Chapter V

Interpretation of Fundamental Rights in Slovakia

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1. Introduction

This chapter aims to analyze the jurisprudence of the Constitutional Court of the Slovak Republic (hereinafter the 'Constitutional Court') and related case-law of the European Court of Human Rights (hereinafter also 'the Court' or 'the ECtHR') within the framework of the Interpretation of Fundamental Rights in Europe project. It is divided into five subchapters. The first presents the position and competence of the Constitutional Court of the Slovak Republic and discusses basic features of its proceedings compared to ECtHR proceedings. The second subchapter explains the status of the Convention on Human Rights and Fundamental Freedoms within the Slovak legal order and the status of the Convention as an international treaty. Both issues are important in relation to the opinion of the Constitutional Court and the Court on the matter of interpretation as such that is analyzed and compared within the third subchapter. The fourth and fifth subchapters begin with a presentation of the selection criteria of decisions of the Constitutional Court and the Court, respectively, which are subsequently analyzed and compared in relation to the methods of interpretation. The conclusion summarizes the result that both courts use similar interpretative methods, but not to a similar extent. Moreover, there are certain differences that originate qualitatively from the position of these courts within the system of judicial bodies and quantitatively from the selection criteria since the selection of the decisions of the Court has been fundamentally influenced by the selected decisions of the Constitutional Court.

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2. Constitutional Court of the Slovak Republic

The Constitutional Court of the Slovak Republic was established on 1 January 1993 by the Constitution of the Slovak Republic no. 460/1992 Coll. (hereinafter also the 'Constitution'). According to the Constitution, the Constitutional Court is an independent judicial body for the protection of constitutionality.[1] It is a separate judicial body from the judicial system of the Slovak Republic. Its separate position is pointed out also by a separate section within the part of the Constitution upon judicial power. The judicial system as such is composed of the Supreme Court of the Slovak Republic and other courts.[2]

The organization and powers of the Constitutional Court and the position of judges of the Constitutional Court are regulated by Art. 124 to Art. 140 of the Constitution of the Slovak Republic and Act no. 314/2018 Coll. on the Constitutional Court of the Slovak Republic and on Amendments of Certain Acts (hereinafter also the 'Act on the Constitutional Court').

As for its organization, the Constitutional Court has its seat in Košice, the second largest city in Slovakia, situated in its eastern part. Its location might be considered to balance the location of most supreme bodies in the capital city of Bratislava. It consists of 13 judges appointed by the President of the Slovak Republic for a 12-year term on a proposal of the National Council of the Slovak Republic; this proposal shall consist of twice the number of candidates for judges that shall be appointed by the President of the Slovak Republic.[3] The President and Vice-President are appointed from among the judges of the Constitutional Court by the President of the Slovak Republic. The Constitutional Court decides in plenary or in three-member senates; the plenary session consists of all judges of the Constitutional Court.

The composition of the senates is regulated by the Work Schedule of the Constitutional Court of the Slovak Republic, and the Administration and Rules of Procedure of the Constitutional Court of the Slovak Republic regulated by Regulation No. 500/2019 Coll., which deals with details of the organization of the Constitutional Court of the Slovak Republic and proceedings before it, in particular with the preparation of proceedings and decisions, the position of the plenum, senates, judges, rapporteurs, and resolutions of the Constitutional Court of the Slovak Republic, and disciplinary proceedings against judges of the Constitutional Court.

Before presenting the competence of the Constitutional Court by introducing several areas it is authorized to deal with, it is important to note that the Constitutional Court acts and decides upon several legal questions, namely: on conformity of listed legal acts and negotiated international agreements with the Constitution, and

1 Art. 124 of the Constitution.

2 Ibid., Art. 143.

3 This fact is expressly pointed out here because there has been a decision adopted by the Constitutional Court that the authority of the President to make appointments is limited as well, although not expressly by the Constitution. See III. ÚS 571/2014, finding from 17 March 2015.

the same in relation to the subject and the result of a referendum or a declaration of the state of emergency. Moreover, it also decides upon complaints from individuals and local self-government bodies and upon electoral matters. It is also empowered to decide on the vacancy and the indictment of the President, and on competence disputes.

Keeping in mind the aim of this chapter, two basic matters are to be pointed out: First, the Constitutional Court of the Slovak Republic is authorized to give an interpretation of the Constitution or constitutional law if the matter is disputable, i.e., on fundamental rights and freedoms as well if there is a dispute.[4] The judgment of the Constitutional Court on the interpretation of the Constitution or constitutional law shall be promulgated in the manner laid down for the promulgation of laws; it is expressly set down that the interpretation is generally binding from the date of its promulgation.[5]

Second, the Constitutional Court is empowered to decide on complaints of natural persons or legal persons if they plead the infringement of their fundamental rights or freedoms, or human rights and fundamental freedoms resulting from an international treaty that has been ratified by the Slovak Republic and promulgated in the manner laid down by a law, save that another court shall decide on protection of these rights and freedoms.[6] If the Constitutional Court accepts a complaint, it has to decide whether the protected rights or freedoms were infringed by a valid decision, measure, or other action, and if so, it must cancel such a decision, measure, or other action. If the infringement of protected rights or freedoms emerges from inactivity, the Constitutional Court may order the party who has infringed these rights or freedoms to act in the matter. The Constitutional Court may at the same time remand the matter for further proceedings, prohibit continuing in the infringement of specified fundamental rights and freedoms, or if possible, order the party who has infringed the protected rights or freedoms to reinstate the status before the infringement.[7] As a consequence, the Constitutional Court may, by the decision by which it allows a complaint, award the party whose protected rights were infringed an adequate financial satisfaction.[8]

The Constitutional Court decides in plenary sessions if it is so provided by the Constitution or specified Acts.[9] Otherwise it adopts its decisions in a senate.

According to § 11 of the Act on the Constitutional Court, the senate of the Constitutional Court consists of three judges of the Constitutional Court, one of whom is the president of the senate of the Constitutional Court. The composition of the senates and the representation of their members is determined by the plenum of the Constitutional Court in the work schedule. The session of the senate of the Constitutional

4 Art. 128 of the Constitution.
5 Ibid.
6 Art. 127 of the Constitution.
7 Ibid.
8 Ibid.
9 Art. 131 of the Constitution.

Court is convened, its agenda is determined, and the meeting is chaired by the president of the senate of the Constitutional Court. The president of the senate is elected by the senate itself from among its members. The term of office of the president of the senate is 12 months, unless otherwise specified in the work schedule. The Constitutional Court is competent to act and pass resolutions in the senate if all its members are present at the proceedings and voting of the senate. All members of the senate are obliged to vote, and the senate decides by an absolute majority of its members.

A case is prepared for the decision of the Constitutional Court (either by its the plenary session or by the senate) and is referred to the session by the judge of the Constitutional Court to whom the case was assigned (hereinafter also referred to as the 'Judge-Rapporteur').[10] Members of the senate have a right to file a countermotion, which is voted on before the vote on the draft decision submitted by the Judge-Rapporteur.[11]

Since there are several senates working within the Constitutional Court, the legislator has adopted a procedure to secure promotion of legal certainty of its decision-making authority by a process of unification of legal opinions of the senates of the Constitutional Court.[12] If the senate of the Constitutional Court, in the course of its decision-making activity, reaches a legal opinion different from the legal opinion already adopted in the decision of another senate of the Constitutional Court, the Judge-Rapporteur shall submit to the plenum a proposal to unify the legal opinions. The plenum of the Constitutional Court shall decide on the unification of legal opinions by a resolution. It is important to note in this context that in further proceedings, all the senates of the Constitutional Court are bound by this resolution.[13] The situation is resolved the same way if it is found that the senate of the Constitutional Court has deviated by its decision from the legal opinion already expressed in the decision of one of the senates of the Constitutional Court. In such a case, the president of the Constitutional Court shall submit a proposal to the plenum to unify the legal opinions.

Cases are assigned to the Judge-Rapporteurs at random by technical and program means approved by the plenum of the Constitutional Court, so as to exclude the possibility of influencing the allocation of the case.[14] For proceedings in a matter falling within the competence of the senate of the Constitutional Court, the competent senate is the one of which the rapporteur is a member according to the work schedule, to whom the case has been assigned according to these technical means.[15]

10 § 6 of the Act on the Constitutional Court.
11 Ibid., § 10.
12 Ibid., § 13.
13 Ibid.
14 Ibid., § 46.
15 Ibid., § 47.

In general, the petitioner must be represented throughout the proceedings at the Constitutional Court by a lawyer.[16] Nevertheless, the Constitutional Court may appoint a legal representative for a petitioner who requests the appointment of a legal representative in proceedings before the Constitutional Court, if this is justified by the petitioner's property situation and it is not an obviously manifestly ill-founded exercise of the right of protection of constitutionality. Furthermore, costs of the appointed legal representative are borne by the state. Finally, also in case of the proceedings before the Constitutional Court, everyone has a right to act in one's own mother language or in a language he or she understands. In case it is necessary, the Constitutional Court shall recruit an interpreter.[17]

Proceedings of the Constitutional Court begin in general[18] upon a motion submitted by at least one-fifth of all Members of Parliament, the President of the Slovak Republic, the Government of the Slovak Republic, a court, the Attorney General, or what is the most relevant option in relation to the promotion and protection of human rights, by acts of individuals, i.e., by anyone whose right is to be adjudicated in a case as provided in Art. 127 of the Constitution according to which the Constitutional Court decides on complaints of natural persons or legal entities if they object to a violation of their fundamental rights or freedoms, or human rights and fundamental freedoms arising from an international treaty ratified and promulgated by the Slovak Republic, if another court does not decide on the protection of these rights and freedoms.[19]

To summarize the possible results of the decisions, if the Constitutional Court upholds the complaint, it then declares by its decision that the relevant rights or freedoms have been violated by a valid decision, measure, or other interference, and annuls such an act. If the claimed violation of rights or freedoms has arisen through inaction, the Constitutional Court may order the person who violated these rights or freedoms to act in the case. At the same time, the Constitutional Court may remand the case for further proceedings, prohibit the continuation of the upheld violation, or order restoration of the situation prior to the infringement. Similar to the proceedings in Strasbourg, Košice may, by its decision upholding the complaint, alike award a person whose rights have been violated adequate financial satisfaction.

16 Art. 134 of the Constitution.

17 Art. 38 of the Act on the Constitutional Court.

18 In some specific cases proceedings of the Constitutional Court are commenced if the motion is submitted by the ombudsman, Supreme Audit Office, or President of the Judicial Council.

19 Such a wording means that before a motion is submitted before the Constitutional Court, other local remedies have to be exhausted. A complaint upon violation of human rights before the Constitutional Court is the last to be exhausted before submitting a complaint at international bodies. Before amendment of the Constitution in 2001, a different system of motions was to be applied; however, as it was not considered an effective remedy by the ECtHR, it was therefore possible to reach the Strasbourg court even without filing a proposal at the Constitutional Court.

The following will similarly compare basic features of proceedings at the Constitutional Court and the European Court of Human Rights. Although these proceedings are different from the point of view of status since the former is held at the national level, and the latter at the international level, both were established to ensure a minimum standard of proceedings and human rights protection while avoiding a misuse of the system. Therefore, relevant jurisdictional issues are focused on, namely the time context, the status of the victim, and the authority to adopt provisional measures.

