

POSITION OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE LEGAL ORDER OF BOSNIA AND HERZEGOVINA

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Abstract

This paper will try to describe in more detail the position of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention) in the legal order of Bosnia and Herzegovina, together with the basic concepts and questions that this relationship raises and brings with it. The European Convention as a constitutional principle, and as a ratified international agreement and one of the supporting pillars of the state structure of Bosnia and Herzegovina, together with the principle of democracy, rule of law and free elections, is directly applicable, and hierarchically above other constitutional provisions. This paper is divided into two thematic units, the first of which refers to the basic characteristics of the European Convention and the second to its specific position in Bosnia and Herzegovina. In the first thematic unit, emphasis is placed on the impact of the European Convention on the legal systems of the Council of Europe countries, the circumstances that led to its adoption and the significant contribution to raising the minimum standard of human rights protection in Europe, which had not existed until then, are listed. In the second thematic unit, which is divided into 4 parts, the constitutional structure of Bosnia and Herzegovina and the incorporation of the European Convention into our legal system are described, together with the advantages and specificities that this relationship brings, which in some cases become inconsistencies. The paper ends with a conclusion in which the authors subjective opinion on the impact of the European Convention on the domestic legal order is presented.

Keywords: European Convention on Human Rights, Law, Bosnia and Herzegovina

1. Influence of The Convention on the legal orders of the members of The Council of Europe

The Convention for the Protection of Human Rights and Fundamental Freedoms, as a fundamental legal instrument for the protection of human rights of the Council of Europe, was adopted on November 4, 1950 in

Rome, and entered into force on September 3, 1953. The Convention is the fundamental legal instrument for the protection of human rights of the Council of Europe, and its greatest success is reflected in the fact that it established effective institutional supervision over its application, i.e. the implementation of its rights in the internal legal system of the member states, and a system of forced execution of obligations accepted by the contracting states by its ratification. The convention creates and applies a minimum standard of human rights on the territory of the contracting states, and the European Court of Justice was established with its headquarters in Strasbourg, which is solely responsible for its interpretation. Today, all member states of the Council of Europe are under the jurisdiction of the European Court, so it can be said that it is the largest area of setting legal standards in Europe. The European Court already emphasized in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976) that the Convention was "designed to maintain and promote the ideals and values of a democratic society." Therefore, starting from this basic premise, the European Court established its task in the application of the Convention very early on, and in the case of *Ireland v. the United Kingdom* (1978) expressed the opinion that the judgments of the European Court actually serve, not only to resolve those cases that are filed before the European Court, but, much more broadly, to analyze, preserve and develop the rules established by the Convention. Today, the Convention has the status of a "constitutional instrument of European public order". In the *Loizidou v. Turkey* case (1995), the European Court expressed its view that it views the Convention as "a constitutional instrument of European public order". However, it can be said that the Convention, in certain cases, also has "supreme importance". For example, in the case *Sejdić and Finci v. Bosnia and Herzegovina* (2009), the European Court found that the constitutional provisions of that country contradict the prohibition of discrimination established by Article 14 of the Convention, and in connection with the passive voting right from Article 3 of Protocol No. 1. The European Court, therefore, becomes the "creator of European constitutional standards", which should be implemented at national levels by national bodies, especially courts. Therefore, it can be asserted that, although the Convention is one of the most significant documents for the protection of human rights in Europe, the meaning of the Convention does not derive from the text itself, but from the practice of the European Court.

It was the European Court, applying an evolutionary approach, that ensured the Convention a leading role in defining modern standards of human rights protection in European countries. The European Court has expanded the scope of Convention rights in accordance with today's conditions, so that the Convention not only protects against direct violations of classic civil and political rights, but also sets standards regarding other violations of rights in the private sphere, establishing negative obligations for the contracting states, but also a wide scope of positive obligations. It can therefore be concluded that the Convention has become a very strong instrument of social change in Europe.

2. Bosnia and Herzegovina and European law

Since Bosnia and Herzegovina consists of the Federation of Bosnia and Herzegovina (hereinafter: FBiH) and the Republic of Srpska (hereinafter: RS), it is important to note the following. The Constitution of the RS was originally adopted in 1992. The Constitution of the FBiH was adopted in 1994. The Constitution of the Federation of BiH, adopted in June 1994, was part of the Washington Agreement reached between Bosniaks and Croats, with American mediation. According to the FBiH Constitution at the time, only Bosniaks and Croats were constitutive peoples in the FBiH, and decisions on the constitutional status of territories with a majority Serb population were left for future negotiations. The FBiH Constitution established an extremely decentralized federation of ten cantons, with five cantons primarily Bosniak in character, three cantons primarily Croat, and two mixed Bosniak-Croat. In addition to the directly elected House of Representatives, an indirectly elected House of Peoples was established, composed of an equal number of Croat and Bosniak representatives. In this House, decisions concerning the vital interests of any constituent people required the consent of the majority of delegates of both peoples, which often led to blockages in the work of legislators in FBiH. The Constitution of Bosnia and Herzegovina established the legal continuity of the Republic of Bosnia

and Herzegovina, which became independent from the former Yugoslavia, under the name Bosnia and Herzegovina and with a modified legal structure. Two already existing units, RS and FBiH, were confirmed as entities of Bosnia and Herzegovina. Bosniaks, Serbs, Croats, Others and citizens are described in the preamble of the BiH Constitution as constituent nations. By the Constitution of Bosnia and Herzegovina, the state is given extremely limited competences, and most of the competences have been transferred to two entities. At the state level, such decision-making mechanisms have been introduced that it is practically impossible to make any decision against the will of the representatives of any constituent people. In addition to the House of Representatives, the House of Peoples was established, a veto was introduced based on the vital interests of all three constituent nations in both houses, as well as a collective Presidency of three members, with a Serb from the RS, and a Bosniak and a Croat from the Federation. Both entities are obliged by the Constitution of Bosnia and Herzegovina to harmonize their constitutions with the national constitutions within three months. Although this obligation is established by the Constitution, this was not done within the given period or was done only partially. Nevertheless, some progress was made, which was rarely done voluntarily, but, as a rule, either the High Representative or the Constitutional Court made decisions that represented an unavoidable obligation for the responsible authorities. Regarding the Constitution of the RS, this was done after the opinion given by the Venice Commission, at the request of the High Representative. However, the fact remains that both entity constitutions were conceptually different, where the RS was conceived as a unitary entity dominated by Serbs, and the FBiH as a decentralized federation in which, at the federal level, powers are shared between Bosniaks and Croats. The extremely limited responsibilities given to the state by the BiH Constitution were insufficient to ensure the functioning of a modern state. By using some general provisions in the Constitution of Bosnia and Herzegovina and interpreting the provisions broadly, it turned out to be possible to somewhat expand the powers at the state level. Examples are the establishment of a court at the BiH level and the transfer or assumption of competence in the fields of defense, intelligence, justice and indirect taxation. Given that it was part of the peace treaty, the Constitution of BiH was drawn up and adopted without the participation of the citizens of BiH and without the application of procedures that would give it democratic legitimacy. This represents a unique case of a constitution that was never officially published in the official languages of the country it refers to, but was adopted and published in a foreign language - English. On June 12, 2002, after becoming a member of the Council of Europe, Bosnia and Herzegovina ratified the European Convention. By ratifying the European Convention, Bosnia and Herzegovina signed an international agreement. With this, Bosnia and Herzegovina assumed the obligation to adapt its legislation to the international obligations arising from that treaty. The Parliamentary Assembly, in its resolution number 234 (2002), recommended the Council of Ministers to invite Bosnia and Herzegovina to membership in the Council of Europe. Bearing in mind what has been stated regarding the general characteristics of international law and the theoretical-practical understanding of the concept of direct application, the European Convention, as a ratified international agreement, contains the character of self-execution and is based on the principles of a monistic legal understanding of the relationship between international and domestic law, as this was explained earlier on the example of the Constitution of Bosnia and Herzegovina. This represents a special angle of observing the place of the European Convention with regard to the constitutional principle that the general principles of international law are an integral part of the legal order of Bosnia and Herzegovina. At this point, it is useful to recall once again the position of the Court of Justice, according to which provisions that have a self-executing character enjoy priority over the provisions of national laws, even over the provisions of national constitutions. The priority of the European Convention over provisions of national law that may be inconsistent with it can be very clearly defined on the basis of the fundamental, one might even say constitutional, character of the rights and freedoms protected by the European Convention, as well as on the basis of the goal of the Council of Europe, expressed in the preamble of the European Convention, i.e. achieving greater unity between the contracting states; unity to which the supervisory system established by the European Convention aspires. Based on the previous statements about the effects of the general principles of international law and the effects on the legal order of Bosnia and

Herzegovina, it can be concluded:

1. The European Convention, as a ratified international treaty, is an integral part of the legal order of Bosnia and Herzegovina.
2. By ratifying the European Convention, Bosnia and Herzegovina accepted the obligation to continuously examine the compatibility of all legislative acts with the European Convention, which also includes constitutional provisions. In other words, legislative acts (which includes the Constitution of BiH) must not contradict the European Convention.
3. The European Convention is directly applicable in Bosnia and Herzegovina, and its provisions are self-executing, so that individuals can directly refer to such a provision before domestic courts without the need for additional measures by the national authorities.
4. Rights from the European Convention are protected by legal procedures.
5. The European Court of Human Rights is competent to make final and binding decisions.
6. The European Court of Human Rights has a supranational character.
7. Within the national framework, the Constitutional Court is competent to make final and binding decisions regarding the application of the European Convention.

