THE CONSTITUTIONAL CHARACTER OF THE ECHR: OVERVIEW, CHALLENGES IN IMPLEMENTATION AND LIMITATIONS

Vesna STEFANOVSKA
PhD, Program Coordinator in the Institute for Human Rights, Republic of North Macedonia
E-mail: vesna.stefanovska87@gmail.com

Abstract

The constitutional character of the European Convention on Human Rights (ECHR or Convention) has always been an issue for debate. Having in mind the fact that the European Court of Human Rights (ECtHR or the Court) decides on violations upon fundamental rights that are a constitutional category, there is no doubt that the ECtHR is at least some sort of Constitutional Court while the Convention acts as a supranational constitution.

This article[1] focuses on the differences in the implementation of the Convention in national legal systems depending of the monist or dualist approaches and subsequently on the limitations to application of the ECHR. Indeed, the practice shows that most problems arise from the inconsistencies between the national constitutions and the ECHR regarding some issue which is differently regulated in the national law, or the state in question does not want to abide by the provisions of the ECHR regarding the subject in question. The situation is quite complicated when the conflict arises between the Convention and the national constitution on certain core human rights where the obligation to protect them is more important than established national laws and practices. The differences which arise should not be considered as a negative remark, or a system which fails to protect human rights. It is quite a difficult task for the Court to decide on possible violations of the Conventions' rights, but states should resume their obligations undertaken with the ratification of the Convention and the Court should be more open-minded and flexible in adjusting its case-law to the new developments on the European level.

[1] The translation of materials which are originally written in Macedonian language, has been done by the author.

Keywords: *ECHR, monism, dualism ECtHR, human rights and constitutionalism*

1. Introduction

Convention rights have evolved since 1953, making it difficult to predict how they will be incorporated in the national legal systems and how the relationship between the ECtHR and national constitutional courts might change. When the Convention entered into force, none of the originally contracting states possessed effective systems of rights protection. The fact that the Convention system developed during the same period that many national systems of rights protection emerged and matured, no doubt facilitated the Court's efforts to build its own political legitimacy (Keller and Stone Sweet, 2008, p.678). Rosenfeld indicates three requirements of modern constitutionalism: imposition of limits on the powers of government, adherence to the rule of law and the protection of fundamental rights. With Protocol 11, the ECHR established a system of constitutional justice, a system that entrenches fundamental rights and provides for judicial protection of those rights at the behest of individuals.

Almost seven decades after, the situation has changed. The Convention provides that only certain human rights are legally binding upon all Member States. The others contained in the additional protocols will become binding after their ratification. Most states have made considerable progress in redressing incompatibilities between the domestic law and the Convention guarantees. However, exceptions are noted when states impose limitations to the implementation of the Convention as a result of its incompatibility with the Constitution or other obstacles which negate the application in the domestic legal system. This article discusses the position that application of the ECHR, within the national legal system, depends in great part on the national constitutions and the effect that an international treaty has upon national legislation. For this reason, the relationship between the Convention and national constitutions is different in monist or dualist states and this argument is further supported by the fact that the Convention is a living instrument which should be interpreted in present day conditions. The doctrine of evolutive or dynamic interpretation leaves a space for the Court to change its opinion on certain matter keeping in mind the fact that the conditions are changed in the national laws of states as well as the fact that states can reach consensus on certain matters which were impossible to deal with in the past. These models of interpretation, as well as the differences between international and national laws, sometimes cause difficulties in implementation of the Convention. In other cases, the binding force of the Convention should be respected and ECtHR decisions should be implemented.

2. The sui generis nature of the ECHR

Human rights litigation in national legal systems raises fundamental questions about the distribution of benefits and burdens and about the structure of social and institutional relationships, because it tests the limits of the exercise of public power. Principles of interpretation used by the ECtHR such as democracy, rule of law, effective protection of human rights, margin of appreciation, subsidiarity, and proportionality are effectively constitutional principles because they raise two distinct and quintessentially constitutional questions, which Greer and Wildhaber (2012, p.668) define as: (a) "the normative question of what a given Convention right means and (b) the institutional question of which institutions, judicial/non-judicial, national/European should be responsible for providing the answer".

