THE EFFECTS OF THE EUROPEAN COURT DECISIONS OF HUMAN RIGHTS ON THE LEGISLATION AND NATIONAL JUDICIAL PRACTICE

Chifa Felicia
Law Teacher, Moldova State Uuniversity
Law Faculty, Civil Lawsuit Deparment

Key Words: Human rights,
judicial practice,
national legislation,
litigations,
European Court

By the European Convention ratification on Human Rights Protection and the Fundamental Liberty, all member states of the European Council admitted the obligation both of the Convention instruction and it materialization in European Court decision and Human Rights which have an important role in the states judicial life and often lead to the legislation change and judicial practice with a view to defense efficacious the fundamental human rights and liberty.

At one time with the ratification by the Parliament of the European Convention on Human Rights Protection and the Fundamental Liberty [1], the Republic of Moldova, like all states of the European Council, undertook the provided obligations in it contents. Unlike the majority of the international treaties, the Convention provides a mechanism of guaranty and control of the undertaken engagement execution by the contractor states. The responsibility of this control was divided between: the European Community of Human Rights (established in 1954),the European Court of Human Rights (established in 1959) [2] and the Ministry Community of the European Council, constituted from foreign affairs ministers of the member states or from their representatives. This controlling system imported a general reorganization on 1 November 1998, at one time with the admission of the Protocol 11, which abolished the European Community of Human Rights, creating the only Court that always functions in Strasbourg (France).

The access at ECHR is a subsidiary measure of the litigation solution in case that internal means of the states proved to be feckless. ECHR examines the petitions

upstart against its taking in consideration the *ratione loci,* it means that it has attribution in the solution of the claims only in case that alleged infringement was committed in the jurisdiction limits of the states in which is applying the Convention and *de ratione materiae* that results from article 34 from Convention which foresees that ECHR can be observed by each person who insists to be a victim of an infringement of the rights approved by the Convention or by it additional Protocols.

The solution of the cases finishes by the issuance of a decision. After that the decisions become definitely [3] they are obligatory for the defendant states in litigation, these being engaged to comply with the final decisions. The Ministry Community of European Council is responsible of the decision execution supervision by controlling if the states, according to which ECHR decided that they infringed the Convention, took the necessary measures to execute the specific or general obligations which issue from the ECHR decisions. The Ministry Community has the possibility of the interim resolutions adoption and possible the imminence to apply article 8 from the European Council Statute, it means the exclusion from the European Council, in case of opposition of the state with the Decision instructions adopted by ECHR against it. We cite the fact that, as a rule, the states execute the ECHR decisions. Thus, for example, from 12 September 1997, the date of the Convention admission for the Republic of Moldova, and till 28 March 2008 the Court declared proportionally at Republic of Moldova 111 decisions in which observed at least an infringement of a law guaranteed by the Convention. All the decisions declared and admitted were executed.

According to the Convention, the control of the decisions execution enters in the bilateral scheme between the defendant state and the Ministry Community. The execution of the decisions issues from the state responsibility engagement, which didn't execute its primary obligation to guarantee the admitted rights in the Convention. The state is imposed to execute: the obligation of the cancellation of the illicit fact, the obligation of the allotment (to liquidate the past consequences of the fact) and, finally, the obligation to avoid the similar infringements (the obligation of the no recurrence of the illicit fact). The mentioned engagement implicates the submission with the ECHR decisions instructions by:

- the defrayal towards the claimant of the equitable satisfaction given by ECHR. The equitable satisfaction is given by ECHR in case that this declares that it took place an infringement of its Convention or Protocols and if the internal right of the state doesn't allow an incomplete avert of the consequences of this infringement (article 41 from the Convention). The equitable satisfaction is the only measure which ECHR can order to the State responsible for the infringement of the Convention;
- the adoption of some individual measures to assure the cessation of the infringement and the placement of the injured part, in the measure of the possibility, in the situation in which was before the infringement of the Convention. As an example can serve the reopen of the internal judicial proceeding, which constitutes,

