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Freedom of Contract and the Constitution

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This paper deals with the constitutional foundation and features of freedom of contract. It attempts to describe the dogmatic relations that exist between the market economy, general freedom of action, and the right to self-determination on the one hand, and the market economy on the other. The essay examines the constitutional limits of the freedom of contract and presents the most important findings of the Hungarian Constitutional Court on the issue.
Keywords: *private law, constitution, freedom of contract, freedom of action Constitutional Court*

The Constitution (the act 1949. XX. which was amended several times) following the change of system in Hungary mentioned the market economy in two places: on the one hand, the preamble contained the term "social market economy"[1], and 9. § (1), according to which Hungary's economy is a market economy in which public and private property have equal rights and receive equal protection. Paragraph 9. § (2) added to this that the Republic of Hungary recognizes and supports the right of entrepreneurship and the freedom of economic competition. It is a historical fact that the market economy is only really functional on the basis of private ownership. This basis of private property presupposes the freedom of private property and, as part of it, the freedom of contract. These two freedoms function as a social organizing principle and force in the civilization that is now called European. Both freedoms – based on the principle of equality before the law – were based on the equality and subordination of the parties entering into a property relation-

1 See Muzslay's definition of this: "The social market economy is based on a free, self-disciplined, responsible person, who strives for initiative, economic activity and private property, who can take care of himself under normal circumstances. The human person as a free and independent citizen is the human ideal of the social market economy." István Muzslay: *Gazdaság és erkölcs. (Economy and morality.).* Márton Áron Publishing House, 1995. 134. p.

ship with each other, which was based on the assumption of real, economic and social equality of the parties.[2]

Although before the entry into force of the Basic Law, the Constitutional Court dealt with the issues of the market economy in a number of decisions, it did not develop the principle of the market economy in such detail as, for example, the rule of law.[3] After quite a few fundamental decisions, the decisions contain rather "defensive" arguments. So, for example, that the market economy is a constitutional task, which, apart from its connections with the basic institutions of the rule of law, is irrelevant to any constitutionality investigation. No one has a right to the market economy, and no violation of fundamental rights can be based on it. As a result, some legal provisions cannot directly violate the constitutional principle of the market economy, and no constitutional objection can be directly based on it.[4] Similarly: the market economy is irrelevant in all constitutionality investigations. No one has a right to the market economy, that is, it cannot be classified as a fundamental right. The unconstitutionality of the violation of any fundamental right cannot be decided by referring to the violation of the market economy. In other words, the constitutionality of an intervention or legal restriction cannot be made dependent on the extent to which the restriction serves the development of the market economy, or whether it serves at all.[5]

The reason for the relegation of the constitutional clause concerning the market economy is, that in a stable market economy, the assessment of the state's economic policy is fundamentally not a question of constitutionality. Aspects that serve the market economy typically come into effect through issues within the scope of fundamental rights protection, but fundamental rights also have an independent content that goes well beyond the market economy, and are only partially connected to the constitutional principle of the market economy.[6]

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2 See more about this: Lenkovics Barnabás: Szerződési szabadság – alkotmányos nézőpontból. (Freedom of contract – from a constitutional point of view.) In: *Liber Amicorum Studia Gy. Boytha Dedicata.* Edited by: király Miklós, gyertyánfy Péter. ELTE 2004. 247-249. p.

3 It is typical of the Constitutional Court that it derives certain fundamental rights from the rule of law. See, for example, in this respect in detail: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra; in: Tóth J. Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról; Budapest, KRE-ÁJK; Patrocinium; 2023; p. 216.; pp. 9-30.

4 1524/B/1992. AB decision, ABH 1995, 651., 655.

5 668/B/1996. AB decision, ABH 1996, 636, 637.