The importance of the ECHR lies in the supranational control mechanism aimed at examining and remedying any violation of these right and ensuring compliance with the obligation imposed therein. There is no doubt that the Convention has become a constitutional instrument of the European public order. Although, as mentioned by the Court and reiterated by the judges in many decisions, the Court is not designed to be a court of fourth instance and its existence is not intended to substitute national human rights systems, rather to impose the responsibility on the nations to provide adequate protection within their own legal systems. According to Wildhaber, whether the Court is itself a "Constitutional Court" is largely a question of semantics. It can always be called a quasi-Constitutional Court or *sui generis* court. What is not in doubt is that the issues which it is called upon to decide are constitutional issues in so far as they concern the fundamental rights of European citizens (Wildhaber, 2013). This argument is supported by Grabenwarter whose opinion indicates that the ECtHR is the last conscience in human rights questions, a last legal instance or decision-making body similar to the constitutional court. In many cases, it has given guidelines to the national courts by exercising its role in the same manner as the national constitutional court does in protection of fundamental human rights and freedoms (Grabenwarter, 2014). Sometimes, it even uncovers structural problems that can only be solved by adaptation and amendment of the legal system.

The *sui generis* nature of the ECHR is emphasized in the jurisprudence of the ECtHR. The Court stated that a "purpose of the High Contracting Parties in concluding the Convention was not to concede to each other's reciprocal rights and obligations in pursuance of their individual national interests, but to realize the aims and ideals of the Council of Europe and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedoms and rule of law" (Austria v. Italy no.788/60, ECHR 1960). In the case of *Lozidou v.Turkey*, the

Court described the Convention as a "constitutional instrument of European public order" (Loizidou v. Turkey no. 40/1993/435/514, ECHR 1993). *Mutatis mutandis* in *Karner v.Austria*, the Court emphasized that "while the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues of public policy grounds in the common interest" (Karner v. Austria 4016/98, ECHR 2003, § 26). Although, the Convention does not contain any explicit rules on how contracting parties are to implement its provisions, rather it is left on their margin of appreciation, the ECHR functions as a "shadow constitution" or a "Surrogate charter of human rights", particularly in those states that do not have their own judicially enforceable Bill of Rights. However, if we analyze the *Travaux perapartories* of the ECHR, is can be observed that the drafters intended the provisions of the Convention to have a direct effect on the states where the ECHR would form part of the law. In certain cases, the Convention goes beyond traditional boundaries that exist between international and constitutional law and encroaches upon the area that is traditionally reserved for constitutional law (Nastic, 2015, p.205). In *James et. al.* and in the *Lithgow et.al.* cases, the ECtHR held that states are not required to incorporate the Convention into their domestic law, but the substance of the right and freedoms set forth must be secured under the domestic legal order. This position was once again reiterated by the judges in the *Soering* case (Soering v. the UK no.14038/88, ECHR 1989). Article 1 ECHR confirms that the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. At the same time, the Convention establishes its jurisdiction as a *sine qua non* which is a necessary condition for a Contracting State to be held responsible for violations of the Convention's provisions.

From today's vantage point, it is obvious that the underlying nature and purposes of the Convention system have changed. The founding signatories of the ECHR were deeply divided on the question of establishing an autonomous legal system with supranational authority to monitor and enforce compliance. Although the ECHR was originally considered to have established minimum and largely minimal standards for basic human rights, the ECtHR has interpreted the Convention rights in a progressive manner. In Greer's view, for example, the Court is already "the Constitutional Court for Europe" in the sense that it is the final authoritative judicial tribunal in the only pan- European constitutional system (Stone Sweet and Keller, 2008, p.13).

2.1. The Relationship between ECHR and national constitutions

One of the characteristics which distinguish the ECHR from national constitutions is that only certain human rights are legally binding upon all Member States. The others contained in the additional protocols will become

binding after their ratification. Distinctively, some constitutions provide protection for many constitutional human rights and freedoms sometimes divided in categories such as civil and political, economic, and labor rights. Furthermore, some constitutions, such as Austria and the United Kingdom, do not contain any provisions regarding the protection of human rights, so they directly incorporate the ECHR.