Similarly to the ECtHR, the Constitutional Court may proceed if a complaint is submitted by a person who claims that his or her fundamental rights and freedoms have been violated, i.e., they claim to be a victim.[20] Nevertheless, unlike the case of the ECtHR, a constitutional complaint may be filed only within two months of the entry into force of the act that is complained against, not six months after the exhaustion of domestic remedies, which has been shortened to four months within the Strasbourg system. Moreover, although the filing of a constitutional complaint has no suspensive effect,[21] the Constitutional Court may, unlike the ECtHR, at the request of the complainant, suspend the enforceability of the contested final decision, measure, or other intervention if the legal consequences of the contested act would threaten serious harm and the suspension of enforceability is not contrary to the public interest.[22] Furthermore, the Constitutional Court may, at the request of the complainant only, decide to adopt interim measures, if this is not contrary to the public interest and if the enforcement of the contested decision, measure, or other intervention would cause greater damage to the complainant than it may cause to other persons, and in particular it may order the state body that, according to the complainant, has violated their fundamental rights and freedoms to temporarily refrain from enforcing a final decision, measure, or other interference and order third parties to temporarily refrain from the legal entitlements granted to them by such an act.[23] Such a reasoning is important for provisional measures of the ECtHR as well, although those provisional measures might be adopted only vis-à-vis States.[24]

As has already been mentioned, if another court has jurisdiction to decide on the protection of the complainant's fundamental rights and freedoms in the matter to which the constitutional complaint relates, the Constitutional Court rejects the constitutional complaint for lack of jurisdiction to hear it. Moreover, a constitutional complaint is inadmissible if the complainant has not exhausted the remedies granted to him by law to protect his fundamental rights and freedoms. However, comparable to the judiciary of the ECtHR, the Constitutional Court will not refuse to accept a constitutional complaint on the grounds that it is inadmissible if the applicant proves

20 Compare Art. 122 of the Constitution and Art. 34 of the ECHR.
21 § 128 of the Act on the Constitutional Court.
22 Ibid., § 129.
23 Ibid., § 130.
24 Rule 39 of the Rules of Court.

that he or she has not exhausted all the granted remedies for reasons worthy of special consideration.[25]

As for the decision, if the Constitutional Court upholds the constitutional complaint, it states in the judgment which fundamental rights and freedoms have been violated, which provisions of the Constitution, constitutional law, or international treaty have been violated, and by which act the fundamental rights and freedoms have been violated. Nevertheless, as it will be presented below in this chapter, it is not always the case that the Constitutional Court includes the relevant case-law of the ECtHR in its reasoning.

To explain several forms of decisions of the Constitutional Court, as for the merits, the Constitutional Court decides by a finding. In other matters, the Constitutional Court decides by a ruling.[26] The Constitutional Court adopts a judgment only in the proceedings on a prosecution by the National Council of the Slovak Republic against the President of the Slovak Republic in matters of willful infringement of the Constitution or treason.[27]

A written copy of the decision of the Constitutional Court is prepared by the Judge-Rapporteur. If the Plenum of the Constitutional Court adopts a decision that differs significantly from the draft decision submitted by the Judge-Rapporteur, the written copy of the decision is prepared by the Judge of the Constitutional Court appointed by the President of the Constitutional Court instead of the Judge-Rapporteur. If the Senate of the Constitutional Court adopts a decision that differs significantly from the draft decision submitted by the Judge-Rapporteur, a written copy of the decision shall be prepared by the Judge of the Constitutional Court appointed by the President of the Senate of the Constitutional Court instead of the Judge-Rapporteur.[28]

In relation to the goal of the submitted research, it is important to point out the possibility of a judge of the Constitutional Court adopting a dissenting opinion. Such a dissenting opinion may relate either to a statement or reasoning of a decision. It is delivered in the same way as the decision.[29]

Regarding international standards of proceedings, an appeal cannot be lodged against a decision of the Constitutional Court. However, this does not apply if a decision of a body of an international organization established for the application of an international treaty by which the Slovak Republic is bound obliges the Slovak Republic to re-examine a decision of the Constitutional Court. We note, however, that not all the analyzed decisions, even some adopted in the second half of the analyzed period, have included this information at the end of the notice about no possibility of appeal.

25 § 132 of the Act on the Constitutional Court.
26 Ibid., § 64.
27 Art. 129 of the Constitution.
28 § 66 of the Act on the Constitutional Court.
29 Ibid., § 67.

3. Status of the Convention within the Slovak legal order

Before analyzing decisions selected on the basis of a factor of interpretation of fundamental rights, it is necessary to explain the position of the European Convention on Human Rights and Fundamental Freedoms (hereinafter also 'the Convention') within the Slovak national legal order, since this influences its interpretation on the national level.

For the general rule, Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations.[30] However, this constitutional article is just a statement that specifies the position and political orientation of Slovakia within international community. To be more precise regarding international treaties, one must consider Art. 7 of the Constitution that regulates the precedence of international treaties over laws.[31] Nevertheless, this authority is provided only under certain conditions and only for some types of international treaties. Precedence over laws is possible only for international treaties on human rights and fundamental freedoms, international treaties for whose exercise a law is not necessary, and international treaties that directly confer rights or impose duties on natural persons or legal persons. Moreover, all of them must be ratified and promulgated in the way laid down by law. Of course, Slovakia must be a contracting party of such a treaty.[32]

This article of the Convention has been included in the Convention on the basis of a so-called great amendment of the Constitution that was essential also in relation to the EU membership of Slovakia.[33] It has changed the position of international treaties within the Slovak legal order, which is especially important regarding the Convention since it was ratified by Slovakia (at that time a part of Czechoslovakia) in 1992, i.e., before the great amendment of the Constitution. Therefore, Transitory Article 154 c of the Constitution is the most important in relation to the Convention and other international treaties that were ratified by Slovakia before 1 July 2001. According to this article, international treaties on human rights and fundamental freedoms that the Slovak Republic has ratified and were promulgated in the manner laid down by law before the entry in force of this constitutional act shall be a part of its legal order and shall have precedence over laws if they provide a greater scope of constitutional rights and freedoms.[34] Other international treaties that Slovakia has

30 Art. 1 para. 2 of the Constitution.

31 However, this precedence does not include precedence over the Constitution.

32 Moreover, according to Art. 7 para. 4 of the Convention, the validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary, and international treaties that directly confer rights or impose duties on natural persons or legal persons require an approval of the National Council of the Slovak Republic before ratification.

33 Constitutional Act No. 90/2001 Coll.

34 Art. 154 c para. 1 of the Constitution.

ratified and that have been promulgated in a manner in accordance with law before the entry in force of this constitutional act have become a part of its legal order, if this is so provided in accordance with law.[35]

It is interesting, in relation to this different position of international treaties, to compare the basis of judicial decision making since the judges are constitutionally bound by the Constitution, by constitutional law, by international treaty pursuant to Article 7, paras. 2 and 5, and by law and on the basis of the oath taken by judges according to which they are bound by the Constitution, constitutional laws, international treaties ratified by the Slovak Republic and were promulgated in the manner laid down by a law, and by laws. The oath is thus determined in a broader sense.[36] To conclude, the Convention is adhered to by the judges, including judges of the Constitutional Court, and sometimes has precedence over laws. This could mean that a reference to it should be a part of their decisions. However, this is not always the case.

3.1. Rules of interpretation of the Convention determined by its status as an international treaty

Before analyzing selected decisions, it is also important to point out the position of the European Convention on Human Rights and Fundamental Freedoms as an international treaty in relation to the means of interpretation. As for the ECtHR, it is important to emphasize that the Convention is an international treaty concluded between States.

However, although the Vienna Convention on the Law of Treaties (hereinafter also 'the Vienna Convention')[37] did not enter into force until 1980, it was already in 1975 that the ECtHR decided the applicability of its articles upon means of interpretation, namely that

> *The Court is prepared to consider … that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to 'any relevant rules of the organization'—the Council of Europe—within which it has been adopted (Article 5 of the Vienna Convention).*[38]

According to the general rule of interpretation of Art. 31 of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary

35 Ibid., para. 2.
36 Comparable to the oath of a judge of the Constitutional Court.
37 Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, 1155 U.N.T.S. 331.
38 *Golder v. the United Kingdom*, application no. 4451/70, judgment from 21 February 1975.

meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It was the *Golder case* in which the ECtHR pointed out expressly that these rules are to be considered. Moreover, the Vienna Convention specifies that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty made between all the parties in connection with the conclusion of the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Furthermore, together with the context, there shall be considered any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties. Finally, the Vienna Convention allows a special meaning to be given to a term if it is established that the parties so intended.[39]

Nevertheless, although the Vienna Convention general interpretation rule is considered to be applied as one, i.e., all its elements together, the ECtHR has expressly stated in the same decision where it emphasized the applicability and unity of this rule that

> *Again, Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.*[40]

The Vienna Convention also determines supplementary means of interpretation, including the preparatory work of the treaty[41] and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.[42]

Articles of the Vienna Convention are norms of international positive law, i.e., legally binding rules. Nevertheless, it is clear that they themselves distinguish the general *rule* of interpretation and supplementary *means* of interpretation. The singular in Art. 31 emphasizes that it contains only one rule. Moreover, although individual paragraphs might appear to create a hierarchy at the first sight, this is not the

39 See, for example, the term 'alcoholic' in *Witold Litwa v. Poland*, application no. 26629/95, judgment from 4 April 2000, para. 60.

40 *Golder*, op. cit., para. 28.

41 *Travaux préparatoires* were important in *Johnston and others* v. Ireland, application no. no. 9697/82, judgment form 18 December 1986, para. 52.

42 Art. 32 of the Vienna Convention.

case; it simply verbalizes a logical process that leads the interpretation process, i.e., one naturally begins with the text and only afterwards examines the context and other materials available.[43]

As will be analyzed, the ECtHR has already used every single interpretation rule provided for by the Vienna Convention. Nevertheless, it might be submitted that the ECtHR prefers those interpretation rules that enable it to interpret the Convention like a living instrument. As a result, it is teleological interpretation that is most used, rather than grammatical or systemic interpretation. Of course, as the interpretation of documents is to some extent an art, not an exact science,[44] it is a complicated matter to count the number of methods used.

In relation to interpretation methods, it might be also submitted that every norm is either a rule or a principle.[45] If a rule is understood as a standard that is met or not, and a principle as a standard to be met to a maximum degree,[46] the difference between rules and principles stands out clearly where the application of one standard leads to a result that is incompatible with the requirements of the other standard. Indeed, if there is a conflict between norms at the level of rules, one rule must either be declared an exception to the other or be declared invalid.[47] In contrast, in the case of competing principles, one of the principles prevails over the other. The conflict of principles is thus not resolved at the level of validity, as in the case of rules, but at the level of weighting, i.e., on the basis of the principle of proportionality[48] that might be considered a basic interpretative rule in case of human rights protection.[49]

4. Opinions of the Constitutional Court and the ECtHR upon interpretation as such

The overall analysis must consider what interpretation is, not what it should be. Therefore, the first step after explaining the specific status of the Convention itself and the status of the Convention within the Constitution is to examine the understanding of the interpretation by the Constitutional Court and the European Court of Human rights within their jurisprudence. The following subchapter examines first the methods of interpretation expressly pointed out by both judicial institutions that are similar, and second the methods that were identified as specific because of a

43 Aust, 2007, p. 234.
44 ILC Commentary on draft Arts. 27 and 28, para. 4. Available online at http://untreaty.un.org/ilc/reports/reports.htm [last accessed 31 May 2021].
45 Alexy, 2010, p. 48.
46 Ibid.
47 Ibid., p. 49.
48 Ibid., p. 50.
49 *Soering v. the United Kingdom*, application no. 14038/88, judgment from 7 July 1989, para. 89.

different position of the examined institutions and because of the specificities of legal documents that have established these judicial bodies.

