CONSIDERATIONS REGARDING THE AUTHORITY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND OF THE EUROPEAN COURT ON HUMAN RIGHTS JURISPRUDENCE ON THE NATIONAL LAW SYSTEMS IN SOME OF THE MEMBER STATES

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Abstract

In the study hereby, the author reviews, from the comparative law point of view, the effects that the European Convention on Human Rights and Fundamental Freedoms, as well as the decisions of the European Court on Human Rights, have on the national law systems in some member states (Austria, Belgium, the Netherlands, Germany, Great Britain and Romania), both on the substantive law as well as on the procedural law level.

Keywords: *ECHR; international treaties; Constitution; direct application; incorporation*

Introduction

The provisions of the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as Convention) had and continue to have, at a large amount, considerable effects on national law systems of the Member Parts. At this time, the Convention is an instrument of harmonization of the national legal systems on human rights, growing towards a common European law system of human rights.

The overall conclusion of last years European literature on human rights, regarding the hierarchy of juridical rules, is that generally, in the Member States, the Convention takes precedence over domestic common regulations.

On the other hand, we may find that the European Human Rights Court (hereinafter referred to as EHCR) decisions are compulsory in international law for the member states, but the Convention provisions do not impose formally to national courts to give them „direct effect".

In this context, we may say that generally, a solution to this matter is up to the Contracting States national law, which may implement the decisions taken in Strasbourg according to domestic judicial rules[1)].

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[1)] Mihail Udroiu & Ovidiu Predescu, 2008, *Protecția europeană a drepturilor omului şi procesul penal român*, Editura C.H. Beck, Bucureşti, p. 20.

The main conclusion of the European doctrine in this regard is that at this time, the Convention has been almost incorporated, one way or another, in the national law in all member states.

The concrete way of the incorporation and the way the Convention is being applied in the national law systems, the hierarchy of conventional and internal rules, as well as the reaction of the national courts, all these may be explained by the specificity of every Constitutional system that exist in the member states, by the monist or dualist tradition accepted in a state, or by the tradition of every national school law. This implies a diversity of solutions in the Contracting States, fact that does not contradicts, on the contrary, consolidates the general conclusion which states that the European instrument in Strasbourg influence the national law systems on human and fundamental rights. The evolutions from the last twenty years shows very clear this thing, the conservative doctrine and more prudent practise in many national cases being slowly abandoned in favour of a more open attitude from part of governmental, judicial and legislative authorities in these states, sometimes even through a more creative translation of the same constitutional provisions that existed twenty or thirty years ago.

We will make the case for the thesis above by showing some relevant national cases.

1. Austria

Austria did not participate in the drafting of the Convention nor was the country among the original contracting parties. However, it became member of Council of Europe in April 1956 and signed the Convention and First Protocol on December 13, 1957. These were ratified by the President and came into force on September 3, 1958, after the approval of the two chambers of the Austrian Federal Parliament, „Nationlrat" (the National Council) and the „Bundesrat" (the Federal Council), had been obtained in accordance with Section 50 of the 1929 Constitutional Act. With the publication of the Convention and its Protocol in the Federal Law Gazette, *the Convention obtained the status of domestic law.*

In accordance with the general principle of incorporation of state treaties, that governed the Austrian constitutional law till 1964, the Convention and the Protocol became part of domestic law. The Convention has been considered as having the *status of constitutional law,* being compulsory for the judicial and administration authorities. The rights contained by the Convention have been considered as existing simultaneously with the already existing Catalogue of Fundamental Rights and other judicial domestic provisions. The Austrian system in force by then explained that, although, generally, the Convention rules are

directly enforceable[2], not all must be considered as self-executing by the public bodies or by the courts.

Although, the Convention had been obtained the constitutional status, in 1961 The Constitutional Court made a different interpretation, underling the fact that actually, it has not this status:

„Taking into consideration the fact that the decision of the National Council to approve the European Convention on Human Rights, and consequently, the text made public by the Federal Gazette do not contain the mention „constitutional", as requested by Art. 50(2) corroborated with the second part of Art. 44(1) from the Constitution, the Convention nor any other part of the document does not have the status of constitutional law"[3].

The effect of this decision was that the Convention has been brought back to the status of common law.

The reaction to this decision has been prompt: *The 1964 Federal Constitutional Act (Amendment)* from March 1964 *revised the whole procedure of treaty incorporating into the Austrian law*. The Second article of the quoted act, with retrospective effect, awarded the Convention the Constitutional Federal Law status.

We have to mention, in this context, that actually there is no strict rule in the Austrian Constitution that may stand international treaties in domestic law, ratified according to Article 50.

Nonetheless, there is a casuistry that shows the fact that treaties have direct effect. While the 1964 amendment of Article 50 stipulates a special procedure by which the National Council may decide that a treaty may be implemented through a separate law, is broadly accepted that if there is no such decision, the provisions of an international treaty – concluded accordingly to Article 50 (1) (which is the Convention case) – is directly applicable to domestic law.

The Constitutional Court has exclusive jurisdiction to decide on the validation of every law and regulation. The Court is the only judicial institution which has competence for deciding on infringements of fundamental rights protected by the law, on international treaties concluded by Austria, or any other domestic norms, decisions or administrative authorities' orders. Consequently, if during a procedure in an Austrian court, it is raised a doubt that a provision of a law may or may not respect the Constitution, that matter must be referred to the Constitutional Court immediately. In other words, when it is checked who is entitle to decide if the statutes are valid or not [Article 140 (a)], it may appear the question *if such a norm is not consistent with the Convention. If the answer is affirmative, the respective norm is annulled.*

[2] D. Harris, M. O'Boyle, Warbrick, *Law of the European Convention of Human Rights*, Oxford University Press, Second Edition, 2009, p. 24.

[3] A. Z. Drzemczewski, *European Human Rights Convention in Domestic Law – a comparative study,* Oxford University Press, New York, 1985, p. 94.

For instance, the Constitutional Court validated the Constitutional statute of the Convention in the record regarding „The Burgerland Hunting Law”, examined in respect to the „civil rights” which Art. 6 par. 1 of the Convention referred on. In its decision dating from October 14, 1965, the Constitutional Court has admitted that Art. 6 was not only a programmatic principle of the law maker, but a compulsory norm with Constitutional significance[4)].

Since then, the Austrian Constitutional Court developed an outstanding jurisprudence based on the Convention provisions, like those regarding Art. 2 – the right to life (Case B. 425/75 from June 17, 1977 on police using fire arms while performing arrests); Art. 3 – ill treatments (Case B. 350/76 from October 6, 1977 on police agents performing arrests); Art. 8 – the right to private life (Case G. 63/77 from March 9, 1978 on limits of interference in private life)[5)], and so on.

In the same time, we may underline the Constitutional Court jurisprudence on the Convention organs practice. Such an example is ECHR annulling decision in the ruling from June 29, 1973 in the „Tyrol Real Property sales Commission” case, on the ground that the criticised authority was not an independent and impartial tribunal, as states Art. 6 par. 1 of Convention and the *EHCR jurisprudence* in the „Ringeisen *v.* Austria” case.

In the other hand, we underline that although the Constitutional Court has exclusive jurisdiction on verifying the infringements of fundamental rights as defined through the Convention in the national legislation, *the Court has no competence to verify the ordinary or administrative courts decisions* in this regard.

Only the Supreme Court of Justice, or the Administrative Court, both independent from one another, as well as from the Constitutional Court, have competence in this regard.

From this point of view, we may underline the fact that the Supreme Court of Justice, the highest rank criminal and civil court in Austria, passed a number of important decisions which reviewed some rulings adopted by low ranking courts, especially on criminal law matters (like the Art. G (3) (c) regarding the right to free legal advice), decision based on the Convention provisions as well as on the Strasbourg Court jurisprudence.

The substantial impact of the Convention on the judicial system included several other important aspects, as verifying if the *draft laws* or the *adopted laws* are consisting with the Strasbourg norms or jurisprudence, or with the *re-opening of the internal procedures*[6)].

[4)] *Ibid*, p. 98.

[5)] *Ibid*, p. 99.

[6)] The Federal Act from March 26, 1963 allows the Austrian citizens who make complaints to the ECHR regarding the national procedure in appeal, to obtain the right to ask for reopening of the internal procedures in Austrian courts.

