

# ASPECTS REGARDING THE DIVERGENCES BETWEEN THE CONSTITUTIONAL AND THE CONVENTIONAL CONTROL IN THE FIELD OF HUMAN RIGHTS

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**Abstract:** *The integration, at national level, of the jurisprudence of the European Court of Human Rights may open the subject of a dispute in relation to a contrary jurisprudence of the Constitutional Court, regarding the protection of human rights. This paper integrates the possible disputes and proposes ways of solving them, as well as proposals for improving the dialogue of European states regarding the jurisdictional protection of human rights.*

**Key words:** *unconstitutionality, unconventionality, res judicata*

## 1. Introduction

The decisions of the Constitutional Court are generally binding and they should not create a divergence with judicial decisions in terms of the interpretation of a rule in the field of protection of fundamental rights. However, what establishes that the application of a normative text would be contrary to the European Convention on Human Rights, therefore non-conventional, pre-exists a decision of the Constitutional Court that finds the constitutionality of the same normative text. In this case, the judge must establish the precedence of one of these decisions.

## 2. A Case in the Judicial Practice

In the judicial practice, the issue was the prevalence of a definitive judicial decision that provided an interpretation in accordance with the European Convention on Human Rights, in relation to a decision of the Constitutional Court that found the constitutionality of the same normative text.

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In a case, the plaintiff addressed the competent authority in Romania, i.e. the National Authority for Property Restitution, relying on the provisions of Law no. 9/1998. This law provided for a compensation system for the former owners of goods that were located in former Romanian territories, which in 1940 were ceded to Bulgaria.

Article 1 para. (2) of Law no. 9/1998 provided that the right to compensation belongs to the former owners or their heirs, who have Romanian citizenship on the date of entry into force of this law. The plaintiff was the heiress of the former owner of the building. The plaintiff was not a Romanian citizen. The authority did not resolve the request and the plaintiff addressed the court.

The plaintiff claimed the unconstitutionality of the legal provisions which stipulated that the compensations are granted to the former owners or their heirs, who have Romanian citizenship at the time of the request. In that litigation, the court found by decision that the plaintiff is entitled to compensation, noting that she is the heir of the former owner and obliged the authority to issue a decision to grant compensation. Along with the decision by which the case was settled, the court notified the Constitutional Court with the exception of unconstitutionality. The judiciary court's decision remained final, as no appeal was filed.

The Romanian legal system no longer provides for the suspension of the main litigation until the resolution of the exception of unconstitutionality, a fact that allowed the Constitutional Court to rule on the exception after the definitive resolution of the main litigation. By decision no. 113/2015 the Constitutional Court rejected the exception of unconstitutionality. The Constitutional Court found that it is an option of the legislator the manner in which he regulates the conditions for granting compensations.

After the judiciary court's decision and based on the decision of the Constitutional Court, the National Authority for Property Restitution did not grant compensation, but considered that the plaintiff could not request compensation because she was not a Romanian citizen.

The plaintiff addressed the court again. The court found that the plaintiff is entitled to compensation. The court considered that after the first definitive sentence, no public authority can challenge the claimant's status as a person entitled to compensation due to the lack of the Romanian citizenship.

### **3. Procedural Aspects**

We note that the litigation is atypical, since although the Constitutional Court considered that the condition of Romanian citizenship for the granting of compensation is constitutional, in the first litigation the judicial court ruled before the decision of the constitutional court and gave a different interpretation to the citizenship condition, considering it excessive from the perspective of the system compensation and recognized the claimant's right to compensation.

On the other hand, even if the Constitutional Court sentenced on the exception of unconstitutionality after the judgment of the judicial court was final, this does not mean that the court's decision can be reviewed as a result of the decision of the constitutional

court, as no such mechanism is regulated. The Romanian system only provides for the review of the judicial decisions that were based on normative provisions that the Constitutional Court subsequently found unconstitutional as a result of an exception of unconstitutionality that was raised in that case.

