I. STUDII, CERCETĂRI, ARTICOLE

TOWARDS A REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Rezumat

Curtea Europeană a Drepturilor Omului poate fi sesizată de orice persoană, care pretinde că un stat membru la Convenție i-a încălcat un drept prevăzut de Convenția Europeană şi Protocoalele sale adiționale. Rolul Curții este de a statua prin decizii în ce măsură autoritățile naționale ale statelor membre au respectat drepturile garantate. Legislația europeană prevede că numai Comitetul de Miniştri este competent să monitorizeze hotărârile Curții Europene, iar statul pârât trebuie să-l informeze pe acesta în legătură cu măsurile luate pentru aplicarea hotărârilor Curții. Nu în ultimul rând, Comitetul de Miniştri se preocupă de eficientizarea şi sporirea eficienței Curții, de reformarea continuă a acestui mecanism jurisdicțional european.

Cuvinte cheie: **Mecanism jurisdicțional, drepturile omului, încălcare, punere în aplicare, control, eficiență**

Résumé

La Cour européenne des droits de l'homme peut recevoir de toute personne qui prétend qu'un membre a violé la Convention, comme prévu par la Convention européenne et de ses protocoles additionnels. Son rôle est de décider si les décisions des autorités nationales des États membres ont respecté les des droits garantis. Le droit européen prévoit que seul le Comité des Ministres est chargé de surveiller la Cour européenne et l'Etat défendeur à l'informer des mesures prises pour appliquer les décisions de la Cour. Enfin, le Comité des Ministres s'occupe de l'efficacité et l'efficience de la Cour et de la réforme en cours du mécanisme judiciaire européen.

Mots-clés: **Mécanisme judiciaire, violations des droits de l'homme, la mise en œuvre, le contrôle, l'efficacité**

Human rights are protected and guaranteed by the States internationally, but they are also protected and guaranteed domestically, which is, as a matter of fact, a permanent concern for the United Nations Organization. The doctrine evokes more and more the term 'regionalization' of human rights when human rights in a certain zone of the world or a certain continent are analyzed.

In recent years, the means protecting human rights have become more and more numerous and diversified at both national, regional and international levels.

The fundamental rights and freedoms and protection thereof at the European regional level has lately been a permanent concern for both the Council of Europe and for the European Union as well.

In fact, the European Convention on Human Rights created a regional system for the protection of human rights, which is highly appreciated owing to the activity of the European Court of Human Rights.[1] The system we refer to is under continuous transformation, both because the evolution of the content of the guaranteed rights, and because of modifications on the mechanism monitoring the way the accused States put the Court's decisions into execution. Obviously, the efficiency of the jurisdictional mechanism guaranteeing the fundamental rights and freedoms largely

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[1] See M. K. Addo, *The Legal Nature of International Human Rights*, Martinus Nijhoff, Leiden, Boston, 2010, p. 288 *et seq.*

depends on the consequences the decisions pronounced by the European Court of Human Rights have upon their addressee and on the importance the latter attaches[2] to these decisions, for the pronouncements of the European Court of Human Rights are of a declarative nature.[3]

The European litigation on human rights, considered to be a judicial proceeding[4], therefore does not bring along annulment of an act, nor a compensation for the damage.

In order to understand the importance of the Court's decisions, a distinction between two hypotheses should be made. The violation of human rights should originate in an individual act or behaviour and in this case the State is bound to interfere and adopt the necessary individual measures to reinstate the situation preceding the violation of human rights, under the control of the Committee of Ministers. The individual measures involved by the Court's decisions are variable (withdrawal of a legal act, pecuniary redress, etc.). In principle, the Court does not indicate itself the measures the State should take. At the same time, the decision made by the European Court of Human Rights has more and more often come to include recommendations, particularly in the case of detention of persons.[5]

In fact, Article 41 of the European Convention on Human Rights[6] authorizes the Court to give just satisfaction to the injured party.