In *conclusion,* being in consonance with the present literature in this field regarding the Austrian national law system, a system based on the force of the Constitutional norm, we can affirm that the direct applicability and the „self-executing" characteristic of the European norm and of the ECHR jurisprudence, make the above mentioned system one of the most powerful law systems in Europe that guarantees a full exercise of the human fundamental rights.

2. Belgium

Belgium is part of the states with *monist tradition* which attributes direct effect to international treaties in internal norms by ratification, promulgation and publication in the Official Gazette of the state. This way the treaty, precisely the Convention, obtain the *domestic law status*.

Belgium was one of the original states signatories of the Convention on 4 November 1950. Prior to its ratification, the legislative section of the *State Council* was consulted. Thereupon both the Senate and House of Representatives passed the law of approval authorizing the instrument's ratification in accordance with Article 68 of the Constitution. The ratification law of the Convention and First Protocol have been passed on 14 June 1955, the law authorizing the instrument's *„full and entire effect"*[7].

The text of the Convention has been annexed to the approval law. The authors of Belgian legal doctrine, quoted by A. Z. Drzemczewski[8], insisted on the fact that the *Convention itself and not the ratification law is applied by the national courts.* The last one can be called „law", being seen as a legislation act due to suspend the effect of some preceding laws which stated contrary to the Convention provisions, but from a „substantive" point of view, the ratification is not a „law".

Accordingly to the accepted Constitutional practice, the Convention – after being incorporated into the domestic law through parliamentary approval and the following publication in the Official Gazette (Moniteur Belge) – *had obtained the „Statute" rank (domestic law). Its national status has been considered identical with other legislative acts, although was mentioned its pre-emption on domestic norms which may be in conflict with.*

The Belgian Constitutional doctrine has made no distinction between the international law norms approved and domestic law. This allows the Convention provisions considered to be „self-executing" by the Belgian courts, to be called upon in the mentioned tribunals.

A decisive moment was, from the point of view of the already *mentioned jurisprudence*, a Court of Cassation ruling from May 27, 1971, which stated the pre-eminence of the international norms direct applicable to domestic law on the

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[7] The Official Gazette (Moniteur Belge) from August 19, 1955.
[8] A. Z. Drzemczewski, *op. cit.,* p. 64.

internal norms that may be in conflict with. The Court of Cassation, meant as the Strasbourg Court, easily admits that international norms on a general scale can have direct effect, which means they may be applied by a judge. Moreover, the mentioned ruling allows the national judge to remove the national norm that contradicts the European one[9]. As we said, before the 1970' nor the Legislative neither the courts have decided over the status of the Convention norms as opposed to the domestic law. After the mentioned ruling from 1971, it was only in the context of the examination of this matter in relationship with the Community law, i.e. the Court of Cassation ruling in the case „Fromagerie Franco-Suisse „Le SCHI" (from May 1971), that it was made a step forward on the way to confirmation of a new national jurisprudence and reach the conclusion that "direct application of all provisions of international treaties will give supremacy over the domestic law which may be in conflict with, regardless when the domestic law came into force[10].

This way, national courts became competent to verify if every legislation act is consistent with those provisions of the treaty that has direct effect in the Belgian law, if the law is inconsistent with the treaty provisions. Consequently, *„mutatis mutandis"*, the Convention provisions considered to be „self-executing" in the Belgian law, will be regarded as prevailing over the preceding or the following laws, only if, as stipulated by Art. 60 of the Convention (which became Art. 53 after Protocol 11 came into force), the domestic law or any international treaty that Belgium has signed, do not afford more favourable guarantees.

The „Lootens" case, closed with a decision of the Second Chamber of the Court of Cassation from September 26, 1978, on the matter of „seat belt legislation", ruled that the lower court (the Correctional Tribunal of Antwerp) was wrong when rejected the applicant motivation which stated that the Convention provisions have a higher ranking than the ordinary laws. The Court of Cassation criticised the traditional reasoning (until then) of the Belgian courts, expressed in that case by the Tribunal, which stipulated that „according to constant jurisprudence, the judge can not decide on a law according to the criteria of an international treaty".

The Court of Cassation showed:

„The motivation (of the Correctional Tribunal) is contrary to the law principle which stipulates that in the event of a conflict between a norm of domestic law and a norm of international law which produces direct effects in the internal legal system, *the rule established by the treaty shall prevail*; *the primacy*

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[9] See e.g. I. Verougstraete, *La protection des droits de l'homme dans le droit Belge*, in *The history of the Supreme Courts of Europe and the development of Human Rights*, printed by Alfodi Nyomada Co., Debrecen, 1999, p. 41.

[10] *Ibid*, p. 65.

of the treaty generates for the judge (…) the obligation to withdraw the application of domestic law (A/N - TC)”[11].

One of the consequences of this evolution of domestic Belgian jurisprudence led, according to the former President of the Belgian Court of Cassation, Ivan Verougstraete, to the fact that „the European Convention on Human Rights has been daily cited in Belgian courts (beginning with Art. 6) … Additionally, as Belgian courts can not assess the constitutionality of the laws and the decrees, the judges usually appeal to the last form of assessment, while, in other states, the judges rather use the constitutional assessment. The results are pretty much the same: the Belgium’s Constitution includes much of the guarantees afforded by the European Convention on Human Rights”[12].

As to the direct applicability of the Strasbourg norm, i.e. the competence of the national court to determine if the Convention provisions are „self-executing”, is worth to remember the jurisprudence of the same Belgium’s Court of Cassation, which, in a ruling from 1983[13], showed:

„The notion of direct applicability of the treaty cited by a citizen of a state that signed the above mentioned treaty, presumes that the obligation taken by that state should be expressed in a complete and precise way and that the contracting parties should have, regarding this treaty, to afford subjective rights or to impose obligations on individuals”.

As a result of the things said above, is worth to mention that the legislative system and the evolution of the Belgian jurisprudence have allowed, in the context of Belgium being convicted in several cases („de Beckes”, „the Belgian linguistic case”, „Marckx”, „Vermeire” and so on), a proper reaction from part of the Belgium’s institutions which were ready and promptly started the legislative and administrative amendments in order to conform with the international obligations taken once the Convention has been ratified.

It is worth to remember that starting from the ECHR’s motivation in the „Marckx” case, e.g. „a judgement, by itself, can not decide the annulment of the domestic courts inconsistent rulings or of the domestic law”[14], the Belgian authorities took the task of putting into force the European court’s decisions, based on the principle of subsidiarity[15].

Putting into force of the European Court’s decisions has led to a positive obligation to secure a proper law statute for the children born out of a marriage which ended with the fulfilment of a legislative reform, a law actually, approved on March 31, 1987, which contained some changes of several norms on filiation.

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[11] A. Z. Drzemczewski, *op. cit.*, p. 68.

[12] I. Verougstraete, *op. cit.,* pp. 41-42.

[13] The ruling Thonon v. Belgium, 1983, cited by J. Polakiewicz, *Treaty-making in the Council of Europe*, Council of Europe Publishing, 1999, p. 157.

[14] D. Harris, M. O’Boyle, Varbrick*, op. cit.*, p. 25.

[15] Mihail Udroiu, Ovidiu Predescu, *op. cit.,* p. 19.

In our opinion, this is an eloquent example of the way in which legislation, administrative bodies and Belgian jurisdictions have adopted the procedures of incorporation, the direct applicability in the domestic system of the norms as well as of the jurisprudence of the assessment mechanism that were in effect in Strasbourg.

3. The Netherlands

The Convention and the First Protocol have been signed by the

Netherlands on 4 November, 1950, and respectively on 20 March, 1952. Both have been approved by the law on 28 July, 1954. The two instruments have been ratified on 31 August, 1954.

Due to the provisions of the Netherlands Constitution, and to the monist tradition adopted by the domestic law system, the authors of the literature in this field approved with a large majority the opinion that in the Netherlands, the Convention *prevails on the Constitution*[16)].

At the same chapter of the motivation is quoted the ruling „Oerlemans *v.* the Netherlands" from 1991[17)].

