

Constitutional Court of Hungary

Questionnaire for the XVIIIth Congress of the Conference of European Constitutional Courts

Human Rights and Fundamental Freedoms: The relationship of international, supranational and national catalogues in the 21st century

I. General part: catalogues of human rights and fundamental freedoms

I.1. International catalogues of human rights (ECHR, UDHR and ICCPR)

a) In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?

A) Before defining the position of the international human rights treaties in the Hungarian legal system, it is necessary to examine Hungary's approach towards international law – not including the law of the European Union. Article Q) of the Fundamental Law reads as follows: "(1) In order to create and maintain peace and security and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world. (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law. (3) Hungary shall accept the generally recognized rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in laws". This constitutional provision, especially paragraph (3) shows that Hungary transforms the generally recognized rules of international law (universal customary law, *ius cogens* and the general principles of law recognized by civilized nations) by the Fundamental Law itself (general transformation). However, international treaties shall become part of the Hungarian legal system by transforming them into a Hungarian legal act (special transformation). That is to say, the Hungarian legal system concerning international law is to be considered dualistic. It is worth to mention that Article 7 § of the former Constitution contained substantially similar rules, thus the case-

law of the Constitutional Court of Hungary (hereinafter: CCoH) shall be quoted when it is necessary.

B) Secondly, the hierarchy between international law and the Hungarian law – including the Fundamental Law – should be evaluated. Bearing in mind the case-law of the CCoH a general statement can be taken. Ratified and transformed international treaties (including the generally transferred customary international law) are below the Fundamental Law but above all other national law. On the other hand, *ius cogens* rules shall prevail even on the Fundamental Law. The precise hierarchy could be learnt by studying the case-law of the CCoH.

In the light of this framework, an insight into the practice of the CCoH shall be made. Noteworthy, the CCoH evaluated the precise position of the international human rights treaties since the Fundamental Law – just as the former Constitution – does not provide clear regulations on the relation between the transformed international treaty and the Hungarian law. The CCoH in Decision 53/1993. (X. 13.) AB acknowledged that the Hungarian legal system was dualistic {re-affirmed in Decision 36/1996. (IX. 4.) AB; Decision 4/1997. (I. 22.) AB; Decision 30/1998. (VI. 25.) AB; Decision 1/2011. (I. 14.) AB; after the Fundamental Law entered into force: Decision 1/2013. (I. 7.) AB, paragraphs [26]-[28]; Decision 6/2013. (III. 1.) AB, paragraphs [105]-[107]}. Regarding international human rights treaties it is to be underlined that the CCoH pointed out that “as a general rule – an international treaty with a generally binding content must be promulgated in an internal source of law in order to make the legal norm contained in the treaty applicable to Hungarian subjects of law.” [Decision 30/1998. (VI. 25.) AB]. In Decision 7/2005. (III. 31.) AB, the CCoH underlined that an international treaty shall only be applied if it had been promulgated in a due legal source. The details of transformation are provided by Act no L of 2005, on the Procedures Concerning International Treaties. According to Section 7 (1) of this Act, the ratification of an international treaty can only happen if – bearing in mind its content – an Act (in case the subject of the treaty falls under the competences of the National Assembly) or in any other cases a Government Decree authorizes to do so. This rule shows that international treaties shall be transformed into an Act or into a Government Decree.

Not recalling all the international treaties but the most important ones had been ratified and promulgated. It shall be noted that before the political changes in 1989-1990, the

authorization for ratification (and promulgation) was made by a so-called Legislative Decree but they place at the same position in the legal hierarchy as Acts. For example:

- International Covenant on Civil and Political Rights (Legislative Decree no. 8 of 1976);
- International Covenant on Economic, Social and Cultural Rights (Legislative Decree no. 9 of 1976);
- Convention on the Rights of the Child (Act no. LXIV of 1991);
- European Convention of Human Rights (Act no. XXXI of 1993) – hereinafter: ECHR;
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Act no. III of 1995);
- Maternity Protection Convention (Revised), 1952 (No. 103) (Act no. LVIII of 2000);
- Convention on the Elimination of All Forms of Discrimination against Women (Act no. LX of 2001);
- Convention on the Rights of Persons with Disabilities (Act no. XCII of 2007).

Considering the Universal Declaration of Human Rights, it shall be noted that it does not have a legally binding force. However, the CCoH has been quoted some of its regulations from the beginning of its operation: Article 6 in Decision 64/1991. (XII. 17.) AB; Article 16 in Decision 14/1995. (III. 13.) AB; Article 2 and 7 in Decision 28/2000. (IX. 8.) AB; Article 19 in Decision 18/2004. (V. 25.) AB; Article 16 in Decision 15/2008. (XII. 17.) AB; Article 10 in Decision 36/2014. (XII. 18.) AB; Article 25 in Decision 21/2018. (XI. 14.) AB.

C) Finally, the position of the international human rights treaties in the Hungarian legal system shall be presented. According to Article T) (2) of the Fundamental Law, legal act having the force of law shall mean Acts of Parliament, government decrees, decrees adopted by the Prime Minister and other ministers, decrees adopted by the Governor of the Hungarian National Bank (*Magyar Nemzeti Bank*), any decree of the head of an autonomous regulatory agency, as well as municipal decrees. Moreover, legal act shall also mean the decrees issued by the National Defense Council during a state of national crisis or by the President of the Republic in a state of emergency. The quoted regulation of the Fundamental Law also represents the hierarchy of norms. That is to say, there is no special note considering international treaties since the nature of the dualistic legal system. As it was mentioned, international treaties need to be transformed whether to an Act or to a Government Decree.

That does not mean that the ratified international treaties would not have a special status in the Hungarian legal system. Article Q) (2) states: Hungary shall ensure that Hungarian law is in conformity with international law in order to comply with its obligations under international law. The same regulation was to be found in Article 7 (1) of the former Constitution. In this case the situation should be mentioned when a national law is to be measured to an international treaty. The main organ that is responsible for fulfilling Article Q) (2) of the Fundamental Law is the CCoH. Article 24 (2) *f*) and (3) *c*) of the Fundamental Law read as the CCoH shall examine the conformity of national legislation with international treaties and it may annul any law or statutory provision that is contrary to an international treaty. The Court may also apply other consequences as laid down in an implementing Act. More elaborated regulations can be found in the Act no. CLXI of 2011 on the Constitutional Court (hereinafter: ACC). Section 32 of the ACC prescribes that the CCoH shall examine legal regulations on request or *ex officio* in the course of any of its proceedings. The proceedings may be requested by one quarter of Members of Parliament, the Government, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights. Moreover, ordinary courts' judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty. Regarding legal consequences, besides the already cited Article 24 (3) *c*) of the Fundamental Law, Sections 42 of the ACC is to be considered. It rules that if the CCoH declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in whole or in part – annul the legal regulation that is contrary to the international treaty. Moreover, if the Constitutional Court declares that such a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, it shall – in consideration of the circumstances and setting a time-limit – invite the Government or the law-maker to take the necessary measures to resolve the conflict within the time-limit set.