In the practical situation that we are analyzing, the court in the second dispute had to balance, on the one hand, the *res judicata* authority of the legal interpretation given by the first court, and, on the other hand, the binding decision, of the Constitutional Court. Article 1 para (2) from Law no. 9/1998 has already been interpreted, *inter partes*, by the judiciary court. The court ruled that the plaintiff has the right to a "good" in line with the provisions of Article 1 of Protocol no. 1 from the European Convention on Human Rights, while the Constitutional Court did not address this issue, considering that the legislator has a margin of regulation regarding compensations.

#### **4. New Challenges and Perspectives**

The decisions issued by the constitutional court may raise new questions regarding the relationship between the constitutional control carried out by the Constitutional Court and the control of conventionality by the judicial judge. The unconventionality of the law recognized by the judge leads to the non-application of the law *inter partes*, while a decision of unconstitutionality issued by the constitutional court removes the law *erga omnes*.

Although the constitutionality control is an abstract control, i.e. it is not a law enforcement control, just like the conventionality control, it is carried out during the application of the law.

The Constitutional Court examines the compatibility of the legal texts subject to constitutionality control, both with the provisions of the Constitution and with those of the European Convention on Human Rights. This, however, does not exempt the judge from the possibility of facing, in the matter of the protection of fundamental human rights, both the authority of a decision of the Constitutional Court and that of a decision of the European Court of Human Rights. As happened in the litigation we presented, the court may be faced with a decision that validates the constitutionality of a legal text, without this being equivalent to a validation of its conventionality.

Of course, to be enforceable, a law must simultaneously comply with the Constitution, the European Convention on Human Rights and the European Union law. If a constitutional requirement is incompatible with a requirement of the European law, the question is which judge is competent to identify the conflict and, if applicable, to resolve it. We consider that the judicial judge is responsible for a conventionality analysis in case the normative text has been validated from the perspective of constitutionality. We believe this as the judicial judge is the one who applies the law to the specific case and is the final frontier in a conventionality check where the normative text has been validated from the perspective of constitutionality.

The national judges legitimized their control of conventionality based on a flexible jurisprudence of the European Court of Human Rights that validated this role.

The Romanian Constitution established a mechanism able to ensure in any situation the protection of fundamental rights and freedoms at a maximum level, referring to the normative benchmark that offers the strongest guarantees of protection, be it in the national normative system, or provided by an international legal instrument ratified by Romania.

In the Romanian system, the plaintiff can challenge before the judicial court a normative text both for unconstitutionality and for unconstitutionality. If a litigant invokes a principle protected both conventionally and constitutionally, he can choose three strategies: to raise only the question of constitutionality, to raise only the question of conventionality, or to raise both questions simultaneously.

The national judge is not competent to make an analysis of unconstitutionality, so he will only make an analysis of the admissibility of the exception of unconstitutionality and, if it passes the admissibility test, he will refer it to the Constitutional Court of Romania for the constitutional review.

The Constitutional Court, as part of the constitutionality control, will make a conventionality analysis of the normative text, based on the jurisprudence of the European Court of Human Rights.

If the normative text is validated by the Constitutional Court for constitutionality, the question would arise whether the role of the national judge is reduced to the role of incorporating the decision of the constitutional court in his decision or whether he will also make his own analysis of conventionality.

The decisions of the Constitutional Court are generally binding and have *erga omnes* effects. This obligation concerns the entire decision. Therefore, we can affirm that the decisions are binding for the courts regarding the interpretation of the jurisprudence of the European Court of Human Rights which was analyzed by the Constitutional Court in its decision. However, this situation is a particular one because, as a rule, we are talking about the binding nature of the decisions of the Constitutional Court regarding its own considerations.

Currently, the Constitutional Court frequently invokes in the reasoning of its decisions the principles instated by the jurisprudence of the European Court of Human Rights. There have also been situations in which European jurisprudence constituted a reason for the reconsideration of the constitutional review court's own jurisprudence (Barbu, Muraru and Bărbăţeanu, 2021, p. 236).