The Constitutional Court itself has taken several opportunities to declare its understanding of the issue of interpretation, especially in relation to the concept of legal certainty. It is in this context that it has stated that within the proceedings on motions or complaints where it is required not to decide upon a question of abstract protection of constitutionality but to apply a constitutional norm in accordance with principles of state of law guaranteed by Art. 1 of the Constitution, it has to apply this norm under the same conditions in the same way.[50] The Constitutional Court has since pointed out several times that a part of the principle of legal certainty is created by a requirement that if a legally relevant question is asked again under the same conditions, the same answer has to be provided.[51] According to the Constitutional Court, this is a proper approach toward an unambiguous, accurate, and understandable rule of the process of application of legal norms.

The Constitutional Court has emphasized that the interpretation of law and its concepts cannot be realized only in relation to the text of a norm, not even in a case where the text appears to be unambiguous and definite, but first of all according to the meaning and purpose of the norm, as well as in the interest of constitutional principles, including the protection of fundamental human rights. Textual interpretation can, in the sense of the settled case-law of the Constitutional Court, represent only an initial approximation to the content of a legal norm, the bearer of which is the interpretation of a legal regulation; to verify the correctness or incorrectness of the interpretation and respectively to support or clarify it, other interpretive approaches, especially teleological and systemic interpretation, including a constitutionally conforming interpretation, which are capable in the context of rational argumentation, constitute an important corrective in determining the content and meaning of the applied norm.[52]

Similarly, as will be pointed out *infra*, with regard to interpretation by other state bodies, the Constitutional Court has pointed out that an overly formalistic approach in interpreting the final provisions that leads to a manifest injustice cannot be tolerated in the case of public authorities. Moreover, according to the Constitutional Court, general courts are not absolutely bound by the literal wording of the law, but they can and must deviate from it if required by the purpose of the law, the history of its origin, a systemic connection, or certain constitutional principles. In the interpretation and application of legal regulations, it is therefore impossible to omit their purpose and meaning, which is not only expressed in the words and sentences of any final regulation, but also in the basic principles of the legal status.[53]

50 II. ÚS 80/1999, ruling from 18 August 1999, p. 639.
51 I. ÚS 236/06, finding from 6 June 2007, p. 234.
52 I. ÚS 351/2010, finding from 5 October 2011, p. 5.
53 I. ÚS 306/2010, finding from 8 December 2010, p. 1004.

The case law also elaborates the opinion of the Constitutional Court on the historical method. This applies to the protection of human rights as well, e.g., the history of the adoption of the Charter of Fundamental Rights and Freedoms might be considered crucial to the context.[54] Nevertheless, the Constitutional Court has expressly noted that the argument intended by the historical legislator has only a subsidiary place in the interpretation of the constitution. What matters in this context is not what the individual members of the Constituent Assembly intended by a particular constitutional provision, but what text they adopted after ongoing discussion.[55] Therefore, this subjective teleological interpretation is considered of less importance for the approach to the interpreted text.

Moreover, in relation to the interpretation of the Constitution, the Constitutional Court has applied several rules of interpretation that it has distinguished from methods of interpretation. Nevertheless, within this analysis, those concepts are examined interchangeably.

First is the rule of a causal link between legal norms. The Constitutional Court expressly pointed out already in the early years of its functioning that the Constitution represents a legal unit that must be applied in the mutual connection of all constitutional norms.[56] The Constitutional Court later also stressed that every constitutional norm should be interpreted and applied in conjunction with other constitutional norms, as long as there is a causal link between them.[57] This domestic systemic argument might be compared to the context element of the interpretation of international treaties as already explained; nevertheless, according to the Constitutional Court, this approach retains a preferred position vis-à-vis other approaches, unlike a context element, that is, one of elements to be applied as one rule.[58]

Another specific rule of interpretation applied by the Constitutional Court has been verbalized as determination of the purpose of the norm. Although the text of the Constitution does not include any express provision in this matter, the Constitutional Court has stressed that the basis for the interpretation and application of each legal norm in a state that is governed by the rule of law is the determination of the purpose of the legal regulation, the definition of its scope, and the identification of its content.[59] That such a rule is supplementary and not an element of the overall approach to understanding a legal norm has been proved by a decision of the Constitutional Court in which it upheld that interpretation and application of a legal norm, *if its normative text is not sufficiently clear* (emphasis added by the author), should meet the requirement of legal certainty and at the same time should be proportionate to

54 The Charter of Fundamental Rights and Freedoms was adopted on 9 January 1991 by the Czechoslovak Parliament.

55 PL. ÚS 12/2001, finding from 4 December 2007, pp. 57–58.

56 II. ÚS 128/95, ruling from 10 October 1995, p. 324.

57 II. ÚS 48/1997, finding from 7 January 1998, p. 288.

58 See *supra* comparison of Arts. 31 and 32 of the Vienna Convention.

59 II. ÚS 171/05, finding from 27 February 2008.

the content and purpose of the legal relations that should be regulated by it.[60] This might also be the reason that such an interpretation focusing on the purpose of the norm is not used by the Constitutional Court very often. It is a different approach from that taken by the ECtHR that considers the objective teleological interpretation as the leading one.

Moreover, keeping in mind the slightly different wordings of the Constitution and the Convention in relation to rights that do not include express limitations, e.g., a right to free elections, the interpretation has led to a comparable result, although using different terms. The Constitutional Court has started to use the term of the constitutional intensity of a violation of constitutional norms, while the ECtHR has introduced a concept of implied limitations:

> *The concept of 'implied limitations' under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 is not limited by a specific list of 'legitimate aims' such as those enumerated in Articles 8 to 11, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case. It also means that the Court does not apply the traditional tests of 'necessity' or 'pressing social need' that are used in the context of Articles 8 to 11. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people.*[61]

The result is an acceptation of a violation of a human right to a certain degree despite possible strict grammatical interpretative approach that would not allow limitations. Both institutions point out the aim of the protection of the spirit of relevant rights. In the case of the right to free elections, the ECtHR has elaborated and applied the test of essence, not the test of necessity in a democratic society:

> *However, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with. It has to satisfy itself that limitations do not curtail the rights in question to such an extent as to impair their very essence, and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim and that the means employed are not disproportionate… In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature—in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage … Any departure from the principle of universal suffrage risks*

60 III. ÚS 24/07, finding from 17 April 2007, p. 549.
61 *Yumak and Sadak v. Turkey*, application no. 10226/03, para. 109 iii.

undermining the democratic validity of the legislature thus elected and the laws which it promulgates.[62]

To compare, the Constitutional Court has taken the position that it understands a certain level of the violation of the constitution if it does not exceed a tolerated measure of gravity. It has therefore decided, taking into account that achieving a state of full compliance with the law upon the preparation and conduct of elections is practically impossible, that if dissatisfaction with the election results would lead to election complaints, this could call into question parliamentary democracy as such. According to the Constitutional Court, declaring an election invalid on the basis of a minor violation of the law can lead to a deliberate manipulation of the election. It has therefore decided to declare parliamentary elections invalid only if there has been a gross or serious or repeated violation of the right to free elections in a way that affects the free competition of political forces in a democratic society.[63]

If these terminologically different methods are compared, their driving motor is the essence of the democratic society that is a cornerstone of both the Convention[64] and the Constitution,[65] and as such might be presented as an example of substantive interpretation based on non-legal arguments. Another means or method of interpretation that might be considered in this context is teleologically, or more precisely axiologically oriented interpretation.

Finally, there is another specific rule that is used by the Constitutional Court, although rarely, that is only partially comparable to an interpretative approach of the ECtHR: the so-called rule of priority of a more constitutionally conforming interpretation. Again, it also might be described as an axiologically oriented interpretation that takes into account compatibility with the Convention.

This principle of the priority of a more constitutionally conforming interpretation also implies that in cases where, when applying standard methods of interpretation, different interpretations of related legal norms come into consideration, the one that ensures the full or fuller implementation of rights of natural or legal persons guaranteed by the Constitution is prioritized. In case of doubt, all public authorities are obliged to interpret legal norms in favor of the implementation of the fundamental rights and freedoms guaranteed by the constitution, or human rights and fundamental freedoms resulting from a qualified international treaty.[66]

62 Ibid., § 109 iv.

63 PL. ÚS 19/94, ruling from 2 November 1994, p. 261.

64 See the relevant part of the Preamble of the Convention: '… reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend…'

65 See the relevant part of the Preamble of the Constitution: '… endeavouring to implement democratic form of government, to guarantee a life of freedom, and to promote spiritual culture and economic prosperity…'

66 PL. ÚS 110/2011, finding from 3 July 2013, p. 104.

In comparison, as will be pointed out, the ECtHR has used all the methodological rules provided for by the Vienna Convention on the Law of Treaties. It has therefore already also used a supplementary means of interpretation; however, these means are used only in order to confirm the meaning resulting from the application of a general rule of interpretation, or to determine the meaning when the interpretation based on the general rule of interpretation leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.[67] It cannot be compared to an approach that is based on a choice between results of interpretation that are both in conformity with the Constitution.

Nevertheless, such interpretation might be compared to the rule of interpretation of treaties authenticated in two or more languages.[68] If it happens in such a case that the texts disclose a difference of meaning that cannot be removed by application on the basis of a general rule or supplementary means, and no text has been agreed upon as prevailing, the meaning that best reconciles the texts with regard to the object and purpose of the treaty is adopted.[69] This means that comparably to the rule of the priority of a more constitutionally conforming interpretation, the purpose of the promotion and protection of fundamental rights as effectively as possible is prioritized.

Finally, an even more thoughtful comparison in relation to the principle of the priority of a more constitutionally conforming interpretation would point out the practice of the ECtHR in relation to interpretation based on the margin of appreciation. In such a case, interpretation of the Convention by general or supplementary rules might lead to different results, all of them nonetheless in conformity with the Convention. Consequently, since the ECtHR presumes that the States interpret and apply their obligations under the Convention in good faith, it leaves them space for non-arbitrary discretion, since it should not simply reject their conclusion whenever it has a different opinion on the matter. Of course, this is possible only to a certain level, meaning unless it is such an incorrect interpretation that its application would exceed a specific margin of appreciation. However, despite the existence of different results of possible interpretations and the search for balance, the reasoning behind the concept of margin of appreciation is not a search for a better, or rather a fuller protection but for a level of protection that does not exceed a minimum level.[70] Therefore, it is more suitable to compare it to a specific rule that has already been mentioned and that accepts the violation of a human right to a certain degree.

67 Art. 32 of the Vienna Convention.
68 Ibid., Art. 33.
69 Ibid.
70 Harris, O'Boyle, Warbrick, 2009, p. 11 et seq.

5. Selection and analysis of decisions adopted by the Constitutional Court, focusing on interpretation

The criteria for selecting 30 decisions of the Constitutional Court of the Slovak Republic have been chosen on the basis of two sets of factors. First, the presented observations are a result of research based on the research design, and as such they must have followed standards that have been agreed upon. It has been decided at the beginning of the whole research process that the 30 most relevant decisions of national constitutional courts have to be identified, and moreover that they must have been adopted within the period from 2011 to 2020. Furthermore, it is specified that all the analyzed decisions must refer substantively to the ECtHR or CJEU case law. This has proved a highly limiting rule since several important and decisive decisions have been identified that have no reference to these international judicial institutions.[71] Nevertheless, taking into account the aim of the research, it is obvious that they must be omitted from analysis.

