Chapter VI

Interpretation of Fundamental Rights in Serbia

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1. Introduction: An overview of the status and powers of the Constitutional Court

The Constitutional Court of Serbia is part of the European continental system of constitutional justice, whose beginnings trace back to the Constitutional Court of Austria (*Verfassungsgerichtshof, VfGH*), established in 1920. That system presumes the existence of a specific public body (centralized control of constitutionality), a constitutional court, or a constitutional council (*Le Conseil constitutionnel* in France), with the main power to review the constitutionality of legal acts. The constitutional court undertakes the review of constitutionality of a legal act (law) regardless of whether it should be applied in a particular judicial proceeding (abstract dispute on constitutionality). In the older dated American system of judicial review, there is no such specific body as a constitutional court; rather, constitutional disputes are settled by ordinary courts (decentralized control of constitutionality). In that system, the constitutionality of a law is reviewed in a concrete constitutional dispute, where the law to be applied in a concrete judicial proceeding is subject to validation.[1]

In Serbia, as a federal unit of former Yugoslavia, constitutional justice has been in place since 1963, but the system of constitutional review of legislation of socialist constitutionality conceptually developed at that time had rarely found

1 See: Marković, 2015, pp. 543–551.

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a law unconstitutional.[2] The 1990 Constitution of Serbia reinstated a system of division of powers and of multiple political parties, while vesting in the Constitutional Court 'the protection of constitutionality, as well as the protection of legality, in accordance with the Constitution' (Art. 9). However, even with the constitutional guarantees of independence, such as the permanence of the judicial function, the work of the Constitutional Court had been under some degree of political control by the ruling political party. Its work in that period has been criticized for adherence to the principle of political appropriateness, which practice had, to some extent, undermined constitutionality and democracy, the rule of law, division of power, independence of the courts, and freedoms and rights of citizens.[3]

The Serbian Constitutional Court under the 2006 Constitution fulfills almost all the legal conditions of the role of a guardian of constitutionality and legality. The Constitution defines it as an 'autonomous and independent state body, which shall protect constitutionality and legality and human and minority rights and freedoms' (Art. 166). Almost two decades later, however, it cannot be stated that it has fully secured the protection of human rights by way of constitutional complaint, although it has been achieving continued progress in this area. It is particularly susceptible to criticism regarding its power to review constitutionality and legality, because it failed to act with sufficient courage in dealing with cases with significant political weight (the Constitutional Court's activism there is modest). For this reason, the level of reputation, authority, and citizens' confidence in the Constitutional Court, which must be an uncompromising guardian of the Constitution, is still inadequate.

Deciding on important constitutional matters, which always carries political weight (from deciding on the 'Brussel's Agreement' of 2013 or 'pension cuts' to the review of constitutionality of the state of emergency during the COVID-19 epidemic),[4] seems to have been motivated by the desire to avoid confrontation with the political government. The Constitutional Court had failed to oppose the dominant political factor instead of working to build itself, through its independence in decision-making, into an institution important in the political system.[5] Hence the answer is still pending as to the question of the role, functioning, and decision-making of the Constitutional Court—Is judicial activism an integral part of the constitutional judicial function that the Constitutional Court uses to fight for its

2 Slavnić, 2003, p. 241. During the effective period of the 1963 Constitution of SR Serbia, not a single decision was rendered finding a law unconstitutional; the system never became operational. From the 1974 Constitution of SR Serbia up to 2003, a total of 74 decisions were rendered (39 under the 1974 Constitution) finding non-compliance of laws with the Constitution. *Ibid*., pp. 240–241.

3 Vučetić, 1995, p. 215.

4 About some of the most important Constitutional Court decisions, see: Papić, Djerić, 2016, pp. 24–48.

5 Tripković, 2013, p. 761.

own position, or are its efforts directed toward the protection of the Constitution and its values?[6]

Looking into the numbers, the Constitutional Court with its 15 judges—experienced and prominent lawyers having a fixed term of office of nine years (more than twice as long as the mandate of members of Parliament) and enjoying immunity—could and would have to respond to such broad powers that it has.

Of its powers, the one that stands out in terms of scope is deciding on the constitutional complaints, and in terms of broader social importance, the constitutional review of laws and other acts producing significant political consequences undoubtedly takes center stage. But one must not overlook the problem of justification of constitutional review nor its limits in political issues (acts), because the Constitutional Court could usurp the democratic process and the separation of powers.[7]

Here lies the reason why moral standing (integrity) and dignity of the Constitutional Court judges, as well as their inviolability (immunity) and objectivity (impartiality), are more relevant than in the political branches of power. These qualities would contribute to the citizens accepting the Constitutional Court as a guardian of the Constitution that enjoys the highest reputation and whose decisions are undeniably enforced.

Not only did the 2006 Constitution significantly increase the number of judges (from 9 to 15), but it also broadened the powers of the Constitutional Court and provided additional guarantees of independence and autonomy. Of equal importance is that the Constitutional Court was separated from all other branches of power, even the judicial. It can be said that this independent authority itself constitutes a separate branch, the constitutional judicial one. The influence of authorities from other branches on the Constitutional Court is, therefore, mostly exerted in the election of constitutional judges. Influence over the Constitutional Court can also be achieved by delaying the election of missing judges. Currently, of a maximum 15 judges, the Constitutional Court is working with 13. Also, at the time of formation of the Constitutional Court in accordance with the 2006 Constitution, the Court had worked with only 10 judges. The lack of engagement of the political powers in fulfilling these empty seats is a reflection of their relationship with this institution.

The same, however, cannot be concluded after an analysis of the Court's case law, particularly bearing in mind the decisions in the mentioned cases with significant political weight. On the other hand, the Constitutional Court has become not only the crucial protector of constitutional rights and freedoms by ruling on

6 Nenadić, 2014, pp. 81–82.

7 The judicial review of constitutionality of legislative and executive acts envisaged by the rule of law involves distinguishing between legal and 'political' matters—it reflects the contrasting functions of different state bodies and limits the powers of the court (Constitutional court, *note by S.O.*). See: Allan, 2005, p. 161.

the constitutional complaints, but also the authority that applies European legal standards, referring (almost without exception) to the jurisprudence of the European Court of Human Rights (ECtHR). Hence, the relationship with the ECtHR constitutes one key element in assessing the status of the Constitutional Court and its performance.

According to the Constitutional Court Act, the work of the Constitutional Court is public. In particular, the Constitutional Court publishes its decisions and holds public debates and hearings. In December 2013, the Court adopted new Rules of Procedure of the Constitutional Court, which, in accordance with the amended Constitutional Court Act, do not provide for the presence of the media at its regular sessions. There are differences of opinion among experts on this matter. While some claim that the public does not have a place when the judges contemplate disputed constitutional issues, others view this as unacceptable from the standpoint of securing the public nature of the Constitutional Court's work, as set forth by the Constitution. No one questioned that votes should be cast in camera.[8]

1.1. Jurisdiction

The Constitutional Court draws powers from the Constitution, and they are mostly grouped into a single article (167). Additionally, the Constitution allows it to perform other constitutionally and legally mandated duties and even be the initiator of laws (Art. 167, para. 2, item 6 of the Constitution).[9]

Two of the Constitutional Court's powers can be singled out: the review of constitutionality of laws and legality of regulations, as a core competence of constitutional courts in general, the other being the adjudication of constitutional complaints, chosen due to their frequency and the importance of human rights protection. In these cases, the Constitutional Court refers, as precedents, to the concrete ECtHR decisions and, incomparably less frequently, to those of the European Court of Justice (ECJ).

The constitutionality and legality review forms the basis of the legal order as it protects the systemic rule that lower-level regulations must be consistent with higher-level ones. With this power of the Constitutional Court, the hierarchical order of legal acts is established and maintained. The Constitution and generally recognized rules of international law rank highest in the constitutional system of Serbia, followed by the ratified international treaties, then laws, and below them the statutes, decrees, decisions, and all other regulations of general application.

8 Papić, Djerić, 2016, pp. 20–22.

9 Thus, the Constitutional Court, by law, 'notifies the National Assembly of the situation and problems of exercising constitutionality and legality in Serbia, provides opinions, and indicates the need for adopting and revising laws and undertaking other measures for the protection of constitutionality and legality' (Art. 105 of the Constitutional Court Act, *Official Gazette of RS*, No. 109/2007 and other).

The Constitutional Court can assess the constitutionality and legality of both the acts currently in force (posterior constitutionality review) and those that ceased to be effective. The constitutionality of laws (not also of other acts) can be assessed even earlier—after their being voted for in the National Assembly but before being promulgated (prior constitutional review) (Arts. 168–169 of the Constitution). All these constitutional disputes are 'abstract', meaning that the authorized subjects can institute them regardless of whether the respective general act should be applied in a particular case. On the other hand, a concrete constitutional dispute, although legally possible, does not exist in practice.[10]

One important question should be raised about this competence—Is it too broad, given that all general acts fall subject to constitutionality and legality review? Is it in fact relevance to the protection of the legal system that the Court assesses some rulebook of a local public utility enterprise? Or should that level of decision-making be delegated to another body, the administrative court, for example.[11]

Deciding on constitutional complaints (Art. 170 of the Constitution), by contrast to assessing constitutionality and legality, means a constitutional judicial review of individual acts. From an ultimate legal means of human rights protection, the constitutional complaint has become one type of 'ordinary legal remedy' against court judgments. By upholding a constitutional complaint, the Constitutional Court invalidates the judgment rendered by the court of the last instance.

The subjects of constitutional complaints are most often judgments violating the human rights guaranteed by the Constitution and the European Convention on Human Rights (ECHR). It is worth noting that this protection would never have even existed (after three years of practice, 2008–2011) if the Constitutional Court had not, on its own initiative, declared unconstitutional the legislative amendments intended to make court decisions exempt from review.[12] Having thus remained subject to constitutional judicial review, the court decisions violating fundamental human rights were the factor contributing most to the Constitutional Court practically becoming a general jurisdiction court of the last instance.[13]

10 The judge has the right to pause a trial and institute the proceedings for the review of constitutionality of the law that is to be applied in the trial (a concrete dispute on constitutionality, incidental review of constitutionality), but it is not being practised.

11 In 2020, in the total caseload, there were 414 such cases. See: *Overview of the Work of the Constitutional Court in 2020*, pp. 25–30. Available at: http://www.ustavni.sud.rs/Storage/Global/Documents/Misc/%D0%9F%D1%80%D0%B5%D0%B3%D0%BB%D0%B5%D0%B4_2020.pdf (Accessed: 6 May 2021).

12 The Act amending the Constitutional Court Act (2011) was declared unconstitutional in the part 'except for a court decision', by the Constitutional Court's Decision No. IU ž-97/2012.

13 In the total number of newly formed cases in 2020, there are 13,164 cases of constitutional complaints, and 194 cases concerning other matters from the Constitutional Court's scope of jurisdiction. In the total caseload in 2020, there were 34,702 cases of constitutional complaints, of which 12,056 were decided (62.19% of these were solved by rejection). *Overview of the Work of the Constitutional Court in 2020*, pp. 4, 40.

A constitutional complaint can be lodged against the individual acts or actions of state authorities and organizations entrusted with public authorities. Reasons for its submission include infringement of a human right guaranteed by the Constitution, provided that other remedies have been exhausted or have not existed.

In addition to constitutional complaints, the Constitutional Court also decides other, complaint to the Constitutional Court (*žalba Ustavnom sudu*) filed by natural or legal persons. Judges, public prosecutors, and deputy public prosecutors have the right to appeal to the Constitutional Court against decisions on termination of office (this appeal excludes the possibility of lodging a constitutional complaint, which means that they are practically equal in terms of effect).[14] A selected candidate for a deputy in the National Assembly whose mandate has not been confirmed by the Assembly also has the right of appeal to the Constitutional Court (this appeal, however, does not exclude the possibility of also lodging a constitutional complaint). Autonomous provinces and local self-governments have the right to file a special appeal to the Constitutional Court for the protection of their constitutional and legal rights (Arts. 148 (2), 161 (4), 187 (1), and 193 (1) of the Constitution).

A competence typically having a political weight and a potential to cause political consequences is the participation of the Constitutional Court in the procedure for the dismissal of the President of the Republic.[15] 'The Constitutional Court shall have the obligation to decide on the violation of the Constitution, upon the initiated procedure for dismissal, not later than within 45 days' (Art. 118 of the Constitution). After that, the President of the Republic can be dismissed upon the decision of the National Assembly. The Constitutional Court, therefore, does not decide on the merits; rather, its decision constitutes a prior and mandatory but not also a sufficient requirement for the dismissal of the President of the Republic. To date, this competence has remained unpracticed. However, despite the dismissal procedure never having been put into play, it is concluded that the Constitutional Court's role is inappropriate because it does not decide but gives (a non-binding) opinion.

The Constitutional Court also decides on the prohibition of the activity of political parties (banning of political parties), trade union organizations, or citizens' associations, as well as religious communities. This competence has indeed been exercised, but the Court's practice has not been consistent regarding registered and unregistered organizations. Moreover, there are no clear criteria for banning an

14 In 2020, there were three cases in total. *Ibid.*, p. 36.

15 Here, the role of the constitutional court varies: In Montenegro, it decides whether or not there has been a violation of the Constitution (Art. 97 of the 2007 Constitution); in Russia, it confirms the legality of initiating the impeachment procedure (Art. 93 of the 1993 Constitution); in Italy, it establishes whether he/she has violated the Constitution or committed high treason (Art. 134 of the 1947 Constitution); in Hungary, it conducts the procedure and removes the head of state from office (Art. 13 of the 2011 Constitution). Available at: http://confinder.richmond.edu/ (Accessed: 7 May 2021). See: Dmičić, Pilipović, 2013, pp. 31–38.

organization.[16] As for banning a political party or a religious community, there had been no proceedings of this type before the Constitutional Court.

The Constitutional Court's competences further include resolving jurisdictional conflicts between the authorities at the same level of government—courts and other state authorities, as well as those between central and non-central authorities, republican, provincial, and local authorities at different levels. The number of these cases in 2020 amounted to 24.[17]

Finally, one Court's competence that stands by merely as a reserve is the resolution of election disputes. For its activation, there is one insurmountable negative requirement—the existence of electoral disputes not falling under the jurisdiction of courts. It is not clear what kind of electoral disputes these might be, and accordingly, this competence 'on paper' should be deleted.[18]

1.2. Constitutional judges

The Constitution of 2006 brought about an increase in the number of constitutional judges to 15 (from 9) and stricter professional requirements—having a minimum of 15 years of experience in practicing law and being a prominent lawyer of at least 40 years of age. The requirement 'prominent lawyer' has no formally specified criteria, which is considered a shortcoming.[19] This notion was left elastic, inexact, and even hollow, while in the judicial selection it should be crucial—only a Constitutional Court with prominent lawyers can protect the Constitution.