However, we believe that the judicial court could also provide an analysis of the dispute, based on the European jurisprudence analyzed by the constitutional court or by any other relevant jurisprudence. The judicial court may also consider other elements of European jurisprudence, which were not analyzed by the Constitutional Court. Therefore, from this perspective, the procedure must be flexible, in the sense that the judicial court should also be given the opportunity to make its own analysis of the jurisprudence of the European Court, as the judicial court is the only one competent to apply the law to a factual situation, having the power of *jurisdictio*.

The problem of the conflict of conventionality may arise if the Constitutional Court considered that the text complies with the requirement of constitutionality and,

implicitly, of conventionality, and the judicial court has a contrary conclusion regarding conventionality.

We consider that, in this case, the judicial court has the possibility to remove for unconventionality a normative text previously found to be constitutional.

The judicial courts are obliged to apply the provisions of the Convention as interpreted by the European Court of Human Rights. The European jurisdiction and the constitutional jurisdiction wish to see that the authority of the interpreted thing (*res judicata*) is recognized in their decisions. If the constitutional review court declares that a text is in accordance with the Constitution, and the European Court of Human Rights declares the same text contrary to the Convention, the two decisions have the authority of *res judicata*.

Since, to be enforceable, a law must comply with both the Constitution and the Convention, the judge must exclude the law from application, regardless of its compliance with the Constitution.

We believe that in this case the judge does not thus violate the *res judicata* authority of the Constitutional Court's decision, which exhausts its effects when recognizing the validity of the national law in relation to the Constitution. This is also the case when the Constitutional Court declares unconstitutional a provision considered to be in accordance with the Convention, since the conventionality analysis made by the constitutional judge is in the limited spectrum to an analysis of constitutionality, and not of *jurisdictio*.

The power of jurisdiction, to either establish or not the existence of a right or to repair a damage caused by its violation, does not belong to the constitutional court, but to the judicial judge. That is why we can say that the judicial judge is the last guarantor of compliance with the European Convention on Human Rights.

## 5. Proposals

In the last 70 years, after the Second World War, the states of Europe understood that only collaboration between their jurisdictions and the application of the common principles of international conventions for the protection of human rights lead to the effectiveness of law, of *jurisdictio*. This collaboration could not have been effective without procedures for this purpose.

*Jurisdictio* is a mechanism that can be improved and should always be rethought so as to be adapted to the modern world, in which the national judge should meet demands for professionalism, urgency, clarity, accessibility in a synthetic language.

Many times, however, less clear normative provisions, a non-unitary jurisprudence or non-predictable administrative practices can harm effective justice in terms of the protection of fundamental rights.

Therefore, both the litigants and the courts must have access to more accessible collaboration mechanisms when they have doubts about the compliance of some national normative provisions with the requirements of the protection of human rights.

Most of the time, however, a mechanism for the removal of possible errors in the legislation intervenes after the harm has already been done, by finding violations of the European Convention on Human Rights, after the final settlement of a dispute at the national level.

Unlike the mechanism of the request for a preliminary ruling, which intervenes *ex ante* in the procedure for the final settlement of a dispute and thus makes effective the avoidance of a violation of the EU law, the control of conventionality carried out by the European Court intervenes *ex post*, after the final settlement of a dispute.

The task of ensuring compliance with the rights enshrined in the Convention is primarily incumbent upon the authorities of the contracting states. It should be considered that this protection is ensured first, as far as the control of the law is concerned, in the constitutional order.

We can also assume that the assertion of compliance with the Constitution is equivalent to a presumption of compatibility with the European Convention on Human Rights. But this is obviously a mere assumption. Only the European Court of Human Rights is the authentic interpreter of the Convention.

Since the authentic interpretation of the Convention always takes place *ex post*, after the final settlement of the dispute before the national court, we question whether in the near future, in accordance with the model of the request for a preliminary ruling, a similar mechanism could be regulated at the European level, to allow a direct dialogue between the national court and the European Court of Human Rights regarding the interpretation of the European Convention on Human Rights, without abandoning the *ex post* mechanism for establishing the violation of the Convention.

A direct dialogue of the judicial court would ensure a uniform interpretation of the Convention and would prevent the settlement of a dispute based on legislation or on administrative or judicial practice with unconventional elements.

## References

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