

Conclusions of the summary report on the application in practice of Article 28 of the Fundamental Law of Hungary

On the recommendation of the President of the Constitutional Court of Hungary, in 2021 the President of the Curia of Hungary set up a jurisprudence-analysing working group to examine the application in practice of Article 28 of the Fundamental Law of Hungary (hereinafter referred to as the Fundamental Law).

According to Article 28 of the Fundamental Law (hereinafter referred to as Article 28): “In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law. When interpreting the Fundamental Law or laws, it should be presumed that they serve moral and economic purposes that are in accordance with common sense and the public good.”

The original text of Article 28 conveyed the demand to identify the objective goal sought to be achieved by a given piece of law. The seventh amendment to the Fundamental Law introduced subjective teleological interpretation into the text of Article 28, which primarily demanded to take into account the legislative reasons underlying the piece of legislation at issue. Additionally, historical constitution and the results of jurisprudence also appeared in legal interpretation, raising the quality of judicial decisions. The jurisprudence-analysing working group has concluded that from among the various methods of interpretations the ones leading to results that are in conformity with the Fundamental Law without departing from the text of the piece of legislation at issue should be used. This requirement flows from the fact that Article 28 does not release from the obligation of being bound by the norms; nor does it empower the courts to interpret the law *contra legem*.

Furthermore, the analysis has established that the courts must identify the constitutional aspects of the cases brought before them within the framework of the margin of interpretation defined by the law and must interpret the legal provisions in their decisions in the light of the constitutional content of the fundamental right involved in the case at issue. This primarily requires familiarity with the Constitutional Court’s practice and the application of that practice to concrete cases. The analysis has revealed that in about one third of the examined cases the application of Article 28, in addition to helping a party win a case, also served to unify

jurisprudence and give a clear interpretation of the substantive and procedural norms applied in the case. The analysed cases demonstrate that Article 28 calls for the application of constitutional principles and values in judicial adjudication.

The analysis covered a period of five years and addressed cases in which a constitutional rule was invoked either by the parties in their submissions or by the court *ex officio*. The analysis has revealed a trend of yearly increasing number of references to Article 28. In sectoral breakdown, the highest number of references to the interpretative clause were made in administrative cases. In civil, economic, and labour cases the presence of Article 28 was more pronounced if the case had a public law dimension or if the issue in the case was related to both public and private law. Legal interpretation meeting the demands of Article 28 also appeared in criminal cases. In 36.45 percent of the examined cases, Article 28 substantially affected the decision, whereas in 63.55 percent of the cases it did not. The rate of 36.45 percent is very high in terms of the outcome of cases. Thus, it can be established that in the field of rights enforcement the demand (obligation) of rights enforcement in conformity with the Fundamental Law – that is, the effective enforcement of the Fundamental Law – has come to the fore.

The analysis also covered the question whether legal interpretation carried out by relying on Article 28 of the Fundamental Law changed the earlier interpretation of the law or the interpretation of law followed by the lower courts. Aggregate data show that in almost one-fifth of the cases in which it was invoked, jurisprudence explicitly changed in consequence of the interpretation of the given piece of legislation in conformity with Article 28 of the Fundamental Law.