The judicial function is not permanent, but the term of office is long—it lasts 9 years, and with the potential re-election possibly a whole 18 years, which does constitute a guarantee of judicial independence. However, the possibility of re-election of judges does not offer the true guarantee of independence, because practice has shown that the first mandate can be used for the purpose of gaining the trust of the political powers and securing a second mandate.

16 See: Petrov, 2011, pp. 133–145. The Constitutional Court, in the decision 'National Front' No. VIIУ-171/2008 (*Official Gazette of RS*, No. 50/2011), established merely that this organisation is a secret society, the actions of which are banned by the letter of the Constitution, and that its registration with the appropriate register and the promotion and dissemination of its goals and ideas are prohibited. The Court has, however, in its Decision No. VIIУ-279/2009 (*Official Gazette of RS*, No. 26/2011), taken the view that registration with the appropriate register constitutes a necessary condition (*conditio sine qua non*) for exercising a constitutional guarantee of a political and any other form of organization, and that, accordingly, no registration means non-existence of the society in the formal and legal sense. Hence, the proposal to ban the 'extreme subgroups' was dismissed.

17 *Overview of the Work of the Constitutional Court in 2020*, p. 31

18 Since the adoption of the 2006 Constitution, the Constitutional Court has on several occasions passed the conclusion rejecting the application for election dispute resolution due to procedural reasons. Resolution of election disputes has *in totum* been transferred to the administrative justice. Stojanović, 2012, p. 37. In 2020, there was one rejected case. *Overview of the Work of the Constitutional Court in 2020*, p. 31.

19 It involves elite lawyers, consistent and brave. See: Petrov, 2013, pp. 46–50.

Another factor contributing to their independence is a 'shared' method of selection (based on the Italian model) by three branches of power: the President of the Republic, the National Assembly, and the Supreme Court of Cassation, each electing and appointing five judges.[20] However, this model of judicial selection can lead to the prevalent influence of the executive branch, that is, the Government,[21] notwithstanding that any relationship between the constitutional judge and his/her electing authority would have to terminate upon his/her assumption of the office. This point is also implied in the provision that the electing authority has no right to dismiss 'its own' judge, but the National Assembly can do so once the relevant legal requirements are met (Art. 174 of the Constitution).

Although this kind of appointment mechanism and the one-time renewable term have been established to strengthen political insulation, the non-transparent selection procedure has allowed Serbian politicians to discard the selection criteria. Instead of selecting prominent lawyers with a proven record of professional quality and integrity, politicians appointed mostly poorly qualified but 'amicable' judges who would not put the politicians' short-term interests at risk.[22] Probably also because of that, there are periods when the Constitutional Court does not operate at full membership.

Constitutional Court judges all have equal legal status, whereas the President of the Court (and the Vice-President in his/her absence) has the right to represent the Court, manage the work of the Court, etc.[23] The judge is a member of councils (Small Council and Grand Chamber) and has a leading role in the proceeding wherein he acts as a judge-rapporteur. He/she then conducts the proceeding and proposes a draft decision to other judges, which is adopted by simple majority vote. The practice has shown that the judge-rapporteur has a significant influence on the final decision-making, that is, that his/her proposal is in most cases accepted. As the cases, particularly the 'big' ones (politically and legally relevant), are decided by outvoting, judges remaining in the minority have the right to have their separate dissenting (but also concurring) opinion published along with the decision.

20 Marković, 2006, p. 55.

21 Thus, the 'government majority' in the National Assembly can formally propose for the Constitutional Court judges all 10 potential candidates, 5 of which are appointed by the President of the Republic; the Government also influences the selection of members of the High Judicial Council and the State Prosecutorial Council (the Assembly, read the government majority, selects eight elected members, including the competent minister), each of which bodies also propose 10 candidates for judges to the Supreme Court of Cassation, which suggests that two thirds of the Constitutional Court judges can in fact be appointed at the will of the Government. If we add to this fact that another authority from the executive branch, the President of the Republic, also proposes 10 candidates for the Constitutional Court judges, of which the National Assembly (once again, the pro-government majority) elects 5, we can conclude that the executive branch's decisive influence on the recruitment of staff in the Constitutional Court is inevitable. This is a line of politicization and derogation of the independence and autonomy of the Constitutional Court (at least while the political majority that participated in the judicial selection is in power), which this authority so modestly enjoyed under the 1990 Constitution.

22 Beširević, 2014, p. 973.

23 See Art. 8 of the Rules of Procedure of the Constitutional Court (*Official Gazette of RS*, No. 103/13).

Constitutional judges are not allocated cases by the type of constitutional-legal matter (as practiced in some constitutional courts),[24] neither do they administer merely some of the specific proceedings but are assigned with cases in order of their receipt by the court ('natural judge').[25] Proceedings have certain particularities related to the case—for example, proceeding on the conflict of jurisdiction differs from that on the constitutional complaint. Proceedings before the Constitutional Court can be instituted on a proposal of authorized proponents, whereas the constitutionality and legality review may also be instituted on an initiative by any legal or natural person. Public hearing, as a mandatory phase of the proceedings, is a common feature in some constitutional disputes (constitutionality and legality review, election disputes, prohibition of a political party, trade union organization, citizens' association, or a religious community), while it is optional in others.

Constitutional Court proceedings are more specifically regulated by the Constitutional Court Act and the Rules of Procedure of the Constitutional Court. The proceeding can be divided into preliminary procedure (examination of admissibility) and main (merits) procedure and it ends by a decision of three judges (Small Council),[26] eight judges (Grand Chamber), or all judges (Constitutional Court Session). The decisions of the Small Council and Grand Chamber are adopted only unanimously, while those of the Constitutional Court Sessions require at least eight votes for adoption. Exceptionally, at least 10 judges (two thirds) must vote for the self-initiation of the constitutionality and legality review procedure. The Constitutional Court's decisions are universally binding, enforceable, and final. The finality of the decision has, however, been relativized by recognition of the competence of the European Court of Human Rights, which can, upon application, render a decision that would amend even the Constitutional Court's decision in respect of a constitutional complaint alleging violation of human rights.

Like other constitutional courts, the Constitutional Court of Serbia would be assuming the role of a temporary 'positive lawmaker' based on the authority to determine the manner of enforcement of its decisions (Art. 104 of the Act).

24 The Federal Constitutional Court of Germany has two councils (senates), for constitutional disputes and for fundamental rights (Available at: http://www.bundesverfassungsgericht.de/EN/Richter/richter_node.html;jsessionid=578B3159C2EAE4DC688A25247B2B727D.2_cid370 (Accessed: 8 May 2021), Austrian Constitutional Court operates in the form of: A Great Assembly (plenum), consisting of the President of the Court, the Vice-President, and 12 judges; and a Small Assembly, for matters of minor importance, which consists of the President, Vice-President, and four judges (Available at: https://www.vfgh.gv.at/verfassungsgerichtshof/organisation/the_courts_bench.en.html, (Accessed: 8 May 2021).

25 Three committees are formed, though, each consisting of three judges: civil law committee, criminal law committee, and administrative law committee, which give opinions on the judge-rapporteur's proposal upon the received constitutional complaint from the specific legal area (Arts. 37–38 of the Rules of Procedure of the Constitutional Court).

26 About arguments for unconstitutionality of the Small Council's final decision-making on constitutional complains, see: Marković-Bajalović, 2017.

The issues concerning the Constitutional Court itself can be rectified by a legal norm when it comes to the composition and status of judges, jurisdiction, forms of work, and procedure. However, this possibility does not suffice for reaching the desired level of independence and reputation of the constitutional judicial power, as it would lack the unquestioned acceptance of its decisions by all the authorities, other political factors, the public, and citizens. It is only when its decisions are undeniably accepted, even by those power players whose interests they do not serve, that a social environment will be created wherein the Constitutional Court will enjoy a high reputation, which, for the 30 years of the multi-party system, has not been the case.

1.3. Relationship with European law and institutions

As an authority constitutionally defined as a human rights protector, the Constitutional Court also applies international sources of law (generally recognized rules of international law and confirmed international treaties, Art. 194 of the Constitution) protecting human rights. The Constitutional Court is the human rights protection organ in the last instance—in the first instance are courts providing judicial protection in cases of violation of constitutionally guaranteed rights and removing the consequences arising from those violations (Art. 22 of the Constitution). Finally, citizens can refer to the European Court of Human Rights, as an international institution, for 'the protection of their rights and freedoms protected by the Constitution' (Art. 22 of the Constitution). A prerequisite for the application to the ECtHR to be an efficient legal means is that ECtHR judgments are binding on a state. The enforcement of ECtHR judgments is an international obligation of every state that has ratified the Convention, and thus Serbia as well. Notably, the ECtHR may not modify or repeal a domestic court's judgment. It practically establishes that, in a particular case, a violation of some provision of the Convention had occurred and can thus order a just (monetary) satisfaction.[27]

Human and minority rights guaranteed by the Constitution are directly applied, and the Constitutional Court has even extended the scope of protected human rights (beyond the Constitution)—to those that have become part of the legal order by way of ratified international agreements.[28]

The international source most relevant to the human rights protection in Serbia is the European Convention on Human Rights (1950). Like the constitutional provisions on human rights, the Convention is directly applied by Serbian courts, including the Constitutional Court (see Art. 18 of the Constitution). The basis for this practice is found in the definition of Serbia as a state founded on the commitment to European principles and values, the latter being enshrined in the ECtHR decisions, as well as those of the European Court of Justice (ECJ). The adoption of European

27 Popović, 2016, pp. 450–451.

28 Constitutional Court's views in the proceeding for examining and deciding a constitutional complaint, Su No. I—8/11/09, 2 April 2009.

standards is further confirmed in the constitutional norm mandating that constitutional human rights provisions be interpreted, among others, following the practice of international institutions, which primarily includes the jurisprudence of the European Court of Human Rights.

Decisions of the European Court of Human Rights are regarded as part of the Serbian legal order and form an indispensable part of the rule of law. Moreover, there are views that the ECtHR decisions relating to the standards of deprivation of liberty, the right to a fair trial, or the 'hard core' of human rights (Arts. 2–4 and 7 and Art. 4 of Protocol No. 7 to the ECHR) constitute a confirmation of actual political democracy and observance of human rights.[29]

The importance of the ECtHR's judgments and views for the Constitutional Court's practice is immense, extending to a broad array of rights: the rights to life, freedom and security, a fair trial (length of detention, presumption of innocence, and others), respect for private and family life, human dignity and free development of personality, peaceful assembly, property, and others.

The Constitutional Court of Serbia has a long history of reliance on the ECtHR case law.[30] In hundreds of its decisions, the Constitutional Court has referred to the ECtHR jurisprudence. Adjudicating in various types of proceedings (normative review, constitutional complaints, proposals for banning political organizations, appeals by unelected judges) and intervening in the human rights matters (the principle of equality and prohibition of discrimination, civil rights, political rights, procedural rights), the Constitutional Court has applied the Convention as both a source (*res iudicata*) and a means (*res interpretata*). The Court has referred to the ECtHR not only as a matter of obligation, but also whenever it was necessary for filling legal gaps or strengthening its own legal viewpoint.[31] Sometimes, the relationship between ECtHR and Constitutional Court involved sharp communication resulting in the Constitutional Court accepting the position of the ECtHR. For example, the ECtHR began directly awarding full damages for unenforced judgments together with compensation for non-pecuniary damage, thus compelling the Constitutional Court to change its jurisprudence. After that, the ECtHR once again recognized the constitutional complaint as an effective local remedy.[32]

There are authors (Krstić and Marinković) who opine that the use of the European Court's jurisprudence by the Serbian Constitutional Court is twofold. In one set of cases, the Constitutional Court relies on the interpretative force of the ECtHR jurisprudence, whereas in the other, it treats the ECtHR cases as binding. Thus, the latter option comes as close as possible to the doctrine of precedent. It is possible to

29 Kolarić, 2018, p. 55.
30 Djajić, 2018, p. 235. See: Etinski, 2017 (1), Etinski, 2017 (2), Nastić, 2015, Popović, Marinković, 2016.
31 Krstić, Marinković, 2016, p. 271.
32 Djajić, 2018, p. 238.

discern different types of deference to the jurisprudence of the ECtHR by the Constitutional Court that exceeds habitual interpretative reference.[33]

Interestingly, the ECtHR changed its position about whether the constitutional complaint is an effective remedy. Following the first positive decision on a constitutional complaint (of 10 July 2008), the Constitutional Court established violations in several dozens of cases (concerning access to the court, detention, length of proceedings, and other matters relating to the right to a fair trial), which practice contributed to the ECtHR assessing the constitutional complaint as an effective legal remedy (in the case of *Vinčić and others v. Serbia,* 1st December 2009).

This shift in the ECtHR's view of the constitutional complaint as an effective remedy is best reflected in cases concerning non-enforcement of judgments rendered against companies with majority socially-owned capital. In those cases, the Constitutional Court changed its case law directly on the basis of the ECtHR judgments against Serbia. After the first decisions adopting constitutional complaints, the ECtHR emphasized a difference between the constitutional complaint's effectiveness in principle and its actual ineffectiveness in cases concerning the non-enforcement of judgments against companies with majority socially-owned capital (in the case of *Milunović and Čekrlić v. Serbia,* 17th May 2011), concluding accordingly that the constitutional complaint cannot be considered an effective remedy.

In response to this criticism, the Constitutional Court aligned its positions with the European Court's case law. Thus, in a case wherein the complainant sought indemnification for the non-enforcement of a final court judgment against a socially-owned company (Už - 775/2009, as of 19th April 2012), the Constitutional Court found a violation of the complainant's 'right to trial within a reasonable time' and 'the right to the peaceful enjoyment of property' and ordered the State to pay him the sum awarded in the judgment of the municipal court (it cited the ECtHR's positions in the cases of *R. Kačapor and others v. Serbia, Grišević and others v. Serbia,* and *Crnišanin and others v. Serbia*). However, the ECtHR concluded that the Constitutional Court failed to achieve full progress, as it exempted from such practice socially-owned companies undergoing restructuring. In those cases, the constitutional complaint could not have been considered effective.

Finally, in several subsequent cases (Už - 1712/2010 of 21 March 2013, Už - 1645/2010 of 7 March 2013, and Už - 1705/2010 of 9 May 2013), the Constitutional Court adapted its practice in respect of non-enforcement of judgements against socially/state-owned companies in restructuring. Hence, the ECtHR (in the case of *Fereizović v. Serbia,* 26th November 2013) found the Constitutional Court's approach fully harmonized with the relevant jurisprudence, and the constitutional complaint an effective remedy.[34]

Furthermore, the Constitutional Court changed its position about the interpretation of the Constitutional guarantee of the *ne bis in idem* principle (Art. 34(4) of the

33 Djajić, 2018, p. 235.

34 Krstić, Marinković, 2016, pp. 267–273.

Constitution) because the ECtHR relaxed the conditions for finding a violation of the *ne bis in idem* principle. The Constitutional Court accepted the understanding of the *ne bis in idem* principle on the basis of a particular judgment of the ECtHR, which served as the precedent. Specifically, the Constitutional Court opined that the *ne bis in idem* principle would not be breached despite both administrative and criminal punishments for the same act (the case of use of forged traffic documents) because different goals were to be achieved by those two proceedings.[35]

2. The interpretation of fundamental rights in the case law of the Constitutional Court

This part of the chapter will address the case law of the Constitutional Court of Serbia concerning the protection of human rights guaranteed by the Constitution, with a view to gaining an appropriate picture of the quality of human rights protection.

