THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN HUNGARY

Sára Hungler and Zoltán Pozsár-Szentmiklósy

1. CONSTITUTIONALISATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Hungary ratified the International Covenant on Economic, Social and Cultural Rights in 1976 and promulgated it in Decree-Law 9. of 1976. At the time of the ratification, the People's Republic of Hungary was part of the Eastern bloc, dominated by a strong Soviet influence; therefore, promulgating social rights had merely a symbolic significance.

At the time of the ratification of the Covenant, the constitution of the country (Act XX of 1949, amended in 1972) contained a chapter on the fundamental rights (and fundamental duties) of citizens, including economic, social and cultural rights.[1] However, the ratification of the Covenant did not lead to a

[1] E.g. the right to work (55. § (1)), the right to recreation (56. § (1)), the right to the protection of health (57. § (1)), in relation to the organisation of labour protection and health care services (57. § (2))], social protection related to age, health and incapacity to work (58. § (1)), and the right to education (59. §).

change in practice. At that time, the rights included in the constitution did not a have normative force; therefore, the effect of the related provisions of laws and international treaties was also only symbolic.

During the time of transition from the state-socialist period to a constitutional democracy, the constitution was comprehensively amended by Act XXXI of 1989 (1989 Constitution) in order to safeguard the transition. By basing the constitution on the principles of people's sovereignty, separation of powers, rule of law and protection of fundamental rights, the provisions of the constitution – including those which declared the protection fundamental rights – regained their normative force.

The present constitution of the country, the Fundamental Law (which entered into force on 1 January 2012) contains a separate chapter on fundamental rights ('Freedom and responsibility'). The provisions of the constitution related to certain fundamental rights are included in separate articles within this chapter.[2]

The majority of these rights are not subjective rights in the sense that they do not grant the possibility for individuals to claim certain actions and support from the state; rather they invoke the duty of the state to take certain measures (e.g. by regulation, by organising certain services and activities, by financial support) in this field. The state has to take these measures with due consideration to the respect for human dignity, as well as the requirement of equal treatment. The latter is aspect is judicially enforceable, as well as everyone's right to choose his or her work and employment freely[3] – which is a subjective right.

Like the other fundamental rights included in the constitution,[4] economic, social and cultural rights are understood as relative rights. There are no specific, explicit limitation clauses linked to these rights – the general requirement of proportionality has to be taken into consideration when examining the limitation of these rights.[5] However, when considering the extent to which the state has to fulfil its duties related to these rights, according to the Constitutional Court, the state is entitled to take into consideration the available resources, based on the economic conditions of the country.

---

2 E.g. Article XI on the right to education, Article XII on the right to work, Article XVII on the relations between employers and employees and the rights of employees, Article XIX on social security, Article XX on physical and mental health, and Article XXII on the protection for homes.

3 Article XII(1).

4 In the Hungarian constitutional system, the right to life and human dignity as a whole, in conflict with external limitations (e.g. death penalty, torture) and the safeguards of the 'constitutional criminal law' (e.g. principles like *nullum crimen sine lege*, *nulla poena sine lege*, the presumption of innocence, the right to legal remedy) are considered absolute rights and therefore exceptions from the above-mentioned relative rights.

5 Fundamental Law, Article I: '(3) 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.'

The most important difference between the Fundamental Law and the 1989 Constitution (in force between 1989 and 2011) in this field is related to the right to social security. While the former Constitution explicitly mentioned the right to social security,[6] the present constitution, the Fundamental Law, refers to social security not as a right but rather as a state objective.[7] Moreover, the Fundamental Law opens the possibility for the state to link certain social measures to conditions which relate to the 'usefulness' of the activities of the beneficiaries.[8] This change has political reasons: the shift of emphasis from the liberal understanding of fundamental rights to the 'role of the individual within the community, on the responsibility of individuals for themselves and the community.'[9]

Another, less significant change in the regulation is that the Fundamental Law explicitly mentions that the state shall strive to ensure decent housing conditions and access to public services for everyone,[10] whereas the former 1989 Constitution did not contain such a formula. However, even this provision is seemingly progressive; it does not refer to a right, but rather to a state objective. Moreover, the widely criticised Seventh Amendment to the Fundamental Law (2018) opened the possibility for the criminalisation of homelessness,[11] which later took place in the Act on Misdemeanours.[12]

Based on the provisions of the 1989 Constitution, the Constitutional Court interpreted the social rights with a focus on minimum living standards which are indispensable for exercising the right to human dignity.[13] In its practice based on the Fundamental Law, the Constitutional Court usually does not refer to dignity when interpreting social rights.

2. THEORETICAL APPROACH TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS

In the Hungarian legal literature, economic, social and cultural rights are generally considered to be fundamental rights belonging to the second

6 1989 Constitution, Article 70/E: '(1) Citizens of the Republic of Hungary have the right to social security'.

7 Fundamental Law, Article XIX: '(1) Hungary shall strive to provide social security to all of its citizens.'

8 Fundamental Law, Article XIX: '(3) The nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary's activity.'

9 Zsolt Balogh and Barnabás Hajas, 'Rights and Freedoms' in Lóránt Csink, Balázs Schanda and András Zs. Varga (eds), *The Basic Law of Hungary. A First Commentary*, Clarus Press, Dublin 2012, p. 135.

10 Fundamental Law, Article XXII(1).

11 Fundamental Law, Article XXII: '(3) Using a public space as a habitual dwelling shall be prohibited.'

12 Viktor Kazai, 'Guilty of Homelessness – The Resurgence of Penal Populism in Hungary', *Verfassungsblog.de* (31 October 2018). The case is presented in detail in section 9 below.