Firstly, the CCoH declared in Decision 4/1997. (I. 22.) AB that universal customary law and the general principles of law recognized by civilized nations would not prevail over the former Constitution. The same logic shall be applied on the basis of the Fundamental Law. Secondly, the CCoH advocated in Decision 30/1998. (VI. 25.) AB, in Decision 61/2011. (VII. 13.) AB; in Decision 12/2013. (V. 24.) AB, paragraph [35] and in Decision 9/2018. (VII. 9.)

AB, paragraph [31] that international standards that were to be considered as *ius cogens* were in a higher position than the Fundamental Law. Finally, the question regarding international human rights treaties shall be answered. As it was indicated above, the CCoH is in the position to examine whether a Hungarian legal norm meets Hungary's international obligations. As the ACC suggests, the first case is not problematic. If a legal regulation is contrary to an international treaty which, according to the Fundamental Law, shall not be in conflict with the legal regulation promulgating the international treaty, the CCoH shall – in whole or in part – annul the legal regulation that is contrary to the international treaty. For example: if there is a regulation of a Government Decree which violates a provision of an Act that promulgated an international treaty, the latter shall prevail. However, when the opposite happens, the CCoH may invite the Government or the law-maker to take the necessary measures to resolve the conflict within the time-limit set. The problematic – and typical case – when the CCoH is to measure whether a provision of a Hungarian Act would meet an Act that transformed an international treaty. In these cases two Acts are in conflict. Resolving this problem, the CCoH set up a hierarchy in its case-law and it usually implies by annulling the Hungarian regulation, so in these cases international treaties prevail over national Acts but not over the Fundamental Law. It shall be emphasized that the CCoH decides such a question case by case. In Decision 6/2014. (II. 26.) AB, paragraphs [25]-[33], the CCoH concluded that the ACC did not provide specific solutions to the cases when there was a clash between a national Act and an Act that promulgated an international treaty. The CCoH formulated that in the light of Article Q (2) and 24 (2) f) of the Fundamental Law, it might annul the provision of the national Act to ensure that Hungarian law was in conformity with international law. In Decision 23/2015. (VII. 7.) AB, paragraph [43], the CCoH re-affirmed this approach. It also added that Article 24 (2) f) of the Fundamental Law authorized the CCoH to annul a regulation that violated a transformed international treaty and it did not specify the form of the legal sources. The CCoH also added that it may apply the consequence of annulment if the clash between the national law and the transformed national treaty were on the same hierarchical level. However, the annulment was not to be considered as an obligation but rather as an opportunity, the CCoH may apply any consequences specified in the ACC to provide the conformity of the Hungarian with the international obligations.

b) What mechanism is used to invoke the international treaties in national court decision-making?

As it was suggested, the CCoH may revise legal regulations in the light of a ratified international treaty on request or *ex officio* in the course of any of its proceedings. The proceedings may be requested by one quarter of Members of Parliament, the Government, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights. Judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty [Section 32 (1)-(2) of the ACC].

Bearing in mind these regulations, the CCoH follows a firm and well-established case-law that applicants may not invoke international human rights treaties when they file a constitutional complaint since they are not authorized for doing so. In other words, individual grievance cannot be established for instance on the ECHR directly (however, the CCoH may apply it *ex officio*). See Ruling 3327/2018. (X. 16.) AB, paragraph [22]; Ruling 3138/2018. (V. 19.) AB, paragraph [14]; Ruling 3258/2017. (X. 10.) AB, paragraph [16]. Additionally, neither national courts may do so. They are not entitled to establish their judgments on international human rights treaties. However, it is utterly important to highlight that the CCoH may – and regularly does – quote international treaties and their interpretation in constitutional complaint procedures as well.

c) Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

In the previous point it was indicated that the CCoH on the motion by an authorized person or organ, as well as by *ex officio* may apply and invoke an international human rights catalogue. As Section 32 (2) of the ACC suggests, the procedures that could be initiated are *ex post* norm controls. The CCoH – while interpreting its competences – pointed out several times that in these procedures it shall make a decision on the basis of the concerned international treaty and not on the basis of the Fundamental Law {Decision 166/201. (XII. 20.) AB; Decision 43/2012. (XII. 20.) AB, paragraph [67]; Decision 32/2014. (XI. 3.) AB, paragraph [32]; Decision 3157/2018. (V. 16.) AB, paragraph [21]}. In other words, in these procedures an international human rights catalogue may be invoked directly.

I.II. Supranational catalogues of human rights (the Charter)

a) Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by “radiating” through the national catalogues (a substantive point of reference in other states)?

As Article 51 (1) of the Charter reads, its provisions are addressed to the institutions and bodies of the Union with due regard to the principle of subsidiary and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective power. The CCoH, in the light of Article 24 of the Fundamental Law and the provisions of the ACC does not bear the competence to review a norm of the European Union {See: Decision 29/2011. (IV. 7.) AB; Decision 61/2011. (VII. 13.) AB; Decision 34/2014. (XI. 14.) AB, paragraph [54] and with special attention to the Charter: 16/2014. (V. 22.) AB, paragraph [50]}. In conclusion, the CCoH has not established any rulings on the basis of the Charter and neither has it invoked it.

b) Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?

Firstly, it is necessary to highlight – however the question concerns general courts – that the CCoH has also quoted judgments of the Court of Justice of the European Union (hereinafter: CJEU) with respect to its interpretation of Article 48 of the Charter {Decision 16/2014. (V. 22.) AB, paragraph [38]}, its case-law on the appliance of the principle *ne bis idem*; Decision 33/2013. (XI. 22.) AB, paragraph [22], its acknowledgment on the importance of trade secrets or in Decision 6/2018. (VI. 27.) AB, the case-law of the CJEU concerning discrimination of transgender persons}.