As the basis of this analysis, we will study 30 decisions of the Constitutional Court rendered upon constitutional complaints concerning human rights protection. They involve crucial Constitutional Court decisions that invoke the views from the 'exemplary decisions' rendered by the ECtHR.

This study covered several types of human rights decided by the Constitutional Court upon the received constitutional complaints, including the right to life, right to human dignity and free development of personality, prohibition of torture, right to a limited duration of detention, right to the presumption of innocence, right to a fair trial, right to an effective legal remedy, freedom of movement, prohibition of expulsion, rights of parents, right to respect for private and family life, and right to property. These rights and freedoms derive from different areas of law: criminal and criminal procedure law, civil law, property law, asylum law, family law, and anti-discrimination law.

It is important to emphasize that the Constitutional Court interprets the content of a given human right using the views and interpretations put forward by the ECtHR in its decisions, and it is the most common model of decision-making. Less commonly does the Serbian Constitutional Court invoke the case law of its own, that is, legal interpretations presented in its earlier decisions.

This part of the chapter will first outline the essential elements of the procedure before the Constitutional Court until the rendering of a decision as a final procedural step. Particularities of the procedure before the Constitutional Court are described in line with the norms of the existing Rules of Procedure. It will then, through an analysis of these Constitutional Court decisions, discuss the style characterizing the

35 Djajić, 2018, pp. 235–236.

Court in its decision-making. The decision-making involves assessing the facts and applying relevant law in specific cases.

It can undoubtedly be stated beforehand that the manner of explaining decisions and the style of the Constitutional Court reasoning vary depending on the type of constitutional dispute at issue (be it the review of the constitutionality of a law or deciding on a constitutional complaint). But the conclusion about the nature of the Constitutional Court's reasoning style can only be reached after recognizing the methods applied in its work (procedure) and the decision-making itself.

2.1 The characteristics of the constitutional decision-making and style of reasoning

2.1.1 The normative framework of considering cases and decision-making

The Constitutional Court conducts proceedings on the basis of the provisions of the Constitution, Constitutional Court Act, and the Rules of Procedure, these last being the most detailed.

The work of the Constitutional Court can take the following organizational forms: Session of the Court (all 15 judges), Grand Chamber session (eight judges), and Small Council session (three judges), and there is also a session of a working body of the Court. The President of the Court annually decides on the selection of judges for each council. As for the subject matter of this work, it is important to note that for deciding on constitutional complaints, the Court sets up constitutional complaint committees as standing working bodies. Those committees (in the fields of criminal law, civil law, and administrative law) consider and give opinions on the proposal for a decision of the judge-rapporteur before the merits of a constitutional complaint are decided.

One general characteristic of the Constitutional Court procedure to be noted is the publicity of work, which is ensured by publishing decisions, delivering communications, and in other ways. On issues falling within its jurisdiction, the Court decides at Court Sessions. For purposes of clarifying complex constitutional law matters, the Court may also hold a preparatory session (for which the judge-rapporteur prepares a report on disputed constitutional legal issues). The President of the Court may also convene a consultative meeting to discuss issues relevant to decision-making, to which it invites representatives of public authorities, and scientific and other experts as well.

Court cases are allocated according to the order of their receipt and case type to the judge-rapporteur who conducts the proceedings, and there is also an appointed case administration assistant who provides expert legal assistance to the judge-rapporteur.

Generally, proceedings before the Constitutional Court can have three phases: preliminary proceeding, public hearing, and the Court Session, also including the sessions of the Small Council and the Grand Chamber. The preliminary proceeding

involves examining the accuracy of the submissions, serving the documents, and gathering data and information. Public hearing occurs as a phase merely in some cases (for example, constitutionality and legality review), and it is where the opinions and facts of relevance for case resolution are presented. The President of the Court convenes the Court Session, where the judge-rapporteur first presents his proposal for the decision, which is then deliberated and voted. The decision is adopted by the majority vote of all judges (at least eight), with the possibility for a dissenting judge to deliver a separate opinion, which is published along with the Court decision.

In the proceeding on the constitutional complaint, the judge-rapporteur initially verifies whether the procedural presumptions for the Court to act are met (accurate application form, time limits, etc.) and then prepares a proposal for the decision. The Constitutional Complaints Committee gives its opinion on the judge-rapporteur's proposal. The proposal for the decision on the constitutional complaint, the Committee's opinion, and the associated documents are then delivered to the Court's President for decision-making at the Court Session. Constitutional complaint resolutions are issued in the form of decisions, while dismissals for not meeting the procedural presumptions are in the form of rulings.

The Constitutional Court may also render a partial decision when deciding a case involving multiple issues, of which only some are sufficiently resolved. Additionally, different claims can be decided in a single decision. The Redaction Commission determines the final wording of a decision, which is then signed and served on the parties to the proceeding. The Court may decide to have the decision published in the 'Official Gazette of the Republic of Serbia'. The decision is final, and the Court determines the manner of its enforcement. The Court decision can be subject to reconsideration, on a reasoned request of the President, a judge, or a working body of the Court, before being served. The same subjects can request reconsideration even of a previously taken position of the Court.

2.1.2. The characteristics and style of constitutional reasoning and adjudicating

There is no simple way to give an accurate account of the style that characterizes the constitutional reasoning of the Constitutional Court and its decision-making. Even if it would be possible to give a general assessment of the Court's style, one must always bear in mind that general and broad conclusions are often insufficiently accurate. It is a fact that there will typically be variations in the conduct and style of the Constitutional Court simply because the cases decided are diverse, not belonging to the same type. Thus, a style typical of reasoning and adjudicating constitutional complaints would constitute one separate whole; however, there, too, variations occur, given that the subject matters of the complaints are mutually different (right to privacy and right to property, for example). A completely different reasoning and adjudicating style is exhibited by the Court when it assesses the constitutionality of laws, undertakes other normative controls, or resolves jurisdictional conflict cases.

The Constitutional Court's decision-making style also depends on its position in the constitutional system, or who may address the Court and when. The question of who may address the Constitutional Court comes down, in fact, to who may institute or initiate constitutional court proceedings. Petitioners of different proceedings conducted before the Constitutional Court are determined in the Constitution. The very fact of their being recognized as subjects authorized to institute the proceeding implies that they have a legal interest in doing so. For some constitutional court proceedings, no time limits are imposed regarding their initiation. Thus, in the constitutionality and legality review procedure, the authorized subjects (25 Assembly deputies, state authorities, etc.) are free to institute proceedings before the Constitutional Court by virtue of being assumed to have a legal interest in it. All other parties may file an initiative, which will be accepted either by some of the authorized petitioners or by the Constitutional Court (also an authorized petitioner).

The Constitutional Court has thus received multiple initiatives to institute the review of constitutionality and legality of acts adopted during the COVID-19 epidemic. The initiatives against the Regulation on measures during the state of emergency ('Official Gazette of RS', No. 31/20 and other) and the Regulation on offences in violation of the Order of the Minister of the Interior Restricting and Prohibiting the Movement of Persons in the Territory of the Republic of Serbia ('Official Gazette of RS', No. 39/20) have been accepted and these acts declared partially unconstitutional. Specifically, the provisions of Art. 2 of the Regulation on offences (…) and those of para. 2 of Art. 4d of the Regulation on measures (…) provided that for certain offences for not observing the prohibition of movement, a misdemeanor proceeding may be instituted and completed despite the offender's already having been a subject to a criminal proceeding for a criminal offence comprising the elements of that misdemeanor. The Constitutional Court established that it violated the prohibition from para. 3 of Art. 8 of the Misdemeanor Act, the constitutional and legal principle of *ne bis in idem*, and the International Covenant on Civil and Political Rights and the ECHR (Art. 4 of Protocol No. 7).[36]

To lodge a constitutional complaint, there must, however, exist a legal interest of the submitter in it and several other preconditions satisfied for the complaint to be taken for decision-making. The legal interest requirement, under the Constitutional Court Act, assumes that the complainant's (not another person's) human right has been violated by an individual act or action of an entity exercising public authority. To lodge a constitutional complaint on behalf of another person, one needs a written authorization of that person. The procedural requirement for lodging a constitutional complaint is that all other legal remedies for human rights protection have been exhausted. It follows that the Constitutional Court constitutes the authority deciding in the last instance, which makes its position in the

36 See IUo-45/2020 (28.10.2020).

constitutional system correspond to that of the supreme legal authority that makes the final decision.

Another feature typical of the Constitutional Court's decision-making is that it is not limited by the request of the authorized petitioner (in the constitutionality and legality review procedure) in that, in case of its withdrawal, the Court can continue the procedure. During the procedure, it may decide to suspend further proceeding to give an opportunity to the enacting body of the challenged act to eliminate the noted unconstitutional and unlawful elements (deferred effect of the decision). In addition, in some proceedings, under legal conditions, it can also impose provisional measures. In the course of the procedure, the Constitutional Court can decide to suspend, until it makes its final decision, the enforcement of an individual act adopted based on the regulation the constitutionality of which is being under review (provisional measure). The Court can postpone entry into force of an autonomous province's decision, the constitutionality or legality of which is being assessed (provisional measure). The constitutional complaint, as a rule, does not preclude the application of the act it challenges. However, on the complainant's proposal, the Constitutional Court can suspend the implementation of that act if its further implementation would cause irreparable or considerable harm (provisional measure).[37]

Constitutional complaint decisions on the merits often invoke the views and opinions put forward in ECtHR decisions in their reasoning section, and not so often references to earlier decisions of the Constitutional Court itself. Reasoning statements may not exceed 15 pages (decisions on constitutionality and legality review may be significantly longer). The Constitutional Court has established a practice of consolidating similar applications into a single case, by which it reduced the total number of cases almost by half. Most of the constitutional complaints are dismissed (about 80%), while those judged on the merits usually receive upholding decisions (in three out of four cases). According to the type of case, the constitutional complaints filed most frequently involve the following violations: the right to a fair trial, the right to trial within a reasonable time, the right to property, the right to equal protection, the right to legal remedy, the right to legal certainty, and the right of access to court (more than 90% of the cases).[38]

The Constitutional Court has formed its views and approaches concerning the proceeding on the constitutional complaint. Against an act resolving a constitutional complaint (decision, ruling, conclusion), no legal remedy is allowed, except where the act is grounded on an obvious Court error that cannot be eliminated by a rectification conclusion. This view is complemented by the position that decisions on the compensation of non-pecuniary damages will be reconsidered if Serbia, in respect of the same violations, has a concluded a friendly settlement with the ECtHR. Another view the Court has established is that constitutional complaints protect all human rights guaranteed by the Constitution, regardless of whether they are explicitly

37 See Arts. 54–56, 67, and 86 of the Constitutional Court Act.
38 See Beljanski, 2019, pp. 7–9, Pajvančić, 2019, pp. 37–38.

enumerated in the Constitution or are inherent in the legal order enshrined in the ratified international agreements. A further view is that a constitutional complaint can be lodged against an individual act or action by the bodies of the three branches of power or holders of public authority. A complaint can be lodged by any natural or legal persons, provided that they are holders of the right protected by the constitutional complaint. Other established positions include those on the procedure for examining constitutional complaints, the permissibility of the revision, supplements to the constitutional complaint, and other procedural issues.[39]

Notwithstanding all these considerations, there are views that the efficiency of human rights protection using the constitutional complaint have become questionable given the growing number of unresolved cases. The dynamic of resolving constitutional complaints is slower than the inflow dynamic of such cases.[40]

The extent to which the constitutional complaint has influenced the decision-making style of the Constitutional Court is illustrated in the 'judicial reform' cases wherein the Court virtually overturned the decision of the High Judicial Council on the termination of judicial office. Under this decision, almost 1000 judges (937) were not re-elected to judicial office, and their judgeships were determined to terminate as of 31 December 2009.

The Constitutional Court assessed that regarding all complainants—unelected judges—the same disputed legal issues arose, which rendered it appropriate and rational to consolidate all complainants' case files and decide the submitted complaints in a single decision. The Court upheld the unelected judges' complaints and issued a decision (VIIIU-534/2011) establishing that in the process of deciding on the complainants' objections, the presumption that they met the requirements for election to a permanent judicial function had not been rebutted. It overturned the High Judicial Council decisions and ordered it to have, within 60 days of the receipt of the said Decision, the election of the complainants executed in line with the existing Rules ('Official Gazette of RS', Nos. 35/11 and 90/11). Moreover, before acting upon the Constitutional Court Decision, the High Judicial Council had to determine whether a particular complainant satisfied the statutory criteria for election to judicial office or whether, in respect of a specific complainant, there were grounds to terminate the judicial office by operation of law.

Deciding on constitutional complaints, the Constitutional Court utilizes various arguments and methods of interpretation, perhaps not so numerous and diverse as those of other constitutional courts included in this study. Usually, the methodological starting point of courts, by the very fact of applying positive law, is based on a dogmatic interpretation in which a base is an ordinary (textual) and legal meaning of a certain norm. Similarly, the Constitutional Court draws its arguments for the decision from the dogmatic (normative) meaning of the constitutional norm to be applied in a particular case. Between other methods of interpretations

39 Beljanski, 2019, pp. 5–6.
40 Pajvančić, 2019, p. 39.

in this jurisprudence of the Constitutional Court, we can point out interpretations of practice of international courts.

When it comes to the Constitutional Court's attitude toward ECtHR decisions, this basic methodology has been modified to some extent and is not so autonomous. Generally, once it applies the ECtHR jurisprudence in a particular case, it adheres to it in all future cases with similar facts. Nevertheless, this general consideration can be examined in more detail by distinguishing between three standards.

The Constitutional Court fully accepts the ECtHR case law, as *res iudicata*, not only in respect of requirements the constitutional complaint must meet to be an effective remedy, but also in other types of proceedings upon constitutional complaints when it decides on the merits. The Court applies the ECtHR jurisprudence in procedural issues, as well as *res interpretata*, but has not been consistent in this. On the one hand, it invokes the ECtHR case law to fill legal gaps and strengthen its arguments, and on the other hand, there are cases where references to the ECtHR judgments are purely 'decorative', unrelated to relevant legal issues in a particular case. The third standard of the Constitutional Court would involve non-application of the ECtHR approaches, whether those judgments concern Serbia or other states.[41]

This third standard is rarely applied, one of its forms being the departure from previously adopted ECtHR views. Thus, in a case concerning the protection of the right to property, No. Už-5214/2016, the Constitutional Court abandoned its previous practice, which was based on the ECtHR standards to be met to allow for the property (ownership) to be seized—that seizure is prescribed by law, that there is a reasonable and necessary public interest to deprive property rights, and that in depriving property rights, a fair balance is struck between the public interest and the interest of the individual whose property is being seized, taking into account the purpose and weight of the measure imposed (Už-367/2016). When making a decision, the Constitutional Court abandoned these standards and introduced new ones concerning 'the implementation of monetary and exchange rate policies, and thus the provision of the financial stability of the Republic of Serbia, public order protection or prevention against its breaches, and influencing the offender to never commit an offence again' (Už-5214/2016).

