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# **The Influence of the European Convention on Human Rights on National Law**

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**Europa-Kolleg Hamburg  
Institute for European Integration**

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## **The Influence of the European Convention on Human Rights on National Law**

Yuliya Zaplotynska\*

### **Abstract**

*This thesis is devoted to the analysis of the influence exerted by the Convention for the Protection of Human Rights and Fundamental Freedoms upon national law of parties to it. The direct impact of the Convention's provisions is estimated in this paper together with the role of the European Court of Human Rights' case-law. This research is an attempt to provide a full and complex assessment of the influence not merely of the Convention as an international treaty but of the Convention as a source of legal order sui generis.*

*This research comprises a theoretical analysis of the Convention's impact on national legal systems and its evaluation on the practical example of Ukraine. The influence of the Convention on Ukrainian law is assessed mainly from the practical point of view, however, a theoretical analysis is also provided. A balance between pure theoretical and practice-based approaches is sought.*

*The aim was to evaluate the current situation as well as to analyze the pattern of its evolution and also perspectives for the development in the future. In this research paper I try to provide the theoretical basis of the Convention's impact on national law and its practical assessment on the example of Ukraine.*

**key words: European Convention on Human Rights, national law, Ukraine, legal system, case law**

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## **1. Introduction**

The system of human rights protection created by the Convention for the Protection of Human Rights and Fundamental Freedoms has always been an exciting topic for me. My interest in this topic first appeared during a specialized course within my first master studies at Ivan Franko National University of Lviv. While studying at the Europa-Kolleg Hamburg I became assured that I would love to research the influence of the Convention more deeply. Interaction between national legal systems and the system of the Convention was of particular interest for me. As long as I have a background in theory of law, theoretical aspects of co-existence of different legal systems in connection with human rights aspects which bring real consequences felt by each individual were perfect objects for my research.

The European Convention for the Protection of Human Rights and Fundamental Freedoms arose as a public law instrument of unprecedented importance in Europe. It is already deemed to be a kind of constitutional act for the whole continent which exerts an influence beyond its original objectives. The Conventional system serves as an example for other systems for the protection of human rights, including those in other parts of the world. However, it is important to first estimate its impact on states which are parties to the Convention. Do the Conventional provisions interfere with the national legal norms? Does the Convention change the shape of the whole national legal system?

Nowadays, the Convention itself is more than a usual treaty of international public law, it does not only have a very special objective, but also created its own 'legal system'. Conventional norms are not stable, they are further developed by the European Court of Human Rights with regards to the most recent developments. The constant development of the Convention does not only change the shape of the Conventional system, it also causes changes in national laws but not only.

What are the ways of the Convention's influence on domestic legal orders? To what extent does the Convention exerts its impact? What is the role of the European Court of Human Rights' case-law in this process?

Moreover, in the current paper the impact of the Convention on the Ukrainian legal system, as a particular example, is also addressed. It was beneficial for the research, as it provided a possibility to analyze the influence of the Convention in detail. Moreover, it was beneficial for me, as I could analyze the situation in my native country more precisely and were able to make suggestions concerning necessary steps to be taken.

This research is an attempt to make a first profound and systematic analysis of the Convention's impact on national legal systems, taking into consideration the direct influence of the provisions enshrined in the Convention as well as their dynamic interpretation by the European Court of Human Rights and finally the role of the Court's decisions within countries. Moreover, this thesis comprises also an analysis of the particular situation in Ukraine and effects caused by the Convention's system on its legal order. For the first time the Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights" is discussed from the perspective of its constitutionality.

This paper is based on the analysis of scientific articles and monographs dedicated to the topic of this research. Theoretical concepts and positions contained in the aforementioned sources were analyzed from the point of view of the particular objective of the research and were partially referred to in the paper. Moreover, original documents, legal acts and other materials were used as a basis for the research.

Methodologically this research was pursued on the basis of a traditional dogmatic approach. However, in this paper I also sought to refer to more practical issues and experiences. Current research was held with the help of logical methods such as analysis, synthesis, comparison and generalization. General jurisprudence, historical and comparative-law methods were also applied in this research. Moreover, I based my research on notions of

theory of law such as for example legal system, legal order, legal provision, legal norm, binding force and direct effect in order to give a description of the researched phenomenon of the Convention's impact on countries.

This thesis contains six parts: 1. Introduction; 2. The European Convention on Human Rights in national legal orders; 3. Influence of the European Court of Human Rights' Case-Law; 4. Impact of the Convention for the Protection of Human Rights and Fundamental Freedoms on the Ukrainian legal system; 5. Conclusions and 6. Bibliography. The main part of the paper is divided into three chapters.

The question of the effect of the Convention within national legal systems and its direct influence on them is addressed in the chapter 'The European Convention on Human Rights in national legal orders'. In particular, I have analyzed the binding power of the Convention upon states, the status it enjoys within domestic legal orders and the practical outcome of the influence exerted by the Convention.

The chapter 'The Influence of the European Court of Human Rights' Case-Law' is devoted to the analysis of the Court's practice and its role within the parties to the Convention. In this chapter I refer to the essence of the Court's interpretational activity, to the status of its case-law and its practical influence within national legal systems.

The particular impact of the Convention on the Ukrainian legal order is analyzed in the chapter 'Impact of the Convention for the Protection of Human Rights and Fundamental Freedoms on the Ukrainian legal system'. The status of the Convention in national law, legislative changes brought by the Convention and practice of the Court are addressed in this part of the thesis. Moreover, the Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights" as the most recent and controversial development in Ukrainian legal practice is analyzed in detail. All addressed questions and problems are summarized in the Conclusions.

## **2. The European Convention on Human Rights in different national legal orders**

### **2.1. Introduction**

The impact of provisions enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms on domestic law and its application is significant. The Convention arose as a semi-constitutional act for Europe and goes by now beyond the most optimistic views on its possible effects as regarded by the original parties – the authors of the Convention. Finally its influence exceeded all possible expectations.<sup>1</sup>

The European Convention on Human Rights has entered into force in all state parties – members to the Council of Europe; however, this does not imply that it has become part of their law.

### **2.2. Pacta sunt servanda**

Any state once having signed and duly ratified the Convention for the Protection of Human Rights and Fundamental Freedoms is obliged to perform it in accordance with the main fundamental and universal principle of public international law as well as of all legal systems<sup>2</sup> - the principle '*pacta sunt servanda*'. This principle is universally recognized and has really fundamental value.<sup>3</sup> It is embodied in article 26 of the Vienna Convention on the Law of Treaties which states: "Every treaty in force is binding upon the parties to it and must be performed in good faith". Therefore, the European Convention on Human Rights should be carried out in 47 states.

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<sup>1</sup> Keller/Sweet (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 678.

<sup>2</sup> Aust, Modern Treaty Law and Practice, p. 179.

<sup>3</sup> Buergenthal/Murphy, Public International Law in a Nutshell, p. 119.

However, the '*pacta sunt servanda*' principle provides that the Convention should be performed after entering into force. Yet there are also exemptions from that rule, such as article 18 of the Vienna Convention on the Law of Treaties which foresees limited obligations of the state which has signed a treaty subject to ratification, i.e. the European Convention, before it entered into force.

The European Convention on Human Rights is a very important international law treaty that establishes not only standards for human rights protection within the countries but it also provides an effective mechanism for judicial review in case the state fails to fulfill its obligations. The Convention includes provisions of great value for each European citizen. Therefore, it is obvious that such a treaty could not enter into force without due procedure of the ratification. According to article 59(1) of the Convention in line with the provisions of articles 11, 14, 16 and 24 of the Vienna Convention on the Law of Treaties it should be ratified after being signed. And it enters into force at the date of the deposit of its instrument of the ratification (usually an act of parliament, a statute or a law on ratification) under article 59 (3) of the Convention in conformity with article 24 of the Vienna Convention.

Signing and ratification are necessary and essential preconditions for a treaty to enter into force in the realm of public international law, they implicate a free consent of the state to be bound by the treaty and afterwards perform its obligations under this treaty in a good faith. It is common that the government (which represents the executive branch of state power) is authorized to conclude and sign international treaties. However, in order a treaty to be fully enforceable and binding for the state there should be also consent of the parliament (legislative branch of power) to adhere to such treaty. Such consent is usually given in the form of an 'instrument of ratification' or a special law adopted in order to become a party to the particular treaty.

Hence, it is self-understandable that the European Convention on Human Rights requires ratification after signing with the purpose to come into effect for the particular state.

One more general issue of public international law should be addressed in order to understand the role and influence of the Convention on its parties. One of the most widespread and important practices in this realm is signature or ratification of treaties with reservations.<sup>4</sup> Stemming from customary international law the right of states to make reservation was embodied in article 19 of the Vienna Convention on the Law of Treaties. The European Convention on Human Rights itself provides that reservation in respect of its provisions may be made except ones of general character.

In accordance with article 2(1)(d) of the Vienna Convention 'reservation' is defined as follows: *a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.* Thereafter, the respective state agrees to give effect to the treaty, i.e. the European Convention, however, also stating that some legal rules contained in the treaty are not applicable or are applicable in a different way. One can also assume that in case a possibility to make a reservation is not given, the state could not or would not become a party of such treaty. As long as the European Convention addresses very vulnerable and sensitive issues of human rights protection –often in contrast to state interests<sup>5</sup>-, it can be assumed that the respective reservations are so essential for the respective state that without the reservation the European Convention would not come into effect.

However, the European Court of Human Rights itself addressed the issue of the Convention's validity. It deployed from the classical public international law approach in its

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<sup>4</sup> Buergenthal/Murphy, Public International Law in a Nutshell, p. 115

<sup>5</sup> Castberg, The European Convention on Human Rights, p. 12.

case-law.<sup>6</sup> Prominent and outstanding conclusions were reached by the Court in its decisions in the cases of *Belilos v Switzerland*<sup>7</sup> and *Loizidou v Turkey*<sup>8</sup> which became prominent issues in the Court's jurisprudence. The Court held that the validity of the European Convention does not rely on the validity of reservations and may even -in the final consequence- lead to the invalidity of the reservations made by the state. It is a unique issue of departure from standard public international law rules.<sup>9</sup>

Therefore, the European Convention on Human Rights once ratified should be duly performed by the state.

Furthermore, according to article 27 of Vienna Convention on the Law of Treaties a party to the European Convention may not invoke the provisions of its internal law as justification for the failure to perform the treaty. It should be carried out in good faith notwithstanding any conflicting national law.<sup>10</sup> However, existence and validity of such conflicting domestic regulations is not questioned, the fact that some provisions contradict the Convention does not have an immediate consequence of their invalidity. If such a provision infringes a particular right of a person under jurisdiction of the respective state it only means that this state failed to fulfill its obligations under international law. National legislation may not be invoked as an excuse for the non-fulfillment of state obligations under the Convention.