Based on Art. 60 to Art. 67 of the Constitution, the Convention provisions which, by virtue of their contents, are direct applicable („self-executing"), have *direct binding force* in the Dutch legal system on the date of the Convention publication.

The Dutch doctrine, quoted by A. Z. Drzemczewski, shows that the publication does not have to be considered as a governmental act due to which the international treaty gains binding effect and, therefore, does not transform it into domestic law. The binding effect on all persons of the treaty is the direct consequence of the international law obligations that the state has assumed.

In this context, we have to mention the fact that *Art. 65* and *66* of the Dutch Constitution stipulates *the direct applicability in the domestic law of the international treaties, as well as of the Convention* and respectively, that they take precedence over ordinary law.

Based on these articles, the *statutory regulations have to give pre-eminence to the provisions direct applicable of the treaties („self-executing") if they conflict with the Constitution or with the preceding or the following laws*[18)].

This pre-eminence to the Constitution, as to the Parliament acts and to other legislative norms, refers not only to the provisions of the international treaties direct applicable, but also to the decisions of the international governmental organisations [Art. 67(2) of the Constitution].

[16)] See e.g.: D. Harris, M. O' Boyle, Warbrick, *op. cit.,* p. 24; A. Z. Drzemczewski, *op. cit.* pp. 88-89.

[17)] D. Harris, M. O' Boyle, Warbrick, *op. cit.*, p. 24.

[18)] See e.g. H. F. von Panbuys, L. J. Brinkhorst, J. G. Lammers and others, as cited by A. Z. Drzemczewski in *op. cit.*, p. 88.

This is why the Constitution itself authorizes the Dutch courts to use the direct applicable provisions of the treaties, even against domestic norms with which may be in conflict, without requiring a supplementary action of legislative or administrative implementation.

We have to remind the fact that there are some authors, although not so many, that tinge the nature of the relations between the Convention provisions and the Dutch Constitution.

While Art. 60 par. 4 of the Constitution stipulates that domestic courts are not competent to rule on the Constitutionality of the *international treaties*, Art. 63 admit, on the other hand, that the content of the treaty may – if the development of the international order asks for it – deflect from certain constitutional provisions. The conclusion of the authors mentioned above[19)] is that, in this case, the direct applicable provisions of the Convention (as well as of other international treaties) have a „unique statute of extra-Constitutionality".

When the Convention has been ratified, both the Government and the Parliament considered that the Dutch law is consistent with the norms stipulated by the European instrument and therefore, consequently, they don't have to take into consideration amending the Constitution. Although, a certain subsequent legislation, in particular referring to the treatment of foreign citizens, extradition, and so on, has been modified in order to avoid a possible conflict with certain provisions of the Convention.

In this line, the ECHR jurisprudence had, in its turn, a quite pregnant impact on the domestic law system in the Netherlands. Here we mention three cases that we consider relevant.

First, *by obeying the „res judicata force"*, the Dutch authorities took the necessary conclusions from the „Marcks *v.* Belgium" ruling (13 June, 1979), *even the Netherlands were not a party in this litigation.* As a result, the Netherlands decided to *amend the domestic law* on children born out of a marriage[20)].

Second, the Netherlands decided, based too on *obeying the „res judicata force"*, to respect the *conclusions of the* Strasbourg *jurisprudence in the „Brogan v. Great Britain" case* (November 29, 1988)[21)] regarding Art. 5 par 3 of the Convention. As a result, the Dutch authorities decided to amend the domestic law regarding the time in which a suspect, a withhold person or a person being in preventive detention, has to be brought in court[22)].

Finally, the decision in the „Engel *v.* the Netherlands" case[23)], from June 6, 1976, that led to legislative modifications of the disciplinary military system.

[19)] J. Fawcett, cited by A. Z. Drzemczewski, *op. cit*, p. 91.

[20)] See D. Harris, M. O'Boyle, Warbrick, *op. cit.,* p. 31.

[21)] See Fr. Sudre, *Les grands arrêts de la Cour Européenne des Droits de l'Homme*, PUF, 5e édition, 2009, pp. 201-202.

[22)] See D. Harris, M. O'Boyle, Warbrick, *op. cit*., p. 31.

[23)] See Fr. Sudre, *op. cit*., pp. 39-41.

The mentioned case, altogether with the „König *v.* West Germany” case (June 28, 1978), is regarded in the literature as *the European Court jurisprudence* that *founded the „autonomous notions”* mechanism, used by the ECHR to ensure the indispensable uniformity of the Convention reading[24]. In other words, the European norms that protect human rights do not have to differ related to judicial qualifications used by every national system in part. In this case, the judge confronted with some vaguely notions of criminal prosecutions, respectively with disciplinary matters, which reading could not have been left over to the discretionary decision of the Dutch jurisdictions, as guaranteed by Art. 6 of the Convention.

4. France

The doctrine includes France in the group of states that, through the *monist tradition and* pertinent *Constitutional provisions* ensure the incorporation of the Convention into the domestic law and, respectively award effects in the domestic law system[25].

According to J.F.Renucci, *the incorporation* of the Convention into the domestic system is a *direct* one and is based on Art. 55 of the Constitution. Its judicial force is both *infra-constitutional and over-legislative*[26]. The same author says that „in France the admittance of the direct effect didn’t led to serious challenges, the administrative law judges being still more responsive than the magistrates (court judges)[27].

The evolution in time of the authors’ position from the doctrine, and respectively of the jurisprudence of French jurisdictions, shows the difference between the reality and the present situation. It evolved from a initially conservative and protective position to the norms and to the French courts, to a more open position in present, connected to the *„res judicata force”* of the norms of the Convention and of the ECHR’S case laws.

France was among the original states signatories of the Convention on 4 November 1950, but has ratified it only later, on 3 May 1974. According to Art. 53 of the French Constitution from 1958, the Convention has been ratified by law (because it was an international treaty), and according to Art. 55, this treaty has, „after publication, pre-eminence over the laws”. In this way, *the Convention norms have been incorporated into the domestic law by the time of the publication in the Official Gazette* on May 4, 1974.

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[24] *Ibid*, p. 41.

[25] See J. Polakiewicz, *op. cit.*, p. 153.

[26] See: J. F. Renucci, *Droit européen des droits de l'homme*, LDGJ, Paris, 2001, p. 414; F.Sudre, *op. cit.*, p.154; A. Pellet, cited by A. Z. Drzemczewski, *op. cit.,* p. 81.

[27] J. F. Renucci, *op. cit.,* p. 414.

As a result, starting from the date of the publication of the „self-executing" provisions of the Convention, these have pre-eminence over the preceding or the following laws which may be in conflict with.

However, a seemingly simply rule, like the mentioned one, was for a very long time very difficult to implement by the administrative and ordinary jurisdictions.

The reasons in the literature were diverse.

An explanation was that the text of the Convention wouldn't impose a full incorporation into the domestic law and the extent of the receiver depends on the constitutional specificity of the contracting states, fact that is shown by the diversity of the national systems regarding this issue[28)].

Other reasons were connected with the competence of the various jurisdictions, like: the State Council, in the administrative field, which does not have competence to question the lawfulness of the legislative action; the Court of Cassation, in the civil and criminal law, that does not have the capacity to give solutions to a legislation that conflicts with the obligations assumed by the ratified treaties; the Constitutional Council, to whom the Art. 61 of the French Constitution confers the right to assess the constitutionality of the laws (before ratification/publication/putting into force) and that, in a decision from January 15, 1975, regarding the French abortion law, refused to incorporate the Convention into the constitutional criteria as required by Art. 61 of the Constitution[29)].

In other words, in spite of a seemingly simply rule which awards the Convention a status of domestic law, even over-legislative when it conflicts with the domestic norms, a long time, the courts were reserved when they had to verify or to define norms for this structure that was hierarchically entailed by the Constitution.

Even the President of the Court of Cassation, Pierre Truche, admitted in an article published in 1999[30)], that „finding a violation of a treaty results in a conviction for the state, but this does not allow a review of a decision taken by a French court".

For example, in the „Glaeser-Touvier" case, from June 30, 1976, the Court of Cassation considered itself incompetent in reading the provisions of the international treaties. As a motivation, the Court argued that if it would acted otherwise, it have had interfered with the „prerogatives of the government in the field of „international public order"[31)]. And J. F. Renucci underlined in his turn that, „in case of conflict between a provision of the European Convention and a principle with constitutional value, a French judge would claim his incompetence

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[28)] See J. F. Renucci, *op. cit.,* p. 413.