2.2.1. Grammatical (textual) interpretation (1)

Grammatical (textual) interpretation is one of the most common methods in the work of the courts and likewise of the Constitutional Court. We find it in almost all the studied Constitutional Court judgments. It has various forms that we find in the work of the Constitutional Court.

1/A/a. The interpretation based on an ordinary meaning, a *semantic interpretation,* starts from the general sense of a particular term in a language. The meaning

41 Marinković, 2019, p. 55.

of some legal term from the constitution is more closely determined or defined using the general (ordinary) sense of the word contained in the constitutional norm.

Thus, in the case of Už-2356/2009, a positive definition of detention is determined as a constitutional and criminal procedural institution deriving from the notion of liberty and its general meaning. '(…) detention constitutes *a particularly delicate measure of depriving a man of personal liberty* until the final judicial decision on guilt is rendered'.

In the same case, the Court also gives a negative definition of detention—what detention does not and must not constitute, deriving it from the usual meaning of the term punishment for existence. 'Detention is not a criminal sanction and *for a detainee it must not turn into a punishment*'.

In the case of Už-1823/2017, the Constitutional Court interprets the constitutionally guaranteed right to freedom (Art. 27 of the Constitution).

> 'The Constitutional Court points out that the right to freedom is one of the fundamental personal rights guaranteed by the Constitution; that the right to freedom *means physical freedom of an individual and guarantees protection in respect of all types of deprivations of liberty*'.

1/B/a. The legal professional (dogmatic) interpretation, a *simple conceptual dogmatic interpretation* of the Constitution, interprets particular legal terms in a way widely accepted by the legal community. This is the way the Constitutional Court, in its Decision No. Už-6300/2017, interprets the constitutional term 'protection of the family', or specifically, how one part of that protection—'protection against domestic violence', is exercised.

> '(…) given the particular importance of the protection the family enjoys under the Constitution (…), *primary protection against domestic violence is provided through civil law, while protection by criminal law is subsidiary,* particularly owing to the nature of the marital and family relations that belong to the private sphere of an individual, and thus render criminal law limited only to cases where other types of protection do not suffice'.

In the case of Už-1823/2017, the Constitutional Court interprets the right to inviolability of physical and mental integrity (Art. 25 of the Constitution) as an absolute right (*jus cogens*).

> 'The Constitutional Court initially finds that the right to inviolability of physical and mental integrity (…) constitutes an absolute right (*jus cogens*) and that by its substantive aspect, this right represents one of the fundamental values of a democratic society'.

1/B/b. The interpretation on the basis of legal principles enshrined in the Constitution means, in a practical sense, determining a more specific legal meaning of an abstract principle, be it by the Constitutional Court determining either what it is, namely, what it encompasses, or what it does not encompass. This closer determination is not only valid in the circumstances of a particular case but also applies to all other cases of human rights protection, regardless of their different facts and circumstances.

The Constitution of Serbia contains principles of law, mainly in the matter of criminal law (*res iudicata, in dubio pro reo, nullum crimen*, *nulla poena sine lege,* etc.). The interpretation on the basis of legal principles was identified in few of the judgments analyzed. In the case of Už-5057/2015, the Constitutional Court decided whether the principle of *ne bis in idem* was violated, while also applying in its argumentation the principle of *res iudicata*.

> 'Starting from the position that Art. 34 (4) of the Constitution aims to bar repetition of the proceedings ended by a decision having acquired the status *of res iudicata* and that the Constitutional Court established that the complainant had his charges initially dismissed, and, accordingly, that after the judgment of the Basic Court (…) had become final he was declared guilty of the crime referring to the same behavior and including essentially the same facts, the Constitutional Court concluded that the disputed judgments led to violation of the principle of *ne bis in idem*'.

In the case of Už-7676/2015, the Constitutional Court interprets the basic principle and starting point of human rights protection in all democratic constitutions—the prohibition of discrimination.

> 'The Constitutional Court notes that the provision of Art. 21 of the Constitution (prohibition of discrimination) does not guarantee any particular right or freedom but establishes the *prohibition of a discrimination principle,* under which all guaranteed rights and freedoms are exercised, therefore the violation of which is of accessory nature, meaning that *it can occur solely in conjunction with an established violation or denial of a particular right or freedom (…)'.*

In the case of Už-775/2009, the Constitutional Court defines the elements of the notion of a reasonable duration of a judicial proceeding in connection with the constitutional right to a fair trial (Art. 32 of the Constitution).

> '(…) the notion of a reasonable duration of a judicial proceeding (is) *a relative category dependent on a range of factors, and primarily the complexity of legal issues and the state of facts in a particular dispute, complainant's behavior, conduct by courts conducting the proceeding, as well as the relevance of the stated right to the complainant* (…)'.

2.2.2. Logical (linguistic-logical) arguments (2)

In the processed practice of the Constitutional Court, a logical (linguistic-logical) arguments, *argumentum a contrario* (2/D), was found in two decisions.

> '(…) the essence and aim of constitutional guarantee for the prohibition on lowering the attained level of human and minority rights lies in the peculiar self-restriction of a constitution-maker to the effect that even the changes to the supreme legal act cannot suspend some formerly guaranteed right or freedom. In the Court's view, this *a contrario* means that the legally prescribed manner of exercising a constitutionally guaranteed human or minority right or freedom cannot be regarded as the acquired right (…)' (IUz-48/2016).

2.2.3. Domestic systemic arguments (3)

3/A. The contextual interpretation in a narrow and/or broad sense is present in all the judgments subject to consideration in this text. Herewith, the Constitutional Court determines the meaning of a single constitutional norm (what it is or is not) through other constitutional norms, using their mutual relationship. Thus, applying the contextual interpretation in the broad sense leads to a more precise meaning of a particular constitutional provision. The Constitutional Court, in the cases of Už-367/2016, Už-1202/2016, Už-7676/2016, determined more closely the meaning and domain of application of the norm guaranteeing the right to the peaceful enjoyment of property, wielding the contextual interpretation in a broad sense.

> 'The Constitutional Court finds that the Constitution, in the first para. of Art. 58, guarantees the peaceful enjoyment of one's possessions and other property rights acquired by law. The Court further finds that the *right to property is not an absolute right, given that the Constitution, in the second para. of Art. 58, allows for deprivation or restriction of property rights*. Whether (…) depriving or restricting property rights is in line with guarantees established in the provision of Art. 58 of the Constitution must be assessed in each concrete case' (Už-367/2016).
>
> 'In reference to the cited violation of the right to human dignity (Art. 23 of the Constitution), the Constitutional Court emphasizes that guarantees from Art. 23 of the Constitution constitute fundamental values of a democratic society. In this context, the Court points that the Constitution, in the provision of Art. 25 (inviolability of physical and mental integrity), absolutely forbids torture, inhuman, or degrading treatment or punishment *and that at the core of degrading treatment lies violation of human dignity* (…)' (Už-7676/2016).

A contextual interpretation in a narrow sense is rare in the Constitutional Court practice in general, and hence in the decisions analyzed here. This interpretation defines the meaning of a particular human right from the Constitution without

references to other constitutional provisions. The meaning of a human right is established according to its own sense or, simply, the placement of that right in the Constitution or a part of it. This way of determining a more specific meaning of a human right also applies to closer defining that right's protection (as an element of that right), or specifically, what that protection entails (positive definition) or does not entail (negative definition).

In the case of Už-10061/2012, all the various types of conduct with potential to lead to violation of the right to a fair trial were established without the Court making references to other constitutional norms or its previous practice.

> 'The Constitutional Court finds that *any random and arbitrary application of the substantive or procedural law* to the detriment of the complainant can lead to *violation of the constitutionally guaranteed right to a fair trial*'.

Interestingly, in one of the selected cases, No. 1823/2017, in a single legal position, the Constitutional Court applied the contextual interpretation both in a narrow and in a broad sense, in that it interpreted violation of the right to inviolability of physical and mental integrity (Art. 25 of the Constitution) by relating it to the provisions of that article governing the prohibition of degrading treatment (a narrow sense), while interpreting the right to human treatment of a person deprived of liberty (Art. 28 of the Constitution) according to the provisions of Art. 25 of the Constitution (a broad sense).

> 'Starting from the point that guarantees in Art. 25 (inviolability of physical and mental integrity) and Art. 28 (treatment of a person deprived of liberty) of the Constitution constitute fundamental values of a democratic society, that the Constitution in the provisions of Art. 25 absolutely forbids torture, inhuman, or degrading treatment or punishment, and that at the core of degrading treatment lies violation of the human dignity protected by the provisions of Art. 28 of the Constitution, *the Constitutional Court has weighed the violations of rights from Arts. 25 and 28 of the Constitution against the stated violation of the right to inviolability of physical and mental integrity guaranteed by the provisions of Art. 25 of the Constitution'.*

3/B. The interpretation of constitutional norms on the basis of domestic statutory law is quite common in the Constitutional Court's decision-making on constitutional complaints. In many of the studied cases, the Constitutional Court also analyses the statutory law concerning a particular human right guaranteed by the Constitution. This method is frequent and necessary because a constitutional norm is further elaborated and made concrete by a legal provision governing the same issue (a human right). A statutory law, in fact, helps to apply an abstract constitutional norm in a particular case. The latter refers to both the constitutional principles aimed at human rights protection and the concrete human rights guaranteed by the Constitution.

In case no. Už-10061/2012, relating to the constitutionally guaranteed prohibition of discrimination, the Constitutional Court has established, by invoking the law, the requirements that must be met to award compensation for damage on the basis of discrimination.

> '(…) the complainant sought compensation for pecuniary and non-pecuniary damages allegedly caused to him by discrimination against him by the defendant. The Constitutional Court assesses that *neither the Anti-Discrimination Act nor the Act on the Prohibition of Discrimination of Persons with Disabilities contains specific rules on the notion of damage, types of damages, or a causal link between discriminatory act and damage, but in these respects apply the generally applicable provisions of the Contract and Torts Act*. This means that any discriminatory tort that causes specific damage directly creates liability for the damage. Therefore, the act by a discriminating party must be the cause of damage, and the discriminating party guilty of it, which is not the case here'.

3/C. The interpretation of the Constitution on the basis of case law of the Constitutional Court is a method commonly practised by the Court. It is much rarer than the interpretation of the Constitution in the light of the case law of ECtHR and the provisions of international conventions (primarily the ECHR). Moreover, even when the Constitutional Court invokes its previous practice (whether the specific previous decisions or abstract norms), the basis of those decisions is either in an international law norm or an ECtHR decision.

3/C/a. In the case of Už-1823/2017, the Constitutional Court refers to its specific decision as precedent, which, however, has as a basis a norm of international law (UN Convention) and the case law of ECtHR, when determining the meaning of terms within the inviolability of physical and mental integrity (Art. 25 of the Constitution).

> 'The Constitutional Court has, *in its earlier decisions (see the Constitutional Court Decision No. Už-4100/2011, item 5 of the Reasoning Statement), guided by the definition of torture from the UN Convention, as well as the ECtHR case law and autonomous concepts developed by that court,* defined the meaning of terms from Art. 25 of the Constitution, pointing to the distinction between the notions of torture, inhuman, or degrading treatment or punishing and found (…)'.

3/C/b. A specific reference to the 'practice' of the Constitutional Court is found in the case of Už-5057/2015, being reflected in the Court citing one of its previous decisions, but with it the ECtHR case law as well, thereby in fact reinforcing the reference to its previous practice.

> 'Reviewing the alleged violation of the principle of *ne bis in idem* (…), the Constitutional Court reminds that, *observing the ECtHR case law, in its Decision No. Už-1285/12,*

of 26 March 2014, it set the criteria according to which it assesses whether the violation has occurred of the right from Art. 34 (4) of the Constitution (*ne bis in idem),* namely: (…)'.

3/C/c. The Constitutional Court has made references to its own judicial practice in a general manner, for example, in its Decision No. Už-367/2016, when it invoked the guarantees of the right to a fair trial.

'The Constitutional Court points *that in its multiple decisions*, with the basis in the case law of the European Court of Human Rights, *it had established the guarantees of the right to a fair trial*'.

It is further stated what those guarantees include, without citing the specific previous decisions of the Constitutional Court that served as precedents: 'one particular guarantee of the right to a fair trial refers to the court's obligation to reason its decision (…). To assess whether in those cases the standards of the right to a fair trial have been met, it is necessary to consider whether the court of recourse has examined the decisive issues presented before it or has simply been satisfied by the mere affirmation of the lower court's decision'.

In the case of Už-10061/2012, the Constitutional Court makes general references to its previous practice in its determinations of what, regarding the content, the constitutionally guaranteed right to a fair trial includes.

'(…) in terms of the content of the constitutionally guaranteed right to a fair trial from para. 1 of Art. 32 of the Constitution, *the Constitutional Court points to its previously taken position* that it is not competent to review the conclusions and assessments made by ordinary courts regarding the established facts and application of law in the proceeding conducted to decide on the rights and obligations of the complainant'.

In the case of Už-10061/2017, the Constitutional Court refers to its previous case law, specifically an abstract norm, without explicitly citing its decision.

'Reviewing the presented reasons and allegations in the constitutional complaint in terms of the content of the constitutionally guaranteed right to a fair trial from Art. 32 (1) of the Constitution, the Constitutional Court *points to its previously taken position* that it is not competent to review the conclusions and assessments made by ordinary courts regarding the established facts and application of law in the proceeding conducted (…)'.

3/D/b. Interpretation by referring to individual court decisions is found in four examples from the studied Constitutional Court case law. In the case of Už-10061/2012, the Constitutional Court interprets the constitutionally guaranteed prohibition of discrimination according to the view of the Supreme Court of Cassation.

> 'The Constitutional Court points to the *provisions of Art. 21 of the Constitution* establishing that all are equal before the Constitution and law, that everyone has the right to equal legal protection, without discrimination, and that *any discrimination is prohibited*, direct or indirect (…). *The forms of discrimination against persons with disabilities—indirect and direct discrimination, are expressly explained by the Supreme Court of Cassation in its contested judgment* (Rev. 746/12)' (Už-10061/2012).

In the next example (Už-11707/2017), the Constitutional Court interprets the *right to a limited duration of detention* by way of establishing that there has been no violation of the constitutionally guaranteed rights to liberty and to limited duration of detention since the Higher Court in Belgrade—Special Department (…) found, *in constitutionally and legally acceptable manner, that in the concrete case, the ground (…) for extending the detention measure fell away* (prohibition on leaving the house, with the use of electronic surveillance).