In case the Court finds, by means of a decision it pronounces, that there has been a violation of the Convention, the State concerned is legally bound to put the decision into execution and pay the amount of money decided by the Court as compensation for the accuser, and also to adopt, if possible, other individual measures as well to restore the rights of the accuser (for instance, release of a person in temporary detention, issuing of a Residence Permit to an alien who is facing the risk of expulsion, restitution of confiscated properties, reunification of families, of children with their parents, etc.).

The obligation to restore the person to the previous situation may raise a problem in case the violation of human rights can only be removed by re-opening the legal procedure.[7] An example could be the case of a person sentenced to imprisonment based on a procedure violating the right to a fair trial (Article 6 in the European Convention on Human Rights).[8] A re-opening of the case is likely to infringe upon the definitive nature of a Court's ruling and therefore upon the authority of *res judicata*. Nevertheless, many States have implemented such procedures. Violation of a fundamental right may originate in a legal legislative norm or an administrative act.

The Court may find a serious violation of the Convention and, under such circumstances, it compels the States concerned, sometimes other States as well, to take measures of a general nature, in order to comply with its decision. Let us remind here that the provisions of the European Convention are directly applicable at domestic level, and no additional

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[2] See H. Oberdorff, *Droits de l'homme et libértés fondamentales*, LGDJ, Montchrestien, 2010, p.120 *et seq.*; C. Harlow, *L'accès à la justice comme droit de l'homme: La Convention européenne et l'Union Européenne* in "L'Union Européenne et les droits de l'homme", Bruylante, Bruxelles, 2001, p. 189 *et seq.*

[3] See C. Bârsan, *Convenţia europeană a drepturilor omului – comentariu pe articole*, vol. II, Procedura în faţa Curţii. Executarea hotărârilor, Ed. C. H. Beck, Bucureşti, 2006, p. 480 *et seq*.

[4] See O De Shutter in *Accountability for Human Rights Violations by International Organisations*, Intersentia Antwerp, Oxford-Portland, 2010, p. 121 *et seq.*

[5] See Raicu vs. Romania, 19 April 2006, No. 28104/03, in Irina Moroianu Zlătescu and Gheorghe Pârvan (coordinators), *Din jurisprudenţa Curţii Europene a Drepturilor Omului. Cazuri cu privire la România*, IRDO, Bucureşti, 2010, p. 820 *et seq*.

[6] Article 41 on *Just Satisfaction* provides: "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".

[7] This is the meaning of Committee of Ministers Recommendation No. R(2000), 2 of 19 January 2000.

[8] See *Proces echitabil. Jurisprudenţa comentată a Curţii Europene a Drepturilor Omului*, Vasile Pătulea, IRDO, Bucureşti, 2007, p. 753 şi urm.

measures for implementation are necessary. The mere application before the European Court triggers or accelerates legislative or jurisdictional changes in many States.

The Council of Europe Committee of Ministers supervises putting into execution of the Court's decisions . In general, the decisions are put into execution, no State refusing to comply. The Committee was given this control competence by Article 54 of the Convention and actually consists in supervising the legislative or the administrative reforms adopted in response to a Court's decision that finds a serious violation of the Convention or, in the case of decisions giving a "justified satisfaction" by virtue of Article 50, it consists in making sure that the State did pay the amount of money to the person entitled to it within the time limit established by the European Court.[9]

In the year 2004, a reform of the supervising system provided for by the European Convention was initiated. In the framework of this reform, Protocol 14, in force since 1 June 2010, amends the control system of the Convention. The reform is meant to guarantee at regional European level the efficiency of this control system, by reducing the time limits for solving the complaints and, of course, for putting the decisions into execution.[10]

Execution of the decisions requires total and actual redress for the damages suffered by the complainers. Accepting external supervision as provided for by the European Convention contributes to the legitimacy of the international actions taken by the Member States, particularly in the field of human rights.[11]

Taking into account the situation in various countries, the European Court of Human Rights intervened by initiating the system of pilot decisions[12], indicating the measures that have to be taken at national level in the accused country, which is the source of several complaints based on one and the same regulation which led to successive violations of human rights and, in spite of the Court's sentences, the normative act was not modified.

