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International Human Rights Standards and the Constitutional Jurisprudence of Transition States in Central and Eastern Europe

by Pál Sonnevend[*]

Law becomes reality when it is applied. Whether this happens depends to a large extent on whether the judiciary is able and ready to enforce legal norms. It is therefore highly important to examine judicial practice when addressing the international influences on national constitutional law in states in transition. One of the most important aspects of this question is the reception of international human rights standards in the jurisprudence of constitutional courts in Central and Eastern Europe.

Constitutions in the region are quite friendly toward international law. They usually provide for the domestic application of international treaties as long as such treaties are duly ratified and promulgated into the national legal order. Moreover, most constitutions in Central and Eastern Europe give precedence to international treaty law over competing national norms. Some constitutions do it in a general way, like the Bulgarian Constitution, which provides in Article 5 that international treaties take precedence over conflicting national legislation. Other constitutions limit the supremacy of international treaties to those previously approved by parliament. Examples of this are Poland and Hungary. Finally, there are constitutions—like those of the Czech Republic and Slovakia—that provide for the supremacy of international agreements in protecting fundamental rights and freedoms.

Procedural rules can also create the possibility of reviewing domestic statutes on the basis of international treaties. Examples occur in Bulgaria, the Czech Republic, Poland, Slovakia, and Hungary. But even in those countries where there is no explicit competence for such review, as in Russia, the constitutional courts may reach the same result through interpretation.

In view of this normative background it is inevitable that international human rights standards play a major role in the jurisprudence of constitutional courts in the region. Interestingly, however, it is rather exceptional for these courts to directly apply international instruments, such as the International Covenant on Civil and Political Rights (ICCPR)[1] and the European Convention on Human Rights (ECHR).[2] And even where direct reference is made to one of these instruments, this alone usually does not determine the matter.

On the other hand, international human rights standards do come into play in interpreting national constitutional rights. Some courts draw inspiration from the ICCPR or the ECHR on the basis of specific constitutional provisions. Article 20 of the Romanian Constitution, for instance, provides that the human rights guarantees of the constitution shall be construed and applied in accordance with the Universal Declaration on Human Rights, with the international human rights covenants, and with other treaties to which Romania is a party. On this basis, the Romanian Constitutional Court, in deciding whether to criminalize homosexual conduct, ruled that the Romanian Constitution

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[1] International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978); 99 UNTS 171 (*entered into force* Mar. 23, 1976).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 UNTS 221 (*entered into force* Sept. 3, 1953).

must be interpreted not only in conformity with the ECHR but also with the interpretation of the ECHR by ECHR organs.[3]

Many constitutional courts use international law as a means of constitutional interpretation without having been given an explicit power to do so. Examples include courts in the Czech Republic, Romania, Slovenia, Slovakia, Poland, and Hungary. The Supreme Court of Estonia has spelled out clearly the considerations that lie behind this approach: "In a democratic state, both the drafting of legislation and the implementation of laws, including their interpretation, are to be guided by the constitution and by historically established general principles of law. In forming and developing general principles of Estonian law, principles shaped by the Council of Europe and institutions of the European Union must be taken into consideration alongside the Estonian Constitution."[4]

It is possible to point to a vast number of examples where constitutional courts in the region extensively apply international human rights standards. Such a survey would reflect the considerable influence of international law. One has to appreciate it if, for example, the Russian Constitutional Court abrogates a provision of the Russian Code of Criminal Procedure on the basis of Articles 5 and 6 of the ECHR.[5] Equally, one can only express respect for the Ukrainian Constitutional Court for its courageous step in declaring capital punishment unconstitutional, relying on a comprehensive international and comparative law survey.[6]

One should not, however, ignore the problems that accompany the reception of international human rights standards. These problems appear to be deeply rooted and systemic. The application of human rights treaties does not always reflect a proper understanding of how far these treaty guarantees actually extend. In fact, courts often attribute more to a human rights treaty than it actually guarantees. If, for instance, the Slovenian Constitutional Court uses the International Covenant on Economic, Social and Cultural Rights (ICESCR) to abrogate tax laws that do not respect the subsistence minimum of taxpayers, it is probably going beyond of what the ICESCR actually provides.[7] Similarly, the Polish Constitutional Court relied in 1997 on the Convention on the Rights of the Child (CRC) to declare abortion laws unconstitutional;[8] it would seem that the CRC does not under all circumstances lead to such a result.

