



Strasbourg, 7 November 2008

CoCoSem 2008 / 011



CDL-JU(2008)040
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in co-operation with
the Ministry of Justice of the Palestinian National Authority

SEMINAR ON
“MODELS OF CONSTITUTIONAL JURISDICTION”
Ramallah, 25-26 October 2008

REPORT

“The Jurisdiction of the Hungarian Constitutional Court”

by

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Introduction

Though the institution of judicial review belongs undoubtedly to the heritage of American constitutionalism, in Europe it has been implemented into a completely different legal context. The judicial review by an independent judiciary as a mechanism for constitutional enforcement has a different role in the American constitutional system where its idea originated, and where courts since *Marbury v. Madison* have been controlling the acts of legislatures. During the twentieth century, and mainly after World War II European democracies set up constitutional courts to promote emerging constitutionalism, to help frame a new legal system to replace the former authoritarian one (e.g. Austria, Germany, Italy, Spain, Portugal). This European courts, unlike the Supreme Court in the United States, represent the centralized type of judicial review where one single judicial organ has the jurisdiction to adjudicate the constitutionality of laws. The difference between the two models was very clearly highlighted by Alexis de Tocqueville already in the first part of the 19th century:

“The Americans have given their courts immense political power; but by obliging them to attack the laws by judicial means, they have greatly lessened the dangers of that power. If the judges had been able to attack laws in a general and theoretical way, ... they would have played a prominent part on the political scene... But when a judge attacks a law in the course of an obscure argument in a particular case, he partly hides the importance of his attack from public observation. His decision is just intended to affect some private interest; only by chance does the law find itself harmed.”
(*Democracy in America*. Part I, chapter 6)

The institution of a Constitutional Court was first introduced to the Constitution in 1989. The detailed provisions on the Court were enacted in October 1989 by Act No. XXXII of 1989 on the Constitutional Court, and soon afterwards the first five members of the Court were elected by Parliament. The Constitutional Court commenced its functions on the 1st of January, 1990. The Constitutional Court is an independent Court that is not part of the hierarchy of the ordinary courts.

Composition

The number of judges - as determined by the Constitution - is eleven.

All members of the Constitutional Court are elected by Parliament. An *ad hoc* nominations committee composed of one representative of each parliamentary party nominates candidates for election. The candidates are heard by the Legal Committee of the Parliament. The members of the Constitutional Court are elected by the votes of two thirds of all Members of Parliament. The President of the Court is elected by the plenary session of the Court itself.

The constitutional judges are elected for nine years tenure, and can be re-elected once.

The judges must be lawyers, having graduated from a School of Law. The minimum age limit is 45, while the maximum age limit is 70.

The members of the Court take an oath before the Parliament pledging the absolute observance of the Constitution and conscientious exercise of their duties. The members of the Constitutional Court shall not be members of any party and shall not carry out any political activities beside those arising from the sphere of authority of the Constitutional Court.

No person who, in the course of four years preceding the election, has been a member of the Government, or an employee of a party, or who has held a leading office in public administration, shall be eligible to become a member of the Constitutional Court. A member of the Constitutional Court shall neither be a Member of Parliament, Member of local government, nor hold office in any state organ. Except for a scientific, educational, literary or artistic activity, a member of the Constitutional Court shall pursue no occupation for which he receives remuneration.

A member of the Constitutional Court shall enjoy an immunity identical to that of the Members of Parliament. Without the consent of the plenary Constitutional Court, a member of the Constitutional Court cannot be arrested or prosecuted. Only the plenary Constitutional Court has the right to suspend the immunity of a member. No member of the Constitutional Court shall be answerable for his/her opinion given in the course of exercising his/her duties.

A member of the Constitutional Court shall, if there emerges any cause of incompatibility, put an end thereto. Failure to do so within ten days shall result in his membership being declared discontinued by the Plenary Court.

The mandate may be discontinued by discharge if the member of the Constitutional Court, for a reason not attributable to him/her, becomes unable to meet his duties.

The mandate may be discontinued by exclusion if the member of the Constitutional Court, for a reason attributable to him/her, does not meet his/her duties, or if he/she commits a criminal offence, or becomes unworthy of the office in another way, and therefore, is excluded by the Plenary Court.

Competences

The jurisdiction of the Hungarian Constitutional Court includes:

1. Preventive (*a priori*) norm control of enacted but yet not promulgated statutes on the initiative of the President of the Republic.
2. Constitutional review of enacted norms (repressive norm control).

Review of legislative acts and sub-legislative legal norms, such as decrees of ministers, and similarly of local government decrees.

This may be performed as

- Abstract norm control (no case or controversy) or
- Concrete norm control (initiated by the judge who during the process suspects the unconstitutionality of the law to be applied).

One of the difficulties that the Court has to face is that the procedure of repressive norm control can be initiated by anybody. This unlimited possibility of *actio popularis* (no special personal interest is required) is discussed frequently in the literature and the Court itself is divided on the question of its scope. The overwhelming majority of the cases before the Court are abstract norm control initiated for the most part by private individuals.

3. Review of unconstitutional omission of legislation.

If the legislature has omitted to comply with its legislative duty, deriving from a legal rule, and has thus given rise to unconstitutionality, then the Court shall appoint a term within which the organ that has committed the omission must meet its duty.

4. Examination of the conformity of legislative acts with international treaties.
5. Abstract interpretation of the Constitution (advisory opinion).
6. Conflict of competences.
7. Constitutional complaint (for the violation of one's constitutional rights as a result of the application of an unconstitutional law).
8. Constitutional complaints of municipalities.
9. Constitutional complaints related to the control of popular referendums.
10. Impeachment of the President of the Republic.