In the case of a structural or systematic violation, in the framework of the respective legal order, the European Court indicates what general measures have to be taken at national level. It postpones the examination of the complaints and waits for the necessary general measures it established to be implemented. Then, if the State has complied with the Court's orders, the respective cases are removed from the Court's list of pending cases.

According to Article 46, the European Convention institutes a mechanism controlling the execution of the Court's decisions, the Committee of Ministers being Tasked to supervise execution of the Court's decisions. The accused State is summoned to inform about the measures taken in order to execute each decision ruled by the Court, the case being put on the agenda of the Committee of Ministers every six months until the State complies with the Court's decision. It is only then that the Committee adopts a resolution. The provisions of Protocol No. 14 to the European Convention nevertheless do not offer a solution to all the problems the system of the Convention has faced so far; however, it should also be taken into account that negotiations regarding the European Union's adherence to the European Convention are under way.[13] The Court's role regarding the execution of its decisions is also

[9]See Titus Corlăţean, *Executarea hotărârilor Curţii Europene a Drepturilor Omului*, Editura Universul Juridic, Bucureşti, 2011, p. 36.

[10] See *L'impact réal des mécanismes de suivi du Conseil de l'Europe*, Direction générale des droits de l'Homme et des affaires juridiques Conseil de l'Europe, H/Inf (2010)7, p. 8.

[11] *Ibidem.*

[12] In this respect, see the Pilot decision on Romania in the case Maria Atanasiu et al. vs. Romania., in Jurisprudenţa Curţii Europene a Drepturilor Omului, Cazuri recente cu privire la România, Irina Moroianu Zlătescu (coord.) I.R.D.O., Bucureşti, 2011, p. 224.

[13] See Conférence à haut niveau sur l'avenir de la Cour européenne des droits de l'homme, Izmir, Turkie, 26-27 avril 2011; *Zilele juridice franco-române*, in Drepturile omului No. 2/2011, p. 2 and Irina Moroianu Zlătescu, *Curtea Europeană a Drepturilor Omului ... in loco citato*, p. 7 *et seq*., Communication sur les activités du Comité des Ministre (novembre 2011-janvier 2012.

reflected in Protocol No. 14, while according to Article 46 of the European Convention on Human Rights the Committee of Ministers may request the Court an interpretation of a final judgment to improve supervision of its execution. Based on the same article, the Committee of Ministers institutes an appeal procedure in the absence of the State. The Committee of Ministers may decide by a majority vote of two thirds to refer to the Court the question whether the State refuses to abide by the final judgment ruled in a litigation against the same State.

To improve the activity of the European Court of Human Rights, the Steering Committee for Human Rights (CDDH), on request by the Committee of Ministers, elaborated a Report that includes proposals for amending the European Convention on Human Rights. These refer to the regulation of the access to the Court, for it has been found that the provisions laid down in Protocol No. 14 do not allow, by themselves, for a balance to be established between the filed petitions and the solved ones. The newly adopted criterion for admissibility of the complaints hasn't had the expected effect yet and is about to be modeled by the future jurisprudence. The proposals made by the Steering Committee for Human Rights also refer to the introduction of certain expenses for the submission of a complaint to the Court, the compulsory legal assistance, the introduction of a sanction in case of a groundless lawsuit, admission of an application only in case there is an important prejudice; a new criterion for the admissibility of the complaints applicable to the cases that were solved in compliance with the legal proceedings existing in the accused State.[14]

An important problem whose best solution is still to be found is to cope with the large number of complaints pending before the Court. The CDDH elaborated a Report including measures basically meant to increase the capacity to of dealing with the complaints, inclusion of a clause regarding the priority of analyzing certain cases and/or remove them, which raises the question of conferring the Court the discretionary power to choose what case to examine and when to do so. In fact, proposals for a new filtering mechanism were made in 2010 at the High-Level Conference on the future of the European Court of Human Rights. There was also a Report by the CDDH on measures meant to consolidate the relationship between the Court and the national jurisdictions and the measures that should be taken to expand the Court's competence in terms of advisory opinions. An important role lies with the States and their cooperation with the Committee of Ministers.

