

Comparative study on the implementation of the ECHR at the national level



Alessia Cozzi
Athanassia Sykiotou
Dagmara Rajska
Ivana Krstic
Maria Filatova
Nikolina Katic
Petra Bard
Stephanie Bourgeois

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

COMPARATIVE STUDY on the Implementation of the ECHR at the National Level

Authors

Alessia Cozzi, Athanassia Sykiotou,
Dagmara Rajska, Ivana Krstic, Maria Filatova,
Nikolina Katic, Petra Bard, Stephanie Bourgeois

*This publication has been prepared within the framework
of the “Human Rights Friendly Judiciary” project funded
by the Human Rights Trust Fund and implemented
by the Council of Europe.*

*The opinions expressed in this work are the responsibility
of the authors and do not necessarily reflect
the official policy of the Council of Europe.*

Council of Europe

Belgrade 2016

Publisher

Council of Europe
Office in Belgrade
Španskih boraca 3, 11070 Belgrade
www.coe.org.rs

For the Publisher

Tim Cartwright

Editor

Silvija Panović-Đurić

ISBN 978-86-84437-85-5

Circulation

500

Print, layout and cover design

Dosije studio, Belgrade

Copyright©2016

All rights reserved.

No part of this publication may be translated, reproduced or transmitted, in any form or by any means, electronic (CD-Rom, Internet, etc.) or mechanical, including photocopying, recording or any information storage or retrieval system, without the prior permission in writing from the Directorate of Communications (F-67075 Strasbourg Cedex or publishing@coe.int)

Contents

Foreword	5
----------	---

Stephanie Bourgeois

THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AT THE DOMESTIC LEVEL	7
---	---

Alessia Cozzi

THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW IN ITALIAN JURISPRUDENCE	29
---	----

Athanassia Sykiotou

THE RELATION OF GREEK COURTS WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW	47
---	----

Dagmara Rajska

NATIONAL IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS – EXAMPLE OF POLAND	67
--	----

Ivana Krstic

STATUS AND APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE REPUBLIC OF SERBIA	87
---	----

Maria Filatova

**THE IMPLEMENTATION OF THE EUROPEAN CONVENTION
ON HUMAN RIGHTS AND THE EUROPEAN COURT'S
CASE-LAW IN THE RUSSIAN LEGAL ORDER** 107

Nikolina Katic

**IMPLEMENTATION OF THE EUROPEAN CONVENTION
ON HUMAN RIGHTS ON NATIONAL LEVEL** 129

Petra Bard – Károly Bárd

**THE EUROPEAN CONVENTION ON HUMAN RIGHTS
AND THE HUNGARIAN LEGAL SYSTEM** 147

Stephanie Bourgeois

**IMPLEMENTATION OF THE EUROPEAN CONVENTION
ON HUMAN RIGHTS IN FRANCE, A PROCESS
OF PROGRESSIVE ACCULTURATION** 167

Foreword

Comparative analysis before you is dedicated to the issue of the application of the European Convention on Human Rights in the national legal framework of several contracting states to the Convention.

This issue is of great importance, as the acceptance of the European Convention on Human Rights represents the first step towards its implementation in the national law, while the Convention leaves to the states the freedom to decide on their own how to respond to their commitment to respect and apply its provision. The way the state will do so, depends primarily on a reply to a question whether the European Convention can be applied directly, and on its status in the hierarchy of the national legal norms. Consequently, two legal systems emerged: monistic and dualistic. However, simple incorporation of the European Convention in domestic legal system is not capable of solving all problems emerging in the application of the European Convention, nor it is a guarantee of its complete and efficient application. Therefore, it is even more important to review the role of courts in this process. It is necessary to analyse up to which level national courts can examine conformity of the authorities' procedures with the provisions of the European Convention, as well as the readiness of judges to apply the principles contained in the European Court of Human Rights jurisprudence, even in the cases when domestic legal framework provides clear basis.

Replies to these important issues are provided in the eight articles dealing with the application of the European Convention in Croatia, France, Greece, Hungary, Italy, Poland, Russia and Serbia. The selection of countries was made following two principles: affiliation to the monistic, or dualistic legal system – in order to demonstrate different

legal consequences of both systems in the application of the European Convention; as well as the length of the contractual status, presenting the contracting states since the adoption of the Convention, respectively the states who became contracting states in the last two decades, on which depends the level of courts' activity in its implementation.

Initially, all articles examine the status of the European Convention in domestic legal system, through the analyses of the hierarchy of legal norms and its direct application. In the second part, the authors point out the application of the European Convention and principles incorporated in the European Court's jurisprudence by national courts, providing examples from both good and bad practice in the national case law. Finally, all authors give recommendations for improvement of the implementation of the European Convention and further steps that should be taken for the better, more effective and thorough implementation of the principles and standards outlined in the European Court jurisprudence. Experience from one country can serve as an inspiration for the improvement of implementation in another country, as well as a way to overcome some common obstacles and issues identified in the articles.

Brief comparative overview of solutions from several states is given at the beginning.

We hope that you will find this publication useful for your future professional endeavours.

The Implementation of the European Convention on Human Rights at the Domestic Level¹

Stephanie Bourgeois

Former lawyer at the ECtHR

I. The Status of the European Convention on Human Rights in domestic law	8
A. Preliminary remarks: the legal force of international treaties in the domestic legal order, monism versus dualism.....	8
1. The dualistic view	8
2. The monistic view	9
B. Constitutional variety in Member States	10
II. Judicial practices	13
A. Consistent interpretation.....	13
1. Constitutional provisions.....	14
2. Legislative provisions	16
3. Constitutional courts' case law	16
B. Judicial disapplication of domestic law	20
1. Disapplication practice on constitutional bases	21
2. Disapplication devised by domestic judges	21
3. Constitutional provisions empowering national judges to disapply national law that conflicts with international treaties.....	22
C. The limits to primacy: the counter-limits doctrine	23
III. Conclusion	27

1 Initial version of this Article has been prepared within the Council of Europe HELP programme. This version is revised and updated one.

It is primarily the task of the national authorities of Contracting States to secure the rights and freedoms set forth in the Convention. To what extent the national courts can play a part in this, by reviewing the acts and omissions of those national authorities, depends mainly on the question of whether the provisions of the Convention are directly applicable in proceedings before those national courts.

The answer to this question depends in turn on the effect of the Convention within the national legal system concerned. The Convention does not impose upon the Contracting States the obligation to make the Convention part of domestic law or otherwise to guarantee its national applicability and prevalence over national law.

I. The Status of the European Convention on Human Rights in domestic law

A. Preliminary remarks: the legal force of international treaties in the domestic legal order, monism versus dualism

In the context of the relationship between international and domestic law, there are two contrasting views:

1. The dualistic view

In the so-called dualistic view:

- ▶ The international and the national legal system form two separate legal spheres;
- ▶ International law has effect within the national legal system only after it has been “transformed” into national law *via* the required procedure;
- ▶ The legal subjects depend on this transformation for the protection of the rights laid down in international law; their rights and duties exist only in national law.

In a dualistic system, after the Convention has been approved and transformed into domestic law, the question remains which status it has within the national legal system. The answer to this question is to be found in national constitutional law.

2. The monistic view

In the so-called monistic view:

- ▶ The various legal domestic systems are viewed as elements of the all-embracing international legal system, within which the national authorities are bound by international law in their relation with individuals as well, regardless of whether or not the rule of international law has been transformed into national law;
- ▶ The individual derives rights and duties directly from international law, so that in national proceedings he may directly invoke rules of international law;
- ▶ Rules of international law must be applied by the national courts, which must give priority to them over any national law conflicting with it.

However, even among the monistic systems many differences exist. Although as a general rule they accept the domestic legal effect of (approved) international treaties, the scope of this acceptance varies considerably.

In the prevailing opinion the system resulting from the monistic view is not prescribed by international law at its present stage of development. International law leaves the States full discretion to decide for themselves in what way they will fulfil their international obligations and implement the pertinent international rules within their national legal system; they are internationally responsible only for the ultimate result of this implementation.

The consequence is that in some Contracting States no internal effect is assigned to the Convention, while in others it is so assigned.

In States in which the Convention has internal effect, one must ascertain for each of its provision separately whether it is directly applicable – is self-executing-, so that individuals may directly invoke such a provision before the national courts. The self-executing character of a Convention provision may generally be presumed when the content of such a provision can be applied in a concrete case without there being a need for supplementary measures on the part of the national authorities.

B. Constitutional variety in Member States

Looking at the constitutional provisions governing the effects of the ECHR norms on domestic orders, we can appreciate the variety of ways in which to conceive the relationship between the national and European “constitutional levels”.

The ECHR’s status in the domestic order may be summarized as follows:

- Some constitutions attribute constitutional rank to the ECHR, as in Albania, Austria, Bosnia and Herzegovina, the Netherlands (‘the world’s most monist State’) and Norway.

In **Albania**, there is a solid position in the doctrine with regard to a privileged status of the ECHR. It is widely accepted that the European Convention has in the domestic legal order a status which is different from the status of other international treaties ratified by Albania. Indeed, Article 17 of the Albanian Constitution grants the ECHR the same status of the Constitution when restrictions of fundamental rights of individuals are at issue.

Interestingly, there are some decisions of the Joint Colleges of the Albanian High Court where the Court when citing the applicable law of the case, refer firstly to the ECHR then to the Constitution. While this “informal” ranking does not confer to the ECHR a supra-constitutional status, it would be worth observing in the future whether the High Court may develop explicit arguments with regard to the hierarchy between provisions of the Constitution and those of the Convention in cases related to human rights.

- In some States, instead, the ECHR has a super-legislative ranking (e.g., in Belgium, France, Georgia, Greece, Portugal, Russia, Serbia, Slovenia, Spain);
- In other States (e.g., in Denmark, the United Kingdom), finally, the ECHR has a legislative ranking.

It is noteworthy that the ECHR formal status, as provided by national Constitutions is sometimes strengthened by Constitutional Courts or commonly interpreted in such a way.

Countries like Italy and Germany seemingly belong in the third group (if one reads their constitutions) but their Constitutional Courts clarified

that the ECHR has a special force that exceeds the normal constitutional discipline of international norms.

Under this model, human rights treaties have the force of law, and for this reason they cannot serve as referential grounds for the constitutional court.

The **German Constitutional Court** had declared that the ECHR has within the German legal order the status of a federal statute. The Constitutional Court deduced that ordinary courts must observe and apply the ECHR in the same way as other federal statutory law, moreover by means of a “methodologically defensible interpretation”.

The Constitutional Court stated that:

- In consequence of their incorporation into the hierarchy of norms, the guarantees afforded by the ECHR are not, in the German legal order, direct constitutional referential norms for the Constitutional Court;
- A complainant cannot (successfully) directly invoke in a constitutional complaint before the Constitutional Court the infringement of human rights contained in the ECHR.

Nevertheless, the Constitutional Court hastened to add that:

- The guarantees of the ECHR influence the interpretation of the basic rights and the constitutional principles flowing from the domestic Basic Law;
- Both the text of the ECHR and the case law of the European Court of Human Rights serves, on the constitutional level, as an interpretive guideline for determining the content and the extent of impact of basic rights and public law principles contained in the Basic Law.

Of course, it functions this way under the condition that such an approach does not result in the restriction or decrease in the protection of the basic rights under the Basic Law, an eventuality which the ECHR itself also excludes.

Similarly, although Croatia seems to belong in the second group, its national Constitutional Court granted the ECHR a quasi-constitutional status.

The **Croatian Constitutional Court** reserved to the ECHR, and hence to all ratified international treaties, a very special position within the domestic legal hierarchy. Although the ECHR has a sub-constitutional status, it granted it a quasi-constitutional status.

In fact, international treaties do not formally have the power of a constitutional law but nevertheless their role is the same as the Constitution since they serve as standards for reviewing national legislation, particularly acts of parliament.

In its decision U-I/1583/2000 of 24 March 2010, the Constitutional Court implicitly granted to international treaties the same position as Croatian constitutional laws in its proceedings.

In Slovenia, it is commonly agreed that human rights law actually possesses constitutional rank.

In **Slovenia**, regardless of the general rule on the primacy of constitutional law over international law, the interpretation of the Constitution allows for the conclusion that certain sources of international law have a different position.

Although the Constitution does not particularly mention treaties that regulate human rights, these treaties have the position of a constitutional norm.

Article 15/V of the Constitution determines that no human right regulated by the legal acts in force in Slovenia may be restricted on the grounds of the Constitution not recognising that right or recognising it to a lesser extent. This Article thus introduces the principle of the maximum protection of human rights, which requires protection either according to the Constitution or according to a treaty depending on which act protects a given human right and on the level of its protection.

Despite these differences, recent research has pointed to the progressive rapprochement between the European domestic orders with regards to the 'position' of the ECHR in the national hierarchy of sources.

This convergence is the final outcome of different national pathways:

- ▶ sometimes national legislators must be credited;

- ▶ in other circumstances it is rather Constitutional or Supreme Courts, or even ordinary judges.

This is irrespective of the formal position set out in the constitution, or of the dualism or monism classification.

A gap may indeed exist between the formal status of the ECHR norms and its real value and nature. This gap is sometimes described as distinguishing between a 'static approach' (what national constitutions say) and a 'dynamic approach' (concerned with the actual force of this law, as emerges in the case law).

It is therefore necessary to go beyond the wording of formal provisions and to observe how national judges treat European law.

II. Judicial practices

The first element of the European regime is the crucial role of national judges, who are the real 'natural judges'. They are indeed the first adjudicators of the ECHR in national systems, due to the principle of subsidiarity.

Three judicial practices will be treated here:

- Consistent interpretation (a consequence of the 'indirect effect' of supra-national laws);
- Disapplication of domestic law (the consequence of supra-national laws' direct effect/primacy);
- Counter-limits doctrine (setting a limit to supra-national law's supremacy).

A. *Consistent interpretation*

We can observe that an interpretive superiority is accorded to the ECHR by national judges, independently of what national constitutions provide about its status in the domestic legal order.

There are at least three different orders of reasons for this:

- ▶ Constitutional provisions (e.g., in Bulgaria, Norway, Portugal, Romania, Serbia, Spain);

- ▶ Legislative provisions (e.g., in the United Kingdom);
- ▶ Constitutional courts' case law (e.g. in Cyprus, Estonia, Germany, Italy and Poland).

This is a reflection of the constitutional variety described above.

1. Constitutional provisions

Sometimes the language of domestic constitutions conveys a message of reaction to totalitarian experiences, e.g., in the form of an increased openness to international law and the acknowledgment of peace as a fundamental constitutional principle, not simply as a strategic foreign policy option.

In **Spain** and **Portugal** constitutional courts run a preventive check on the constitutionality of international treaties.

In Spain, when a conflict arises the Constitution must be amended before the stipulation of the treaty.

In Portugal, instead, in order to be ratified the treaty must be approved by the Assembly of the Republic with a special majority. Treaties may be subject to constitutional review even after ratification.

The particular domestic force of treaties in the domestic legal order can be inferred by Article 8 of the Portuguese Constitution and Article 96 of the Spanish one, although these two provisions seemingly regulate treaties' validity rather than their efficacy.

Nevertheless, the most important confirmation of human rights treaties' special ranking in Spain is Article 10.2, acknowledging that they provide interpretive guidance in the application of human rights-related constitutional clauses.

As for Portugal, the fundamental provision is Article 16 of the Constitution, which recognizes that international human rights treaties have a role which is complementary to the Constitution. This provision accords an interpretative role to the Universal Declaration of Human Rights, seemingly excluding other conventions like the ECHR. In 1982, an attempt to insert a reference to the ECHR into the Constitution failed, but the Portuguese Constitutional Court often used the ECHR as an important auxiliary hermeneutic tool for interpreting the Constitution, leaving the matter unresolved.

A similar provision is Article 20(1) of the **Romanian Constitution**:

'[c]onstitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to'.

Article 5 of the **Bulgarian Constitution** recognizes a general precedence of international law (including the ECHR law) over national law, and also covers the duty to interpret national law in a manner which is consistent with its regime (and the case law of its Court).

In 1998, the Bulgarian Constitutional Court ruled that:

- The Convention constitutes a set of European common values which is of a significant importance for the legal systems of the Member States;
- The interpretation of the constitutional provisions relating to the protection of human rights has to be made to the extent possible in accordance with the corresponding clauses of the Convention.

The **Serbian Constitution** recognizes as well general precedence of international law over national law:

- It prescribes the hierarchy of legal acts (international law possessing super-legislative ranking) as well as the rules governing their effect;
- It also stipulates the relevant mechanisms for implementing human rights. In particular, its Article 142 (1) and (2) provides that the courts *"shall perform their duties in accordance with the Constitution, laws and other general acts, when stipulated by the law, generally accepted rules of international law and ratified international treaties"*.

In **Norway**, new Article 92 of the Constitution states that every governmental body — including the Supreme Court — shall respect and secure all rights and freedoms stemming from any international human rights convention to which Norway is a party. Hence, the human rights conventions position as to being a part of domestic Norwegian law, and the supremacy of the rights and freedoms within those conventions, now have a clear-cut constitutional foundation.

According to all these provisions, national law is to be interpreted in light of the ECHR (and other human rights treaties).

2. Legislative provisions

The duty to interpret national law consistently with the ECHR provisions is sometimes based on legislative provisions.

In the **United Kingdom**, the ECHR was incorporated in 1998 into the Human Rights Act, containing a selective incorporation of the ECHR's rights.

Section 345 sets out the necessity to interpret domestic law 'so far as is possible' in conformity with the Convention. The proposed schematization – i.e., the statutory source of the consistent interpretation obligation – may be contested, however, since there are some recent English cases where the Human Rights Act was treated as a part of the 'constitutional core'.

3. Constitutional courts' case law

Finally, in the absence of express written provisions (either constitutional or statutory) the duty to interpret national law in light of the ECHR can sometimes derive from the Constitutional Court's case law, as in Cyprus, Estonia, Germany, Italy and Poland.

In 2003, the **Chypriot Supreme Court** has clarified in stark terms its view on case law coming from the ECtHR.

It stated, in *Andreas Kyriacou Panovits v Republic*, that:

“Whichever the judgment of the ECtHR might be, it will be respected and implemented by our courts and the competent authorities of the Republic”.

Two guiding principles flow from the Supreme Court’s case law with regard to a potential conflict between national law and the ECHR:

- The national provision is read in the light of the corresponding provision of the ECHR in order to produce an interpretation which will be in line with the ECtHR case law;
- If this is not attainable, then the ECHR supersedes the national provision.

It is noteworthy that this readiness by domestic Courts to ensure full implementation of the ECHR probably stems from the fact that a part of the Cypriot Constitution of 1960 is, with slight amendments, an actual adaptation of the Convention’s substantive provisions.

Similarly, the **Estonian Supreme Court** expressly acknowledged the ECHR’s priority over national law, and its own duty to bear in mind the ECtHR’s case law.

It notably delivered a judgment in n 2008, which urges Estonian courts, if necessary, to *“proceed from the Convention and the practice of application thereof”*.

In **Germany**, the Second Senate of the Bundesverfassungsgericht (BvG) in 2004 clarified the relationship between the BvG and the ECtHR, and somehow followed up the Strasbourg Court’s decision *Görgülü v. Germany*.

This judgment must be connected to another instance of judicial conflict between the two courts, the *Hannover v. Germany* case. On that occasion, the two courts had interpreted the right to privacy differently.

The BvG thus in 2004 seized the opportunity to bring some clarity: the ECHR and the ECtHR’s case law bind the Federal Republic only as a public international law subject.

According to the BvG:

- The ECHR was ratified as ordinary law and, therefore, it can be derogated from by any subsequent ordinary statute and cannot serve as a standard of constitutional review (i.e., one cannot claim the violation of conventional rights before the BvG);
- The case law of the Strasbourg Court may however be referred to when interpreting the Constitution, if this does not entail a limitation of another constitutional right;
- The open nature of the German Constitution (Articles 23 and 24), obliges national judges to take into account the law and case law of the Convention and to interpret domestic norms in the light thereof, but only if this is possible (and providing reasons when failing to do so).

In 2011, the BvG reaffirmed the above principles and seemed to take openness to international law and the “taking account of Strasbourg’s judgments” further. It developed the following approach:

- The Convention must be given effect by all public authorities and indirectly becomes a mandatory standard of review in spite of its formal status as federal law;
- The BvG ensures the fulfilment of this obligation by accepting constitutional complaints based on violations of the Convention, not directly but in conjunction with constitutional fundamental rights.

In **Italy**, in two fundamental decisions of 2007 the Constitutional Court clarified the position of the ECHR in the domestic legal system.

The nucleus of these decisions can be summarized as follows:

1. The Convention has a super-primary value (i.e., its normative ranking is half-way between statutes and constitutional norms);
2. In some cases, the ECHR can serve as ‘interposed parameter’ for the constitutional review of primary laws, since the conflict between them and the ECHR can entail an indirect violation of the Constitution;

3. This (no. 2) does not imply that the ECHR has a constitutional value; on the contrary, the ECHR has to respect the Constitution;
4. The constitutional favour accorded to the ECHR implies the obligation to interpret national law in light of the ECHR's norms.

In **Poland**, the Supreme Court held in 1995 that the ECtHR case law should, from the moment of ratification of the ECHR, be relied upon by the courts in their construction of Polish law when interpreting domestic legal provisions.

However, even though the Polish Constitutional Tribunal has repeatedly stated that the ECHR can be directly applied by domestic courts, the Convention is not used in this manner by the majority of Polish courts. It seems indeed that there is no practice of disapplying domestic provisions on the basis of the ECHR or the ECtHR judgments.

Even though a broad agreement exists as to the need of the ECHR friendly interpretation of domestic provisions, the domestic courts tend to use an interpretation that does not create an open conflict between the ECHR and domestic law.

In conclusion, it emerges that the technique of consistent interpretation follows different paths (constitutional, legislative, and judicial). This does not mean however that the convergence is perfect: for instance, it is not always clear whether the duty to interpret national law in light of the ECHR includes the need to take into account the case law of the ECtHR.

In this respect, there are different answers:

- ▶ Formally, the abovementioned Constitutions are silent on this;
- ▶ The United Kingdom's Human Rights Act expressly provides (section 2) that: '*[a] court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights*'.
- ▶ In some member States, it is the Constitutional Court that gave instructions to this effect.

We can observe that the constitutional provisions providing for the duty of consistent interpretation do not distinguish between the ECHR and other international treaties on human rights, whereas when this doctrine is based on legislation and judicial decisions the ECHR enjoys ad hoc treatment.

Turning now to other jurisdictions:

In the Baltic countries, the ECHR is deemed a source of inspiration for the construction of national (including constitutional) law, and was cited by the constitutional courts of these countries even before their accession to the ECHR:

- In Lithuania and in Latvia, the courts expressly agreed to be bound by the ECtHR's case law even when it interprets its own Constitution;
- The Belgian Cour Constitutionnelle uses the technique of consistent interpretation, taking into account the case law of the European Court and showing its readiness even to revise its previous case law, if need be;
- The **Supreme Courts of the Nordic countries** have acknowledged the ECHR law's special role. They have accorded to this regime a sort of interpretative priority, and used consistent interpretation and indirect effects doctrines to avoid constitutional conflicts between national and supranational law.

B. Judicial disapplication of domestic law

Here again, we can find different reasons for this phenomenon:

- ▶ The disapplication practice may be explained on constitutional bases (France, the Netherlands);
- ▶ Such practice may be devised by domestic (common) judges (e.g. in Italy);
- ▶ There may be constitutional provisions empowering national judges to disapply national law that conflicts with international treaties.

1. Disapplication practice on constitutional bases

In **France** (where the Constitution stipulates the superiority of treaties), there are no specific provisions concerning human rights treaties, and all the provisions in the Constitution's Title VI – regarding the entry into force of international treaties – are applicable to the ECHR.

The domestic super-legislative ranking of international treaties is inferable from Article 55, which provides that ratified treaties are superior to domestic legislation. The review of the conformity of national law with international treaties (control of '*conventionnalité*') is entrusted to national judges.

Unlike France, many Eastern European Countries have entrusted this control to constitutional courts, causing a certain degree of convergence between the control of constitutionality and that of '*conventionnalité*'.

A similar mechanism – with the important difference of the absence of judicial review of legislation – is the **Dutch model**, based on Articles 91 and 93 of the Grondwet (the Basic Law).

The clearest signal of the Dutch order's incredible openness to international law is Article 90: '*the Government shall promote the development of the international rule of law*'.

Another confirmation comes from Grondwet's Article 94 which entitles national judges to review the conventionality of national law, even though they are not allowed to review the constitutionality of the statutory norms under Article 120 of the Grondwet.

2. Disapplication devised by domestic judges

In **Italy**, common judges started disapplying domestic norms conflicting with the ECHR.

In 2007, the *Corte Costituzionale* resolved to stop this trend, which constituted an undue 'constitutional exception' to constitutional supremacy, and derogated from centralized constitutional review. The Constitutional Court, to hinder this practice and ensure at the same time the ECHR's supra-statutory status, agreed for the first

time to assess the validity of national provisions using the ECHR standard. In essence, it sent this message to common judges: 'instead of disapplying, refer a preliminary question of constitutionality to the Constitutional Court'!

3. *Constitutional provisions empowering national judges to disapply national law that conflicts with international treaties*

In **Bulgaria**, national judges are considered the first defenders of the ECHR's precedence over national law under Article 5.4 of the Constitution.

Both common judges and the Constitutional Court are seemingly entitled to carry out the *contrôle de conventionnalité*, but scholars have noticed certain reluctance on the part of ordinary judges: the national courts prefer to decide that the case pending before them doesn't fall into a field of the ECHR.

In **Portugal**, theoretically, it can be argued that Articles 204 and 8 of the Constitution, combined, entitle national judges to disapply national law conflicting with constitutional and international law, but scholars describe this possibility as a sort of 'sleeping giant' that has never woken up.

In **Spain**, the meaning of Article 96 of the Constitution is a matter of debate: does it empower judges to disapply national legislation in conflict with the ECHR provisions? Granted, according to the Constitutional Tribunal, Spanish judges may disapply national laws conflicting with international treaties, although the possible disapplication of national law for conflict with human rights treaties like the ECHR appears to be more problematic, and the Constitutional Tribunal has never pronounced on this issue.

Since the Constitutional Tribunal has demonstrated its willingness to take the ECHR into account – via Article 10.2 of the Constitution – scholars suggested that ordinary judges should refer a question

to the Constitutional Tribunal when conflict arose, rather than disapply national law.

However, there are also States where disapplication is forbidden.

In the **United Kingdom**, in case of conflict between primary legislation and the Convention, judges can only adopt a 'declaration of incompatibility', which does not influence the validity and the efficacy of the domestic norm. After such a declaration, '*if a Minister of the Crown considers that there are compelling reasons for proceeding . . . he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility*' (Human Rights Act, section 10).

Regardless of whether disapplication is allowed or practised to ensure the implementation of the ECHR norms, in all jurisdictions the Convention is apparently provided, at least, with a sort of 'direct effect'.

C. *The limits to primacy: the counter-limits doctrine*

'Counter-limits' should be understood as those national fundamental principles raised by constitutional courts – like impenetrable barriers – against the infiltration of the ECHR law. The counter-limits are conceived as a form of *contrepoids* to the European power.

The most telling example is the Bundesverfassungsgericht (BvG)'s order no. 1481/04, where the **German judges** ruled that, in the case of unresolvable conflicts between the ECHR and domestic law, the latter should prevail.

For the first time in its history, the BvG specified which matters are off limits for the primacy of the ECHR: family law, immigration law, and the law on protection of personality.

The BvG stressed the particularities of the proceedings before the ECtHR, which might lead to a different outcome in the balancing between values.

Even in legal orders lacking a fully fledged constitutional text, like **the United Kingdom**, judges limited the openness granted to the ECHR. Emblematically, in *Manchester City Council v. Pinnock* [2010] UKSC 45, the Supreme Court said:

This Court is not bound to follow every decision of the [ECtHR]. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue . . . which is of value to the development of Convention law. Of course, we should usually follow a clear and constant line of decisions . . . But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber . . . Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.

Since then, the Supreme Court seems to have adopted an even more flexible approach (see, in particular *R (Kaiyam) v Secretary of State for Justice* [2015] 2 WLR 76): unless a Grand Chamber decision dictates a particular result, it is open to the domestic courts to take a different view; and where the Strasbourg case-law is not relevant, it may be open to the domestic courts to go beyond Strasbourg.

In **Austria**, where the ECHR enjoys constitutional status, this Convention-friendliness cannot justify a violation of the Constitution. In the *Miltner case*, the Austrian Constitutional Court stressed the possibility of departing from the ECtHR's case law if adherence thereto would entail a violation of the Constitution.

The **Italian Constitutional Court** came to a similar conclusion in 2007 (decisions 348 and 349), where it clarified that the ECHR has a privileged position, but enjoys no 'constitutional immunity'; on the contrary, it must abide by all constitutional norms.

The Italian judges equated the ECHR with any source of international law and found, accordingly, that the 'constitutional tolerance' of the Italian system towards the ECHR is lower than that towards EU law.

The Italian court is stricter with the Convention, requiring its conformity with every constitutional norm:

the need for a constitutionality test on the Convention norm excludes the possibility of having a limited set of fundamental rights that could serve as a counter-limit; indeed, every norm of the Constitution shall be respected by the international norm challenged'.

A further step was taken in 2015 with judgment no. 49 of 26 March where the Constitutional Court introduced the criteria of “consolidated law” to limit the effects of ECtHR judgments in the Italian legal system,

According to the Constitutional Court:

- The Italian courts will only be obliged to implement the provision identified at Strasbourg in cases involving “consolidated law” or a “pilot judgment” by adjusting their criteria for assessment in line with it in order to resolve any contrast with national law, primarily using “any interpretative instrument available” or, if this is not possible, by referring an interlocutory question of constitutionality.
- In the event that the ordinary court questions the compatibility of an the ECHR provision with the Constitution, it goes without saying that, absent any “consolidated law”, this doubt alone will be sufficient to exclude that rule from the potential content which can be assigned through interpretation to the ECHR provision, thereby avoiding the need to refer a question of constitutionality by interpreting the provision in a manner compatible with the Constitution.

In Hungary, the Constitutional Court has considered in 2013 that the judgments of the ECtHR possess only declaratory power, but that they should assist the courts in the interpretation of fundamental rights

“The judgment of the European Court of Human Rights is declarative i.e. it does not mean directly the transformation of legal issues but its (Court’s) practice could give help to the interpretation of constitutional rights – secured in the Fundamental Law and international conventions – and to the definition of their content and their field of application...”

The observance of the Convention and the practice of the ECHR cannot lead to the limitation of the protection of fundamental rights secured by the Fundamental Law and to the definition of a lower level of protection.

The practice of Strasbourg and the Convention define the minimum level of the protection of fundamental rights that all contracting parties have to assure but the national law may establish a different and namely a higher order of requirements in order to promote human rights."

Counter-limits doctrine may however lead to situations incompatible with States' obligations under international law.

In a judgement of 19 April 2016, the **Russian Constitutional Court** ruled for the first time that a decision of the ECtHR cannot be implemented in Russia because measures aimed at its implementation would contradict the Russian Constitution.

This decision followed a previous ruling by the Court (dated 14 July 2015) and a federal law passed in December 2015 allowing the Constitutional Court to decide whether principles declared by an international tribunal can or cannot be applied in Russia.

The procedure that would now trigger a review of the constitutionality of an the ECHR provision or the execution of an ECtHR judgment would be as follows:

- In case of an application filed by a domestic court, involving the constitutionality of a national law where the ECtHR has held it to be contrary to the ECHR;
- In case of doubt as to constitutionality with specific reference to the execution of an ECtHR judgment in the internal legal system.

In any cases, the Constitutional Court made clear that the Russian Constitution had priority, with the consequence that a decision from the ECtHR that contradicted the Russian Constitution could not be executed in Russia.

However, this newly adopted procedure raises two major issues:

- It allows a direct review of the constitutionality of an ECtHR decision and leads to a decision about the feasibility of the enforcement of an ECtHR decision in Russia;

- The Russian Constitutional Court is empowered to rule about the conformity of an ECtHR decision with the Russian Constitution. The decision binds all other Russian courts as well as public authorities and interdicts the application of the respective the ECtHR judgment.

However, as stressed by the European Commission for Democracy through law (Venice Commission) in its Interim Opinion of March 2016:

“(...) whatever model of relations between the domestic and the international system is chosen, a State is bound under Article 26 of the Vienna Convention on the Law on Treaties to respect ratified international agreements and pursuant to Article 27 of the Vienna Convention it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the ECHR.

The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court; thus, it is the duty of all State bodies to find appropriate solutions for reconciling those provisions of the treaty with the Constitution (for instance through interpretation or even the modification of the Constitution).

Instead, the Russian Constitutional Court has been empowered to declare an international decision as “unenforceable”, which prevents the execution of that decision in any manner whatsoever in the Russian Federation. This is incompatible with the obligations of the Russian Federation under international law”.

III. Conclusion:

Comparing the current scenario in the 1970s–1980s, it is immediately clear that, today, the issue of the ECHR’s primacy and direct effect does not depend just on what is written in the constitutions, it is something that seems to go beyond the full control of national constitutions.

We can indeed observe judicial practices consisting in:

- According an interpretive favour to the ECHR law independently of what the constitutions provide about its status in the hierarchy of domestic legal sources.

For instance, in **France, the Netherlands** and in **the Nordic countries**, the practice of consistent interpretation is widely used for the ECHR law, to solve the antinomies existing between national and the ECHR law.

- Using disapplication to resolve conflicts between domestic and the ECHR norms.

In this respect, the **Italian** case is symptomatic. Disapplication is allowed in other jurisdictions as well (Romania, Portugal, Spain), but national judges, for different reasons, have so far refrained from this practice.

In any case, even in these States, it is fair to underscore that the ECHR, apparently, has at least direct effect and precedence.

- But also, in setting limits on the ECHR's primacy since a particular counter-limits doctrine is emerging with regard to the ECHR. Such doctrine may however lead to situations incompatible with States' obligations under international law.

The Implementation of the European Convention on Human Rights and the European Court of Human Rights case law in Italian jurisprudence

Alessia-Ottavia Cozzi,

Constitutional Law

Department of Law, Interpretation and Translation

University of Trieste

Chapter I	
The status of the European Convention on Human Rights in Italy	30
I.1. The legal status of the ECHR before 2001.....	30
I.2. The Constitutional Reform of 2001 and the Italian Constitutional Court “twin” judgements of 2007	35
I.3. The recent constitutional case law: the criterion of “the greatest expansion of fundamental rights”	38
Chapter II	
National Courts referral to the European Court of Human Rights case law in Italian judgements.....	41
Chapter III	
Conclusions and Recommendations	44

Chapter I

The status of the European Convention on Human Rights in Italy

Italy is a dualistic legal order. In this Chapter, we will analyse the formal position of the ECHR in the Italian hierarchy of legal norms. The Chapter is divided into three parts: the first part is devoted to the status of the ECHR before 2001; the second part deals with the status of the ECHR after 2001 and the two Constitutional Court landmark judgements of 2007; the third part concerns the recent Constitutional Court case law.

1.1. The legal status of the ECHR before 2001

The European Convention of Human Rights (ECHR) was signed by the Republic of Italy on November 4, 1950, while the First Protocol was signed on March 20, 1952. They were both ratified on October 26, 1955. Subsequently, Italian law no. 848 of August 4, 1955 incorporated the ECHR in Italian legal order, providing the authorisation for ratification and the order of execution. Article 2 of that law ordered execution of the Convention into domestic law. In fact, according to the Italian constitutional law, once ratified and executed by the legislature, an international treaty becomes integral part of domestic law. Italy recognised the competence of the Strasbourg organs to receive individual application in 1973.

The Italian Constitution does not mention the ECHR itself, nor it includes special provisions on international human rights treaties¹. Until 2001, any express provision regulated the problem of the implementation or the hierarchical positioning of international agreements in domestic law. Some general articles take into consideration the relationship between the Italian legal order and the international law. Those articles are intended to express a general principle of openness of Italian Republic

1 See the general overview on the ECHR *status* in Italian legal order in D. TEGA, "La Cedu e l'ordinamento italiano", in M. CARTABIA (a cura di), "I diritti in azione", Il Mulino, Bologna, 2007, 67–91; A. CALIGIURI, N. NAPOLETANO, "The Application of the ECHR in the Domestic Systems", in The Italian Yearbook of International Law, 2010, 125–159. About the protection of fundamental rights in the European dimension, mentioning the Italian perspective, M. CARTABIA, "L'ora dei diritti fondamentali nell'Unione Europea", in M. Cartabia (a cura di), "I diritti in azione", Il Mulino, Bologna, 2007, 13–66.

to international legal order. Art. 10, paragraph 1, It. Const. reads: "Italian laws conform to the generally recognised norms of international law", while Article 11 It. Const. reads: "Italy rejects war as an instrument of aggression against the freedoms of others peoples and as a means for settling international disputes; it agrees, on conditions of equality with other states, to the limitations of sovereignty necessary to create an order that ensures peace and justice among Nations; it promotes and encourages international organisations having such ends in view". Article 11 was written to allow Italian participation to United Nations.

On these grounds, legal scholars have tried to find a constitutional "anchor" for the ECHR and several possibilities have been suggested. According to some scholars, a potential basis was found in Article 10, paragraph 1, as the ECHR includes general rules that could be considered part of the "generally recognised norms of international law". For other scholars, the ECHR could enjoy the protection of Article 11. The limitation of sovereignty needed to ensure peace and justice among the Nations, which is mentioned in this Article, could be extended to the Council of Europe system for the protection of human rights. Furthermore, some other authors have invoked Article 2 It. Const., which protects "inviolable rights".

All these theories aimed at justifying a higher position of the Convention in the hierarchy of norms. However, the Italian Constitutional Court rejected all of them. On the one side, the Court affirmed that Article 10, paragraph 1, does not apply to international covenants. Article 10, paragraph 1, confines itself to the automatic incorporation of general principles of international law and to customary law. On the other side, under Article 11 no international treaty can entail any limitation of sovereignty. In fact, the Italian Constitutional Court referred to Article 11 to justify Italian membership to EEC and the supremacy of EU Law since its decision no. 183/1973. The meaning of Article 11 was extended to allow limitations of sovereignty related to the European integration process. However, the Court always rejected the application of the same mechanism to the ECHR².

2 The different theories aiming at recognising a constitutional *status* to the ECHR despite its incorporation by ordinary law are deeply described in G. MARTINICO, O. POLLICINO, "Report on Italy", in G. MARTINICO, O. POLLICINO (eds.), "The National Judicial Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective", Europa Law Publishing, Groningen, 2010, 271–299, 282–283; D. TEGA, "The Constitutional Background of the 2007 Revolution. The Jurisprudence

Therefore, until 2001, from a formal point of view, due to the ratification and the execution order, the ECHR obtained the force of the ordinary law. For this reason, the last-in-time rule, or the *lex posterior* principle, could have emerged. In fact, these international norms, incorporated in Italian law no. 848/1955, could have been rendered invalid by later national norms, i.e. the subsequent provision could have abrogated the anterior rule³. Indeed, the last-in-time rule was not applied to the ECHR. For many years, Italian courts did not make frequent reference to the ECHR. The explanation of this behaviour has been found in the fact that the ECHR provisions overlap to a great extent with those of the rights already protected under the Italian Constitution. Moreover, sometimes the application of the ECHR as source of autonomous rights was denied because of the vague and indeterminate nature of its norms. This argument was referred to the so called “non-self-executing” character of conventional norms and concerned their incomplete content⁴.

of the Constitutional Court”, in G. REPETTO (ed.), “The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective”, Intersentia, Cambridge-Antwerp-Portland, 2013, 25–36, 26–27.

