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STUDIES, DISCUSSIONS, COMMENTS

ASPECTS ON THE CONTRIBUTION OF JUDGMENTS PASSED BY THE EUROPEAN COURT OF HUMAN RIGHTS TO THE INTERPRETATION AND DEVELOPMENT OF ROMANIAN LAW

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Abstract

The provisions of the European Convention of Human Rights are an integral part of the Romanian legal system, and the Convention itself with its annexed Protocols may be considered without hesitation as sources of law, because it is undeniable that they are part of Romanian law.

This article analyzes the issues regarding the applicability of the judgments passed by the European Court of Human Rights to domestic law and whether they are or not a source in shaping the Romanian legislation, based on two situations. The first regards judgments directly concerning the Romanian State in a trial judged before the Court and where the judgment passed by the Court must be enforced under art. 46 of the European Convention on Human Rights and the second of cases concerning other countries, where such judgments serve in one way or another to settle certain legal issues faced by the Romanian State.

The article focuses also on the influence of the European Court of Human Rights judgments in the construction of the new Civil and Criminal Codes.

Keywords: *European Court of Human Rights judgments /Romanian domestic law/Civil, Civil procedure, Criminal, Criminal Procedure Codes.*

The decision of the European Court of Human Rights are especially important in the density of legal issues addressed, as well as in the originality and creativity proven in settling certain controversial issues.

It is well known that courts' judgments - regardless of their nature - did not form a source of law in the Romanian law.

As Professor Nicolae Popa argued in his courses: "The reserved attitude in recognizing that jurisprudence can be seen as a source of law is based on the separation of powers principle. Indeed, in a state of law, legislative bodies are

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responsible for creating laws, while judicial bodies account for the enforcement of laws to specific cases. To recognize for courts the right to elaborate laws would force the door on legislative creation, disturbing the balance of powers."[1].

Given that Romania is a member not only of the European Union, but also of the Council of Europe, judgments of the European court have particular relevance in evidencing Romania's attachment to the principles of the rule of law and its permanent separation from the tutelary system. Therefore, the old view that case law is not a source of law - as in Anglo-Saxon systems - was seen from different perspectives, which in turn have generated reflection themes for law theorists.

"By signing the Convention for the Protection of Human Rights and Fundamental Freedoms on 7 October 1993, on the day of its accession to the Council of Europe, Romania has turned the page on totalitarianism and made its entrance into the club of European democracies. Ratifying that Convention on 20 June 1994, Romania admitted to any person within its jurisdiction the rights and freedoms defined in this instrument, accepting at the same time the right of individual appeal to the European Court of Human Rights; it was subscribed to an international and even supranational control system. Thus, as a signatory to the Convention, Romania accepted the obligations thereunder and the "discipline" resulting from it"[2].

The applicability judgments passed by the European Court of Human Rights to domestic law is, however, based not on the existence of a "superior law" at European level, which would be enforceable against the judicial and state bodies of Romania, but relies instead on a sovereign act, on Romania's participation in the European Convention on Human Rights, which requires all contracting parties the obligation to observe human rights, and in case of adopting judgments, to execute them in good faith and to strictly comply with the measures set forth by the judicial forum[3].

In fact, the Romanian Constitution of 1991, revised in 2003, includes two essential provisions, namely the one under art. 11 para. (2) which states that "treaties ratified by Parliament, by law, are part of domestic law", and, on the other hand, art. 20 which - in turn - specifies two fundamental provisions. The first is the provision under art. 20 para. (1), that "Constitutional provisions on rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, and with any covenants and other treaties to which Romania is a party", and the second is the one discussed under art. 20 para. (2), stating that "Where any inconsistencies exist between such covenants and treaties on fundamental human rights to which Romania is a party, and domestic laws, the

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[1] Nicolae Popa, *General Theory of Law*, ACTAMI Publishing House, Bucharest, 1997, p. 207.

[2] Vincent Berger, *Case Law of the European Court of Human Rights*, 5th Edition, in Romanian, foreword, Romanian Institute for Human Rights, Bucharest, 2005, p. IX.

[3] Victor Duculescu, Georgeta Duculescu, *European justice. Mechanisms, Challenges and Perspectives*, Lumina Lex Publishing House, Bucharest, 2002, pp. 38-39.

international regulations shall prevail, unless the Constitution or domestic laws include more favorable provisions".

Under these conditions, it is quite obvious that in the current stage of development of our national legal system, the provisions of the European Convention of Human Rights are an integral part of the Romanian legal system, and the Convention itself with its annexed Protocols may be considered without hesitation as sources of law, because it is undeniable that they are part of Romanian law.

