in BiH: Convention on the Prevention and Punishment of the Crime of Genocide; Geneva Conventions I-IV on the Protection of the Victims of War and the 1977 Geneva Protocols I-II thereto; European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto; Convention relating to the Status of Refugees and the 1966 Protocol thereto; Convention on the Nationality of Married Women; Convention on the Reduction of Statelessness; International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; European Charter for Regional or Minority Languages; and Convention for the Protection of National Minorities. Annex 6. Available at: https://www.osce.org/files/f/documents/e/0/126173.pdf (Accessed: 10 January 2025).

Article V of Annex 6 establishes the competencies of the Ombudsman:

> The Ombudsman may investigate, either on his or her own initiative or in response to an allegation by any Party or person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, alleged or apparent violations of human rights (...).
> The Ombudsman shall determine which allegations warrant investigation and in what priority, giving particular priority to allegations of especially severe or systematic violations and those founded on alleged discrimination on prohibited grounds.
> The Ombudsman shall issue findings and conclusions promptly after concluding an investigation. A Party identified as violating human rights shall, within a specified period, explain in writing how it will comply with the conclusions (...).
> The Ombudsman may also present special reports at any time to any competent government organ or official. Those receiving such reports shall reply within a time limit specified by the Ombudsperson, including specific responses to any conclusions offered by the Ombudsman.
> The Ombudsman shall publish a report, which, in the event that a person or entity does not comply with his or her conclusions and recommendations, will be forwarded to the High Representative described in Annex 10 to the General Framework Agreement while such office exists, as well as referred for further action to the Presidency of the appropriate Party (...).[35]

According to Article VI of Annex 6,

> The Ombudsman shall have access to and may examine all official documents, including classified ones, as well as judicial and administrative files, and can require any person, including a government official, to cooperate by providing relevant information, documents and files. The Ombudsman may attend administrative hearings and meetings of other organs and may enter and inspect any place where persons deprived of their liberty are confined or work.
> The Ombudsman and staff are required to maintain the confidentiality of all confidential information obtained, except where required

35 Article V of Annex 6.

> by order of the Chamber, and shall treat all documents and files in accordance with applicable rules.[36]

In addition to the above Annexes, the institution of the Ombudsman is also regulated by other legal provisions.

The Law on the Ombudsman for Human Rights of Bosnia and Herzegovina[37] establishes that the institution of the Ombudsman is the main guarantor of the rule of law and the protection of human rights and fundamental freedoms throughout the territory of Bosnia and Herzegovina. In this regard, it acts on the basis of individual complaints received from individuals or legal entities, or ex officio. This law largely follows the Paris Principles of the United Nations, which represent standards for state institutions for the protection of human rights. The Rules of Procedure of the Ombudsman were adopted on the basis of the Law, which elaborate in more detail the activities of this Institution.

The independence of the Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina is grounded in both institutional and functional autonomy. Institutional independence[38] is reflected in its legal and organisational

36 Article VI of the Constitution of BiH.

37 Law on the Human Rights Ombudsman of Bosnia and Herzegovina, Official Gazette of BiH, Nos. 32/00, 19/02, 35/04 and 32/06.

38 One of the key elements of institutional independence is financial independence, which entails the Institution's ability to independently plan, manage, and utilise budgetary resources without political interference and without the possibility of influence from other branches of government, particularly the executive. According to the applicable provisions of the Law on the Financing of the Institutions of Bosnia and Herzegovina, the Institution of the Ombudsman has the right to autonomously prepare its own budget request, which is submitted in draft form to the Ministry of Finance and Treasury of Bosnia and Herzegovina within the time limits prescribed by law. This provision confirms the normatively recognised autonomy of the Institution in planning its financial needs. In the subsequent stages of the budgetary procedure, the Ministry of Finance and Treasury does not decide upon the request; rather, it is required to prepare an opinion on the submitted draft budget, which is then forwarded, together with the budget request, to the competent legislative bodies – the Finance and Budget Committee of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina and the Joint Committee on Human Rights of the Parliamentary Assembly of Bosnia and Herzegovina. In this manner, the formal influence of the executive branch is minimised, and parliamentary oversight of the budgetary process is ensured.
Nevertheless, despite these positive aspects, the financial independence of the Institution is not complete, as the influence of the executive branch in the budgetary process has not been fully eliminated. The Ministry of Finance and Treasury of Bosnia and Herzegovina, as well as the Finance and Budget Committee of the House of Representatives, exert significant influence in the process of budget formulation and verification, leaving room for potential political pressure. Furthermore, the absence of an equal and substantive role for the committee responsible for human rights in the decision-making process concerning the budget limits the effective oversight necessary to safeguard institutional independence. Accordingly, it is essential to further improve the legislative framework in order to ensure the Institution's full financial independence, in line with the requirements of international standards, particularly the Paris Principles.

self-sufficiency, that is, in its complete separation from the legislative, executive, and judicial branches of government. Functional independence, on the other hand, entails the Ombudsmen's ability to perform their duties freely, impartially, and without any external influence.

The principle of functional independence is explicitly guaranteed by Article 15 of the Law on the Human Rights Ombudsman of Bosnia and Herzegovina. Meanwhile, Article 8 of the Rules of Procedure of the Ombudsman further clarifies that Ombudsmen, in the performance of their duties, shall not receive any orders or instructions, and that no person, body, or institution has the right to interfere with their work or decision-making. This ensures their full autonomy in carrying out the entrusted responsibilities.

In addition to financial independence, organisational and administrative independence represent key components of the overall institutional autonomy of the Ombudsman. The Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina enjoys a considerable degree of organisational autonomy, as it possesses the exclusive authority to regulate its internal structure and to independently adopt internal acts governing its mode of operation and the distribution of competences. It is also important to emphasise that the Institution enjoys a certain level of administrative autonomy, as it is authorised to independently conduct recruitment procedures through public competitions, thereby ensuring the selection of professional, competent and impartial staff.

Together, these dimensions of independence constitute a solid foundation for the impartial, professional, and effective functioning of the Institution. They enable the Ombudsmen to act as objective and credible defenders of citizens' rights and freedoms, to contribute to strengthening public trust in state institutions and to ensure effective and comprehensive protection of human rights in Bosnia and Herzegovina.

The principle of impartiality is deeply embedded in all aspects of the Institution's work, and its preservation is ensured through the application of strict ethical standards and clearly defined mechanisms for the prevention of conflicts of interest. The Law on the Human Rights Ombudsman of Bosnia and Herzegovina explicitly stipulates that Ombudsmen must not perform any functions or engage in any activities that could compromise their independence or objectivity. In this regard, they are prohibited from holding membership in political parties, trade unions, non-governmental organisations, foundations or religious communities, as well as from performing duties within the executive branch, the judiciary, or the private sector. Furthermore, in order to mitigate the risk of potential pressures during their term of office, a safeguard measure has been established, allowing an Ombudsman to return to their previous position upon the expiration of their mandate, provided that they were employed in an institution prior to their appointment. This provision further strengthens the personal and professional independence of the officeholders, ensuring that Ombudsmen perform their

duties solely in the interest of protecting human rights, entirely free from any pressure, influence, or personal considerations throughout the duration of their mandate.

The Law establishes the composition, method of appointment and cases of resignation of the Ombudsman, as well as immunity and incompatibilities in performing the function of Ombudsman. In this regard, the Law stipulates that Ombudsman shall be appointed from among the members of the three constituent peoples, which does not exclude the possibility of appointment from among Others. Ombudsmen are appointed and dismissed by the House of Representatives and the House of Peoples of the Parliamentary Assembly of BiH by a majority vote, in accordance with the rules of procedure of each House. The Paris Principles establish, *inter alia*, that one of the essential elements of the independence of this institution is its pluralism. The representativeness of the institution for the protection of human rights and its composition, which reflects the social, ethnic, linguistic, and gender structure of a specific social community, significantly contribute to its efficiency. According to the Law on the Ombudsman for Human Rights of BiH, the function of "protector of human rights" is performed by three Ombudsmen.[39]

Pursuant to the Law, the institution of the Ombudsman for Human Rights of BiH is responsible for:

> considering cases relating to poor functioning or violations of human rights and freedoms committed by any government body; acting upon receipt of a complaint or 'ex officio'; undertaking a general investigation and making individual or general recommendations; conducting investigations into all complaints about violations of human rights and freedoms allegedly committed by military authorities; conducting investigations into all complaints regarding the poor functioning of the judicial system, or improper processing of individual cases and making recommendations for appropriate individual or general measures, provided that the Institution cannot interfere in the decision-making process of the courts, but may initiate court proceedings, or intervene in the course of the proceedings, whenever it determines that such action is necessary in the performance of its duties; ensuring equality of citizens and the elimination of all forms of discrimination; informing the public

39 Although this institution is generally tied to a single person, which makes it impossible to meet the aforementioned representativeness requirement, BiH is not the only exception to this rule. For example, in Sweden there are four Parliamentary Ombudsman; in Austria, there is a collective body consisting of three Ombudspersons; while in Belgium, the functions of the Federal Ombudsman are performed by two persons, one of whom belongs to the French and the other to the Dutch language community.

> about human rights through the media and education; publishing notices, opinions, recommendations, proposals and its reports; initiating amendments and adoption of laws and by-laws with the aim of harmonising them with international human rights standards, and ensuring the improvement of human rights and fundamental freedoms; preparing annual, periodic, special and other information and reports on the state of human rights and fundamental freedoms; cooperating, in accordance with the Constitution of BiH and existing legislation, with all domestic and international authorities and institutions dealing with the protection of human rights and fundamental freedoms.[40]

When it comes to the Ombudsman' reports,[41] they represent a kind of indicator of the level of human rights violations. For example, during 2023, as stated in the Annual Report, the BiH Ombudsman received a total of 2,794 complaints; with the cases transferred from previous years (1,768), there were 4,562 cases being processed. Work was completed on 2,831 cases, of which 1,686 were from 2023 and 1,145 cases were from previous years. When it comes to the structure of the complaints filed, in relation to the violation of rights: violations of political and civil rights – 771 cases; complaints related to the violation of economic, social and cultural rights – 741 complaints; violations of rights in the judiciary and administration – 709 complaints; violations of children's rights – 231 complaints; discrimination – 187 complaints; violations of the rights of persons deprived of their liberty – 86 complaints; violations of the rights of persons with disabilities – 56 complaints; and violations of the rights of national, religious and other minorities – 13 complaints.[42]

The specific competences of the Ombudsman are regulated by the Law on Ministerial Appointments, Appointments to the Council of Ministers and Other

40 Kulić and Serdarević, 2020, pp. 11–12.

41 According to the Freedom House report, Bosnia and Herzegovina is a Partly Free country (51/100). If we look at the segments of political rights, the score is 17/40; while the score for civil liberties is 34/60. Last year's scores were 52/100 [Online]. Available at: https://freedomhouse.org/country/bosnia-and-herzegovina/freedom-world/2024 (Accessed: 10 January 2025).

42 See: Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina (2024) *Annual Report on the Results of the Activities of the Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina for 2023*. Banja Luka: Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina [Online]. Available at: https://www.ombudsmen.gov.ba/documents/obmudsmen_doc2024040915403579eng.pdf (Accessed: 4 January 2025).

Appointments of Bosnia and Herzegovina,[43] the Law on Prohibition of Discrimination and the Rules of Procedure of the Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina.[44]

The provisions of the Law on Ministerial Appointments, Appointments to the Council of Ministers and Other Appointments of Bosnia and Herzegovina empower the Ombudsman to review the appointment process carried out in accordance with the provisions of the aforementioned Law. If there is evidence that the principles or procedures for appointment to public positions under this Law have not been followed, any member of the public may file a complaint against the final appointment. The complaint is submitted to the responsible public official (head of the institution - *e.g.* minister, director of an administrative body, etc.), and a copy is submitted to the Ombudsman.

The Ombudsman may take all necessary measures to investigate the complaint. In this regard, the Ombudsman may raise issues related to the appointment procedure to which the complaint relates and may request that the responsible public official submit all documents and files related to the said appointment to his or her office. If the evidence collected indicates that the final appointment was made in violation of the Law, the Ombudsman is obliged to prepare a finding and conclusions regarding the complaint. The conclusions may include a recommendation where the evidence indicates that the principles of the Law as well as the appointment procedures established by the Law have been violated. The Ombudsman may, without disclosing confidential information (including personal data about candidates), publish the findings and conclusions, including recommendations. The Ombudsman is also obliged to submit his/her findings and conclusions to the complainant.[45]

43 The Law on Ministerial Appointments, Council of Ministers Appointments, and Other Appointments of Bosnia and Herzegovina, Official Gazette of BiH, Nos. 07/03 and 37/03, available at: https://odgovorno.ba/wp-content/uploads/2020/09/Zakon-o-ministarskim-imenovanjima-imenovanjima-Vijeca-ministara-i-drugim-imenovanjima-BiH-1-1.pdf (Accessed: 10 January 2025).

44 Rules of Procedure of the Institution of the Ombudsman for Human Rights of Bosnia and Herzegovina, Official Gazette of BiH, No. 104/11 [Online]. Available at: https://www.ombudsmen.gov.ba/documents/obmudsmen_doc2013041003424659bos.pdf (Accessed: 10 January 2025).

45 For example, the Human Rights Ombudsman of BiH received a complaint that pointed to irregularities in the procedure for the election and appointment of four members of the Governing Board of the University of Sarajevo, appointed by the Government of Sarajevo Canton, and a violation of the Law on Higher Education of Sarajevo Canton. After conducting an investigation, the Ombudsman issued a recommendation to the Government of Sarajevo Canton to consider the possibility of amending the Law on Civil Service of Sarajevo Canton in terms of clearly defining the conditions under which a civil servant may be a member of the Governing Board, Supervisory Board, Assembly, Administration, or Management, or in the capacity of an authorised person, and taking into account the allegations in the recommendation. The aforementioned recommendation has not been implemented. See: Kulić and Serdarević, 2020, p. 15.

On the other hand, the Law on Prohibition of Discrimination stipulates that the Ombudsman is the central institution for protection against discrimination and is competent to:

> 'receive individual and group complaints regarding discrimination; provide necessary information to natural and legal persons who have filed a complaint due to discrimination on their rights and obligations, and the possibilities of judicial and other protection; regarding the complaint, the Ombudsman of BiH may decide not to accept the complaint, or to initiate an investigation procedure in accordance with special regulations; propose the initiation of a mediation procedure in accordance with the provisions of the Law on Mediation; collect and analyse statistical data on cases of discrimination; submit annual and, if necessary, extraordinary reports on the occurrence of discrimination to legislative bodies of all levels of government in Bosnia and Herzegovina; inform the public about the occurrence of discrimination; conduct research in the field of discrimination on its own initiative; provide opinions and recommendations with the aim of preventing and combating discrimination, and proposes appropriate legal and other solutions to the competent institutions in BiH; utilise its right to initiate and participate in the procedure for protection against discrimination for violations prescribed by this Law; monitor legislation and provides advice to legislative and executive bodies; work on the promotion of this law, informs the public, raises awareness, conducts campaigns and in other ways actively promotes the fight against discrimination for the purpose of its prevention; improve policies and practices aimed at ensuring equal treatment'.[46]

When it comes to the type of violations and the manner of the Ombudsman's activities, the Law on Prohibition of Discrimination has not significantly expanded the Ombudsman's jurisdiction. Namely, the jurisdictions listed in Article 7 of the Law on Prohibition of Discrimination follow the jurisdictions regulated by the Law on the Institution of the Ombudsman, as well as the Paris Principles. Conditionally speaking, the only new obligation that has been established is the submission of a special annual report on the occurrence of discrimination, as well as the possibility for the Ombudsperson to refer persons to mediation procedures.

46 Article 7 of the Law on Prohibition of Discrimination, Official Gazette of BiH, Nos. 59/09 and 66/16 [Online]. Available at: https://fuzip.gov.ba/wp-content/uploads/2022/09/Zakon_o_zabrani_diskriminacije_sl_glasnik_bih_broj_59_2009_i_66_2016-1.pdf (Accessed: 12 January 2025).

However, the Law on Prohibition of Discrimination expands the jurisdiction of the Ombudsperson with regard to violators of rights. Namely, the traditional jurisdiction of the Ombudsperson as an institution that stands between the authorities and individuals or groups has been expanded, and (only) in the area of discrimination, this institution has the possibility to consider complaints about the actions of individuals.

In conclusion, the Institution of the Human Rights Ombudsman of Bosnia and Herzegovina embodies the key features of modern ombudsman mechanisms – independence, a dual function encompassing both oversight and protection, accessibility and informality of procedure, action based on moral authority and a high degree of transparency achieved through the regular publication of comprehensive reports on its work. These characteristics position the Institution as a crucial corrective mechanism in the relationship between public administration and citizens, as well as an indispensable pillar of the contemporary system for the protection of human rights.

■ *3.2. Constitutional Court of Bosnia and Herzegovina*

The Constitutional Court of Bosnia and Herzegovina has existed since the time when Bosnia and Herzegovina was part of the former Socialist Federal Republic of Yugoslavia (SFRY). It was first established on 15th February 1964 in accordance with the 1963 Constitution of the SFRY and later continued to exist on the basis of the 1974 Constitution. The jurisdiction of the initially established Constitutional Court of BiH was primarily focused on abstract normative control, such as the assessment of the compliance of republican laws with the Constitution and the assessment of the constitutionality and legality of other general acts, self-government acts, resolution of disputes between the Republic vs. other socio-political communities and conflicts of jurisdiction between courts and bodies of a socio-political community.

Defining the preconditions for the further development of a democratic political system and a market economy and modifying the internal structure of the state, the 1995 Constitution of BiH (Annex 4) also established the institutional framework of the Constitutional Court on a completely new and different political and legal basis compared to the past. With the changes made, the constitutional position and competences of the Constitutional Court of BiH made it compatible with the standards of constitutional judicature—both as an independent "guardian of the constitution" and as an institutional arbiter of the protection of human rights and freedoms.[47]

The Constitutional Court of Bosnia and Herzegovina has nine members. Four members are selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining

47 See: Omerdić, 2022; Trnka, 2006; Ibrahimagić, 2009.

three members are selected by the President of the European Court of Human Rights after consultation with the Presidency of Bosnia and Herzegovina.[48] The judges shall be distinguished lawyers of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights could not be citizens of Bosnia and Herzegovina or of any neighbouring state. The judges shall act in the Constitutional Court in their personal capacity.

The Constitutional Court elects its President and Vice-Presidents from among the judges. The term of office of President of the Constitutional Court shall be three years, and it shall commence upon election. The President of the Constitutional Court represents the Constitutional Court, organise, direct, convene and chair the sessions and public hearings, sign the decisions of the Constitutional Court, be responsible for cooperation with other institutions, issue individual acts and carry out other duties as specified in these Rules and other acts of the Constitutional Court.

Each judge has the right and obligation to participate in the work and decision-making by the Constitutional Court and those of its working bodies of which he or she is a member. The position of a judge is incompatible with various positions, including a membership in a political party or a political organisation in Bosnia and Herzegovina; a membership in a legislative, executive and other judicial authority in Bosnia and Herzegovina or the Entities and the Brčko District of Bosnia and Herzegovina; and any other position that could affect the impartiality of the judge.

Article 24 of Rules relates to the status of Judge Rapporteur:

> '(1) As a rule, following the examination of admissibility, a case shall be assigned to the Judges Rapporteurs in an alphabetical order of the judges' surnames. The President of the Constitutional Court may decide to assign cases to the Judges Rapporteurs in a different manner.
> (2) The cases concerning the same factual and legal issues may be assigned to a single Judge Rapporteur.
> (3) When deciding on a case the Constitutional Court may, on a proposal of the Judge Rapporteur, decide on his/her discharge from the case.

48 The Constitution of BiH does not stipulate that the Federation of BiH must elect two Bosniak and two Croat members, and for the Republika Srpska to elect two Serb members of the Constitutional Court. However, an analysis of the current practice and procedure for electing judges to the Constitutional Court leads to the conclusion that the principle of ethnic parity is implemented without exception, although it is not stipulated by the Constitution itself.

(4) A Judge Rapporteur shall give his/her approval for a proposal of the decision to be brought before the session of the Constitutional Court.'

The Secretariat of the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Secretariat) assists the Constitutional Court in performing its professional and other duties. The Secretariat is managed by the Secretary General who assists the Constitutional Court in the performance of its functions, along with being responsible for the organisation and activities of the Secretariat under the authorisation of the President of the Constitutional Court.

In addition to the Secretary General of the Constitutional Court, the most complex professional duties relating to exercising of the rights and duties of the Constitutional Court are carried out by the Registrar, Heads of Departments, Head of Office of the President of the Constitutional Court, Assistant Secretary General of the Constitutional Court and legal advisors to the judges who are appointed and dismissed by the plenary Court. Distinguished lawyers with experience in the same or similar legal activities and in accordance with the conditions prescribed by a special act of the Constitutional Court may be appointed to the Secretary General of the Constitutional Court, Registrar, Heads of Departments, Head of Office of the President, Assistant Secretary General of the Constitutional Court and as legal advisors to the judges. The Registrar performs the duties of the Deputy Secretary General in the event he/she is absent or otherwise prevented.

The work of the Constitutional Court is carried out through permanent and ad hoc commissions and other bodies of the Constitutional Court. The permanent commissions are: a) the Editorial Commission; b) the Commission for Administrative Affairs; c) the Commission for Budget; d) the Commission for Publication, Information and Information Systems. The work of the permanent commissions is regulated in the Rules. *Ad hoc* commissions might be established for the purpose of drafting general acts, professional papers, analysis and for other purposes.

According to the provisions of the Rules of the Constitutional Court of Bosnia and Herzegovina (Rules), the Constitutional Court shall be independent of all other governmental bodies in Bosnia and Herzegovina and of any other external influences. Furthermore, the Constitutional Court shall exercise its rights and obligations in accordance with the Constitution, Rules and other acts of the Constitutional Court. The organisation of the Constitutional Court shall be exercised under the principle of administrative and financial independence.

According to Article 3 of the Rules:

'(1) The funds for the operation of the Constitutional Court shall be secured within the Budget of the institutions of Bosnia and Herzegovina.

(2) The use of the approved funds shall be governed by an internal act of the Constitutional Court.
(3) The Secretary General of the Constitutional Court shall prepare a Draft Budget of the Constitutional Court and, following the procedure conducted in accordance with these Rules, shall submit it to the Ministry in charge of the preparation of the Budget of the institutions of Bosnia and Herzegovina.
(4) The Minister of the competent Ministry referred to in paragraph 3 of this Article shall submit an Opinion with reasoning on the Draft Budget to the Constitutional Court.
(5) After the competent Commission of the Constitutional Court has considered the previously submitted Opinion, the Constitutional Court shall establish the Proposal of the Budget of the Constitutional Court.
(6) The Budget Proposal of the Constitutional Court shall be submitted to the Presidency of Bosnia and Herzegovina to be included in the Budget Proposal of the institutions of Bosnia and Herzegovina.
(7) The Constitutional Court shall be independent in allocating the approved funds from the Budget of the institutions of Bosnia and Herzegovina, in accordance with its annual Budget'.[49]

The Constitutional Court takes decisions sitting in sessions: the plenary Court, the session of the Grand Chamber and the session of the Chamber.

The Plenary Court is composed of all the judges of the Constitutional Court. The Constitutional Court takes decisions in the plenary session by a majority of votes of all the judges of the Constitutional Court. This is done in cases arising out of the competence of the Constitutional Court: a) under Articles VI(3)(a), where instituted by an authorised applicant, VI(3)(c) and IV(3) (f) of the Constitution and Amendment I to the Constitution (hereinafter: Amendment I); b) under Article VI(3)(b), which are included in the agenda of the plenary Court; c) other issues set forth in the Constitution, these Rules and conclusion of the plenary Court.

The Grand Chamber is composed of the judges elected by the competent Entity Legislature. The President of the Constitutional Court presides at the sessions of the Grand Chamber. The Grand Chamber takes decisions by a majority of votes of all the judges of the Constitutional Court (a minimum of five judges) on cases arising out of the competence of the Constitutional Court under Article VI(3) (a). This is done when instituted by unauthorised applicants and Article VI(3)(b)

49 Article 3 of the Rules of the Constitutional Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 94/14 [Online]. Available at: https://www.ustavnisud.ba/uploads/documents/rules_1611259624.pdf (Accessed: 12 January 2025).

of the Constitution – which are not included in the agenda of the plenary Court – and for other issues included in the agenda of the session in accordance with the Constitution and these Rules. If no decision is made, the case shall be referred to the Constitutional Court sitting in the plenary session with a text proposed by a Judge Rapporteur, unless the Grand Chamber decides otherwise.

The Chamber is composed of the President of the Constitutional Court and two Vice-Presidents from among the judges elected by the competent Entity Legislature. The President of the Constitutional Court presides over the Chamber. The Chamber takes decisions by a unanimous vote on requests for interim measures regarding administrative issues, which are not decided at the sessions of the Constitutional Court.

3.2.1. Jurisdictions of the Constitutional Court of Bosnia and Herzegovina

The competences of the Constitutional Court of BiH are defined in Articles VI/3. and IV/3. of the Constitution of Bosnia and Herzegovina.

In addition to the basic task - to support the Constitution of Bosnia and Herzegovina, based on Article VI/3. of the Constitution of Bosnia and Herzegovina,

> 'a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to: Whether an Entity's decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina. Whether any provision of an Entity's constitution or law is consistent with this Constitution.
>
> Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.
>
> b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.
>
> c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols,

> or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision'.[50]

When it comes to disputes of conflict of jurisdiction and abstract review of constitutionality, the Constitutional Court of BiH has exclusive jurisdiction to decide on all disputes arising from the Constitution between two Entities, or between Bosnia and Herzegovina and one or both Entities, or between institutions of Bosnia and Herzegovina. In essence, the Court here decides on positive or negative conflicts of jurisdiction, as well as on any other disputes that may arise in relations between state and entity structures of government or institutions of Bosnia and Herzegovina.

The Constitutional Court has jurisdiction to decide whether any provision of the Constitution or law of an Entity is in accordance with the Constitution of BiH. Although the Constitution of BiH explicitly speaks only about «provisions of Entity laws,» the next general task of the Constitutional Court is to uphold the Constitution of BiH, which does not exclude the laws of Bosnia and Herzegovina from the review of constitutionality. As a special case of upholding the Constitution of BiH, the Constitutional Court is also competent to examine whether the decision of an entity to establish a special parallel relationship with a neighbouring state is in accordance with this Constitution, including provisions relating to the sovereignty and territorial integrity of Bosnia and Herzegovina. In both cases, according to the Constitution of BiH, disputes may only be initiated by a certain circle of authorised initiators: a member of the Presidency of Bosnia and Herzegovina, the Chairman of the Council of Ministers, the Chairman, or his deputy, of any Houses of the Parliamentary Assembly, one quarter of the members/delegates of any Houses of the Parliamentary Assembly or one quarter of the members of any Houses of the legislative body of an Entity. The Rules of the Constitutional Court of BiH regulate the principle of self-limitation, based on which the Constitutional Court cannot initiate proceedings for the assessment of constitutionality on its own initiative, but the cause for action, *i.e.* for conducting proceedings before the Constitutional Court, must be initiated by the aforementioned authorised bodies.[51]

For the subject of this analysis, the appellate jurisdiction of the Constitutional Court of BiH is of particular importance. Namely, the appellate jurisdiction of the Constitutional Court of BiH is established by Article VI/3.b), based on which "The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and

50 Article VI/3 of the Constitution of BiH.

51 Rules of the Constitutional Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 94/14 [Online]. Available at: https://www.ustavnisud.ba/uploads/documents/rules_1611259624.pdf (Accessed: 12 January 2025).

Herzegovina."[52] This means that the Constitutional Court of BiH represents the highest legal instance in relation to the courts in Bosnia and Herzegovina, which confirms its role in terms of a special institutional guarantor of the protection of rights and freedoms established by the Constitution of BiH.

The Constitutional Court may consider an appeal only if all effective legal remedies available under the law have been exhausted against the judgment, or the decision challenged by it, and if it is filed within 60 days from the date on which the appellant received the decision on the last effective legal remedy he or she used. However, the Constitutional Court may exceptionally consider an appeal even when there is no decision of the competent court, if the appeal indicates serious violations of the rights and fundamental freedoms protected by the Constitution or international documents applicable in Bosnia and Herzegovina.[53] By the decision accepting the appeal, the Constitutional Court shall annul the contested decision and return the case to the court or body that made that decision for a new procedure, except in cases where the consequences of the violation of constitutional rights can be eliminated in another way. The court or body whose decision has been annulled shall be obliged to issue a new decision, whereby it is obliged to respect the legal understanding of the Constitutional Court on the violation of the constitutionally established rights and fundamental freedoms of the appellant. Exceptionally, if the body whose decision has been annulled in the sense of the previous paragraph issues a new decision without respecting the legal understanding of the Constitutional Court, the Constitutional Court may decide on the merits of the case itself if there is a decision of the body that does not violate constitutional rights, by leaving such a decision in legal force.

Pursuant to Article VI/3.c),

> 'The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision'.[54]

52 Article VI/3.b) of the Constitution of BiH.

53 Article 18 of Rules of the Constitutional Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 94/14 [Online]. Available at: https://www.ustavnisud.ba/uploads/documents/rules_1611259624.pdf (Accessed: 12 January 2025).

54 Article VI/3.c) of the Constitution of BiH. Summaries of sixty-six decisions rendered by the Court in the exercise of this competence are available on the official website of the Constitutional Court. See more at: https://www.ustavnisud.ba/bs/opcenito-171 (Accessed: 12 January 2025).

The aforementioned provision consists of two parts. The first part refers to the classic concept of the assessment of the constitutionality of a law. The second does not link the consideration of the Constitutional Court to a specific legal provision or the law as a whole but introduces the jurisdiction for the Constitutional Court to examine the existence or scope of a general rule of international law that is important for the court's decision.

Although the purpose of this constitutional jurisdiction is to reduce the number of cases in which violations of individual rights that have their origin in legislation are established through the active approach of regular courts and through the activities of the Constitutional Court of BiH, this jurisdiction is the least represented in the work of the Constitutional Court. The reason for such a small number of requests under this jurisdiction of the Constitutional Court may also be the fact that the constitutional courts of the Entities have similar jurisdiction and that a significantly larger number of this type of case is before the entity constitutional courts, especially before the Constitutional Court of the Federation of Bosnia and Herzegovina. However, these cases mainly relate to cantonal regulations for which the Constitutional Court of Bosnia and Herzegovina does not have jurisdiction.

The Constitutional Court's decisions are final and binding and every natural and legal person is obliged to respect them. All authorities are obliged, within their competences established by the Constitution and the law, to implement the decisions of the Constitutional Court of BiH. Anyone with a legal interest may request that the decision of the Constitutional Court be implemented. In the event of failure to act, or delay in implementing or informing the Constitutional Court of the measures taken, the Constitutional Court shall issue a decision establishing that the decision of the Constitutional Court has not been implemented or may determine the manner of implementing the decision. This decision shall be submitted to the competent prosecutor, or another body competent for implementation designated by the Constitutional Court.

Failure to implement the decisions of the Constitutional Court of BiH, according to Article 239 of the Criminal Code of BiH, is punishable by imprisonment for a term of 6 months up to 5 years.[55]

■ *3.3. Ministry of Human Rights and Refugees of Bosnia and Herzegovina*

Based on Article 12 of the Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina, the Ministry of Human Rights and Refugees of Bosnia

55 Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15, 35/18, 46/21, 31/23 and 47/23 [Online]. Available at: https://www.paragraf.ba/propisi/bih/krivicni-zakon-bosnei-hercegovine.html (Accessed: 4 January 2025). Krivični zakon Bosne i Hercegovine [Online]. Available at: https://www.paragraf.ba/propisi/bih/krivicni-zakon-bosne-i-hercegovine.html (Accessed 4 January 2025).

and Herzegovina is responsible for monitoring and implementing international conventions and other documents in the field of human rights and fundamental freedoms.

In addition to the above, the Ministry of Human Rights and Refugees is responsible for: promoting and protecting personal and collective human rights and freedoms; coordinating and preparing reports to competent domestic bodies and institutions and international institutions and organisations on the implementation of obligations under international conventions and international documents; designing and implementing activities to facilitate the fulfilment of BiH's obligations concerning accession to Euro-Atlantic integration, in particular concerning the application of the European Convention on Human Rights and Fundamental Freedoms and its Protocols; establishing and operating the representative/agent of the Council of Ministers of BiH and the Office of the Representative/Agent of the Council of Ministers of BiH before the European Court of Human Rights; establishing and operating the Agency for Gender Equality in BiH and ensuring gender equality; the monitoring, production and dissemination of information on standards, achievements and activities in the field of human rights; cooperation with religious communities; cooperation with national minorities and their associations; with institutions and organisations responsible for searching for missing persons in BiH, as well as with the Red Cross of BiH and the International Committee of the Red Cross and humanitarian organisations.[56]

In addition to taking care of the rights and issues of refugees and persons under subsidiary protection in BiH after determining their status, pursuant to Article 12 of the Law, the Ministry for Human Rights and Refugees is also responsible for: all data that the Ministry deems relevant in accordance with all applicable data protection standards, as well as the use of data for the purpose of protecting individual human rights; reception and care, for a period of up to 30 days, of BiH citizens returning to Bosnia and Herzegovina on the basis of the Readmission Agreement; implementation of Annex 7 of the Dayton Peace Agreement, as well as monitoring and supervision of the implementation of that Annex; creation and implementation of BiH policy in the field of return of refugees and displaced persons to BiH, reconstruction projects, and provision of other conditions for sustainable return; coordination, direction and supervision within the Commission for Refugees and Displaced Persons, activities of entities and other institutions in BiH responsible for implementing policy in this area; all other activities prescribed by law, and/or related to the implementation of Annex 6 and Annex 7 of the Dayton Peace Agreement; cooperation with the non-governmental

56 Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, Nos. 5/2003, 42/2003, 26/2004, 42/2004, 45/2006, 88/2007, 35/2009, 59/2009, 103/2009, 87/2012, 6/2013, 19/2016 and 83/2017 [Online]. Available at: https://www.paragraf.ba/propisi/bih/zakon-o-ministarstvima-i-drugim-organima-uprave-bosne-i-hercegovine.html (Accessed: 12 January 2025).

sector on issues within the competence of the ministry; creation of Bosnia and Herzegovina's policy towards emigration; collection, systematisation, publication and distribution of all data within the competence of the ministry.

In accordance with the Decision on the Procedure for Medium-Term Planning, Monitoring and Reporting in the Institutions of Bosnia and Herzegovina,[57] the Ministry for Human Rights and Refugees has prepared a document entitled «Medium-Term Work Plan for the Period 2024 – 2026.» The aforementioned document emphasises that the mandate of the Ministry for Human Rights and Refugees relates to a transparent, efficient and accountable public sector that prioritises undertaking coordinated policies that will strengthen the rule of law, security and fundamental rights of all citizens in Bosnia and Herzegovina. The medium-term goal is defined as improving the system of human rights protection and developing relations between the institutions of Bosnia and Herzegovina and the diaspora. The specific goal of the Ministry for Human Rights and Refugees is:

> 'Promotion and protection of human rights and freedoms of all citizens, realisation of rights from Annex 7 of the Dayton Peace Agreement, international legal protection and readmission, protection of gender equality in Bosnia and Herzegovina, protection of the rights of emigrants and development of BiH's relations with the diaspora'.[58]

4. Conclusion

The protection of human rights in Bosnia and Herzegovina is one of the key elements for building a stable, democratic and just society. The Constitution of BiH contains an unusually broad catalogue of human rights and freedoms listed. Human rights and freedoms in the Constitution of BiH are not concentrated in a single catalogue but are found in different places and in different legal sources. There are few modern democratic states in which the most relevant international norms on human rights and freedoms are directly incorporated into the legal order, as is the case in Bosnia and Herzegovina. The normative basis for the protection of human rights and freedoms at the state level of Bosnia and Herzegovina exists because the state is a signatory to all major international conventions and charters relating to human rights.

57 Decision on the procedure for medium-term planning, monitoring and reporting in the institutions of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 44/15 [Online]. Available at: http://www.mpr.gov.ba/biblioteka/podzakonski_akti/05%201%20Odluka%20za%20srednjorocno%20planiranje%20u%20institucijama%20BiH%20-%20BJ.pdf

58 Ministry for Human Rights and Refugees, 2023.

Although the basic principles of human rights protection are formally incorporated into the legal system through the Constitution of BiH and international conventions, their application in practice often encounters obstacles. The complex state structure, political division and lack of political leads to unequal application of laws and institutional weaknesses that make it difficult to exercise equal rights for all citizens.

The established system does not enable full protection of human rights and freedoms. One of the biggest challenges remains discrimination in political rights, which has been recognised through judgments of the European Court of Human Rights – such as the Sejdić-Finci, Pilav, Zornić and others – which have not yet been implemented. In addition, access to justice and the efficiency of the judicial system are often limited by administrative obstacles and political influence. Economic inequalities and social exclusion of marginalised groups – such as national minorities, women and persons with disabilities – also indicate the need for more comprehensive reforms.

However, there are also positive developments. The role of civil society, international organisations and institutions such as the Human Rights Ombudsman is increasingly important in protecting fundamental freedoms and raising awareness concerning human rights. Also, the European integration process imposes certain standards that BiH must meet, which can serve as a trigger for necessary reforms.

In the future, key steps towards improving the efficiency of human rights protection in Bosnia and Herzegovina include constitutional reform to ensure equality for all citizens, strengthening the independence of the judiciary and consistent application of international standards. Furthermore, it is necessary for the competent state institutions to be more active in adopting legal acts and consistently implementing norms that prevent and eliminate all forms of discrimination against citizens of Bosnia and Herzegovina. Acting on the recommendations of the institution of Ombudsman and implementing the final and binding decisions of the Constitutional Court of Bosnia and Herzegovina would greatly strengthen the system of human rights protection in Bosnia and Herzegovina.

Ultimately, only the strengthening of institutions and a more active role of civil society can further contribute to the creation of a more inclusive and just society. Only through systemic and consistent reforms can Bosnia and Herzegovina ensure genuine protection of human rights, thereby becoming a more democratic and just society for all its citizens.