- 3 For a general analysis of the last-in-time rule application to international norms when the national legal system does not give higher priority to treaty norms, B. CONFORTI, “National Courts and the International Law of Human Rights”, in B. CONFORTI, F. FRANCONI (eds.), “Enforcing Human Rights in Domestic Courts”, Martinus Nijhoff Publisher, The Hague-Boston-London, 1997, 3–14, 11. When a formal superiority is not sanctioned, the inconsistency between a treaty rule and a subsequent national rule is often solved through interpretation, to increase the cases of prevalence of the international provision even if it is anterior. The Author describes different criteria to ensure prevalence to anterior international norm. The most common criterion is the presumption of conformity of the domestic law to international law. Another criterion considers the convention a special law, thus applying the principle *lex posterior generalis non derogat priori speciali*. This criterion was applied by Italian courts to the relations between conventions of uniform law or of cooperation in judicial matters and Italian domestic provisions in the field of private and procedural law. The same criterion was applied by Italian Constitutional Court to the ECHR only once, in decision no. 10/1993, stating that the law no. 848/1955 of ratification and execution of the Convention had an “atypical competence”. The criterion is based on the special character of the subject matter governed by the international treaty. Another criterion – not frequent in Italian experience – considers that the subsequent law prevails only if there is a “clear indication” of the intention of the law-maker to derogate from the treaty.
- 4 The cases in which courts, in order not to apply conventional norms, focus on their vague and indeterminate nature are critically discussed by B. CONFORTI, “National Courts and the International Law of Human Rights”, quoted above, 8.

Thus, the judiciary tended essentially to use the Convention as a supplementary aid when interpreting domestic law.

Progressively, decisions referring to the provisions of the Convention became more frequent, especially in criminal cases⁵. The Supreme Court (*Corte di Cassazione*) had rejected the view that the ECHR may possess a constitutional rank, because of incorporation as an ordinary law. However, the Supreme Court itself used the ECHR to confirm and reaffirm some constitutional rights. In the same way, the Italian Constitutional Court referred to the Convention to confirm the meaning of those rights directly protected under the Italian Constitution. The ECHR was therefore an interpretative tool to support domestic law interpretation in conformity with constitutional rights. In the end, the Italian Constitutional Court accepted, at least implicitly, the ECHR provisions embodied the same category of fundamental human right that find protection in the Italian Constitution. Thus, the ECHR rights fell essentially within the field of constitutional law⁶. In short, it is possible

5 A. DRZEMCZEWSKI, "European Human Rights Convention in Domestic Law. A Comparative Study", Clarendon Press, Oxford, 1983, 145–154, quoting V. GREMENTIERI, N. TROCKER, "The Protection of Human Rights in Constitutional Law: Italy, in Italian National Reports to the IXth International Congress of Comparative Law", Tehran, 1974, 491–504. At the beginning of the Eighties, the Author considered the number of Italian Supreme Court judgements referring to the ECHR "impressive" and observed academic interest in the Convention was rapidly growing.

6 See for example the so called *San Michele* case, decision no. 98/1965, "Il Foro italiano", 1966, I, 8–14, 13, in which the Court referred to Article 6 the ECHR to confirm that the right to a fair trial was one of the inviolable rights guaranteed in art. 2 It. Const; decision no. 124/1972, "Il Foro Italiano", 1972, I, 1897–1898, affirming that an acquittal for insufficient proof was not contrary to Article 27 It. Const. and to the ECHR; decision no. 178/1973, "Il Foro Italiano", 1973, 15–16, quashing some articles of Italian Criminal Code contrary to Article 3 and Article 24 It. Const., which guarantee equality before the law and the right to defence, as well as to Article 6, paragraph 3, c), the ECHR. For other examples see A. DRZEMCZEWSKI, "European Human Rights Convention in Domestic Law", quoted above, 149.

The use of the Convention as an interpretative tool has been much stronger since the 1990s. See, for example, decision no. 388/1999, in which the Constitutional Court underlined that human rights enjoy a constitutional guarantee irrespective of the formal position of their respective source in the hierarchy of norms. This is the outcome of the evolution of Italian Constitutional Court jurisprudence until 2007. For a deep analysis of the constitutional case law, D. TEGA, "The Constitutional Background of the 2007 Revolution. The Jurisprudence of the Constitutional Court", quoted above, 28–36. The Author distinguishes the constitutional jurisprudence before 2007

to affirm that, before 2001, while the ECHR had formally the force of an ordinary law, materially it had the meaning of a constitutional norm.

In order to understand the evolution of the ECHR in domestic law, it is useful to describe some general features of the Italian legal system. First, the Italian judicial system includes civil, penal and administrative courts. The violation of subjective rights lays under the jurisdiction of civil courts, while the violation of a rule made in the public interest lays under the jurisdiction of administrative courts. Second, Article 107, paragraph 3, It. Const. reads that judges are distinguished only by their different functions, so that there is not a hierarchical relation between higher and lower courts. The Supreme Court (*Corte di Cassazione*) is the highest civil and penal court, while the Council of State (*Consiglio di Stato*) is the highest administrative court. In case of conflict between jurisdictions, the *Corte di Cassazione* has the last word. Third, under Article 134 It. Const., the Constitutional Court adjudicates controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and the Regions. In relation to civil, penal or administrative matters, the constitutionality of a law may only be questioned during a trial *incidenter tantum*. The judge of the trial has to decide if the constitutional issue is relevant to the decision of the case before him and if it is not manifestly unfounded. Therefore, the jurisdiction of Italian Constitutional Court is limited to cases referred to it by ordinary courts. Thus, the protection of fundamental rights is not secured by means of a direct individual appeal to the Constitutional Court, challenging the law on grounds of constitutionality, but only incidentally⁷.

in three “phases”. The first, between 1960 and 1993, is the phase of “traditional dualism”. Between the end of the Eighties and the early 2000s, a “more modern dualism” arose. The Constitutional Court referred to the Convention, as well as to other international human rights Treaties, to “discover” new constitutional rights through the “open clause” of Article 2 It. Const. protecting “inviolable rights”. The third phase is called “duality in transformation”: without giving international treaties a supralegislative *status*, the Court started questioning the legislation compliance with international commitments.

All Italian Constitutional Court judgements are available in www.cortecostituzionale.it; an English summary of more recent decisions is now available at <http://www.cortecostituzionale.it/actionJudgment.do>.

- 7 See A. DRZEMCZEWSKI, “European Human Rights Convention in Domestic Law”, quoted above, 148–149 for a short description of the main features of Italian legal system. Alternatively, the constitutionality of a law can be adjudicated by the Italian Constitutional Court by procedure *in via principale*, which regards

1.2. *The Constitutional Reform of 2001 and the Italian Constitutional Court “twin” judgements of 2007*

The Italian Constitutional Law no. 3 of 2001 introduced a specific reference to international obligations into Article 117, paragraph 1, It. Const.: “Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from European Union law and *international obligations*”. A special “anchor” to international treaties was so introduced for the first time into the Constitution.

Under Article 117, paragraph 1, the Italian Constitutional Court recognised a supralegislative rank to the ECHR. The status of the ECHR changed due to two landmark judgments, no. 348 and 349/2007. To understand the *rationale* of the “twin” 2007 leading case, it is necessary to look at the background. Since the 1990s the Supreme Court and ordinary judges had referred more and more to Strasbourg case law⁸. A cultural change arose, as lawyers increased their knowledge of the Strasbourg mechanism. Non-profit associations contributed to spread principles from Strasbourg jurisprudence, asking for their application in domestic trials. Judges started to face directly the Strasbourg decisions to define and interpret the applicable law. In the early 2000s, some courts began to apply the ECHR in the same way they applied EU law. Since the leading case *Granital* no. 170/1984, the Italian Constitutional Court stated that priority must be accorded to EU law in conflict with national law and that the conflict must be solved by ordinary courts.

the review of a statute or legislation concerning the State and the Regions. For a general overview of the Italian constitutional review of legislation model, see now M. CARTABIA, “Of Bridges and Walls: The “Italian Style” of Constitutional Adjudication”, in “Constitutional Court of the Republic of Slovenia, 25 Years”, International Conference, Bled, Slovenia, June 2016, Conference Proceedings, 69–84, and in Italian Journal of Public Law, Vol. 8, Issue n. 1/2016, 37–55.

- 8 Especially the Supreme Court in criminal cases, referring to the procedural guarantees of a fair trial under Article 6 the ECHR; see G. REPETTO, “Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law”, in G. REPETTO (ed.), “The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective”, Intersentia, Cambridge-Antwerp-Portland, 2013, 37–53, 38, and the Supreme Court leading cases no. 2194/1993; no. 6672/1998 and no. 28507/2005. The Author quotes, for further references to this trend, E. CANNIZZARO, “The Effect of the ECHR on the Italian Legal Order: Direct Effect and Supremacy”, XIX Italian Yearbook of International Law, 2009, 173, 175–177.

Thus, every judge has to apply EU law, if provided with direct effect, and to decide the non-application of the domestic norm. Some courts considered the same solution viable for the ECHR. They resolved disputes giving direct application to the ECHR norms and deciding the non-application of the relevant internal rules⁹. The Constitutional Court “twin” judgments of 2007 rejected this new judicial approach emerging in ordinary jurisprudence and reaffirmed that judicial review of legislation falls within the exclusive competence of the Constitutional Court. At the same time, the Constitutional Court accepted to give the Convention a higher ranking and to set a mechanism to quash the law incompatible with the Convention itself.

Decisions no. 348 and 349/2007 stated the ECHR has an “intermediate” ranking (*norma interposta*) between law and the Constitution, so that a law violating the Convention is indirectly incompatible with Article 117, paragraph 1, It. Const. and must be quashed¹⁰. Furthermore, the Constitutional Court stated that every judge, when applying a domestic norm that appears incompatible with the ECHR, shall first try an interpretation of the Italian norm in conformity with the ECHR. If the interpretation “in compliance” is not possible, then the judge must make a referral order to the Constitutional Court, based on Article 117, paragraph 1. In doing so, the judge has to demonstrate the ground on which the domestic law does not comply with the ECHR. Once the referral order is submitted, the Constitutional Court makes a two-step reasoning process. First, the Constitutional Court verifies if the ECHR norm, as interpreted by the Strasbourg Court, is compatible with the Italian Constitution. Second, the Court compares the domestic norm with the Convention, as interpreted by the ECtHR. The first step of this reasoning entails that the incorporation of the ECHR finds its limits in the constitutional norms. Hence, the Italian Constitutional Court can make a barrier to the entry of conventional norms whenever they collide with constitutional norms.

9 This approach was “surprising, if not revolutionary” and “daring” for G. F. FERRARI, “National Judges and Supranational Law. On the Effective Application of EU Law and the ECHR”, in G. MARTINICO, O. POLLICINO (eds.), “The National Judicial Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective”, Europa Law Publishing, Groningen, 2010, 25.

10 Decisions no. 348 and 349 concerned expropriation and the right of owners to a reasonable compensation in relation to the market value of the expropriated lands. The ECtHR has in several occasions sanctioned Italian regulation on the matter under Article 1 Prot. n. 1 ECHR. See the ECtHR, *Scordino v. Italy*, May 29, 2006.

Two other principles are also relevant and must be taken into consideration. First, the Italian Constitutional Court confirmed the different status of the ECHR and EU law. If the ECHR norms were to share the EU law nature, they would overtake conflicting national law without the balancing intervention of the Constitutional Court. In the Court's opinion, Article 11 It. Const. does not apply to the ECHR, because the Council of Europe system for the protection of human rights did not set up a "supranational legal order" as the EEC first, and EU then, did.

Second, the Italian Constitutional Court made a strong reference to the Strasbourg case law, recognising to the ECtHR a prominent role as interpreter of the Convention. The Court so considered the Convention as a living instrument, that has to be applied in conformity with Strasbourg jurisprudence¹¹. The Constitutional Court made no distinction between Strasbourg decisions against Italy on the unconventionality of a specific Italian domestic rule at issue, according to Article 46 ECHR, and Strasbourg jurisprudence in general, including decisions given in different contexts against other States¹².

Looking at the relation between the ECHR and the Italian legal order, the "twin" judgments somehow confirmed the Italian dualistic model, distinguishing between EU law and the ECHR and preventing non-application of domestic law by ordinary courts in case of the ECHR incompatibility. However, the "twin" judgments admitted an implicit integration between the ECHR and domestic law, strongly asking Italian courts to interpret domestic law in conformity with the Strasbourg jurisprudence and considering that the Convention lives through the ECtHR case law.

The outcomes of the "twin" judgments can be summarised as follow: the ECHR possesses a hierarchical status superior to ordinary law and

11 On the decisions no. 348 and 349 see G. REPETTO, "Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law", quoted above, 39–41; O. POLLICINO, "Constitutional Court at the cross road between parochialism and co-operative constitutionalism", in *European Constitutional Law Review* (4) (2008), 363 ss.; F. BIONDI DAL MONTE, F. FONTANELLI, "The Decision No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention on the Italian Legal System", in *German Law Journal*, Vol. 09, No. 07, 2008, 889–932.

12 The point is underlined by A. GUAZZAROTTI, "Strasbourg Jurisprudence as an Input for "Cultural Evolution" in Italian Judicial Practise", in G. REPETTO (ed.), "The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective", Intersentia, Cambridge-Antwerp-Portland, 2013, 55–68, 63.

it has acquired a predominant position into domestic legal order; the conflict between domestic law and the Convention has been shaped as a constitutional conflict carried out before the Constitutional Court; national judges are obliged to interpret domestic law in conformity with the interpretation given by the Strasbourg Court.

1.3. The recent constitutional case law: the criterion of “the greatest expansion of fundamental rights”

The principles displayed in the “twin” judgements were confirmed by following constitutional jurisprudence. However, they were in some way reshaped. In decision no. 311/2009, the Constitutional Court admitted that several rights guaranteed under the Convention, i.e. the right to life under Article 2 ECHR and the prohibition of torture under Article 3 ECHR, embody international customary law, so that they can be directly applied by judges on the basis of Article 10, paragraph 1, lt. Const.

In decision no. 317/2009, the Constitutional Court clarified the criterion of “the greatest expansion of fundamental rights”. The Court stated that “It is evident that this Court not only cannot permit Article 117 (1) of the Constitution to determine a lower level of protection compared to that already existing under internal law, but neither can it be accepted that a higher level of protection which it is possible to introduce through the same mechanism should be denied to the holders of a fundamental right. The consequence of this reasoning is that the comparison between the Convention protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion of guarantees, including through the development of the potential inherent in the constitutional norms which concern the same rights”. The Constitution and the ECHR are so joined to pursue the greatest expansion of fundamental rights common to both catalogues. If a different level of protection exists between constitutional norms and conventional norms, prevalence will be given to the rule that more extensively protects the individual right at stake¹³. Thus, the final criterion does not call upon the formal rank of norms (constitutional norms and supralegislative norms as the ECHR), but the substantial degree of protection.

13 G. REPETTO, “Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law”, quoted above, 47.

In the same decision no. 317 of 2009, the Italian Constitutional Court also affirmed: “The concept of the greatest expansion of protection must include, as already clarified in judgements no. 348 and 349 of 2007, a requirement to weight up the right against other constitutionally protected interest that is with other constitutional rules which in turn guarantee the fundamental rights which may be affected by the expansion of one individual protection. This balancing is to be carried out primarily by the legislature, but it is also a matter for this Court when interpreting constitutional law [...]. The overall result of the supplementation of the guarantees under national law must be positive, in the sense that the impact of individual the ECHR rules on Italian law must result in an increase in protection for the entire system of fundamental rights”¹⁴. Finally, it is the Constitutional Court itself that is requested to strike a fair balance between rights and general interests at stake.

The following decision no. 80/2011 confirmed that the review of legislation on the ground of conventionality belongs to the exclusive competence of the Constitutional Court. The Court clearly reaffirmed that the mechanism set up by the “twin” judgements does not change as a result of the entry into force of the Treaty of Lisbon. Again, doubts have arisen as to whether the ECHR could have the same position and force of EU law due to Article 6 of the Treaty of Lisbon¹⁵. The Constitutional Court reiterated that Article 11 It. Const. is confined to EU law and does not apply to the ECHR.

Up to the present time, the Italian Constitutional Court has never declared the incompatibility of a conventional norm with constitutional norms. In the “twin” judgments the Court has emphasised obedience to the Strasbourg case law, affirming that the exact meaning of the ECHR can be ascertained only as it is interpreted by the ECtHR. Instead,

14 Decision no. 317/2009, para. 7, quoted by G. REPETTO, “Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law”, 47.

15 Article 6, paragraphs 2 and 3, Treaty on the European Union reads: “2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

in following judgments the Court starts using interpretative tools to justify a margin of discretion while applying the ECHR¹⁶.

On the one hand, the Court makes reference to general interests protected by the Italian legal system. In this way, it is for the Court to declare where the fair balance lies between the rights and the legitimate interests at issue. The Court sometimes refers to the ECtHR margin of appreciation doctrine, according to which national authorities enjoy some discretion in fulfilling their obligations under the ECHR¹⁷. In fact, the ECtHR stated since its early decisions that the Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Thus, the Constitutional Court shapes the fair balance between rights and general interest using the margin of discretion that the ECHR system in principle allows.

On the other hand, the Italian Constitutional Court resolves potential conflicts between constitutional norms and conventional norms through the technique of distinguishing¹⁸. The same strategy is

16 For a case of non-obedience to a Strasbourg precedent, see the so-called *Maggio case*, decision no. 264/2012, following ECtHR, *Maggio and others v. Italy*, May 31, 2011. The Constitutional Court considered a challenge to legislation modifying the system to calculate pensions of Italian workers employed in Switzerland. Due to a law of “authentic interpretation”, these Italian pensions were to be calculated in a different way than before, thus resulting lower. The Court ruled that the applicants had no legitimate expectations to a pension in line with the previous system of calculation, since the contested legislation expressed the principles of equality and solidarity, prevailing within the balancing text of rights and interests at stake. For a general overview of Italian Constitutional recent case law in English, see now P. FARAGUNA, M. MASSA, D. TEGA, M. CARTABIA, “Developments in Italian Constitutional Law: The Year 2015 in Review”, *Int’l J. Const. L. Blog*, Mar. 4, 2016, at: <http://www.icconnectblog.com/2016/02/developments-in-italian-constitutional-law-the-year-2015-in-review>

17 S. GREER, “The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights”, Council of Europe, Strasbourg, 2000, 5.

18 For example, Constitutional Court decision no. 236/2011, concerning the principle of *nulla poena sine lege*. The decision has been intended as a reply to ECtHR, Grand Chamber, 17 September 2009, *Scoppola v. Italy* (no. 2), application no. 10249/03. The Italian Constitutional Court stated the Strasbourg precedent “although aimed at establishing a general principle [...], remains nonetheless linked to the concreteness of the case in which it was ruled: the fact that the European Court is called to assess upon a material case and, most of all, the specificity of the single case issued, are factors to be carefully weighed and

applied by the Supreme Court. The Constitutional Court itself often asks ordinary courts to distinguish their cases from the relevant precedents of Strasbourg. Legal scholars recognise that the technique of distinguishing is admissible, as the ECtHR has jurisdiction on the facts of the case. This technique also increases the dialogue between the ECtHR and Italian courts, questioning if and in which circumstances a situation could entail a violation of the Convention¹⁹. Nevertheless, a superficial application of the technique could jeopardise the respect for Strasbourg precedents and it could threaten the principle of legal certainty, the principle of equal treatment and the respect for legitimate expectations.

Chapter II

National Courts referral to the European Court of Human Rights case law in Italian judgements

In the previous Chapter, we provided some information on the behaviour of the judiciary before the Italian Constitutional Court landmark decisions no. 348 and 349/2007. We explained how the referral to the ECtHR case law is more and more frequent in recent years and how the Strasbourg jurisprudence has become pervasive in legal reasoning concerning human rights. As a whole, the ECHR has a prominent role in driving interpretation of national law. In the previous Chapter, we illustrated also that the “twin” judgments aimed at preventing ordinary judges from not applying national law incompatible with the ECHR.

In this Chapter, we will evaluate if the Italian highest courts and ordinary courts comply with the “twin” judgments’ directives. This issue was addressed by a comprehensive study recently conducted by an Italian legal scholar. We will refer to this study, quoting the main outcomes²⁰.

taken into account by the Constitutional Court, when applying the principles ascertained by the Strasbourg Court at the domestic level, in order to review the constitutionality of one norm allegedly at odds with that principles”. The decision is quoted by A. GUAZZAROTTI, “Strasbourg Jurisprudence as an Input for “Cultural Evolution” in Italian Judicial Practise”, quoted above, 65.

19 A. GUAZZAROTTI, “Strasbourg Jurisprudence as an Input for “Cultural Evolution” in Italian Judicial Practise”, quoted above, 63.

20 I. CARLOTTO, “I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell’uomo dopo il Trattato di Lisbona”, in L. CAPPUCCIO, E.

Regarding the highest courts behaviour, both the Supreme Court and the Council of State fully respect the “twin” judgments model²¹. This means that they do not state the direct non-application of national law incompatible with the ECHR. In fact, when a problem of compatibility arises, the highest courts firstly attempt to give the domestic law an interpretation “in conformity with” the Strasbourg case law. This attempt sometimes leads to a strong modulation of the meaning of the written legal text. Only when the interpretation “in conformity with” is not possible, as a second step the highest courts make a referral order to the Constitutional Court, asking for the invalidation of the national law. Furthermore, as illustrated in the previous Chapter, the highest courts “shape” the precedents of the ECtHR through the technique of distinguishing. In these cases, it is the Court of Strasbourg that, when an application is submitted, verify if the facts of the cases were different – so that the condition for distinguishing did exist – and if the implementation of the ECHR in the Italian legal order was correct.

The overview of ordinary courts’ behaviour is more complicated. Most of the judges – civil, penal, as well as administrative judges – follow the Constitutional Court’s directives²². However, a minority of them

LAMARQUE, “Dove va il sistema italiano accentrato di controllo di costituzionalità. Ragionando intorno al libro di Victor Ferreres Comella *Constitutional Courts and Democratic Value*”, Editoriale Scientifica, Napoli, 2013, 177–240. See also the previous research of the same Author, I. CARLOTTO, “I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un’analisi sul seguito giurisprudenziale (Parte I)”, in *Politica del diritto*, 2010, 76 ss.

- 21 See, among others, Supreme Criminal Court (Corte di Cassazione penale), VI Section, 8 June 2012, no. 22301; Supreme Criminal Court, VI Section, 15 June 2011, no. 24039; Supreme Criminal Court, II Section, 15 January 2013, no. 3809; Supreme Criminal Court, V Section, 23 October 2012, no. 41249; Supreme Court, United Sections, 25 October 2012, no. 41694, on unlawful detention; Supreme Court, United Sections, 10 September 2012, no. 34472, on the ECtHR *Scoppola case*, concerning the principle of *nulla poena sine lege* under Article 7 ECHR; Supreme Court, United Sections, 13 June 2012, no. 9595 and 20 June 2012, no. 10130; Supreme Civil Court, VI Section, 27 November 2012, no. 21053 to no. 21060 and 14 December 2012, no. 23154. Concerning administrative issues, Council of State, VI Section, 9 August 2011, no. 4723 and 2 April 2012, no. 1957, all quoted by I. CARLOTTO, “I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell’uomo dopo il Trattato di Lisbona”, cited above, 204, 222, 225.
- 22 For example, in the administrative jurisprudence, Regional Administrative Tribunal (Tribunale Amministrativo Regionale), Lombardia, Milan, II Section, 7 August 2012, no. 2178; Regional Administrative Tribunal Trentino Alto Adige,

resists the logic of the “twin” judgements, giving a direct application of the ECHR instead of making a referral order to the Constitutional Court²³. This behaviour is not necessarily a form of “rebellion”. Most of the time, this results from a misunderstanding and misapplication of different charters of rights. Sometimes ordinary judges give direct application to the ECHR because they unintentionally overlap the ECHR with the Charter of Fundamental Right of the European Union. It is well known that the Charter of Fundamental Right of the European Union confines itself into the scope of EU Law. Yet in practice it is not clearly distinguishable what is inside and what is outside the scope of

4 April 2012, no. 101; Regional Administrative Tribunal Calabria, ordinance 13 October 2011, no. 732; Regional Administrative Tribunal Lazio, Rome, I Section, 25 June 2012, no. 5769 and 16 May 2012, no. 4455, 4456, 4457; Regional Administrative Tribunal Sicilia, Palermo, ordinance 10 January 2012; Regional Administrative Tribunal Toscana, 15 March 2012, no. 544; Regional Administrative Tribunal Umbria, 21 January 2013, no. 29, all quoted by I. CARLOTTO, “I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell’uomo dopo il Trattato di Lisbona”, cited above, 205. Civil and penal ordinary courts’ judgements quoted by I. CARLOTTO are dozens, regarding the Court of Appeal of L’Aquila, Venezia and the Tribunals of Nardò, Pozzuoli, Lecce, Nocera Inferiore, Cagliari. See “I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell’uomo dopo il Trattato di Lisbona”, 210.

- 23 Regional Administrative Tribunal Campania, V Section, 13 December 2011, no. 5764; Regional Administrative Tribunal Lazio, Rome, III Section, 5 January 2011, no. 40; Regional Administrative Tribunal Puglia, I Section, 7 June 2012, no. 289 and III Section, 10 January 2013, no. 20, all confusing the ECHR and the EU Charter of Fundamental Rights. Regional Administrative Tribunal Lombardia, Brescia, II Section, 9 February 2012, no. 213 and 214; 6 September 2012, no. 1521 and 22 November 2012, no. 1836; Regional Administrative Tribunal Lombardia, Milan, III Section, 1 February 2013, no. 313; Regional Administrative Tribunal Veneto, III Section, 21 November 2012, no. 1430; Regional Administrative Tribunal Lazio, Rome, I Section, 28 January 2013, no. 966 and 973; 4 February 2013, no. 1180, concerning compensation for the length of proceedings, provided non-application of Italian law on the matter (*Legge Pinto*) and condemned the Public Administration to make financial resources available in order to pay compensation. See also Regional Administrative Tribunal Sicilia, Palermo, II Section, 9 March 2011, no. 418 and 14 October 2011, no. 1864 evaluating family ties of aliens under Article 8 ECHR, even if the relevant domestic law does not oblige the public administration to take them into consideration. Among civil and penal courts, Tribunal of Milan, Labour Section, 17 May 2011, no. 2474; Tribunal of Cassino, 27 September 2011; Corte di Assise, Terni, 6 July 2011; Court of Appeal, Firenze, Labour Section, 26 April 2011, no. 534; Tribunal of Milan, 8 July 2011, no. 3558. Cfr. I. CARLOTTO, “I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell’uomo dopo il Trattato di Lisbona”, 206–210, 213–214.

EU Law. Furthermore, the constitutional substance of all human rights encourages their direct application irrespectively of their formal source. Indeed, the supremacy of human rights is not in question. However, the attitude of a minority of judges to self-determine the non-application of domestic law challenges the competence of the Constitutional Court. In conclusion, the main problem is who decides not to apply the domestic law incompatible with the ECHR and to what extent. In fact, only the Constitutional Court decisions are compulsory *erga omnes*. Most of the ordinary courts refer to the Constitutional Court. Only a minority of them acts autonomously. All in all, the consistency of the Constitutional Court, the Supreme Court and the Council of State jurisprudence ensures legal certainty and stability. As recognised by legal writers, the highest courts can regularly quash the decisions of lower courts that deviate from existing precedents²⁴.

Chapter III

Conclusions and Recommendations

As we illustrated in the previous Chapters, the ECHR status in Italian legal order can be summarised as follows:

- a. the ECHR has a supralegislativ rank;
- b. all the courts are obliged to implement conventional rights following the ECtHR case law; all the judges must interpret domestic law as far as possible in conformity with the ECtHR living interpretation;
- c. the judicial review of legislation on the ground on conventionality is an exclusive competence of the Constitutional Court. When the interpretation in conformity with the Convention is not possible, ordinary courts must make a referral to the Constitutional Court, in order to evaluate the consistency of the internal norm with the ECHR;
- d. the Italian Constitutional Court recognises a prominent role to the ECtHR interpretation, but eventually it is for the

24 V. FERRERES COMELLA, *Constitutional Courts and Democratic Values*, 22, quoted by I. Carlotto, "I giudici italiani e il divieto di applicazione diretta della Convenzione europea dei diritti dell'uomo dopo il Trattato di Lisbona", cited above, 225.

Constitutional Court to strike the fair balance between all the rights and the general interests at stake.

As Keller and Stone had demonstrated, there was not a causal linkage between *ex ante* monism and dualism and the reception of the ECHR. The way the ECHR is incorporated is an outcome of the reception process which, in turn, will impinge on reception *ex post*. The Italian experience confirms that the assumption that dualistic States have, *a priori*, an unfriendly attitude towards international law, and will, therefore, generate a relatively poorer rights record, is untenable²⁵. The spread of the Strasbourg Court principles has grown impressively in recent years. The attitude of courts of every level to quote the Strasbourg jurisprudence is wide.

As legal scholars affirmed years ago, international protection of human rights has reached an impressive scope regarding both the rights covered and the number of countries bound. However, this protection remains unsatisfactory if the related obligations are not implemented in the real life. The responsibility of an effective implementation of human rights to a great extent is assigned to the judiciary. Courts participate in the “interpretative enterprise” of internationally shared values and act independently from the governments in power. Surely, interpretation and application of human rights cannot be a substitute for democratic elections and political decision. Nonetheless, human right adjudication provided by independent judges is an indispensable instrument for a democratic and liberal society. Developing a jurisdictional model that is responsive to the universal recognition of a minimum human rights core is part of the aims of a democratic legal order²⁶. This is

25 H. KELLER, A. STONE SWEET (eds.), “A Europe of Rights: The Impact of the ECHR on National Legal Systems”, Oxford University Press, Oxford, 2009, 685–686. That point accepted, some States, including Italy, have found it difficult to confer supralegislative rank on the Convention precisely because of their dualistic natures, though there is a great deal of variation even among this small group. Dualistic countries tend to incorporate through statute, whereas monist States tend to do so through judicial decision. Clearly, a monistic constitutional structure can provide the judiciary with more leeway in the reception process. In dualistic countries where a powerful Constitutional or Supreme Court defends national human rights, the Authors observed reticence among judges to base their rulings on the Convention as an independent source of rights.

26 F. FRANCONI, “The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience”, in B. CONFORTI, F. FRANCONI (eds.), “Enforcing Human Rights in Domestic Courts”, Martinus Nijhoff Publisher, The Hague-Boston-London, 1997, 15–34, 15, concluding that the hiatus between

much more true if we considered that international remedies, as the ECtHR mechanism, depend on the exhaustion of domestic remedies²⁷. This requirement is based on the assumption that the domestic legal order will provide an effective remedy for the violation of conventional rights. The requirement finally expresses the subsidiary nature of the ECHR system. National authorities, and especially national courts, are in a “better position” to assure the effective implementation of human rights, because they are in direct contact with vital forces, national traditions and cultural backgrounds of their countries.

If this is true, in our opinion the main point is that the interpretation and application of the ECtHR case law into the domestic legal order must follow a clear and well established mechanism. In the previous Chapters, we illustrated the evolution of the Constitutional Court’s jurisprudence and the consistency of the judicial behaviour with the Constitutional Court’s directive. The stability of this mechanism and the coherence between judgments are meaningful to fulfil a responsive jurisdictional model. In fact, stability and coherence guarantee values that are fundamental to the effectiveness of human rights, like legal certainty and equal treatment. Surely, modern legal systems are complex. The overlapping of charters of rights can jeopardise the protection of human rights instead of increasing their effectiveness. Thus, assuring full knowledge and awareness of the different sets of human right legal sources currently existing, and their respective mechanism should be an aim of primary importance, in order to avoid risk of diverging jurisprudence and unequal treatment. In our opinion, this objective could be better achieved through the continuing training of judges and prosecutors about the different system of protection of human rights and their co-ordination.

the international recognition of rights and their actual implementation by domestic court, and by public organs in general, was at that time one of the most disturbing aspects of the international effort to ensure respect for human dignity.

- 27 See Article 35, §1, ECHR, on admissibility criteria, reading that: “1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law...”.

The Relation of Greek Courts with the European Convention on Human Rights and the European Court of Human Rights Case-Law

By Prof. Dr. Athanassia P. Sykiotou

Faculty of Law, Democritus University of Thrace

Abstract.....	47
Introduction.....	48
Chapter I: The status of the ECHR at national level	49
Chapter II: The national courts referring to the ECtHR judgments	51
A. Examples of bad practice.....	53
B. Examples of good practice and the national measures taken for an effective harmonisation of the domestic case-law with the ECtHR.....	57
Chapter III: Conclusions and recommendations	62
A. Conclusions.....	62
B. Recommendations	63

Abstract

According to the Greek Constitution all international conventions are not only integral part of the domestic law, but they also have an additional value of “supremacy” over national laws. The Greek courts are obliged to invoke and apply the provisions of the ECHR. As a normal consequence of the commitments of the country as

member of the Council of Europe, the Greek courts have the obligation to adapt their jurisprudence to the case-law of the ECtHR. However, judges have shown for many years reluctance to do so. Nowadays, there are many examples of referring to the ECtHR case-law and of direct application of provisions of the ECHR by the courts. Measures are also taken on constant basis to make sure that judges are familiar with the case-law of the ECtHR and follow it.

Introduction

The European Convention on Human Rights (ECHR) together with its protocols pose the framework of protection and respect of human rights, comprising in its provisions the fundamental guarantees of both substance and procedure that need to be implemented in every case. Under the principle of primacy of international over domestic law, the ECHR should prevail as such to national instances in Greece, which have the duty to apply it. The ECtHR by its successive interpretations of the provisions of the ECHR enrich the content of their guarantees and expands their scope. Most of these guarantees are included in the ECHR and its additional protocols, but there are many others who derive from unwritten principles that emerged from the case-law of the ECtHR, such as the principle of proportionality.

The European Court of Human Rights (ECtHR) plays an important role for the harmonisation of both the European states' domestic legislation and national case-law¹, through its case-law which determines the content of protected rights laid down in the ECHR. Thus the ECtHR, by applying a Europe-wide law, cannot –except in limited cases where the ECtHR accepts a *margin of appreciation*²– deviate from a common

1 Christos Rozakis, Conference in: Symposium of the Movement of citizens for an open society, *The Greek courts and the case-law of the ECtHR*, Kinisi politon, 2011, p.12, http://www.kinisi politon.gr/wp-content/uploads/2014/03/125219_APEDDA1.pdf

2 The question has raised a huge controversy and confusion related to the content of the “margin of appreciation”. The Protocol No. 15, adopted in May 2013, adds to the Preamble of the Convention references to both the margin of appreciation and subsidiarity. See, Dean Spielmann, *Current Legal Problems. Whither the Margin of Appreciation?*, Lecture in UCL, 20–3–2014, http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf. See also, Y. Arai-Takahashi, “The margin of appreciation doctrine: A theoretical analysis

line. This sometimes brings the ECtHR in conflict with the States and the domestic courts, which do not always realise why their decisions should be reversed by a mechanism that works outside their territory and their logic. Greece has been convicted many times in the past by the ECtHR for not applying the ECHR. It took many years and constant training of the judges to reverse this perception and increase the direct application of provisions of the ECHR and consideration of the ECtHR's case-law by the national courts.

Chapter I: The status of the ECHR at national level

The ECHR and its additional protocols in some of their provisions set out the rights, which impose on member States a real obligation of compliance. However, among these rights, the text itself establishes some gradation between rights of absolute and of relative protection. Not only Art. 15 of the ECHR, but other clauses as well, provide expressly for certain exceptions. It is obviously difficult – and at the same time undesirable – to impose uniformity on States of very different legal tradition.

Whatever variations admitted, these fall into the *margin of appreciation* and not into a *sovereign discretion* of the States. The word itself 'margin' simply indicates a space between compliance and non-compliance, and it is precisely there that the term of 'compatibility' takes its full

of Strasbourg's variable geometry", in: Andreas Føllesdal, Birgit Peters, Geir Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge, 2013, pp.62–105; Steven Greer, *The margin of appreciation: interpretation and discretion under the European convention on Human Rights*, Human rights files No. 17, Council of Europe Publishing, July 2000.

The origins of the margin of appreciation can be traced back to the earliest days of the Convention mechanism, and more precisely to the 1956 inter-State case taken by Greece against the United Kingdom over the troubled situation on the island of Cyprus: *Greece v. United Kingdom*, application no. 176/56 and 299/57 (Article 15). Some of the leading cases of the ECtHR on the margin of appreciation: *Engel and Others v. the Netherlands*, judgment of 8 June 1976 (Article 8); *Kokkinakis v. Greece*, judgment of 26 September 1996 (Article 9); *Handyside v. the United Kingdom*, judgment of 7 December 1976 (Article 10); *United Communist Party of Turkey and others v. Turkey*, judgment of 30 January 1998 (Article 11); *Lawless v. Ireland*, judgment of 1st July 1961 (Article 14); *Phocas v. France*, judgment of 23 April 1996 (Article 1 of Protocol No. 1).

meaning, because it does not require the identity, in the sense of uniformity of laws and national practices that are very diversified in a common European understanding of the human rights and fundamental freedoms³.

In this respect, Article 6 of the ECHR which guarantees the right to an effective judicial protection, does not exclude the possibility for the national legislator to enact procedural conditions and general formalities for the proceedings, provided that these are compatible to the function of Justice and the need for an effective administration of Justice and also consistent with the principle of proportionality.

In Greece national courts use the system of either subsidiary application of the ECHR (together with provisions of national law), but also of direct application of the ECHR, given that the ECHR – as any other international text ratified by Greece – is considered inherent part of the national law. According Article 28 para 1 of the Constitution *“The generally recognised rules of international law, as well as international conventions as of the time they are sanctioned by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.”*

The Constitution renders all international conventions not only integral part of the domestic law, but it also gives them the additional value of “supremacy” over national laws. By doing so, the Greek constitutional legislator wanted to underline the importance of the binding international texts and make the point to applicators that these are the texts that should apply first, since they have superior value over “simple” domestic laws. Therefore, the primacy of the ECHR is not disputed. Besides, after the Treaty of Lisbon, the superiority of the ECHR against the entire national law, including of the Constitution through the incorporation into the Treaty of the EU, is a fact. The Greek courts should invoke and apply the provisions of the ECHR.

The domestic courts, which have responsibility for giving effect to the right to an effective remedy enshrined in Article 13 of the Convention, contribute to effective compliance with European standards and also

3 See, M. Delmas-Marty, “Vers une autre logique juridique, à propos de la jurisprudence de la CEDH”, *Dalloz* 1988, p.221.

to disseminating and deepening those standards. On a day-to-day basis, they are the first, at all levels of jurisdiction, to conduct an in depth review of the domestic law's compatibility with the rights and freedoms guaranteed by the Convention⁴. In particular, they should ensure that the harmonisation of competing rights conducted by the legislature does not exceed the national margin of appreciation, the extent of which is assessed in the light of the criteria established by the ECtHR. Where the ECtHR finds a violation, the domestic courts should ensure, using their powers to make orders, that the administrative authorities do their utmost to bring it to an end, if necessary by repealing a provision of domestic law. In addition, in developing their case-law, the domestic courts are obliged to take into consideration the ECtHR's judgments, although these are not binding *erga omnes* in the majority of the European legal traditions. However, in the majority of these traditions, as in Greece, the Court's judgments enjoy genuine persuasive force, and even a fairly clear interpretative authority.

Chapter II: The national courts referring to the ECtHR judgments

The first point to be noted is that between the two judicial orders, national and European, it is not conceivable and allowed to have any type of 'competition'. Both judicial orders serve the purpose and attribution of Justice and have been established to protect the rights of the parties.

An important issue is that the national courts must recognise the jurisprudence of the ECtHR so that cases are not driven to Strasbourg for issues on which the Court has established a consistent line in its case-law.

4 Some good examples are the following decisions of the Supreme Administrative Court: decision 1914/2010 (reference to Art.6 para 1 of the ECHR); decisions 1734/2009, 1522/2010, 501/2012, 647/2012, 3611/2013 and 2454/2013 (reference to Art.6 para 2 of the ECHR and Art.4 para 1 Protocol 7 of the ECHR); decisions 3487/2008, 1087/2010, 730/2010, 4132/2011, 4665/2012 and 691/2013 (reference to Art.1 Protocol 1 of the ECHR); decisions 2077/2009 and 2960/2010 (reference to Art.7 para 1 of the ECHR).

