

REVIEW BASED ON A SPECIAL CASE OF A JUDGMENT (AND ADVISORY OPINION) OF THE EUROPEAN COURT OF HUMAN RIGHTS IN ROMANIAN CRIMINAL PROCEEDINGS. BRIEF CONSIDERATIONS ON THE CONDITIONS FOR EXERCISING IT

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Abstract: *The regulation of the review procedure in the case of decisions of the European Court of Human Rights is imposed by the need to eliminate the consequences of the violation of the provisions of the European Convention in criminal proceedings, when these consequences continue to occur even after a final decision of the European Court of Human Rights has found the violation. In this regard, the promotion of a request for review based on the existence of a final decision issued by the European Court of Human Rights is an admissible approach only to the extent that, by reference to the nature of the right whose violation the European court found, the cessation of the serious consequences of the violation of the Convention is possible only by re-examining the domestic case that was the basis for the referral.*

Keywords: *Judgement, decision of the European Court of Human Rights, review, criminal proceedings*

Introduction

1. In criminal proceedings, the trial constitutes one of the most important procedural activities because during the trial, the criminal law conflict submitted to judgment is resolved. The existence of the criminal act, the perpetrator's guilt, and the application of a sanction are determined.

The remedies against judicial decisions, both ordinary and extraordinary, have been established out of the necessity to control the activity carried out by the courts. Through the exercise of judicial review, possible errors made during the trial, whether regarding the establishment of facts or the application of the law, can be corrected (Lorincz, 2014, p. 7). Doctrine (Dongoroz, 1943, p. 339) has pointed out that a judicial decision, despite all the guarantees provided by law and the Constitution, may contain errors in judgment and resolution (a presumption of error) (Theodoru, 2007, p. 1) and that during the new trial, these errors will be corrected (a presumption of rectification) (Dongoroz, 1943, p. 339). However, doctrine has also warned that the use of the term "presumption" might imply an *a priori* negative evaluation of the judicial activity, thus undermining the prestige of the judiciary (Theodoru, 2007, p. 2). In this context, it has been suggested that using the term "possibility" that a judicial decision might not be lawful and well-founded would be more appropriate and would not affect the prestige that the judiciary should enjoy, given that cases of unlawfulness or lack of sound reasoning are exceptions. Therefore, remedies are considered procedural instruments through which any potential errors contained in judicial decisions can be corrected (Theodoru, 2007, p. 2).

By exercising the remedies, a new criminal procedural relationship is not created; rather, the conduct of the original one is extended into a new phase of the criminal process. Similarly, by exercising the remedies, a new criminal action is not initiated; instead, it represents a way of pursuing the initial criminal action by moving into another procedural phase.

The extraordinary remedy of revision may be exercised against final judicial decisions, having the nature of a retractor remedy, allowing the criminal court to revisit its own decision, and at the same time, the nature of a factual remedy, through which judicial errors in the resolution of criminal cases are identified and corrected. Revision is filed against a decision that has acquired the authority of *res judicata*, based on facts or circumstances that were unknown to the court at the time of adjudication, discovered after the trial, and which demonstrate that the decision was based on a judicial error (Udroiu, 2019, p. 623).

2. Through Recommendation No. R (2000) 2 of the Committee of Ministers (Recommendation No. R (2000)), member states were advised to review their national legal systems to ensure that adequate possibilities exist for the re-examination of a case when the Court has found a violation of the Convention, particularly where the injured party continues to suffer very serious negative consequences from the outcome of the national decision, which are not adequately remedied by the just satisfaction awarded and can only be rectified through re-examination or reopening (Ghenici, 2019, p. 98; Pușcă & Rus, 2020, p. 186).

The same solution must be offered if the Court's judgment leads to the conclusion that the contested national decision is essentially contrary to the Convention, or if the established violation is caused by procedural errors or deficiencies of such gravity that they raise serious doubts about the outcome of the contested national proceedings (Ghenici, 2019, p. 98; Pușcă & Rus, 2020, p. 186). Subsequently, through Resolution 1226 (2000) of 28 September 2000, the Parliamentary Assembly invited the states parties to the Convention to provide in their national legislation for the reopening of proceedings following judgments of the Court.