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BENEDIKT RIEDL*

Between Law and Politics: Enforcing European Values Before the CJEU

ABSTRACT: *This article examines how the Court of Justice of the European Union (CJEU) enforces the values in Article 2 TEU through its recent case law, particularly in infringement proceedings. While Article 2 TEU sets out binding legal norms, this article argues that their enforcement by the CJEU is only legitimate when tied to the material scope of EU law. The CJEU's approach – especially since the ASJP ruling – is best understood as a doctrinally constrained method of interpreting existing obligations, not as a basis for autonomous value enforcement. The article identifies four conditions that must be met: a concrete link to EU law, a clearly defined legal obligation in primary or secondary law, limits on expanding the substance of legal norms through values, and interpretation based on the shared constitutional traditions of the Member States. The article concludes that using Article 2 TEU as an independent legal basis would breach the principle of conferral and bypass the political enforcement mechanism laid down in Article 7 TEU.*

KEYWORDS: *Article 2 TEU, rule of law, CJEU, Infringement Proceedings, principle of conferral, European values*

1. Introduction

For the first time, Advocate General Ćapeta explicitly argued that Article 2 TEU provides a legal basis for infringement proceedings in her Opinion of 5 June 2025 in Case C-769/22 (*Commission v Hungary*).[1] In this case, the Commission decided

1 Advocate General Ćapeta, Opinion of 5 June 2025, Case C-769/22 *Commission v Hungary* EU:C:2025:408.

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https://doi.org/10.47078/2026.1.369-396

to challenge Hungary's law restricting LGBTI content directly for violating the values enshrined in Article 2 TEU, rather than for breaching specific secondary legislation. This marks the first time that the direct legal bindingness and applicability of Article 2 TEU itself, detached from any other secondary law, has been the focal point of a case. This Opinion represents a crucial shift by establishing the EU's core values as an independent legal standard to judge the actions of Member States.[2]

This builds on the CJEU's case law since the 2018 *ASJP* (*Associação Sindical dos Juízes Portugueses*) ruling, which for the first time imposed a binding obligation for Member States to uphold the values set out in Article 2 TEU from Article 19(1), second subparagraph TEU.

Since 2018, the CJEU has developed a new line of case law on judicial independence, based on Article 2 TEU in conjunction with Article 19(1), second subparagraph, TEU.[3] This approach, referred to here as *value operationalisation*, enables the CJEU to give effect to the values listed in Article 2 TEU, which refer to the essential values of the European Union including: respect for human dignity, freedom, democracy, equality, the rule of law, the protection of human rights, and the rights of persons belonging to minorities – and to derive specific legal obligations for the Member States. The CJEU's focus so far has been exclusively on judicial independence as a concrete expression of the rule of law, one of the values named in Article 2 TEU. As a result, the CJEU has been able to penalise Member States in infringement proceedings if their judicial system fails to meet the CJEU's essential conditions for judicial independence.[4] This approach has been widely supported in the academic literature, considering the rule of law crises in Poland[5]

2 Advocate General Ćapeta, Opinion of 5 June 2025, Case C-769/22 *Commission v Hungary* EU:C:2025:408, para. 142.

3 See: *Associação Sindical dos Juízes Portugueses*, Case C-64/16, 27 February 2018, EU:C:2018:117; on the current academic discussion; see, among many: von Bogdandy and Spieker, 2023, p. 65; von Bogdandy et al., 2021; Britz, 2023, p. 2819; Grabowska-Moroz, 2023; Hainthaler, 2024, p. 293; Mayer, 2024, p. 219; Nettesheim, 2024, p. 269; Riedl, 2024, p. 157; Spieker, 2019, p. 1182; Spieker, 2023; Wyrozumska, 2022, p. 379.

4 See: *Associação Sindical dos Juízes Portugueses*, Case C-64/16, 27 February 2018, EU:C:2018:117, para. 32; further developed in, inter alia, *Minister for Justice and Equality (Deficiencies in the system of justice)*, Case C-216/18 PPU, 25 July 2018, EU:C:2018:586, para. 48; *Commission v Poland (Independence of the Supreme Court)*, Case C-619/18, 24 June 2019, EU:C:2019:531, para. 47; see also: Gärditz, 2019, pp. 134–136; Bonelli and Claes, 2018, pp. 622–623.

5 See *Minister for Justice and Equality (Deficiencies in the system of justice)*, Case C-216/18 PPU, 25 July 2018, EU:C:2018:586, paras. 47 et seq; *Commission v Poland (Independence of the Supreme Court)*, Case C-619/18, 24 June 2019, EU:C:2019:531, paras. 42 et seq; *Commission v Poland (Independence of the ordinary courts)*, Case C-192/18, 5 November 2019, EU:C:2019:924, paras. 98 et seq; *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, 19 November 2019, EU:C:2019:982, paras. 82 et seq, 167; *Poland v Parliament and Council*, Case C-157/21, 16 February 2022, EU:C:2022:98, para. 145; see also: Sadurski, 2019a; Sadurski, 2019b; Castillo-Ortiz, 2019, p. 48.

and Hungary,[6] as well as rule of law concerns in other countries such as Romania,[7] Bulgaria,[8] and Malta,[9] and in light of the political inability or unwillingness of the member states to impose sanctions under the Article 7 TEU procedure.[10] The analysis proceeds in three steps. Section II addresses the substantive dimension of value enforcement, examining whether Article 2 TEU produces independent legal effects and delineating its normative scope. Section III focuses on procedural constraints, in particular the limits imposed by Article 7 TEU and the Treaties' allocation of enforcement roles. Section IV concludes by proposing a doctrinal framework that respects the principle of conferral and ensures that judicial enforcement of Union values remains both legally sound and democratically legitimate.

2. The Substantive Test: Is Article 2 TEU More Than Just Words?

The first step is to determine whether, and in what way, Article 2 TEU produces normative effects. This involves examining whether, from a legal-doctrinal perspective, Article 2 TEU contains binding legal principles that go beyond merely declaratory or programmatic statements. If this is affirmed, the next step is to define the substantive scope of Article 2 TEU.

6 See: *Hungary v Parliament and Council*, Case C-156/21, 16 February 2022, EU:C:2022:97; on the 'court packing' of the Hungarian Constitutional Court, see: Kovács and Tóth, 2011, p. 183; Kovács and Scheppele, 2021, p. 32; Castillo-Ortiz, 2019, p. 48; more generally Bánkuti, Halmai and Scheppele, 2012, p. 138; Halmai, 2019, p. 302.

7 In the wake of the rule of law crises in Poland and Hungary, Romania also implemented a controversial judicial reform. A central element of this reform was the establishment of a special section within the prosecution service to investigate offences committed within the judiciary, which was ultimately abolished in March 2022. This section enabled pressure to be exerted on prosecutors and judges. See: Călin, 2020, p. 1; Spieker, 2022, p. 306; Weber, 2022, p. 292; see also: Romanian Constitutional Court, Decision of 16 February 2016, No. 51/2016; Decision of 4 May 2017, No. 302/2017; Decision of 7 November 2018, No. 685/2018; Decision of 16 January 2019, No. 26/2019; Decision of 3 July 2019, No. 417/2019; see also *Euro Box Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19FQ and C-840/19NC, 21 December 2021, EU:C:2021:1034; *RS (Effect of a decision of a constitutional court)*, Case C-430/21, 22 February 2022, EU:C:2022:99; for problems and progress see European Commission, *2020 Rule of Law Report, Country Chapter on Romania*, SWD(2020)322; European Commission, *Report on the developments regarding judicial reform in Romania*, 8 June 2021.

8 See: Dimitrov and Plachkova, 2020, p. 167; Vassileva, 2020, p. 741.

9 See: *Repubblika* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311).

10 See, among many: von Bogdandy and Spieker, 2020, p. 301; Spieker, 2023; Jakab and Kochenov, 2017; Scheppele, Kochenov and Grabowska-Moroz, 2020, p. 3; Spieker, 2019, p. 1182; Grabowska-Moroz, 2023; Wyrozumska, 2022, p. 379.

■ *2.1. From Aspiration to Obligation: Confirming the Legal Force of EU Values*

According to consistent case law of the CJEU, the values of the European Union possess legal normativity. Article 2 TEU sets out the Union's fundamental values, which are not merely political aspirations but legally binding obligations for the member states. These values also shape the identity of the Union as a community based on the rule of law.[11]

The fundamental legal normativity of these values can also be justified from a doctrinal legal perspective. At first glance, the wording of Article 2 TEU may cast doubt on its legal effect, as it refers explicitly to 'values' rather than legal principles. This impression is reinforced by the vague and open-ended language of Article 2, which closely resembles Recital 4 of the TEU Preamble.[12] A literal reading thus initially suggests that Article 2 sets out general programmatic statements, which are then given concrete form in the provisions that follow, in accordance with the intention of the contracting parties.[13]

However there are also indications supporting the view that Article 2 TEU possesses a certain degree of legal normativity, no matter how it may be defined.[14] Article 2 TEU emphasises that the values listed therein form the foundation of the Union and are shared by all member states. Although this may initially appear to be merely a descriptive statement of fact, an alternative interpretation is possible. The use of the present tense in the phrase 'on which the Union is founded' can be understood to mean that these values are not only foundational at the moment of accession but are intended to remain binding over time. A similar argument can be made with regard to the second sentence of Article 2 TEU, which states that these values are 'common to the Member States.' Thus, when interpreted broadly, the wording of the provision also provides textual support for the ongoing obligation of member states to uphold these values.[15]

Looking at the historical development of Article 2 TEU, it becomes clear that its predecessor, Article 6(1) of the Amsterdam/Nice version of the TEU, more strongly supported the provision's legal normativity, as it referred to 'principles' rather than merely to 'values.' One might interpret this change in wording to mean that the contracting parties deliberately chose not to maintain a framework of

11 See for the first time Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97, judgment of 16 February 2022, para. 232.

12 The preamble expresses the Member States' 'attachment to the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'. By contrast, the first sentence of Article 2 TEU provides: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.'

13 See only Nettesheim, 2024, p. 269.

14 See, among many others: von Bogdandy, 2009, p. 22; Rossi, 2020, p. 639; Spieker, 2023, p. 33; Sommermann, 2020, Art. 3 para. 8.

15 See also, among many others: Hilf and Schorkopf, 2025, Art. 2 para. 39; Calliess, 2004, pp. 1036, 1040; Calliess, 2022, Art. 2 paras. 8 and 33; with approval Voßkuhle, 2018, p. 27.

binding legal principles. However, the drafting history of the values clause suggests otherwise: despite the vagueness of the language, the drafters did not intend Article 2 TEU to serve merely as a second preamble to the Treaty. The travaux préparatoires of the Constitutional Convention show that careful consideration was given to which formulations and values should be included in Article 2 TEU, and which should be placed in the Preamble.[16] In particular, the President of the Convention, Valéry Giscard d'Estaing, emphasised that Article 2 TEU should contain only legally well-defined values – not vague or purely emotional programmatic statements.[17]

In conclusion, despite the many textual, systematic, and historical arguments that can be interpreted in both directions, one can state, perhaps unsurprisingly, that Article 2 TEU constitutes a legal norm and therefore possesses legal normativity.[18] Compliance with the values it sets out is a mandatory requirement for accession to the EU, which supports the view that their continued observance during membership is not merely a matter of political expectation or mutual interest but should be regarded as a fundamental legal obligation for all member states.

■ *2.2. The Conferral Constraint: Why EU Values Cannot Bypass the Scope of Union Law*

The key doctrinal question concerns the extent of Article 2 TEU's substantive binding effect. It is undisputed that the Union institutions themselves are bound by the values set out in Article 2 TEU.[19] The scope of Article 2 in relation to the member states, by contrast, raises significant doctrinal and competence-related concerns.[20]

16 See only European Convention, 2003; see also: Hilf and Schorkopf, 2025, Art. 2 paras. 8–10.

17 See European Convention, 2003; for more detail see: Spieker, 2023, p. 45; see also: Tridimas, 2006, p. 15; Calliess, 2022, Art. 2 para. 6.

18 See, among many: von Bogdandy, 2019, p. 522; Rötting, 2009, pp. 93 and 231; Scheppele, Kochenov and Grabowska-Moroz, 2020, p. 67; Streinz, 2018, p. 10.

19 On the binding nature of Article 2 TEU vis-à-vis the EU institutions, see, among many: Spieker, 2023, p. 87; Hilf and Schorkopf, 2025, Art. 2 para. 18; Terhechte, 2023, Art. 2 paras. 6.

20 See only Huber, 2022, p. 293; Nettesheim, 2019, p. 91; Nettesheim, 2021, p. 223; Nettesheim, 2022, pp. 529, 534; Riedl, 2024, p. 173; Schorkopf, 2020, pp. 482 ff; Hillgruber and Strickrodt, 2022.

In its *Repubblika* judgment of 2021, the CJEU introduced the principle of non-regression,[21] which prohibits member states from adopting measures that weaken the protection of the rule of law as enshrined in Article 2 TEU and further specified by Article 19(1), second subparagraph, TEU.[22] This principle implies that member states are expected to uphold the standard of respect for these values. The CJEU reasoned that, under Article 49 TEU, adherence to the values of Article 2 TEU is a precondition for joining the EU and that this obligation continues throughout membership.[23] The CJEU made it clear that a member state may not amend its legal framework in a way that undermines the protection of judicial independence.[24]

Despite developing the principle of non-regression, the CJEU has so far not abandoned the requirement that Article 19(1), second subparagraph, TEU links the application of Article 2 TEU to the scope of Union law. From a doctrinal perspective, the non-regression principle, based solely on Article 49 TEU, cannot justify applying the values of Article 2 TEU to member states independently of the scope of EU law. This is because the EU is bound by the principle of conferral and by the member states' integration mandate. As such, the Union's measures and obligations may neither bypass the substantive scope of Union law nor override its inherent limits, for example those defined by the limited applicability of the Charter of Fundamental Rights.[25] The Charter of Fundamental Rights' restricted scope of application is primarily set out in Article 51(1), first sentence, CFR, which binds the institutions, bodies, offices, and agencies of the Union, as well as the member states *only when they are implementing Union law.* In addition, Article 6(1), second

21 See only from the settled case law of the Court of Justice: *Repubblika v Il-Prim Ministru* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311); *Asociația "Forumul Judecătorilor din România" and Others* (Judgment of 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393); *Commission v Poland* (Judgment of 15 July 2021, Case C-791/19 R, EU:C:2021:596); *Euro Box Promotion and Others* (Judgment of 21 December 2021, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034); *Commission v Poland* (Judgment of 5 June 2023, Case C-204/21, EU:C:2023:442) para. 74. For a critical view on the principle of non-regression, see: Scholtes, 2023.

22 *Repubblika v Il-Prim Ministru* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311) paras. 56, 63 and 73.

23 *Repubblika v Il-Prim Ministru* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311) para. 61; see also: the early approach in *Wightman and Others v Secretary of State for Exiting the European Union* (Judgment of 10 December 2018, Case C-621/18, EU:C:2018:999) para. 63.

24 *Repubblika v Il-Prim Ministru* (Judgment of 20 April 2021, Case C-896/19, EU:C:2021:311) para. 63; see also: *A.B. and Others (Appointment of Judges to the Supreme Court – Remedy)* (Judgment of 2 March 2021, Case C-824/18, EU:C:2021:153); *Openbaar Ministerie (Independence of the issuing judicial authority)* (Judgment of 17 December 2020, Joined Cases C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033) para. 40; *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (Judgment of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982).

25 See also on this issue: Kaiser, 2023.

sentence, TEU and Article 51(2) CFR make it clear that the Charter of Fundamental Rights neither extends the Union's competences nor creates any new powers.[26]

From this perspective, the infringement proceedings initiated by the Commission on 19th December 2022 against Hungary are problematic. The case concerns legislation that restricts the depiction of homosexuality and transgender identities in media and educational materials aimed at minors. In addition to alleging violations of secondary law (Article 9(1)(c)(ii) of Directive 2010/13/EU on audiovisual media services, Article 3(2) of Directive 2000/31/EC on electronic commerce, and Articles 16 and 19 of Directive 2006/123/EC on services in the internal market), the fundamental freedoms (Article 56 TFEU), and fundamental rights (Articles 1, 7, 11, and 21 CFR), the Commission also argues – under its second plea – that there has been an autonomous breach of Article 2 TEU.[27] If the Commission's claim were to be understood as suggesting that Article 2 TEU can be invoked independently of any violation of specific provisions of primary or secondary Union law, particularly without reference to the Charter of Fundamental Rights, this would effectively circumvent the limitations set out in Article 51(1), first sentence, CFR, Article 6(1), second sentence, TEU, and Article 51(2) CFR. It is therefore understandable that, during the oral hearing in Case C-769/22 on 19th November 2024, the Commission took a markedly more cautious position, almost contradicting its written submission, by emphasising that Article 2 TEU could not be applied in isolation from the rest of Union law. Accordingly, it argued that the second plea could not be upheld independently of the first, which invokes specific provisions of primary and secondary law.[28]

Even under the CJEU's broad interpretation of Article 51(1), first sentence, CFR, the Charter of Fundamental Rights is only applicable where there is a concrete substantive link to Union law.[29] Since the *ASJP* judgment, the CJEU has held that an abstract potential for any involvement with Union law is sufficient to trigger

26 BVerfGE 152, 152 (para. 43) – *Right to be Forgotten I*; Schorkopf, 2020, p. 481; Huber and Paulus, 2015, p. 296; Bogdandy and Spieker, 2019, p. 421.

27 Pending proceedings of 19 December 2022, Case C-769/22 (Commission v Hungary (Act LXXIX of 2021)), plea 2.

28 In the hearing for C-769/22, the Commission took a notably more defensive stance – almost in contradiction to its statement of claim – emphasising that Article 2 TEU cannot be applied independently of other Union law provisions and that plea 2 cannot be treated as arising directly from plea 1 (i.e. the complaint regarding specific primary and secondary law provisions).

29 See: *Åkerberg Fransson*, judgment of 26 February 2013, Case C-617/10, EU:C:2013:105, para. 19; *Hernández*, judgment of 10 July 2014, Case C-198/13, EU:C:2014:2055, para. 34; *Paoletti*, judgment of 6 October 2016, Case C-218/15, EU:C:2016:748, para. 13; critically Britz, 2015, p. 277; Huber, 2015, p. 305; Wollenschläger, 2014, p. 577.

Article 2 TEU in conjunction with Article 19(1), second subparagraph, TEU.[30] However, as long as the CJEU's case law on Article 19(1), second subparagraph, TEU remains focused on ensuring the effective enforcement of Union law, does not subjectivise this provision, and does not extend the operationalisation of the rights of the Charter of Fundamental Rights beyond the specific content of Article 47 CFR, the limitations of Article 51(1), first sentence, CFR can still be respected. In contrast, any attempt to apply Article 2 TEU as an autonomous legal norm, or worse to turn it into a source of individual rights, such as for human dignity or minority protection, would be methodologically inappropriate. Such matters are to be assessed exclusively under the Charter of Fundamental Rights.

The CJEU's value-based jurisprudence does not raise competence concerns, so long as Article 2 TEU is used solely as an interpretive aid to clarify specific obligations under Union law, without establishing a value-based reservation that applies independently of the scope of EU law. Therefore, there is no circumvention of the principle of conferral if the CJEU relies on Article 2 TEU to interpret clearly defined Union obligations. This is illustrated by the *LM* judgment.[31] In *LM*, the CJEU held that the obligation to assess judicial cooperation under the principle of mutual recognition, specifically in the context of the European Arrest Warrant[32], does not derive from any 'legal effect of Article 2 TEU going beyond the standard provisions of primary law.'[33] Rather, the obligation is grounded in established secondary legislation, in particular Article 1(3) of the Framework Decision on the European Arrest Warrant (FD EAW). Article 2 TEU merely supports the interpretation of these specific obligations, without creating a general value-based exception.[34] Accordingly, not every violation of Article 2 TEU automatically leads to a suspension of cooperation or a breakdown in mutual trust.[35] Mutual trust

30 See also: Klatt, 2019, p. 1117; Schorkopf, 2019, p. 3421; See the restrictive case law of the Court of Justice: *Siragusa*, judgment of 6 March 2014, Case C-206/13, EU:C:2014:126, paras. 25–6, 31–2; *Hernández*, judgment of 10 July 2014, Case C-198/13, EU:C:2014:2055, para. 37. However, the line of case law has not since been entirely clear and tends towards applying the Charter: *Berlioz Investment Fund*, judgment of 16 May 2017, Case C-682/15, EU:C:2017:373, paras. 33; in more detail *Tjebbes*, judgment of 12 March 2019, Case C-221/17, EU:C:2019:189.

31 See: LM (C-216/18 PPU), judgment of 25 July 2018, EU:C:2018:586; see also in detail: Hainthaler, 2024, p. 74; Wendel, 2019, p. 111.

32 See on the *Aranyosi* test *Aranyosi and Căldăraru (Joined Cases C-404/15 and C-659/15 PPU)*, judgment of 5 April 2016, EU:C:2016:198, para. 89; and already on mutual recognition in the asylum system *N.S. and Others (Joined Cases C-411/10 and C-493/10)*, judgment of 21 December 2011, EU:C:2011:865.

33 Hainthaler, 2024, p. 63.

34 The judgment in *LM* illustrates the CJEU's institutional restraint when operationalising Article 2 TEU values. The Court involves national courts in the assessment of judicial independence. See also: Wendel, 2019, p. 119.

35 See also: *Minister for Justice and Equality (Deficiencies in the judicial system) (C-216/18 PPU)*, judgment of 25 July 2018, EU:C:2018:586, paras. 60 ff; see also Wendel, 2019, p. 112.

merely underpins the recognition regime, whereas the suspension of cooperation must be based on specific provisions of secondary law.[36]

■ *2.3. Interim Conclusion: A Constrained Mandate*

Article 2 TEU is a legal norm and therefore binding on the member states, but only within the scope of Union law. It generally serves as an interpretive aid for clearly defined obligations under Union law, particularly in conjunction with Article 19(1), second subparagraph, TEU, as established since the *ASJP* judgment. Article 2 TEU cannot generate autonomous legal obligations independently of specific provisions of Union law. Otherwise, it would undermine the Union's competence structure as defined by the integration framework and the specific, normatively defined scope of application, such as Article 51(1), first sentence, CFR. As such, the CJEU's value-based jurisprudence does not raise concerns of ultra vires action provided that Article 2 TEU is used exclusively to interpret existing Union obligations. Doctrinally, Article 2 TEU does not establish an independent value-based reservation that overrides the principle of conferral or operates beyond the defined limits of Union competences.

3. The Procedural Hurdle: The Challenge of Judicial Enforcement

As outlined above, the CJEU has so far operationalised Article 2 TEU only by way of Article 19(1), second subparagraph, TEU. This has allowed the CJEU, albeit through a broad interpretation of that provision, and subject to the condition that the *Repubblika* approach does not evolve into a full-fledged *ordre public communautaire* reservation,[37] to establish a point of legal link between value enforcement and the scope of Union law. This limited substantive reach is mirrored by a correspondingly restricted justiciability: under the structure of the EU Treaties, Article 2 TEU cannot be enforced judicially by the CJEU in infringement proceedings unless it operates within the material scope of Union law.

■ *3.1. The Primacy of Politics: Why Article 7 TEU is the Exclusive Path to Sanctions*

At first glance, the CJEU's general responsibility[38] to ensure the observance of the law in the interpretation and application of the Treaties under Article 19(1) TEU

36 See especially: Hainthaler, 2024, p. 78. The judgment of the CJEU in *OG (Parquet de Lübeck) (C-508/18)*, judgment of 27 May 2019, EU:C:2019:456.

37 On the possibility of such a development, see only: Hainthaler, 2024, p. 82.

38 In the same direction, among many, see: Spieker, 2023, p. 47; von Bogdandy and Spieker, 2020, p. 319; Hillion, 2016, p. 66; Weber, 2017, p. 748; Giegerich, 2019, p. 96. Contra, among many, see: Nettesheim, 2022, p. 534; Riedl, 2024, p. 173; Martenczuk, 2018, p. 45; Levits, 2018, p. 262; Terhechte, 2023, Art. 2 para. 11.

might suggest that it has a broad judicial competence to review violations of Union values.[39] However, this authority is explicitly limited by Article 269 TFEU in conjunction with Article 7 TEU when it comes to the sanctioning of value violations.[40] Article 269(1) TFEU restricts the CJEU's jurisdiction in Article 7 TEU proceedings to purely procedural matters.[41] As a result, the substantive definition and enforcement of the values enshrined in Article 2 TEU, when linked to sanctions under Article 7 TEU, are, as clearly stated in Article 269 TFEU, excluded from the CJEU's jurisdiction and instead left to the political discretion of the member states.[42]

However, this does not yet resolve the question of whether, outside or alongside the procedure under Article 7 TEU, an additional judicial review of the values in Article 2 TEU by the CJEU is possible, whether in the context of preliminary rulings or infringement proceedings, or whether Article 7 TEU constitutes an exhaustive special mechanism for addressing breaches of the Union's fundamental values.[43] Whether the Treaties allow for the enforcement of Article 2 TEU values exclusively through the potentially exhaustive procedure of Article 7 TEU, or also through infringement proceedings before the CJEU, is ultimately a matter of interpretation.

The wording of Article 7 TEU alone does not conclusively establish that it serves an exclusive function, as it lacks terms such as 'only' or 'exclusively.' However, the structure of the Treaties strongly suggests that Article 7 TEU constitutes a special and exhaustive mechanism.[44] A systematic analysis of the Treaties shows that the drafters have already operationalised Article 2 TEU in various

39 In this direction also Lenaerts, 2017, p. 639.

40 See also: Martenczuk, 2018, p. 45; Levits, 2018, p. 262; Riedl, 2024, p. 173.

41 See: *Hungary v Parliament* (judgment of 3 June 2021, Case C-650/18, EU:C:2021:426) para. 29; Schmahl, 2000, p. 827; Ruffert, 2022, Art. 269 para. 1.

42 See also: Schorkopf, 2019, p. 3422; Ruffert, 2022, Art. 269 para. 3. Not convincing from a doctrinal perspective is AG Bobek, Opinion of 3 December 2020, *Hungary v European Parliament* (Case C-650/18, EU:C:2020:985) paras. 43ff, who seeks to reinterpret Art. 269 TFEU – contrary to its clear wording – from a jurisdiction-limiting into a jurisdiction-expanding provision. Correctly, however, on rule-of-law grounds, the CJEU's jurisdictional restriction to purely procedural issues should apply only to the determination decisions under Art. 7 paras. 1–2 TEU, but not to the suspension decision under Art. 7 para. 3 TEU; see especially: Hainthaler, 2024, p. 241.

43 For an in-depth discussion of this issue, see: AG Bobek, Opinion of 3 December 2020, *Hungary v European Parliament* (Case C-650/18, EU:C:2020:985) para. 43; see also: Ruffert, 2022, Art. 7 para. 36; von Bogdandy, 2019, p. 532, 535; Germelmann, 2021, p. 193; Schorkopf, 2000, p. 106; Pechstein, 2018, Art. 7 para. 22; Schmidt and Bogdanowicz, 2018, p. 1061; Lavelle, 2019, p. 45; on the *lex specialis* principle generally see: *Commission v Ireland and Others* (judgment of 2 December 2009, Case C-89/08 P, EU:C:2009:742) para. 14; *Heininger* (judgment of 13 December 2001, Case C-481/99, EU:C:2001:684) para. 37; Martens, 2013, p. 428.

44 In this regard, see also: Giegerich, 2015, p. 535; Nettesheim, 2024, p. 293; Riedl, 2024, p. 174; Martenczuk, 2018, p. 45; Levits, 2018, p. 262; Hillgruber and Strickrodt, 2022; Schorkopf, 2020, p. 482; contra Hainthaler, 2024, p. 293; Hummer, 2015, p. 90; Schmahl, 2015, p. 854; Spieker, 2023, p. 62; Skouris, 2018, p. 50.

places by referring to it as a legal condition in specific provisions and linking it to concrete legal consequences. The values in Article 2 TEU are first mentioned at the beginning of the Treaties and are then addressed in Articles 3, 7, 8, 13, 21, 32, 42, and 49 TEU. These specific provisions embed the values of Article 2 TEU into defined legal contexts and attach enforceable consequences to them, subject to particular requirements. Article 49 TEU is especially illustrative: even in the accession process, the decision on membership – and, implicitly, the assessment of value compliance – rests primarily with the member states, each of which must independently ratify the accession agreement.[45] This political decision-making power of the member states continues after accession through Article 7 TEU.

Article 7 TEU provides a special procedure for responding to serious breaches of the Union's fundamental values by member states. By contrast, the idea that Article 2 TEU should allow the CJEU to independently derive legal consequences and obligations from that provision requires significantly stronger justification than what the CJEU's case law has so far provided.

In any case, as will be shown below, a systematic and teleological interpretation suggests that the specific purpose of Article 7 TEU, to provide for a graduated and differentiated protection of the values in Article 2 TEU through both preventive and sanctioning measures, can only be achieved if Article 7 is understood as an exhaustive special provision. In addressing the question of whether the conditionality mechanism can apply alongside Article 7 TEU, the CJEU itself has commented on this issue:

> that the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision. However, it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, in an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are

45 Provisions of the Accession Treaty that form part of primary law are not subject to the legality review of the Court of Justice. The Court cannot review one provision of primary law against another, as there is no hierarchy within primary law. See: LAISA (joined cases 31 and 35/86, judgment of 28 April 1988, EU:C:1988:211) para. 14; similarly Ohler, 2025, Art. 49 para. 59; Niedobitek, 2004, p. 375; contra Cremer, 2022, Art. 49 para. 12; Pechstein, 2018, Art. 49 para. 11.

> different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU.[46]

Applied to the question of whether judicial enforcement of the values enshrined in Article 2 TEU is permissible, the decisive point is that the CJEU's value-based jurisprudence must differ from the Article 7 TEU procedure both in purpose and in subject matter.

To begin with, the subject matter of the Article 7 TEU mechanism and the CJEU's value jurisprudence must be examined. Both approaches rely on Article 2 TEU as their legal basis. However, the CJEU in its value-operationalising case law also refers to Article 19(1), second subparagraph, TEU, which could suggest that they rest on distinct normative foundations. Moreover, the Article 7 procedure and infringement proceedings before the CJEU differ in both the legal criteria and the legal consequences they entail. Substantively, Article 7(2) and (3) TEU require serious and systemic breaches of the values in Article 2 TEU, whereas judicial proceedings before the CJEU could address even isolated violations. As for legal consequences, a CJEU judgment finding a breach of Article 2 TEU leads,[47] apart from the obligation to comply with the ruling, only to financial penalties in the form of lump sums or daily fines under Article 260(2) TFEU. In contrast, Article 7(3), first sentence, TEU allows for the suspension of specific membership rights, including a member state's voting rights in the Council.[48] Precisely because Article 7 procedure is politically challenging, due to the unanimity requirement in the European Council under Article 7(2) TEU, the CJEU's value-operationalising case law, now supported by secondary law tools such as the conditionality mechanism, has enabled the development of a more differentiated system for protecting the Union's fundamental values. Therefore, clear distinctions can be made between the issues addressed by the Article 7 TEU procedure and those covered by the CJEU's value jurisprudence.

As the CJEU has rightly observed,[49] not only the subject matter but also the purpose and objective of the two procedures must differ. Otherwise judges could continuously introduce new, less demanding, and subsidiary mechanisms in pursuit of the same aim, effectively undermining the principle of conferral, especially in the context of judicial law-making. According to the CJEU's reasoning

46 Court of Justice, *Hungary v Parliament and Council* (Case C-156/21, judgment of 16 February 2022, EU:C:2022:97) paras. 167–168 and *Poland v Parliament and Council* (Case C-157/21, judgment of 16 February 2022, EU:C:2022:98) paras. 206–207, emphasis in the original.

47 See also: Ruffert, 2022, Art. 7 para. 37; para. 37; Schorkopf, 2000, p. 106; Schmidt and Bogdanowicz, 2018, p. 1061; Schorkopf, 2025, Art. 7 para. 31; Lavelle, 2019, p. 45.

48 See further: Schorkopf, 2025, Art. 7 paras. 43; Skouris, 2018, p. 50; Schmidt and Bogdanowicz, 2018, p. 1072; Kassner, 2003, p. 137.

49 Court of Justice, *Hungary v Parliament and Council* (Case C-156/21, judgment of 16 February 2022, EU:C:2022:97) para. 168; *Poland v Parliament and Council* (Case C-157/21, judgment of 16 February 2022, EU:C:2022:98) para. 207.

however, the value-operationalising approach developed since *ASJP* specifically aims to safeguard one of the Union's core values: the rule of law. Yet this is precisely the same objective pursued by Article 7 TEU, which establishes a detailed procedure with clearly defined institutional roles and sanctions for breaches of the EU's fundamental values. As recently as 2014, the Commission itself acknowledged that the EU Treaties did not provide sufficient enforcement instruments for the values of Article 2 TEU outside of the Article 7 procedure.[50] The Council Legal Service had reached the same conclusion back in 2014:

> Respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU. Only this legal basis provides for a Union competence to supervise the application of the rule of law, as a value of the Union, in a context that is not related to a specific material competence or that exceeds its scope.[51]

This is doctrinally compelling, since the CJEU's purely judicial development of the law effectively bypasses the high threshold requirements of the Article 7 TEU procedure. This is particularly problematic, since it would enable the CJEU to largely determine both the conditions and the consequences of the very broadly worded Article 2 TEU on its own. The exclusion of the CJEU from the Article 7 procedure, as expressly provided for in Article 269 TFEU, reflects the original intent of the Treaty drafters: that the enforcement of the values in Article 2 TEU should rest solely with the other member states, as political equals, through a process grounded in political legitimacy.[52] The fact that this was the unanimous view of all Union institutions up until 2014 only reinforces the historical intent behind the Treaties. Article 7 TEU reflects the member-driven structure of the European Union in matters of value enforcement.[53] The provision demonstrates that the 'masters of the Treaties' deliberately entrusted the definition and enforcement of Article 2 TEU values to the deep democratic legitimacy of the member states represented in the European Council, thus relying on the intergovernmental dimension within the EU's institutional culture. Within the EU's constitutional architecture, the two-stage sanction mechanism, the consultation of member states, the high voting thresholds, the central role of the Council and the European Council, and

50 European Commission, 2014, pp. 8–9.
51 Council of the European Union, Opinion of the Legal Service of the Council, 10296/14 LIMITE, 27 May 2014, para. 17.
52 See also: Nettesheim, 2019, p. 91; Nettesheim, 2022, p. 543.
53 Nettesheim, 2019, p. 91; for background on the development of Article 7 TEU see: Sadurski, 2010, p. 385.

the limitation of the CJEU's role to procedural review under Article 7 TEU all serve a single purpose: the protection of member state competences.[54] Accordingly, the values enshrined in Article 2 TEU can override the principle of conferral and grant new powers to Union institutions only within the narrow framework of Article 7 TEU.[55] It is no surprise that the Council (Article 7(1) TEU: four-fifths majority) and, above all, the European Council (Article 7(2) TEU: unanimity; Article 7(3) and (4) TEU: qualified majority) play a particularly prominent role in safeguarding the member states. The European Council, which provides the Union with the necessary impetus for its development and sets its general political directions and priorities, is ultimately responsible for defending the values enshrined in Article 2 TEU through the Article 7 procedure. Only the European Council has the authority to determine that a member state has violated these values. As the representative body of the member states, it concentrates their full constitutional legitimacy. It is therefore, in principle, the appropriate forum for the collective enforcement of shared values, especially values such as the rule of law, which, as the CJEU rightly notes, form part of the constitutional identity of the member states.[56]

In addition to the political procedure under Article 7 TEU, the conditionality mechanism[57] offers another way to sanction breaches of the Union's fundamental values. In line with the logic of the European Union as a supranational organisation still primarily focused on the internal market, the conditionality regime allows for the protection of the Union budget against violations of Article 2 TEU, based directly on the legal basis provided in Article 322(1)(a) TFEU.

An infringement procedure based directly on Article 2 TEU, outside the scope of Union law, would not only bypass the mechanisms laid down in Article 7 TEU, including clearly defined procedural steps, designated institutional actors, and a graduated system of sanctions. More than that, such a procedure would create a structurally inconsistent grey area between the conditionality mechanism and the Article 7 TEU procedure. The specific legal frameworks for both mechanisms – the conditionality regime, which is tied to the protection of the EU budget, and the Article 7 procedure, which is a political process centred on the role of the member states – are grounded in primary and secondary Union law. These

54 See: Council of the European Union, Opinion of the Legal Service, 13593/18, 25 October 2018, para. 13.

55 Moreover, as already mentioned, Art. 2 TEU does not serve to confer additional competences upon the EU institutions, see: BVerfGE 123, 267 (397) – *Lissabon*.

56 Court of Justice, *Associação Sindical dos Juízes Portugueses* (Case C-64/16, judgment of 27 February 2018, EU:C:2018:117) para. 35, referring in this sense to Court of Justice, *Unibet* (Case C-432/05, judgment of 13 March 2007, EU:C:2007:163) para. 37; Court of Justice, *DEB* (Case C-279/09, judgment of 22 December 2010, EU:C:2010:811) paras. 29–33; Court of Justice, *Rosneft* (Case C-72/15, judgment of 28 March 2017, EU:C:2017:236) para. 73; Court of Justice, *Hungary v Parliament and Council* (Case C-156/21, judgment of 16 February 2022, EU:C:2022:97) paras. 231ff; and Court of Justice, *Poland v Parliament and Council* (Case C-157/21, judgment of 16 February 2022, EU:C:2022:98) para. 263.

57 European Parliament and the Council of the European Union, 2020.

frameworks risk being circumvented through unchecked judicial law-making by the CJEU.

■ *3.2. The Legitimacy Deficit: When Judicial Activism Undermines the Rule of Law*

Beyond the legal questions already raised, there is also a fundamental issue of legitimacy: how far may judicial development of the law based on Article 2 TEU go before the CJEU begins to assume a quasi-legislative role, introducing structural changes to the Union without adequate democratic legitimacy, bypassing both the member states and the Union legislator?[58] The operationalisation of constitutional values within a legal order is, in principle, a task for the legislature. Courts, especially constitutional courts, are meant to play a complementary, gap-filling role. Thus, even apart from concerns about circumventing specific procedures and legal competences, it must be recognised that the CJEU is not institutionally suited to lead the European Union into a new phase of constitutionalism on the basis of the broadly worded and highly indeterminate Article 2 TEU.[59] At the heart of the principle of separation of powers, or, in the EU context, the principle of institutional balance,[60] is the idea that tasks should be carried out by the institution best equipped for them.[61] It is therefore primarily the responsibility of the Union legislator to create instruments for safeguarding the EU's values, where necessary. If the protection of the rule of law under Article 7 TEU is rightly seen as inadequate, it is up to the Commission, Parliament, and Council to initiate and adopt new legislation, as they have done, for example, through the conditionality mechanism. By contrast, any structural reform of the European

58 On this issue see also: Möllers and Schneider, 2018, p. 147; Blauberger and Kelemen, 2017, pp. 325–326 and 331.

59 Accurately observed by Nettesheim, 2024, p. 269: 'Its legitimacy and political capital are insufficient to create a meta-constitution for the constitutions of the EU Member States. The Court's 'value constitutionalism' amounts to an eclectic 'Frankenstein constitutionalism' that has no place within the current treaty architecture. The democratic quality of the overall system suffers. Highly political conflicts cannot simply be resolved by juridification.'