It is however noteworthy that, although the Convention and its principles are binding on the Romanian State, there is no text that expressly provides for the binding nature in domestic law of the judgments passed by the European Court of Human Rights. Here, naturally, two situations can be distinguished. The first regards judgments directly concerning the Romanian State in a trial judged before the Court and where the judgment passed by the Court must be enforced under art. 46 of the European Convention on Human Rights.

A second situation is that of cases concerning other countries, where such judgments serve in one way or another to settle certain legal issues faced by the Romanian State.

Regarding the first assumption, mention can be made of famous older judgments passed by the European Court of Human Rights in the cases Vasilescu, Brumărescu, Petra, Constantinescu, Dalban, etc.

In these cases, the Court ruled not only case-specific solutions, but also made some important legal considerations on the issues, such as protection of property rights, nature of nationalization acts, rights of detainees etc.

The second category includes judgments of the European Court of Human Rights that have debated various issues addressing the development of the rule of law, with settlements that have only a relative validity, limited to participants to the judicial "duel" and, on a larger scale, regarding all Member States of the Council of Europe[4]. We can mention in this regard the judgments in ruled in matters relating to: political parties and their position in the rule of law, gay rights, meaning of lustration in former socialist countries and its limits etc.

After Romania joined the European Convention on Human Rights, the case law of the European Court of Human Rights has often been cited in judgments of the Constitutional Court serving to substantiate solutions in the spirit of European ideas[5].

In a substantive article on this issue, Professor Ion Vida found that by the approximately 380 judgments in which, between 1994 and 2003[6], the Court has

[4] *Idem*, pp. 39-40.

[5] In fact, there is an alphabetical index on the website of the Constitutional court with judgments of the European Court of Human Rights which were taken into account in adopting certain rulings.

[6] Ioan Vida, *Case law of the Constitutional Court and the European Convention on Human Rights*, on the website of Constitutional Court, http:www.ecr.ro .

substantiated part of the rulings delivered on texts of the Convention on Human Rights and Fundamental Freedoms, it served to underline the importance of these international provisions in the framework of the human rights legislation, but also to ensure a fair interpretation and enforcement of these rules by the courts in the light of the constitutional provisions of art. 147 para. (4), which provides the binding nature of Constitutional Court judgments.

The Constitutional Court also had its special contribution in clarifying the scope and content of the rights and freedoms enshrined in the Convention.

Interpreting the provisions of art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Court had the opportunity to rule on the compliance with a reasonable time for settling cases, observing the principle of equality of arms between litigants, of safeguards that the accused party must enjoy in the criminal trial and the presumption of innocence. Regarding this latter aspect, we should signal Judgment no. 317/2003 of the Constitutional Court which upheld the applicability of the presumption of innocence in cases of contraventions. The European Court noted as positive the measure to remove indictment in Romania in the "interests of the individual" for less serious offenses for which the perpetrator is not criminally responsible any longer, but in the opinion of the European Court, the distinction made by the European countries, between crimes, offences and contraventions is operated in such a case, since, pursuant to art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms all these facts are criminal in nature and that is why its provisions guarantee to all "accused parties" the right to a fair trial, whatever the qualification of the facts in domestic law. For the purposes stated, the European Court of Human Rights ruled in Case *Garyfallou AEBE against Greece* (1997)[7], in the case of *Lauko against Slovakia* (1998)[8], and in the case *Kadubec against Slovakia* (1989)[9]".

The same arguments which led to removing the distinction between criminal law and contraventional law also grounded the ruling whereby the Constitutional Court held that the principle of retroactivity of the more lenient criminal law can also apply to contraventions.

The study mentioned, signed by Ioan Vida, also highlights that the same extremely significant political and legislative event which was Romania's accession to the European Convention also marked the completion of art. 21 of the Constitution, paragraphs (3) and (4), which state that "*parties have the right to a fair trial and to a settlement of their cases within a reasonable time*", and "*administrative special jurisdictions are optional and free*", stressing on this occasion the special resonance enjoyed by judgments of Constitutional Court among options of Romanian legislators, including those of constitutional ones.

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[7] ECHR, *Recueil des arrêts et décisions*, 1997, vol.V.

[8] ECHR, *Recueil des arrêts et décisions*, 1998, vol.V.

[9] ECHR, *Recueil des arrêts et décisions*, 1998, vol.VI.

