

**THE IMPORTANCE OF THE EUROPEAN CONVENTION FOR
THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL
FREEDOMS IN CONSTITUTIONAL LAW AND THE
CONSTITUTIONAL SYSTEM OF THE REPUBLIC OF SERBIA ***

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Abstract. *The paper analyzes the position of the European Convention in the Serbian national legal system within the framework provided by the new Serbian Constitution, which derives from the fact that our country has ratified the Declaration. The importance of the European Convention for constitutional law is discussed in the light of its specific legal nature, its position in comparative law, in particular in the system of constitutional law of the Republic of Serbia, and also in view of the activities of the Constitutional Court of Serbia, especially when it decides on constitutional appeals.*

Key words: *The European Convention, international treaty of human rights, constitutional court, constitutional appeal.*

INTRODUCTION

Today we can claim there are three relevant systems for the protection of human rights. The first one functions on the national level, with national courts playing the central role; the second, functioning on the level of the European Union, with the prominent role of the European Court of Justice; and the third, established on the level of the Council of Europe, with the European Court of Human Rights at the forefront. These systems cannot be viewed as fully separate and independent, but rather as complementary systems coexisting in the same broad or narrow area. The synthesis of these systems is ensured through the activities of national courts, which apply both their national law and the law of the European Convention for the Protection of Human Rights and Fundamental Free-

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doms (hereinafter: the European Convention) and the law of the European Union, if they are member states, or if they are invited to apply European standards on the protection of human rights nationally. When we discuss the European standards for the protection of human rights, we have in mind, first of all, the standards established by the European convention and those originating from the activities of the European Court of Human Rights. Although in EU member states one should not neglect the protection of rights exercised before the European Court of Justice, the European Convention and the European Court of Human Rights have been reputable for a long time and are still "leaders" in this domain. After all, in spite of the fact there is the Charter of Fundamental Rights, in the most recent Lisbon Treaty a possibility is suggested that the European Union should accede to the European Convention. Likewise, the system of the protection of human rights in the European Union has long relied solely on the system given in the European convention. It is the European Convention, therefore, that binds together both EU member states and non-member states.

The European Convention for the Protection of Human Rights and Fundamental Freedoms emerged on the ruins of Europe, establishing a healthy, solid foundation for the protection of human rights at the European level. With the European Convention at the forefront, in parallel with economic reconstruction, a restoration of democratic institutions was undertaken, where a comprehensive system for the protection of human rights was built. The European Convention was signed on 23 May 1950 in London, and it entered into force in 1953. From that moment until late 1980s it was implemented only in Western European countries. After the collapse of socialism, the Convention played the crucial role in binding the East and the West. Back then, the Convention started its "second" life and was adopted in the countries of Central and Eastern Europe, which soon doubled the number of signatories and members of the Council of Europe. Apart from this, the acceptance of the European Convention and membership in the Council of Europe was very important for the former socialist countries, which took their new positions in the European "house", wishing to get closer to the European Union. The ratification of the European Convention and accession to the Council of Europe imply a serious reform of the legal system and its harmonization with the established European standards, and the first step along this path is to harmonize the system for the protection of human rights with standards defined by the European Convention and the European Court of Human Rights. This is why membership in the Council of Europe is experienced as an "antechamber" of the European Union.

The European Convention was ratified by the State Union of Serbia and Montenegro on 26 December 2003, along with the Protocols No. 1, 4, 6, 7, 12, and 13, and it entered into force on 3 March 2004. In accordance with the Guidelines for the Transformation of the Relations between Serbia and Montenegro, and also Article 60 of the Constitutional Charter¹, Serbia became the legal successor of the State Union, and, among other things,

¹ Article 60 of the Constitutional Charter reads: "In the event of the separation of Montenegro from the State Union of Serbia and Montenegro, international documents pertaining to the Federal Republic of Yugoslavia, in particular United Nations Security Council's Resolution 1244, would pertain and be fully valid for the State of Serbia, as a legal successor. The member state exercising the right to separate from the Union does not inherit the right to become a subject of the international law, while all issues under dispute are to be resolved between the successor state and the new independent state."

became a member of the Council of Europe and committed itself to the observation of the European Convention. This change of the legal status of the country, the subsequent adoption of the new Serbian Constitution (2006), and the first judgments of the European Court of Human Rights with regard to the Republic of Serbia, have all reintroduced the question of the importance of the European Convention in the system of constitutional law of the Republic of Serbia. In order to evaluate the importance of the Convention in our national constitutional system, we will analyze the legal nature of the Convention, its position in the national legal system, as defined by the Serbian Constitution, and its application in practice before the Serbian Constitutional Court. This analysis may lead us to the proper conclusion on how influential and important the European Convention is in the national constitutional system for the protection of human rights.