As far as repetitive complaints are concerned, the first encouraging results have emerged in relation to the new competencies of the 'three-judge committees' such as closing repetitive cases amiably or through unilateral declarations by the States if not otherwise possible. When referring to 'well-established jurisprudence', the Court clarifies that it should take into account the circumstances, the evolution of the legislation and of the jurisprudence that took place in the accused State.

The Committee of Ministers elaborates proposals for amending the Convention so as to increase the Court's capacity to solve the cases and allow it to rule within a reasonable time limit in the case of repetitive cases. Of course, it looks for the most adequate solutions itself, and the High-Level Conference of Izmir appreciated the new Article 61 on the pilot-judgment procedure in the Rules of Court adopted by the Court. A more consistent application of the Convention at national level would reduce the Court's work burden, particularly in the case of repetitive cases. In this respect, the Committee of Ministers issued several recommendations to be applied at national level.

The European Court should apply all admissibility criteria and the rules related to its jurisdiction; it should apply the new admissibility criteria in consonance with the

[14] See CDDH (2012)R74 *Addendum I.*

principle according to which the Court shall not deal with insignificant issues; it should confirm through its jurisprudence that it is not a new remedy at law, thus avoiding re-examination of the *de facto* and the *de jure* matters ruled by the national courts; it should elaborate and make available to those interested predictable rules for all the Parties regarding application of Article 41 of the Convention; and, of course, it should clearly specify the level of just satisfaction that could be expected.

A constant preoccupation is that the decisions ruled by five-judge panels to the effect that an application for having a case resubmitted to the Grand Chamber is rejected should be clearly motivated, thus avoiding repetitive applications and ensuring a better understanding of the Chamber's decisions; it is also intended to propose to the Committee of Ministers to create a unit made up of jurists and persons of a different profession as well, all without budgetary obligations.

As far as supervision of the execution of the decisions ruled by the European Court of Human Rights is concerned, the Ministers' Delegates decided in late 2011 that the working methods adopted in December 2010 as a result of the Declaration and Plan of Action of Interlaken continue to be applied. The Committee of Ministers is competent to control the Court's decisions, but has no power to influence the content of the respective decisions nor to derogate from their coercive nature.

Most of the proposals that were made are to be found in the Declarations of Interlaken and Izmir and they are still urgent. They refer to: increased openness of the national authorities to the standards of the European Convention on Human Rights and application thereof; the fact that the training of the personnel working in the judiciary and law enforcement systems should include information about the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights; increased availability of information about the Convention, particularly the importance of its protection, the competence of the Court and the admissibility criteria for the complaints, so that possible petitioners might access such information more easily. At the same time, a systematic control on the compatibility of bills with the Convention should be introduced, which involves a motivated study of governmental impact, establishment of a department that should assist the Member States to apply the European Convention and find pertinent technical assistance, particularly in terms of executing the decisions; it also involves: the existence of national human rights institutions that can play and important role with the juridical training; public information campaigns, which point out the accountability of governments; and supervision and elaboration of reports on the execution of the court's decisions at national level.

The British presidency of the Council of Europe Committee of Ministers organizes in April 2012 a Conference on the reform of the European Court of Human Rights. In this framework, it intends to adopt a Declaration that would be the basis for the decisions to be made in May by the Committee of Ministers. To this end, it demanded the CDDH to present a written contribution for the Conference. This contribution is structured into five topics, which refer to: implementation of the European Convention on Human Rights at national level and execution of the decisions of the European Court of Human Rights; the Court's role and its relations with the States' authorities for consideration of subsidiarity; clarity and coherence of the Court's decisions and designation of candidates for the position of judge of the Court; the Court's efficiency and effectiveness; a long-term consideration of the Court and the Convention.[15]

[15] See The Steering Committee for Human Rights, 74th session, Strasbourg, 7-10 February, 2012, CDDH (2012) R74 Addendum III.