The content acquired by various law institutions as a result of interpretations given by the Constitutional Court in light of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, but also the case law of the Strasbourg Court, have contributed in many cases essential changes to guarantees and forms of protection provided for personal rights and freedoms[10].

In this sense, we can say that, by interpreting the provisions of the Convention, the principle of equality and prohibiting discrimination, as otherwise provided under art. 4 para. (2) and art. 16 of the Romanian Constitution, has acquired new meanings in Romanian law, through settlements ruled by the Constitutional Court. Thus, reconsidering the initial practice on this matter, the Court recognized that this principle is to be applied to other individuals without citizenship, as required by art. 16 of the Constitution. In grounding this settlement, it showed that the provisions of art. 14 of the Convention make no distinction between individuals falling within its scope.

In interpreting the same *principle of equality*, the Constitutional Court, starting from a series of judgments passed by the Strasbourg Court, has also held that equality does not mean uniformity and that separate legal treatments may be established for certain categories of persons or groups, if there is an objective and reasonable justification. Moreover, following up on these arguments, it argued on the existence of a genuine right to difference, which inevitably implies the need for imposing a different legal treatment when the factual situations are objectively different[11].

No doubt that the guarantees enshrined in the Convention to defend *property rights* could not be left out of the arguments invoked by the Constitutional Court in its practice. Judgment no. 70/2001 is of particular importance in this regard, the notions of "goods" and "property" acquiring, in light of the practice of the European Court of Human Rights, an extended interpretation, stating that the protection granted by art. 1 of Additional Protocol no. 1 to the Convention should also cover the scope of those rights and ownership interests that do not necessarily intermingle with the ownership right over tangible goods, such as collateral, clientele or even a claim, like that of being reimbursed[12].

In drafting the new codes, an important influence was exerted by judgments of the European Court of Human Rights and in particular by principles derived therefrom.

Compliance with European rules appears, for instance, as evident as possible, in the provisions of the new Criminal Procedure Code. We firstly need to mention, in this regard, *the institution of the judge for rights and freedoms*, newly created.

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[10] Ioan Vida, *cited art.*

[11] *Ibidem.*

[12] Romanian Official Gazette, Part I, no. 236, of 10 May 2001

Regarding the competence of the judge for rights and freedoms, it settles requests, proposals, complaints, appeals or any other intimations regarding preventive measures, precautionary measures, provisional safety measures, acts of the prosecutor, the consent granted for searches, for using special surveillance or research methods and techniques, or other evidentiary procedures under the law, the procedure of anticipated hearing and any other situations provided by law.

In order to respect the right to privacy and correspondence, the new Criminal Procedure Code set out procedural rules in the matter of special techniques of surveillance and research to meet the accessibility, predictability and proportionality requirements of the European Court of Human Rights case law. Whenever such measures are authorized, there is a need for the existence of certain reasonable suspicions for committing a crime, for observing the subsidiarity principle - with the exceptional nature of an interference with the right to privacy being highlighted - and for the principle of proportionality of such measure with restricting the right to privacy, in relation to any peculiarities of the case, to the importance of the information or evidence to be obtained or to the seriousness of the offense.

Still in order to guarantee the rights provided by art. 8 of the European Convention on Human Rights and Fundamental Freedoms, the new Code sets out, as a principle, the obligation of prosecutors, after the end of the technical surveillance measure, to notify each subject of a mandate in writing, as soon as possible, on the technical surveillance measure taken against him/her.

Some surveillance or research techniques, such as the technical surveillance mandate, the retention, handover and search of postal items, shall be ordered by the judge of rights and freedoms.

Regarding evidence, the new Criminal Procedure Code includes important new rules which enshrine the principles of legality and loyalty in using evidence.

The principle of legality in using evidence involves using only the evidence provided by law, as determined by the new Criminal Procedure Code, special legislation and jurisprudence of the European Court of Human Rights.

The principle of loyalty in using evidence is expressly governed and states that it is forbidden to use violence, to promise an advantage disallowed by law, to threaten with an unjust harm or any other means of coercion prohibited by law in order to obtain evidence. Also, no eavesdropping methods or techniques are allowed affecting the individual's ability to remember and report consciously and voluntarily the evidentiary facts. Such prohibition applies even if the person eavesdropped consents to the use of such methods or techniques. Criminal judicial bodies or other individuals acting on their behalf cannot cause a person to commit a crime to obtain evidence.

Evidence obtained through torture, inhuman or degrading treatments cannot be used in criminal proceedings. Thus, it is absolutely presumed that the fairness of the criminal trial will be affected if evidence is obtained by torture, inhuman or degrading treatments.