60 See from the case law of the Court of Justice only *Roquette Frères* (Case C-138/79, judgment of 29 October 1980, EU:C:1980:249); *Commission v Council* (Case C-302/87, judgment of 27 September 1988, EU:C:1988:461); *Parliament v Council (Chernobyl)* (Case C-70/88, judgment of 22 May 1990, EU:C:1990:217); *Commission v Council (Titanium Dioxide)* (Case C-300/89, judgment of 11 June 1991, EU:C:1991:244); and from the literature among many Jacqué, 2004, p. 383; Craig, 2021, p. 46; Yuratich, 2017, p. 99.

61 For the German Federal Constitutional Court's case law on the principle of separation of powers, see: BVerfGE 49, 89 para. 73 – Kalkar, and in particular BVerfGE 68, 1 para. 144 – *Atomwaffenstationierung*: 'The organisational and functional distinction and separation of powers, normatively enshrined there as a principle, primarily serve the distribution of political power and responsibility, as well as the control of those holding power; it also aims to ensure that state decisions are made as correctly as possible – that is, by the bodies that are best suited for this purpose based on their organisation, composition, function, and procedures (...).'

Union can only be legitimately undertaken by the member states themselves, as the 'masters of the Treaties.' They decide politically on the Union's values, whether in the accession process, under Article 7 TEU, or through treaty amendments.[62]

The conditionality mechanism clearly demonstrates that new procedures for defending the Union's values must, as a matter of principle, be based on new legal foundations rather than leaving such developments to the CJEU through Article 2 TEU and thereby assigning the CJEU a quasi-legislative role that the actual legislature fails to fulfil. In this context, former Commission President Barroso rightly observed as early as 2012 that 'We need a better developed set of instruments, not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 TEU.'[63] The Commission recognised that an additional enforcement mechanism required a proper legal basis, and that such a sensitive area could not be left to the discretion of the CJEU. This is why the regulation establishing the conditionality mechanism was introduced on the basis of Article 322(1)(a) TFEU.[64]

Ultimately, the CJEU's case law aimed at defending the rule of law in Poland, Hungary, and Romania leads to a paradoxical outcome. In seeking to counteract democratic backsliding, the CJEU risks overstepping its judicial mandate, thereby undermining its own legitimacy and that of the European Union. The core rule-of-law paradox lies in the fact that this approach may endanger the rule of law *within* the Union itself.[65] By disregarding the vertical balance of power between the Union and its member states, and by weakening the horizontal institutional balance within the EU, the CJEU's legitimacy, as well as that of the Union, is diminished.[66] This is especially problematic because the direct and overriding effect of Union law rests precisely on the premise of conferred powers. The expansion of the CJEU's authority through value-based jurisprudence is not matched by a corresponding increase in democratic legitimacy.

■ *3.3. Interim Conclusion: A Judicial Dead End*

The judicial enforcement of the values enshrined in Article 2 TEU is likewise limited to the scope of EU law. Article 7 TEU constitutes an exclusive special

62 See also among many: Schorkopf, 2020, p. 482; Nettesheim, 2024, p. 269.

63 See: European Commission, 2014.

64 Council of the European Union, Opinion of the Legal Service, 13593/18, 25 October 2018, para. 2.

65 See also: Haltern, 2017, paras. 756 etc.; 2021, p. 213: 'Constitutionally speaking, the erosion of competence boundaries undermines the legitimacy of the entire constitutional structure of the European Union [...]. Both the Union's formal legitimacy (as the internal rationale for primacy and direct effect implodes) and its substantive legitimacy (as the expansion of competences must go hand in hand with an increase in democratic legitimacy) are thereby impaired.'

66 See explicitly: *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case C-26/62, judgment of 5 February 1963, EU:C:1963:1) 1 (25); *Flaminio Costa v ENEL* (Case C-6/64, judgment of 15 July 1964, EU:C:1964:66) 1259 (1269).

procedure for serious breaches of these values, which is largely shielded from judicial review by Article 269 TFEU. An infringement procedure based solely on Article 2 TEU would circumvent the established allocation of roles and competences, effectively hollowing out Article 7 TEU, and pushing the CJEU into a quasi-legislative role without any legitimate basis. In order to preserve both the institutional balance and the principle of conferred powers, judicial enforcement of Article 2 TEU independently of the scope of Union law remains excluded, unless as with the conditionality mechanism, a specific legal framework is established by the legislator.

4. Conclusion: Structural Limits of the ECJ's Current Approach and Prospects for a Coherent Path Forward

Ultimately, the Treaties' structure makes clear that only Article 7 TEU permits repressive enforcement of the Union's values against Member States, independently of the material scope of Union law. Article 2 TEU itself does not extend its applicability beyond that scope. So far, the CJEU has relied on Article 19(1), second subparagraph TEU to establish a connection to Union law. However, it is doctrinally questionable to consider the mere abstract potential of a body acting as a Union court in a functional sense sufficient to trigger the material scope of Union law. At the same time, it is unlikely that the CJEU will reverse this line of case law. Nevertheless, the application of this jurisprudence on judicial independence should be avoided in contexts beyond the clear dismantling of the rule of law. It would be far from convincing to extend the use of purely abstract points of reference to establish a link to Union law in relation to other national institutions. Doing so would, in theory, allow the CJEU to subject the entire administrative and governmental structure of the Member States to a form of European constitutional oversight. Yet under the functioning of Union law, it is precisely the national authorities and institutions that are responsible for implementing and enforcing Union law, thereby ensuring its effectiveness. With respect to the judiciary, the CJEU has already developed detailed requirements regarding the appointment, term of office, and dismissal of judges. On the basis of Articles 10 and 12 TEU, similarly detailed requirements could be imposed on national parliaments concerning the election and exercise of parliamentary mandates. Likewise, the CJEU could establish a system of constitutional oversight for national administrations, given that Articles 197, 291, and 298 TFEU require the Union's institutions, bodies, and

agencies to rely on an open, efficient, and independent European administration, something that necessarily involves the Member States.[67]

Without violating the principle of conferral, the CJEU cannot, by judicially developing the law under Article 2 TEU, create a generally applicable set of obligations that would allow it to exercise constitutional oversight over areas that fall within the original competences of the Member States or over constitutionally grounded national decisions within the framework of infringement proceedings. For a provision of Union law to have effect within the constitutional orders of the Member States, it must be based on a clear legal foundation, namely one that defines or at least clearly specifies both the conditions for its application and its legal consequences. This requirement, rooted in the constitutional identity of the Union, has long been insisted upon by the constitutional and supreme courts of the Member States, dating back to the Maastricht Treaty,[68] and it once again comes to the fore in the context of operationalising the values enshrined in Article 2 TEU.

A comparison with the Conditionality Mechanism introduced by the EU legislator further illustrates that the repressive enforcement of the Union's values requires a specific legal basis in the Treaties. It is no coincidence that the Conditionality Mechanism is grounded in the dedicated Conditionality Regulation (Regulation (EU, Euratom) 2020/2092), which is based on Article 322(1)(a) TFEU. In this regard, the Union's legislature has taken responsibility by establishing a mechanism for the enforcement of values that is sufficiently distinct from Article 7 TEU, particularly due to its link to the internal market.

Conversely, another repressive instrument for protecting the Union's values, the so-called 'New EU Framework to strengthen the Rule of Law,' also referred to as the pre-Article 7 procedure, explicitly operates,[69] according to the Commission, without relying on a specific legal basis. It can arguably be based in general on Article 292, fourth sentence, TFEU.[70] However, in terms of legal consequences, it only authorises the Commission to issue recommendations, and not to impose binding sanctions.

Within this graduated system – comprising primary law procedures, secondary law instruments, and purely recommendatory mechanisms for safeguarding values – the ECJ's value-based jurisprudence under infringement proceedings

67 See also: Nettesheim, 2022, p. 542: 'In this way, the CJEU is developing comprehensive judicial requirements for the member state system of court establishment, the appointment, tenure, and dismissal of judges, as well as the position of courts in the state function system.'

68 For a similar example, see particularly: Højesteret, judgment of 6 April 1998, I 361/1997, UfR 1998, 800, – *Carlsen v. Rasmussen*. In this case, the Højesteret clarified that Art. 20 para. 1 of the Danish Constitutional Act, which regulates the delegation of state powers to international organizations, contains a requirement for clarity: the powers delegated must be clearly defined. It would be unconstitutional if the organization itself decides the extent of its own jurisdiction (competence-competence).

69 European Commission, 2024.

70 Instructive on this: Hainthaler, 2024, p. 291.

introduces a structurally inconsistent tool. It overextends the effectiveness of value enforcement (by combining application beyond the Union's legal scope with the harsh consequence of financial sanctions under Article 260 TFEU), while disregarding the limited scope of Union law.

Even the cross-sectoral enforcement instruments long established in other areas of Union law, namely the fundamental freedoms aimed at achieving the Union's internal market objectives, offset their broad scope by relying on clearly defined legal criteria (such as a cross-border element, a personal or material nexus, a specifically protected good or type of conduct, defined exemptions, and justification grounds). Following the same logic, Article 51(1) sentence 1 CFR introduces a limited scope of application as a corrective to the horizontal effect of the fundamental freedoms, tying the Charter of Fundamental Rights' applicability to the 'implementation of Union law.'[71]

Even outside the system of repressive enforcement of values, the differentiated logic of the EU Treaties becomes evident. Where legal norms apply across the board and independently of specific areas of application, other mechanisms are used to safeguard the principle of conferral: clear legal criteria and scope-based exceptions for the fundamental freedoms, the limited scope of application of the Charter of Fundamental Rights, and the strict procedural requirements and central role of the European Council in the Article 7 TEU procedure. Abandoning all these safeguards and shifting the repressive enforcement of values largely into the hands of the CJEU – channelling it through infringement proceedings (Articles 258 and 259 TFEU refer, not coincidentally, to a 'failure to fulfil an obligation under the Treaties') – would only be conceivable through a formal Treaty revision, which is the exclusive prerogative of the Member States, not under the current constitutional framework of the EU.

It follows that any judicial enforcement of the values set out in Article 2 TEU must meet four cumulative conditions.

It requires a concrete link to the *material scope* of Union law. Article 2 TEU cannot serve as a standalone source of Union competence. It becomes operational only when another provision of Union law, such as Article 19 TEU, Article 291 TFEU, or sector-specific secondary legislation, already applies. The scope of Article 2 TEU is thus necessarily derivative.

Even where the material scope of Union law is established, the enforcement of values must rely on a *normative basis* that imposes a specific legal obligation. It is not sufficient that a provision merely refers to the values of the Union; it must concretise them. The relevant Treaty or legislative norm must define the legal standard to be enforced. Abstract or programmatic references, such as those in Articles 10(2), 12 TEU or Article 298 TFEU, cannot serve as a sufficient foundation for infringement proceedings.

71 Critically: Spieker, 2024.

The legal obligation must be interpreted *within its own normative limits*. Article 2 TEU may serve to guide the interpretation of a norm, but not to expand its substantive content. Infringement proceedings require a clearly defined legal obligation under the Treaties. Using Article 2 TEU to transform limited obligations into far-reaching constitutional mandates would violate the principle of legal certainty and exceed the Court's interpretive authority.

The *substantive meaning* of the values in Article 2 TEU must be derived from the shared constitutional traditions of the Member States. This interpretive approach ensures democratic legitimacy and doctrinal coherence. Article 2 TEU can only produce concrete normative content through comparative constitutional reasoning, analogous to the development of general principles under Article 6(3) TEU. The values must reflect constitutional common ground, not judicial innovation.

This fourfold structure is not merely a theoretical constraint; it follows from the very logic of the Union's constitutional order. Repressive value enforcement, particularly when linked to Article 260 TFEU financial sanctions, must remain legally predictable, politically accountable, and normatively limited. Without a formal Treaty revision, which only the Member States can initiate, any further expansion of value enforcement through judicial channels would lack structural legitimacy.

The following table summarises the necessary preconditions for a coherent and legally sound application of Article 2 TEU in infringement proceedings:

Table 1. Preconditions for a Coherent Application of Article 2 TEU in Infringement Proceedings

Precondition	Doctrinal Function	Legal Justification
Material Scope of Union Law	Article 2 TEU can only be operationalised where the situation falls within the scope of Union law, as defined by a separate substantive legal norm.	Prevents unwarranted expansion of Union competences; upholds the principle of conferral under Article 5(2) TEU.
Normative Anchor in Primary or Secondary Law	Value enforcement must rely on a Treaty provision or legislative act that contains a concrete and specific legal obligation.	Avoids reliance on declaratory or programmatic provisions; ensures legal certainty and normative specificity.
Prohibition of Normative Overreach	Article 2 TEU may inform the interpretation of a specific obligation but cannot extend its substantive content beyond what is defined in Union law.	Maintains the interpretive limits of judicial reasoning; protects the integrity of the Treaties' legal framework.
Substantive Elaboration via Shared Constitutional Traditions	The concrete meaning of the values in Article 2 TEU must be developed through comparative constitutional analysis grounded in the common traditions of the Member States.	Ensures democratic legitimacy; aligns with the methodology for deriving general principles under Article 6(3) TEU.

Source: Author's own elaboration.

This framework not only respects the structural logic of the Treaties but also offers a coherent path forward: one that preserves the legitimacy of value enforcement without transforming the ECJ into a constitutional court of general jurisdiction over national institutions.

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MARTIN ŠKUREK*

The Basic Institutions for the Protection of Human Rights Under the Czech Constitution and the Charter

ABSTRACT: *This part of the paper primarily examines the human rights protection system in the Czech Republic. Given the extensiveness of its legal regulation and the multitude of bodies involved in its implementation, the protection of fundamental rights and freedoms might appear robust and their status unproblematic. In reality, however, the opposite is true. According to the 2023 reports of the European Union Agency for Fundamental Rights, Amnesty International, European Network of National Human Rights Institutions, European Commission, United Nations Human Rights Council, Commissioner for Human Rights of the Council of Europe, and Public Defender of Rights, significant shortcomings persist in the protection of the fundamental rights and freedoms of the Roma, persons with disabilities, and women.*

KEYWORDS: *human rights protection, fundamental rights and freedoms, the Charter, the Constitution, the Anti-Discrimination Act, general courts, administrative courts, the Civil Procedure Code, the Code of Administrative Justice, the Constitutional Court, the Constitutional Court Act, the Defender, the Defender Act, the Council, the Commissioner*

1. The Protection of Fundamental Rights in the Constitution and the Charter

Regarding the sources of human rights protection standards in the Czech Republic, it must first be noted that the Czech Republic, as a Member State of the United Nations (hereinafter "the UN"), the European Union (hereinafter "EU") and the Council of Europe (hereinafter "the COE"), has human rights obligations at the

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https://doi.org/10.47078/2026.1.397-458

universal, regional and national level.[1] The Czech Republic, as a UN Member State, is subject to the oversight of various UN human rights bodies, including the Human Rights Council and its Universal Periodic Review and thematic special procedures. As a party to specific universal human rights treaties, the Czech Republic's policies and practices are monitored by the UN treaty bodies. It has accepted the complaints procedure of six treaty bodies, and ratified the following UN human rights treaties: International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Protection of All Persons from Enforced Disappearance, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of Persons with Disabilities, Convention on the Rights of the Child, International Convention on the Elimination of All Forms of Racial Discrimination.[2]

As a Member State of the EU,[3] the Czech Republic ratified the Treaty of Lisbon which amended the Maastricht Treaty, and the Treaty of Rome. The Treaty of Lisbon also amends the attached treaty protocols and the Treaty on the European Atomic Energy Community.[4] According to the Treaty on European Union, the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These interrelated values guide the EU's internal and external action. In the area of human rights, the EU's actions are primarily based on the EU Charter of Fundamental Rights,[5] which establishes principles and rights related to dignity, liberty, equality, solidarity, citizenship and justice for EU citizens and residents with a scope broader than the European Convention on Human Rights. The EU Charter of Fundamental Rights is legally binding, possessing the same legal value as the EU treaties in accordance with the Treaty on European Union. It applies to all the actions of EU institutions and to the EU Member States in their implementation of EU law. However, it does not extend the competences of the EU beyond those already granted in the treaties. Regarding the EU Charter of Fundamental Rights, it is noteworthy that the EU Agency for Fundamental Rights was established to provide EU institutions and Member States assistance and expertise in the field of fundamental rights. In other words, the EU Agency for Fundamental Rights is a body tasked with collecting and analysing data on fundamental rights with reference to, in principle, all rights listed in the

1 See also: Matczak, Bencze and Kühn, 2010, pp. 81–99; Bělohlavek, 2012; Šturma, 2013, pp. 357–370; Zukal, 2021, pp. 334–350; Kosař, Petrov, 2018, pp. 397–425; Šipulova, Janovsky and Smekal, 2018, pp. 181–205.

2 See: International Justice Resource Center, n.d; see also: Schellongova, 2022, pp. 1–13; Heyns, Viljoen and Murray, 2024.

3 See also: Hamuľák, 2020, pp. 108–124; Kříž, Chovančík and Krpec, 2021, pp. 49–72.

4 See also: Zemánek, 2016, pp. 135–157; Němečková, 2009, pp. 239–258.

5 See also: Madej, 2019, pp. 228–247.

EU Charter of Fundamental Rights. However, it is intended to focus particularly on the thematic areas within the scope of EU law.[6]

As a Member State of the COE, the Czech Republic has ratified the European Convention on Human Rights[7] and is subject to the jurisdiction of the European Court of Human Rights. The country has also ratified the European Social Charter and authorised the European Committee of Social Rights to decide collective complaints against it. Its human rights policies and practices are monitored by the COE Commissioner for Human Rights, who identifies gaps in human rights protection, conducts country visits, engages in dialogue with the Member States, and prepares thematic reports and advice. As a State party to the European Social Charter, the Czech Republic must submit regular reports to the European Committee of Social Rights on its implementation of the Charter's provisions. As a Member of the COE, the Czech Republic is also party to the following regional human rights treaties: the COE Convention on Action against Trafficking in Human Beings, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Framework Convention for the Protection of National Minorities.[8]

As for domestic law, human rights are primarily guaranteed by the Constitution and the constitutional Act No. 2/1993 Coll., and the Charter of Fundamental Rights and Freedoms (hereinafter "the Charter"). Under Article 112(1) of the Constitution, the constitutional order of the Czech Republic comprises the Constitution itself, the Charter, constitutional acts adopted under the Constitution and those of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic, the Czech National Council defining the state borders of the Czech Republic, and constitutional acts of the Czech National Council adopted after 6 June 1992.[9] Article 3 of the Constitution directly states that the Charter is part of the constitutional order of the Czech Republic . The reason for this state of affairs is that fundamental rights and freedoms are not regulated in the Constitution. Notably, although the Charter regulates fundamental rights and freedoms almost in their entirety, this legal regulation is not absolutely reserved for this purpose. Within the definition of Article 87(1)(d) of the Constitution, fundamental rights and freedoms may also be guaranteed by other constitutional acts. Although the Charter is part of the constitutional order in terms of legal force and formally equivalent to its other parts, it nevertheless stands apart from the other constitutional acts in its significance. Its incorporation into the constitutional order is expressly mentioned in the basic provisions of the Constitution, alongside Article 112(1), and it regulates the rights and freedoms of the human being and the citizen, namely, the fundamental rights

6 For more details see: EUR-Lex.
7 See also: Grünwaldová, 2018, pp. 248–292; Kokeš and Mikuli, 2013, pp. 79–101.
8 See: International Justice Resource Center, n.d.
9 See also: Dani, Goldoni and Menéndez, 2023, pp. 1–331.

and freedoms on which a democratic state based on the rule of law is founded and which are, therefore, protected by the judiciary, particularly by the Constitutional Court. In addition, the Charter sets out the conditions and limits for the exercise of state power typical of a democratic state governed by the rule of law, and the scope of individual freedom within it. Thus, the majority of the Charter regulates the essential elements of a democratic state governed by the rule of law, which the Constitution does not allow to be changed. In material terms, the Charter, together with the Constitution, forms the very core of the constitutional order of the Czech Republic.[10]

Specifically, the Constitution states that the Czech Republic is a sovereign, unitary and democratic, law-abiding state, based on respect for the rights and freedoms of man and citizen, and the fundamental rights and freedoms shall be protected by the judiciary power.[11] The Charter then guarantees human rights to all without distinction of sex, race, colour, language, creed and religion, political or other opinions, national or social origin, membership of a national or ethnic minority, property, birth or other status. Conversely, the Charter guarantees that no one shall be harmed by the exercise of fundamental rights and freedoms.[12] Introductory articles of the Charter are directly followed by Act no. 198/2009 Coll., on Equal Treatment and on the Legal Means of Protection Against Discrimination, which incorporates the relevant anti-discrimination Directives of the European Parliament and the Council.[13]

Regarding the details of the protection of human rights through the Constitution,[14] as mentioned above, the Constitution states in Article 1 that the Czech Republic is a sovereign, unitary and democratic, law-abiding state, based on respect for the rights and freedoms of man and citizen and the fundamental rights. The prioritising of the individual over society, and thus of fundamental rights and freedoms, can be deduced from Article 1 of the Constitution. The modern conceptualisation of democracy is that the rule of the majority is challenged by the unbreachable boundary of the fundamental rights and freedoms of individuals, which enables all people who are subject to the decisions of the majority to live in dignity[15] and enables the minority to realise a fair social order by becoming the majority in free democratic elections. In this sense, the protection of fundamental rights and freedoms undoubtedly constitutes an essential element of a democratic state governed by the rule of law the elimination of which is expressly prohibited. Article 9(2) of the Constitution specifically states that the substantive requisites of

10 For more details see: Sládeček et al., 2016, pp. 1258–1262.
11 See also: de Visser, 2013, pp. 1–484; Blokker, 2013.
12 See also: Kudrna, 2011, pp. 19–28.
13 See: Preuss, 2025.
14 See also: Wiedermann, 2016, pp. 27–60.
15 See also: Benák, Vyhnánek and Zahumenský, 2019, pp. 197–210.

the democratic, law-abiding state may not be amended. In this way, the concept of fundamental rights and freedoms is protected.[16]

Article 1 of the Constitution is the basic interpretative guide for the activities of all state authorities. It applies to legislative, executive and judicial powers. Therefore, in the broadest sense, protection of fundamental rights and freedoms is provided by all bodies of the state, and hence, of public authority. The legislator, by issuing legal regulation that is consistent in content with the constitutional order, and the executive and judiciary, by constitutionally consistent interpretation and application of this legal regulation, or, in specified cases, by removing it from the legal order for contradicting the Constitution.[17]

Fundamental rights and freedoms are principles that are further elaborated in the legal regulations of individual branches of law. For instance, Article 11 of the Charter regulates the basic characteristics of property, which is further specified by the Act No. 89/2012 Coll., namely, the Civil Code. Therefore, simple law completes the form of fundamental rights and freedoms, reinforces the legal certainty that cannot be guaranteed by general principles, and thus serves as their effective, everyday protection in social relations.[18]

For the protection of fundamental rights and freedoms, the introductory part of the Charter, specifically, Articles 1 to 4, is absolutely crucial, as it establishes the principles on which the entire system is built within the Czech legal structure. In general terms, they can be expressed as the principle of equality, freedom and dignity. These introductory articles of the Charter only comprise basic and general provisions. The principles contained in these articles apply to all fundamental rights and freedoms included in the Charter and are the basis for their interpretation. Violations of the aforementioned provisions of the Charter cannot be generally challenged since they are not directly applicable. Therefore, a specific, primarily substantive fundamental right or freedom – and the corresponding provision of the Charter or of an international agreement – that may have been violated must be identified.[19]

Article 1 of the Charter specifically states that all human beings are free and equal in dignity and rights. Freedom is defined in Article 2(3) of the Charter such that everyone may do what is not prohibited by law and no one may be compelled to do what the law does not require. In a democratic state governed by the rule of law, the individual is fundamentally free, and his or her freedom may be restricted only in order to protect the rights and freedoms of others or an important public interest. Under Article 2(2) of the Charter, the state power may interfere with

16 See: Linhart, 2008, p. 36; for more details see: Sládeček et al., 2016, pp. 104–121.
17 See: Linhart, 2008, p. 36; for more details see: Sládeček et al., 2016, pp. 9–24.
18 See: Linhart, 2008, pp. 27–28; for more details see: Husseini et al., 2021, pp. 362–421.
19 See: Linhart, 2008, p. 27; for more details see: Husseini et al., 2021, pp. 73–198.

rights and freedoms of individuals only in these cases, and within the limits and in the manner prescribed by law.[20]

Equality[21] is a relative category requiring the elimination of unjustified differences. Therefore, the principle of equality in rights and freedoms must be understood as non-arbitrary legal distinctions in access to certain rights and freedoms, although it does not imply that everyone must be granted every right or freedom. The Constitutional Court case-law considers equality to be a fundamental human right. Generally, along with a violation of the principle of equality, a violation of another fundamental right or freedom must also be claimed. This is the case with the Charter or the European Convention on Human Rights; the exception is Article 26 of the International Covenant on Civil and Political Rights, which constitutes equality as a separate civil right.[22]

In this vein, the requirement of equality can be understood as a prohibition of discrimination.[23] Article 3 of the Charter states that fundamental rights and freedoms are guaranteed to all without distinction; however, this does not mean that all groups of people must be afforded the same level of legal protection. International human rights treaties and related case-law make a distinction between formal equality (i.e. equal treatment of formally equal subjects in formally equal cases) and substantive equality (i.e. formally unequal treatment of factually unequal subjects in order to compensate for that very factual inequality and thus help to establish substantive equality between them). This is often referred to as positive discrimination. For example, the Charter gives special legal protection to minors, women and persons with disabilities. Thus, the categories of equality and freedom are mutually reinforcing.[24]

Article 4 of the Charter, the final introductory article, states that obligations may be imposed only on the basis and within the limits of the law and only when fundamental rights and freedoms are preserved. These obligations are to be understood as analogous to fundamental human rights and freedoms. They are expressly enshrined obligations towards the state in the form of doing something, refraining from doing something, and so on. This so-called public subjective obligation characterises the relationship between the state under the rule of law and the individual, without which it is impossible to describe the full characteristics of this relationship. Without individuals under the jurisdiction of the state fulfilling these obligations, the state under the rule of law could not exist because its legal order would lose its meaning. This is a prerequisite for the exercise of state power.[25]

20 See: Linhart, 2008, p. 28; for more details see: Husseini et al., 2021, pp. 73–119.
21 See also: Idriz, 2022, pp. 297–323.
22 See: Linhart, 2008, p. 28 and for more details see: Husseini et al., 2021, pp. 73–119.
23 See also: Serghides, 2021, pp. 117–145.
24 See: Linhart, 2008, pp. 28–29; for more details see: Husseini et al., 2021, pp. 141–184.
25 See: Linhart, 2008, p. 29; for more details see: Husseini et al., 2021, pp. 185–198.

The remaining sections of Article 4 of the Charter regulate the restriction of fundamental rights and freedoms.[26] Thus, fundamental rights and freedoms may be restricted by law under the conditions set out in the Charter, as long as this is done on a non-discriminatory basis, and their purpose and essence are preserved. Besides statutory restrictions, for instance, a restriction arising in conflict with another fundamental right, freedom or constitutional value may be considered. The provisions of Article 4 of the Charter can also be applied to these cases.[27]

Article 3 of the Charter is followed by the Act No. 198/2009 Coll., on Equal Treatment and on the Legal Means of Protection Against Discrimination (hereinafter "the Anti-Discrimination Act"), which incorporates the relevant anti-discrimination Directives of the European Parliament and the Council, and directly follows the introductory articles of the Charter. Under its Article 1(1)(a) to (j), the Anti-Discrimination Act transposes the relevant regulations of the European Communities and, in relation to the Charter and the international agreements that are part of the legal order, defines more precisely the right to equal treatment and prohibition of discrimination with respect to: (a) the right to employment and access to employment, (b) access to an occupation, business or other self-employment, (c) employment contract, service and other paid employment, including remuneration, (d) membership of, and involvement in, trade unions, workers' councils or employers' associations, including the benefits such associations provide to their members, (e) membership of, and involvement in, professional associations, including the benefits such legal persons governed by public law provide to their members, (f) social security, (g) the granting and provision of social advantages, (h) access to and provision of healthcare, (i) access to and provision of education, and (j) access to goods and services, including housing, to the extent as they are offered to the public, or in their supply. In legal relationships subject to the Anti-Discrimination Act, a natural person has the right to equal treatment and to non-discrimination. On the other hand, the Anti-Discrimination Act does not apply to legal relationships connected with the stipulation of conditions relating to the entry and residence of third-country nationals or stateless persons in the territory of the Czech Republic.[28]

■ *1.1. The Relationship Between the Constitution and International Law*

Regarding the relationship between the constitution and international law in the Czech Republic, Articles 10, 10a and 10b of the constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic (hereinafter "the Constitution") are relevant. Specifically, under Article 10 of the Constitution, the ratification of promulgated international treaties for which Parliament has given its consent and by

26 See also: Barroso, 2023, pp. 74–91.
27 See: Linhart, 2008, p. 29; for more details see: Husseini et al., 2021, pp. 185–198.
28 See also: Boučková et al., 2016, pp. 137–169.

which the Czech Republic is bound, form a part of the legal order. The fulfilment of all three conditions expressly stated in the first part of Article 10 of the Constitution is a prerequisite for an international treaty to become ex constitutione (without the need for further expressions of will by the state) "part of the legal order", referring to the legal order of the Czech Republic, namely, the domestic and not the international legal order. The term "legal order" includes all domestic legal regulations and international treaties under Article 10 of the Constitution. No distinction is made between different types of international treaties, such that international treaties under Article 10a(1) of the Constitution, which states that certain powers of the Czech Republic's authorities may be transferred to an international organisation or institution by international treaty, also fall under Article 10. However, internal legal acts of international organisations or institutions to which the Czech Republic has contractually transferred certain powers of its authorities are no longer international treaties.[29,30]

In order for an international treaty to become part of the legal order, the condition that both Chambers of Parliament have given their prior consent to its ratification by the President of the Republic, or that this consent has been given in a referendum, must first be met. Since the Parliament – with its legislative power – decides on the adoption of a draft law, within the meaning of Article 10 of the Constitution, it is impossible for an international treaty that the Parliament has not expressly recognised as eligible for ratification to take precedence over the law. Thus, international treaties concluded by the government or ministries do not become part of the legal order. In case of doubt as to whether an international treaty is in accordance with the constitutional order of the Czech Republic, the Constitution grants the Constitutional Court the power to decide, even before ratification. The second condition necessary for an international treaty to become and remain part of the legal order is that the treaty is internationally binding on the Czech Republic. The starting point for assessing whether a treaty has become or remains binding on the Czech Republic is primarily the Vienna Convention on the Law of Treaties. Although Article 49 of the Constitution states that the consent of both Chambers of Parliament is required for the ratification of international treaties, the Rules of Procedure of both Chambers expressly provide for decisions on consent to withdraw from an international treaty that a Chamber has consented to ratify. The third condition is the promulgation of the international treaty in the manner prescribed by law, under Article 52(2) of the Constitution. If a statute must be promulgated in the manner prescribed by law in order to be valid, it is entirely logical and necessary that in a democratic state governed by the rule of law, an

29 For more details see: Sladeček et al., 2016, pp. 121–130.

30 See also: Hájek, 2023, pp. 1425–1447; Schellongová, 2022, pp. 1–13; Pouperová, Dienstbier and Vícha, 2015, pp. 1331–1344; Šturma, 2013, pp. 357–370; Bělohlávek, 2012.

international treaty forming part of the legal order must also be promulgated in the manner prescribed by law and thus made accessible to the public.[31]

Article 10 of the Constitution prioritises the provisions of an international treaty in the event of a conflict with the content of a law, because such a solution generally leads to the fulfilment of obligations under international law. However, this does not imply that an international treaty, as part of the legal order of the Czech Republic, takes precedence over the law in the sense of a hierarchical structure. An international treaty has application priority; while judges, under Article 95(1) of the Constitution, are bound by both the law and international treaties that are part of the legal order of the Czech Republic, if a conflict arises between their provisions, they are required to proceed under Article 10 of the Constitution. However, application of the precedence principle is only considered if there is a real conflict between specific legal norms; specifically, if situation A is required by law, whereas situation B is required by an international treaty under the same circumstances. However, such a conflict cannot arise if the international treaty does not lay down directly applicable legal rules but merely contains an obligation on the Czech Republic to incorporate certain legal rules into its domestic legal order. Ignoring such an obligation would be a breach of Article 1(2) of the Constitution and could also lead to the Czech Republic being held liable internationally for breach of its obligation to perform a valid treaty in good faith.[32]

■ *1.2. The Responsibility for the Protection of Freedoms and Rights Under the Constitution and the Charter*

In the case of the Czech Republic, it is clear that the Constitution and the Charter are based on both the horizontal and vertical functioning of fundamental human rights and freedoms, as evidenced in particular by their introductory provisions (in particular Article 2 of the Constitution and Articles 2–4 of the Charter). Meanwhile, protection of all human rights is primarily provided by the general courts, namely, district courts, regional courts, and high courts, led by the Supreme Court of the Czech Republic. The administrative judiciary is exercised by special chambers of regional courts, of which the Supreme Administrative Court of the Czech Republic is the highest authority and provides a specialised check on the legality and correctness of decisions of administrative bodies. The Constitutional Court of the Czech Republic is sometimes erroneously referred to as the highest authority to which appeals can be made if other means fail. While exhaustion of other legal remedies is one of the conditions for its jurisdiction to rule, the decision in the proceedings must also have violated a right guaranteed by the constitutional order.[33]

31 For more details see: Sládeček et al., 2016, pp. 121–130.
32 For more details see: Sládeček et al., 2016, pp. 121–171.
33 See: Preuss, 2025; see also: Kratochvíl, 2019, pp. 69–84; Kühn, 2018, pp. 173–186.

Other options in the Czech Republic for the protection of human rights include the activities of the Public Defender of Rights (hereinafter "the Defender") under Act No. 349/1999 Coll., on the Public Defender of Rights. Although the Defender is not an institution focused directly on human rights, it aims to protect people from the actions, or even inactions, of authorities and other institutions that are contrary to the law, or do not comply with the principles of democratic rule of law[34] and good governance.[35] In doing so, it contributes to the protection of fundamental rights and freedoms. However, the Defender cannot directly enforce human rights or make authoritative decisions; he or she has, for instance, the competence to bring an action in the public interest.[36]

For many years, the protection of human rights in the Czech Republic was entrusted to one member of the Government: the Minister for Human Rights. This function ceased to exist in 2017. However, within the Office of the Government of the Czech Republic, there is still the post of Government Commissioner for Human Rights (hereinafter "the Commissioner"), which is usually linked to the chairmanship or vice-chairmanship of the Government Council for Human Rights. The Government Council for Human Rights is an advisory body to the Government of the Czech Republic. It does not deal with individual cases of rights violations, but rather with the concept of the long-term development of human rights protection in the Czech Republic. It prepares proposals and initiatives to improve the human rights situation. Since the system of human rights protection at both regional and European level is identical for all the Central European countries, it is not necessary to deal with it in detail. Therefore, the rest of this paper will focus on the specifics of human rights protection in the Czech Republic.[37]

The first noteworthy issue is the fundamental rights and freedoms protection by the general and administrative courts. Under Article 4 of the Constitution, fundamental rights and freedoms are protected by judicial power. This undoubtedly includes the activities of the Constitutional Court as a body protecting constitutionality, as well as the general courts. Under Article 90 of the Constitution, the courts are primarily called upon to protect fundamental rights and freedoms in the manner prescribed by law. This provision of the Constitution complements Article 36(1) of the Charter and its entire Chapter V, which enshrines the right to a fair trial. Specifically, Article 36(1) of the Charter states that everybody may assert in the set procedure, his or her right in an independent and unbiased cerate of justice and, in specified cases, with another organ.[38]

34 See also: Sládeček, 2019, pp. 82–98.
35 See also: Janderová and Hubálková, 2021, pp. 63–82.
36 See: Preuss, 2025.
37 Ibid.
38 See: Linhart, 2008, p. 37; for more details see: Husseini et al., 2021, pp. 1032–1135; Sládeček et al., pp. 1048–1061.