Regarding general courts, the following can be detected. The *Kúria* – the supreme court of Hungary – does apply the case-law of the CJEU on the protection of fundamental rights. However, it is necessary to highlight that it tends to quote the practice of the European Court of Human Rights (hereinafter: ECtHR) more often. The reason behind this phenomenon is that the *Kúria* strictly applies that the Charter shall only be applied when the organs of the EU or of the Member States enforce EU Law. The *Kúria* also follows that according to Article 52 (3) of the Charter which incorporates the practice of the ECtHR into the EU Law. That is to say, when there is EU Law to be applied, the case-law of the ECtHR shall be cited as part of the legal system of the EU.

c) Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, by making a request for preliminary ruling with the Court of Justice of the EU?

So far, such a statement has not been made by the CCoH, neither has a request been motioned for a preliminary ruling to the CJEU.

I.III. National human rights catalogues

a) Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?

The former Constitution contained the human rights catalogue at its end, under Chapter XII "Fundamental Rights and Duties". The Fundamental Law has changed the previous – basically socialist – structure and placed the human rights catalogue in the beginning, right after the fundamental principles, under the title "Freedoms and responsibilities". So the catalogue is part of the constitution. The human rights catalogue of the Fundamental Law does not have a specific structure, it contains thirty-one Articles, starting with Article I which imposes an obligation on the Hungarian State, namely "[t]he inviolable and inalienable fundamental rights of MAN must be respected. It shall be the primary obligation of the State to protect these rights." Noteworthy, that the very first provision that contains concrete rights is Article II which reads that "[h]uman dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the fetus shall be protected from the moment of conception."

b) What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?

To answer this question, an insight shall be taken into the constitutional evolvement in Hungary. Until 1949 there had not been a single constitutional Act but a compilation of laws that were called as the "historical constitution". It is commonly accepted that within these laws there were some legislations that contained some reference to fundamental rights. That is to say, the first attempt to constrain the power of the king by the novelty

embodied in the "*Aranybulla*" (Golden Bull) of 1222. In this document, similarly to the *Magna Charta Libertatum* of 1215 in England, King Andrew II took an oath to respect some rights and privileges of the nobility who had the right to resist, the so-called "*ius resistendi*" if the king had violated them. The concept of the *Aranybulla* had been quoted by the nobility, especially during the Habsburg rule. Another example of the original evolution of the protection of the fundamental rights is the so-called "*April Laws*" of 1848. These Acts – after the revolution of 15th of March, 1848 against the Habsburg throne – basically transformed the feudalistic Hungarian society into a more civic one. However, it was not until 1949 when a fundamental rights catalogue was uniformly enacted, into to body of the constitution. Naturally, the original Act no. XX of 1949 on the Constitution of the People's Republic of Hungary did not constitute a democratic order, which was based on the rule of law and the respect of human rights, but it was the literal translation of the 1936 constitution of the Soviet Union. In 1989-1990, during the political changes the whole text of the communist constitution was altered by Act no. XXXI of 1989. As it was indicated above, the former Constitution did contain a comprehensive catalogue of fundamental rights and provided the legal basis to transform the Hungarian legal system into a democratic one. It was also noted that the Fundamental Law, since the constitutional changes in 1989 were meant to be temporary, contains right after the general principles a fully elaborated human rights catalogue. Naturally, the constitutional amendment during the political changes was inspired by the constitutional examples of the Western democracies. That applies to the Fundamental Law which is however a slightly different and shows some respect to the organic Hungarian legal development. The National Avowal of the Fundamental Law proclaims that "[w]e honor the accomplishments of our historical Constitution and the Holy Crown, which embodies the constitutional continuity of Hungary and national unity". Besides, Article R) (3) orders that "[t]he provisions of the Fundamental Law shall be interpreted in accordance with their intended purpose, with the Fundamental Law's National Commitment, and with the achievements of our historical Constitution". This rule applies to the human rights catalogue as well.

c) What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

The development of the human rights charter of the Fundamental Law was presented above. Most recently, the 7th Amendment of the Fundamental Law was enacted. Most of its provisions entered into force on the 29th of June, 2018 and they concerned some

fundamental rights such as the right to privacy (Article VI of the Fundamental Law). Regarding the amendment procedure, Article S) of the Fundamental Law is to be quoted. It reads that the adoption of a new Fundamental Law or the amendment of the existing Fundamental Law may be initiated by the President of the Republic, the Government, any parliamentary committee, or any Member of Parliament. For the adoption of a new Fundamental Law or for the amendment of the existing Fundamental Law, the votes of two-thirds of all Members of Parliament shall be required. The Speaker of Parliament shall sign the adopted Fundamental Law or the adopted amendment thereof within five days and forward it to the President of the Republic. The President of the Republic shall sign the Fundamental Law, as received, or the amendment thereof, as received, within five days of receipt and shall order its publication in the official journal. If the President of the Republic is of the opinion that the procedural requirements set out in the Fundamental Law for adopting the Fundamental Law or any amendment thereof have not been met, the President of the Republic shall submit it to the CCoH for review. If the review of the CCoH did not find any infringement of said requirements, the President of the Republic shall sign the Fundamental Law or the amendment thereof without delay and shall order its publication in the official journal. The designation of the amendment of the Fundamental Law for the purposes of publication shall contain the title, the number of the amendment and the day of promulgation.

There are some differences between the fundamental rights catalogue of the former Constitution and the Fundamental Law.

- It is highly important that the Fundamental Law now contains in Article I (3) the regulation concerning the limitation of the fundamental rights. The so called necessity-proportionality test had been evaluated by the CCoH on the basis of the former Constitution that did not include such a provision.
- The Fundamental Law also makes a stronger commitment concerning the protection of human dignity when it proclaims in its Article II that human dignity shall be inviolable. Everyone shall have the right to life and human dignity; the life of the fetus shall be protected from the moment of conception. Whilst the former Constitution in its Article 54 (1) read only that in the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.
- Another example of the different approach of the Fundamental Law towards the protection of fundamental rights is the question of equality between women and

men. Article 66 (1) of the former Constitution stated that the Republic of Hungary shall ensure the equality of men and women in all civil, political, economic, social and cultural rights. In contrary, the Fundamental Law in Article XV (3) declares – as a general standard – that women and men shall have equal rights.