[29)] See A. Z. Drzemczewski, *op. cit.*, pp. 79-80.

[30)] P. Truche, *La France et l'application de la Convention Européenne des Droits de l'Homme*, in *The history of the Supreme Courts ...*, *op. cit*., p. 146.

[31)] A. Z. Drzemczewski, *op. cit.*, p. 75.

in assessing the constitutionality of the texts[32]. And this, even more because the Constitutional Council rejected, by its decision dating from January 15, 1975, the incorporation of the Convention in the so called „constitutionality block".

However, the developments of the ECHR's jurisprudence, of the acknowledgement in Europe of its *res judicata* force, as well as the rising collective pressure exerted by the Ministers' Committee couldn't avoid influencing certain developments of the French case laws, as well as of the literature.

In a *decision regarded as historical* in the French doctrine, *the Court of Cassation conceded the direct effect of the Convention on June 30, 1976.*

The pre-eminence of the European instrument is, at last, confirmed by the domestic jurisprudence, no matter if the domestic law has been adopted before or after the Convention, by *the Court of Cassation's decision* adopted by the Full Court in the *„Société des cafés Jacques Vabres"* case dating from May 24, 1975, as well as by the *decision of the State Council adopted on October 20, 1989 in the „Nocolo" case*[33]. In this last case, the State Council explicitly ruled that the national law adopted after an international convention has been approved, cannot hold the last one to come into effect.

The two decisions mentioned above established this way the constitutionality assessment of French jurisdictions. This way, for example, the Paris Tribunal prevented Art. L. 122-14.4 of the Labour Code to come into effect, the Code being adopted after the approval of the Convention, on the ground of inconsistence with Art. 6 and Art. 14 of the Convention (January 27, 1987)[34].

From a several decades practitioner's point of view, are interesting the findings from 1999 of the then President of the Court of Cassation, Pierre Truche, in a time of the domestic jurisprudence reconfiguration.

At that time, Mr. Truche first underlined that „the French judge, on the basis of the provisions of the treaty (the Convention – A/N –T.C.), may either discharge a domestic law, with the specifications of the law enforcement, or make the necessary additions".

Sometimes, underline Mr. Truche, „rather exceptionally than usually, the domestic provisions will be discharged in the name of defending human rights. Being so, the „arm's length" principle led to the cancellation of a stage of appeal for the Department of public prosecution, when this remedy was not affordable to the offender; the Superior Council of Magistrates, on the bases of Art. 6 par. 1 of the Convention, removed a provision of the statute that provided „closed-doors" disciplinary hearings for magistrates".

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[32] J. F. Renucci, *op. cit.,* p. 416.

[33] See J. F. Renucci, *op. cit.*, p. 416; see also F. Sudre, *Drept european şi internaţional al Drepturilor Omului*, Editura Polirom, Iaşi, p. 156.

[34] See J. F. Renucci, *op. cit.,* p. 416.

In the mean time, Mr. Truche reminds that „the judge may be in a situation to ask for procedural terms that are not covered by law. This was the case when France was convicted in Strasbourg for wire tapping, because the law did not have enough restrictive terms. As a result, the Court of Cassation imposed more precise rules that a following law was to confirm. The same Court, based on a ruling of the Strasbourg Court, reverted the ban on changing the marital status of a transsexual that has conducted a surgery, in the name of the right to private life[35)].

We widely mentioned the considerations of the then President of the Court of Cassation (1999), because they seemed extremely relevant to us for the qualitative changing of attitude of the domestic jurisdictions in relation to the role and the position of the Convention, as well as of the ECHR jurisprudence in the French law system.

Regarding the assessment of the consistence with the Convention's norms mentioned above, we underline the concern raised in the French doctrine by Fr. Sudre, according to which this assessment competes to avoid the constitutionality assessment and tend to transform ordinary players in „second degree judgers of the legislative norms constitutionality".

This happens especially when the ordinary judge decides that a law, judged by the Constitutional Council being consistent with the Constitution, can't be put into force on the basis of its „inconsistence with the Convention provisions"[36)].

Recently, *the previous position of the French courts to limit the ECHR decisions to a res judicata force gradually faded, leaving the place for the acknowledgement of an „almost explicit" judicial force of the case laws of the European judge, through the res judicata*[37)].

The development of the European jurisprudence causes a faster revival of the jurisprudence of the high French jurisdictions. Relating to the applicability of Art. 6 of the Convention to the public office, the State Council do not hesitate to follow the development of the ECHR jurisprudence[38)], changing in his turn the position taken on July 11, 2001, in the „Ministry of Defence *v.* Préaud" case, with a reviewed one, a position that, after 2007, was consistent with the new jurisprudence of the Strasbourg Court.

[35)] P. Truche, *op. cit.,* p. 147.

[36)] Fr. Sudre, *European and international Law of Human Rights, cit. above,* p. 156.

[37)] Fr. Sudre, *Les grands arrêts ..., cit. above*, p. 786.

[38)] The „Vilho Eskelinen *v.* Finlad" ruling from April 19, 2007 redesigns the criteria of the incorporation of the legal dispute over the public office into the application field of the civil part of Art. 6 par 1, as they were assessed initially by ECHR in the "Pellegrin *v.* France" case, dating from December 8, 1999.

The French jurisdictions no longer hesitate to refer to the ECHR jurisprudence on visas[39)], or to mention an article of the Convention „as red by the European Court”[40)].

More of that, when the France was convicted by the ECHR for a decision of the State Council[41)], the Council reviewed its jurisprudence.

Finally, the State Council forestall a conviction on the main issue and decides to change its jurisprudence[42)], following an admissibility ruling of the ECHR, from 2003[43)].

Concluding, we consider that the above mentions prove very clear, that at the present time, the recent developments of the French courts jurisprudence, as well as that of the domestic institutions, reinforced the provisions of Art. 55 of the French Constitution regarding the direct incorporation of the Convention into the domestic law system, the over-legislative force of the European norm, when this is in conflict with the domestic norm, as well as the admittance, even imperfect, of the *res judicata* force of the ECHR rulings[44)].

5. Germany

The literature frames Germany in the group of states with *dualistic tradition.* The internal ratification Act (the Act approving the Treaty) „converts” substantial rules of the Treaty and „enacts” them into the domestic legal order[45)].

The post-war Germany was among the „founding fathers” of the Convention, which was signed on 4 November 1950. The Convention was then approved in Parliament on 7 August 1952 in the form of a law („ratification Act”), and then published in the „Federal Legislation Gazette”.

The relationship between the international law norms and their application in the German legal system is defined mainly by the following provisions of the „Fundamental Law” of the Federal Republic of Germany:

„Article 25: the general rules of international public law are *part of the federal law*. They will *prevail in relation to laws and will directly create rights and obligations* for the inhabitants of the federal territory”[46)].

Please note that the approval of the ratification by the Parliament attired the form of a law [„the Treaty (...) is therefore approved”][47)] accordingly to Art. 59(2)

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39) The State Council ruling from February 24, 2006 in the „Association départamentale et intercommunale pour la protéction du lac de Sainte-Croix” case, that sees the ECHR decision in the „Mocil *v*. France” case from April 8, 2003.

40) Fr. Sudre, *Les grands arrêts ..., cit. above,* p. 786.

41) The „Draon *v*. France” and „Maurice *v*. France” decisions from October 5, 2005.

42) The State Council decision dating from December 30, 2003, in the „Beausoleil et Mme Richard” case.

43) The admissibility ruling of the ECHR in the „Richard-Dubarry *v*. France” case.

44) See also: Mihail Udroiu, Ovidiu Predescu, *op. cit.,* p. 986.

45) J. Polakiewicz, *op. cit.*, p. 153.

46) A. Z. Drzemczewski, *op. cit*., p. 107.

of the „Fundamental Law" (the Legislator „agrees to participate"). In this way, *the Convention acquires the status of federal law.*

The German doctrine seems divided in regards to *the exactly legal effect of the approval law. Most authors* adhere to the *doctrine of transformation* by which the rules of a treaty shall be transferred to national level by the approval law, with the result of enforceability against officials or individuals.

