

**THE HUMAN RIGHTS AND LIBERTIES IN THE COUNTRIES OF THE WESTERN BALKANS
ACCORDING TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND LIBERTIES*****Emilija Icoska**

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Abstract

The constitutions of the countries from the Western Balkans express the same principle in a slightly different way when it comes to the relationship between international law, which guarantees basic freedoms and rights, and domestic law. It is the principle according to which those states, although sovereign, accept that the realization of human rights is not only an internal matter of each sovereign state, but that it is a joint matter of the international community. The acceptance of this principle is an expression of the desire of all states to be an equal part of the international community, among other things, by accepting this principle, which is characteristic of the entire democratic world.

Keywords: Human rights, Liberties

INTRODUCTION

The interest of this paper is to give a picture of how human rights are nurtured by the European Convention on Human Rights and Freedoms in the countries of the Western Balkans. Of course, this applies to the countries that have accepted and ratified the ECHR, with the exception of Kosovo, which, although it has not ratified this convention, is not left out of the analysis because it is an integral part of the Western Balkans. The treatment of compliance with the ECHR is different in all countries. The bodies through which it is established are almost similar, but the regulation is different from country to country. The paper also analyzes the position of the Constitutional Court in relation to the ECHR, whether there is a mechanism to implement it within the state. It is interesting to note that all states have a common interest, which is to establish human rights. However, it is done in different ways.

Republic of north Macedonia and ECHR

The first Constitution of the Republic of North Macedonia was adopted in 1991, which contains identical articles or with similar wording to those of the ECHR (Art. 10, Art. 11, Art. 12, Art. 13 and 14, Art. 25, Art. 17, Art. 18, Art. 19, Art. 20, Art. 21...). After joining the Council of Europe, RSM started preparations for the harmonization of the Macedonian legislation with the acts of the Council of Europe. Then Republic of Macedonia signed the ECHR in 1995 (November 11) - to incorporate the relevant provisions of the Convention into its Constitution and laws. Since, there were provisions in the Constitution, the focus was on examining the compatibility in the legislation. After the completion of the legal amendments on April 10, 1997, the instruments of ratification of the ECHR and Articles 1, 4, 6 and 7 were handed over to the Secretary General of the Council of Europe. In 2008, the Law on the Execution of the Decisions of the European Court of Human Rights was adopted.

Two bodies, the Government Agent and the Interdepartmental Commission, have been established to oversee the implementation of the ECHR in the Republic of North Macedonia. The Constitutional Court only provides for the protection of human rights and freedoms, however, after the finality of the third instance verdict, it does not have the authority to decide. In essence, it is not a pre-filter when submitting applications before the ECtHR.

Republic of Serbia and ECtHR

Serbia ratified the ECHR in 2003. By ratifying, Serbia accepted the jurisdiction of the ECtHR and thus limited the monopoly of the Constitutional Court on the interpretation of human rights (Momič, 2015). Thus, the Constitution of the Republic of Serbia states that human and minority rights are immediately applied in accordance with the generally accepted rules of international law confirmed by international agreements and laws (Constitution of Serbia, 2006). This means that human and minority rights are guaranteed and confirmed by international agreements, as well as by the Constitution itself. It is further stipulated that the provisions on human and minority rights should be in accordance with the practice of the international institutions that supervise their implementation, in the specific case in accordance with the ECHR (Constitution of Serbia, 1990). From this provision, we note that the Constitutional Court has constitutional powers when deciding to interpret the Constitution in accordance with the practice of the European Court (Momič, 2015). In other words, according to the Constitution, when deciding on persistent violations of human and minority rights, the Constitutional Court should do so in accordance with the practice of the European Court. The Constitution stipulates that generally accepted international rights and confirmed international agreements, constitute the internal legal order of the Republic of Serbia and must not be in conflict with the Constitution (Constitution of Serbia, 1990). The hierarchy of legal acts is regulated in the Constitution. According to the mentioned article, the Constitution is the highest legal force, and then come laws that have the same legal force as international agreements (Constitution of Serbia, Art. 193). So,

in principle confirmed international agreements have a weaker force than the Constitution. When it comes to international agreements that guarantee human and minority rights, in view of the previously mentioned, the Constitution transfers its own stronger legal force to international agreements. In accordance with this, the entities that are competent to act for their protection, immediately apply the same. However, if the Constitution does not contain a provision, such as the right to private and family life, which is guaranteed by Article 8 of the Convention, the Constitution in this case authorizes the Constitutional Court to immediately apply the provisions of the Convention. According to the provisions of the Convention, the ECtHR has the authority to directly apply and interpret the Convention. This shows that the same competence belongs to the Constitutional Court of Serbia in relation to the Constitution of the Republic of Serbia.