In connection with the establishment of precise deadlines for meeting certain obligations by the judicial bodies, the ECHR examined, in line with art. 5 para. (1) of the Convention, the continued detention of plaintiffs in the absence of a legal basis[13]. On this occasion it was found that art. 5 para. (1) of the Convention has been breached because the plaintiffs have been kept in detention after expiry of the prosecutor mandate, without extending the measure by an act of a judicial body). Accordingly, the Commission who helped draft the new Criminal Procedure Code held that the rule to establish strict legal deadlines to arrange for custodial measures cannot be automatically extended to cases concerning other aspects, such as: the term by which the suspect must be notified about his/her right to be assisted by a lawyer, the deadline for conducting computer searches, the maximum reasonable term motivated for the prosecutor to postpone informing the suspect or defendant or submitting to him/her the media used to store technical surveillance activities.

In fact, the European Court has stated in its jurisprudence, that the concept of "short-term", like the concept "reasonable term", must be assessed in light of the circumstances of each case[14]. Hence, experts who took part in drafting the Criminal Procedure Code concluded that the jurisprudence of the Court does not impose an obligation for States to set legal deadlines for each procedural document.

The impact of certain principled provisions contained in the European Convention on Human Rights and in the practice of the European Court of Human Rights s found in other Codes adopted by the Romanian Parliament. Thus, for the *Criminal Code*, we can mention the adjustment to normal limits of penalty handling, introducing in many cases alternative penalties to imprisonment, the new provisions on conditional release, the provisions on the European arrest warrant, mentioning the conditions to restrict the scope of parental rights, regulating the possibility of voting by inmates, incriminating acts of violence against family members, new regulations on corruption, breach of professional secrecy, money laundering, currency counterfeiting, incriminating offenses against the financial interests of the European Union.

For the new *Civil Code* we can mention the increased care granted to protecting the rights of individuals, ensuring a balance between the right to privacy and freedom of expression, protecting personal non-property rights by specific means, setting the rule that non-property loss is likely to be remedied, reformulating certain private international law provisions in line with European rules.

Thus, in Book VII, "Private international law provisions" of the new Civil Code the provisions of Law no. 105/1992 have been integrated, but in a revised form, to be brought in line with the new conception in family law matters and with

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[13] For example, in case Varga against Romania (Judgment of 1 April 2008, ruled in File no. 73957/2001).

[14] The case Pantea against Romania, File no. 33343/1996, ruling of 3 June 2003; case Jablonski against Poland, File no. 34392/1996, ruling of 21 December 2000.

Community and international instruments in private international law matters. The new regulation establishes the spouses' autonomy of will by their possibility to choose, within certain limits, the law applicable to the matrimonial regime. Therefore, the proposed regulation reflects the principle established by the Hague Convention of 1978 on the law applicable to matrimonial property regimes and reaffirmed in the Green Paper of the European Commission on developing a European regulation on conflict of laws in matrimonial property regimes, jurisdiction and recognition of court judgments[15].

Also, the new regulation distinguishes between personal effects and general property of marriage (primary imperative regime) on the one hand, and proper matrimonial regimes (legal and secondary), on the other hand, taking into account such changes made in family law (Book II).

For the *Code of Civil Procedure* we can mention some innovations related to Romania's ECHR casuistry regarding, among others, the simplification and acceleration of judicial procedures, the simplification of divorce procedure, the provision whereby the bail may also regard real estate rights or financial instruments, and the introduction of the appeal concerning delays in the trial as a new remedy. The Code establishes a self-reliant special procedure directed against the breach of the right to settle a trial within an optimal and predictable time: the appeal against delays in the trial. Under the new procedure, observing ECHR decisions that sanctioned the absence of legal means to act in case of exceeding the reasonable time to settle a case, the party considering a cause to be delayed may require legal measures for this situation to be removed.

Romania, who is also a member of the Council of Ministers of the Council of Europe, participated actively in the *process of streamlining the European Court of Human Rights*. It is well known that, following the entry into force of Protocol 11 (1998), the work of the European Court of Human Rights was increased, but also

