The Authority of the European Convention on Human Rights and the European Court's Jurisprudence
The Case of Romania

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The Romanian domestic law system has agreed to the res judicata force of the European Court rulings, as well as to the res interpretata force of the Strasbourg Court jurisprudence.

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The provisions of the European Convention on Human Rights have had considerable effects on the national law systems of the Member sates. 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. In recent years, the overall conclusion to the European doctrine 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 Court of Human Rights decisions are compulsory in international law for the Member States, but the Convention provisions do not formally impose to national courts to give them "direct effect." In this con-

text, we may say that, generally speaking, a solution to this matter is up to the Contracting States national law, which implement the decisions taken in Strasbourg according to domestic judicial rules.

The main conclusion of the European doctrine in this regard is that at this time the European Convention on Human Rights has been almost fully incorporated, one way or another, in the domestic legal order of all Member States.

The concrete manner 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 of law. This implies a diversity of solutions in the Contracting States, a fact that does not contradict but rather consolidates the general conclusion which states that the European instrument in Strasbourg influences the national law systems on human and fundamental rights. The evolutions of the last twenty years shows very clearly that in many national cases the conservative doctrine and a more prudent practice are slowly abandoned in favor of a more open attitude on the 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 illustrate the thesis above by showing the specificity of Romania's case.

Romania has granted, on the basis of the provisions of the Constitution and of the monist system which it adopted, direct effect in the national legal system both to the European Convention on Human Rights and its protocols, and to the European Court of Human Rights jurisprudence. The Convention was incorporated through the Law of ratification no. 30/1994, published in Official Journal 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, it 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 the author's opinion, in which we can read that, by the force of legal practice and of the "res judicata force" of the European Court's jurisprudence, the results at the Romanian constitutional and legislative level indicate an over-constitutional legal force of certain provisions of the European Convention.

The Direct Applicability of the European Convention

ART. 11 par. 1.2 of the Romanian Constitution, republished, stipulates that international treaties ratified by the Parliament, according to the law, are part of domestic law. Therefore, even at the constitutional level it is expressly stipulated that the European 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 the necessary conditions for the admission of the "self-executing" nature of the provisions of the Convention have been met.

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 enter into force at the domestic level, according to the Law of the treaties in force at that time.[1]

Some Romanian authors consider that international treaties on human rights are legal acts different from the law of ratification. 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.[2]

The arguments raised relate mainly to the fact that the two legal acts entered into force at different times. The ratification law should enter into force, according to constitutional rules, normally at the time of its official publication. 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 European Convention on Human Rights. The explanation comes from the fact that

> *the ratification in these cases (including the European 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 European 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, for Romania, each time the mentioned treaties entered into force first domestically, and then internationally.[3]

In our opinion, the above thesis proposes a formal approach and is fully objectionable, for the following reasons:

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 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 by Parliament of the ratification law of the treaty is the obligation for the state and its institutions to undertake no action which would contradict the purpose and the object of the treaty, until its full entry into 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 the treaties of 1969. More precisely, this obligation comes from the time of the signing of the treaty by the state legal agent.

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

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 another for the international relations.

Because the ratification law is a domestic legal act, which would incorporate the treaty in the annex, according to the thesis that the author objects to, naturally it fully complies with the principle of Roman law "accesorium sequitur

principale." I.e., the law annex, represented by the treaty (the European 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, at 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 thesis that we object to, 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 European Convention on Human Rights. The evidence shows that Romania signed the Convention on 7 October 1993, 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 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 the register shows, the date when 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 European Convention on Human Rights have to be regarded as a whole. The two parts (the text of the law and the text of the Convention) have a 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 within domestic law, and the treaty is binding for all social, institutional or individual actors. While the treaty, once ratified (that means the completion 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 domestic effects after publication, but it is just a stage—"the expression of consent to become a party to the treaty"[4]—of a broader procedure whereby the State undertakes obligations under the Convention, a procedure that begins with the signing of the treaty and shall end with depositing the instrument of ratification.

The Constitutional Power of the European Convention on Human Rights

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, conventions and other treaties to which Romania is a party.

It is inferred that the constitutional rule also refers 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 European 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 conclusion that *the rules of the European Convention which establish substantive rights and freedoms have constitutional value*. This is a valid statement as long as the norms on human rights of the Romanian Constitution themselves have comply, when they are read or applied, with the provisions of the European Convention enjoys constitutional legal force given by the Constitution itself.

The Over-constitutional Power of the European Convention As an 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, we might use the principle of the application of the more favorable norm, which is the rule of international law. This way would have, in the Romanian constitutional system, an over-constitutional legal force.

This analysis, which may be found in the Romanian doctrine,[5] remains valid only in theory, in our opinion. We believe that the relevant constitutional provisions which, inter alia, require the interpretation and application of constitutional norms themselves consistent with the European Convention, in practice eliminate this possibility.

However, through a text analysis "lato sensu," which probably does not meet at this time the support of the majority of the Romanian constitutional authors,

we may take into consideration even the provisions of Art. 20 par. 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 cannot understand why the treaty norm should 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 (the legislative comparison term has variable geometry within the same phrases), we see that the formula "provisions that contradict the Constitution," used in Art. 11 par. 3, differs from that used in Art. 20 par. 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 (the postponement of the ratification until the revision of the Constitution), while the "inconsistency," which signifies a different degree of lack of harmony, of nuances 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. 2 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, which 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 its Art. 23 par. 4 that preventive detention may be decided by a magistrate, to a maximum of 30 days, a decision which may be contested in court.

The term "magistrate" included, according to the legislation in force at that time and to the judicial practice, both the judge and the prosecutor. Please note that the European Court constant 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 set up, a requirement which was not met by the prosecutor, according to the Romanian legislation in force at that time.

Furthermore, the European Court criticized this matter in the rulings in the Vasilescu v. Romania case[6] of 22 May 1998, and particularly in the Pantea v. Romania case[7] of 3 June 2003. In both cases Romania was convicted by the European Court. In the Pantea case, the decision was based, inter alia, on Art. 5 par. 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, with a partially similar substantiation.

Both European Court rulings received the res judicata force status in relation with the Romanian institutions, and have generated significant reactions from the Romanian institutions and scientists, as well as among practitioners in Romania. This strong impact 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, consecrated in the new text adopted in 2003 the amendment of Art. 23 par. 4 of the Constitution, in a European form that was agreed upon, namely that only the judges have the power to decide on preventive detention.

We may say therefore that the legal force of Art. 5 par. 3 of the European Convention on Human Rights, and respectively the res judicata force of the European Court 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 to this analysis is that, exceptionally, there may be norms of the European Convention which possess *over-constitutional force*.

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."[8]

The Over-legislative Force

The Romanian Constitution, republished, stipulates, on the one hand, that the ratified treaties are part of domestic law (so the European Convention on Human Rights is also part of the domestic law), 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, on the basis of the principle of subsidiarity.

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

A possible case law that would be in favor of the domestic norm would be an unnatural solution, since even the Constitution, in Art. 11 par. 1, forces the Romanian institutions to respect exactly and in good faith the provisions of the treaties Romania is party to (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 in the human rights field prevail in relation to the laws adopted in this domain before, as well as after the entry into force of the international treaty (i.e. the European Convention).

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 has been 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 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.[9] Professor Liviu Popescu is of the same opinion, stating that "in the conflict between the constitutional and the international norm, the first will prevail, even if it is more restrictive."[10]

In our opinion, the mentioned conflict is possible, but in practice it is hard to come across such a case, because the international treaties not ratified by Romania have a safety clause provided by Art. 11 par. 3 of the Constitution, which makes it impossible to ratify a norm of such a treaty conflicting 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 conformity 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 of the Constitution grants constitutional power to the European 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 abovementioned authors in the Romanian doctrine. This does not mean that situations like the one previously mentioned regarding Art. 5 par. 3 of the European Convention can no longer arise, as a result of the res judicata force of the European Court 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.

The Position in the Domestic Law of the European Court of Human Rights Jurisprudence

We mentioned above that 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 European Convention), with the elements based on the judicial precedent (the European Court jurisprudence).

The Convention and its protocols may be correctly read and applied only by referring to the jurisprudence of the Strasbourg Court. This leads to the formation of a so called "Convention block"[11] agreed as such even in the Romanian legal system.

As a result, in the Romanian domestic law, the European Court jurisprudence has the same position as 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 Court rulings.[12] This way, the Romanian domestic law system has agreed to the res judicata force of the European Court rulings, as well as to the res interpretata force of the Strasbourg Court jurisprudence.

The Constitutional Court rulings prove this, as well as the hundreds of rulings of the Romanian courts, which have 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 mention, 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 read 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 examples deemed relevant 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 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 Section for minors and family cases, of 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 on the European Court ruling in the Mikulic v. Croatia case of 7 February 2002;

• The Court resolution issued by the Bucharest Tribunal, Second Criminal Section on 11 March 2009, in the Case no. 8786/3/2009. The Court based its decision relative to a 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 European Court 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 European Convention;

• The Civil Decision no. 6/FM issued on 23 January 2009 by the Constanţa Court of Appeal, Civil Section for minors and family cases, and for labor conflicts and social security cases.

The Court based its decision on the provisions of Art. 8 of the Convention, and on the European Court jurisprudence in the Ignaccolo-Zenide v. Romania case and in the Laforgue v. Romania case of 13 July 2006.

Taking into account the abovementioned elements, we can conclude 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/res interpretata force of the European Court on Human Rights jurisprudence have become, for many years, an undeniable reality in Romania.

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Notes

1. Art. 11 par. 1 of Law no. 4 of 1991, on the signing and ratification of treaties.
2. See C. L. Popescu, *Protecţia internaţională a drepturilor omului: surse, instituţii, proceduri* (Bucharest: All Beck, 2000), 260.
3. Ibid., 261.

4. See A. Năstase (ed.), B. Aurescu, and I. Păunescu (co-authors), *Legea nr. 590/2003 privind tratatele—comentată şi adnotată* (Bucharest: Coresi, 2004), 34.
5. See Popescu, 263–264.
6. Par. 41 of the Vasilescu ruling.
7. Par. 238–239 of the Pantea ruling.
8. See I. Muraru, *Drept constituţional şi instituţii politice*, 6th edition, vol. 1 (Bucharest: ACTAMI, 1995), 205.
9. Ibid., 204–205.
10. Popescu, 264–265.
11. Ibid., 270.
12. See the Vasilescu and Petra rulings that led to the amendment of Art. 23 par. 4 of the Constitution.

Abstract

The Authority of the European Convention on Human Rights and the European Court's Jurisprudence: The Case of Romania

The present study emphasizes the role and the authority of the European Convention on Human Rights upon the legal domestic order within the States Parties to this international instrument. Today is almost generally considered that both the text of the Convention and the jurisprudence of the European Court of Human Rights are incorporated in the national legal systems of the European states and have a legally binding force. The study presents the specific situation of Romania, where the decisions of the national Courts of Justice in the domain of human rights are based on the case law of the European Court. Also, the legal authority of the European Convention is above the common legislation, as it has the same power as the specific norms of the Constitution and may have, in exceptional cases, even a stronger legal power than the Constitution.

Keywords

legal authority, European Convention on Human Rights, European Court's decisions, Romania