Other authors consider that the treaty as such is not transformed into domestic law, but that the approval law confers domestic applicability without the need to change the legal basis of those rules.

There are other authors, „more pessimistic"[48)], who consider that even in the case of Germany, which has its own „Human rights Act" established by the Constitution, there was the temptation to grant a limited role, the German courts preferring to refer in the first place, to the national human rights act.

Although in the doctrine continues to prevail the first opinion cited, *in practice* was confirmed that *„the German jurisdictions consider that this legislative approval implies an order addressed to national authorities and courts to give effect to the provisions of the treaty at national level"*[49)].

As a result, while Art. 59 of the „Fundamental Law" *granted the Constitution at least the status of federal law,* that means that the direct applicability of the provisions of this instrument has pre-eminence over all the regional laws, no matter if the laws were adopted before or after the incorporation of the Convention in the domestic law.

As based on the principle *„lex posterior derogat legi priori"*, its provisions shall prevail even on the previous federal law.

This was unequivocally decided by Federal Administrative Court in December 1955: „the Convention has the status of federal law. After its entry into force, the *Convention is applicable to all the procedures subsequently established* (A/N -T.C.), and also to all *cases pending* at that time"[50)].

As a result, after September 3, 1953, those provisions of the Convention considered by the German courts directly applicable („self executing"), i.e. those that provide substantial rights to individuals are part of German law and may be claimed before the courts.

The Convention *does not have* yet *the Constitutional law status* and cannot be claimed by the Constitutional appeal procedure in the Federal Constitutional Court. In its decision of 14 January 1960, the mentioned court decided that „an appeal to the Constitutional Court cannot be based on the Human Rights Convention (Article 90 of the Federal Constitutional Court Act ...)".

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47) *Ibid*, p. 108.

48) See D. Harris, M. O'Boyle, Warbrick, *cit. above*, p. 24.

49) B. Vatányi, H. Rupp, cited by A. Z. Drzemczewski in *op. cit.,* p. 108

50) The decision of the Federal Administrative Court of the Federal Republic of Germany, from December 15, 1955, cited by A. Z. Drzemczewski in *op. cit.*, p. 109.

A problem quite sensitive represented the *dilemma if the provisions of the Convention possess a higher rank status than the federal legislation.*

In a case law from 1971, the Federal Constitutional Court has ruled that it may be prepared to give the supremacy to certain „general rules of international law" well established, which are presumed to possess a higher hierarchical status than the federal laws. We can therefore assert that at least in front of the ordinary and administrative jurisdictions, certain norms of the Convention are part of these „general rules" of international law (under Article 25 of the „Fundamental Law") and can, therefore, prevail over federal legislation either this have been adopted before or after the Convention.

It is worth to mention, in this context, a fundamental ECHR case law from 1978, which strengthens the pre-eminence of certain provisions of the Convention over the federal laws that may be in conflict with.

The ruling in the „König *v.* Germany" case from 28 June 1978 represented, along with the „Engel *v.* the Netherlands" case (8 June 1976), the founding jurisprudence of the „autonomous notions" mechanism used by ECHR to ensure the indispensable uniformity of the Convention reading in the contracting states. In this case, ECHR focus on the meaning of the term „charge" which appears, in the civil law, in Art. 6 par.1 of the Convention. The European Court of Human Rights states that *this term must be understood in the sense in which it is described by the Convention and not by the domestic German norm.* Moreover, ECHR finally convicts Germany for violation of Art. 6 par. 1, respectively of the specific appellant's rights, regarded by the Strasbourg court as belonging to the private law, that means belonging to the civil law and not to the administrative law, as ruled by the German Administrative Tribunal under the domestic law.

In other words, the fundamental rights of the individual receive a uniform „reading" and understanding from the point of view of the European norm, based on the principle of „autonomous notions" and do not vary depending on the legal qualifications („reading") given by the national systems.

This ECHR jurisprudence had domestic consequences in Germany, when the decision has been enforced and confirmed the pre-eminence of certain (at least) provisions of the Convention over the German federal rules[51)].

In the light of the above mentioned, it is not a surprise that German jurisdictions often refers to the provisions of the Convention. Some Federal Supreme Court decisions since the 1970s can be cited in this regard.

For example, the Civil Chamber of the Supreme Court decided on 29 September 1977 that helping a person to escape from the German Democratic Republic was not contrary to „moral behavior", namely that a contract between parties having this object is not necessarily null and void. In support of its decision, the Court referred to Art. 2 par. 2 (the freedom of the person to leave

[51)] See Fr. Sudre*, Les grands arrêts ..., cit. above,* pp. 40-41.

another country, including his own country), and to Art. 3 par. 2 (the right to enter the territory of the state of which national he or she is) of Protocol 4 of the Convention.

Generally speaking, all German courts, regardless of the hierarchical order, are competent to establish violations of the German „Human Rights Act”, but also of the Convention. In this case, the doctrine cites, inter alia, the jurisprudence of the administrative courts in reading Art. 6 of the Convention, which they regard as relevant in theirs pending cases[52].

The German legal order recognizes the power of ECHR judgments.

From the point of view of the *res judicata force*, the Germany's convictions and their enforcement under the German law led to important reforms, including, for example, amending the criminal procedure code as a result of the decision in the „Wenhoff” case from 27 June 1968, or the modification of an extradition treaty concluded with the former German Democratic Republic in the „Bruckman” case[53].

We remind the recent well known ruling in the „Vogt *v.* Germany” case from 26 September 1995, which confirmed the *res judicata force* of the Strasbourg jurisprudence in relation to the German state and its institutions, including during the enforcement of a decision, even in a matter so difficult as that in this case (the reading of preserving of some fundamental rights provided by the democratic Constitution of Germany in the light of Article 10 (freedom of expression) and 11 (freedom of assembly and association) of the Convention)[54].

From the point of view of the *res judicata force*, we consider relevant, in our opinion, to remember the German Constitutional Court case law, which „admits the power of the European Court of Human Rights' decisions and requires the German courts their observance”[55].

It's no less true that regarding the direct effect of the jurisprudence of the Supreme Court and, respectively, the procedures of the enforcement of its decisions in the domestic German system, certain limits can be identified. Harris and O' Boyle noted, for instance, that following a conviction in the Strasbourg court, „in Spain, the courts may ... annul a decision, including a criminal conviction, while in Germany they cannot do such a thing”[56].

6. United Kingdom

The dualistic legal tradition of the domestic system frames the United Kingdom within the group of states parties to the Convention that have indirectly

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[52] See A. Z. Drzemczewski, *op. cit.*, p. 114.

[53] *Ibid.*

[54] See Fr. Sudre, *Les grands arrêts ..., cit. above,* pp. 638-640.

[55] F. Sudre, *Les grands arrêts ...* that cites the cases „B Verf G, 2BvR 1481/04 from 14 October 2004.

[56] D. Harris, M. O'Boyle, Varbrick, *op. cit.*, pp. 26-27.

incorporated (with delay) this instrument, after its transposition by a special law[57].

United Kingdom was among the countries that have signed the Convention on 4 November 1950, and was the first country which has ratified it, in March 1951.

According to Lord Irvine of Lairg[58], when the United Kingdom ratified the Convention, the general opinion was that the rights and freedoms guaranteed by the Convention were already fully protected, in their substance, by British law. It has not been considered necessary the „inclusion" of the Convention in the British law, or the adoption of new laws that should be in line with the Convention.

From the point of view of international obligation taken by the United Kingdom, once the Convention has been ratified, this was understandable. More so, as we previously reminded, the ECHR confirmed explicitly that there is no formal obligation, not even in the text of the Convention, to incorporate the mentioned instrument in the domestic legal system.

Or, according to British constitutional and legal practice well established, based on the concept of sovereignty of the Parliament, the provisions of the international agreements ratified by the United Kingdom does not have domestic effect unless they are assigned into domestic law by the Parliament[59]. As shown above, the adoption of such legislation was not considered necessary for a long time in relationship with the Convention, because the general opinion was that in all cases, the rights and freedoms guaranteed at European level were already provided by the domestic law. *The main consequence* was the following: *at that time, the Convention did not achieve the national status in the United Kingdom,* and individuals could not have claimed it before the British courts.