- The former Constitution contained the right to property and the right to inheritance not in the fundamental rights catalogue but in the first title “General Provisions” (Article 13 and 14). However, the Fundamental Law has brought a change in this structure and enshrines these rights in Article XIII (1), in the fundamental rights catalogue. Noteworthy that the second sentence of Article XIII (1) is a novelty since it rules that property shall entail social responsibility.
- In comparison to the former Constitution, as a completely new provision – inspired by the Charter – Article XXIV of the Fundamental Law provides the right to “good administration”: [e]veryone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to state the reasons for their decisions, as provided for by an Act. Everyone shall have the right to compensation for any damage unlawfully caused to him or her by the authorities in the performance of their duties, as provided for by an Act”.
- Article XXVI of the Fundamental Law is also a novelty. It reads that the State shall strive to use the latest technical solutions and the achievements of science to make its operation efficient, raise the standard of public services, improve the transparency of public affairs and promote equality of opportunity.

I.IV. The mutual relationship between different catalogues of human rights

a) Can you give examples from the case law of your court related to the use of any of the international catalogues?

The CCoH has been quoting several international human rights catalogues ever since the beginning of its operation, primary the ECHR; the ICCPR and the ICESCR; the UDHR and also other international treaties (ratified by Hungary) such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women or the Convention on the Rights of Persons with Disabilities. That is to say, the CCoH may invoke the ECHR in three possible situations: 1) it has been already stipulated that according to

Article 32 of the ACC the authorized petitioners shall initiate a procedure – examination of conflicts with international treaties – when the basis of the procedure is the international treaty, not the Fundamental Law; 2) Article 32 (1) of the ACC also stresses that the CCoH is entitled to examine legal regulations *ex officio* in the course of any of its proceedings – again, the basis would be the international treaty; and 3) it shall quote – *ex officio* – the international treaty or its interpretation to support its argumentation. The firstly mentioned three treaties have been quoted several times by the CCoH. It is necessary to examine the case-law of the CCoH separately concerning these human rights catalogues.

i) ECHR

- The ECHR appeared in the decisions of the CCoH as around 110 times since 1990. It has to be highlighted that the CCoH may have quoted the case-law of the ECtHR without mentioning the ECHR itself. A few very recent / significant examples shall be presented. However, it is worth to mention that in one of its first – and highly important – decisions, the CCoH already cited the ECHR. In Decision 23/1990. (X. 31.) AB the CCoH found capital punishment unconstitutional and in its argumentation the CCoH referred to Article 1 of Protocol 1 of the ECHR.
- Decision 6/2018. (VI. 27.) AB paragraphs [50]-[55]: the CCoH referred to the case-law of the ECtHR concerning the rights of transgender people – without mentioning a specific provision of the ECHR – and also on the interpretation of the “living instrument” doctrine;
- Decision 3002/2018. (I. 10.) AB paragraphs [46]-[56]: the CCoH recalled Article 10 (1) of the ECHR and the case-law of the ECtHR when it adjudicated a constitutional complaint and meanwhile when it interpreted Article IX. (2) of the Fundamental Law (freedom of the press);
- 3328/2017. (XII. 8.) AB, paragraph [76]: the CCoH referred to Article 10 (2) of the ECHR and the case-law of the ECtHR when it illustrated the acceptable limitation of the right to the freedom of expression – Article IX. (1) of the Fundamental Law;
- Decision 3313/2017. (XI. 30.) AB paragraphs [34]-[42]: the CCoH comprehensively examined Article 6 (2) of the ECHR and the case-law of the ECtHR when it depicted Article XXVIII. (2) of the Fundamental Law – the presumption of innocence;
- Decision 30/2017. (XI. 14.) AB, paragraph [64]: the CCoH quoted Article 14 of the ECHR while interpreted Article XV (2) of the Fundamental Law (discrimination between fundamental rights);

- Decision 2/2017. (II. 10.) AB, paragraphs [66]-[67]: the CCoH cited the first sentence of Article 6 (1) of the ECHR when it interpreted Article XXVIII (1) of the Fundamental Law (right to fair trial) and stated that the two provisions contained identical wording concerning reasonable time in criminal procedures. Thus, the CCoH examined the case-law of the ECtR;
- Decision 30/2015. (X. 15.) AB, paragraph [35]: the CCoH has always intended to follow the case-law of the ECtR concerning the right to peaceful assembly (Article 11 of the ECHR);
- Decision 23/2015. (VII. 7.) AB, paragraphs [25]-[48]: the CCoH made a comprehensive analysis regarding a law on the situation of Churches in the light of Article VI. (1) and Article VIII. (2) of the Fundamental Law (right to the freedom of thought, conscience and religion and the right to the freedom of association) and cited Article 9 and 11 of the ECHR and also the case-law of the ECtR. Importantly, in this decision the CCoH declared that the challenged regulations violated the cited provisions of the ECHR;
- Decision 29/2014. (IX. 30.) AB, paragraph [47]: regarding the limitation of the right to access to information, the CCoH referred to Article 10 (2) of the ECHR;
- Decision 28/2014. (IX. 29.) AB, paragraph [26]: the CCoH had to adjudicate a collision between fundamental rights emerged from publishing a picture of a policeman. The CCoH referred to Article 8 of the ECHR and the case-law of the ECtR while depicted the legitimate limitations of Article IX. (1) and (2) of the Fundamental Law (right to the freedom of expression, right to the freedom of the press);
- Decision 36/2013. (XII. 5.) AB, paragraph [32]: the CCoH recalled Article 6 (1) of the ECHR when it comprehensively interpreted Article XXVIII. (1) of the Fundamental Law (right to fair trial);

ii) ICCPR

- Decision 36/2014. (XII. 18.) AB, paragraph [46]; Decision 34/2014. (XI. 14.) AB, paragraph [174], Decision 21/2014. (VII. 15.) AB, paragraph [57]; Decision 34/2013. (XI. 22.) AB, paragraph [25]; Decision 8/2013. (III. 1.) AB, paragraph [27]: the CCoH referred to Article 14 of the ICCPR concerning the interpretation of the right to fair trial [Article XXVIII. (1) of the Fundamental Law];

- Decision 16/2014. (V. 22.) AB, paragraph [42]: the CCoH quoted Article 15 (1) of the ICCPR when it interpreted the constitutional framework of the criminal law, namely the question of *nullum crimen sine lege / nullum poena sine lege*;
- Decision 13/2014. (IV. 18.) AB, paragraph [36]: the CCoH recalled Article 19 (2) and (3) of the ICCPR when it formulated the limitation of the freedom of expression [Article IX. (1) and (4) of the Fundamental Law].

iii) ICESCR

- Decision 21/2018. (XI. 14.) AB, paragraph [20]: the CCoH referred to Article 9 and 11 when it interpreted the rights of the disabled people;
- 17/2014. (V. 30.) AB, paragraph [20]: the CCoH recalled that Article 10 of the ICESCR required special protection to mothers during a reasonable period before and after childbirth;

b) Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?