Interpretations referring to the case law of ordinary courts (3/D/a) and interpretations by reference to abstract judicial norms (3/D/c) have not been found in the analyzed sample of judgments of the Constitutional Court.

3/E. The Constitutional Court referred to an act issued by a special body, UNHCR, which, although impossible to be categorized as a state organ, has been considered in the Constitutional Court's decision-making. Namely, deciding on the effectiveness of remedy regarding the right to asylum, in the case of Už-5331/2012, the Constitutional Court referred to the UNHCR act relating to the Republic of Serbia. This method was used to interpret the constitutional right to asylum (Art. 57 of the Constitution).

The Constitutional Court holds that *also relevant to the assessment of the effectiveness of remedies in the asylum seeking procedure is the practical implementation of the legal principles* (Arts. 7–18 of the Asylum Act). *'Attesting to this view are the data from the 'Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in the Republic of Serbia',* UNHCR, August 2012, according to which asylum-seekers (…) are provided with information on their rights and duties, and primarily the rights to stay, free interpretation assistance, legal aid (…), observance of the principles of anti-discrimination, preservation of family unity, gender equality, care for persons with special needs, and freedom of movement'.

In the same case, the Constitutional Court further refers to the established position of the Council of Europe's Parliamentary Assembly (Resolution No. 1471/2005) that 'the effective remedy in the matter of removal of foreign nationals means the right to appeal a negative decision and the right to suspend the enforcement of the imposed measure of removal until the domestic authorities make a decision on its compatibility with the Convention'.

As an example of the interpretation on the basis of normative acts of other domestic state organs there is case Už-3238/2011, in which the Court interpreted a right to respect for private and family life in regard to one legal issued by the municipality administration.

2.2.4. External systemic and comparative law arguments (4)

In the group of analyzed Constitutional Court decisions, referring to the provisions of international agreements, particularly those of the ECtHR, is quite common, whereby references made solely to the ECtHR case law (without referring to the provisions of ECHR) can be considered more frequent. When in its reasoning the Court refers to the ECHR provisions, it most often does so in parallel with its referring to the appropriate provision of the Constitution protecting the same human right. However, there are some human rights in the Constitution that are not at the same time contained in the ECHR, and vice versa. In this context, the Constitutional Court can practically expand the meaning of a human right guaranteed by the Constitution to include the one contained in the ECHR but not also in the Constitution, provided that they both documents protect similar values.

4/A. One example of the interpretation of fundamental rights on the basis of international treaties, especially ECHR, in the Constitutional Court case law, is its Decision No. Už-3238/2011 (the right to change gender), which, relying on the right to private life contained in the ECHR, expands and interprets the content of the constitutional right to dignity and free development of personality.

> 'The Constitution, in Art. 23, guarantees the inviolability of human dignity (…) and the right of every person to free development of personality (…). The Constitutional Court finds that free development of a person and one's personal dignity primarily refer to establishing and freely developing one's physical, mental, emotional, and social life and identity. *Although the Constitution lacks an explicit provision on the respect for the right to private life, in the Court's view, this right is an integral part of the constitutional right to dignity and free development of personality. Conversely, the European Convention makes a provision in the first para. of Art. 8 for the right of every person to respect for their private life'.* Further, the Constitutional Court found that 'the sphere of private life of a person undoubtedly includes, among others, his/her sexual affiliation (…)'.

Constitutional Court Decision No. Už-4395/2017 (parental rights) is another illustrative example of the interpretation of fundamental rights on the basis of international treaties in that in making a decision in the present case, besides the constitutional provision on the rights and duties of parents (Art. 65 of the Constitution), the ECHR provision aimed at protecting the same types of values was also applied.

> 'Also relevant in this constitutional judicial matter is Art. 8 of the European Convention (…) establishing that: *everyone has the right to respect for his private and family life*, home, and correspondence (para. 1); public authorities will not interfere with the exercise of this right except where such interference is lawful and necessary in a democratic society in the interests of national security, public safety, or economic

well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or *for the protection of the rights and freedoms of others* (para. 2)'.

The Constitutional Court further interprets Art. 8 of the ECHR, while also referring to the ECtHR case law, by ascribing to it a meaning that more closely relates it to the constitutional rights of parents (Art. 65 of the Constitution):

'Art. 8 of the European Convention *also requires an active role of parents* in procedures concerning children, with a view to achieving the protection of their interests. In a situation requiring the enforcement of a judicial decision, also to be considered is the *behavior of the parent* seeking enforcement, bearing in mind that it constitutes an equally important factor as the behavior of the court itself'.

4/B. In the analyzed Constitutional Court decisions, the interpretation of fundamental rights on the basis of judicial practice of international courts is most common in this analysis. In its human rights protection practice, the Constitutional Court refers to the established positions of the ECtHR and accepts them as precedent law, which means that in all analyzed cases of protection of human rights guaranteed by the ECHR and decided by the ECtHR, the Constitutional Court adopted the ECtHR's opinion and incorporated it into its decision. Even when rendering different decisions in cases with identical factual circumstances, the Constitutional Court made references to the ECtHR case law in each of them. This suggests that referral by the Constitutional Court to an ECtHR case is not always possible to assess as being based on the merits and substance; the reasons can also be of formal nature, just to quantitatively strengthen the legal arguments. References to the ECtHR case law are found where the Constitutional Court applies substantive law, and much more rarely where it rules on some procedural issues. The ECtHR practice is adopted in respect of constitutional complaint cases of criminal law and civil law nature, and from the areas of misdemeanor law and administrative law (classification by the Constitutional Court). Also typical of the analyzed Constitutional Court decisions is that each of them cites several ECtHR decisions, whether on the same issue or argument (likely to indicate the firmness of the ECtHR's position), while there has also been a practice of a single case containing references to the ECtHR views on different issues—various human rights and substantive and procedural law, and therefore on all issues the Constitutional Court decides in a particular case.

The analyzed cases concerning the protection of property rights, Už-367/2016 and Už-5214/2016, are precisely where we have the paradox of the Constitutional Court referring in both instances to the ECtHR judgments while deciding them differently, thus modifying its practice, although, factually and legally, it concerns the protection of the same human right.

The Constitutional Court assessed (Už-367/2016) the complete confiscation of the object of the offence, together with the imposed fine, as posing an excessive burden on the complainant, and the said protective measure (money seizure), as a measure aimed at protecting the public interest, as disproportionate to the protection of the complainant's right to the peaceful enjoyment of property. Examining whether, in the present case, a fair balance was struck between the public interest and that of the individual whose possessions were being confiscated, the Constitutional Court referred to several ECtHR judgments, including, among others, judgments in the cases: *Ismayilov v. Russia*, of 6 November 2008, para. 38; *Gabrić v. Croatia*, of 5 February 2009, para. 39; *Grifhorst v. France*, of 26 February 2009, para. 94; *Boljević v. Croatia*, of 31 January 2017, para. 41.

The conflicting decision was issued in the case of Už-5214/2016 although in determining, in this case, whether a fair balance was struck between the public interest and the interest of the individual whose possessions were confiscated, the Constitutional Court referred to the same ECtHR judgments (*Ismayilov v. Russia*; *Gabrić v. Croatia*; *Grifhorst v. France*; *Boljević v. Croatia*). The Court assessed that with imposing a fine, in the present case, the purpose of misdemeanor sanctions was attained and with the measure to confiscate the object of the offence (EUR 19,000) the purpose of imposing protective measures. Therefore, proportionality between sanctioning the infringement of the public interest reflected in bringing in the undeclared money (EUR 19,000) and the constitutionally guaranteed right of an individual to the peaceful enjoyment of property was not upset.

One particular form of interpretation of fundamental rights on the basis of the judicial practice of international courts is the Constitutional Court's making general references to the ECtHR case law without citing concrete decisions. Thus, in the case of Už-5214/2016, it is stated that the Constitutional Court, 'in making its decision*, considered the decisions of the European Court of Human Rights* but found that circumstances of this case differed from those of the *cases in which the same were rendered*, in that the complainant was indisputably aware of the duty to declare the money (…)'.

In the analyzed Constitutional Court decisions, we further find one reference to the European Court of Justice (ECJ). Being an exception, it only confirms the rule that international judicial practice, as the source of the established positions of the Constitutional Court in the matter of human rights, actually reduces to the ECtHR case law. Moreover, even in the concrete decision, Už-5057/2015, the Constitutional Court implicitly refers to the ECJ case law, invoking the ECtHR decision without closer identification of the ECJ case law.

> 'Examining (…) the existence (…) of the identity of the criminal offences of which the complainant was found guilty in the misdemeanor and criminal proceedings (*idem*), the Constitutional Court notes that the ECtHR, *observing the ECJ case law*, in the judgment (…) in *Zolotukhin v. Russia,* No. 14939.03, of 10 February 2007, paras.

> 79–81, assessed that *ne bis in idem* 'means prohibiting prosecution or trial against a person for the second offence (…)'.

As an illustration of other external sources of interpretation (4/D), we cite the decision of the Constitutional Court in case no. IUo-42/2020, in which the Constitutional Court even refers to the Report of the European Commission of Human Rights (dissolved 1998) in the 'Greek case' (4. October 1968), which contains a definition of 'public danger'.

2.2.5. Teleological interpretation (5)

5. Teleological (goal-based) interpretation of a legal norm is used in tandem with other legal methods for the norm to be applied correctly in a particular case. A constitutional norm usually does not have a stated goal it aims to achieve; the goal, and thus purpose of the norm, is identified by interpreting, primarily, the respective constitutional principles, but also other constitutional norms. Usually the goal of a constitutional norm is not explicit, in which case we must interpret the Constitution as a whole (or most important norms) to discover it. The Constitutional Court can use this method in interpreting what the goal is not only of a concrete constitutional norm but also of some other legal institution not necessarily contained in the Constitution. Thus, in the case of Už-1202/2016, the Court establishes what a protective measure means, notably through the goal aimed to be achieved by its imposing.

> 'Therefore, the Constitutional Court assessed that confiscation of the object of the offence in its entirety, together with the imposed fine, posed an excessive burden on the complainant, and that, accordingly, the imposed *protective measure, as a measure aimed at protecting the public interest,* was not proportionate to the protection of the complainant's right to the peaceful enjoyment of property'.

The case of Už-1823/2017 is another example where the Constitutional Court's position is not presented according to the goal and purpose of the Constitution as 'a document for the future' but the meaning of the constitutional concept—degrading treatment or punishment (Art. 25 of the Constitution)—is interpreted pursuant to the aim of this form of abuse.

> '(…) when it comes to degrading treatment or punishment, the Court found *that this form of abuse requires the existence of an aim to degrade a particular person*, so it concerns a treatment that creates in a victim the feelings of fear, anguish, and inferiority'.

2.2.6. Historical / subjective teleological interpretation (6)

In the processed practice of the Constitutional Court no examples were found of historical/subjective teleological interpretation.

2.2.7. Arguments based on jurisprudence / scholarly works (7)

Among the considered Constitutional Court decisions on constitutional complaints, no instances are found of using arguments based on scholarly works. Nevertheless, an example demonstrating the Constitutional Court's practice of also invoking jurisprudence or scholarly works is the Constitutional Court decision, IUo-42/2020 on constitutionality and legality of the Decision on declaring the state of emergency during the COVID-19 epidemic, which undoubtedly affected fundamental human rights by its being the basis for their restriction (freedom of movement, freedom of religion, and other rights).

The Constitutional Court dismissed the initiatives to institute the review of the decision of state of emergency but nevertheless indulged judging on merits, thereby referring to the scholarly works regarding the decision to declare the state of emergency. The Constitutional basis for the decision on the state of emergency is the 'necessity, understood as the supreme need to safeguard the constitution and, therefore, also the source allowing the acceptance of regulations derogating from the formal constitutional text but aimed at preserving the essence of the constitution' (see Giuseppe De Vergottini, *Diritto constituzionale comparato*, Belgrade 2015, 403).

2.2.8. Interpretation in light of general legal principles (8)

In the processual practice of the Constitutional Court no interpretations were found in light of general legal principles.

2.2.9. Substantive interpretation / non-legal arguments (9)

In the selected decisions of the Serbian Constitutional Court, non-legal arguments were identified in decision no. IUo-42/2020, where they were deployed two times in total. Both non-legal arguments relate to the epidemic disease of COVID-19.

> '(…) The Constitutional Court finds that the *outbreak of the infectious disease COVID-19 and the threat of its uncontrolled spread (…) could be considered as a danger significantly jeopardizing* the health of the general population, thus calling into question the normal course of life in the country (…), and particularly the health system'.
> '(…) The Constitutional Court assesses that the infectious disease COVID-19 could be considered 'a public danger threatening the survival of the state or its citizens', within the meaning of Art. 200 (1) of the Constitution'.

I Table of frequency (in how many decisions) and weight (frequency of use) of arguments and methods of interpretation

Methods			Frequency (in how many decisions)	Weight (frequency of use)	%	Sum
1	1/A	a)	8	15	5%	43(15%)
		b)	0	0	0%	
	1/B	a)	14	18	6%	
		b)	8	10	3%	
	1/C		0	0	0%	
2	2/A		0	0	0%	2(1%)
	2/B		0	0	0%	
	2/C		0	0	0%	
	2/D		2	2	1%	
	2/E		0	0	0%	
	2/F		0	0	0%	
3	3/A		20	28	9%	97(32%)
	3/B		11	42	13%	
	3/C	a)	10	10	4%	
		b)	2	2	1%	
		c)	2	2	1%	
	3/D	a)	0	0	0%	
		b)	4	4	2%	
		c)	0	0	0%	
	3/E		4	4	2%	
4	4/A		12	20	7%	134(45%)
	4/B		30	112	37%	
	4/C		0	0	0%	
	4/D		2	2	1%	
5			14	18	6%	18(6%)
6	6/A		0	0	0	0(0%)
	6/B		0	0	0	
	6/C		0	0	0	
	6/D		0	0	0	
7			1	1	1%	1(1%)
8			0	0	0%	0(0%)
9			2	2	1%	2(1%)

Legend:

1. Grammatical (textual) interpretation
- *1/A. Interpretation based on ordinary meaning*
  - a) Semantic interpretation
  - b) Syntactic interpretation
- *1/B. Legal professional (dogmatic/doctrinal) interpretation*:
  - a) Simple conceptual dogmatic/doctrinal interpretation
  - b) Interpretation on the basis of legal principles
- 1/C. O*ther professional interpretation*

2. Logical (linguistic-logical) arguments
- *2/A. Argumentum a minore ad maius*
- *2/B. Argumentum a maiore ad minus*
- *2/C. Argumentum ad absurdum*
- *2/D. Argumentum a contrario / arguments from silence*
- *2/E. Argumentum a simili and, within it, analogy*
- *2/F. Interpretation according to other logical maxims*

3. Domestic systemic arguments
- 3/A. *Contextual interpretation, in a narrow and broad sense*
- *3/B. Interpretation of constitutional norms on the basis of domestic staturory law*
- *3/C. Interpretation of the constitution on the basis of case law of the Constitutional Court*
  - a) References to specific previous decisions of the Constitutional Court (as "precedents")
  - b) References to the "practice" of the Constitutional Court
  - c) References to abstract norms formed by the Constitutional Court (e.g., the rules of procedure)
- *3/D. Interpretation of the Constitution on the basis of the case law of ordinary courts*
  - a) Interpretation referring to the practice of ordinary courts (not of single case decisions)
  - b) Interpretation referring to individual court decisions (as "precedents" in the judiciary)
  - c) Interpretation referring to abstract judicial norms (directives, principled rulings, law unification decisions, etc.)
- *3/E. Interpretation of constitutional provisions and fundamental rights on the basis of normative acts of other domestic state organs*

4. External systemic and comparative law arguments:
- *4/A. Interpretation of fundamental rights on the basis of international treaties*
- *4/B. Interpretation of fundamental rights on the basis of individual case decisions or case law ('judicial' practice) of international fora.*
- *4/C. Comparative law arguments: e.g., references to norms or case decisions of a particular foreign legal system*
- *4/D. Other external sources of interpretation (e.g., customary international law, ius cogens, etc.)*

5. Teleological / objective teleological interpretation

6. Historical / subjective teleological interpretation (based on the *intention* of the constitution-maker):
- *6/A. Interpretation based on ministerial / proposer justification*
- *6/B. Interpretation based on draft material: references to travaux préparatoires / Materialen / and legislative history*
- *6/C. In general, references to the intention, will etc. of the constitution-maker*
- *6/D. Other reasons based on the circumstances of making or modifying/amending the constitution or the constitutional provision in question*

7. Arguments based on jurisprudence / scholarly works

8. Interpretation in light of general legal principles

9. Substantive interpretation / non-legal arguments

2.3. Decisive arguments

The general conclusion arising from the analyzed Constitutional Court judgments is that the arguments and interpretive methods deployed are not so diverse, but that the Constitutional Court (out of the nine major altogether) most often used just a few. As for decisive arguments, it is possible to recognize the decisive argument or arguments in each decision, but when it comes to others that should 'strengthen' the decisive argumentation—the defining, strengthening, and illustrative arguments—there were either none or few. Additionally, the reasonings of Constitutional Court decisions are articulated in a way not making it easy to distinguish these 'auxiliary' arguments from each other.