1. THE LEGAL NATURE OF THE EUROPEAN CONVENTION

The European Convention was signed by the "Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law", which, "reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend"². Having signed the European Convention "the High Contracting Parties" agreed to "secure to everyone within their jurisdiction the rights and freedoms"³ defined in this document. Therefore, by its legal nature, the European Convention is a multilateral treaty of international law and, as such, it is subject to the rules of international law of treaties, especially the Vienna Convention on the Law of Treaties of 1969. This applies to the regulations of its entering into force, interpretation of treaties, reservations, terminations.⁴

The European Convention is an international treaty, but an international treaty of human rights, concluded between states to the benefit of individual users (beneficiaries), i.e. people in the jurisdiction of contracting states. As a contract on human rights, the European Convention is a treaty act in the full sense of the word. Through this treaty, states do not exchange prestations, but rather establish an objective regime of human rights, upon which anyone can call.⁵ With the Universal Declaration of Human Rights as its model, the goal of the European Convention, and thus of the Council of Europe, under whose auspices it was adopted, is to "achieve full unity of its members and preserve and develop fundamental human rights and freedoms". It is different from other similar international treaties of human rights in that it defines legal measures to be undertaken in case there has been a breach of rights contained therein. A revolutionary novelty introduced by the Convention has to do with the right of every individual to file a suit against his or her own

² From the Preamble of the European Convention.

³ Article 1 of the European Convention ("The Official Bulletin of the Republic of Serbia, "International Treaties"-No.9/2003).

⁴ See S. Caric, "The influence of the European Convention on the international law and Serbian law" in Z. Radivojevic, *Human Rights Guarantees in the Constitution and International Law*, Nis, 2008, p. 85.

⁵ More on this in V. Dimitrijevic, D. Popovic, T. Papic, V. Petrovic, *International Law of Human Rights*, Belgrade, 2006, p. 6.

state before the European Court of Human Rights for violating the rights contained in the Convention, thus becoming a party in the proceedings equal to the state. At the same time, by adopting the Convention, the signatories have agreed to observe and implement resolutions reached in such proceedings by the European Court of Human Rights. The importance of this system is not diminished by the fact that there is subsidiarity, "activating" the provisions only if the member state is unable to provide efficient protection of human rights by its own legal remedies. To the contrary, through this the European Convention strengthens its position even more, creating a twofold obligation for the member state: first, its national law must be harmonized with the European Convention; and second, it must rectify any violation of fundamental rights and freedoms protected by the Convention. The purpose of this obligation is to ensure that every country respects the rights defined in the Convention, but also to create a new, objective, positive legal system for the protection of human rights.⁶

Thus, in the practice of the European Court of Human Rights, through the interpretation of the European Convention, a new form of law was slowly made. This is law in substantial, not formal sense. The law of the Convention, just like the law of the European Community (Union), is neither national nor international, but contains elements of both. This law is applied not only by the Court of Human Rights, but also by the Committee of Ministers of the Council of Europe and national courts. The law contained in the Convention does not produce obligations only for the states, but also defines a series of rights related to individuals in the domain of civil liberties, thus making a new system substituting the individual system of each member state for a common European system. In this process, the Convention ceases to be an "ordinary" international treaty based on the principle of reciprocity, and becomes a normative treaty, encompassing both international and national legal structures. Therefore, the Convention cannot be interpreted as other multilateral synallagmatic contracts.⁷

The special character of the European Convention is also emphasized in the practice of the European Court of Human Rights. Thus, in the *Pfunders Case*, the Court stated that the obligations accepted by the high contracting parties are of essentially objective nature, made in such a way with the primary purpose of protecting the fundamental rights of people from the violation performed by contracting states, rather than creating subjective and reciprocal rights of the contracting states themselves. In the *Belgian Linguistic Case*, the Court stresses that the contracting states have committed themselves in the European Convention to ensuring effective protection of human rights, not only for the historical context in which the Convention was made, but also for the sociological and technical development of our age, which offers contracting states possibilities to regulate the enjoyment of these rights.⁸

Member states are expected to ensure actual enjoyment of the rights guaranteed in the Convention. For individuals to truly enjoy these rights, it is not enough for the state to

⁶ Cf. Dona Gomien, *A Short Guide through the European Convention of Human Rights*, Belgrade, 1994, p. 11, A. Jaksic, *The European Convention of Human Rights – Commentary*, Belgrade, 2006, p. 20, and T. Burgental, *International Human Rights: Digest*, Belgrade, 1997, p. 104.