3. In Romania, this special case of re-examining a final judgment was introduced among the cases of annulment appeal through Emergency Ordinance No. 207/2000 (Official Gazette Part I nr. 594 din 22 November 2000) on the amendment and completion of the Criminal

Code and the Code of Criminal Procedure, under Article 410 paragraph 3 of the Code of Criminal Procedure, which provided: "decisions pronounced in cases where the ECHR has found a violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms may be challenged by an annulment appeal."

Later, through Law No. 576/2004 (Official Gazette Part I no. 1223 din 20 December 2000) for the amendment and completion of the Code of Criminal Procedure, the provisions regarding the annulment appeal were repealed, and Article 408¹ was introduced, regulating revision in the case of judgments of the European Court of Human Rights.

The current Code of Criminal Procedure regulates this procedure in Article 465 — *Revision in the case of judgments and opinions of the European Court of Human Rights*, which essentially represents the possibility granted to the party to exercise this extraordinary remedy. The European Court of Human Rights confirms that the right to a fair trial before a tribunal is guaranteed by Article 6 paragraph (1) of the Convention, and this right must be interpreted in light of the Convention's preamble, which proclaims the rule of law as part of the common heritage of the contracting states. Although one of the fundamental elements of the rule of law is the principle of legal certainty, which requires, among other things, that the solution definitively given by the courts to any dispute should not be called into question again (*Brumărescu v. Romania*, Official Gazette Part I no. 414 din 31 august 2000) because legal certainty implies respect for the principle of *res judicata*, that is, the finality of judicial decisions, when a violation of a right is established, the European Court of Human Rights imposes on the national courts the obligation to resume the proceedings from the stage in which the party found itself at the time of the rights violation (Pușcă & Rus, 2020, p. 187).

4. Conditions of exercise.

The revision request based on the existence of a conviction issued by the European Court or an advisory opinion of the ECtHR must be submitted to the court that issued the final judgment whose revision is being sought.

The determination of the competent court is based on the decision of the European Court specifying before which of these courts the fundamental right violation occurred. For the European Court to issue a judgment, it is necessary to exhaust domestic remedies (otherwise, the procedural inadmissibility ground provided by Article 35 paragraph 1 of the European Convention will apply) (Udroiu, 2023, p. 814).

The revision request based on this ground must, in principle, be addressed to the court of appeal. Thus, the filing of a revision request is conditional upon the existence of a final judgment of the ECtHR or an advisory opinion of the ECtHR, finding a violation of a right provided by the European Convention or its additional protocols, in a criminal trial conducted before Romanian judicial authorities, where the Romanian criminal courts ruled by final judgment (or in cases where the case was struck out following an amicable settlement between the state and the applicants). The doctrine has shown that one of the essential conditions for the admissibility of a request for review is not met, namely, the existence of a final judgment delivered by the Romanian courts, when the ECHR found a violation of Art. 3 and Art. 13 of the Convention in a case in which only resolutions not to initiate criminal prosecution had been issued, (Ghenici, 2019, p. 99).

This case of revision is subject to a double condition and requires both the existence of a judgment by the European Court finding a violation of fundamental rights or freedoms, and the persistence and impossibility of remedying the serious negative consequences of the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols, provided that the

established violation concerns a final judgment rendered by a Romanian court.

In situations where it has been established that, during the adjudication of the appeal, the Romanian court violated Article 6 paragraph 1 of the Convention, by convicting the defendant without the defendant having been heard by the appellate court, especially considering that the lower courts had ordered his acquittal, and Article 6 paragraph 3 letter d) of the Convention, by convicting the defendant without the whistleblower having been heard in court and without ensuring the defendant's opportunity to cross-examine him (Ghenici, 2019, p. 100).