The CCoH formulated several times – especially in connection with the ECHR and with the ICCPR – the followings. Regarding some fundamental rights the Fundamental Law regulates their essence in the same way as some international human rights treaty does. In these cases, the level of protection that is provided by the CCoH shall not be lower than the level of the international protection (mostly formulated by the ECtR). Thus the CCoH – bearing in mind the obligation imposed by Article Q) (2) of the Fundamental law “*pacta sunt servanda*” – shall follow the case-law of the ECtR even if the relevant argumentation would not be necessarily depicted from its own precedent cases {Decision 61/2011. (VII. 13.) AB; Decision 32/2012. (VII. 4.) AB, paragraph [41]; 22/2013. (VII. 19.) AB, paragraph [16]; Decision 36/2013. (XII. 5.) AB, paragraph [26]; Decision 30/2015. (X. 15.) AB, paragraph [35]; Decision 15/2016. (IX. 21.) AB, paragraph [42]; Decision 2/2017. (II. 10.) AB, paragraph [65]}.

c) Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary.)

No.

II Special Part – Specific Issues Related to Selected Fundamental Rights

II.I. Right to life

a) What is the original wording of the provision protecting this right in your national catalogue?

Article II of the Fundamental Law declares that human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the fetus shall be protected from the moment of conception.

b) Is it possible to restrict the right? If so, how and under what conditions?

In one of its very first decisions, the CCoH had to make its stand towards the right to life when it adjudicated the constitutionality of the capital punishment on the basis of Article 54 (1) of the former Constitution ("In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights"). The CCoH in its Decision 23/1990. (X. 31.) annulled the provision of the Criminal Code on the capital punishment and stated the followings: Chapter I of the Constitution, entitled "General Provisions," stated that "The Republic of Hungary recognized the inviolable and inalienable fundamental human rights. Ensuring the respect and protection of these shall be a primary obligation of the State" [Art. 8 (1)]. It mentioned in the first place in Chapter XII, "Fundamental Rights and Duties," that "In the Republic of Hungary, every human being had the inherent right to life and the human dignity, of which no one shall be arbitrarily deprived." [Article 54 (1)]. Article 8 (4) states that the right to life and human dignity were considered fundamental rights, whose exercise may not be suspended or curtailed even in times of a state of exigency, emergency or peril. It could be concluded from the comparison of the quoted provisions of the Constitution that, irrespective of citizenship, the right to life and human dignity was an inherent, inviolable and inalienable fundamental right of every human being in Hungary. It was a primary responsibility of the Hungarian State to respect and protect these rights. Article 54 (1) of the Constitution stipulated that "no one may be arbitrarily deprived of" life and human dignity. The wording of this prohibition, however, did not exclude the possibility that someone may be deprived of life and human dignity in a non-arbitrary way. Nevertheless, when judging

the constitutionality of the legal permissibility of capital punishment, the controlling provision was Article 8 (2) of the former Constitution. Under this provision, "in the Republic of Hungary the law contains rules on fundamental rights and obligations shall be determined by law which, however, shall not impose any limitations on the essential contents of fundamental rights." Thus, CCoH found that the provisions in the Criminal Code concerning capital punishment and the quoted related regulations came into conflict with the prohibition against the limitation of the essential contents of the right to life and human dignity. The provisions relating to the deprivation of life and human dignity by capital punishment not only imposed a limitation upon the essential meaning of the fundamental right to life and human dignity, but also allowed for the entire and irreparable elimination of life and human dignity or of the right ensuring these. Therefore, the CCoH established the unconstitutionality of these provisions and declared them null and void.

The quoted decision of the CCoH suggests that the right to life – embraced with the right to human dignity – is to be considered as an absolute right.

c) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Considering the absolute nature of the right to life, the CCoH had to make decisions in two areas that are strongly connected to this issue. The CCoH delivered two decisions concerning abortion and three ones on the constitutionality of euthanasia.

i) Abortion

- Decision 64/1991. (XII. 17.) AB: the CCoH formulated that the question of whether the fetus was a legal subject could not be resolved by constitutional interpretation. Subject to Parliament's determination on whether the fetus was a legal person, there were constitutional boundaries limiting the opportunities for abortion. If the legislature decided that the fetus was not legally a person, a legal subject entitled to the right to life and dignity, then abortion would be permissible only in those situations where the law tolerated a choice being made between two lives and therefore did not punish the extinction of human life. Were the legislature to decide otherwise, the State would be compelled to balance its duty to protect life against the woman's right to self-determination. An outright ban would be

unconstitutional since this would completely negate the mother's right to self-determination as would rules which exclusively favored that right. The State's duty was to protect human life from its inception and so the right to self-determination could not be dispositive even at the earliest stages of pregnancy. This duty meant that the State could not lawfully permit unjustified abortions. Justifications deemed adequate by Parliament had to be incorporated into a new abortion law as conditions with which to be complied. In the ultimate analysis, it was for Parliament to decide where to draw the line between the two unconstitutional extremes of total prohibition and unrestricted availability of abortions.

