

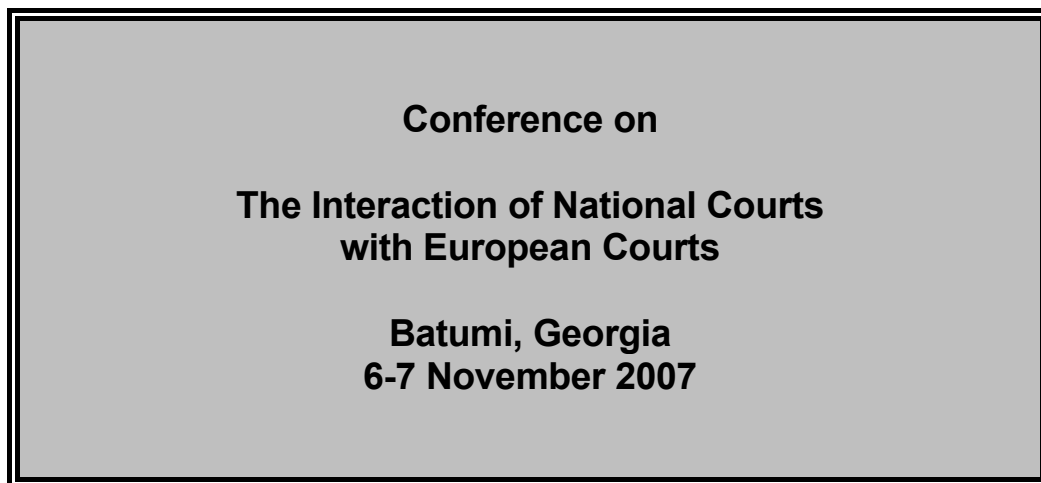


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in co-operation with  
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**The impact of the decisions of the European Court of Human Rights  
over the jurisprudence of the Constitutional Court of Romania**

by

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After the fall of the communist regime in December 1989, Romania entered a new era, in which the values of democracy represent an essential coordinate of the State. After the dramatic experience of almost 50 years of totalitarian regime, in which human dignity and basic human rights and freedoms were concepts denied by the communist authorities, in its first democratic Constitution from 1991, Romania declared its character of "democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values (...) and shall be guaranteed".

In this context, 4 years after the Revolution, Romania has reached a level of political maturity, which entitled it to express to a superior level the attachment towards these values and to offer its citizens the right to benefit of the European mechanism of protection of fundamental rights and freedoms. Therefore, in 1993 Romania became member of the Council of Europe, and in 1994 it ratified<sup>1</sup> the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, acknowledging also the mandatory jurisdiction of the European Court of Human Rights.

Through the effect of the rule<sup>2</sup> comprised in the Constitution, which establish that "Once ratified by Parliament, subject to the law, treaties shall be part of domestic law", the provision of the mentioned Convention have been incorporated in the Romanian legislation. Moreover, the wording of the texts of the Constitution of Romania that settle the human rights' guarantees is similar with that of the European Convention, the catalogue of all rights enshrined by Convention being listed also in the Basic Law of Romania. In order to stress the necessity of respecting human rights the Constitution provides<sup>3</sup> that "(...) where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favorable provisions".

As sole authority of constitutional jurisdiction in Romania, the Constitutional Court fulfils an essential role in the system of protection of human rights, inclusively by underlining the importance of the provisions of the European Convention and of the interpretations rendered in their respect by the Court of Strasbourg.

From this perspective, the Constitutional Court examines the concordance of the legal text submitted to its review both with the provisions of the Constitution of Romania, and with those of the Convention for the Protection of Human Rights and Fundamental Freedoms. In one of its decisions, the Court stated that the reference to any of texts of the Convention is subject to the same regime as that applicable to the references to the provisions of the Basic Law<sup>4</sup>, when human rights violations are involved.

I think it is interesting to mention, in this context, that, in Romania, the Constitutional Court was the first court, which invoked, as grounds for its decisions, the principles arising from the case law of the European Court of Human Rights, and along the years, the grounding of its decisions on the ECHR practice became a routine.