⁷ Andrew Dremczewski: "The sui generis nature of the European Convention on Human Rights", *The International and Comparative Law Quarterly*, Vol. 29, No. 1, Jan 1980, pp. 54-63.

⁸ *Ibidem*

prescribe them in its own regulations, or to ensure that international treaties are directly applicable, but that these rights can actually be enjoyed. One of the most important pre-conditions for this is the existence of the effective legal remedy, which will be able to rectify any violation of fundamental rights and freedoms protected by the Convention.

2. THE POSITION OF THE EUROPEAN CONVENTION IN THE NATIONAL LEGAL SYSTEM

In relation to this, one should mention that the European Convention does not contain any provisions on its status in the national legal system of the signatory state. However, having in mind the commitments mentioned above, each state is allowed to define the status of the European Convention in its own regulations. The lack of such provisions is understandable if one recalls the situation and circumstances in the 1950s when the Convention was adopted. At that time, there were no indications that the European Community would be made, nor how much integration would once emerge from this Community, so that imposing such a commitment would have been inappropriate. Apart from this, many states, in particular Scandinavian ones, had long cherished the tradition of dualism of national and international law.

The European Court of Human Rights has reiterated a number of times that there is no obligation for the state to incorporate the Convention into the national law, and that the Court will not investigate the compliance of the national legislation *in abstracto*.⁹ The Convention does not generally oblige contracting states to ensure effective implementation of any provision from the Convention.¹⁰

Since there are no internal mechanisms to accurately define its status in the national law, every state has chosen its own way to incorporate the European Convention. Thus, in comparative law there are various solutions covering the status of the European Convention in the national law. In some countries, the European Convention has the status of constitutional law (Austria) or is given supremacy over national law, including even the constitution (the Netherlands). In most states the European Convention has the status otherwise given to international treaties in the general sense, and is ranked below the constitution, but above legislative acts. As a rule, the constitution of a state contains provisions on the status of international contracts in the national legal system, but does not explicitly define the status of the European Convention. At best, the constitution defines the status of international treaties on human rights.¹¹ Countries with long tradition of dualism have

⁹ In the case *James and others v. United Kingdom*, the Court stresses that in the general sense the Convention does not bind the contracting states to ensure effective implementation of any provision from the Convention. Although Article 13 of the Convention states that anyone whose rights and freedoms as set forth in the Convention have been violated shall have an effective remedy before a national authority, neither Article 13 nor the Convention in the general sense pose any obligation for the state to ensure an effective implementation of the provisions of the Convention in its national legal system. The Court takes the position that Article 13 does not go so far as to allow that national legal acts of contracting states should be challenged before national authorities since they stand in contrast to the Convention. The requirements from Article 13 shall be satisfied by the existence of effective domestic remedies to secure compliance with the legislation. *Case of James and others v. United Kingdom*, Series A, no.98, br. 84, *Case of Observer and Guardian v. United Kingdom*, Series A, no. 216, no. 76.

¹⁰ The resolution of the Swedish Engine Drivers' Union of 6 February 1967, Series A, No. 20, p. 18, paragraph 50.

¹¹ Thus, Article 10 of the Constitution of the Czech Republic deals with the status of international treaties and human rights and defines that such treaties, if properly ratified and promulgated, oblige the Czech Republic to directly apply

long "denied" the existence of the European Convention; in their national systems they often did not recognize the rights guaranteed by the Convention, nor did they observe standards applied by the European Court of Human Rights, since no one obliged them to. They were only expected to comply with and enforce the judgments of the European Court of Human Rights upon the suits initiated by citizens from within their jurisdictions. And so, their citizens could file suits against their states for not observing the commitments from the European Convention, but could not call upon the provisions of the European Convention when appealing to national courts, since the European Convention was not a part of the internal legal system.¹²