What is certain about the decisive argument, which we find in all Constitutional Court decisions, is its automatically being taken over from the cited ECtHR decisions. This means that a concrete decisive argument in the Constitutional Court decision-making is, in fact, the argument and the established position of the ECtHR. Another practice is that of using the ECtHR positions repeatedly in the reasonings of the Constitutional Court decisions, which means that even when presenting its views on issues not crucial for the final decision but merely ancillary thereto, the Constitutional Court still refers to the ECtHR established positions.

If a decision to protect a specific right depends on multiple preconditions constituting a complex structure of the decisive argument (as in the examples of property right protection), in assessing whether those necessary conditions are met, the Constitutional is also guided by established ECtHR positions. Where the Constitutional Court, however, cites some of the defining, strengthening, or illustrative arguments to bolster the decisive argument, the ECtHR case law, again, constitutes the most common source. Matters become more complex when the Court decides on multiple issues (seeking protection for more than one human right) in a single decision, in respect of which it then for each presents decisive arguments that differ from one another. In these examples, each of these specific decisive arguments can be supported by various defining, strengthening, or illustrative arguments.

This is not to mention that in judgments determining issues in respect of which the Constitutional Court had already invoked the ECtHR case law, the same references to the ECtHR decisions and positions are repeated, or specifically, the same arguments are cited over and over. The same is true of the decisive arguments cited in the previous Constitutional Court practice.

The issue of detecting decisive arguments in a concrete Court's case is easier in respect of less complex cases where, as a rule, there exists but one such argument. It also means that the given argument has a legal strength to the extent of making it unnecessary for the Constitutional Court to establish some additional arguments in its support (defining, strengthening, or illustrative). For a decision in such a case, they are not necessary or just, in the circumstances of that factual and legal state, not even possible to find.

Among the considered Constitutional Court judgments, the most used decisive arguments are grammatical interpretation as a legal professional (dogmatic) interpretation, domestic systemic arguments, and interpretation based on the judicial practice of ECtHR.

Dogmatic interpretation (1/B) was used 24 times in the examined decisions and in 10% of them we can assess it to be a decisive argument. Other methods in this group (1. grammatical or textual interpretations) used by the Constitutional Court did not have the capacity of a decisive argument for its concrete decision.

The Constitutional Court uses contextual interpretation in a broad sense (3/A) as a decisive argument in a way that it determines the real meaning of a constitutional norm by referring to other constitutional provisions. It occurs on 28 occasions, representing 5% of all cases with identified decisive arguments. Another two methods in this group (3. domestic systemic arguments) are identified as decisive arguments in a similar or smaller percentage 3/B—5%, 3/E—3%. Those methods in this group (no. 3) also bolster the decisive arguments or constitute illustrations of no specific significance.

In the analyzed cases, the most common decisive arguments are the views presented in the ECtHR decisions (4/B. interpretation of fundamental rights on the basis of judicial practice of international courts). Conversely, the utilized interpretation of fundamental rights on the basis of international treaties (4/B) does not in fact constitute a decisive argument but serves as illustrative arguments. Interpretation of fundamental rights on the basis of the judicial practice of the ECtHR occurs 112 times, representing more than 50% of all cases with identified decisive arguments.

Finally, teleological interpretation (no. 5) was identified as a decisive argument in 17% of all cases, and logical arguments (no. 2) were identified as decisive arguments in 2% of all cases with identified decisive arguments.

Other methods of interpretation (6. historical interpretation, 7. arguments based on jurisprudence or scholarly works, 8. interpretation in the light of general legal principles, and 9. substantive interpretation/non-legal arguments) were not identified as decisive arguments or were not identified at all. These methods we mainly find serving as strengthening and illustrative arguments.

II Table of decisive arguments and methods of interpretation

Methods			Frequency (in how many decisions)	Weight (frequency of use)	%	Sum
1	1/A	a)	0	0	5%	8(10%)
		b)	0	0	0%	
	1/B	a)	4	4	5%	
		b)	4	4	5%	
	1/C		0	0	0%	

Methods			Frequency (in how many decisions)	Weight (frequency of use)	%	Sum
2	2/A		0	0	0%	2(2%)
	2/B		0	0	0%	
	2/C		0	0	0%	
	2/D		2	2	2%	
	2/E		0	0	0%	
	2/F		0	0	0%	
3	3/A		4	4	5%	9(12%)
	3/B		4	4	5%	
	3/C	a)	0	0	0%	
		b)	0	0	0%	
		c)	0	0	0%	
	3/D	a)	0	0	0%	
		b)	0	0	0%	
		c)	0	0	0%	
	3/E		1	1	2%	
4	4/A		0	0	0%	43(59%)
	4/B		16	43	59%	
	4/C		0	0	0%	
	4/D		0	0	0%	
5			9	12	17%	11(17%)
6	6/A		0	0	0	0(0%)
	6/B		0	0	0	
	6/C		0	0	0	
	6/D		0	0	0	
7			0	0	0	0(0%)
8			0	0	0%	0(0%)
9			0	0	0	0(0%)

2.4. Concluding remarks on the characteristics of the decision-making of the Constitutional Court

From the examined body of work of the Constitutional Court of Serbia, it is possible to make several concluding remarks on the characteristics of its decision-making in the field of human rights protection. Deciding on constitutional complaints, the Constitutional Court usually deploys several different arguments and methods of legal interpretation. We can divide them into those frequently used (external systemic and comparative law arguments and domestic arguments) and other

arguments and methods (under the research design) found to either never have been used in decision-making or used only sparsely.

Pursuant to the general goal of this research, we can proceed from the external systemic and comparative law arguments (no. 4). This group of arguments is present in all Constitutional Court decisions used as the research sample. However, not all forms of arguments within this group are equally represented. Moreover, this analysis found no comparative law arguments and other external sources of interpretations (no. 4/C and 4/D). In contrast, in all the analyzed decisions, the Constitutional Court used the interpretation of fundamental rights on the basis of the judicial practice of international courts.

As for the practice of international courts, the Constitutional Court actually completely relies on the ECtHR case law, with only a single case found containing a reference, an implicit one, to the ECJ case law. References to the practice and approaches of international courts were found in all the selected Constitutional Court decisions, whereby the Court in a single case typically cites several (similar) ECtHR judgments in respect of multiple questions of law that it considers in its decision. Of the total applied arguments and methods, the judicial practice of international courts makes up 37%. Less than 1% of these arguments refer to the ECJ case law (in the case of Už-5057/2018, it cited both the ECtHR and ECJ case law), while the remaining part relates to the references to ECtHR cases. There is only one analyzed judgment where the Constitutional Court diverges in its decision from the ECtHR practice, namely, the ECtHR approach served as a non-binding illustrative example.

Against the background of these data, we conclude that the ECtHR represents to some extent the supreme legal authority for the Constitutional Court when it comes to human rights protection. While this practice can be criticized in terms of independence and autonomy in the work of the Constitutional Court, it must be noted that the Court herewith demonstrates opportune behavior—by adopting the ECtHR approaches in its decision-making, it avoids its decisions being overturned upon application to ECtHR.

Other methods frequently used by the Constitutional Court in its decision-making relate to the domestic law—domestic systemic arguments (no. 3). These arguments are identified in all the analyzed Constitutional Court decisions and make up 35% in the total methods and arguments identified (nos. 1–9 of the research design). Nowhere within this group of arguments and methods has there been equal representation of the subgroups of arguments and methods (no. 3/A-E). Between them, the contextual interpretation in a broad sense (3/A) is found in 20 Constitutional Court decisions, accounting for 9% of the total arguments and methods used within this group (3). Also used here is the interpretation of the constitution on the basis of case law of the Constitutional Court (3/C), accounting for 6%, and interpretation of the constitution on the basis of domestic statutory law (3/B), 13%; while other methods are used less often: interpretation of the constitution on the basis of the case law of ordinary courts (3/D), 2%; and interpretation of the constitution on the basis of other domestic normative acts of state organ (3/E), 2 %. These statistics point to the

conclusion that the domestic systemic arguments constitute an inevitable method of interpretation in the work of the Constitutional Court and that, along with the judicial practice of international courts, they are decisive for its practice. It further suggests that by applying this method, the Constitutional Court defends, in some way, domestic law against international law (although they are mainly compatible). This method is also a symbol of some degree of autonomy of the Constitutional Court from the ECtHR.

The third group of applied arguments and methods covers grammatical (textual) interpretation (no. 1), within which the Constitutional Court is found to have used in the examined practice semantic interpretation (no. 1/A/a) in 5% of all arguments and methods and legal professional (dogmatic) interpretation (no. 1/B) in 9% of all arguments and methods. The research found no evidence of syntactic interpretations (no. 1/A/b) or other professional interpretations (no. 1/C). As with previous domestic systemic arguments, here too, it is possible to conclude that by applying this method, the Constitutional Court 'defends', though with less intensity, domestic from international law.

All the remaining arguments and methods used we classified in the last group. All those methods: interpretation based on non-legal arguments (no. 9), arguments based on scholarly works (no. 7), teleological interpretation (no. 5), and logical (no. 2), have rarely been applied in the studied practice of the Constitutional Court (except teleological interpretation), namely, in 1% (no. 9), in 1% (no. 7), in 6 % (no. 5), and in 1% (no. 2) of all arguments and methods. We conclude that the application of these methods represents an exception in the Constitutional Court practice, with two remarks to be made thereon. Arguments based on scholarly works are more common in the separate opinions of Constitutional Court judges, while teleological interpretation is rarely expressed explicitly (for example, 'the aim of the constitutional norm is to…'); rather, it is assumed that the legitimate aim is incorporated in other herewith applied arguments and methods. Also to be noted is that the interpretation based on non-legal arguments (no. 9) is found in the Constitutional Court decision, which, however, merely implicitly refers to the human rights matter.

In respect of other arguments and methods of which no evidence is found (no. 6, historical; and no. 8, interpretation in the light of general legal principles), it is impossible to conclude that the Court does not use them at all in the matter of human rights protection but that they have just not been found in the studied sample. This indicates that, even if they have been in use, they do not constitute the key arguments and methods in the work of the Constitutional Court, or specifically, that their application is generally rare and their significance marginal.

Finally, it is among the arguments and methods most often used in the studied practice of the Constitutional Court and previously classified in three groups that we find the decisive interpretative arguments. Of all of them, in its intensity and impact on the Constitutional Court the most important is interpretation on the basis of the judicial practice of the ECtHR.

3. The interpretation of fundamental rights in the case law of the European Court of Human Rights (ECtHR)

3.1 General remarks of the criteria for the selected judgments of the ECtHR and methods of interpretation

Following the analysis of the case law of the Constitutional Court of Serbia, and particularly that of the methods of interpretation, we will attempt to analyze, in a similar fashion, the case law of the ECtHR. The European Court judgments that are the subject of this analysis are essentially the exemplary judgments referred to by the Constitutional Court of Serbia. We have seen that when it comes to the case law of the Constitutional Court of Serbia, reference to the ECtHR case law is, in fact, the most common method applied by the Constitutional Court of Serbia. Given that the Constitutional Court of Serbia embraces the legal views of the ECtHR, we conclude that these two courts similarly (sometimes even identically) interpret regulations guaranteeing fundamental human rights. Decisions on the merits that protect those human rights attest to the same legal views held by the Constitutional Court of Serbia and the ECtHR. Hence, our initial hypothesis is that there are similarities in the case law of these two courts in respect of the methods of interpretation used, but that a complete overlap is not possible because the ECtHR represents, in a sense, a precedent court for the Constitutional Court of Serbia, which is certainly not true in reverse.

Another common feature is that both courts use many types of methods of interpretation. Those various methods of interpretation do not carry the same weight for every adjudication—merely some of them are crucial. The decisive interpretative arguments have not been the same in the case law of the Constitutional Court of Serbia and ECtHR.

The difference in the practice of the two courts is partly influenced by the fact that the ECtHR predominantly applies the provisions of the ECHR, while the primary source of law for the Constitutional Court of Serbia is the Serbian Constitution. While the articles on some human rights in the Constitution match for the most part those of the ECHR, some differences also occur. Although there is no causal link, the ECtHR also founds the legal basis for interpretation of the ECHR in the Vienna Convention of the Law of Treaties (1969). The Vienna Convention is allied because the ECtHR decided to use it. Use of the Vienna Convention for interpretation of the ECHR was not a consequence of the ECHR's provisions, but from the decision in one case by the ECtHR (Golder v. the United Kingdom, application no. 4451/70, judgment from 21 February 1975). Herewith, we will not analyze the methods of interpretation of the ECJ because the Constitutional Court of Serbia makes almost no references to its case law.