Second, the process of the identification and selection from the decisions of the Constitutional Court has been influenced by the author of the research, i.e., the subjective context must be considered as well. Moreover, the author has considered the customary annual choice by the Constitutional Court itself of its most important decisions. Finally, recommendations of other members of the academia have been included as well, especially from experts in the area of constitutional law.

To understand legally binding decisions, their reasonings are considered of fundamental importance in interpretation. Exactly these have been the object of analysis within this project. Before presenting the results, two general observations are submitted. The first concerns the timeline. The Constitutional Court of the Slovak Republic is a rather young institution. Its own way of reasoning has not yet been crystalized. One may see this, e.g., in the formal setting of decisions. The earlier are divided into sections and subparts, while to the latter numbers of paragraphs have been added to allow more specific reference to parts of decisions. Unfortunately, this is not a standard. Second is the composition of the senates and the Constitutional Court itself. The fact that some cases, even leading ones, do not include references to the ECtHR judiciary, not even to the Convention, despite its special position in the legal order of the Slovak Republic, mirrors the lag in legal education from the previous era when Slovakia was not a party to important international human rights treaties and referring to them was, as it were, only theoretical acknowledgement of their importance. Therefore, there are some differences that are considered important on a subjective level. Although no special survey has been realized to confirm or refuse such a claim, not all the judges of the Constitutional Court, probably identifiable by their age, have already become habituated to the fact that ECtHR is a

71 E.g. I. ÚS 397/2014-262, finding from 4 December 2014, II. ÚS 703/2014, finding from 18 February 2015.

source of law that the Slovak Republic observes and that under certain conditions has precedence over the Slovak national legal framework. Therefore, they do not refer to the Convention on a regular basis. On the other hand, some of them refer to it even if the *petit* does not include such a reference. That is perhaps also one of the reasons why domestic law and own case law have been much more important for the Constitutional Court in deciding a case. Third, although one must keep in mind all the differences that the relevant cases include, compared to the ECtHR, the Constitutional Court lacks an elaborated, general way of taking a decision. This not only concerns a systematic approach, i.e., the Constitutional Court first declares its decision and then explains it (unlike the ECtHR which declares its decision at the end of the reasoning); it is not common for a majority of the Constitutional Court decisions to follow a certain way of reasoning that is seen in the ECtHR decisions. Nevertheless, this might be explained by the first general observation, namely the young age of the Constitutional Court.

As has already been submitted, every Constitutional Court decision begins by stating the merit of the case and declaring whether there has (not) been a violation or by stating that a particular legal norm is (not) in accordance with the Constitution. The third possibility is a decision whereby the Constitutional Court decides not to proceed with a case since it is (generally) manifestly ill-founded. It is after this declaration that the Constitutional Court reasons its decision, which is where almost all the methods of interpretation from the research design are used. The arguments of a complainant and relevant state bodies are usually summarized, and the position of the Constitutional Court is then presented. It is obvious that the Constitution is not an international treaty. It is also true that it has been claimed that Constitutional Court reasonings in general miss generalized ways of coming to a decision. Nevertheless, as the analysis proves, the overall approach indicates a preference for textual and systemic argumentation that might be compared to the first part of the general rule of interpretation according to the Vienna Convention on the Law of Treaties.

As for *textual argumentation*,[72] three subcategories have been identified in the research design. The first one, interpretation based on an ordinary meaning, has been used only in 6 cases out of 30. Within these cases it was only in one case, although used twice, that the Constitutional Court referred to a dictionary.[73] The second one, argumentation based on legal interpretation, has been used more often, namely in 28 cases out of 30. To develop the previous example, arbitrariness has been explained by looking the word up in the dictionary; nevertheless, the Constitutional Court continued to interpret arbitrariness also in relation to its use in a particular area.[74] Other examples include the terms of law, or statements interpreted for a special use in relation to the speech of members of Parliament. While reading the decisions, the

72 For details of the methods of interpretation see Toth, 2016, p. 173 et seq.

73 Arbitrariness as a 'reckless exercise of one's will', 'The preference for one's own will … instead of law and justice', PL. ÚS. 7/2017, finding from 31 May 2017, p. 128.

74 Ibid.

author has taken notes for a special subcategory concerning textual argumentation since two words have been found to be of special importance. The terms that constitute, as it were, a special sub-subcategory are the following: discrimination (interpreted in 7 cases, although in the same manner) and proportionality (interpreted in 12 cases, usually in relation to the test of proportionality in either its strict or broad understanding). Originally, this sub-subcategory was considered unimportant since, e.g., the test of proportionality is almost of automatic use within the application of constitutional norms. Nevertheless, a special *aha*-moment occurred in relation to one case, where the interpretation of discrimination was decisive for the result of a case. Finally, regarding the last subcategory within textual argumentation, no instances of professional interpretation in the case of non-legal technical meaning have been identified.

The system of *logical argumentation* has been used often by the Constitutional Court, 29 times altogether, although it might not be considered so if we were to examine the numbers of instances of its use within individual subcategories separately. To give an example, argumentation *a minore ad maius* has been identified in 9 cases out of 30. The best case to show the argumentation of the Constitutional Court in this area concerns the protection of privacy in which the Constitutional Court has decided that conditions that have to be met in relation to the protection of privacy against the use of surveillance technologies by State bodies have general application, concerning anything used to limit any value of a private nature, including the protection of personal data against unauthorized activity by any public authority.[75]

It is interesting, however, that there have been cases in which the Constitutional Court has used the logical argumentation to explain that the reasoning of a certain approach of a state body has been lacking. For example, Parliament has submitted that since state property has been administered and not owned by particular subjects, state property could not be executed. The Constitutional Court has admitted that certain property is owned by the State and therefore not executable in some situations and that the system of administration of State property might function the same way; nevertheless, it found that Parliament had not provided any reasoning for this. Such an argumentation *a maiore ad minus* has been identified in 5 cases out of 30.

The logical argumentation *ad absurdum* has been found in 3 cases out of 30. As already noted *supra*, part of one Constitutional Court decision is of special importance, since it pointed out that in certain situations a too-strict formalism (exclusively textual interpretation) might lead to injustice, which would be an absurd result of a judicial decision, and therefore teleological argumentation is necessary:[76]

> *The Constitutional Court further states that the public authorities, and in particular ordinary courts, cannot tolerate an excessively formalistic procedure in interpreting legal*

75 I. ÚS 290/2015-36, finding from 7 October 2015, para. 49.
76 I. ÚS 155/2017, finding from 31 August 2017, para. 19.

provisions that leads to a manifest injustice. A general court is not absolutely bound by the literal wording of the law, but can and must deviate from it, if required by the purpose of the law, the history of its creation, a systematic connection, or one of the constitutional principles. In the interpretation and application of legal regulations, therefore, their purpose and meaning cannot be neglected, which is expressed not only in the words and sentences of a particular legal regulation, but also in the basic principles of the rule of law.

Two other examples of interpretation *ad absurdum* concerned the interpretation of a right to a reasoned judgment and a right to a fair trial. In both cases this argumentation aimed to point out an absurd result if values and purposes are not considered while interpreting the law. First, according to the Constitutional Court, the validity of a decision might be 'sufficient to contradict' by repeatedly raising the objection of a failure to give reasons for a judgment, which would always lead an appellate court to refer the case back to the court of the first instance for further proceedings. Such an application of the right to a reasoned judgment that in fact serves to misuse this fundamental right is incompatible with its purpose.[77]

Second, although the Constitutional Court has accepted that the ECtHR interpreted the Slovak Act on Offenses as belonging to the criminal law, it has upheld that the interpretation of the Slovak legal system cannot be so extensive as to conclude that the imposition of a sanction under any law is a criminal sanction and falls within the area of criminal law.[78]

The fourth type of logical argumentation, argumentation *a contrario*, has been identified in the research sample of the selected 30 Constitutional Court decisions only once, in a case dealing with so-called Mečiar amnesties in which the Constitutional Court had to interpret the substance of specific acts adopted by the legislative branch. Therefore, the Constitutional Court first pointed out that for acts of constitutional power, only those acts of Parliament may be included that undoubtedly have the character of a normative legal act, indicated by the fact of containing legal norms characterized by generality. Subsequently, if this starting point is applied *a contrario* to the legal acts listed in Art. 84 para. 4 of the Constitution, a resolution of Parliament declaring a referendum on the removal of the President, a resolution of the National Council on indictment of the President, and a resolution of the Parliament on declaring war cannot be considered acts of constitutional power.[79]

Argumentation *a simili* has been recognized five times, mostly in cases where the Constitutional Court has found that the reasons for declaring a certain right violated have been similar to those that are relevant for declaring another right violated as well. Similarly, the Constitutional Court compared reasonings of the applicant in different parts of an application and decided that it was sufficient to analyze them

77 Compare I. ÚS 290/2015, op. cit., para. 20.
78 Compare I. ÚS 505/2015, finding from 13 January 2016, para. 37.
79 See PL.ÚS. 7/2017, op. cit., p. 97.

only once. Interestingly, regarding the case on Mečiar amnesties, the Constitutional Court has refused to compare incomparables by pointing out different cultural and legal-political traditions and fundamentally different constitutional-political conditions. It has therefore emphasized that the exercise of public power based (also) on the use of violence against political opponents is an essential feature of military dictatorships. On the contrary, in democratic states the use of violent means in the exercise of public power applied in the context of a legitimate competition of political forces is absolutely unacceptable and incompatible with the essence of a democratic regime.[80]

Finally, for logical argumentation, it was very encouraging to identify use of interpretation according to other logical maxims (6 cases out of 30) in cases of true/false retroactivity,[81] *par in parem non habet imperium*,[82] *sui generis* substance of a legal act adopted by the Parliament,[83] implied powers (twice),[84] and the implicit material core of the Constitution. The last of these in particular has stimulated much discussion in the Slovak Republic, and not only in relation to the selected decisions. For some it has even become a tool of misinterpretation of the Convention since it may sound mysterious, scientific, and therefore attractive; contrariwise, to base the argumentation on the text of the law, it sounds bureaucratically insatiable.[85]

Taken overall, it is submitted that the most used means of interpretation has been *systemic argumentation*, both domestic and external. Domestic systemic argumentation has been used quite often in relation to contextual interpretation, appearing in 16 cases out of 30. Most of these cases concerned other constitutional provisions, especially provisions dealing with the rule of law, Art. 1 of the Constitution,[86] and separation of powers, Art. 2 of the Constitution.[87]

Although not expected that often, many cases included a reference to domestic law that was found relevant to interpreting the Constitution. Materially speaking, all the legal statutes that have been identified in relation to this way of interpretation were considered important for understanding specific situations, and included a range of legal statutes, most of them rather legal codes than simple statutes, such as the Criminal Code (2), Criminal Procedural Code (2), Administrative Law Procedure (2), Civil Code (2), Rules of Procedure of the National Council (1), Law on Electronic Communication (1), Labor Code (1), Law on Judges and Associates (1), Law on the Judicial Council (1), Law on Material deprivation (1), and Press Law (1). In relation

80 Ibid., p. 149 et seq.
81 PL. ÚS 3/2009, finding from 26 January 2011, p. 46, 51.
82 PL. ÚS 111/2011, finding from 4 July 2011, p. 63.
83 PL. ÚS 7/2017, op. cit., p. 96.
84 II. ÚS 29/2011, finding from 13 December 2012, p. 16, I. ÚS 290/2015, op. it., para. 42.
85 PL. ÚS 21/2014, 30 January 2019, dissenting opinion of Lajos Mészáros, para. 20.
86 Art. 1 para. 1 of the Constitution: 'The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion'.
87 Art. 2 para. 2 of the Constitution: 'State bodies may act solely on the basis of the Constitution, within its scope and their actions shall be governed by procedures laid down by a law'.