[15] A harmonized European regulation is obviously hampered by the variety of legislative solutions in national legal systems. This is also why, in general, the matter of matrimonial property regimes was largely only explored by the European legislator, and only occasionally, an expression of the principles of equality and freedom within the family group, it was treated directly and sought to impose universally valid rules. All these amid great difficulties encountered in managing family relationships when they also contain an extraneous element, amplified in recent years by large-scale migratory phenomena, by a recognized family instability and, practically, by the impossibility to find and, then, to impose a regulatory framework that would be recognized and adopted by the European Union States. In these circumstances, however, in 2011, the European Commission and its subordinate legislative apparatus drafted and proposed two models for a regulation on the jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes, one on marriages and the second regarding registered partnerships. The first attempt to adopt such regulations, which occurred in the European Parliament in 2013, resulted in a severe failure, the huge number of amendments proposed leading perhaps in the future to the drafting of other texts. For more details on matrimonial property regimes, see I. Chelaru, A.L. Chelaru, *Foreigners in Romania. Legal regime*, Universul Juridic Publishing House, Bucharest, 2016, pp. 273-277.

became more efficient, thanks to the simplifications applied, which continued with Protocol 14 (2004), not effective yet.

Among the new reform measures proposed and which provoked Romania's agreement, there is the issue of the "*pilot decision*", i.e. decisions regarding a case, but addressing an issue that is reproduced in a large number of other cases heard by the European Court Human Rights. We believe that such pilot decisions are intended to facilitate the simplification of procedures and for a faster settlement of cases which raise similar problems, like in Romania with the first cases heard by the European Court of Human Rights related to retrocession of nationalized property.

In fact, it should be noted that, for a more efficient relationship between Romania and the ECHR, *a reassessed and a resized position of the Government Agent for ECHR* has been applied since 2003. Therefore, the institution of the Government Agent for the European Court of Human Rights is operational at the Ministry of Foreign Affairs, being transferred from the Ministry of Justice by Government Emergency Ordinance no. 64/2003 on setting out certain measures concerning the establishment, organization, reorganization or operation of some workforce structures within the Government, ministries, other specialized bodies of the central public administration and of some public institutions[16].

The institution of the Government Agent seeks, whenever possible, to boost administrative procedures that could lead to an internal settlement, before Court ruling, of cases where either a new domestic remedy is possible, following the adoption of new legislation, or the infringement is due to non-enforcement of domestic judgments. In these cases, if such administrative procedures to return or grant possession for the plaintiff are successful, the Romanian state can avoid being convicted by requiring that cases be deleted from Court dockets or by signing amicable settlement conventions.

It should be emphasized that among other duties, the Government Agent[17]:

• collaborates with the courts, the Constitutional Court, the Court of Auditors, the Public Ministry, with criminal investigation authorities, public notaries, enforcement officers and other persons or entities with public service missions,

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[16] Romanian Government Ordinance no. 94/1999 on Romania's participation in proceedings before the European Court of Human Rights and the Council of Ministers of the Council of Europe and exercising the right of state retrogression as a result of decisions and conventions of amicable settlement (published in Official Gazette no. 431 of 31 August 1999), was approved with amendments and additions by Law no. 87/2001, as amended and supplemented by Government Emergency Ordinance no. 64/2003 on on setting out certain measures concerning the establishment, organization, reorganization or operation of some workforce structures within the Government, ministries, other specialized bodies of the central public administration and of some public institutions (published in Official Gazette no. 464 of 29 June 2003) and by Government Emergency Ordinance no. 48/2008 (published in Official Gazette nr. 330 of 25 April 2008)

[17] Romania's Government Agent before ECHR, the Ministry of Foreign Affairs http://www.mae.ro

related to the implementation or administration of justice or other jurisdictional activities, or to the enforcement of judgments or other jurisdictional acts, who must send to the Government Agent, at its the request and by the deadline set by it, in addition to the documents, data and information necessary to represent the interests of the Romanian State before the Court and the Council of Ministers, all acts on procedures ongoing before such bodies, regardless of the trial phase, complying with the celerity of internal procedures in progress;

• signs, on behalf of the Romanian Government, amicable settlement conventions for a case based on an individual application against the Romanian state, after the Court communicates such application;

• informs the Minister of Foreign Affairs about the legislative changes required by the evolving case-law of the Court in order to promote, together with the competent institutions, the related legal acts.

In conclusion, when we refer to the contribution of ECHR jurisprudence in perfecting the construction of the rule of law in Romania, we should not refrain from mentioning the value of judgments passed by the European Court of Human Rights in the educational process of legal learning.

Finally, we consider encouraging that all university textbooks concerned with human rights - but other disciplines, too - include ample references to cases judged in the European Court of Human Rights. Such references are quite useful for shaping a European legal consciousness to undergraduates and students of higher forms of education, and they are also useful for the general public to understand the value and high moral significance of the judgments passed by the European Court of Human Rights[18].

[18] Victor Duculescu, Georgeta Duculescu, *op. cit.*, p. 40.