According to Galigiuri and Napoletano, the strengths of the impact of the Convention on the national legal system mainly depend on two aspects: "the position of the ECHR in the domestic hierarchy of sources of law, whether it has supra-national status or not and the self-executing character of the ECHR rules by national laws" (Galigiuri and Napoletano, 2010, p.127). In many countries, the Convention is acknowledged to have supra-legislative force, but its relationship with constitutional supremacy is more controversial and quite complicated. This complexity arises from the relationship between international and national law which distinguishes two main approaches: monist and dualist. These approaches are by no means mutually exclusive, as many states combine elements of monism and dualism within their legal orders. In fact, most states today belong to what could be described as a mixed type, showing the universal evolution from strict dualism that most states embraced in the past, to moderate monism with special treatment reserved to certain sources of international law.

In the manner of the monist tradition, national authorities and citizens are bound by domestic law as well as treaty law and customary international law. Together they constitute the body of law which has to be respected by both public authorities and individuals. The dualist tradition is much younger. In this view, the international and national legal systems form two separate legal systems. Historically, the development of this tradition is closely connected to the primary role that gradually came to be granted to national parliaments in the modern era (Gerards and Freuren, 2014, p.335).

The Convention's status in the domestic legal order depends mainly on the application and the position of ECHR within the national system. A classification of states can be developed whereby the Convention has a different status such as the constitution attributing constitutional rank to the Convention, such as the case of Austria, or as in most of the states, the Convention having a super-legislative ranking such as in France, Spain, and Portugal or the Convention having a legislative ranking, such as in the United Kingdom.

In the first group of states, the ECHR has been granted the rank of constitutional law by an explicit constitutional norm. (Federal Constitutional Law, 1964) In most of the second group of states, 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, in order to be ratified the treaty must be approved by

the Assembly of the Republic with special majority. As an example of the third group, the United Kingdom, in 1998, incorporated the provisions of the Convention into the Human Rights Act, containing a selective incorporation of the ECHR's rights (Martinico, 2012, p.410).

Supra-legislative status (most common for many states) means that the international treaties have been ranked above the domestic legislation, but below the constitution. Even in this category, distinctions can be made depending of the possibility of constitutional courts reviewing the constitutionality of laws that ratify the international treaties i.e., the ECHR. Furthermore, constitutional courts may apply the Convention by direct application of the ECHR provisions or by accepting the ECtHR interpretation of its case law.

In case of conflict between a national legislative act and a ratified international treaty, the international treaty will prevail over subsequent contrary domestic legislation according to the principle *lex superior derogat legi inferiori ((*a law higher in the hierarchy repeals the lower one). However, what most influences the relationship between the international treaty and national laws is the issue of the direct effect of international law, the relevance of a treaty in a national legal system. The direct effect is the legal mechanism which enables a national body to apply some international treaty directly. In this connotation Keller and Stone Sweet argue that a state that adopts a more monist posture to the ECHR including the abandonment of the *lex postiori derogat legi priori* principle, will be much more capable of building a stable mechanism for coordinating the ECHR with the national legal order than a state that maintains a strong dualist posture (Keller and Stone Sweet, 2008, p.28).

The relationship between ECHR and national constitutions depends on many factors such as: the position of the Convention in national legal order determined by the Constitution; the issue of direct effect of the Convention and the possibility that the ECHR rights can be directly enforced by national laws.

2.2. The impact of the ECHR to the Constitutional Court of North Macedonia

The ratification of the ECHR by Republic of Macedonia in 1997, urged a number of recommendations for legislative changes in order to fulfill the requirements of the Convention. According to Article 118 from the Macedonian Constitution, international agreements ratified in accordance with the Constitution are part of the international legal order and cannot be changed by law. Additionally, Amendment XXV to the Constitution prescribes that courts deliver judgements on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution. Hence, the ratified international agreements are directly applicable to the internal legal order.

From normative point of view, the Convention is positioned between the Constitution and the laws, meaning that it is higher than the laws and below the Constitution. The Macedonian Constitution undoubtedly emphasized that the Constitution has the highest normative rank and every other act including international agreements and laws are positioned below the Constitution. This means that international agreements cannot be subject to the constitutional review procedure i.e., the Constitutional Court has not competence given by the Constitution to review the constitutionality of laws that ratify international treaties. In this manner, the ECHR is implemented in the internal legal order of North Macedonia as it has been ratified in full. According to Spirovski, since the Constitution places ratified treaties into the body of the internal legal order in a rank below the Constitution, the Court from the early nineties split between two options, either to keep the constitutional provision listing its competences in which international treaties are not mentioned as an object of review, or to build its competence on a theory that, since ratified international treaties becomes part of the domestic legal order, it must, as any other regulation, be in accordance with the Constitution, and therefore reviewable by the Court. The first option prevailed during the first years, leading to the rejection of six initiatives for review of laws for ratification of international treaties concluded by the State. However, the latter theory finally prevailed among majority of judges in 2002. The Court repealed the law on ratification of a bilateral agreement, for the agreement contained provisions breaching the Constitution, but did not repeal the said provisions of the agreement, finding that it would have been in breach of international law. The effect of the decision was that the international agreement ceased to be part of the domestic legal order, not losing its legal force in international law. This case inevitably opened a discussion on possible reform directed toward the introduction of *a priori* review of constitutionality of international treaties, as probably the most appropriate technique to protect both the constitution and the credibility of the state in international relations (Spirovski, 2009), However, the majority of the present composition of the Court, harken back to the previous stance, accepting the reasoning, among other things, that the control of constitutionality in case of international agreements is carried out by the Parliament in the process of their ratification, after which the treaties become part of the domestic legal order and are self-executing.

The position of the Macedonian legal system can be identified as some variation of the monist system. According to the fundamental principles of the monistic doctrine, in case of incompatibility between a ratified international agreement and a national law, a provision of the ratified international agreement will be used. This rule, which is only one segment of the basic rules for regulating a conflict regarding the relationship between the international and national law, is also administered in the Macedonian constitutional system (Karakamisheva-Jovanovska and Saveski, 2022, p.328). The explanation would be that the Macedonian Constitution has given supra-legislative status to the Convention, as in many other states, with a distinction that the Constitution Court cannot review the constitutionality of the Convention. However, this

could also mean that the Constitutional Court, in its delivered decisions has '*carte blanche'* to interpret the Convention provisions and to implement the Court's practice in its national law.

The impact of the Convention could be seen through the implementation of the ECHR provisions and the ECtHR's case law by the Constitutional Court in its decisions. In the past, the practice of the Constitutional Court has shown that it used the wording of the Convention as an additional argument and not as primary source of the law. Moreover, the Constitutional Court wrote in its decision that although the ECHR is an integral part of the domestic legal order, its status is below the Constitution and cannot represent a direct legal ground on which the Court could base its decisions as an assessment of the constitutionality of law (U.br.39/2004). In another case, the Court took an opposite and more profound opinion than that in 2004, underlying that constitutional rights and freedoms should be interpreted within the context of the Convention, since the fundamental freedoms and rights of the individual and citizen, recognized in international law and determined in the Constitution, represent one of the fundamental values of the constitutional order of the Republic of Macedonia. This meant that the Convention should be used not only as an additional argument, but as a criterion for the interpretation of the Constitution (U.br.31/2006). In 2010, when the Constitutional Court decided on the constitutionality of the Law on Electronic Communications, it took an official position that the interpretation of the constitutional provisions should be based on the general legal principles prescribed in the ECHR and interpreted by the ECtHR in its case law (U.br.139/2010). The clear(positive effect of the impact of ECHR can be seen in the decision delivered by the Constitutional Court in its 2008 decision on the initiative concerning the constitutionality of the Criminal Code. The decision called upon the most recent case of the ECtHR mentioning the Leger v. France, Kafkaris v. Cyprus, Stanford v. the U.K., Hill v. the U.K., and Wynne v. the U.K (U.br. 28/2008). Furthermore, as a result of the ECtHR decision in the case of Stoimenov, the Department of Criminal Offences of the Supreme Court took a legal position in favor of the direct applicability of the Court's case law prescribing that for each and every freedom and right foreseen in the Convention and whose protection is effectuated before the ECtHR, the courts in Macedonia directly apply its judgements and, in accordance with the Law on Criminal Procedure, in the reasons of their decisions should invoke the case-law of the ECtHR. This was a clear message to all courts that they, like the Supreme Court in criminal procedures, will have to directly implement the provisions and the case law of the Convention (Lazarova Trajkovska and Trajkovski, 2016, p. 283).

If we analyze the decisions delivered from the Constitutional Court since the ratification of the Convention, it is obvious that there is a need to use the provisions from the Convention as well as the citing ECtHR case law more frequently. On this way, the decisions of the Constitutional Court will be supported by the claims already expressed by the ECtHR and, at the same time, will demonstrate commitment by the Constitutional Court to quote the

Convention and its provisions as part of the directly applicable internal legal order.

3. Implementation of ECtHR judgments and the *res interpretata* effect

Since the entry into force of Protocol 11 ECHR, the Convention provides for a system of legal protection authorizing the ECtHR to review judicially whether Member States have complied with the guarantees of the Convention and obliges the Member States to grant rights to the individual citizen as per the application of the Convention. With these elements, the Convention becomes more constitutional than before and the Court becomes a quasi-Constitutional Court. The obligation to respect human rights arises from Article 1 ECHR which stat4es that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. This article, together with Articles 19, (establishment of the Court) and 32 (jurisdiction of the Court), provide for the principle of *res interpretata*, which has also been confirmed in the case law of the ECtHR.

According to Arnardóttir, this engenders a legal obligation under international law for the contracting states to take the full body of the Court's case law into account when performing their obligation under the Convention (Arnardóttir, 2017, p.819). This is confirmed by the theory that interpretative principles and standards developed by the Court's case law can be said to have *res interpretata* effect which is implicit in the Court's acceptance of 'autonomous interpretations' of the Convention, meaning that an interpretation is given to Convention terms that is transversely applicable to all states and does not depend on the meaning of such terms in national laws.

Through the interpretation of the ECHR, the Court's jurisprudence gradually generated a new form of law which has developed into an evolving concept of Convention law. The *res interpretata* effect of the Court's judgment implies that all national authorities, including national courts have to comply with the Convention. In the case of *Fabris v. France*, the Court's Grand Chamber held that national courts generally have an obligation to ensure that national legislation is in conformity with the Convention. This statement by the Court can be related to the margin of appreciation. The Court applies the margin of appreciation in making judgments, especially where no common standard exists across the Council of Europe and it may be necessary to balance rights and other interests, thereby taking into account of the diverse ways a right may be specified within different legal systems. Moreover, according to Bellamy, the Court has generally applied a wider margin of appreciation when the case involves a choice that has been publicly debated by a democratic legislature and where opinions reasonably differ, and narrowed the margin where a legislature has enacted or re-enacted a measure without due consideration (Bellamy, 2014, p.1036). In *Rasmussen v. Denmark*, the Court pointed out in

several judgments that the Contracting States enjoy a certain "margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances and the subject-matter. In this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (Rasmussen v. Denmark, 1984, 7 EHRR). Using *mutatis mutandis*, in *Dickson v. United Kingdom*, the Court reiterated the issues of balance, stating that since the national authorities make the initial assessment as to where the fair balance lies, in a case before a final evaluation by this Court, a certain margin of appreciation is, in principle, accorded by the Court to those authorities as regards to that assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the activities restricted and the aims pursued by the restrictions. Accordingly, where a particularly important facet of an individual's existence or identity is at stake, the margin of appreciation accorded to a State will in general be restricted. Where, however, there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (Dickson v. United Kingdom (2008) 46 EHRR 41, § 77–79)

Analyzed together, Articles 1, 19 and 32 indicate that the Convention is a living instrument which should be interpreted in present day conditions. This means that the opinions and case law of the Court may gradually change, mutually dependent on the conditions in the Council of Europe Member States and changes in their legal systems. The Court's judgments do not only serve to decide violations of certain human rights prescribed in the Convention, but, at the same time, the Court creates and develops case law having not only *inter partes* effect for certain judgments, but establishing *erga omnes* influence with the necessity for the utmost respect for human rights and fundmanetal freedoms.

However, a great debate exists between the wide and narrow margin of appreciation, suggesting that the Court could be more respectful of national sovereignty and the fact that national authorities are in a better position to apply the Convention in the national context. In this connotation, the Brighton Conference leveled criticism against the Court's power over national law and whether the overall authority of the Court has changed. A possible solution is for the Court to find a balance between respecting national sovereignty and national diversity on the one hand and protecting Convention rights on the other. Critiques still exists over the ECHR and the idea that the Court interferes too much with national sovereign policy choices and hampers the democratically legitimized decision-making process. Maybe that is the reason why states are imposing limitations on application of the Convention. Maybe the reason is not only the inconsistency of the national constitutions with the

Convention, but rather the position of the Court and its influence in national legal systems.

4. Limitations to application of the ECHR

The obligation of the state is to comply with the judgment of the ECtHR with regards to measures appropriate to the particular case. However, if at the origin of the violation there is a legal provision or a practice, the reason for the adoption of measures of a general nature is indeed in order to prevent future violations. In its recent practice, the ECtHR tends to limit the freedom of the State in selecting suitable measures, indicating which individual measures or general measures to be taken in order to give effect to its judgments (Broniowski v. Poland no. 31443/96, ECHR 2004). According to Article 46 ECHR, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. This requirement is supported by the Vienna Convention on the Law of Treaties (VCLT) and the Interim opinion of the Venice Commission from March 2016 where it is emphasized that whatever model of relations between the domestic and the international system is chosen, a States is bound, under Article 26 of the VCLT, to respect ratified international agreements and pursuant to Article 27 cannot invoke the provisions of its internal law as justification for its failure to perform a treaty. Most problems arise from the inconsistencies between the national constitutions and the ECHR regarding some issue which is not differently regulated in the national law, or the state in question does not want to abide to the provisions of the ECHR regarding a particular subject.

The situation is quite complicated when the conflict arises between an international treaty and the Constitution. Such a conflict is delicate as it confronts the highest normative instruments of a country with instruments adopted at the international level. In Europe, domestic courts have ruled on the effects of the judgments of the ECtHR in the domestic legal order from their own perspective. ECHR as interpreted by the ECtHR can be directly enforceable. According to the Venice Commission, there are several factors affecting the implementation of international human rights treaties in domestic law, including a) domestic factors depending the approach taken (monist or dualist), the legal status of human rights treaties, direct or indirect effect, adoption of domestic legislation which facilitates the implementation of human rights treaties and b) international factors linked to the observance of reciprocity of human rights treaties (Venice Commission Report, 2012 CDL-AD(2014)036-e). For example, in Hungary in 2013 the Constitutional Court considered that the judgments of the ECtHR possess only declaratory power i.e., it does not directly mean the transformation of legal issues, but the Court's practice could give help to the interpretation of Hungarian constitutional rights

(Cozzi et.al, 2017). Moreover, the Constitutional Court expressed the opinion that the practice of the ECtHR 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. According to the Court's view, the practice of Strasbourg and the Convention define the minimum level of the protection of fundamental rights that all contracting parties have to ensure but the national law may establish a different and higher order of requirements in order to promote human rights.

The Decisions 348 and 349/2007 from the Italian Constitutional Court clarified that the ECHR has a privileged position, but enjoys no 'constitutional immunity'. It must abide by all national constitutional norms. After these decisions, a significant evolution has happened. Not only has the Italian Constitutional Court clarified, through Article 117 paragraph 1 of the Italian Constitution, the efficiency of the ECHR, but it has interpreted international obligations as an interposed standard of review, on the basis of which the constitutionality of domestic law must be assessed. In Austria, although the Convention enjoys constitutional status, in the Miltner case, the Constitutional Court stressed the possibility of departing from the ECtHR's case law if adherence thereto would entail a violation of the Convention (Austrian Constitutional Court, Miltner, VfSlg 11500/1987).

Similar decisions exist in the Baltic countries and in Germany. In the Baltic countries, the ECHR is deemed a source of inspiration for the construction of national law and was cited by the constitutional courts of these countries even before their accession to the ECHR, while in Germany the Bundesverfassungsgericht (BuG)'s order no 1481/04, prescribes that in case of unresolvable conflict between the ECHR and the domestic law, the latter should prevail. 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 special majority.

The most tectonic limitation to the application of the ECHR has been made by Poland. The Polish Constitutional Court ruled that part of the ECHR guaranteeing the right to a fair trial is inconsistent with the Polish Constitution. This was due to the fact that, according to the Polish Constitutional Court, the ECtHR did not have jurisdiction to review and assess the legality of the appointments of judges to the Polish courts. This confrontation came as a result of the ECtHR's judgment questioning the legality of appointment of judges to the Constitutional Court. This is just one example of many applications against Poland concerning various aspects of the reorganization of the Polish judicial system through reforms initiated in 2017. The answer of the ECtHR was that its task was not to assess the legitimacy of the reorganization of the Polish

judiciary as a whole, but to determine whether, and if so, how the changes affected judges' rights under Article 6 (1) of the Convention. In its explanation, the Court found that the procedure for appointing judges had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which had examined the applicants' cases. The Chamber of Extraordinary Review and Public Affairs was not therefore an "independent and impartial tribunal established by law" within the meaning of the European Convention. When the Court finds a breach of the Convention, the State has a legal obligation under Article 46 of the Convention to select, subject to supervision by the Committee of Ministers, the general and/or individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress the situation. It therefore falls upon the State of Poland to draw the necessary conclusions from this judgment and to take appropriate measures in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future (ECHR Press release, 2021).

The consequences of not respecting certain provisions from the Convention and stating that they are not in conformity with the law in just one segment is a worrying fact of how the Convention will be implemented in Poland in future. The ratification of an international treaty is a serious task and shows the dedication of the country to implement the provisions of the international treaty. The importance of the ratification is also emphasized by the Court in *Slivenko et.al. v. Latvia* where it was stated that the ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention. If that should not be the case, the State concerned has the possibility of entering a reservation in respect of the specific provisions of the Convention (or Protocols) with which it cannot fully comply by reason of the continued existence of the law in question (Slivenko et.al. v. Latvia, App.no 48321/99).

5. Conclusion

This article focuses only on some aspects regarding the constitutional character of the ECHR, but the fact is that the constitutionalism of the Convention provides for the International Court to be sort of quasi- Constitutional Court which protects human rights and fundamental freedoms. The constitutional character of the ECHR can be foreseen from two aspects, the way in which international treaties are incorporated in the constitutions of states and the rank of international treaties in the internal legal order of states. These two segments in one way determine whether or not states have monist or dualist systems,

although differences exist between states in just one system. This points to the uniqueness of the constitutionality of the Convention and its applicability by the states.

The Convention and its protection system are not designed to substitute national human rights systems. That is the idea of the principles of subsidiarity and margin of appreciation postulates. The Court has generally applied a wider margin of appreciation when the case involves a choice that has been publicly debated by a democratic legislature and where opinions reasonably differ, and narrowed the margin where a legislature has enacted or re-enacted a measure without due consideration. However, in recent years, the ECtHR has adopted its jurisprudence in order to embed itself into national legal systems. Although the ECtHR is not bound to accept what national courts say, its case law suggests that it has gone a long way towards recognizing the role of superior national courts and on this way has departed from its previous case law in light of disagreement by a superior national court.

The obligation of the state to give effect to the ECtHR judgment is expressed in Article 46 ECHR where it states that the States must abide by the final judgment of the Court. The *res interpretata* effect of the Court's judgments implies that all national authorities, including national courts have to comply with the Convention. Complications arise when the higher national courts refuse to implement a judgment by the ECtHR which where they are *inter partes*. The recent cases with Poland regarding the right to a fair trial and the legality of appointment of judges to the Constitutional Court imply that structural problems exist in national legal systems when a state which is bound by the Convention accepts the jurisdiction of the ECtHR for certain provisions and neglects others. Some future research with more specific framework might explain in detail the problems arising from the complicated relationship between the ECtHR and national constitutional courts.

Reference

Arnardóttir, O.M. (2017). Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights. *European Journal of International Law 28:3, 819-843.* https://doi.org/10.1093/ejil/chx045

Austrian Constitutional Court, Miltner, VfSlg 11500/1987 *Austria v. Italy* no.788/60, EHRR 1960

Bellamy, R. (2014). The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights. *European Journal of International Law* 25:4, 1019–1042. https://doi.org/10.1093/ejil/chu069

Broniowski v. Poland , no. 31443/96, ECHR 2004

Caligjuri, A. Napoletano, N. (2010). The Application of the ECHR in the Domestic Systems. Italian Yearbook of International Law. 20:1, 125–159. DOI: https://doi.org/10.1163/22116133-90000173

Ustaven sud na Republika Severna Makedonija. (2004). Reshenie U.br.39/2004 [Decision U no.39/2004]. Constitutional Court of the Republic of North Macedonia

Ustaven sud na Republika Severna Makedonija. (2006). Odluka U.br.31/2006 [Decision U no.31/2006]. Constitutional Court of the Republic of North Macedonia

Ustaven sud na Republika Severna Makedonija. (2008). Odluka U.br.28/2008 [Decision U no.28/2008]. Constitutional Court of the Republic of North Macedonia

Ustaven sud na Republika Severna Makedonija. (2010). Odluka U.br.139/2010 [Decision U no.139/2010]. Constitutional Court of the Republic of North Macedonia

Cozzi, A. Sykiotou, A. Rajska, D. Krstic, I. Filatova, M. Katic, N. Bard, P. Bourgeois, S. (2016). *Comparative study on the Implementation of the ECHR at the National Level.* Council of Europe.