to the relevance of domestic law, the Constitutional Court has even explained its understanding of the interpretation of particular norms and general abstract norms. According to the Constitutional Court, generality in relation to the subject-matter of legislation means that a legal norm generally defines its material substance, which otherwise means that it could never solve a specific case. If a piece of legislation did so, such a provision would not be a legal norm, but would be issued as a legal act *per nefas*, e.g., as an individual administrative act.[88]

Systemic argumentation based on the Constitutional Court's own case-law has been found crucial for the process of decision making. The Constitutional Court has indicated in 25 cases out of 30 that it had already decided upon a relevant issue in a previous case, and the Court has declared openly that its previous approach in relation to the very conclusion about the non-compliance of the challenged law with certain provisions of the Constitution 'mechanically' perceived as its non-compliance with Art. 2 para. 2 of the Constitution was obsolete.[89] Interpretationally speaking, it could be described as tautological.[90]

It might be submitted that the Constitutional Court, by referring to its own decisions, might be considered as being within a *de facto* precedential system similar to the ECtHR referring to its previous case law. Nevertheless, a common understanding of this legal institute is missing in the judiciary and literature in the Slovak Republic. On the other hand, although not expressly a system of precedents, interpretation by the Constitutional Court is expected to respect the rule of law, and that is one of the required and expected consequences of deciding in accordance with previous decisions.[91]

It has been challenging to identify interpretations of the Constitution on the basis of the case law of ordinary courts. Most of the cases that have been recognized in this regard consider the judiciary of the Supreme Court of the Slovak Republic, which might not be considered as an ordinary court. Nevertheless, it is not the Constitutional Court, and moreover, it is a part of the ordinary court system. Nonetheless, it is only in 2 cases out of the 30 selected that the Constitutional Court has presented the argumentation of the Supreme Court or other courts of the ordinary court system and assessed it the same way.[92] On the other hand, it is a usual approach in cases where the final decision of the Constitutional Court means that it has found the submission manifestly ill-founded. The best example is a case where the complainant invoked his right to use his mother language in criminal proceedings. However, such a right is not guaranteed to the complainant by the Constitution nor the Convention, and this regulation of the fundamental right to an interpreter is the same in the Criminal Procedure Code, which contains a specific regulation of the

88 PL. ÚS 7/2017, op. cit., p. 97. Such an understanding of the interpretation of the Constitution was relevant in relation to the so-called Mečiar amnesties.

89 PL. ÚS 18/2014-97, ruling from 22 March 2017, para. 114.

90 Ibid.

91 Ľalík, 2013, pp. 36–65.

92 Compare IV. ÚS 57/2014-42, ruling from 30 January 2014, p. 20.

application of the relevant fundamental right in criminal proceedings.[93] The Constitutional Court has repeated the ordinary court argumentation and then assessed the applicant's submission as purposeful and therefore manifestly ill-founded.[94]

Finally, regarding domestic systemic argumentation, the Constitutional Court has presented and taken into account the acts of other domestic state bodies. It has done so in 11 cases out of 30. It is true that some cases concerned situations where Parliament has provided its interpretation of a situation under consideration that was initiated by a group of members of Parliament; however, the Constitutional Court has also taken into account the position of Parliament as a legislative body, not only that of its members. One case was quite specific, in that the Constitutional Court was asked to decide whether a particular act of Parliament was in accordance with the Constitution, although it was not an abstract statutory act.[95] The Constitutional Court decided, however, that it was an act adopted in accordance with the Constitution, since an amendment of the Constitution had been adopted. This reasoning was especially important, since a different legal foundation had been held by the Constitutional Court in a similar matter before the amendment.[96] This was one of the points emphasized by the position of Parliament. Other public bodies whose acts the Constitutional Court found relevant to interpreting the Constitution were the Broadcasting Council, the Judicial Council, Ministry of Interior, Ministry of Environment, Ministry of Health, Attorney General, and Association of Judges of Slovakia.

Turning to *external systemic and comparative law arguments*, we note in general that it has been the second most used means of interpretation in the research sample, especially the first three of the four means analyzed. Since the selection factor from the beginning of the research has been the presence of reference to ECtHR case law, which is based on the Convention, the Convention has not been considered in this part, nor has the EU primary and secondary legal sources in a case that was selected from the Court of Justice case law. However, if such an EU legal source has been referred to in other cases that have been selected under the condition of ECtHR reference, it has been counted in the research. Having said that, it is of interest, especially from the point of view of the international law commitments of Slovakia, that in 14 out of 30 cases other international treaties have been referred to. Most of these cases included reference to the International Covenant on Civil and Political Rights,

93 IV. ÚS 57/2014-42, op. cit. p. 19.

94 Part of the settled case law of the Constitutional Court is also the legal opinion (e.g. II. ÚS 12/01, IV. ÚS 61/03, IV. ÚS 205/03, I. ÚS 16/04, IV. ÚS 252/2013) according to which protection of a right to a fair trial, i.e. a fundamental right under Art. 48 para. 2 of the Constitution and of a right under Art. 6 para. 1 of the Convention, is provided in proceedings before the Constitutional Court only if at the time of application of this protection the violation of this fundamental right by designated public authorities could still persist. If, at the time when the complaint was delivered to the Constitutional Court, the alleged violation of this fundamental right could no longer take place, the Constitutional Court in principle rejects it as manifestly ill-founded (see § 25 para. 2 of the Act on Constitutional Court).

95 PL. ÚS 7/2017, op. cit., p. 97.

96 Ibid., pp. 99–100.

International Covenant on Economic, Social and Cultural Rights, International Convention on the Rights of the Child, International Labour Organisation conventions, the EU Charter and primary treaties, and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

Although the Convention was not mentioned in all the cases, the ECtHR was definitely referred to in every case, since that was a condition of selection. Nevertheless, there were other international bodies that were referred to in the research sample of the Constitutional Court decisions, precisely in 9 cases out of 30, namely the Inter-American Court of Human Rights, Human Rights Committee, Committee on the Rights of the Child, Council of Europe Committee of Ministers, Venice Commission for Democracy through Law, UNHCR, European Commission, Court of Justice of the European Union, and Consultative Council of European Judges.

Since no case has included argumentation based on other external sources of interpretation, such as customary international law, the last means of external systematic argumentation that has been used is reference to other foreign legal systems. This has been used by the Constitutional Court rather often, in 21 out of 30 cases. Most references pointed out the practice of the Czech Constitutional Court and then the German Constitutional Court. Other countries were referred to in three cases, most of them European countries—in some cases their statutes, and sometimes even their Constitutions. Apart from Europe, this example includes USA.[97]

Contrariwise, teleological argumentation has very weak representation in the selected case-law of the Constitutional Court. There were only five cases detected in the sample examined that included a reference to the objective teleological argumentation. The most interesting case in relation to this type of argumentation was a case that concerned interpretation regarding access to a judicial function.[98] Although there is no such right in the Convention, as there is a right to public function under the same conditions according to the Constitution,[99] it has been referred to in this way in the decision and therefore in this contribution as well. Moreover, legally speaking, the case concerned the status and related claimed arbitrariness of the decision-making process of an autonomous body in the area of the self-administration of judges and courts. The status and competence of the Judicial Council have been changed by several amendments of the particular legal act, and at the moment when the decision was taken not to nominate a claimant for a judicial function, the Judicial Council was authorized to decide in a secret ballot and without obligation to reason its decision. Within the decision, the Constitutional Court analyzed the purpose of the specifics of the process of the selection of a judge and also the substance of the

97 PL. ÚS. 7/2017, op. cit., p. 58.

98 II. ÚS 29/2011-64, op. cit.

99 Art. 30 para. 4 of the Constitution. Access to a judicial function is considered to be included in access to a public function.

decisions that are taken during this process.[100] While according to the later amended legal framework there would have been no violation, nevertheless, requirements of a reasoned decision were included in the amendment after the decision had been taken. In relation to the interpretation, this decision is noteworthy also vis-à-vis interpretation of the Constitution as a living instrument. The Constitutional Court has commented upon this interpretation, although in the opposite way, when it pointed out that

> *We have become accustomed to the evolutionary interpretation of law, the application of the theory of so-called living Constitution (see, for example, the interpretative prisms applied by the European Court of Human Rights) that changes legal norms without changing the legal text. In this case, on the contrary, and therefore perhaps even more surprisingly, we can talk partially about the situation when by changing the text of the legal regulation, the law (legal norm) does not change in principle (cf. already described amendment to the Judicial Council Act). When the legislator adopts an amendment to the regulation to 'make the implicit requirement visible' and to execute it (or rather to balance it), in our case the requirement of objectivity, it does not have to actually introduce a legal norm by changing the text, but 'only' to specify it. This is also related to the existence of legal principles which, when applied to specific situations, often factually turn into legal norms*.[101]

Other examples that included reference to the object and purpose of the Convention concerned already mentioned not recommending a too-strict formalism in the interpretation of the Constitution and also its material core. As for subjective teleological interpretation, it has been used rarely as well. Proposer justification of the Convention was identified only twice,[102] and draft materials of the Constitution only twice as well.[103] The same holds for the intention of the constitution-maker,[104] and other circumstances of the constitution making, which were identified in three cases.[105]

Contrariwise, interpretation based on scholarly works has been a very often used means of interpretation in the selected decisions of the Constitutional Court. It has been identified in 23 out of 30 cases. The scope devoted to academic literature has in some cases decided by the Constitutional Court been almost astonishing.[106] It was out of the ordinary expectation that in many cases there was much more reference to the output of scholars than to outcomes of the case-law of the ECtHR, although the interpretation by the ECtHR is to be given more weight.

100 II. ÚS 29/2011-64, op. cit., para. 7 et seq.
101 Para. 11.
102 PL. ÚS. 111/2011, op. cit., p. 32 et seq., PL. ÚS 7/2017, op. cit.
103 E.g. III. ÚS350/2014, op. cit.
104 E.g. I. ÚS 505/2015, op. cit.
105 E.g. historical survey of a right to reply, see III. ÚS 350/2014, op. cit., p. 15.
106 PL. ÚS 13/2012–90, finding from 19 June 2013.

Ex iniuria ius non oritur,[107] *pacta sunt servanda*,[108] prohibition of *reformatio in peius*[109] and *audiatur et altera pars*[110] have been the general legal principles that have been identified in the research sample, i.e., in 4 out of 30 cases. Moreover, substantive interpretation based on non-legal arguments has been identified as well, surprisingly even more often (in 10 out of 30 cases). Most of these identified uses referred to democracy, justice, public interest, and once even to the 'atmosphere' in society or common sense. The most important case has been selected from reasoning concerning the State Security Service, which aimed at the publication of the archive files of this special police body during the communist regime.[111] Although the reasoning has been elaborated using all the means of interpretation already mentioned, it is noteworthy to present its ending paragraph, according to which

> *… a specific tension arises between (i) the rule of law, which seeks to establish its legitimacy by acting directly to deal with the past on the one hand, and (ii) the constitutional rights on the other hand of the individuals concerned, to whom these rights are guaranteed by the rule of law. The legislator has attempted rationally and in a non-judiciable way to balance the interest in truly reflecting on history in connection with the protection of the rights of individuals by the already cited provisions of § 23 of the Act and § 19 of the Act on the Memory of the Nation. The Constitutional Court accepts that from the principle of substantive/material rule of law, more precisely from its strict version, which serves to deal with the era of non-freedom, a lower standard of protection of certain individual rights may result exceptionally in order to protect the principles of a democratic state formed after 1989 (cf. extension of limitation periods for perpetrators of crimes of communism.). Provisions of § 23 and also § 19 of the Act on the Memory of the Nation are, according to the opinion of the Constitutional Court, just such provisions that reflect the principle of the substantive/material rule of law in society's relationship to documents of the former State Security Service and a manifestation of discontinuity with the power in times of non-freedom.*[112]

To conclude this part, we note that the Constitutional Court has used almost all the means of interpretation that were supposed to be analyzed in the selected case law of this Court. Nevertheless, they were not used to the same extent, and, moreover, their position is not decisive in the same way. For the most decisive arguments, the textual and domestic systemic argumentation has been identified. Textual argumentation has not been used as often as e.g. references to the Court's own decisions; nevertheless, their common use has led to the adopted conclusion.