As a normal consequence of the commitments of the country as member of the Council of Europe, there is from one hand the specific obligation of the Greek courts to adapt their jurisprudence to the case-law of the ECtHR, and on the other hand, in view of article 28 of the Constitution (supranational validity of the ECHR), not to ignore the principles expressed and safeguarded by the different texts of the Council of Europe, such as Article 6 of the ECHR and Art.1 of the first additional Protocol to the ECHR. This is because the case-law of the ECtHR, *inter alia*, contributes to the creation of a European public order, since it aims at a collective guarantee of human rights requiring from member States objective obligations for their protection. Therefore, it is imperative for the national judge to harmonise the domestic case-law with that of the ECtHR.

The ECtHR does not replace the national legislator on the establishment of the applicable procedural system, but only controls, with the provided means, if these rules meet the requirements of the ECHR. Moreover, the 'compliance' of the member State to the final decision of the ECtHR matches conceptually with the legal consequence of a *res judicata*⁵. Of course, the ECtHR has no power to annul or set aside the decision of the national court, but if the legal situation, which was judged by the ECtHR as contrary to the Convention, continues –which is the case when the breach of the fundamental right of the appellant is constant– then the national judge is obliged to annul the domestic decision⁶.

In this respect, Art.525 (1.5) of the Greek Code of Criminal Procedure provides that the criminal proceedings have to be repeated if the ECtHR found a violation of a right on the fairness of the procedure followed or the substantive provision applied. A similar provision is also included in Art.105A, of the Code of Administrative Procedure⁷.

5 See on this line the decision of the Supreme Court of Greece No 818/2008.

6 See, Fr. Sudre, *Droit européen et international des droits de l'homme*, PUF, Coll. Droit fondamental, 12e édition, 2015, p.725.

7 With regard to the mechanisms of compliance of Greece to the decisions of the ECtHR, it is worth noting that the provisions of article 23 of law No. 3900/2010, by which article 105A (2) was added in the Code of administrative procedure, provides for the possibility of the repetition of the procedure before the same Court that issued the judgment, which by a decision of the ECtHR was found to be in breach of the principle of a fair trial or any other substantive provision of the ECHR.

A. Examples of bad practice

There are many cases – as showed by the convictions of Greece by the ECtHR – where the Greek judges have not followed the constant jurisprudence of the ECtHR in the respect of rights safeguarded by the ECHR. The problem is that in practice, some national courts insist on positions that have however repeatedly been ruled by the ECtHR as against the ECHR. This attitude is not only a deadlock, but also generates the international responsibility of the country, particularly since the implementation of the decisions of the ECtHR falls to the competence of the Committee of Ministers of the Council of Europe.

The reluctance by the judicial practice to referring to the ECtHR constant case-law has resulted in condemning Greece by the ECtHR in many cases. Some examples related to the violation of the right to a fair trial are the judgments of the ECtHR in the cases: *Mahmundi and Others v. Greece* of 31.7.2012 (application no. 14902/10), related to an Afghan family detained in the Pagani detention centre in Greece in inhuman and degrading conditions and without effective judicial review; *Rahimi v. Greece*, 5 April 2011 (application no. 8687/2008) related to the arbitrary detention of an unaccompanied minor who did not have access to judicial review, because the leaflet of information given to him was not provided in a language the applicant could understand; and he could not contact a lawyer, as he was an unaccompanied minor and no guardian had been appointed. It is clear in these cases that the Greek courts did not take into consideration Art.6 of the ECHR, nor the absolute nature of Article 3 of the ECHR, under which the ECtHR has constantly stressed that the bad conditions of detention result to violation of the prohibition of inhuman and degrading treatment. Furthermore, the ECtHR, in the above cases, has stressed the positive obligation of states to protect and provide care for extremely vulnerable individuals, such as unaccompanied minors, regardless of their status as irregular migrants, nationality or statelessness. According to the Court, the prime characteristic of the positive obligation of a State is that it requires national authorities to take the necessary measures to safeguard a right or, more precisely, to adopt reasonable and suitable measures to protect the right of an individual. The ECtHR has recalled also that the best interest of the

child implies that states ensure as far as they can family unity and use detention only as a measure of last resort⁸.

Other examples of bad practice related to the right to a fair trial and the presumption of innocence are reflected in the judgments of the ECtHR: *Boulougouras v. Greece* of 27-5-2004; *Perlala v. Greece* of 22.2.2007; *Paraponiaris v. Greece* of 25.9.2008; *Karavelatzis v. Greece* of 16.4.2009; *Tsotsos v. Greece* of 30.4.2009; *Elyasin v. Greece* of 28.5.2009; *Popovitsi v. Greece* of 14.1.10; *Sygelidis v. Greece* of 28.6.2010.

Besides the absence of referring to the case-law of the ECtHR and thus, the substantial content of the fair trial that has been violated, in the above cases, the national courts, contrary to the case-law of the ECtHR, considered that the right to a fair trial, as guaranteed by article 6 of the ECHR, was not to constitute a separate ground of appeal before the Supreme court, but on the contrary, it could only be invoked to support one of the reasons for recourse as exhaustively provided for in article 510 § 1 of the Code of Criminal Procedure.

As a result, in the cases *Perlala v. Greece* of 22-2-07 (Appl. No. 17721/04) and *Karavelatzis v. Greece* of 16-4-2009 (Appl. No. 30340/07), the ECtHR has considered that this interpretation of the ECHR by the Greek Supreme Court on the one hand tends to be a sophism and on the other, it weakens considerably the protection of citizens' rights in the Greek proceedings; offering an approach excessively formalistic⁹. In these cases, the ECtHR considered that from the refusal of the Greek Supreme Court to consider the appellant's arguments it may reasonably be deduced that, in this case, the guarantees set in Article 6 of the ECHR have not been taken into account as they should¹⁰.

8 For more details on the cases, see: Yiannis Ktistakis (2013), *Protecting migrants under the ECHR and the European Social Charter. A handbook for legal practitioners*, Council of Europe Publishing, p.37-41.

9 Hoursoglou St., "Comments on the Decision of the ECtHR, *Perlala v. Greece*, 22.2.2007, Requirements for the admissibility of appeal before the Supreme court for violation of Article 6 of the ECHR", *Nomiko Vima*, (2) 2007, p. 520.

10 See, Jean-Marc Sauvé, Speech in the Seminar organised by the ECtHR on Subsidiarity: a two-sided coin? The role of the national authorities, Strasbourg, 30 January 2015, http://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf

In 2010 (by the law No. 3900/2010¹¹ on acceleration of criminal justice), it has been added that any violation of rights protected by the international human rights instruments results in the absolute nullity of the criminal procedure. This was essential for the effective and efficient implementation of the rights protected by the ECHR through the national judicial practice. With this law Greece has conformed with the 14th Protocol to the ECHR which promotes even further the principle of subsidiarity, according to which the rights and freedoms enshrined in the Convention must be protected effectively and efficiently primarily at national level.

Regarding cases referred before the administrative courts, we have observed that some national judges in their decisions underline the auxiliary character of control of the ECtHR, highlighting their obsession in the logic of State sovereignty. These courts believe that it should not be left to the ECtHR, in view of its subsidiary role, the control of conformity to the Convention of acts of public administration, which essentially belongs to the national judge¹².

Below are two eloquent examples that show the reluctance of the national courts of administrative justice to adapt their case-law to that of the ECtHR.

In the decision of the ECtHR, *Athanasiou & other v. Greece* of 21.12.2010 (application no. 50973/08), related to the excessive length of administrative proceedings (which in this case lasted more than 13 years!)¹³ and right to an effective remedy, the Court underlines the systemic problem of slowness in the administration of Justice (article 6 § 1 of the ECHR) by the administrative courts, with first the Supreme Administrative Court, in conjunction with the violation of article 13 of the ECHR, due to the absence of specific provision in the domestic law

11 Official Gazette A/213 of 17–12–2010.

12 On the issue of state sovereignty see: Paul Tavernier, "La compétence de l'organe de contrôle", in Fr. Sudre (dir.), *L'interprétation de la Convention Européenne des Droits de l'Homme*, Bruylant, Bruxelles, 1998, p. 175–195, especially p. 185.

13 Between 1999 and 2009, the Court delivered about 300 judgments concluding that there had been an excessive length of judicial proceedings in Greece, the majority of which concerned the excessive length of administrative proceedings. See, ECtHR, *Excessive length of administrative proceedings: Greece must take measures to deal with this structural problem*, Press Release issued by the Registrar of the Court no. 990, 21.12.2010.

providing for a remedy, which would allow to issue a decision on the case of the appellant within a reasonable time.

It is characteristic that the above claimant, for an amount of 5,000 euros he was requiring as an additional retirement pension from the Army Solidarity Fund, he ended up with 14,000 euros more, awarded by the ECtHR as moral damages for the delay of justice...

It has to be noted that the problem of delay in the overall administration of Justice and, in particular, of administrative justice in Greece has taken worrying (if not explosive), dimensions in the past reaching around 30,000 cases only in the administrative courts until 2013. The 50% of convictions of Greece by the ECtHR, regards the reasonable time of trial and about 16.5% the violation of the provisions of article 6 of the ECHR and 13% the right to effective judicial protection¹⁴.

This phenomenon – common also to other member States of the Council of Europe – is of great importance, because it hinders the effectiveness of judicial protection, shakes the relationship of citizen's confidence towards the administration of Justice and in some cases, it can be compared to a denial of Justice.

Following the large number of convictions by the ECtHR, the administrative assembly of the Greek Supreme Court, being aware that in the past many excesses have been observed by the Greek jurisprudence, as well as many cases of rigidity, by its decision 14/2010, has recommended a more flexible interpretation of the ECHR by the Court, in line of the ECtHR's case-law. It also suggested a wider use of the possibility of the judge of the Supreme Court to complete the reasons of appeal in order to safeguard the right to judicial protection and called for the respect of the right to legal protection within a reasonable time. The court should examine *ex officio* the reasons for the delay¹⁵ and redress the injury of the claimant by this delay¹⁶.

14 See, I. Sarmas in: Symposium of the Movement of citizens for an open society, *The Greek courts and the case-law of the ECtHR*, Kinisi politon, 2011, , p. 62.

15 One reason of the delay in issuing a decision is the multiple postponements of the hearing. The establishment of control of the motivation of the postponements by the Inspectorate of courts is a useful measure, because it cultivates a spirit of responsibility to the judges who vote in favour of postponements.

16 This issue has been raised in the case of the ECtHR, *Athanasiou v. Greece*, 21–12–2010, and ended with the amendment of the legislation. A recourse has

The Supreme Administrative Court underlined that the case-law of the ECtHR, contributes, *inter alia*, to the creation of a European public order, since it aims at a guaranteeing human rights of everyone and imposes on member States objective obligations to protect them. That means that the domestic courts are obliged to take into consideration the case-law of the ECtHR before issuing their decisions. It also considered essential the notification of these principles to all judges through the training provided by the National School of judges.

B. Examples of good practice and the national measures taken for an effective harmonisation of the domestic case-law with the ECtHR

It took several years and repeated convictions of Greece by the ECtHR, for the Greek judiciary to understand that the ECHR is an inherent part of the domestic legislation – as provided by the Greek Constitution in Art.28 – in order to take measures to harmonise the case-law in line with the ECtHR and for the legislator to change accordingly the legislation where needed. In the recent years Greek courts have shown a considerable progress in following the ECtHR's standards.

In contrast to the past, where Greek courts were rarely considering the rules of the ECHR and the case-law of the ECtHR, nowadays Greek judges invoke frequently the ECHR and take into consideration the case-law of the ECtHR. As a result, we can say that a creative national case-law has been formed that responds to the principles of the ECHR¹⁷. This is evident from the examination of the legal positions of the Sections and also of the Assembly of the Supreme Courts of Greece (Supreme civil and criminal Court¹⁸ and Supreme Administrative Court¹⁹), and also of courts of first and second instance, attesting that they take account of and implement the principles of the ECHR and previous case-law of the ECtHR.

been provided in Art. 53–57 of the Law No.4055/2012, giving the possibility to demand an indemnity in cases of exceeding the reasonable time of trial.

17 See, D. Kanellopoulos, Conference in: Symposium of the Movement of citizens for an open society, *The Greek courts and the case-law of the ECtHR*, Kinisi politon, 2011, p. 24, http://www.kinisi politon.gr/wp-content/uploads/2014/03/125219_APEDDA1.pdf

18 The Supreme (Civil and Criminal) Court is called "*Areios Pagos*"; it has different civil and penal sections.

19 The Supreme Administrative Court is called *Symvoulio Epikrateias* =*State Council*. It follows a similar model of the *Conseil d'Etat* of France.

It is important to notice that in Greece, according to the Supreme Court, the violations of the ECHR and of the European legislation should be examined *ex-officio* by all courts. This means that all judges are obliged to have knowledge and take into consideration the case-law of both European courts (ECtHR and CJEU) and the previous case-law of domestic courts on related matters.

The case-law of the Supreme Courts is characterised by the tendency to adopt interpretative solutions of the European Court of human rights whenever issues of implementation of the ECHR occur, with often straight reference to the case-law of the ECtHR.

The Greek judge as enforcer of the European Convention on human rights is called to adapt the Greek law to the newest trends in the jurisprudence of the Strasbourg Court. This contributes also to limiting the number of cases that are referred to the ECtHR. At the same time, the harmonisation of the Greek legal system with the requirements of a uniform rule of law at European level is achieved; a rule of law which requires the protection of human rights as the primary expression of democratic progress in Europe. In cases where provisions of Greek law do not adequately protect the human rights, the Supreme Courts issue decisions following the interpretation of the ECHR provisions on human rights by the ECtHR's²⁰.

The case-law of the Supreme administrative court (: State Council) has played an important role in the shaping a core of general principles. It has created a complete system of general principles of law, which has affected not only the functioning of the Administration, but also the constitutional life of the country. It is noteworthy that in the text of the Greek Constitution, provisions appear illustrating legal principles extracted from the case-law of the State Council in the spirit of the interpretation of the ECHR by the ECtHR.

In the recent years more and more decisions of the courts, including the Supreme Courts, make direct reference to the case-law of the ECtHR²¹.

20 See, Stavroula Ktistaki, *The implementation of the European Convention on human rights from the State Council*, Athens: Ant. Sakkoulas Publ., 2009.

21 Some good examples of the decisions of the Supreme Administrative Court making reference to the case-law of the ECtHR are: Decision 545/2007 (reference to *Gaygusuz v. Austria* of 16.9.1996 and *F.Q. Zapata v. Spain* of 4.3.1998, in relation to Art.14 of the ECHR); decision 1405/2007 (reference to *Engel et al. v. Netherlands*

In the last years the evaluation of the case-law of the Supreme Court in relation to direct reference to the case-law of the ECtHR is rather positive. While in 2001 the reference to the ECHR and the case-law of the ECtHR is present in 20 cases of the Supreme Administrative Court, in ten years this reference is made in more than 120 cases²².

Accordingly, the case-law of the Supreme Civil and Criminal Court focuses also on principles as safeguarded by the ECHR²³, such as e.g. the principles of fair trial and non-self-incrimination, given that these are procedural guarantees of supra-legislative power with a wide protective scope. In view of the fact that the main axe safeguarding these principles in Greek law is Article 6 para. 1 of the ECHR, as interpreted by the ECtHR, a systematic analysis of the jurisprudence of the ECtHR is taken into consideration by the Supreme Court in related cases²⁴.

-
- of 8.6.1976, *Pellegrin v. France* of 8.12.1999, *Zcan v. Turkey* of 15.5.2001 and *Kepka v. Poland* of 11.7.2000, in relation to Art.6 para 1of the ECHR and Art.2 of the Protocol 7 of the ECHR); decision 124/2008 (reference to *Mathieu, Mohin and Clerfayt v. Belgium* in relation to Art.10 para 1 of the ECHR); decision 143/2008 (reference to: 1) *Greek Distilleries and Andreadis v. Greece* of 9.12.1994, 2) *Papageorgiou v. Greece* of 22.10.1997, 3) *Zielinski et al. v. France* of 28.10.1999, 5) *Agoudimos v. Greece* of 28.9.2001, 6) *Smokovitis et al. v. Greece* of 11.7.2002, 7) *National and Provincial Building Society et al. v. UK* of 23.10.1997, 8) *OgisInstitut Stanislas v. France* of 27.8.2004, 9) *Velli-Makri v. Greece* of 4.9.2003, 10) *Saint-Adam et Millot v. France* of 2.8.2006 and 11) to *Vezone v. France* of 13.9.2006, in relation to Art.6 para 1 of the ECHR); decision 781/2009 (reference to *Meidanis v. Greece* in relation to Art.1 of Protocol 1of the ECHR); decision 3457/2012 (reference to *Scoppola v. Italy* of 17.9.2009, in relation to Art.7 of the ECHR); decision 5382/2012 (reference to: 1) *Lingens v. Austria* of 8.7.1985, 2) *Editions Plon v. France* of 18.5.2004 and 3) to *Rizos & Daskas v. Greece* of 27.5.2005, relation to Art.8 and 10 of the ECHR); decision 2374/2013 (reference to *Stavropoulos v. Greece* of 27.9.2007 and 2) *Paraponiaris v. Greece* of 25.9.2008, in relation to Art.6 para 2 of the ECHR).
- 22 Eug. Prevedourou, *The impact of the ECHR in the trials before the State Council*, Nomiki Vivliothiki Publs, Series of Library of Theory & Practice of Administrative Law (9), 2012, p. 1223–1315.
- 23 In the decision 2/2014 the Supreme Court (criminal section) referring to the case law of the ECtHR, has judged that the Court cannot overrule an appeal of the accused on foreclosure as having an unknown residence, only based on the proof of notification of the appealed decision, without estimating the other elements submitted before the court, from which the address of the accused appears. By doing so, the court has violated the provision of article 6 paragraph 1 of the ECHR, in view of which, when the citizens have no knowledge of the charges, there is no reason why they should inform themselves the Prosecutor's Office of any change of their address.
- 24 Th. Papakyriakou, *The principle of non self-incrimination in Greek legal order in the light of the recent case-law of the ECtHR*, Athens: Nomiki Vivliothiki Publ., 2009.

The articles of the ECHR, such as Article 6 para 1, which enshrines the right to a fair trial, as well as Article 1 of the Protocol No 1 of the ECHR, in respect of the property have been invoked and used more by the Greek courts, especially the Supreme courts at a rate of 45%²⁵. It is also interesting to note that while the invocation of Art.6 para 1 of the ECHR is made often in conjunction to relevant articles of the Greek Constitution²⁶, Art.1 of the Protocol No 1 is invoked alone by the courts. This does not mean that for the Greek courts the invocation of Art.6 para 1 of the ECHR has a subsidiary character, despite the fact that in many judgments this has been the case. However, in cases of direct application of the ECHR, the Supreme Court primarily invokes and implements the jurisprudence of the ECtHR, in order to interpret that provision, and by doing so there is a fuller protection of human rights. For example, the Supreme Court has used a broader interpretation of Art.6 para 1 of the ECHR, adopting and guaranteeing the specific aspects of the rights, as they have been developed on the basis of the case law of the ECtHR, such as the right to the existence of a court and access to it; the requirements for respecting the principle of impartiality and independence of the court; the right to be heard; the principle of equality of arms; or the requirement to respect the principle of publicity. The systematic processing of this right by the Court completes the compliance of the legislation, starting with the novelties created by the ECHR, concerning the proper administration of justice, establishing provisions at both administrative and criminal procedural law²⁷.

Through the above examples of direct application of the provisions of the ECHR, we see how this way of application of the ECHR by the courts is directly linked to the integration and application of the case-law of the ECtHR.

Nowadays, the case-law of the ECtHR, through HUDOC, is disseminated to all judges, since all courts of Greece have access. In addition to the on-line system, decisions of the ECtHR of general interest are distributed to all courts of first instance in Greek language. Courts of first and second

25 Eug. Prevedourou, *The impact of the ECHR in the trials before the State Council*, op. cit.

26 For example the decision No 3633/2004 of the Assembly of the Supreme administrative court.

27 As e.g. the recourse provided in Art. 53–57 of the Law No.4055/2012, giving the possibility to demand an indemnity due to exceeding the reasonable time of trial.

instance are also connected to the data base of the Supreme Court of Greece containing domestic case-law²⁸.

Further, the State Council issues a Bulletin on judgments of the ECtHR in Greek language distributed to its judges. It also organises frequent events (seminars, colloquia, workshops, conferences) for its members contributing to their continuous training together with the National School of Magistrates. Among the events of the State Council is the organisation of colloquia between judges of the State Council and of the ECtHR²⁹.

The Legal Council of the State (*Nomiko Symvoulío tou Kratous*)³⁰ contributes also in the harmonisation process by translating all judgments of the ECtHR into Greek and disseminating them through its database³¹. In addition, it organises many seminars and symposiums each year.

Measures for the harmonisation of case-law are also taken at the level of education of judges and prosecutors by the National School of Magistrates that also participates in the Council of Europe HELP programme³². The programme aims in the incorporation of the European Convention on human rights and the case law of the European Court of human rights in the curricula of Schools of Judges and Prosecutors and in general into the organisation of training of judges and prosecutors of Member States.

28 www.areiospagos.gr

29 See, M. Pikramenos (ed.), *The ECtHR and the State Council in a continuous dialogue*, Minutes of the Colloquium organised in Athens on 22–4–2013, Sakkoulas A.E. Pubs, 2013.

30 According to Article 100A of the Constitution, the Legal Council of State, as a large body of the administration, is constitutionally provided and regulated institution. The Legal Council of the State is a single, supreme authority of the State reporting directly to the Minister of Finances (Article 1 of the Law 3086/2002). It is competent mainly for the legal support and representation of the public and State interests.

31 This database is accessible to all: www.nsk.gr

32 Since 2006, the Council of Europe has put in place the HELP program (: European Programme for Human Rights Education for Legal Professionals), in accordance with the Committee of Ministers Recommendation (2004)4, the 2012 Brighton Declaration and Parliamentary Assembly Resolution 1982 (2014). Its main objective is to enhance the capacity of judges, lawyers and prosecutors in all 47 Member States to apply the ECHR in their daily work. See: <http://helpcoe.org/>

The Committee on Legal Affairs and Human Rights of the Council of Europe³³ stresses the importance of solid training for law professionals on the European Convention on Human Rights, as interpreted by the European Court of Human Rights. This requires the Court's case law to be accessible in a language which law professionals in each State Party can understand.

In addition, the National School of Magistrates undertakes a continuous training ("life-long" training) of judges and prosecutors with seminars organised in collaboration with other European institutions of education and training of judges and prosecutors, such as the *European Judicial Training Network (EJTN)*³⁴, which is however focused on the harmonisation of EU law.

The trainees of the National School of Magistrates also participate in the *THEMIS competition*³⁵ organised every year by the EJTN³⁶. Such competitions contribute also in the harmonisation of law and jurisprudence at European level.

Chapter III: Conclusions and recommendations

A. Conclusions

To the question whether the national judge has responded to his/her role to implement and incorporate the ECHR, we can reply that regarding the quantitative data that has occurred at least in the recent years, given the growing number of judgments in which reference is made to the

33 Michel J. P. (rapporteur), "The European Convention on Human Rights: the need to reinforce the training of legal professionals", Committee on Legal Affairs and Human Rights, Council of Europe, Report Doc. 13429, 18 February 2014, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20533&lang=EN>

34 The European Judicial Training Network (EJTN) is based in Brussels and is funded by the European Commission and the annual contributions of its members.

35 Over 4 days, 10 teams from across Europe defend their written papers and debate challenging issues with fellow team members as well as the assembled jury members. During the competition, each team has 90 minutes to defend its written paper and debate challenging issues.

36 The Greek debated with a paper on "Judges and Social Media: Managing the Risks" and came third in the selection of finalists in semi-final D. http://www.ejtn.eu/Documents/THEMIS%202015/List_of_teams_2015.pdf.

ECHR and to the case-law of the ECtHR, the answer is yes. Especially, the Supreme Courts seem quite familiar with both the text of the ECHR and the interpretation of its provisions through the case-law of the ECtHR.

The consistent application by national courts of the ECHR requires good knowledge of the judgments of the ECtHR. In this direction the teaching of the relevant topics in the National School of Magistrates is not only positive, but also necessary. Beside the normal courses of education of trainee judges and continuous training for judges and prosecutors, several other activities are organised every year to enhance the better use of the ECHR, through multiple seminars and training sessions involving national and international trainers and awareness raising activities. In addition, the continuous collaboration of the National School of Magistrates with European institutions, their participation in trainings for judges and the development and availability of trainings and resources (database, handbooks, including HELP materials), available in Greek, strengthens the level of professional skills and knowledge on the ECHR standards among judges.

Efforts undertaken by the Supreme Courts on a systematised and regularly updated database of court decisions and recommendations and translated decisions of the ECtHR with free access to all professionals, contribute so that judges and other legal professions have access to the necessary information in order to apply correctly the ECHR in their professional activity.

However, there is still room for improvement so that the national courts make direct application of the ECHR and continuous referring to the ECtHR's case-law in order to reduce the cases that are being sent to the ECtHR and improve effective implementation of the ECHR.

B. Recommendations

Regarding the main question how can we prevent the ECtHR from dealing continuously with the same violations, although the meaning of Convention standards is often abundantly clear in the light of previous cases decided by the Court, there is a series of recommendations that need to be taken into account.

1. The answer to the above question resides first in the effective implementation of the principle of '*res interpretata*'

authority of the ECtHR's judgments³⁷. The principle refers to the duty for national legislators and courts to take into account the Convention as interpreted by the Strasbourg Court –*even in judgments concerning violations that have occurred in other countries*³⁸.

The successful implementation of this principle depends on two conditions. The first is that the national legislatures and courts should be aware of, and give due consideration to the case law of the ECtHR, including cases concerning other countries. The second condition is that the ECtHR exercises appropriate self-restraint in the interpretation of the Convention, respecting the States Parties' margin of appreciation that the ECtHR has itself stipulated in its well established case-law. This is especially true in sensitive cases concerning fundamental moral issues or deep rooted national traditions, as in the case *Lautsi v. Italy*³⁹. The ECtHR is the only body that is invested with the authority to interpret the Convention. Article 19 of the Convention is clear on this⁴⁰. In order for this to be feasible, relevant judgments of the Strasbourg Court must be accessible to the legislative and judicial authorities in all countries which are potentially concerned –including in a language understood by those who are expected to take them into account. In some member States there are the ECtHR 'case law monitoring units' as this is the case in Greece in the Ministry of Justice.

37 ECtHR, 1979, in *Marckx v. Belgium* and 1981, in *Dudgeon v. the United Kingdom*.

38 A strong plea for the interpretative authority of the ECtHR's judgments was expressed by PACE rapporteur Christos Pourgourides, at the Conference on the Principle of Subsidiarity, Skopje, 1–2 October 2010; See *The interpretative authority (res interpretata) of the Strasbourg Court's judgments: compilation of background material*, Committee on Legal Affairs and Human Rights, Council of Europe, AS/Jur/Inf (2010) 04, http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf

39 ECtHR, *Lautsi and others v. Italy* (Application no. 30814/06), 18 March 2011.

40 See the judgment *Opuz v. Turkey* ECtHR, *Opuz v. Turkey* of 9 June 2009 (Application no. 33401/02), "...bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, *even when they concern other states*" (§ 163).

2. It is also important for national parliaments to set-up “specific mechanisms and procedures for effective parliamentary oversight of the implementation of the ECtHR’s judgments on the basis of regular reports by responsible ministers” as the Parliamentary Assembly Resolution 1516 (2009, § 22.1) has suggested, not only limited to cases involving the countries concerned.
3. The Greek judge as enforcer of the European Convention on human rights should adapt the Greek law in light of the newest trends of the jurisprudence of the ECtHR. In addition, the highest national courts have a duty to ensure on a constant basis that lower courts are aware of and respect Strasbourg case law.
4. On the other hand, the national authorities expect the ECtHR to take positions which are stable and coherent and to provide solid case-law positions, so that they can rule with certainty on the situations submitted to them without running the risk of subsequent disavowal.
5. Where a thorny question arises with regard to interpretation, the national authorities must themselves attempt to show openness, even extraversion, by incorporating the content of European standards and elements of comparative law from other member States into their debates. On this point, the States expect the ECtHR to be transparent in its use of the available data on comparative law and to explain the scale for assessing consensus and identifying its emergence.
6. In accordance with their positive obligations, the national authorities must secure tangible and effective protection of the Convention safeguards against any form of public inertia or any interference by a third party in the exercise of a right. In this respect, it is important that the ECtHR specifies the nature and scope of these positive obligations, and how it reconciles them with the principle of subsidiarity and, where appropriate, with the existence of a national margin of appreciation or a European consensus.
7. Where the national courts and the European Court differ in their assessment, the national authorities must engage

in a loyal and constructive dialogue. Where this divergence arises from a decision by a lower court, the relevant national Supreme court(s) must play its role as a regulator in full, by explicitly applying the interpretation criteria identified in the Strasbourg Court's established case-law. This "domestic" dialogue between lower and supreme courts occasionally should provide the opportunity to specify the relevant criteria for weighing up the differing interests at stake⁴¹.

8. It is also crucial to combine any initiatives concerning those authorities with continued reform of the ECtHR's internal functioning. As the Brighton Declaration⁴² emphasised, considerable progress has already been made in prioritising case processing and streamlining procedures, particularly with regard to inadmissible or repetitive applications. Thanks to those efforts, the number of pending applications fell by 22% in 2013 and by 28% between January and November 2014.
9. However, other steps must be taken over the coming years in order to enhance the ability of the European system to address serious violations promptly and effectively. In this connection, perhaps a possibility should be created, under the supervision of the ECtHR and of the Committee of Ministers, to send applications back to the domestic courts where there has been a failure to comply with the Court's clear and consistent case-law. Such a procedure would make it possible to lighten the ECtHR's workload and empower those courts.

41 As shown in the ECtHR judgment *Von Hannover v. Germany* of 24 June 2004 (Appl. no. 59320/00).

42 See, ECtHR, High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19–20 April 2012, p.5: http://www.echr.coe.int/documents/2012_brighton_finaldeclaration_eng.pdf

National Implementation of the European Convention on Human Rights – Example of Poland

Dagmara Rajska

PhD in Human Rights, Aix-Marseille University (2013), and
Cardinal Stephan Wyszyński University in Warsaw (2015),
Barrister (Poland)

Introduction.....	68
Chapter I	
Status and Implementation of the European Convention on Human Rights in Poland	69
I. Poland and the Strasbourg Court, a story of an imperfect but united and creative marriage.....	69
II. To execute or not to execute: that is not the question ...	73
III. Monist or dualist approach in implementing the European Convention on Human Rights in Poland?	75
Chapter II	
National Courts Referral and Judicial Application of the European Convention on Human Rights in Poland.....	76
I. Examples of the application of the European Convention on Human Rights concerning the prohibition of discrimination by the national courts	76
II. Examples of the application of the European Convention on Human Rights concerning the right to a fair trial within a reasonable time by the national courts.....	80

III. National courts referral to the European Convention on Human Rights and the European Court of Human Rights case-law	83
Conclusions and Recommendations	84
I. Conclusions	84
II. Recommendations	86

Introduction

According to Prof. Lech Garlicki: “ (...) democracy cannot exist without proper implementation of human rights, particularly – political rights (expression, association, assembly) and free elections. The European Convention, and the case-law of the European Court of Human Rights, provides here a vast body of standards and requirements. Of particular importance are the guarantees of the freedom of political expression (including different forms of assemblies), unhindered creation of political parties, pluralism in electronic media and, last but certainly not least, undistorted expression of the will of all voters.”¹

The European Convention on Human Rights (ECHR) was adopted after the Second World War, because the States had learnt that the national mechanisms of human rights’ protection can become inefficient and result in crimes committed by totalitarian regimes. At the same time, from the very beginning, it was very difficult for States to accept external control of power over their citizens. That is why, the mechanisms of control remained procedurally limited for many years. Firstly, States kept the right either to recognize or not to recognize a right to lodge an individual complaint before the Strasbourg organs. Second, until 1958, when a complaint had been lodged before the European Commission of Human Rights, the States could have decide whether or not they wished to pursue the proceedings before the European Court of Human Rights (ECtHR) or to solve it politically before the Committee of Ministers. Since then, there have been many reforms as regards the organisation of the European Court of Human Rights.

1 Garlicki L., *Democracy in the European Convention on Human Rights*, Public Lecture, Faculty of Law, University of Hong Kong, Summary available at: <http://www.law.hku.hk/ccpl/events/23-03-15LechGarlicki.pdf>, visited 1 December 2016.

On 19 January 1993, Poland ratified the European Convention on Human Rights. At that time, following period of transformation, Poland was a new democracy, which wished to draw closer to European values. It followed the lead of other States such as France, with a more stable legislative system and a long culture and tradition of respect for human rights. According to Wojciech Sadurski: “the accession of Central and East European States into the European Convention on Human Rights system was both a threat and a promise to the system. The threat resulted not only from the substantial increase of the number of Member States and that of the case-load, but also from the demise of a consensus which was, originally, presupposed by the system of protection of human rights in Western Europe: original members of the Council of Europe were “like-minded” and the Convention system did not represent a challenge to their internal apparatus of human rights protection”².

This study describes and analyses the process of implementation of the European Convention on Human Rights in Poland, the successes and the experiences, which have served as a lesson for the future. It has the objective to indicate further challenges for the legal and judicial system in Poland.

Chapter I

Status and Implementation of the European Convention on Human Rights in Poland

1. Poland and the Strasbourg Court, a story of an imperfect but united and creative marriage...

From the formal, legal point of view, the European Convention on Human Rights is an international treaty. According to Article 9 of the Polish Constitution³: “the Republic of Poland shall respect international

2 Sadurski W., ‘Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments’, EUI Working Papers, Law 2008/33, Available at: http://cadmus.eui.eu/bitstream/handle/1814/9887/LAW_2008_33.pdf;jsessionid=9E4439D0BA38FF5EEC1AF3F3FEC5F00A?sequence=1, visited 13 November 2016.

3 Article 9, Polish Constitution of 2 April 1997, available at: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

law binding upon it". It means that its ratification results in a legal international obligation to execute its provisions. The rules of application and interpretation of the Convention are established by the general law of treaties, codified later in the Vienna Convention on the Law of Treaties of 23 May 1969⁴. States have a right to make reserves to treaties and they dispose of a margin of appreciation, doctrine created by the European Court of Human Rights, which refers to room for manoeuvre in fulfilling the obligations under the ECHR for Contracting Parties and creates a limited right for them "to derogate from obligations laid down in the Convention".⁵

The relationship that the national courts and other authorities have with the European institutions should not in any event be considered as a conflict of norms or case-law, but should be understood as providing interaction or a need of pertinent interpretation.⁶ In order to leave some flexibility in the hands of the Contracting States when they are executing their human rights engagements, and because international treaties do not aim to deprive the Member States of their sovereignty, the application of the European Convention on Human Rights can be nuanced by many well-functioning mechanisms. This opening – including a "dialogue of national and international judges" – is very important in respect of finding agreement in the most complex cases involving numerous actors and interests from different sectors without entering into conflict or permanent impasse in changing the political and economic context.

Concerning the dialogue of judges, freedom of expression case-law can serve as an example. Freedom of expression, one of the most important principles of a democratic society, is protected by Article 54 paragraph 1 of the Polish Constitution⁷ and Article 10 of

4 Vienna Convention on Law of Treaties of 23 May 1969, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> visited on 1 December 2016.

5 *Greece v. United Kingdom*, no. 176/56, 20 June 1956, see also: Greer S., *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, Council of Europe, July 2000, [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf)

6 Sudre F., *Convention européenne des droits de l'homme et ordre juridique interne, Les droits de l'homme et la nouvelle architecture de l'Europe*, Institut du droit de la paix et du développement, Nice, 1991, p. 42.

7 Article 54 of the Polish Constitution of 2 April 1997: 1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to

the European Convention on Human Rights. As the provisions are similar, the Constitutional Tribunal and the European Court of Human Rights should elaborate similar principles, but there are divergences between them. For example, the authorisation of press statements was considered as having been compatible with the Constitution⁸. Three years later, the European Court of Human Rights in the same case found a violation of Article 10 of the European Court of Human Rights⁹ and it criticised the arguments used in the judgment of the Constitutional Tribunal¹⁰.

The control of the European Court of Human Rights stays subsidiary in comparison to national mechanisms and it is founded on two primordial principles: exhaustion of domestic remedies in the case of a violation of rights protected by the Convention (Article 35 § 1 of the Convention) and the right to receive prompt, adequate and effective compensation at the national level to redress the violation (Article 41 of the Convention). These principles were recently reminded in the case of *Rutkowski and Others v. Poland*¹¹.

For these reasons, we should “abandon once and for all the fiction of it (the ECtHR) being merely a sort of super-appellate court which scrutinizes individual decisions rather than laws in Member States. This shift towards a quasi-constitutional role, going beyond the simple identification of wrong individual decisions so as to point to systemic legal defects, was triggered by systemic problems within the new Member States, while also facilitated by collaboration between the European Court and national constitutional courts”¹².

everyone. 2. Preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station.

8 Judgment, Constitutional Tribunal, 29 September 2008, no. 52/05.

9 *Wizerkaniuk v. Poland*, no. 18990/05, 5 July 2011.

10 Głowacka D., ‘Dialog między Trybunałem Konstytucyjnym a Europejskim Trybunałem Praw Człowieka w sprawach dotyczących swobody wypowiedzi’, in: Wyrozumsk A., *Swoboda orzekania sądów międzynarodowych*, Katedra Europejskiego Prawa Konstytucyjnego, Łódź 2014, p. 21–34, available at: <http://www.wpia.uni.lodz.pl/zeupi/Publikacje/Anna%20Wyrozumsk%20red.%20%20Swoboda%20orzekania%20w%20prawie%20mi%20C4%99dzynarodowym.pdf> visited 1 December 2016.

11 *Rutkowski and Others v. Poland*, nos. 72287/10, 13927/11, 46187/11, 7 July 2015.

12 *Ibid.*, 3.

The emergence of so-called “pilot judgments” is the best and most recent illustration of this trend. The way in which a national court may form a *de facto* alliance with the European Court, effectively “pierces the veil of the State”, and positions the European Court as a quasi-constitutional judicial body at a pan-European level.¹³

The pilot-judgment procedure was developed as a technique of identifying the structural problems, which underline repetitive cases deriving from a common dysfunction at the national level. In this kind of situation the Court selects the most frequent case or cases for priority treatment under the pilot-judgment in order to identify the systemic problem and to give the Government clear indications of the general measures, which should be adopted to resolve the issue, which is at heart of this dysfunction. At the same time, the Court may decide to freeze other concerned cases for a period of time while the Government looks for a solution to this problem and ensures that the interests of justice are protected¹⁴.

The pilot-judgment procedure is particularly important in the case of Poland, as it is a precursor of this kind of procedure before the European Court of Human Rights. The first case considered under the pilot-judgment procedure was *Broniowski v. Poland*¹⁵ concerning failure to take measures to compensate people who had had to abandon property in order to be repatriated from the “territories beyond the Bug River” after the Second World War. It was a structural problem, which concerned 80,000 people. The Court noted later that a new law had been passed to settle cases of this type. In *Hutten-Czapska v. Poland*¹⁶, the matter concerned the restrictive system of rent control, which originated in laws passed under the former communist regime and the ceiling on rents so low that they did not even cover building maintenance costs. This structural problem concerned some 100,000 people. The Grand Chamber noted later¹⁷ that a new law had been passed to settle cases of this type. Finally, the most recent pilot

13 *Ibid.*, 3.

14 ECtHR, Factsheet, Pilot judgments, Available at: http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf visited 1 December 2016.

15 *Broniowski v. Poland*, no. 31443/96, 22 June 2004.

16 *Hutten-Czapska v. Poland*, no. 35014/97, 19 June 2006.

17 *Hutten-Czapska v. Poland*, no. 35014/97, 18 April 2008 (GC).

judgment, *Rutkowski and Others v. Poland*¹⁸, concerned the applicants' complaints that the length of proceedings before the Polish courts in their cases had been excessive and that the operation to remedy this situation at national level for the excessive length of court proceedings was defective. The Court communicated about 650 applications to the Polish Government, giving it a two-year time limit for processing those cases and affording redress to all victims.