6 See Balogh – holló – kukorelli – sári: *Az Alkotmány magyarázata. (Explanation of*

The Basic Law, which entered into force in 2012, no longer includes the term market economy, but it speaks about the freedom of entrepreneurship, linking it with the freedom to choose work and occupation [Article M) paragraph (1), and XII. Article (1)]. This is the constitutional context, as well as the declaration of the right to property [XIII. Article (1)] form the appropriate basis for the use of the doctrine developed by the previous practice of the Constitutional Court regarding freedom of contract.[7] The Constitutional Court, following the entry into force of the Basic Law, in 3192/2012, (VII. 26.) AB decision explained, that although the Basic Law does not contain the term market economy, this textual change does not mean that the freedom of contract – which by its nature is closely related to the freedom of the enterprise – will no longer be enjoyed protection of the Basic Law. The omission of the reference to the market economy can be evaluated as a consequence of the fact, that special emphasis on this circumstance has become unnecessary nowadays.[8]

The freedom of contract and the private autonomy of property transactions are one of the main inherent and inseparable conceptual elements of the private property system. However, the last hundred years have brought restrictions on freedom of contract in market economies based on private property. Either ensuring the balance of national economic processes, or other general societal needs (e.g. environmental protection), or social aspects (requirements to protect the "weaker party") can all make it necessary to limit the freedom of contract. In addition to the limits of cartel law and competition law, strict private law regulations cannot remain free from prohibitions that limit freedom of contract. This is reflected in the private law codes, which frame the fundamentally dispositive norms expressing the principle of freedom of contract with an ever-increasing number of cogent norms.[9]

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the Constitution) KJK - Kerszöv, 2003. 245. p.

7 According to the fourth amendment of the Basic Law, which entered into force in 2012, "[t]he decisions of the Constitutional Court, made before the entry into force of the Basic Law shall lose their effect." (Final and miscellaneous provisions, point 5) Given that the provisions of the Basic Law and the previous Constitution on the market economy are almost verbatim, according to the above, references to constitutional court decisions that have "lost their effect" in this way – under certain conditions – by the Constitutional Court does not consider it excluded either. The basis of their reference in this study is our belief that the dogmatic propositions formulated in these decisions have not lost their importance from both a historical and a scientific point of view.

8 See: JUHÁSZ Zoltán: *A szerződési szabadság és határai alkotmányjogi és magánjogi nézőpontból, valamint a „clausula rebus sic stantibus" elve. (Freedom of contract and its limits form the point of view of constitutional law and private law, and the principle of „clausula rebus sic stantibus.)* Közjogi Szemle, 2015/1. 34-35.

9 The creators of the German BGB considered the enforcement of freedom of contract

A question that is different from this, and only posed by the legal development of the 20th century is, where the constitutional boundaries of the legal transactions of private owners and the freedom of contract are drawn.[10] The freedom of contract includes the freedom to enter into a contract[11], the freedom to choose a contractual partner (in this context, issues of the obligation to enter into a contract) and, of course, the freedom to form the content of the contract. In this respect, the basic question of private law is, what kind of limits are raised by the constitutional fundamental rights to the basic expression of the freedom of contract, as the right of disposal arising from private property. In a constitutional approach, the same question means whether the restriction of contractual freedom is really done for the purpose of implementing a fundamental right, or whether the restriction of contractual freedom is a necessary condition for the enforcement or realization of a constitutional fundamental right.

Regarding the legal relationship between constitutional fundamental rights and private law contracts, the starting point is that private legal entities are not direct recipients of constitutional articles establishing fundamental rights; their obligees are the organs of the state, above all the legislative power, the legislator. It follows from this that the obligations arising from constitutional fundamental rights do not bind private law entities directly in their contractual relations, fundamental rights exert their effect on contracting parties through the mediation of private law rules.[12] Accordingly, the permissibility of contractual limitations of constitutional fundamental rights does not depend on whether the fundamental rights themselves permit such a limitation or not, but on the extent to which and in what way private law regulations mediate fundamental rights requirements.[13] It is clear that the

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so obvious that principle itself was not included in the code. Later legal codes, however, already include the autonomy of the contracting parties one by one: Articles 19 of the Swiss ZGB, 1322 of the Italian Codice Civile, or the Hungarian Civil Code, which entered into force in 1960. § 200. See: Vékás Lajos: *A szerződési szabadság alkotmányos korlátai. (Constitutional limitations of contractual freedom.)* Jogtudományi Közlöny, 1999/2. 53. p.