107 PL. ÚS 7/2017, op. cit., p. 137.
108 PL. ÚS 10/2014-78, finding from 29 April 2015, p. 33.
109 I. ÚS 505/2015, finding from 13 January 2016.
110 II. ÚS 285/2017-163, finding from 12 October 2017, p. 61.
111 II. ÚS 285/2017-163, op. cit.
112 II. ÚS 285/2017, op. cit., para. 26.

Logical arguments and external systemic argumentation together with comparative argumentation have been considered defining arguments, especially the case law of the Czech and German constitutional courts. It is challenging to find other decisions that have played a significant role in a decision of the Constitutional Court, not only an illustrative one. Nevertheless, regarding their quantity, one must bear in mind that the presence of the ECtHR case-law was a selection criterium for the search sample.

The overwhelming use of references to scholarly works has been identified as a form of strengthening arguments, together with teleological argumentation, which, however, has been used much less often. As presented in one dissenting opinion, academic works support the legitimacy of the decision. General legal principles and application of non-legal arguments have been recognized as strengthening arguments as well, since they were of great weight when used.

Finally, regarding illustrative arguments, the positions of other public bodies as a means of domestic systemic argumentation have been identified. It was these that the Constitutional Court presented, usually marking out their right or limited application. The following subchapter, however, shows a different methodological approach to the interpretation of human rights and fundamental freedoms regarding both its quantitative and qualitative aspects.

6. Selection and analysis of decisions adopted by the ECtHR and the EU Court of Justice, focusing on interpretation

Decisions of the European Court of Human Rights (29) and the Court of Justice of European Union (1) have been selected from the references in the decisions of the Constitutional Court of the Slovak Republic analyzed in the previous subchapter. First, several decisions were enlisted since reasonings of the relevant decisions of the Constitutional Court included several ECtHR decisions. The list of these ECtHR decisions was reduced while reading and analyzing the Constitutional Court decisions, as the most relevant decisions were identified, especially in relation to the subject-matter of the case. Moreover, although it was not an agreed condition, the choice was made to include mostly cases with the Slovak Republic as a party if there were such a case referred to in the CC decision. However, it is submitted that it has no influence on the methodology used by the ECtHR. Nevertheless, it has been observed that there are some general aspects that have influenced the methodology of interpretation used by the ECtHR, but since there were not a part of the agreed research process, they are only mentioned here and not analyzed.

The first issue to consider is the timeline. In years where there were two bodies within the European regional human rights protection system, the ECtHR took a slightly different approach than later, when it has been the only decisive body upon

human rights complaints. There were several cases where the Court has just taken the decision and methodology used by the Commission for granted and as not even needing comments.[113] Second is the composition of the chambers of the ECtHR. Although there might have been only a minor influence on the final outcome in relation to the voting ratio, it might be interesting to analyze—as in the case of the Constitutional Court of the Slovak Republic—how the composition of the Chambers and the Court as such has influenced the methodology used in the jurisprudence of the Court, especially after the accession of former communist countries. Third, the methodology used by the ECtHR has been observed as already showing several generalizing characters; however, this might be the result of a longer existence and practice. For example, the oldest chosen ECtHR decision, the Golder case, did not refer extensively to the previous case law of the Court, since there was little. Newer decisions refer to the previous case law much more, which is understandable. This point is not considered in the statistics, however, since it was enough that the ECtHR referred to its previous decisions only once to include it as the methodology based on external systemic argumentation.

The methodology used by the ECtHR is referred to and analyzed within the scope agreed upon by the research design. In general, it is submitted that the scope mirrors the methodology provided for by the Vienna Convention on the Law of Treaties, whereby a treaty is to be interpreted in accordance with ordinary meaning of the terms used in the treaty in their context and in the light of its object and purpose.[114] Moreover, as has already been quoted,[115] the Vienna Convention on the Law Treaties specifies what the context comprises, namely acts related to the conclusion of the treaty. Furthermore, subsequent practice and relevant agreements are to be taken into account as well. Finally, a special meaning is given to a term if it is so established by the parties.

As for the research design in relation to the ECtHR case analyses, it starts with *textual interpretation*. This group reflects the interpretation of the text within three subgroups. The first is precisely the interpretation based on ordinary meaning, i.e., if the meaning of a provision is recognizable in the context of a common language, that provision must be interpreted in accordance with the meaning that would be attributed to it by a regular speaker of that language. It is submitted that apart from domestic systemic arguments, namely reference to its own case law, this is the most used argument (19 out from 30 judgments). There would have been even more, except that decisions adopted later usually refer to the previous cases instead of explaining the ordinary meaning again.

113 This could be taken as either logical interpretation based on analogy or as a decisive external influence. The former has been chosen since the Commission and the Court were two bodies of the same system working on the same legal basis for interpretation. The Court has, as it were, aimed to save resources by not repeating what has already been reasoned properly in a way that the Court can agree upon.

114 Art. 31 para. 1 of the Vienna Convention.

115 Ibid., para. 2.

The *usual meaning*, i.e., the meaning that a regular speaker of the language in question would give to the word as an ordinary meaning, is determined by the ECtHR in two ways, first by using interpretive dictionaries that contain the definition of the interpreted word. The best example is provided in the Golder case, where the ECtHR explained that

> *The Government have emphasized rightly that in French 'cause' may mean 'procès qui se plaide' (Littré, Dictionnaire de la langue française, tome I, p. 509, 5 o). This, however, is not the sole ordinary sense of this noun; it serves also to indicate by extension 'l'ensemble des intérêts à soutenir, à faire prévaloir' (Paul Robert, Dictionnaire alphabétique et analogique de la langue française, tome I, p. 666, II-2o).*[116]

However, the use of interpretive dictionaries to determine the usual meaning of words has been identified only once in the research sample. Rather, the rule is that the usual meaning of the interpreted term is determined by the ECtHR without any justification or reference to other sources. That was the case in the rest of identified examples of interpretation based on ordinary meaning, namely in relation to its semantic interpretation,[117] and in one decision the ECtHR found it not important to decide what the meaning is, finding that it does not actually matter whether the person had refused or withdrawn his consent.[118]

The second subpart, namely *legal interpretation*, has been less used, but still appears in more cases than some logical arguments (10 out from 30). Although it has been proposed that legal interpretation might be used in case of a special legal meaning of words uniformly accepted by lawyers, this analysis has identified legal interpretation mostly on the basis of legal principles. The case of Al-Adsani was rich in interpretations as to why some concepts are applicable and others are not, starting with an explanation that the grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.[119] This form of giving terms a legal understanding has been identified especially in cases where it was interpreted by the ECtHR regarding what the law means, not as a formal requirement that is decisive but concerning other requirements flowing from the expression prescribed by law or in accordance with the law.[120] Again, it was

116 *Golder*, op. cit., para. 32.

117 E.g. 'any person' also means an insolvent person, *Pine Valley Developments LTD and others v. Ireland*, application no. 12742/87, judgment from 29 November 1991, para. 42. Family life, *Schalk and Kopf v. Austria*, application no. 30141/04, judgment from 24 June 2010, para. 94. Right to an interpreter, *Kamasinski v. Austria*, application no. 9783/82, judgment from 19 December 1989, para. 74. Impartiality, *Piersack v. Belgium*, application no. 8692/79, judgment from 1 October 1982, para. 30.

118 *Evans v. the United Kingdom*, application no. 6339/05, judgment from 10 April 2007, para. 76.

119 *Al-Adsani v. the United Kingdom*, application no. 35763/97, judgment from 21 November 2001, para. 48.

120 E. g. *Feldek v. Slovakia*, application no. 29032/95, judgment from 12 July 2001, para. 56, *Malone v. the United Kingdom*, application no. 8691/79, judgment from 2 August 1984, para. 67, *Amann v. Switzerland*, application no. 27798/95, judgment from 16 February 2000, para. 62.

identified as a legal interpretation only in cases where the ECtHR explained it in a deeper analysis, not in cases where it only referred to its previous case law relevant in this matter. Another typical example of legal interpretation is the explanation of the ECtHR of so-called autonomous meanings of terms that might be used differently in different national legal orders, such as 'criminal',[121] or 'victim'.[122]

The last subpart of textual interpretation refers to a methodology that considers the *professional interpretation* of particular profession. It was expected to be a rare type, and this has proved to be so. Even the one case that has been identified as including this type of interpretation might be found controversial since there was in fact no interpretation at the end, just the statement that there is no scientific definition of the beginning of life.[123]

Turning to *logical arguments*, it is to be explained that such an interpretation might sometimes be considered a part of grammatical interpretation arising from the text, since it is not only in cases when the text misses a particular regulation (and one can present an argument from silence) that one can interpret the text by use of logic. Nevertheless, as it has been agreed upon in the research design, linguistic-logical arguments have been analyzed separately.

Arguments *a minore ad maius* have been used rather often (10 out from 30), although in general they were not decisive, and sometimes were even opposite to the final decision. The best example is probably a decision upon vaccination, where the ECtHR, similarly to the decisions of domestic courts, has not found it significant that the vaccination was made outside the vaccination room, contrary to the regular procedure.[124] Similarly, the prohibition of torture as such has not supported the position that States are therefore not entitled to immunity in respect of civil claims for damages.[125] Another case that is determined to have used this methodology is the Michalko case. Here the ECtHR emphasized that it did not have the authority to decide upon the legal order of Slovakia in an abstract way and interpreted the legal background of the particular situation in relation to Art. 5 § 3 of the Convention. The ECtHR found it not compatible with the Convention that applicant's arguments had not received a proper judicial answer and therefore as such were not susceptible of review on account of a lack of reference to concrete facts and analysis. Lack of an opportunity to have a case reviewed was not in compliance with the Convention, and therefore there was also found a violation of Art. 5 § 3 of the Convention.[126]

As for other selected ECtHR decisions and the argument *a minore ad maius*, the Court has quite often found irregularities in the procedural parts of a specific right

121 *Engel and others v. the Netherlands*, applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment from 8 June 1976, *Lauko v. Slovakia*, application no. 4/1998/907/1119, judgment from 2 September 1998, para. 58.

122 *Klass and others v. Germany*, application no. 5029/71, 6 September 1978, para. 34.

123 *Evans*, op. cit., para. 54.

124 *Solomakhin v. Ukraine*, Application no. 24429/03, judgment from 15 March 2012, para. 38.

125 *Al-Adsani*, op. cit., para. 66.