II. Monist or dualist approach in implementing the European Convention on Human Rights in Poland?

A State is not obligated to incorporate the Convention into its internal legal order, this obligation results from the provisions of the Constitution, which is at heart of the eventual primacy of the Convention. Some authors consider that it is a paradoxical situation that the States are not obligated to recognize the direct effects of the Convention even if they benefit from its efficiency¹⁹. Neither the European Convention on Human Rights nor the European Court of Human Rights indicates the manner which should be chosen by the States in order to comply with the Convention, as it was explicitly said in the judgments of *James and Others*²⁰ and *Lithgow and Others*²¹: "the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States". The strength of the impact of the Convention on domestic legal order depends mainly on two aspects²²: 1. the supra-legislative position of the Convention within the domestic hierarchy of those sources of law which place the Convention over other conflicting, already enacted national laws; 2. the self-executing character of the ECHR rules and their direct enforcement by the national courts.

18 *Ibid*, 10.

19 Coussinat-Coustène V., *Convention européenne des droits de l'homme et droit interne: primauté et effect direct*, C.E.D.H, éditions Némens, 1992, p. 12.

20 *James and Others v. the UK*, no. 8793/79, § 84.

21 *Lithgow and Others v. the UK*, nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, § 205.

22 Caligiuri A., Napoletano N., 'The application of the ECHR in the domestic orders', Essay available at: https://www.academia.edu/633695/The_Application_of_the_ECHR_in_the_Domestic_Systems.

The dualist or monist approach to the system of implementation of human rights in a country is critical for the distribution of competencies between legislator, the executive and the courts. It depends on the internal effect of the international treaty, the status of the international human rights treaties and powers of the courts. There is a joint responsibility between the executive, the legislative and the judiciary in implementing international human rights treaties²³.

If a State adopts the monist approach, the international human rights treaty becomes a part of domestic legal order and its norms have self-executing character. It means that the international provisions can be challenged directly before national jurisdictions and applied by them. International legal instruments include treaties, customary rules and general principles of law and non-incorporated treaties. Such instruments have priority over statutes in a case in which there is a conflict of norms but in which it is not sure whether or not it has priority over the Constitution²⁴.

Article 91 of the Polish Constitution of 2 April 1997 guarantees direct applicability of the Convention²⁵: 1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. 2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. 3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

23 *Report on the implementation of international human rights treaties in domestic law and the role of courts*, Venice Commission, Rome 10–11 October 2011, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdf file=CDL-AD\(2014\)036-e \(S85\)](http://www.venice.coe.int/webforms/documents/default.aspx?pdf file=CDL-AD(2014)036-e (S85)) visited on 2 December 2016.

24 *Miejsce prawa międzynarodowego w polskim porządku prawnym*, available at: <http://www.grocjusz.edu.pl/Materials/skrypt/03.pdf> visited on 2 December 2016.

25 Article 91, Polish Constitution, 2 April 1997, available at: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> visited 4 December 2016.

III. To execute or not to execute: that is not the question

When Poland signed and ratified the European Convention on Human Rights, it accepted the obligation to implement its provisions and it accepted the jurisdiction of the European Court of Human Rights. The Convention is an international agreement ratified with prior consent granted by statute in accordance with Article 91 of the Constitution. In a case in which the provisions of the Convention do not comply with statute, the provisions of the Convention have priority over that statute.

There is no obligation in the Convention to reopen the judicial proceedings, although the Committee of Ministers of the Council of Europe recommended it on 19 January 2000. However, the proceedings can be reopened in certain situations in accordance with Polish law. In response to the above-mentioned recommendation, the Polish authorities published a report on execution of judgments of the European Court of Human Rights on 7 April 2006.

As regards criminal proceedings, Article 540 § 3 of the Polish Code of Criminal Proceedings states that the proceedings are reopened in accordance to the decision of the international organ established in the frame of an international Convention ratified by Poland. This provision is applicable under condition that the Polish court in charge of the case considers that the national judgment is issued in breach of the provisions of this Convention²⁶.

The criminal proceedings raising similar issues to those, in which the European Court of Human Rights found a breach of the Convention, can be reopened before the national courts²⁷. This is an important step towards lesser number of applications lodged at the Court and a way to decrease the number of judgments in violation of the Convention.

As regards administrative proceedings, the right to reopen them after the ECtHR judgment, stating a violation of the Convention is enshrined in Article 272 § 3 of the Polish Act on Proceedings before the administrative courts.

26 Resolution, Supreme Court, 24 November 2005, no. III KO 10/05.

27 Decision, Supreme Court, 16 July 2013, no. III KO 118/12; Resolution, Supreme Court, 24 June 2014, no. I KZP 14/14.

However, the right to reopen administrative proceedings is given only to the parties of international proceedings and cannot be applied *per analogiam* to other similar proceedings because the deadline to lodge a request to reopen the proceedings starts to run from the date of delivery of the judgment to the party of international proceedings²⁸.

Finally, concerning civil proceedings, there is no right to reopen proceedings under Article 401 § 1 and 2 of the Code of Civil Proceedings in accordance with the interpretation of the Supreme Court of 30 November 2010²⁹.

Chapter II

National Courts Referral and Judicial Application of the European Convention on Human Rights in Poland

1. Examples of the application of the European Convention on Human Rights concerning the prohibition of discrimination by the national courts

As regards the application of the European Convention on Human Rights, the judgments delivered against other Member States should be taken into account by the Polish authorities in the light of the principle of the transversal application of the Convention (see for example: *Salduz v. Turkey*³⁰ followed by the reform of the police custody in France).

Having looked at some case-law delivered by the Polish national courts in recent years, we can see whether or not if the international human

28 *A contrario* as regards the reopening of cases following the ECtHR judgments in analogous situations: Decision, Supreme Administrative Court, 8 November 2013, II GSK 2031/13.

29 Resolution of seven judges, Supreme Court, 30 November 2010, no. III CZP 16/10; see for detailed analysis of the legislation and case law in this matter: Rajśka D., Bzdyń A., Ryngielewicz K., 'Reopening of judicial proceedings after the judgment of the European Court of Human Rights', *Przegląd sejmowy*, rok 23, nr. 2–127 (2015), p. 206–222 (French translation of this article is available in the library of the European Court of Human Rights).

30 *Salduz v. Turkey*, 27 November 2008, no. 36391/02.

rights antidiscrimination standards have yet been implemented in the domestic judicial order and how the Polish courts refer to the ECHR and the CJEU standards.

Article 14 of the Convention states that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race (...)”. Therefore, race is a discriminatory ground explicitly expressed in the Convention. The judgment of Katowice Regional Court of 12 October 2006³¹, can serve as an example of a case concerning discrimination based on race. The Turkish citizen was beaten and abused because of the colour of his skin. The perpetrator of this incident was sentenced for assault and battery and for threatening on an individual person because of his race (Article 119 § 1 and Article 158 § 1 of the Polish Penal Code). The national courts reacted in accordance with the standards of prompt, impartial and effective investigation established in *Beganović v. Croatia*³² and *Koky and Others v. Slovakia*³³.

Although Article 14 of the European Convention on Human Rights does not expressly list sexual orientation, disability and age as protected grounds, the ECtHR has explicitly stated that they are included among the “other grounds” protected by Article 14. However, there are still cases in which the Polish national courts do not penalize or redress discriminatory treatment based on these grounds.

In *Ireneusz M. v. X s.p.o.o.*, a case concerning discrimination based on sexual orientation in the workplace, the plaintiff, working in a supermarket, was dismissed because of his homosexual orientation. On 18 June 2012, the Słubice District Court partially granted the plaintiff's complaint in accordance with Article 18 3a § 5 p. 2 of the Polish Labour Code. On 27 November 2012, the Regional Court upheld this decision and awarded the applicant higher compensation explaining that Directive 2000/78/EC requires that sanctions for discrimination based on sexual orientation in employment should be deterrent, efficient and proportional³⁴. Even though the national courts referred only to CJEU

31 Judgment, Katowice Regional Court, 12 October 2006, no. VK 117/06.

32 *Beganović v. Croatia*, 25 June 2009, no. 46423/06.

33 *Koky and Others v. Slovakia*, 12 June 2012, no. 13624/03.

34 Judgment, 18 June 2012, Słubice District Court, no. IV P 30/11; Judgment, Regional Court, 27 November 2012, no. VI Pa 56/12.

standards, it provides an example of a good application of the ECHR standards, which were established in cases *Lustig – Prean and Beckett v. the United Kingdom*³⁵ and *Smith and Grady v. the United Kingdom*³⁶.

In *Ryszard G. v. X*, concerning discrimination based on sexual orientation, the plaintiff was a victim of a neighbour who was the perpetrator of hate speech with regards to the plaintiff's homosexuality. On 4 August 2009, the Szczecin Regional Court found that hate speech infringed the personal rights of the plaintiff. On 4 February 2010, the Court of Appeal upheld this judgment³⁷. The courts did not expressly refer to the ECtHR standards, which however were applied (implicitly) in accordance with *Vejdeland and Others v. Sweden*³⁸ (see also: *Bayev v. Russia*³⁹).

A judgment of Warsaw Śródmieście Regional Court, 16 November 2010 concerns the discriminatory treatment based on nationality⁴⁰. The plaintiff complained before the domestic courts about employment discrimination because of his nationality. The applicant fulfilled all requirements for the post, but he did not have Polish nationality. As the work was not linked to executive authority, the foreign nationality of the plaintiff was not an objective or justified ground to eliminate him as a candidate in recruitment proceedings. Therefore, the Regional Court found that the treatment of the applicant was discriminatory. According to the Court's case-law, "a difference of treatment is discriminatory, for the purposes of Article 14 (art. 14), if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover Contracting States enjoy a certain margin of appreciation in assessing whether or not, and to what extent, differences in otherwise similar situations justify different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of

35 *Lustig – Prean and Beckett v. the United Kingdom*, 12 June 2012, no. 31417/96.

36 *Smith and Grady v. the United Kingdom*, nos. 33985/96, 33986/96, 27 September 1999.

37 Judgment, Szczecin Regional Court, 4 August 2009, no. IC 764/08; Judgment, Court of Appeal, 4 February 2010, I ACa 691/09.

38 *Vejdeland and Others v. Sweden*, 9 February 2012, no. 1813/07.

39 *Bayev v. Russia*, no. 67667/09, communicated on 16 October 2010.

40 Judgment, Warsaw Śródmieście Regional Court, 16 November 2010, no. VIII P 511/10.

treatment based exclusively on the ground of nationality as compatible with the Convention (*Gagusuz v. Austria*⁴¹, see also: *Quing v. Portugal*⁴²).

On 28 September 2011, the Warsaw Court of Appeal found that prohibiting a person from entering restaurant with a guide dog is discrimination on grounds of disability⁴³. In this situation, the protection of the rights of the plaintiff should probably be more broadly considered in Poland than under the European Convention on Human Rights. In *Mólka v. Poland*⁴⁴, the severely handicapped applicant complained about lack of access, and had to rely on his wheelchair in order to reach a polling station where he intended to vote in municipal elections. A ballot paper could not be carried outside the premises of the polling station and there was nobody to carry the applicant inside the polling station. The Court found that the applicant had in particular not shown that he could not have been helped to enter the polling station by other people. As it was an isolated incident, the complaint under Article 8⁴⁵ was declared as manifestly ill founded. In *Fracas v. Romania*⁴⁶, the lack of accommodate access for disabled persons to a tribunal was not a breach of the right of access to a court, because there are ways of communicating with a tribunal other than by personally entering the tribunal building. The case was declared inadmissible.

The problem of access to public buildings is also broadly known in other countries, such as, for example, Montenegro.

On 10 December 2008, a blind lawyer in the support service of the municipal Parliament of Montenegro was deprived of access to her workplace when she came, as usual, with her guide dog. At that time, the national legislation allowed the use of guide dogs; the disabled person lodged a complaint about the lack of access to her workplace against the Mayor of Podgorica who had delivered the order to prohibit this access. In February 2012, the High Court of Montenegro upheld the judgment of the basic court and ordered that access be provided for the blind lawyer to official premises in the workplace. In 2012, the basic

41 *Gagusuz v. Austria*, no. 17371/90, 16 September 1996, § 42.

42 *Quing v. Portugal*, no. 69861/11, 5 November 2015, § 82.

43 Judgment, Warsaw Court of Appeal, 28 September 2011, no. I Aca 300/11.

44 *Mólka v. Poland*, no. 56550/00, 11 April 2006.

45 The applicant claimed that this situation affected the quality of his private life.

46 *Fracas v. Romania*, no. 32596/04, 14 September 2010.

court in Podgorica also penalised a restaurant for refusing access to a visibly blind person with his guide dog⁴⁷.

II. Examples of the application of the European Convention on Human Rights concerning the right to a fair trial within a reasonable time by the national courts

The Law of 17 June 2004 on complaint about a breach of the right to have a case examined in judicial proceedings without undue delay⁴⁸ entered into force on 27 September 2004. It only applied to cases pending before the national judicial authorities. The Law of 20 February 2009 on amendments to the law on complaint about breach of the right to have a case examined in judicial proceedings without undue delay⁴⁹, which entered into force on the same day (20 February 2009), enlarged the scope and included preparatory proceedings when assessing the length of proceedings. At the same time the legislator increased the maximum level of compensation. Despite existing national remedies, there were still complaints concerning the excessive length of proceedings lodged before the Court in 2015⁵⁰.

The pilot judgment *Rutkowski and others v. Poland*, cited above is a reminder that “a failure to deal with a case within a reasonable time is not necessarily the result of a fault or omission on the part of individual judges or prosecutors. There are instances where delays result from the State’s failure to place sufficient resources at the disposal of

47 Rajska D., *Prohibition of disability discrimination in Montenegro in the light of European Court of Human Rights and the Court of Justice of the European Union case-law*, Council of Europe, Montenegro, 2016.

48 The Law of 17 June 2004 on complaint about a breach of the right to have a case examined in judicial proceedings without undue delay, *ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*), Official journal 2004, No. 179, item. 1843.

49 The Law of 20 February 2009 on amendments to the law on complaint about breach of the right to have a case examined in judicial proceedings without undue delay (*Ustawa o zmianie ustawy o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*), Official journal 2009, No. 61, item. 498.

50 ‘Excessive length of judicial proceedings in the case-law of the European Court of Human Rights’, Rajska D., Klaudiusz R., *Przegląd sądowy*, 2015; Rajska D., V. Petrović Škero, *Protection of the right to a trial within a reasonable time in the court proceedings*, Council of Europe and Serbian Supreme Court of Cassation, 2015.

its judiciary or from deficiencies in domestic legislation pertaining to the organisation of its judicial system or the conduct of legal proceedings⁵¹. The Court therefore suggests that the authorities have to take measures, of both an organisational and legislative character, on the basis of thorough analysis of the key factors, which lead to an excessive numbers of backlogs of cases.

The central concern is the speediness of proceedings should not be the origin of eventual mistakes committed by the judges. If this is the case, not only will the proceedings be longer, because of the remittals of higher instances, but also the fairness of the proceedings under Article 6 of the Convention may be breached.

Again, in the judgment *Rutkowski and others v. Poland*, cited above, the Court recalls that: "Although the Court is not in a position to analyse the quality of the case-law of the domestic courts, the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts. The repetition of such orders within one set of proceedings discloses a deficiency in the judicial system. Moreover, this deficiency is imputable to the authorities and not the applicants (see, among many others, *Wierciszewska v. Poland*⁵², *Matica v. Romania*⁵³ and *Vlad and Others v. Romania*⁵⁴)⁵⁵.

There are some other problems, which can be identified in the effective application of the Convention at the national level, like excessive formalism in the case of the applicant who did not sufficiently justify factual and legal circumstances relevant for the case. For example, on 13 March 2013, Lublin Court of Appeal dismissed a case concerning the theft of wood in proceedings engaged on 7 February 2006, and had thus lasted for eight years and twenty days⁵⁶.

The national courts had had a long-term tendency towards the "fragmentation of the proceedings" when they examined the length of proceedings in an instance in which a plaintiff had lodged a complaint.

51 *Rutkowski and others*, § 184.

52 *Wierciszewska v. Poland*, no. 41431/98, 25 November 2003, § 46.

53 *Matica v. Romania*, no. 19567/02, § 24, 2 November 2006.

54 *Vlad and Others v. Romania*, nos. 40756/06, 41508/07 and 50806/07, § 133, 26 November 2013.

55 *Rutkowski and others*, § 149.

56 Judgment, Lublin Court of Appeal, 13 March 2013, no. II S 5/13.

For example, on 22 August 2012, Katowice Court of Appeal found that it was obligated to take into account only the second instance proceedings and to disregard the first instance proceedings⁵⁷.

There are also cases in which the length of proceedings was not examined from their start day but, for example, from the date on which the complaint had most recently been rejected⁵⁸.

These examples show how the national courts interpreted the Law of 17 June 2004 and this interpretation was not made in the light of the Convention. The step towards better compliance was finally made by the Supreme Court, which issued a resolution of seven judges delivered on 28 March 2013⁵⁹, clarifying that the whole length of proceedings should be taken into account.

In response to the judgment in *Rutkowski v. Poland*, delivered by the European Court of Human Rights, the Ministry of Justice prepared an amendment to the Law of 17 June 2004, which was recently approved by the Council of Ministers. The amount of the compensation to be awarded was raised and in future, the national courts will take into account the whole length of proceedings (and not only the instance in which the complaint was lodged)⁶⁰.

The Council of Europe Commissioner for Human Rights welcomed the progress made in the area of the implementation of the right to a fair trial in a reasonable period of time in Poland. Meanwhile, Poland reduced the length of judicial proceedings and it decreased the use and length of pre-trial detention⁶¹.

57 Judgment, Katowice Court of Appeal, 22 August 2012, no. II S 47/12.

58 For example: case no. II S 18/12.

59 Resolution of seven judges, Supreme Court, 28 March 2013, no. III SPZP 1/13.

60 Project of Ministry of Justice of the new Law on fair trial without undue delay, available: <https://www.premier.gov.pl/wydarzenia/decyzje-rzadu/projekt-ustawy-o-zmianie-ustawy-o-skardze-na-naruszenie-prawa-strony-do-0.html> visited on 2 December 2016.

61 Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Poland from 9 to 12 February 2016, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2940490&SecMode=1&DocId=2376250&Usage=2>; in the same report, the Commissioner remains concerned about the independence and the functioning of the Constitutional Tribunal; recent amendments to the Code of Criminal Procedure and to the Law on Prosecution; the public service media

III. National courts referral to European Convention on Human Rights and the European Court of Human Rights case-law

Concerning the question of how often the national courts refer to the European Convention on Human Rights or the judgments of the European Court of Human Rights, there are two groups of judgments. First, the highest courts in Poland: the Polish Constitutional Tribunal – frequently refers to the Convention and analyses the interactions between national and international human rights instruments. Second, compared to the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court do not so frequently make such referral. Meanwhile, the ordinary courts rarely refer to the provisions of the Convention or to the Court's case-law.

The other problem, which sometimes occurs in national case-law, is the misinterpretation and lack of legal analysis of the key principles of the ECtHR case-law and the relevant precedents, which the national courts should efficiently apply after using a reference to the pertinent the ECtHR case-law.

The implementation of the Convention can be observed in the examples of the Constitutional Tribunal and the Supreme Court. The Constitutional Tribunal plays an important role in the implementation of European Court of Human Rights judgments; most often it refers to both, constitutional and conventional provisions. Sometimes, it has an even broader interpretation of the constitutional protection of individual rights than the conventional one⁶².

If referring to the ECtHR case-law, the ordinary national courts still choose to take note on the Polish doctrine in this area rather than refer directly to the provisions of the Convention. For example, see the judgment of Wrocław Śródmieście Regional Court of 8 December 2016⁶³. In the past, the Supreme Court generally used this practice

current reforms and the new law on surveillance activities which, according to the Commissioner, raises concern on incompatibility with international human rights law, p. 2 ff.

62 Judgment of Polish Constitutional Tribunal, 16 March 1999, SK 19/98, OTK 1999 no. 3, pos. 36, available at http://www.repozytorium.uni.wroc.pl/Content/66155/38_Konrad_Gieron.pdf visited on 2 December 2016.

63 Judgment, Wrocław Śródmieście Regional Court, 8 December 2016, no. IX C 1093/15.

when it cited case – law and reports – mostly indicated in the doctrine – in its judgments. For example, see the resolution of seven judges of 18 October 2001⁶⁴. With time, it started to directly apply the ECtHR case – law⁶⁵.

More recently, in a case in which the Constitutional Tribunal did not find any incompatibility between the provisions of the Constitution, and the European Convention on Human Rights, the Supreme Court dealt with the question of the compatibility of legal provisions. However, it concluded that it is the Constitutional Tribunal that is competent to legislate on this in accordance with Article 188 of the Constitution and Article 2 and 41–45 of the Law on the Constitutional Tribunal of 1 August 1997⁶⁶.

Conclusions and Recommendations

I. Conclusions

Poland signed the European Convention on Human Rights on 26 November 1991, and ratified it on 19 January 1993. According to Article 91 of the Polish Constitution, the Convention is directly applicable in the domestic legal order as it is considered to be an international agreement ratified with prior consent granted by a statute in accordance with the above-mentioned provision of the Polish Constitution. In Poland, there is a monist system of implementation of the Convention. This is a system, which has established the priority of international agreements, in particular the European Convention on Human Rights, without a clear indication of the place of these international agreements in relation to the Constitution.

The right to reopen of the proceedings after a judgment in violation of the Convention is established in Article 540 § 3 of the Polish Code of Criminal Proceedings and in Article 272 § 3 of the Polish Act on Proceedings before the administrative courts. It is still not possible to reopen proceedings under Article 401 §§ 1 and 2 of the Code of Civil Proceedings, mainly because of the objective to protect the rights of

64 Judgment, 18 October 2001, no. I KZP 25/2001, p. 13.

65 For example: Judgment of 3 October 2014, no. V CSK 281/14.

66 Law on the Constitutional Tribunal, 1 August 1997, SC, 6 May 2016, I CSK 364/15.

the other parties in these proceedings. The possibility to reopen the proceedings after the ECtHR judgments is an important measure in the efficient implementation of the provisions of the Convention.

The legislator and the national courts play the principle role in the implementation of the Convention. The Polish legislator has regularly proceeded with legislative reforms following the recent pilot judgment *Broniowski v. Poland*⁶⁷ or recent pilot judgment *Rutkowski v. Poland*. As a general measure, the State has adopted the new laws with remedies for victims of human rights violations caused by systemic deficiencies of the Polish legal system. The judicial system is second decisive factor for effective implementation of the Convention, e.g. concerning the problem of “fragmentation of the proceedings”. The interpretation of the Supreme Court remedied the misinterpretation of the national courts, which took account only of the length of the proceedings at the instance in which the complaint was lodged instead of taking into account the global length. The problem is that it took unfortunately four years from when the Law was passed in 2009 until 2013, before the Supreme Court finally issued the resolution. In this period, around 650 complaints for the excessive length of proceedings were lodged to the European Court of Human Rights. This issue is finally being remedied, also at the legislative level, because the project of the Law has been submitted by the Minister of Justice and has been adopted by the Council of Ministers.

There are some examples of good practices by the national courts in the area of the prohibition of discrimination. For example, as cited above, see the case of a blind person who could not enter with his guide dog to a restaurant or the man dismissed from his work in a supermarket because of his sexual orientation.

The highest courts, in particular the Constitutional Tribunal, play an important role in the implementation of the Convention. The Constitutional Tribunal controls constitutionality by referring to any relevant provision of the European Convention on Human Rights, for example Article 6 of the Convention when the case concerns Article 42 of the Constitution (right to fair trial).

67 *Broniowski v. Poland*, no. 31443/96, 22 June 2004.

II. Recommendations

Although Poland is a Member State of the Council of Europe and the European Union, there is still a desperate need for the education of legal professionals. The best option would be for training needs to be assessed in the light of further training relating to the European Convention on Human Rights.

There is a need for initial, continuing and on-demand training for the judiciary. This must follow the rapidly changing legislation in Poland in the past years. The main areas of interest are: general HR, international law and its place in the national legal system, application of international norms by judges and constitutional case-law (particularly HR areas), including the prevention of discrimination. Conferences, round tables, and other public events could provide a platform of exchange. Building the capacity of the Judicial Training Centre is important, in particular taking into consideration sending in house advisers, organizational improvements, plus study visits to the region, Council of Europe and other relevant countries. Training for trainers should be provided to judges of higher courts, Constitutional Tribunal judges, prosecutors of higher posts, judges of the basic courts, prosecutors, judges' advisers and prosecutors' associates. Enhancing cooperation with the Law Faculty is essential for the further and long-term development of human rights in Poland.

Status and Application of the European Convention on Human Rights in the Republic of Serbia

Professor Ivana Krstić

Faculty of Law, University of Belgrade

Introductory remarks	87
1. Status of the European Convention in the legal order of the Republic of Serbia	89
1.1. Primacy of international law over internal law	89
1.2. Direct application of the ECHR	91
1.3. Interpretation of the provisions on human and minority rights guaranteed in the Constitution	92
2. Application of the ECHR in practice	93
2.1. Direct application of the ECHR	94
2.2. General invocation of the ECHR	97
2.3. Erroneous invocation of the ECHR	99
2.4. More detailed invocation of the ECHR	100
Recommendations for a better application of the ECHR	102

Introductory remarks

The incorporation of the norms of the international law into the domestic legal order depends on the solution incorporated in the Constitution. The international law does not contain the rules on the manner in which a state will fulfil its international obligations by accepting an appropriate international instrument, which is the

reason why a legislator, courts and individuals of every country face numerous complex conceptual and doctrinarian issues concerning the role and position of the international law in the domestic legal system.¹ However, the international law is clear with respect to the obligations that a state assumes at the international level, which do not depend on the internal norms. Article 26 of the Vienna Convention on the Law of Treaties clearly stipulates that states must perform the treaties in good faith, while Article 27 envisages that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.² In other words, a state that fails to observe the obligations assumed under an international treaty, due to some internal obstacles, shall be deemed responsible at the international level to other state parties.³

After the Second World War, a great number of international conventions in the area of human rights protection had been adopted. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (the ECHR), is one of the most important instruments in the area of human rights protection, which was ratified by the Republic of Serbia in 2003.⁴ The European Convention has started to be applied with respect to the Republic of Serbia on 3 March 2004. The ECHR guarantees a number of rights and freedoms, which states shall secure to everyone within their respective jurisdiction. Accordingly, the Republic of Serbia is obliged to undertake all necessary measures in order to ensure unhindered and effective enjoyment of human rights and freedoms set forth in the ECHR, as well as to refrain from acts

-
- 1 See more in J. L. Dunoff, S. R. Ratner, D. Wippman, *International Law – Norms, Actors, Process, A Problem Oriented Approach*, Apen Law & Business, 2009, p. 253.
 - 2 Vienna Convention on the Law of Treaties entered into force in 1978 and it has had a total of 114 State Parties as of 1 December 2016. The Republic of Serbia acceded the Convention on 12 March 2001. The text of the Convention in the English language is available at: http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf, 25 November 2016.
 - 3 This position was taken by the Permanent Court of International Justice, (see, *Polish Nationals in Danzig*, PCIJ, Series A/B, no. 44 (1931), p. 24; *Free Zones Case*, PCIJ, Series A/B, no. 46, p. 167), and was upheld also by the Hague Tribunal (see, the *Blaskic* case, ICTY, decision of 3 April 1996, paragraph 7).
 - 4 Law on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "Official Gazette of Serbia and Montenegro" – *International treaties*, Nos. 9/2003, 5/2005, 7/2005 – Corrigendum and "Official Gazette of the Republic of Serbia" – *International treaties*, Nos. 12/2010.

violating the rights guaranteed under the Convention. The European Court of Human Rights (the ECtHR) was set up as far back as 1959, which has been instituted since 1 November 1998 as a permanent court based in Strasbourg, which task is to monitor the observance of the ECHR by member States. The standards established in the work of this Court are binding on the Republic of Serbia.

This paper is set first to explain the status of the international law in the legal order of the Republic of Serbia, and then to explain the extent to which the domestic courts rely on and apply the standards of human rights protection established in the case-law of the ECtHR.

1. Status of the European Convention in the legal order of the Republic of Serbia

1.1. *Primacy of international law over internal law*

The Constitution of the Republic of Serbia contains a number of provisions relating to international law, which separates it from the majority of other constitutions. However, regarding the status of the international law, the 2006 Constitution departs from the solution contained in the previous constitutional act. The Constitutional Charter of the State Union of Serbia and Montenegro⁵ contained Article 16, which explicitly recognised the primacy of the international over the internal law:

“The ratified international treaties and universally accepted rules of international law shall have primacy over the law of Serbia and Montenegro and the law of the member states.”

Although constitutions have been intensively shaped under the influence of the international law, particularly so over the last decade, which is most visible in the parts of constitutions relating to human rights, constitutions giving absolute primacy to the international over the internal law are rare,⁶ and courts refuse to recognise the

5 The Constitutional Charter of the State Union of Serbia and Montenegro, *Official Gazette of Serbia and Montenegro*, No. 1/2003.

6 The 2008 Constitution of Turkmenistan may serve as an example, reading in Article 6 that Turkmenistan recognises the primacy of the universally accepted norms of international law.

supremacy of the international law over the constitutional provisions.⁷ The Constitution of the Republic of Serbia also abandons the absolute primacy of international law, with Article 16, paragraph 2 establishing the hierarchy of legal norms and providing that ratified international treaties must be in conformity with the Constitution. Article 194 of the Constitution confirms this hierarchy as it stipulates that laws and other general acts must not be in contravention of the universally accepted rules of the international law and the ratified international treaties.⁸ The first source implies treaties ratified under an established procedure, while the second source implies, as a matter of fact, international customary law.⁹

Therefore, the Constitution prescribes the following hierarchy of legal norms: the Constitution of RS, international law, laws, bylaws. The Constitution prescribes in Article 167, paragraph 1, item 1 that the Constitutional Court shall decide on the compliance of laws and other general acts with the Constitution, the universally accepted rules of the international law and the ratified international treaties, as well as on the compliance of the ratified international treaties with the Constitution (Article 167, paragraph 1, item 2), confirming this hierarchy of norms in the legal order of the Republic of Serbia. Bearing in mind that the Republic of Serbia has ratified the ECHR, its status in the domestic legal order has been clearly stipulated by the foregoing

7 See, A. Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law", *International Constitutional Law*, 3/2009, p. 171.

8 Article 16, paragraph 2 and Article 194, paragraph 4 contain different constitutional rules: "must not be contrary", that is to say "must be in compliance", which may be the cause for different interpretations of constitutional norms in practice. See, M. Pajvančić, *Commentary of the Constitution of the Republic of Serbia*, Konrad Adenauer Foundation, Belgrade, 2009, 25.

9 This source of law is recognised in Article 38, paragraph 2 of the Statute of the International Court of Justice as "evidence of a general practice accepted as law". This is an unwritten source of law, which develops through long term, uniform practice of states and which is followed by awareness of its mandatory nature. The fact that this is the international customary law is corroborated by a decision of the Constitutional Court from 2009, where the court stated that it was "a source that either contains the rules of conduct of the entities of the international law, which developed as an international custom and are related to a permanent and uniform practice of states with respect to some of the most universal values ..., or they contain principles that ought to be applied if there are no more detailed rules on which basis one should approach the interpretation of other norms." See the Procedural Decision of the Constitutional Court, IUŽ, No. 43/2009, of 9 July 2009.

provisions: the Convention comes after the Constitution, but is above laws and delegated legislation. A law may regulate solely the manner of the exercise of human rights if the Constitution contains an explicit authorisation for a legislator to act and if, due to the nature of a certain right, it is necessary for the law to regulate the manner of its exercise.

Constitutions of the countries in the region contain the same solution as the Constitution of Serbia. Accordingly, Article 140 of the Constitution of the Republic of Croatia envisages that international treaties shall have primacy over laws, and the provisions thereof may be amended or repealed only under the conditions and in the manner specified therein, or in accordance with the general rules of international law.¹⁰ The Constitution of the Republic of Macedonia envisages in Article 118 that international treaties ratified in accordance with the Constitution shall be part of the internal legal order and may not be amended by law.¹¹ Also, under Article II (2) of the Constitution of Bosnia and Herzegovina it is envisaged that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms shall apply directly in BiH and shall have priority over all other law.¹²

1.2. Direct application of the ECHR

Contemporary constitutions have a different relationship to the applicability of international law and may be roughly divided into monistic and dualistic systems.¹³ Dualistic systems are based on a premise that the international and the domestic law are separate systems, so that it is not possible to apply the international law norms directly, instead they have to be incorporated into the internal legal

10 Constitution of the Republic of Croatia, *Official Gazette*, No. 28/2001.

11 Constitution of the Republic of Macedonia, *Official Gazette of the Republic of Macedonia* no. 1/92.

12 Constitution of BiH, *Official Gazette of the Federation of BiH*, No. 1/94.

13 See more about this division and the introduction of the third division in u A. Cassese, *International Law*, Oxford University Press, 2001, pp. 162–165. See also J. R. Paust, *Basic Forms of International Law and Monist, Dualist, and Realist Perspectives* in M. Novakovic (eds.), *Basic Concepts*, pp. 244–265. As to the significance of the division into the monistic and dualistic systems see A. Abashidze, *The Relationship between International Law and Municipal Law: Significance of Monism and Dualism Concepts*, in M. Novakovic (eds.), *Basic Concepts*, pp. 23–33.

order in the manner prescribed by the Constitution.¹⁴ On the other hand, monistic systems start with an idea of the domestic and the international law being parts of a single system, and envisage for the norms of the international law to be directly applied and that there is no need to adopt a special internal regulation, which would confirm such a status of the international law.¹⁵

The Constitution of the Republic of Serbia accepts the so-called monism concept, as the mentioned sources make an integral part of the legal order of the Republic of Serbia and are applied directly. That is visible from Article 18, paragraph 2 of the Constitution, which guarantees direct application of human and minority rights “guaranteed by the universally accepted rules of international law, the ratified international treaties and laws”. In other words, the ECHR may be directly applied in the internal legal order, which may be of special importance in the event of the existence of a legal gap or a legal norm or a delegated legislation norm, which is contrary to the standards arising from the case-law of the ECtHR.

1.3. Interpretation of the provisions on human and minority rights guaranteed in the Constitution

Unlike the majority of other constitutional acts, the Constitution of the Republic of Serbia contains a very significant provision, which reads that the norms in the area of human and minority rights are interpreted with a view to promoting the values of a democratic society, in conformity with the applicable international standards of human and minority rights, as well as practices of international institutions that monitor the implementation thereof. This is a unique solution in the region and it should be welcomed that the author of the constitution explicitly stated also as relevant the practice of the monitoring bodies dealing with human rights, referring here primarily to the case-law of the ECtHR and of different UN Committees dealing with human rights protection (for instance, Committee against Torture, Committee on the Rights of the Child, Human Rights Committee and such like). Even without the introduction of this provision, and bearing in mind that the

14 See more on this in M. Kreća, *Međunarodno javano pravo /Public International Law/*, Belgrade, 2011, pp. 71–74. The third theory, the so-called compromise theory appeared over time. See, vis-à-vis this, pp. 74–75.

15 *Ibid*, 72–75.

Constitution comprises solely the general norms guaranteeing human rights and freedoms, it is clear that their range is determined precisely in the case-law of the ECtHR. Nevertheless, such a provision constitutes yet another piece of evidence that the legislator had the intention to point to the significance of the international monitoring bodies in the area of human rights protection, which usually have the right to carry out authentic interpretations of conventions on which basis they were set up. Speaking of the ECHR, in the case of *Loizidou v. Turkey*, particular emphasis were placed on the role of the Court as a “constitutional instrument for the European public order”,¹⁶ which provides an authentic interpretation of the ECHR, by determining the content of the guaranteed right and the scope of positive obligations of states.

Moreover, in Article 145, paragraph 2 the Constitution stipulates that court decisions are based on the Constitution and the law, as well as on a ratified international treaty and a regulation passed pursuant to laws. On the other hand, Article 142, paragraph 2 the Constitution reads that courts “shall try pursuant to the Constitution, laws and other general acts, when so envisaged by the law, the universally accepted rules of the international law and the ratified international treaties”, where the international law was left out for unclear reasons. Such inconsistency in regulating this area may also cause an ambivalent and inconsistent relationship of domestic authorities to the international law in practice.

2. Application of the ECHR in practice

Although the ECHR has been assigned, pursuant to the Constitution, a rather high position in hierarchy, right below the Constitution, its application in practice can still be characterised as insufficient. This fact was publicly uttered in March 2015, at the Second Regional Forum on the Rule of Law, by the then Minister of Justice, pointing out that there is still insufficient knowledge of the ECHR and of the jurisprudence of the ECtHR, which results in a large number of applications against Serbia before this Court.¹⁷ The following text carries decisions illustrating a position on (in) adequate invocation of the Convention.

16 *Loizidou v. Turkey*, Application no. 40/1993/435/514, judgment of 23 February 1995, paragraph 75.

17 See Blic, Selaković: Application of the European Convention is seldom in the case-law, 6 March 2015, <http://www.blic.rs/vesti/drustvo/selakovic-primena-evropske-konvencije-retka-u-sudskoj-praksi/fn3q4t2>, 1 December 2016.

2.1. Direct application of the ECHR

What may be concluded with certainty is that judgments wherein courts directly invoke an international norm due to the lack of a national norm are almost non-existent. In other words, in the majority of cases courts are not prepared to directly apply the international norms in the event of a legal gap.¹⁸ Decisions wherein courts emphasise that the ECHR makes an integral part of the legal order of the Republic of Serbia are not as frequent in practice either.¹⁹ Unlike other courts, the Constitutional Court frequently points out that the ECHR, which is of relevance for the decision-making in a given case, makes an integral part of the internal order. However, whenever the provisions of an international treaty are identical to the Constitution, the Constitutional Court will assess a violation by invoking a constitutional provision. If a right is not guaranteed by the Constitution, then it will carry the invocation to the provision safeguarding that right. For instance, in an interesting case where a person changed the sex, a municipal administration failed to enter the change of data as to the sex in the Register of Births. The Constitutional Court assessed that the municipal administration failed to perform its “positive obligation” of harmonising the factual with the legal state of affairs and thereby violated Article 23 of the Constitution, which guarantees the right to dignity and free development of one’s personality. Also, the Constitutional Court found that Article 8 of the European Convention guaranteeing the right to

18 See, e.g., Judgment of the Administrative Court No. 8 U 3815/11 of 11 July 2011. On the other hand, the case of *Krsmanovača* is a positive example, where a worker of the Sports and Recreation Centre from Šabac prevented three Roma persons from entering a pool area exclusively on the ground that they were Roma people. By the judgment in this case in 2004 the Supreme Court of Serbia pointed out the mandatory nature and direct applicability of international conventions, clearly specified the term of the right of person and, finally, accepted “the testing” as an appropriate manner of proving discrimination before a court, at a time when not a single antidiscrimination law has been adopted in Serbia. In the present case, the court found that the ratified international treaties make an integral part of the internal legal order, and it went on to apply the definition of racial discrimination referred to in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, and it also invoked Article 26 of the Covenant on Civil and Political Rights prohibiting discrimination on the ground of race. Judgment of the Supreme Court of Serbia, Rev. 229/2004/1 of 21 April 2004.