The relationship between the Constitutional Court of Serbia and the ECHR is developing on the basis of a constant dialogue between Belgrade and Strasbourg. However, the Constitutional Court has not always been equally keen to talk, as it has sent different signals regarding its willingness to engage with international law. Formal progress began in 2006 when the Constitutional Court of Serbia introduced the institute (that's how a constitutional lawsuit is supposed to stand, it's a legal institute, that's what it's called) constitutional complaint as an additional instrument in the protection of human and minority rights. It can be filed against an individual act or work of a state body or organization entrusted with public authority, which violates or curtails human or minority human rights and freedoms provided for in the Constitution, if they are exhausted or no other legal remedies are provided assets or the right to judicial protection is excluded by law (Law on Constitutional Court, 2007, art. 82). The largest number of constitutional appeals before the Constitutional Court are refer to the violation of the right to a fair trial and the right to a trial within a reasonable time, guaranteed in Article 32 of the Constitution and Art. 6 of the Convention.

When it comes to the decisions of the European Court, it is safe to say that they are the source of law in Serbia. At the same time, two conditions must be met cumulatively:

1. That there is an overlap between the text of the Constitution and the text of the Convention in terms of the guarantee for the enjoyment of a specific right and
2. The violation was the subject of a decision by the European Court in a dispute against Serbia.

By interpreting Articles 16, 18 and 193 of the Constitution, we can come to the conclusion that the decisions of the European Court have their place in the hierarchy of the legal system of Serbia. The Constitution establishes rights according to its own legal force. However, in the practice of the Constitutional Court, it can be noted that the Constitutional Court often relies on the views reached by the European Court in its decisions.

Republic of Croatia and ECtHR

The Republic of Croatia ratified the ECHR in 1997. Since then, the Convention in Croatia has experienced both successes and failures in terms of its implementation. However, one should also take into account the burden of the ECtHR, which required Croatia to solve problems with simpler cases within the state itself (Conforta, 2017). Such reforms without the

introduction of new court formations for simplification and quick procedures for the simplest cases, as well as continuous improvement and simplification of work methods, inside the court itself, led to quick resolution of cases. The obligation to execute judgments comes from Article 46 paragraph 1 of the Convention, according to which the state is obliged to execute the final judgments of the ECtHR in every dispute to which it is a party. The enforcement of judgments and amicable settlement of disputes is overseen by the Committee of Ministers. In the case of a simple recognition of the violation and deletion of the case from the list of cases of the Court, the Committee of Ministers has no supervisory obligations, although this does not mean that the obligations of the Convention have ceased. In Croatia, in accordance with the Constitution, the term constitutional lawsuit is used (Constitution of Croatia, 1990). According to the claim of many lawyers in this field, this term is not the most appropriate; although it is used as the term constitutional lawsuit, it is more associated with initial process activity before the regular courts, so the citizens, and many of the lawyers, when filing the lawsuit, name the defendant. In the case of a constitutional lawsuit, the subject is not given to the authority that passed the act (that is, the defendant) by which it is claimed that a certain right has been violated. Accordingly, it is considered that this violates the right to a fair trial, that is, the opposing side is not given the right to present its defense (Krchinski and Constitutional Appeal, 2010).

The Constitution of Croatia in article 115, paragraph 3 and article 134 determines the matter for solving the decisions of the ECtHR. There is an Expert Council for the execution of judgments and decisions of the ECtHR, as well as an Interdepartmental Commission and an inter-institutional expert body among the representatives of Croatia before the ECtHR. The Professional Council includes experts from all ministries and other bodies of the state administration, state agencies and devices of representatives of the Constitutional Court, the Supreme Court and state councils. The analysis of the data of the Committee of Ministers on the execution of judgments and decisions of the ECtHR in relation to Croatia, from the ratification of the Convention in 1997 to 2017, amounts to a total of 434 Croatian cases, of which the procedure for supervision by the Committee of Ministers has been closed for 248 cases. Thus, for the time being, 186 cases are under the supervision of the Committee of Ministers. In the execution of the cases in the above-mentioned period, Croatia took individual measures, namely the renewal of criminal proceedings and general measures for how in the future, in similar cases, the evaluation of the evidence should be in accordance with the convention standards. In one of the cases, the Constitutional Court emphasized that when evaluating the evidence, the courts in criminal proceedings must follow the rules of the ECtHR. It should be emphasized that the harmonization of the subjects with the standards of the Convention was too slow a process, which is still ongoing (Conforta, 2017). Because of that, the number of pending cases before the Committee of Ministers in relation to Croatia is increasing. Another general measure that should have been implemented by the courts was the change in the jurisprudence of the Constitutional Court and other courts, as the most common general measure. Another problem, which is noticeable during the analysis of the procedures, is the excessive duration of the individual measures. The judicial system of Croatia was supposed to make a series of reforms inside the judiciary, as well as to speed up individual measures.