The Constitutional Court has impeachment jurisdiction over the President of the Republic for breach of the Constitution or other statute.

Relationship with the judicial power

The main points of interference between the two organs are the following:

1. The concrete norm control initiated by ordinary judges (the number of these petitions until 2007 did not exceed 30 initiatives annually. In the last two years their number has raised intensively).
2. The constitutional review of the normative decisions of the Supreme Court (these decisions are issued to secure the unity of judicial statutory interpretation). This competence of the Constitutional Court – after years of hesitation – was pronounced by the Court itself in 2005, and reaffirmed the next year.
3. Constitutional complaint (although the Constitutional Court can only exceptionally review judicial decisions, and only when the underlying legal provision is declared unconstitutional).
4. Certain competences of the Constitutional Court are essentially that of an administrative court, e.g. the review of local government decrees where the standard of the review is not the constitution but the respective statutes.

Procedure

The Constitutional Court proceeds by plenary session or by chambers composed of three members. The chambers proceed in cases of repressive norm control and in the examination of conformity of legal rules with international treaties - except if an Act of Parliament is to be adjudicated, or if it is a case of constitutional complaint, unconstitutional omission of legislation, or conflict of competences that come under the plenary session's jurisdiction.

Oral hearings are not made obligatory by law; it depends on the decision of the Court. The eleven-member Court has a quorum if eight members are present. In the panels for the quorum the presence of all the three members is required.

Guarantees for independence

The budget of the Court is defined by the Parliament on the proposal of the Court.

There is no time limit for decision by the Constitutional Court.

If the Constitutional Court finds a legal provision unconstitutional, then the Court declares it wholly or partly null and void. The decision of the Constitutional Court is final and without appeal. As a rule, the legal norm shall be abrogated on the day of publication of the decision, but exceptions are possible.

The rulings of the Court generally have *erga omnes* effect. All the Constitutional Court's decisions exert a binding effect on all organs of the State. The judgment declaring unconstitutional an omission of a legislative organ of the State has mandatory effect.

The most important decisions of the Court are published in the Official Gazette (*Magyar Közlöny*). All the decisions of the Court are published in the monthly gazette edited by the Court (*Alkotmánybírósági Határozatok*). The Court also publishes a volume every year containing all the decisions of the respective year.

Conclusion

Certainly the most unexpected new feature of the democratic constitutional system is the outstanding importance of the Constitutional Court. The Constitutional Court and the idea of judicial review itself were unknown in the Hungarian constitutional tradition. The unwritten constitution also excluded the principle of the supremacy of a written constitution. The Constitutional Court as a completely new institution in the constitutional history of Hungary, commenced its function in January, 1990. It is considered to be a safeguard of human rights and an institutional guarantee of the separation of powers.

In its interpretation of the constitution, the Hungarian Constitutional Court follows the principle of the unity of the constitution, and under this principle tries to develop a coherent system by means of interpretation. Chief Justice László Sólyom elaborated the philosophical basis of the constitutional interpretation in his concurring opinion in the death penalty case:

The Constitutional Court must continue its effort to explain the theoretical bases of the constitution and the rights included in it, and to form a coherent system with its judgements to provide a reliable standard of constitutionality -- an "invisible Constitution" -- beyond the constitution which is often amended nowadays by current political interests; and this "invisible constitution" probably will not conflict with the new constitution to be established or with future constitutions.

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The Court delivered decisions on a series of very important issues, as the death penalty, the compensation acts, abortion, the already mentioned decisions on the presidential powers and on lifting the statute of limitations. Other important judgements addressed the issue of the

interpretation of human dignity, privacy, equal protection.

Although the Constitutional Court enjoys great prestige both among politicians and citizens, the court also incurs criticism, and attacks the court because of its counter-majoritarian, and consequently, antidemocratic character.

The Constitutional Court has, indeed, wide-ranging jurisdiction to abrogate norms enacted by the Parliament. But what are the powers of the Parliament over the Constitutional Court?

1) The Parliament, being not only a legislative assembly, but also a constituent body, by the single vote of the two-thirds of the representatives may modify the Constitution, terminate constitutional institutions, e.g. to limit the jurisdiction of the Constitutional Court or -- ad absurdum -- to abolish it.

2) The Parliament may reverse the decision of the Constitutional Court by new legislation. A shocking example of this parliamentary power has occurred during the last sessions of the former ("not freely elected") Parliament. The Constitutional Court on 27 February, 1990 declared unconstitutional a provision of the Election Act, according to which those who stay abroad on the day of elections are prevented from voting. The Constitutional Court considered it to be an unconstitutional limitation upon the right to vote. The court called the Parliament's attention to fill the gap in the Election Act regarding the right to vote of those citizens who stay in a foreign country. The Parliament instead of that, practically because of the very close date of the election, amended the constitution, compiling the unconstitutional provision to the text of the constitution.

3) As this example shows, the Constitutional Court has no means to enforce its decisions against the will of the Parliament.

4) All members of the Constitutional Court are elected by Parliament. With the election of the judges the formal control of the Parliament ends over the Court. Nevertheless, the parliamentary powers over the Court give enough democratic legitimacy to the institution.

The Hungarian regulation of judicial review is following the European model with a mixture of competences taken from various examples of other constitutional courts.

Reference:

László SÓLYOM and Georg BRUNNER: *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court.* (Foreword by Justice Stephen G. Breyer) The University of Michigan Press, Ann Arbor, 2000.