19 See Procedural Decision of the Higher Court in Valjevo, Km. 32/2011 of 14 October 2011.

respect for private life was also violated, which right is not guaranteed by the Constitution itself.²⁰

On the other hand, it is almost certain that in the event of a conflict with a domestic norm, a state body will not apply the international norm. An illustrative example is the application of the concept of a “safe third country” referred to in Article 2 of the Law on Asylum of the Republic of Serbia.²¹ This provision adequately defines a safe third country²² and requires from a state to observe the international standards in the area of the protection of refugees, in order to be considered safe. Further, Article 33 of the Law on Asylum provides the basis for rejecting an application for asylum, if it is established, among other things, that an asylum seeker may receive protection from a safe third country, unless he/she proves that it is not safe for him/her (Article 33, paragraph 6, item 1). Problems in the application of this article have occurred in practice due to the existence of the List of safe third countries, which the Government of the Republic of Serbia adopted in 2009, without setting clear criteria on which basis 42 states were included in this list, and without establishing an obligation to review this list periodically.²³ In practice, the greatest number of applications for asylum were rejected

20 See, Constitutional Court Už. 3238/2011, of 08 March 2012.

21 Law on Asylum, *Official Gazette of RS*, No. 109/2007.

22 This is a state “from the list established by the Government, which adheres to the international principles on the protection of refugees incorporated in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, where an asylum seeker stayed or crossed, right before arriving in the territory of the Republic of Serbia and where he/she had a possibility to seek asylum, where he/she would not be subjected to persecution, torture, inhuman or degrading treatment or *refoulement* to a state where his/her life, security or freedom would be threatened”.

23 Decision establishing the List of safe countries of origin and safe third countries, *Official Gazette of RS*, No. 67/2009. The list carries the states, which have a rather problematic situation in the application of the international standards in the area of human rights protection. For example, Turkey is considered a safe third country, against which a large number of judgments of the European Court of Human Rights have been delivered, and which applies restrictively the Convention on the Protection of Refugees. Also, the Republic of Greece made it to the list, which may have been considered a safe third country up until the adoption of the judgment of the European Court of Human Rights in the case of *M. S. S. v. Belgium and Greece*, where this international body found a violation of the European Convention and a violation of the right of an asylum seeker on account of being subjected to inhuman treatment and restrictions in the asylum procedure. See, *M. S. S. v. Belgium and Greece*, Application no. 30696/09, Decision of 21 January 2011.

in the procedure of asylum precisely through the application of the concept of a safe third country, taking into account that asylum seekers must have crossed on the way to Serbia one of the neighbouring countries, and they are all on the list of safe third countries.

This practice was confirmed in the beginning also before the Administrative Court, which pointed out particularly that “the competent body is not competent to determine whether a state, which is on the list established by the Government of the Republic of Serbia, is safe for asylum seeker, but is obliged to accept that a state is safe if it is on the list established by the Government of the Republic of Serbia.”²⁴ In lawsuits filed with the Administrative Court, the plaintiffs were of the opinion that the Commission for Asylum, the second-instance body in the asylum procedure, failed to apply correctly the concept of a safe third country deeming that certain states, listed in the Decision of the Government, could not be considered such states for asylum seekers. On the other hand, the Administrative Court dismissed the majority of such lawsuits as ill-founded. The basic position of the Administrative Court was that the states on the list established by the Decision of the Government establishing the list of safe countries of origin and safe third countries fall among the states that observe the international principles on the protection of refugees under the 1951 Convention and the 1967 Protocol, wherefrom “it explicitly follows that the competent body is not competent to determine whether a state, which is on the list established by the Government of the RS, is safe for an asylum seeker, but is obliged to accept that fact.”²⁵ Such a formalist approach, without assessing the standard referred to in the ECHR, best illustrates the relationship to the relevant international law, which is not being considered at all, although this is a bylaw.²⁶ Even more so since the Law on Asylum contains Article 65, which prescribes that the provisions of a law, including the concept of a safe third country, must be interpreted in accordance with the international law. The Administrative Court

24 See, Administrative Court, 8 U 3815/11, Judgment of 7 July 2011. See, also, Administrative Court, 15 U 10336/11, Judgment of 10 November 2011.

25 Judgment 1 U 9050/14, of 16 September 2014.

26 The European Court adopted on several occasions decisions that individual EU member states did not meet the standards under the ECHR. See, e.g., *M. S. S. v. Belgium and Greece*, ECtHR, Application no. 30696/09, judgment of 21 January 2011; *Sharifi v. Austria*, ECtHR, Application no. 60104/08, judgment of 5 December 2013; *Tarakhel v. Switzerland*, ECtHR, Application no. 29217/12, judgment of 4 November 2014.

only subsequently assessed in its decisions whether a plaintiff proved through his/her lawsuit whether the countries on the List of safe countries were indeed unsafe for him/her. The lawsuits frequently mentioned different reports of international organisations, as well as important judgments of the ECtHR, which plaintiffs used to support their allegations that certain countries, which were on the list of safe third countries, were not safe for asylum seekers.

The position of the Administrative Court that the judgments of the ECtHR “are relevant only in the event that a plaintiff has pointed out in a lawsuit that a right of his/hers, as safeguarded under the European Convention, has been violated in an administrative procedure before a competent administrative body in the Republic of Serbia, or in a procedure before the Administrative Court,”²⁷ is indicative of the lack of understanding of the status of the ECHR in the legal system of the Republic of Serbia. Recently, the Administrative Court emphasised in a judgment the obligation of administrative bodies deciding on the application for asylum to consider all allegations stated in an appeal, “being mindful of the fact that the decision-making on the part of administrative bodies in this matter is directly related to the exercise of a plaintiff’s rights to the protection of the fundamental human rights and fundamental freedoms proclaimed in the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols passed along with the Convention, which constitute integral parts of the legal order of the Republic of Serbia.”²⁸ This position of the Administrative Court is appropriate and points to the change in the relationship to the ECHR, although there is no mention of the case-law of the ECtHR. Also, in a judgment of the Basic Court in Valjevo, the Court emphasised that the international treaties are applied directly, which is the reason why domestic courts have the obligation to comply with the ECHR and the case-law of the ECtHR.²⁹

2.2. *General invocation of the ECHR*

In practice, in the increasing number of decisions courts refer to the ECHR, but without adequate knowledge, though, of the extent of the provisions, stemming from extensive interpretation by the

27 Administrative Court, judgments 1 Y 540/13, 20 March 2013; 23 Y 1280/13, 28 March 2013.

28 Administrative Court 12 U 17279/13, judgment of 10 July 2015, p. 3.

29 See, Basic Court in Valjevo 1K Judgment No. 1041/12 of 06 November 2012.

ECtHR.³⁰ Although the Constitution explicitly states that human and minority rights shall be interpreted in accordance with this practice, there are no systematic attempts to make this practice accessible to those who are supposed to apply it in their work. Despite this problem, it is possible to notice the tendency of an increasing number of decisions wherein courts invoke the ECHR. Still, a more detailed analysis shows that this has been done as a matter of principle, by mentioning solely the relevant article of the Convention, without further elaboration of the manner in which that right is interpreted in the case-law of the ECtHR and whether it is applicable to the instant case. There is an example of a case in which the Appellate Court in Belgrade revoked a procedural decision by the Higher Court in Belgrade, alleging that there has been a violation of the European Convention on Human Rights and of Protocol No. 7, “which, within the meaning of Article 16, paragraph 2 of the Constitution of the Republic of Serbia, make an integral part of our legal order.”³¹ In this decision, the Appellate Court found a violation of Article 4 of Protocol No. 7, without, however, elaborating in more detail the mechanism itself, particularly through the analysis of the relevant case-law.³²

Moreover, in a certain number of decisions, it is evident that domestic courts only invoke the ECHR as a matter of principle, without stating the specific article, which has been violated in the case at hand. The Appellate Court in Kragujevac indicated the following in a decision: “according to the filed request, that discriminatory treatment against the plaintiff is reflected in that he has been denied *certain* rights, or such rights have been restricted, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, in that he has been denied the right to a fair trial within a reasonable time before a court having subject-matter jurisdiction, before an independent, impartial tribunal established under the law, in that his right to property and inheritance has been violated and such like. All

30 See, e.g., Judgment of the Appellate Court in Belgrade Gž2 562/10 of 08 September 2010, wherein the Court invoked Article 16 of the Universal Declaration on Human Rights and Article 23, paragraph 2 of the International Covenant on Civil and Political Rights, without stating, though, the jurisprudence of the Human Rights Committee.

31 Procedural Decision of the Appellate Court in Belgrade Kž2 Po1 286/12 of 02 July 2012.

32 See, also, Procedural Decision of the Appellate Court in Belgrade, Kžm1. 86/2011 of 22 December 2011.

these rights that the plaintiff claims to have been, allegedly, violated, fall in the human rights corpus set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which have been set forth, as such, also in the applicable Constitution of the Republic of Serbia³³. While deciding on a request, it is unacceptable for a court not to define the specific violations of the European Convention concerned, in order to be able to correctly assess whether a violation has occurred or not.

2.3. Erroneous invocation of the ECHR

Albeit it is praiseworthy that an increasing number of judgments invoke the ECHR or the case-law of the ECtHR, which is indicative of an increasing awareness of judges as to the status of the ECHR in the internal legal order, oftentimes the provisions referred to in the Convention are understood insufficiently and applied erroneously. For instance, the Basic Court and the Appellate Court in Novi Sad found in a judgment that a violation of Article 5 of the ECHR has occurred in the present case, on account that the ordering of a detention against the plaintiff accused of robbery and his detention caused stress, fear and anxiety as to the development of the situation, that he had difficulties in healing a leg injury and that his wife with three children abandoned him.³⁴ Also, in yet another case, a plaintiff's mental and physical condition was poor during his detention, he stayed in a small room along with 5 more detainees who smoked cigarettes, where the diet and maintenance of personal hygiene were poor. The Appellate Court invoked Article 5, paragraph 5 of the ECHR, which sets out that everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation. However, as in the previous case, the facts of the case are also indicative here of a violation of Article 3 of the ECHR, while in order to determine compensation it is much more relevant to consider whether grounds for detention have existed in the case at hand.³⁵

The same can be said for a judgment of the Appellate Court in Novi Sad, where the Court made a material error as it alleged that Article

33 Procedural Decision of the Appellate Court in Kragujevac, Gž 2510/11 of 14 October 2011.

34 Judgment of the Appellate Court in Novi Sad, Gž. 106/16, 22 June 2016.

35 Judgment of the Appellate Court in Novi Sad, Gž. 3438/14, 13 May 2015.

4 of Protocol No. 7 was amended by Protocol No. 11, which by no means introduces an alteration in the regulation of the *ne bis in idem* principle, instead it introduces only procedural alterations related to the functioning of the European Court of Human Rights itself.³⁶

It has happened rather frequently that judgments invoking the ECHR incorrectly cite the relevant judgment of the ECtHR, or that a court refers solely to a single case before the European Court. For the purpose of illustration, in one case, the Appellate Court in Belgrade ordered the first-instance court to keep in mind, during the assessment of a risk that the accused may repeat a criminal offence, the case of *Muler v. France*, and to assess in connection thereto the affiliation of the earlier sentence, the time elapsed since the earlier sentences, the manner of the perpetration of a criminal offence and other circumstances of relevance for the decision-making.³⁷ Thus, the Court failed to state the exact paragraph of the judgment it referred to, neither did it take into account the facts of the case at hand, to be able to conclude whether this judgment established some general principles, or it concerned analogous facts, as a result of which it is necessary to invoke this case in particular. There is a similar situation when it comes to the judgments delivered against the Republic of Serbia, which are published, as a rule, in the Official Gazette.³⁸

2.4. More detailed invocation of the ECHR

The analysis of available court judgments shows that the majority of judgments relies greatly on the standards arising from the case-law of the ECtHR as to the trial within a reasonable time. The reasons should be, by all means, sought in a great number of judgments adopted by the European Court of Human Rights against Serbia, which are published in the Official Gazette,³⁹ thus making them available to the judges. Also,

36 Judgment of the Appellate Court in Novi Sad Gž. 8340/2010 of 19 October 2011.

37 Procedural Decision of the Appellate Court in Belgrade, Kž2. Po1 330/2012 of 31 July 2012.

38 See, e.g., Procedural Decision of the Commercial Appellate Court, Pž. 12081/2010 of 24 September 2010, wherein the Court pointed to the case of *Enterprise Motion Pictures Guarantors LTD v. Serbia*. The Court failed to state the date of the decision, or a paragraph wherein the Court established the principle it invoked, and it alleged the plurality of decisions of the European Court without specifying the judgments concerned.

39 See, e.g., *Vinčić et al. v. Serbia*, Application no. 44698/06, 1 December 2009; *Krivošej v. Serbia*, Application no. 42559/08, 13 April 2010; *Veljkov v. Serbia*,

a large number of seminars and trainings on trial within reasonable time have been held to this date, and supported by handbooks and materials carrying the relevant case-law of the ECtHR.⁴⁰

For the purpose of illustration, the Appellate Court in Novi Sad assessed in one case the reasons behind the length of a procedure, taking into account whether complex factual and legal issues existed, that is to say whether the culpability for the time during which the procedure was adjourned may be attributed to the court, or not.⁴¹ Although the court did assess all the facts of the case in order to establish whether the trial occurred within a reasonable time, i.e. it considered the complexity of the case, the conduct of persons and authorities, as well as the significance of the subject-matter of the dispute for the person concerned, it failed to refer to the specific case-law of the ECtHR, but it did invoke a violation of Article 6, paragraph 1 of the ECHR. The same conclusion was presented in yet another case, where the same court stated what the trial within a reasonable time implied, in general terms though “according to the already established case-law of the European Court of Human Rights and the Constitutional Court of the Republic of Serbia”,⁴² and without quoting the specific case. The court nevertheless points to those principles, indicating that the reasonable length of a procedure “depends on a number of factors, first and foremost on the nature of a request, the complexity of the factual and legal issues that the resolution of the dispute at hand depends on, the action on the part of a competent court conducting a procedure, the conduct on the part of a proponent as a party to the procedure, and on the significance of the right for the proponent – the subject-matter of dispute subject to decision-making in a procedure, which are necessary to be assessed on a case-by-case basis.”⁴³

Application no. 23087/07, 19 April 2011; *Backović v. Serbia*, Application no. 47997/06, 7 February 2012; *Momčilović v. Serbia*, Application no. 23103/07, 2 April 2013; *Maširević v. Serbia*, Application no. 30671/08, 11 February 2014; *Raguž v. Serbia*, Application no. 8182/07, 7 April 2015.

40 See, e.g., Snežana Andrejević et al., *Manual for the Training of Judges – trial within a reasonable time*, Judicial Academy, May 2016.

41 Procedural Decision of the Appellate Court in Novi Sad, P4 g 64/15, 29 June 2015.

42 Procedural Decision of the Appellate Court in Novi Sad, P4 g 1/15.

43 See, *inter alia*, Procedural Decisions of the Appellate Court in Novi Sad R4 g 114/15, R4 g 120/2015, R4 g 93/2015, R4 g 124/15, R4 g 97/2015, R4 r 3/2016, Ržr 3/2016, R4 g 30/15, R4 g 54/15.

However, there are decisions wherein courts refer to specific cases before the ECtHR. For instance, the reasons adduced for a procedural decision read that labour-related disputes require special diligence on the part of a court, which is indicated in the case-law of the ECtHR against Serbia (*Stevanovic v. Serbia, i.e. Simić v. Serbia*), while it was particularly stressed that in the case of *Ruotolo v. Italy* the ECtHR pointed out that this requirement is strengthened where the national law of the state stipulates that such cases must be dealt urgently.⁴⁴ Also, there are other decisions wherein a domestic court refers equally to the case-law of the ECtHR, by quoting a number of specific cases, as it does to the relevant case-law of the Constitutional Court.⁴⁵

Recommendations for a better application of the ECHR

The international law, including the European Convention on Human Rights, justifiably deserves a high position in the hierarchy of legal norms in the Republic of Serbia and comes right after the Constitution, and is above laws and bylaws. Nowadays the majority of states accept the primacy of the constitution over the international sources, however, they avoid the conflict between the international law and the highest domestic legal act by interpreting it in accordance with the international norms and standards. In order to achieve this in the Republic of Serbia, it is necessary, first and foremost, to have a better understanding of the international norms and the competence for their correct interpretation, primarily by studying the extensive case-law of the ECtHR.

The Constitution envisages that the ECHR is considered an integral part of the internal legal order and that it applies directly. However, things look completely different in practice and the ECHR is not applied in the manner required by the Constitution, particularly not so in the part binding all state bodies to interpret the provisions on human and minority rights in accordance with the case-law of the ECtHR. In other words, the domestic courts, which are supposed to conduct trials in accordance with the case-law, are completely inconsistent and

44 Procedural Decision of the Appellate Court in Novi Sad, P 4 p 62/2014.

45 See, e.g., Procedural Decision of the Appellate Court in Novi Sad P4 p 8/2016, 22 February 2016.

unsystematic when it comes to keeping up to date with the judgments of the European Court.⁴⁶

All research activities concerning the topic of the application of the ECHR are not completely founded, bearing in mind that the case-law is still not easily accessible, and that there is no register of judgments wherein courts refer to this international instrument.⁴⁷ However, it is possible to conclude that the invocation of the case-law of the ECtHR has become more frequent, but still insufficient and fragmentary.⁴⁸ Also, in the judgments wherein courts invoke the case-law of the European Court, such invocation is inadequate and erroneous at times.

The reasons should be sought in the insufficient study of the substance of the European Human Rights Law, the lack of understanding of this area and in the fear of judges to venture into assessing these sources. The correct interpretation of international norms requires a systematic and continuous study of this area, the understanding of basic concepts such as the margin of appreciation, positive obligations of the state, restrictions on human rights, as well as the knowledge of a very extensive jurisprudence of the ECtHR and the understanding of the manner of the application thereof to a specific case. This can be achieved, first and foremost, through the introduction of a mandatory study course in the area of Human for undergraduate studies, which would, by all means, include the study of the jurisprudence of the European Court in relation to the most relevant articles of the ECHR. Such a course should

46 This situation should have been changed by the Council for Relations with the European Court of Human Rights, which task was to follow the application of the ECHR and to consider the topical issues in the Republic of Serbia related to the application of the Convention. This Government's body was set up in April 2013, but failed to live up to the tasks assigned. See. "Official Gazette of the Republic of Serbia", No. 35/2013.

47 Since November 2016 the Supreme Court of Cassation demanded from all courts to keep a special register of judgments wherein courts referred to the ECHR and to the case-law of the ECtHR.

48 See, e.g., Judgment of the Appellate Court in Novi Sad, Gž. 3863/2012 (1), where the court drew correctly a conclusion on the position of the European Court concerning the greater exposure of public persons to criticism, but it failed to quote the case-law wherefrom that rule stemmed. On the contrary, see the Procedural Decision of the Appellate Court in Belgrade, Kž2. Po1 330/2012 of 31 July 2012, where the court referred to a specific case before the European Court, which established the principles that ought to be taken into account when assessing the reasons for detention. However, despite numerous case-law the court mentioned but one case here that it referred to.

be available also at the higher levels of studies – master and doctoral studies respectively, while it would be important, as the next step, to integrate this substance and standards and principles referred to in the jurisprudence of the ECtHR into all study courses (Criminal Law, Family Law, Property Law and such like). Also, it would be necessary to initiate the reform of a bar exam, which would imply the testing of knowledge precisely in this area, bearing in mind that currently no one is insisting at all on the knowledge of the jurisprudence of the ECtHR. Other forms of work with students should be encouraged at universities, in order to motivate them additionally to study this substance (legal clinics, essay contests, conferences, seminars, summer schools). Also, it is necessary to raise to a higher level the initial and continuous trainings, administered by the Judicial Academy, which must be accessible and systematic, in order to be useful for judges. The publications of handbooks on a regular basis, which would bring closer this complex substance to those who are supposed to apply it, is yet another way to overcome the observed problem. Certainly, what should be insisted upon the most is the brief and clear overview of the judgments of the ECtHR, with a brief presentation of the facts of the case and the legal standards set out by the Court, with references to the paragraphs of judgments. Finally, provisions should be made to set the training in the area of Human Rights and particularly the European Convention as an additional requirement for the promotion of judges, which would contribute to the increased perception of the importance of the ECHR.

Nevertheless, one should not lose sight of the fact that the Republic of Serbia is amongst countries, which have ratified a large number of international instruments without questioning the measures that need to be adopted before or immediately upon the ratification thereof. Not a single Government's body in Serbia has the competence to evaluate which regulations are necessary to be passed in order to harmonise the international obligations with the domestic legal system and which domestic laws are necessary to be brought in line with such obligations,⁴⁹ neither is any single committee in the Assembly of the Republic of Serbia in charge to examine in detail the existing legal framework before or after the ratification of a specific international instrument. Under the current Rulebook of the National Assembly of the

49 Only the Council on Private International Law has done that so far in this area. See the Decision of the Government of the RS setting up the Council on Private International Law, 05 No. 02–377/2011, 27 January 2011.

Republic of Serbia, solely Article 67 envisages that the Committee on the Rights of the Child will be in charge of controlling the harmonisation of the national legislation with the international standards in the area of the rights of the child. It is very important to realise this harmonisation for as long as there is discomfort among judges to apply directly an international norm on account of its inconsistency with the domestic norm. When it comes to the area regulated by the European Convention on Human Rights, it should be mandatory to request an opinion on the conformity of laws from the Agent of the Republic of Serbia before the European Court, who follows and knows its jurisprudence, and it would be desirable to set up also a Human Rights Council, which had already existed for a brief period of time, and which task was to follow and analyse the existence of inconsistent regulations and practice.

Besides all the articulated criticism, it is necessary to point to the fact that a problem of insufficient integration of the ECHR into the domestic legal system has been observed. For instance, the National Judicial Reform Strategy for the period of 2013–2018⁵⁰ envisaged mechanisms for the harmonisation of the case-law and for a better familiarity with the international standards, which should result in more frequent references thereto by judges. The anticipated measures for the achievement of this objective have been set well, but without a serious, comprehensive and systematic approach to this problem there will be no progress in the practice of the application of the ECHR in the Republic of Serbia.

50 Adopted on 1 July at the 7th extraordinary session of the National Assembly.

The implementation of the European Convention on Human Rights and the European Court's case-law in the Russian legal order

Maria Filatova,

PhD, Master Droits de l'Homme (Strasbourg University),
Associate Professor, Chair of Judicial Power, Higher School
of Economics, Moscow, former officer of the Constitutional
Court of Russia, former Lawyer at the European Court of
Human Rights

Introduction.....	107
1. International law in the national legal system: historical background	109
2. Current legal framework and doctrinal status of the Convention and the ECtHR's case-law	110
3. National courts' case-law on the application of the ECHR in the Russian legal system	114
Conclusions and recommendations	126

Introduction

The implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights interpreting its

provisions, remains one of the most important tasks for all European States – Members of the Council of Europe. However, the significance and impact of the Convention go today far beyond the formal scope of this organization, since the Convention system represents a whole philosophy of legal standards applicable in and importable to any domestic system. The Convention – together with its evolutionary interpretation by the European Court of Human Rights – has become the most developed set of human rights protection standards and highly influences all areas of national legal regulation including organization of justice; protection of property; State government (electoral rights); business law; intellectual property; security and international relations, etc.

The implementation of a treaty such as the Convention obviously cannot be a static process. The content of the Convention is developing through evolutionary interpretation of the European Court of Human Rights; hardly any other international treaty may be called to such an extent a “living instrument”. These dynamics, however, create some challenges for national legal systems. The application of constantly developing international treaty requires from domestic enforcement bodies continuous diligence and monitoring of the ECtHR’s case-law development. This implies permanent interaction between the Convention mechanism and national systems, which is based on a dialogue and cooperation.

The need of the dialogue of systems is emphasized in numerous documents of the Council of Europe, which means that the main conditions for the effectiveness of the application of the European human rights protection standards are now political will and the principle of “shared responsibility” of the Member States for the result of such application and implementation.

For the purposes of the present article, we shall mean under “implementation” of the Convention the whole process of application of the conventional standards in the national legal order; that is, not only the direct application of the Convention provisions by national courts but its much larger impact to the Russian legal system. Here, again, the Convention is a unique treaty as its implementation and – unlike many other international treaties – means not only the application of its separate provisions by the courts, but rather the use

of and the adherence to the whole system of its standards including the interpretation of the Convention by the ECtHR, the prevention of new violations, the enforcement of the Court's judgments; taking into account its case-law on applications against other States, etc. Therefore, the implementation within this context shall include:

1. *Informative aspect*: the knowledge of the Convention provisions and their interpretation by the ECtHR, including the case-law on the applications against this particular State and other States (*erga omnes* effect);
2. *Organizational aspect*: the enforcement of the ECtHR's judgments, including the adoption of both individual and general measures; re-opening of cases in necessary situations; payment of just compensation etc.;
3. *Preventive effect*: use by domestic courts of the Convention standards (established by the Court in its case-law) to avoid similar violations in the future. And thus the implementation of the Convention is a whole cycle of actions aimed at the largest possible impact on the national legal system.

1. International law in the national legal system: historical background

When analyzing the current status of the Convention and the ECtHR's case-law in the Russian legal order account should be taken of a number of factors influencing the modern condition of the Russian legal system. In particular, the degree of real implementation of the Convention is strongly influenced by the past historical period, radical turnover to new standards in the early 90s and current political situation.

The place and status of the Convention in the Russian legal system should be looked through in a more general context of international law status.

As the whole legal regulation in the post-Soviet period, the relations of international and national law went through dramatic change in comparison with the preceding historical period after the adoption of the Russian Constitution of 1993. The Soviet legal system – like those

of many socialist countries – was rather hostile towards or at least ignoring international law. The last Constitution of the USSR adopted in 1977 established the foundations of the relations with other States, referring to the principles of international law, including that of *bonae fide* execution of international obligations, emanating from generally recognized principles and international treaties of the USSR (Article 29 of the USSR 1977 Constitution). However, the vague formula did not allow to recognize the principles of international law and international treaties as an integral part of the Soviet legal system. Although isolated laws contained the provisions establishing the primacy of international norms in case of conflict with the domestic ones, these provisions hardly applied in practice in the absence of the general principles governing relations between domestic and international law.¹ Most part of the international treaties signed and ratified by the Soviet Union related to international assistance and cooperation.

The case-law of Soviet courts sometimes contained references to international law but this practice was not permanent neither stable. As to the Soviet legal doctrine, it formally declared the primacy of domestic norms over principles and norms of international law. In spite of rather intense theoretical debate, it did not manage to arrive at solutions meeting the needs of the practice and matching the current global context.²

2. Current legal framework and doctrinal status of the Convention and the ECtHR's case-law

The Russian Constitution adopted on 12 December 1993 marked a real break-up with the Soviet period while establishing, in the “classic” tradition of positivism, the principle of primacy of international treaties over domestic laws.

- 1 Marochkin, S. *Deistvie i realizacia mezhdunarodno-pravovykh norm v pravovoy sisteme Rossiskoy Federacii* [The effect and realization of international law norms in the legal system of the Russian Federation]. Moscow, 2011, p. 13. [In Russian]
- 2 Baudoin, M.-E., Filatova, M. *Les rapports entre les ordres juridiques en Russie// Traité des rapports entre ordres juridiques* (réd. B. Bonnet). – Paris, LCDG, 2016. P. 1650–1651.

As many constitutions of post-socialist States (especially in the East-European countries), it expressed a consensus between the State and society about the waiver of many pillars of the preceding historical period, like the predominance of State ideology and the public interest prevailing over the private one. The most important achievement was enshrining, in Article 2 of the Constitution, the priority of man, his rights and freedoms as the supreme value. This paramount formula established the grounds for the implementation of international standards into the national legal order and created a basis for effective interaction with supranational systems.

The status of international law and treaties is secured by Article 15 (§4) of the Constitution, according to which “[t]he universally recognized norms of international law and international treaties and agreements of the Russian Federation shall be an integral part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall apply”.

Thus, the Russian Constitution – as the constitutions of many post-socialist countries – has established the primacy of international treaties over the provisions of national laws. International law thus has supralegislative but infraconstitutional status in the Russian legal system. Besides, this is the formula that ensures direct effect of international treaties; Russia thus belongs to the monistic “legal family”.

Formally this constitutional provision does not contain any differentiation as regards the types of international treaties of the Russian Federation and their relevant place in the hierarchy of legal sources – all of them have equal status; neither is the concept on special place of international treaties on human rights developed enough in the Russian legal doctrine. Nevertheless, should be taken into account generally recognized principles of the international law doctrine, according to which this type of treaties acquires special rank in national legal systems. In particular, this is true for Article 31 (§ 3(c)) of the Vienna Convention on the law of international treaties: “There shall be taken into account, together with the context: <...>(c) any relevant rules of international law applicable in the relations between the parties”.

Besides, it would be unreasonable to ignore the concept of “autonomy of the international human rights law”³ and the point of view of outstanding researchers that “the object and the aim of conventions concerning human rights single them out within other international treaties, in particular since they impact the content of legal regulation of the Member States”.⁴

It is widely recognized that human rights, as universal norms, form the basis of the international legal order as well as domestic ones.⁵ This approach begins to be recognized in the Russian legal system, too, although not in the positive law. The grounds for it may be found already in the constitutional provisions, since according to Article 17 of the Russian Constitution in the Russian Federation man and citizen's rights and freedoms are recognized and guaranteed in compliance with the generally recognized principles and norms of international law and with the Constitution. And thus the general concepts of human rights as having paramount significance in the international law should be taken into account when interpreting their content and scope in the legal system.

This provision may be interpreted as establishing the special status of international treaties on human rights. The European Convention, being incorporated, in accordance with Article 15 §4 of the Constitution, to the domestic legal system, takes a special place among other international treaties. Its provisions enshrining human rights and freedoms may be regarded as generally recognized norms and consequently, the provisions of the Convention have the effect of a tool for the protection of rights and freedoms enshrined by the Russian Constitution (Articles 15 and 17).

The provision of Article 15 (§4) of the Russian Constitution establishes in substance direct effect of international treaties which implies the duty

3 Cohen-Jonathan, G. “Conclusions générales”, in: *L'évolution des droits de l'homme et l'évolution du droit international*, Colloque de la S.F.D.I., Pedone, Paris, 1998, p. 307–341, p. 321.

4 See Wachsmann, P. “Les méthodes d'interprétation des Conventions internationales relatives à la protection des droits de l'homme”, in: *L'évolution des droits de l'homme et l'évolution du droit international*, Colloque de la S.F.D.I., Pedone, Paris, 1998, p. 157–195, p. 171.

5 Sciotti-Lam, C. “L'application des traités internationaux relatifs aux droits de l'homme en droit interne”. Bruxelles: Bruylant, 2004, p. 4.

of Russian courts not to apply domestic norm when it is contrary to an international treaty of the Russian Federation. Another legal effect of the constitutional norm above is (for the courts) to apply the norms of the Russian legislation in their interpretation which is compatible with the international treaties of the Russian Federation.⁶

In practice difficulties appear, since the resolution of conflicts between the provisions of international treaties and domestic norms is delegated by the constitutional norm to a court examining a particular case, in which an issue of such discrepancy arises. But neither the Constitution nor the “ordinary” legislation establish any procedure in which this resolution should be done.

The Russian law in force provides for the only form in which may be exercised the control of compatibility of a law with an act of a higher legal force, and this is the control of constitutionality in constitutional proceedings. No other body, except the Constitutional Court, has competence to review the provisions of federal laws.

However, formally the control of compatibility of national laws with international treaties of the Russian Federation does not fall within the scope of competence of the Russian Constitutional Court since the Constitution and the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” do not endow the Constitutional Court with such powers.

Since the international treaties of the Russian Federation formally take an intermediate position in the hierarchy of legal acts between national laws and constitutional provisions, they imply a procedure of control of compatibility similar to that of control of constitutionality, especially when it is a treaty on human rights and freedoms. As regards the European Convention, it should be taken into account that it enshrines in substance the same catalogue of rights and freedoms as the Russian Constitution (with slightest differences) and thus would require a special procedure of control to be applied.

6 About different judicial practices of dealing with conflicts of international and domestic norms see: *Martinico G.* Is the European Convention going to be “supreme”? A Comparative-Constitutional Overview of the ECHR and EU Law before National Courts//The European Journal of International Law. Oxford University Press, 2012. Vol. 23, No.2. P. 407. URL: <http://ejil.oxfordjournals.org/content/23/2/401.full.pdf+html>

The reference here may be made to the experience of some European countries (such as Austria, Switzerland, Norway) where we observe “autonomous” application of the European Convention by national constitutional courts, that is, the use of its norms as a direct criterion of assessment of domestic laws.⁷ At the same time, it would be difficult to deny that for most Member States of the Council of Europe the Convention remains an “auxiliary instrument”, taken into account together with constitutional norms and enlarging the nuances of constitutional interpretation. Russia is now following this trend, with the Convention provisions used as an additional tool of control and constitutional interpretation by the highest courts (in more details see below).

As to the status of the ECtHR’s case-law, apart from “formal” provisions on the recognition of its exclusive powers on the interpretation of the Convention, the Russian legislation contains almost no provisions in this regard. However, this status in the domestic legal system has been established by the Russian Constitutional Court, which indicated, in its Judgment of 5 February 2007 N 2-P, that the ECtHR’s case-law had the same status as international treaties and principles and norms of international law and thus formed an integral part of the Russian legal system, too.

3. National courts’ case-law on the application of the ECHR in the Russian legal system

It would be difficult to deny that apart from the legal framework (and sometimes independently of it) the harmony of legal orders is mainly ensured by the role that play judges and courts – both national and supranational. The concept of “judicial dialogue” – whatever indefinite this notion remains from strictly legal point of view – is regarded today as nearly the only method which can provide, in a long-term perspective, the effectiveness of the Convention system in the Member States. In this process the role of highest national courts is crucial since the main burden on application and implementation of conventional standards lie on them.

7 Szymczak, D. “La Convention Européenne des droits de l’homme et le juge constitutionnel national”. Bruxelles: Bruylant. 2007, p.120–148.

The Russian Constitutional Court has played an extremely important role in the process of implementation of principles of international law and of conventional standards in particular. As it was mentioned above, that was the Constitutional Court which indicated, in its Judgment of 2007, that the status of the ECtHR's case-law for the domestic order is equal to the status of the Convention itself. Besides, the Court has acted as an intermediary between the systems, transmitting the international principles and norms – as well the case-law of supranational bodies – to the internal legal system. “External” provisions, being incorporated into constitutional case-law, take roots much easier in the case-law of other courts, and thus become – truly – an integral part of the domestic legal order.

The first reference to the European Convention on Human Rights was made by the Constitutional Court already in 1996 – even before Russia became part of the Council of Europe (1996) and ratified the Convention (1998). The Court has relied on supranational norms with a view to “develop” the potential of the Russian law and to ensure conformity of constitutional and ordinary legislative norms to international provisions; thus a new dimension should be given to domestic norms. This methodology, therefore, goes far beyond a simple “application” of the international norm in question. Declaring unconstitutional several norms of domestic legislation as incompatible with international obligations of Russia, the Constitutional Court obliges the legislature to obey to the European law, including its concepts of human rights and freedoms. And thus the reference to external sources stimulates the evolution of internal norms.

The case-law of the Constitutional Court has made international treaties (especially the European Convention) a supplementary tool of constitutional interpretation by the way of their frequent use in the reasoning of its decisions. At the same time, the reference by the Court to the European Convention (as well as other international treaties) in the operative part of judgments still remains infrequent. Nevertheless, the case-law of the Constitutional Court has engendered a new type of decisions which one could qualify as a decision of compatibility with the Constitution under the reservation of interpretation compatible with the Convention.

Therefore the modern methodology of the Constitutional Court, although based on the use of international legal arguments as additional

ones, has not went so far to the autonomous use of these arguments as separate criterion of control exercised be the Court. But even this “light” type of methodology has been an enormous step forward in the relations with external legal orders and has contributed considerably to their orchestration by the way of invitation to consider international law or “external law” no more as a rival but as a supplementary system of law integrated into the domestic legal system.

The examples of positive contribution of the Russian highest courts into the process of the Convention implementation are numerous. Among the most significant one could highlight the following. Russia has signed but not ratified Protocol N 6 to the Convention on the final abolition of the death penalty. Formally according to the Constitution (Article 20 §2) death penalty may be applied until its complete abolishment for the commitment of grave crimes and if the accused had the right to his/her case to be examined in a jury trial. In practice, however, there exists moratorium for the application of the capital punishment; the courts do not sentence to it, it is *de facto* excluded from the system of criminal sanctions. The moratorium was declared by the Constitutional Court which in its extremely important decisions of 1999⁸ and of 2009⁹ vetoed the application of such sanction on the ground that Russia, when joining the Council of Europe and the Convention system, had taken the commitment to decline from the application of the capital punishment as incompatible with the conventional standards of human right protection. The issue of the application of the death penalty is not an easy one for Russia since numerous opinion polls show that the majority of society are in favour of the restoration of the death penalty in the Russian legal system – logical and understandable human reaction to the threat of terrorism.¹⁰ And this is an example of how the conventional standards, being introduced into a national system, outstrip the level of society legal – and even moral – maturity; similar examples have been observed in different countries numerous times during the

8 Judgment of 2 February 1999 N 3-P.

9 Decision of 19 November 2009 N 1344-O-R.

10 On the historical background of the death penalty as criminal sanction in Russia and the modern state of public opinion towards it see in more detail, in particular: Anatoly Kovler. *La peine de mort en Russie: de moratoire à son abolition le chemin est long//L'abolition universelle de la peine de mort. Actes du colloque du 9 et 11 octobre 2014 (Sous la rédaction de Sébastien Touzé. Préface de J.-P. Costa)*. Editions A. Pedone, Paris. 2016. P. 175–181.

“life” of the Convention. In such manner the highest domestic courts – primarily the Constitutional Court – ensure the harmonization of national and supranational practices and approaches.

Another example of the Constitutional Court’s contribution to the implementation of the Convention regards the enforcement of the ECtHR’s judgments, namely the possibility of re-opening case after the ECtHR had established a violation of a right guaranteed by the Convention. It is well-known that Article 46 of the Convention implies 2 types of individual measures to be adopted for the restoration of the infringed right: just compensation and *restitutio in integrum*, with latter implying re-opening of the applicant’s case before domestic courts when necessary and possible. The Russian legislation before 2010 provided for re-opening of cases in criminal and commercial proceedings but not in civil ones before ordinary courts. However, these courts examine most part of the total number of court cases in Russia, and most part of applications lodged with the ECtHR against Russia also deal in such or another way with the civil cases. As the Civil Procedure Code of Russia formally did not contain any provision permitting the re-opening of proceedings in case of the Strasbourg Court judgment establishing a violation of the Convention, courts declined the applications for such re-opening and the ECtHR’s judgment remained unenforced or enforced in part of just compensation only. The Constitutional Court in its Judgment of 26 February 2010 stated that the ECtHR’s judgments are to be enforced, as a general rule implies both just compensation and restoration of the infringed right by the competent national authorities. Thus, despite the formal absence of legislative provisions permitting re-opening of such cases, the courts should initiate it under the applicant’s request in any case and then the court should establish particular ways for restoration of the applicant’s rights. The judgment ensured the possibility of re-opening of proceedings in all types of procedure – which is not the case in all European countries (it is well known that re-opening in criminal cases is much more formalized whereas in civil cases that possibility is often lacking).¹¹

A whole series of the Constitutional Court’s judgments regarded the enforcement of the ECtHR’s block of case-law in the area of review

11 See, for example, Council of Europe, Committee of Ministers Recommendation R 2000 (2).

procedures in Russia.¹² The problem from the point of view of the European Court lied in the unique procedural institute of “*nadzor*” (supervisory review proceedings) the concept of which has been inherited from Soviet procedure. This institute also existed in the legislation of many socialist countries of the Eastern Europe. *Nadzor* in the new Russian legal history went through some serious modifications but it still had allowed (until 2012) the possibility of repeated annulment of a judicial decision *res judicata* by highest courts on rather ordinary grounds. The Constitutional Court in its Judgment of 5 February 2007 N 2-P confirmed the international obligations of the Russian Federation on enforcement of the ECtHR’s judgments, indicated main directions of legislation reforming in compliance with the Strasbourg Court conclusions and obliged the federal legislator to follow these general directions of review procedures development.