Article 95 of the Constitution states that a judge, when making a decision, is bound by the law and any international treaty that is part of the legal order. This must, of course, be interpreted extensively, which means that the judge is bound not only by ordinary law but also by constitutional law and other parts of the constitutional order of the Czech Republic. An international treaty is one that is incorporated into the national legal order under Article 10 of the Constitution, with international human rights treaties being crucial in this respect. At the same time, the aforementioned Article 1 – serving as a basic rule of interpretation and application of law in judicial decision-making – and Article 9(3) – prohibiting the interpretation of legal norms that justify their removal or threaten the basis of the democratic state – of the Constitution are applicable here.[39]

Therefore, to conclude that the protection of fundamental rights and freedoms is primarily provided by the Constitutional Court of the Czech Republic and that the general courts are bound by sub-constitutional law is impossible. If it is the constitutional duty of the courts to protect rights arising from the provisions of the ordinary law, all the more so must they protect fundamental rights and freedoms. Article 95 of the Constitution remembers this fact in two ways. First, under Article 95(1), a judge may assess the compatibility of another legal regulation with the law or the international treaty mentioned above. If they are inconsistent, for instance, because they are contrary to fundamental rights or freedoms, then the judge may not apply such a legal regulation. Second, under Article 95(2) of the Constitution, if a judge concludes that the law to be applied in resolving a case is contrary to the constitutional order, he or she shall suspend the proceedings and submit the case to the Constitutional Court. The Constitutional Court will assess the law in question and either annul it or declare its conformity with the constitutional order. The court will then complete the proceedings and make a decision on the matter. International treaties on human rights and fundamental freedoms that have been, as mentioned above, ratified and promulgated are also considered as a part of the legal order.[40]

Article 36(1) of the Charter, and Articles 95(1) and (2) of the Constitution, are followed by Act No. 99/1963 Coll., the Civil Procedure Code (hereinafter "the Civil Procedure Code"), which in its Sections 1 to 6, the so-called basic provisions, defines the nature and purpose of civil proceedings. Specifically, the Civil Procedure Code regulates the procedure of the general courts and the parties in civil proceedings to ensure the fair protection of private rights and legitimate interests of the participants, and the honest performance of duties, and to respect the rights of others. In civil judicial proceedings, courts hear and decide disputes and other legal matters and enforce decisions that were not achieved voluntarily yet ensure that there is no violation of the rights and interests protected by law, and that

39 See: Linhart, 2008, p. 37; for more details see: Sládeček et al., 2016, pp. 1094–1120.
40 Ibid.

rights are not abused. Civil law is a guarantee of fairness and justice, serving the consolidation and development of the principles of private law. Any person may request the court to protect their private rights that have been threatened or violated. The courts provide the participants of their procedural rights and obligations. In the proceedings, the court predictably – and in coordination with the parties – protect rights in a manner that is fast and efficient and ensure that the facts disputed between the parties according to the extent of their participation are reliable. The provisions of this Act are interpreted and applied so as to prevent their abuse.[41]

Very important is also the legal regulation under Article 7(1) to (4) of the Civil Procedure Code, concerning the competence of courts deciding in civil proceedings. Specifically, in civil proceedings, the courts hear and decide disputes and other legal matters arising from the realm of private law that are not dealt with by other organs and make decisions about them. Litigation and other legal matters that are decided by authorities other than courts, are heard in civil proceedings and judged according to the conditions set out in Part V of the Civil Procedure Code. Other matters are discussed and decided by the courts in civil proceedings only if set out by the law. Unless otherwise provided by the law, these disputes are first heard at the district courts. As courts of first instance, the regional courts decide for example, disputes by mutual settlement payment of overpaid dose pension insurance, sickness insurance, state social support and assistance in material need, and disputes of compensation paid as a result of entitlement to sickness insurance. The Supreme Court of the Czech Republic decision as a court of first instance shall be determined by a special regulation.[42]

In addition, the Civil Procedure Code contains Part V called proceedings in matters decided by another body, i.e. Articles 244 to 250l, regulating judicial proceedings concerning matters decided by another authority, which states that if the elected body of the executive authority of the unitary authority, institution or professional self-interest, or arbitration body set up under a special law pursuant to a special act of the litigation or other legal matters arising from relations of private law, and entered into if enforced by the decision of the administrative body, can be consulted in civil proceedings. This condition does not apply (a) if the decision on the dispute comes from other legal matter arbitrators or permanent arbitration courts or arbitration committee of the association; (b) if the decision of the administrative body, as a result of objections or other similar transactions involved in a legal relationship made before the administrative body under a special law, is repealed or becomes ineffective; (c) is referred to under a special

41 For more detail see: Boučková et al., 2016; Svoboda et al., 2021.
42 Svoboda et al., 2021.

law administration affecting participants' legal relationship with their claims to court.[43]

Under Article 36(2) of the Charter, anybody who claims that his or her rights have been violated by a decision of a public administration organ may approach a court for a review of its legality, unless the law provides differently. However, review of decisions affecting the fundamental rights and freedoms listed in the Charter may not be excluded from the jurisdiction of courts. Articles 36(1) and (2) of the Charter and Articles 95(1) and (2) of the Constitution are followed by Act No. 150/2002 Coll., the Code of Administrative Justice (hereinafter "the Code of Administrative Justice"), which in its Articles 1 to 10, the so-called basic provisions, defines the nature and purpose of administrative court proceedings. Specifically, the Code of Administrative Justice provides for (a) jurisdiction and competence of courts acting and making decisions in administrative justice, and some of the issues concerning the organisation of courts and the status of judges; (b) procedure of courts, parties to proceedings (hereinafter "party") and other persons in administrative justice. Courts in administrative justice provide protection to the individual public-law rights of both natural persons and legal entities in a manner specified by the Code of Administrative Justice, under the conditions specified by this Act or by a special law, and make decisions in other matters set out by this Act.[44]

Very important is also the legal regulation under Articles 4(1) and (2) of the Code of Administrative Justice, concerning the competence of courts deciding in administrative court proceedings. Specifically, courts of administrative justice decide on (a) complaints against decisions made in the sphere of public administration by an executive authority, the autonomous unit of a local administrative authority, and by a natural person or legal entity or another authority if entrusted with decision-making about their rights and obligations in the sphere of public administration (hereinafter "administrative authority"); (b) protection against the inaction of an administrative authority[45]; (c) protection against an unlawful interference of an administrative authority; and (d) competence complaints. Furthermore, courts of administrative justice decide on (a) election matters and in the matters of a local referendum; and (b) matters concerning political parties and political movements. Unless otherwise set out by the Code of Administrative Justice or by a special law, the protection of rights that can be claimed in administrative justice provides only on the submission of a complaint and after the exhaustion of all appropriate remedial actions, if admissible under a special law.[46]

It follows from other provisions of the Code of Administrative Justice that the bodies hearing and deciding matters in the judicial review of administrative

43 Ibid.
44 For more details see: Blažek et al., 2016; Husseini et al., 2021, pp. 1032–1135.
45 See also: Skulová et al., 2019, pp. 43–68.
46 For more details see: Blažek et al., 2016.

decisions are regional courts and the Supreme Administrative Court of the Czech Republic. In regional courts, administrative justice is implemented by specialised benches and judges sitting alone. Courts of administrative justice are excluded from deciding on matters as specified by the Code of Administrative Justice or by a special law. Unless otherwise set out by the Code of Administrative Justice or by a special law, a regional court shall have subject-matter competence in proceedings. The Supreme Administrative Court, as the highest judicial authority in matters within the jurisdiction of courts of administrative justice, guarantees unity and legality of decision-making by ruling on cassation complaints in cases prescribed by the Code of Administrative Justice and, furthermore, decides on other cases specified by this Act or a special law. The Supreme Administrative Court follows and assesses the final decisions of the courts of administrative justice and adopts a position on judicial decision-making in matters of specific kinds on the basis of these decisions and in the interest of uniform judicial decision-making. In its decision-making, the Supreme Administrative Court may, in the interest of lawful and uniform decision-making by administrative authorities, make a ruling of an exemplary nature.[47]

Another instrument is the fundamental rights and freedoms protection by the Defender. As mentioned previously, the Defender defends persons against the conduct of authorities and other institutions set forth in the Act No. 349/1999 Coll., on the Public Defender of Rights (hereinafter "the Defender Act"), wherein such conduct is at variance with the law or does not comply with the principles of a democratic State governed by the rule of law and good administration. It also defends against their inaction, thereby contributing to the defence of fundamental rights and freedoms. These competences of the Defender, as defined in the general provisions of the Defender Act, apply to ministries and other administrative authorities[48] having competence over the entire territory of the Czech Republic, the administrative authorities subject to them, the Czech National Bank when acting as an administrative authority, the Council for Radio and Television Broadcasting, bodies of regional and local government in the exercise of State administration and, unless hereafter stipulated otherwise, the Police of the Czech Republic, Army of the Czech Republic, Castle Guard, Prison Service of the Czech Republic, and also to the facilities serving for remand in custody, imprisonment, protective or institutional education, protective treatment, preventive detention, as well as to public health insurance companies (hereinafter "an authority").[49]

Under the Defender Act, the Defender shall systematically visit places where persons restricted in their freedom by public authority or as a result of their dependence on the care provided are or may be confined with the objective

47 Ibid.
48 See also: Skulová, Potěšil and Hejč, 2014, pp. 393–420.
49 For more details see: Chamráthová et al., 2019, pp. 1–30.

of strengthening the protection of these persons against torture; cruel, inhuman and degrading treatment; punishment; and other forms of ill-treatment. These competences of the Defender apply to: a) facilities serving for remand in custody, imprisonment, protective or institutional education, protective treatment or preventive detention; b) other places where persons restricted in their freedom by public authority are or may be confined, especially police cells, facilities for the detention of foreigners and asylum facilities; c) places where persons restricted in their freedom are or may be confined as a result of dependence on the care provided, especially social services facilities and other facilities providing similar care, health-care facilities, and facilities providing social and legal protection for children (hereinafter "a facility").[50]

The Defender must also: (a) act within his or her competence in matters concerning the right to equal treatment and protection against discrimination; (b) monitor the detention of foreign nationals and the enforcement of their administrative expulsion, transfer or transit, and the punishment of expulsion imposed on those placed in expulsion custody or serving prison sentences (hereinafter "expulsion monitoring"); (c) monitor the implementation of the international treaty on the rights of persons with disabilities; and (d) demonstrate competence in matters related to the freedom of movement of citizens of the European Union and the European Economic Area and their family members. Finally, the Defender is authorised to initiate proceedings under the Act No. 7/2002 Coll., on Proceedings in Matters of Judges and Public Prosecutors, and participate in these proceedings but not to interfere with the activities and decisions made by authorities and facilities in any manner other than as stipulated in the Public Defender of Rights Act. On the other hand, the competence of the Defender does not apply to the Parliament, the President of the Republic and the Government, the Supreme Audit Office, the intelligence services of the Czech Republic, prosecuting bodies, public prosecutors and courts, with the exception of the public prosecutor's administrative bodies and the State administration of courts.[51]

It follows from the Defender Act that the Defender initiates the exercise of his powers: (a) on the basis of a complaint lodged by a natural or legal person (hereinafter "a complaint") addressed to him or her; (b) on the basis of a complaint addressed to a member of the Chamber of Deputies or the Senate, who has passed the said complaint on to the Ombudsman; (c) on the basis of a complaint addressed either to the Chamber of Deputies or the Senate, which has been passed to the Ombudsman; or (d) on his or her own initiative. Everyone has the right to address the Defender with a written complaint in matters that fall under the Ombudsman's

50 For more details see: Chamráthová et al., 2019, pp. 1–30.
51 Ibid, pp. 67–83.

competence; such a complaint may also be made orally into a record. A complaint may not be subject to official inspection or a fee.[52]

If the case in question does not fall within his or her competence or does not concern the party lodging the complaint, the Defender sets the complaint aside. The Defender may also set a complaint aside if (a) the requisites mentioned above have not been supplemented within the set deadline; (b) it is manifestly unfounded; (c) on the date of delivery of the complaint, more than one year has elapsed from the legal force of the decision or from the measure or event to which the complaint pertains; (d) the case to which the complaint pertains is subject to pending court proceedings or has already been decided by a court; or (e) if the complaint is filed in a case that has already been inquired into by the Defender and the new complaint does not reveal any new facts. The Defender shall advise the complainant in writing that the complaint has been set aside and state the reasons. If a complaint, in view of its content, represents a remedy under the regulations on proceedings in administrative or judicial matters, a lawsuit or remedy in administrative justice, or a constitutional complaint, the Defender shall inform the complainant accordingly without delay and provide instructions as to the correct procedure.[53]

On the other hand, if the Defender does not set the complaint aside, he shall initiate an inquiry and the complainant shall be informed in writing accordingly. The Defender is authorised, with the heads of the concerned authorities having been notified, to enter all the authorities' premises without prior notice to carry out an inquiry involving: (a) inspection of files; (b) interviewing employees; and (c) interviewing persons placed in the facilities, in the absence of other parties. At the Ombudsman's request and within his set deadline, the authorities shall: (a) provide information and explanations; (b) submit files and other written materials; (c) provide their statement in writing as to the facts of the case and legal issues; (d) take evidence adduced by the Ombudsman; or (e) perform such supervisory actions to which they are authorised by law and which the Defender suggests. The Defender is authorised to be present at oral hearings and during the process of taking of evidence by the authorities, and to question the persons present. For the purposes of inquiry pursuant to the previous paragraphs, a person authorised to this effect pursuant to a special law shall release the individual employees of an authority, at the Ombudsman's request, from their duty to maintain confidentiality that has been imposed on them by this special law. Where no special law identifies the person authorised to release the above from the duty to maintain confidentiality, for the purposes hereof, the head of the relevant authority shall be deemed to be such a person with respect to any employee of that authority; the head of the superior authority, or if there is no such authority, the Prime

52 Ibid.
53 Ibid.

Minister, shall be deemed such with respect to the head of a subordinate authority. For the purposes of an inquiry under this Act, the Defender cannot be required to comply with a confidentiality obligation based on a contract.[54]

Moreover, all governmental bodies and persons exercising public administration are obliged, within the scope of their competence, to provide any assistance requested by the Defender in the performance of the Ombudsman's inquiry. Specifically, for the performance of the Ombudsman's duties, the Ministry of the Interior or the Police of the Czech Republic shall provide the Defender with: (a) reference data from the basic register of inhabitants; (b) data from the agenda information system for the population records; (c) data from the agenda information system for foreign nationals; or (d) data from the register of birth identification numbers of persons who were assigned such a number but do not have a record in any of the information systems listed above.[55]

At the end of the commentary on the Defender, it is necessary to mention that if the Defender does not ascertain any breach of legal regulations or any other maladministration in the course of his or her inquiry, he shall inform the complainant and the authority in writing accordingly. On the other hand, if the Defender ascertains a breach of legal regulations or any other maladministration in the course of inquiry, he shall request the authority to provide a statement on the Ombudsman's findings within 30 days. If the authority then states that it has implemented or is in the process of implementing remedial measures, and the Defender finds these measures to be sufficient, the Defender shall inform the complainant and the authority accordingly. Otherwise, following receipt of the statement or expiry of the deadline to no effect, the Defender shall inform the complainant and the authority in writing of the Ombudsman's final statement; the latter shall include a suggested remedy. Specifically, the Defender may suggest mainly: (a) initiating proceedings on the review of a decision, act or procedure of the authority if it is possible to initiate such proceedings ex officio; (b) performing acts to eliminate inactivity; (c) initiating disciplinary or similar proceedings; (d) initiating prosecution for a criminal offence, infraction or some other administrative offence; or (e) provision of indemnification or filing a claim for indemnification. The authority shall inform the Defender within 30 days of receipt of the final statement of the remedial measures that have been adopted. If the authority fails to comply with this or her duty, or if the remedial measures are insufficient in the Ombudsman's opinion, the Ombudsman: (a) shall inform the superior authority, or if there is no such authority, the Government; (b) may inform the public of his or her findings, including disclosure of the names and surnames of persons authorised to act on behalf of the authority.[56]

54 For more details see: Chamráthová et al., 2019, pp. 83–97.
55 Ibid.
56 For more details see: Chamráthová et al., 2019, pp. 83–97; Chamráthová, 2019, pp. 65–83.

The last instrument discussed is the fundamental rights and freedoms protection by the Council of the Government of the Czech Republic for Human Rights (hereinafter "the Council"). The Council is a permanent advisory body to the Government in the field of protection of human rights and fundamental freedoms in the territory. It was established under Government Resolution no. 809 of 9 December 1998, and monitors compliance with the Constitution, the Charter and other legislation governing the protection of and respect for human rights and fundamental freedoms. The Council further monitors the national implementation of the international commitments of the Czech Republic in this domain. The Council Chairman convenes meetings at least four times a year. Activities of the Council are governed by the Statute and the Rules of Procedure. In addition, its secretariat is a part of the organisational structure of the Office of the Government of the Czech Republic.[57]

The Vice-Chairman of the Government Council for Human Rights is also the Commissioner. The Commissioner: (a) develops concepts for the long-term development of human rights protection; the rights of national minorities, the integration of the Roma minority, gender equality, the status of persons with disabilities and the status of non-governmental non-profit organisations; (b) prepares proposals and initiatives to improve the human rights situation and the position of national minorities; (c) prepares reports on the fulfilment of obligations arising from international human rights treaties that the Czech Republic submits to individual treaty monitoring mechanisms at the level of the UN, the COE and within the EU; and (d) considers materials of a legislative and non-legislative nature relating to the above-mentioned agendas in the inter-ministerial comment procedure; and cooperates with public authorities (state administration and self-government), non-governmental non-profit organisations and experts.[58]

■ *1.3. The Protection by the Constitution and the Charter in Terms of Human Rights*

Article 3(1) of the Charter states that everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.[59] The guarantee of fundamental human rights to all, regardless of the discriminatory grounds[60] expressly listed in Article 3(1) of the Charter, is one of the manifestations of equality in rights and dignity within the meaning of Article 1(1) of the Charter. The dignity of human beings is certainly a fundamental

57 See: the Government of the Czech Republic, 2008.
58 Ibid.
59 See also: Šturma, 2013, pp. 357–370.
60 See also: Vieten, 2009, pp. 91–114.

pillar of modern constitutionalism in the field of human rights. Human dignity[61] expresses the unique value of each individual human being. Dignity is inherent to human beings by virtue of their being human. It is an ontological category defined by certain inherent dignity. However, the protection of individual dignity is not singled out in the Charter, but mentioned together with the values of freedom and equality.[62] Moreover, it is not in the form of a declaration of the inviolability of human dignity, but of "equality in dignity" (although the preamble to the Constitution mentions "the inviolable values of human dignity and freedom").[63] In terms of consequences, there is no major difference between these formulations, as evidenced by the case law of the Constitutional Court.[64] As regards freedom, Article 1 of the Charter does not enshrine a specific subjective "right to freedom" but a general principle emphasising the primacy of the free individual over the state – the freedom of the individual being the basic state of affairs – that public authority may restrict only in accordance with constitutionally prescribed rules. Freedom is guaranteed to all people, which means that everyone can exercise their freedom only to the extent that it does not infringe on the freedom of others. The freedom of one limits the freedom of others. The mutual harmonisation of the interests of individuals and their possible free self-realisation then logically leads to certain conceptual limits of human freedom[65] if people are to live together in the same human community, for instance, in a state. Equality is one of the most complicated concepts in law, because of its generality, its cross-cutting scope, and the efforts of all social sciences to capture it. However, different conceptual approaches, perspectives, and methods of examination lead to differences in terminology, definitions and classifications, and equality is often discussed using the same term but with slightly different meanings. The idea of natural human rights,[66] on which the Charter is based, stems from the belief that every human being has the same moral value and is worthy of the same respect regardless of a number of a priori givens or personal characteristics such as origin, race, skin colour, religion, property, and gender. In other words, moral equality, equality in dignity, and the recognition of equal value for every individual. If people are worthy of equal respect, they should also be treated equally, both in the creation and application of rules.[67]

Article 3(1) of the Charter aims to prohibit discrimination in the area of guaranteeing fundamental rights and freedoms. The term "fundamental rights and freedoms", within the meaning of Article 3(1) of the Charter, can be understood

61 See also: Benák, Vyhnánek and Zahumenský, 2019, pp. 197–210.
62 For more details see: Husseini et al., 2021, pp. 141–184.
63 See also: Porter, 2020, pp. 301–326.
64 Wagnerová et al., 2012, pp. 55–61.
65 See also: Vandenhole, 2009, pp. 1–20.
66 See also: Massini-Correas, 2022, pp. 71–86.
67 For more details see: Husseini et al., 2021, pp. 73–119.

to mean not only the fundamental human rights and freedoms guaranteed directly by the Charter but also by international treaties.[68] However, these international treaties often have their own anti-discrimination provisions or deal directly with specific types of discrimination. Not every conceivable right is fundamental, which means that the scope of Article 3(1) of the Charter is somewhat narrower than that of Article 1. Given that the right to equal treatment is covered by both articles in a certain symbiosis, this distinction is not significant for practical application or prohibition of discrimination, as cases of discrimination that cannot be subsumed under Article 3(1) of the Charter – whether due to the absence of the fundamental right concerned or the absence of the element of discrimination – fall within the scope of Article 1 of the Charter. Meanwhile, fundamental rights are guaranteed to everyone without further ado. If equality in rights is guaranteed in Article 1 of the Charter, then equality in fundamental rights is also automatically guaranteed, and discriminatory grounds, namely, grounds for exclusion, play no role in this respect. Notably, the significance of Article 3(1) of the Charter does not lie solely in the guarantee of fundamental rights in the above context, but also in the guarantee of equality in their application or restriction.[69]

It follows from the above that the legal regulation under Article 3(1) of the Charter also has a fundamental practical impact. In its case law, the Constitutional Court uses[70] the term "accessory equality"[71] for equality that is linked to another fundamental right. This means that when alleging a violation of Article 3(1) of the Charter before the Constitutional Court, another fundamental right must be identified, the application of which has resulted in the alleged discrimination. If no such right is identified, Article 1 of the Charter must be applied. However, this may not be a common situation, as the Charter covers a wide range of rights. Therefore, unless the scope of rights is interpreted "generously", almost any situation can be subsumed under the "broader framework" of a particular right. The fundamental right in question does not have to be violated; it is sufficient that there has been unjustified unequal treatment in relation to that right. From the perspective of the protection of individual rights, it can be concluded that the issue of the non-existence of the fundamental right in question is not of fundamental importance. It may only be reflected in the operative part or the reasoning of the Constitutional Court's decision in connection with the provision on which the Constitutional Court expressly based its decision.[72]

68 See also: Ramcharan et al., 2023.
69 For more details see: Husseini et al., 2021, pp. 141–184.
70 See: Judgment Case No. Pl. ÚS 15/02 of 21 January 2003.
71 See also: Lépinard and Rubio-Marín, 2018, pp. 339–423 and the dissenting opinion of Judge Boštjan Zupančič, *Burden vs. the United Kingdom*, No. 13378/05 of 29 April 2008, *Reports of Judgments and Decisions of the European Court of Human Rights*, 6/2008, p. 319.
72 For more details see: Husseini et al., 2021, pp. 141–184.

Notably, the anti-discrimination clause in Article 3(1) of the Charter states that people are equal and even the characteristics defined therein cannot change this; in other words, although people are not the same, the differences listed as grounds for discrimination must not be held against them. In the context of protected persons, we also speak of "protected grounds."[73] However, it also follows that a distinction can, in principle, be made using criteria that are linked to the individual but are of the nature of abilities, merits, skills, knowledge, and so on. The protected grounds defined in Article 3(1) of the Charter are perceived as a priori suspect, albeit to varying degrees, which means that they either exclude differential treatment almost always (typically racial, national or ethnic discrimination), or require very strong justification for it. These grounds are based either on a certain a priori condition or characteristic of an individual (e.g., race, ethnic origin, family, gender), strong personal choice (e.g., belief, religion, opinion), vulnerability of minorities that need protection (e.g., persons with disabilities), or a combination of the above reasons. Thus, the Constitutional Court must provide at least the same standard of protection to all complainants.[74]

With regard to the legal regulation under Article 3(1) of the Charter, it is noteworthy that guarantees of equality are also enshrined in the provisions of the Charter regulating equality in the restriction of fundamental rights (Article 4(3)), equality of forms of ownership (Article 11(1)), equality of electoral rights (Article 21(3)), equal access to elected and other public functions (Article 21(4)), equality of children born in and out of marriage (Article 32(3)), and equality of parties to proceedings (Article 37(3)). Article 29 then states that women, adolescents, and persons with health problems have the right to increased protection of their health at work and to special work conditions. Adolescents and persons with health problems have the right to special protection in labour relations and assistance in vocational training. Finally, Article 30 states that citizens have the right to adequate material security in old age, during periods of work incapacity, and in the case of the loss of their provider. Everyone who suffers from material needs has the right to such assistance as is necessary to ensure her a basic living standard.

■ *1.4. The Guiding Principles of the Status of the Individual Under the Constitution and the Charter*

The guiding principles of the status of the individual is undoubtedly the rule of law,[75] whose basic components include the sovereignty of the people, guarantees of

73 See also: Zaccaroni, 2017, pp. 167–195.

74 For more details see: Husseini et al., 2021, pp. 141–184.

75 See also: Fruhstorfer, 2019, pp. 1028–1046; Havlík, Hrubeš and Pecina, 2014, pp. 440–460; Janderová, 2019, pp. 117–139; Janderová, 2024, pp. 55–77; Janderová and Hubálková, 2021, pp. 63–82; Kudrna, 2011, pp. 19–28; Meier, Lorenz and Wendel, 2023; Přibáň and Young, 2019; Sever, Rakar and Kovač, 2014, pp. 249–275.

fundamental human rights and freedoms, the principle of legality, the principle of legal certainty and the principle of prohibition of retroactivity. These components are regulated at the constitutional level, specifically in Articles 1, 36(1) and 40(6) of the Charter and in Articles 1(1), 2(1), 4(1) and (3) and 9(2) of the Constitution.

As for the sovereignty of the people, Article 2(1) of the Constitution provides that the people are the source of all State power. The constitutional rule that 'the people are the source of all State power' is the traditional form of expression of Rousseau's popular sovereignty.[76] However, sovereignty is limited by the natural rights of the people, the preservation and guarantee of which the government or state is relatively spontaneously constituted. In the constitutional order of the Czech Republic, the natural law sources are reflected, in addition to Article 2(1) of the Constitution, in the second sentence of Article 1 of the Charter, which uses typical natural law terms. Natural rights are explicitly mentioned in the constitutional wording of the oath taken by the judges of the Constitutional Court in Article 85(2) of the Constitution. By Article 6 of the Constitution, the most important political decision of the citizens is free elections, on the basis of which a system of institutions is formed, shaping the will of the State. The principle of sovereignty of the people also implies the guarantee of universal equal suffrage for the election of State bodies and free competition of political parties and forces. The concept of the people, within the meaning of Article 2(1) of the Constitution, falls into two basic groups: citizens and inhabitants of the State. The decision-making of State organs through elections is limited to citizens of the State; on the other hand, foreign citizens and stateless people must also be guaranteed those political rights which allow the basic expression of political will. These are regulated by the Charter, specifically Articles 17, 19 and 20, by the legal regulation of freedom of expression, the right of assembly and the right of association. Another aspect of the concept of popular sovereignty is that the people themselves have the right to determine the ways in which State power may be exercised.[77]

The basic forms of the exercise of State power are determined by the democratically adopted Constitution. The sovereignty of the people must be insured by fundamental guarantees, and a form of government guaranteeing its continuance must be adopted. The separation of state powers through a tripartite division into "legislative, executive and judicial organs" is considered a fundamental guarantee of democratic organisation, a safeguard against the concentration of State power and thus against the possibility of undemocratic ways of exercising State power; in other words, a guarantee of the preservation of the people as the *pouvoir constituant*.[78] Another substantive aspect of the principle of popular sovereignty is the thesis that when the sovereignty of the people is significantly undermined,

76 See also: Nikolakakis, 2023, pp. 140–157.
77 For more details see: Sládeček et al., 2016, pp. 24–51.
78 See also: Aroney and Kennedy, 2025.

the people have the right to resist. It follows that the state authorities can only interfere to a limited extent with the expression of the people's will through free and democratic elections.[79] The organisation and regulation of elections must not be overly formalised to allow citizens to express their own will, or to run in elections without bureaucratic obstacles. The activities of state bodies must also not be partisan in the sense that they infringe the possibility of the free establishment of political parties and the equality of opportunity of political parties in elections. Nor may the courts interfere excessively in the establishment of state organs through free and democratic elections, nor in the formation of political parties and associations. All state organs arise from the people and their decisions. It means that all other institutions derived from directly elected State organs, whatever they can be called and whatever powers they may have, are State organs and subject to the relevant rules on accountability.[80]

Furthermore, Article 1 of the Charter provides that fundamental rights and freedoms are inherent, inalienable, non-barred and irrevocable. Thus, it emphasises the inherent and enduring nature of fundamental rights and is linked in value to key international human rights instruments. The impossibility of these rights being revoked or withdrawn from individuals is expressed in the concept of "irrevocability". This characteristic does not mean that the rights in question cannot be limited unless they are absolute rights. Article 1 of the Charter merely prohibits public authorities from abrogating, withdrawing or depriving individuals of those rights that they possess by virtue of being human. The State does not constitute fundamental rights, it merely declares and acknowledges their existence and undertakes to protect them, and thus has no power to abrogate them, since they are beyond its disposal. Nor can these rights be extinguished by the individual's failure to claim, invoke or exercise them. They cannot therefore be extinguished by the passage of time; they are "non-barred". Every individual has the right to life, the right to private and family life, personal liberty, and so on, even if he may never have claimed them in life. The specific nature of fundamental rights is also linked to their "inherence" and "inalienability", namely the impossibility for their holder to alienate, transfer, give away, renounce, or lend these rights to another. The inalienability of rights protects individuals to some extent even against their will. Thus, no one can transfer or waive their fundamental rights to another, even if they want to. In connection with the above, the Constitutional Court stated[81] that the right of access to a court can be waived in a particular and specific case if it is a matter of the free decision of its holder. It is important to emphasise the words "in a specific case"; however, that no one can naturally alienate their human right in general applies to all cases and times; only ad hoc actions, specifically

79 See also: Fiorespino, 2025, pp. 355–380.
80 For more details see: Sládeček et al., 2016, pp. 24–51.
81 See: Judgment Case No. Pl. ÚS 6/02 of 27 November 2022.

limited to specific cases, can be considered valid. In summary, only rights that are fundamental in the substantive sense – fundamental, natural rights – can be associated with their characterisation as inherent, inalienable, non-barred and irrevocable within the meaning of Article 1 of the Charter.[82]

Regarding the separation of powers, Article 2(1) of the Constitution, after the semicolon, provides that the people shall exercise state power through the legislative, executive and judicial organs. Thus, Article 2(1) expresses the separation of powers through Montesquieu's tripartite branches of State power, which is considered to be a fundamental guarantee of a democratic polity, a safeguard against the concentration of State power and thus against the possibility of undemocratic exercising of State power. That the powers are separate, and the way they are separated or combined, is evident from the general arrangement of their relations, which is regulated in other articles of the Constitution. To preserve the separation of powers as an element of the rule of law, it is certainly necessary to uphold the basic principles of separation and independence as derived from the Constitution and constitutional principles. The Constitutional Court of the Czech Republic states[83] that the very foundation of our constitutional system enshrines the principle of the separation of state powers, which has become a guarantee against arbitrariness and abuse and, in essence, a guarantee of freedom and protection of the individual.[84]

With regard to the principle of legality, Article 2(3) of the Constitution provides that State (public) power serves all citizens. The principle of legality, which comprises the exercise of State (public) power only in cases, within the limits and in the manner prescribed by law, means that all organs of the state, namely, legislative, judicial, executive and other state organs, or constitutional officials and official persons who exercise State (public) power in the name of the State on behalf of the competent State authority, must be guided by the law in the exercise of that power. In Article 2(3) of the Constitution, law means not only ordinary law but also constitutional law insofar as it is directly applicable. Therefore, the State authorities, constitutional officials and public officials may act only as the law allows them to do; they must not do anything that the law does not allow them to do. It must be added, however, that Article 2(3) of the Constitution applies only to acts of authority wherein State (public) power is exercised in some form. Notably, the obligation to be bound by the law in the exercise of State (public) power does not apply only to the State authorities but also to other entities, specifically those to which the exercise of State (public) power has been delegated or conferred, or which exercise so-called self-government on the basis of the law. This means in particular territorial public corporations, such as municipalities and regions, and

82 For more details see: Husseini et al., 2021, pp. 73–119; Daly, 2025, pp. 147–154.
83 See: Judgment Case No. Pl. ÚS 7/02 of 16 April 2002.
84 For more details see: Sládeček et al., 2016, pp. 24–51; Young, 2025, pp. 1–31.

professional self-governing public corporations or their bodies, but also private legal and natural persons. The rules on bindings apply to a more limited extent, or only in certain aspects, to other entities that are, by virtue of the law, the bearers of the exercise, to varying degrees, of other public powers or provide a particular public service. These include health insurance companies, Czech Television, Czech Radio, public universities, state funds and public research institutions. In summary, it follows from Article 2(3) of the Constitution that the substantive, jurisdictional and procedural conditions for the exercise of State (public) power can only be regulated by law. This general constitutionally enshrined reservation of the law is followed by the general injunction under Article 4(1) of the Charter that obligations should be imposed only on the basis of the law and within its limits, and only while preserving fundamental rights and freedoms.[85]

The principle of legal certainty stems from Article 4(3) of the Charter, providing that legal restrictions on fundamental rights and freedoms must apply equally to all cases that meet the conditions laid down. Article 4(3) of the Charter thus provides for the prohibition of discrimination in the restriction of fundamental rights and freedoms, which is part of the constitutionally protected principle of equality. The article also contributes to the right to equal treatment arising from Article 1 of the Constitution, according to which the Czech Republic is a sovereign, unitary and democratic state governed by the rule of law based on respect for the rights and freedoms of man and of the citizen, Article 1 of the Charter, according to which people are free and equal in dignity and rights, and Article 3(1) of the Charter that enshrines equality in relation to the guarantees of fundamental rights and freedoms. Equality is to be understood not absolutely, but relatively; the principle of equality in rights represents an idea that legal distinctions between subjects in access to certain rights must not be a manifestation of arbitrariness. The Constitutional Court in its case law upholds[86] both the concept of accessory equality – equality in relation to another fundamental right or freedom – and non-accessory equality – general equality before the law. Thus, in the case of the requirement of equal restriction of fundamental rights and freedoms under Article 4(3) of the Charter, this is always an accessory equality. When restricting fundamental rights and freedoms, in the interest of equality before the law, the specific scope of the fundamental right, which is to be guaranteed to the individual from the perspective of the legislator, must flow from the law and apply equally to all subjects.[87]

The first sentence of Article 40(6) of the Charter provides that the criminality of an act shall be judged and punishment imposed in accordance with the law in force at the time the act was committed. Thus, Article 40(6) lays down special

85 For more details see: Sládeček et al., 2016, pp. 24–51; Sharp and Blahoudková, 2024, pp. 35–48.

86 See: Judgment Case No. Pl. ÚS 24/17 of 11 September 2018.

87 For more details see: Husseini et al., 2021, pp. 185–198; Carlsson, 2025, pp. 302–321.

rules for the application of criminal law in the area of punishment for an offence and the imposition of punishment. As it does not primarily establish a subjective right of a procedural nature, its content is more related to Article 39 of the Charter, while in its first sentence it sets out the principle of *nullum crimen sine lege praevia*. This rule also applies in the area of administrative punishment and is a prohibition that is unbreakable under normal conditions of the rule of law. In the case law of the Constitutional Court,[88] it is regarded as a part of the so-called hard core of human rights and its establishment is one of the essential elements of a democratic state governed by the rule of law within the meaning of Article 9(2) of the Constitution, stating that changes to the essential elements of a democratic state governed by the rule of law are inadmissible. Subjective rights under Article 40(6) of the Charter are held not only by the accused but also suspects or all persons against whom criminal proceedings, obviously contrary to the Charter, would be directed. The addressees of Article 40(6) of the Charter are primarily law enforcement authorities applying the comparable legislation. However, with the exception of the courts, they are fully subject to the will of the legislator. Hence, the court is also its addressee because its task is to maintain criminal law in a consistent state. In summary, Article 40(6) of the Charter establishes a subjective right to set out the prohibition of retroactive application of criminal law. It is a special protection of the principle of legal certainty, according to which everyone must be able to know what conduct is prohibited and under what conditions and how they can be punished for it. Conversely, legislation cannot fulfil its function of regulating individual behaviour if it acts retrospectively.[89]

Examining whether the provisions on human rights and freedoms have equal force or are perhaps ordered hierarchically according to the values they protect, it is clear from the interpretation of the introductory provisions of the Charter, its introductory provisions, and Article 112(1) of the Constitution that no such hierarchy arises explicitly from the constitutional order of the Czech Republic.[90] However, it is necessary to draw attention to Article 9(2) of the Constitution, which states that any changes in the essential requirements for a democratic state governed by the rule of law are impermissible. Article 9(2) is a clause limiting the power of the constitutional legislator to change certain parts of the constitutional order. The clause is, in its concept, wording, and systematic placement, inspired by Article 79(3) of the Basic Law for the Federal Republic of Germany,[91] specifically by the so-called eternity clause (Ewigkeits-garantie),[92] and is a response to the abuse of a formalistic or legalistic approach to law-making. The clause prohibits change in the provisions laying down the essential elements of a democratic

88 See: Judgment Case No. III.ÚS 1698/14 of 10 January 2017.
89 For more details see: Husseini et al., 2021, pp. 1240–1270.
90 See also: Benák, Vyhnánek and Zahumenský, 2019, pp. 197–210.
91 See also: Alvarez, 2019, pp. 285–315.
92 See also: Korioth and Marx, 2021, pp. 145–175.

state governed by the rule of law. Thus, the provision acknowledges the value orientation of the Constitution towards the rule of law, not in the legalistic sense of the term but, according to the Constitutional Court, in a materially rational sense. According to the case law of the Constitutional Court,[93] in the concept of a constitutional state on which the Czech Constitution is based, law and justice are not subject to the free disposal of the legislature and, therefore, not subject to the law, because the legislature is bound by certain fundamental values that the Constitution declares to be inviolable. Unchangeable provisions have a so-called supra-constitutional character, which means that they cannot be changed even by constitutional acts, specifically, by regulations of the highest legal force. In its case law, the Constitutional Court states[94] that the constitutive principles of a democratic society within the framework of this Constitution are placed above the legislative competence and thus ultra vires of Parliament. The constitutional state stands or falls with these principles. The significance of unchangeability lies in the restriction of future legislators by emphasising certain values and principles in the constitutional text to such an extent that they are declared and generally considered to be natural values. Their change would indicate a violation of the fundamental principles of democracy and the rule of law.[95]

Notably, the provisions of the Constitution that may not be changed in terms of the requirements of a democratic legal state[96] are not precisely defined in the Constitution. This suggests that Article 9(2) of the Constitution is not motivated by a desire for textual continuity or identity of the future Constitution but only by the protection of the abovementioned principles. Therefore, Article 9(2) does not mean that the Constitution as a whole cannot be changed. If all the principles pursued by Article 9(2) are preserved in the new Constitution, all constitutional formulations may differ significantly from the current Constitution in terms of text and structure. What cannot be changed, even by indirect amending, are the essential elements of a democratic state governed by the rule of law. Not only the whole but also part of the text of the relevant provision of the Constitution may be amended, on condition that the essential elements of a democratic state in the Constitution are not impaired in the new text. For example, in Article 1 of the Constitution, it would be possible to change the republic to a kingdom, provided that the essential elements of a democratic state governed by the rule of law remain intact.[97]

The unchangeable provisions of the Constitution are partially calculated in the case law of the Constitutional Court, which expressly claims[98] as indisput-

93 See: Judgment Case No. Pl. ÚS 19/93 of 21 December 1993.
94 See: Judgment Case No. Pl. ÚS 21/01 of 12 February 2002.
95 For more details see: Sládeček et al., 2016, pp. 104–121.
96 See also: Kazanchian, 2021, pp. 114–119.
97 See also: Roznai, 2014, pp. 29–57; or more details see: Sládeček et al., 2016, pp. 104–121.
98 See: Judgment Case No. Pl. ÚS 19/93 of 21 December 1993.

able the sovereignty of the people[99] and the principles contained in the following: Article 5 (i.e. that the Czech political system[100] is founded on the free and voluntary formation of and free competition among those political parties which respect the fundamental democratic principles and renounce force as a means of promoting their interests); Article 6 of the Constitution (i.e. in the Czech Republic, political decisions emerge from the will of the majority[101] manifested in free voting and the decision-making of the majority shall take into consideration the interests of minorities); and in Article 23 of the Charter (i.e. in the Czech Republic, citizens have the right to resist anybody who would do away with the democratic order of human rights and fundamental freedoms established by this Charter, if the actions of constitutional bodies or the effective use of legal means have been frustrated), which further refers to several articles of Chapter I of the Constitution and Chapters I and V of the Charter, as well as the principles of electoral law. Thus, it is clear that the unchangeable provisions are not limited to the Constitution but can also be found in the Charter and in other constitutional acts. As for doctrinal opinions on the concerned provisions of the Constitution and the Charter, these differ somewhat. Some theorists consider Articles 1(1), 5 and 6 of the Constitution to be unchangeable, while others add the sovereignty of the people, namely, Articles 2(1) and 23 of the Charter. The selection of Articles 1(1), 5 and 6 can in principle be agreed with, as these are provisions that deal with the essential elements of a democratic state, since they regulate the democratic rule of law and a pluralistic political system. As for Article 2(1) of the Constitution, regarding the sovereignty of the people and the separation of powers, and Article 23 of the Charter, namely, the right to resist, these clearly formulate the basis of the legitimacy of the democratic state and the legal order on which the other articles of the Constitution and the Charter are based, and whose inviolability is also indisputable. Article 4 of the Constitution, which states that fundamental rights and freedoms are protected by the judiciary, and similarly, Article 36(1) to (4) of the Charter, could probably be added. At this point, it is necessary to add that the concept of Article 9(2) of the Constitution is linked to the Constitutional Court's doctrine of the so-called material core of the Constitution. In its case law, the Constitutional Court states[102] that the material core of the Constitution, under Article 9(2), refers to the values for which the prohibition of retroactive effect of legal regulations may be violated.[103]

99 See also: Přibáň, 2019, pp. 13–28.
100 See also: Lorenz and Formánková, 2020.
101 See also: Corneo and Neher, 2015, pp. 96–109.
102 See: Judgment Case No. Pl. ÚS 42/2000 of 24 January 2001.
103 For more details see: Sládeček et al., 2016, pp. 104–121.

