

Respondent:

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I hereby consent to the publication of my answers given to the below questions. The opinions expressed solely reflect my personal opinion, and can in no way be attributed to the institution I am affiliated with.

1. Who is "human" in the concept of modern human rights?

Several approaches to this issue exist, but normally those are considered to be the holders (beneficiaries, subjects) of human rights (i.e. "humans"), who are natural persons (either individually or in a group, meaning in some cases the extension of these rights to some entities as well).

While without further explanation it is unclear what the questionnaire designates as the concept of "modern human rights" (for a point of reference of the definition of "human"), I assume that Artificial Intelligence also influences thinking about the modern concept of "human" in terms of "modern human rights". I would argue that a sentient consciousness and a moral compass enabling an individual to separate right from wrong are quintessential to any concept defining who humans are.

2. How is the protection of a right which is not regulated in the Constitution carried out in your legal system? What kind of balancing is done when a non-constitutional right interferes with a constitutional right?

(Human) Rights not regulated per se in the Hungarian constitution (Fundamental Law) can still appear in the constitution as state objectives (i.e. regulatory objectives), meaning e.g. the protection of biodiversity, the assurance of humane living conditions (amounting to dignified living) – they are all contained in the constitution (Fundamental Law), but are not protected as fundamental rights but state objectives. (usual wording suggests Hungary's "commitment to ensuring" these.)

Also, there are constitutional values (e.g. the right to life of the fetus), which are not protected as fundamental rights but have the potential of limiting fundamental rights (in the previous example, the mother's right to self-determination), in case fundamental rights' limitations are to be considered.

Other rights (and underlying principles) not appearing in the constitution are made part of the constitutional legal order through ensuring the harmony of public international law and domestic law (under Article Q) of the Fundamental Law) - this way IHR conventions are promulgated in

the national legal order in the form of laws (Acts of parliament, normally).

Regarding the Law of the EU, the issue of the rights contained in the Charter of Fundamental Rights is problematic. As the Charter's scope only extends to Member States when they implement EU law, it is a point of debate what is understood under this on a case-by-case basis. E.g. in front of the Hungarian Constitutional Court (HCC), no references to the Charter are to be expected as directly informing a decision on a so-called 'rights issue', because the HCC is not a Member State institution that implements EU law. It protects the constitution and implements the protections afforded by the Fundamental Law irrespective of any eventual EU context. (Regardless, in some of the cases there is a reference to the Charter, but merely as an additional supporting argument that would not be binding on its own)

Based on the leading cases of the HCC, in cases involving the limitation of a fundamental right, the normal exercise of balancing (under Article I (3) of the Fundamental Law) is necessity and proportionality (a. legitimate aim, b. necessity for the realization of another fundamental rights or constitutional value, c. suitability of the limitation to achieve aim, d. use of the least restrictive means in limitation (i.e. limitation proportional to the intended aim)

Other tests – in addition to necessity and proportionality – exist for specific circumstances (also based on HCC jurisprudence):

a, "rationality test" – in the case of discrimination, the test measures whether the discriminatory differentiation between two groups had an objectively reasonable and rational cause.

b, "public interest test" – in the case of limiting the right to property (typically through expropriation), the balancing is done by looking at the underlying public interest, whether it is substantiated or not.

Relevant regulatory framework:

Fundamental Law of Hungary (in English as of June 2018: https://www.kormany.hu/download/f/3e/61000/TheFundamentalLawofHungary_20180629_FIN.pdf)

- esp. Article I (3) on limiting fundamental rights

For English summaries and decisions of the HCC

visit: www.hunconcourt.hu

3. Do International Human Rights Documents applied in your country represent minimum standards that are already provided or the must-reach aims? Are there any regulations in your legal system above international human rights standards?

By definition, IHR standards in PIL represent minimum standards. They have been created by the international community as a lowest common denominator for all MS. (Being minimum standards does not mean that

they are already provided – to answer an important turn of the first question.)