Moreover, constitutional courts in the region are not always consistent in relying on the case law of the ECHR and ICCPR. They tend to refer to treaty articles or decisions of the Strasbourg forums if it fits their purposes. And it sometimes seems that some constitutional courts use the jurisprudence of the ECHR organs to derogate from higher standards of domestic constitutional law. In 2000 the Hungarian Constitutional Court addressed the question of whether national symbols may be accorded specific criminal law protection.[9] Having in its earlier jurisprudence been inspired by the U.S. Supreme Court, the court had until then applied the "clear and present danger" test to criminal

[3] Romanian Constitutional Court decision of July 15, 1994, *available at* <http://www.ccr.ro>.

[4] Estonian Supreme Court decision of September 30, 1994, *available at* <http://www.nc.ee>.

[5] Russian Constitutional Court decision No. 11-P of June 27, 2000, *available at* <http://ks.rfnet.ru>.

[6] Ukranian Constitutional Court decision of December 29, 1999, *in* VISNYK KONSTITUTSIYNOGO SUDU UKRAINY (The Bulletin of the Constitutional Court of Ukraine) No. 1/2000 (2000).

[7] Slovenian Constitutional Court decision of November 14, 1996, *in* OFFICIAL GAZETTE OF THE REPUBLIC OF SLOVENIA, No. 68/96 (1996).

[8] Polish Constitutional Court decision of May 27, 1997, *available at* <http://www.hli.org.pl/pl/orzecz/CONSTCOURT.html>.

[9] Hungarian Constitutional Court decision No. 143/2000. (V. 12) AB of May 12, 2000, *available at* <http://www.mkab.hu/belso/mm031.htm>.

laws that restricted freedom of expression. In its recent decision on criminal law protection of national symbols, however, the court did not see it fit to apply that test any more. It referred instead to the judgment of the European Court of Human Rights (European Court) in *Rekvényi v. Hungary,* in which the court gave special allowance to the specific historical circumstances in limiting fundamental rights in a transition state like Hungary.[10]

These are some of the difficulties that accompany the reception of international human rights standards: There are deficiencies in disciplined and coherent legal thinking. Basic rules of how to handle the jurisprudence of international bodies like the European Court are sometimes unknown or ignored. Moreover, knowledge of the relevant international law is often incomplete or missing. Thus, the numerous references to different international instruments and to pronouncements of the European Court do not necessarily mean that basic human rights standards are being applied properly.

PANEL DISCUSSION

Thomas Franck (New York University) suggested that too stark a line had been drawn between democratic constitutionalism and its tendency towards localism, on the one hand, and republican constitutionalism with its tendency towards removing from the area of democratic discourse certain issues, on the other. The real task would be how in 2002 to induce a demos that determines for itself the extent to which it is willing to delegate control over certain aspects of human life to some transnational system. In Europe today, the European Union seemed sufficiently attractive to the states of Europe, particularly the newly emerging states of Eastern Europe. That would not work with the United States. It might even be true today, if the United States were being asked to join the United Nations. Thus, the external counterweights by which a demos determines for itself that it wants to surrender certain aspects of democratic politics in order to have some guarantee for certain rights, protected by the U.S. Supreme Court, protected by the International Court of Justice or protected by the experts of Venice, would not work for the United States. The real question would be whether there are benefits to the United States of placing beyond the demos a question like the death penalty in the same way that the United States places beyond the demos a property penalty. **Marco Sassoni** (University of Quebec) expressed skepticism over whether European constitutional standards could be defined. **Simon Chesterman** (International Peace Academy) pointed to the tension within UN-administered territories, especially Kosovo and East Timor, which consists in the concentration of all legal powers within a special representative of the secretary general, who is then entrusted with the values of democracies in society.

Responding to Thomas Franck, **Giorgio Malinverni** referred to the Swiss experience with the European Convention of Human Rights and the attitude of Swiss judges with respect to unconstitutional cantonal laws that were accepted by referendum. Responding to Marco Sassoni he acknowledged that the European constitutional heritage is not always precisely and easily identifiable but that certain general principles could be refined by taking into account the particular situation of the country concerned.

Jed Rubenfeld responded to Thomas Franck by suggesting that the republican alternative of placing questions outside the reach of the demos could be viewed in two different ways. For the European international conception of constitutionalism, it would

[10] Rekvényi v. Hungary, 1999-III Eur. Ct. H.R., *available at* <http://www.echr.coe.int>.