The analyzed judgments from the ECtHR case law (30) were selected for the primary reason that the Constitutional Court of Serbia quoted or simply cited them in its decisions. They include some judgments rendered against Serbia and more cases with proceedings conducted against other states. Some among these ECtHR judgments

can be regarded as leading or crucial, but, essentially, many of them are not so because they invoke previous ECtHR practice. The auxiliary criterion for the selection of these ECtHR judgments was that they must protect different human rights.

Also helpful in this effort to identify the methods of interpretation in ECtHR decisions was the fact that judgments of ECtHR have a clear and logical structure (with enumerated paragraphs), which is common to all judgments: composition of the Chamber, procedure, the facts (circumstances of the case and relevant domestic law), the law (arguments before the Court, the Court's assessment), and final decision. The structure of the decisions of the Constitutional Court of Serbia differs to some extent from that of the ECtHR decisions, but it too has its logical sequence, wherein it initially presents the factual situation, followed by the legal arguments and finally the decision.

3.1.1. Grammatical (textual) interpretation (1)

This type of interpretation has several subtypes but has not been widely used in the ECtHR case law, with a similar state of affairs being true of the case law of the Constitutional Court of Serbia. Moreover, textual interpretation does not fall in the group of decisive arguments in making a judgment.

Grammatical interpretation concerns the ordinary meaning (1/A) of a word, term, or phrase from the ECHR. This 'ordinary meaning' is also mentioned in the Vienna Convention; however, what should be stressed at this point is that the true meaning of a term is not reached by merely interpreting its ordinary meaning but by applying with it the contextual interpretation of the given provisions, necessarily interpreting their aim. In the analyzed judgments, no evidence was found of *syntactic interpretation* (1/A/b), but we do have the instances of semantic interpretation (1/A/a).

The Court determines the ordinary meaning of property (possession) by defining it as a nominal value in the concrete case. The *'possession' at issue in the present case was* an amount of money in US dollars which was confiscated from the applicant by a judicial decision' (*Ismailov v. Russia*, para. 29).

The Court determines the ordinary meaning of the term 'respect' (respect for the right to a private life): 'The Court recalls that the *notion of 'respect'* as understood in Art. 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities *may be wider than* that applied in other areas under the Convention' (*C. Goodwin v. U.K*, para. 72). The Court also determines the ordinary meaning of the term 'court' (*O. Volkov v. Ukraine*, para. 88) and 'private life' (*C. v. Belgium*, para. 25; *Denisov v. Ukraine*, paras. 95–97, 120).

Considerably more common than the interpretation based on ordinary meaning is the legal professional (dogmatic/doctrinal) interpretation (1/B), with both of its sub-forms: simple conceptual dogmatic/doctrinal interpretation (1/B/a) and interpretation on the basis of legal principles (1/B/b).

Simple conceptual dogmatic/doctrinal interpretation (1/B/a) was found to be in use in ECtHR practice, with the terms being given a legal meaning not matching their ordinary meaning. With the use of the simple conceptual dogmatic interpretation, a term may obtain either a narrower or a broader meaning than its ordinary meaning, and if those two differ, the Court attaches importance to the dogmatic interpretation relative to the ordinary meaning.

The Court has determined the content of the term 'freedom of expression' and how broad a meaning it can have without affecting one legal principle—the presumption of innocence: '*The freedom of expression*, guaranteed by Art. 10 of the Convention, includes the freedom to receive and impart information. Art. 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if *the presumption of innocence* is to be respected (*Karakaş and Yeşilirmak v. Turkey*, para. 50).

Another judgment determines the domain of the expression 'the state of evidence': 'The expression "the state of the evidence" could be understood to mean the existence and persistence of serious indications of guilt. Although in general these may be relevant factors, in the present case they cannot on their own justify the continuation of the detention complained of' (*Mansur v. Turkey*, para. 56).

The same judgment designates the notion of 'the reasonableness of the length of proceedings': 'The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct, and that of the competent authorities' (*Mansur v. Turkey*, para. 61).

We further give examples of decisions wherein the Court defines the notions of 'personal autonomy' (*C. Goodwin v. U.K*, para. 90), 'family life' (*V.A.M v. Serbia*, para. 130, 136), 'inhuman treatment' (*Van der Ven v. Netherlands*, para. 51), 'minimum level of severity' and 'degrading' (*Wieser v. Austria*, para. 35, 36), 'victim' (*Kačapor and others v. Serbia*, para. 88-91), 'effective investigation' (*Kolevi v. Bulgaria*, paras. 192–194). 'possession as a legitimate expectation' (*Agrokompleks v. Ukraine*, para. 166), 'independent and impartial tribunal' (*O. Volkov v. Ukraine*, paras. 103–108), 'arbitrary decision (*ultra vires*)': '(…) decisions where the authorities have a purely discretionary power to grant or refuse an advantage or privilege (…)' (*Denisov v. Ukraine*, para. 46), and 'legitimate aim' (*Baka v. Ukraine*, para. 156).

Rule of law should count (if it does at all) as a general legal principle (method 8)—this is so in the other chapters as well. (Or, if it seems more suitable, only as a key concept for the interpretation.)

Interpretation on the basis of legal principles (1/B/b) is also represented in the analyzed the ECtHR case law. Among the represented principles are the traditional general principles (from the Roman Law onwards), such as *non bis in idem* and the presumption of innocence. The rule of law that we find in some decisions is not an element of this sort of interpretation; it is, above all, a key concept for the interpretation at all. Then again, the ECtHR can also be said to have established by its case

law some legal principles to which it adheres in its practice and the meanings of which are defined in each given case (for example, the principle of proportionality).

In assessing which interest is at risk and which is to be protected, the Court applies the principle of proportionality (fair balance). This is the most used legal principle in the analyzed judgments. 'However, the Court considers that, in the present case, the comparative duration of the restriction in itself cannot be taken as the sole basis for determining whether a *fair balance* was struck between the general interest in the proper conduct of the criminal proceedings and the applicant's personal interest in enjoying freedom of movement. This issue must be assessed according to all the special features of the case. The restriction may be justified in a given case only if there are clear indications of a genuine *public interest which outweigh the individual's right* to freedom of movement.' In view of the above, the Court considers that the restriction on the applicant's freedom of movement for a period of five years and two months was *disproportionate*, particularly given that he was forced to stay for all that period in a foreign country and was not allowed to leave even for a short period of time (Miazdzyk v. Poland, paras. 35, 41). Moreover, the Court also gives a negative definition of the principle of proportionality in a concrete case, namely that it cannot be consistent with proportionality: '(…) the Court of Justice of the European Union held that a fine equivalent to 60 % of the amount of undeclared cash did not seem to be proportionate' (*Boljević v. Croatia*, para. 21).

> 'The Court reiterates in the first place that the presumption of innocence enshrined in para. 2 of Art. 6 is one of the elements of a fair trial that is required by para. 1. The *presumption of innocence* will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty' (*Karakaş and Yeşilirmak v. Turkey*, para. 49).

The ECtHR acts in observance of the principle of equity when it admits applications and adjudges compensations for damages: 'making its assessment on an *equitable basis*, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on it' (*Ismailov v. Russia*, para. 45).

In the analyzed the ECtHR judgments, as an example of other professional interpretations (1/C), we marked the construing of the appropriate default interest level in the concrete case. Thus, the ECtHR 'considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points' (*Ismailov v. Russia*, para. 47).

3.1.2. Logical arguments in the practice of the ECtHR (2)

Logical interpretation (2) is little represented in the analyzed ECtHR decisions (CC of Serbia has not used this interpretation at all). Instances were found of the

following logical interpretations: *argumentum a contrario*, *argumentum a simili*, *argumentum ad absurdum*. By applying *argumentum ad absurdum* as a logical argument, the Court points out that the possible adoption of some claim would lead to absurd consequences, or specifically, to an unsustainable and unacceptable condition.

The ECtHR refers to its previous practice in respect of cases with similar factual circumstances, which makes it possible to conclude that in those cases, it applied the *argumentum a simili*.

> 'The Court notes that it has *examined similar grievances in the past* and has found a violation of Art. 6 § 1 (see, among other authorities, Özel v. Turkey, no. 42739/98, §§ 33–34, 7 November 2002 and Özdemir v. Turkey, no. 59659/00, §§ 35–36, 6 February 2003)' *Karakaş and Yeşilirmak v. Turkey*, para. 43).
>
> 'In the Government's submission, the judicial authorities could not be criticized for any delay in their handling of the case. Being conscious of their country's international responsibility in the prevention of drug trafficking, they could not adopt an expeditious procedure; *on the contrary*, they had a duty to look into all matters which might have a bearing on the judgment. (*Mansur v. Turkey*, para. 61).

An example of *argumentum ad absurdum* is found in the case where the ECtHR interpreted an illogical behavior of the state: 'Where a State has authorized the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (…), *it appears illogical to* refuse to recognize the legal implications of the result to which the treatment leads' (*C. Goodwin v. U.K*, para. 78).

3.1.3. Systemic arguments (3)

This group of arguments includes several methods of interpretation and can be said to be widely used in the analyzed ECtHR decisions, whereas not all enumerated methods of interpretation (from the research design) have been identified.

When it comes to contextual interpretations, no instances were found of contextual interpretation in a narrow sense, while contextual interpretation in a broad sense was identified in a more than half of the all analyzed the ECtHR decisions. This method involves the Court making references to Convention provisions to give the true meaning of the Convention norm to be applied in a concrete case.

Among the systemic arguments, the contextual interpretation in a broad sense (3/A) is a form widely used. This form of interpretation involves the Court assigning the meaning to a concept or a right by interpreting some other provisions, and above all, those of the ECHR. This interpretation means that the norms need to be interpreted together with other appropriate norms as part of a harmonized entirety.

Thus, the Court determines the scope of the right to life and the protection of life in the procedural sense. 'The Court has consistently held that the obligation

to protect life under Art. 2 of the Convention, read in conjunction with the State's general duty under Art. 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or by private individuals' (*Mladenović v. Serbia*, para. 51).

On the other hand, we found no examples of interpretation in the narrow sense in any of 30 analyzed international decisions, or of 'derogatory formulae'.

In the case *Mladenović v. Serbia* (para. 31), the Court applies the interpretation under national procedural law (3/B): 'Arts. 19 and 20 of the Code of Criminal Procedure (…) provide, *inter alia*, that formal criminal proceedings can be instituted at the request of an authorized prosecutor. In respect of crimes subject to prosecution *ex officio*, including murder, the authorized prosecutor is the public prosecutor personally. The latter's authority to decide whether to press charges, however, is bound by the principle of legality which requires that he must act whenever there is a reasonable suspicion that a crime subject to prosecution *ex officio* has been committed'. In the case *Boljević v. Croatia,* the Court further applies the contextual interpretation in broad sense, in responding to a procedural issue: 'The Court notes that this complaint is not manifestly ill-founded *within the meaning of Art. 35 § 3 (a)* of the Convention. It further notes that it is not inadmissible on *any other grounds*. It must therefore be declared admissible' (paras. 82, 83).

It even interprets the procedural law when it puts forward its view on the exhaustion of internal legal remedies and their effectiveness (*V.A.M v. Serbia*, para. 83, *Akdivar and others v. Turkey*, para. 69) or attitude of 'reasonableness of the length of proceedings' (*Agrokompleks v. Ukraine*, para. 155).

We find that the ECtHR refers in its judgments to the national law, and rarely to other pieces of subordinate legislation, without assessing their compliance with fundamental rights guaranteed in the ECHR. Legal and other domestic provisions are cited to gain a sense of how particular national legal institutions associated with human rights referred to in the concrete application to the ECtHR are regulated.

A right guaranteed by the ECHR (for example, in Art. 5) can be restricted in line with domestic law, in which case the ECtHR examines whether the national law of a given state contains the provisions on the restriction of that right. By interpreting the content of those internal norms, it, in fact, interprets the specific ECHR provision (for example, in the case *Miażdżyk v. Poland*, application No. 23592/07, judgment of 24 January 2012). The ECtHR also analyses the domestic law when it interprets the procedural issues regulated by the ECHR—for example, the issue of exhaustion of internal remedies under the domestic law or that of the effectiveness of remedies (Art. 13 of the ECHR) before national authorities (for example, *V.A.M v. Serbia*, application no. 39177/05, judgment of 13 March 2007; *Akdivar and others v. Turkey*, application no. 21893/93, judgment of 01 April 1998).

3.1.4. External systemic and comparative law arguments (4)

The Court is not formally bound to follow its previous judgments, but it is in the interest of legal certainty, foreseeability, and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. Thus, in all analyzed the ECtHR judgments, it is found to have repeatedly invoked its previous practice.

Like the Serbian Constitutional Court, the ECtHR employs, as the most frequently used method in its reasoning, its own practice, previous case law, as 'precedent law'. Additionally, analyzed judgments making references to the previous case law of the ECtHR are becoming, to some extent, 'precedents' for the subsequent judgments with similar factual circumstances. In this way, continuity is ensured in this type of interpretation. In the analyzed judgments, we rarely find a departure from the previous case law of the ECtHR, as, for example, in the judgment *C. Goodwin v. United Kingdom* in relation to the earlier judgment in the case *Rees v. United Kingdom* (17 October 1986).

The general legal source in all the analyzed ECtHR judgments, as an object of interpretation, are norms of fundamental rights based on the ECHR (4/A). In all analyzed judgments, the interpretation of these norms is crucial to the decision on the merits (together with the arguments invoked from previous ECtHR judgments). Less common are other international treaties, and primarily those adopted under the UN. Notably, in the analyzed ECtHR judgments, those other sources of law (beyond the ECHR) do not hold the status of decisive arguments.

Comparative law arguments (4/C) are not so common among the analyzed ECtHR decisions. Nevertheless, the ECtHR considers the relevant aspects of some legal systems.

> 'The following paras. describe the relevant aspects of several member States' legal systems, with the emphasis on the guarantees that exist to secure the effective and independent investigation of cases involving suspicion against high-ranking prosecutors. The report was prepared on the basis of an overview of the legal systems of Croatia, Cyprus, Estonia, France, Germany, Greece, Ireland, Italy, Malta, Russia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia and the United Kingdom (…)' (*Kolevi v. Bulgaria*, paras. 138–151).
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> 'A comparative law research report entitled 'Judicial Independence in Transition' was completed in 2012 by the Max Planck Institute for Comparative Public Law and International Law (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht), Germany (…)' (*O. Volkov v. Ukraine*, paras. 81–82).

A small number of analyzed judgments contain arguments and opinions of other bodies of the Council of Europe and other international organizations. As other external sources of interpretation (4/D), we cite the opinion of the Venice Commission: '(…) that the inclusion of the Prosecutor General as an ex officio member of the HCJ raises further concerns, as it may have a deterrent effect on judges and be perceived as a potential threat (…)' (*O. Volkov v. Ukraine*, para. 114).