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<sup>1</sup> Law no.30/1994, published in the Official Gazette of Romania, Part I, no.135 of May 31<sup>st</sup> 1994

<sup>2</sup> Article 11 paragraph (2) of the Constitution of Romania

<sup>3</sup> Article 20 paragraph (2) of the Constitution

<sup>4</sup> Decision no.146 of July 14<sup>th</sup> 2000, published in the Official Gazette of Romania, Part I, no.566 of November 15<sup>th</sup> 2000

As the decisions rendered within the constitutional review are generally binding, the contribution of the Constitutional Court in the process of effective application of the provisions of the Convention and of the ECHR case law by judges from other courts, as well as by law practitioners, is quite obvious.

Through its decisions rendered while settling the objections of unconstitutionality of laws and government ordinances, the Constitutional Court has verified the constitutionality of such legal texts not only in relation with the provisions of the Constitution of Romania, but also in relation with the provisions of the European Convention, as these were interpreted by the Court of Strasbourg. Moreover, the case law of the European Court of Human Rights constitutes a thesaurus of valuable judgments taken into account by the Constitutional Court each time it exercises the constitutional review.

For example, at the beginning of this year, called to adjudicate on the constitutionality of a legal text which has decriminalized the insult and the calumny, the Court held<sup>5</sup> that, besides the principle of free access to court and the principle of equal rights enshrined by the Constitution of Romania, this legal text also infringes the provisions of Article 6 and of Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the right to a fair trial and the right to an effective remedy. By repealing the texts of the Criminal Code, which used to incriminate insult and calumny, human dignity, honor and reputation of persons do not longer benefit of any other form of real and adequate legal protection. The Constitutional Court has also held that free access to court does not mean only the possibility to address the courts of law, but also to benefit of adequate means for the protection of the right breached, according to the gravity and social danger of the occurred damage. In the same respect, the European Court of Human Rights has constantly stated in its case-law<sup>6</sup>, that the essential effect of the provision comprised under Article 13 of the Convention consists in imposing the existence of a national remedy which may authorize the domestic court to offer an "*adequate repair*", while the remedy must be "*effective*" both within the legal regulations, and in the practice of application thereof.

On the same issue of observance of the right to an effective remedy, the Constitutional Court was called to adjudicate as concerns the sanction of nullity established in case of non-fulfillment of certain formal requirements concerning the identification data of the parties within the application for appeal, without any possibility to remediate the omission. The Constitutional Court held<sup>7</sup> that the appellant is deprived, without reasonable justification, of his/her right to make use of this avenue of appeal. As grounds for declaring the unconstitutionality of these provisions, the Constitutional Court invoked the case-law<sup>8</sup> of the European Court of Human Rights which recalled that the Convention is intended to guarantee "not rights that are theoretical or illusory but rights that are practical and effective".

Moreover, the Constitutional Court found that the Court of Strasbourg had adjudicated in a case resembling the case subject to constitutional review. The ECHR stated<sup>9</sup> that there is a

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<sup>5</sup> Decision no.62 of January 18<sup>th</sup> 2007, published in the Official Gazette of Romania, Part I, no.104 of February 12<sup>th</sup> 2007

<sup>6</sup> for example in the cases *Aydin v. Turkey* from 1997 or *Conka v. Belgium* from 2002

<sup>7</sup> Decision no.176 of March 24<sup>th</sup> 2005, published in the Official Gazette of Romania, Part I, no.356 of April 27<sup>th</sup> 2005

<sup>8</sup> case of *Airey v. Ireland*, 1979, and case of *Artico v. Italy*, 1980

<sup>9</sup> Through the Decision of November 9<sup>th</sup> 2004, rendered in the case *Saez Maeso v. Spain*

breach of Article 6 paragraph 1 of the Convention, where the norms concerning the formalities to be observed for the initiation of an appeal and the application thereof deter the litigant from using the available avenues of appeal. In grounding its decision the ECHR has mentioned that, although the access to court is not an absolute right, being susceptible to limitations, especially as concerns the conditions of admissibility of an avenue of appeal, nevertheless, these limitations must not restrict the free access of a litigant in such manner or up to such point as to infringe the very essence of that right.