After all, in those states in which the Convention had a constitutional status, relevant state institutions did not pay particular attention to the Convention. For instance, in Austria, although the Convention was ratified in 1958 and immediately given constitutional status, the Government in office at the time held that national human rights standards matched European standards. In time, circumstances changed substantially. As a "sleeping beauty", the Convention woke up, and began a new life between 1980 and 1990. Significant changes in the Austrian constitutional system, and also in civil and criminal law, followed.¹³ Today, the Convention is a generally accepted, crucial part of the Austrian system of constitutional law. It has been acknowledged and is applied by the courts, as a means of orientation, in parallel with the case law of the European Court of Human Rights.¹⁴ There have also been changes in the Scandinavian countries, which incorporated the European Convention in their legal systems only recently, although they ratified them as early as in the 1950s. This process started in Denmark, continued in Sweden, Iceland, Norway, and then reached the British Isles.

Thus, even though there is no obligation that the Convention should be incorporated in the national law, based on its Article 1, the high contracting parties are committed to ensuring the substance of rights and freedoms guaranteed by the Convention in the national legal system, one way or the other, for all individuals in the jurisdiction of contracting states.¹⁵ Today we are witnessing a totally changed "experience" of the European Convention. Although there was no insistence on the incorporation of the Convention into the national legal system either in the Convention or in the practice of the European Court of

them and are given advantage over national laws. Source: http://www.servat.unibe.ch/icl/ez00000_.html

¹² For instance, ever since 1966, in Northern Ireland, citizens who wished to prove that the state had not respected their rights guaranteed in the European Convention could only appeal to the Court in Strasbourg, after all legal remedies in the national legal system had been exhausted. Only in October 2000 was the European Convention incorporated in the national law: since then it has been applied in Northern Ireland so that now all citizens could enjoy the rights defined in the Convention on the national level, too. If a national court decides that the right from the Convention has not been violated, the citizen can still appeal to the Court of Human Rights. See Mark Kelly, *The Right to Life: A Practical Guide to the European Convention on Human Rights*, Northern Ireland Human Rights Commission 2005. pp. 3-5 (<http://www.nihrc.org>).

¹³ A few fundamental rights were incorporated into the Austrian constitutional system, e.g. the right to education, the right to birth; a reform of the right to freedom and security followed, harmonized with the generally accepted standards put forth by the European Convention.

¹⁴ Walter Berka: "The impacts of the European Convention on human rights on the system of human rights protection in Austria" in Z. Radivojevic (Ed.), *The European System for the Protection of Human Rights*, Nis, 2005, pp. 53-64.

¹⁵ See the judgment *Ireland against the United Kingdom*, resolution of 18 January 1978, Series 1, No. 25, p. 91, paragraph 239.

Human Rights, sooner or later, all states realized that this was both necessary and useful for the state and its citizens. Citizens will not appeal to the European Court of Human Rights if they can protect the said rights before national courts, which will ensure that the state does not pay possible damages to its citizens. In such circumstances, the European Court of Human Rights could expect less load in its activities. As it may be, the increased number of contracting states has resulted in the multifold increase of petitions, where the Court has become a "victim" of its own success.¹⁶ Nowadays, when the Council of Europe gathers 47 states with over 800 million inhabitants, the future of this system may no longer be based on individual petitions.

3. THE POSITION OF THE EUROPEAN CONVENTION IN THE LEGAL SYSTEM OF THE REPUBLIC OF SERBIA

In Serbia, the Convention was ratified almost 50 years later than in Western European countries, which may be justified by the fact the country was a part of the socialist bloc, but also about 10 years later than in its neighbors, which may be "justified" by the fact the country was not interested in the protection of human rights. However, having in mind the fact that the European Convention has only recently got out of the period of "hibernation", where courts of the signatory states have only lately started to "seriously" monitor and analyze the practice of the European Court of Human Rights, Serbia can and must use the experience of other states to accelerate this process and catch up with the remaining European countries.

Like many other constitutions, the Constitution of the Republic of Serbia (2006) does not explicitly mention the status of the European Convention. Rather, the position of this Convention is determined based on the status of international treaties in general. The Constitution defines that "ratified international treaties and generally accepted rules of international law are a part of the legal system of the Republic of Serbia. Ratified international treaties cannot contradict the Constitution."¹⁷ Thus, in the hierarchy of legal regulations, international treaties are located below the Constitution, but above legislative acts. That way, in the procedure of normative control, the Constitutional Court decides on the harmonization of legislative acts and other general acts with the Constitution, generally accepted regulations of international law and ratified international treaties. However, among all international treaties, the Constitution of the Republic of Serbia still singles out the treaties from the domain of human rights. Indeed, following the Constitutional Charter of Serbia and Montenegro, the Constitution of the Republic of Serbia adopts the principle of direct application of international treaties in the domain of human rights and freedoms. *The Constitution shall guarantee, and, as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws.*¹⁸ Direct implementation of international treaties is limited only to those treaties dealing with human rights, including the European Convention. In terms

¹⁶ Since 1990 the number of contracting states has doubled, from 22 to 47 countries. In terms of petitions, there were 404 in 1981, and 4750 in 1997. Today, the number is even bigger.

¹⁷ Art. 194, par.4 and 5 of the Serbian Constitution.

¹⁸ Article 18 of the Serbian Constitution.

of the European Convention, this means that only its provisions which are suitable for direct implementation can be applied. These are "legally complete" provisions, i.e. provisions which are "legally perfect and capable of producing effect between the state and individuals in its territory".¹⁹ *The law may prescribe the manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right. Provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.*²⁰ At the same time, in Article 22, entitled "Protection of Human and Minority Rights and Freedoms" it is stated that "the citizens shall have the right to address international institutions in order to protect their freedoms and rights guaranteed by the Constitution". This provides a framework for the implementation of the European Convention in the national legal system. Our citizens are already using this possibility, mainly addressing the European Court of Human Rights, which is testified by the now substantial number of judgments already pronounced by the European Court of Human Rights and the total number of petitions filed by our citizens.²¹

4. THE EUROPEAN CONVENTION AND THE SERBIAN CONSTITUTIONAL COURT

The importance of the Convention for constitutional law is not only reflected in the status it has in the national legal system. One should also observe how influential it is on the protection of human rights in the national legal system and how much it is implemented by the bodies entitled to protect human rights. It would be particularly interesting to observe whether and how much the Constitutional Court implements the European Convention, having in mind its role of the "protector of the Constitution", but also that of the "protector of human rights and freedoms". The Constitutional Court may apply the Convention and the resolutions and legal positions of the European Court of Human Rights in two ways: through direct implementation of the applicable provision of the Convention interpreted in accordance with the legal opinion of the European Court of Human Rights, and through the acceptance of the interpretation of contents and scope of certain principles and institutes in the way in which they have been interpreted in the practice of the European Court of Human Rights. Carrying out normative control, its primary competence, the Constitutional Court can continuously "scan" its own legal system and check its compatibility with the constitution and subordinate provisions of interna-

¹⁹ See B. Nenadic, "The Position of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Legal System of the Republic of Serbia" in *The Position and Role of the Constitutional Court in the Implementation of the European Convention of Human Rights (proceedings)*. Podgorica, 2007, pp. 23-45.

²⁰ Article 18 of the Serbian Constitution.

²¹ The number of petitions against the Republic of Serbia submitted to the Serbian Government's Attorney for ECHR was 5 in 2005. In 2006, additional 40 petitions were submitted, while in 2007 another 24 files were given in. By the end of 2008, 40 new petitions were filed, 9 judgments were pronounced, and 15 resolutions made. Data taken from the site of the Serbian Citizens' Attorney for the European Court of Human Rights, <http://www.zastupnik.gov.rs>.

tional law.²² From the viewpoint of our topic here, it is relevant to observe the activities of the Constitutional Court when deciding on constitutional appeals. *A constitutional appeal may be lodged against individual general acts or actions performed by state bodies or organizations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other remedies for their protection have already been applied or not specified.*²³ As an extraordinary remedy, the constitutional appeal can be used against individual acts of the judiciary or the executive. It supplements the protection of human and minority rights in the constitutional system of the Republic of Serbia and completes the national mechanism for the protection of human rights prior to the system of protection before the European Court.²⁴ The constitutional appeal could then be considered the "most fortunate medium for the interaction between the national constitutional law and the law of the European Court of Human Rights."²⁵

In acting upon receiving constitutional appeal, the Constitutional Court has called upon the practice of the European Court of Human Rights in its justification of a number of decisions. "In deciding whether the duration of the judicial proceedings was reasonable in this suit, having in mind the practice of the European Court of Human Rights, the Constitutional Court has used the following criteria: the complexity of the case, the behavior of competent governmental agencies, the behavior of the party filing the petition, and the importance of the subject for the petitioner."²⁶ The constitutional appeal, thus, appears as a means for protecting the rights guaranteed in the Serbian Constitution, but also the rights deriving from the provisions of the European Convention.