■ *1.5. The Organization of Freedoms and Rights in the Constitution and the Charter*

It follows from the above interpretation that fundamental rights in the Czech Republic are not enshrined in the Constitution, but in a separate human rights catalogue, namely, the Charter. The Charter was formally promulgated by Resolution No. 2/1993 Coll. of the Presidium of the Czech National Council as a part of the Czech constitutional order, which was an incorporation of the text of the Federal Czechoslovak Charter approved by the Federal Assembly of the Czech and Slovak Federal Republic, with the introductory constitutional Act No. 23/1991 Coll., of 9 January 1991, with effect and validity from 8 February 1991. After the dissolution of the Czech and Slovak Federal Republic, the Federal Czechoslovak Charter was incorporated into the legal order of the Czech Republic without any terminological changes, which means that federal terminology appears in many places in the Charter, such as references to the territory of the Czech and Slovak Federal Republic, and citizenship of the Czech and Slovak Federal Republic.[104] Therefore, the interpretative rule under Article 1(2) of the Czech National Council's constitutional Act No. 4/1993 Coll. must be applied on Measures connected with the Dissolution of the Czech and Slovak Federal Republic; where individual provisions of the Charter refer to the Czech and Slovak Federal Republic, the relevant provision must be interpreted as referring to the Czech Republic.[105]

In terms of its legal force, the Charter is considered a constitutional act thanks to the explicit reference in Articles 3 and 112 of the Constitution, which declare the Charter to be part of the constitutional order. If the constitutional order comprises a set of constitutional acts and the Charter assigned to them, it can be inferred from the intention of the constitutional legislator that the Charter should be granted the same importance and legal force as other parts of the constitutional order.[106] This interpretation is necessary despite the fact that the Charter was never approved as a constitutional act by the Czech legislative body. Despite the form in which the Charter is enshrined in the legal order of the independent Czech Republic, no other interpretation is possible from a substantive point of view, because the enshrinement of a catalogue of fundamental rights and freedoms should be part of the constitution in a state governed by the rule of law, whether that constitution is mono-legal or semi-legal,[107] as is the case of the Czech Republic.[108]

The Resolution of the Presidium of the Czech National Council has no formal relevance in terms of the legal binding force or effect of the Charter. It is merely a decision to publish the text of the Charter in the Collection of Laws of

104 See also: Kudrna, 2011, pp. 19–28.
105 For more details see: Husseini et al., 2021, pp. 1–53.
106 See also: Grinc, 2019, pp. 16–26.
107 See also: von Gall, 2022.
108 For more details see: Husseini et al., 2021, pp. 1–53.

the independent Czech Republic, symbolically immediately after the Constitution, under No. 2/1993 Coll. The Resolution was adopted on the same day that the Constitution was approved by the Czech National Council, on 16 December 1992. However, the constitutional force of the Charter is fully accepted in legal practice and clearly declared by the Constitutional Court.[109]

The Charter is divided into six Chapters. Chapter I contains general provisions. Chapter II is dedicated to fundamental rights and freedoms, and political rights. Chapter III enshrines rights of national and ethnic minorities. Chapter IV includes economic, social and cultural rights. Chapter V encompasses the right to a fair trial. Chapter VI contains rather unsystematically incoherent provisions as to the right to asylum, and common restrictive clauses on social rights and distinctions regarding which fundamental rights are enjoyed by aliens. The Charter also includes an introductory text of interpretative and technical nature. The Charter is based on the conception of natural law (the state guarantees and enshrines fundamental rights and freedoms but does not create them). When drawing up the Charter, the main sources of inspiration were the international conventions on human rights, particularly the European Convention on Human Rights, also the Universal Declaration of Human Rights and to a lesser extent also the constitutions of other countries and philosophical sources. Notably, the European Convention on Human Rights and the Charter differ in many aspects; the catalogue of rights protected by the Charter is longer (economic, social and cultural rights, right to asylum, rights of national and ethnic minorities), the number of legitimate aims justifying restrictions to political rights is lower, and the number of unqualified rights (without its own restrictive clause) is greater, among several other differences. The absence of a general restrictive clause and the enshrinement of the common restrictive clause of social rights are specific and distinctive traits of the Charter.[110]

■ *1.6. The Important Freedoms and Rights Contained in the Constitution and the Charter*

Given the long-standing and ongoing political debate on the concept, the topic of marriage and family protection is particularly important in the Czech Republic. In the Czech Republic, the institution of marriage[111] is not directly mentioned at the constitutional level. The first sentence of Article 32(1) of the Charter merely states that parenthood and family are protected by law. Article 32 of the Charter is systematically included in Chapter IV, regulating economic, social and cultural rights, and specifies the social aspect of the fundamental right to protection of family life, set out in Article 10(2) of the Charter. It includes the guarantee of several

109 Ibid.

110 See: Masaryk University in Brno – Faculty of Law 2015; for more details see: Husseini et al., 2021, pp. 1–53.

111 See also: Zdechovský and Fialová, 2024, pp. 157–174.

subjective rights and positive obligations on the part of the State, including to protect the family and parenthood. The legal guarantee of family and parenthood protection is one of the social rights listed in Article 41(1) of the Charter, according to which an individual may invoke it only within the limits of the implementing laws. Therefore, the Charter presupposes that the law specifies the content of this constitutionally guaranteed social right. Direct protection under the Charter itself can be invoked only in relation to its essential core. This essence is, as opposed to the negative obligation not to interfere in the private sphere of family life within the meaning of Article 10(2) of the Charter, the positive obligation of the State to provide active support toward parenthood and the family. In connection with the above, the legal norms implementing Article 32 of the Charter are in private law, in particular, the norms in Part Two of Act No. 89/2012 Coll., the Civil Code, and in public law, the norms of social and legal protection of children in Act No. 359/1999 Coll., on the Social and Legal Protection of Children, and in Act No. 109/2002 Coll., on the Provision of Institutional Education or Protective Education, Part Four of Act No. 40/2009 Coll., the Criminal Code regulating offences against the family and children, and the norms in Act No. 218/2003 Coll., the Juvenile Justice Act, regulating child offenders.[112]

Although the protection of family and parenthood is one of the rights fulfilled by the legislator through ordinary laws, Article 32 of the Charter defines the very core of this positive obligation of the State and can serve as an interpretative guide to statutory regulation in any matter, such that the duty to protect the family and parenthood is never violated by the applying authorities. In accordance with this thesis, the Constitutional Court stated[113] that given the entire complex of all rights and obligations between parents and children, the legal reason for parents to inspect the criminal file containing information about the death of their child is instinctively recognisable and presumable. This reason does not only arise from the rights of the child itself, but many of these rights originally belong directly to the parents. The third sentence of Section 65(1) of the Code of Criminal Procedure must also be interpreted in a constitutionally consistent manner in light of the special protection of parenthood within the meaning of Article 32(1) of the Charter. If the parents do not explicitly state in their request for access to the file which specific right they wish to exercise, this does not prevent access to the file. This conclusion does not create any new right and, therefore, does not violate Article 41(1) of the Charter, since it merely sets out the requirements for the interpretation of the third sentence of Article 65(1) of the Code of Criminal Procedure. The constitutionally conforming interpretation is that the right, for the exercise of which the so-called other person requires inspection of the criminal

112 For more details see: Husseini et al., 2021, pp. 892–935.
113 See: Judgment Case No. IV ÚS 3526/16 of 21 March 2017.

file, is certified by the very nature of the special protection of parenthood in the case of minor children.[114]

The concept of family is not legally defined in the Czech legal system. It can thus take many forms depending on the interpreter, the time in which it is defined, and the society and values on which it is based. Traditionally, family was institutionalised in the form of marriage. However, today, the legislator must respond to social developments and reflect the social reality of the increase in cohabitation of unmarried couples. Thus, the current version of the Civil Code in force does not base the concept of family on that of marriage and strictly differentiates these two institutions. Legal regulation under Article 655(1) of the Civil Code provides that marriage is a permanent relationship between a man and a woman, formed in the manner prescribed by law, the main purpose of which is the establishment of a family, the proper upbringing of children and mutual support and assistance. Under Article 687 of the Civil Code, spouses have equal status, are obliged to respect each other, live together, be faithful to each other, respect and support each other and create a healthy family environment for the joint care of children. Marriage may only be contracted by a person who is fully capable of exercising their legal capacity, namely, an adult or one not restricted in their legal capacity. An exception to this rule is made for minors over 16 years of age, if the court grants them permission to marry for important reasons under Article 672 of the Civil Code. In particular, a person who has already entered into an analogous permanent relation in the past, and persons in the direct line of descent, siblings or adoptive parents with adopted children are prohibited from marrying, under threat of criminal sanctions.[115]

Same-sex couples can legalise and institutionalise their relationship only by entering into a registered partnership under Act No. 115/2006 Coll., on Registered Partnerships. With effect from 1 January 2025, Article 655 of the Civil Code was amended by adding a second paragraph stating that a partnership is a permanent relationship of two people of the same sex, which is concluded in the same way as a marriage. Unless otherwise provided by law or other legislation, the provisions on marriage, rights and obligations of spouses, widows and widowers shall apply mutatis mutandis to partnerships and the rights and obligations of partners.[116]

Parenthood is also not legally defined in the Czech Republic. Biological conditionality means that a child has two parents, a father and a mother, and the law tries to reflect this biological reality. However, in the course of a child's life, or even an adult's life, legal parental relationships, unlike those biologically determined, may become complicated by the emergence of various social situations. The legal parenting relationship is established by the birth of a child – most

114 For more details see: Husseini et al., 2021, pp. 892–935; see also: de la Mata Barranco, 2023.
115 For more details see: Husseini et al., 2021, pp. 892–935.
116 Ibid.; see also: Sekerák and Novotný, 2021, pp. 374–399.

often to biological parents – or by adoption. As society, technology and medicine evolve, new challenges arise for legislators. Besides the natural conception of a child, artificial insemination associated with possible donation of genetic material or surrogacy, which is not legally regulated in the Czech Republic, can be considered. Consequently, various legal repercussions can arise. Furthermore, the question arises as to what extent the Charter guarantees an individual, or a couple, the right to parenthood if it is not biologically possible for them. The Constitutional Court commented[117] on the issue of artificial insemination with the sperm of a deceased husband by stating that doubts as to the actual will of the applicant's deceased husband to become a father after his death cannot be excluded. Indeed, the informed consent to the cryopreservation of sperm contained an express provision for the destruction of that biological material in the event of his death. Thus, the cryopreserved sperm of a man cannot be used for conception after death, even if the six-month period after the man's death has not yet expired. The Constitutional Court also expressed[118] its opinion on the issue of recognition of a foreign state's decision on the parentage of two persons of the same sex by stating that it is contrary to the best interests of the child as protected by Article 3(1) of the Convention on the Rights of the Child not to recognise such a foreign decision in a situation where family life has already been factually and legally constituted between them in the form of surrogacy, on the grounds that Czech law does not allow parentage of two persons of the same sex. Where a family life already exists between persons, established on a legal basis, it is the duty of all public authorities to act in such a way such that this relationship can develop, and the legal guarantees that protect the relationship between the child and their parent must be respected.[119]

Notably, Czech legislation still works with the assumption that a child can have only one mother and one father, although in practice this concept is beginning to encounter obstacles. In the case of maternity, disputes do not arise because, under Article 775 of the Civil Code, the mother of a child is, without exception, the woman who gives birth to it. More complex situations arise with the determination of paternity under Article 776 to 793 of the Civil Code. It should be noted that the Czech legislation has evolved in response to the widespread use of DNA testing, yet the three-presumption model for determining paternity is still a well-established one. The first presumption of paternity applies to the mother's husband if the child is born between the time of the marriage and the 300th day after the dissolution of the marriage. The second presumption of paternity comes into play when the first presumption is excluded, for instance, if the child is born to an unmarried woman, or the paternity of the first presumption is finally

117 See: Judgment Case No. I. ÚS 1099/18 of 8 November 2018.
118 See: Judgment Case No. I. ÚS 3226/16 of 29 June 2017.
119 For more details see: Husseini et al., 2021, pp. 892–935; see also: Deech, 2023, pp. 19–34.

denied. The third presumption of paternity then arises if paternity has not been established under the first and second legal presumptions. However, the three-presumption model for determining paternity encounters limits in practice, for example, in the case of artificial insemination ex *mortuo*, where none of the legal presumptions of paternity can be invoked.[120]

This suggests that the requirement of conformity of legal and biological paternity cannot be considered absolute. The legal relationship between father and child is not merely a mechanical reflection of the existence of a biological relationship, but over time, even in the absence of such a relationship, a social and emotional bond can develop between the legal father and the child which, from the perspective of the right to protection of private and family life, also enjoys legal protection. In such a case, the continuation of the legal relationship will depend on several factors, among which the interest of the child plays an important role.[121]

The Constitutional Court addressed[122] the necessity of considering the specific circumstances where the change in the status of legal paternity was not sought by a man, but by an adult child. An adult woman, the complainant before the Constitutional Court, failed in her application for the establishment of paternity due to the obstacle of *res iudicata*, because she unsuccessfully sought the same as a minor in 1963, when DNA testing was unavailable. The Constitutional Court expressly stated[123] that persons seeking to identify their relatives have a protected interest in obtaining information necessary to reveal important aspects of their personal identity. That right is counterbalanced by the general interest in the stability of the legal relationship based on a matter already decided, as well as by the rights of the third parties concerned; however, these must be balanced as precisely as possible with the right cited. While both parties have the right to maintain legal certainty, they also have the right to have their own identity established. The legislation cannot ignore the fact that a significant legal interest in the establishment (or denial) of paternity can sometimes only arise with a considerable time lag after the birth of the child.[124]

The legal regulations under Article 792 and 793 of the Civil Code seem to reflect the above theses sufficiently based on the possibility to waive the time limit for denying paternity – a restrictively applicable exception to the rule. The Constitutional Court specifically stated[125] that the grounds for exceptional waiver of the time limit for denying paternity exist specific cases of fathers of adult children and who are not dependent on either maintenance, the presence of a fatherly figure, or the provision of a stable educational environment during adolescence.

120 For more details see: Husseini et al., 2021, pp. 892–935; see also: Rogers, 2002, pp. 1151–1173.
121 For more details see: Husseini et al., 2021, pp. 892–935.
122 See: Judgment Case No. I. ÚS 2845/17 of 17 January 2019.
123 See: Judgment Case No. I. ÚS 987/07 of 28 February 2008.
124 For more details see: Husseini et al., 2021, pp. 892–935; see also: Esteve, 2021, pp. 133–160.
125 See: Judgment Case No. II ÚS 1741/18 of 21 May 2019.

On the other hand, in the case of minor children, the Constitutional Court has consistently stated that when the biological father is not clearly known, by denying paternity, the child would lose the person who has fulfilled the paternal role so far. This legal presumption corresponds to the existing social reality – the removal of family ties would thus constitute a disproportionate interference with the rights of the child, who would have to deal with the existence of an apparent father and would be detrimental to his proper and moral upbringing.[126]

However, even this does not provide a certain guarantee of reconciliation of biological and legal reality. This state of affairs can be demonstrated by a situation wherein the Constitutional Court dealt[127] with the case of a putative biological father who was not actively legitimated to file an action to deny the paternity of the mother's husband, within the meaning of Article 785(1) and 789 of the Civil Code. Neither the mother nor her husband had any interest in denying legal paternity to the newborn. The Constitutional Court expressly stated that if there is no revision of the circle of persons actively entitled to bring a denial action in the case of establishing paternity under the first presumption, the question of the possibility of contact between the biological father and the child whose paternity he claims, remains essential. As is undoubtedly apparent from the case-law of the European Court of Human Rights, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms imposes an obligation on Member States to examine whether it is in the best interests of the child to allow their natural father to establish a relationship, for example, by granting them a right of access. The biological father must not be completely excluded from the life of his child unless there are compelling reasons in the best interests of the child.[128]

Given the migration crisis of recent years, the Russian Federation's invasion of Ukraine, and Czech society's deteriorating attitude towards immigrants, another important topic is the protection of ethnic and national minorities' rights in the Czech Republic. In the Czech Republic, the protection[129] of minorities at the constitutional level is regulated by Article 24 and Article 25 of the Charter. The notion of minority can certainly be viewed from various perspectives, such as legislative, cultural or social, but always refers to a group of persons who are distinguished in society by various characteristics such as religion, language, nationality, ethnicity, gender or culture. From the various theoretical definitions, it can be deduced that an ethnic minority is a numerically minority group of people who do not have their own state territory, and their belonging to such a group is not a matter of individual will but an innate characteristic. A national minority is a smaller group of members of a nation that has its own state territory,

126 For more details see: Husseini et al., 2021, pp. 892–935.
127 See: Judgment Case No. II ÚS 3122/16 of 16 May 2017.
128 For more details see: Husseini et al., 2021, pp. 892–935.
129 See also: Baumgart, 2023, pp. 39–127; Jacob-Owens, 2021, pp. 167–197; Klučka, 2018, pp. 17–37; Machalová, 2016, pp. 173–186; Rechel, 2008; Řezníková, 2025, pp. 1315–1330.

but the members of the minority are settled outside its borders. Membership of a national minority is generally a matter of individual will. It is important to add that in the Czech Republic, the distinction between ethnic and national minorities is not legally relevant, since their members are entitled to the same protection, or the same consequences are associated with a violation of the prohibition of discrimination against members of the aforementioned minorities.[130]

Article 24 of the Charter specifically states that membership of any national or ethnic minority shall not be to the detriment of anyone. Article 25 of the Charter enshrines the specific rights of citizens of the Czech Republic belonging to a national or ethnic minority. Article 25(1) of the Charter specifically states that citizens belonging to national or ethnic minorities are guaranteed all-round development, in particular, the right to develop their own culture together with other members of the minority, the right to disseminate and receive information in their mother tongue and to associate in national associations. Article 25(2) of the Charter states that citizens belonging to national and ethnic minorities are also guaranteed, under the conditions laid down by law, (a) the right to education in their language, (b) the right to use their language in official dealings, and (c) the right to participate in matters concerning national and ethnic minorities.[131]

Article 24, together with Article 25, forms the entire Chapter III of the Charter, entitled 'Rights of National and Ethnic Minorities'. This legal regulation is directly related to the issue of non-discrimination and equality in dignity and rights. However, the title of this chapter is misleading, as it is not possible to talk about minorities' rights as such. The concept of fundamental human rights is based on individual rights of specific persons, not collective rights. Therefore, it is more appropriate to speak about individual rights of individual members of national and ethnic minorities. Article 24 of the Charter is linked to the general constitutional context of minority protection, namely Article 6 of the Constitution, setting out the protection of minorities in relation to the democratic rule of the majority and the prohibition of discrimination enshrined in Article 3(1) of the Charter, the so-called anti-discrimination clause, according to which equality in the exercise of fundamental rights is guaranteed to all without distinction as to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status. The related Article 3(2) of the Charter guarantees the right of the individual to freely decide on their nationality, while expressly prohibiting any influence on this free choice or pressure towards de-nationalisation. Thus, Article 24 of the Charter emphasises on the general prohibition of disadvantaging an individual because of their membership of a minority, specifically a national

130 For more details see: Husseini et al., 2021, pp. 728–748.

131 For more details see: Husseini et al., 2021, pp. 728–748; see also: Barczewski and Sykuna, 2024, pp. 257–269.

or ethnic minority. In light of the wording of Article 3(1) and (2) of the Charter, as well as the declaration of equality in dignity and rights under Article 1 of the Charter, Article 24 of the Charter is of no more fundamental significance because membership of any minority, not just a national or ethnic one, must not be to the detriment of anyone.[132]

In the Czech Republic, therefore, the protection of national or ethnic minorities is guaranteed in particular in Chapter III, and Articles 1and 3 of the Charter, and their statutory implementation can be found primarily in the Act no. 273/2001 Coll., on the Rights of Members of National Minorities (hereinafter referred to as the "Minorities Act"). In Section 2(1) of the Minorities Act, a minority is defined as

> 'a community of citizens of the Czech Republic living in the territory of the present-day Czech Republic who, as a rule, differ from other citizens by common ethnic origin, language, culture and traditions, form a numerical minority of the population and at the same time express the will to be considered a national minority for the purpose of joint efforts to preserve and develop their own identity, language and culture and at the same time to express and protect the interests of their community which has historically formed.'

Under Section 2(2) of the Minorities Act, a member of a national minority is 'a citizen of the Czech Republic who claims to be of a nationality other than Czech and expresses a wish to be considered a member of a national minority together with others who claim the same nationality.' At this point, it should be noted that the Minorities Act implements Article 25 of the Charter, not Article 24, which grants rights to members of all national and ethnic minorities without further ado. It follows that its application cannot take into account the narrowed circle of addressees of the above-mentioned norms of the Minorities Act, since Article 24 of the Charter applies to any member of any national and ethnic minority[133] without further consideration, in other words, regardless of the nationality of the minority member or membership of a legally recognised minority. However, it also follows from Article 24 of the Charter that it leaves it to the legislator and public authorities to interpret the term "minority" for their own practice and application. The Czech legislator took advantage of this when defining the term national minority in the Minority Act.[134]

In the context of minorities' protection, it is necessary to mention the annual reports of the Public Defender of Rights, which have shown for many

132 For more details see: Husseini et al., 2021, pp. 728–748; see also: Lakatos, 2019, pp. 502–511.
133 See also: Barczewski and Sykuna, 2024, pp. 257–269.
134 For more details see: Husseini et al., 2021, pp. 728–748.

years that discrimination on the grounds of race or ethnic origin constitutes a significant number of complaints. As regards unequal treatment on grounds of nationality or ethnicity, the Constitution contains in its Preamble a declaration of the Czech citizens' determination, inter alia, to build, protect and develop the Czech Republic, in the spirit of the inviolable values of human dignity and freedom, as a homeland of equal and free citizens. As mentioned above, Article 3(1) of the Charter sets out the so-called anti-discrimination clause, followed by Article 24 regarding the prohibition of harm on the ground of a national or ethnic minority membership. Racial discrimination is considered to be a particularly serious ground for exclusion and very serious reasons must be provided to justify such exclusion. The same is the case for national and ethnic grounds.[135]

Commenting on this issue, the Constitutional Court dealt[136] with a dispute concerning the personality protection of a restaurant guest. In the public area of the restaurant, a statue of a figure holding a baseball bat with the inscription '*To the gypsies...*' was placed. The complainant, of Roma[137] origin, sought an order requiring the restaurant keeper in question to apologise to him and to pay him compensation for non-pecuniary damage in the amount of 300 000 CZK. The Constitutional Court stated that there is nothing to reproach from a constitutional point of view with regard to the legal basis of the reasoning of the general courts that the mere subjective feeling of an individual is not decisive from the perspective of the protection of personality; however, the objective capacity to cause personal injury is crucial. This can already be deduced by the argument of reduction ad absurdum. Otherwise, any negative subjective perception of any situation would have to be regarded as an unjustified interference with personality rights (and any action would thus have to be upheld without further delay), which is indeed not the purpose of the constitutional and specific sub-constitutional regulation. In addition to the subjective aspect, which will always be present in court proceedings (otherwise no action would be brought) and which cannot practically be proved, the objective aspect referred to above must also be fulfilled. The personality of an individual may be objectively affected by the unintended consequences of an act as well as by the intended consequences, and the result is the same. In terms of the possibility of an individual's personality being affected, it is irrelevant whether or not the other party's injurious conduct was intentional. If an individual feels themselves to be related to a particular set of persons or group, they may be objectively affected in their personality even if the formulation is expressed only in relation to a set of persons (i.e. without individualising the persons). If the statement is directed against a set of persons (i.e. defined in general terms), it is, by its very nature, also directed against individuals, since they are its

135 Ibid.
136 See: Judgment Case No. II. ÚS 1174/09 of 13 January 2010.
137 See also: Tomšej, 2025, pp. 118–127.

own content (subsets). The name of such a group is only a means of designating the content that the individuals constitute. Notably the issue of unequal treatment on grounds of nationality or ethnicity is also regulated in Act no. 198/2009 Coll. on Equal Treatment and Legal Means of Protection against Discrimination.[138]

■ *1.7. The Clauses of the Constitution and the Charter Limiting the Exercise of Constitutional Freedoms and Rights*

Regarding whether the Constitution contain clauses limiting the exercise of constitutional freedoms and rights, Article 4(2) of the Charter states that limitations may be placed upon the fundamental rights and freedoms only by law and under the conditions prescribed in the Charter.[139] Article 4(3) of the Charter states that any statutory limitation upon the fundamental rights and freedoms must apply in the same way to all cases that meet the specified conditions. Article 4(4) of the Charter states that when employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted. With a few exceptions, the fundamental rights and freedoms guaranteed by the Charter are not absolute, which means that they may be restricted by law under the conditions set out in the Charter, while complying with the conditions contained in Article 4(2) to (4). In terms of the conditions set out in the Charter, such a restriction of a fundamental right or freedom: 1. must be provided for in the Charter; 2. must be prescribed by law; 3. must not be discriminatory; and 4. must respect the essence and meaning of the fundamental right being restricted. The last condition also applies in cases where there is a conflict among the fundamental rights and freedoms or between them and the so-called public good.[140]

For a restriction of any of the fundamental rights and freedoms guaranteed by the Charter to be considered at all, it must be provided for by the Charter itself. The prerequisite for the restriction of a fundamental right or freedom can be left unspecified. In a number of cases, the Charter sets out more specific conditions for the restriction of fundamental rights and freedoms. To fulfil the relevant conditions, it is decisive whether the Charter provides for their restriction in one of the above-mentioned manners; in other words, whether there are so-called limitation clauses in the case of particular fundamental rights and freedoms. However, it follows from the case law of the Constitutional Court that even in the case of rights that do not have their own limitation clause, in the case of a conflict, they may be restricted in the interest of another fundamental right or freedom or even in the interest of the public good.[141]

138 For more details see: Husseini et al., 2021, pp. 728–748; see also: Hermida, 2017, pp. 93–113.
139 See also: Valutytė, Jočienė and Ažubalytė, 2021, pp. 1–15.
140 See also: Weber, 2024, pp. 581–604; for more details see: Husseini et al., 2021, pp. 185–198.
141 For more details see: Husseini et al., 2021, pp. 185–198.

The limits of fundamental rights and freedoms may only be regulated by a statute. The purpose of this exclusive power of the legislature, known as the reservation of statutory regulation, is to prevent the executive power from implementing its own ideas on the manner and extent to which fundamental rights and freedoms should be restricted. However, this does not mean that any restriction of fundamental rights and freedoms can only be implemented by statutory law and not by subordinate regulation.[142] There is also the case where the limits of fundamental rights and freedoms are set out in basic features directly by statutory regulation, while subordinate regulation imposes obligations restricting fundamental rights and freedoms on the basis of and within the limits of the statutory regulation. What is meant by these basic features that must be set out by the statutory regulation depends (as does the extent to which such specification is permissible) on the nature of the relevant obligation, or the corresponding right. Thus, the reservation of the statutory regulation does not preclude the statutory limits on fundamental rights and freedoms from being further regulated by subordinate legislation. However, this cannot lead to a narrowing or broadening of the limits set out by the statutory regulation. As for the reservation of the statutory regulation and the limits of delegated rule-making, the executive power cannot be empowered by law to set limits on fundamental rights and freedoms, specifically, to regulate matters reserved for the legislative power by the Constitution.[143]

As for the rule that statutory restrictions on fundamental rights and freedoms must apply equally to all cases that meet the specified conditions, this implies a prohibition of discrimination in this context, which is part of the constitutionally protected principle of equality, or the right to equal treatment arising from Article 1 of the Constitution and Articles 1 and 3(1) of the Charter. At this point, it is important to recall that equality must be understood not in absolute terms but in relative terms.[144] The Constitutional Court upholds the concepts of both accessory and non-accessory equality. The case of a requirement for equal restriction of fundamental rights and freedoms under Article 4(3) of the Charter is always a matter of accessory equality. In the interests of equality before the law in the restriction of fundamental rights and freedoms, the specific scope of a fundamental right must be derived from the law and apply equally to all subjects. This condition is also violated if the law does not guarantee that the limits of a fundamental right or freedom are set out in a similar manner for all cases that are similar in nature.[145]

When applying provisions on the limits of fundamental rights and freedoms, their essence and meaning must be respected. In other words, their essential or

142 See also: Hejč, 2019, pp. 738–752.
143 For more details see: Husseini et al., 2021, pp. 185–198.
144 See also: Erica, 2009, pp. 19–38.
145 For more details see: Husseini et al., 2021, pp. 185–198.

substantive content – the core of fundamental rights[146] – must be considered. Such restrictions must not be abused for purposes other than those for which they were established. The legal regulation under Article 4(4) of the Charter thus concerns the restrictions on fundamental rights and freedoms contained in the so-called limitation clauses to which it refers, and thus follows on from Article 4(2) of the Charter, according to which restrictions must be provided for by the Charter. Article 4(4) of the Charter cannot be regarded in this respect as a general limitation clause for all fundamental rights and freedoms; it instead lays down a general condition, a restriction, for legislators when applying limitation clauses to individual fundamental rights and freedoms. In addition, Article 4(4) of the Charter applies in cases of mutual conflict among fundamental rights and freedoms, and between a fundamental right or freedom and a public good, where a fundamental right or freedom is to be restricted in the interest of another fundamental right, freedom or public good, regardless of whether the restriction is provided for by a limiting clause.[147]

Thus, the limit on the restriction of fundamental rights and freedoms set out in Article 4(4) of the Charter applies not only to the creation of law but also to its application by courts and other public authorities in cases of conflict among fundamental rights, freedoms and the public good. Resolving such conflicts always carries the risk of a disproportionate restriction of one right or freedom in preference of another.[148] It is precisely in connection with such conflicts that the Constitutional Court, in its case law, has derived[149] the requirement to minimise interference with fundamental rights and freedoms (the principle of preserving the maximum content of conflicting fundamental rights) from Article 4(4) of the Charter. In addition, the requirement to preserve the essence and meaning of fundamental rights and freedoms implies that, if there are several interpretations of a public law norm, the one that interferes least with the fundamental right or freedom in question must be chosen; in case of doubt, a more lenient approach must be taken.[150]

The principle of minimising interference is usually seen as part of the proportionality test[151] in the Constitutional Court's decisions, in the form of considering ways to minimise restrictions on one conflicting fundamental right and freedom or public good, although this isn't always the case. Sometimes it is applied alongside (outside) the proportionality test. The requirement to minimise interference is then usually part of the last of the three components of the proportionality test, which is the balancing test that compares the importance of the

146 See also: van Drooghenbroeck and Rizcallah, 2019, pp. 904–923.
147 For more details see: Husseini et al., 2021, pp. 185–198.
148 See also: Bor, Jørgensen and Petersen, 2023, pp. 704–711.
149 See: Judgment Case No. I. ÚS 353/04 of 16 June 2005.
150 For more details see: Husseini et al., 2021, pp. 185–198.
151 See also: Vyhnánek, 2024, pp. 773–790.

two conflicting rights. The balancing test, within the proportionality test, follows the suitability test, according to which the relevant measure must be capable of achieving the intended objective, which is the protection of another fundamental right or public good. The balancing test also follows the necessity test, according to which only the least restrictive of several possible means may be used in relation to the fundamental rights and freedoms concerned.[152]

In its case law, the Constitutional Court uses[153] two types of proportionality tests[154] namely the proportionality test in the form of an optimisation order, which is the postulate of minimising restrictions on fundamental rights and freedoms or the public good, and generally applies in cases of conflicts among them, unless a modified proportionality test is to be applied in accordance with the case law of the Constitutional Court.[155] In the case of a modified proportionality test, the Constitutional Court applies the structure of the principle of proportionality in a narrower sense, namely of excluding extreme disproportionality. In addition, when applying the modified proportionality test, an assessment is also made from the perspective of compliance with measures arising from the constitutional principle of equality, both non-accessory in the sense of Article 1 of the Charter, which arises from the requirement to exclude arbitrariness in distinguishing between subjects and rights, and accessory within the scope defined in Article 3(1) of the Charter. This modified proportionality test is used by the Constitutional Court when reviewing legal provisions on property sanctions for unlawful conduct or in the context of pension insurance for instance. Notably, the requirement to exclude extreme disproportionality in the above-mentioned cases of review involves assessing whether the legal provision has a so-called choking effect. This means that its impact must not be, in its consequences, confiscatory or choking in relation to the property of an individual.[156]

The constitutional possibility of restricting the exercise of freedoms and rights in exceptional circumstances appears in Articles 2, 5, and 6 of constitutional Act No. 110/1998 Coll., on the Security of the Czech Republic.[157] According to this legal regulation, if the Czech Republic's sovereignty, territorial integrity, or democratic foundations are directly threatened; if its internal order and security, lives, health or property are to a significant extent directly threatened; or if such is necessary to meet its international obligations on collective self-defence, the state of emergency, condition of threat to the State, or state of war may – in accordance with the intensity, territorial extent and character of the situation – be declared.[158]

152 For more details see: Husseini et al., 2021, pp. 185–198.
153 See: Judgment Case No. Pl. ÚS 41/02 of 28 January 2004.
154 See also: Vyhnánek, 2024, pp. 773–790.
155 See: Judgment Case No. Pl. ÚS 29/08 of 21 April 2009.
156 For more details see: Husseini et al., 2021, pp. 185–198.
157 See also: Bílková, 2015, pp. 457–482.
158 See also: Horák, Dienstbier and Derka, 2021, pp. 431–450.

The state of emergency or condition of threat to the State is declared either in a restricted area or for the entire territory of the State, whereas a state of war is declared for the entire territory of the State. The government may declare a state of emergency in cases of natural catastrophe, ecological or industrial accident, or other danger which to a significant extent threatens life, health, property, or domestic order and security. A state of emergency may not be declared on grounds of a strike held for the protection of rights or of legitimate economic and social interests. If delay would present a danger, the Prime Minister may declare a state of emergency. Within 24 hours of the announcement thereof, the government must either ratify or annul his decision. The government shall inform the Chamber of Deputies without unnecessary delay that it has declared a state of emergency, which the Chamber of Deputies may annul. A state of emergency may be declared only for the stated reasons, for a fixed period, and in relation to a designated territorial area. Concurrently, with its declaration of the state of emergency, the government must specify which rights prescribed in individual statutes shall be restricted in conformity with the Charter and to what extent, and which duties shall be imposed and to what extent. Detailed provisions shall be laid down by statute. A state of emergency may be declared for a period of no more than 30 days, and the stated period may be extended only with the prior consent of the Chamber of Deputies. A state of emergency ends upon the expiry of the period for which it was declared, unless the government or the Chamber of Deputies decides to annul it earlier.[159]

The legal regulation under Articles 2, 5, and 6 of constitutional Act No. 110/1998 Coll., on the Security of the Czech Republic, is directly followed by Section 5 of the Act No. 240/2000 Coll., on the Crisis Management, according to which during a state of emergency or condition of threat to the State, for the period and to the extent unavoidably required, the following can be limited: (a) the right to inviolability of a person and habitation during evacuation from the place, where their life and health are endangered; (b) the right to property and the enjoyment right of legal and natural entities related to their property in case of forced restriction of their property and enjoyment rights for the reason of protection of life, health, property or environment, endangered by the crisis situation, whereby adequate compensation is provided; (c) freedom of movement and residence within the restricted area endangered or affected by the crisis situation; (d) the right to free assembly within the restricted area endangered or affected by the crisis situation; (e) the right to operate their business that would endanger executed crisis measures or disrupt or preclude their realisation; and (f) the right to strike in case it would lead to disruption or constrain of rescue and disposal operations.[160]

159 The Ministry of the Interior of the Czech Republic 1998.
160 The Ministry of the Interior of the Czech Republic 2000.

■ *1.8. The Current State of the Constitutional Freedoms and Rights Regulation*

Because of the extensiveness of legal regulation and the multitude of bodies involved in its implementation, it would seem that the protection of fundamental rights and freedoms in the Czech Republic is robust and their status unproblematic. Unfortunately, the opposite is true. Regarding the content of the European Union Agency for Fundamental Rights, Amnesty International, European Network of National Human Rights Institutions, European Commission, United Nations Human Rights Council, Commissioner for Human Rights of the Council of Europe and Public Defender of Rights 2023 reports, there are significant shortcomings in the protection of the fundamental rights and freedoms of Roma,[161] persons with disabilities[162] and women.[163]

Specifically, as per these reports, the Roma face discrimination when looking for housing; according to the Defender and NGOs, some healthcare providers allegedly deny Roma access to healthcare; and infringement proceedings concerning the discrimination against Roma children in education are still ongoing.[164] The key findings from the Roma Survey 2021 provide a snapshot of the persisting impact of antigypsyism and the problems many Roma face in enjoying their fundamental rights. Every fourth Roma surveyed felt discriminated against in the previous 12 months in one or more core areas of life. This number remains practically unchanged since 2016, reaching almost 50% of Roma in the Czech Republic. Finally, a large number of Romani pupils continue to be segregated in special programs with lower learning outcomes. On the other hand, the Czech Republic has set up systemic reforms aimed at strengthening their participation and that of pro-Roma civil society in structures of policy making and implementation.