It was also noted (ÎCCJ 2017), for example, that the conditions provided by Article 465 of the Code of Criminal Procedure are met when the ECtHR has found a violation of the right provided by Article 6 paragraph 1 of the Convention, following a conviction issued after the acquittal of the defendant by two lower courts, without the direct hearing of witnesses: "Following the prosecution's appeal, the High Court took advantage of the possibility offered by domestic law to re-examine the issue of the defendant's guilt. For this purpose, the High Court relied on the same evidence that had led the lower courts to order the acquittal, with no new evidence being presented before the court. The High Court concluded that it was certain from the evidence, and especially from the content of the witnesses' statements, that the claimant had committed the act he was accused of." It was established that the High Court interpreted the statements in the case file without directly hearing the witnesses. Thus, the High Court adopted a position contrary to that of the lower courts, which had acquitted the claimant, particularly based on the statements of the witnesses made during hearings before them (Potoroc vs. Romania). The High Court determined that the review request could only be conducted within the limits set by the European Court of Human Rights' judgment, specifically only concerning the party and the facts addressed by the Court, and only concerning the violation of the *ne bis in*

idem principle. As for the other findings, the decision of the appellate court remained unchanged. In this regard, the ECtHR noted the violation of Article 4 of Protocol No. 7 to the Convention and observed that "the claimant was prosecuted twice for the same acts of violence committed against the same person (...). Even though other acts, namely damage to D.M.M.'s property, were attributed to the individual in the second procedure, it remains true that the two proceedings coincided regarding the acts of violence."

The Court also noted that, although the claimant invoked *res judicata* in the second procedure, the domestic courts did not expressly establish within this procedure that there were factual circumstances distinguishing the charge of robbery from that of assault or other violence for which the individual had already been acquitted (Asadbeyli and others, para. 161). On the other hand, it pointed out that the appellate court ruled, in its decision of March 4, 2008, that there was identity of facts between the two proceedings in question (*supra*, para. 20), but that these findings could not, for procedural reasons, lead to the reopening of the procedure (*supra*, para. 21) (Butnaru and Bejan-Piser vs Romania).

A request for the revision of a final judgment cannot be made by invoking decisions issued by the ECtHR against other states in similar cases or as a result of the finding of a violation of the European Convention through a domestic regulation of the convicted state that is identical to the Romanian regulation, even if the victim's complaint against the Romanian state has been declared admissible but not definitively adjudicated. The ECtHR judgment must allow for the annulment of the final judgment, that is, it must examine the substance of the case in some way. For example, it was decided that the reexamination of the initial case is not possible in the context where the European Court found a violation of Article 6, paragraph 1 of the Convention, as evidenced by the excessive duration of the procedure (Ghenici, 2019, p. 100).

Also, in the jurisprudence of the High Court, it is stated that the conditions provided by Article 465 of the Code of Criminal Procedure are met even in situations where the defendant's rehabilitation has occurred by law (...) However, this circumstance does not constitute grounds for considering that the violation of the rights provided by the Convention, as found by the ECtHR judgment, ceases to occur. The effects of rehabilitation consist in the cessation of disqualifications, prohibitions, and incapacities arising from a conviction, but rehabilitation presupposes the very conviction that has established, with *res judicata* authority, the defendant's guilt for committing an act punishable by criminal law.

In this regard, it was noted that rehabilitation does not have the value of declaring the defendant's lack of criminal responsibility, and that in the case of revision, it is not a matter of forgiveness for future consequences but rather a determination of the person's innocence and the invalidity of the judgment in general, so that the consequences of the conviction are formally extinguished by rehabilitation (Pușcă, Rus, 2020, p. 191). Therefore, on one hand, it was decided that when the ECtHR found that the final conviction was pronounced in a case that was not resolved fairly, rehabilitation cannot constitute grounds for rejecting the revision request, with the reasoning that the serious consequences of the Convention violations no longer continue to occur (ICCJ, secția penală, decizia nr. 179/2016). On the other hand, it was decided that if the ECtHR found a violation of rights guaranteed by the Convention, but the conviction was pronounced following an uncontested procedure regarding fairness, and the consequences of the conviction ceased by operation of law through rehabilitation, the revision request is unfounded and must be rejected (Ghenici, 2019, p. 102).