Likewise, in its jurisprudence, the Constitutional Court of Romania has assumed the principles established on praetorian way by the Court of Strasbourg concerning the requirements of precisions, clarity and foreseeability, which a legal text must meet. Relevant in this meaning is a decision rendered last year<sup>10</sup>, on the issue of constitutionality of a legal text according to which the ruling pronounced in first instance by the court of contentious administrative can be challenged by means of appeal, within 15 days as from pronouncement or as from communication, without stipulating in which conditions and for which of the participants to trial the appeal deadline is related to one of the two procedural moments. The Constitutional Court has held that the principle of the free access to justice implies, through other things, the adoption by legislator of certain clear procedural norms, prescribing with precision the conditions and the terms in which the litigants may exercise their procedural rights, inclusively those referring to the avenues of appeal against the rulings pronounced by the courts of law.

While declaring the unconstitutionality of the legal text subject to review, the Constitutional Court invoked again the case-law of the European Court of Human Rights, which, for example, in the case of *Rotaru v. Romania, 2000*, reiterated that „a rule is «foreseeable» if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct”, and in the case *Sunday Times v. United Kingdom, 1979*, decided that „[...] the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case and he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Shortly, the law must be, in the same time, accessible and foreseeable.”

On the other hand, as concerns the observance of the criterion on the quality of the law in the law-making process, the Constitutional Court noticed<sup>11</sup> that the Court of Strasbourg has stated that the foreseeability of the consequences which a given action may entail need not be foreseeable with absolute certainty, whilst certainty is highly desirable, it may bring in its train excessive rigidity of the law<sup>12</sup>.

The jurisprudence of the Constitutional Court of Romania comprises a multitude of decisions concerning equal rights, embodied both in the Constitution of Romania<sup>13</sup>, and in the European Convention under Article 14 on the prohibition of discrimination. In each case the Court considered the case-law of the European Court of Human Rights, which stated as principle value, that the principle of equality before the law implies the institution of an equal treatment for situations which, according to the objective pursued, are not different, and a

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<sup>10</sup> Decision no.189 of March 2<sup>nd</sup> 2007, published in the Official Gazette of Romania, Part I, no.307 of April 5<sup>th</sup> 2007

<sup>11</sup> Decision no.227 of March 7<sup>th</sup> 2006, published in the Official Gazette of Romania, Part I, no.311 of April 6<sup>th</sup> 2006

<sup>12</sup> case of *Reckvényi v. Hungary, 1999*

<sup>13</sup> Article 16 paragraph (1)

differential treatment cannot be only the expression of the legislator's exclusive opinion, such treatment must be rationally and objectively justified.

Thus, by way of example, while settling a case<sup>14</sup> referring to the challenge of constitutionality of a legal text providing that a person who meets the requirements provided by the law for the admission in the lawyer's profession may request such admission at least 5 years prior to reaching the standard retirement age, the Constitutional Court held that this age criterion cannot represent an objective and rational justification as concerns the differential legal treatment to which a certain category of persons is submitted. I should mention that the Constitution of Romania does not include within the non-discrimination criteria also the age. It only mentions<sup>15</sup> race, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, wealth, or social origin. Nevertheless, the Constitutional Court applied Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms according to which enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination, which may result from "any other situation" besides the non-discrimination criteria expressly enumerated.