10 See: Harmathy Attila: *Droit civil – Droit constitutionnel.* Revue internationale de droit comparé, 1998. 45–56.

11 For the limitation of this, see Gadó Gábor: *A szerződési szabadság egyes kérdései, figyelemmel a Ptk. felülvizsgálatára. (Certain issues of freedom of contract, taking into account for review of the Civil Code.)* Gazdaság és Jog, 1998. 16–26. p.

12 Canaris, C-W.: *Grundrechte und Privatrecht.* Archiv für die civilistische Praxis, 1984. 201., 222–245. page

13 Lajos Vékás also refers to several authoritative German authors, according to whom constitutional fundamental rights have a direct impact on the subjects of private law;

latter approach is of fundamental importance from the point of view of constitutional adjudication.

Among the private law norms mediating fundamental legal requirements, the positive norms – representing the majority of the rules of contract law – are of particular importance. These norms are permissive only against the agreement of the contracting parties, and are just as binding for courts and other state bodies as other rules of law.

However, in the dispositive norms, the legislator strives to balance the typical interest position of the parties in the contract by considering the conditions of presumed agreement of reasonably acting contracting parties as a model.[14] In this case, we are talking about the fact that in the relationship between dispositive private law norms and constitutional fundamental rights, the constitutional reference bases can gain their content – much more than in the case of cogent private law rules – by weighing the public and private interests. This means that the dispositive norms framing private autonomy can limit the constitutional fundamental right of one party to the extent that the protection of the other party requires it – without disproportionately harming the limited contracting partner. Thus, achieving the constitutionality of the legislation and the legal transaction is logically divided: the cogent and dispositive norms of private law are also directly bound by the limitations of the constitutional fundamental rights; these limits reach the sphere of private autonomy and the freedom to form contracts only indirectly, through private law legislation.[15]

In accordance with all of this, the practice of the Constitutional Court – which examined the constitutionality of legislation in general – does not distinguish between cogent and dispositive rules for the regulation of contracts.[16] The essence of the issue of freedom of contract, unlike the dogmatics

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NIPPERDEY, H.C.: *Grundrechte und Privatrecht.* In: Festschrift Molitor, 1962.; SCHWABE, J.: *Die sogenannte Drittwirkung der Grundrechte.* 1971; STEINDORFF, E..: Persönlichkeitschutz im Zivilrecht.1983. 12.; discusses the issue in detail: GÁRDOS-OROSZ Fruzsina: *Alkotmányos polgári jog? Az alapvető jogok alkalmazása a magánjogi jogvitákban.* (*Constitutional civil right? Application of fundamental rights in private law disputes).* Dialogue Campus, 2011.

14 For this see: CHARNY, D.: *The New Formalism in Contract.* The University of Chicago Law Review, 1999. 66. 842., seq. page

15 VÉKÁS: op.cit. 58. p.

16 The dispositivity of the rules is of course important from the point of view of the "low" constitutionality standard of restricting the freedom of contract. "Nevertheless, the Constitutional Court points out that the provision of the Civil Code objected to in the motion and in the constitutional complaint does not limit freedom of contract. There is no rule that prohibits the contracting parties from the Civil Code. 478. § (2). ('The principal may claim his fee even if his procedure did not lead to a result. The

of private law, is precisely the dogmatics of constitutional law, namely, on what basis and in what contexts freedom of contract, which is not included in the text of the constitution, enjoys constitutional protection. The principle of freedom of contract is contained in the Civil Code[17], and its guarantees and limitations are consequently not directly defined by the Constitution, but by the Civil Code, determined by its provisions. The constitutional protection of any type of freedom of contract as "freedom" essentially means that the Constitutional Court elevates one of the important institutions of civil law to the constitutional level. The "only" question is, with the help of which constitutional institutions this "raising to a constitutional level" takes place, to which constitutional category does the Constitutional Court link the institution of freedom of contract.