Article 465, paragraph 1¹ of the Code of Criminal Procedure also provides for the case of an advisory opinion regarding a final judgment pronounced in a case by the ECtHR, which can be subject to the extraordinary appeal of revision under the following conditions:

a) the final judgment was pronounced before the communication by the Government Agent for the European Court of Human Rights of the advisory opinion, translated into Romanian; b) the contradiction between the interpretation in the final judgment and the one established by the advisory opinion generates a violation of fundamental rights or freedoms, and one of the serious consequences of the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols continues to occur and can only be remedied by the revision of the judgment. In this case, the revision request can be made no later than 3 months from the date of publication of the opinion issued by the European Court of Human Rights in the Official Gazette of Romania, Part I.

Regarding the condition of the continuity of the serious consequences caused by the violation found by the ECtHR and the impossibility of remedying them otherwise than by revising the final judgment, the promotion of a revision request based on the existence of a final judgment pronounced by the ECtHR is an admissible step only insofar as, concerning the nature of the right whose violation was found by the European court, the cessation of the serious consequences of the violation of the Convention can be achieved by retrying the domestic case that led to the referral.

In a case, the ECtHR found that the applicant's right to a fair trial, as provided by Article 6, paragraph 1 of the European Convention on Human Rights, and the right to freedom of expression through the right to communicate information, as provided by Article 10 of the European Convention on Human Rights, were violated. The violation occurred because the domestic courts had refused to examine whether the classification of "strictly secret" was justified in light of potential data collected by the SRI (Romanian Intelligence Service), and whether the interest in maintaining the confidentiality of the information outweighed the public interest in accessing the alleged unlawful interceptions. The domestic courts did not attempt to examine the case in all aspects,

limiting themselves to merely noting the existence of the legal authorization documents, even though this was a crucial argument in the applicant's defense, which the courts left unanswered (paragraph 131). These elements were sufficient for the Court to conclude that the case leading to the applicant's criminal conviction was not decided fairly, thus violating Article 6 § 1 of the Convention (paragraph 132). The Court concluded that the interference with the applicant's right to freedom of expression, particularly the right to communicate information, was not "necessary in a democratic society," and therefore Article 10 of the Convention was violated (paragraph 120) (Pușcă & Rus, 2020, p. 192).

Also, regarding the conditions for exercising the revision, legal doctrine (Ghenici, 2019, p. 191) has pointed out that the special procedure of revision constitutes a remedy for removing potential negative effects, and the phrase "serious consequences" covers a particularly wide range of rights or freedoms that the ECtHR may find to have been violated.

The High Court held that the second condition imposed by the provisions of Article 465 paragraph 1 of the Criminal Procedure Code is not fulfilled, as the serious consequences of the violation of the rights provided by the Convention, as found by the European Court of Human Rights, are no longer continuing to occur (Ghenici, 2019, p. 191). Therefore, the special procedure of revision does not constitute an effective remedy for eliminating potential negative effects, as long as the national courts did not pronounce the conviction based solely on the evidence consisting of intercepted telephone conversations. The conviction of the defendant was based on a set of consistent evidence, including relevant witness and defendant statements, fiscal documents, reception protocols, accounting documents, balance sheets, and trial balances. Contesting the legality of the evidence obtained through the aforementioned method cannot lead to an acquittal of the defendant (Pușcă & Rus, 2020, p. 194).