However, a close relationship between national and international law was maintained, on the basis of the principle of legal interpretation which states that „international law uses a part of the law of the country"[60]. This principle is supplemented by a rule of construction under which judiciary, while admitting the prevalence of the effect of the fundamental acts, meanwhile, reads the law in a way that avoids contradicting the treaties ratified by the United Kingdom.

Precisely by this rule, the courts were ready to refer to the Convention.

Therefore, although a long time the Convention was not considered as a source of domestic law, this instrument was used, however, as a „persuasive authority" when there was a shortcoming of the law, it was necessary to clarify an ambiguity or the courts had to assess a controversial law matter.

The „Waddington v. Miah" case was apparently the first cited case in which the British courts have relied effectively on the Convention in the reading of a

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[57] See Fr. Sudre, *European law ..., cit. above*, p. 154.

[58] Right Honorable Lord Irvine of Lairg, *The Application of the European Convention on Human Rights in Britain*, in *The history of the Supreme Courts ..., op. cit.,* p. 106.

[59] Lord McNair, *The law of the treaties*, Oxford University Press, 1961, p. 81.

[60] P. J. Duffy, cited by A. Z. Drzemczewski, *op. cit.*, p. 179.

law[61]. The cited case regarded the interpretation of certain provisions of the „Immigration Act" from 1971, consonant with the obligations arising from treaties.

To support the motivation that criminal law of the mentioned act could not act retrospective, Stephenson L. J., in the Appeal Court, and Lord Reid, in the House of Lords, have directly referred to Art. 7 of the Convention, which explicitly prohibits the retroactively apply of the criminal law.

The Act of incorporation of the Convention in the British legal system was adopted on 9 November 1998 by the Parliament, under the name „the Human Rights Act 1998"[62]. The incorporation was done in the English law, the Scottish law and the Northern Irish law, and gave the Convention an express effect in the British law, offered British citizens the right to claim the rights and freedoms guaranteed in the European instrument directly in the proceedings in British courts, and, as a result of the courts decisions, confirmed the possibility of the pre-eminence over the domestic rules, in the case of a conflict between them[63].

The incorporation of the Convention in the British legal system through the „Human Rights Act 1998" had *two main consequences*. The first says that if the primary British legislation, despite all efforts, cannot be interpreted as consistent with the Convention, in the examined cases, then the competent court may make a *„statement of incompatibility"*. This does not affect the validity of the legislation itself, but averts the Government that it has to amend the legislation. Secondly, a victim has a public right for a case for damages *v*. the institution (and not *v*. a private person) which action is not consistent with a right provided by the Convention.

„The Human Rights Act" has increased substantially the powers of the British courts in order to provide a remedy at national level for a violation of the Convention, with the result that both the complaints filed in Strasbourg *versus* Great Britain, and the convictions decreased in number[64]. This meets, in our opinion, the intention of the authors of the Convention and, respectively the principle of subsidiarity stated by this instrument, i.e. placing the first responsibility in safeguarding the fundamental rights and freedoms at the national level.

The impact of the Convention and of the jurisprudence of the Strasbourg Court on the British legal system was substantially, and it is expressed by the legislative and institutional reforms, adopted in some cases even before the adoption of the „Human Rights Act 1998".

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[61] See A. Z. Drzemczewski, *op. cit.,* p. 179.

[62] See D. Harris, M. O'Boyle, Varbrick, *op. cit*., p. 24; Fr. Sudre, *European law ..., cit. above,* p. 154.

[63] Lord Irvine of Lairg, *op. cit.,* pp. 105-107.

[64] See D. Harris, M. O'Boyle, Warbrick, *op. cit*., pp. 24-25.

We can remind here: the amendment of the detention regulations (a result of the „Golder" case[65)]), the improvement of immigration procedures (see „Alan and Khan" case[66)]); the suppression of some methods of interrogation of detainees accused of terrorism in Northern Ireland (see „Ireland *v.* Great Britain" case[67)]); modification of legislation relating to the prohibition of homosexual relations between consenting adults (the „Dudgeon" case[68)]); the implementation of the legislation that prohibits the judicial corporal punishment (the „Tyrer" case) etc.

7. Romania

Romania has granted, on the basis of *the provisions of the Constitution* and of *the monist system* which was adopted, *direct effect in the national legal system both to the Convention* and its protocols, as to *the ECHR jurisprudence.*

The Convention was incorporated through the *Law of ratification* No. 30/1994, published in Official Gazette No. 135 of 31 May 1944 (the Convention and the first 10 Protocols).

After the reading in conjunction of *Art. 11 and Art. 20 of the Romanian Constitution, republished,* results that the *rules of the mentioned instrument are part of the Romanian domestic law* and have legal *over-legislative* force and, under certain conditions, even *constitutional force. There is at least a case* in which we can read that, by the *force of legal practice* and that of *the ECHR's jurisprudence res judicata force*, the results at the Romanian constitutional and legislative level, indicate an *over-legislative legal force of certain provisions of the European Convention.*

7.1. The direct applicability of the European Convention

Article 11, par 1.2 of the Romanian Constitution, republished, stipulates that international treaties ratified by the Parliament, according to the law, are part of the domestic law. Therefore, even at the constitutional level it is expressly stipulated that the Convention may be used directly in the domestic legal system. The practice of Romanian institutions, to which we will refer later, showed that even in the Romanian legal system have been met the necessary conditions for the admission of the „self-executing" nature of the provisions of the Convention.

Taking into consideration the facts mentioned above, we may note that this instrument has a double nature, being both an *international law act* and a *domestic law act,* and, as a result, it had to be officially published in Romania, in order to

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[65)] The ruling in the „Golder *v.* Great Britain" case from 21 February 1975.

[66)] The complaint no. 2991/66 and the related report of the European Commission of Human Rights.

[67)] The ruling in the „Eire *v.* Great Britain" case, from January 10, 1978.

[68)] The ruling in the „Dudgeon *v.* Great Britain" case, from 22 October 1981.

enter into force at the domestic level, according to the treaties law that was in force at that time[69].

Some Romanian authors consider that international treaties on human rights are legal acts different from the ratification law. Though related in terms of legal status, *the treaty ratification law* and, respectively, *the international treaty* ratified by that law *remain two distinct legal acts*[70].

The arguments raised relate mainly with the fact that *the two legal acts entry into force at different times.* The ratification law should enter into force, according to constitutional rules, normally at the time of its official publication. While the international treaty on human rights would enter into force, both generally and for the Romanian State, according to the rules contained in its own text, which usually requires a minimum number of ratifications, as well as the formal deposit of the instruments of ratification. As a single legal act, the mentioned treaty cannot enter into force domestically before its entry into force on the international level.

Therefore, as a general rule, an international treaty on human rights shall enter into force, in the Romanian legal system, after the entry into force of the ratification law (after its official publication), namely on the date of entry into force of that treaty as stated by the international law.

According to the same opinion, in practice, there are some exceptions to the rule according to which international treaties on human rights and theirs ratification laws are different legal acts, one of them being the Convention.

The explanation comes from the fact that „the ratification in these cases (including the Convention) was made using *a special legal technique,* which remained an exception until now. Hereby, the ratification law contains a provision stating that the treaty ratified by it is an annex to the law, so it is actually part of the law. This means that the treaty under discussion is also part of the ratification law. As part of the ratification law, these international treaties that we referred to when we talked about exceptions (including the Convention), enter into force, exclusively at the domestic law level, at the same time when the law of ratification entry into force, and that is the date of the official publication. So, each time for Romania, the mentioned treaties entered into force first domestically, and then internationally"[71].

In our opinion, the above proviso proposes a formal approach and is *fully objectionable,* on the considerations we will expose in what follows.

1. Accepting the claim that we are dealing with two separate legal acts, one of domestic law (the act of ratification) and one of international law (the

[69] Art. 11 par 1 from Law No 4 of 1991, on the signing and ratification of treaties.

[70] See C. L. Popescu, *International defence of human rights,* All Beck Publishing House, 2000, p. 260.

[71] *Ibid*, p. 261.

international treaty), which have different times of entry into force, would lead to anomalous conclusions and effects.

