Human Rights Enforcement Mechanisms

SPEECH ABSTRACTS

International Workshop
25 November 2011
ELTE University Budapest

TÁMOP-4.2.1/B-09/1/KMR
Can the European Convention on Human Rights Substitute for National Constitutional Guarantees?

Pál Sonnevend – ELTE University Budapest, Hungary

The constitutionalisation of international law has become an overly popular concept in the last decade. Various efforts have been made to describe changes in the international community and the transfer of certain constitutional functions from the nation state to the international level. It occurs that one of the central elements and motivating factor behind the conceptual debate is the international protection of human rights and foremost the eminent role played by the European Convention of Human Rights.

The contribution takes the adoption of the new Hungarian Basic Law as a starting point for an inquiry of the state of the constitutionalisation of the European Convention of Human Rights. The question put is as follows: can the Convention mechanisms substitute for a partial blackout of a national system of fundamental rights protection? It is submitted that developments of recent years within the Convention protection system but also in EU law indeed transformed the Convention so that it can play the role of a default constitution.

Pál Sonnevend will be speaking at 10.00 a.m.

Institutional aspects of the EU’s accession to the European Convention of Human Rights: on the way towards a better enforcement of fundamental rights?

Mattias Wendel – Humboldt University Berlin, Germany

The protection of fundamental rights within the multi-levelled structure of Europe’s constitutional order has been subject to intense debate. In particular, the triangular relationship between the ECHR in Strasbourg, the ECJ in Luxembourg and national constitutional courts seems to be the source of a never ending narrative – not only seen from the perspective of legal scholarship, but also in terms of the courts’ evolving case-law and judicial dialogue.

EU’s future accession to the European Convention of Human Rights is about to bring a fresh wind into this field of academic and judicial activity. After the entry into force of the Lisbon-Treaty on December 1st 2009 and the 14th protocol to the Convention on June 1st 2010, a highly dynamic negotiation process has been launched. These intense negotiations – taking place both at the level of the Council of Europe and within the EU – have resulted as early as in summer 2011 in a draft agreement which was (and not undisputedly) transmitted to the Committee of Ministers in October 2011. The negotiation process reveals that the remarkable complexity of the EU’s accession to the Convention lies particularly in institutional issues – issues that had not sufficiently been addressed by legal scholarship in the years before.
The challenges the negotiators had to face have led to several institutional innovations. Two aspects are standing out: *Firstly*, the conditions under which the EU shall, mutatis mutandis, participate in the Committee of Ministers of the Council of Europe; *secondly*, the so-called “co-respondent”- and “prior-involvement”-mechanisms which were, in the words of the draft explanatory report, considered necessary “to accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States”. This contribution aims to explore if these innovations may contribute to a better enforcement of fundamental rights protection in Europe’s multi-levelled setting. While first comments seem to be sceptical, we will come to a rather optimistic conclusion in this respect.

Mattias Wendel will be speaking at 10.20 a.m.

**“Civil rights” and the Reach of Judicial Review in UK Public Law**

*Gordon Anthony* – Queen’s University of Belfast, Ireland

This paper considers the relationship that UK public law has with the ECHR within the framework of the Human Rights Act 1998. Its focus is on Article 6 ECHR and the requirement that individuals have access to courts of “full jurisdiction” for the purposes of challenging decisions that engage their “civil rights”. That requirement initially caused far-reaching debate about the nature of judicial review under the UK constitution, as it was thought that the traditional grounds for review – which operate almost exclusively at the level of administrative law – were insufficient for the purposes of Article 6 ECHR. However, while this first resulted in a partial reinvention of the grounds for review, subsequent case law has since seen the courts narrow the reach of Article 6 ECHR and take common law principle back to many of its more traditional reference points. This paper thus provides something of a tale about a cyclical development of the law at the interface of domestic and European norms: while the reception of the ECHR projected far-reaching change to the common law, the corresponding case law has in fact returned to many of the constitutional assumptions that anchored judicial review pre-Human Rights Act 1998.

Gordon Anthony will be speaking at 11.00 a.m.

**What role for constitutional courts in multi-level constitutionalism?**

*Attila Vincze* – ELTE University Budapest, Hungary

Constitutional courts have been traditionally the watchdogs of constitutional values controlling legislation enforcing rule of law and human rights standards. However, moving the centre of gravity from nation state to European Union has been changed their function.

Pro forma, they have still remained the cornerstone of constitutionalism having broad jurisdiction to quash any legislation. Nonetheless, the political reality makes such broad powers merely illusory and political theory suggests a rather deliberative model of judicial co-operation between union and state courts.
As the Hungarian Constitutional Court eye-catchingly cannot cope with its tasks if a question is embedded in a European constellation the situation does beg the question how constitutional courts should carry out their duties in a multi-level constitutional system.

Attila Vincze will be speaking at 11:20 a.m.

The Polish experience with multi-level guarantees of fundamental rights
Przemysław Saganek – Institute of Law Studies, Polish Academy of Sciences, Poland

The last decade of socialism (which followed the emergence of the Solidarity and the introduction of the martial law) was a time of emergence in Poland of important institutions dealing with human rights. They were namely the High Administrative Law, the Ombudsman and the Constitutional Court. The end of the communist regime gave their scope of activity a real dimension. Since 1993 Poland is subject to the competence of the European Court of Human Rights (ECHR). Its role could hardly be overestimated for the popular perception of respect of human rights. The 1997 Constitution established a new set of human rights granting them as a rule a direct application.