3.1.5. Teleological / objective teleological interpretation (5)

Interpretation according to the purpose of the ECHR occurs in three decisions, being used when the ECtHR interprets the provisions of the ECHR, or specifically, the purpose of measures taken by state authorities in each concrete case. Thus, it is stated that '(…) *the confiscation measure that the failure to declare cash to the customs authorities incurs is a part of that general regulatory scheme* designed to combat those offences' and '(…) the *confiscation measure was not intended* as pecuniary compensation for damage—as the State had not suffered any loss as a result of the applicant's failure to declare the money—*but was deterrent and punitive in its purpose'* (*Ismailov v. Russia*, para. 29, 38, similar *Gabrić v. Croatia*, para. 39).

The Vienna Convention implies that the ECHR is interpreted according to its aim. Given that the use of the Vienna Convention in the process of interpretation is presupposed, the ECtHR does not often refer explicitly to the general aim of the ECHR, that is, to the purpose of a specific provision of the ECHR. '(…) *the object of the term 'established by law' in Article 6 of the Convention* is to ensure that the judicial organization in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament'. (*O. Volkov v. Ukraine*, para. 150).

3.1.6. Historical interpretation (6)

Among the analyzed judgments, the use of historical/subjective teleological interpretation (based on the intention of the ECHR-maker) is rare. As illustrative examples, we cite: '(…) the Court proposes therefore to look at the situation within and outside the Contracting State to assess *in the light of present-day conditions what is now the appropriate interpretation and application of the Convention*' and 'In the previous cases from the United Kingdom, this Court has *since 1986 emphasized* the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments' (*C. Goodwin v. United Kingdom,* paras. 75, 92).

3.1.7. Arguments based on jurisprudence/scholarly works (7)

Argumentation based on jurisprudence/scholarly works does not occur in the analyzed decisions of the ECtHR.

3.1.8. Interpretations in light of general legal principles (8)

This interpretation is not often used in the analyzed ECtHR judgments. More often, we find in the practice of the ECtHR the principles that apply to the particular branches of law (most often in criminal law). Here we cite the example of legal certainty as part of the rule of law. 'The Court reiterates that *legal certainty*, which is one of the fundamental aspects of the *rule of law*, requires that where courts have finally determined an issue, their ruling should not be called into question' (…) 'The

principle of *legal certainty* implies that no party is entitled to seek review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (…)' (*Agrokompleks v. Ukraine*, paras. 144, 148). (About legal certainty also see *O. Volkov v. Ukraine*, paras. 137, 145). The principle *affirmanti, non neganti, incumbit probatio* is stated in the case *Baka v. Hungary* (para. 143).

3.1.9. Non-legal arguments (9)

The only illustrative non-legal argument found occurs in this case out of all the ECtHR's processed decisions: 'the Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals' (*C. Goodwin v. U.K*, para. 83).

3.2. Concluding remarks on the characteristics of the decision-making and style of the ECtHR

From the studied case law of the ECtHR, one can observe not only some similarities but also differences in relation to the methods of interpretation of human rights used by the Constitutional Court of Serbia. The difference is found in the frequency of use of specific methods by the two courts (not that the methods were even expected to completely overlap), whereby it is possible to say that the methods used by the ECtHR are more diverse and frequent (comparing the analyzed decisions) than the methods of the Constitutional Court. The main similarity, however, as revealed by our research, is that both courts most often interpret by means of the ECtHR case law. On this basis, it could be concluded that both courts treat previous ECtHR decisions as precedent law, which they, in a notable number of cases, unofficially conceive of as binding.

Methods of interpretation used in the analyzed case law of the ECtHR could be divided by frequency of use into several groups. The first group comprises methods that are rare or not identified (0–20%); the second group includes methods used in less than half of the cases (20–50%); the third group refers to methods frequently used in more than half of the cases (more than 50 to 80 %); and the fourth group includes methods used regularly or nearly always (80–100%). This classification should give us an idea of the usage of the methods of interpretation and, in this connection, the style of the ECtHR, or, put differently, which legal reasoning of the ECtHR is most common, and which, conversely, is atypical of the ECtHR. In between are the methods of interpretation (second and third group) that the ECtHR mainly or generally applies.

Grammatical (textual) interpretation comprises several sub-methods that we classify, by their respective use frequency, into different groups. Interpretation based on ordinary meaning is included in the first group (rarely used methods) because the analyzed case law shows that the ordinary meaning of a term within a legal norm (usually that of the ECHR) is not relevant to the ECtHR. A similar result holds for other professional interpretations (for example, the interest calculation), only these occur even more rarely and are not norm interpretations that affect the *meritum*—protection

of a specific right. In contrast, legal professional (dogmatic) interpretation is classified into the fourth group—methods regularly (frequently) used, namely as semantic interpretations and interpretations on the basis of legal principles. From within this group of methods, we found no instances of using syntactic interpretation.

Logical arguments are not common in the analyzed methodology used by the ECtHR. We found merely a few examples of the use of logical arguments (see above), while the rest remained unidentified (*minore ad maius, a maius ad minore* and others), so we classify them among the rarely used methods (first group).

Systemic arguments—contextual interpretations in the broad sense fall in the second group of the applied methods. We find these interpretations used in the less than half of the analyzed judgments of the ECtHR. Simply put, the provisions of the ECHR concerning some human rights must be examined conjointly with other provisions of the Convention. Of other systemic arguments, contextual interpretations in the narrow sense were not identified among the analyzed cases. The analysis further revealed that the ECtHR rarely applies interpretations of norms of domestic statutory law, case law of national ordinary courts and constitutional courts, and interpretations of norms of constitutional law. These methods of interpretation do not have the power of decisive arguments for a final decision of the ECtHR. According to their rare frequency, we classify them in the fourth group.

As already mentioned, the interpretative method the ECtHR always uses (fourth group) is the case law of the ECtHR. In all analyzed judgments, in respect of substantive and procedural matters, merit-related or formal, the ECtHR uses the legal positions established in its previous judgments. They serve as a basis for the decision on the merits (on account of previous, factually similar cases being decided in the same way) or, even more frequently, as arguments in favor (support) of the final decision in a particular case. In instances where the previous case law directly relates to the final decision, the ECtHR neither emphasizes nor quotes the former; that connection can be inferred solely by a more in-depth analysis of the previous positions quoted. This point further confirms the foregoing statement that previous case law of the ECtHR mainly serves to strengthen the argumentation for the final judgment on the merits.

Generally, the ECtHR cites its previous positions in different parts of the reasoning statement of a decision. The cited previous positions concern the issues in connection with the human right being decided. The ECtHR also has a regular practice of invoking many of its previous decisions; in some cases, we found more than 10 references. In fact, throughout the analyzed cases, the ECHR constitutes the legal framework within which the ECtHR operates, while the true meaning of a norm of the ECHR is defined, in each specific case, using the methods of interpretation.

A further method the ECtHR uses is the interpretation of fundamental rights on the basis of other international treaties and external sources, but far less frequently than is the case with the ECHR norms. Here, essentially, the frequency of use of the interpretation of norms of international treaties depends on the nature of the human right to be protected and the subject whose right is being protected. Differences occur where the right at issue is the one exercised in the international sphere or

within a state, as well as in whether the holder of the right is a national, a foreigner, or a stateless person. For foreigners' rights, the interpretation of norms of international law is used.

The ECtHR, according to the analyzed case law, uses teleological interpretation in less than half of the cases (second group). According to the Vienna Convention, this means applying the goal-based interpretation of the ECHR, both as a whole and of its individual provisions, whereby the ECtHR has not always been explicit in doing so, which renders identification of the teleological interpretation in the ECtHR case law difficult.

The remaining four methods of interpretation: historical, jurisprudence, general legal principles, and non-legal arguments, we classify into the first group, rarely used methods.

As for the manner (style) of decision-making on the existence of a violation of a human right, the ECtHR starts from the concrete factual and legal circumstances. Examining the above-presented methods of interpretation—examples and frequency—we can conclude that the ECtHR adheres to a style characterized, on the one hand, by references to own former practice (which is not officially binding), and on the other hand, by a thorough review of previous proceedings and decisions in the light of applicable law. Both the characteristics, each in its own way, contribute to our determination of the decision-making style of the ECtHR as one of 'essentially free evaluation of evidence'.

Quite specifically, acceptance of factual description of a given case (evaluation of facts based on case files) and assessment of the law applied are entirely in the hands of the ECtHR, being the court of last instance. This authority gives the ECtHR the discretion to determine, in a particular case, according to own judgment, the meaning of a relevant norm and present its final position on whether the human right in the given case has been violated or the interference (by the state) has been lawful. Nevertheless, although there is no higher court above the ECtHR that could evaluate its case law and overturn a decision, its freedom to decide is certainly not absolute. It is limited by basic principles of democracy in the modern society in whose framework the ECtHR operates: the rule of law, division of power, individual freedoms, and other values of the democratic order in general.

Each 'free' decision on the merits delivered by the ECtHR is preceded by the steps also typical of the style of this court: verifying whether the assessment of a given behavior by the respondent state falls within the jurisdiction of the ECtHR, whether the behavior was in line with statutory reasons for limiting a human right (whether it is possible to limit a right at all), whether derogation from a right has been done to the least extent, and whether the aim of that derogation is acceptable in a democratic society. These steps take place in a contradictory procedure where both parties present their arguments to make it possible for the Court, applying the mentioned methods of interpretation, to finally decide on whether a fundamental human right has been violated.

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List of selected decisions

1.	Decision Už-227/2008 of the Constitutional Court	Karakaş and Yeşilirmak v. Turkey, Application no. 43925/98, judgment of 28 June 2005.
2.	Decision Už-775/2009 of the Constitutional Court	R. Kačapor and others v. Serbia, Aplications nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06), judgment of 15 January 2008.
3.	Decision Už-2356/2009 of the Constitutional Court	Mansur v. Turkey, Application no. 16026/90 , judgment of 08 June1995.
4.	Decision Už-4100/2011 of the Constitutional Court	Mađer v. Croatia, Application no. 56185/07, judgment of 21 June 2011.
5.	Decision Už-3238/2011 of the Constitutional Court	Goodwin v. the United Kingdom, Application no. 17488/90, judgment of 27 March 1996.
6.	Decision Už-4527/2011 of the Constitutional Court	Mladenović v. Serbia, Application no. 1099/08, judgment of 22 May 2012.
7.	Decision Už-10061/2012 of the Constitutional Court	Weiser v. Austria, Application no. 2293/03, judgment of 22 February 2007.
8.	Decision Už-5331/2012 of the Constitutional Court	Akdivar and others v. Turkey, Aplication no. 21893/93, judgment of 01 April 1998.
9.	Decision Už-10061/2012 of the Constitutional Court	Weiser v. Austria, Application no. 2293/03, judgment of 22 February 2007.
10.	Decision Už-2513/2014 of the Constitutional Court	Maresti v. Croatia, Application no. 55759/07, judgment of 25 June 2009.
11.	Decision Už-7014/2014 of the Constitutional Court	Milenković v. Serbia, Application no. 50124/13, judgment of 1 March 2016.
12.	Decision Už-5057/2015 of the Constitutional Court	Zolotukhin v. Russia, Application no. 14939/03, judgment of 10 February 2009.
13.	Decision Už-7676/2015 of the Constitutional Court	Van der Ven v. The Netherlands, Application no. 50901/99, judgment of 4 February 1999.
14.	Decision Už-4303/2015 of the Constitutional Court	Ilnseher v. Germany, Application no. 67021/01, judgment of 27 January 2009.

15.	Decision Už-367/2016 of the Constitutional Court	Boljević v. Croatia, Application no. 43492/11, judgment of 31 January 2017.
16.	Decision Už-3702/2016 of the Constitutional Court	Steel and others v. the United Kingdom, Application no. 24838/94, judgment of 23 September 1998.
17.	Decision Už-1202/2016 of the Constitutional Court	Gabrić v. Croatia, Application no. 9702/04, judgment of 5 April 2009.
18.	Decision Už-5214/2016 of the Constitutional Court	Ismailov v. Russia, Application no. 30352/03, judgment of 6 November 2008.
19.	Decision Už-6463/2016 of the Constitutional Court	Rohlena v. Czech Republic, Application no. 59552/08, judgment of 27 January 2015.
20.	Decision IUz-48/2016 of the Constitutional Court	Carlo Boffa and others. v. San Marino, Application no. 26536/95, judgment of 15 January 1998.
21.	Decision Už-4395/2017 of the Constitutional Court	V.A.M v. Serbia, Application no. 39177/05, judgment of 13 March 2007.
22.	Decision Už-11707/2017 of the Constitutional Court	Lavents v. Latvia, Application no. 58442/00, judgment of 28 November 2002.
23.	Decision Už-2820/2017 of the Constitutional Court	Stanković v. Serbia, Application no. 41285/19, judgment of 19 December 2019.
24.	Decision Už-6300/2017 of the Constitutional Court	Miażdżyk v. Poland, Application no. 23592/07, judgment of 24 January 2012.
25.	Decision Už-5357/2018 of the Constitutional Court	Nejdet Şahin and Perihan Şahin v. Turkey, Application no. 13279/05, judgment of 20 October 2011.
26.	Decision Už-5108/2017 of the Constitutional Court	Letellier v. France, Application no. 12369/86, judgment of 26 June 1991.
27.	Decision Už-5677/2018 of the Constitutional Court	Bochan v. Ukraine, Application no. 22251/08, judgment of 5 February 2015
28.	Decision Už-13306/2018 of the Constitutional Court	Nankov v. N. Macedonia, Application no. 26541/02, judgment of 29 November 2007.
29.	Decision Už-12698/2019 of the Constitutional Court	Ignaccolo-Zenide v. Romania, Application no. 31679/96, judgment of 25 January 2000.
30.	Decision IUo-42/2020 of the Constitutional Court	Ireland v. the United Kingdom, Application no. 5310/71, judgment of 18 January 1978.

Methods			Frequency	Frequency of method (1-9)	Weight	%	Sum
1	1/A	a)	8	14(47%)	15	5%	43(15%)
		b)	0		0	0%	
	1/B	a)	14		18	6%	
		b)	8		10	3%	
	1/C		0		0	0%	
2	2/A		0	2(7%)	0	0%	2(1%)
	2/B		0		0	0%	
	2/C		0		0	0%	
	2/D		2		2	1%	
	2/E		0		0	0%	
	2/F		0		0	0%	
3	3/A		20	21(70%)	28	9%	97(32%)
	3/B		11		42	13%	
	3/C	a)	10		10	4%	
		b)	2		2	1%	
		c)	2		2	1%	
	3/D	a)	0		0	0%	
		b)	4		4	2%	
		c)	0		0	0%	
	3/E		4		4	2%	
4	4/A		12	30(100%)	20	7%	134(45%)
	4/B		30		112	37%	
	4/C		0		0	0%	
	4/D		2		2	1%	
5			14	14(47%)	18	6%	18(6%)
6	6/A		0	0(0%)	0	0	0(0%)
	6/B		0		0	0	
	6/C		0		0	0	
	6/D		0		0	0	
7			1	1(3%)	1	1%	1(1%)
8			0	0(0%)	0	0%	0(0%)
9			2	2(7%)	2	1%	2(1%)

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

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

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

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

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

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

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

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

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