- Decision 48/1998. (XI. 23.) AB: the CCoH added to its former decision the followings ("pro choice" / "pro life"). It was not unconstitutional if the law made it possible to terminate a pregnancy when a woman was in a crisis situation. The legislator could give up regulating the monitoring of whether a woman's condition was actually serious enough to qualify as a crisis situation in accordance with the Constitution only if at the same time the legislator protected by its laws the life of fetuses. The legislator should have regulated the notion and the possible application of the notion of crisis situation by an act of parliament.

ii) Euthanasia

- Decision 36/2000. (X. 27.) AB: the CCoH delivered the following argumentation. The CCoH held that it was contrary to the principle of personal autonomy embodied in the right to human dignity [Article 54 (1) of the former Constitution] to restrict the right to consent to medical services and the right to refuse medical treatment in the case of an incompetent patient and a patient whose legal competency was limited.
- Decision 22/2003. (IV. 28.) AB: In the case of euthanasia, the right to human dignity did not form an inseparable unity with the right to life, but *vice versa*: the exercise of the one may mean that the other was pushed into the background. Therefore, it may not be claimed, on the basis of the absolute nature of the right to human dignity in unity with the right to life, that an incurable patient's right to self-determination in relation to ending his or her life would be an absolute right. The right to self-determination may be restricted on the bases of the general test of fundamental rights and Article 8 (2) of the former Constitution.

d) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No.

II.II. Freedom of expression

a) What is the original wording of the provision protecting this right in your national catalogue?

Article IX of the Fundamental Law rules:

(1) Everyone shall have the right to freedom of expression.

(2) Hungary shall recognize and protect the freedom and diversity of the press, and shall ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion.

(3) In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under the conditions guaranteeing equal opportunities, laid down in a cardinal Act.

(4) The right to freedom of expression may not be exercised with the aim of violating the human dignity of others.

(5) The right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act.

(6) The detailed rules relating to the freedom of the press and the organ supervising media services, press products and the communications market shall be laid down in a cardinal Act.

b) Is it possible to restrict the right? If so, how and under what conditions?

The right to the freedom of expression may be restricted. The rule of such a limitation shall be found in the Fundamental Law itself. It is necessary to highlight that no such provision was enacted in the former Constitution but the CCoH evaluated it and the Fundamental Law incorporated this principle.

Article I (3) of the Fundamental Law proclaims: “[t]he rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right.” With special attention to this right, Article IX (4) and (5) of the Fundamental Law shall be cited. They read that the right to freedom of expression may not be exercised with the aim of violating the human dignity of others and it may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act. Finally, Article VI (1) shall be quoted: “[e]xercising the right to freedom of expression and assembly shall not impair the private and family life and home of others.”

c) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The CCoH bears an elaborated and well-established case-law concerning the interpretation / aspects / limitation of the right to the freedom of expression. Not recalling all the decisions concerned, only the core interpretation shall be noted.

- Decision 7/2014. (III. 7.) AB, paragraphs [14]-[24], [42]-[43]: the CCoH comprehensively interpreted the right to the freedom of expression, firstly after the Fundamental Law entered into force. The CCoH cited its former case-law (based on the former Constitution) and the practice of the ECtHR. The CCoH concluded that the freedom of speech, the freedom of expression has a special position among constitutional fundamental rights as it is the “mother right” of several freedoms, the so-called fundamental rights of communication. With regard to the fundamental rights of communication it is important to note that in addition to individual self-expression it is the combination of rights that guarantees the

individual's well founded participation in the social and political life of the community. The CCoH stressed that in addition to the subjective right of the individual to the freedom of expression, the former Constitution imposed the duty on the State to secure the conditions for the creation and maintenance of democratic public opinion. The objective, institutional aspect of the right to the freedom of expression relates not only to the freedom of the press, freedom of education and so on, but also to that aspect of the system of institutions which places the freedom of expression, as a general value, among the other protected values. For this reason, the constitutional boundary of the freedom of expression must be drawn in such a way that in addition to the person's subjective right to the freedom of expression, the formation of public opinion, and its free development – being indispensable values for a democracy – are also considered. The freedom of speech requires special protection when it relates to public matters, the exercise of public authority, and the activity of persons with public tasks or in public roles. In the case of the protection of persons taking part in the exercise of public authority, a narrower restriction on the freedom of expression corresponds to the constitutional requirements of a democratic State under the rule of law. According to the position of the CCoH, value judgments expressed in the conflict of opinions on public matters enjoy increased constitutional protection even if they are exaggerated and intensified. In a democratic State under the rule of law, the free criticism of the institutions of the State and of the local governments – even if done in the form of defaming value judgments – is a fundamental right of the citizens, i.e. the members of the society, which is an essential element of democracy.

The freedom of speech is on the one hand indispensable for the full development of individual autonomy, as one's personality can only be evolved if the person is free to communicate his or her views and thoughts to others without any restriction of content. Free self-expression by free persons is one of the essential elements and the essence of the constitutional order based on the Fundamental Law. On the other hand, the freedom of speech is a fundament of a democratic and pluralist society and public opinion. The special role of the freedom of speech implies that, on the one hand, it can only be restricted exceptionally by other rights or constitutional values, and, on the other hand, the Acts restricting the freedom of speech must be interpreted in the narrow sense. Despite of the special role of the freedom of speech, the high constitutional rank of human dignity can justify the restriction of the earlier by the latter.

- Decision 8/2018. (VII. 5.) AB, paragraphs [22]: the CCoH compiled its case-law concerning the freedom of expression. "In the course of harmonizing the freedom of expression and the protection of personality, the primary question is whether, with due account to all circumstances of the case, the speaker expressed his opinion in a social, public issue, a "public affair". This question cannot be decided solely on the basis of the status of the person affected by the expression – although this aspect should remain one of the most important elements of the weighing, sometimes an element with a determining force. On the one hand, the constitutional aspects applicable to expressing opinions in public life may have to be followed in a scope wider than the realm of opinions affecting the persons exercising public authority or those who act in public on a professional basis, but on the other hand one should not claim that any communication – including the ones not related at all to public affairs – affecting public figures should be assessed on the basis of these criteria".

d) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

As it was indicated, the CCoH takes into consideration the practice of the ECtHR when it interprets the right to the freedom of expression. Most of its cases, such citation can be found: Decision 34/2017. (XII. 11.) AB, paragraphs [37]-[40]; Decision 3328/2017. (XII. 8.) AB, paragraphs [48]-[52]; Decision 28/2014. (IX. 29.) AB, paragraph [26]; Decision 13/2014. (IV. 18.) AB, paragraph [35]; Decision 7/2014. (III. 7.) AB, paragraphs [25]-[37]. It is fair to say that the case-law of the CCoH is in line with the practice of the ECtHR. However, there are cases when the CCoH and the ECtHR came to different conclusions {Ruling 3226/2016. (XI. 14.) AB and 3227/2016. (XI. 14.) AB, whereas *Case of Magyar Kétfarkú Kutya Párt v. Hungary* (Application no. 201/17), Judgment of 23 January, 2018 – referred to the Grand Chamber on 28th of May, 2018}.