As for the protection of fundamental rights and freedoms of persons with disabilities, in these reports, the continuing investment in the construction and refurbishing of institutions runs counter to the deinstitutionalisation agenda and should be halted. The allocation of financial resources to responsible authorities on a one-year budget cycle inhibits the long-term planning necessary for such transformation processes.[165] Rising costs of services for persons with disabilities risk forcing such persons to seek care in institutions. Regarding involuntary placement in social care and health care institutions as well as involuntary treatment, steps must be taken to ensure effective access to justice to those affected, whilst systemic change towards the provision of health care on the basis of free and informed consent is necessary. Finally, judicial practice often focuses on limiting the legal capacity of persons with disabilities, rather than making use of supported decision making.

161 See also: Albert, 2023, pp. 248–262.
162 See also: van Kessel et al., 2020, p. 105; Sinecká, 2009, pp. 195–203.
163 See also: Šiklová and Hradilková, 2018, pp. 82–86.
164 See also: Cashman, 2017, pp. 595–608; Nyitray, 2016, pp. 230–246.
165 See also: Šiška and Beadle-Brown, 2011, pp. 125–133.

Regarding women, these reports recommend that various measures be taken for victims with specific protection needs, including women. They should be interviewed in premises adapted for that purpose by trained professionals. In addition, the same people should conduct all the interviews. On the other hand, the Czech Republic has adopted amendments to the Act No. 45/2013 Coll., on Victims of Crime, introducing special protection measures to prevent the secondary victimisation of victims of rape and domestic violence. The newly accessible measures include conducting interviews in premises that trained specialists have designed for that purpose and the same interrogator if repeated questioning is necessary. Notably, a law providing financial compensation to women sterilised against their will or without proper consent came into force in 2022. By December 2023, hundreds of applications were rejected or pending. In this context, civil society organisations have criticised Ministry of Health of the Czech Republic for a burdensome application process, leading to significant delays in awarding compensations. Finally, the Committee for Prevention of Domestic Violence and Violence against Women, and the Defender and Members of Parliament, respectively, recommended the adoption of a consent-based definition of sexual violence to the Czech state authorities. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) then criticised the failure of the Czech Republic to do so.

■ *1.9. The Right of Access to Justice and the Right to an Effective Remedy*

Regarding whether the Constitution provide for a right of access to justice[166] or a right to an effective remedy,[167] Article 4(2) of the Charter states that everyone may assert, through the prescribed procedure, their rights before an independent and impartial court or, in specified cases, before another body. The right to judicial and other legal protection primarily entails the right of access to justice. This is the individual's right to have someone to turn to and to effectively seek protection of their rights. Article 36(1) of the Charter specifically implies a positive obligation on the part of public powers to establish independent and impartial courts – together with other bodies for the protection of rights – to which individuals shall have access if they decide to seek protection of their rights through this channel. These rights of access are a necessary condition for the realisation of the right to a fair trial. Article 36(1) of the Charter establishes the right of access to judicial protection provided by independent and impartial courts and to other legal protection provided by non-judicial bodies of public power established by law.[168]

166 Skládalová, Hrubešová and Svoboda, 2023, pp. 37–58.
167 Sommermann and Weber, 2024, pp. 327–350.
168 For more details see: Husseini et al., 2021, pp. 1032–1135.

It is once again the positive obligation[169] of public power to ensure that everyone can assert their substantive rights[170] through these two channels. However, the criminal, civil, and residual guarantees of the Charter and the Convention must also be applied in these channels. These guarantees define in depth what the procedural path through the two channels should look like. In practice, it is always necessary to examine which procedural guarantees can also be applied in the case of other legal protection provided, in particular, by administrative bodies. Furthermore, it is essential to ask about the standard of their application. Other law enforcement bodies, for example, are not independent and impartial as these characteristics are understood in relation to courts. However, before other law enforcement bodies, it is possible to exercise the right to a proper statement of reasons (see Article 36 of the Charter), the right to comment on all evidence presented (Article 38(2) of the Charter), the equality of participants (Article 37(3) of the Charter) or the right to a reasonable length of proceedings (Article 38(2) of the Charter).[171]

When interpreting Article 36(1) of the Charter, one must consider Article 4 of the Constitution, which stipulates the fundamental rights and freedoms being protected by the judiciary. This negative rule of competence prevents the legislature from adopting legislation that would, in individual cases, deprive the courts of their power to protect fundamental rights and freedoms. In general, the first sentence of Article 36(2) of the Charter guarantees that everyone who claims that their rights have been infringed by an administrative body may apply to the court for a review of the legality of the administrative body's procedure.[172] Article 4 of the Constitution is specified in the second sentence of Article 36(2) of the Charter, which states that the review of decisions concerning fundamental rights and freedoms under the Charter cannot be excluded from the jurisdiction of the courts. This obviously has an impact on the other legal protection. If the protection provided concerns fundamental rights and freedoms under the Charter, then the constitutionally guaranteed protection is duplicated. The final decisions of the so-called other legal protection bodies must still be subject to judicial review.[173] This completes the entire structural system provided for in the Charter regarding the right to judicial and other legal protection.[174]

In its case-law, the Constitutional Court stated that constitutionally guaranteed judicial protection is not the only way by which an individual can obtain protection of their subjective rights. The legal system also regulates various forms of other legal protection, which usually constitute effective and sufficient solutions

169 See also: Barnes, 2022, pp. 369–415.
170 See also: Guild and Lesieur, 1998.
171 For more details see: Husseini et al., 2021, pp. 1032–1135.
172 Batalli and Pepaj, 2022, pp. 85–94.
173 See also: Kosař and Ouředníčková, 2023, pp. 445–472.
174 For more details see: Husseini et al., 2021, pp. 1032–1135.

in practice, although they do not offer the same guarantees of independence and impartiality as the courts. This includes all administrative or other proceedings conducted before a body of public power other than a court. Other legal protection may be provided not only by bodies of public power, but also by authorised natural and legal persons. As long as access to the courts is not ultimately excluded, the legislature has considerable scope to find solutions that enable effective protection of rights to be achieved in the required quality, in real time and without unnecessary costs, taking into account the specific nature of the legal relationship in question. If properly designed, the need to seek judicial protection in such cases should be the exception rather than the rule.[175]

Article 36(1) of the Charter further stipulates that everyone may assert their rights before an independent and impartial court[176] or, in cases provided for by law, on the basis of the prescribed procedure.[177] This part of Article 36(1) of the Charter must be applied in conjunction with Article 36(4), which stipulates that the conditions and details of the rights arising from Article 36 of the Charter are regulated by law. Thus, this provides a constitutional basis for possible restrictions on the right of access to justice. Notably, the rights arising from Article 36 of the Charter are not absolute, including access to justice. However, it is always necessary to examine each specific case for whether restrictions on the right of access to the courts interfere with the very essence of that right. A statutory restriction on the right of access to the courts will only comply with the guarantees of a fair trial if it pursues a legitimate aim and there is a reasonable relationship between the means employed and the aim pursued. Such restrictions typically include imposing fees on certain submissions, requiring mandatory legal representation, defining the conditions for the admissibility of certain submissions, setting time limits for submissions, or determining the subject-matter and territorial jurisdiction of public authorities called upon by law to protect rights in specific cases.[178]

Furthermore, it is necessary to bear in mind that Article 36(1) of the Charter prohibits the denial of justice.[179] This refers to a situation wherein a public authority refuses to deal with the merits of a case, thereby depriving a party of judicial and other legal protection. This most often occurs in situations involving a formalistic assessment of a proposal. However, there may be more sophisticated cases wherein a public authority traps a party in a vicious circle, such that one public authority refers to another procedural instrument or another public authority, although neither of these can provide the individual with the desired protection of their rights. The denial of justice is defined similarly by the case law of the

175 See: Judgement Case No. Pl. ÚS 32/18 of 30 July 2019.
176 See also: Marmor, 2010, pp. 666–674.
177 See also Wawrzyńczak, 2023, pp. 89–116.
178 For more details see: Husseini et al., 2021, pp. 1032–1135.
179 See also: Walde and Sabahi, 2008, pp. 1049–1124.

Constitutional Court, which emphasises[180] that procedural rules of sub-constitutional law imperatively specify the concrete means and procedural institutions by which the right to judicial and other legal protection can be exercised. If an individual complies with the procedure so established, and the court or other law enforcement body still refuses to decide on their right, this amounts to a constitutionally impermissible denial of justice.[181]

The category of denial of justice,[182] albeit at the level of the highest court, also includes situations wherein a civil court of appeal or a regional court acting in administrative proceedings incorrectly inform a party to the proceedings that an appeal or cassation complaint is inadmissible, although an extraordinary remedy is admissible in the case in question. Such a course of action constitutes a violation of that party's right to judicial protection or access to the Supreme Court and the Supreme Administrative Court. The Constitutional Court, to which the parties to the proceedings refer directly in such cases, even without objection, will overturn the decision of the civil court of appeal or regional court acting in administrative proceedings to give them the opportunity to refer the matter to the Supreme Court or the Supreme Administrative Court after receiving the correct instructions. However, the Constitutional Court has consistently ruled that if the case goes beyond the interests of the complainant, who acted in good faith based on the appellate court's instruction that the appeal was inadmissible, then the constitutional complaint may be heard in exceptional cases. Notably, the Supreme Court does not take into account the procedure of the court of first instance that, in its request for the appeal to be supplemented, granted the appellant a longer time limit than that provided for by law. If the Supreme Court fails to take into account the supplement to the appeal filed within this longer time limit and does not examine the merits of the case on the grounds of late filing, it thereby deprives the appellant of his right to judicial protection.[183]

■ *1.10. The Duties of Individuals*

Article 4(1) of the Charter states that duties may be imposed only on the basis, and within the bounds, of law, and only while respecting the fundamental rights and freedoms. The obligations to which Article 4(1) of the Charter applies are, from a general point of view, expressly established obligations of individuals towards the state in the form of doing something, refraining from doing something, and so on. These so-called public subjective obligations characterise the relationship between the legal state and the individual, and without them, it is impossible to provide a complete description of this relationship.[184] Without individuals under

180 See: Judgment Case No. II. ÚS 2398/18 of 14 August 2019.
181 For more details see: Husseini et al., 2021, pp. 1032–1135.
182 See also: Wälde and Sabahi, 2008, pp. 1049–1124.
183 For more details see: Husseini et al., 2021, pp. 1032–1135.
184 See also: Dömők, 2023, pp. 83-95.

the jurisdiction of the state fulfilling their obligations, such a state could not exist because its legal order would lose its meaning. The general conditions for the exercise of state or public power are laid down in Articles 2(2) and (3) of the Charter, which stipulate the requirement of a legal form (reservation of law) for all exercise of public power, both in organisational matters – the very existence of public authorities and the definition of their powers and competences – and in the imposition of obligations on individuals. Article 4(1) of the Charter follows from the principle of the reservation of public power to the law and regulates further limitations on public power in cases where it is to be exercised against individuals and their autonomous sphere, or where fundamental rights and freedoms are to be restricted. The rule contained in Article 4(1) should also be understood as an essential requirement of any democratic state governed by the rule of law, without which there can be no legal state.[185]

The rule that obligations may only be imposed on the basis of and within the limits of the law can also be referred to as the principle of legality.[186] Specifically, under Article 2(3) of the Constitution and Article 2(2) of the Charter, state authority is to serve all citizens and may be asserted only in cases within the bounds of and in the manner provided for by the law. This is a general legal principle linked to the concept of the rule of law, requiring that every public authority, in exercising its powers, act only on the basis of and within the limits of the law, within the scope of its powers and competences as defined by law and in the manner prescribed by law. In this respect, Article 4(1) of the Charter is a complementary provision to Article 2(2), which means that it operates by clarifying the impact of Article 2(2) of the Charter on individuals. The principle of legality constitutes a fundamental limit on public power exercised over individuals. Exceeding these limits, or violating the principle of legality, constitutes a violation of an individual's subjective right to have public authority respect the autonomous expressions of their personality, including expressions of will that are reflected in specific actions, unless such actions are prohibited by law.[187]

The relevant reservation of the law requiring that obligations be imposed on individuals only on the basis of and within the limits of a legal regulation, including a constitutional law and a statutory measure is by its nature a formal condition. In addition, Article 4(1) of the Charter also sets out a substantive requirement that the obligation imposed must not lead to the failure to uphold any of the fundamental rights and freedoms. Meanwhile, conditions may only be imposed on the basis of and within the limits of the law. This means that obligations may not be imposed by subordinate legislation or contained in other legal forms.[188] Therefore, a public authority also violates the above-mentioned reservation of law in its application

185 For more details see: Husseini et al., 2021, pp. 119–141.
186 See also: Sharp and Blahoudková, 2024, pp. 35–48.
187 For more details see: Husseini et al., 2021, pp. 119–141.
188 See also: Kačer, 2021, pp. 1024–1037.

if it imposes an obligation on an individual beyond the scope of the law, whether it is a case of flagrant disregard for a mandatory norm of sub-constitutional law or the application of an extensive interpretation of a legal norm.[189] However, the reservation of law cannot be understood in absolute terms; the law must at least establish the basis of the obligation in question, although it may be specified in another legal form including a subordinate legal regulation. The Constitutional Court stated[190] that not every obligation must be set out directly and exclusively by law, as such a requirement would clearly lead to absurd consequences. This would negate the meaning of sub-statutory rule-making, since a conceptual component of every legal norm is the definition of certain rights and obligations of the norm's addressees. However, a sub-statutory regulation must always remain within the limits of the law, which are either expressly defined or derive from the meaning and purpose of the law. At this point, it is worth noting that formal restrictions on public power when imposing obligations can also be seen as a formal limit on the restriction of a fundamental right, since the reservation of law in question essentially corresponds to the formal requirement set out in Article 4(2) of the Charter, according to which fundamental rights and freedoms may only be restricted by law.[191]

The formal condition for imposing obligations under Article 4(1) of the Charter is accompanied by a condition that is, by its nature, substantive, namely that the obligation imposed must be based on and within the limits of the law and must preserve fundamental rights and freedoms.[192] This substantive condition follows on from Article 4(4) of the Charter, according to which the essence and meaning of fundamental rights and freedoms must be respected when applying provisions limiting them. If Article 4(1) of the Charter is a limit on the restriction of a fundamental right, then Article 4(4) of the Charter provides the same as the above substantive condition.[193]

Article 4(1) of the Charter is directly followed by Article 2(4) of the Constitution, which states that all citizens may do that which is not prohibited by law, and nobody may be compelled to do that which is not imposed upon them by law. Thus, Article 2(4) of the Constitution guarantees the freedom of natural and legal persons to behave or act in legal and other relationships in a manner they deem appropriate, thereby expressing respect for the autonomous sphere of the individual and for the expression of their personality.[194] However, this freedom is limited by prohibitions on certain acts. These may be activities that are inappropriate or harmful for various reasons, primarily to other persons (e.g., insults,

189 See also: Guli and Hoti, 2025, pp. 63–75.
190 See: Judgment Case No. Pl. ÚS 23/02 of 30 June 2004.
191 For more details see: Husseini et al., 2021, pp. 119–141.
192 See also: Skládalová, 2023, pp. 139–150.
193 For more details see: Husseini et al., 2021, pp. 119–141.
194 See also: Blicharz, 2021, pp. 34–46.

discrimination, unfair competition), dangerous behaviour (e.g., criminal offences of general endangerment), or acts preventing the limitation of the freedom of others by the binding establishment of certain rules (e.g., traffic rules). Meanwhile, in connection with Article 2(3) of the Constitution, it is guaranteed that no person shall be compelled by public authority to perform or refrain from performing any act unless such act is imposed by or on the basis of law (e.g., traffic rules, the performance of community service on the basis of a final court judgment, the submission of certain documents, and the fulfilment of maintenance obligations). In both cases, this may be a prohibition or an order imposed by law, as confirmed by Article 4(1) of the Charter.[195]

The case law of the Constitutional Court[196] provides an extensive interpretation, according to which the state guarantees protection against interference by other persons, restricts itself, and only takes action that interferes with the private sphere in cases justified by public interest, by issuing orders or prohibitions.[197] Furthermore, the priority of the citizen over the state is guaranteed, which should not be burdened by excessive formalism. Prohibitions on certain acts are formulated directly at the constitutional level and are contained primarily in the Charter, for instance, in Articles 2(2) and (3), 6(2) and (3), 9(1) and 15(3), as well as in the Constitution, such as in Article 12(2). However, the vast majority of these prohibitions apply to both private natural and legal persons and to state authorities or other entities exercising public power, which means that they have a broader scope in relation to Article 2(4) of the Constitution.[198]

2. Summary

As for a brief summary of this paper, it is necessary to state that in the Czech Republic the freedom of action of a private individual is not absolute and unlimited. Certain activities may be prohibited (e.g. petitions may not interfere with the independence of the courts under Article 18(2) of the Charter), while others may be mandated (e.g. the public duty of school attendance for the period specified by law under Article 33(1) of the Charter). In addition, however, some acts are not expressly prohibited by law, but are subject to some form of notification to a state authority (e.g. the right of assembly), and may require the issuance of a (permit) act by the competent state (administrative) authority prior to the commencement of (qualified) action.[199] For instance, a trade license for business activities under the Act No. 445/1991 Coll., on Trade Licensing, or a permit for special, above-normal,

195 For more details see: Husseini et al., 2021, pp. 119–141.
196 See: Judgment Case No. I. ÚS 331/98 of 12 June 2000.
197 See also: Červínek, 2020, pp. 905–926.
198 For more details see: Husseini et al., 2021, pp. 119–141.
199 See also: Kayange, 2021, pp. 133–148.

use of surface or groundwater under the Act No. 254/2001 Coll., on Water. However, in general, the law does not often contain an explicit prohibition of certain conduct or make it conditional on an act by a state authority. It is sometimes necessary to deduce the prohibition or inadmissibility of specific conduct from the provisions of the law establishing penalties for certain unlawful conduct. Furthermore, although the term "citizen" is used in Article 2(4), the interpretation must take into account the wording of the similar Article 2(3) of the Charter, which uses the term "everyone". Therefore, it can be deduced on the basis of the cited provision that every private natural and legal person has the possibility and freedom to act in a manner not prohibited by law and, simultaneously, may not be compelled to act or to fulfil obligations not imposed by law. A natural person is also understood to mean a citizen of another state or a person without nationality, and it is irrelevant whether they reside in the Czech Republic or abroad.[200]

200 See also: Doubek, 2023, pp. 353–379; for more details see: Husseini et al., 2021, pp. 119–141.

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KONRAD WALCZUK*

National Human Rights Systems: Poland

ABSTRACT: *Poland has an extensive system of human rights protection. In addition to domestic (internal) regulations, international regulations, including those of the European Union (EU), are also sanctioned. It is worth emphasising that internal Polish law frequently guarantees a wider range of human rights than international law. Thus, this paper will discuss internal regulations and institutions (based on the Polish Constitution, which expresses sovereignty and international subjectivity, also in terms of human rights), with only a brief reference to international law.*

The discussion of the national human rights system should begin with an indication of the hierarchical position of legal regulations on this issue. This will make it possible to illustrate the system of values shaping this system and indicate the special position of constitutional regulations. It is primarily on the regulations of the Basic Law that the system of guarantees of human and civil freedoms and rights has been formed. As the source of these freedoms and rights, the inherent and inalienable dignity of man has been indicated, which is a clear nod by the legislator to natural law. This further impinges on the following indicated in the study: the internal systematics of freedoms and rights; their guarantee system; the admissibility of restrictions on constitutional human rights and the basic principles governing them (including, for example, the principles of proportionality and legalism).

A *sort of summary of the analysis is a presentation of the basic measures and institutions of human rights protection, among them: the right to a court of law and the prohibition against closing the judicial route to asserting violated freedoms or rights; the right to compensation for damage that has been caused to the subject of law by the illegal acts of a public authority; the constitutional complaint to the Polish Constitutional Court; the right to apply to the Polish Ombudsman for assistance in protecting one's freedoms or rights violated by public authorities; and the protection provided by the Ombudsman for Children.*

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https://doi.org/10.47078/2026.1.459-492

■ **KEYWORDS:** *hierarchy of sources of human rights, human dignity, constitutional human rights, guarantees of human rights, limitations on human rights*

1. Introductory Issues

The system of human rights (*system praw człowieka*), which includes human and civil freedoms and rights, in Poland is based on two – possibly three – pillars, grounded in: 1) Polish law *sensu stricto* (state law/domestic law/internal law); 2) international law (including so-called supranational law): (a) public international law *sensu largo*; (b) European Union law (EU law/European law).

The main element shaping the Polish system of human rights in the independent and sovereign Republic of Poland is undoubtedly Polish law *sensu stricto*, based primarily on the Constitution on the Republic of Poland of 2 April 1997. At the same time, it is absolutely necessary to bear in mind that the system of Polish law is also shaped by public international law, including the law of the European Union (which is not specified in the Polish Constitution as distinct from public international law as such). These issues are reflected in the system of generally applicable law in Poland, which will be briefly presented below (to the extent necessary to define the human rights system). International agreements do not appear in the first place in it – this is unconditionally a position reserved for the Constitution, although by their nature, they often take precedence over domestic acts of law, even of statutory rank[1].

Because the dependence of Polish law (Polish domestic law) on international law *sensu largo* and the law of the European Union does not in principle deviate from universally recognised standards, it seems that the main emphasis should be placed on internal legal conditions.

Nevertheless, it is necessary to point out the main acts of public international law, including the law of the European Union, having a particular impact on the Polish system of (protection of) human rights. These are primarily: the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights) and the International Covenant on Civil and Political Rights.

2. Hierarchy of Human Rights Law Universally (Generally) Applicable

In principle, every legal system is structured hierarchically. This makes it possible to carry out the proper interpretation of the law and its implementation.

1 Walczuk, 2012b, p. 74.

This also applies to the system of human rights and is directly related to the practical guarantees of compliance with human rights.

With regard to human rights, the sources of universally binding law, that is, statute law (positive law), containing (defined by) ordered and interrelated (legal) norms of a general and abstract nature, valid in a given territory at a certain time, are of primary importance. In the case of Poland, the sources of universally binding law are defined in Article 87 of the Polish Constitution. According to this provision:

> (1) The sources of universally binding law of the Republic of Poland shall be the Constitution, statutes, ratified international agreements, and regulations.
> (2) Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments.

By interpreting the provisions of the Polish Constitution and taking into account the international legal environment,[2] it should be considered that the hierarchy of sources of generally applicable law in Poland, which also relates to human rights, looks as follows:

The aforesaid findings indicate that broadly speaking, and referring specifically to EU legal acts, the hierarchy of the sources of law generally applicable in Poland is as follows: 1) The Constitution of the Republic of Poland; 2) International agreements ratified with a pre-approval for their ratification expressed in the form of a statute (in Polish legal doctrine, the so-called "large ratification") or on the basis of a nationwide referendum carried out pursuant to article 125 of the Constitution of The Republic of Poland and agreements deemed to be such under article 241 point 1 of the Constitution of The Republic of Poland, and also European Union primary legislation and (only those that are generally applicable) derivative law made before 1 May 2004; 3) Law made by an international organisation ratified by the Republic of Poland if it derives from the treaty founding that organisation; 4) Statutes (*ustawy*) and statutory instruments; 5) Ratified international agreements that do not require a pre-approval for their ratification in the form of a statute (in Polish legal doctrine, the so-called "small ratification"); 6) Orders (*rozporządzenia*); 7) Local legislation (*akty prawa miejscowego*).

2 See more: Walczuk, 2023, pp. 185–211.

3. Human Dignity as the Basis of the Polish Human Rights System

In the case of human rights, there seems to be a general consensus in legal doctrine that they are derived (or that they should be, or that they can be derived) from natural law. Although it should be remembered that they require, or in any case are subject to positivisation, both in the form of acts of public international law (generally speaking, this is primarily so-called human rights law), as well as in systems of domestic law (primarily constitutions and acts of law)[3]. At the same time, state law is supposed to strive to realise natural law, which *lex naturalis nihil aliud est quam participatio legis aeternae in rationali creatura*. Which does not change the fact that the core of human rights was not created by positive legislators but is only reproduced by them.[4]

The founders of the Polish Constitution undoubtedly recognised the natural-law origin of human rights. This is evidenced by Article 30 of the Constitution, according to which:

> The inherent and inalienable dignity of the person *(przyrodzona i niezbywalna godność człowieka*) shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

For the functioning of the entire system of human rights, it is essential not only to recognize human dignity as their source, but also to indicate *expressis verbis* the qualities that define it: inherent nature and inalienability.

The very concept of dignity – being a "central category"[5] – eludes attempts at formal definition, and this is true both under national and international law. However, it finds its explanation primarily in the entirety of European culture (including legal culture) shaped by Greek philosophy, Roman law and drawing primarily on Christianity – as expressed in the preamble to the Polish Constitution, referring to "culture rooted in the Christian heritage of the Nation." Such a foundation of understanding of human dignity was not altered by, for example, the disputes in 2003-2005 around the preamble of the ultimately unratified Constitutional Treaty of the European Union, during which some differences in the understanding of European culture and its foundations became apparent[6].

3 On the relationship between natural law and positive law (*ius positum*) see, for example: Łączkowski, 1999, pp. 173–182.
4 Walczuk, 2012b, p. 113.
5 Piechowiak, 1997, p. 19.
6 Walczuk, 2005, pp. 43–49.

From the perspective of the regulation of Article 30 of the Polish Constitution, it can be said that due to the fact of the aforementioned "centrality" of the concept of dignity, it should be assumed that

> human rights derive, among other things, from this concept. Little - it can be argued that it is human dignity itself that is the source of law as such, and all rights and freedoms (identified with *ius*) and all legislation (*lex*) should be interpreted through the prism of human dignity.[7]

When discussing the human rights system, it may be helpful to note that "recognition of the principle of the dignity of the human person as a source of fundamental rights and freedoms creates a certain bridge between positive law and natural law in the process of creating a catalogue of human rights."[8].

Of fundamental importance here in Polish law (but not only) will also be a clear indication of the inherent nature of human dignity – that is, the recognition that a person becomes the subject of freedoms and rights by virtue of being human. It should be assumed that the moment of "becoming human" is the moment of conception[9]. If only for the reason that, in case of doubt, it is better to grant (someone) rights to which they are not entitled than to deprive someone to whom they do belong. Nevertheless, some consider that human dignity belongs to a person only from the moment of birth.

With regard to the human rights system, it may not be irrelevant to observe that the inherent nature of human rights

> points to the ontic dependence – human rights are inseparable from man (the person). Thus, they cannot exist as a specific entity on their own, unlike natural law, from which they can be derived. The existence of the human person is the raison d'être for the existence of human rights, or as some want, recognizing the distinction between human rights as such and fundamental rights, which are positive human rights - the raison d'être for the existence of fundamental rights[10].

At the same time, it should be clearly reiterated that human rights cannot be reduced to positive law alone, and it should be added that their recognition cannot be made conditional on the conclusion of a social contract or left to the discretion of the sovereign – according to Article 4 of the Polish Constitution: 'Supreme power

7 Walczuk, 2012a, pp. 121–122.
8 Krukowski, 1999, p. 191; Syryt, 2024, pp. 140–142.
9 See also, e.g.: Dudek, 2010, p. 27.
10 Walczuk, 2012a, pp. 115–116.

in the Republic of Poland shall be vested in the Nation'[11] and 'The Nation shall exercise such power directly or through their representatives'.[12]

4. Admissibility of Restrictions on Constitutional Human Rights

The functioning of a community, especially one that is organised into state structures, by its very nature requires various types of interference by the state (or *de facto* representatives of the state), necessary for the good of the "whole" or "majority," among other things, in the sphere of behavior of subjects against whom it has *imperium*. The fundamental legal regulation on this issue under Polish law is Article 31 paragraph 3 of the Constitution, according to which

> Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

This provision indicates the general principles of admissibility of restrictions on constitutional freedoms and rights of human beings and citizens (human rights), and on the one hand – after taking into account the formal requirement that a restriction must be introduced by a legal act of the rank of statute – is directly applied in cases in which there are no individuals, that is, relating to a given freedom or a given right, constitutional regulations defining the individual conditions of material admissibility of restrictions, and on the other hand provides a point of reference, especially in a situation where specific regulations are not sufficiently precise[13].

In addition, it should be borne in mind that the delimitation of the scope of restrictions is also made in international agreements and human rights treaties, of course, with the appropriate hierarchy in place.[14]. However, their concretisation occurs primarily in separate statutes and in jurisprudence reflected in the constitutional provisions[15]. Nevertheless, neither states acting in the public international sphere, that is, contracting in the form of primarily international agreements and European Community law, nor national legislators, that is, constitutional drafters and so-called ordinary legislators, can impose restrictions

11 Art. 4 para. 1 of the Polish Constitution.
12 Art. 4 para. 2 of the Polish Constitution.
13 Walczuk, 2018, p. 93.
14 Walczuk, 2015, pp. 247–255.
15 Garlicki, 2009, p. 96.

on constitutional human rights without limit. For since the fundamental nature of these rights and freedoms is ascribed a natural-law character, the role of the positive legislator is primarily only 'to affirm the existence of this freedom, to define its fundamental aspects and to establish the necessary guarantees and the necessary limitations.'[16]

In this context, it is worth noting that in the jurisprudence of the Polish Constitutional Court:

> It is a well-established view that, although the freedom of the legislator is limited by constitutional norms and principles and the obligation to respect the values protected by them, but in cases of doubt the presumption should speak in favor of the compatibility of statutory decisions with the Constitution, and the rebuttal of this presumption requires an indisputable demonstration of incompatibility occurring between the statute and the Constitution[17].

Although it seems the more appropriate approach is that in the case of regulations that restrict human rights, the presumption is to the contrary, the state body must demonstrate the compatibility of the restrictions with the Constitution[18].

Particularly noteworthy is the aforementioned formal requirement to introduce restrictions on constitutional human rights - by means of a statute. Thus, the participation of directly elected representatives of the sovereign – deputies and senators (members of the Polish Parliament – the Sejm and Senate, respectively), representatives of the legislature – is essential, taking into account that Poland adheres to the classical separation of powers. According to Article 10 of the Polish Constitution

> (1) The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.
> (2) Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

However, it would be going too far to conclude that entities belonging to the executive branch are completely excluded from the process of restricting freedoms and rights. Indeed, it is permissible for Parliament to statutorily define the scope of

16 Resolution of the Polish Constitutional Tribunal of 2 March 1994, file reference W. 3/93.
17 Judgment of the Polish Constitutional Tribunal of 30 October 2006, file reference P. 10/06.
18 Wojtyczek, 2001, p. 312.

restrictions and impose on the executive branch the obligation to issue executive acts – primarily regulations that

> shall be issued on the basis of specific authorisation contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorisation shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.[19]

Under certain circumstances, it is even permissible to involve local (municipal) government bodies, which are authorised to issue local laws to implement statutory provisions.

On the other hand, the main substantive requirement for the introduction of restrictions on constitutional freedoms and rights of a human being and citizen is the necessity of such restrictions in a democratic state (as *expressis verbis* indicated in Article 31 paragraph 3 of the Polish Constitution. It is worth noting that, according to Article 2 of the Constitution, The Republic of Poland shall be a democratic state ruled by law. Whereas

> part of the doctrine notes that modern standards of freedom and human rights, which are an indispensable element of a democratic state (and a democratic state of law), have their reference not so much to the state - for it is recognized that the state, by respecting the fundamental freedoms and rights of the individual, meets the minimum requirements of a democratic state - but precisely to society, which is the real subject, whose interests must prevail over the freedoms and rights of the individual in the event that the conflict between these two values cannot be resolved in any other way[20].

The requirement that the introduction of a given restriction on a constitutional freedom or right be necessary also needs to be emphasised. This requirement can be traced back to to the principle of proportionality, consisting of the prohibition of excessive state interference in the sphere of human and civil liberties and rights, that is, the recognition that if the establishment of restrictions on human rights is really needed, it can be done only to the minimum extent that is truly necessary, and the basic measure for determining what is necessary is to compare the importance of the public interest that the restriction is designed to serve and

19 Art. 92 para. 1 of the Polish Constitution.
20 Walczuk, 2012c, p. 90.

the right or freedom that the restriction is supposed to affect[21]. The principle of proportionality is a tool for resolving conflicts between legal norms, including principles of law, particularly those involving human rights. However, it is not applicable to all human rights issues. For example, human dignity is not subject to balancing.[22].

Another material condition required for the introduction of restrictions on constitutional human rights is the aim of protecting state security (*bezpieczeństwa państwa*) or public order (*porządku publicznego*), as well as to protect the natural environment (*ochrony środowiska*), health or public morals (*zdrowia i moralności publicznej*), or the freedoms and rights of other persons. The need for protection may concern all values together, but only a few at the same time, or each one individually. It is natural that, at times there must be a weighing of the value (right, freedom) that is to be restricted against the value that is to be protected. In resolving these dilemmas, state bodies – belonging to each of the three authorities indicated in Article 10 of the Constitution

> (1) The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.
> (2) Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

will have a decisive role. Proceedings in this regard are directly related to the organisation of the human rights protection system. However, it must be remembered that 'in all situations of doubt or ambiguity, including any extreme situation, an indelible interpretative guideline will also be the general principle of humanity [...] as closely related as possible to the interpretation of *pro homine et pro humanitate*'[23].

Important is the proviso contained in Article 31 paragraph 3 *in fine* of the Polish Constitution, according to which restrictions on constitutional human rights must not violate their essence. This provision demonstrates that Polish constitutional law pays homage to the concept of the essence of rights and freedoms derived from German constitutionalism. It is based on the assumption that within each specific right and freedom it is possible to distinguish certain basic, essential elements – their core or, in other words, nucleus – without which such

21 Walczuk, 2018, pp. 98–99; see also extensive considerations on this topic in Judgment of the Polish Constitutional Tribunal of 22 March 2018, file reference K 17/18.
22 Granat, 2021, pp. 175–176.
23 Jasudowicz, 1997, p. 49.

a right or freedom will not be able to exist, as they would lose their meaning[24]. At the same time, such rights or freedoms also contain additional elements that can be viewed from different angles and modified in different ways without destroying the identity of the right or freedom in question.[25]

In the context of the general regulations of Article 31 paragraph 3 of the Polish Constitution – which can often have the character of *lex generalis* – it should be remembered that the Constitution indicates specific cases when exceptional conditions for the introduction of restrictions on human rights are permitted (*lex specialis*). This applies, for example, to expropriation, which, on the one hand, is permissible, although it is the most radical restriction of property rights (Everyone shall have the right to ownership, other property rights and the right of succession – Article 64 paragraph 1 of the Constitution), but on the other hand, "expropriation may be allowed solely for public purposes and for just compensation" (Article 21 paragraph 2 of the Constitution)[26].

To sum up, as a rule, permissible by the Constitution – and therefore generally permissible in the Polish system of human rights – the restriction of freedoms or rights of a person and citizen is allowed only when it: 1) is established by statute; 2) does not violate the essence of the freedom or right in question; 3) is necessary in a democratic state due to: (a) state security;[27] (b) public order;[28] (c) environmental protection;[29] (d) (public) health;[30] (e) public morals;[31] (f) freedoms and rights of others.

A separate category of restrictions on human rights is those permitted under extraordinary measures (*stany nadzwyczajne*). According to Article 228 paragraph 1 of the Polish Constitution, in situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced:

1) Martial law (*stan wojenny*) –
   In the case of external threats to the State, acts of armed aggression against the territory of the Republic of Poland or when an obligation of common defence against aggression arises by virtue of international agreement, the President of the Republic may, on request of the Council of Ministers, declare a state of martial law in a part of or upon the whole territory of the State"[32],

24 Walczuk, 2018, pp. 111–112.
25 See: Garlicki, 2009, pp. 98–99.
26 Syryt, 2022, pp. 367–378.
27 Walczuk, 2013b, pp. 293–306.
28 Walczuk, 2013a, pp. 11–22.
29 Walczuk, 2012d, pp. 381–394.
30 Compare Czarnik, 2022, pp. 3–12.
31 See: Garlicki, 2001, p. 17; see also: Brzozowski, 2010, passim.
32 Art. 229 of the Polish Constitution.

2) A state of emergency (*stan wyjątkowy*) –
In the case of threats to the constitutional order of the State, to security of the citizenry or public order, the President of the Republic may, on request of the Council of Ministers, introduce for a definite period (...) a state of emergency in a part of or upon the whole territory of the State[33]

3) A state of natural disaster (*stan klęski żywiołowej*) –
In order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, the Council of Ministers may introduce, for a definite period (...), a state of natural disaster in a part of or upon the whole territory of the State (...).[34]

According to further constitutional regulations contained in Article 233, the statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights specified in: (a) Article 30 – the dignity of the person; (b) Article 34 and Article 36 – citizenship; (c) Article 38 – protection of life; (d) Article 39, Article 40 and Article 41, paragraph 4 – humane treatment; (e) Article 42 – ascription of criminal responsibility; (f) Article 45 – access to a court; (g) Article 47 – personal rights; (h) Article 53 – conscience and religion; (i) Article 63 – petitions; (j) Article 48 and Article 72 – family and children (para.1).

In contrast, in the case of the state of natural distaster, there are no express exclusions of values that may not be restricted; rather, there is an enumeration of freedoms and rights that may be restricted. The statute specifying the scope of limitations of the freedoms and rights of persons and citizens during states of natural disasters may limit the freedoms and rights specified in: (a) Article 22 – freedom of economic activity; (b) Article 41 paragraphs 1, 3 and 5 – personal freedom; (c) Article 50 – inviolability of the home; (d) Article 52 paragraph 1 – freedom of movement and sojourn on the territory of the Republic of Poland; (e) Article 59 paragraph 3 – the right to strike; (f) Article 64 – the right of ownership; (g) Article 65 paragraph 1 – freedom to work; (h) Article 66 paragraph 1 – the right to safe and hygienic conditions of work; (i) Article 66 paragraph 2 – the right to rest (Article 233 paragraph 3).

In the case of any extraordinary measure, a limitation of the freedoms and rights of persons and citizens solely by reason of race, gender, language, faith or lack of it, social origin, ancestry or property shall be prohibited (Article 233 paragraph 2).

33 Art. 230 para. 1 of the Polish Constitution.
34 Art. 232 of the Polish Constitution.

5. The Principle of Legalism

From the point of view of the functioning of the human rights protection system, the principle of legalism (also referred to in Polish legal doctrine as the principle of the rule of law) is of fundamental importance. It has been given the character of one of the main constitutional principles and is expressed in Article 7 of the Polish Constitution, according to which "The organs of public authority shall function on the basis of, and within the limits of, the law." A correct view has been expressed in Polish legal doctrine, according to which "legalism, identified with the rule of law in its formal aspect, falls implicitly within the formula of the rule of law."[35].

