THE DYNAMICS OF THE PARLIAMENTARY STRUCTURES AND MECHANISMS OF SCRUTINY APPLICABLE TO THE EXECUTION OF THE ECtHR JUDGMENTS AGAINST ROMANIA

Alina Mihaela GRIGORESCU*

Abstract

All levels of state power (the executive, legislature and judiciary) are required to ensure respect for human rights. National parliaments are the key to the effective implementation of international human rights norms and standards at national level and they are in an excellent position to protect human rights through legislating, being involved in the ratification of international human rights treaties. Also, national parliaments are strategically placed to hold the governments to account for swift and effective implementation of the Court's judgments, as well as to swiftly adopt the necessary legislative amendments.

This draft examines a small piece of the role of national parliaments - through the specific structures - within domestic systems for the implementation of European Convention on Human Rights (ECHR) standards and European Court of Human Rights (ECtHR or 'the Court') judgments.

Key Words: *respect for human rights, national parliaments, implementation of European Convention on Human Rights (ECtHR) standards, parliamentary scrutiny, execution of judgments of the European Court*

JEL Classification: [K38]

1. Introduction. Perspectives on the European model for guaranteeing fundamental human rights

The Convention for the Protection of Human Rights and Fundamental Freedoms is the most effective instrument for the protection of human rights throughout Europe and is the concrete expression of the collective safeguarding by the High Contracting Parties "of the universal and effective recognition and execution"[1] of the fundamental rights set out in *The Universal Declaration of Human Rights* of December 10, 1948. This commitment is based not only on the political will of the Contracting Parties to protect and uphold universal values, but also on the common interest to safeguard democratic security in Europe and to provide the foundations for an ever closer union between the States that make it up.

The Convention is also aimed at securing the adoption by the signatory States of the supremacy of "the rule of law, of the respect for human rights and of the principles of pluralist democracy" (Moroianu-Zlătescu, 2015, p. 93).

* PhD. Student, National University of Political Studies and Public Administration (NUPSPA).

[1] Preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The compulsory jurisdiction of the Court, as well as the binding nature of its case-law are integral to being a member of the Council of Europe, and the Member States, by virtue of their membership, represented in the Committee of Ministers, become part of the instruments for monitoring the compliance with the principles and values of the organization. The legal doctrine increasingly refers to the term "regionalization of human rights" (Moroianu-Zlătescu, 2012, p. 7) when they are invoked, analysed and researched in a certain area of the world or continent.

"The acceptance by the Contracting Parties of the provisions of the Convention as well as of the jurisdiction of the Court and of the binding nature of the judgments passed becomes, in this context, the key to the status of a Member State", as claimed Resolution ResDH (2001) 80 adopted by the Committee of Ministers on 26 June 2001, concerning the judgment of the European Court of Human Rights of 28 July 1998 in the case of "*Loizidou against Turkey"*.

The Resolution states as follows:

The Committee of Ministers (...)

Stressing that *"every member State of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."*

Stressing that *"acceptance of the Convention, including the compulsory jurisdiction of the Court and the binding nature of its judgments, has become a requirement for membership of the Organisation"*;

Stressing *that "the Convention is a system for the collective enforcement of the rights protected therein"*.

The Convention is currently an integral part of the domestic legal system of the Signatory States. The observance thereof is also ensured by the European Union, although the issue of adherence to the protection system established by the Council of Europe remains open.

From a practical point of view, the force of the Convention also lies in the development and consolidation of the control mechanism, enabling the concrete and effective safeguarding of the rights and freedoms it sets forth.

The compliance with the provisions of the Convention is based on *two institutional instruments:*

- *The European Court of Human Rights (ECtHR)*, an international court with jurisdiction to dispose of, by binding judgments, individual (art. 44 of the European Convention on Human Rights) or inter-state applications (art. 33 of the Convention);
- *The Committee of Ministers*, the main political body of the Council of Europe, an executive and decision-making body of the Council of Europe, entrusted by the Convention, under art. 46 para. 2 (amended by Protocol 11), *with the specific responsibility for monitoring and supervising the execution of Court decisions.*

Throughout its existence, the European Court of Human Rights has created a complex legal system, the formal approach of which, both in domestic law and in

the policy of the Contracting States, has *constraints only within the wider scope of the Convention* per se. This case-law has been a promoter of significant structural, procedural and political innovations, and the result of such innovations is visible in the domestic law of Member States and in the mechanisms designed to harmonize domestic legal systems with that of the European Court in Strasbourg, which is itself permanently variable.