II.III. Right to privacy/right to respect for private life/right to private life

a) What is the original wording of the provision protecting this right in your national catalogue?

Article VI of the Fundamental Law formulates:

(1) Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected. Exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others.

(2) The State shall provide legal protection for the tranquility of homes.

(3) Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest.

(4) The application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act.

b) Is it possible to restrict the right? If so, how and under what conditions?

The right to privacy may be restricted. The rule of such a limitation shall be found in the Fundamental Law itself.

Article I (3) of the Fundamental Law proclaims: “[t]he rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right.”

c) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The very Article of the Fundamental Law contains some highly important fundamental rights that are strongly connected to the right to privacy / private life such as the protection of personal data. The CCoH bears an elaborated and well-established case-law concerning the interpretation / aspects / limitation of the right to private life [i.e. Article VI (1) of the Fundamental Law]. Not recalling all the decisions concerned, only the core interpretation shall be noted.

- Decision 19/2013. (VII. 19.) AB, paragraph [23]: the CCoH pointed out that the Fundamental Law protected the right to private life in a more elaborated way than the former Constitution had done, since the new regulation included home, communications and good reputation.

- Decision 32/2013. (XI. 22.) AB, paragraphs [82]-[84]: the CCoH gave a comprehensive interpretation on the right to private life in connection with secret surveillance. The CCoH stated that the essence of the right to private life / privacy was to be considered a sphere where no one else was entitled to interfere without the agreement of the person concerned. The CCoH also added that there was an especially strong link between the right to private life and the right to human dignity (Article II of the Fundamental Law). That is to say, the right to human dignity determined the foundation of the core sphere of the right to privacy – the area that was excluded from any interference of the State – since it was the basis of the human dignity itself. However, the protection of privacy was not to be interpreted only in connection with the right to human dignity but it shall also be understood in a broader sense and applied to communications, home and good reputation.
- Decision 9/2014. (III. 21.) AB, paragraphs [42]: the CCoH – again in connection with the constitutional aspects of secret surveillance – stated that the right to private life may be limited in line with Article I. (3) of the Fundamental Law. The CCoH took into consideration the interpretation of the ECtR on Article 8 of the ECHR.
- Decision 13/2016. (VII. 18.) AB paragraphs [43]-[44]: the CCoH adjudicated a case concerning the right to private life and the right to peaceful assembly [Article VIII. (1) of the Fundamental Law]. In this decision, the CCoH cited two judgments of the Supreme Court of the United States – *Carey v. Brown* [447 US 455 (1980)] and *Frisby v. Schultz* [487 US 474 (1988)] – and formulated that the calmness of the home was to be considered as a “last resort” for people to rest. The CCoH also recalled the case-law of the ECtR.

d) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

As it was indicated above, the CCoH has recalled the practice of the ECtR when it interpreted the right to private life. In other words, the case-law of the CCoH corresponds with the international trends.

II.IV. Freedom of religion

a) What is the original wording of the provision protecting this right in your national catalogue?

Article VII. of the Fundamental Law formulates:

(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change one's religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practice or teach his or her religion or other belief through religious acts, rites or otherwise, either individually or jointly with others, either in public or in private life.

(2) People sharing the same principles of faith may, for the practice of their religion, establish religious communities operating in the organizational form specified in a cardinal Act.

(3) The State and religious communities shall operate separately. Religious communities shall be autonomous.

(4) The State and religious communities may cooperate to achieve community goals. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established Churches. The State shall provide specific privileges to established Churches with regard to their participation in the fulfillment of tasks that serve to achieve community goals.

(5) The common rules relating to religious communities, as well as the conditions of cooperation, the established Churches and the detailed rules relating to established Churches, shall be laid down in a cardinal Act.

b) Is it possible to restrict the right? If so, how and under what conditions?

The right to the freedom of religion may be restricted in line with Article I. (3) of the Fundamental Law.

c) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

- Decision 6/2013. (III. 1.) AB, paragraphs [112]-[118]; [122]-[127]; [134]; [136]-[137]: the CCoH delivered a comprehensive and significant decision concerning the freedom of religion. It examined the case-law of the ECHtR and its previous precedents, based on the former Constitution. It concluded the following in

connection with the right to human dignity. On one hand the right to human dignity – together with the right to life and legal capacity – was considered as a right determining legal status. On the other hand it covered the right to free personal expression. The CCoH interpreted the freedom of conscience as a right to personal integrity. (The State cannot force anybody to come into conflict with himself because something is incompatible with one of his or her important beliefs which determine his or her personality).

The freedom of conscience and religion acknowledged [a person's] conviction and within this, in a certain sense, religion is part of human dignity, so their freedom guaranteed the success of the free expression of personality. Personality itself for law was untouchable (this was expressed by the unlimited right to life and human dignity); the law could only help to ensure this autonomy while ensuring the external conditions. From the concept that the right to freedom of conscience and religion itself the State's duty was not to judge the truthfulness of religious faith and beliefs. Primarily, the State bore a negative obligation to refrain from interference.

The freedom of collective exercise of religion was not tied to any organizational form. The right to exercise one's religion with others was conferred upon everyone without regard of the organizational form it manifests and, indeed, without regard whether the collective exercise of religion proceeds within or without a legally regulated organizational framework. The freedom of exercise of religion, on the individual or collective level, may not constitutionally be made conditional on membership in a religious organization or upon the organizational form of a religious community.

In the very decision the CCoH concluded – in conjunction with the right to the freedom of association – that the church was not the same for ecclesiastic law and for state law. The neutral State must not follow any churches' differing ideas. But it could consider religious communities and churches in relation to their historical and social roles which are different from those communities, unions, clubs (that can be established on the basis of Article VIII of the Fundamental Law). Besides the organizations that could be established on the basis of the right to public assembly, the Fundamental Law ensured that the religious communities could freely use the legal form of "church" as defined by legal rules. The State considered the churches' characteristics with this legal institution and made possible their special reception into the legal system. The religious community obtained its legal status through

the legal institution chosen by itself and could enforce its special characteristics within this ambit. The churches were organized for the exercise of religion and not for the conduct of limited activities or representation of certain interests like business organizations, associations, political parties or trade unions. On the other hand every aspect of the life and the personality of the believer was influenced and determined by the religion. The freedom of religion and its operative capacity are inseparable. The CCoH came to the conclusion that the National Assembly shall adopt legal regulations that may provide special legal framework for the operation of churches.