The Constitutional Court has been a trigger of implementation of the Convention standards into the domestic legal order, having the powers comparable with those of the Strasbourg Court as regards the control of the quality of law and compliance with the human rights protection standards. However, the other highest courts¹³ also contributed to the process. Thus, the Supreme Court of the Russian Federation adopted several extremely important documents containing directions to the lower courts as how to take into account the Convention and the ECtHR’s case-law. In the Ruling of the Plenary Session¹⁴ of 10 October 2003 “On the application by ordinary courts of generally recognized principles and norms of international law and international treaties of the Russian Federation” the Supreme Court established the fundamentals of international law application

12 See, among many others, the ECtHR’s judgments *Ryabykh v. Russia*, application No. 52854/94, judgment of 24. July 2003; *Volkova v. Russia*, application No. 48758/99, judgment of od 5. April 2005; *Zasurtsev v. Russia*, application No. 67051/01, judgment of 27. April 2006.

13 Until August 2014 in Russia there were three highest courts: the Constitutional Court, the Supreme Court and the Supreme Commercial Court; in 2014 the Supreme Commercial Court was merged with the Supreme Court and now there are two highest courts functioning in the Russian legal system.

14 The rulings of the Plenary Session of the Supreme Court are adopted on “abstract” issues and not during the examination of particular cases; they contain clarification of the meaning of laws to be applied by the lower courts. The tradition of adoption of such clarifications having in fact mandatory character for lower courts has been inherited from the Soviet period when such practice was quite developed.

(international treaties as well as principles and norms of international law) by all the courts in the system of general (ordinary) courts. It indicated that “[t]he application by the Russian courts of the European Convention provisions should be done taking into account the case-law of the European Court of Human Rights with a view to avoid any violation of the Convention for the Protection of Human Rights and Fundamental Freedoms”.¹⁵

Another text adopted 10 years later – the Ruling of the Supreme Court’s Plenary Session of 2013 “On the application by ordinary courts of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols” – is much more concrete. This document focuses mainly on the re-opening and re-examination of cases following the declaration of violations by the ECtHR of the European Convention on Human Rights. Nevertheless, the Ruling contains, as well, general provisions of revolutionary character on the applicability of the Convention as the main treaty in the area of human rights protection thus emphasizing its special character among other international treaties, including in the area of human rights protection. Besides, this document may be called, to a certain extent, a revolutionary one, since it imposed on the Russian courts the obligation to take into account in their case-law not only the ECtHR’s judgments delivered against Russia but also against other states, thus introducing the *erga omnes* effect to the Russian legal system.

Nevertheless, even recognizing the crucial role of the highest courts in the process of implementation of the Convention standards into the domestic legal order, the main “actors” on which depends the effectiveness of the whole process remain national courts of all levels. Maybe the most important in this sense are first instance courts dealing with particular cases on day-to-day basis and applying legal norms in their interpretation compatible with international standards and obligations of the State. Enormous load of work has been done in this direction in the Russian judicial system, including numerous education seminars, study visits of judges to Strasbourg, trainings of judges and court staff, publication and sending information notes on the ECtHR’s case-law to all courts of the country. Moreover, a course on the Convention is included now in a mandatory curriculum that all judges follow on a regular basis in the Russian Academy of Justice. All

15 *Bjulleten’ Verkhovnogo Suda Rossijskoi Federacii*, 2003, №12, S.3.

these efforts give results, although they are not very fast and require modification not only of judicial methodology – but rather of judicial way of thinking. The number of judicial acts in which judges referred to the Convention is constantly growing, whereas in the early 2000s that number was quite insignificant and invoking the Convention itself in the proceedings was quite rare, even exotic.

Nowadays references to the Convention and the ECtHR's case-law are made regularly, but here a lot depends on the active role of attorneys. That is why education of bar members remains a key condition for the effective implementation of the Convention, together with the education of judges. Another factor which should be mentioned in this regard: if a reference to the ECtHR's case-law on specific issue or a set of Convention standards has been made by one of the highest courts in their practice or guidelines, lower courts are much more keen to refer to these cases and follow the Strasbourg approach than in the absence of such guidelines (positivist tradition and some distrust to international law *per se* still have strong positions in the Russian judicial body). And thus the areas where the Russian courts are more inclined to refer to the case-law of the ECtHR are those on which the Supreme Court or the Constitutional Courts gave directions or guidelines, such as the choice of pre-trial detention measure, review procedures and the grounds for quashing judgments, protection of social rights (in the aspects dealt with by the European Court such as equality and anti-discrimination policy), etc.

At the same time, there are traditional spheres where the Strasbourg jurisprudence does not persuade the Russian courts and the latter deal with issues of human rights regardless of the ECtHR's case-law. This is true, first of all, for the rights strongly connected with politics, such as freedom of assembly, freedom of expression, etc. In some types of cases (for instance, on administrative responsibility for assembly non-sanctioned by authorities) the references to the ECtHR's case-law do not give necessary positive results. Interesting, this type of cases, having began with politically related examples, now involve even neutral categories of persons sanctioned from the point of view of domestic case-law. The latest example of this sort – street musicians who are sanctioned by courts to administrative arrest (for 15 days, which is equal to deprivation of liberty from the point of view of Strasbourg case-law)

for playing on the streets because of the violation of public order and impeding the normal circulation.¹⁶

Apart from numerous examples of harmony in approaches of national and Convention system on the standards of human rights protection, the Russian legal system, as those of almost all Member States, has confronted several cases of divergences in approaches with Strasbourg. These cases have been widely discussed both in Russia and abroad and demonstrate how the discrepancies and even conflicts may arise even in the activities of bodies so close from the point of view of objectives and tasks. Special type of conflicts between national and supranational vision of protected rights content rises from the eternal question of supremacy of constitutional or supranational norms to be applied in a particular case. In Russia the most famous cases of this type are those of Konstantin Markin – on the parental rights of servicemen, and of Anchugov and Gladkov – on the prisoners’ right to vote.

The first case concerned the servicemen’s right to take a parental leave. Under the Russian law civilian fathers and mothers are entitled to three years’ parental leave to take care of their minor children and to a monthly allowance for part of that period. The right is expressly extended to female military personnel, but no such provision is made in respect of male personnel. The applicant challenged the legal provisions in question before the Constitutional Court, which dismissed the complaint holding that this restriction was based on the special legal status of the military and the need to avoid large numbers of military personnel becoming unavailable to perform their duties. The right for servicewomen to take parental leave had been granted on an exceptional basis and took into account the limited participation of women in the military and the special social role of women associated with motherhood.¹⁷

16 The most famous case of this type is that of Semen Lashkin –musician playing his cello on the streets in the centre of Moscow; he was arrested in September 2016 for 15 days and his cello was confiscated by the police; the case is still examined by the Russian courts.

17 The circumstances of the case are cited from: <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22fulltext%22:%5B%22markin%22%2C%22itemid%22:%5B%22002-120%22%5D%7D>

In contrast, the European Court by its judgment of 22 March 2012 (Grand Chamber) found a violation of Article 14 in conjunction with Article 8.¹⁸

The reaction to the European Court's judgment in Russia was quite heated, especially because of the critics expressed by Strasbourg judges towards their Russian colleagues from the Constitutional Court. The question arose what should have priority for Russian judges: the Constitutional Court's conclusion that there is no violation of constitutional rights or the declaration of violations by Strasbourg? Should the court that examines the case apply a Russian law which creates the problem with regard to the Convention but had not been invalidated by the Russian Constitutional Court?

After the ECtHR had delivered its judgment, the applicant lodged a request for re-opening of his proceeding in the Russian courts. The latter, being seized by the motion, suspended the proceeding and addressed a request for control of constitutionality to the Constitutional Court. The request regarded the constitutionality of procedural norms establishing the grounds for re-opening of the case in the Russian courts following a decision delivered by the European Court of Human Rights or by the Constitutional Court. The norms in question tell nothing about the consequences of a conflict between the decisions of these two courts: how should they impact re-opening of the proceeding and which one should have priority for a court re-examining the case?¹⁹

The Constitutional Court in its judgment of 6 November 2013 reiterated the obligatory character of the ECtHR's judgments and an unconditional obligation of Russia to enforce them. However, noted the Constitutional Court, the enforcement of the ECtHR's judgment may confront a possible issue of compatibility of a domestic norm with an international treaty. A conflict may arise if the Constitutional Court previously had not doubted in constitutionality of the norm in question.

18 <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%22fulltext%22:%22markin%22,%22itemid%22:%222001-109868%22>}}

19 The analysis of the case and its perspectives for the Russian legal system and its relations with the ECtHR is given, among others, in: Olga Chernishova. Konstantin Markin and its consequences: Comet's Tail//Liber Amicorum Dean Spielmann. Wolf Legal Publishers, 2015.

The Constitutional Court stated that in similar cases the competent court should suspend the proceeding and address to the Constitutional Court a request for verification of constitutionality of the norm raising such doubts (in the present case– the norm establishing the servicemen’s right to parental leave). Therefore, without giving response to the substance of the issue, the Constitutional Court at least proposed a methodology of the resolution of conflicts; it will be possible to assess its effectiveness when such a request is lodged with the Court.

This case was in substance the first one in which the conflict of interpretation of human rights content arose: that by a domestic court (on the basis of constitutional norms) and by a supranational body (based on an international treaty). Although the core of the rights protected (right to respect of family life, prohibition of discrimination) is generally understood in the same way more or less in all the systems, the details of this content may differ significantly, up to opposite ends of the scale, and the case of Markin is a good display of it. And thus, the divergences – if not conflicts – between the Convention system and the national system of standards – arise in 2 main situations: 1) different understanding of the content of the protected rights (including the details of such content); and 2) dispute about who has the last word in interpreting such rights – national or supranational bodies, that is: is that the Constitution or the international treaty that should have priority?

The case of Konstantin Markin is an example of the first type; but recently the Russian legal system has confronted the case of the second type, that on the prisoners’ right to vote (disenfranchisement).

The case was examined by the ECtHR which in its judgment *Anchugov and Gladkov v. Russia*²⁰ declared a violation of Article 3 of Protocol N 1. The ban for prisoners to vote is imposed by Article 32 §3 of the Constitution; the ban is automatic and apply to all sentenced prisoners regardless of their term of sentence, gravity of the crime committed and personal circumstances. The facts of the case in brief: two applicants were convicted of murder and other criminal offences and sentenced to death, later commuted to fifteen years’ imprisonment. They were also debarred from voting, in particular, in elections to the State Duma and in presidential elections, pursuant to Article 32 §3 of the Russian

20 ECtHR, judgment of 4 July 2013, applications Nos. 11157/04 and 15162/05.

Constitution. Both applicants challenged that provision before the Russian Constitutional Court, which, however, declined to accept the complaint for examination on the grounds that it had no jurisdiction to check whether certain constitutional provisions were compatible with others.

The European Court's position in this case was based on several cornerstones. One of them is that "[i]n the twenty-first century, the presumption in a democratic State must be in favour of inclusion and universal suffrage has become the basic principle" (§ 94)

After the ECtHR's judgment had been delivered, the question arose about its enforcement. How to enforce a judgment which in substance requires modification of the Constitution? The problem is even more drastic account taken that the constitutional provision in question belongs to Chapter 2 on man's and citizen's rights and freedoms that can be amended only in a special procedure in substance equal to the adoption of the new Constitution.

In December 2015 the amendments were introduced to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" modifying the Constitutional Court's powers in this area. According to newly introduced Article 104.1 of the Law, the Constitutional Court may be seized by a request on possibility of execution of Interstate authorities' judgments in the area of protection of human rights and freedoms. The request may be lodged by a federal authority having powers in ensuring the activities on the protection of the Russian Federation interests in the course of examination by an Inter-State body of applications lodged against the Russian Federation (which normally means the Ministry of Justice).

No surprise that the case of Anchugov and Gladkov has become the first one to be examined by the Constitutional Court within the framework of these new powers.

Theoretically, different approaches were possible to be used by the Constitutional Court in the case. The most expected, however, was that the Court would choose (with account taken, among other factors, of the current political situation), the hierarchical approach and the choice in the favor of constitutional primacy, with the arguments on the infra-constitutional status of international treaties of the Russian Federation

and the acts of supranational bodies in the Russian legal order. This argumentation, being already used by the Constitutional Court in its previous case-law, in particular in its judgment of 14 July of 2015 on the possibility of the execution of the ECtHR's judgments, obviously had big chances to be adopted and developed in the present case.

At the same time, the Constitutional Court had the choice of other arguments, too. First of all, the potential of constitutional interpretation – including a kind of “consistent interpretation” with account taken of the international dimension of constitutional provisions – was not used by the Constitutional Court. The interpretation *ex nunc* of the constitutional provision – taking account of the current situation and its needs – would have given the Constitutional Court a possibility to analyze whether there are still grounds to keep this ban (introduced to the Russian legislation in the late 80s of the last century when there existed indeed a threat of criminalization of elected legislative bodies). Finally, the methodology of a “higher level of protection” could have been used by the Court, with priority given to the anthropocentric approach and the choice in favor of the norm (act) giving more rights to the individuals, be it a domestic or supranational norm. The Court, however, preferred to follow a rather formal hierarchical approach, without explaining why the ban itself should be kept in the Russian legislation and relying on the supremacy of the Constitution over international law as the main argument.

The Constitutional Court's main conclusions in this judgment may be summarized as follows.

First of all, the Court emphasized that the relations between the Russian legal system and the conventional system may not be based on the principle of subordination (in the sense of supremacy of international norms over constitutional ones) and that only the dialogue can ensure a necessary balance in these relations. The Court emphasized as well its will to seek and provide for a compromise between the systems to support this balance.

The Court highlighted non-absolute character of the right guaranteed by Article 3 of Protocol 1, and the margin of appreciation which belongs to the Member States in this regard. Finally, the Constitutional Court indicated that Russia, when it ratified the Convention and agreed

to apply this treaty in its system, had not given its consent for the modification of the State constitutional order. The starting point at the time of the ratification of the Convention was the priority of the constitutional norms in the Russian legal order as well as the general compatibility of the Convention – as an international treaty – with the Constitution.

In the operative part of the Judgment the Constitutional Court recognized it impossible to execute the ECtHR's judgment delivered in the case *Anchugov and Gladkov v. Russia*²¹ – in the measure in which this judgment had declared violation of Article 3 of Protocol 1 as a result of an automatic and absolute ban of the right to vote for all prisoners sentenced by the court and established by Article 32 (§3) of the Russian Constitution.

The second case to be examined by the Constitutional Court in the new procedure of control of possibility of enforcement of the ECtHR's judgments is the one *OAO Neftyanaya kompaniya Yukos v. Russia*²². The case that is no less famous and discussed. However, the situation from the point of view of enforcement of this judgment is quite different: the issue is not a conflict between the judgment and a constitutional norm but the amount of just compensation without precedent awarded by the ECtHR to the stakeholders of the applicant – liquidated company: 1,8 billion Euros. Obviously, here the Constitutional Court will be obliged to use different arguments to justify its position. The case should be examined at the end of the year 2016.

Conclusions and recommendations

Any integration or international cooperation process implies some delegation by the State of its sovereign powers to external authorities. Traditionally such delegation has been done on the basis of international treaties signed and ratified by Member States. However, in the modern legal landscape this process becomes much more complicated and diverse, with appearance of different types of international obligations arising not from “classical” treaties but from supranational bodies’ acts and case-law. And thus, the implementation

21 ECtHR, judgment of 4 July 2013, application Nos. 11157/04 and 15162/05

22 ECtHR, judgment of 20 September 2011, application No. 14902/04.

of a treaty such as the Convention for the Protection of Human Rights and Fundamental Freedoms turns to be the comprehensive politics of the State on incorporation of the Convention standards into the “tissue” of the domestic legal system, but also into legal thinking and legal culture of legal community and society in whole.

The process of the Convention implementation into the Russian legal system – as in those of many Members States of the Council of Europe – goes through different stages, altering from highest enthusiasm to some coolness and even a kind of rejection. Alteration of different stages – from harmony to conflict – does not mean by itself the disappointment in the human rights protection system; rather, this is a natural phase in the relations of legal orders of different levels, when centripetal processes alter to increasing “sovereignism”.

Russia is going currently through one of such “sovereignist” stages on which increased sensibility to the external influences provokes more energetic, if not resentful reaction to calls for changes on the part of supranational authorities. Besides, the domestic legal system is seeking now for the boundaries of its constitutional identity – or “constitutional core” – which is not subject to any changes imposed from outside partners. On this stage sometimes the legal system makes the choice in favor of strictly hierarchical approach declaring the primacy of its national (constitutional) norms over supranational ones, and keeping the last word in the interpretation of its international obligations. Sometimes the manifestations of this process appear as excessive “sovereignism” or too formal hierarchical approach – but in substance they do not affect the general will of the State to adhere to the system of principles and standards generally recognized in the international community. Time is needed for alternatives to strictly hierarchical approach to be worked out, with more nuanced concepts of interaction between national and supranational systems. On this way the “dialogue of the judges” – what vague and indeterminate this notion is from the legal point of view – remains the only effective means for holding afloat the common boat.

The reasons for the “dialogue of judges” (formula invented by a French lawyer Bruno Genevois) lie primarily in the common mission of courts in the area of the protection of human rights; the ECtHR’s decisions are aimed at the same goals as the mission of national highest courts:

elimination of violations of human rights from national legal orders and creation of preconditions for the absence of such violations in the future.

From the organizational point of view, the State politics on the effective implementation of the Convention standards should comprise a comprehensive set of activities: education of lawyers – primarily those working with law enforcement (trainings of judges, prosecutors and bar members), coordination of State authorities' efforts on the enforcement of the ECtHR's judgments; translation and distribution of the Strasbourg Court case-law among largest possible audience; regular meeting of the highest courts' judges and their colleagues from the ECtHR; secondment – sending legal professionals to the Council of Europe (with special stress to the Court and Department of Execution of the Committee of Ministers) to study the process of work from inside; etc. The Russian experience has included those and many other types of activities within the framework of the Convention implementation; it may be asserted that they give their results, but it requires time, efforts and funds, and the effect is not fast. On the other hand, the effect reached is stable– so that even in the current period – not the most easy for the relationships of Russia with the external world – the Convention and the system of its standards remains a crucial treaty and instrument for the domestic legal order. Its importance is not questioned and new mechanisms are sought to increase its effectiveness, despite all difficulties that the legal system faces on this road.

Implementation of the European Convention on Human Rights on National Level

Nikolina Katić,
dipl. iur, legal expert

Chapter I	129
The effect of the Convention within the national legal system: Dualism and Monism	133
The Court's Impact on National Legal Systems	135
Implementation of the ECHR in Croatia	135
Chapter II	
National Courts' Referral to the European Court of Human Rights Judgments	137
Chapter III	
Conclusions and recommendations	144

Chapter I

After the Second World War the issue of international protection of human rights was in focus of the United Nations as well as on the European level. The European Convention for the protection of Human Rights and Fundamental Freedoms (further: the ECHR) was a product of such efforts in Europe. Its intention was to guarantee the protection of human rights on a higher level since the protection of these rights on national levels proved to be inadequate.

The Council of Europe (further: CoE) was founded in 1949. On the first session of the Consultative Assembly (today called the Parliamentary Assembly of the Council of Europe) in August 1949 the issue of more detail and collective protection of human rights was discussed. All of this led to the draft of the ECHR, which was adopted by the Committee of Ministers of the CoE and opened for signature. On 4 November 1950 it was signed in Rome by Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Turkey and the United Kingdom. On 28 November 1950 this was signed also by Greece and Sweden. Other European countries followed, and today 47 countries are the ECHR Contracting States.¹

Why is the ECHR so special and important? As Mr. Jean Paul Costa, former judge and president of the European Court of Human Rights said, the ECHR *“was [at the time of its making] the first successful attempt to give binding legal effect to the ideals embodied in the Universal Declaration of Human Rights. The Convention is an international treaty which sovereign States have freely accepted. They have agreed, as expressed in Article 1 of the Convention, to guarantee the fundamental rights defined in the treaty to all those within their jurisdiction”*²

The ECHR consists of its Preamble, text of the Convention which includes most of the fundamental rights and freedoms protected by the Convention, and Protocols to the Convention. Today there are in total 16 Protocols to the Convention, but Protocol No 15 and Protocol No 16 to the Convention are still opened for signature and/or ratification because not all CoE Member States have signed and/or ratified these protocols.

Rights and freedoms which are guaranteed by the ECHR are defined and developed through the case law of the European Court of Human Rights (further: the Court).³ In the Court's case law we can also find a sort of definition of the ECHR and its position in the international law.

-
- 1 The list of 47 Contracting States to the ECHR available at Council of Europe web site <http://www.coe.int/en/web/about-us/our-member-states>
 - 2 Memorandum of the president of the European Court of Human Rights to the states with a view to preparing the Interlaken conference available at http://www.echr.coe.int/Documents/Speech_20090703_Costa_Interlaken_ENG.pdf
 - 3 The Court's entire case law to this date can be found on Court's web site in HUDOC search database

Unlike classic international treaties the ECHR “comprises more than mere reciprocal engagements between contracting States. It creates, over and above, a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement””.⁴ Further, Article 1 of the ECHR prescribes that “the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities”.⁵ This responsibility is primarily set on national courts whose role is to make the rights and freedoms guaranteed by the ECHR effective on national level.

As stated above, the Contracting states must secure the rights and freedoms to “everyone within their jurisdiction”.⁶ These words directly emerge from the Convention and do not imply any limitations as to nationality. Even those alleged victims who are not nationals either of the State concerned or of any other Contracting state may claim this guarantee when they are in some respect subject to the jurisdiction of the State from which they claim the guarantees.⁷

If we look at the Court’s case law on the issue, we can see that for example in *Austria v. Italy* case the Court stated: “...in becoming a Party to the Convention, a State undertakes, vis-à-vis the other High Contracting Parties, to secure the rights and freedoms defined in Section I to every person within its jurisdiction, regardless of their nationality or status; whereas in short, it undertake to secure these rights and freedoms not only to its own nationals and those of other High Contracting Parties, but also to nationals of States not parties to the Convention and to the stateless persons.”⁸

This leads us to one of the main principles of human rights protection provided by the ECHR and Council of Europe and that is the principle of subsidiarity of the ECHR protection. By ratifying the ECHR, the

4 See *Ireland v the United Kingdom*, Application No 5310/71, Judgement of 18 January 1978, § 239

5 See *Súrmeli v Germany* [GC], Application no 75529/01, Judgement of June 2006, § 97

6 See Article 1 of the ECHR

7 See P. van Dijk, G. J. H. van Hoof; *Theory and Practice of the European Convention on Human Rights*, Third edition, Kluwer Law International, The Hague, 1998, p 3

8 See *Austria v Italy*, Application no 788/60, § 116, 138–140

Contracting States undertook the obligation that their national legal systems are in order and in compliance with the ECHR and thus capable of applying the ECHR on national level. In this respect Protocol no 15 to the Convention is extremely important because it brings the principle of the subsidiarity directly in the wording of the Convention. Up to the draft of Protocol no 15 the principle of subsidiarity was actually defined by the Court's case law and its interpretation of Article 1, 13 and 17 of the Convention.⁹

The ECHR leaves it to the States parties to decide how to comply with their duty to observe the provisions of the Convention. As stated by the Court, indeed the ECHR does not lay down for the Contracting States "any given manner for ensuring within their internal law effective implementation" of any of the rights and freedoms guaranteed.¹⁰ Furthermore, in two cases against the United Kingdom¹¹ the Court held that States are not requested to incorporate the Convention into domestic law, but that "the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or the other, to everyone within the jurisdiction of the Contracting States."¹²

The mere incorporation of the ECHR into a domestic legal system is, therefore, neither able to solve all the problems related to its application on national level nor is it the guarantee of faithful and effective application of the Convention in the domestic legal system of the Contracting States.¹³

9 Article 1 of the Convention prescribes the obligation of the Contracting state to secure the rights and freedoms to everyone within its jurisdiction and Articles 13 and 17 impose an obligation to the Contracting State to ensure effective domestic remedies and effective functioning of the whole national system in respect of protection of human rights and freedoms in the Contracting State. On these provisions the Court based its case law regarding the subsidiarity of the Convention protection

10 See *Swedish Engine Drivers Union*, Application no 5614/72, Judgement of 6 February 1976, § 50

11 See *James and Others v the UK*, Application no 8793/79, judgement of 21 February 1986, §84 and *Lithgow and others v. the UK*, Application nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, judgment of 8 July 1986, §205

12 See A. Caligiuri and N. Napoletano; „The Application of the ECHR in the Domestic Systems” available at http://www.academia.edu/633695/The_Application_of_the_ECHR_in_the_Domestic_Systems

13 *ibid*

The strength of the impact of the ECHR on national legal system mainly depends on two aspects:

- 1) The position of the ECHR in the domestic hierarchy of sources of law;
- 2) The self-executing character of the ECHR and the possibility that the ECHR rights be directly enforced by national courts.

There are different approaches and a variety of constitutional provisions concerning the status, the application and the effects of the ECHR in the domestic legal orders. The approach differs from one Contracting state to another.

The effect of the Convention within the national legal system: Dualism and Monism

In the context of the relationship between international law and national law there are two contrasting views.

In the so called dualistic view, the international and national legal systems form two separate legal spheres and the international law has an impact on national legal system only if it is incorporated into the national system via adequate required procedure (e.i. through separate national law etc.). This is for example the case in Germany, where the ECHR has been transformed into the national legal system through a federal law (*Zustimmungsgesetz*), thereby becoming part of the domestic German law. The United Kingdom and Ireland have respectively incorporated the Convention through the Human Rights Act of 1998 and the European Convention on Human Rights Act of 2003.

In dualistic system, after the Convention has been approved and transformed into domestic law, the question remains which status it has within the national legal system. The answer to this question is to be found in national constitutional law.¹⁴ For example in the United

¹⁴ See P. van Dijk, G. J. H. van Hoof; Theory and Practice of the European Convention on Human Rights, Third edition, Kluwer Law International, The Hague, 1998, p 16

Kingdom and Ireland after incorporation, the ECHR rules are judicially enforceable by national courts and directly applicable within the British and Irish legal systems by courts and other public authorities.¹⁵

On the other hand, in the so called monistic view, the various domestic legal systems are viewed as elements of the international legal system. According to the monistic view the national authorities are bound by international law in their relations with individuals as well, regardless of whether or not the rules of international law have been transformed into national law. In this situation the individuals derives rights and duties directly from the international law, which is then applied before national courts and it must be given priority over any national law when conflicting it.

In Contracting States in which the Convention has external effect it must be established for each of its provisions separately whether it is directly applicable so that individuals can directly invoke such provision before national courts or not.¹⁶ The so-called self-executing character of a Convention provision may generally be presumed in cases when the content of such provision can be applied in concrete case without there being a need for additional (legislative) measures on the part of national authorities.¹⁷

Today, in Belgium, France, the Netherlands, Switzerland and the UK, we can say that the ECHR constitutes a kind of surrogate or "shadow Constitution".¹⁸ These states have incorporated the Convention in ways that make Convention rights directly effective, supra-legislative norms in the domestic system. On the other hand, there are states where the ECHR tends to function as a supplement to the Constitution, such as in Germany, Ireland, Spain and some Central European States.¹⁹

15 See Besson: „The Reception Process in Ireland and the United Kingdom”, note 24, p 42 and 46

16 See P. van Dijk, G. J. H. van Hoof; Theory and Practice of the European Convention on Human Rights, Third edition, Kluwer Law International, The Hague, 1998, p 17

17 Ibid, p 18

18 See H. Keller, A. Stone Sweet: Assessing the Impact of the ECHR on National Legal System; Yale Law School, Faculty Scholarship Series, paper 88, 2008, p 686

19 Ibid

The Court's Impact on National Legal Systems

The Court protects rights and freedoms guaranteed by the Convention in many different ways. The Court functions as (1) as a kind of high instance (High Cassation Court for example) when it comes to the procedure, (2) as an international watchdog when it comes to the grave human rights violations and massive breakdown in rule of law in any of the Contracting States; (3) as an oracle of constitutional rights interpretation when it comes to qualified rights of Article 8–11 and 14 of the ECHR.²⁰

In many of its cases, the Court has stated that rights and freedoms guaranteed by the Convention are not theoretical or illusory but practical and effective, putting thereby an obligation on the Contracting states to provide effective protection of human rights on national level.²¹ This is another reminder to the Contracting States that Conventional protection of human rights is subsidiary, and it activates only in cases and situations where domestic legal system failed to provide the necessary protection of human rights.

In order to provide effective protection of human rights on national level there are three crucial things Contracting States must ensure at national level. That is 1) high level of knowledge and understanding of Conventional law among judges and other public officials; 2) knowledge of the Court's case law and its adequate implementation in national proceedings; and 3) effective execution of the Court's judgements according to Article 46 of the Convention.²²

Implementation of the ECHR in Croatia

In the Republic of Croatia (further: RoC) the Convention is part of domestic legal system and domestic law. According to the Article 141

20 See H. Keller, A. Stone Sweet: Assessing the Impact of the ECHR on National Legal System; Yale Law School, Faculty Scholarship Series, paper 88, 2008, p 695

21 See among others, recent case *Dvorski v. Croatia*, Application no 25703/11, [GC], 20 October 2015

22 See *mutatis mutandis* Implementation of the Convention in Domestic Courts and Institutions: Tools for Application of the European Convention of Human Rights in Domestic Legal System of the Countries of Southeast Europe, The Aire Center, legal bulletin, 1/2014, p 6

of the Constitution of the Republic of Croatia²³ all international treaties which are signed and ratified by the RoC form a part of domestic legal system and are by their legal power above the law and under the Constitution.

In practice this means that all Croatian judges and public officials are bound by the Convention in the way they are bound by any other (domestic law) and have an obligation to directly apply Convention provisions in everyday work.

Therefore, Croatia has a monistic approach towards implementation and application of international treaties in domestic system. Apart from the cited Constitutional provision, this monistic approach is also acknowledged through provisions of domestic laws such as Law on conclusion and implementation of international agreements²⁴ whose provisions do not prescribe any additional procedure for (direct) application of international agreements and treaties in domestic system.

Some dilemma on whether the Convention and other international treaties are directly applicable in domestic system was caused by former Article 115§ 3 of the Constitution which prescribed that "Courts [in Croatia] judge based on Constitution and laws".²⁵ Namely, in the cited provision there were no international agreements mentioned. However, correct interpretation of this provision was that explicit mention of international agreements in this context was not necessary.²⁶

Nevertheless, this dilemma was eliminated in 2010 when the Constitution was amended. The provision which is now legally binding reads as follows: "Courts [in Croatia] judge based on Constitution, international agreements and other sources of law in effect".²⁷

23 See Constitution of the Republic of Croatia, Official Gazette No 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14 available at www.nn.hr

24 see Law on conclusion and implementation of international agreements, Official Gazette 28/96

25 see J Omejec: Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava, Strasbourški *acquis*; Novi informator, Zagreb 2013, p 47

26 *ibid*

27 *ibid*

Hence, In RoC Convention has a quasi-constitutional character²⁸, which was affirmed by a Constitutional court's decision no U-I-745/1999.²⁹ In the named ruling, the Constitutional court in the proceedings of abstract assessment of constitutionality of the Expropriation Act for the first time adopted the view that any non-compliance of the national legislation with the ECHR represented the non-compliance of the national law with the principle of rule of law laid down in Article 3 of the Constitution, the principles of constitutionality and legality enshrined in Article 5 of the Constitution, and the principle of legal monism of national and international law stipulated in Article 141 of the Constitution.³⁰

Chapter II

National Courts' Referral to the European Court of Human Rights Judgments

The ECHR is legally binding in RoC for 19 years³¹ and is, as explained above, part of domestic legal system. In the beginning, during the late 90ies and early 00s, there was not much understanding for the ECHR and Court's case law among national judges and public officials since the ECHR since it was all considered "foreign" or "international" law, non-directly applicable in domestic proceedings, despite above cited Article 141 of the Constitution.

There was very little knowledge of the Convention provisions and Court's case law among citizens and lawyers also, and almost none of the parties in domestic proceedings invoked Convention provisions in domestic proceedings nor did they ask for its direct application. This has changed. Nowadays we can see that parties in the domestic proceedings call upon the Convention provisions and/or Court's case

28 see J Omejec: Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava, Strasbourgski *acquis*; Novi informator, Zagreb 2013, p 64

29 see ruling U-I-745/1999 of 8 November 2000, available at www.usud.hr

30 See also S. Rodin, T. Čapeta; *Judicial Application of International Law in Southeast Europe*, Springer (eBook) 2015, p 138–139

31 The ECHR is legally binding RoC from 5 November 1997

law even upon first action in the proceedings, and domestic courts base explanations on their rulings on Court's case law.

Nevertheless, beginnings were tough. As it always is, the system, which is huge and inert needs time to process and accept new things. On the other hand, private parties and lawyers who are contesting their legal issues before the courts, quickly learned about new tool they could use to straighten their legal grounds *vis-à-vis* opponent or to persuade the courts to rule in their favor.

Obvious example of the above said can be seen in the judgement of the (High) Administrative Court of RoC in the case Us-1044/2005³². In the named judgment Administrative Court rejected the applicant's claim, she filed after an administrative body (police) declined to issue identity card to the applicant. Namely, the applicant, who was a Muslim by religion, requested an issue of identity card and brought a photograph on which she was wearing hijab (a Muslim head covering) which photograph was not in accordance with provisions of domestic law prescribing the standard identity card photograph (which has to have at least 80% of the head and face visible). The applicant invoked before the Administrative court provisions of Article 9 and Article 14 of the Convention, claiming that she was discriminated against based on her religion. The Administrative court commented these applicant's arguments in only one sentence claiming that *"there is no need to comment applicant's claims based on the Convention since her claim is inadmissible based on the provisions of domestic law."*

Contrary to this, some domestic courts were directly implementing the Convention provisions but without further referral to Court's case law. Such rulings can be found for example in the Supreme Court's judgements I Kž-548/1999³³ and I Kž 440/03³⁴ concerning application of Article 6 of the Convention in criminal matters.

The milestone turnover in this attitude of domestic courts was the ruling of the Constitutional Court of RoC stressing the importance of the (direct) implementation of the Convention (and international law in general) in domestic proceedings and especially respect of the

32 See judgement Us-1044/2005 of 7 May 2009, available at www.upravnisudrh.hr

33 See judgement I Kž-548/1999 of 1 September 1999 available at www.vsrh.hr

34 See judgement I Kž-440/03 of 11 November 2004 available at www.vsrh.hr

Article 46 of the Convention (execution of Court's judgements) is ruling U-III-3304/2011.³⁵

This was in fact first Constitutional Court's decision in which this court dealt with responsibilities of RoC towards an international treaty or Convention. The subject of the case was in fact failure of domestic courts and authorities to execute the Court's judgement in case *Vanjak v. Croatia*.³⁶ Namely, the applicant, Mr Vanjak could not reopen the disciplinary proceedings which were subject of the proceedings before the Court and where the Court found violation of Article 6 of the Convention. According to the Croatian law, a Court's judgement in which was found at least one violation of Convention rights presents a basis for reopening of domestic proceedings. However, Mr Vanjak was rejected by domestic authorities and courts.

The Constitutional court accepted the applicant's constitutional complaint and concluded: *"Failure to observe international obligations, which in the present case led to the dismissal of the "request to reopen disciplinary proceedings", had a serious effect on the personal legal situation of the applicant of the constitutional complaint (Article 35 of the Constitution). His interest, doubtlessly legitimate, for the ECHR judgment Vanjak v. Croatia (2010) to be duly executed at national level (namely that the well-foundedness of his request be reviewed) has the weight of constitutional law, sufficiently corroborated by the findings of the ECtHR contained in this judgment. The Constitutional Court could not have neglected this fact in the present proceedings. It is deemed indisputable that the impugned decisions and the judgment of the Administrative Court inevitably diminished the applicant's confidence in the justice system and further imperiled the principles of legal certainty and equality of all persons before the law, which are the main characteristics of the rule of law both in the Constitution and the Convention. They also disrupted the applicant's legitimate expectation that the ECHR judgment would lead to a review of the well-foundedness of his request to amend a legally effective court decision on the basis of a decision of the ECtHR, and through it also to a potential reopening of the disciplinary proceedings against him. Until the well-foundedness of the applicant's request to amend a legally effective court decision on the basis of a decision of the ECtHR is reviewed*

35 See ruling U-III-3304/2011, of 23 January 2013 available at www.usud.hr

36 See case *Vanjak v. Croatia*, Application No 29889/04, judgement of 14 January 2010

in conformity with the positions expressed in the present decision, the applicant of the constitutional complaint shall continue to be deemed the victim of a violation of the right to a fair trial in the meaning of Article 29.1 of the Constitution and Article 6.1 of the Convention.”³⁷

Another distinguished Constitutional court’s decision is ruling U-III-2026/2010³⁸, a case which is related to another Court’s judgement in case *Peša v. Croatia*³⁹ in which the Court found violation of applicant’s Conventional right to presumption of innocence (Article 6§2 of the Convention). The constitutional complaint in the above mentioned case was lodged by Mr J. M, Mr Peša’s co-accused in the criminal proceedings who claimed before the Constitutional court that his right to presumption of innocence was violated too and that he was in fact in the same legal position as Mr Peša. Constitutional court concluded: *“The Constitutional Court finds it necessary to recall the statement of reasons of the Peša v. the Republic of Croatia judgment (application no. 40523/08, of 8 April 2010) in which the European Court of Human Rights (hereinafter: the European Court) found that there had been a violation of the applicant’s right to the presumption of innocence. This means that there had been a violation of Article 6 para. 2 of the Convention. The Constitutional Court notes that these were criminal proceedings in the same case as the one that is the subject of these constitutional proceedings, publicly known as the “M.” affair.[...] The above findings are also applicable to the instant case. The Constitutional Court finds that the statements quoted in point 12 of the statement of reasons of this decision violated, with reference to the applicant of the constitutional complaint, fair proceedings in the case and “undermined public confidence in the judiciary” (see the European Court in the case of Times Newspaper, § 63). That is to say, the quoted statements of the high-ranking officials of the Republic of Croatia directly refer to the applicant of the constitutional complaint and they undoubtedly touch on the applicant’s guilt in the proceedings which had at that time just begun, and also in the further course of the criminal proceedings.”⁴⁰*

There are also number of important Constitutional court’s decisions which precede the proceedings before the Court, and directly influence

37 See ruling U-III-3304/2011, of 23 January 2013, §42, available at www.usud.hr

38 See ruling U-III-2026/2010 of 30 June 2011, available at www.usud.hr

39 See *Peša v. Croatia*, Application No 40523/08, judgment of 8 April 2010

40 See ruling U-III-2026/2010 of 30 June 2011, §§ 13 and 14, available at www.usud.hr

them. For example, ruling U-III-64744/2009⁴¹ in which the Constitutional court accepted constitutional complaint by Mr Eduard Miljak regarding the conditions of his prison detention. Subsequently, Mr Miljak lodged an application before the Court but his application was dismissed as inadmissible.⁴²

The essential part of the named Constitutional court's decision reads as follows: *"The Constitutional Court links the above findings concerning the applicant's treatment in the Prison Hospital with two facts: a) that the representatives of the Ministry of Justice said at the preliminary meeting at the Constitutional Court that this ministry had been aware, from the days when the Prison Hospital was under construction, of the problem of the non-existence of a lift, but that so far no funds have been found in the budget to make one, and b) that the representative of the Ministry of Health and Social Welfare informed those present that public-health supervision over the prison system in the Republic of Croatia is at present weak and ineffective. In connection with this, the Constitutional Court observes that the Government of the Republic of Croatia has the duty to harmonise and supervise the concerns of the state administration (Article 9 of the State Administration System Act, consolidated wording, Narodne novine, no. 190/03). These concerns of the competent ministries – the Ministry of Justice and the Ministry of Health and Social Welfare – include, among other things, performing administrative supervision and other administrative and professional matters (Article 1 para. 1 of the same Act). This is why the Constitutional Court, in this decision, instructs the Government of the Republic of Croatia to establish efficient supervision over the quality of health protection in the entire prison system and to enable, in an appropriate time not longer than three years, the unhindered movement of persons with special needs, and especially, because of the obvious need for a lift, to ensure the funds necessary for making one in the Prison Hospital."*⁴³

A number of domestic decisions which present good practice of direct implementation of the ECHR and Court's case law, are decisions regarding Article 8 of the Convention in part concerning the respect of one's home. Respect of home is an autonomous Conventional institute,

41 See ruling U-III-64744/2009 of 3 November 2010, available at www.usud.hr

42 See *Miljak v Croatia*, Application No 66942/09, decision of 7 February 2012

43 See ruling U-III-64744/2009 of 3 November 2010, available at www.usud.hr, §§ 15 and 16

different from the property law known as part of civil domestic law and therefore a good example of domestic court's direct application of Convention provisions and Court's case law. For example, Supreme Court of RoC in its ruling Rev-x 1050/12-2⁴⁴ clearly stated that while deciding upon a request for eviction, (lower) domestic courts must carry out a proportionality test according to Article 8 of the Convention and Court's case law.