The "*res interpretata"* principle becomes, from this perspective, a corollary of such variables, applicable in domestic law systems. Examples in this regard are provided by states such as Austria (the establishment of independent administrative tribunals, not subordinated to the Ministry of Justice, following the delivery of the *Benthem v. The Netherlands* Judgment)[2], Belgium (repeal of some articles of the Criminal Code following the delivery of the *DH, Zaraouali v. Belgium*, 29 June 1994, No 20.664/92 Judgment), France (new regulation on surnames following the delivery of the *Burghartz v. Switzerland* (2004) Judgment), Germany (The Constitution imperatively stipulates - art. 20.3 - that the ECtHR case-law must be taken into account in the judgments passed by magistrates, as part of the methodology of interpretation of laws) etc.

The Convention mechanism has developed, on the basis of the principle of subsidiarity, in addition to the specific decision-making and control bodies, this transnational case-law, subsequent derived bodies, at domestic level, and Member States, recognizing this subsidiary nature of the supervisory mechanism established by the European Convention, have tried, within the framework defined by own historical, political, economic, and social transformations and challenges, to create complementary institutional mechanisms to monitor the observance of the fundamental human rights and of the ECtHR rulings.

Thus, the governments of the Member States, through specific central and/or local authorities, contribute to the execution of the judgments issued by the ECtHR, under the supervision of the Committee of Ministers. Relevant examples in this respect are, at national level, the institution of the Government Agent, established within the scope of the executive power (Government) and the parliamentary control structures, established within the scope of the legislative power. The powers of representing the Government of Romania before the European Court of Human Rights are provided by law to the Ministry of Foreign Affairs, through the institution of the Government Agent of Romania to the ECtHR.

2. Considerations on the scrutiny function imposed by the Convention mechanism and part of the regulatory framework

The scrutiny function for the execution of judgments is intrinsically linked to the legal force of the judgments delivered by the Strasbourg Court. Moreover, the *exercise levels* of this function are *double structured*, both *vertically*, at the level of

[2] http://www.assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf – pp. 17-40, viewed at 4th of October 2020.

the supranational court, through the Committee of Ministers, as well as *horizontally*, at the level of specific national bodies from all three spheres of power, i.e. legislative (through the legal acts it adopts and through the parliamentary scrutiny mechanisms), executive (through the institution of the Romanian Government Agent to the ECtHR), and judicial (through the judgments delivered, which must be in accordance with the standards of the European Convention and the ECtHR case-law). It follows from this last interdependence that the *shared responsibility*, in which the actors involved, according to their own spheres of political and legal legitimacy, are called upon to strengthen their collaboration for a Europe of rights and of a unitary transnational legal space. Considering all the above, the regulatory legal framework ensures the long-term effectiveness of the Convention.

Pursuant to art. 32 (1) of the Convention:

"*The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto...*", which leads to the obligation of the national authorities of the Member States to comply with the judgments and decisions of the European Court of Human Rights.

The binding nature of the case-law of the Court is enshrined in art. 19 of the Convention:

"*To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.*"

Art. 46 para. (1) sets forth *the nature of the effects generated by the Convention and the case-law of the Court: direct and indirect.* The direct effects are identified in art. 46 para. (1): "*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties*."

The legal doctrine considers as indirect effects of the case-law of the Court those that concern the legal consequences generated by a judgment of the Court in the domestic law, as well as in the domestic case-law. Such effects are: the interpretative authority, the preventive authority and the existence of reviews.

Pursuant to art. 46 and art. 41 of the Convention, according to the judgments of the Court[3], the obligations of party States concerning the adverse consequences incurred by an injured party as a result of a violation of its legal provisions consist of remedying, by means of binding measures aimed, on the one hand, to ending the violation of the provisions of the Convention and the protocols thereto, removing the adverse consequences incurred by the injured party (restitutio in integrum), and, on the other hand, to preventing further similar violations of the mandatory provisions of the Convention. One of the fundamental obligations of the Member

3 E.g. Memlika v. Greece (application no. 37991/12) – decided on 6.01.2016; Hoalgă and Others v. Romania (application no. 76672/12) - decided in 2016; Nedescu v. Romania (application no. 70035/10) - Judgment of 16 January 2018 (application no.:70035/10)**;** Anamaria-Loredana Orăşanu and Others v. Romania (application no. 43629/13 and 74 more applications) – Judgment of 7 November 2017 (application number**:** 43629/13).