- Decision 15/2015. (V. 29.) AB, paragraphs [28]-[29], Decision 3144/2015. (VII. 24.) AB, paragraphs [31]-[32]: the CCoH re-affirmed that allowing religious communities to perform their activity independently from the State was not to be considered as a premise to practice the right to the freedom of religion but they were strongly connected. Having said that, the ability to function of the religious communities was inseparable from the right to the freedom of religion. Thus, for a religious group, gaining the status as an officially recognized religious community is strongly connected to their fundamental right.

d) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

No, as Decision 6/2013. (III. 1.) AB shows, the CCoH takes into consideration the interpretation of the ECtR on Article 9 of the ECHR. Additionally, in Decision 23/2015. (VII. 7.) AB, the CCoH declared that the law-maker shall dissolve the collision between Article 9 of the ECHR and the Hungarian legislation.

II.V. Prohibition of discrimination

a) What is the original wording of the provision protecting this right in your national catalogue?

Article XV. of the Fundamental Law contains the prohibition of discrimination:

- (1) Everyone shall be equal before the law. Every human being shall have legal capacity.
- (2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability,

language, religion, political or other opinion, national or social origin, property, birth or any other status.

(3) Women and men shall have equal rights.

(4) By means of separate measures, Hungary shall help to achieve equality of opportunity and social inclusion.

(5) By means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities.

b) Is it possible to restrict the right? If so, how and under what conditions?

The CCoH applies two different tests if the question of the prohibition of discrimination occurs. One concerns Article XV (1), the general equality clause and Article XV (2), the prohibition of discrimination regarding fundamental rights.

i) Article XV (1)

The CCoH formulated for example in Decision 42/2012. (XII. 20.) AB, paragraph [22]; Decision 14/2014. (V. 13.) AB, paragraph [32]; in Decision 32/2015. (XI. 19.) AB, paragraphs [78]–[80] and [91] or in Decision 3157/2018. (V. 16.) AB, paragraphs [30]–[32] the followings. The CCoH stressed out that under the general equality clause – which is based on the equal dignity of all human being – not every discrimination was prohibited but only the ones that could not be justified, if it was arbitrary or there was no reasonable balancing based on an objective criterion.

ii) Article XV (2)

The CCoH has been following a well-established practice on the interpretation of the non-discrimination between fundamental rights. Such as in Decision 42/2012. (XII. 20.) AB, paragraph [22]; in Decision 14/2014. (V. 13.) AB, paragraph [32]; in Decision 32/2015. (XI. 19.) AB, paragraphs [78]–[80] and [91]; in Decision 9/2016. (IV. 6.) AB, paragraph [22]; in Decision 6/2018. (VI. 27.) AB, paragraphs [37]–[39] or in Decision 11/2018. (VII. 18.) AB, paragraph [22] the CCoH formulated that under Article XV (2) – when the discrimination occurred in connection with fundamental rights – the so-called necessity / proportionality test – Article I (3) of the Fundamental Law was to be applied to strike a fair balance.

c) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The question of non-discrimination has occurred concerning several constitutional issues since the CCoH started its operation in 1990. Having said that, only the most recent cases shall be highlighted.

- Decision 11/2018. (VII. 18.) AB: the CCoH found omission on the part of the law-maker violating Article XV (1) of the Fundamental Law – in conjunction with social security and the right to physical and mental health [Article XIX (1) and XX. (1) of the Fundamental Law]. The law-maker had not regulated how prisoners may participate in 100% state-subsidized public health care since they were lacking the opportunity to get the necessary certificates from their local physicians.
- Decision 6/2018. (VI. 27.) AB: the CCoH declared an omission on the part of the law-maker violating the prohibition of discrimination clause [paragraph (2) of Article XV] and of human dignity clause (Article II) of the Fundamental Law since the law-maker had not yet regulated the name-changing procedures concerning the lawfully settled non-Hungarian citizens.
- Decision 1/2018. (IV. 6.) AB: the CCoH found omission on the part of the law-maker violating Article XV (5) in conjunction with Article XIX (1) of the Fundamental Law (social security, right to assistance). The CCoH advocated that the law-maker had not regulated the assistance for disabled people who had the same level of incapacity to move – caused by any reasons – as the ones who were suffering from physical disadvantages.

d) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The CCoH pointed out several times – like in its Decision 30/2017. (XI. 14.) AB, paragraph [64] – that Article XV (2) by principle corresponds Article 14 of the ECHR. That is to say, the test that is used by the CCoH concerning non-discrimination is in line with international standards.

II.VI. Right to liberty

a) What is the original wording of the provision protecting this right in your national catalogue?

Article IV. of the Fundamental Law states:

(1) Everyone shall have the right to liberty and security of the person.(

(2) No one shall be deprived of liberty except for reasons specified in an Act and in accordance with the procedure laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences.

(3) Any person suspected of having committed a criminal offence and taken into detention must, as soon as possible, be released or brought before a court. The court shall be obliged to hear the person brought before it and shall without delay make a decision with a written statement of reasons to release or to arrest that person.

(4) Everyone whose liberty has been restricted without a well-founded reason or unlawfully shall have the right to compensation.

b) Is it possible to restrict the right? If so, how and under what conditions?

The right to liberty may be restricted in line with Article I (3) of the Fundamental Law.

c) Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

- Decision 3017/2016. (II. 2.) AB, paragraphs [30]-[35]: the CCoH comprehensively interpreted the right to liberty. One's liberty could only be deprived in accordance with an Act. Constrain measures during penal procedures shall only be ordered by a lawful judge. One of the State's primary goals was to be considered to prosecute crimes. For effectively doing so, the State needed effective measures at its disposal that were to be applied. Pre-trial detention shall be considered one, despite the fact that it was a serious limitation of one's fundamental rights. However, pre-trial detention aimed to enforce an effective penal procedure, prevent a commitment of another crime which were constitutionally acceptable reason to restrict the right to liberty.

d) Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Ever since the Fundamental Law entered into force in 2012, the CCoH has only delivered less than ten decisions or rulings concerning the right to liberty. In the mentioned decisions the CCoH did not refer to the case-law of any international organization or to an international treaty. That is to say, this question cannot be answered.