The position of the Constitutional Court regarding this problem is that the domestic jurisprudence must be built in a way that respects the international obligations arising from the Convention and which must be in accordance with the relevant legal positions and practice of the ECtHR. From this it can be noted that the national bodies in Croatia pay more and more attention to the implementation of the convention standards in the execution of the court decisions of the ECtHR. The Constitutional Court takes an active role in compliance with the principle of subsidiarity as a fundamental, principled, conventional rule and strives for the judicial system in Croatia to behave according to the practice of the ECtHR. Also, the Supreme Court has a decisive and important role in the interpretation of the Convention in accordance with the Croatian legal order and its effort to act in accordance with the principles of the Convention. The complex process of implementation of court judgments by the state requires thinking about the individual case itself and finding measures to apply the most painless for the individual and the most favorable for the state, when it comes to general measures. The responsibility of the state is great when it has to devise and adopt an enforcement measure, which will lead to the removal of established violations from the Convention, in a way that will prevent future such violations so that the measure is in accordance with the domestic legal system and tradition, on a way that won't cause much resistance. Execution data for Croatia show that the situation could be better (Council of Europe, Facts on the Republic of Croatia 2017). The new tendency of the Constitutional and Supreme Court in the direction of the recommendations of the Council of Europe gives real hope that the situation will improve in the future.

Bosnia and Herzegovina and ECHR

Bosnia and Herzegovina has incorporated the guarantees of the main human rights instruments into the system of guarantees for human rights. At the same time, the Constitution does not directly guarantee them, but declares in a general way that the highest level of internationally recognized basic freedoms and rights of man and citizen will be ensured in Bosnia and Herzegovina and in both entities. (Constitution of Bosnia and Herzegovina, 1995) With a special provision of this article, the Constitution of Bosnia and Herzegovina immediately singles out the ECHR as the source of the catalog of rights that are directly applicable on the territory of Bosnia and Herzegovina. The Constitution also establishes the constitutional character of the Convention and its protocols in the legal order of Bosnia and Herzegovina, because it gives it priority over domestic laws. With that, the Convention is practically given the status of a source of domestic law. The next paragraph of Article 2 of the Constitution enumerates the freedoms and rights enjoyed by all persons on the territory of Bosnia and Herzegovina: the right to life, the prohibition of torture and inhuman and degrading treatment and punishment, the prohibition of slavery, servitude and forced labor, the right to freedom and personal security, the right to a fair trial in civil and criminal cases and other rights in criminal proceedings, the right to privacy and family life, freedom of thought, conscience and religion, freedom of expression, the right to marry and form a family, the right to property, the right to education and the right to freedom of movement and establishment (Constitution of the Republic of Bosnia and Herzegovina, 1995). What is particularly characteristic of the Constitution of Bosnia and Herzegovina is the emphasis on the international element, not only in terms of the legal sources of guarantees of freedoms

and rights, but also in terms of their implementation. The Constitution stipulates that in the exercise of their powers, the authorities in Bosnia and Herzegovina will cooperate and provide unrestricted access to international institutions, established by international conventions ratified by Bosnia and Herzegovina (Constitution of the Republic of Bosnia and Herzegovina, 1995). In Bosnia and Herzegovina, there is a complaint to the Commission for the Protection of Human Rights, which is composed of the Office of the Ombudsman and the House for Human Rights. It is a quasi-international sui generis body, integrated into the legal order of Bosnia and Herzegovina. The Commission's task is to ensure the highest level of respect for internationally recognized human rights and freedoms, including those provided for in the ECHR (Kazić, 2005). All this indicates that the conception of freedoms and rights in the Constitution of Bosnia and Herzegovina, both according to the sources of guarantees and according to the mechanisms for their implementation, is almost entirely based on the international factor.