The Constitutional Court has also relied on the European Convention and positions of the European Court of Human Rights in the procedures of normative control, even before it became a part of our legal system.²⁷ However, in the wording of the resolution, the Serbian Constitutional Court did not decide on the incompatibility of the acts with the Convention, or another international treaty. Instead, in the justification of its adjudication, it only expressed the position or the assessment that the given provisions of the act, or the act as a whole, are not accorded with certain provisions from the Convention. Thus the provisions of the Convention, i.e. the practice and positions of the European Court of Human Rights, have been used by the Constitutional Court in certain resolutions in which it exercised its abstract normative control, to interpret certain provisions of the Constitution precisely in the way defined in the provisions of the Convention, i.e. in the way in which those provisions have been interpreted by the European Court of Human Rights.²⁸

²² More on this: Simljko Sokol: "Foundations in constitutional law for the application of the European Convention in exercising the competences of the Constitutional Court of Croatia", *The Position and Role of the Constitutional Court in the Application of the European Convention of Human Rights (proceedings)*, Podgorica, 2007, pp. 11-22.

²³ Article 170 of the Constitution of the Republic of Serbia.

²⁴ I. Pejic, 'Guarantees of Human Rights in the National Legal System: Protection in Constitutional Law', in Z. Radivojevic (Ed.), *Human Rights Guarantees in the Constitution and International Law*, Nis, 2008. p. 273.

²⁵ Cf. B. Zupancic, "Constitutional Law and Jurisprudence of the ECHR", *German Law Journal*, No.10/2001, and I. Pejic, op.cit, pp. 261-275.

²⁶ See decision of the Constitutional Court, const. appeal -293/08.

²⁷ See decision of the Court, IU 358/95 of 25 September 2003, when it deliberated whether the Inheritance Act was accorded with the Constitution, resolution IU 166/03 of 4 November 2003, when it decided on whether the Bylaw on Organizing Religious Education was constitutional and legal.

²⁸ More on this: Bosa Nenadic, op.cit, pp. 23-45.

The Council of Europe insists precisely on this kind of application of the European Convention. Indeed, in its most recent recommendations, the Committee of Ministers of the Council of Europe has welcomed the fact that the Convention is now everywhere an integral part of national legal systems of contracting parties, which gives an even more important role to national courts, but also obliges member states to put in additional effort in order for the Convention to become fully effective, especially through the adaptation of national standards in such a way as to comply with those from the Convention and the case law of the Court. It is recommended that member states ensure that there are appropriate functional mechanisms for verifying how much the existing legal acts and administrative practice are harmonized.²⁹ In the Recommendation REC (2004) 6, issued by the Committee of Ministers to member states on the improvement of domestic remedies, it is pointed out that a primary requirement for an effective remedy to exist is that the Convention rights should be secured within the national legal system. Such an effect can be expected if there are national legal remedies which are effective and which lead to an adequate compensation for every violation found, or such that they prevent the avoidance of bringing repetitive cases before the Court. Today, the Court faces an increasing number of petitions, which jeopardizes the long-term effectiveness of the system and, thus, efficient national remedies become especially important. The Recommendation stresses that the primary requirement for an efficient remedy is that the Convention rights should be secured within the national legal system. In this context, it is a welcome development that the Convention has now become an integral part of the domestic legal systems of all contracting states. This development has improved the availability of effective remedies, and is further assisted by the fact that courts and executive authorities increasingly respect the case law of the Court in the application of domestic law, and are conscious of their obligation to abide by judgments of the Court in cases directly concerning their state.

This tendency has been reinforced by the improvement, in accordance with Recommendation Rec(2000) of the possibilities of having competent domestic authorities re-examine or reopen certain proceedings which have been the basis of violations established by the Court. The improvement of domestic remedies also requires that additional action be taken so that, when applying national law, national authorities may take into account the requirements of the Convention and particularly those resulting from judgments of the Court concerning their state. In order to reduce the number of petitions, some countries have introduced a general legal remedy (e.g. before the Constitutional Court).