From this regulation, it is clear that without an explicit indication in the law (in regulations), state bodies – or even more broadly, public bodies – cannot act. Thus, they are only allowed to do what is expressly ordered or permitted for them by law, from the various levels of the above-mentioned hierarchy of generally applicable acts, but also internal law (whereby no legal consequences can be drawn from internal, non- generally applicable acts against entities not in a broadly defined official relationship or organisational subordination). Unlike in the case of citizens – or even more broadly, individuals, people – they can do anything that is not forbidden to them or commanded (in the latter case, in principle, they also have no discretion): 'Everyone shall observe the law of the Republic of Poland'.[36]

In principle, the principle of legalism is formal. Substantive issues, on the other hand, are regulated primarily from the previously mentioned principle that statutes Poland as a democratic state under the rule of law. As a result, public authorities face special restrictions on their human rights activities. This also follows directly from the constitutional regulations discussed above, including, first of all, those concerning the permissibility of restrictions on constitutional freedoms and rights of man and citizen. Although also, as was mentioned, they are entitled to special powers in this regard.

At the same time, it should be clearly emphasised that these powers cannot be presumed. They must be clearly indicated in the provisions of the law, and these provisions may be of different natures – constitutional, substantive, procedural. Consequently, the actions of public bodies without express authorization or in excess of it will be unlawful, and as such may result in constitutional and criminal liability of the specific persons taking these actions, as well as the State's liability for damages[37] (or that of specific individuals taking these actions): 'Everyone shall

35 Zubik and Sokolewicz, 2016; Morawska, 2003, pp. 27–28.
36 Art. 83 of the Polish Constitution.
37 Florczak-Wątor, 2023a, p. 49.

have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law'.[38]

6. Categories of Freedom and Rights

■ *6.1. Personal Freedoms and Rights*

Human rights include various categories of freedoms and rights. The doctrine of law recognises many methods of classifying them, while in the Polish system of human rights based on the Constitution, freedoms and rights are specified as follows: personal; political; economic, social and cultural.

Personal freedoms and rights can be considered the most immanent to the human being, among which the Polish Constitution includes:

1) The right to protection of life[39] – 'The Republic of Poland shall ensure the legal protection of the life of every human being" – here, it is necessary to emphasise the consistent line of judgments of the Polish Constitutional Court limiting the permissibility of abortion"[40];
2) The right to personal integrity and to personal freedom –
   Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute[41]. Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Any deprivation of liberty shall be immediately made known to the family of, or a person indicated by, the person deprived of liberty[42]. Every detained person shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. The detained person shall be set free unless a warrant of temporary arrest issued by a court, along with specification of the charges laid, has been served on him within 24 hours of the time of being given over to the court's disposal[43]. Anyone deprived of liberty shall be treated in a humane manner[44]. Anyone who has been unlawfully deprived of liberty shall have a right to compensation[45];

38 Art. 77 para. 1 of the Polish Constitution.
39 Art. 38 of the Polish Constitution.
40 Judgment of the Polish Constitutional Court of 22 October 2020, file reference K. 1/20 and 28 May 1997, file reference K. 26/96
41 Art. 41 para 1 of the Polish Constitution.
42 Ibid., Art. 41 para 2.
43 Ibid., Art. 41 para 3.
44 Ibid., Art. 41 para 4.
45 Ibid., Art. 41 para 5.

3) The right to the presumption of innocence until guilt is established by a final court judgment[46];
4) The right to a court of law, including: the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court[47]; openness of judicial proceedings[48]
   Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly;
5) The right to defence in all stages of the proceedings[49]
   Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself – in accordance with principles specified by statute – of counsel appointed by the court;
6) The right to protection of private life, family life, honor and good name, and to decide on one's personal life[50];
7) The right of parents to raise their children according to their own beliefs[51]
   Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions[52]. Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment[53];
8) Freedom of conscience and religion[54]
   Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services[55]. Parents shall have the right to ensure their children a moral and religious upbringing and teaching in

46 Ibid., Art. 42 para. 3.
47 Ibid., Art. 45 para. 1.
48 Ibid., Art. 45 para. 2.
49 Ibid., Art. 42 para. 2.
50 Ibid., Art. 47.
51 Ibid., Art. 48.
52 Ibid., Art. 48 para. 1.
53 Ibid., Art. 48 para. 2.
54 Ibid., Art. 53.
55 Ibid., Art. 53 para. 2.

accordance with their convictions. (...)[56]. The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby[57]. The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others[58]. No one shall be compelled to participate or not participate in religious practices[59]. No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief[60];

9) Freedom of speech[61] – freedom to express one's views and to obtain and disseminate information;
10) The right of a person to have access to official documents and datasets concerning himself[62];
11) Prohibition of extradition of a Polish citizen[63];
12) The right of asylum[64]
Foreigners shall have a right of asylum in the Republic of Poland in accordance with principles specified by statute[65]. Foreigners who, in the Republic of Poland, seek protection from persecution, may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party.[66]

From the perspective of of the Polish system of human rights, it is worth noting that the right to a court as defined in the Polish Constitution and confirmed in the jurisprudence of the Polish Constitutional Court is broader than the "right to a fair trial" resulting from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms European Convention on Human Rights).[67]

■ *6.2. Political Freedoms and Rights*

Another category detailed in the Polish Constitution is political freedoms and rights, which include:

56 Ibid., Art. 53 para. 3.
57 Ibid., Art. 53 para. 4.
58 Ibid., Art. 53 para. 5.
59 Ibid., Art. 53 para. 6.
60 Ibid., Art. 53 para. 7.
61 Ibid., Art. 54 para. 1.
62 Ibid., Art. 51 para. 3.
63 Ibid., Art. 55.
64 Ibid., Art. 56.
65 Ibid., Art. 56 para. 1.
66 Ibid., Art. 56 para. 2.
67 Granat, 2021, p. 186.

1) Freedom to organise and participate in peaceful assemblies – 'The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute'[68];
2) Freedom of association[69], including in trade unions, socio-occupational organizations of farmers, and in employers' organisations[70]. But "associations whose purposes or activities are contrary to the Constitution or statutes shall be prohibited"[71]. What is important: "the courts shall adjudicate whether to permit an association to register or to prohibit an association from such activities"[72];
3) The right to vote in elections and referendums[73];
4) The right to access the public service on an equal basis – 'Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality'[74];
5) The right to information about the activities of the authorities: organs of public authority, persons discharging public functions, self-governing economic or professional organs and other persons or organisational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury[75];
6) The right to legislative initiative[76] – the right to introduce legislation shall belong to a group of at least 100,000 polish citizens having the right to vote in elections to the Sejm;
7) The right to submit petitions – everyone (not only Polish citizens – *sic!*) shall have the right to submit: a) petitions, b) proposals and c) complaints in a) the public interest, b) his own interest, c) the interests of another person – with his consent – to organs of public authority, as well as to organisations and social institutions in connection with the performance of their prescribed duties within the field of public administration[77].

■ *6.3. Economic, Social and Cultural Freedoms and Rights*

However, in the case of constitutional human rights of an economic, social and cultural nature, a division can be made into those that

1) can be enforced directly under the Constitution. This category can include:

68 Art. 57 of the Polish Constitution.
69 Ibid., Art. 58.
70 Ibid., Art. 59 para. 1.
71 Ibid., Art. 58 para. 2.
72 Ibid., Art. 58 para. 2.
73 Ibid., Art. 62.
74 Ibid., Art. 60.
75 Ibid., Art. 61.
76 Ibid., Art. 118 para. 2.
77 Ibid., Art. 63.

a) freedom to conduct business[78] 'Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons';
b) the right to ownership, to other property rights and the right of inheritance[79];
c) freedom of choice and exercise of profession and choice of place of work
An obligation to work may be imposed only by statute[80]. The permanent employment of children under 16 years of age shall be prohibited. The types and nature of admissible employment shall be specified by statute[81]. A minimum level of remuneration for work, or the manner of setting its levels shall be specified by statute[82]. Public authorities shall pursue policies aiming at full, productive employment by implementing programmes to combat unemployment, including the organisation of and support for occupational advice and training, as well as public works and economic intervention[83];
d) the right to education
(1) Everyone shall have the right to education. Education to 18 years of age shall be compulsory. The manner of fulfilment of schooling obligations shall be specified by statute.
(2) Education in public schools shall be without payment. Statutes may allow for payments for certain services provided by public institutions of higher education.
(3) Parents shall have the right to choose schools other than public for their children. Citizens and institutions shall have the right to establish primary and secondary schools and institutions of higher education and educational development institutions. The conditions for establishing and operating non-public schools, the participation of public authorities in their financing, as well as the principles of educational supervision of such schools and educational development institutions, shall be specified by statute.
(4) Public authorities shall ensure universal and equal access to education for citizens. To this end, they shall establish and support systems for individual financial and organizational assistance to pupils and students.
(5) The conditions for providing of such assistance shall be specified by statute.

78 Ibid., Art. 22.
79 Ibid., Art. 64.
80 Ibid., Art. 65 para. 2.
81 Ibid., Art. 65 para. 3.
82 Ibid., Art. 65 para. 4.
83 Ibid., Art. 65 para. 5.

(6) The autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute[84];

e) the right to social security in case of incapacity due to illness and disability and upon reaching retirement age[85];

f) the right to health care
   (1) Everyone shall have the right to have his health protected.
   (2) Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute.
   (3) Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age.
   (4) Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment.
   (5) Public authorities shall support the development of physical culture, particularly amongst children and young persons[86];

2) an be enforced within the limits set by statutes (as follows directly from Article 81 of the Polish Constitution). This category includes: claiming the minimum wage[87]; the right to safe and healthy working conditions and the right to leave[88]; the obligation of public authorities to provide assistance to persons with disabilities[89]; the obligation of the state to take into account the welfare of the family in its social and economic policies, including the provision of assistance by public authorities to the mother before and after the birth of the child[90]; the obligation of public authorities to pursue policies that ensure environmental safety[91]; the pursuit by public authorities of policies conducive to the satisfaction of citizens' housing needs, the protection of consumers, users and tenants from activities that threaten their health, privacy and safety, and from unfair market practices[92].

In the case of economic, social and cultural freedoms and rights, it can be noted that some of them have been expressed in the form of rules for the conduct of specific policies by the state, only aimed at the goals indicated in these rights.

84 Ibid., Art. 70.
85 Ibid., Art. 67 para. 1.
86 Ibid., Art. 68.
87 Ibid., Art. 65 para. 4.
88 Ibid., Art. 66.
89 Ibid., Art. 69.
90 Ibid., Art. 71.
91 Ibid., Art. 74 para. 1.
92 Ibid., Arts. 75–76.

7. Human Rights Protection Measures

The Polish Constitution provides for a number of institutions guaranteeing the observance of human rights[93] – primarily in the vertical dimension (in the relationship between man and the state). These include: the right to a court of law[94] and the prohibition of closing the court to seek redress for violated freedoms or rights[95]; the right to compensation for damage caused to a legal entity by an unlawful action of a public authority[96]; a constitutional complaint to the Polish Constitutional Court[97]; the right to apply to the Polish Ombudsman for assistance in protecting its freedoms or rights violated by public authorities[98]; protection provided by the Ombudsman for Children's Rights.

■ *7.1. The Right to a Court of Law*

The right to a court of law – closely related to the principle of a democratic rule of law[99] – consists primarily in the following: 1) that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court[100]. It is a general guarantee that applies to all rights guaranteed by law, regardless of its position in the hierarchy of sources of law, and 2) that a constitutional prohibition on closing the judicial route has been established; thus, statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights[101] -this is a specific guarantee concerning the freedoms and rights of man and citizen constitutionally guaranteed.

The content of the right to a court – which is both a personal public subjective right and a fundamental means of protecting constitutional freedoms and rights[102] – has been clarified in the jurisprudence of the Polish Constitutional Court. It is characteristic that the judgments of the Constitutional Court have universally binding force and are final[103], what distinguishes them from other judgments of Polish judicial authorities, which are binding in a specific case.

This right includes: access to the court, that is, the right to initiate the procedure in the court (the cognisance of the court is to be shaped in such a way that

93 Vide Lis-Staranowicz, 2016, pp. 239–270.
94 Art. 45 of the Polish Constitution.
95 Ibid., Art. 77 para. 2.
96 Ibid., Art. 77 para. 1.
97 Ibid., Art. 79 para. 1.
98 Ibid., Art. 80.
99 Ibid., Art. 2.
100 Ibid., Art. 45 para. 1.
101 Ibid., Art. 77 para. 2.
102 Tuleja, 2023, p. 160.
103 Art. 190 para. 1 of the Polish Constitution.

none of the matters affecting the individual are excluded from it); the formation of the judicial procedure in accordance with the requirements of fairness and openness (it is to enable the individual to actually assert his rights); obtaining a court judgment, that is, a binding settlement of the case; the right to appropriate formation of the court system[104].

The last of the elements mentioned above is particularly highlighted during the disputes that have taken place in recent years, partly legal but mostly political in nature[105].

■ *7.2. Compensatory Liability of a Public Authority*

The Polish Constitution, in Article 77 paragraph 1, creates a constitutional principle encompassing the subjective right of everyone to compensation in the event of unlawful action by an organ of the broader public authority (this is primarily about a public official[106] – *funkjonariusz publiczny* – although not only) and defines the prerequisites necessary to enforce this responsibility. Such State responsibility is a necessary element of the idea of a democratic state of law and at the same time an institutional guarantee of the principle of legalism[107].

It should be clearly stated that this concerns compensation for damages (*wynagrodzenie szkody*), which need not necessarily be of a (purely) financial nature. The purpose (intention) of the actions of state representatives is also irrelevant; what matters is the effect.

A special type of right to compensation for unlawful action of a public authority is compensation for unlawful deprivation of liberty, which, due to the special importance of the violated good, namely personal liberty, is separately regulated in the aforementioned (*lex specialis*) Article 41 paragraph 5 of the Constitution.

According to the jurisprudence of the Polish Constitutional Court and, as it seems, the majority of representatives of the legal doctrine, Article 77 paragraph 1 has two basic functions: performs a guarantee function in the event of unlawful conduct by a public authority[108]; enforces respect for the principle of legalism in the actions of public authorities, and is a means of forcing authorities to behave in accordance with the law[109].

104 Granat, 2021, p. 196.

105 See e.g.: Resolution of the Polish Supreme Court of 23 January 2020, file reference BSA I-4110-1/20. See also: Hyżorek, 2024, pp. 6–7.

106 Taczkowska-Olszewska, 2020, pp. 1–34.

107 See: Judgment of the Polish Constitutional Tribunal of 20 January 2004, file reference SK 26/03; Wronkowska, 2006, p. 106.

108 Judgment of the Polish Constitutional Tribunal of 4 December 2001, file reference SK 18/00.

109 Judgment of the Polish Constitutional Tribunal of 20 January 2004, file reference SK 26/03; Granat, 2021, p. 194.

7.3. Constitutional Complaint to the Polish Constitutional Court

A constitutional complaint filed with the Polish Constitutional Court (Constitutional Tribunal – *Trybynał Konstytucyjny*) constitutes an extraordinary (subsidiary, auxiliary to the right to a court specified in Article 45 of the Polish Constitution) legal remedy available to "everyone," which can be used only after the relevant state body has issued a final ruling on the human rights of the complainant to protect some subjective right guaranteed by the Constitution. The Polish Constitution in Article 79 paragraph 1 clearly states that

> in accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

At the same time, the constitutional complaint may not concern the right to asylum[110].

As stated by the Polish Constitutional Court, in order to speak of a "final decision", which is required for a constitutional complaint to be admissible,

> the action of judicial and public administrative bodies should assume a decision-making character and determine the legal situation of an individually defined subject. It should be stated that the constitutional concept of a "ruling" on the freedoms, rights or duties of an individual includes rulings that impose, modify or abrogate obligations or grant, modify or abolish rights. Rulings on freedoms, rights or duties should also include rulings that establish the existence of an obligation or entitlement, if these rulings are relevant to the realization of certain rights or duties of the individual. Rulings on freedoms, rights or duties may also include rulings, which, it should be emphasized, involve the denial of one of the previously mentioned rulings. It should be added that the specific duties or rights of the individual affected by the said rulings must be within the scope of the freedoms, rights or duties set forth in the Constitution. The essence of a "ruling on the freedoms, rights or duties" of an individual always includes its binding nature[111].

110 Art. 79 para. 2 of the Polish Constitution.
111 Resolution of the Polish Constitutional Tribunal of 19 June 2012, file reference SK 37/08.

Thus, a constitutional complaint is admissable in the situation of a violation of a specific right indicated in the Polish Constitution as a result of a ruling by a court or a relatively broad public administration body. At the same time, the complainant must specify, not only which constitutional freedom or right has been violated but also indicate the manner of this violation[112]. The violation should be current at the time of filing the complaint but need not remain current at the time the Court decides the complaint (the decision of the Constitutional Court *de facto* exceeds in its significance the decision in a particular case). Nevertheless, the complainant must act in defense of his own constitutional right, not the right of another person.[113]

Importantly, the subject of the complaint is the provision of law[114] – primarily a statute, but also another normative act (containing general and abstract norms, although not necessarily universally binding, such as the Code of Medical Ethics)[115], on the basis of which a court or other State (public) body has finally ruled on the human rights belonging to the applicant, as defined in the Constitution.

> The subject of the complaint may not be a final judgment, final administrative decision or other final decision of a court or other body. The subject is the normative basis on which the decision was made, provided that the provisions of this act violate the provisions of the Constitution on freedoms or rights[116].

In Polish legal doctrine and jurisprudence (case law)[117], it is rightly argued that the subject of a constitutional complaint can be an act of European law – for example, in a situation where Polish law guarantees a wider range of protection of human rights than European law does. It is only debatable whether it is appropriate to limit the admissibility of the complaint only to acts of derived law of the European Union. At this point, it should be emphasised that the standard of review (that is, the indication of which constitutional freedom or right of the complainant was violated and in what way) in the complaint procedure cannot be acts of international law, including the Convention for the Protection of Human Rights and Fundamental Freedoms and International Covenant on Civil and Political Rights.

112 At it seems otherwise Więcek, 2011, pp. 30–32.
113 Syryt, 2021, pp. 36–58.
114 Judgment of the Polish Constitutional Tribunal of 24 June 2008, file reference SK 16/06.
115 Florczak-Wątor, 2023b, pp. 260–261.
116 Granat, 2021, p. 651.
117 Granat, 2021, p. 652; Judgment of the Polish Constitutional Tribunal of 16 November 2011, file reference SK 45/09.

The procedure before the Constitutional Court, including the constitutional complaint, was regulated in the Act of 30 November 2016 on the organisation and procedure before the Constitutional Tribunal. An important caveat is that

> within the scope of the preparation and submission of a constitutional complaint and an appeal against a decision on refusal to proceed with the complaint as well as with regard to the legal representation of the complainant in proceedings before the Tribunal, there is a requirement that the complainant shall be represented before the Tribunal by an advocate or a legal adviser, unless the complainant is a judge, a public prosecutor, an advocate, a legal adviser, a notary public, a professor of law, or a doctor habilitowany [in Poland scholar with a post-PhD degree] of law[118].

This is intended to eliminate cases that are not suitable for a complaint to the Constitutional Court. In addition, the complaint must be filed with the Constitutional Court within three months from the date of delivery to the complainant of a final judgment, final decision or other final ruling, and must meet the requirements of a pleading (which, among other things, is to ensure that the complainant is represented by a professional lawyer). At the same time, it is free of court fees – the costs of proceedings before the Constitutional Tribunal shall be covered by the State Treasury.

A negative judgment issued as a result of a complaint results in the exclusion of the defective provision from the legal system, with erga omnes effect. However, the judgment or decision itself issued on the basis of a provision that has been declared unconstitutional by the Constitutional Court is not abolished or invalidated. Although the Court's ruling provides a basis for any interested party to request the resumption of the relevant legal proceedings.

The Constitutional Court has at its disposal the means of an interim order to suspend or suspend the execution of a ruling on the case to which the constitutional complaint relates. It can be issued, first of all, in a situation where the execution of a judgment, decision or other ruling could cause irreversible consequences involving great harm to the complainant, but also when it is supported by other important interests of the complainant or important public interests. Importantly, this is the only situation where the Constitutional Court may interfere – due to statutorily specified special circumstances – in other individual proceedings in progress.

118 Art. 44 para. 1 of the Act of 30 November 2016 on the organization and procedure before the Constitutional Tribunal.

■ ***7.4. Application to the Polish Commissioner for Citizens' Rights (Ombudsman)***

What is not irrelevant from the point of view of the formation and functioning of the human rights system in Poland, the Commissioner for Citizens' Rights (*Rzecznik Praw Obywatelskich*) – the Ombudsman – was established even before the political changes, in 1987, but already at a time when the communist authorities anticipated the collapse of communism. The Ombudsman began its activities in 1988 and became a constitutionally empowered body in 1989.

It should be emphasised that, contrary to his name, the Commissioner for Citizens' Rights does not guard only this category of human rights. His activities are precisely related to human rights in the broadest sense and are directed not only towards citizens, but to people in general, to everyone under the authority of the Republic of Poland. This is why English translations and, for example, English-language versions of the websites of Polish human rights institutions use the informal term "Commissioner for Human Rights." In addition, the Commissioner protects human and civil freedoms and rights shall apply accordingly to legal persons and organizational entities without legal personality, which, under the Act of 3 December 2010 on Implementing Certain European Union Regulations on Equal Treatment, have legal capacity within the scope determined in the Act.

In accordance with Article 208 paragraph 1 of the current Polish Constitution, 'the Commissioner for Citizens' Rights shall safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts.' However, Article 209 indicates that he is appointed by the Sejm (lower house of the Parliament), with the consent of the Senate (upper house of the Parliament), for a period of 5 years (whereas the term of Parliament is 4 years; and the office of the Commissioner may not be held by the same person for more than two terms). The Ombudsman shall not hold any other post, except for a professorship in an institute of higher education, nor perform any other professional activities, and he shall not belong to a political party, a trade union or perform other public activities incompatible with the dignity of his office. As the practice of recent years indicates, the requirement for political impartiality is not always preserved. There is a well-known case in which an Ombudsman who was still in office began preparations to enter active politics, culminating in assuming the political post of Minister of Justice.

In the Constitution, it is indicated *expressis verbis* that the „The Commissioner for Citizens' Rights shall be independent in his activities, independent of other State organs and shall be accountable only to the Sejm in accordance with principles specified by statute"[119]. As a guarantee, immunity was granted to the Ombudsman, according to which he shall not be held criminally responsible nor deprived of liberty without prior consent granted by the Sejm, and shall be neither detained nor arrested, except for cases when he has been apprehended in the

119 Art. 210 of the Polish Constitution.

commission of an offence and in which his detention is necessary for securing the proper course of proceedings. But in that case, the Marshal of the Sejm shall be notified forthwith of any such detention and may order an immediate release of the person detained[120]. In accordance with statutory regulations a motion for consent to hold the Commissioner criminally liable for an offence prosecuted: a) by public indictment shall be submitted through Prosecutor General and b) pursuant to a private claim shall be submitted by a private plaintiff after bringing the case to court.

It should be borne in mind that annually, the Commissioner for Citizens' Rights shall inform the Sejm and the Senate about his activities and report on the degree of respect accorded to the freedoms and rights of persons and citizens[121].

Analysing the Ombudsman's formal powers, it should be pointed out that his activities are characterised by the use of non-authoritarian measures. First of all, he does not settle disputed human rights cases. He does not issue verdicts, orders or decisions in this regard.

By design, access to the Ombudsman should be easy. This is facilitated, among other things, by the fact that the proceedings before him are free of charge and that the proceedings are as informal as possible. Statutory regulations on the ombudsman himself, as well as on proceedings before him, are contained in the Act of 15 July 1987 on the Commissioner for Citizens' Rights. In accordance with Article 1, the Commissioner shall safeguard human and civil freedoms and rights, including the implementation of the principle of equal treatment, as set forth in the Polish Constitution and in other legislative acts[122].

Being a constitutional authority, the Commissioner for Citizens' Rights shall cooperate: in matters relating to children, with the Ombudsman for Children (Children's Rights Ombudsman; *Rzecznik Praw Dziecka*); and in matters relating to micro enterprises and small and medium enterprises, with the (an extra- constitutional authorities) Ombudsman for Small and Medium Enterprises (*Rzecznik Małych i Średnich Przedsiębiorców*).

In accordance with Article 2 paragraph 3 of the Act,

> in matters concerning the safeguarding of human and civil freedoms and rights, the Commissioner shall examine whether the law or the principles of social conduct and social justice have not been violated as a result of acts or omissions of authorities, organizations or institutions required to respect and implement these freedoms and rights.

120 Ibid., Art. 211.
121 Ibid., Art. 212.
122 Art. 1 para 2 of the Act on the Commissioner for Citizens' Rights.

Whereas in accordance with Article 2 paragraph 4 of the Act, the Commissioner for Citizens' Rights

> shall perform the role of a visiting body responsible for the prevention of torture and other inhuman or degrading treatment or punishment (National Preventive Mechanism) within the meaning of the Optional Protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted by the United Nations General Assembly in New York on 18 December 2002.

In addition, the Ombudsman performs the tasks specified in the Act of 14 June 2024 on the protection of whistleblowers, where a whistleblower is an individual who reports or publicly discloses information about a violation of law obtained in a work-related context[123].

The Commissioner shall take measures provided for in the Act of 15 July 1987 on the Commissioner for Citizens' Rights if he becomes aware of any violation of human or civil freedoms or rights (*naruszenie wolności i praw człowieka i obywatela*), including the principle of equal treatment. Moreover, the Commissioner shall, on a regular basis, monitor the treatment of persons deprived of liberty[124].

The Commissioner shall take action upon a motion: of a citizen or citizens' organisation; of a local government; of the Ombudsman for Children; of the Ombudsman for Small and Medium Enterprises; or on his own initiative[125].

Having accepted a case for further proceedings, the Commissioner in accordance with Article 12 of the Act may: carry out an explanatory procedure independently; request the examination of the case, in whole or in part, by competent authorities, in particular by supervisory authorities, public prosecutors, state audit authorities, professional supervision bodies or social oversight bodies; request the Sejm of the Republic of Poland to order the Supreme Audit Office (*Najwyższa Izba Kontroli*) to examine the case in whole or in part. As indicated in Article 203 of the Polish Constitution, the Supreme Audit Office: (a) shall audit the activity of the organs of government administration, the National Bank of Poland, State legal persons and other State organizational units regarding the legality, economic prudence, efficacy and diligence; (b) may audit the activity of the organs of local government, communal legal persons and other communal organisational units regarding legality, economic prudence and diligence; (c) may audit, regarding legality and economic prudence, the activity of other organizational units and economic subjects, to the extent to which they utilise State or communal property or resources or satisfy financial obligations to the State.

123 Ibid., Art. 4.
124 Ibid., Art. 8.
125 Ibid., Art. 9.

> The Commissioner may:
>
> examine every case on site, even without prior notification; request explanations; request access to files on every case examined by national-level state administration authorities, government administration authorities, bodies of cooperative, social, professional and socio-occupational organisations, bodies of organisational units which have legal personality, as well as local government entities and their organisational units; request information on the status of proceedings conducted by courts, prosecutor's offices and other law enforcement authorities, and request that court files, public prosecutors' files and files of other law enforcement authorities are made available for review at the Office of the Commissioner for Human Rights after the proceedings covered by those files have been closed and decisions on the cases have been issued; order the development of expert reports and opinions[126].

However, after taking action related to investigating the case, the Commissioner may: inform the complainant that no violation of human and civil freedoms and rights has been found; submit an intervention to the authority, organisation or institution whose activity has been found to have violated human and civil freedoms and rights; such intervention may not, however, violate the independence of the judiciary; request the authority superior to the one referred to in paragraph 2 (above) to take measures provided for under the law; demand the initiation of a civil proceeding, and take part in any such ongoing proceeding; in which the Commissioner shall have the same rights as the prosecutor; demand the initiation, by a competent prosecutor, of a preparatory proceeding regarding an offence prosecuted *ex officio*; request the initiation of an administrative proceeding, lodge a complaint with an administrative court and take part in those proceedings; in which the Commissioner shall have the same rights as the prosecutor; demand adjudication of penalty or annulment of a valid decision in a proceeding regarding an offence, under the rules and procedures laid down in separate regulations; file a cassation appeal or extraordinary appeal against a valid judgment, under the rules and procedures laid down in separate regulations[127].

■ *7.5. Protection Provided by the Ombudsman for Children*

Mentioned in the Polish Constitution, the Ombudsman for Children operates under the Act of 6 January 2000 on the Ombudsman for Children. The Ombudsman

126 Art. 13 para. 1 of the Act of 15 July 1987 on the Commissioner for Citizens' Rights as published in Journal of Laws.

127 Art. 13 para 1 of the Act on the Commissioner for Citizen' Rights.

upholds the rights of the child as set forth in the Constitution of the Republic of Poland, the Convention on the Rights of the Child adopted by the United Nations General Assembly on November 20, 1989, and other laws, each time respecting the responsibilities, rights and duties of parents. He is obliged, in exercising his powers, to be guided by the welfare of the child and to always take into account that the natural environment of his development is the family[128].

In carrying out his tasks, the Ombudsman may: 1) report his participation in proceedings before the Constitutional Court, initiated on the basis of the Ombudsman's request, or in cases of constitutional complaint, concerning the rights of the child, and participate in these proceedings; 2) make proposals to the Polish Supreme Court (*Sąd Najwyższy*) to resolve discrepancies in the interpretation of the law in the area of children's rights legislation; 3) file a cassation (extraordinary appeal against a final judgment of the court of criminal appeals) or cassation appeal against a final decision; 4) take part with the rights of a prosecutor in pending juvenile proceedings.

8. Summary

The Polish human rights protection system covers both domestic and international regulations, including those in force within the European Union. Since international regulations (including the EU) are not specific to Poland, because in principle they are equally binding on all contracting parties, this study primarily discusses domestic regulations and institutions, mainly based on the Constitution of the Republic of Poland, which is the fundamental law with the highest legal force among all legal acts in force in Poland, expressing its sovereignty and international subjectivity. Including in the field of human rights.

There is no doubt that the hierarchical structure of legal acts defining the system is of particular importance for the human rights system. This structure covers all legal acts in force in the territory of Poland – once again both domestic and international. As a result of the clear definition of the unique position of constitutional regulations, it was the Constitution that was assigned the task of shaping the system of guarantees of human and civil rights and freedoms. The source of these freedoms and rights was indicated as the inherent and inalienable dignity of man, which is why the Polish legislator, after years of communist oppression, clearly referred to natural law. This had an impact on the internal systematisation of freedoms and rights, as indicated in the study, as well as on the system of their guarantees and on the admissibility of constitutional restrictions on human rights, including, for example, the principles of proportionality and legalism.

128 Art. 1 paras. 2–3 Act of 6 January 2000 on the Ombudsman for Children.

The constitutional freedoms and rights that are common to the Polish national and international systems were listed in the structural division. Elements specific to Polish conditions were discussed in more detail. Their different locations affect the guarantees granted to them for their preservation. Because the Polish Constitution also indicates basic means and institutions for the protection of human rights, such as: the right to court and the prohibition of closing the court route to claim violated freedoms or rights; the right to compensation for damage caused to a legal entity by the unlawful action of a public authority, which initially raised doctrinal disputes and practical doubts; the constitutional complaint to the Constitutional Tribunal, which seems particularly important due to the final and universally binding nature of judgments; the right to apply to the Commissioner for Human Rights for assistance in protecting freedoms or rights violated by public authorities, a mechanism characteristic of Poland, as well as the protection provided by the Commissioner for Children's Rights. All these national elements of the Polish system of human rights protection indicate that human rights protection in Poland (at least theoretically) is often more developed than that found in the general public.

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TAMAR ZARANDIA*

Europeanisation of Georgian Private Law: Legal Reform and Future Development Through the Lens of Property Law Reception

ABSTRACT: *This article examines the historical foundations, conceptual evolution, and contemporary development of Georgian private law through the lens of legal reception, focusing on property law. It begins by tracing the formation of Georgian legal culture, shaped over centuries by Byzantine, Eastern, and later Russian influences, and highlights the creative codification tradition exemplified in the legislative works of Vakhtang VI. The analysis then turns to the Soviet era, in which law functioned as an instrument of ideological control, subordinating private ownership to socialist forms of property. The article explores the divergent post-Soviet reform strategies adopted across the region and emphasises Georgia's unique choice to reject the Soviet legacy and ground its new Civil Code in the German legal tradition. The article analyses the reception of German property law principles – such as numerus clausus, publicity, specificity, superficies solo cedit, the right to follow, and priority – and assesses how these concepts were adapted within Georgian law. A recurring theme is the creative, not mechanical, nature of the reception process, shaped both by historical conditions and practical constraints of the post-Soviet transition. The article evaluates the implications of Georgia's causal model of ownership transfer, contrasting it with the German separation and abstraction principles. In addition, the article discusses the effects of the EU-Georgia Association Agreement on legal approximation, particularly in the field of property law, and examines continued challenges stemming from Soviet-era doctrinal remnants, such as the former classification of property forms. The conclusion emphasises that while Georgian civil law continues to undergo legislative change, the core structural principles of the Civil Code remain stable. The article underscores the crucial role of legal principles and judicial practice in*

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https://doi.org/10.47078/2026.1.493-514

shaping future development, arguing that the dynamic interplay between legislative reform, doctrinal reception, and judicial interpretation remains central to the evolution of Georgian private law.

■ **KEYWORDS:** *legal reception, Georgian Civil Code, property law, German private law, EU legal approximation*

1. Historical Foundations of Georgian Law

■ *1.1. Before the Adoption of the 1997 Civil Code: A Brief Introduction*

Owing to Georgia's geopolitical location, Georgian law has historically been influenced by both Eastern and Western cultures.[1] In the Greco-Roman reception, *jus civile* reached the Caucasus, including Georgia. At the end of the seventeenth century, the second part of King Vakhtang VI's Code, also known as Vakhtang VI's Book of Law, contained certain laws of Leo the Wise, Constantine, and other Byzantine emperors concerning judicial proceedings.[2] Notably, Vakhtang VI brought together, in a single 'codification compendium', the norms of foreign and Georgian law, becoming the first to declare that Georgian law is a synthesised product of the national and the general spirit of law.[3] However, the Georgian translation of Greek law included in Vakhtang VI's Book of Law is creative in character and adapted to Georgian reality.[4] Translational activity indeed played a special role in the law-making process and, more generally, Georgian law was distinguished by an unusually broad scale of borrowings.[5] In addition to the aforesaid laws of the Byzantine emperors, King Vakhtang's Code contained norms from the Mosaic Pentateuch and Armenian legislation.

Importantly, from the prefaces to the Books of Law of Vakhtang VI and Giorgi, the Brilliant, it appears that in the seventeenth to eighteenth centuries in Kartli and Mtiuleti, the system of justice was often the domain of feudal arbitrariness, for the correction of which collections of laws were created. Not only kings but also specially established legislative commissions – 'commissions of learned men', clerical and secular persons, and local scholars – were actively involved in law-making, so that the laws would correspond to reality.[6]

1 Zoidze, 2005, pp. 5 et seq.
2 Коркунов [Korkunov], 2025, p. 281.
3 Zoidze, 2005, p. 25.
4 Bregvadze, 1964, p. 36.
5 Коркунов [Korkunov], 2025, p. 281.
6 According to the introduction to Vakhtang VI *Law Book* the law was drafted *inter alia* by the King, Catholicos, the Metropolitan/Archbishop, and an *Eristavi* (duke). Thus, law-making was an organised process with the involvement of the monarch and the elite. Zoidze, 2005, pp. 9 et seq.

The Byzantine canon law had a profound influence on the development of Georgian law. In the eleventh century, the *Small Nomocanon* and the *Typicon of the Georgian Monastery of Petritsoni* were translated into Georgian. The most comprehensive monument of canonical law was the *Great Nomocanon*, also known as the *Nomocanon in Fourteen Titles*, dating from the ninth century. This text served as a constitutional framework for ecclesiastical law in Georgia. According to Georgian scholars, the Acts of the Council of Ruis-Urbnisi were compiled on the basis of the *Great Nomocanon*.[7] Georgian law, of course, was also influenced by Eastern law. Valerian Gabashvili, a scholar of Eastern terminology, noted that in the sixteenth to eighteenth centuries, there was no single document in which Eastern terms were not used, something dictated by contemporary political processes[8] and particularly evident in public law.[9] According to Georgian linguists, from the nineteenth century, Georgia became detached from Eastern influences, and the influence of Russian law is attested. In 1729, in Moscow, the 1649 Law Code of Alexei,[10] the son of Mikhail (*Sobornoye Ulozheniye*), was translated at the behest of Erekle II and commissioned by Prince Bakar; it constituted the first translation of a Russian law code.[11] The interest shown by the Georgian kings in Russian law was a form of preparation for the Treaty of Georgievsk, and simultaneously, Russian law during that period was perceived as European. [12] In the initial period following the establishment of Russian rule, the manifesto on Georgia's incorporation into Russia was followed by Alexander I's *Regulations on the Governance of Georgia*. Here, civil disputes were to be resolved according to Georgian customs and the Codes of Vakhtang VI, while criminal cases were to be adjudicated under Russian laws. At that time, neither Georgian customs had been systematised nor had Vakhtang VI's Book of Law been translated into Russian;[13] nevertheless, since Vakhtang VI's Book of Law – despite its antiquity – was the applicable law in Eastern Georgia, it was preferred. From 1813, upon the submission of the Minister of Justice, a special commission was established under the chairmanship of David Bagrationi, which extracted from Vakhtang VI's Book of Law, the legal norms deemed expedient for use, and undertook a degree of systematisation. According to the Commission's conclusion, Russian laws were to be applied only in the event of lacunae in the Vakhtang Code.[14] Thus, it is apparent that Georgia has always shown an interest in progressive cultures: to use the words of Georgia's

7 Gabidzashvili, 1975, pp. 3 et seq.
8 Gabashvili, 2001, p. 785.
9 Such as forms of governance and the sphere of taxation.
10 Орбели [Orbeli], 1956, p. 105.
11 Ibid.
12 Zoidze, 2005, p. 68.
13 Ibid., p. 72.
14 *The Law of Prince David*, p. 217.

first President, Zviad Gamsakhurdia, 'Georgia's mission, in cultural terms, is the synthesis of Western and Eastern cultures and their giving as a single whole'.[15]

During the Soviet period, law was regarded as an instrument of class politics; the primary purpose was to support the construction of a socialist society and implement the party's policy. After coming to power, the Bolsheviks' chief objective was to eliminate private ownership of the means and instruments of production; theoretically, this would prevent individuals from accumulating capital assets and income and using them to exploit others' labour. An individual's right of ownership was confined to items for personal use or consumption acquired with income earned through their own labour. Putting this formula into practice proved more complex when Soviet legislators and judges sought to make this goal a reality.[16] The economic system of the USSR rested precisely on socialist ownership (for the forms of ownership, see below). Moreover, the aim of protecting property rights was to ensure socialist legality in proprietary relations and promote the development and consolidation of property relations.[17] Soviet legal philosophers set Marxist-inspired tasks for their legal system, yet employed familiar terms and formulae from the past,[18] which pointed to the positivist roots of Soviet law. Legal education in the Soviet context was sharply ideologised: its purpose was not only to impart technical legal knowledge but also to entrench Marxist–Leninist theory and the Party line. The training of judges, prosecutors, and lawyers was based not on pluralistic discussion, but on the unconditional acceptance of the doctrine of socialist law, which also determined the practical application of the law. This applied, among others, to Georgia.