In another case<sup>16</sup>, the Court held the unconstitutionality of a legal text concerning active military staff statute. The text was granting the paid family leave, until the child reaches the age of 2 years, only to women who belong to the active military staff. Unlike all the other categories of employees, men who were active militaries could not benefit of these rights and, therefore, they were discriminated both in relation with the civilians and with the women who were active militaries. Before reaching this conclusion, the Constitutional Court analyzed the legal provision also in relation with the equal legal treatment, which the Romanian State must secure both for men and women. In this respect, it considered relevant the solution pronounced by the European Court of Human Rights<sup>17</sup>, when it stated that the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention. Moreover, the Court of Strasbourg has underlined the necessity of an objective and rational justification for the institution of such treatment, requirements which, in this case were not fulfilled<sup>18</sup>.

In two decisions<sup>19</sup> with great impact in the Romanian legal environment, the Constitutional Court held that there is no objective and reasonable justification as concerns the limitation on the right of the injured party, of the civil party and of the party bearing the civil responsibility to exercise the ordinary avenues of appeal, in what concerns the criminal issues.

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<sup>14</sup> Decision no.513 of June 20<sup>th</sup> 2006, published in the Official Gazette of Romania, Part I, no.598 of July 11<sup>th</sup> 2006

<sup>15</sup> article 4 paragraph 2

<sup>16</sup> Decision no.90 of February 10<sup>th</sup> 2005, published in the Official Gazette of Romania, Part I, no.245 of March 24<sup>th</sup> 2005

<sup>17</sup> in the case of *Schuler-Zraggen v. Switzerland* (1993)

<sup>18</sup> While applying the non-discrimination principle provided under Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Court of Strasbourg established that any difference of treatment made by State between persons in similar situations must be objectively and reasonably justified (for example, in the case of *Markx v. Belgium*, 1979).

<sup>19</sup> Decision no.100 of March 9<sup>th</sup> 2004, published in the Official Gazette of Romania, Part I, no.261 of March 24<sup>th</sup> 2004 and Decision no.482 of November 9<sup>th</sup> 2004, published in the Official Gazette of Romania, Part I, no.1500 of December 15<sup>th</sup> 2004

This inequality arises in relation with the charged person who can challenge the decision both in relation with the criminal issues, and in relation with the civil issues.

It is worth recalling a decision<sup>20</sup> in which the Constitutional Court assumed the extensive interpretation rendered by the ECHR, in its case law, to the concepts of "possessions" and "property".

Thus, the Court points out<sup>21</sup> that the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is independent from the formal classification in domestic law, and this meaning is not limited to the right of ownership over corporal goods<sup>22</sup>. Using the reasons mentioned by the ECHR in several cases<sup>23</sup>, the Constitutional Court has decided that property protection must cover also the sphere of those patrimonial rights and interests which do not necessarily confound with the ownership right over corporal assets, such as security on land or movables, clientele or even a right to receive payment of a debt, such as that of getting compensation.

In basis of these reasons, the Constitutional Court has held that the legal provisions concerning the non-granting of interests, as well as non-updating of the price returned after the annulment of a sale-purchase agreement, are unconstitutional.

Finally, I think that it is important to mention that the effort to understand the exigencies of the European Convention and the standards of protection of human rights imposed by the case law of the Court of Strasbourg is an experience that enriched the Romanian legal system. In this complex process of implementation of the European mechanism of protection of human rights and fundamental freedoms, the Constitutional Court initiated a real trend of thinking which specificity was the acknowledgement and safeguarding of human rights. That's why it has the role of promoter of the values of democracy and of the rule of law, which characterize all Member States of the Council of Europe.

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<sup>20</sup> Decision no.70 of February 27<sup>th</sup> 2001, published in the Official Gazette of Romania, Part I, no.236 of May 10<sup>th</sup> 2001

<sup>21</sup> case of *"Former King of Greece and others v. Greece"*, 2000

<sup>22</sup> case of *"Beyeler v. Italy"*, 2000

<sup>23</sup> *"Gasus Dosier und Fördertechnik GmbH v. Holland"*, 1996, *"Van Marle and others v. Holland"*, 1986, *"Iatridis v. Greece"*, 1999, *"Pressos Compania Naviera S.A. and others v. Belgium"*, 1995