When a judgment which points to structural or general deficiencies in national law or practice ("pilot case") has been delivered and a large number of applications to the Court concerning the same problem ("repetitive cases") are pending or likely to be lodged, the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to a competent national authority, which may also apply to current applicants. Although decisions of the European Court of Human Rights are binding for all states, the Court itself can neither change the national legislation nor annul a judgment of a national court nor order any concrete changes in the national legal

²⁹Recommendation Rec(2004)5 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights .

system. In the case *Marx vs. Belgium*, with regard to this problem, the Court only commented that "only the sued state can undertake measures it deems appropriate in order to ensure the compliance and coherence of its domestic law."³⁰ Thus, in *Serbia*, with regard to the "precedent judgment" in the case *V.A.M. vs. Serbia*, the European Court for Human Rights has pointed out that in Serbian legal system citizens do not have available an "efficient" remedy for trial within reasonable time, guaranteed in Article 13 of the European Convention. This adjudication, and the increasing number of petitions filed before the European Court, where our citizens call upon the violation of the right to trial within reasonable time, has resulted in the national introduction of a modality of constitutional appeal, which can be submitted only in the event of the violation of the right to trial within reasonable time³¹. The introduction of this remedy is an intervention by our legislator whose purpose is to fulfill the general measures that Serbia must implement in order to eliminate any further violation of human rights guaranteed by the European Convention.³²

With the purpose of implementing the decisions of the European Court of Human Rights, significant novelties have been introduced in the Serbian legal system. Namely, the Litigation Procedure Act defines that *the procedure irrevocably completed by the decision of the court may be repeated upon such request by the party if, after the irrevocably completed procedure before the national court, the European Court of Human Rights has reached a decision on the same or similar legal relation against Serbia and Montenegro.*³³ Similar novelties have been added to the Criminal Procedure Code. Thus, *the criminal procedure which has been ended through an irrevocable judgment may be repeated to the benefit of the defendant if, upon the decision of the European Court of Human Rights or another court emerging from a ratified international treaty, it has been found that during the criminal proceedings human rights and fundamental freedoms were violated or that the judgment was based on such violation, and the violation committed may be rectified in the repeated procedure.*³⁴ Also, in accordance with provisions from Article 438 of the Criminal Procedure Code, if the law has been violated, the Serbian Attorney General may petition a motion for the protection of legality against irrevocable court decisions and against the judicial proceedings which preceded the pronouncement of such irrevocable decision if the European Court of Human Rights or another court emerging from a ratified international treaty has decided that during the criminal procedure human rights and fundamental freedoms were violated or that the adjudication was based on such violation, and the competent court did not allow that the criminal procedure be repeated, or the violation made in the adjudication may be removed by the abrogation or modification of the adjudication, without a repeated procedure.

³⁰ See S. Djajic, "The protection of human rights and freedoms in the practice of the European Court of Human Rights – Individual protection, interpretation of the Convention and the efficiency of the European system", *Bulletin of the Bar Association of Vojvodina*, No. 7-8, 2001, p. 343.

³¹ Article 82 paragraph 2 of the Constitutional Court Act, thus, defines that the constitutional appeal may also be filed if all remedies have not been exhausted, in case the petitioner's right to trial within reasonable time is violated.

³² More on this in S. Lilic: "Is constitutional appeal an efficient remedy for the trial within reasonable time?", *Annals of Belgrade Faculty of Law*, year LV, 2/2007, p. 776.

³³ Article 422, paragraph 1, clause 10 of the Litigation Procedure Act ("Official Bulletin of the Republic of Serbia", 125/04).

³⁴ Article 426, paragraph 1, clause 6 of the Criminal Procedure Code.

In accordance with such changes, appropriate provisions of the Administrative Litigation Act and Administrative Procedure Act should be reformed, and harmonized with the standards set up by the European Convention. In these procedures, too, it should be possible to repeat a suit upon the judgment of the European Court of Human Rights.³⁵

Indeed, the human rights protection system defined in the European Convention should provide additional protection of human rights, while primary protection should be exercised within the national legal systems of member states. This is so even though the role of the European Court has not been only to provide the "final" way out for those whose rights have been violated, but also to provide its own practice which would cause a reverse effect on national legislations and national courts.³⁶ Hence, national courts, and constitutional courts in particular, stand out as extremely important partners of the European Court for Human Rights in protecting the rights of individuals.