It can be forwarded: the practice of the Constitutional Court, which was followed from the beginning – and described in detail below – implemented the protection of the freedom of contract in connection with the market economy contained in 9. § of the Constitution at that time. However, this connection was not necessary (but remained so). In its very first decision regarding freedom of contract, the Constitutional Court briefly stated that the essential element of the market economy defined in 9. § (1) of the Constitution is freedom of contract, which the Constitutional Court considers an independent constitutional right (but not a fundamental right).[18] The dogmatic problem is that fundamental rights cannot be derived from the category of the market economy – which, like other state goals that are not classified as fundamental rights, is realized through nominal fundamental rights.[19]

After making this decision, the Constitutional Court stated that it interprets the right to human dignity defined in 54. § (1) of the Constitution (Articles II. of the Basic Law) as a general personality right, and this means,

principal may reduce the fee or refuse to pay it, if he proves that the result was partially or entirely due to a reason for which the appointed responsible.') differ by agreement of will. The provision of the Civil Code complained of in the constitutional complaint is therefore a law that allows deviations, which is based on the principle of general dispositivity for contracts, so the enforcement of the petitioner's right to freedom of contract is neither excluded nor limited by this provision." 1414/D/1995. AB decision, ABH 1999, 539, 541.

17 Civil Code (Ptk.) 6:59. § (1): The parties may freely enter into a contract and freely choose the other contracting party. (2) The parties are free to determine the content of the contract. They may deviate from the rules of the contracts regarding the rights and obligations of the parties by mutual consent, if this law does not prohibit the deviation.

18 13/1990. (VI. 18.) AB decision, ABH 1990, 54, 55.

19 21/1994. (II. 16.) AB decision, ABH 1994, 117, 120.

among other things, the general freedom of action.[20] Based on this, the freedom of contract could not necessarily be linked to the institution of the market economy, but also to the autonomy of action, which freedom of contract is the basic manifestation of autonomy of action in the field of the economy, and in civil law based on private autonomy in general. Instead of applying the freedom of contract derived from the general personal law, the Constitutional Court decided the dogmatic uncertainty expressed in the terminology by considering the freedom of contract derived from the market economy as a constitutional right, but not as a fundamental right.[21]

Subsequently, on only one occasion, in its decision regarding the unconstitutionality of the Ministerial Decree on the regulation of certain issues of fine art, applied art, photography and industrial design, the Constitutional Court classified freedom of contract under the concept of general freedom of action. This decision established that the provision according to which a work of art can only be acquired (put on the market, or used) after an assessment required from an artistic point of view constitutes an infringement of the general freedom of action. In principle, the Constitutional Court in 8/1990. (IV. 23.) AB decision[22] pointed out that the right to human dignity protected in 54. § (1) of the Constitution is the so-called one of the manifestations of "general personal right". The freedom to create legal transactions, the independent decision-making right in such transactions, free from any power influence, can be regarded as one form of manifestation of the general freedom of action. The

20 8/1990. (IV. 23.) AB decision, ABH 1990, 42. "The decision of the Constitutional Court is based on the interpretation of the right to human dignity. This right is declared as an innate right of every human being at the head of the chapter "Basic rights and duties" in 54. § (1) of the Constitution. The Constitutional Court recognized the right to human dignity in the so-called considers it one of the formulations of 'general personal right'. Modern constitutions and the practice of the Constitutional Court refer to the general personality right with its various aspects: e.g. as the right to the free development of the personality, as the right to freedom of self-determination, as general freedom of action, or as the right to the private sphere. The general personality right is a 'mother right', i.e. a subsidiary fundamental right that both the Constitutional Court and the courts can invoke in any case to protect the autonomy of the individual, if none of the specific named fundamental rights can be applied to the given facts." 44–45.

21 See: Sólyom László: *The beginnings of constitutional adjudication in Hungary.* Osiris, 2001. 657–658. p. Sólyom refers to the fact, that the decision on freedom of contract was made by the Constitutional Court on April 12, 1990. (ABH 1990. 56), although it was only published on June 18. However, the decision on general personal rights was issued five days later on April 17 (ABH 1990, 45). According to the president of the Constitutional Court at the time, if the decisions were made in a different order, the freedom of contract could also have been replaced.

22 ABH 1990, 42.

constitutional requirement of general freedom of action also gives rise to the possibility that anyone can buy a work of art without the obligation to express an objectionable opinion. In order to protect other constitutional rights and constitutional values, the general right of action can also be limited by law, but this limitation must be necessary and proportionate to the goal to be achieved. However, the restriction of the freedom of access to works of art – with the general requirement of obtaining a mandatory art review – cannot be constitutionally justified, and is therefore an arbitrary restriction.[23]

Thus, in the very first related decision of the Constitutional Court, freedom of contract was linked to the market economy, and it was defined as an independent constitutional right and raised to the level of constitutional protection. This fact – at the beginning of the regime change – also had a symbolic significance. Subordination manifests itself in freedom of contract, and just as the extension of the right to self-determination in 1990 can be understood as a reflection of the relationship between the state and citizen, the subordination manifested in freedom of contract also reflects a new aspect of the relationship between state and citizen.[24]

In terms of its constitutional status, freedom of contract in 32/1991. VI. 6.) AB decision (ABH 1991, 146.) is related to interest on housing loans, it received its final place in the sístem of constitutional adjudication, according to which it is not a fundamental right, but a constitutional right, which can be limited on the basis of appropriate constitutional reasons; such an acceptable reason can be a substantial change in – external – circumstances *(clausula rebus sic stantibus).*

The possibility of interference in contracts and the restriction of freedom of contracts, which can also be recognized in international legal comparisons, are related to the fact that the behavior of state bodies in relation to contracts has changed significantly in our time globally due to changes in economic life. The state has become an important factor in civil law contracts. Today, in many cases, the state does not give the parties completely free space for

23 24/1996. (VI. 25.) AB decision, ABH 1996, 107., 111. However, in the context formulated in the decision, the reference to general autonomy of action can be misleading, as it uses the same concept with regard to the nature of protection existing on the basis of completely different conditions from a constitutional point of view. Depending on the nature of the organization, organizational autonomy can be protected either on the basis of the market economy, freedom of competition, the right of association, or other constitutional provisions that actually apply to organizations as well. Invoking the right to human dignity causes conceptual uncertainty in this context. See Balogh Zsolt: *Az Alkotmány fogalmi kultúrája és az alkotmánybíráskodás*. *(Conceptual culture of the Constitution and constitutional adjudication*.) Fundamentum, 1999. 2. 30. p.

24 Ld. Balogh – Holló – Kukorelli – Sári: op. cit.: 252. p.

agreement, but imposes various limits on agreements by means of rules defined in laws and regulations and determines the content of contracts, from which the parties cannot deviate. A major transformation is therefore taking place in the area of contracts, contracts are becoming "public law in nature".[25]

International experience clearly shows that overall economic and national economic aspects sometimes make it necessary to limit freedom of contract in the public interest. In advanced contemporary legal systems, such areas of restriction are in particular the law of competition restrictions, cartel law, abuse of economic dominance, control of organizational mergers, price regulation, standard contracts, environmental protection, consumer protection, etc. areas.[26] In these regulatory circles, the parties' freedom to enter into contracts, the definition of the content of the contracts by the parties, and even the fact that the content of the contracts remain unchanged, often become doubtful.

The freedom of contract – which the Constitutional Court considers an independent constitutional right – is enforced in the general rule of the Civil Code, according to which the parties are free to determine the content of the contract, and can deviate from the provisions of the contract by mutual consent. The contractual will of the parties when concluding the contract is obviously that they wish to fulfil their contractual obligations under external conditions existing at the time of the conclusion of the contract, and the parties undertake to bear the reasonably foreseeable risk of possible subsequent changes when concluding the contract. If, on the other hand, these conditions change significantly, the basic assumption related to contracts ceases to exist. In such cases, in addition to the given changes, it is no longer fair to enforce the performance of the contract with the original content, to maintain the contractual obligations, because the burden of the service, as well as the ratio of the service and compensation, has become completely different from what the parties stipulated in the contract. Due to a significant change in circumstances, the performance of the contract may differ significantly from the goal stated at the time of the conclusion of the contract, so that the original condi-

25 See for example: Arató, Balázs: *A klasszikus polgári jogi szerződéses jogviszony és a közbeszerzési szerződéses jogviszony összehasonlítása,* In: Boóc, Ádám; Csehi, Zoltán; Homicskó, Árpád Olivér; Szuchy, Róbert (szerk.) 70 : Studia in Honorem Ferenc Fábián; Budapest, Magyarország: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2019) 546 p. pp. 31-35., 5 p.

26 The public interest did also have a very important role on the field of contract law during the pandemic period (COVID-19) in Hungary. See: Boóc Ádám: *Megjegyzések a Covid-19 vírus hatásairól a magyar szerződéses jogban, különös figyelemmel a vis maior fogalmára. (Notes on the effects of the Civid-19 virus in hungarian contract law, with special attention to the concept of vis maior.)* Glossa Iuridica 7 (2020). pp. 85 – 94. 69

tions of the contract are no longer fulfilable, unrealizable. In this case, the courts have the possibility to amend the contract by applying the *clausula rebus sic stantibus*, on the basis of the Civil Code 6:192. §.[27] In such a case, the court must weigh the trust of the other party in the contract against the difficulty of one party's service and, after reconciling them, solve a new, fair distribution of the contractual burdens.

A general clause similar to this – with a more general wording – is found in the Civil Code. 6:60. §. The "exceptionality" formula of paragraph (2) of §, based on which legislation may exceptionally change the content of contracts concluded before its entry into force. In this case, if the changed content of the contract violates the essential legal interests of one of the parties, this party may ask the court to amend the contract or withdraw from the contract. Both individual legal relationships, i.e. changing the content of a specific contract, and changing legal relationships on a social scale, i.e. through legislation, can only be done within a constitutional framework. The constitutional guarantee of the change is the judicial control with regard to individual legal relations, and the constitutional court's control with regard to changes of legal relations on a social scale.

According to the position of the Constitutional Court, therefore, exceptionality – in the case of which the content of existing legal relationships can be modified by legislation – must be examined case by case, by legislation, as well as the applicability of court contract amendments in individual legal relationships. The question to be decided separately for each legal regulation is, therefore, when state intervention in existing contractual relations complies with the Constitution and the above criteria. Deciding this is primarily the responsibility of the legislator, but the constitutionality of the intervention is decided by the Constitutional Court.

The state may constitutionally change the content of contracts with the rule of law only if the same conditions exist as the conditions requires to amend the contract through court. This can be done by applying the *clausula rebus sic stantibus*.[28]

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27 Civil Code (Ptk.) 6:192. § (1) Any party may request a court amendment of the contract if, in the permanent legal relationship between the parties, as a result of a circumstances that arose after the conclusion of contract, the fulfillment of the contract under unchanged conditions would harm its substantial legal interest, and
a) the possibility of a change in circumstances was not foreseeable at the time the contract was concluded;
b) he did not cause the change in circumstances; and
c) changes in circumstances do not fall within the scope of your normal business risk.
28 32/1991. (VI. 6.) AB decision, ABH 1991, 146., 153–154.

According to a later decision, since the freedom of contract cannot be considered a constitutional fundamental right, it is consequently not governed by the constitutional principle of inviolability and inviolability of the rights included in the constitutional system of fundamental rights. Constitutionally, therefore, it can be limited even in terms of its essential content, as long as there are constitutional reasons for the final means of restriction.[29]

Dogmatically, therefore, the situation is clear in one aspect: freedom of contract is not a fundamental right, it is not subject to the restrictions set out in 8. § (2) of the Constitution [Article I. (3) of the Basic Law], so it can be restricted even in terms of its essential content, if there are constitutional reasons. Although the freedom of contract, which is considered a constitutional right, receives stronger constitutional protection than the state goal (market economy), the question still remains as to what this protection consists of and what are the methods of judging the restriction.

A summary of this is contained for the first time in the parallel justification attached to the decision containing the constitutionality examination of the Land Act. According to this, the absence of a violation of fundamental rights does not mean that the legislator could limit other rights at will. Non-fundamental rights can also enjoy the protection of the Constitution; however, if such a case does exist, the criteria for protection are different – lighter – than those prescribed by 8. § (2) of the Constitution for fundamental rights. We must be careful not to paralyze the legislator's freedom and the fulfillment of his constitutional role by raising every step of his actions into a constitutional problem.

A violation of a non-fundamental right may be assessed by the Constitutional Court if it is related to a rule of the Constitution. A variety of rights can be included in the protection of fundamental rights; the Constitutional Court decides when it can still refer to a fundamental right, and when it establishes the lack of connection. If the violation of rights raised in a motion cannot be considered a violation of a named fundamental right, it may still conflict with a state goal, the basic principle of the rule of law, equality of law as broadly interpreted by the Constitutional Court, and ultimately with the general personality right derived from the right to human dignity or general freedom of action.

In its practice so far, the Constitutional Court has used a standard that is lighter than necessity/proportionality to determine the violation of a "right" that is not considered a fundamental right, but is derived separately from a constitutional value or a state goal. Freedom of contract, for example, is not

29 61/1993. (XI. 29.) AB decision, ABH 1993, 358., 361.

protected by fundamental rights – "it can be restricted even in terms of its essential content" – but the Constitutional Court requires the restriction to be "constitutionally justified". Rights that do not qualify as fundamental rights can be included in constitutional protection through the prohibition of discrimination, the requirement of the rule of law and the protection of human dignity.

The prohibition of discrimination can be safely extended to all kinds of rights other than human and civil rights. (Most such discrimination is also certainly unconstitutional due to the violation of another fundamental right; for example, discrimination based on religion, political or other opinion is also a violation of the right to express an opinion; discrimination based on gender is also a violation of the equal rights of men and women; national minority rights, etc.)

Discrimination based on any other aspect that affects non-fundamental rights is also unconstitutional if it violates the right to human dignity. This was the permanent practice of the Constitutional Court. If the discrimination – according to the criteria used by the Constitutional Court up until now – is "arbitrary", i.e. "unjustified", i.e. there is no reasonable reason, then it violates the right to human dignity, because in such a case the persons concerned were certainly not treated as persons of equal dignity and were not evaluated the aspects of each of them with similar attention and fairness. Consequently, with respect to a non-fundamental right, discrimination is unconstitutional if there is no reasonable justification.

This criterion for establishing a violation of human dignity – arbitrariness – can be used in all cases as a measure of the unconstitutionality of non-fundamental rights violations, if the Constitutional Court considers these violations either under the title of equal treatment or violation of the rule of law, or directly due to the restriction of the general right to privacy (freedom of action) subject to constitutional review. The arbitrariness of legislators or law enforcement officers is contrary to the rule of law, equality of law and human dignity, even if it does not affect a fundamental right. According to the above, the previous practice of the Constitutional Court was also based on this common criterion, even if the connection was not made obvious by the different use of words, especially in terms of equal treatment.