Dickson v. United Kingdom, 2008, 46 EHRR 41, GC

European Court of Human Rights. (2021, November 8). *Judgment Dolinska-Ficek and Ozimek v. Poland: Poland must take rapid action to resolve the lack of independence of the National Council of the Judiciary* [Press release]. Retrieved from https://hudoc.echr.coe.int/eng-press#{%22sort%22:[%22kpdate%20Descending%22]} [Accessed on 8 October 2022].

Federal Constitutional law, Federal law Gazette 59/1964

Grabenwarter, C. (2014). The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights. Elte Law Journal Issue 1. 101:115 Retrieved from https://eltelawjournal.hu/european-convention-human-rights-inherent-constitutional-tendencies-role-european-court-human-rights/, [Accessed on15 September 2022].

Gerards, J. Fleuren J. (2014). Implementation of the ECHR and of the judgments of the ECtHR in national case law. *Intersentia.* ISBN 9781780682174,

Greer, S., Wildhaber, L. (2013). Revisiting the Debate about 'constitutionalising' the European Court of Human Rights. Human Rights Law Review 12:4, 655-687, doi:10.1093/hrlr/ngs034

Karakamisheva-Jovanovska, T. and Saveski, D. (2022). Macedonian Constitutional Court and Ratified International Agreements – Can the Concluded International Agreement be a Subject of Constitutional Review? Zbornik radova Pravnog fakulteta u Splitu [Proceedings of the

Law Faculty in Split] 59 (2), 315-349. https://doi.org/10.31141/zrpfs.2022.59.144.315

Karner v. Austria, no. 4016/98, ECHR 2003

Keller, H., Stone Sweet, A. (2008). The Reception of the ECHR in National Legal Orders. In Keller, H., Stone Sweet, A., *A Europe of Rights: The Impact of the ECHR on National Legal Systems (pp.11-36).* Oxford University Press. DOI:10.1093/acprof:oso/9780199535262.001.0001

Lazarova Trajkovska, M. Trajkovski, I. (2016). "The impact of the European Convention on Human Rights and the case law on the Republic of Macedonia". In Iulia Motoc, Ineta Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge University Press.

Loizidou v. Turkey, no. 40/1993/435/514, ECHR 1993

Martinico, G., (2012). Is the European Convention going to be Supreme? A Comparative Constitutional Overview of the ECHR and the EU Law before National Courts. European Journal of International Law, 23:2, 401–424, https://doi.org/10.1093/ejil/chs027

Nastic,M., (2015). ECHR and National Constitutional Courts. *Zbornik Radova Pravnog Fakulteta u Nišu* [Proceedings of the Law Faculty in Nis]. 71, 203-220

Rasmussen v. Denmark, 1984, 7 EHRR 371

Soering v. the United Kingdom, no. 14038/88, ECHR 1989

Slivenko and Others v. Latvia, no 48321/99, ECHR 1999

Spirovski, I. (2009). Report "The Competence of the Constitutional Court to control the Conformity of Laws with International Treaties: New Trends in Constitutional Justice". CDL-JU (2009)036. Seminar on "The Competence of the Constitutional Court to Control the Conformity of Laws with International Treaties" European Commission for Democracy Through Law (Venice Commission). Retrieved from https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2009)036-e , [Accessed on 8 October 2022].

Venice Commission. (2012). Report on the implementation of international human rights treaties in domestic law and the role of courts CDL-AD(2014)036-e, Venice Commission 100th plenary session. Retrieved from https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)036-e [Accessed on 2 October 2022].

Wildhaber, L. (2013). The place of the European Court of Human Rights in the European Constitutional landscape. Conference of European Constitutional Courts XIIth Congress. 1-9. Retrieved from https://www.confeuconstco.org/reports/rep-xii/Report%20ECHR-EN.pdf , [Accessed on 20 September 2022].