THE EUROPEAN CONVENTION ON HUMAN RIGHTS SYSTEM – CONSTITUTIONAL INSTRUMENT ON HUMAN RIGHTS

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Abstract

The Convention system is itself a constitutional instrument of the European public order, generating an irreversible process of congruence of national public orders.

The metamorphosis of the legislative and administrative systems of the States has been obligatory in terms of the interpretative and constitutional paradigm, the correlations being indispensable for an elliptical approach, in which the domestic rule finds correspondence in the legal articulation regulated by the Convention system and vice versa.

The value of constitutionalisation also derives from the influence of the European Court of Human Rights' judgments at the level of national constitutions and Constitutional Courts, which have normatively and administratively reshaped the limits of the application of fundamental rights and freedoms at national level. We are talking here about an integrated, interconnected constitutionalism, which has identified and achieved that fine-tuning between the confluence of the national fundamental rule in the dimensions of the reality in which it applies and the rule described by the Convention in the frame of reference of the European reality. At the same time, this integrated constitutionalism has had the sensitive role of balancing the sovereignist ambitions of domestic legal systems with, paradoxically, the concrete projection, within the limits of those same domestic legal systems, of the effects of the protection of the universal rights guaranteed by the Convention.

Keywords**:** *constitutionalisation, European Convention on Human Rights, standards, judgments of the European Court of Human Rights, public order, the hierarchy of values, transnational authority*

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1. Introduction. Juridical philosophy

As far back as the Age of Enlightenment, David Hume's analysis on the meaning of the term convention, although archaically worded, is inductively complete with regard to the philosophical and legal sense, as well as the purpose of the exploration: „if by convention be meant a sense of common interest, which sense each man feels in his own breast, which he remarks in his fellows, and which carries him, in concurrence with others, into a general plan or system of actions, which tends to public utility. (Hume, 1902, §257, p.306)

Thus, conventionalism becomes the philosophical attitude that, in society, the exercise of the fundamental principles (achieving the common interest) is based on the (explicit or implicit) agreements which, in turn, aim to achieve the collective interests.

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On the other hand, constitutions describe how societies function, based on fundamental principles whose exercise is ideally under the strict supervision of the national authorities.

In this paradigm, the analysis of the provisions included in the Convention, in the additional protocols, and in the Court's case law, on the one hand, and, on the other hand, the careful observation of the national law systems in the matter of human rights protection, lead us to the idea that, with regard to safeguarding of the fundamental rights and freedoms, the system of the Convention has caused, in most Member States, the translation of concepts, procedures, and standards from a transnational level to a national level, as the states spectacularly adjusted their human rights protection system at the level decreed by the Convention system. This process is continuous and is still ongoing, having started from the establishment of the Court.

2. The European Convention on Human Rights - a role of constitutional essence

The system of the European Convention on Human Rights is, beyond its moral charge, an explicit and implicit set of fundamental principles in the matter of fundamental rights and freedoms, to be exercised in the best interest of the (European) citizen, for the purpose of preserving the fundamental rights and freedoms exercised within and in the service of public order, under the supervision of the Convention's institutional instruments. Starting from this idea, the similitude between the legal effects caused by the Convention system and those induced by the national constitutions is evident. The contents of the two types of regulations - minimal set of fundamental principles and of rules - along with the established purpose - the exercise of legal order - undertaken and mutually agreed upon in the Member States' internal systems, as well as between Member States, can be interpreted in the same manner.

Thus, the idea that the Convention system has a role of constitutional essence, not only due to "the nature of the fundamental rights and freedoms it contains" (Wildhaber, 2002, pp. 1-6; Ulfstein, 2021, pp.151-174) and which the Court is vested to protect, but also by setting up "the minimum level of protection of fundamental rights that should be guaranteed in all Convention States" (Gerards, 2019, p. 10) may be argued and supported on its own.

The constitutional nature also derives from the extent and from the significance of the scope of the Court's case law, of its legal precedent.

Thus, in arguing the idea of the constitutional nature of the Convention system, a real international system of guaranteeing and promoting human rights (Zlătescu, 2015, p. 101), we bring to attention the following levels of reflection and analysis:

- the influence of the Convention's interpretation in the national legal and political systems, in the sense that the Convention system extrapolated in the

internal system certain principles and values of universal character, which transformed the internal regulatory framework in agreement with such principles and values and, moreover, required the political authority systems of the Member States to provide a minimum protection threshold for the exercise of the fundamental rights. This exerted great influence, particularly in the legal systems of the states which joined the Council of Europe in the 90s;

- the influence of the Convention's interpretation on a considerable number of European citizens and the responsibilities assumed by the states in this regard;

- the relation and the impact of the implicit public order of the Convention system on the creation of a joint European legal policy, one of commitment, in which the unity of terminology, interpretation, and approach produces an integrated and strengthened version of the common legal space;

- the transnational nature of the Court's authority and case law produces an institutionalisation of transnational constitutional nature in the matter of protection of fundamental rights and freedoms;

- moreover, we provide as grounds the double mechanism (Zlătescu, 2020, p.172; Severin, 2020, p.75) for controlling the validity and the rigour of the national regulations in the matter of human rights, first on an internal level, through the constitutional courts and the national courts of law, as well as through the parliamentary mechanisms exercised based on the control prerogative awarded to parliaments under the constitutional requirements, and secondly through the European Court of Human Rights, with a final amending role.