Montenegro and ECtHR

In Montenegro, human rights are defined in the Constitution in Articles 17 to 44, as human rights and freedoms; from articles 45 to 57, as political rights and freedom of suffrage; from articles 58 to 78, as economic, social and cultural rights and freedoms and from articles 79 to 81, as minority rights. The ECHR was ratified by Montenegro in 2003. even in the period of the existence of the community of Serbia and Montenegro. Since then, Montenegro actively participates in the cooperation with the Council of Europe, while in 2007 becomes a member of the CE. The systemic problems faced by Montenegro (general measures) are the issues of protecting a fair trial within a reasonable time. Over 50% of all judgments refer to various aspects of the violation of the right to a fair trial (Art. 6 ECHR). (A short guide to the legislative and institutional framework for the protection of human rights in Montenegro, 2015). The Constitution of Montenegro provides for a constitutional appeal due to a violation of human rights and freedoms guaranteed by the Constitution, where the Constitutional Court decides after exhausting all available legal remedies (Constitution of Montenegro, 2007).

Kosovo and ECtHR

The catalog of human rights in the Constitution of Kosovo (2008) from a general point of view guarantees two categories of human rights: individual and collective rights. Chapter II of the Constitution regulates and guarantees the individual man and his rights, such as the right to life, human dignity, the right to a fair and impartial trial, the right to privacy, freedom of expression and others (Constitution of Kosovo 2008). Looking at this chapter, it can be concluded that no distinction is made between the ethnicity of the individual. Among the collective rights provided for in Chapter III (art. 57 to 62), are the rights of the communities that have the status of ethnic minority. This includes the rights of representation in the public administration and parliament, the rights to use their languages on official grounds and the maintenance of autonomous cultural institutions, educational programs, media institutions and cultural centers (Constitution of Kosovo, 2008). Since Kosovo is not a signatory to the ECHR, it has no international responsibility to follow the jurisprudence of the ECHR. In the constitutionality of the ECHR, Kosovo does not follow the traditional path for ratification and is therefore isolated from

debates on the level and format of the connection between the agreement and judicial practice. According to that, the only valid concept for integration is the one that can be extracted from the Constitution itself and the context of its preparation. In this regard, Kosovo undertakes through its own Constitution to comply with the jurisprudence of the ECtHR. This is only an imposed domestic obligation arising from the domestic legal order. "Human rights and basic freedoms guaranteed by this Constitution are interpreted in accordance with the court decisions of the ECtHR (Constitution of Kosovo 2008, Article 53). The question arises: can the Constitutional Court refuse to follow the practices of the ECtHR if, according to the view of the Kosovo court, the ECtHR can issue a verdict limiting the rights guaranteed by the Constitution in Kosovo? This practice does not bring the court into conflict with its duty to remain within the country as a single court. This means that the expression "to be consistent" in the jurisprudence of the ECtHR suggests that the Constitutional Court seems to take international law only as a minimum standard of human rights, but not as a maximum (Korenica P. 2015). The court may decide to override international standards in accordance with domestic law.

Republic of Albania and ECtHR

The Republic of Albania signed the ECHR in 1995, and ratified it in 1996. The Council of Ministers of the Council of Ministers oversaw compliance with the judgments of the ECtHR and the adoption of measures (general and individual) necessary to prevent similar violations of the Convention on Leadership. In the Constitution of Albania from 1998 in Art. 131 provides for a constitutional appeal (complaints of individuals) for which the Constitutional Court decides for violated human rights provided by the Constitution since all legal remedies for the protection of the same have been exhausted (Constitution of the Republic of Albania, 1998). Judgments of the ECtHR led to various reforms and improvements in Albania. The reformists were particularly interested in strengthening the fairness of court proceedings. In the criminal sphere, the rights of accused persons should be strengthened, with special reference to access to a lawyer from the moment of arrest and the right to defense in first-instance and appellate courts. Other reforms are in the improvement of the conditions of detention, then improvements were made in the Law on health care during detention, especially in relation to the medical treatment of prisoners. Likewise, rules were adopted for the treatment of prisoners with mental health problems. The reforms were implemented with the aim of speeding up the court procedure and, also, to make it possible to grant compensation for the excessive length of the proceedings.

The protection of property was improved and the execution of court decisions at the ECtHR was improved. The service of bailiffs has been reformed with the aim of ensuring effective enforcement of court judgments. Almost half of the violations are related to Article 6 (right to a fair hearing), which mainly refers to the unfairness of the proceedings and the non-enforcement of the final judgments of the ECtHR.

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