without a doubt, the most imposing effect which can produce an international judgment. The logic of this proceeding consists from the fact that ECHR doesn't have the adequacy to suspend the execution of the decisions on the defendant state territory. It neither modify nor annul the judiciary decisions adopted in the state which infringed the Convention, this being the prerogative of the respective state. Therefore," a decision which observe an infringement implicates for the defendant state the judicial obligation to cease the law infringement and to liquidate the infringement consequences thus not to reset the anterior situation as possible "[4] The Convention let at the secrecy of the competent authority of the defendant state to establish the most adequate measures for the realization *restitution in integrum*, paying attention on the available means from the national judicial system cadre. Taking in consideration the necessity and the importance of this mechanism, the Ministry Community of European Council adopted the Recommendation number R (2000) 2 with respect to the re-examination and reopen of some cases at an internal level behind the ECHR decisions [5] Adequate to this Recommendation, the contractor parts continue to assure that at the internal level there adequate possibilities to realize, in the measure of the possibility, *restitution in integrum*. The contractor parts are encouraged to examine national judicial systems to assure that there are adequate possibilities to re-examine a case, inclusive the reopen of an process, in case that the Court observed a Conventional infringement, in particular if:

1) the injured part continues to support the very serious negative consequences behind the national decision (a continuous infringement), consequences which can't be compensated through equitable satisfaction and which can't be modified only by the re-examination or reopen, and

2) from the Court decision issues that:

a) the assaulted internal decision contravenes to the Convention, or

b) the observed infringement is caused by the errors or deficiency of the proceeding by a seriousness like this which provokes a serious doubt towards the attacked internal proceeding result.

In Republic of Moldova this effect is realized with the help of the revision, thus through the Law from 12.07.2002 was completed the article 325 of the Civil proceeding Code of Republic of Moldova from 1964 with respect to the decisions infringement bases. This norm was reproduced at the article 449 lit. h) of the Civil proceeding Code from May 30, 2003 [6] which foresees as a basis for the revision the fact that the European Court of Human Rights observed an infringement of the rights or of the fundamental liberties, but the interested person can obtain, according to the national law, a compensation, at least partly, through the declared decision cancellation by a country judgment

- the adoption of the general measures to prevent new similar infringements with those observed or to liquidate the infringements which continue. It means the modifications and the legislative settlements and\or constitutional. The Court

doesn't examine the problems of modification, interpretation and application of the internal right even this doesn't correspond to the ECHR or to the Conventional practice, because with respect to the sovereignty and independency principle, the state in exclusiveness creates, modifies and applies its own system of right. Therewith, ECHR Decisions take in consideration at the liberation of the law project compatible with the normative cadre of the European Council which hold on the law observance of the human rights and of the fundamental liberties, the consolidation of the judiciary system etc. The responsible public authorities assure the continue analysis of each folder which served as a basis for the declaration by ECHR of the condemnation decision of Republic of Moldova and other states and will undertake all the measures possible for the abolition of the deficiencies and legislative failures observed. With the respect to Republic of Moldova legislation, the Parliament has to assure the examination and the adaptation of the law projects which hold on the rights protection and human liberty, the consolidation and the insurance of the judicial system, as other legislative acts which will redound at the development of the democratic institutions from our country. [7] Thus, for example, on 9 October, 2007 ECHR adopted the decision in Clionov litigation against Moldova [8] In this case, the claimant pretended the infringement of its right of access at the judgment instance guaranteed by article 6 §1 from the Convention, whereas the European Court of Justice refused the examination of it appeal with the motivation that this didn't paid the state tax, because article 437 paragraph 2) from the CPC doesn't foresee the possibility of the application of the article 85 paragraph (4) and the article 86 the CPC looking on the exoneration, the recession or the echelon from the state tax payment in case of the appeal against the instance decision. In this context, ECHR decided explicitly that these stipulations of the CPC contravene to the instructions of the article 6 §1 from the Convention. With a view to the premonition of some eventual conviction, the CPC was submitted to some modifications by means of which was allowed the exemption, the recession and the echelon from the state tax payment in the appeal instance.[9]

An eloquent example of the ECHR decisions effects adopted against other states, about Republic of Moldova legislation it is the introduction in the execution Code of the interdict to leave the country as a measure of execution insurance.[10] At the adoption of this modification it was taken in consideration the instructions of the *Reiner against Bulgaria* decisions [11], where were mentioned the conditions when the state has the right to restrict some human rights. Thus, to the Court opinion, the restriction of some human rights can be done with the observance of some conditions, and specially:

- these restrictions have to be express foreseen by law (condition respected through the express including of this attribution of the judicial executor in article 25 CE); the eventual application of the restriction has to be predictable for the debtor (this exigency will be realized through the express stipulation in article 25 and 57 CE of the application possibilities of these measures and as through its

denomination in the nomination contents of the voluntary execution forth the debtor);

- at one time this measure was disposed, it has to be susceptible to an assault way (pursuant to the stipulation of the article 10 and 158 CE, all the judicial executor acts can be attacked with the appeal) ;
- this measure can be applied only after the expiring of the term of a voluntary execution and in case of its misapplication it would do the judicial infringement execution difficult or impossible, as a final measure in case that other ways were out of print (thise conditions are express stipulated in the legal norm);
- the necessity of the maintenance of this interdict continue to be partly verified, not having an automatic character (here in the text of the law it shows that the maintenance of the restriction is done until their revolution decline, but the maximal term of application is of 12 months, with the possibility of the multiple application, in case of necessity, but no more then 3 times in the same execution proceeding. Therewith, the judicial executor has the obligation to effectuate periodically, once a 30 days, a control of the maintenance necessity of this interdict).

Therefore, the adoption of this modification didn't affect the Moldavians citizens rights and liberties.

The ECHR decisions have an incontestable value both for the judicial practice, thus the judicial instances have the obligation to apply on the solution of the civil reason the ECHR jurisprudence, complying to the infringements decisions declared as Republic of Moldova as against other states. European Court of Justice of Republic of Moldova, in its turn, has to systematize the judicial practice in its purpose of uniform application and in concordance with the ECHR jurisprudence, also to adopt explanatory infringements in the ERCH decisions declaration with respect to Republic of Moldova which endorses effectiveness at the examination of the reasons by the national judicial instances.

In conclusion we mention that next to the individual satisfaction of the claimant obtained through the reinstatement of its right guaranteed by the Conventional, the ECHR jurisprudence proved to be a great importance for the judicial practice from Republic of Moldova and for the improvement of the national normative cadre in the human fundamental law area. In Republic of Moldova it functions the permanently government Commission for the organization of the definitely infringements of the ECHR and Republic of Moldova [12], which supervises permanently the realization of the measures with an individual and general character on the integral execution overview of the infringements declared against Republic of Moldova, as for the premonition and avoiding of some similar infringement.

REFERENCES:

1. The Parliament decision of Republic of Moldova Nr. 1298-XIII from 24.07.97, in continuation of the Convention
2. In continuation ECHR
3. A decision of a Community becomes finally at the expiring term of 3 months or earlier if the parts declare that they don't have the intention to ask the resending of the file to the Great Community, or in case that the five judge college refused the resending application forth to the Great Community. In case that the college accept the application, the Great Community declares itself through a decision, taken with the majority of the votes, which remains definitely
4. The Papamichalopolous cause and others against Greece from 31 October, 1995
5. The Recommendation nr. R (2002) 2 of the Ministry Community towards member states with respect to the re-examination or reopen of some decision at an internal level behind the European Court of Human Rights decision.
6. To the Proceeding civil law of Republic of Moldova, nr. 225-XV from 30.05.2003, the Official Monitor of Republic of Moldova nr. 111-115/451 from 12.06.2003
7. Decisions looking up the hearing on the infringements declared causes of the European Court of Human Rights with respect to Republic of Moldova, their execution and the premonition of the infringement of human right and of the fundamental liberties nr. 72 from 28.03.2008, MO of RM nr. 74-76 from 15.04.2008
8. Clionov cause against Moldova nr. 13229/04 from 9 October,2007
9. The modification Law of the proceeding Civil Code nr.83-XVI from 17 April, 2008
10. Art. 25 paragraph (2) 1 and art. 57 the Execution Code
11. Reiner cause against Bulgaria nr. 46343/99 from 23 May,2006
12. The government decision nr. 1488 from 31.12.2004 with the respect to the permanent Governmental Commission for the execution organization of the ECHR definitive infringements and Republic of Moldova, OM of Republic of Moldova nr. 001 from 1 January 2005.