In this respect another ruling of Constitutional Court of RoC is important. In ruling No U-III-2073/2010⁴⁵ Constitutional Court noted and established basic principles and doctrine that lower court must incorporate in explanations of their decisions while ruling on right to respect one's home. *"No provision of domestic law may be interpreted or applied in a manner that is not in conformity with the obligations arising from the Constitution and the ECHR. In all cases where the parties state an objection concerning interference in their right to respect for their home by an eviction measure, the duty of the competent civil courts is to examine the proportionality and necessity of the proposed measure having regard to the relevant principles that form part of the content of the right to respect for one's home, and in conformity with the fundamental concepts included in this decision"*.⁴⁶

Further, in ruling U-III-46/2007⁴⁷ Constitutional court decided: *"Any interference by public authorities in the right of ownership must be justified, that is, it must satisfy strict, cumulatively set requirements based on the rule of law and lawfulness, the general or public interest, and proportionality. These requirements – in the light of each particular case – must also be appropriately taken into account when the interference in the right of ownership is not caused by public authorities, but by private persons. In addition, in the case of private law relations, the state has the positive obligation to protect the constitutional and Convention right to ownership of a (physical or legal) person from unlawful interference by third persons in that right, except when this interference is based on the law, is in the general or public interest, and is "necessary in a democratic society"*.⁴⁸

44 See Rev-x 1050/12-2 of 10 September 2014 available at www.vsrh.hr

45 See U-III-2073/2010 of 4 March 2014, available at www.usud.hr

46 *ibid*

47 See U-III-46/2007, ruling of 22 December 2007 available at www.usud.hr

48 *ibid*

Constitutional court has also ruled in cases concerning other aspects of Article 8 of the ECHR. For example in ruling U-III-3526/2010⁴⁹ the Constitutional court concluded that Concerning respect for family life, the state has both negative and positive obligations. The negative obligations include the duty of the state to refrain from meddling into an individual's family life, except in cases prescribed by law (Article 61.2 of the Constitution) and in conformity with the principle of proportionality (Article 16 of the Constitution), considered in the light of the rules which are valid in a democratic state (Article 1.1 of the Constitution). The positive obligations of the state include the duty to act pro-actively in order to achieve the conditions for the respect and effective protection of family life of its citizens, even when this means regulating private relationships among them. The Constitutional Court holds that the state has a wide area of freedom of judgment when regulating this issue, or when deciding which activities or measures it must undertake to achieve the constitutional guarantee referred to in Article 35 of the Constitution, where the existing possibilities of the social community and its individuals are also acknowledged.

In 2014, Constitutional court brought the decision U-III –6559/2010⁵⁰ which was a sort of milestone in respect of application of procedural obligations for the state rising from Article 3 of the Convention (the obligation of conducting the effective investigation).

This decision in many ways reflected the Court's decisions on the issue and it was the first time that the Constitutional court found violation of procedural obligation under Article 3 of the ECHR and ordered another state authority (the State Attorney) to conduct an effective investigation of applicant's allegation of ill-treatment while in police custody, like the Court would. In the name ruling the Constitutional court recalled some of the basic principles previously determined by the Court and based its decision precisely on the Court's case law. Relevant part of the decision reads as follows: *"If an individual claims that official persons have abused him, and may substantiate that claim with certain evidence (for example, with medical records), Article 23.1 of the Constitution and Article 3 of the Convention lay down that an efficient official investigation of the alleged abuse must be carried out. The investigation must be such to allow the discovery and punishment of responsible persons. Otherwise, the general*

49 See U-III – 3526 / 2010, ruling of 30 June 2011 available at www.usud.hr

50 See ruling U-III-6559/2010 of 13 November 2014, available at www.usud.hr

prohibition of abuse, in spite of its basic meaning, would be inefficient in practice, and it might also result in official persons abusing the rights of persons under their custody without any punishment. The investigation must be independent and impartial. Persons responsible for conducting the investigation and persons conducting the investigation must be independent of the persons that have participated in the disputed event. [...]Competent authorities must act diligently and promptly. The obligation to conduct an investigation is not “an obligation of results, but of ways”: every investigation does not necessarily have to be successful and lead to a conclusion coinciding with the description of events of the applicant but, in principle, it must allow for the establishment of the facts of the case and, if it is proven that the claims of abuse are true, for the identification and punishment of the responsible persons.[...]Any oversight in an investigation resulting in the inability to determine the cause of injuries may, depending on the circumstances of an individual case, lead to the conclusion that the investigation was inefficient. The investigation must also be efficient in the sense that it may help establish whether the force used by the police was justified considering the circumstances.”⁵¹

Chapter III

Conclusions and recommendations

Some 2000 years ago Greek philosopher Diogenes of Laertius said “*of all things in this world, only one thing is certain: that everything will change*”. To apply this old and wise philosophical thought on our human rights protection theme, we can without a doubt say that Convention is “a living organism” constantly in change.

Looking back on the Court’s beginnings and seeing where the Court’s case law is now, one can only say it is an evolution in the real sense of the world. And it’s not yet done. Court’s case law on issues like family life, private life, freedom of religion, freedom of expression, positive obligations of the state, to name a few, is constantly changing.

On the one hand, this fact makes it alive and practical in terms of protection of human rights, not theoretical and illusionary, as the Court would often say. On the other hand, it is hard for domestic judges to

51 Ibid, §§ 46, 46.1

keep up with the constant changes and developments in the Court's case law, especially in new democracies who have accepted and ratified Convention nearly "yesterday", figuratively speaking (some 15 or 20 years ago) and are still learning the basics.

Despite everything, the system has to start really implementing all of the provisions, standards and obligations it has taken over by signing the ECHR, as well as other international treaties. And no matter how hard it's going to be for the new democracies to keep up the pace in relations to the old democracies who are learning and doing it for almost half of the century, they will have to deliver the level of protection of human rights which is established by the Court.

Firstly, this is important for the development of a country, and not just the rule of law, but also for the prosperity in general. The most efficient but also the cheapest protection of human rights is the one done by the national courts at home. Activation of subsidiary protection of human rights in Strasbourg not only costs money, it exhausts the system as a whole, since it has to be activated in full, until the last instance, and then often all over again after the Court finds violation of one or more Convention rights.

No one says this is going to be easy or that it will happen overnight. It takes a lot of investment in the system, primarily the education of judges, legal advisers and prosecutors, because they are the ones who have to implement the Convention on a daily basis. Also, the states must invest in translation and publication of the Court's case law, because often there is a problem of language barrier and in that view accessibility of the Court's law. In that respect, Council of Europe initiative to translate and publish translation of Court's case law in the HUDOC data base is highly valuable and has to be encouraged in the future.

Also, the need of raising up the level of protection of human rights in (every) Contracting state has to be seen in the light of the recent events in Europe. Europe today is facing an unprecedented wave of immigrants many of whom are sent back to their home states. While the Strasbourg case-law goes back to the 1950s and 1960s, public opinion has only recently become aware of this. A number of Contracting States has to deal with asylum seekers, family reunions, child disappearances

and abductions, deportations, etc. and some of them were never to this date faced with such legal (and political) challenges. However, these legal issues won't be resolved in Strasbourg, at least not all of them. Primarily, these issues will be left for the Contracting States to deal with on national level. They will be expected to provide a high level of human rights protection and high level of sensibility. Will they be up to the task is yet to be seen.

The European Convention on Human Rights and the Hungarian Legal System

Dr. Bárd Petra LL.M. PhD

Eötvös Lóránd University, Faculty of Law, Associate Professor

Prof. Dr. Károly Bárd PhD

Central European University, Legal Studies Department,
Head of Department, Professor

I. The status of the ECHR at the national level.....	148
I.1. Historical aspects of accession to the ECHR.....	148
I.2. Beyond dualism: the relationship between the ECHR and the national legal order	149
II. Domestic courts' referral to the ECHR and the Strasbourg case-law.....	151
II.1. Disregard of the ECtHR case-law: clear violation of national law	152
II.2. Cherry-picking from the case-law and abusive references to the Strasbourg jurisprudence.....	158
II.3. References to the ECHR and the related case-law by domestic courts: good practices	159
III. Conclusions	164

I. The status of the ECHR at the national level

1.1. Historical aspects of accession to the ECHR

Hungary was the first “post-communist” country to join the Council of Europe and signed the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR or Convention) on 6 November 1990. The ECHR and its eight Protocols were ratified back in 1992.¹

Before ratification it was decided to thoroughly scrutinize Hungarian legislation on its compatibility with Strasbourg case law and to first prepare legislation in areas where compliance with the jurisprudence of the Convention organs called for modifications. Thus an Inter-Ministerial Committee was set up chaired by the then Ministry of Justice deputy secretary of state and composed of senior civil servants working in the various ministries. After seventeen months of study and analysis the report was submitted to the government. The conclusions were published in a Hungarian human rights journal and were made available to all Members of Parliament.² The Committee identified relatively few areas where the Convention required modification of Hungarian laws. This was partly explained by the fact that by the 1989 amendment of the 1949 Constitution the chapter on human rights was radically modified. Further, Parliament enacted in the years of 1989 and 1990 numerous acts relating to basic rights, such as the right to strike, freedom of assembly, and freedom of conscience. In addition, amendments to the Code of Criminal Procedure and the Penal Code also contributed to narrowing the gap between Hungarian law and the Convention.

-
- 1 The ECHR and its eight Protocols were ratified on 5 November 1992 and incorporated into the Hungarian legal system through Act XXXI of 1993 on 7 April 1993 entering into force eight days later. The Act provides that the Convention and Protocols 1, 2 and 4 have to be applied as of 5 November 1992, Protocol 6 is applicable as of 1 December 1992, and Protocol 7 applied from 1 February 1993.
 - 2 For a detailed summary of the findings see Doc. H(95)2 of the Council of Europe published also in A. Drzemczewski, ‘Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification: The Hungarian Model. Introduction to a Reference Document,’ *Human Rights Law Journal*, 16 (7–9) (1995), 241–60.

Hungary ratified all but two protocols to the Convention:³ Protocol 12, which was signed, but not ratified,⁴ and Protocol No. 14bis.⁵

1.2. Beyond dualism: the relationship between the ECHR and the national legal order

On 18 April 2011 a new constitution was passed by Parliament by the two-third majority of MPs, signed by the President on 25 April 2011. The document entitled Fundamental Law (hereinafter: FL) entered into force on 1 January 2012. Hungary's FL defines the relation between international and domestic law in the same way as the former Constitution. The FL first stipulates that "Hungary shall ensure the conformity between international law and Hungarian law in order to fulfill its obligation under international law" [Article Q (2)]. Further, the FL proclaims that "Hungary shall accept the generally recognized rules of international law" and that "other sources of international law shall become part of the Hungarian legal system by promulgation" [Article Q (3)].

Generally recognized rules of international law become automatically part of the Hungarian legal order (and in the Constitutional Court's interpretation are above domestic laws), while international treaties must be proclaimed in a domestic law.⁶ Thus the FL like the previous Constitution opted for the dualist approach: international treaties must be transformed in the form of an Act of Parliament or a decree to be part of the Hungarian legal system and by this to become directly enforceable.⁷ Because rules on fundamental rights and obligations

3 Protocol 11 to the ECHR restructuring the control machinery established thereby has been signed on 11 May 1994, ratified on 26 April 1995 and is applicable to Hungary from 1 November 1998. The law that implemented the Protocol is Act XLII of 1998. Protocol 13 concerning the abolition of the death penalty in all circumstances was signed on 3 May 2002, and entered into force on 1 November 2003. The corresponding Hungarian law is Act III of 2004. Protocol No. 14 amending the control system of the Convention was signed on 7 April 2005 and ratified on 21 December 2005. The implementing Hungarian law is Act CXXIV of 2005.

4 Protocol 12 was signed on 4 November 2000 but is not yet ratified.

5 Protocol 14bis was signed on 11 November 2009 but not yet ratified. See Decrees of the Prime Minister Nos. 20/2009. (V. 12.) and 32/2009. (VI.18.). Since Russia signed Protocol No. 14 in January 2010 as the last high contracting party, Protocol No. 14bis lost its relevance.

6 Constitutional Court Decision No. 53/1993. (X. 13.).

7 The 'generally recognized rules' are transformed directly by the Constitution (and similarly by the FL). Constitutional Court Decision No. 53/1993. (X. 13.).

may be laid down exclusively in an Act of Parliament, international human rights treaties must also be promulgated in an Act enacted by Parliament.

From all this it may appear that the Convention promulgated by an Act of Parliament has the same rank as any other act and in case of conflict the *lex posterior* prevails. However, in the Constitutional Court's (hereinafter: CC) interpretation the act transforming an international treaty is superior to other acts and in the case of conflict the latter have to be annulled.⁸ It should be noted that the fourth amendment to the FL⁹ repealed the rulings of the CC given prior to the entry into force of the FL.¹⁰ This was interpreted to mean that the Court is no longer bound by its earlier rulings and may not even make reference to them. However, the CC made it clear that it still may make reference to arguments used in earlier decisions provided that it gives a detailed reasoning why it does so. However, the CC added that due to the fourth amendment to the FL it may disregard legal principles elaborated in earlier decisions even if the text of the given provision in the FL and the previous Constitution is identical.¹¹ In principle the CC would therefore be free to reconsider its position on the supremacy of acts promulgating international treaties over other Acts of Parliament in the future. Nevertheless in a fear of rule of law backsliding, and in search of standards on which the government had no influence¹² in Decision 61/2011. (VII. 13.) the CC made clear that domestic constitutional protection of human rights must not go

8 Constitutional Court Decision No. 15/2004. (V. 14.), Decision No. 2/1994. (I. 14.), and Decision No. 99/2008. (VII. 3). For details see P. Bárd, 'Hungary,' in L. Hammer and F. Emmert (eds.), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (The Hague: Eleven Publishing, 2012), 225–6.

9 Adopted by the Hungarian Parliament on 11 March 2013.

10 Article 19 of the fourth amendment to the FL, incorporated as point 5 in the Closing and Miscellaneous Provisions of the Fundamental Law. This provision might have been the legislator's response to the Constitutional Court Decision No. 22/2012. (V. 11.), which explicitly declared that the Court in subsequent cases may use the arguments appearing in its decisions rendered prior to the entry into force of the FL provided that the content of the provision in the FL is identical or similar to that of the previous Constitution and if the rules of interpretation of the FL permit the use of the arguments.

11 Constitutional Court Decision No. 13/2013. (VI. 17.), para. 30–1.

12 Viktor Kazai, „... hogy ne kelljen a múltat "véggképp eltörölni"” [Interview with Constitutional Court Justice Miklós Lévay], *Fundmentum* 2016/1, 59–71., 64.

below international level of protection and that the CC must follow the ECtHR case-law.¹³

However, the fact is that both the FL and the law on the CC¹⁴ provide for the review of domestic laws on their compliance with international treaties and not the other way round. According to Article 24 (2) f) of the FL, the CC shall examine whether rules of law are in conflict with an international treaty. Article 24 (3) stipulates that the CC may “annul the law or its provision conflicting with an international treaty”. Article 32 (1) of the law on the CC provides that “(P)ursuant to Article 24 (2) f) of the Fundamental Law, the Constitutional Court shall examine legal regulations on request or *ex officio* in the course of any of its proceedings”. In addition to listing those entitled to request such a review¹⁵ paragraph (2) of the same article provides that “judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty.”¹⁶

II. Domestic courts’ referral to the ECHR and the Strasbourg case-law

Some of the judges of the Curia are appointed by the president of the Curia as advisors on European law to assist – in collaboration with the Office for International Relations and European Law – their colleagues at all levels of the court system in the interpretation of

13 Constitutional Court Decision No. Decision 61/2011. (VII. 13.), Parts 2.2. and 3.

14 Act No. CLI of 2011 on the Constitutional Court.

15 One-quarter of Members of Parliament, the Government, the President of the Curia, the Prosecutor General, and the Commissioner for Fundamental Rights.

16 Judges’ authorization to initiate proceedings before the Constitutional Court constitutes a laudable development. Under the former law on the Constitutional Court (Act No. XXXII of 1989) this could only be done by the president of the Supreme Court and the Chief Public Prosecutor. The Inter-Ministerial Committee preparing the ratification in its report in 1992 suggested that each court should be given the right to suspend the proceedings and invoke the Constitutional Court in case of a perceived conflict between domestic legislation and the Convention. See Drzemczewski, ‘Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification’, 250.

the ECtHR judgments.¹⁷ This is all the more important because – in principle – Hungarian judges are under the obligation to directly apply the Convention and the Strasbourg judgments. According to Act No. L of 2005. on the procedure concerning international treaties “in interpreting an international treaty the decisions of the body entrusted with the authority to settle disputes arising out of the treaty must also be considered” [Article 13(1)]. This provision was meant to put an end to the debate on the extent to which Strasbourg jurisprudence has to be followed in domestic proceedings.¹⁸ Prior to the entering into force of the Law on international treaties only the CC’s duty to observe Strasbourg jurisprudence was obvious due to the constitutional provision that Hungary shall ensure the conformity between international and Hungarian law in order to fulfil its obligation under international law [Article Q (2)]. This debate was supposed to come to an end, but seemingly the 2005 Act did not resolve all debates.

II.1. Disregard of the ECtHR case-law: clear violation of national law

Although the Supreme Court in its judgments dating back to 2003 and 2004 stated that all Hungarian courts have to follow the jurisprudence of the ECtHR, this position was not shared by all judges: some insisted on applying exclusively domestic laws and opined that the ECtHR judgments were not binding for Hungarian courts.¹⁹ Unfortunately, even after the entering into force of Act L of 2005 on the procedure concerning international treaties, there have been cases in which courts consciously disregarded judgments of the ECtHR arguing that those are binding on the government as party to the Strasbourg proceedings only. As the Metropolitan Court of Appeal argued in a case: although the ECtHR “judgments – as a result of legal harmonization – shape Hungarian law, Hungarian courts are not obliged or authorized to apply them directly”.²⁰

17 Article 23(2) of Instruction 9/2012 of the President of the Curia on the Organizational and Operational Regulation of the Curia. Available at <http://www.kuria-birosag.hu/hu/kuria-alkotmanyos-helye-feladatai-es-hataskore>

18 E. Polgári, ‘The European Convention on Human Rights and the Case-Law of the European Court of Human Rights in Hungarian Judicial Practice’, *Fundamentum*, 5 (2008), 74.

19 *Ibid.*, 74–5, 80.

20 Judgment No. Pfv.V.20.607/2007/9. Cited in *ibid.*, 75.

Case *Vajnai v. Hungary* of 8 July 2008, Application number 33629/06 involved Attila Vajnai, then vice-president of the Workers' Party, a Hungarian left-wing political party, who was convicted for wearing a five-pointed red star, the symbol of the international workers' movement banned by Article 269/B of the Hungarian Criminal Code then in force (Act No. IV of 1978) at a demonstration on the streets of Budapest. The Court underlined that there was no real and present danger of any political movement or party restoring Communist dictatorship. As to the red star as a political symbol of totalitarian ideology, the ECtHR noted that the potential propagation of that ideology, however repellent, cannot be the sole reason for criminalization of the use of totalitarian insignia. The red star is a symbol to which several meanings may be attached and in the present case it was used by a leader of a registered political party without any known totalitarian ambitions. His use of the totalitarian symbol cannot be equated with dangerous propaganda in the Court's view. On the contrary, Article 269/B of the Hungarian Criminal Code then in force did not require proof that the actual display amounted to totalitarian propaganda, but limited the use of the red star in an unreasonably broad and indiscriminate way: the use of the red star was prohibited unless it served a scientific, artistic, informational or educational purpose. Therefore, the Court found Hungary to be in violation of Article 10 ECHR. Not just the legislative power, but also judiciary could have remedied the problems of the respective Criminal Code provision by applying the test developed by the ECtHR whenever adjudicating cases of displaying the insignia of totalitarian regimes. Nevertheless, it failed to do so, and continued to hold suspects responsible for wearing the red star, irrespectively of the social and individual contexts. In the *Fratanoló* case,²¹ which resulted in finding Hungary again in breach of the Convention for convicting applicant for using the red star in public, the Pécs Court of Appeal argued that it may not apply the test developed by the ECtHR in the *Vajnai* judgment. In the court's opinion it has to apply the provision of the Hungarian Criminal Code according to which the offense is completed by the mere public display of symbols of totalitarian regimes. Therefore the court is prevented from extending the inquiry to further facts as indicated in the *Vajnai* judgment.²² The second part

21 *Fratanoló v. Hungary*, No. 29459/10, 3 November 2011.

22 According to the *Vajnai* judgment the criminal conviction for using the red star is in line with the Convention if it can be proven that there was a real danger of restoring Communism and that the defendant identified herself or himself

of the red star saga in front of the CC is an example of good practice, please see Chapter II.3.

In the more recent case *Magyar v Hungary*, the Hungarian system of life imprisonment without parole was challenged and held to be in violation of the Convention.²³ In a series of relevant judgments the Hungarian Constitutional Court and the Supreme Court proved that they were neither capable of enforcing European standards, nor of complying with European review mechanisms,²⁴ and the latter also instructed ordinary courts not to directly consider the Convention, but apply domestic law instead, even if in clear contradiction of Strasbourg tests. In *Magyar v. Hungary* the ECtHR issued its long awaited judgment on the Hungarian life imprisonment regime, and held that the sanction of life imprisonment as regulated by the respondent state, which is *de jure* and *de facto* irreducible, amounts to a violation of the prohibition of degrading and inhuman punishment as regulated by Article 3 ECHR. The outcome was rather predictable in light of previous Strasbourg case-law, in particular the Grand Chamber decision in *Vinter v. the UK*.²⁵ The judgment was challenged by the Hungarian government, but the request to the Grand Chamber referral was rejected. The judgment became final in October 2014. First the ECtHR distinguished the case from earlier case-law, in particular from *Törköly v Hungary*,²⁶ where the Applicant was not excluded from conditional release since the domestic court imposed a life sentence on him, with eligibility for release on parole after 40 years. There the Court applied a lower scrutiny to the institution to presidential pardon. In the *Magyar* case however, the Applicant was excluded from conditional release, therefore a stricter review applies to his case. The stricter test made the Court come to the following conclusion: since domestic Hungarian legislation did

with the meaning of the sign representing a totalitarian regime. For a critical assessment of the position of the Pécs Court of Appeal, Pfv.V.20.607/2007/9. Bárd, 'The non-enforcement of Strasbourg decisions and its consequences'.

23 ECtHR, *Magyar v Hungary*, No. 73593/10, 20 May 2014.

24 For the saga see P. Bárd, The Hungarian life imprisonment regime in front of apex courts I. – The findings of the European Court of Human Rights and the Constitutional Court, 18 June 2015, <http://jog.tk.mta.hu/blog/2015/06/the-hungarian-life-imprisonment-hu> and P. Bárd, The Hungarian life imprisonment regime in front of apex courts II. – The findings of the Kúria (Supreme Court), 18 June 2015, <http://jog.tk.mta.hu/blog/2015/06/the-hungarian-life-imp-hu>.

25 ECtHR, *Vinter v. the UK*, Nos. 66069/09, 130/10 and 3896/10, 9 July 2013.

26 ECtHR, *Törköly v Hungary*, No. 4413/06, 5 April 2011.

not oblige the authorities or the President of the Republic to assess, whenever a prisoner requested a pardon, whether his or her continued imprisonment was justified on legitimate penological grounds, and since they were not bound to give reasons for the decisions concerning such requests, the ECtHR considered that the institution of presidential pardon, taken alone did not allow prisoners to know what they had to do to be considered for release and under what conditions, and did not guarantee proper consideration of the changes and progress towards rehabilitation made by the prisoner. The discretionary nature of the presidential pardon led the Court to believe that the life imprisonment of Mr. Magyar was in fact irreducible in breach of Article 3 of the Convention. The Court also noted that the human rights violation was caused by a systemic problem, which may give rise to similar applications, and therefore suggested a legislative reform of the system of review of whole life sentences.

The Hungarian legislative responded to the judgment by a modification of the Penitentiary Code.²⁷ According to the new review mechanism prisoners sentenced to real life imprisonment have the right to have the possibility of conditional release examined, after having served 40 years in prison. The end of a complex review mechanism is a judicial body's, the Pardon Committee's reasoned opinion, which might or might not be taken into account by the President who retains the final and discretionary say on pardon. The new law still kept the problematic parts of the earlier regulation: the President of the Republic deciding on pardon is not bound by the opinion of the Pardon Committee, and is not obliged to give a reasoned opinion, therefore aspects decisive to have a realistic chance of conditional release can still not be foreseen at the time of imposing the life sanction. At the same time, the new process was likely to fail on the ground that pardon may take place after 40.²⁸

The Hungarian Constitutional Court (hereinafter: HCC) had a chance to remedy the situation and could have prevented yet another attack on the life imprisonment regime in front of the ECtHR. However the HCC

27 See Article 109 of Act LXXII of 2014, which inserted a new subtitle on the mandatory pardon proceeding of persons sentenced to life imprisonment without the possibility of conditional release, Articles 46/A-46/H into Act CCXL of 2013.

28 As foreseen by P. Bárd, *op. cit.*

missed this opportunity in HCC Resolution 3013/2015. (I. 27.). In a rather dubious decision the majority of the court rejected the complaint and did not decide the case in the merits. The majority noted that the rules on life imprisonment changed since the constitutional challenge was submitted. The majority held that the new rules introduced by the Penitentiary Code on the Pardon Committee procedure were new circumstances that made the case substantially obsolete, and therefore the procedure was terminated. The majority decision was harshly criticized for a lack of causal relation between the change of the law and a constitutional review becoming obsolete.²⁹ These voices stated the obvious: the mere fact that a law was amended does not automatically render the modification constitutional.

As a means of individual measure of enforcement in its decision of 11 June 2015 the Kúria, the Supreme Court of Hungary had to decide on Mr. Magyar's case again in the review procedure. The judgment was rendered in the middle of political pressures not to destroy the constitutionally entrenched³⁰ institution of life imprisonment without parole.³¹ Two issues needed to be decided by the Kúria in light of the Strasbourg *Magyar* judgment: the procedural form reviewing the possibility and the earliest date of conditional release. The Kúria acknowledged that the Hungarian law's Pardon Committee review mechanism contravened the Convention as interpreted by the ECtHR due to its discretionary nature. Therefore the Kúria disregarded the new piece of law, sentenced Mr. Magyar to life, with conditional release possible after 40 years the earliest. By refusing the Pardon Committee

29 Eötvös Károly Institute, Immár "nyilvánvalóan okafogyott" az Alkotmánybírósághoz fordulni [It became clearly obsolete to turn to the Constitutional Court], <http://www.ekint.org/ekint/ekint.news.page?nodeid=769>.

30 The possibility of real life imprisonment was constitutionally embedded into Article IV Section (2) of the Fundamental Law, which holds that real life imprisonment may only be imposed for the commission of intentional and violent criminal offences. One should read this provision in conjunction of Article Q Section (2) of the Fundamental Law on Hungary's obligation to ensure that Hungarian law was in conformity with international law.

31 Nem fogjuk hagyni a tényleges életfogytiglan eltörlését [We will not let the abolition of the real life imprisonment regime], 28 May 2015, <http://www.fidesz.hu/hirek/2015-05-28/nem-fogjuk-hagyni-a-tenyleges-életfogytiglan-eltorleset/>; Szükség van a tényleges életfogytiglanra a többszörösen visszaeső bűnözőkkel szemben [Real life imprisonment is needed for recidivists], 10 June 2015, <http://www.fidesz.hu/hirek/2015-06-10/szukseg-van-a-tenyleges-életfogytiglanra-a-tobbszorosen-visszaeso-bunozokkel-szemben/>

proceeding and placing the decision on a potential future conditional release of Mr. Magyar into the hands of the judiciary, the Kúria created a *Törkőly*-like scenario, and therefore the Hungarian justices believed that their judgment could not be successfully attacked in front of the ECtHR. The Kúria dismissed the possibility of taking the ECtHR cases other than those decided against Hungary into account. With this problematic stance, it excluded the *Vinter* case from its review, and as a consequence refused to go into the merits of the 40-year-rule. A week later a resolution concerning the uniformity of criminal law was issued by another Section of the Kúria,³² making clear that the Magyar case must not set precedent, and that it should have been decided taking the new pardon committee procedure into account. The Kúria also took the stance that in case a criminal procedure is reopened as an individual measure of enforcement, the court shall not directly rely on the Convention, but shall apply domestic law not effected by the Strasbourg judgment. The Kúria also stated that Hungarian courts must not assess Hungarian laws in light of the Convention. It insisted that life imprisonment without the possibility of parole is allowed by international law, and that the ECtHR case law, the Hungarian Constitutional Court's decision or the above mentioned Magyar decision do not offer reasons to depart from the newly established pardon procedure. This statement is difficult to interpret, since the Constitutional Court did not decide on the new procedure in the merits, whereas the Strasbourg jurisprudence is in clear contradiction with the new rules.

As a consequence of the Hungarian disrespect for Strasbourg decisions, the ECtHR refined its position in a judgment where it found Hungary's new legislation on whole life sentences again to be in violation of Article 3 of the Convention. In *T. P and A. T. v. Hungary*³³ the Court found the 40-year-rule for reviewing the possibility of conditional release as too long and a violation of its earlier case-law, namely *Vinter v. the UK*.³⁴ The ECtHR not only made clear that the new law is in violation of the Convention, but it indirectly condemned the Kúria for not taking its case-law into consideration, other than cases where Hungary was a Respondent, in the review procedure. At the same time there was a lack of sufficient safeguards in the remainder of the procedure foreseen by

32 Resolution No. 3/2015 concerning the uniformity of criminal law.

33 *T. P and A. T. v. Hungary*, Nos.: 37871/14 and 73986/14, 4 October 2016.

34 ECtHR, *Vinter v. the UK*, Nos. 66069/09, 130/10 and 3896/10, 9 July 2013.

the new Hungarian legislation. The ECtHR was therefore not persuaded that, the applicants' life sentences provided them with the prospect of release or a possibility of review. The judgment is not yet binding. The Hungarian Ministry of Justice thinks the Strasbourg judgment is ill-founded and considers appealing to the Grand Chamber.³⁵

II.2. Cherry-picking from the case-law and abusive references to the Strasbourg jurisprudence

Fortunately more and more courts in Hungary invoke Strasbourg jurisprudence in different type of cases, such as custody of children, pretrial detention, judges' disqualification for lack of impartiality, or in personality rights lawsuits.³⁶ It must also be noted that when reading the references to Strasbourg jurisprudence in some of the decisions of higher courts and of the CC one may gain the impression that the ECtHR case law is invoked rather to give additional legitimacy to the conclusion the courts have already arrived at under Hungarian law.³⁷

From time to time in order to justify the desired outcome courts invoke Strasbourg jurisprudence when this is clearly inappropriate, or arbitrarily select certain passages of the ECtHR decisions that are in contrast with the spirit of the judgment at hand.

The CC, for instance, in the decision finding the provision of the Criminal Code that penalizes the violation of national symbols to be compatible with the Constitution,³⁸ invoked the *Otto-Preminger Institute*³⁹ and *Wingrove*⁴⁰ judgments. It rightly noted that in those cases the interference with the applicants' freedom of expression was found to be justified for the protection of others' right to respect for religious feelings but drew the arbitrary conclusion that the conviction

35 See the government's website at <http://www.kormany.hu/hu/igazsagugyi-miniszterium/hirek/aggalyos-a-tenyleges-eletfogytig-tartoszabadsagvesztessel-kapcsolatos-itelet>, 4 October 2016

36 For references to the ECtHR case law see E. Polgári, 'The European Convention on Human Rights and the Case-Law of the European Court of Human Rights in Hungarian Judicial Practice' *Fundamentum*, 5(2008), 74–80.

37 Viktor Kazai, *op. cit.*

38 Constitutional Court Decision No. 13/2000. (V. 12.).

39 *Otto-Preminger Institute v. Austria*, No. 13470/87, 20 September 1994, Series A295-A.

40 *Wingrove v. United Kingdom*, No. 17419/90, 25 November, the ECHR 1996-V.

and feeling of belonging to a given state should be afforded similar protection. The CC disregarded the fact that the ECtHR found the interference acceptable through reading Articles 9 and 10 of the Convention together, while the “feeling of belonging to a certain state” may not be brought under any right listed in the ECHR.⁴¹

The decision of the Metropolitan Court on the prolongation of the pretrial detention in the case underlying the *Hagyó* judgment of the ECtHR⁴² involving an opposition politician, is a striking example of the abusive reference to Strasbourg jurisprudence, taken out of context in order to justify conclusions that are opposite to what the ECtHR has ruled.⁴³ According to the decision “there is extremely pressing public interest in fully and accurately exploring the criminal conduct that caused loss of state property of a magnitude unprecedented in the history of the Republic of Hungary and in convicting all members of the criminal organization suspected of having committed the crimes. The unimpeded conduct of the investigation requires that the suspects are completely deprived of their personal liberty. The authorities’ activity aiming at proving the suspects’ guilt must be given preference over the rights of the suspects. The suspects’ right to liberty is outweighed by the public interest in prolonging the pre-trial detention”. The Metropolitan Court noted without indicating one single judgment that this was the position of the ECtHR.⁴⁴

II.3. References to the ECHR and the related case-law by domestic courts: good practices

Undoubtedly, the Strasbourg jurisprudence has had an impact on enhancing the democratic process and political pluralism. The first set of relevant cases concerns the **freedom of assembly**. In *Bukta and others v. Hungary*⁴⁵ the Court found that the dispersal of a spontaneous peaceful

41 Judge Németh in his concurring opinion noted that the reference to the ECtHR judgments and the conclusion drawn was incorrect.

42 *Hagyó v. Hungary*, No. 52624/10, 23 April 2013. The Court found Hungary in violation of Articles 3, 5(3), 5(4), 8, and Article 13 in conjunction with Article 8.

43 Case No. 30. Bnf. 1355/2010.

44 Metropolitan Court, Bnf. 1355/2010/2., 26 May 2010. The full text of the decision is available at <http://hagyomiklos.com/files/07.pdf>. We are grateful to Mr. A. Kádár, copresident of the Hungarian Helsinki Committee for drawing attention to the decision of the Budapest Court.

45 *Bukta and others v. Hungary*, No. 25691/04, 17 July 2007.

assembly because of the demonstrators' failure to notify the police in advance was in breach of Article 11. Following the Bukta judgment the CC ruled that freedom of assembly extends also to demonstrations held without prior organization and annulled the provision of the law on freedom of assembly (Act No. III of 1989) which listed the absence of prior notification among the grounds for dispersing demonstrations.⁴⁶

In *Patyi and others v. Hungary*⁴⁷ the ECtHR found that the interference with the applicants' freedom of assembly had been disproportionate. The applicants who were among the creditors of an insolvent private company were planning to hold silent demonstrations in front of the prime minister's private home. They duly notified the police, which refused to grant permission with the explanation that the demonstration would hinder traffic. The decision of the police was confirmed by the Budapest Regional Court. Although the interference pursued the legitimate aims of protecting others' rights and the prevention of disorder the ECtHR found the explanation given by the police and the court unconvincing and concluded that the limitation of the applicants' freedom of assembly was not necessary in a democratic society.

Second, the preceding judgments of the ECtHR have broadened the scope of **freedom of expression** and contributed significantly to the strengthening of political pluralism primarily through rulings of the CC. In 1994 the CC found in its decision focusing on freedom of the press⁴⁸ that the criminal offense of insult to an authority or an official that carried a heavier penalty than ordinary slander and defamation is incompatible with the freedom of expression as guaranteed in the Constitution and repealed the relevant provision of the Criminal Code. The CC asserted that, with the annulling of the offense, the reputation of public figures and those exercising official authority is protected under the general provisions of the Criminal Code on slander and defamation.

The decision of the CC also implicitly modified the provision on slander if committed to the detriment of officials and politicians. According to the relevant provision of the Criminal Code the offender was criminally

46 Constitutional Court Decision No. 75/2008. (V. 29.).

47 *Patyi and others v. Hungary*, No. 5529/05, 7 October 2008.

48 Constitutional Court Decision No. 36/1994. (VI. 24.).

liable of an allegation if that could impugn the honor of the injured party irrespective of the truthfulness of the allegation. However, the court could permit the defendant to prove the truthfulness of the allegation if this was justified by public or pressing private interest. If permission was granted and the defendant succeeded in proving the truthfulness of the slanderous allegation he or she had to be acquitted. Accordingly only proven truth precluded criminal liability.⁴⁹

However, with respect to slanderous allegations made in respect of politicians and other public figures, the CC asserted that the person making the allegation can be held criminally liable only if he or she knew that the statement was in essence untrue, or was only unaware of its untruthfulness because he or she failed to display the necessary care and circumspection incumbent upon him or her according to the relevant rules of his or her vocation or profession. Thus, contrary to the text of the Criminal Code, the CC recognized impunity also for false allegations provided that the injured party was a public figure and the defendant could not be blamed for negligence with regards to the error in fact.

The CC relied heavily on the case law of the ECtHR. It summarized and employed the principles developed by the Court on the scope and the limits of criticism infringing the honor of politicians and public officials in the leading cases such as *Lingens v. Austria*,⁵⁰ *Castells v. Spain*,⁵¹ or *Thorgeirson v. Iceland*.⁵²

In 2004 the CC – through the adoption of a constitutional requirement – extended the immunity of Members of Parliament on their expressions containing a value judgment made against fellow Members of Parliament s, politicians acting in public, or persons exercising public power in the context of debates pertaining to public affairs.⁵³ The CC reviewed the rules on the immunity of Members of Parliament in constitutional democracies and with reference to numerous judgments it summarized the Strasbourg case law on politicians' freedom of speech. The CC stressed the importance of free debate of public

49 Act No. IV of 1978 on the Criminal Code, Article 232.

50 *Lingens v. Austria*, No. 9815/82, 8 July 1986, Series A103.

51 *Castells v. Spain*, No. 11798/85, 23 April 1992, Series A236.

52 *T. Thorgeirson v. Iceland*, No. 13778/88, 25 June 1992, Series A239.

53 Constitutional Court Decision No. 34/2004. (IX. 28.).

affairs in Parliament and concluded that in the case of allegations that could impugn the honor of a politician the immunity of a Member of Parliament can be suspended only if he or she knew that the statement was, in essence, untrue. By this the CC further broadened impunity from prosecution for slander: Members of Parliament may not be held criminally liable for false allegations even if the error can be attributed to their failure to display the necessary care provided that the allegation concerns public affairs and is made against other politicians or persons exercising public power. In sum, the ECtHR case law through the decisions of the CC has had considerable impact on raising awareness of the crucial place of uninhibited political speech in a democratic society. This is true, even if some recent legislative measures raise concerns, and it may not be ruled out with certainty that the achieved standard in guaranteeing freedom of political speech will be lowered. As noted earlier, the Venice commission had criticized the provision of the fourth amendment of the FL,⁵⁴ which prohibits the exercise of the right to freedom of speech “with the aim of violating the dignity of the Hungarian nation”. The Venice commission rightly fears that this provision could easily be abused for curtailing the criticism of the Hungarian institutions and office holders. The new Criminal Code penalizes the violation of not only the national anthem, the flag, or the coat of arms of Hungary as did the previous Criminal Code, but also violation of the Holy Crown [Article 334 of Act No. C of 2012]. The fourth amendment to the FL brought about a rather problematic change to political advertisement during election campaigns: parties and candidates may only publish political content through the public media, which as research and perception shows stands close and is loyal to the governing coalition [Article IX (3)].