Based on the logics of the “principle of national protection” (first argued by the Solange decision of the Federal Constitutional Court in Germany, 1974) if the level of protection should be higher for a right in the national constitution than in an IHR norm, this would trigger constitutional review (checking the conformity of national and international law against each other).

The answer to the part of the question whether there are “*any regulations in your legal system above international human rights standards*” hugely depends on the hierarchy of legal norms in a country and on the model of adoption of public international law. Hungary follows a dualistic system, therefore international treaties and conventions containing IHR norms have to be ratified, and then implemented into national law. The implementation of PIL IHR norms usually takes place on the level of laws (Acts of Parliament or Government Decrees) – cf. Article T) of the Fundamental Law on the hierarchy of legal norms (1. Fundamental Law, 2. Acts of Parliament, 3. Government Decree, etc.)

4. In your legal system, is the jurisdiction an actor itself to move forward human rights standards?

If by jurisdiction, the question refers to court jurisprudence/judicial practice, then Yes: courts take into account IHR commitments of Hungary, and also those rights that are protected by the Fundamental Law. In the case of errors in this process causing a violation of someone’s constitutional rights protected in in the Fundamental Law, proceedings of the HCC can be initiated (constitutional complaints) that – if successful – lead to remedying the violation committed by the courts. (cf. www.hunconcourt.hu on laws and procedures for constitutional complaints, and the Act CLI of 2011 on the Constitutional Court of Hungary)

5. Are there values and issues in your country that are not covered by human rights documents but need to be protected under the concept of human rights?

Not to my knowledge, although the answer would largely depend on the definition of ‘human rights documents’.

6. Are there such human rights regulations in the legal system that are protected by the constitution but contradict social reality and justice?

By definition, human rights rules contradicting social realities and social justice should not exist. This is because the exact reason for their existence is to serve social justice and to enhance and best reflect social realities. To answer the question, there are no HR regulations in the

Fundamental Law that contradict social reality and justice (in Hungary). A constant debate is, however, whether the constitution should or should not define marriage as a union between a man and a woman. There are considerable arguments supporting the statements that such a regulation contradicts social realities.

7. In your legal system, are there legal mechanisms to protect human rights if fundamental rights are violated by private persons? Are these mechanisms effective?

In ordinary court practice, horizontal effect issues arise from time to time, e.g. in cases when the right to one's privacy collides with the freedom of expression, assembly of others or the rights to a fair trial of others (e.g. submitting evidence in breach of a personal confidence) – if these collisions (concurring rights) are not effectively assessed and balanced by ordinary courts, the constitutional complaint is available as a special remedy against court decisions.

Hungarian constitutional jurisprudence (HCC practice) is, however, in general reluctant (and has been since the beginning in 1990) to accept a clear doctrine of horizontal effect (*Drittwirkung*). More recent HCC practice has set up the alternate doctrine of “concurring fundamental rights positions” in reviewing ordinary court cases where the exercise of the right to assembly or freedom of expression infringed upon the personal privacy or the private and family life of others.

The HCC argued that conditions for the exercise of these rights in “fair balance” with each other should be created first by the legislator, then controlled by the courts and finally by the HCC (in e.g. constitutional complaint proceedings).

8. Are there any social realities contradicting international human rights concept based on individualism?

Because the majority of international human rights concepts is based on individualism (in the dominant “liberal” approach), the question is unclear what it means by contradicting social realities in this context.

9. What do you think is the most current human rights problem in your country?

From one angle, the obvious answer would be: the problems caused by the migration situation (conditions of placement, living standards, alleged violations of dignity and procedural errors). Furthermore, domestic violence also causes significant problems, and there are issues regarding the rights of children that require relevant solutions (in the context of e.g. institutional care and placement, unaccompanied minors or the best interests of the child in ‘international

abduction' cases in "marriages gone wrong") Landmark HCC decisions have also been recently issued regarding online freedom of expression on social media and on the concept of public figures. Extreme right groups are often rights criticized with Antigypsism, violation of LGBT rights through hate speech.