Formally, it is true that a law shall enter into force after publication, and the international treaty after depositing the instrument of ratification with the depositary.

Actually, both the widely accepted doctrine and the practice, record *a single time of entry into force* for *a single legal act.*

Otherwise, it would mean, for example, that the ratification law, once published and enacted, begins producing consequences in the domestic system, while the treaty still has no effects, at least for a while. Actually, this law does not have any effect till the completion of the international proceedings, because it is a law that cannot be enforceable, i.e. a „form without content".

The only consequence that occurs with the approval of the Parliament of the ratification law of the treaty is the obligation for the State and its institutions, not to undertake anything which would contradict the purpose and the object of the treaty, till its entry into full force. This effect however is not the result of the law approved in Parliament, but of the treaty itself, by the provisions of the Vienna Convention on the law of treaties of 1969. I.e., this obligation comes from the time of signature of the treaty by the state legal agent.

2. The so-called exception, which would represent the special legal technique by which the Convention was ratified in Romania, is an objectionable proviso too.

Although this time we agree that we are talking about *a single legal act, we cannot accept the idea of two different times of entry into force of the same act, a time for the domestic legal system, and other for the international relations.*

Because the ratification law is a domestic legal act, which would incorporate the treaty in the annex, according to the proviso that the author objects, naturally fully complies with the principle of Roman law *„accesorium sequitur principale"*. I.e., *the law annex,* represented by the treaty (the Convention), *takes the same route as the main act and shall enter into force on the same date with the law and only once* (as the main act), *not twice, in two different times* (domestic and international). In addition, the entry into force of the treaty domestically, at the same time with the law (after publication), according to the proviso that we object, would involve that the mentioned treaty would have legal consequences, which is also contrary to the legal real situation.

3. The section „List of treaties" of the Treaty Office of the Council of Europe shows very clearly the time when Romania consented to become party to the Convention. The evidence shows that Romania has signed the Convention on 7 October 1993, has ratified it on 20 June 1994 (for the Treaty Office, the term „ratification" means „depositing the instrument of ratification to the depositary" – the office of the Secretary General of the Council of Europe), and for Romania, the treaty has entered into force at the same time – 20 June 1994. Actually, the official submission of the instrument of ratification of the Convention by Romania

occurred on 20 June 1994, as shows the register, the date on which the Convention entered into force and began to have effects for Romania, both in relations with other States parties, as well as domestically.

In *conclusion,* the ratification law and the Convention have to be regarded as *a whole.* The two parts (the text of the law and the text of the Convention) have different content, tasks and objectives but shall be completed in the form of a *single act.* The ratification law is intended, on the basis of the provisions of the Constitution, the law of treaties and the particularities of the monist system adopted by the Romanian legal system (at least in matters of human rights), to ensure the incorporation of the treaty into the domestic law, and that the treaty is binding for all the social, institutional or individual actors. While the treaty, once ratified (that means the completing of the procedure by depositing the instrument of ratification), ensures the validity in international relations with other States parties and, respectively, with the Strasbourg control mechanism. The legal act can have legal effects only if both elements have a contribution. Regarding the domestic ratification proceedings, culminating with the approval of the ratification law by the Romanian Parliament, this is not the expression of a distinct legal act, which has domestically effects after publication, but it is just a stage – „the expression of consent to become a party to the treaty”[72)] – of a broader procedure which result is that the State takes obligations under the Convention, procedure that begins with the signing of the treaty and shall end with the deposit of the instrument of ratification.

7.2. The Constitutional power of the Convention

According to Art. 20 par. 1 of the Romanian Constitution, republished, the constitutional provisions on the rights and freedoms of citizens shall be read and applied according to the Universal Declaration of Human Rights, covenants and other treaties to which Romania is a party.

It is inferred that the constitutional rule refers too to the Convention, included in the „treaties” chapter, and which had not yet been ratified by our country at the date of entry into force of the Constitution, in 1991.

Therefore, the Romanian Constitution, republished, states that the reading and application of constitutional provisions on human rights have to be made *according* to the international treaties on this matter, and that includes the Convention. We have to remember that the fundamental law includes its own „list” of fundamental rights and freedoms, and not as a separate „Human Rights Act”, as is the case in other states, but in the form of rules included in the Constitution. The provision contained in Art. 20 par 1 is binding and leads to the

[72)] See A. Năstase (coordinator), *Law No 590 of 2003 on treaty signing – with comments and footnotes*, Ministry of Foreign Affairs/Association of International Law and International Relations, Bucharest, 2004, p. 34.

conclusion that *the rules of the Convention which establish substantive rights and freedoms have constitutional value.* This is a valid statement as long as the norms of the Romanian Constitution themselves (the norms on human rights), have to obey, when they are read or applied, the provisions which possess constitutional legal force (this force being given by the Constitution itself).

7.3. The over-constitutional power of the Convention – as exception

In theory, is possible to regulate the same fundamental right through two rules, one by an international treaty, and the other by the Constitution, the latter with a more restrictive character. In this case, you might use the principle of the application of the more favorable norm, which is the rule of international law that, this way would have, in the Romanian constitutional system, an over-constitutional legal force.

This analysis, which may be found in the Romanian doctrine[73)], remains valid, in our opinion, in theory. We believe that the relevant constitutional provisions, which, inter alia, require the interpretation and application of constitutional norms themselves *consistent* with the Convention, eliminate in practice this possibility.

However, through a text analysis *„lato sensu”,* which probably does not meet at this time the support of the majority of the Romanians constitutional experts, we may take into consideration even the provisions of Art. 20 par 1. 2 which states that in the event of *inconsistency* between the treaties and the domestic laws, *including the Constitution,* international regulations prevail, and that would grant them over-constitutional force.

In this context, we can not understand why the treaty norm should be refer, in the case of a conflict, *only to the domestic laws* when the international norm is more favorable, and respectively to the *Constitution* and *to the domestic laws,* when the latter are more favorable. Beyond the apparent lack of constitutional logic of the text (*term legislative comparison is* with *variable geometry* within the same phrases), we see that the formula „provisions that contradict the Constitution”, used in Art. 11 par.1.3 differs from that used in Art. 20 par 1.2, namely „inconsistencies”.

The hypothesis of the conflict between the constitutional norm and the norm of the Convention is dealt with in Art. 11, which contains the solution (and that is the delaying of the ratification until the revision of the Constitution), while the *„inconsistency”,* which signifies a different degree of lack of harmony, of shades or different amplitudes of the norms, not necessarily conflicting, is settled by Art. 20 par. 2.

Introducing in the domestic system a norm of international law which contradicts (is conflicting with) the constitutional norm is not possible, due to *the safety clause in Art. 11 par 3,* so that the hypothesis provided by Art. 20 par 1. 2

[73)] See C.L. Popescu, *op. cit.*, pp. 263-264.

may take place, in theory, but in reality, it is possible and can grant an over-constitutional force to the Convention norm.

Beyond the theoretical reasoning, that can be true or not, we propose a concrete case analysis which, *as an exception, in practice, can really be taken as an example of a norm of the Convention with over-constitutional legal force.*

The Romanian Constitution of 1991 stated in Art. 23 par 4 that the preventive detention may be decided by a magistrate, to a maximum of 30 days, decision which may be contested in court.

The notion of the term „magistrate" included also, according to the legislation in force at that time and to the judicial practice, both the judge and the prosecutor. Please note that the ECHR jurisdiction unequivocally required that the magistrate who decides over the preventive detention should be independent and impartial, in the sense in which the *institution of the judge* is built up, and which *was not met by the prosecutor*, *according to the Romanian legislation in force at that time*.

Furthermore, the ECHR criticized this matter in the rulings in the „Vasilescu *v.* Romania" case[74)] of 22 May 1998, and particularly in the „Pantea *v.* Romania" case[75)] of 3 June 2003. In both cases Romania has been convicted by ECHR. In the „Pantea" case, the ECHR decision was based, inter alia, on Art. 5 par 1. 3 of the Convention, referring explicitly to the matters mentioned above, after confirming the jurisprudence in the „Vasilescu" case. In the latter case, the ruling is based, inter alia, on Art. 6 par 1.1, with a partially similar substantiation.