In another case, it was decided that the moral damage caused by the pronouncement of a final conviction, without giving the accused person the opportunity to present evidence in their defense and without the courts examining all defenses (Article 6 paragraph 1 of the Convention), as well as through the violation of freedom of expression (Article 10 of the Convention), is so significant that neither the judgment of the European Court of Human Rights nor rehabilitation stops the serious consequences of the violations of the Convention as found in the Court's judgment. The significant moral damage consists in the petitioner's dissatisfaction and frustration of not being tried fairly, resulting in the pronouncement of a conviction based on the acknowledgment of guilt. Therefore, the case must be retried with the assurance of a fair criminal trial (Ghenici, 2019, p. 101).

Similarly, both moral and material damage were considered a hindrance to accessing various positions or jobs due to the criminal record. It was decided that the serious consequences of the violation found by the European Court of Human Rights continue to occur, as the convicted person, due to the criminal record, is prevented from accessing public functions or certain jobs, and these consequences can only be remedied through the review of the conviction (Ghenici, 2019, p. 102).

At the same time, in many cases against Romania (Ghenici, 2019, p. 102), the European Court of Human Rights has found a violation of Article 3 of the Convention due to the material conditions of detention. Sometimes these relate either to the execution phase or the pretrial detention period. However, in none of these situations can the consequences of the violation of the right not to be subjected to inhuman or degrading treatment be removed through the review procedure, regardless of whether they continue to occur or not. Even if such violations continue to occur, they cannot be remedied through the special review procedure of the conviction, as the violations did not take place during a judicial procedure in which procedural guarantees were not

respected, but rather later, during the execution phase of the sentence, or earlier, in the case of pretrial detention.

However, if the applicant is in detention, serving the sentence imposed by the judgment reviewed by the Court, the continued existence of harm caused by the pronouncement of a conviction with disregard for the requirements of the right to a fair trial requires the annulment of the prison sentence execution warrant and immediate release (ICCJ, secția penală, decizia nr. 325/2018).

The High Court of Cassation and Justice ruled that the recognition of the violation of the rights provided by the Convention, as well as the sum awarded by the European Court for repairing the harm suffered by the claimant, fall within the meaning of the term "equitable satisfaction," and therefore, they are sufficient to remove the moral harm caused to the applicant (ICCJ, decizia nr. 140/2013). In another case, the Supreme Court considered the compensation represented by the very fact of the Government's acknowledgment of the violation of the applicant's rights, together with the value of the compensation proposed by the Government, to be sufficient (ICCJ, decizia nr. 121/2015).

In other situations, although the consequences of a flawed final criminal judgment continue to occur, revision is not a remedy. For example, it has been found that the violation of the rights of the applicant can only be remedied by initiating a criminal investigation *in rem*, in which the criminal investigation authorities establish the facts and identify the responsible persons (Ghenici, 2019, p. 104). Alternatively, although there was a right whose violation was found by the European Court of Human Rights in a civil case, the serious consequences of this violation cannot be remedied through the revision of a judgment issued by a criminal court.

Therefore, for the admissibility of the revision request, it is necessary that the only remedy capable of removing the consequences of the violation of the right to a fair trial, as found by the European Court of

Human Rights, is the annulment of the court's decision and the ordering of a retrial by the same court, with respect for the rights of the applicant.

Conclusions

The analysis of the fulfillment of the condition regarding the continuity and impossibility of remedying the serious negative consequences of the violation of the Convention remains the exclusive responsibility of the court seized with the review request in the procedure provided by Article 465 of the Criminal Procedure Code, concerning the specific factual situation established in the case. The presentation of this illustrative overview of the High Court's decisions in the field aims to highlight the arguments considered in the legal interpretation made regarding this condition. As evidenced by the jurisprudence of the Supreme Court mentioned earlier, the existence of an ECtHR judgment does not necessarily imply the continued occurrence of serious negative consequences regarding the claimant's situation. In some cases, the material compensation awarded by the European Court's judgment has been sufficient to cover the moral damage suffered, while in other cases, the consequences of the conviction have ceased as a result of legal rehabilitation, or the violation of the right under the Convention concerned only part of the evidence administered in the case, without playing a decisive role in shaping the conviction.

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