We shall come back to the follow-up of the judgments *Vajnai v. Hungary* and *Fratanoló v Hungary* on the wearing of a five-pointed red star discussed *supra*. Following the ECtHR judgment in Attila Vajnai’s case, the applicant was acquitted by the Supreme Court in March 2009, but because the law was not changed he was tried and made responsible for the wearing the red star act again.⁵⁵ As a result of the constitutional

54 European Commission for Democracy through Law (Venice Commission), Opinion No. 720/2013, CDL-AD(2013)012, Strasbourg, 17 June 2013 (Opinion).

55 In the meanwhile a new Criminal Code, Act C of 2012 has been adopted and the provision on the display of insignia of totalitarian regimes was taken over without changes. (Article 335 of the Hungarian Criminal Code)

complaint by Mr. Vajnai, the CC reviewed the provision on the display of insignia of totalitarian regimes after 13 years again in its decision 4/2013 (II. 21.). The Act on the Constitutional Court allows for a second review if circumstances significantly changed in the meanwhile,⁵⁶ and a Strasbourg judgment amounts to such a significant change. With regard to the ECtHR case-law, the CC invalidated the respective Criminal Code provision as of 30 April 2013. As a result Parliament reinserted a modified version of the provision into the Criminal Code, and according to new Article 335 the commission of the act needs to be capable of disturbing public peace – in particular in a way of violating the human dignity or piety of victims of dictatorial regimes – in order for it to qualify as a crime.

A number of provisions of Act XIX of 1998 on the Criminal Procedure as amended in 2002, 2003 and 2006 are supposed to ensure a **speedy proceeding**. According to Article 176, the investigation has to commence within the shortest possible period and has to be concluded within two months following its order or start. The prosecutor can extend this deadline by two months, in a complex case. After the lapse of that deadline, only the County Prosecutor General may postpone the deadline up to one year from the commencement of the criminal proceedings. After one year, the deadline of the investigation may be extended by the Prosecutor General. Should the investigation be conducted against a specific person, the extension may not be longer than two years.

According to Article 179 detained suspects have to be interrogated within twenty-four hours. In line with Article 216 after the inspection of the documents of the investigation, within thirty days after receiving the documents, the prosecutor has to examine the files of the case and take an action (perform further investigation, suspend or terminate the investigation, or file an indictment). In exceptional cases, this deadline may be extended by the head of the prosecutor's office by thirty days.

In complicated cases, at the recommendation of the head of the prosecutor's office, the superior prosecutor may exceptionally permit a longer – but maximum ninety-day – deadline.

According to Article 287 on the continuity of the trial, the court shall not interrupt an already commenced trial, unless required due to the

56 Act CLI of 2011 on the Constitutional Court, Article 31.

scope of the case or for other reasons. In these exceptional cases, the presiding judge may interrupt the already commenced trial for a maximum eight days, and the court may adjourn the trial. Within six months, the trial may be resumed without repetition, unless the composition of the panel has changed; otherwise the trial has to be recommenced anew. As to the appeal at second and third instance, Articles 358 and 391 provide that the chairperson of the panel of the court sets the trial date within 60 days from the date when she or he received the document.

Decision 155/2005. (X.4.) of the National Council of Justice as amended through Decision 78/2007. (VI.5.) obliges the courts to annually inform the National Council of Justice of cases processed for more than five years. The National Council of Justice also asked the Supreme Court, and Appellate Courts to discuss the ECHR cases in professional workshops. Furthermore, the Hungarian Judicial Academy is to incorporate in its courses Article 6(1) case law of the ECtHR.

III. Conclusions

In 2012 Gábor Kardos, professor of international human rights law, recalled the concerns voiced by Western European experts more than twenty years ago when the accession of the former Communist countries of Eastern Europe had been put on the agenda. He also made an attempt to assess taking Hungary as the example whether the concerns have proven to be valid or not.⁵⁷ As Kardos observes, it was feared that the accession of the transition countries would lower the level of protection reached by the early 1990s resulting in the alienation of the old state parties from their own human rights protection system. It was also anticipated that as a result of the applications from the new Member States the ECtHR would be confronted with problems of basically political nature such as the protection of minorities, compensation for property nationalized after World War II, or difficulties arising from prosecution of crimes committed under the Communist regime. This – in the skeptics' view

57 G. Kardos, 'Az Emberi Jogok Európai Bírósága és Magyarország: Jogi kultúra és hatékonyság' [The European Court of Human Rights and Hungary: Legal Culture and Efficiency], *Kriminológiai Közlemények* (Magyar Kriminológiai Társaság, 2012), 205–7.

– would have hindered the ECtHR in further refining its jurisprudence on human rights problems arising in the context of established democracies of Western Europe. As regards the Hungarian experience Kardos concludes that the fears and concerns have proven to be unfounded. The Court was successful in avoiding the use of a ‘double standard’ and the judgments rendered in respect of Hungary have not lowered the level of protection. The Court, of course, was confronted with cases that had their source in the Communist past. In *Rekvényi*⁵⁸ the Court accepted the restriction imposed on police persons’ political activities taking into account – among others – the difficulties new democracies were faced with in the period of transition. However, the Court in *Vajnai* and *Fratanoló* made it clear that the historical experience of a nation that it was prepared to consider right after the collapse of the Communist regime when assessing the necessity of the interference may no longer be invoked with the passing of time when the country had become a stable democracy.

The ECtHR has contributed to strengthening democracy in Hungary through, among others, judgments concerning the right to vote, freedom of expression, and access to information. Its jurisprudence has become part of Hungarian legal culture. Strasbourg case law is regularly invoked by the Hungarian CC and human rights NGOs, and an increasing number of attorneys use frequently the ECtHR jurisprudence in litigation before domestic courts. Courts from time to time invoke the ECtHR judgments, but this is certainly not the rule. However, research indicates that also in the Western European democracies it took for judges two decades to regularly rely on judgments of the Strasbourg Court.⁵⁹

Because structural deficiencies may not be corrected overnight we may expect a further increase in the number of applications. A further reason for this is that the CC, as compared to earlier times, has less opportunity to quash laws that fail to comply with the judgments of the ECtHR. First, the competence of the CC has been narrowed down. Second, laws found unconstitutional by the earlier judgments of the CC

58 *Rekvényi v. Hungary*, No. 25390/94, 20 May 1999, ECHR 1999-III.

59 G. Kardos, ‘Az Emberi Jogok Európai Bírósága és Magyarország: Jogi kultúra és hatékonyság’ [The European Court of Human Rights and Hungary: Legal Culture and Efficiency], *Kriminológiai Közlemények* (Magyar Kriminológiai Társaság, 2012), 207.

have now been incorporated into the FL. Finally, laws running counter to the jurisprudence of the ECtHR (such as the provision in the Criminal Code on mandatory life imprisonment⁶⁰ or the law criminalizing homelessness⁶¹) have been adopted exactly on the basis of the FL. These are just a few examples which will all likely contribute to an increase of the workload of the Strasbourg Court.

60 Act No. C of 2012. Article 90 (2)

61 Article 1 of Act No. CLIII of 2011 amending Act No. LXIX of 1999 on Petty Offenses.

Implementation of the European Convention on Human Rights in France, a process of progressive acculturation

Stephanie Bourgeois

Former lawyer at the ECtHR
with the contribution of Mr Sébastien Pompey,
French Magistrate

Chapter I: Status of the ECHR at the national level	168
I. Status of the international law in French Constitutional Order	168
A. Monism and the Binding Character of International Law.....	168
B. Status of International Law in the Hierarchy of Norms.....	169
C. Direct Effect of the ECHR and of its Substantial Protocols	169
II. Scope of the Judicial Review.....	170
A. Radical separation between constitutional and conventional review.....	170
B. The impact of the 2008 constitutional reform introducing the QPC	172
1. Impact on Conventional review by the ordinary courts.....	172
2. Impact on Constitutional review by the Constitutional Council.....	173
Chapter II: Implementation of the ECHR by national courts....	173
I. Anticipation of the ECHR violations by national courts ..	175

A. Domestic judgments on Police custody	175
B. Domestic judgments on the reasoning of decisions of assize courts.	177
II. The change in judicial practice following a judgment of the ECtHR	179
A. The change of judicial practice by the judge	179
B. Legislative intervention	181
III. Procedures set out to redress the violations.	182
IV. Conclusions.	183
Chapitre III: Conclusions and Recommendations	183

Chapter I: Status of the ECHR at the national level

Although France was one of the Council of Europe's founding States, signing the text of the Convention on 4 November 1950, it ratified the European Convention on Human Rights (ECHR) only on 3 May 1974.

In addition to being late, the French ratification was also restricted in scope. Although France accepted the compulsory jurisdiction of the Court (former Article 46 ECHR), it refused to adopt the declaration under former Article 25 ECHR relative to the competence of the Commission concerning the individual right to petition. The individual right to petition was only recognized on 2 October 1981.

I. Status of the international law in French Constitutional Order

A. Monism and the Binding Character of International Law

France is formally a monist State with primacy of international law, which means that international rules do not need to be transposed in order to be enforceable in domestic law; international treaties are automatically integrated into the internal system by the simple formality of their publication in the official gazette.

It follows that France considers judgments of international courts that have had their jurisdiction approved under a treaty that has been duly ratified and approved (e.g. the European Court of Human Rights, the

ECtHR, the International Court of Justice, etc.) to be binding, regardless of whether they are handed down in an interstate dispute or in cases brought by individuals exercising their right to individual application under an international treaty.

B. Status of International Law in the Hierarchy of Norms

Article 55 of the Constitution determines the relationship between domestic and international law: *“Treaties or accords duly ratified or approved have, from the moment of their publication, an authority superior to those of laws, on condition, for each accord or treaty, of application on the part of the other party.”*

According to the Constitution, the ECHR is superior to national law. With regard to the relationship between the ECHR and French constitutional law, however, the Council of State (*Conseil d’Etat*)¹, in its judgement dated 30 October 1998, *Sarran, Levacher et autres*, unequivocally affirmed that *“the superiority conferred upon international agreements by Article 55 of the French Constitution does not, in the internal legal order, apply to provisions of a constitutional nature”*². The position of the Court of Cassation is the same³.

In terms of rank in the hierarchy of norms, treaty law therefore possesses supra-legislative, but infra-constitutional status.

C. Direct Effect of the ECHR and of its Substantial Protocols

All substantive human rights provisions of the ECHR and its substantive protocols have been granted direct effect in the French legal system.

Like all international treaties which are duly ratified and published, the Convention is automatically integrated into the national legal order.

The recognition of its direct application did not raise any problems with either the administrative or the civil judges. The Court of Cassation

1 France has three superior courts: the Constitutional Council, the Council of State, and the Court of Cassation. The Constitutional Council is entitled to exercise judicial review of constitutionality of statutes and treaties, as well as to monitor the integrity of national elections. The Court of Cassation and the Council of State are the highest courts of the judicial and administrative branches of the French system, respectively.

2 Translation by the author.

3 Cass. Ass. Plen. 2 June 2000, *Fraisse*.

(*Cour de cassation*) paved the way in the Raspino Case of 3 June 1975. It established the direct applicability of the ECHR by judging that: *'the Indictment Chamber had to decide according to the provisions of the European Convention on Human Rights and Fundamental Freedoms which, regularly promulgated in France, confers direct rights to individuals under French jurisdiction'*⁴. Likewise, the administrative courts did not find it difficult to admit the direct applicability of the ECHR as a whole⁵. Therefore, the provisions of the ECHR have always been recognised as sufficiently precise, both in their object and in their form, to be directly applicable in the French legal order without any additional measures for execution.

In addition, the legal doctrine unanimously considers that the reciprocity rule does not apply to human rights treaties.

The monist features of the system, however, have clashed with the separation of powers, specifically, the prohibition of judicial review of statute. The Court of Cassation, prior to the 1975 *Sté Café Jacques Vabre* judgement,⁶ and the Council of State, prior to the 1989 *Nicolo*⁷ judgement, refused to review the legality of French law with respect to the ECHR, on separation of powers grounds. Today, the Constitutional Council (*Conseil constitutionnel*) alone reviews the constitutionality of laws, while the civil and administrative judges control the compliance of laws with the Convention. Given these two distinct systems of rights protection, it may be misleading to characterize the French legal order as monist. In any case, the French Constitution contains no clause stipulating that international law be taken into account to interpret domestic law, although the courts have developed such doctrines.

II. Scope of the Judicial Review

A. Radical separation between constitutional and conventional review

What are the consequences in terms of judicial review of the legal status thus defined?

4 Translation by the author.

5 See the reports of R. ABRAHAM and F. SUDRE, 'Le juge administratif et la CEDH', *Revue Universelle de Droits de l'Homme* (1991), pp. 275 and 259.

6 Cass., Ch. Mixte, 24 May 1975, *Ste Cafe Jacques Vabre*.

7 CE, ass., 20 October 1989, *Nicolo*.

This question was answered by the Constitutional Council in an important decision of 1975⁸. In this decision, the Constitutional Council established a radical separation between constitutional and conventional review. This has been consistently upheld such as in the 2010 Ruling *Jeux en ligne*⁹. Referring to the hierarchy of norms, constitutional review operates to affirm constitutional supremacy and expresses a judgment on the validity of statutory laws with respect to the Convention. Therefore, any unconstitutional law is invalid and must be quashed. Conventional review, by contrast, addresses the relationship between domestic and international law; and Article 55 has to be interpreted by the competent authorities as a conflict of laws rule giving priority to the application of international law. The radical separation between constitutional and conventional review resulted in a more or less dualistic orientation of the constitutional system.

Civil courts began to exercise this prerogative from 1975 onwards and finally, in 1989, administrative courts did so. Thus, in the French legal system the national jurisdictions supervise the conformity of the national law to the ECHR under conventional review and not under constitutional review.

With respect to constitutional review, it should be stressed that the Constitutional Council does not recognize the international norms as norms of reference in its judicial review of the conformity of the national laws to the Constitution. It has ruled that *“a statute that is inconsistent with a treaty is not ipso facto unconstitutional”*¹⁰. This means that French legal order does not consider the ECHR as part of the so-called “block of constitutionality” (mainly comprised of the Constitution and its Preamble); the Convention can therefore not be pleaded directly as part of the Constitution, for purposes of constitutional review of laws and acts.

8 See Cons. Constit., décision n° 74–54, 15 January 1975, *Loi relative à l’interruption volontaire de grossesse*, item 4.

9 In this Ruling, the Constitutional Council expressly distinguished between *“le contrôle de conformité des lois à la Constitution, qui incombe au Conseil Constitutionnel, et le contrôle de leur compatibilité avec les engagements internationaux ou européens de la France qui incombe aux juridictions administratives et judiciaires”*.

10 See Cons. Constit., decision n° 74–54, 15 January 1975, *Loi relative à l’interruption volontaire de grossesse*, item 5.

B. The impact of the 2008 constitutional reform introducing the QPC

In 2008, a constitutional amendment was adopted which introduced a new constitutional review procedure to the French legal system: ‘the priority preliminary ruling on the issue of constitutionality’ (in French, *question prioritaire de constitutionnalité*, QPC). The QPC system thereby sets up *a posteriori* review for laws which would infringe a liberty or fundamental right.

According to new Article 61-I of the Constitution, an application for a priority preliminary ruling on the issue of constitutionality is the right for any person who is involved in legal proceedings before a court to argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution. Priority status is however given to the issue of constitutionality. This means that when a court is asked to rule on arguments which challenge both the constitutionality of a statute (priority preliminary ruling on the issue of constitutionality) and the failure of said statute to comply with international treaties and agreements (plea of failure to comply with international obligations) the court shall be required to address the issue of constitutionality in priority.

1. Impact on Conventional review by the ordinary courts

In the new QPC Procedure, the high courts are invested with the responsibility for filtering constitutional questions. Indeed, when a first-instance court or a court of appeal is confronted with a party referral asking for a preliminary constitutional ruling, the competent judge transmits the application to his/her high court. It is up to the Court of Cassation or to the Council of State to decide whether or not the question fulfils the legal conditions and has to be submitted to the Constitutional Council in order to be decided.

Their involvement in the QPC procedure has pushed the high courts to rethink their reasoning on human rights. Both courts have felt obliged to increasingly examine, consider and reflect on fundamental rights protection. As a result, sensitivity to human rights has been heightened. In particular, when considering whether a question is new or serious in order to decide whether it should be submitted to the Constitutional Council, the high courts are led to anticipate the approach of the Constitutional Council pointing out possible violations

of the Convention or the Constitution and elaborating the best strategy. Thus the collaboration between the high courts within constitutional review proves to be quite beneficial for conventional review.

2. Impact on Constitutional review by the Constitutional Council

Since the QPC was introduced in France, some violations of the ECHR rights are now no longer presented as such, but are rather framed as constitutional cases and hence can be dealt with via constitutional review.

Still, it seems that the ECHR serves as a constant interpretive reference for the Constitutional Council. This can be explained by the fact that the ECHR rights are still more concrete and offer more protection to individual rights in comparison to the French Constitution, especially because the Court has offered extensive interpretations of these rights.

It follows that the Constitutional Council is increasingly integrating European human rights law into its reasoning and decisions, so much so that it anticipates possible convictions of France in Strasbourg. Even if the ECHR is still not part of the “block of constitutionality” and still not considered an imperative norm with constitutional value, with the introduction of the QPC, it is gradually becoming a persuasive element of this block.

Chapter II: Implementation of the ECHR by national courts

Although French citizens could not bring cases to the ECtHR before 1981, the impact of the Convention on domestic courts began to be felt much earlier, shortly after its ratification in 1974. Indeed, as long as the Convention was binding on the parties and could be directly invoked before the domestic courts, the latter applied the provisions of the ECHR in a number of cases, in particular in relation to conscientious objectors invoking Article 9 of the ECHR¹¹.

11 See in particular the decision by the Court of Cassation dated 4 January 1979, under reference n° 78–92042, where the judges held that: “ *Attendu que la Cour d’appel énonce que si le prévenu était libre de changer d’opinion, comme le prévoit l’article 9 de la CESDH, il n’aurait pu se prévaloir du statut particulier de l’objecteur de conscience qu’en se conformant aux règles fixées par la loi du 10 juin 1971* ”.

Since then, the influence of the ECHR has been extended to all areas of French law and has profoundly shaped the French legal order. Every single French court is influenced sooner or later by the reasoning of the ECtHR and French judges, although initially somewhat suspicious, today appear prepared to apply national law in conformity with the prescriptions of the ECtHR.

Indeed, contrary to the French judges' initial belief, the Convention and the Court's case-law do not restrict them, they are a source of extension of their role and a factor strengthening their primary mission as guardians of individual liberties. French judges are thus entering a phase of acculturation – or rather inculturation – in the sense that they have appropriated the instrument not as something external but as part of the resources at their disposal¹².

The judicial review of conformity of laws with the ECHR has thus become today a daily task of the judicial and administrative courts. In this context, when the issue of a possible inconsistency between domestic law and the ECHR provisions is raised, the three following scenarios may arise:

- First, the domestic law is fully consistent with the Convention. In this case, the national court may refer to domestic law only after having demonstrated – where appropriate – that the latter is fully consistent with the ECHR provisions.
- Second, the domestic law clearly conflicts with the ECHR provisions. Under Article 55 of the Constitution, the national court is obliged to set aside national legislation that violates Convention rights.
- Third, the domestic law is only partially consistent with the Convention. The national court will apply domestic law only in light of the provisions of the Convention.

This Conventional review, as carried out by the ordinary courts, ensures full effectiveness of the rights enshrined in the Convention and can take several forms.

12 Antoine Garapon, *The Limits to the Evolutive Interpretation of the Convention* in "Dialogue between judges, European Court of Human Rights, Council of Europe, 2011".

I. Anticipation of the ECHR violations by national courts

This anticipation by the national judge is in line with the principle of subsidiarity which features implicitly in Article 1 of the Convention. States have indeed the primary obligation to respect and protect Convention rights and the national judges are on the front line when it comes to identify possible inconsistencies of statutory provisions or of factual situations.

Two striking examples may serve to illustrate this point.

A. Domestic judgments on Police custody

The first example relates to the implementation of a far-reaching reform to bring the French justice system in line with the ECHR standards on the right to custodial legal assistance.

When the French system of police custody appeared to have become inconsistent with the Court's case-law, as reflected in judgments delivered by the ECHR against Turkey¹³, the French high courts issued two notorious judgments.

First, in its decision 2010–14/22 QPC du 30 juillet 2010, the Constitutional Council adopted the ECtHR reasoning with respect to the importance of the investigation stage for the preparation of the criminal proceedings¹⁴ and declared contrary to the Constitution the provisions of the French Criminal Code under which legally aided assistance was not available for persons deprived of liberty from the very start of the detention and before any questioning. It is worth underlining that, for the first time ever, the Constitutional Council postponed the effects of this repeal – during a period of eleven months – to enable the French legislature to reform the legislation applicable.

13 See notably, ECtHR, 27 November 2008, *Salduz v. Turkey* (GC), Application No. 36391/02 and ECtHR, 13 October 2009, *Dayanan v. Turkey*, Application No. 7377/03.

14 See notably, item 16 of the Decision: "(...) même dans des procédures portant sur des faits complexes ou particulièrement graves, une personne est désormais le plus souvent jugée sur la base des seuls éléments de preuve rassemblés avant l'expiration de sa garde à vue, en particulier sur les aveux qu'elle a pu faire pendant celle-ci; que la garde à vue est ainsi souvent devenue la phase principale de constitution du dossier de la procédure en vue du jugement de la personne mise en cause", available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/201014_22QPC201014qpc.pdf

It is therefore by transposing judgments against Turkey to the French legal order that the Constitutional Council held that some provisions of the Criminal Procedure code, including its Article 63–4, should be invalidated.

Yet, interestingly, the decision by the Constitutional Council makes no reference whatsoever to the ECHR case-law. Indeed, as discussed earlier, treaty law possesses supra-legislative, but infra-constitutional status, it can therefore not be used as such as a legal basis for decisions taken by the Constitutional Council. The Commentary¹⁵ accompanying the Constitutional Council decision refers, however, expressly to the ECHR case-law, in particular to the judgment delivered in the case *Salduz v. Turkey*¹⁶.

The same dichotomy can be found in numerous decisions of the Constitutional Council: although the Commentaries make it clear that the Constitutional Council ruling draws the consequences of the ECHR case-law, this is not explicit in the decision itself.

Examples include the decision 2016–536 QPC, dated 19 February, on administrative searches and seizures under the state of emergency, whose Commentary recalls relevant the ECHR case-law on searches¹⁷. Similarly, the Commentary accompanying decision n° 2015–512 of 8 January 2016¹⁸, includes detailed information on the ECHR case-law in relation to revisionism.

The second set of decisions was delivered by the Court of Cassation on 15 April 2011¹⁹ by which it quashed a decision concerning an arrest under Article 63–4 of the Criminal Procedure Code before the deadline provided by the Constitutional Council for the amendment of this provision. It explained that the States signatory to the ECHR are obliged to respect

15 Some rulings of the Constitutional Council are accompanied by a Commentary written by its legal service.

16 See the Written Commentary published in *Les Cahiers du Conseil constitutionnel*, Cahier n° 30, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/201014_22QPCccc_14qpc.pdf

17 See the Commentary available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2016536QPC2016536qpc_ccc.pdf

18 See the Commentary available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2015512QPC2015512qpc_ccc.pdf

19 Plenary, appeals no. 10–17049, 10–30242; 10–30316 and 10–30313.

the judgments of the ECtHR without waiting to be brought before it or have their legislation amended and that, in order for the right to a fair trial to be practical and effective, the person in custody should as a rule be entitled to the assistance of a lawyer from the start of the measure and during the interrogations. The Court of Cassation only made reference to Article 6 of the Convention without citing the relevant case-law against Turkey which is obviously the basis of its ruling.

More generally, it is noted that the national judge most often refers to the ECHR only in response to arguments raised by the parties concerning an incompatibility with the ECtHR case-law. The rulings of the Court of Cassation being generally brief, merely indicate that the situations examined are contrary or not to one of the ECHR provisions, without giving further details. As regards the lower courts, where decisions are reasoned more thoroughly, it is rather rare to see detailed reference to the ECtHR case-law therein.

By way of example, the Aix-en-Provence Court of Appeal, in a judgment of 21 June 2012 (no. 11/02930) confirmed the nullity of a marriage after merely recalling that the ECtHR, in a judgment of 13 September 2005, held that the limitations imposed on the right of a man and a woman to marry and to found a family must not be so severe as to hinder its enjoyment. The judgment was quashed by the Court of Cassation solely on the basis of a reference to Article 8 of the ECHR and on the ground that *"in so ruling, whereas the annulment of the marriage ... was unjustifiably interfered with in the exercise of the ... right to respect for private and family life, since the union, concluded without opposition, had lasted for more than twenty years, the Court of Appeal breached the aforementioned text"*²⁰.

B. Domestic judgments on the reasoning of decisions of assize courts

Another interesting example of self-initiated change by national courts of their established practice, following a judgment of the ECtHR, concerned the reasoning of the decisions of assize courts²¹.

20 Translation by the author.

21 Assize courts are the competent courts to try crimes. They have the particularity of being composed mainly of jurors, which are drawn by lot from the civil society on the basis of electoral lists.

By a judgment of 16 November 2010²² the Grand Chamber found a violation against Belgium on the ground that, in the absence of a statement of reasons in the judgment of the Assize Court and in view of the lack of clarity of the questions put to the jurors, the accused was not able to understand the reasons for his conviction. This judgment was quickly reflected in the rulings of the French assize courts, as the criminal procedure had certain common points with the Belgium one.

Without waiting for the ECtHR to formally examine the compatibility of the French system with the Convention, several assize courts have started to reason their decisions, albeit in brief, allowing the accused to know the elements founding their conviction. In a highly mediatised case, on 20 June 2011 the Paris Assize Court convicted Yvan Colonna to life imprisonment, stating the reasons for its decision in a written document appended to the list of questions submitted to the court, although the French law did not require such a reasoning. No reference to *Taxquet v. Belgium* was made in the decision of the Assize Court.

This change of practice is all the more interesting given that in 2002 the ECtHR had already ruled on a complaint alleging lack of reasoning in a judgment rendered by a French assize court and had not found it admissible²³.

In five subsequent judgments, the ECtHR examined the compliance with Article 6 para. 1 of the ECHR of several jury trial cases and in three of them²⁴ it found a violation. Consequently, the French assize courts had to add a “reasoning sheet” to their decisions, containing the elements which founded the conviction.

These examples show that national judges, concerned with respecting the rights and freedoms set out in the Convention, adapt their decisions in line with the approach taken by the ECtHR, even if formally no reference to the Strasbourg case-law is made.

22 ECtHR, 16 November 2010, *Taxquet v. Belgium*, Application No. 926/05.

23 ECtHR, 15 November 2001, *Papon v. France*, decision on admissibility, Application No. 54210/00.

24 ECtHR, 10 January 2013, *Agnelet v. France*, Application No. 61198/08; CEDH, 10 January 2013, *Fraumens v. France*, Application No. 30010/10; CEDH, 10 January 2013, *Oulahcene v. France*, Application No. 44446/10.

II. *The change in judicial practice following a judgment of the ECtHR*

Under Article 46 of the Convention, the States have an obligation to take the necessary measures to comply with the Court's judgments. Where the violation relates to an individual situation and results from the inadequate implementation (or lack thereof) of the Convention provisions, there is no specific action to be taken. This was particularly the case in several judgments against France finding a violation of freedom of expression following the publication of a press article, in particular because of the margin of appreciation left to the state in this field.

Where the case-law of the Supreme Court is the source of the breach, it is for the respective Court and the judges under its jurisdiction to comply by reversing its practice (A).

When the breach stems from the inconsistency between a national provision and the Convention, the judge is obliged to give prevalence to the latter. Most of the time, the change in practice is accompanied by a legislative change to put an end to the inconsistency (B).

A. *The change of judicial practice by the judge*

A particularly enlightening example is provided by the *Menesson* case, concerning a couple with fertility problems who had decided to go to California to obtain a surrogate pregnancy, in accordance with the applicable law in that state. After the birth of their twins, the couple obtained birth certificates from California, requesting their entry in the French civil registers upon their return to France.

On 6 April 2011²⁵ the Court of Cassation upheld the refusal of registration on the ground, *inter alia*, that *"it does not deprive children of maternal and paternal filiation that Californian law recognises, nor prevents them from living with the Menesson couple in France, it does not infringe the right to respect for private and family life of these children within the meaning of Article 8 of the European Convention on Human Rights, nor their best interests guaranteed by the Article 3 § 1 of the International Convention on the Rights of the Child"*²⁶.

25 Appeal No 10-19053.

26 Translation by the author.

In its judgment²⁷, the ECtHR found that there had been a violation of the right to respect for private life of the two girls born through a surrogate pregnancy, while expressly recalling that States remain free to prohibit the use of this practice on their territory. On the other hand, it considered that France could not refuse to take into account a legal situation validly created abroad.

In a judgment of 3 July 2015²⁸ concerning a similar case, the plenary of the Court of Cassation²⁹ changed its practice holding that *“having found that the birth certificate was neither irregular nor falsified and that the facts stated therein corresponded to reality, the Court of Appeal rightly found that the contract of surrogate pregnancy... did not interfere with the registration of the birth certificate”*. No reference was made to the Convention or to the relevant the ECtHR case-law which generated the reversal, although the arguments raised before it were based thereon. The same can be said about cases involving requests for change of civil status made by transsexuals.

In a judgment of 31 March 1987³⁰, the Court of Cassation refused to change the civil status on the ground, inter alia, that the change in appearance was the deliberate will of the subject. The judgment gave rise to an application³¹ before the ECtHR which found a violation of Article 8 of the Convention on the ground that the applicant, whose physical appearance did not correspond to her civil status was placed, on a daily basis, in a situation incompatible with the respect for her private life.

In a judgment of 11 December 1992³², the Court of Cassation, following a mere reference to Article 8 of the Convention, amended its case-law and validated the change in civil status after it had ascertained that the applicant had all the characteristics of transsexualism and that the medical and surgical treatment to which he had been subjected led to a physical appearance closer to the female than to the male.

27 ECtHR, 26 June 2014, *Mennesson v. France*, Application No. 65192/11.

28 Appeal No 14–21323.

29 This is the most solemn formation of the Court of Cassation.

30 Appeal No. 84–15691.

31 ECtHR 25 March 1992, *B. v. France*, no. 13343/87.

32 Appeal No. 91–11900.

B. Legislative intervention

In *Kruslin and Huvig v. France*³³ the ECtHR found that the telephone tapping carried out during the investigation lacked a legal basis and concluded that there had been a violation of Article 8 of the Convention. Since the finding of a violation was based on the absence of a legal basis, the judge had no margin of discretion in assessing whether the Convention provisions has been complied with. It is for this reason that the legislator swiftly intervened by adopting, on 10 July 1991, a law framing the practice of telephone tapping.

Subsequently, the judges were able to examine the telephone tapping carried out and the ECtHR, invested with two new applications, delivered two judgments, in 1998 and in 2005, in which it considered that the measures had now a legal basis and were therefore “prescribed by law”.

A second set of cases showed what might be called a bad practice on the part of the legislator and the judges, reluctant to modify the provisions and the practice in order to comply with the ECtHR judgments.

In *Kress v. France*³⁴, the ECtHR found that the proceedings before the Council of State lacked impartiality on the basis, inter alia, of the participation of the Government Commissioner in the deliberations.

In response, the Government added article R731-7 to the Code of Administrative Justice, which henceforth provides that the Government Commissioner “*shall attend but not take part in the deliberations*”, meaning that he does not vote, although present.

The amendment was examined in *Martinie v. France*³⁵, in which the ECtHR pointed out that the violation in the Kress judgment concerned the mere presence of the Government Commissioner during deliberations, regardless whether active or passive, and not its participation in the deliberations.

33 ECtHR 24 April 1990, *Kruslin and Huvig v. France*, Application No. 11801/85.

34 CEDH, 7 June 2001, *Kress v. France*, Application No. 39594/98.

35 CEDH, 12 April 2006, *Martinie v. France*, Application No. 58675/00, para. 53.

It is only after this second judgment, in which the Court did not provide more details than in the *Kress* judgment, that the Government finally introduced Article R732–2 of the Code of Administrative Justice, which provides that the decision is henceforth taken without the presence of the parties and the Commissioner of Government.

III. Procedures set out to redress the violations

As seen above, the consideration by the judge or the legislator of a violation of the Convention sometimes implies a change in law or in practice. It also requires that procedures be set out at national level, in order to give the judge the opportunity to rule on a potential violation before it reaches the ECtHR, in accordance with the principle of subsidiarity.

Thus, the Government added³⁶ Article L. 141–1 in the Code of the judicial organisation providing the possibility to complain about the length of judiciary proceedings before domestic courts. A similar provision appears in the Code of Administrative Justice³⁷, giving the possibility to challenge before the Council of State the length of an administrative procedure.

The aim of these remedies is to enable the national judge to take account of the complaints of potential applicants before the ECtHR, to assess the possible delays in the proceedings and, where appropriate, to grant compensation for the damage suffered. Above all, they prevent the applicants from referring directly to the ECtHR a complaint not submitted beforehand to a national court.

Similarly, the legislator introduced³⁸ a new remedy allowing the review of a criminal case following a judgment of the ECtHR, generally for lack of fairness of the procedure.

This allows the national courts, under the control of the ECtHR, to remedy the errors committed by granting the accused the benefit of a new trial, where possible.

36 By an Ordinance of 8 June 2006.

37 Article R. 311–1 of the Code of Administrative Justice.

38 Law No. 2000–516 of 15 June 2000 strengthening the protection of the presumption of innocence and the rights of victims.

IV. Conclusions

The French judge seems eager to take into account the case-law of the ECtHR by amending its practice, and does not hesitate in certain cases to transpose into national practice judgments against other states concerning similar situations.

If formally it is rare to find an extremely developed reasoning related to the provisions of the Convention, it is above all because France is a country with a legal system based on Roman law and does not know, internally, the principles of common law applied by the Anglo-Saxon countries. Thus, the French judge principally applies a legal provision, even when it should be read in light of the relevant case-law.

This undoubtedly explains why the Court of Cassation decides only by means of reference to the articles of the Convention, without citing or analysing the ECtHR case-law in its reasoning. The same goes for the Council of State or the Constitutional Council. However, the ECtHR judgments are taken into account by national courts and the commentaries of the Constitutional Council and the conclusions of the Government Commissioner (who became a public rapporteur) or of the Advocate General before the Court of Cassation come to amply demonstrate this approach.

Chapitre III: Conclusions and Recommendations

As discussed earlier, the French courts do not hesitate to apply the Convention directly to ensure that the fundamental rights of individuals are respected, they are usually inclined to follow the case-law of the ECtHR carefully. However, if the domestic courts are often prepared to change their own interpretations and judicial approaches pursuant to cases against France, they seem to be more reluctant to take a proactive approach and to amend their case-law solely on the basis of the Convention, in order to prevent possible violations.

Apart from the cases on police custody and on the reasoning of assize court judgments³⁹ which are exceptions, it is not common for the French courts to overturn their case-law on the basis of a judgment

39 See the *Salduz* and *Taxquet* cases, cited above.

delivered by the ECHR against another State. It is not common either that national courts amend their case-law proactively, to prevent a possible finding of violation of the Convention. This can be explained by several reasons:

- First, members of legal professions (judges, lawyers, etc.) seem to lack sufficient knowledge of both the ECHR and/or of the ECtHR implementation mechanisms⁴⁰.

In this regard, it should be recalled that France has a legal system stemming from Roman law and based on codified laws, i.e. on a written text which is then subject of interpretation by the courts. It should therefore be distinguished from “common law” systems which are largely based on precedent, meaning the judicial decisions that have already been made in similar cases.

However, the mechanism for the implementation of the Court’s rulings is precisely a common law mechanism, unknown to French Courts. This makes the direct application of the ECHR more difficult.

- Second, the concepts used in the ECHR are not fixed or “frozen in time”. The Court makes extensive use of the evolutive interpretation and has recalled on numerous occasions that the Convention is a “living instrument”. The meaning of a concept can therefore change over time.

This mobility of law is, again, a feature of “common law” systems. In “roman law” systems, major changes do not result from judicial practices but from amendments brought to the written law. If evolutive interpretation provides the ECtHR with the necessary degree of flexibility to ensure the realization of rights guaranteed by the ECHR and the Protocols, it makes it challenging for the national courts to anticipate such changes.

- And third, the principle of subsidiarity and the margin of appreciation recognized by the ECtHR to States are vague concepts whose outlines can only be determined

40 The need for improving university education and professional training has been identified by the CM as a general need that should be met in all Member States. See its Recommendation Rec (2004)4 *on the European Convention on Human Rights in university education and professional training*.

by the Court in the light of the circumstances of the cases submitted to it.

Therefore, when national courts intend to amend their case-law on the basis of the European Convention, they should first assess whether these changes would remain within the limits of their margin of appreciation or would overstep it. This assessment has proved to be difficult, in particular when it comes to complaints based on Article 10 of the Convention. Indeed, when, for example the case relates to criminal conviction for the publication of an article, the margin of appreciation afforded to the domestic courts will vary depending on the content of the publication and of the specific circumstances of the publication. It will therefore make it particularly difficult for domestic courts to anticipate the position of the ECtHR.

Despite the efforts by the ECtHR to improve the readability of its case-law, applying the Convention to the specific circumstances of the cases submitted to domestic courts is sometimes still largely unpredictable.

In view of the above, some avenues for improvement can be identified.

As we have just seen, the Court must take a dynamic and flexible approach to the interpretation of the Convention to ensure that its rights are made practical and effective. Evolutive interpretation provides a necessary degree of flexibility to the ECHR law in a rapidly changing environment. It is therefore extremely difficult to seek solutions from the ECtHR whose tangible efforts to clarify its case-law have just been highlighted. Solutions should therefore come from the domestic authorities and could include the following:

- Further work should be pursued on the analysis and on the transposition of the cases against other States so that domestic courts could better identify the provisions of French law that may be in breach of the Convention. This work should be carried out by the high courts in their areas of concern since the workload⁴¹ faced by lower courts would not enable them to do it on their side.

41 According to the 2016 Report by the CEPEJ, there are in France 10 professional judges for 100.000 inhabitants while the European average is 21 professional judges for 100.000 inhabitants: <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>.

- Communication efforts and dialogue between the European authorities (the ECtHR and the Committee of Ministers) and the domestic supreme courts should be reinforced in order to better identify and address possible systemic violations.
- Member States should take all necessary measures to ensure that Protocol 16 to the ECHR enters into force shortly. This Protocol will indeed enable the highest courts of member States to forward to the ECtHR requests for advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms set out in the Convention. This new mechanism seems to provide adequate solutions to the difficulties encountered by domestic courts when applying the Convention since it will limit the legal uncertainties they are currently facing.

CIP – Каталогизација у публикацији
Народна библиотека Србије, Београд

341.231.14(4)(094.2)(082)

342.7(4)(094.2)(082)

COMPARATIVE Study on the Implementation of the
ECHR at the National Level / Alessia Cozzi... [et Al.] ; [editor
Silvija Panović-Đurić]. – Belgrade : Council of Europe Office in
Belgrade, 2016 (Београд : Досије студио). – 186 str. ; 21 cm

Tiraž 500. – Foreword: str. 5–6. – Napomene i bibliografske
reference uz tekst.

ISBN 978-86-84437-85-5

1. Cozzi, Alessia [аутор]

а) Европска конвенција за заштиту људских права и
основних слобода

б) Судска пракса – Људска права – Европа – Зборници

COBISS.SR-ID 228529164

This comparative analysis deals with the issues of application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in national legal systems of several States Parties to the Convention.

These important issues are dealt with in eight articles elaborating the application of the ECHR in Croatia, France, Greece, Hungary, Italy, Poland, Russia and Serbia. Countries were selected following two criteria: monistic or dualistic systems – in order to demonstrate different legal consequences in both systems due to the application of the European Convention, and the commencement of the application of the Convention – presenting the states that have been parties to the Convention since its adoption, as well as those that have become so in the past two decades, which affects different level of activity of their courts regarding the implementation of the Convention.

The experience from one country, as shown here, can serve as the inspiration for improving the implementation in another, as well as for overcoming certain obstacles and problems identified in the articles.

www.coe.int/nationalimplementation

ENG

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE