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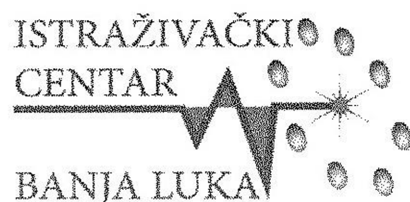
- Stanje u Bosni i Hercegovini i iskustva drugih -

Banja Luka, 2017. godine



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Pregledni rad

THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE NATIONAL LEGAL SYSTEMS OF THE MEMBER STATES WITH SPECIAL REFERENCE TO THE REPUBLIC OF SERBIA

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Abstract: The European Convention on Human Rights is a unique system of protection of human rights and an international document which, along with more than half a century long practice of the European Court of Human Rights, undoubtedly affects the national legislation and case law of the Member States, including the Republic of Serbia. Through that influence, the national legal system is harmonized with the EU *acquis communautaire* (whose member the Republic of Serbia is aiming to become), since all members of the European Union, through the membership in the Council of Europe, are the signatories to the Convention. In the field of protection of the rights guaranteed by the Convention, the importance of accepting the EU *Acquis Communautaire*, i.e. the common European values, is reflected in the improvement of the national legislative framework and the harmonization of national case law with accepted European standards. This ensures that the protection of guaranteed rights is achieved significantly faster and more efficiently, but it also provides an opportunity to consider possible directions of development *de lege ferenda* that would lead to improvement in the protection of rights by upgrading the existing solutions and implementing the new ones.

Keywords: European Convention on Human Rights, the European Court of Human Rights, the impact on national legal systems of Member States, the impact on the Republic of Serbia

THEORIES ON THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS - MONISTIC AND DUALISTIC -

The range of ratified international conventions among national sources of law is, of course, determined by each legal system independently. The principle of the validity of the norms of international law at the national level, namely the relations between international and national legal sources are the subject of ongoing discussion in the framework of two theories - monism and dualism.[1] As theoretical models of relations of internal and international law, monistic and dualistic theory are certainly not the norm, real or assumed, but an abstract vision of relations between the two groups of authorities, whereby

[1] A. Jakšić, *Evropska konvencija o ljudskim pravima – komentar*, Beograd, 2006, 29.

both have a stronghold in practice.[2] Expressing the attitude towards the ideas that underlie the two rights - the idea of sovereignty in internal law and the idea of unity embodied in international law - monism and dualism have more of a legal and political meaning, rather than legal and technical one.[3] Additionally, as reported in theory, both theories blur the reality because the relation between international and national law cannot be solved *a priori*.[4] Namely, the strict division between monistic and dualistic legal systems must be taken with caution, not only because of the fact that these theories arose long ago in circumstances that were certainly different from the existing ones, but also because there is a consensus that these two doctrines in their pure form nowadays does not exist in any system.

The question of dualism and monism is a question of two approaches, the doctrine of transformation on the one hand, and the doctrine of incorporation on the other.[5] In states which accept the dualistic theory, international agreements become part of domestic law once the laws concerning the matter of an international agreement are adopted, that is when the contents of an international agreement is transformed into national law by adopting national legislation; and in hierarchy of legal norms its provisions take legal position and acquire legal force of ordinary law.[6] This system is applied in Denmark, Finland, Germany, Iceland, Italy, Liechtenstein, Lithuania, and Sweden.[7] The monistic approach, on the other hand, means that international treaties are incorporated into national law in the original form from the date of their entry into force in that state with the intention of recognition of the supremacy over the "ordinary" national laws. With the ratification in the national system, the international treaty becomes part of national law, which is a characteristic of the monistic system and takes place between the Constitution and the law. This position the international treaty has in France, Belgium, Cyprus, Greece, Luxembourg, Malta, Norway, Spain, Portugal and most of the countries of Central and Eastern Europe.[8]

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[2] M. Kreća, *Odnos unutrašnjeg i međunarodnog prava*, Prilog projektu "Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU (pravni, ekonomski i sociološki aspekti)", Pravni fakultet u Beogradu, 2006, 15.
http://www.ius.bg.ac.rs/Naucni/Razvoj%20pravnog%20sistema%202006/01%20-%20Projekat%202006-3.pdf

[3] M. Kreća, *op.cit.*, 15.

[4] A. Jakšić, *Evropska konvencija...*, 29.

[5] I. Krstić, *Status međunarodnog prava u pravnom poretku Republike Srbije i njegova primena u praksi*, Pravni život, br. 12/2015, 22.

[6] J. Polakiewicz, *The Status of the Convenction in National Law, Fundamental Rights in Europe*, The ECHR and the Member States 1950-2000 / R. Blackburn and J.Polakiewicz (eds.), Oxford University Press, 2001, 42 according to J. Omejec, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava (Strasbourški acquis)*, Zagreb, 2013, 60.

[7] *Ibid.*

[8] J. Polakiewicz, *op.cit.*, 39-42 according to J. Omejec, *op.cit.*, 64.

In the national legal system of the Republic of Serbia, the European Convention on Human Rights (hereinafter "the Convention")[9] is a European standard of protection of human rights and international document that performs the biggest impact on their protection. As a ratified document in Republic of Serbia, Convention applies *ratione loci*, primarily in the territory, as well as extraterritorially when the authorities perform the functions of the sovereign authorities outside these territories and as *ratione personae* for all persons who come into contact with jurisdiction of state bodies of the Republic of Serbia, which are party in civil court proceedings.[10] The Convention applies *ratione materia* on all the guarantees contained in Articles 2-14 of this document, which, inter alia, also include a series of procedural guarantees in civil court proceedings.[11] In general, the Convention is not retroactive so it applies *ratione temporis*, only to those facts that occurred after the Convention entered into force in the Republic of Serbia.[12]

The current legal framework for the application of international law in the national legal system of the Republic of Serbia is closer to the monistic system, because of the principle of direct application of international law.[13] The general constitutional framework is the basis of direct application. Namely, the provision of Article 16 of the Constitution of the Republic of Serbia provides the direct application of ratified international treaties and primacy over the law, but not over the Constitution. That is, in the hierarchical relationship of legal acts in the national legal system of the Republic of Serbia, ratified international treaties are located between the Constitution and the law – they are hierarchically lower legal acts of the Constitution ("... shall be in accordance with the Constitution" - Article 16/2; "... may not be in conflict with the Constitution "- Article 194/4) but higher than the law ("laws and other general acts enacted in the Republic of Serbia may not be in noncompliance with the ratified international agreements ... "- Article 194/5). As a result of this attitude of the creators of the Constitution it is explicitly foreseen that the Constitutional Court decides on "consent of the laws and other general acts with the Constitution, generally accepted rules of international law and ratified international treaties" - Article 167/1 (1) as well as "the compliance of ratified international treaties with the Constitution" -

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[9] As a legal act of the Council of Europe the Convention was adopted in 1950 in Rome (CETS No.005). Also applies to the Republic of Serbia, on the basis of the Law on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Zakon o ratifikaciji Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda, "*Službeni list Srbije i Crne Gore-Međunarodni ugovori*", br. 9/2003, 5/2005).

[10] A. Jakšić, *Građansko procesno pravo*, Beograd, 2012, 84.

[11] *Ibid.*

[12] A. Jakšić, *Građansko procesno...*, 84.

[13] S. Đajić, *Primena međunarodnog prava u pravnom poretku Republike Srbije: načela i praksa*, Monism & Dualism: Basic Concepts of Public International Law / M. Novakovic (eds.), Beograd, 2013, 484.

Article 167/1 (2). Although this solution is subject to criticism,[14] the aim, however, of the Convention is not to replace the national system of guaranteeing human rights, but the machinery of protection established by the Convention in relation to the national system of guarantees for human rights is subsidiary.[15] Therefore, in accordance with the commitments and obligations that the Republic of Serbia took by signing the Convention, the national legal system should provide the primary protection of human rights guaranteed under this international treaty. In this sense, the judge of the European Court of Human Rights *L. Bianku* emphasized that the rights that have been established in the Convention must be protected as much as possible in the most direct environment of the appellants, within national legislation and national jurisdiction and administration, stating that this question touches the essential nature of the system of human rights protection under the Convention. This, in his view, provides that the protection of human rights is achieved significantly faster and more effectively, but is also significantly visible.[16]

IMPACT OF PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE NATIONAL LEGAL SYSTEMS OF THE MEMBER STATES

In relation to the national courts of the Member States, the European Court of Human Rights is a supranational court, and more than half a century long jurisprudence of this Court undoubtedly left a deep mark on legislation and case law of the Member States. It must be pointed out that the Court is not an instance of the fourth degree, nor has the function of control over the national courts of the Member States. This Court can't annul the decisions of the national courts or repeal the national law when, for example, its provisions are incompatible with the Convention. The Court does not provide protection against the false, inaccurate, or inadequate implementation of the provisions

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[14] It is emphasized in the theory that the control of the constitutionality of ratified international treaties is opposed to the Vienna Convention on the Law of Treaties (United Nations, 1969, 1155 UNTS 331), as per Article 27 of this Convention "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".This lack of the Constitution is recognized by the European Commission for Democracy through Law (Venice Commission), recommending that, until its elimination, the state examines the constitutionality of the international treaty before its ratification, appropriately to the application of the rules of the assessment of a voted, but unpublished Act. Z. Ivošević, Kontrola ustavnosti i zakonitosti, http://www.danas.rs/danasrs/dijalog/kontrola_ustavnosti_i_zakonitosti.46.html?news_id=79415&action=print#sthash.ZjbmCHO1.dpuf

[15] *Case of Handyside v. the United Kingdom*, No. 5493/72 od 7. decembra 1976., §48.

[16] L. Bianku, *Različiti aspekti primene Evropske konvencije za zaštitu ljudskih prava na nacionalnom nivou*, Ljudska prava u Evropi, Pravni bilten, br.2, 2013, 5, http://www.airecentre.org/data/files/bulletins/2013/2.2013.pdf

of national law (substantive and procedural), but from the violation of the rights guaranteed by the Convention and the protocols that accompany it. The mechanism of collective supranational control functions only as a supplementary, which is directly related to the above-mentioned subsidiarity of protection system established by the Convention.

The judgment of the Court should be a stimulus for the adoption and maintenance of European standards, reform and improvement of the legal system of the Member States.[17] It represents the ultimate outcome of conducting a trial, but essentially speaking only with the complete execution of the judgment of this Court the purposes for which the entire process is launched are achieved.[18] The purpose of conducting any judicial process is not just a judgment, but also its effective execution, not even the "judgment of the Court is an end in itself, but the promise of future changes, the starting point of a process which should allow for the human rights and freedoms to become effective.[19] In short, the Court's judgment in a case of a violation of human rights is not a goal *per se*, but, in addition to representing a certain satisfaction for the applicant, it also has some significant repercussions of respondent State. Although the decision declares a violation of rights, states are required to comply to the final decision of the Court in any case in which they are parties. This follows from Articles 46/1 of the *Declaration on comliance with commitments accepted by member States of the Council of Europe*.[20] Therefore, this Article directly orders a conscientious execution of judgments or other obligations that have been identified in relation to the state. In addition, it should be noted that this system of protection is not provided by any other international act. Regardless of the fact that the process of execution of judgments of the Court is very developed and regulated and it involves a number of different organs, mechanism of execution of judgments of the Court presents, as some authors cite "the Achilles' heel of the entire system established by the Convention".[21] This is especially related to the situation when, along with the award of compensation, some additional measures has to be taken to prevent further violations of rights and/or eliminate arising consequences. The obligation to take additional measures is for the first time

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[17] N. Vajić, *Djelovanje Europskog suda za ljudska prava s osvrtom na presude protiv Republike Hrvatske*, Der Europäische Gerichtshof für Menschenrechte, Herwig Roggemann (Hrsg.), Heft 5/2003, http://www.intercentar.de/fileadmin/files/Arbeitspapiere_Zentrum/ap5.PDF

[18] S. Carić, *Evropski sistem ljudskih prava*, Novi Sad, 2011, 149.

[19] F.Tulkens, *Execution and effects of judgements of the European Court of Human Rights: the role of judiciary*, "Dialogue between judges", Council of Europe, Strasbourg, 2006, 12, according to S. Carić, *op.cit.*, 149.

[20] *Declaration on comliance with commitments accepted by member States of the Council of Europe, Council of Europe*, 1994. Penalties for failure to execute the decision of the Court are contained in the Statute of the Council of Europe, London, 1949, CETS No.001.

[21] S.Greer, *Protocol 14 and the Future of the European Court of Human Rights*, 2005, P.L. 83, p. 92, S. Carić, *op.cit.*, 170.

featured in the *Case of Scozzari and Giunta v. Italy*,[22] which refers to the separation of the family, which has resulted in the violation of respect for family life.[23] In this decision, the Grand Chamber, with the declaration of infringement, determined the state's obligation to take individual measures in order to avoid violations of the rights protected by the Convention in specific cases, but also to undertake appropriate measures to prevent further (same or similar) violations.[24]

After the decision in the case *Scozzari and Giunta v. Italy*, the Court in its judgments refers to two types of measures, individual and general, which is due to the indisputable authority of the Court proved to be very effective. First, when it comes to individual measures, they depend on the character of the violation of the Convention and the circumstances of the case, and are largely taken when a just satisfaction ordered by the Court is not sufficient for the elimination of all the consequences of the violation, or when an individual continues to suffer from the consequences of a violation even after the court verdict. The measures of individual character are, for example, re-trial, the abolition of the injunction, erasing criminal records, the release of prisoners, transfer to another prison cell, measures relating to the residence (e.g. the approval of residence in the territory of the respondent State, the abolition of decisions on the expulsion of the State where the applicant is threatening the death penalty), acceleration or termination of proceedings pending before the competent national authority, measures related to the return of property, access to property or its use, destruction of some controversial pictures or information, organization of meetings between parents and children.[25]

In addition to individual measures, in response to the judgment of a violation of a Convention right, Member States should sometimes take the general measures, such as legislative changes, which certainly leads to an amend of judicial practice. Namely, it is clear that violations of Convention rights may arise as a result of a deficiency in national legislation. Having that in mind, the general measures would be reflected in the changes and

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[22] *Case of Scozzari and Giunta v. Italy*, No. 39221/98, 41963/98 od 13. jula 2000.

[23] In the catalog of rights guaranteed by the Convention, among other rights, the right for respect of family life is guaranteed. This right is included in Article 8 of the Convention and reads as follows:

1.Everyone has the right to respect for his private and family life, his home and his correspondence.

2.There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[24] *Case of Scozzari and Giunta v. Italy*, §249.

[25] See for example Collection of Interim Resolutions 2009-2014 (by country), Department for the execution of judgments of the European Court of Human Rights, https://www.coe.int/t/dghl/monitoring/execution/Source/Documents/IntRes2014_en.pdf

amendments of laws and regulations or the adoption of new laws, if the cause of rights violations is their lack or emptiness in a statutory (legal) system. In these cases, the respondent State is to review their legislation, or to supplement the new laws or amending existing provisions, in order to be harmonized with the judgments of the Court,[26] which is a direct impact on the legislation of the Member States. This also emphasizes the obligatory side of the Convention, through the so-called soft impact on the internal law of the Member States. General measures certainly have a preventive purpose, as they are designed to prevent the occurrence of new, similar violations of Convention rights in the future.

Examples of the impact of the Convention and the Court's case law on the Member States are numerous. After the decision of this Court, Austria amended the parts of the law on criminal procedure and regulations on the treatment of prisoners in hospitals; Belgium modified the Civil Code and equalized marital and extramarital children, adopted amendments to the law on vagrants and prescribed measures to subsidize schools in the French language in the Flemish part of the country; France passed a law which regulated the phone tapping; Denmark has adopted amendments to the law on custody for children born out of wedlock; Greece has adopted amendments to the law on pre-trial detention; The Netherlands has amended the military penal law and the law on the detention of mentally ill patients; Germany, due to improper detention period, changed the rules of criminal procedure; Switzerland completely reformed the organization of its judiciary and amended the Civil Code in respect of detention and involuntary placement in correctional centers; The United Kingdom legally prohibited corporal punishment in public schools; Croatia amended its Constitution and provided the possibility of an action before the Constitutional Court even before all legal remedies are exhausted, in case of a grave violation of constitutional rights when a regular court did not bring a verdict in a reasonable time; Italy has conducted amend to the Code of Civil Procedure (the so-called Pinto law), introducing a remedy for length of proceedings in civil matters, allowing claimants to receive a fair compensation for the violation of the rights guaranteed by the Convention without recourse to the Court.[27]

The European Court of Human Rights in addition to the national legislation of a Member States, exercised influence on the legislation of the Republic of Serbia. Decisions of the Court against Serbia for a violation of Convention rights have a "quasi - constitutional" character, because the recommendations of these decisions relate to desirable changes in national legislation. Therefore, there is no question as to whether the state should

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[26] J. Omejec, *op.cit*, 317.

[27] V. Rakić-Vodinelić, S. Gajin, M. Reljanović, *Evropa ne stanuje u Babušnici: građani protiv Srbije pred Sudom u Strazburu*, Peščanik, Beograd, 2013, 268, https://pescanik.net/wp-content/PDF/Evropa.pdf

amend its legislation and act according to what the decision of the Court ordered, because the answer is clear. If the state fails to comply with the judgment, it shall be deemed to continue to violate the relevant provisions of the Convention.[28]

A typical example of the impact of the Court to the legislation of the Republic of Serbia is the introduction of a special remedy to protect the right to trial within a reasonable time. The introduction of this remedy is the result of a decision in the *Case of V.A.M. v. Serbia*, where the Court concluded that the Serbian citizens do not have at their disposal "an effective remedy" to protect the "right to a trial within a reasonable time", which is guaranteed by Article 13 in conjunction with Article 6/1 of the Convention.[29] In essence, the Court in this decision traced course of action of the national authorities in Serbia in order to ensure respect for the right to trial within a reasonable time. Thus, the decision in the case V.A.M. was, in fact, the immediate cause for the introduction of modalities of constitutional complaint as an effective remedy in case of violation of the right to trial within a reasonable time and had a far-reaching significance for the measures in the Republic of Serbia with the aim to align a national system of human rights protection with accepted international standards of the Convention. A step closer in harmonizing national legal systems is made by adopting the Law on the Protection of the right to trial within a reasonable time,[30] which comprehensively regulates the procedure for the protection of this right. Considering that, apart from the constitutional complaint, the right to trial within a reasonable time in Serbia did not enjoy effective protection over a longer period of time, it can be said that the "recommendations" in the decision of the European Court of Human Rights has influenced the adoption of an entirely new law.

The impact of the Court to make changes in the legislation of Serbia with regard to the Civil procedure is reflected in the introduction of two new grounds for retrial. First, Article 426/1 (11) of the Code of Civil Procedure[31]

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[28] If the state does not resolve the cause of unlawfulness (not amend the regulation does not make restitution, no retry) it is a continued violation of the relevant provisions of the Convention. The final result of the negative report of the Committee of Ministers and the sanctions that may be taken by the Council of Europe. It may, in fact, say that in practice the decision of the Strasbourg Court are executed without exception; otherwise the Member State threatens exclusion from the Council of Europe. In this regard S. Đajić, *Dejstva odluka Evropskog suda za zaštitu ljudskih prava u nacionalnim pravnim sistemima*, Zbornik radova Pravnog fakulteta u Novom Sadu, br. 1-2/2003, 221.