The Constitutional Court also has to decide a Case-by-case basis When it examines the violation of the right to human dignity according to fundamental law criteria, and when it applies it to include originally non-fundamental rights violations under the protection of the Constitution. In the latter case, you should measure with the lighter standard. Borders cannot be drawn in general; special protection of certain living conditions may be necessary, or a stricter standard may be justified by a violation of a legal institution. By

applying a stricter standard, the Constitutional Court can raise certain rights to the status of fundamental rights, i.e. separate fundamental rights from the mother right of human dignity. It could justify invoking the fundamental right of human dignity if it were about the application of objective responsibility in criminal law, or something similar; an extensive restriction of contractual freedom that threatens the validity of the institution may justify direct fundamental rights protection.[30]

The essence of the line of thought is therefore that constitutional rights receive less protection than fundamental rights. However, if the restriction – even minimally – violates one of these constitutional principles or rights through the mediation of the rule of law, general equqlity of law, or personal rights (in principle, sny other fundamental right or constitutional principle), i.e. based on a remote connection, the freedom of contract – as constitutional right – its protection can be justified.[31]

In order to establish a violation of the constitution, it is necessary that a violation of a fundamental right or a constitutional institution closely related to the freedom of contract (as an abstract right) that implements and includes the freedom of contract must also occur. A milder restriction of the freedom of contract than the one mentioned does not usually constitute a direct violation of the constitution. These fundamental rights, state goals, and constitutional values do not, however, ensure the constitutionally based subject right to the immutability of the regulation of legal institutions.[32]

This latest decision requires the actual restriction of another right or constitutional principle in order to establish a constitutional violation, and stipulates that the restricted right or violated principle is closely related to the freedom of contract. In this case, however, it is obviously no longer about the freedom of contract or the autonomy of action that is part of human dignity (general personality right), but about the protection of the given fundamental right or constitutional principle.[33]

Freedom of contract is an essential element of the market economy, free trade and systems that profess its principles, which ensure that the contracting parties are free to decide on essential issues related to their agreement. However, the task of the state is to ensure stability, to influence economic development, and to protect the weaker party. However, it can be stated that

30 35/1994. (VI. 24.) AB decision, ABH 1994, 197. Parallel justification of László Sólyom 214–216.

31 See: Balogh – Holló – Kukorelli – Sári: op. cit.: 255. p.

32 327/B/1992. AB decision, ABH 1995, 604, 607; similarly to 897/B/1994. AB decision, ABH 1995, 726.

33 Balogh – Holló – Kukorelli – Sári: op. cit.: 256. p.

these limitations do not absolutely and completely empty the freedom of contract and only come to the fore in socially and economically justified cases. Without the principle of freedom of contract, it would not be possible for the parties to decide on their own whether they wish to enter into a contract or to determine their contractual partner, the content and type of their contract, and without freedom we cannot even talk about actually a contract as an agreement created by the free will of the parties.[34]

From a constitutional point of view, the true importance of freedom of contract lies in the general freedom of action, the exercise of the right to self-determination. The freedom of legal entities in relation to the conclusion of contracts within the framework of the given legal system basically determines their scope in all areas of the economy. Freedom of contract is an inseparable part of the market economy, including the freedom of entrepreneurship. For all these reasons, the constitutionality of the restriction of contractual freedom always remains a cardinal question in a democratic legal state based on a market economy.[35] Freedom of contract also has its own significance, which, however, cannot fulfill its social organizing function only within the framework of the basic constitutional rights that carry the human rights value system.[36]

34 vízkeleti Edit: A szerződési szabadság elve alkotmányjogi nézőpontból. (The principle of freedom of contract from a constitutional point of view.) In: *Alapelvek és alapjogok. (Basic principles and fundamental rights).* Edited by: lajkó Dóra, varga Norbert. Szeged, 2015. 485-486. p.
35 Juhász Zoltán: op.cit.: 40. p.
36 Lenkovics Barnabás: op.cit.: 254. p.