■ *1.2. Legal Reforms in the Post-Soviet Countries and the Reception of the Civil Code of Georgia*

An analysis of civil law reforms carried out in post-Soviet countries reveals two main but opposing models of reform. The first model is based on adapting existing civil laws to the demands of the market economy. Within this framework, Soviet civil law norms that lacked ideological content remained valid. Most post-Soviet states adopted this model.[19] In these countries, new civil codes were drafted based on a model civil code; however, many norms from the Soviet era remained in effect.[20] Thus, in states that followed this model, civil law reform and development were grounded in traditions inherited from the Soviet period.[21]

15 Gamsakhurdia, 1991, p. 213.
16 Hazard et al., 1977, p. 361.
17 Simons, 1988, p. 111.
18 Hazard et al., 1977, p. XVI.
19 Kurzynsky-Singer and Zarandia, 2014, pp. 108 et seq.
20 Makovsky, 1998, p. 339.
21 Kurzynsky-Singer and Zarandia, 2014, pp. 108 et seq.

Georgia chose a significantly different path in developing its civil law. In drafting Georgia's Civil Code, the German Civil Code (*Bürgerliches Gesetzbuch*, or BGB) served as the primary model. The choice of the German model was motivated by its strong academic authority and the belief of the code's drafters that European-style codification corresponded to Georgia's historical legal traditions.[22]

Notably, neither of the reform models described above exists in its 'pure form'. Cross-influences between them are inevitable. Countries that opted to develop civil law based on Soviet-era traditions often borrow individual legal institutions from other legal systems. This borrowing is essential for ensuring the legal regulation of civil commerce.[23] Conversely, countries that chose to adopt foreign legal models often preserve certain existing legal traditions, as was the case in Georgia – a matter that will be discussed in more detail in this article.

Evidently, no legal culture exists in absolute isolation. Every national legal system evolves and enriches itself through its interactions with other cultures.[24] The formation of national legal orders is a result of intercultural contact and mutual influence. Global legal culture continues to develop in parallel with these processes.[25] Just as human life is not an isolated phenomenon, so too is the life of peoples and nations a matter of coexistence, constant interaction, mutual influence and exchange. Life consists of borrowing from the outside and assimilating from within. To distract from external borrowing and criticise internal adaptation is to doom an organism to stagnation; internal development begins only in a lifeless body.

The supranational nature of law is rooted in its national character, and vice versa; the national essence of law is shaped by its supranational dimension.[26] The inheritance of legal thought from humanity's common intellectual achievements is a great asset.[27] In fact, there is likely no law – whether a particular legal act or an entire legal system in the positive sense – that has not, at some point, been transplanted or received from another legal tradition. All law is transplanted.[28] The drafters of Georgia's Civil Code deliberately studied ancient Georgian law and incorporated what was compatible with it.[29] Consequently, the Civil Code bears the imprint of both cultural heritage and interlegal influence.[30] These interlegal influences are particularly prominent in private law. Even within German law, many institutions were received from Roman and French laws. French law, in turn, retained close ties with Roman law for historical reasons. Accordingly,

22 Zoidze, 2005, pp. 92 et seq.
23 Zarandia, 2018, p. 7.
24 Khubua, 2004, pp. 83–84, 233.
25 Bregvadze, 2006, pp. 34–35.
26 Zoidze, 2013, p. 105.
27 Jorbenadze, 1994, p. 141.
28 Bregvadze, 2006, p. 23.
29 Zoidze, 2001, p. 1097.
30 Zarandia and Mchedlidze, 2024, p. 54.

Georgia's reception of German law represents an adoption of what had already been received since the fundamental institutions of private law, such as ownership, inheritance, sale, donation, and others, form the deep historical-legal foundation of any civilised society. Undoubtedly, each state has its own subjective basis for regulating legal relationships differently, but even these variations do not alter the universal principles of private law, which are grounded in the common nature of humanity itself.

The idea of drafting a new Civil Code in Georgia emerged shortly after the dissolution of the Soviet Union during the administration of Zviad Gamsakhurdia. Its implementation began in the first half of 1992. The commission tasked with drafting the Civil Code was chaired by the distinguished and respected Professor Sergo Jorbenadze. This effort brought together the leading figures in Georgian civil law scholarship, including Professors Lado Chanturia, Besarion Zoidze, Zurab Akhvlediani, Roman Shengelia and others.[31] During the same period, cooperation with German colleagues also began, led by Professor Rolf Knieper from Bremen.[32] In recognition of his significant contributions to Georgian statehood, he was later awarded the title of Honorary Citizen of Georgia and Honorary Doctor (Honoris Causa Doctor) of Tbilisi State University.

■ *1.3. The Civil Code of Georgia – A Result of the Creative Reception of German Private Law*

Owing to its geopolitical location, Georgia has always been influenced by both Eastern and Western cultures. For centuries, our country maintained a tradition of legal codification,[33] yet, due to historical misfortunes, Georgia remained outside the processes of the 'Great Codifications' era.[34] Nonetheless, aspirations towards European ideals have never ceased. After the collapse of the Soviet Union on 26 June 1997, the Parliament of Georgia unanimously adopted the Civil Code of Georgia,[35] the first civil code in the country's history, based on the achievements of Western civil law scholars.[36]

The reception of European private law in Georgia is grounded in its strong historical foundation.[37] It is noteworthy that Soviet law, including Georgian Soviet

31 Zoidze, 2005, pp. 1 et seq.

32 For his outstanding contribution to Georgian law, Professor Rolf Knieper was later awarded the title of *honoris causa doctor* of Ivane Javakhishvili Tbilisi State University and named an Honorary Citizen of Georgia.

33 Zoidze, 2005, pp. 5 et seq.

34 The 19th century is, with minor reservations, justly considered the period of comprehensive and systematic codifications of private law on the European continent, Knieper, 2005, p. 28.

35 The Civil Code of Georgia, 1997 [Online]. Available at: https://matsne.gov.ge/ka/document/view/31702?impose=translateEn (Accessed: 12 November 2025).

36 On the adoption of the Civil Code of Georgia, Zoidze, 2003a, pp. 86–114; Zoidze, 2005; Chanturia, 2011, pp. 19 et seq.; Zoidze, 2005, pp. 5 et seq.

37 Zoidze, 2005, pp. 5 et seq.

law such as the Civil Codes of 1923 and 1964, followed the model of the Russian SFSR codes, which themselves were based on the legacy of continental European civil law, particularly German civil law traditions.[38] With the adoption of the new Civil Code, Georgia deliberately adopted European–primarily German–law, an adoption rooted in both historical legacy and contemporary realities.

Historically, Georgia belonged to the Romano-Germanic family of continental law. Accordingly, the Civil Code was constructed based on the Pandect system while also incorporating contemporary innovations of the time.[39]

■ *1.4. The European Union Association Agreement and Subsequent Developments*

Property Law and the Europeanisation of Law. Since 1 July 2016, the Association Agreement between Georgia and the European Union has been in force. Under Article 431 of the Agreement, the process of 'legal approximation' and law-making activities affected all fields, including private law. These processes require the recognition and integration of new legal realities. This includes both research on the process of approximating civil law institutions with EU legislation and the support of private law harmonisation based on normative concepts. For Georgia, the Europeanisation of national law began precisely with the reception of German private law.

Although the Europeanisation process in the field of property law has not been as active as in the field of obligation law, it remains an area of growing importance.[40] Article 222 of the Treaty establishing the European Economic Community[41] (now Article 345 of the Treaty on the Functioning of the European Union [TFEU])[42] appears to largely exclude property law from the scope of EU interests. Nonetheless, certain aspects, such as security rights, are still regulated to some extent by union law.

Generally, compared to contractual law, the tendencies toward Europeanisation and legal approximation in property law are more limited. This is primarily due to significant differences in the property law systems of EU Member States. Traditionally, these differences have been attributed to the inherently national character of property law, particularly its relationship with land and its essential role in tax-related matters.[43] Property law systems are considered to differ so substantially from one another that the development of common principles, similar to

38 Jorbenadze, 1994, p. 141.
39 Ibid., p. 142.
40 Van Erp, 2012, p. 1.
41 Treaty of Rome Establishing the European Economic Community (25 March 1957), 294 UNTS 17.
42 Treaty on the Functioning of the European Union (TFEU), consolidated version, OJ 2012 C 326/47.
43 Akkermans, 2008, p. 397.

the Principles of European Contract Law, UNIDROIT Principles, or the Principles of European Law, has not been feasible.

However, there have been attempts to develop common principles in specific areas related to property law, such as insolvency law and the concept of a Common Mortgage for Europe (Eurohypothec). Moreover, in the 21st century, law is no longer limited to a single jurisdiction; it is increasingly being shaped by both legal and technological transformations.

■ *1.5. Abandoning Soviet Legal Relics: Reconsidering the Classification of Property Forms*

The classification of property into distinct forms constituted a relic of Soviet legal doctrine, which was expressly abandoned by Georgian law in the course of legal reforms. In this context, the Constitutional Court of Georgia played a substantive role in shaping its legal approach. The legislative foundation for the classification of property forms was embedded in the provisions of the 1936 and 1977 Constitutions of the Soviet Union. This doctrinal approach was subsequently reflected in the Civil Codes of the Union Republics, where property was categorised according to its form.

Accordingly, under Soviet law, socialist property was categorised into three main forms: state (public) property, collective-cooperative property, and trade union-social property. These three forms of property were granted priority over private property. Private property was considered a derivative of socialist property and was permitted to exist only 'until the arrival of the higher phase of communism'.[44] In the Soviet state, a distinct legal regime was established for socialist property that differed significantly from the legal regime applicable to private property. Crimes against property were classified based on the form of ownership involved and regulated under separate chapters of the criminal code.[45] For instance, socialist property was afforded stricter protection under criminal law than private property.[46] Moreover, while limitation periods were applied to vindicatory claims brought by private individuals, no such limitation was applied to vindicatory claims initiated by state authorities against citizens,

44 Vasilenkov and Dudikov, 1964, p. 237; Liluashvili, 2015, pp. 313 et seq.

45 Lekveishvili et al., 2011, p. 359.

46 For example, theft of socialist property was punishable by imprisonment for up to three years (Criminal Code of the Russian Soviet Federative Socialist Republic, Art. 89; Criminal Code of the Georgian SSR, Part I, Art. 91) [Online]. Available at: https://dspace.nplg.gov.ge/bitstream/1234/321696/1/Saqartvelos_Sabchota_Socialisturi_Respublikis_Sisxlis_Samartlis_Kodeqsi.pdf (Accessed: 12 November 2025). Theft of private property was punishable by imprisonment for up to two years (Criminal Code of the RSFSR, Art. 144; Criminal Code of the Georgian SSR, Part I, Art. 150) [Online]. Available at: https://upload.wikimedia.org/wikipedia/commons/8/8a/Criminal_Code_of_Russian_Soviet_Federative_Socialist_Republic%2C_1961.pdf (Accessed: 12 November 2025).

cooperative–collective farms, or public organisations.[47] The division of property into different forms was based on the existence of differing legal regimes applicable to different legal subjects.[48]

In contrast to the socialist model, a fundamental element of the concept of ownership, as enshrined in the modern Civil Code of Georgia, lies in the principle that the content and scope of the right of ownership are not contingent upon the legal status of the rights-holder.[49] While adopting elements of the German law of property (*Sachenrecht*), Georgia, unlike many other post-Soviet jurisdictions,[50] expressly rejected the doctrinal division of ownership into distinct forms.[51] Pursuant to Article 24(4) of the Civil Code of Georgia, state and municipal entities engage in civil law relations under the same legal regime as private legal persons. In such cases, the rights and obligations of these public entities are exercised and performed through their respective organs (institutions, departments, and similar bodies), while the entities themselves do not constitute legal persons.

Nonetheless, in the jurisprudence of the Constitutional Court of Georgia, the issue of equality of legal standing between the state and private legal persons in civil law relations became a subject of constitutional scrutiny. Specifically, the case concerned the constitutionality of Article 21 of the Law of Georgia on 'Enforcement Proceedings', enacted on 16 April 1999. Under the challenged provision, compulsory enforcement measures, including forced auctions,[52] seizures, and sequestration, were inapplicable to, inter alia, generation facilities, electricity distribution, and regional gas networks that were either state-owned or belonged to enterprises in which the state held no less than 50 percent of the shares or charter capital. In this case, the claimants entered into contractual relationships with enterprises either fully owned by the state or in which the state held a controlling interest (more than 50 percent). Due to their outstanding financial obligations, the claimants pursued legal remedies, obtained favourable court judgments, and were issued writs of execution. However, enforcement of these judgments was rendered impossible because of the statutory exemption established by the impugned provisions.

47 Complied, by, for instance Civil code of RSFSR, Article 90, Civil code of Georgian SSR, Art. 87.

48 Kurzynsky-Singer and Zarandia, 2014, pp. 133 et seq.

49 Zoidze, 2015, p. 19.

50 Art. 8.2 of the Constitution of the Russian Federation [Online]. Available at: https://www.policinglaw.info/assets/downloads/1993_Constitution_of_the_Russian_Federation_(as_amended)_(English_translation).pdf (Accessed: 12 November 2025); Art. 53 of the Constitution of the Republic of Uzbekistan [Online]. Available at: https://www.constituteproject.org/constitution/Uzbekistan_2011 (Accessed: 13 November 2025); Art. 13 of the Constitution of the Republic of Belarus [Online]. Available at: https://constitutionnet.org/sites/default/files/Belarus%20Constitution.pdf (Accessed: 12 November 2025).

51 Chanturia, 2011, p. 29.

52 Regarding forced auction, see: Kavtaradze, 2013, pp. 77 et seq.

In the case in question, by its ruling dated 28 July 2005, the Constitutional Court of Georgia declared the contested norm unconstitutional in relation to the first sentence of Article 21, paragraph 1, and the first sentence of Article 30, paragraph 2 of the Constitution of Georgia. The Constitutional Court emphasised that property, as recognised and safeguarded by the Constitution, entails the establishment of a uniform and equal right to property for all individuals. Georgia was one of the first post-Soviet states to reject the classification of property into the forms and institutions of the privileged proprietor, which under the Soviet regime was represented by the state. The concept of property enshrined in Article 21 of the Constitution of Georgia legally places the state, as an owner, on an equal footing with other proprietors. This foundational principle has influenced the development of Georgian civil law. A crucial provision within Article 24, paragraph 4 of the new Civil Code of Georgia explicitly asserts that the state participates in civil law relations in the same manner as private legal entities, thereby establishing parity between public and private actors in civil law.[53]

2. Reception of German Principles of Property Law in Georgia

The reception of German law into Georgian legal doctrine has been accompanied by the transposition of fundamental legal principles inherent in the German legal tradition. It is important to emphasise that, in general, legal principles have not exerted a significant influence on the development of private law systems in the Caucasus and Central Asian regions.[54] However, principles of property law play a pivotal role in guiding the interpretation and application of legal norms by courts and legal practitioners. Consequently, the adoption of these principles into Georgian law serves as a valuable point of reference for assessing broader trends in the development and localisation of private law.

■ *2.1. The Doctrinal Relationship Between Property Rights and Obligatory Rights*

The authors of the Georgian Civil Code were guided by a fundamental conceptual distinction between property rights (*rights in rem*) and obligatory rights (rights in *personam*). Property rights are characterised by their absolute nature – meaning that they are enforceable *erga omnes* and include the right of pursuit (*ius persequendi*) with respect to the object. This defining feature serves as a key criterion[55] distinguishing them from obligatory rights, which are inherently relative and binding only *inter partes*. The conceptual differentiation between these

53 Constitutional Court of Georgia, judgment No. 1/4/184,228, 28 July 2008.

54 This observation finds support in comparative legal literature. See: Chanturia, 2010, p. 232.

55 Chanturia, 1994, pp. 227 et seq.; Chanturia, 2001, p. 152; Zoidze, 2003b, pp. 5–9; Chechelashvili, 2009, p. 18.

two categories of private rights underlies several core principles of property law. Georgian law, following the German model, reflects a structurally coherent system that facilitates the functional interplay between contract and property laws.[56] A salient example is the development of the law of security rights, which evolved as an auxiliary branch of contract law intended to enhance the enforceability of obligations. In general, property law assumes a passive role until an obligation remains unfulfilled, at which point it becomes a powerful legal enforcement mechanism. Furthermore, while the law of obligations is founded upon the principle of contractual autonomy,[57] permitting parties to regulate their private affairs as long as third-party rights are not infringed, property rights exert legal effects on all persons involved in civil commerce. As such, the creation or modification of property rights is subject to limitations derived from overarching interests in legal certainty, particularly regarding the validity of title transfers and the scope of encumbrances.

The principal doctrines of property law as reflected in the Georgian legal system and largely derived from German law include the following:

The *Numerus Clausus* Principle: This doctrine restricts parties to employing only those proprietary rights explicitly recognised by statute, thereby prohibiting the creation of novel or *sui generis* rights, or the arbitrary alteration of existing legal forms. Consequently, the principle of contractual freedom is more constrained in property law than in the law of obligations.[58] The Principle of Publicity: This principle serves to safeguard the transparency of proprietary relations by enabling third parties to ascertain the existence and legal content of property rights. The Superficies Solo Cedit Principle: This tenet affirms the legal unity between land and its fixtures, stipulating that ownership of the land encompasses any buildings constructed on it.[59] The Principle of Specificity and Individualisation: In accordance with this principle, a property right may be established only with respect to a specifically identified and individualised object, thereby ensuring clarity as to which asset a given proprietary right pertains to.[60] Whereas German law protects the security of civil commerce through the Principle of Abstraction, under which defects in obligatory transactions do not affect the validity of the transfer of ownership, Georgian law does not embrace this principle. Instead, it adheres to the Causal Model of Transfer in which the transfer of ownership is contingent on the legal validity of the underlying obligation (*causa*).[61]

56 Akkermans, 2008, p. 401.
57 Lakerbaia, 2016, pp. 17 et seq.
58 Jorbenadze, 2016, p. 253.
59 Kurzynsky-Singer and Zarandia, 2014, pp. 131 et seq.
60 Chanturia, 1994, pp. 228 et seq.; Chanturia, 2001, p. 154; Zoidze, 2003a, pp. 5 et seq.
61 Kurzynsky-Singer and Zarandia, 2014, pp. 116 et seq.; Begiashvili, 2013, p. 61.

■ *2.2. The Principle of Numerus Clausus of Property Rights*

The notion of quantitative and substantive restrictions on property rights is pervasive in almost all European legal systems.[62] Property rights are considered absolute rights enforceable against all persons; as such, there exists an expectation that the content of these rights is publicly accessible to third parties. The principle of numerus clausus, or an exhaustive (closed) list, constrains the parties' ability to establish property rights that are not expressly foreseen by law.[63] The efficacy of property rights in commerce is enhanced when the acquirer can rely on clearly delineated and legally recognised content. Consequently, property law permits the existence of only a finite set of property rights, including ownership, and specific restrictions on property rights expressly provided by the law.[64] The creation of new property rights by the parties was prohibited. Hence, in property law, the freedom of contract is inherently limited. While parties retain the freedom to enter into contracts, in contrast to the law of obligations, they do not possess the freedom to determine the substantive content of their rights.[65]

The principle of the numerus clausus of property rights eliminates the parties' freedom to structure their rights as they see fit.[66] This principle is supplemented by the legislative codification of property rights, which not only prohibits the creation of novel types of property rights but also restricts the parties' ability to alter the types of property rights recognised by law, except in very limited circumstances. From this perspective, there is no freedom to structure the rights in a manner that deviates from statutory provisions.[67]

■ *2.3. The Principle of Publicity in Property Law*

The principle of publicity ensures that civil commerce participants can determine the existence of their real rights. As noted previously, the requirement for the absolute structuring of real rights warrants a legal definition of the permissible types of such rights. Furthermore, the existence of specific real rights must be apparent to the participants in civil transactions;[68] therefore, the principle of publicity is applicable. The establishment and transfer of real rights must be perceptible, visible, and public to third parties; or, so to speak, to an external observer.[69]

For movable property, the principle of publicity is expressed through possession, whereas for immovable property, it is reflected in the registration

62 Akkermans, 2008, p. 403.
63 Chachanidze, 2012, pp. 249 et seq.; Jorbenadze, 2016, p. 255.
64 Zarandia, 2023, p. 62.
65 Zoidze, 2003b, p. 5; Shotadze, 2014, p. 29; Wolf and Wellenhofer, 2018, Art. 3 para. 2.
66 Jorbenadze, 2014, pp. 262 et seq.
67 Wolf and Wellenhofer, 2018, p. 31.
68 Kurzynsky-Singer and Zarandia, 2014, pp. 134 et seq.
69 Lazareishvili, 2001, p. 44.

procedure of a public registry.[70] For the transfer of ownership over movable property, the Civil Code, alongside the 'real right', generally requires the delivery of the item (i.e., the transfer of possession).[71] This serves as an expression of the principle of publicity, since the transfer of factual control over the item must make the transfer of ownership perceivable to an external observer. The possessor is usually considered to be the owner. This forms the basis of the presumption of ownership, which is affirmed by Article 158(1)[72] of the Civil Code of Georgia, and also underpins the regulation of bona fide acquisition found in Article 187.

Crucially, however, it is debatable whether possession can always fulfil the function of expressing publicity under the conditions of a modern dynamic economic order, since in cases such as conditional ownership, an item may be used by a possessor who is not the actual owner. Thus, a creditor cannot always rely solely on the factual manifestations of possessions.[73] The establishment and transfer of rights over immovable property presuppose registration in a public registry, rendering any change in legal status visible to external observers. Therefore, the circulation of immovable property carries less risk. By contrast, in the case of movable property, participants in civil commerce are unable to ascertain the legal status behind factual possession. They are always at risk of relying on the visible situation (i.e., possession) and being misled about the authenticity of the right because a right, by its nature, is not visible.[74]

Theoretically, to ensure publicity, there should also be a registry of movable items. However, this requirement would render the circulation of movable property impracticable because of the disproportionate costs involved. This is because the circulation of such items is more dynamic, and the items themselves are more susceptible to rapid depreciation or destruction. Therefore, the legislature found a legal compromise by requiring registration in a registry only for particularly important movable items such as ships and aircraft.[75]

In Georgian law,[76] the presumption of correctness applies to the Public Registry; entries in the register are deemed correct until their inaccuracy is proven (Civil Code, Article 312(1)). The essence of the presumptions of completeness and correctness is to determine the legal precondition for the validity of a contract. Accordingly, the alienation of immovable property requires entry into the Public Registry.[77]

70 Wolf and Wellenhofer, 2018, 28; Lapachi, 2013, pp. 62 et seq.
71 For the transfer of ownership of a movable item, it is necessary that the owner delivers the item to the buyer based on a valid real right (Civil Code, Art. 186 I).
72 It is presumed that the possessor of a thing is its owner (Civil Code, Art. 158 I).
73 Bzekalava, 2013, pp. 24 et seq.
74 Sklovsky, 1999, p. 99.
75 Wolf and Wellenhofer, 2018, p. 29.
76 Art. 312.1 of the Civil Code of Georgia, and Art. 5 of the Law of Georgia of 2008 on the Public Registry.
77 Jorbenadze, 2016, p. 259; in German law, Weiling, 1994, pp. 254 et seq.

Similar to movable things, the transfer of ownership requires delivery of the thing for land plots and other immovable items, and a disposition takes effect only after registration in the Public Registry. Simultaneously, whether, under Georgian law, entry into the Public Registry constitutes a rights-creating element for the acquisition or transfer of title by virtue of law is a disputed issue. On one hand, in one judgment of the Supreme Court of Georgia, it was stated that the title to immovable property may not be derived from the Public Registry; however, in such a case, the object may be regarded, without dispute, as a person's property, which leads to the upholding of a vindicatory claim.[78] For example, the Supreme Court refers to inheritance through the operation of the law, as evidenced by a certificate of inheritance.[79] On the other hand, based on rulings delivered by the Supreme Court of Georgia concerning spouses' common property, it may be inferred that Georgian law accords entries into the Public Registry with constitutive significance and extends this to the transfer of ownership arising from the operation of law.[80] Pursuant to Article 1158 of the Civil Code of Georgia, property acquired by spouses during marriage constitutes their joint property (common ownership) unless otherwise provided by a matrimonial agreement.[81]

In one of its judgments, the Supreme Court of Georgia noted that, in the interests of the acquirer, joint ownership of spouses with respect to immovable property arises only after both spouses are registered in the Public Registry. Otherwise, regarding third parties, the entries in the register are deemed correct.

■ *2.4. The Principle of Superficies Solo Cedit and Challenges in Georgian Law*

According to the principle of *superficies solo cedit*, the legal status of a building located on a plot of land is linked to the legal status of the land itself, thereby ensuring the legal unity of the land and the structure. This principle has its roots in Roman law.[82] Under Roman law, immovable property included not only the plot of land and subsoil but also any improvements on the surface created by another or the owner, which were considered to be part of the land's surface, either naturally or artificially, and subject to the rule of inseparability from the land.[83]

According to Article 193 of the Civil Code, if a movable item is so connected to a plot of land that it becomes an essential component of that land, the landowner, under Article 150(2), simultaneously becomes the owner of that item. Article 150(2) defines buildings and other items that are permanently attached to land as essential components.[84] In this way, the principle of *superficies solo*

78 Zarandia, 2016, p. 75.
79 Supreme Court of Georgia, 2007, pp. 57, 59–60.
80 Zarnadze, 2007, pp. 120 et seq.
81 Civil Code, Art. 1172.
82 Staudinger et al., 2004, Art. 94 para. 2.
83 Garishvili and Khoperia, 2013, p. 277.
84 Kurzynsky-Singer and Zarandia, 2014, pp. 131 et seq.

cedit ensures legal clarity, as it allows a potential purchaser of the plot to easily determine which items are covered by the agreement. Moreover, it prevents economic losses that may arise from situations in which the plot and building belong to different persons.[85]

However, the principle of *superficies solo cedit* is not without exceptions. A clear example is apartment ownership in multi-unit buildings, which under current legislation may constitute a separate object of legal title. In such cases, ownership of the land on which the multi-unit building stands is distributed among multiple apartment owners. Therefore, if we reduce the dogmatic content of *superficies solo cedit* to its practical significance and return to the fundamental rules concerning the accession of immovable property, the concept of multidimensional property rights may emerge.[86] Thus, it may be said that strict adherence to this principle is not observed in all circumstances.[87]

The Georgian legislature has largely implemented the principle of *superficies solo cedit* by adopting the concept of the 'essential component' of a thing.[88] However, the adoption of this principle in the post-Soviet space was fraught with numerous challenges, primarily because Soviet law did not permit ownership rights over land plots, but it did recognise ownership rights over buildings.[89] The Law of Georgia on the Privatisation of State Property did not regulate the privatisation of land plots,[90] except for agricultural land,[91] thereby preventing the establishment of a single owner in cases where buildings were alienated by the state.[92]

The currently effective Law of Georgia on the Public Registry[93] largely reiterates the provisions of the earlier Law on the Registration of Rights to Immovable Property.[94] However, in the area of privatisation, the 2010 Law on State Property[95] established rules for the privatisation of immovable property (including land plots not designated for agricultural use). Significantly, the Law on State Property did not establish prerequisites for the registration of a building as a separate object under the legal title. Despite this, there are still instances in Georgia in which buildings are registered separately when the state privatises land. This contradicts

85 Staudinger et al., 2017, Art. 94 Rn. 3, pp. 85–86.
86 Bouly, 2012, p. 43.
87 Van Der Merwe, 2015, p. 23.
88 Kurzynsky-Singer and Zarandia, 2014, pp. 131 et seq.
89 Gerasin, 2010, p. 49.
90 Law of Georgia of 1997 on the Privatisation of State Property.
91 The special law enacted regarding this issue: Law of Georgia of 1996 on the Ownership of Agricultural Land.
92 Lazareishvili, 2003, pp. 21 et seq.
93 Law of Georgia of 2008 on the Public Registry.
94 Specifically, Art. 2.a) of the above law defines immovable property to include a land plot with or without a structure thereon, a structure (under construction, built, or demolished), a unit within a structure, and a linear structure.
95 Law of Georgia of 2010 on State Property.

Article 150(1) of the Civil Code of Georgia, which states that, in civil commerce, a building is regarded as an essential component of the land.[96] This situation is problematic, as it may result in a case where, following the privatisation of a land plot, the new landowner demands recognition of ownership over the building already registered in the name of another person.

It is also notable that, according to subparagraph 'e' of paragraph 2 of the Law of Georgia on the Recognition of Ownership Rights on Land Plots in the Possession (Use) of Natural Persons and Legal Entities of Private Law,[97] an interested person includes '... a person who, in accordance with the procedure established by Georgian legislation, has acquired/obtained ownership rights over a building or structure located on a state-owned non-agricultural land plot'. This once again indicates that in legal practice, the legal status of a land plot and that of the building situated on it often do not coincide.

It is also significant that in other instances of immovable property transactions, judicial practice considers a building (structure) as an essential component of the land. For example, on 11 December 2007[98] the Supreme Court of Georgia partially upheld a cassation appeal, reasoning that the appellate court failed to render a decision on the ownership of the land plot where the residential house was located, despite awarding part of the residential house to one party. In the view of the Supreme Court, this violated the requirements of Article 150 of the Civil Code of Georgia.

■ *2.5. Principle of Specificity and Principle of Speciality*

The principle of specificity implies that an agreement regarding a property right, owing to its absolute effect towards any third party, must be concluded with clearly defined content. This ensures that third parties can determine precisely the nature of the right in question, thus eliminating any ambiguity regarding the scope of property rights.[99] Accordingly, the principle requires a clear identification of the property over which the parties intend to establish the property right.[100] Moreover, based on this principle, the acquisition or establishment of a property right must involve the precise specification of which item belongs to which person. As a rule, specificity must exist at the moment of contract conclusion. Any individual aware of the agreement should be able to determine with certainty which items are to be transferred. This requirement is considered fulfilled, for instance, when a husband donates all household goods in the home to his wife.[101]

96 Kurzynsky-Singer and Zarandia, 2014, pp. 131 et seq.
97 Law of Georgia of 2007.
98 The Supreme Court of Georgia, No. AS 274-604-07, 11.12.2007.
99 Wolf and Wellenhofer, 2018, p. 30.
100 Shotadze, 2014, p. 31.
101 Kropholler, 2014, p. 700.

When dealing with intangible properties, the principle of specificity functions differently; identification is achieved through a description and valuation of the right in the relevant constitutive document.[102]

■ *2.6. The Right to Follow (Droit de Suite) and the Principle of Priority*

A defining feature of property rights is the *right to follow* (Droit de suite): The legal protection of property rights is reinforced by the fact that they remain effective even against new owners in the event of a transfer.[103] Property rights follow the object regardless of whose possession it is transferred to, and changes in parties do not terminate legal relationships.

Traditionally, obligatory rights are characterised by their relative nature, whereas property rights are absolute in the sense of their absolute protection through vindication claims. The distinction lies in the fact that relative rights do not bind third parties, affecting only contractual parties.[104] By contrast, property rights are attached to the object itself, wherever it may be located. For example, a person with ownership rights may follow and reclaim the object from any third party in possession of it.[105]

The principle of priority means that a person holding a property right has a superior claim to the object compared to rights that arise later. As the Roman Emperor Caracalla put it, *Prior tempore, potior iure* – 'first in time, stronger in right'.[106] This means that, in the case of a dispute, temporal precedence establishes priority. For example, in the context of immovable property, the party that first registers its rights is granted stronger legal protection.[107] This Roman principle of 'first in time' has been adopted by many continental European legal systems.[108] While primarily relevant to security rights, it is also considered a general feature of property rights: the party that first acquires the property rights has precedence over any subsequent rights holder.

The *follow-the-thing* principle is primarily associated with property law: Although similar tendencies exist in the law of obligations,[109] this characteristic remains a distinctive feature of property law and should be analysed in comparison with obligatory rights.

102 Shotadze, 2014, p. 31.
103 Wolf and Wellenhofer, 2018, p. 2.
104 These rights are also occasionally referred to as relative rights, Vacheshvili, 2010, p. 186.
105 Van Erp, 2012, p. 42.
106 De Hoog, 2016, p. 41.
107 Lapachi, 2013, p. 71.
108 De Hoog, 2016, p. 42.
109 Zoidze, 2003b, p. 8.

■ *2.7. Principles of Property Transfer and the Choice of Georgian Law*

2.7.1. The Principles of Separation and Abstraction

The abstraction principle is a hallmark of German law, intended to protect legal transactions. It posits that a defect in the obligatory legal agreement does not affect the transfer of ownership. The prerequisite for abstraction is the separation (*Trennungsprinzip*) of obligatory and dispositive agreements. A dispositive agreement refers to the parties' intent to transfer ownership. According to the abstraction principle, the transfer of ownership is not contingent on the validity of the underlying obligatory contract (e.g., a sale), although such a contract provides a legal cause (causa) for the dispositive agreement. Even if the obligatory agreement is invalid, ownership is still transferred, albeit without a lawful basis, and the transferor may claim restitution under unjust enrichment rules.[110]

If the seller transfers ownership to a third party, that third party becomes the rightful owner, even if they knew, or ought to have known, of the contract's defect.[111]

Although the abstraction principle was considered as a possible component of future property laws during the drafting of the Georgian Civil Code,[112] it was ultimately rejected.[113] The prevailing view in the Georgian doctrine argues that the principle artificially fragments an otherwise unified legal transaction into several components of legal significance, thereby complicating its application.[114] It was seen more as a theoretical construct than a practical tool beneficial to legal circulation, and was believed to contribute to confusion rather than clarity.[115]

2.7.2. The Principle of Unity

As an alternative to the separation and abstraction principles, the 'principle of unity' has been considered in Georgian legal scholarship.[116] This principle does not separate legal transactions into obligatory and dispositive components. Here, ownership is transferred directly through obligatory agreement, and under some variations of this model, no further action is required for the transfer (i.e., a consensual system of transfer). Ownership is passed to the buyer when an obligatory

110 Kurzynsky-Singer and Zarandia, 2014, pp. 119 et seq.
111 On the practical differences between these two systems, Wieling, 2001, p. 301.
112 Chanturia, 1994, p. 241.
113 Zoidze, 2003b, p. 10; Dzlierishvili, 2010, p. 34; Jorbenadze, 2016, pp. 254 et seq.
114 It should be noted that assignment of a claim is an abstract transaction and is not dependent on the legal ground (causa), Zoidze, 2003a, p. 193; Chanturia, 2011, pp. 310 et seq.; Chechelashvili, 2006, p. 238.
115 Zoidze, 2003a, p. 147; Zoidze, 2005, p. 222; Kurzynsky-Singer and Zarandia, 2014, pp. 119 et seq.
116 Kurzynsky-Singer and Zarandia, 2014, pp. 123 et seq.

agreement is concluded.[117] However, this principle was not implemented in Georgian property law. The drafters of the Civil Code believed that although the abstraction principle complicates property transfers, the consensual model overly simplifies them, placing excessive risk on the buyer, who becomes the owner from the moment of agreement.[118]

2.7.3. The Causal System of Traditio

The Georgian legislature has adopted a mixed model based on the principles of *titulus* and *modus*. In this model, ownership is transferred on the basis of an obligatory agreement closely linked to actual delivery. Thus, Georgia retained, to some extent, the *traditio* system that had existed during the Soviet era.[119]

According to Article 186(1) of the Georgian Civil Code, for the transfer of ownership over a movable item, the current owner must transfer the item to the acquirer based on a valid right. Accordingly, the procedure for transferring ownership of a movable item requires valid legal grounds indicating the adoption of a causal model.[120] Under this system, if the obligatory agreement is invalid, ownership is not transferred.

3. Conclusion

The process of legal transformation, which continues in Georgia and many other post-Soviet countries, entails a shift from state-oriented principles toward a market economy and private law structures.

It should also be noted that the reception of German property law in Georgia initially addressed fundamental regulatory structures, whereas many of the detailed provisions in German law remained outside the scope of regulation. In some cases, this altered the balance of interests embedded in the German model and gave Georgian law its distinctive characteristics. Examples include a broader understanding of the concept of property in Georgian law and a model of property transfer, which differs from that of the German legal system.

Georgian law rejected Soviet legal institutions, including forms of ownership, through legislative reforms and judicial practices. Similarly, during reception, the commission responsible for drafting the Civil Code declined to adopt the Soviet legal constructs of operational management and economic administration.

117 Chanturia, 2001, p. 155. This model of transfer of ownership appears in French and Scandinavian legal systems, Ibid., p. 192.
118 Zoidze, 2003a, p. 148.
119 Ioffe, 2004, p. 409.
120 Kurzynsky-Singer and Zarandia, 2014, pp. 121 et seq.

The Georgian Civil Code has been amended numerous times since its adoption. For instance, changes in the sale of immovable property have rendered notarisation non-mandatory. Additionally, amendments to the law on the security of claims altered the balance between creditors and debtors, primarily in favour of improving the creditor's (mortgagee's) position. It is difficult to predict the future direction of Georgian law – whether it will further diverge from the German model, which it creatively adopts because of frequent legislative changes. However, Georgian law still needs to seek its own path and develop independent solutions to various legal issues.

It is also noteworthy that 28 years after the adoption of the Civil Code of Georgia, despite the aforementioned legislative amendments, the fundamental principles and essential components of the Civil Code remain structurally unchanged. In general, civil codifications are to be regarded as long-term societal frameworks which simultaneously serve as a foundation for the legal system.[121] It is important to recognise that law does not evolve solely through legislative changes. In this respect, judges play a unique role in developing the law through judicial practice. Legal principles also play a significant role in this process. Their importance lies in the guidance that they provide, which is essential for the interpretation of legal norms. However, in practice, courts often rely on the literal text of the law when interpreting norms and tend to favour a formal approach to interpretation over one based on legal principles.[122]

In contrast, it is crucial that judicial law occasionally rectifies legislative shortcomings through the application of legal principles, thereby developing the law through interpretation grounded in those principles and the system of values embedded in the legal order itself. In the modern context, court decisions gradually and incrementally construct legal doctrines and frameworks that complement, enrich and often refine legislative creations. In this regard, legal principles play a particularly pivotal role.

121 Knieper, 2005, p. 54.
122 Schramm, 2010, pp. 78 et seq.

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