[29] The European Court of Human Rights, in a number of decisions of various natures rendered against Serbia found that the applicants had no effective remedy in relation to the excessive length of civil proceedings (see for example *Case of Cvetković v. Serbia*, No.17271/04 од 10. јуна 2008. ("Službeni glasnik RS", 68/2008 i 25/2009), *Case of EVT Company v. Serbia,* No.3102/05 од 21. јуна 2007. ("Službeni glasnik RS", 63/2007).

[30] Zakon o zaštiti prava na suđenje u razumnom roku ("Službeni glasnik RS", br.40/2015).

[31] Zakon o parničnom postupku ("Službeni glasnik RS", br. 72/2011, 49/2013 - odluka US, 74/2013 - odluka US i 55/2014).

provides that the procedure, which ended with a final decision of the court can, at the request of a party, be repeated if the party gains the ability to use the decision of the European Court of Human Rights that determined a violation of human rights, which could impact the adoption of favorable decision. On the impact of the decisions of the Court in revising our procedural legislation indicates the reason for retrial of the provision of the Article 426/1 (12) Code of Civil Procedure. Specifically, it stipulates that the procedure, which ended with the court decision, may, at the request of a party, be repeated if the Constitutional Court, by a constitutional complaint, found a violation or denial of human or minority rights and freedoms guaranteed by the Constitution in civil proceedings that could have affected the rendering of favorable decisions. If we bear in mind that the constitutional complaint, as a means to protect the right to trial within a reasonable time, in our legal system is established after the Court found a violation of this right in a number of cases against the Republic of Serbia, there is an obvious connection between the reasons for reopening proceedings and decisions taken by the European Court of Human Rights.

CONCLUSION

When the state assumes responsibility at the international level, it inevitably gives rise to a duty to harmonize national law with the accepted international obligations, provided that the method and the means of achieving that aim are not determined. In other words, by accepting the Convention, the state created a formal acceptance of the obligation to guarantee the approval of national law with the Convention, and that means all its necessary changes, so the impact of the Convention is uncontroversial. In addition, the influence of the practice of the Strasbourg Court can be considered indisputable, given that, as a Member State, the state actually needs to continue to follow this practice and guidelines for changes in the legislation in order to prevent violations of the rights guaranteed by the Convention. Thus, the practice of the Court is not solely in the service of direct protection of human rights, but also a kind of catalyst for the complete harmonization of the legal systems of member states of the Convention.

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UTICAJ EVROPSKE KONVENCIJE O LJUDSKIM PRAVIMA I PRAKSE EVROPSKOG SUDA ZA LJUDSKA PRAVA NA NACIONALNE PRAVNE SISTEME DRŽAVA ČLANICA SA POSEBNIM OSVRTOM NA REPUBLIKU SRBIJU

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Apstrakt: Evropska konvencija o ljudskim pravima predstavlja jedinstveni sistem zaštite ljudskih prava i međunarodni dokument koji, zajedno sa više od pola veka dugom praksom Evropskog suda za ljudska prava, nesumnjivo utiče na nacionalna zakonodavstva i sudsku praksu država ugovornica, pa i Republike Srbije. Kroz taj uticaj nacionalni pravni poredak usklađuje se sa pravnim tekovinama Evropske unije (čija članica nastoji da postane i Republika Srbija), budući da su sve članice Evropske unije, preko članstva u Savetu Evrope potpisnice ove Konvencije. U domenu zaštite prava garantovanih Konvencijom značaj prihvatanja tekovina Evropske unije, odnosno zajedničkih evropskih vrednosti, ogleda se u unapređenju nacionalnog normativnog okvira i usklađivanju nacionalne sudske prakse sa prihvaćenim evropskim standardima. Time se obezbeđuje da se zaštita garantovanih prava ostvari znatno brže i delotvornije, ali se ujedno i pruža prilika za sagledavanje mogućih pravaca razvoja de lege ferenda koji bi doveli do poboljšanja zaštite prava, kroz unapređenje postojećih i implementaciju novih rešenja.

Ključne reči: Evropska konvencija o ljudskim pravima, Evropski sud za ljudska prava, uticaj na nacionalne pravne sisteme država ugovrnica, uticaj na Republiku Srbiju

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