126 *Michalko v. Slovakia*, application no. 35377/05, 21 December 2010, para. 143 et seq.

protection, and since, e.g., lack of objectivity or arbitrariness as such are not compatible with the Convention, it has decided that there was a violation of the substance of a particular article.[127] It is the same if there is a condition within an article that has already been decided in a clear way, but a State has nevertheless not complied with it.[128]

Interestingly, the Court of Justice has used this methodology to settle discussion of its jurisdiction to decide the case. Since case C-240/09 from 8 March 2011 is the only such case within the research sample in this chapter, it cannot be compared to others; nevertheless, we submit that the reasoning in this case was much more based on logical argumentation than most of the ECtHR cases. This case is in general based on all the subgroups of logical argumentation (apart from the argumentation according to other logical maxims) and on the teleological argument. In the analyzed case the argument of *a minore ad maius* has been used to hold that a specific issue that has not yet been the subject of EU legislation is part of EU law where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it.[129]

Another specific example of the applicability of EU-related norms is the Matthews case, which has been classified as a case based on arguments *a minore ad maius* since it was decided there that since legislation created organically with the European Parliament is applicable in Gibraltar, in particular in connection with all the legislative acts adopted by the UK—especially in relation to EU membership—the UK must secure the rights in Art. 3 of Protocol No.1.[130]

Furthermore, comments of the ECtHR upon the interpretation of parliamentary rules that might be vague but nonetheless foreseeable because of the professional status of parliamentarians are of interest.[131]

The final decision where the argument *a minore ad maius* has been used concerned, as it were, the issue of proportionality, since the ECtHR considered decisive that a transfer of land did not appear to have been realized against the will of the former owner, and therefore the fair balance required between the protection of private property and the demands of the general interest was not supported.[132]

Arguments *a maiore ad minus* have been used less often (5 out from 30); nevertheless, they have been identified more often than, e.g., teleological arguments. Most of the cases concern situations in which the ECtHR found it not compatible

127 *Podkolzina v. Latvia*, application no. 46726/99, judgment from 9 April 2002, para. 36.

128 *Fredin v. Sweden* (no. 1), application no. 12033/86, judgment from 18 February 1991, para. 63. *Lauko*, op. cit., para. 64.

129 C-240/09, Court of Justice, judgment from 8 March 2011, para. 36.

130 *Matthews v. the United Kingdom*, application no. 24833/94, judgment from 18 February 1999, paras. 34–35.

131 *Karácsony and others v. Hungary*, applications nos. 42461/13 and 44357/13, judgment from 17 May 2016, para. 126 et seq.

132 *Zvolský and Zvolská v. the Czech Republic*, application no. 46129/99, judgment from 12 November 2002, paras. 72–73.

with the Convention that a contracting Party had not taken into account specific circumstances, such as legal entry into a country and no other choice of minors,[133] or the content of the effective protection of rights within relevant articles.[134] On the other hand, the ECtHR has pointed out other specific circumstances that it took into account when deciding upon compliance with the Convention in relation to the substance of particular articles.[135]

The *ad absurdum* argument has been detected only twice, although in one case rather profoundly since, based on the effectivity, the Court of Justice has held that

> *if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.* [136]

The other case concerned arguments in relation to the storing of a card after reaching the conclusion that creation of a card was not in accordance with the law. Consequently, the ECTHR pointed out that it would seem unlikely that the storing of a card that had not been created 'in accordance with the law' could satisfy that requirement.[137]

Arguments *a contrario* or rather from silence have been identified also in more cases than expected. Leaving aside admissibility issues when the ECtHR sometimes declares admissibility by way of finding no ground for declaring inadmissibility,[138] there are three cases in the search sample that have used this argument. In the first, the ECtHR pointed out that a certain way of interpretation corresponded to the status quo in the case under consideration since the analyzed Constitution contained no provisions expressly permitting a presidential decision on amnesty to be quashed and there was no indication of any practice of the domestic courts or legal theory

133 *Ponomaryovi v. Bulgaria*, application no. 5335/05, judgment from 21 June 2011, para. 63: 'The Court, for its part, finds that in the specific circumstances of the present case the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified'.

134 *Taxquet v. Belgium*, application no. 926/05, judgment from 16 November 2010, para. 100: … the applicant was not afforded sufficient safeguards enabling him to understand why he was found guilty. Since the proceedings were not fair, there has accordingly been a violation of Article 6 § 1 of the Convention.

135 *Kamasinski*, op. cit., the right to legal aid, para. 65: 'It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Art. 6 § 3 (c) (art. 6-3- c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way'. *Fredin v. Switzerland*, application no. 12033/86, judgment from 18 February 1991, para. 54.

136 C-240/09, op. cit., para. 49.

137 *Amann*, op. cit., para. 78.

138 The best example: 'The Court notes that this complaint is not manifestly ill-founded within the meaning of Art. 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible'. *Solomakhin*, op. cit., para. 24.

that could allow a different conclusion to be reached.[139] The second case concerns interpretation covering not only written law but also unwritten law.[140] In the third case, the Court of Justice has admitted that

> *the European Community stated that the legal instruments in force do not cover fully the implementation of the obligations… , and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community… adopts provisions of Community law covering the implementation of those obligations. However, according to the Court of Justice, it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it.*[141]

Last but not least among the logical arguments are arguments *a simili* and by analogy. Such arguments have mostly been identified when the ECtHR has decided that the reasons for finding that there was no violation of one article also afford a reasonable and objective justification for another article and therefore that the result was the same (usually decisions about no violation in case of Art. 14).[142] It is rather often (in 6 of the 30 cases) that the ECtHR has declared that with regard to its decision on one article, it does not consider it important to rule on another issue.[143] Similarly (in 1 of 30), if the arguments presented by the applicant in relation to one article were essentially the same as those presented in relation to another article and the ECtHR decided that the requirements of the latter were less strict, the ECtHR did not consider it necessary to examine the case under that latter article.[144] While it is true that the phrase 'less strict requirements' and the circumstances of argumentation could count as an argument *a maiore ad minus*, nevertheless, we note that the comparative approach has prevailed. Moreover, when analogy is on the table, the Court also likened inherency of the right of access to its restrictions:[145]

> *Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.*

139 *Lexa v. Slovakia*, application no. 54334/00, judgment from 23 September 2008, para. 133.
140 *Malone*, § 66.
141 C-240/09, op. cit., para. 41.
142 *Evans*, op. cit., paras. 95–96.
143 Ibid. *Malone*, op. cit., paras. 89–91. *Bronda v. Italy*, application no. 40/1997/824/1030, judgment from 9 June 1998, para. 65. *Turek v. Slovakia*, application no. 57986/00, 14 February 2006, para. 117. *Lauko*, op. cit., para. 68. *Karácsony*, op. cit., para. 174.
144 *Kamasinski*, op. cit., para. 110.
145 *Al-Adsani*, op. cit., para. 56.

Finally we consider interpretation according to other logical maxims, such as implied powers. This category has been analyzed rather problematically since other arguments, namely external sources of interpretation, might have a similar understanding. Thus, we initially classified *ius cogens* as a logical maxim; nevertheless, after reconsideration this argument has been moved to the category of another external source of interpretation. As a result, only one case has been determined as an example of interpretation expressly according to other logical maxims. In the case of Podkolzina, the ECtHR has pointed out that the subjective rights to vote and to stand for election are implicit in Art. 3 of Protocol 1. The Court then reiterated that since Art. 3 of Protocol 1 recognizes them without setting them forth in express terms, let alone defining them, there is room for 'implied limitations'.[146] While there have been other ECtHR decisions identified in which implied or inherent restrictions have been pointed out, nevertheless, other interpretation methodologies prevailed and were therefore decisive for this research.[147]

As for *domestic systemic arguments*, this part of the research design must be modified when compared to the previous subchapter on the analysis of Constitutional Court decisions since domestic forum is basically the ECtHR and relevant sources related to the Council of Europe. Therefore, this part has considered the Convention itself, previous decisions of the ECtHR/Court of Justice or their internal rules, other Council of Europe/EU materials, and finally, decisions of specific Member States or their abstract judicial norms.

The interpretation of the Convention as a framework for contextual interpretation has been identified almost in all the cases, in 28 out of 30. Examples that might be pointed out include the reasoning where the ECtHR reiterated that the Convention is to be read as a whole and its articles should therefore be construed in harmony with one another.[148] Another judgment pointed out the basis of adoption of autonomous meaning by declaring in short that 'autonomy' operates one way only.[149]

The interpretation on the basis of the practice of the forum in question has been used in all the analyzed cases, i.e., 29 times in the case of the ECtHR, where the later the decision the more case-law is cited, and once in the case of the Court of Justice. Other Council of Europe/EU materials have been detected four times in Parliamentary Assembly resolutions, [150] once in the European Commission for Democracy through Law (the Venice Commission) material,[151] and once in the Rules of Procedure of the European Parliament[152] and several Council Directives.[153]

146 *Podkolzina*, op. cit., para. 33.
147 See e. g. *Al-Adsani*, op. cit., para. 56.
148 *Schalk and Kopf*, op. cit., para. 101.
149 *Engel*, op. cit., para. 81.
150 *Solomakhin*, op. cit., para. 19. *Ponomaryovi*, op. cit., para. 40. *Karácsony*, op. cit., para. 42. *Turek*, op. cit., para. 78.
151 *Karácsony*, op. cit., para. 48.
152 *Karácsony*, op. cit., para. 50.
153 C-240/09, op. cit., para. 5 et seq.

External systemic and comparative arguments have been modified as well to take into account the position and specificities of the ECtHR/Court of Justice decisions. Therefore, this line has analyzed references in nine cases to other international treaties (namely the Convention on Human Rights and Biomedicine,[154] European Convention on State Immunity,[155] Vienna Convention on the Law of Treaties,[156] EU Charter of Fundamental Rights[157] and its Commentary,[158] International Covenant on Economic, Social and Cultural Rights,[159] International Covenant on Civil and Political Rights,[160] Convention on the Rights of the Child,[161] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,[162] Convention against Torture,[163] Treaty on German Unification,[164] and Aarhus Convention[165]), case decisions and the practice of other international legal fora in four cases (the Steering Committee on Bioethics,[166] International Law Commission,[167] International Tribunal for Ex-Yugoslavia,[168] Venice Commission,[169] Human Rights Committee[170]), seven times the issue of general European practice,[171] one Peru case,[172] and the Kuwaiti constitution[173] and finally, other external sources of interpretation in relation to the term of *sui generis*,[174] rule of law[175] and *ius cogens*,[176] and two legally non-binding declarations, though partially presenting international custom, namely the Universal Declaration of Human Rights[177] and Universal Declaration on Bioethics and Human Rights.[178]

154 *Evans*, op. cit., para. 50.
155 *Al-Adsani*, op. cit., para. 22.
156 Ibid., op. cit., para. 55. *Golder*, op. cit., para. 29.
157 *Schalk and Kopf*, op. cit., para. 60. *Karácsony*, op. cit., para. 54.
158 Ibid.
159 *Ponomaryovi*, op. cit.
160 *Al-Adsani*, op. cit., para. 27, *Streletz, Kessler and Krenz*, applications nos. 34044/96, 35532/97 and 44801/98, 22 March 2001, para. 93.
161 *Ponomaryovi*, op. cit.
162 *Amann*, op. cit., para. 65.
163 *Al-Adsani*, op. cit.
164 *Streletz, Kessler and Krenz*, op. cit., para. 27.
165 C-240/09, op. cit., para. 1.
166 *Evans*, op. cit., para. 51.
167 *Al-Adsani*, op. cit., para. 23.
168 Ibid, op. cit., paras. 30–31.
169 *Karácsony*, op. cit., para. 48.
170 *Streletz, Kessler and Krenz*, op. cit., para. 41.
171 *Evans*, op. cit., paras. 79–81. *Al-Adsani*, op. cit., para. 64. *Schalk and Kopf*, op. cit., para. 24. *Ponomaryovi*, op. cit., para. 36. *Lexa*, op. cit., para. 88 et seq. *Taxquet*, op. cit., para. 43 et seq. *Podkolzina*, op. cit., para. 33. *Karácsony*, op. cit., para. 56.
172 *Lexa*, op. cit., para. 97.
173 *Al-Adsani*, op. cit., para. 25.
174 *Matthews*, op. cit., para. 48.
175 *Golder*, op. cit., para. 34.
176 *Al-Adsani*, op. cit., para. 23.
177 Ibid, § 26, *Streletz, Kessler and Krenz*, op. cit. para. 93.
178 *Evans*, op. cit., para. 52.