5. THE IMPORTANCE OF THE EUROPEAN CONVENTION FOR SERBIAN CITIZENS

One should discuss the importance of the European Convention in the legal system of the Republic of Serbia from the point of view of citizens themselves. Namely, as the Convention has been ratified and implemented, the citizens now have the opportunity to protect their rights in a procedure before the European Court of Human Rights. How interested our citizens are in this kind of international legal protection of their rights is best seen by the number of petitions they have filed and the number of decisions pronounced in relation to the Republic of Serbia. Such data testify to the raised awareness on the importance of human rights and increased interest of citizens to protect their rights. However, the ratification of the European Convention is also important since, as of that moment, our courts have had the opportunity to implement standards previously defined by the European Court of Human Rights. Finally, the actions of the Constitutional Court caused by constitutional appeals should be a guarantee that citizens can properly protect their rights at the national level, without a need to address the European Court of Human Rights.

CONCLUDING REMARKS

For 50 years, the European Court of Human Rights has defined minimal standards in the domain of human rights, carrying out a specific kind of harmonization of national legal systems. The accumulated practice of the Court gradually transformed into a true legal system, which was continuously incorporated into national legal systems. National courts, in particular constitutional courts, thus emerge as important partners of the European Court of Human Rights. After all, the system of protection of human rights defined in the

³⁵ See Program of Legislative Reform in the Domain of Human Rights – Harmonization with International Standards – Overview for the Republic of Serbia (part two), Ministry of Human and Minority Rights of the State Union of Serbia and Montenegro, 19 May 2006.

³⁶ V. Djerić, "The reform of the supervisory system of the European Convention of Human Rights: protocol 11 following the Convention", in K. Obradović, M. Paunović (Eds.), *The Law of Human Rights*, Belgrade, 1996, pp. 113-144.

European Convention provides additional protection of human rights, while basic protection of such rights should be exercised within the national legal systems of member states. In addition, one should not neglect the influence that the European Convention and the practice of the European Court of Human Rights have on national legislations and the activities of national courts, and also on the changed awareness of citizens on how important the respect of human rights is.

In our legal system, the position of the European Convention is defined as the status of international treaties in the general sense. The judicial practice of the European Court of Human Rights is not recognized as a formal source of law, and its practice does not bind the Constitutional Court of Serbia. However, in its recent practice, the Constitutional Court has relied on the decisions of the European Court, often calling upon them in the justification of its own decisions. Such actions of the Constitutional Court are found in cases in which it has decided on constitutional appeals submitted by citizens, where citizens themselves have often called upon the provisions of the European Conventions, but also in procedures in which the Constitutional Court has carried out normative control. As for courts of general jurisdiction, they can ground their decisions in ratified international treaties, including the European Convention, for their legal validity is above legislative acts, and they can be directly implemented.

For this reason, the importance of the European Convention in constitutional law cannot be based solely on its status in the national legal system. Although it is often ranked below the constitution, the European Convention commonly provides support to courts, particularly constitutional courts, in their interpretation of the constitution, that is human rights guaranteed by this supreme legal act. Although it is not ranked as high as the constitution, in practice the Convention is often ascribed the importance equal to that of the constitution in the national legal system with regard to matters of human rights. Therefore, regardless of the position of the European Convention in the national legal system, the decisions of the European Court of Human Rights have a dimension in and importance for constitutional law in the interpretation of fundamental rights in the national legal system.

USTAVNOPRAVNI ZNAČAJ EVROPSKE KONVENCIJE ZA ZAŠTITU LJUDSKIH PRAVA I OSNOVNIH SLOBODA U USTAVNOM SISTEMU REPUBLIKE SRBIJE

Maja Nastić

U radu se analizira mesto Evropske konvencije u unutrašem pravnom sistemu u okvirima koji su postavljeni novim Ustavom Srbije, i koji proizilaze iz obaveza po osnovu prihvatanje Konvencije. Ustavnopravni značaj Evropske konvencije sagledan je u svetlu njene posebne pravne prirode, njenog mesta u uporednim, a posebno u ustavnopravnom sistemu Republike Srbije, kao i kroz postupanje Ustavnog suda Srbije, posebno onda kada odlučuje o ustavnim žalbama građana.

Ključne reči: *Evropska konvencija, međunarodni ugovor o ljudskim pravima, ustavni sud, ustavna žalba.*