13 Decision 43/1995 (VI. 30.) CC.

generation of human rights. It also widely accepted that among these rights there are classic liberties (e.g. the right to choose one's work freely), as well as rights which are much closer to services from the point of view of the beneficiaries. From a different perspective, the 'dual nature' of these rights can be highlighted by pointing to their aspects which are closer to fundamental rights, as well as to those which are closer to state objectives.[14]

The different theoretical approaches do not play a significant role in judicial practice. These rights are usually understood both as individual and as collective rights, depending on the function of the respective rights (e.g. the collective agreements or collective actions of workers as well as their individual right to health, safety and dignity both belong to the right to work).

3. GOALS OF LITIGATION AND LITIGANTS

Individuals can turn to ordinary courts in cases relating to the exercise of their individual rights in this field if the economic, social or cultural rights concerned are regulated by law and these legal provisions have been applied by state organs (administrative authorities) in the individual cases (e.g. decisions related to enrolment in schools, on entitlement to pensions, on receiving certain social services). If the individual questions the lawfulness of the decisions of the administrative organs, he or she can bring an action before the administrative court (courts working with administrative cases are part of the ordinary judiciary system). Employees and employers can also turn to the labour courts in legal disputes related to the right to work. Discrimination cases can also be brought before administrative courts by complaining of the actions or non-actions of state organs working in this field or by of the activity of an employer.[15]

It is also possible to bring collective complaints before the courts in this field if the claims of all claimants involved are based on the same facts and arise on the same legal grounds. Based on the provisions of certain acts, in certain cases it is also possible to bring claims of public interest before the court. For example, based on the provisions of the Act on Equal Treatment, the ombudsperson (acting as the authority responsible for the protection of equal treatment), the public prosecutor and certain NGOs ('social and interest representation organisations') can turn to the court 'if the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and the

14 For an overview see 'András Téglási, 'A szociális jogok alkotmányos védelme – Különös tekintettel a szociális biztonság alapjogi védelmére' [The constitutional protection of social rights – With special focus to the fundamental right's protection of social security] Dialóg Campus, Budapest 2019, pp. 62–80.

15 Before the administrative court procedure, it is also possible to turn to the parliamentary commissioner for fundamental rights (the ombudsperson) in discrimination cases.

violation of law affects a larger group of persons that cannot be determined accurately'.[16]

In such cases, the court has the competence to decide whether the challenged decisions of state organs were in accordance with the law and it can order new administrative proceedings in the cases concerned. In legal disputes relating to equal treatment and the right to work, the court can order directly applicable measures (e.g. compensation). Complaints are always required; courts are not entitled to act *suo motu* in this field.

4. INTERPRETATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS BY COURTS

There are distinct periods in the interpretation of social rights in Hungary.[17] At the beginning of the 1990s, the process of drafting the constitution was influenced by the socialist past. A specific solution was developed: in the preamble of the amended (1989) Constitution, the establishment of a social market economy was included as a constitutional objective, whereas Article 70/E[18] of the 1989 Constitution established that the right to social security was a right to benefits, provided for Hungarian citizens only in the event of certain social risks listed in the constitution. The related provisions of the 1989 Constitution established the social protection of the youth and the provision of 'extensive social measures' for the needy as a social objective of the state.[19] These fundamental rights were subject to the prohibition of discrimination. These provisions were relatively short, and based on the text alone. The scope of the fundamental social right could hardly be defined and it would have been very difficult to derive directly enforceable individual rights from Article 70/E of the 1989 Constitution.[20] Thus, the Constitutional Court's interpretation became increasingly important in that matter. Based on a landmark decision on Article 70/E(2) of the 1989

16 Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Article 20.

17 Tímea Drinóczi, 'Szociális jogok' [Social rights] in András Jakab, Miklós Könczöl, Attila Menyhárd and Gábor Sulyok (eds), *Internetes Jogtudományi Enciklopédia* (Alkotmányjog rovat, rovatszerkesztő: Bodnár Eszter, Jakab András) [Internet Encyclopedia of Legal Science (Constitutional Law Chapter, chapter editors: Eszter Bodnár, András Jakab)] http://ijoten.hu/szocikk/szocialis-jogok (2019), paras 9–29.

18 Article 70/E of the Constitution (Act XX of 1949) provides that: 'The Citizens of the Republic of Hungary have the right to social security; they are entitled to the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own'. Paragraph 2 of this article defines it as a state task that 'the Republic of Hungary shall implement the right to social support through social security system and the system of social institutions.'

19 Articles 16–17 of the 1989 Constitution.

20 Decision 32/1991 (VI. 6.) CC.

Constitution, the state must operate a functioning social welfare system, and within it a social security system. The Constitutional Court stated that Article 70/E of the 1989 Constitution does not provide directly enforceable rights, but lays down the obligation of the state to establish a system of social security. One of the constitutionally prescribed subsystems is the social security system; its benefits are subject to the principle of purchased services and therefore are protected as property in line with the principle of 'legitimate expectation', but also with due regard for the principle of solidarity.[21] In relation to benefits under the statutory and means-tested scheme, the Constitutional Court established the principles of the protection of acquired rights and the requirement of adequate time to prepare for changes, based on the principle of the rule of law and the requirement of legal certainty.[22] With regard to the social assistance system as a whole, and in particular to means-tested benefits, the Constitutional Court defined the absolute right to life and human dignity as a constitutional minimum.[23] However, the minimum subsistence level is not enforceable.