States derives from *art. 41 of the Convention - Just satisfaction* -, reading as follows: *"If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."*

Therefore, a first obligation incumbent on the respondent State is the payment of a just remedy which the Court grants to the injured party pursuant to art. 41 of the Convention and which compensates for any financial and non-financial damage and/or costs and expenses. The payment of this compensation is an obligation strictly and clearly defined in the judgment of the Court. However, the adverse consequences incurred by the injured party are not always adequately remedied by the payment of the just reparation. Depending on the circumstances, the judgment of the European Court of Human Rights may provide for the obligation for the respondent State to take *individual measures* in favour of the applicant (reopening of legal proceedings, destruction of information collected in case of violation of the right to privacy, revocation of an expulsion order issued despite the risk of being subjected to inhuman treatment in the country of destination).

The judgment of the Court may also provide for the implementation of certain *general measures* - such as amending the legislation, rules and regulations or the judicial practice, in order to prevent further similar violations of international provisions[4].

Under the Convention, States have significant freedom in choosing the individual and general measures they apply to fulfil their obligations under ECtHR judgments. This freedom, however, is linked to the monitoring by the Committee of Ministers, which ensures that the measures taken by the respondent States are adequate and capable of meeting the objectives pursued by the Court.

The general measures taken to prevent further similar violations of the Convention require an accurate and detailed analysis of the reasons for such violations. Most times, the circumstances of these violations reveal *legislative deficiencies*, obliging States to intervene to change the specific regulatory framework or to adopt new regulations in order to comply with the judgments of the Court. Other times, in many cases, the violations of the Convention are not due to obvious incompatibilities between domestic law and the Convention, but to the judicial practice, the manner in which courts interpret domestic law in the light of the Convention. Should the courts implicitly adjust the interpretation of domestic provisions in conjunction with the provisions of the Convention and the judgments of the European Court in the cases they dispose of, the judgments shall become enforceable under the domestic law. This trend is currently observed in most Member States, with a view to preventing future similar violations of the provisions of

[4] Examples of this are the Court's judgment in the *Case Scozzari and Junta (39221/98)* and the ResDH(99)245 in the case of the *Socialist Party and Others v. Turkey (21237/93*), ResDH(99)434 concerning the activities of the Turkish security forces (21987/93), as well as the Rules for the application of art. 46 (2) adopted by the Committee of Ministers.

international court rulings by publishing and forwarding judgments accompanied, where appropriate, by *explanatory circulars,* to the national authorities.

3. The constitutional regulatory framework of Romania

The constitutional framework imposes to the Romanian state two-way imperative obligations in its relationships with the international bodies to which it has acceded, on the one hand, in terms of *the level of prevalence of the regulatory rule* and, on the other hand, in terms of *the value of its interpretation*. Pursuant to art. 11 of the Romanian Constitution, republished, para. (1) "*The Romanian state undertakes to fulfil strictly and in good faith the obligations incumbent on it under the treaties to which it is a party.*".

Para. (2) provides that "*The treaties ratified by the Parliament are part of domestic law.*" Moreover, art. 20 para. (2) of the Romanian Constitution, republished, states that "*If there are inconsistencies between the pacts and the treaties on fundamental human rights, to which Romania is a party, and the domestic laws, the international regulations shall take precedence, unless the Constitution or domestic law sets forth more favourable provisions.*"

Thus, the Fundamental Law obliges the application and interpretation of domestic laws in relation to international treaties on human rights, implicitly the European Convention on Human Rights, to which Romania is a party.

Title II - Fundamental rights, freedoms and duties

Chapter I - Common provisions

International treaties on human rights

Art. 20, para.

(1) The Constitution provisions concerning rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration on Human Rights, with the pacts and other treaties to which Romania is a party.

(2) If there are inconsistencies between the pacts and the treaties on fundamental human rights, to which Romania is a party, and the domestic laws, the international regulations shall take precedence, unless the Constitution or domestic law sets forth more favourable provisions.