The ECHR being a forum of the last resort, its judgment presupposes at least two judgments of domestic courts. That is why multi-level is present in any Strasbourg case coming from Poland (as from any other country). That is why a much narrower meaning of the term is preferable. We can speak about such multi-level scope in the situation of the interplay between the Strasbourg Court and one of the highest Polish courts. What deserves special importance in this respect is the Constitutional Court. We can speak about cooperation in the majority of cases (e.g. Broniowski, Hutten-Czapska) and friction in others (Wizerkanik). They may result from the different perspectives, procedural settings and biases. The influence of the Strasbourg jurisprudence on the Polish Constitutional Court is very considerable. On the other hand ECHR is not ready to lower the standard flowing from the Constitutional Court jurisprudence.

Przemyslaw Saganek will be speaking at 11.40 a.m.

Human Rights in the Sense of the Basic Law of Hungary
Lóránt Csink – Pázmány Péter Catholic University, Hungary

The protection of human rights should be one of the most basic purposes of every constitution. Such rights are the achievements of historical development; they have a very similar content in the European national constitutions and in international charts. However, the history of human rights is rather short in Hungary. The beginnings of the acknowledgement of human rights in merits are dated back to the political transition in 1989, nonetheless the protection soon reached the European standard with the help of the Constitutional Court. The question arises: how will the Basic Law change the Constitutional Court’s role in protecting human rights? While seeking the answer, my presentation focuses on three topics: firstly, the differences between the Constitution
and the Basic Law; secondly, the role of the Constitutional Court according to the Basic Law; and finally the role of constitutional interpretation.

Lóránt Csink will be speaking at 14.00 p.m.

---

**The New Priority Preliminary Ruling Before the Constitutional Council**

*Xavier Philippe – Paul Cézanne University Aix-Marseille, France*

The introduction in 2010 – following a major constitutional amendment in 2008 – of the Question prioritaire de constitutionnalité (Priority Preliminary Ruling on the issue of constitutionality) is a kind of small revolution within the French legal system. For the first time in French legal history, enforced statutory provisions can be declared unconstitutional and repealed by the Constitutional Council. Prior to this reform, it was impossible to challenge the constitutionality of a statute which had come into force. From now on, persons involved in legal proceedings will be vested with this new right under Article 61-1 of the Constitution. This new procedure applies in the framework of a Court case and can only be triggered by the parties (applicant or defendant) when a statutory provision infringes rights and freedoms guaranteed by Constitutional provisions (i.e. the text of the Constitution itself, the Declaration of the Rights of Man and Citizen from 1789, the Preamble of the 1946 Constitution containing major socio-economic rights and the Environmental Charter of 2004).

The definition of this new mechanism given by the Constitutional Council itself is easy to understand: *An "application for a priority preliminary ruling on the issue of constitutionality" is the right for any person who is involved in legal proceedings before a court to argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution. Once conditions of admissibility have been complied with, the Constitutional Council, to whom the application will have been referred by the Conseil d’Etat or the Cour de cassation, will give its ruling and, if need be, repeal the challenged statutory provision.*

However, the success met by this new proceedings rise a number of issues that will be discussed through this communication:

- How courts (and especially ordinary courts) can enforce fundamental rights and freedoms when several review mechanisms are designed to reach the same goal?
- What are the main differences between Constitutional Review and Conventional Review? As far as the two are offered to the parties, is there a choice to be made or are they obliged to follow the “priority” rule – i.e. using first the Constitution before using the International Conventions (European Convention of Human Rights, EU treaties…)?
- Are there any difference between review mechanisms in terms of effects that could justify the choice of using either Constitutional Review or Conventional Review?

Xavier Philippe will be speaking at 14:20 p.m.
**Constitutional Complaint and Its Limits in the Czech Republic**

*Marek Antos – Charles University in Prague, Czech Republic*

The Constitutional Court in the Czech Republic performs both abstract and concrete constitutional review, with the latter based mostly on individual constitutional complaints. The paper describes general conditions of the proceeding (i.e. who is entitled to file a complaint, permissibility, decisions etc.), limits of the review (esp. regarding the social rights) and the practical experience with this institute in the Czech Republic.

Marek Antos will be speaking at 14:40 p.m.

---

**Citizens’ Role in Constitutional Adjudication in Hungary: From the Actio Popularis to the Constitutional Complaint**

*Bernadette Somody & Beatrix Vissy – ELTE University Budapest, Hungary*

The procedure of constitutional complaint is generally accompanied by the idea of performing the function of efficient individual human rights enforcement. In Hungary, the German-type constitutional complaint is introduced by the new Basic Law entering into force on 1st January 2012. The constitutional change offers the occasion to analyse the benefits of this new competence of the Constitutional Court in the field of fundamental rights protection. Nevertheless, it seems that citizens had to pay a 'high price' for being able to submit a constitutional complaint: the *actio popularis*, a means proved to be outstandingly efficient in constitutional review in the last two decades, has been abolished. The paper focuses on the direct and indirect functions of the constitutional complaint mechanism. By doing so, the paper points out the shift of emphasis in the system of protection of fundamental rights produced by the abovementioned changes.

Bernadette Somody will be speaking at 15.00 p.m.