3. Some jurisprudential arguments

A series of Court judgments highlight, beyond the rationales unifying the undertaking of the judicial process in itself, the most important sources of authority of the transnational court: *the purpose of carrying out the judicial process* - the preservation of European public order -, *the territorial scope* of the judicial process - *the community* of the Convention's Member States, *the method* for carrying out the judicial process - identifying a *minimum level* in ensuring protection for the fundamental rights and freedoms - and *the standard of the judicial process* - the level stipulated by the Convention. Thus, the Court, through its judgments, strengthens and completes the mission of the Convention as *a constitutional instrument of European public order* in the area of human rights protection.

Concretely, in the case *Konstantin Markin v. Russia* (GC) (Judgment of 22 March 2012, para. 89) the Court refers to the Convention's mission in close relation to the extent of the Court's case law, namely the entire community of states which ratified the Convention, showing that, *although the main purpose of the Convention system is to provide individual repair, its mission is also to solve public order issues in the common interest, thus raising the general standards on the protection of*

human rights and extending the case law on human rights to the entire community of Convention Member States.

On the other hand, in the decisions *N.D. and N.T. v. Spain* (Judgment of 13 February 2020, para. 110), *Loizidou v. Turkey (*Judgment 23 March 1995, para. 75, 2nd thesis), *Al-Skeini and Others v. the United Kingdom* (Judgment 7 July 2011, para. 141), the Court makes explicit note of the Court's constitutional character: *"As a constitutional instrument of European public order, the Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction. To conclude otherwise would amount to rendering the notion of effective human rights protection underpinning the entire Convention meaningless."*

In most European states, the provisions of the Convention are recognized as being directly applicable in the national legal systems. The exception is the United Kingdom of Great Britain and Northern Ireland, where the lack of proper constitutional provisions "*makes it difficult to apply the priority of the rules provided by the Convention in relation to the national rules"* (Schmahl, Breuer, 2017, pp. 802–873).

Consequently, the applicability of the provisions and case law from the Convention's system has a major impact on at least *two levels of authority, constitutionally ruled on a national level: on the legislative power (vested with legislative responsibilities and regulatory harmonisation) and on the judiciary (vested with ensuring justice)*, both of them in close relation to the concept of general principles of law and legal standards in the area of human rights protection.

An in-depth understanding of the substance and of the consistency of the Strasbourg Court's case law reveals the similarity between the approach types in the exercise of the public order concept at a national and transnational level which, in relation to the structure and the matrix of the current societies, involves in both situation the protection, safeguarding, and preservation of the fundamental human rights and freedoms. In fact, public order as "*a set of common norms and principles for the European space, which, given their fundamental nature, form the basis of European society" (*Dzehtsiarou, 2015, p. 75), consists of the public order of the national states, and the end purpose of the Convention system in relation to such thesis is to establish universal concepts and procedures having the same significance in any national order in Europe.

One of the most relevant judgments of the Court, with profound implications on the effects of the ECHR case law, due to the strengthening of the concepts and notions with which the Court operates in arguing its conclusions with regard to the constitutionalisation effect subsumed by the Convention, as well as in terms of representing the approach to the cases submitted for judgment in this regard, is the judgment in the case *G.I.E.M. S.R.L. and Others v. Italy* (Application no. 1828/06 and two others). Of particular interest in this case is the *multilevel constitutionalism* approach, seeking to attain the end purpose of the Convention's entire system, namely *reductio ad unitatem* in the conceptual, legal, and justifying

approach of the notion of fundamental rights in all Member States. In fact, this thesis was laid down in an extremely uncompromising manner in the Court's judgment: *"The time of constitutional parochialism is over in Europe. In the era of multilevel constitutionalism, the Convention is a "constitutional instrument of European public order". It thus prevails over constitutional provisions and interests of the Contracting Parties, not only in Malta, Ireland, Bosnia, Russia and Hungary, but also in Italy and in all other Council of Europe member States. To put it in dogmatic terms, from the Strasbourg perspective, the old-fashioned distinction between monist and dualist constitutional orders has become irrelevant and does not impact upon the binding force of the Convention, as interpreted by the Court's judgments, in the domestic legal order of the Contracting Parties. The multilevel constitutionalism sustained and practised by the Council of Europe is beyond such distinction, seeking a reductio ad unitatem in fundamental rights issues in all Contracting Parties".* (*Pinto de Albuquerque, para. 79)*

In principle, this thesis of the *unity of interpretation and of exercise of the fundamental rights and freedoms*, both at the transnational level of the Convention system, and at the national level of the power spheres of the court, in relation to their own societies, as well as the *joint relation* with such concepts essentially describe the *constitutional European space* of fundamental rights and freedom preservation.

Groundbreaking conclusions

This constitutional European space can be a source of inspiration for a new level of rights having universal value which, on the one hand, may indirectly limit the sovereignty of the states, but, on the other hand, provides additional protections and guarantees to a large number of persons.

The integrated and complete exercise of this new standard of fundamental rights and freedoms of universal value is the expression of one of the levels of the shared exercise of the sovereignty and subsidiarity limits between the jurisdiction of the national legal systems and the jurisdiction of the system produced by the provisions of the Convention. In fact, this system includes and involves in its substance levels of authority from an administrative viewpoint, in considering national levers as the first ones having responsibility in the description, recognition, and harnessing of this exercise. It is only if the national systems are, due to various reasons, subjective in appreciating the substance and the exercise of the right in itself - *"reality is often more dismal and the dysfunctions are unprofitable"* (Șora, 2021, p.153) - that the system of the Convention, as a supranational authority, by virtue of its legally regulated competence, is the one that restores the necessary balance. In this context, we are dealing with a ***collective sovereignty***, but one which corresponds to the idea of a diarchy of the sovereignty levels. "*The idea of a divisible sovereignty is perfectly suited to describe the functioning of a mechanism recalled by terms such as "fusion" or "joint exercise" of the sovereignties, which*

elements are indispensable to the functioning of this integrationist mechanism". (Louis, 1988, p.13)

In this paradigm, the role of the European Court as a constitutional instrument of European public order, is merely to provide uniform support for the exercise of the fundamental rights, at the standard provided by the Convention, particularly where, at national level, such standards for the protection of the fundamental rights and freedoms are inferior to the conventional system.

In this regard, the Court fulfils one of the most subtle, but essential roles, namely to democratise the states which still display gaps is the exercise of protection and safeguarding of fundamental human rights and freedoms. For the democratic states, as far as the exercise of rights is concerned, the Court ensures the standard corresponding to the Convention system, which remains the asymptotic reference framework in which the legal communities, both national and supranational level, are vested to ensure the coherence and the substance of the public order which is common to European democracies. A democracy with changing rules and values.

Bibliography:

1. Dzehtsiarou, K., 2015, *European consensus and the legitimacy of the European court of human rights,* Cambridge University Press, pp. 72-114
2. Gerards, J., 2019, *General principles of the European Convention of Human Rights*, Oxford University Press, pp. 9-11
3. Hume, D., 1902, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, Ed. by L. A. Selby-Bigge, M.A. revised 2rd ed., Oxford University Press, Amen House, London E.C.4, app. III, p. 306
4. Louis, J.V., 1988, *L'ordre juridique communautaire*, Office des publications officielles des Communautés européennes, ediţia a 4-a, Paris, p. 13
5. Moroianu Zlătescu, I.; Marinică, C.,2020, *Instituțiile Uniunii Europene*, Ed. Universitară, Ed. Universul Academic, București, p. 172
6. Moroianu Zlătescu, I (2015), *Human rights: a dynamic and evolving process,* Ed. Pro Universitaria, București, p. 101
7. Severin, A., 2020, *Raportul dintre Constituția României și legislația UE (Constituția României în dreptul UE și dreptul UE în Constituția României)*, Dreptul nr. 2/2020, p. 75,
8. Schmahl, S., Breuer, M., 2017, *The Council of Europe: Its law and policies.* Oxford University Press. Impact of the Council of Europe on national legal systems; pp. 802–873.
9. Șora, M., 2021, *Articularea gândirii libere*, în Polis – Revistă de științe politice, vol. IX, nr 2 (32), p. 153

10. Ulfstein, G., 2021, *Transnational constitutional aspects of the European Court of Human Rights, in* Global Constitutionalism (2021), Cambridge University Press, pp. 151-174
11. Wildhaber, L., 2002, *Un avenir constitutionnel pour la Cour europenne des Droits de l'Homme*? R.U.D.H., nr. 14, p. 1-6.

European Court of Human Rights judgments

1. *Al-Skeini and Others v. the United Kingdom* (Application no. 55721/07, Judgment of 7 July 2011)
2. *G.I.E.M. S.R.L. and Others v. Italy* (Application no. 1828/06 and two others – Judgment of 28 June 2018)
3. *G.I.E.M. S.R.L. and Others v. Italy -The partly dissenting, partly separate opinion of judge Pinto de Albuquerque – para. 79*
4. *Konstantin Markin v. Russia* (GC) (Application no. 30078/06, Judgment of 22 March 2012)
5. *N.D. and N.T. v. Spain* (Applications no. 8675/15 and 8697/15, Judgment of 13 February 2020)
6. *Loizidou v. Turkey (*Application no. 15318/89, Judgment of 23 March 1995)