On the other hand, *the Parliament's scrutiny over the Government* is subject to the following constitutional regulations:

Title III - Public authorities

Art. 61 para. 1 of the Romanian Constitution, *"The Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country"*, confers in addition to its pre-eminence over other state authorities, entrusted under the democratic principle of representation, along with one of its fundamental powers, the *scrutiny power*, exercised in the spirit and within the limits of the separation of powers in the state.

The parliamentary scrutiny over the Government is also constitutionally enshrined by Chapter IV of the Fundamental Law, *"The Parliament's Relationships with the Government"*, art. 111, which provides the Parliament's right to be

informed, and art. 112, which sets out the means by which parliamentary scrutiny mechanisms operate, with regard to the questions and inquiries to which the Government and its members are required to answer:

Thus, *art. 111 (1)* provides that *"The Government and the other public administration bodies, the activity of which is subject to parliamentary scrutiny, are obliged to submit the information and documents requested by the Chamber of Deputies, the Senate or the parliamentary committees, through their presidents. "*

Art. 112 (1) The Government and each of its members have the obligation to answer the questions or inquiries submitted by deputies or senators, under the conditions provided by the regulations of the two Chambers of the Parliament.

These constitutional provisions are derived from the basic principles on which the rule of law is built, in this case *the principle of representative democracy*, which "*guarantees mechanisms that ensure the accountability of the executive to the electorate*" (Alder, 2009, p. 37).

Today *"human rights are the foundation of the rule of law and their recognition in the constitutions of states as well as the safeguards supporting them contributes to the assessment of the degree of democracy of a constitution.*" (Zlătescu & Moroianu-Zlătescu, 1996, p. 11).

Moreover, *the principle of parliamentary sovereignty ("the authority to legislate, unconstrained, unlimited by law" (*Endicott, 2018, p. 15) or, according to John Alder, *"in which the Parliament has unlimited legal authority to adopt any law, without external restrictions" (*Alder, 2009, p. 162) comes in addition to the first principle, to complete the framework in which the Parliament can exercise its powers conferred by law.

4. The role of the Romanian Parliament in the scrutiny mechanism set forth by the Convention

The documents of the Parliamentary Assembly of the Council of Europe mention Romania as facing major problems in achieving the standards of the Convention in several areas (failure to execute or late execution of judgments, excessively long judicial proceedings, poor detention conditions).

As early as 2006, by Recommendation 1764 (2006) and Resolution 1516 (2006) of the Parliamentary Assembly of the Council of Europe, the intergovernmental and interparliamentary organization has been constantly concerned with the recommendation to the Member States that they should "*set up domestic mechanisms and procedures – both at the level of governments and of parliaments – to secure timely and effective implementation of the Court's judgments through co-ordinated action of all national actors concerned and with the necessary support at the highest political level."* Furthermore, the Resolution 1787 (2011) of the Parliamentary Assembly of the Council of Europe mentions in paragraph 10 that a major reason for deficient compliance with the Court judgments is the *lack of domestic mechanisms and procedures* to ensure implementation of requisite measures, often requiring co-ordinated action by national authorities. In

this regard, the Parliamentary Assembly of the Council of Europe urges national parliaments to put in place specific mechanisms and procedures to strengthen democratic and effective institutional scrutiny over governments and to observe the standards of the Convention, as an obligation derived from accepting the principles and values established by the founding acts of the Council of Europe. According to the PACE documents[5], the involvement of national parliaments in the scrutiny over their executives gives democratic legitimacy to such scrutiny, and, moreover, contributes to "creation of a pervasive human rights culture".

Considering the thematic documents of the PACE and the nature of the effects generated by the case-law of the Court, it is therefore necessary for the Parliament, as "the only legislative authority of the country" - according to art. 61 para. (1) of the Romanian Constitution -, to be involved in the role of specific subsequent scrutiny over the executive.

Viewed from this perspective, of the role of the Romanian Parliament as sole legislative authority of the country, the interpretative authority and the preventive or corrective authority are of interest. *The preventive effect* is bivalent, and the bivalence is given, on the one hand, by the role of the European Court by the issuance of a conviction against a State, and, on the other hand, by the *ex-ante* scrutiny of draft legal acts on the compatibility with the standards of the Convention, carried out by national institutions and bodies. Precisely from this point of view, of the *preventive scrutiny* over draft legal acts, the need for a specific parliamentary body becomes urgent. The *interpretative effect* of the Court's case-law is used to correct and supplement domestic laws. At the same time, the *interpretive effect* cannot be analysed in isolation from the preventive or corrective effect of the Court's judgments. In this case, the *preventive side* is highlighted in the conviction delivered by the Court against the law of a third State, but which is similar to the law of other States, or when the State amends the law during the proceedings before the Court. The *corrective side* is activated by the State when it reacts to its own conviction in order to amend the law contrary to the case-law of the Court.