The Fundamental Law marked a paradigm shift in the interpretation of the right to social security. This was in line with the changes in social policy after 2010, some of which were reflected in the amendments to the 1989 Constitution enacted after 2010. From 2008 onwards, and particularly from 2010, this change was particularly evident in the area of means-tested benefits, where merit-based benefits have become more dominant, income and means tests applied more frequently, and the work test increasingly applied to income support benefits, as public employment continued to expand. After 2010, eligibility for social security benefits was tightened. The Fundamental Law ultimately provided the constitutional basis for this approach to social policy, as these reforms would have been difficult to fit into the Constitutional Court's previous interpretation of social security.[24]

The Fundamental Law provides for the state's aspiration to provide social security rather than the right to social security. This means that social security is no longer a general right but a state objective. Article XIX(2) of the Fundamental Law provides for a range of 'social institutions and measures' within the institutional system to ensure the achievement of the state's objective. The most significant change is that social security is no longer institutionalised at constitutional level. The first sentence of Article XIX(4) of the Fundamental Law stipulates that the state shall promote the provision of a livelihood in old age by maintaining a uniform state pension system based on social solidarity

21 Decision 26/1993 (IV. 29.) CC.
22 Decision 56/1995 (XI. 15.) CC.
23 Decision 23/1990 (X. 31.) CC.
24 István Hoffman, 'Szociális jog és az alaptörvény. Az államcél és annak teljesülése' [Social rights and the Fundamental Law. A state objective and its realisation], *Közjogi Szemle* 2018/3, pp. 20–28.

and by enabling the operation of social institutions established on a voluntary basis. This legislation enshrined that the pension system was designed to provide a livelihood in old age, i.e. the constitutional protection of the pension nature of benefits for non-elderly persons was removed. The Fundamental Law allowed the lawmaker to diverge from the previous Constitutional Court practice based on the protection of property, since by removing the constitutional institutionalisation of social security and emphasising that the pension system is based on the principle of solidarity – not on the principle of purchased services – the Fundamental Law essentially helped to reduce the property protection aspect of the pension system.[25] Article XVI(4) of the Fundamental Law establishes the constitutional duty of adult children to care for their parents, which institutionalised that care provided for old age now ultimately falls within the scope of family care.

After the Fundamental Law was adopted, the Constitutional Court had to reconsider its former interpretation concerning social security, now defined as a state objective. The Constitutional Court had the opportunity to interpret the rules on the substance of the matter, since, on the one hand, legislation adopted after 2011 has affected a number of benefits and, on the other hand, the relevant laws provided for the possibility of lodging a constitutional complaint in these cases, and several guiding decisions were issued on the matter, mainly on the basis of such petitions.[26]

Against this background, the Constitutional Court explicitly stated in principle that social security cannot be considered a fundamental right under the Fundamental Law, but rather a specific state objective.[27] The Constitutional Court did not consider that the provisions of the Fundamental Law guaranteeing the protection of human dignity were applicable to the question of the amount of the benefits; thus, it had departed from the practice according to which the social assistance system must guarantee the protection of human dignity.[28] This interpretation was confirmed in a subsequent decision by the Constitutional Court, stating that the only constitutionally guaranteed social benefit is the old-age pension, while the state has wide margin of appreciation to determine eligibility for other benefits.[29]

However, in a subsequent decision, the Constitutional Court continued to consider social security as a fundamental objective of the state, but also departed

25 Ibid., pp. 25–26.

26 The procedural rules related to constitutional complaints are addressed below.

27 Decision 40/2012 (XII. 6.) CC.

28 However, the Constitutional Court annulled the questioned legislation, which allowed for the termination of benefits in the case of employment of persons with reduced working capacity, on the grounds of the prohibition of discrimination (Article XV) and the principle of legal certainty, which is part of the rule of law (Article B(1)) of the Fundamental Law.

29 Decision 23/2013 (IX. 25.) CC.

from its previous practice by recognising the fundamental right of a specific sub-entitlement, the right of women to a preferential retirement pension, by institutionalising a specific category, the 'right guaranteed by the Fundamental Law',[30] a concept formerly alien to legal interpretation.[31]

On the other hand, the Constitutional Court has maintained its previous practice in its decisions on personal (care), income and property dependency benefits.[32]

There is no ranking or prioritisation of the different economic, social and cultural rights in the Fundamental Law; however, social rights are often balanced against economic interests of the state.[33]

5. JUDGMENTS

The effect and the scope of interpretation of the Constitutional Court's decisions depends on the type of procedure.

In case of *ex post* examination of conformity with the Fundamental Law (posterior norm control procedure), the Constitutional Court examines the conformity of a statute with the Fundamental Law on the basis of a motion of the Commissioner for Fundamental Rights containing a specific request if the Commissioner for Fundamental Rights is of the opinion that the statute is contrary to the Fundamental Law. The operative part of the decision contains the decision of the Constitutional Court on the merits, the provision on the publication of the decision in the Hungarian Gazette, the identification data of the decision, the provision on the annulment of the piece of legislation concerned in case of annulment and the scope of the annulment. In the event of partial annulment of a provision of law, the operative part of the decision shall state the text of the provision of law which remains in force. Depending on the individual

30 Decision 28/2015 (IX. 24.) CC.

31 István Hoffman, 'Az egészségügyi közszolgáltatások területi finanszírozása' [The territorial financing of health public services] in Tamás Horváth M. and Ildikó Bartha (eds), *Közszolgáltatások megszervezése és politikái. Merre tartanak?* [The organisation of public services and related policies. Where are these heading to?], Dialóg Campus, Budapest/Pécs 2016, pp. 448–49. Marianna Fazekas and József Koncz, 'Egészségügyi jog és igazgatás' [Health law and administration] in András Lapsánszky (ed.), *Közigazgatási jog. Fejezetek szakigazgatásaink köréből III. kötet. Humán közszolgáltatások igazgatása* [Administrative Law. Chapters form the field special administration, vol. III. The administration of human public services], Wolters Kluwer, Budapest 2013, pp. 54–56.

32 Decision 38/2012 (XI. 14.) CC. The Constitutional Court, on the basis of the principle of human dignity, declared the regulation which ultimately sought to induce persons to claim social cash and personal benefits by threatening them with sanctions for infringement of the rules to be contrary to the constitution.

33 See for example Decision 29/2017 (X. 31.) CC, explained in detail below in section 9 on case law.

case, the judgment can have an *ex tunc* or *ex nunc* effect, or the Constitutional Court may grant transitional periods for the legislator to adopt a new regulation.

In the case of a judicial initiative for a declaration of unconstitutionality, if a judge finds that the law applicable to the dispute before him or her is unconstitutional, in the absence of his or her power to disapply the unconstitutional law, the judge is obliged to initiate proceedings before the Constitutional Court.[34] In the specific review proceedings initiated by a judge, the Constitutional Court may, in actions based on the same facts and on the same law, declare a general prohibition of the application of the legislation which it has declared unconstitutional. If the Constitutional Court does not impose a general prohibition of application, but only a specific one, it will, in the event of a new judicial initiative, carry out the procedure related to the judicial initiative for a prohibition of application only. The legal consequences of the Constitutional Court's ruling on the general or specific prohibition of application are drawn by the judge hearing the case and the corresponding decision is taken in the case.[35]

Regarding constitutional complaints, pursuant to Articles 26–27 of the Act on Constitutional Court,[36] there are essentially three different types of constitutional complaint proceedings.[37] If the Constitutional Court finds that a statute or statutory provision in force is contrary to the Fundamental Law in a proceeding pursuant to paragraphs (1) and (2) of Article 26 of the Act on the Constitutional Court, it annuls the statute or statutory provision. In the proceeding under Article 26(1), the annulled statute or legal provision shall not be applicable in the court case giving rise to the Constitutional Court's

34 Article 25 of Act CLI of 2011.

35 Decision 35/2011 (V. 6.) CC.

36 Act CLI of 2011.

37 In the case of a constitutional complaint under Article 27 of the Act on the Constitutional Court, the petitioner may challenge not a legal rule but a judicial decision that is contrary to the Constitution, if the decision on the merits of the case or another decision ending the court proceedings violates the petitioner's right guaranteed by the Constitution or limits his or her powers in a manner that is contrary to the Constitution. This is the most common case of a constitutional complaint. A body exercising public authority may also exercise the right of petition in proceedings under Article 27 of the Act on the Constitutional Court, but the Constitutional Court examines whether the right guaranteed by the Fundamental Law, as stated in the complaint, is vested in it. A constitutional complaint under Article 26(1) of the Act on the Constitutional Court is somewhat different from the previous one, but it is often the case that petitioners challenge a judicial decision on the basis of both provisions. This power was also provided for in the previous Constitutional Court Act. The Constitutional Court reviews the conformity with the Fundamental Law of the legislation applied in an individual case if the application of the unconstitutional legislation in the judicial proceedings in the case has resulted in the infringement of the petitioner's right guaranteed by the Fundamental Law. Based on Article 26(2) of the Act on the Constitutional Court, one can turn to the Constitutional Court claiming that the violation of one's fundamental rights is the result of the direct effect (without its application in the individual case) of the challenged piece of legislation.

proceedings. The Constitutional Court may also declare a repealed statute to be unconstitutional if the statute should still be applicable in the specific case. In the case of proceedings under Article 26(1) and Article 27, the procedural means of redress of a constitutional complaint in civil matters has to be determined by the Kúria (the Supreme Court of Hungary). In its decision, the Kúria is obliged to take into account the decision of the Constitutional Court and the relevant procedural rules.

The annulled act or provision of law ceases to be in force on the day following the publication in the Official Gazette of the decision of the Constitutional Court on its annulment and ceases to be applicable from that day, while an act promulgated but not in force shall not enter into force. If the Constitutional Court annuls a statute applied in an individual case on the basis of a judicial initiative or a constitutional complaint, the annulled statute shall not be applied in the case giving rise to the proceedings before the Constitutional Court. The annulment of a statute shall not affect legal relationships and the rights and obligations arising therefrom, established on or before the date of publication of the decision.

Unless otherwise provided by law, the decision of the Constitutional Court is binding on everyone. Decisions of the courts of general jurisdiction (ordinary courts) and of the Kúria have *inter partes* effect.

Generally, judgments on economic, social and cultural rights leave a wider margin of appreciation to the legislator than judgments on civil and political rights.[38]

6. ROLE OF THE COURTS IN ADJUDICATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The role of the courts, especially of the Constitutional Court, is usually a subject of public discourse from the perspective of the classic, 'countermajoritarian difficulty' perspective. However, this phenomenon was stronger in the case of politically sensitive issues at the time of the constitutional reforms that took place between 2010 and 2013, initiated by the governing supermajority in parliament. Since then, due to the change in its powers (with the constitutional complaint as its dominant competence), the Constitutional Court can be considered as a counterbalance to the judiciary, not to the political branches.[39]

---

38 See below in detail in section 9 on case law.

39 Eszter Bodnár, Fruzsina Gárdos-Orosz and Zoltán Pozsár-Szentmiklósy, 'Hungary. The state of liberal democracy (Hungary)' in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), *2017 Global Review of Constitutional Law*, I-CONnect, Clough Center, 2018, p. 129.

Adjudication related to economic, social and cultural rights is limited to administrative court proceedings, in which the courts examine whether the decisions taken by authorities in individual cases (e.g. decisions related to certain allowances) were in accordance with provisions prescribed by law. In that regard, the activity of the courts is not contested from the separation of powers perspective.

In recent years, the Constitutional Court has examined the constitutionality of a symbolic piece of legislation passed by parliament: that of the criminalisation of homelessness in the Act on Misdemeanours (2018), based on the Seventh Amendment of the Fundamental Law, which created the possibility for such legal provision. In its decision on the constitutionality of the relevant provision of the Act on Misdemeanours, the Constitutional Court did not declare it unconstitutional; rather it formulated a so-called 'constitutional requirement' related to the challenged piece of legislation that is compulsory in order for it to be in accordance with the provisions of the constitution.[40] Therefore, the Constitutional Court did not enter into any conflict with the constitution-amending and the legislative power.

Legal disputes relating to economic, social and cultural rights (in the form of administrative court proceedings, as mentioned earlier) do not differ from other legal disputes; therefore, the need to turn to expert advice in the proceeding is not different from other legal proceedings.

7. PROCEDURALISATION

There are no special procedural duties derived from economic, social and cultural rights in the judicial practice.

In the Hungarian constitutional system, social policies have to be considered by the political organs (especially by the government and the National Assembly) when creating the regulation in this field. The task of the courts is to consider whether the application of the laws in individual cases was in accordance with the constitutional and legal provisions.

The principle of proportionality is a generally accepted standard in Hungary for possible limitations of fundamental rights; therefore, all stakeholders, the lawmakers, judges and the Constitutional Court have to take it into consideration. In practice, the Constitutional Court is the only organ which regularly refers to the principle of proportionality in fundamental rights disputes.[41] Accordingly, the principle of proportionality plays no role in disputes before the administrative courts relating to the exercise of economic, social and cultural rights.

---

40 Decision 19/2019 (VI. 18.) CC.

41 Zoltán Pozsár-Szentmiklósy, 'Érvelés alapjogi jogvitákban' [Argumentation in fundamental right's disputes], *Iustum Aequum Salutare* 2017/2.

There is no special duty of the courts to justify priorities, as their competence is limited to the examination of the question whether the decisions of administrative agencies were in accordance with the legal provisions.

The right to be heard is considered to be part of the right to fair trial in the Hungarian legal system. Therefore, it is not linked especially to disputes relating to economic, social and cultural rights.

8. IMPLEMENTATION OF THE JUDGMENTS

Generally, there is no difference in implementation of Constitutional Court decisions based on subject matter (or otherwise).[42] When the Constitutional Court orders the National Assembly to adopt a new legislation it also sets a deadline for the National Assembly to act in accordance with the decision.[43] There are no sanctions provided for by law in case of non-implementation of judgments on economic, social and cultural rights (or otherwise).

The implementation of a decision of the Constitutional Court annulling a judicial decision is governed by the provisions of the laws containing the rules of judicial procedure. There are no statistical data available on implementation issues relating to the subject matter.

9. CASE LAW

In the following section the most important decisions of the Constitutional Court and Kúria concerning the right to work, the right of social security, the right to adequate living conditions, the right to education and the right to health will be summarised and explained. Due to the paradigm shift in the interpretation of social rights after 2011, this section only scrutinises cases decided after the Fundamental Law came into effect.

Regarding the right to work and adequate working conditions, the most important decision relates to working time.[44] In their constitutional complaint, the petitioners, who were health care workers, requested that the Constitutional Court declare that the Kúria's decision in their lawsuit relating to overtime allowance[45] violated (among others) Article XVII(4)[46] of the Fundamental Law. The Constitutional Court held that Article XVII(4) of the Fundamental Law

42 An exception could be that related to Decision 20/2017 (XI. 14.) CC, explained below in section 9 on case law.

43 Articles 33, 33/A and 41 (4) of Act CLI of 2011.

44 Decision 12/2020 (VI. 22.) CC.

45 Case Mfv.II.10.279/2018/13.

46 'All workers have the right to daily and weekly rest periods and annual paid holidays.'

guarantees the right to rest as a fundamental right, within which, according to the Labour Code, it distinguishes between the right to daily and weekly rest. The right to rest in the context of the Fundamental Law is essentially derived from the right to health guaranteed by Article XX(1) of the Fundamental Law, which is explicitly affirmed for workers in Article XVII(3) of the Fundamental Law.[47] However, the conditions of entitlement and the precise extent thereof do not follow from the Fundamental Law. While daily rest periods are intended to allow workers to recover between two working days, weekly rest periods are intended to compensate for the physical and mental strain caused by successive working days. According to the interpretation of the Constitutional Court, due to the different purposes of rest periods, daily and weekly rest periods are granted to workers as separate entitlements. On the basis of the foregoing, the Constitutional Court held that the judgment of the Kúria was unconstitutional and therefore annulled it.

The decision was widely criticised among labour law scholars. Although presumably unintentionally, the consequences of the Constitutional Court's decision technically affect almost all employers in Hungary. If an employer applies a general working pattern, in which the working days fall between Monday and Friday, the number of working hours per day is equal and the two rest days coincide with the calendar days of Saturday and Sunday, the decision requires that the eight-hour working day on Friday should start at 4.40 a.m., as this is the only way to provide an 11-hour rest period per day starting at 12.00 a.m. on Saturday. It should be noted that under the relevant Hungarian and EU legislation, no overtime can be ordered for this daily rest period.[48] However, without an amendment to the Fundamental Law, any solution that does not provide for separate weekly and daily rest periods would be unconstitutional. Possibly guided by the best intentions, this interpretation of the right to rest as part of adequate working conditions created major legal uncertainty among Hungarian employers, and it is unlikely that this decision will be implemented in practice.

One of the most important decisions concerning social rights, i.e. the right to social security, relates to the parallel payment old-age pension and wages for public servants.[49] The Constitutional Court stated that the right to a pension actually paid, acquired by fulfilling the conditions of eligibility, is a right of

47 'Every worker has the right to working conditions which respect his health, safety and dignity.' Ensuring the right to rest is essential to guaranteeing working conditions which respect health, because it ensures the replenishment of resources, physical and mental energy expended in regular work, and the worker's physical and mental regeneration.

48 Gábor Fodor T., 'Az általános munkarend vége? – Gondolatok a napi és a heti pihenőidőről a 12/2020. (VI. 22.) AB határozat alapján' [The end of the general working arrangement? – Thoughts related to the daily and weekly rest period based on Decision 12/2020. (VI. 22.) CC], *Munkajog* 2020/3, pp. 62–66.

49 Decision 29/2017 (X. 31.) CC.

property protected by Article XIII of the Fundamental Law.[50] Temporarily suspending the payment of an old-age pension strikes the right balance between the general interest of the community and the fundamental rights of the person concerned. The restriction on the joint receipt of an old-age pension and income from work paid from the state budget does not affect the substance of the right to a pension and does not infringe the essential content of that right.[51] The reasoning explains that the Fundamental Law makes a distinction between the constitutional treatment of pension benefits paid before the age of retirement and the pension benefits of persons over the age of retirement, so the question of the extent to which certain social security services and the public claims of individuals are protected by property law, or whether they are protected at all, is contested. In its explanation, the Constitutional Court stressed that solidarity between generations, one of the expressions of which is social security law, is an essential element for the maintenance of any society. The contested part of the Pension Law[52] was linked to the sustainability of the pension system and thus served to express social solidarity. The immutability of the conditions of the pension scheme would be in contradiction with the pension insurance relationship, which, unlike the private insurance relationship, is not based purely on an insurance principle but on the idea of solidarity and social equalisation, but the legislator must duly justify its intervention. The desire to balance the pension system is a rational justification for the legislation. Given that the state has a large discretionary power in social security and pension matters, the prohibition of the parallel payment of wages and pensions was in the public interest of protecting the budget. Among other things, the suspension of pension payments was part of a package of measures aimed at ensuring the sustainability of the Hungarian pension system and reducing public debt.[53]

---

50 'Everyone has the right to have property and inherit. Property is a social responsibility.'

51 Decision 29/2017 (X. 31.) CC.

52 Section 83/C of Act LXXXI of 1997.

53 The petitioner filed a claimed at the European Court of Human Rights (ECtHR) (*Fábián v. Hungary*, application no. 78117/13, 5 September 2007). The ECtHR has held that the suspension of a state pension for a pensioner in the civil service does not infringe the right to the peaceful enjoyment of his or her property. It also found that the discrimination between civil servants and pensioners in the private sector as regards entitlement to the state pension did not constitute a breach of the prohibition of discrimination. The ECtHR found that the Contracting Parties enjoy a wide margin of appreciable discretion when regulating access to employment in the public sector and also in determining the conditions governing such employment. It noted that, for institutional and functional reasons, there are typically significant legal and factual differences between employment in the public sector and employment in the private sector, particularly in areas involving the exercise of sovereign state power and the provision of essential public services. The ECtHR unanimously held that there had been no violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights, and that the complaint relating to an allegedly unjustified difference in treatment between pensioners employed in different categories within the public sector had been introduced out of time and was therefore inadmissible. By 11 votes to six, it also held that there had been no violation of Article 14 (prohibition of

Another landmark decision relating to social security concerned the eligibility for unemployment benefits. Particularly controversial was the law which required public workers to keep their home neat and tidy. The petitioner – the Commissioner for Fundamental Rights – contested the regulation in the Social Security Act[54] providing that the municipal government may stipulate in its decree, as a necessary condition for entitlement to unemployment benefits (in particular, participation in public work, which is compulsory daily participation in the activities specified by the municipal government, e.g. cleaning of public spaces), that the applicants must keep their environment neat and tidy. The Commissioner further argued that Article XIX(3) of the Fundamental Law,[55] in line with the content of the right to human dignity and the right to equal treatment, can be interpreted as imposing a 'duty of reciprocal solidarity' on the beneficiaries of social measures, in return for social solidarity, which requires them to carry out activities for the benefit of the community. However, this specific obligation of reciprocity cannot be interpreted in a broad sense or be subject to any condition imposed on the beneficiary. Furthermore, no condition may be imposed which restricts the other fundamental rights of the person concerned or infringes equal dignity. Therefore, an approach that bases the granting of social assistance to the needy on individual merit beyond the above cannot be constitutionally accepted. The Constitutional Court found it unconstitutional that jobseekers could be suspended from public work if they failed to meet requirements set forth by a decree of a local government ordering them to keep their house/yard/garden neat and tidy. The Constitutional Court argued that such a requirement violates human dignity and the right to privacy, and amounts to discrimination based on property and social status; the imposition of non-systemic conditions on a special employment relationship with social aspects (i.e. public employment), which is outside the logic of the legislation, is unreasonable and, as such, constitutes an arbitrary legislative decision. Keeping one's property clean can be ensured through other measures.[56] Therefore, the Constitutional Court abolished the contested section. Thus, it was rather surprising when in June 2020 this eligibility condition was re-established with minor changes, stating that it is necessary for public health.[57]

---

discrimination) of the Convention, taken in conjunction with Article 1 of Protocol No. 1 to the Convention as concerned Mr Fábián's complaint about the difference in treatment with pensioners working in the private sector.

54 Article 33(7) of Act III of 1993 on Social Administration and Social Benefits.

55 'The nature and extent of social measures may be determined in law in accordance with the usefulness to the community of the beneficiary's activity.'

56 The measures providing for the obligation of a house owner to meet health and safety requirements are Section 5:23 of Act V of 2013, Government Decree No. 17/2015. (II. 16.), and Section 17 of Act LXIII of 1999.

57 For more details about the merit-based approach in public work see: Sára Hungler and Ágnes Kende, 'Diverting Welfare Paths: Ethnicisation of Unemployment and Public Work in Hungary', *e-cardenos CES* 35 (2021).

Concerning the right to adequate living conditions, one of the guiding decisions of the Constitutional Court dates back to 2000. The Constitutional Court interpreted Article 70/E of the Constitution in such a way that the right to social security includes the guarantee by the state of a minimum subsistence level to be provided by the totality of social benefits. However, the guarantee of a minimum subsistence level does not confer any specific sub-rights, such as the 'right to housing' as a fundamental constitutional right. In this respect, the state's obligation and consequently its responsibility cannot be established. It was further argued that pursuant to Article 70/E(2) of the Constitution, the state is obliged to establish, maintain and operate a system of social security and social institutions in order to realise the right of citizens to the provision of the necessaries of life. The protection of human life and dignity is a fundamental constitutional requirement in the establishment of a system of social benefits that ensure a minimum subsistence level. Accordingly, the state is obliged to provide for the basic conditions of human existence, including, in the case of homelessness, shelter to avert an imminent threat to human life.

In 2010 an amendment to the Acts on Spatial Development and Planning[58] empowered the municipalities to classify the improper use of public spaces as an offence. This authorisation became the basis for the municipal by-laws in which the municipality classified as an offence and punished the use of public land for residential purposes. The amendment was contested and the Constitutional Court stated in its decision that neither the removal of homeless people from public spaces nor the encouragement of homeless people to use social services can be considered a legitimate constitutional reason for making it a criminal offence for homeless people to live in public spaces. Homelessness is a social problem which the state must address by means of social administration and social care, not by punishment. It is incompatible with the protection of human dignity, as laid down in Article II of the Fundamental Law, to classify as a danger to society and punish those who have lost their housing for whatever reason and are therefore forced to live in the public space, but who do not violate the rights of others, cause damage or commit other illegal acts. It is also an infringement of the individual's right to autonomy based on his or her human dignity if the state uses punitive measures to force them to use social services. Therefore, the Constitutional Court abolished the contested law.[59]

Against this background, the Seventh Amendment of the Fundamental Law of 2018 amended Article XXII on adequate living conditions,[60] and subsequently the parliament amended the Code of Administrative Offences with effect from

58 Paragraph 2 of Article 6 of Act CXVI of 2010 amending Act XXI of 1996 and Act LXXVIII of 1997 on the Shaping and Protection of the Built Environment.

59 Decision 38/2012 (XI. 14.) CC.

60 The amended Article XXII provides that: '(1) The State shall provide legal protection for the home. Hungary shall endeavour to ensure conditions of decent housing and access to

15 October 2018 to sanction those who habitually reside in public places.[61] Demonstrative police arrests have subsequently started. Five judges appealed to the Constitutional Court, claiming that the relevant provisions of the Code of Administrative Offences are unconstitutional. A Hungarian NGO[62] also referred the matter to the Constitutional Court with its own detailed application (*amicus curiae*). In its decision, the Constitutional Court ruled that the offence of habitual residence in a public place is constitutional as, according to the values of the Fundamental Law, no one has the right to be homeless, and this condition is not part of the right to human dignity, and as long as the state fulfils its constitutional obligation in the area of the achievement of the state's objective as set out in Article XXII(2) of the Fundamental Law and the institutional protection of the related fundamental rights, and performs the resulting state duties, the individual may not refuse to cooperate with the state in this area. The decision was widely criticised as the Constitutional Court completely disregarded the factual analysis provided by an NGO,[63] which made it clear that the volume of established homelessness services is insufficient to accommodate people living in the public space on a regular basis; it was also argued that people experiencing the most severe deprivation (homeless and pregnant, disabled, psychiatric patients) are most affected by the shortcomings and deficiencies in existing services and are most at risk of being directly affected by the legal consequences of an offence.[64]

Concerning the right to education, a landmark decision was delivered by the Kúria in 2020. The Kúria upheld the judgment of the Debrecen General Court,

public services for all. (2) The State and local authorities shall also contribute to the creation of conditions for decent housing and the protection of the public use of public space by endeavouring to provide housing for all persons without shelter.'

61 Section 178/B of Act II of 2012: '(1) Any person who habitually resides in a public place commits an offence. (2) Infringement proceedings shall be dispensed with and an on-the-spot warning shall be issued if (a) the offender leaves the place of the offence at the request of the police officer, or (b) the offender, accepting the assistance offered by the authority or other body or organisation present, cooperates in order to obtain the benefits reserved for homeless persons. (3) At the same time as the on-the-spot warning, the police officer shall inform the offender of the legal consequences provided for in paragraph (4). (4) A person who has been warned on the spot for committing an offence under subsection (2) three times within 90 days shall not be exempted from the initiation of an offence procedure for the next offence. (5) For the purposes of subsection (1), "habitual residence" shall mean any conduct which is deemed to be for the purpose of a permanent stay in a public place without the intention of returning to the place of residence, domicile or other accommodation, and it can be inferred from the circumstances of the stay in the public place or from the behaviour that the activity in the public place, which is typically used as a place of residence, such as sleeping, cleaning, eating, dressing, keeping animals, is carried out by the offender in the public place on a regular basis and on a short and recurrent basis.'

62 Szabálysértési Munkacsoport [Misdemeanor Working Group].

63 Menhely Alapítvány [Asylum Foundation].

64 László Kiss and Miklós Lévay, 'Még egyszer a hajléktalanok büntethetőségéről' [Once again on the culpability of homeless people], *Közjogi Szemle* 2020/1, pp. 8–21.

which ordered the Municipality of Gyöngyöspata, the Nekcsei Demeter Primary School and the Hatvan School District Centre to pay nearly HUF 100 million (€264,000) in non-pecuniary damages for the violation of personality right caused by the segregated education of 63 Roma children. The plaintiff children were supported by an NGO.[65] The so-called Gyöngyöspata case raised general legal issues that go beyond the specific lawsuit, such as whether the disadvantage caused by segregated and substandard education is a well-known fact and does not require separate proof; whether non-material damage should be compensated in money; and whether loss of opportunity should be assessed in awarding damages. The Minority Ombudsman reported on the unlawful segregation of Roma children at the Nekcsei Demeter Primary School in Gyöngyöspata. The report contained a table showing the distribution of Roma and non-Roma pupils, pupils with special educational needs, disadvantaged pupils and pupils with multiple disadvantages between classes in the same year groups.[66]

Against this background, the NGO brought a public interest litigation against the Municipality of Gyöngyöspata, as the controlling authority, and the Nekcsei Demeter Primary School for unlawful segregation and direct and indirect discrimination on the basis of ethnicity. According to the claimant's argument, the lower quality of education deprived the children of the chance to acquire the competences necessary for their future well-being, which made it difficult for them to achieve social fulfilment. The plaintiffs argued that it is not necessary to prove that the plaintiffs are unable to continue their education or to find employment as a result of the defendants' wrongful conduct in order to establish a claim for non-material damages for lower-quality education. It is only necessary to prove that the defendants' conduct has significantly reduced their chances of doing so. The National Curriculum (NAT) defines the so-called key competences that ensure that individuals are able and willing to act effectively and successfully in a given situation. If the acquisition and foundation of key competences is not successfully acquired in lower secondary education, it is obvious that there will be no basis for building on the acquisition of knowledge based on key competences in upper secondary education. If a pupil receives a low-quality education, he or she will not acquire the necessary key competences and will therefore have less chance of a good start in life.

The argument was accepted by the court, and despite the defendant's appeal to lower the compensation, the Kúria did not consider the HUF 500,000 per academic year in non-pecuniary damages claimed by the applicants to be

65 Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány [The Chance for Children Foundation].

66 A nemzeti és etnikai kisebbségi jogok országgyűlési biztosának utóvizsgálati jelentése a közfoglalkoztatásról, a szabálysértési hatóságok eljárási gyakorlatáról és az oktatás helyzetéről Gyöngyöspatán [Follow-up report of the Commissioner for National and Ethnic Minority Rights on public employment, the procedural practice of the infringement authorities and the situation of education in Gyöngyöspata], December 2011.

excessive. In their counterclaim, the defendants requested that, if the court were to award non-pecuniary damages, they should be in the form of compensation in kind (courses, training); however, the Kúria stated that compensation for non-pecuniary damages must be monetary compensation. Thus, the Kúria also upheld the final judgment on the issue of the amount.[67] Regarding the acceptance of the Kúria's judgment, it must be pointed out that the Prime Minister claimed that the decision was a selfish, self-centred 'fundraising mission' of George Soros. Viktor Orbán, in his speech on the state-owned nationwide radio station stressed that the decision hurts society's 'sense of justice' since the people of Gyöngyöspata will see that the town's Roma community receives a 'significant sum without having to work for it in any way'. Orbán also claimed that '[i]f I lived there [in Gyöngyöspata], I would wonder why the members of an ethnically dominant group living with me in one community, in one village, receive a large amount [of money] without working for it while I am struggling here all day'.[68] Later, when the Kúria upheld the judgment, he stated in his annual press conference that 'the judgment [of the Kúria] is entirely unjust, we have to seek justice [as] Hungary is our land, which belongs to our indigenous people'.[69] Such statements from the Prime Minister obviously hinder the proceduralisation of (social) rights and trust in the courts; moreover, they fuel anti-Roma sentiments.

10. IMPACT ON SOCIETY

As highlighted above, the extent to which economic, social and cultural rights are able function effectively in society depends on the regulation of them in

67 Decision of the Kúria Pfv.IV.21.556/2019/ (12 May 2020).

68 Karina Csengel, 'Orbán Viktor szerint Gyöngyöspatán "az az érzés alakult ki a romákban, hogy ők vannak többségben"' [According to Viktor Orbán, 'Roma people have a sentiment that they are in majority'], *Mérce* (31 January 2020) https://merce.hu/2020/01/31/orban-viktor-szerint-gyongyospatan-az-az-erzes-alakult-ki-a-romakban-hogy-ok-vannak-tobbsegben/; Illés Szurovecz, 'Orbán szerint igazságtalan, hogy kártérítést kaphatnak a roma gyerekek, akiket éveken át elkülönítettek az iskolában' [According to Orbán, it is unjust that Roma children, who were segregated in schools, receive compensation], 444.hu (9 January 2020) https://444.hu/2020/01/09/orban-szerint-igazsagtalan-hogy-karteritest-kaptak-a-roma-gyerekek-akiket-eveken-at-elkulonitettek-az-iskolaban.

69 'Gyöngyöspata ügyében jogot és nem igazságot szolgáltatott a Kúria' – mondta a miniszterelnök ['In the case of Gyöngyöspata the Kúria provided law, not justice' – said the prime minister] *Ügyvédfórum* (5 May 2020) http://ugyvedforum.hu/cikkek/2020/05/gyongyospata-ugyben-jogot-es-nem-igazsagot-szolgaltatott-a-kuria-mondta-a-miniszterelnok. See also Sára Hungler, 'Labor Law Reforms after the Populist Turn in Hungary', *Review of Central and Eastern European Law* 2022 (47), pp. 81–111; Eleonóra Hernádi, Adél Kegye, Péter Gárdos and Balázs Sahin-Tóth, 'A gyöngyöspatai szegregációs per jogi krónikája' [The chronicle of the segregation lawsuit of Gyöngyöspata], *Magyar Jog* 2020/7–8, pp. 385–96.

the constitution and the related interpretation of the Constitutional Court. In the period before the democratic transition (until 1989), even though these rights were recognised in the legal system, the constitution itself did not have normative effect, courts were not independent, and therefore economic, social and cultural rights were not justiciable. In the period defined by the 1989 Constitution (1989–2011), the protection of human dignity was recognised as the source of social rights by the Constitutional Court; therefore, the exercise of these rights was able to have a certain significance in social relations. In the period defined by the Fundamental Law (2011–present), social rights are considered to be subjects of social policies and even restrictions; therefore, their impact is strongly limited.

In summary, it can be highlighted that economic, social and cultural rights have had very limited effect on social mobility in Hungary in recent decades.