Both ECHR rulings have received the *res judicata force* status in relation with the Romanian institutions, and have generated significant reactions from Romanian institutions and scientists, as well as among practitioners in Romania. This strong impact have led, including from the point of view of the obligation for the enforcement of the conviction rulings, to a *constitutional reform*, the Romanian Parliament, acting as a Constitutional Convention, and later the Romanian citizens, by referendum, consecrating in the new text adopted in 2003, the amendment of Art. 23 par 1. 4 of the Constitution, in a European form that was agreed, namely that *only the judge have the power to decide on the preventive detention.*

We may say therefore that *the legal force of Art. 5 par 3 of the Convention, and respectively the res judicata force of the ECHR jurisprudence, both with direct applicability in the Romanian legal system, prevailed over the Romanian constitutional norm* (the text of Art. 23, par 4 of the Romanian Constitution from 1991).

The conclusion which might come off as a result of this analysis is that, exceptionally, there may be norms of the Convention which possess over-constitutional force.

[74)] Par. 41 of the „Vasilescu" ruling.

[75)] Par. 238-239 of the „Pantea" ruling.

We mention that this possibility is rejected in general, in the Romanian doctrine, Professor Ioan Muraru stating that „in the Romanian legal system, the provisions of the international treaties cannot prevail, in terms of their legal force, over the provisions of the Constitution”[76)].

7.4. The over-legislative force

The Romanian Constitution, republished, stipulates, on the one hand, that the ratified treaties are part of the domestic law (so does the Convention too), and, on the other hand, that in case of inconsistency with the domestic norms, the Convention norms prevails. A possibly more favorable domestic law is an exception, and that is on the basis of the principle of subsidiarity.

Therefore, the rules of the Convention possess an *over-legislative force.*

A possible case law that would be in favor of the domestic norm it would be an unnatural solution, since even the Constitution, in Art. 11 par. 1.1, force the Romanian institutions to meet exactly and in good faith the provisions of the treaties to which Romania is party (including those in the field of human rights) and which are part of the domestic law.

The Romanian doctrine also mentions that the international norms prevail in relation to the laws adopted before, as well as after the entry into force of the international treaty (i.e. the European Convention).

7.5. The hypothesis of the conflict with the constitutional norm

The thorny problem of the conflict between the norm of the international law, including that in the human rights field, and the constitutional norm is one mentioned in the Romanian doctrine.

Professor Ioan Muraru, after recalling some constitutional solutions from France and Spain, calls upon the supremacy of the Romanian Constitution (Art. 1, par. 5) to argue that it is impossible to incorporate in the domestic law an international treaty, by ratification, which would contain provisions contrary to the Constitution. As we mentioned before, Professor Muraru considers that the constitutional norms prevails over the international treaty norms, the only possible way out being a revision of the Constitution before the treaty is ratified[77)].

Professor Liviu Popescu stands on the same side, by stating that „in the conflict between the constitutional and the international norm, the first will prevail, even if it is more restrictive”[78)].

In our opinion, the mentioned conflict is possible, but in practice it is hard to come across with such a case. And that because the international treaties not ratified by Romania have a safety clause provided by Art. 11 par 1. 3 of the

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[76)] I. Muraru, *Constitutional Law and political institutions,* ACTAMI Publishing House, Bucharest, 1997, p. 205.

[77)] *Ibid,* pp. 204-205.

[78)] C. L. Popescu, *op. cit.,* pp. 264-265.

Constitution, which make impossible to ratify a conflicting norm of such a treaty, with the constitutional norm, before the revision of the Constitution.

In the case of the treaties already ratified (as is the case of the Convention), the procedure for ratification always supposed a prior assessment of the accordance with the Constitution, to meet the requirements of Art. 11 par. 3, as well as those of Art. 20 of the Constitution.

In some cases this procedure resulted in the formulation of reservations or statements, which was not the case (for the substantive rights and freedoms) with the ratification of the Convention.

As on the one hand, Art. 20 par 1.1 of the Constitution grants constitutional power to the Convention, and on the other hand, there is no explicit provision which may grant prevalence to the European norm *in the case of a conflict* with the constitutional norm, we rather agree with the more general position expressed by the cited authors in the Romanian doctrine. This does not mean that situations like the one previously mentioned regarding Art. 5 par. 1.3 of the Convention can no longer arise, as a result of the *res judicata force* of the ECHR rulings. In such a case, a reaction at the institutional and the legislative level of the Romanian legal system, as well as of the constitutional system, would again become necessary.

7.6. The position in the domestic law of the European Court of Human Rights jurisprudence

The European system of protection of human rights is a mixed system, in terms of its sources. It combines elements of the continental system, based on the written law (the Convention), with the elements based on the judicial precedent (the ECHR jurisprudence)

The Convention and its protocols may be correctly red and applied only by referring to the jurisprudence of the Strasbourg Court. This leads to the formation of a so called „Convention block”[79)] agreed as such and in the Romanian legal system.

As a result, in the Romanian domestic law, the ECHR jurisprudence has the same position with the provisions of the Convention and, therefore, is directly applicable and possesses *constitutional force* as well as over-legislative force. As an exception, the previous comments regarding the over-constitutional force of some of the Convention norms shall remain valid even in relation to some ECHR rulings[80)].

This way, the Romanian domestic law system has agreed the *res judicata force* of the ECHR rulings.

[79)] *Ibid,* p. 270.

[80)] See „Vasilescu” and „Petra” rulings, that led to the amendment of Art. 23 par 4 of the Constitution.

The Constitutional Court rulings proof this, as well as the hundreds of rulings of the Romanian courts, which had been based both on the European Convention norms, and on the jurisprudence of the Strasbourg Court, including some cases in which Romania was not a party.

For the first point we remind, as an example, the Ruling No. 486 adopted by the Constitutional Court on 2 December 1997 relating to the former Art. 278 of the Criminal Procedure Code, which was red by the Constitutional Court according to the norms and to the jurisprudence of the Strasbourg Court. This ruling became a relevant one, even during the assessment procedure of putting into force of the „Vasilescu" ruling by the Committee of Ministers of the Council of Europe.

For the second point we mention only a few relevant examples, in the author's opinion:

– Civil Ruling No. 238/A/2010 issued by the Court of Hunedoara - Civil Section, on 13 May 2010. In a case that referred to the personal relations between parent and child as a fundamental element of the family life, the Court has based its decision on the provisions of Art. 8 of the European Convention and on the jurisprudence in the following cases: „Elsholz *v.* Germany" of 13 July 2000, „Ignaccolo – Zenide *v.* Romania" of 25 January 2000 and „Maire *v.* Portugal" of 26 June 2003;

– Civil Ruling No. 44 issued by the Bucharest Court of Appeal – the Third Civil, minors and family cases Section, from 18 January 2010. In a case that involves matters of private and family life, as well as of the procedure of establishing fatherhood, the Court based its decision on a complex analysis, calling upon Art. 8 of the Convention, but also the European Court ruling in the „Mikulic *v.* Croatia" case from February 7, 2002;

– The Court resolution issued by the Bucharest Tribunal, Criminal Second Section on March 11, 2009, in the Case No. 8786/3/2009. The Court based its decision relative to preventive detention/travel ban, on the provisions of Art. 5 par.1c of the Convention, on Art. 2 of Protocol 4 of the Convention, as well as on ECHR jurisprudence in the „Wemhoff *v.* Germany" case;

– The Court resolution issued in Case No. 92 63/3/2009, by the Bucharest Tribunal, Second Criminal Section, on 17 March 2009. The Court based its decision on the provisions of Art. 2 of the Protocol 4 of the Convention;

– The Civil Decision No. 6/FM issued on 23 January 2009 by the Constanța Court of Appeal, Civil Section for minors and family cases, and for labour conflicts and social security cases.

The Court based its decision on the provisions of Art. 8 of the Convention, and on the ECHR jurisprudence in the „Ignaccolo – Zenide *v.* Romania" case and in the „Laforgue *v.* Romania" case, from 13 July 2006.

Conclusion. Taking into account the above mentioned, we can affirm that the incorporation into the domestic legal system of the Convention, the direct effect of the Convention norms, and the exhibit of *res judicata force* of the ECHR jurisprudence, have become for many years an undeniable reality in Romania.

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