Thus, we deem as necessary the establishment of a specific autonomous parliamentary body, in order to give effect to the case-law of the Court, to mark its importance for parliamentary practice and to provide consistency and vitality to the principle of subsidiarity on which the Convention operates. We consider that, by virtue of art. 111 of the Romanian Constitution – "The Government and the other public administration bodies, the activity of which is subject to parliamentary scrutiny, are obliged to submit the information and documents requested by the Chamber of Deputies, the Senate or the parliamentary committees, through their presidents. (...)" -, a specific, autonomous parliamentary committee (non-existent at the moment in the Romanian Parliament) to scrutinize the execution by the Government of the judgments of the European Court would support Romania's efforts to cease to be one of the main Member States providing cases to the

[5] E.g. Resolution 1823 (2011), par. 2.

European Court. Under these circumstances, the involvement of the Parliament through a special committee intended to monitor the implementation of the requirements of the Convention by all the authorities with powers in this respect, would complete the *troika of the shared common responsibility* (legislative, executive, judicial system) for safeguarding the execution of the judgments of the Court, in close connection with the provisions of the Convention.

Conclusions

Far from exhausting the brief research on the topics proposed for analysis in this paper, this brief foray is only an open path to new directions of action, first and foremost, of political action. The *comparative law* can be a means of achieving the proposed objectives, as well as *the real separation of powers in the state*. Moreover, *the principle of balance of powers in the state* generates itself the active involvement of state actors in the full assumption of the role of full member of an international organization.

We consider that *a parliamentary scrutiny mechanism* not only draws attention to the observance of human rights, but also increases the political transparency of the Government's response to the execution of ECtHR judgments. In this sense, a robust parliamentary body would implicitly contribute to ensuring a democratic regime of amending legal acts in accordance with the Court's judgments, would facilitate the coordination of the actors involved, the political visibility of the issues under attention, and would provide a major opportunity for public scrutiny over the Government in relation to its answers to the judgments of the Court or to the delays in providing such answers. The parliamentary involvement is also a key aspect in strengthening domestic mechanisms for ensuring compliance with the provisions of the Convention and the Court's interpretations on the application of the Convention, but also in strengthening the democratic state.

We also draw attention to:

- the imperative need to implement adequate and effective mechanisms for *systematic verification of compatibility and compliance with the Convention* of draft laws, legislative proposals, and other draft legal acts, amendments to legal acts and administrative practice, in accordance with the case-law of the ECtHR;

- *signalling and eliminating incompatibilities* between the provisions existing in the domestic law system and the Convention;

- *increasing the involvement of the executive* in verifying the compatibility of legal acts with the Convention, by analysing the compatibility, at the level of each ministry, of the draft law initiated thereby;

- the draft laws submitted to Parliament must be accompanied by a report certifying compliance with the Convention, in accordance with existing practices in most Member States;

- as a result of domestic experience in applying a law or legal act or following a judgment of the Court of Justice against another Member State, the specific

institutions of the State should immediately implement measures to correct similar deficiencies in the domestic legal system.

Bibliography

1. Alder, J. 2009, *Constitutional and administrative law*, 7th ed., New York: Palgrave Macmillan.
2. Council of Europe - Committee on Legal Affairs and Human Rights, 2010, *The interpretative authority (res interpretata) of the Strasbourg Court's judgments: compilation of background material*, AS/Jur/Inf (2010) 04.
3. Endicott, T., 2018, *Administrative Law*, Oxford: Oxford University Press.
4. Moroianu-Zlătescu, I., 2015, *Human Rights: A Dynamic and evolving process*, Bucharest: Pro Universitaria.
5. Moroianu-Zlătescu, I., 2012, "Towards a reform of the European Court of Human Rights*", Drepturile Omului* (1).
6. Zlătescu, V. D., Moroianu-Zlătescu, I., 1996, *Repere pentru o filosofie a drepturilor omului*, Bucharest: Institutul Român pentru Drepturile Omului (IRDO).