Although the ECtHR and the Court of Justice were expected to focus more on *teleological interpretation*, of the 30 selected decisions only 9 included the issue of the object and purpose of the Convention, out of which 2 emphasized the need to make the protection practical and effective. To summarize the rest of the agreed arguments, it was quite surprising that no decision included any reference to scholarly work. Moreover, regarding subjective teleological argumentation, only three times was an intent of the Convention maker used as a supportive argument,[179] and the same holds regarding arguments by general legal principles.[180] Finally, eight cases of argumentation by non-legal values have been identified.[181]

To conclude this part, it is true that some types of interpretation are used more often, i.e., own case-law has been referred to in every decision, while textual interpretation has been used more than logical. However, this does not mean that one or the other is much more decisive if the cases are considered separately. This is especially so in situations when the Court uses several types of interpretation. Most of them are used only to support the reasoning already presented, in some instances to explain why another decision has (not) been taken.

Nevertheless, we note that in the research sample the ECtHR uses textual interpretation as a decisive argument, together with logical argumentation as mostly defining. This is so not because of the high percentage of use, but because the ECtHR has already created a systematic approach within a reasoning, whereby it presents the facts and relevant domestic and international law and finally focuses on the Convention and its wording and practice—if relevant—so far. By such an approach the ECtHR decides not only a dispute but includes the arguments of the parties to the dispute as well. At the end of the day, it thus speaks not only to them but also to all potential petitioners.

To compare, systemic argumentation, either domestic or external, is rather strengthening, and on the other hand, it might be considered decisive in case there is no European consensus when the test of margin of appreciation is relied upon. Argumentation based on the object and purpose of a particular norm has usually been strengthening, as similarly has argumentation based on non-legal values. However, if we consider the ECtHR and its jurisprudence as a whole, it is submitted that object and purpose might be decisive, especially if the concept of the Convention as a living instrument is reiterated. If the Vienna Convention on the Law of Treaties is reconsidered, this whole approach makes sense, since all these rules of interpretation are to be used together as one means of interpretation; in the reasoning they are usually used one by one, depending on the complexity of the case that has to be judged and on the possible ambiguity of an analyzed norm.

179 *Matthews*, op. cit., *Bronda*, op. cit., *Karácsony*, op. cit.

180 E.g., *Lexa*, op. cit.

181 E.g., public order, substance of the effective functioning of the Parliament, best interest of a child, Radbruch Formula.

7. Conclusion

This chapter on the analysis of the case law of the Constitutional Court of the Slovak Republic and relevant case law of the European Court of Human Rights selected 30 decisions each, which were analyzed from the point of view of the interpretation used by the relevant judicial body.

The beginning presented the competence and position of the Constitutional Court of the Slovak Republic, together with the position of the European Convention on Human Rights and Fundamental Freedoms in the Slovak legal framework. This was found to be very important, since under some conditions this international treaty has precedence over national laws, though not over the Constitution.

None of the analyzed courts has adopted an official framework of interpretative procedure. Nevertheless, both have presented their opinion on interpretation as such several times, as was elaborated in this chapter before analyzing the decisions themselves. Since the Convention is an international treaty, it is no surprise that the ECtHR has upheld that it has considered and applied the interpretation rules set out in the Vienna Convention on the Law of Treaties, particularly the text, context, and object and purpose of the Convention. In comparison, the Constitutional Court has pointed out several methodological means to approach the interpretation of the Constitution. It has presented its view of the importance of not giving too much weight to formalism. Moreover, the principle of the constitutional intensity of violation of constitutional norms has been introduced as well. Finally, according to the Constitutional Court, the more constitutionally confirming interpretation is preferred where there is a variety of interpretation results.

However, the analysis of the selected decisions has shown a somewhat different result. As for the Constitutional Court, while it is true that it considers the purpose of the interpreted norms, nevertheless, textual and systemic argumentation is found to have been used more often and more decisively within the research sample. On the other hand, the European Court of Human Rights has been more systematic and comprehensive in using a general rule of interpretation according to the Vienna Convention and applying all its parts as necessary, especially its object and purpose element. Nevertheless, there have been some specific approaches of the ECtHR that have taken into account particularities of the European human rights protection system.

Bibliography

ALEXY, R. (2010) *A Theory of Legal Argumentation*. Rev. edn. Oxford: Oxford University Press.

AUST, A. (2007) *Modern Treaty Law and Practice*. 2nd edn. Cambridge: Cambridge University Press.

HARRIS, D.J., O'BOYLE, M., WARBRICK, C. (2009) *Law of the European Convention on Human Rights*. 2nd edn. Oxford: Oxford University Press.

ĽALÍK, T. (2013) 'Precedens a Ústavný súd Slovenskej republiky', in *Vybrané aspekty súdneho precedensu v podmienkach Slovenskej republik*y (2013) Bratislava: Univerzita Komenského, Právnická fakulta.

TÓTH, Z. J. (2016) 'The methods of statutory interpretation in the practice of the high courts of Hungary', *Annales Universitatis Mariae Curie-Sklodowska, Lublin-Polonia*, Vol. 1, pp. 173–201; https://doi.org/10.17951/m.2016.1.173.

List of selected decisions

1.	PL. ÚS 3/09, finding from 26 January 2011	*Pine Valley Developments LTD and others v. Ireland*, application no. 12742/87, judgment from 29 November 1991
2.	I. ÚS 408/2010, finding from 16 June 2011	*Handyside v. the United Kingdom*, application no. 5493/72, judgment from 7 December 1976
3.	IV. ÚS 302/2010, finding from 7 July 2011	*Feldek v. Slovakia*, application no. 29032/95, judgment from 12 July 2001
4.	I. ÚS 76/2011, finding from 20 April 2011	*Podkolzina v. Latvia*, application no. 46726/99, judgment from 9 April 2002
5.	PL. ÚS 111/2011, finding from 4 July 2012	*Al-Adsani v. the United Kingdom*, application no. 35763/97, judgment from 21 November 2001
6.	II. ÚS 29/2011, finding from 13 December 2012	*Taxquet v. Belgium*, application no. 926/05, judgment from 16 November 2010
7.	IV. ÚS 294/2012-69, finding from 7 February 2013	*Streletz, Kessler and Krenz v. Germany*, applications nos. 34044/96, 35532/97 and 44801/98, judgment from 22 March 2001
8.	II. ÚS 67/2013, finding from 5 June 2013	*Michalko v. Slovakia*, application no. 35377/05, judgment from 21 December 2010
9.	PL. ÚS 13/2012, finding from 19 June 2013	*Evans v. the United Kingdom*, application no. 6339/05, judgment from 10 April 2007
10.	PL. ÚS 1/2012, finding from 3 July 2013	*Engel and others v. the Netherlands*, applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment from 8 June 1976
11.	IV. ÚS 57/2014-42, ruling from 30 January 2014	*Kamasinski v. Austria*, application no. 9783/82, judgment from 19 December 1989
12.	I.ÚS 73/2014, ruling from 5 March 2014	C-240/09, Court of Justice, judgment from 8 March 2011
13.	I.ÚS 131/2014-22, ruling from 19 March 2014	*Piersack v. Belgium*, application no. 8692/79, judgment from 1 October 1982

14.	III. ÚS 236/2014-22, ruling from 1 April 2014	*Golder v. the United Kingdom*, application no. 4451/70, judgment from 21 February 1975
15.	PL. ÚS 11/2013, finding from 22 October 2014	*Ponomaryovi v. Bulgaria*, application no. 5335/05, judgment from 21 June 2011
16.	PL. ÚS 24/2014, finding from 28 October 2014	*Schalk and Kopf v. Austria*, application no. 30141/04, judgment from 24 June 2010
17.	PL. ÚS 10/2013, finding from 10 December 2014	*Solomakhin v. Ukraine*, application no. 24429/03, judgment from 15 March 2012
18.	II. ÚS 307/2014, finding from 18 December 2014	*Çetin and others v. Turkey*, applications nos. 40153/98 and 40160/98, judgment from 13 February 2003
19.	PL. ÚS 10/2014-78, finding from 29 April 2015	*Malone v. the United Kingdom*, application no. 8691/79, judgment from 2 August 1984
20.	PL. ÚS 8/2014-41, finding from 27 May 2015	*Fredin v. Sweden* (no. 1), application no. 12033/86, judgment from 18 February 1991
21.	I. ÚS 290/2015, finding from 7 October 2015	*Amann v. Switzerland*, application no. 27798/95, judgment from 16 February 2000
22.	I.ÚS 505/2015, finding from 13 January 2016	*Lauko v. Slovakia*, application no. 4/1998/907/1119, judgment from 2 September 1998
23.	III. ÚS 350/2014, finding from 24 January 2017	*Lingens v. Austria*, application no. 9815/82, judgment from 8 July 1986
24.	PL. ÚS 18/2014, ruling from 22 March 2017	*Matthews v. the United Kingdom*, application no. 24833/94, judgment from 18 February 1999
25.	PL. ÚS 7/2017, finding from 31 May 2017	*Lexa v. Slovakia*, application no. 54334/00, judgment from 23 September 2008
26.	I.ÚS 155/2017, finding from 31 August 2017	*Zvolský and Zvolská v. the Czech Republic*, application no. 46129/99, judgment from 12 November 2002
27.	II. ÚS 285/2017-163, finding from 12 October 2017	*Turek v. Slovakia*, application no. 57986/00, 14 February 2006
28.	PL. ÚS 6/2017, ruling from 9 January 2019	*Karácsony and others v. Hungary*, applications nos. 42461/13 and 44357/13, judgment from 17 May 2016

29.	PL. ÚS 21/2014, 30 January 2019	*Klass and others v. Germany*, application no. 5029/71, 6 September 1978
30.	II. ÚS 337/2019, finding from 26 May 2020	*Bronda v. Italy*, application no. 40/1997/824/1030, judgment from 9 June 1998

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

Methods		Frequency (number)	Frequency (%)	Main types Frequency (number and %)
1	1/A	6	20%	28 (93%)
	1/B	28	93%	
	1/C	0	0%	
2	2/A	9	30%	13 (43%)
	2/B	5	17%	
	2/C	3	10%	
	2/D	1	3%	
	2/E	5	17%	
	2/F	6	20%	
3	3/A	16	53%	26 (87%)
	3/B	15	50%	
	3/C	25	83%	
	3/D	2	7%	
	3/E	11	37%	
4	4/A	14	47%	30 (100%)
	4/B	30	100%	
	4/C	21	70%	
	4/D	0	0%	
5		5	17%	
6	6/A	2	7%	3 (10%)
	6/B	2	7%	
	6/C	2	7%	
	6/D	3	10%	
7		23	77%	
8		4	13%	
9		10	33%	

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

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

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

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

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

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

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

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

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