To sum up, states having signed and ratified the European Convention on Human Rights are bound by its rules and are obliged to perform their obligations under it in good faith notwithstanding the reservations made during the ratification procedure, as long as these reservations contradict objectives of the Convention.

### 2.3. Effect of the Convention in domestic legal systems

Notwithstanding of the obligation of a party to the European Convention to perform it, it does not immediately have a consequence of its direct applicability within the state's national legal system. It does not implied that as soon as the Convention enters into force that it is a part of this state's law.<sup>11</sup>

The European Convention does not specify the way how it should be implemented into domestic law; neither has it obliged parties to it to implement it at all. The main obligation of the states is to guarantee everyone under their jurisdiction the rights and freedoms foreseen by the Convention. Hence, it is the state which should ensure implementation of its obligations domestically.<sup>12</sup>

In contrast to the binding effect of the European Convention, the matter of its effect within the national law is a question governed solely by the constitutional law of the given state<sup>13</sup> as long as the European Convention does not specially provide otherwise and does not even give any guidance in this concern. It does not oblige parties to it to make the European Convention part of the internal (domestic) law, neither imposes it its direct effect, national applicability or supremacy over other sources of domestic law.<sup>14</sup>

To sum up, the European Convention does not require its direct applicability in a domestic legal system; such an obligation is not inferred from the treaty itself but also not approved by the case-law of the European Court of Human Rights. The Court holds that a party to the Convention is not bound to give it direct effect or to implement or to incorporate

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<sup>6</sup> Wildhaber, *International and Comparative Law Quarterly* 2007, p. 227.

<sup>7</sup> EHCR, Case [10328/83](#), *Belilos v. Switzerland*, [1988] Pubs, Series A, vol. 132.

<sup>8</sup> EHCR, Case [15318/89](#), *Loizidou v. Turkey*, [1996], *ECtHR 1996-VI, Series A 310*.

<sup>9</sup> Wildhaber, *International and Comparative Law Quarterly* 2007, p. 227-228.

<sup>10</sup> Buergenthal/Murphy, *Public International Law in a Nutshell*, p. 119.

<sup>11</sup> Aust, *Modern Treaty Law and Practice*, p. 178.

<sup>12</sup> Van Dijk/van Hoof/van Rijn/Zwaak, *Theory and Practice of the European Convention on Human Rights*, p. 26.

<sup>13</sup> Janis/Kay/Bradley, *European Human Rights Law: Text and Materials*, p. 831.

<sup>14</sup> Van Dijk/van Hoof/van Rijn/Zwaak, *Theory and Practice of the European Convention on Human Rights*, p. 26.



provisions of the Convention into national law or to adopt any other particular method in order to ensure the observance of rights and freedoms foreseen in the Convention.<sup>15</sup> It is only essential that those rights and freedoms can be enjoyed by the individuals in fact.

However, one could assert that the Convention requires a direct effect. It could be inferred from article 13 of the Convention saying that all states have a duty to provide effective remedies in front of a national authority for everyone whose rights and freedoms enshrined in the Convention are violated.<sup>16</sup> Nevertheless, this can be achieved by other means not involving a direct effect. Therefore, it would be incorrect to suggest that the Convention demands a direct effect .

#### 2.4. 'Monism', 'dualism' and the Convention

A particular state while giving an effect to the Convention can rely on its own constitutional laws and traditions. There are two general approaches followed in some way by countries in their perception of international treaties in general and the European Convention on Human Rights in particular: "monism" and "dualism". In spite of an ever-increasing number of legal scholars who tend to escape from such dichotomy and present the opposition of two approaches as misleading, it provides an important pattern and a general overview of distinctions between countries which belong to them. However, it should be acknowledged that the implementation of the European Convention on Human Rights by the states does not always fit to the traditional approaches.

In accordance with the dualistic approach international law, including the Convention, and national (or municipal, internal, domestic) law constitute two different and distinguishable bodies of law<sup>17</sup> which regulate different subject matters.<sup>18</sup> It is implied that international law regulates relations between sovereign states whereas national law is applicable within the state and regulates relation with or between its citizens. According to this position none of the two legal systems is entitled to create or alter rules of the other.<sup>19</sup> The application of the Convention within a particular 'dualistic' state provided by a particular statute, therefore, is a mere exercise of national law powers.

In such countries the European Convention should be transformed into domestic law by means of the prescribed procedure.<sup>20</sup> Citizens do not enjoy rights and freedoms provided by the Convention unless they are incorporated into national law. National legislation should give an effect to them.<sup>21</sup> Subject to national law, they depend on the incorporation of the rules of the Convention.

Moreover, after being incorporated, provisions of the treaty do not have precedence over domestic law provided that they are enshrined in statutes and, therefore, can be amended and abolished.<sup>22</sup> Such an amendment or abolishment would be in line with national law even though it could constitute a violation of the treaty. However, as long as such provisions constitute a part of domestic legislation but not of the treaty itself the legislator is not constrained to change or to repeal them. The concept of the independence of the two different legal systems – international law and national law, is evidently reflected here.

Traditionally, Anglo-Saxon and Scandinavian countries are reckoned to be among countries where the dualistic approach is applicable. Germany and Italy are also considered to

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<sup>15</sup> *Janis/Kay/Bradley*, European Human Rights Law: Text and Materials, p. 834.

<sup>16</sup> *Letsas*, A Theory of Interpretation of the European Convention on Human Rights, p.33.

<sup>17</sup> *Müllerson/Fitzmaurice/Andenas* (eds.), Constitutional Reform and International Law in Central and Eastern Europe, p. 38; *Wildhaber*, International and Comparative Law Quarterly 2007, p. 218.

<sup>18</sup> *Brownlie*, Principles of Public International Law, p. 33-34.

<sup>19</sup> *Ibid.*, p. 33-34.

<sup>20</sup> *Van Dijk/van Hoof/van Rijn/Zwaak*, Theory and Practice of the European Convention on Human Rights, p. 26.

<sup>21</sup> *Keller/Sweet* (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 187.

<sup>22</sup> *Aust*, Modern Treaty Law and Practice, p. 188.

be rather “dualistic” states. All these countries incorporated the European Convention on Human Rights into their domestic laws and effectively apply it now. However, even though these countries adhere merely to the dualistic approach, the European Convention had its impact even before incorporation, however, faced some particular problems later. These issues will be addressed further on.

According to the monistic approach treaties in effect are part of the state’s domestic law without any requirement of prior transformation into national statutes<sup>23</sup> – incorporation.<sup>24</sup> In conformity with this approach domestic law and international law belong to one single legal system<sup>25</sup> or, to say it differently, national law constitutes an integral and inalienable part of the overarching international legal system; therefore, national authorities are bound by the treaty’s provisions also in their relations with individuals, as long as the individual acquires his or her rights directly from international law.<sup>26</sup>

However, there is no single concept among states pursuing the monistic approach; there are many differences and variations between them.<sup>27</sup> The difference is made in relation to the nature of a treaty and the ability to be self-executive for example. Moreover, in some states provisions of a treaty are supreme to national law, in other it is only superior to ordinary legislation, in some it has the status of ordinary law and can be overridden by later laws. Therefore, international law can have the status of ordinary (statutory) law, above-statutory law, constitutional or even over-constitutional law.<sup>28</sup>

Nevertheless, the legal status of treaties is not a final remedy. It is also essential whether domestic officials and courts apply rules contained in the treaties, whether a particular culture of international law application and adherence to it exists in the society.

France, the Netherlands, Switzerland<sup>29</sup> as well as new Eastern and Central European states – which are parties to the European Convention - belong to the countries which support the monistic approach. The Convention enjoys direct effect and constitutes a part of the national law there, at least *de jure*.

The Convention for the Protection of Human Rights and Fundamental Freedoms requires its incorporation into national law in order to be applicable within ‘dualistic’ states. Having been incorporated, the rights and freedoms foreseen by the Convention become enjoyable by citizens of relevant state. As long as they are incorporated by means of ordinary legislation, they acquire its status and can be withdrawn or amended. In ‘monistic’ states the Convention itself is considered to be a part of national law and is directly applicable. In different states it may enjoy different status reaching from ordinary law to over-constitutional law.

## 2.5. Influence of the Convention beyond traditional approaches

However, theoretical doctrines do not always reflect the whole range of interconnections and collaborations between the Convention and domestic law as well as peculiarities of its internal application. The Convention for the Protection of Human Rights and Fundamental Freedoms evolved into a very influential and crucial source of international law on the one hand. On the other hand law-enforcement practice is of greatest importance; as long as legislative provisions are not sufficient on their own, application or resistance to apply by domestic courts, state authorities determines its real validity and effect within the given state.

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<sup>23</sup> *Van Dijk/van Hoof/van Rijn/Zwaak*, Theory and Practice of the European Convention on Human Rights, p. 27; *Aust*, Modern Treaty Law and Practice, p. 183.

<sup>25</sup> *Wildhaber*, International and Comparative Law Quarterly 2007, p. 218.

<sup>26</sup> *Van Dijk/van Hoof/van Rijn/Zwaak*, Theory and Practice of the European Convention on Human Rights, p. 27.

<sup>27</sup> *Aust*, Modern Treaty Law and Practice, p. 183.

<sup>28</sup> *Wildhaber*, International and Comparative Law Quarterly 2007, p. 218.

<sup>29</sup> *Castberg*, in: *Opsahl/Ouchterlony* (eds.), The European Convention on Human Rights, p.14.

Therefore, monism and dualism do not decide the Convention's real status in a particular country.<sup>30</sup> They can only provide a general perception of the Convention's status.

Austria is considered to be a leader in the incorporation of the Convention.<sup>31</sup> However, it was deemed to combine attributes of monism and dualism<sup>32</sup>, therefore the Austrian constitution was changed in order to render the Convention a special status as a directly applicable constitutional law. Finally and most importantly, the Constitutional Court took a position highly favorable to the Convention and consequently reviewed laws and other legislation in regard to their consistency with the European Convention on Human Rights.<sup>33</sup>

In Germany, country mainly considered to be a dualistic state<sup>34</sup>, the European Convention acquired its special status because of the jurisprudence of the Constitutional Court of Germany. Thereafter, the treaty's provisions formally are directly applicable and have the status of federal law, but not of constitutional law. However, the Constitutional Court in its decisions conferred the Convention semi-constitutional or *lex specialis*<sup>35</sup> status and held that overall the Convention prevails over later legislation unless the legislator explicitly says otherwise.<sup>36</sup> Therefore, in Germany the weight of the European Convention was boosted by judicial practice.

Scandinavian countries, which were always perceived as holding dualistic positions, show a rather monistic attitude in respect to the Convention.<sup>37</sup> The Convention was incorporated into the national law of these countries and got the status of a statute which could be overridden by latter legislation.<sup>38</sup> Nevertheless, national courts when applying domestic law usually refer to the Convention and interpret it in the light of the Convention.<sup>39</sup>

Great Britain is a classical example of a dualistic state. The European Convention was incorporated there comparatively recently and does not possess direct effect. However, national courts - even before its incorporation - could address the Convention when interpreting domestic legislation or when a common law issue was not settled to develop the law.<sup>40</sup>

National courts of the dualistic Belgium clearly departed from the initial constitutional provisions in regard to the European Convention on Human Rights and pursue a strictly monistic approach.<sup>41</sup> There the Convention has a direct effect and following the decision of the *Cour de Cassation* prevails over conflicting national legislation irrespective of the date of the adoption as long as its provisions are clear and 'legally complete'.<sup>42</sup>

As a pure monistic state France is considered to be less effective in the application of the Convention as, for example, Belgium.<sup>43</sup> The treaty has direct effect and takes precedence

<sup>30</sup> Keller/Sweet (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 683.

<sup>31</sup> Janis/Kay/Bradley, European Human Rights Law: Text and Materials, p. 850.

<sup>32</sup> Keller/Sweet (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 684.

<sup>33</sup> Janis/Kay/Bradley, European Human Rights Law: Text and Materials, p. 850.

<sup>34</sup> Keller/Sweet (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 685, European Human Rights Law: Text and Materials p. 852, Van Dijk/van Hoof/van Rijn/Zwaak, Theory and Practice of the European Convention on Human Rights, p. 27; some authors disagree and classifies to monistic states – Aust, Modern Treaty Law and Practice, p. 184.

<sup>35</sup> Keller/Sweet (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 685.

<sup>36</sup> Van Dijk/van Hoof/van Rijn/Zwaak, Theory and Practice of the European Convention on Human Rights, p. 27.

<sup>37</sup> Keller/Sweet (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 684.

<sup>38</sup> Janis/Kay/Bradley, European Human Rights Law: Text and Materials, p. 853.

<sup>39</sup> Krishnamurthy/Ganapathy-Dore (eds.), European Convention on Human Rights: Sixty Years and Beyond, p. xxxii.

<sup>40</sup> Janis/Kay/Bradley, European Human Rights Law: Text and Materials, p. 854.

<sup>41</sup> Keller/Sweet (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 683.

<sup>42</sup> Janis/Kay/Bradley, European Human Rights Law: Text and Materials, p. 851.

<sup>43</sup> Keller/Sweet (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 683.

over national law. However, the French Constitutional Court does not refer to the Convention when examining new legislation in matters of its constitutionality.<sup>44</sup>

Spain and the Netherlands could be also considered as leaders in giving an effect to the Convention within their national legal systems. The Spanish Constitutional Court rendered a special status to the Convention and even constitutional rights are interpreted in its light. The Constitution of the Netherlands foresees that the European Convention has supremacy over itself. The Constitutional Court of the Netherlands also enforces the Convention, however, more cautious.<sup>45</sup>

New participants to the Council of Europe – Eastern European states such as Russia, the Slovak Republic, Poland as well as Turkey are formally monistic states. However, the lack of a culture of human rights protection, systemic judicial problems and insufficient commitment to enforce the European Convention diminishes its overall effect.

Hence, the distinction between monistic and dualistic states is important for the estimation of the European Convention on Human Rights role within domestic legal systems. However, the practice of its application, the position of the highest national courts, sometimes politicians also influence or even shape the particular role of the Convention. Moreover, it is possible to draw the conclusion that in comparison with classic international treaties the Convention is treated in a different way within domestic legal systems because of its specific objective.

## 2.6. Conclusions

The effect and influence of the Convention on national legal system depends on multiple factors. The Conventional provisions should be observed by the state under public international law. However, its domestic status is stipulated by constitutional provisions and traditions, the perception of international treaties as a source of law as partially reflected by dualistic and monistic approaches and also the real application of its provisions by state authorities and especially national courts and their position in this matter. Due to the nature of the Convention it enjoys a different status within states in comparison to other international treaties. It has penetrated much deeply into the respective national legal orders notwithstanding the traditional approaches of the states to international law. And there is a tendency towards an even deeper integration in the future.

## 3. Influence of the European Court of Human Rights Case-Law

### 3.1. Introduction

The impact of the Convention for the Protection of Human Rights and Fundamental Freedoms on national legal systems may not be confined to the implementation of the Convention itself. It is impossible to estimate the influence of the Convention without taking into consideration the case-law of the European Court of Human Rights, which keeps the Convention in a constant process of further development and evolution because of the proactive position of the Court. Its jurisprudence elaborates and expounds legal *acquis* of the Convention. Nowadays, the European Court of Human Rights is considered to be a source of own human rights legal order.<sup>46</sup>

The case-law of the Court influences national legal systems in two different ways. On the one hand, the Court's judgments call for general measures to be taken by the states and not only by the state against which the judgment was rendered. On the other hand, precedent-

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<sup>44</sup> *Janis/Kay/Bradley*, European Human Rights Law: Text and Materials, p. 851.

<sup>45</sup> *Keller/Sweet* (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 684.

<sup>46</sup> *Keller/Sweet* (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 3.

based case-law of the Court extends provisions of the Convention by interpreting them in a dynamic way. These two aspects of the influence of the Courts' decisions are interdependent of each other, because the strengthening of one of them has the consequence of a deeper impact on domestic law by the other one. It brings us to a question concerning their overall effect and position of the Court as a semi-constitutional court for the whole Europe.

This chapter is dedicated to the analysis of the impact of the judgments of the European Court of Human Rights as exclusive interpreter of the Convention on national legal systems and its significance for the effect of the Convention itself.

### 3.2. 'Evolutive' interpretation

The European Convention has a unique nature of a treaty which comprises standards of human rights protection. It renders specific rights and freedoms to each and every individual under the jurisdiction of one of the contracting states. However, the clauses which contain these rights and freedoms are rather general and vague. The Convention also includes the whole scope of imprecise and evaluative legal concepts which require further interpretation, such as 'forced or compulsory labor', 'liberty of person', 'security of person', 'promptly', 'public hearing', 'reasonable time' etc. Provisions are constructed in a way that these legal concepts are crucial for understanding the particular rights granted by the Convention. Depending on their interpretation the essence and scope of the right might change immensely. On the one hand this allows a broad interpretation of such rights, but on the other hand it might diminish their importance and value. In any case provisions of the Convention allow multiple interpretations depending on particular political, cultural and legal traditions, social and economic realities as well as the will of political elite and the whole society. Such state of affairs could be considered positive as long as it ensures flexibility for the development of the Conventional rights and their effective application in all member states to the Convention. Nevertheless, it could also hamper objectives of the European Convention given that such flexibility can also provide states with excessive discretion and consequently weaken the position of granted rights and freedoms.

Provided that the Convention is a special instrument of public international law for the protection of human rights in Europe and the Court is entitled to enforce it, the European Court of Human Rights is therefore responsible of guaranteeing *the Convention's effectiveness in its interpretation of it*.<sup>47</sup> The Court bears the main responsibility for the success of the Convention. Thus, its jurisprudence is essential for the development of the Convention and its overall domestic effect.

According to the position of the Court the Convention for the Protection of Human Rights and Fundamental Freedoms is not static<sup>48</sup> but a 'living instrument which should be interpreted in the light of the present day conditions'.<sup>49</sup> The Court interprets the Convention in a 'evolutive', dynamic way<sup>50</sup> in light of increasingly developing social principles and changing individual requirements,<sup>51</sup> taking into consideration contemporary realities<sup>52</sup> and ideas, going beyond the perceptions of 1950.<sup>53</sup> Moreover, 'evolutive' interpretation implies

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<sup>47</sup> Wildhaber, *The European Convention on Human Rights and International Law*, p. 220.

<sup>48</sup> *Van Dijk/van Hoof/van Rijn/Zwaak*, *Theory and Practice of the European Convention on Human Rights*, p. 77.

<sup>49</sup> ECHR, *Case Tyrer v. the United Kingdom*, [1978] EHRR 1, para 31; ECHR, *Case Marckx v. Belgium* [1979] 2 EHRR 330; Ehlers, *European Fundamental Rights and Freedoms*, p. 38.

<sup>50</sup> *Ress*, TILJ 40:359 2005, p. 363.

<sup>51</sup> *Greer/Wildhaber*, HRLR 12 (2012), p. 678.

<sup>52</sup> *Van Dijk/van Hoof/van Rijn/Zwaak*, *Theory and Practice of the European Convention on Human Rights*, p. 77.

<sup>53</sup> *Merrills*, *The Development of International Law*, p. 79.

setting higher standards of the human rights protection,<sup>54</sup> because their lowering is forbidden under article 53 of the Convention.

Hence, the European Court of Human Rights carries out an important function of the Convention's interpretation. Its interpretations are dynamic and constantly expound legal *acquis* of the Convention bringing life into its provisions.

### 3.3. Precedent-based case-law

In its decisions the European Court of Human Rights interprets Conventional provisions and specifies their essence. From case to case the Court elaborates its positions concerning the interpretation of certain rights or freedoms enshrined in the Convention. Having settled on a particular interpretation in its judgment, the European Court of Human Rights bases its next decision in analogous case on it. Therefore, its interpretations have binding force for future cases as precedents. The Court creates a body of precedent-based case-law.

Taking into consideration the 'evolutive' approach of the interpretation of the Convention, a gradual widening of its scope and creation of precedent-based case-law,<sup>55</sup> the Court could be seen as a progressive 'legislator' which sets up new legal rules. It is considered by some authors to be an autonomous lawmaker.<sup>56</sup> However, it is a misleading conclusion. In accordance with articles 32(1), 33, 34, 46(1) and 47 of the Convention, the jurisdiction of the Court embraces all matters of interpretation and application of the Convention and its protocols. Therefore, the European Court of Human Rights is not entitled to create new legal rules. It has authority only to interpret existing legal provisions; however, such wide interpretation turns out to be.<sup>57</sup>

Indeed, the European Court of Human Rights is an exclusive and authoritative interpreter of the Convention. It is deemed to be already a semi(quasi)-constitutional court for the whole of Europe.<sup>58</sup> The Court renders truly 'constitutional' decisions which are significant well-grounded and persuasive judgments in cases rising new and complex substantive issues of human rights law.<sup>59</sup> It is called upon to determine questions of public policy in the common interest<sup>60</sup> addressing 'serious or widespread violations, systematic and structural problems, and important questions of interpretation and application of the Convention'.<sup>61</sup> It should render decisions of 'principle'.<sup>62</sup>

Hence, the European Court of Human Rights provides national institutions, including courts, with 'a clear indication of the constitutional limits provided by the Convention' upon the exercise of national authority and endorses convergence between the different types of governance in Europe.<sup>63</sup> It creates interpretational precedents which should be followed by states which are parties to the Convention.

To sum up, the European Court of Human Rights has gained a status of a quasi-constitutional court for the whole of Europe as long as it renders profound well-grounded judgments concerning highly valuable issues of human rights law. Its decisions constitute an 'interpretational' precedent-based case-law which serves as a guideline for its member states.

### 3.4. Binding force of the Court's judgments

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<sup>54</sup> *Viljanen*, The European Court of Human Rights as a Developer of General Doctrines of Human Rights Law, p. 92.

<sup>55</sup> *Keller/Sweet* (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 14.

<sup>56</sup> *Keller/Sweet* (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 703.

<sup>57</sup> *Дешко/Боднар*, Правничий часопис Донецького університету №2 2008, стор. 72.

<sup>58</sup> *Wildhaber*, HRLJ 23 (2012), p. 161; *Greer/Wildhaber*, HRLR 12 (2012), p. 670.

<sup>59</sup> *Greer*, The European Convention on Human Rights, p. 165.

<sup>60</sup> *Greer/Wildhaber*, HRLR 12 (2012), p. 670.

<sup>61</sup> Council of Europe, High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, paras 35(c), 33; *Caflich*, in Human Rights Law Review 2006, p. 412.

<sup>62</sup> *Wildhaber*, Mediterranean Journal of Human Rights 28 (2004), p.

<sup>63</sup> *Greer*, The European Convention on Human Rights, p. 171.

However, the question concerning the binding force of the decisions rendered by the European Court of Human Rights shall be addressed separately. In order to estimate the effect of the Court's judgments it is necessary to clear up whether they oblige states to make changes in their legislation, to which extent and whether states adhere to the position of the Court in reality.

To start with, a judgment of the Court is binding upon the parties to the case.<sup>64</sup> If the Court finds that there was a violation of the rights or freedom as an imminent consequence of particular statute which is valid on the territory of respondent state, it brings to a conclusion that this statute might violate or infringe rights of others. Therefore, it is logical and rather expected that the state withdraws or amends such piece of legislation in order to comply with the provisions of the Convention.<sup>65</sup>

There is no direct obligation under the Convention to abolish or change legislative acts or law enforcement practices which do not conform to its provisions and consequently result in their violation. The Court is not entitled to annul provisions of domestic legislation either. Nevertheless, some authors<sup>66</sup> uphold the position that such obligation exists. Indeed, it could be inferred from the very essence and objective of the Convention to ensure the protection of everybody's rights. The state may not secure such rights if a law or general practice which constantly causes infringements of these rights exists there. Therefore, the judgments of the Court serve as an indicator of internal legal problems which should be solved. Once it becomes obvious that a particular legislative provision is a source of human rights violations, it should be abolished or amended in order to comply with the Convention.

The European Court of Human Rights recognized that its judgments should not only bring individual measures but also general measures, i.a. legislative changes: "Admittedly, it is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions and not from individual measures of implementation, but the decision cannot of itself annul or repeal these provisions: the Court's judgment is essentially declaratory and leaves to the State the choice of the means to be utilized in its domestic legal system for performance of its obligation under article 53."<sup>67</sup>

Therefore, the obligation to take general measures can be inferred from the Conventional provisions and is also confirmed by the Court itself. The parties to the Convention are supposed to constantly alter their legislation or administrative practices with respect to the findings of the Court.<sup>68</sup>

The trend to extend the effect of the Court's decision to the necessity to make changes in 'defective' national legislation found its natural continuation in the 'pilot judgment procedure'.<sup>69</sup> This procedure contributes to an increase of the effectiveness of the Convention within national legal systems and reflects the concept of the Court's 'constitutionalization'.<sup>70</sup>

In so-called pilot-judgments the Court not only recognizes that the state has a systemic problem caused by a particular legal act or practice but also calls for general measures to be taken<sup>71</sup> and even suggests possible solutions<sup>72</sup> in some cases.<sup>73</sup> Therefore, it should be

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<sup>64</sup> *Bowett*, *The Law of International Institutions*, p. 269.

<sup>65</sup> *Macdonald/Matscher/Petzold* (eds.), *The European System for the Protection of Human Rights*, p. 26.

<sup>66</sup> *Letsas*, *A Theory of Interpretation of the European Convention on Human Rights*, p. 33.

<sup>67</sup> ECHR, *Case Marckx v. Belgium*, [1979] 2 EHRR 330 para. 58

<sup>68</sup> *Keller/Sweet* (eds.) *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, p. 703; *Polakiewicz* in: *Blackburn/Polakiewicz*, *Fundamental Rights in Europe*, p. 35

<sup>69</sup> *Greer/Wildhaber*, *HRLR* 12 (2012), p. 671.

<sup>70</sup> *Buyse*, *Nomiko Vima* (*Greek Law Journal* (2009)), p. 14.

<sup>71</sup> *Fyrnys*, *German Law Journal* Vol. 5, No. 05 (2011), p. 1232.

<sup>72</sup> ECHR, *Case Scozzari and Giunta v. Italy*, [2000] ECHR 2000-VIII.

<sup>73</sup> *Buyse*, *Nomiko Vima* (*Greek Law Journal* (2009)), p. 1.

acknowledged that the practice of the Court penetrates within national law and requires legislative changes..

For instance, judgments of the Court really influenced and promoted changes in the national legislation of many countries. Nevertheless some states such as Turkey and Russia clearly avoid following the Court's decisions in some cases, whereas the majority of the countries adhere to the statements of the Court.

However judgments rendered against other states do not have binding force over particular countries, they still may and should have influence. If it is obvious that particular legal provisions do not conform to the Convention and they are identical in the legislation of another state, it would be desirable to change them in order to eliminate negative consequences of a breach of the Conventional obligations.<sup>74</sup> This is only the side effect of the Court's decisions. There is no obligation of the third country to take into consideration judgments rendered against other states. Nevertheless, it is a highly desirable and useful practice. If the Court finds that a particular legislation in force or certain practice is not in conformity to the Convention, it would be difficult for another country to prove that the same practice or legislative provision does not violate its obligations under the Convention.<sup>75</sup>

As the practice shows, the jurisprudence of the European Court of Human Rights sufficiently changed the shape of national legislation concerning human rights issues. Decisions of the Court entailed numerous legislative changes in substantive and procedural law in the majority of the member states concerning one or another reason. For example, sufficient changes in procedural criminal and civil law took place in response to the jurisprudence of the Court, especially within civil law countries.<sup>76</sup> Numerous amendments in the field of substantive criminal law, issues concerning access to courts or even procedural rights of the lawyer were caused by the Court's jurisprudence.<sup>77</sup> States constantly adjust their legislation and law enforcement practice in response to the violations found by the Court.<sup>78</sup>

To sum up, judgments of the Court definitely have acquired an autonomous and independent force going beyond individual justice. Currently the practice of the European Court of Human Rights provides states with guidelines for the further development of their national law as a consequence of the Court's judicial activity. Judgments of the Court are binding upon the parties to the case and have gained a persuasive authority in what concerns general measures to be taken by states even though they were not parties to the particular case. This conclusion brings back an idea about the European Court of Human Rights as a constitutional court for Europe.

### 3.5. *Erga-omnes* effect

The Court's influence on legislative changes and its 'interpretational' case-law bring up a question concerning the binding force of the Court's practice and entails the discussion about the *erga omnes* effect of the Court's judgments. Did they acquire such an effect as a result of the evolution of the Court's system or not? The majority of legal scholars and former practitioners in the field argue that the judgments of the European Court of Human Rights may be very close to have *erga omnes* effect but still do not have such an effect or even lack it.<sup>79</sup> The binding effect of the Court's decisions may be considered to be very close to the

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<sup>74</sup> Macdonald/Matscher/Petzold (eds.), *The European System for the Protection of Human Rights*, p. 27.

<sup>75</sup> Greer, *The European Convention on Human Rights*, p. 280.

<sup>76</sup> Keller/Sweet (eds.) *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, p. 695.

<sup>77</sup> Ress, *TILJ* 40:359 2005, p. 375.

<sup>78</sup> Keller/Sweet (eds.) *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, p. 703.

<sup>79</sup> Ress, *TILJ* 40:359 2005, p. 374; Fyrnys, *German Law Journal* Vol. 5, No. 05 (2011), p. 1233; Greer, *The European Convention on Human Rights*, p. 280.



aforementioned *erga omnes* effect, nevertheless, judgments of the Court are regarded to have an orientation effect<sup>80</sup> which is a milder and less obvious formula.

The Court itself held in 1978 that its objective is more than just individual justice but, 'to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties'<sup>81</sup> and reaffirmed this position in its latter jurisprudence<sup>82</sup>. However the jurisprudence of the Court is deemed to be rather 'persuasive'<sup>83</sup> or authoritative than binding,<sup>84</sup> parties to the Convention in their majority seem to abide and follow the Court's decisions. Such practice is very important for the real, however not 'formal' influence on national legal systems. The impact of the Court on domestic law and practice is growing.

### 3.6. Conclusions

The European Court of Human Rights and its jurisprudence influence national legal systems from two perspectives. The Court's 'interpretive' precedent-based case-law creates separate legal *acquis* in elaboration of the Conventional provisions and constitutes its essential and inalienable part. In conclusion the Court evolved into a semi-constitutional court for Europe and this finding can be also substantiated from the other side. The Court not only delivers individual justice, its judgments go beyond it, calling for general measures and directly penetrating into the domestic legal order.

Therefore, the Court's jurisprudence as part of Conventional legal *acquis* has great impact on national legal systems, their development and evolution. The activity of the Court has not only expanded Conventional provisions but also strengthened its position within its member states. Dialogs between the European Court of Human Rights and domestic courts as well as with national legislators become more and more active with a more strengthened position of the European Court and a deeper involvement of the member states to the Convention.

## 4. Impact of the Convention for the Protection of Human Rights and Fundamental Freedoms on the Ukrainian legal system

### 4.1. Introduction

Ukraine has signed the Convention for the Protection of Human Rights and Fundamental Freedoms on 9 November 1995. The First Protocol and the Protocols Nr. 4 and 7 to the Convention were signed on behalf of Ukraine on 19 December 1996, Protocols Nr. 2 and 11 were signed on 9 November 1995 together with the text of the Convention. These documents were ratified by the Law of Ukraine "On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and the Protocols Nr. 2, 4, 7 and 11 to the Convention" from 17 July 1997<sup>85</sup> with statements and reservations.

Consequently Protocol Nr. 6 was signed on 5 May 1997 and ratified on 22 February 2000<sup>86</sup>, Protocol Nr. 13 was signed on 3 March 2002 and ratified on 28 November 2002<sup>87</sup>,

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<sup>80</sup> *Ress*, TILJ 40:359 2005, p. 374.

<sup>81</sup> ECHR, Case *Ireland v. UK* [1980] 2 EHRR 25 para. 154.

<sup>82</sup> ECHR, Case *Karner v. Austria* [2004] 38 EHRR 528 para. 26.

<sup>83</sup> *Greer*, The European Convention on Human Rights, p. 280.

<sup>84</sup> *Ress*, TILJ 40:359 2005, p. 374.

<sup>85</sup> Закон України «Про ратифікацію Конвенції про захист прав людини і основоположних свобод 1950 року, Першого протоколу та протоколів N 2, 4, 7 та 11 до Конвенції» від 17 липня 1997 р., ВВР № 40 1997, стор. 263.

<sup>86</sup> Закон України «Про ратифікацію Протоколу N 6 до Конвенції про захист прав людини і основоположних свобод, який стосується скасування смертної кари», від 22 лютого 2000 р., ВВР № 13 2000, стор. 111.

Protocol Nr. 12 was signed on 4 November 2000 and ratified on 09 February 2006<sup>88</sup> together with Protocol Nr. 14 on 10 November 2004. Therefore, these treaties are binding for Ukraine in accordance with the provisions and principles of international law.

However, the binding force of the Convention within Ukraine also depends on its legal system, the applicable approach of international law reception as well as certain legislative provisions such as provisions laid down in the Constitution of Ukraine. The Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty in the field of human rights; therefore, its legal force depends on the status of international agreements within the Ukrainian domestic legal system as well as on the perception of human rights and their protection in Ukraine.

Moreover, the impact of the Convention shall be also estimated taking into consideration legislative and other changes made under the influence of the Conventional system. It is also necessary to evaluate the perception and role of the European Court of Human Rights' case-law within the domestic legal order.

Furthermore, it would be insufficient to evaluate the real influence of the Convention and the Court's practice without any reference to practice and not taking into account practical problems faced by the Ukrainian human rights' protection system.

#### 4.2. The Convention within domestic legal system

Ukraine could be classified as a country which adopted the monistic approach to international law.<sup>89</sup> Therefore, as long as valid international agreements become a part of domestic law, they constitute one integral system. This conclusion can be inferred from the provisions embodied in the Basic Law of Ukraine - the Constitution - and other key legal documents.

The Ukrainian attitude towards the correlation of national and international law was embodied in the Declaration on National Sovereignty<sup>90</sup> for the first time. It enshrined the essential status and the crucial value of international law within the domestic legal system. Today the main emphasis has shifted to the Constitution of Ukraine.<sup>91</sup> It has the highest legal power in Ukraine. Therefore, it determines the role of international agreements within the legal system. Article 9 thereof provides that international treaties in force, consented by the Parliament as binding, shall be an integral part of the national legislation, the conclusion of international treaties, contravening the Constitution of Ukraine, shall be possible only after introducing relevant amendments to the Constitution. Therefore, Constitutional provisions imply that international law and domestic law constitute a single system, an integral body of laws. This position was also taken by the Constitutional Court of Ukraine. In its decision of 9 July 1998 it affirmed that international law and domestic law constitute one system within Ukraine.<sup>92</sup>

Concerning the status of norms of public international law within domestic legal system, it is necessary to address article 9 of the Constitution of Ukraine again. Because norms of international treaties may not acquire binding force within Ukraine if they contradict the Constitution, it could be inferred that in the hierarchy of norms they stay beneath the

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<sup>87</sup> Закон України «Про ратифікацію Протоколу N 13 до Конвенції про захист прав людини і основоположних свобод, який стосується скасування смертної кари за будь-яких обставин», від 28 листопада 2002 р., ВВР № 4 2003, стор. 36.

<sup>88</sup> Закон України «Про ратифікацію Протоколів N 12 та N 14 до Конвенції про захист прав людини і основоположних свобод», від 9 лютого 2006 р., ВВР № 27 2006, стор. 229.

<sup>89</sup> *Nussberger*, in: *Keller/Sweet* (eds.) *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, р. 626; *Шпакович*, Віче №6 2010, стор. 34; *Святоцький/Захарченко/Сафулько*, Енциклопедичний довідник майбутнього адвоката, стор. 352.

<sup>90</sup> Декларація про державний суверенітет України від 16 липня 1990 р., ВВР № 31 1990, стор. 429.

<sup>91</sup> Конституція України від 28 червня 1996 року, ВВР № 30 1996, стор. 141.

<sup>92</sup> КСУ, Рішення від 9 липня 1998 р. № 12-рп/98 у справі про тлумачення терміна «законодавство», ОВУ № 32 1998, стор. 59.

Constitution.. Therefore, the legal status of the European Convention on Human Rights within the Ukrainian domestic legal system is determined by the Constitution of Ukraine and has a lower rank than the latter.

Nevertheless, norms of the Constitution have the highest supremacy, whereas norms of international law have pre-eminence over norms enshrined in other sources of national law and have a special status within the domestic legal system.<sup>93</sup> This can be inferred from the constitutional provisions and is supported by further legislation in the field. The Law of Ukraine “On International Treaties of Ukraine”<sup>94</sup> expands provisions of the Constitution and states that should an international agreement lay down a rule different from one contained in Ukrainian legislation, the rule of the international agreement ought to be applicable. Moreover, in accordance with provisions of the Declaration on National Sovereignty admitted international legal rules have priority over legal rules of national legislation. Therefore, it is possible to draw a conclusion that norms of the Constitution of Ukraine have supremacy over norms contained in international treaties or other rules of international law, but the latter have priority over norms of all other legislative acts such as ordinary laws or subordinate legislation.

Nevertheless, some scholars raise a problem that it is impossible to conclude whether rules contained in the treaties have priority over domestic legislative rules, as long as they are implemented in the domestic legislation through direct reception.<sup>95</sup> However, as it follows from the legislative provisions mentioned above and legal practice confirmed by the position of the Supreme Court of Ukraine<sup>96</sup>, rules of international law have a position superior to the norms of ordinary legislation. Hence, the European Convention on Human Rights as an international treaty which contains i.a. admitted international rules prevails over rules of national law with the only exception of the constitutional provisions.

Yet, other legal scholars<sup>97</sup> argue that at least generally acknowledged principles and norms of international law have supremacy over not only national legislation but even over the Constitution of Ukraine. Such conclusion is derived from the wording of article 18 of the Constitution of Ukraine which states that “The foreign political activity of Ukraine shall be aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community in compliance with the generally acknowledged principles and norms of international law.” However, such interpretation is too distended and does not conform to the general perception of the international law’s position within the Ukrainian legal system. Read together with article 9 of the Constitution of Ukraine, it is impossible to draw the conclusion that norms of international law could take precedence over constitutional provisions.

The position that norms of international law and international treaties prevail over norms of domestic law and other legislation in force but are inferior to constitutional norms was affirmed by the Constitutional Court of Ukraine in its decision from 11 July 2001. The Constitutional Court held that the Constitution of Ukraine prevails over international law within the domestic legal order in any case.<sup>98</sup>

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<sup>93</sup> Potapenko/Pushkar, in: Blackburn/Polakiewicz (eds.), *Fundamental rights in Europe*, p. 918.

<sup>94</sup> Закон України «Про міжнародні договори України» від 29 червня 2004 року, ВВР № 50 2004, стор. 540.

<sup>95</sup> Баймуратов, *Міжнародне право: підручник*, стор. 198.

<sup>96</sup> Постанова Президії Верховного Суду України №44 від 23 грудня 2003 року «[Щодо практики вирішення спорів, пов'язаних із застосуванням законодавства про оподаткування суб'єктів підприємництва](#)», Господарське судочинство в Україні 2004, стор. 94.

<sup>97</sup> Nussberger, in: Keller/Sweet (eds.) *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, p. 626.

<sup>98</sup> КСУ, Висновок від 11 липня 2001 року № 3-в/2001 у справі про Римський Статут, ОБУ № 28 2001, стор. 104.

Taking into consideration all arguments stated above, it is possible to draw the conclusion that the European Convention on Human Rights is an integral and inseparable part of the domestic legal system of Ukraine and its national legislation in particular; its norms have precedence over norms of the ordinary legislation but are inferior to the norms of the Constitution of Ukraine.

Moreover, one more problem shall be raised. Article 22 of the Constitution of Ukraine provides that human and citizen rights and freedoms affirmed by the Constitution shall not be exhaustive. It implies that people may have other rights, reflected, for example, in international agreements signed and ratified by Ukraine. Should during the time when person enjoyed rights granted by an international treaty the question of their compatibility with constitutional provisions be raised, it could be solved only by the Constitutional Court as the single authority entitled to answer the questions of constitutionality.<sup>99</sup> Nonetheless, this does not diminish the value assigned to international agreements by the Constitution of Ukraine.

To sum up, the Convention for the Protection of Human Rights and Fundamental Freedoms is legally binding and enjoys supremacy over Ukrainian laws and secondary legislation except the Constitution of Ukraine. The Convention is a part of the domestic legislation.

#### 4.3. Legislative changes

However, the European Convention on Human Rights had much wider and deeper impact on the domestic legal system as merely being a part of it. Becoming a part of the Convention's regime entailed multiple changes within Ukrainian law. Numerous reforms were made in order to facilitate compliance of the Ukrainian law with legal provisions enshrined in the Convention.

Legislative changes made in order to comply with provisions laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms as well as in order to eliminate new violations of the aforementioned provisions emphasized by the decisions of the European Court of Human Rights rendered against Ukraine reflect the direct way of the Convention's impact on the Ukrainian national legislation. The Constitution of Ukraine itself was highly influenced by the Convention. Numerous essential legal acts were amended by the parliament. An important role was also played by the Constitutional Court of Ukraine. Afterwards, it affected other laws and secondary legislation.

To start with, Ukraine took an obligation to realize 57 organizational and legal measures, the majority of which had purely legislative character<sup>100</sup> at the time of its accession to the Council of Europe.

What is even more fascinating is the fact that the Constitution of Ukraine was adopted under huge impact of the Convention and reflects many of its fundamental principles.<sup>101</sup> First of all, article 1 provides that Ukraine is a state based on law. Article 3 reflects core ideas and basic principles of the Convention and stipulates that "An individual, his life and health, honor and dignity, inviolability and security shall be recognized in Ukraine as the highest social value. Human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State. The State shall be responsible to the individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the

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<sup>99</sup> Пленум ВСУ, Постанова від 1 листопада 1996 р. № 9 «Про застосування Конституції України при здійсненні правосуддя», <http://zakon4.rada.gov.ua/laws/show/v0009700-96>.

<sup>100</sup> Opinion of the Council of Europe No. 190 (1995), 26 September 1995, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta95/EOP190.htm>; Постанова Кабінету Міністрів України №792 від 20 липня 1996 року «Про організаційні заходи, спрямовані на виконання зобов'язань України, передбачених Висновком Парламентської Асамблеї Ради Європи від 26 вересня 1995 р. № 190 щодо заявки України на вступ до Ради Європи».

<sup>101</sup> Potapenko/Pushkar, in: Blackburn/Polakiewicz (eds.), *Fundamental rights in Europe*, p. 919.

State.” Article 21 (“All people shall be free and equal in their dignity and rights. Human rights and freedoms shall be inalienable and inviolable”) as well as the whole title II of the Constitution of Ukraine “Human and Citizens’ Rights, Freedoms and Duties” also contain crucial norms influenced by the Convention. One of the key rights - the right to an effective trial enshrined in article 13 of the Convention - found its reflection in article 124 of the Constitution of Ukraine which stipulates i.e. that the jurisdiction of the courts shall extend to all legal relations that arise in the State. Hence, the impact of the Convention on the Ukrainian Constitution could be compared to a cornerstone, the most valuable point of repulsion for all further changes brought by the conventional rules as interpreted by the European Court of Human Rights.

Furthermore, highly valuable changes made under the impact of the Convention concern the death penalty. In 1999, the Constitutional Court of Ukraine delivered a decision<sup>102</sup> that the death penalty contravenes the provisions of the Constitution. In its reasoning the Court refers to the general legal principles and, especially, to the Convention. However the Constitutional Court simply mentioned article 3 of the European Convention of Human Rights and its interpretation by the European Court of Human Rights (for instance, the non-conformity of the death penalty with the aforementioned article) in its reasoning without any further dwelling upon it and without any reference to the case-law of the Court in particular, it was already a great step forward in relation to the Convention and its place in the national legal system. Moreover, it was a decision of great importance. As a consequence, the Criminal Code was firstly amended<sup>103</sup> and the death penalty was abolished. Afterwards a new Criminal Code,<sup>104</sup> which embodies also other objectives of the Convention, was adopted. Such legislative changes were caused by the impact of the Convention and allowed the Ukrainian Parliament to ratify Protocol Nr. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances in 2002.

Moreover, the Criminal Procedural Code<sup>105</sup> was amended in order to comply with paragraph 1 of article 5, paragraph 3(d) of article 6 and article 8 of the Convention with respect to the right to liberty and security, the right to a fair trial and the right to respect for private and family life.

The Law of Ukraine “On the Disciplinary Statute of the Armed Forces of Ukraine”<sup>106</sup> was changed with the purpose not to contravene paragraph 3 of article 5 of the Convention. These changes<sup>107</sup> made possible the withdrawal of one of the reservation made by Ukraine during the ratification procedure. Multiple other changes were made in order to enforce rights foreseen by the Convention, especially by articles 5, 6, 8, 13 of the Convention.

However, many legal provisions of the Convention have a general and imprecise character and may be interpreted in numerous ways. Therefore, interpretations of the European Court of Human Rights are essential for the application and development of the initial provisions. The activity of the Court had a strong influence on the Ukrainian legislation.

First of all, when the Court renders a decision against Ukraine, especially when it renders several decisions, concerning a particular infringement of the Convention’s provisions,

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<sup>102</sup> КСУ, Рішення від 29 грудня 1999 року у справі про смертну кару, ОБУ № 4 2000, стор. 114.

<sup>103</sup> Закон України «Про внесення змін до Кримінального, Кримінально-процесуального та Виправно-трудового кодексів України» від 22 лютого 2000 року, ВВР № 17 2000, стор.123.

<sup>104</sup> Кримінальний кодекс України від 5 квітня 2001 року, ВВР № 25-26 2001, стор. 131.

<sup>105</sup> Кримінально-процесуальний кодекс України від 28 грудня 1960 року, Відомості Верховної Ради УРСР № 2 1961, стор. 15.

<sup>106</sup> Закон України «Про Дисциплінарний статут Збройних Сил України» від 24 березня 1999 року, ВВР № 22-23 1999, стор. 197.

<sup>107</sup> Закон України «Про внесення змін до деяких законодавчих актів України» від 3 лютого 2004 року, ВВР № 3 2005, стор.76.

state authorities are interested in amending legal acts that contribute to non-compliance with the Convention and cause a violation of human rights.

The most wide-spread allegations against Ukraine, which are confirmed by numerous decisions of the European Court of Human Rights, concern violations of articles 5, 6, 13 of the Convention and article 2 of the Protocol Nr. 7. Numerous cases are still brought up to the Court in this field. However, it led to the amendment of the Criminal Procedural Code,<sup>108</sup> the Law on the Judicial System<sup>109</sup> and the Code on Administrative Offences<sup>110</sup> as well as of other legal acts in order to ensure their compliance with the right to liberty and security, the right to a fair trial, the right to an effective remedy and the right of an appeal in criminal matters.

The whole process of legislative changes resulted into the adoption of new codes and laws, which aim for the conformity of the Ukrainian legislation with basic requirements of the Convention. For instance, the new Civil Procedure and Administrative Codes foresee a procedure of review of final binding decisions of the court (“under exceptional circumstances”) in case the cassation courts applied law differently or international courts rendered conflicting decision. This change brought national legislation in conformity with article 4 of the Protocol No. 7 to the Convention. Hence, many legislative changes were made under the pressure of judgments of the European Court of Human Rights rendered against Ukraine.

Nevertheless, Ukraine is still deemed to be rather reluctant in these matters. Many legislative changes prove to be ineffective. The most frequent cases against Ukraine still involve violations of the right to a fair trial, especially regarding the execution of judgments, the duration of court proceedings and bad conditions of detention.<sup>111</sup> It led to a pilot judgment against Ukraine concerning non-execution of final domestic court decisions. Such pilot judgments constitute another way to influence national legislation, because the government is forced to adopt the necessary general measures at the national level so as to avoid new similar violations. It is supposed to have more direct and binding effect. Nonetheless, it is not certain either.

Therefore, it is possible to draw the conclusion that the European Convention on Human Rights and the subsequent practice of the European Court of Human Rights had a huge impact on the Ukrainian legislation and caused multiple changes in laws and codes and other legal acts. However, it is still insufficient as long as some of the legislative changes prove to be inadequate or ineffective. Hence, the further involvement of Ukraine in the Conventional system is necessary for the development of its human rights’ protection system and legal system in general.

#### 4.4. Law of Ukraine “On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights”

All aforementioned ways of the Convention’s influence constitute a traditional approach. They were partially reflected in the Law of Ukraine “On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights”.<sup>112</sup> This law contains

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<sup>108</sup> Кримінально-процесуальний кодекс України від 28 грудня 1960 року, Відомості Верховної Ради УРСР № 2 1961, стор. 15.

<sup>109</sup> Закон України «Про судоустрій України» від 5 червня 1981 року, ВВР № 24 1981, стор. 357.

<sup>110</sup> Кодекс України про адміністративні правопорушення від 7 грудня 1984 року, ВВР, додаток до № 51 1984, стор. 1122.

<sup>111</sup> Звіт Урядового уповноваженого про результати діяльності у справах Європейського суду з прав людини станом на 19 березня 2013 року, available at <http://www.minjust.gov.ua/9329>; Доповідь Голови Вищого Адміністративного Суду України Пасенюка О. М. на Міжнародній конференції «Проблеми застосування практики Європейського суду з прав людини у правовій системі України» від 1 липня 2011 року, available at [http://www.vasu.gov.ua/en/imp\\_sub.html?\\_m=publications&\\_t=rec&id=1864](http://www.vasu.gov.ua/en/imp_sub.html?_m=publications&_t=rec&id=1864).

<sup>112</sup> Закон України «Про виконання рішень та застосування практики Європейського суду з прав людини» від 23 лютого 2006 року, ВВР № 30 2006, стор. 1114.

detailed provisions concerning compliance with the Convention and the fulfillment of the Court's decisions. However, what is exceptional is that this law foresees a possibility of the European Court of Human Rights judgments' direct application by national courts.

The first part of the law regulates in detail the procedure of the binding Court's decisions against Ukraine fulfillment. However, the second part already addresses general measures which should be taken in each case in which the Court renders a judgment not on behalf of Ukraine. It implies actions which should be taken in order to ensure further fulfillment of its obligations under the Convention by Ukraine, such as the elimination of systematic shortages in the legislation or administrative practice, the abolition of the background of dispute. These measures include: legislative changes, abolition of wrong and abusing law enforcement practices, maintenance of legal expertise of legislative drafts on the matters related to the Convention and others. Aforementioned measures replicated already existing methods of the Convention's influence on the Ukrainian legislation. However, in the abovementioned law they found their legislative consolidation and were precisely regulated, the law laid down binding procedural rules which are compulsory for state authorities. It was meant to ensure effective application of the Convention and the elimination of its violations.

For instance, a specially authorized body has to provide the Government with a precise analysis of factors which caused the violation of the Convention and has to make proposals concerning necessary legislative amendments or how to change particular administrative practices or to implement other measures. This specialized authority (which nowadays is a department within the Ministry of Justice of Ukraine) is also entitled to review the draft legislation on its compatibility with the Convention. In case the draft legislation is found incompatible with the Convention, the Ministry of Justice will not approve it and therefore not include it into the Single Register of Normative Acts, which entails the consequence of the invalidity of such an act.

Moreover, the Ministry of Justice of Ukraine is bound to draft a list of general measures which should be taken by the government to the Cabinet of Ministers of Ukraine each quarter. It should include legislative drafts, drafts of amending acts, proposals concerning weak administrative practices, proposals that should be taken into consideration of the lawmaking procedures. It is also obliged to make an analysis of circumstances which caused a violation of the Convention's provisions.

Based on the information and proposals received, the Cabinet of Ministers of Ukraine in accordance with its authority arranges the adoption of the secondary legislation or brings a bill to the Parliament. Afterwards the Parliament works out proposed amendments or draft laws and adopts its decision in accordance with due legislative procedures foreseen by applicable law.<sup>113</sup>

This procedure leads to new laws that are enacted to implement new practice of the European Court of Human Rights and hence an advancement of the provisions of the Convention, because the jurisprudence of the Court not only indicates violations but also provides further interpretation of the Convention's provisions what is of greatest importance as long as its provisions have imprecise and sometimes vague wording. The law "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights" has enshrined legal provisions to settle down the obligation of Ukraine to take general measures in response to the findings of the Court and to carry out a legal expertise of all

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<sup>113</sup> Конституція України від 28 червня 1996 року, ВВР № 30 1996, стор. 141; Закон України «Про Регламент Верховної Ради України» від 10 лютого 2010 року, ВВР № 14-15, № 16-17 2010, стор.133; Розпорядження Голови Верховної Ради України №428 від 22 травня 2006 року «Про затвердження Положення про порядок роботи у Верховній Раді України із проектами законів, постанов, інших актів Верховної Ради України».

legislative acts concerning their compatibility with the Convention. The adoption of this law was a huge step forward for Ukraine.

#### 4.5. Practice of the Court as a source of law

Nonetheless, the law “On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights” is even more important and outstanding for Ukraine due to its third part devoted to the direct application of the Court’s practice. Legal scholars consider it to be a fascinating experiment which practical value will be possible to assess only in the course of its further application.<sup>114</sup>

Namely, it implicitly foresees that both the Convention and the practice of the European Court of Human Rights are sources of law in Ukraine. This provision is disturbing and controversial as well as unique at the same time. It causes several theoretical and practical problems for the Ukrainian jurisprudence, the legal system and the law enforcement. It did not become a highly disputed issue, because the aforementioned law was passed rather because of political reasons. However, it is an unprecedented occasion in Ukrainian law and deserves much more attention at least from legal scholars.

The theoretical debate started only in connection with the conceptual subsumption of judicial practice as a source of law. The aforementioned legal provision was differently regarded by scientific circles.<sup>115</sup> At the same time the question of the constitutionality of such provision did not start a discussion among scholars or lawyers-practitioners.

According to the aforementioned law national courts should refer in their judgments not only to the text of the Convention but also to particular decisions of the European Court of Human rights irrespective of Ukraine being a party to the dispute or not. National courts are supposed to use officially translated and published texts of the European Court of Human Rights’ decisions by the Representation body (Ministry of Justice of Ukraine).

From the point of view of jurisprudence it is an unprecedented issue that judicial practice is proclaimed to be a source of law in a state following the Roman (Civil) Law system. Furthermore, it does not take into consideration the fact that the European Court of Human Rights is not entitled to establish new legal rules and always underlines itself that it just interprets the rules embodied in the Convention. It can be inferred that expanding interpretations of the Court enshrine in themselves new legal rules. Moreover, when lawmakers proclaim the practice of the Court as a source of law, they imply that this practice establishes new rules, new rules which go much further than the initial provisions of the Convention. The obligation of the national courts to refer and apply the practice of the European Court of Human Rights constitutes a tradition of judicial precedent. Therefore following the aforementioned argumentation, it turns out that the European Court of Human Rights creates legal precedents which should be followed by Ukrainian national courts.

Moreover, legal precedent is a source of law unknown and untypical for Roman (Civil) Law. This source of law belongs to the traditions of Common (Anglo-Saxon) Law. Therefore, the provision concerning the practice of the European Court of Human Rights as a source of law causes confusion in the system of law sources from the point of view of jurisprudence (theory of law).

Nevertheless some authors argue that the decisions of the European Court of Human Rights are legal precedents and hence a source of law.<sup>116</sup> It is incorrect to suggest that the practice of the Court contains new legal rules. As it was argued in the previous section, judgments of the Court do not create law. In its decisions the Court interprets rules contained

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<sup>114</sup> Nussberger, in: Keller/Sweet (eds.) A Europe of Rights: The Impact of the ECHR on National Legal Systems, p. 688.

<sup>115</sup> Кононенко, Право України №3 2008, стор. 131.

<sup>116</sup> Дідикін, Юридичний журнал №1 2009, стор. 2.



in the Convention. Its interpretations can be that wide that it could create a feeling that the Court creates new law. However, it is a tenuous and false conclusion, as long as the Court only gives an explanation of the conventional provisions,<sup>117</sup> revitalizes them, makes them more flexible and widely-applicable.<sup>118</sup>

It is correct to consider judgments of the European Court of Human Rights to be binding for the Court while interpreting rules of the Convention. From case to case the Court creates legal views concerning the interpretation of the conventional provisions. Such legal views about the interpretation have general effect and constitute a precedent for the Court to refer to in the next analogical cases but they do not create new law.<sup>119</sup> The Court is not engaged in lawmaking, it is engaged in interpreting the Convention, however dynamic, expanding or widening it does this job. Hence, it could be asserted that the Court does not create legal precedents as a source of law but interpretational precedents.<sup>120</sup>

Provided that the practice of the European Court of Human Rights does not create a classical type of a precedent, but an interpretational precedent, it is logical to draw the conclusion that such a precedent does not constitute a source of law but a source of law-interpretation. It could be seen as a new phenomenon of the Ukrainian legal system. The strong prevalence of the positivistic apprehension of law, inherited from soviet times, hampers the implementation of this concept. Lawyers-practitioners as well as judges may continue to perceive only norms of the written law to be binding. However, modern jurisprudence and legal realities indicate an even further convergence between legal systems and the emergence of new legal sources besides the classical 'sources of law'. To such an extent interpretational precedents of the European Court of Human Rights have crucial value, because the Court has not only jurisdiction over all member states, but stands hierarchal also above all national courts, including the Ukrainian ones.<sup>121</sup>

The importance of non-conventional sources of law was underlined by the Constitutional Court of Ukraine. In its decision rendered on 2 November 2004, it stated that: "One way of the expression of rule of law is that law is not restricted to the legislation as one of its forms but also includes other social regulators such as moral norms, traditions, customs, etc which are legitimized by society and are determined by historically reached cultural level of society. All aforementioned elements of law are united by features, which corresponds to the ideology of fairness, idea of law, which is to some extent reflected in the Constitution of Ukraine."<sup>122</sup>

Therefore, the emergence and the applicability of this new legal phenomenon – the law-interpretational precedent - should be recognized in Ukraine, because it has a huge importance for the development of the legal system of Ukraine, which is not anymore a typical continental legal system but a modern European one.

One more problem that should be addressed is the constitutionality of the provision that foresees that the practice of the European Court of Human Rights is a source of Ukrainian law. In accordance with article 9 of the Constitution of Ukraine only international treaties ratified by the Parliament constitute an integral part of the national legislation of Ukraine and are a source of law. Therefore, it is possible to draw the conclusion that the ratification by the Parliament is crucial prerequisite for the validity of the particular provisions and its binding force within the national legal system. Other legal rules, except the admitted international

<sup>117</sup> Шшикина, Право України №4 2005, стор. 104.

<sup>118</sup> Дешко/Боднар, Правничий часопис Донецького університету №2 2008, стор. 76.

<sup>119</sup> Євгафова/Тихий, Вісник Конституційного Суду України №6 2005, стор. 82.

<sup>120</sup> Кононенко, Право України №3 2008, стор. 133.

<sup>121</sup> Кононенко, Право України №3 2008, стор. 133.

<sup>122</sup> КСУ, Рішення № 15-рп/2004 від 2 листопада 2004 року у справі щодо відповідності Конституції України (конституційності) положень ст. 69 Кримінального кодексу України, ОБУ № 45 2004. – стор. 2975.

legal rules as stipulated by the Declaration on National Sovereignty, stemming from other international acts or judicial practice may not have a binding force in Ukraine as long as they are not consented by the Parliament. In this case legal rules contained in the decisions of the European Court of Human Rights may not have universally binding character and, consequently, are not a source of law if they contravene the Constitutional provisions which have superior power. Hence, article 17 of the Law of Ukraine “On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights” which stipulates that the practice of the European Court of Human Rights is a source of law does not conform to the Constitution of Ukraine and may be rendered unconstitutional.

It could be a possible outcome. However, as it has already been stated, in fact, the practice of the European Court of Human Rights is a source of interpretation of law, but not a source of law in the strict sense. Therefore, the application of such a practice does not interfere with the constitutional principles in general. Nevertheless, it is incorrect to use the formula that the ‘practice of the European Court of Human Rights is a source of law’, because it contravenes the basic understanding of the essence of the Courts’ decisions and contradicts constitutional provisions. Therefore, it should be changed. It is logical to agree with the position of the legal scholar L. Tymchenko who suggested that the aforementioned provision should be amended as follows: “Courts shall apply the Convention as a source of law and practice of the European Court of Human Rights as a source of interpretation of law while adjudicating.”<sup>123</sup> This amendment may be the best possible solution in all senses. The practice of the Court applied by the domestic judiciary as a source of interpretation of the law would be logical and beneficial for everyone.

To sum up, the Law of Ukraine “On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights” stipulates that the practice of the European Court of Human Rights is a source of law and should be applied by national courts. The direct application of the Court’s case-law is necessary, because it is an authoritative interpretation of the Conventional provisions. However, it would be desirable to change aforementioned legislative provision as to eliminate proclaiming the practice of the Court as a source of law but rather deeming it as a source of interpretation of law.

#### 4.6. Practical application of the European Court of Human Rights practice by national courts

From the practical point of view, the adoption of the Law of Ukraine “On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights” caused several problems concerning the application of the European Court of Human Rights’ practice by national courts. The first problem is the absence of knowledge in the field. Judges are lawyers who received education and qualification in the traditional Roman Law approach and are not trained to refer to judicial decisions. This problem has not been addressed by the Parliament or by the government. No professional courses or trainings were established for professionals and law students are still not taught to apply judicial practice.

The second problem is the scarcity of the Court’s decisions’ availability.<sup>124</sup> The Ministry of Justice is obliged to translate and publish recent decisions against Ukraine, but other decisions are available only in English or French. However, judges are not required to have substantial knowledge of these languages according to the law.<sup>125</sup> Therefore, the

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<sup>123</sup> Кононенко, Право України №3 2008, стор. 131.

<sup>124</sup> Доповідь Голови Вищого Адміністративного Суду України Пасенюка О. М. на Міжнародній конференції «Проблеми застосування практики Європейського суду з прав людини у правовій системі України» від 1 липня 2011 року, [http://www.vasu.gov.ua/en/imp\\_sub.html?m=publications&t=rec&id=1864](http://www.vasu.gov.ua/en/imp_sub.html?m=publications&t=rec&id=1864).

<sup>125</sup> Закон України «Про статус суддів» від 15 грудня 1992 року, Відомості Верховної Ради України (ВВР), 1993, N 8, ст.56; Закон України «Про судоустрій та статус суддів» від 7 липня 2010 року, Відомості Верховної Ради України (ВВР), 2010, N 41-42, N 43, N 44-45, ст.529.

majority of judges are simply not able to use the majority of the Court's judgments. Moreover, translated and published decisions are not always available due to the insufficiency of budget. Many courts simply do not receive respective journals.<sup>126</sup>

Nonetheless, the Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights" is enforced. Ukrainian courts refer to the Convention and the Court's judgments more and more often. Time has shown that the process of implementation becomes more successful. National courts more often refer to the Convention and the practice of the Court.

In its practice the Constitutional Court of Ukraine referred to the Convention twenty seven times among them the Court referred sixteen times to a judgment of the European Court of Human Rights. The Constitutional Court generally referred to the Convention in the field of human rights, for example, in the case concerning the use of confidential data on mental health.<sup>127</sup> In the cases concerning the freedom to movement within the state,<sup>128</sup> the requirement of fairness in criminal conviction,<sup>129</sup> the inadmissibility of retroactive laws,<sup>130</sup> the principle of social protection,<sup>131</sup> the special role of impartial and independent courts for the protection of human rights,<sup>132</sup> the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, the right to an effective remedy in general,<sup>133</sup> the right to respect for his/her private and family life, his home and his correspondence<sup>134</sup> etc, the Constitutional Court referred to such freedoms, rights and principles as laid down in the Convention underlining their value and their importance for national legislation. All aforementioned decisions were based on the norms of the Constitution, however, as interpreted in the light of the Convention.

In the case concerning guarantees for reimbursement of savings of citizens,<sup>135</sup> the Constitutional Court for the first time did not only refer to the Convention, but also to the position of the European Court of Human Rights. The Constitutional Court referred to the case *James and others v. the United Kingdom*<sup>136</sup> in order to identify the margins of appreciation of the state with respect to the enjoyment of property rights. Since 2007 the Constitutional Court of Ukraine invokes the practice of the European Court of Human Rights more often, mainly in connection with the interpretation of articles 5, 6 and 8 of the Convention.

However, the Constitutional Court of Ukraine refers to the Convention and the practice of the European Court of Human Rights relatively rarely. There is a tendency to

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<sup>126</sup> Доповідь Голови Вищого Адміністративного Суду України Пасенюка О. М. на Міжнародній конференції «Проблеми застосування практики Європейського суду з прав людини у правовій системі України» від 1 липня 2011 року, [http://www.vasu.gov.ua/en/imp\\_sub.html?m=publications&t=rec&id=1864](http://www.vasu.gov.ua/en/imp_sub.html?m=publications&t=rec&id=1864).

<sup>127</sup> КСУ, Рішення від 30 жовтня 1997 року у справі *К.Г.Устименка*, ОВУ № 46 1997, стор. 126.

<sup>128</sup> КСУ, Рішення від 14 листопада 2001 року у справі *щодо прописки*, ВКСУ № 5 2001, стор. 24.

<sup>129</sup> КСУ, Рішення від 2 листопада 2004 року у справі *про призначення судом більш м'якого покарання*, ОВУ № 45 2004, стор. 41.

<sup>130</sup> КСУ, Рішення від 19 квітня 2000 року у справі *про зворотню дію кримінального закону в часі*, ОВУ № 39 2000, стор. 77.

<sup>131</sup> КСУ, Рішення від 8 жовтня 2008 року у справі *про страхові виплати*, ОВУ № 80 2008, стор. 63.

<sup>132</sup> КСУ, Рішення від 24 червня 1999 року у справі *про фінансування судів*, ОВУ № 28 1999, стор. 169; КСУ, Рішення від 1 грудня 2004 року у справі *про незалежність суддів як складову їхнього статусу*, ОВУ № 49 2004, стор. 62.

<sup>133</sup> КСУ, Рішення від 30 січня 2003 року у справі *за про розгляд судом окремих постанов слідчого і прокурора*, ОВУ № 6 2003, стор. 103.

<sup>134</sup> КСУ, Рішення від 20 січня 2012 року у справі *щодо офіційного тлумачення положень частин першої, другої статті 32, частин другої, третьої статті 34 Конституції України*, ОВУ № 9 2012, стор. 106.

<sup>135</sup> КСУ, Рішення від 10 жовтня 2001 року у справі *про заощадження громадян*, ОВУ № 42 2001, стор. 45.

<sup>136</sup> ECHR, Case [8793/79](#), *James and others v. UK*, [1986] 8 EHRR 123.

apply conventional provisions more widely and extensively and this is already a huge step forward. It gives other courts a direction to follow.

Regarding national courts of general jurisdiction and specialized courts, they also show a tendency to refer directly to the Convention in their decisions more frequently and more extensively. Mainly courts apply articles 5, 6, 8 and 13 of the Convention, as well as article 1 of the Protocol 1 to the Convention.<sup>137</sup> This tendency is also a very important reflection of the influence of the Convention.

Therefore, there exist several practical problems in regard to the application of the European Court of Human Rights' case-law by national courts. Nevertheless, the domestic judiciary more and more often refers to the Convention and the Courts' practice. The Constitutional Court of Ukraine interprets constitutional and legislative provisions in the light of the Convention and the courts of general jurisdiction base their decisions on the Conventional provisions as they were interpreted by the European Court of Human Rights.

#### 4.7. Conclusions

In conclusion, the Convention for the Protection of Human Rights and Fundamental Freedoms exerts its influence in several ways. First of all, the Convention constitutes an integral part of the Ukrainian national law and enjoys a legal status which is higher than that of ordinary law and can be overridden only by the constitutional provisions. Secondly, the integration of Ukraine into the Conventional system caused severe legislative changes in many branches of national law. Thirdly, the Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights" was passed in order to ensure the effective enforcement of the Convention. Finally, the Convention together with the practice of the European Court of Human Rights should be and is applied by domestic courts. Certainly, there still exist some problems concerning the conceptual status of the Court's judgments and their application, as well as practical problems, it is evident that nowadays the Convention and the Court's jurisprudence obtain more and more influence and it can be seen as a very positive process for the development of the Ukrainian national legal system. Therefore, the Convention had a very positive and deep impact on the domestic legal order of Ukraine and will have an even more persuasive role in the future.

### 5. Conclusions

The impact of the Convention for the Protection of Human Rights and Fundamental Freedoms on the domestic legal system cannot be overestimated. The system for the protection of human rights created by the authors of the Convention did not only prove to be very effective but it has also created its own legal order. Standards of human rights stipulated by the Convention are now shared by forty seven countries throughout Europe.

The Convention was signed and duly ratified by all member states of the Council of Europe. Therefore, these states are now bound by its rules and are obliged to perform their obligations under its provisions in good faith. What is special about the Convention is the fact that it is valid notwithstanding the validity of the reservations made by the state during the ratification. The European Court of Human Rights held this in its decision underlying the key importance and special objective of the Convention.

The European Convention on Human Rights does not directly stipulate an obligation of its member states to implement it or to make it directly enforceable within the states.

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<sup>137</sup> Вінницький апеляційний адміністративний суд України, Узагальнення практики застосування Конвенції про захист прав людини та основоположних свобод 1950 року, практики Європейського суду з прав людини під час розгляду та вирішення адміністративних справ, Лист Вищому адміністративному суду України, стор. 2-3; Житомирський апеляційний адміністративний суд України, Узагальнення практики застосування Конвенції про захист прав людини під час розгляду та вирішення адміністративних справ, Лист Вищому адміністративному суду України, стор. 1-2.

However, the objectives of the Convention and the subsequent practice show that it is highly desirable. Nevertheless, the status of the Convention within the respective domestic legal systems is stipulated by national constitutional provisions or traditions.

Traditionally, states are divided into those which adhere to the monistic or the dualistic approaches in regard to the perception of international law. The European Convention requires the transformation into domestic law in order to be applicable within states pursuing the dualistic approach. Having been incorporated, the rights and freedoms stipulated by the Convention can be enjoyed by citizens of the relevant state. If they are incorporated by means of national law, they acquire its status and may be withdrawn or amended. In 'monistic' states the Convention is considered to constitute an integral part of national law and should be directly applicable. In different countries it may enjoy a different status ranging from those of ordinary legislation to over-constitutional law.

However, the position of the highest national courts and sometimes of politicians also influences and sometimes even shapes the particular role of the Convention. The dialog between the European Court of Human Rights and national courts has put the Convention on a higher level as it was expected to have and its influence changed the shape of national legal systems especially in what concerns its perception of the Convention as an instrument of public international law.

The European Court of Human Rights has substantially contributed to the development of the Convention's legal order and the deepening of its influence. First of all, the Court carries out an important function by interpretation the Convention. Its interpretations are dynamic and constantly expound the legal *acquis* of the Convention bringing life into its provisions.

Secondly, the Court has gained a status of a quasi-constitutional court for the whole of Europe as long as it renders profound and well-grounded judgments concerning highly valuable issues of human rights law. Its decisions constitute an 'interpretational' precedent-based case-law which serves as a guideline for the member states of the Convention.

And finally, judgments of the Court have definitely acquired an autonomous and independent force going beyond individual justice. However, its power is not binding but rather persuasive. Nevertheless, parties to the Convention seem to follow the Court's case-law. This shows its real influence on domestic legal systems. The impact of the Convention on national legal orders is growing thanks to the practice of the Court.

The Convention for the Protection of Human Rights and Fundamental Freedoms came into force in Ukraine on 17 July 1997. Since that date it is legally binding and enjoys supremacy over Ukrainian laws and secondary legislation, but not over the Constitution of Ukraine. The Convention became an integral part of the domestic legislation. Therefore, it is directly effective and applicable and can be invoked by each person within Ukraine.

The European Convention on Human Rights and the subsequent practice of the European Court of Human Rights had a huge impact on the Ukrainian legislation and caused innumerable changes of laws, substantive and procedural codes and other legal acts. However, its implementation is still insufficient as long as some of the legislative changes are inadequate or ineffective.

The Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights" constitutes an attempt to improve the compliance of the state with its obligations under the Convention. This legislative act is exceptional; because it gives Ukrainian national courts the possibility to apply the judgments of the European Court of Human Rights directly and proclaims them to be a source of law.

The law contains legal provisions which lay down an obligation of the state to take general measures in response to the findings of the Court and to carry out legal expertise of all

legislative acts concerning their compatibility with the Convention. The adoption of this law was a huge step forward for Ukraine.

The direct application of the Court's case-law is a huge step forward for the Ukrainian legal system and is necessary as the practice of the Court provides an authoritative interpretation of the Convention. However, the provision which stipulates that practice of the Court is a source of law is theoretically misleading and could be ruled unconstitutional. Therefore, it is desirable to amend the aforementioned provision. One possible solution would be to state that the practice of the European Court of Human Rights is a source of the interpretation of law.

The overall effect of the adoption of the abovementioned law could be classified as very positive. Indeed, there exist several practical problems in what concerns the application of the European Court of Human Rights' case-law by national courts. Nevertheless, the domestic judiciary more and more often refers to the Convention and the Court's practice. The Constitutional Court of Ukraine interprets constitutional and legislative provisions in the light of the Convention and the courts of general jurisdiction base their decisions on the Convention as interpreted by the European Court of Human Rights.

Hence, the overall influence of the Convention for the Protection of Human Rights and Fundamental Freedoms is huge. Together with the jurisprudence of the European Court of Human Rights it caused multiple and cardinal legislative changes. Moreover, it deeply interfered with national law and even changed the shape of the whole legal system because the direct applicability of judicial case-law is a unique and unprecedented issue for the Ukrainian legal tradition.

To sum up, the European Convention on Human Rights together with the Court's case-law highly influenced the development of national legal systems during the last fifty years. Its impact exceeded all possible expectations and it still keeps growing. All in all, it can be seen as a very positive and beneficial process for humanity.

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