At first glance, it can be assumed that the Constitution of BiH is in full agreement with the European Convention, which it gives priority over all other laws. However, the provisions of the BiH Constitution on the composition and election of the Presidency and the House of Peoples are often considered incompatible with the European Convention. These are certainly not the only provisions of the BiH Constitution, the compatibility of which could be linked to the rights and obligations from the European Convention; Articles IV/1. and V/1. The BiH Constitution represents examples that are difficult to avoid in the possible further consideration of this issue, because it cannot be overlooked that these two possible contradictions reflect the fundamental tension between the constitutional system based on the collective equality of ethnic groups and the principle of individual rights and equality of citizens. "The Presidency of Bosnia and Herzegovina consists of three members: one Bosniak and one Croat, who are directly elected from the territory of the Federation, and one Serb who is directly elected from the territory of Republika Srpska." From the cited provision, it can be concluded that, in order to be elected as a member of the Presidency, a citizen must belong to one of the constituent nations and that the voters' choice is limited to Bosniak and Croat candidates in the FBiH, and Serb candidates in the RS, and that Bosniaks and Croats can be elected only from the territory of the FBiH, not from the RS, and Serbs only from the territory of the RS, not from the FBiH. In principle, in a multi-ethnic state such as Bosnia and Herzegovina, it is legitimate to ensure that a state body reflects the multi-ethnic character of society. The problem may be the way in which territorial and ethnic principles are combined. In its decision number U 5/98, the Constitutional Court considered this problem in the entity constitutions in the following way: "65. Strict identification of territory and certain ethnically defined members of joint institutions to represent certain constituent peoples do not apply even to the rules on the composition of the Presidency given in Article V, first paragraph: 'The Presidency of Bosnia and Herzegovina consists of three members: one Bosniak and one Croat, who are directly elected from the territory of the Federation, and one Serb who is directly elected from the territory of the Republika Srpska.' that the Serbian member of the Presidency, for example, is not only elected by citizens of Serbian ethnic origin, but by all citizens of the Republika Srpska without a particular ethnic affiliation. In this way, he does not represent the Republika Srpska as an entity, nor only the Serbian people, but all the citizens of the electoral unit of the Republic. The same applies to Bosniak and Croat members who are elected from the Federation." If the members of the Presidency who are elected from an entity represent all citizens living in that entity, and not a specific nation, it is difficult to justify that they must declare themselves as members of a specific nation. Such a rule seems to assume that only members of a certain ethnic group can be considered fully loyal citizens of the entity who can defend its interests. The members of the Presidency have the right of veto whenever there is a violation of the vital interest of the entity from which they were elected. It cannot be maintained that only Serbs are able to defend the interests of the RS, and only Croats and Bosniaks are able to

defend the interests of the Federation. The identity of interests in this way under ethnic dominance hinders the development of a broader sense of belonging to the nation. Furthermore, members of the three constituent nations may be elected to the Presidency, but may be prevented from being candidates in the elections of the entity in which they reside, if they live as Serbs in the Federation or Bosniaks or Croats in the RS. In addition, the Electoral Law (based on the relevant provisions of the BiH Constitution) clearly excludes others, i.e. citizens of Bosnia and Herzegovina who do not identify themselves as Bosniaks, Croats or Serbs, from the right to be elected to the Presidency. This seems clearly incompatible with the equal right to vote and be elected, according to Article 25 of the International Covenant on Civil and Political Rights, or with equality under the law, which is guaranteed to members of minorities by Article 4 of the Framework Convention for the Protection of National Minorities, because members minorities are formally excluded from a public function. Furthermore, we can find another inconsistency in the election for the House of Peoples, so it is important to note the following. 1. The House of Peoples. The House of Peoples consists of 15 deputies, two-thirds from the Federation (including five Croats and five Bosniaks) and one-third from the Republika Srpska (five Serbs). (a) Proposed Croat and Bosniak deputies from the Federation are elected by Croats, that is, Bosniak delegates in the House of Peoples of the Federation. Deputies from Republika Srpska are elected by the National Assembly of Republika Srpska." From the above, it can be concluded that only citizens who identify themselves as members of one of the three constituent nations can be elected to the House of Peoples, that only Serbs can be elected to the House of Peoples only from the RS, and Bosniaks and Croats only from the FBiH and that within the House of Peoples Federation, only Bosniak and Croat MPs can participate in the election, as other MPs are deprived of the right to vote on that election.

3. Conclusion

The ratification of the Convention also accepted the competence of the European Court to decide on claims against Bosnia and Herzegovina due to the violation of the rights guaranteed by the Convention. With this, the practice of the European Court has become a source of law that needs to be known in Bosnia and Herzegovina. It should be noted that as a ratified and published international treaty, the Convention, together with the protocols, becomes part of the internal legal order and is directly applicable in Bosnia and Herzegovina, this means that the parties can base their claims before domestic courts directly on the Convention and refer to the provisions Conventions. Furthermore, the direct application of the Convention obliges the courts to interpret domestic law in accordance with the standards of the Convention, and when a party points out a violation of the Convention, they examine the claims of the party by directly applying the Convention. It can be concluded that, in order to protect their individual rights and freedoms, which they consider to have been violated in the proceedings that preceded the constitutional court proceedings, the applicants of the constitutional lawsuit can refer not only to the constitutional provisions, but also to the convention provisions, that is, they can be referred exclusively to the violation of the provisions of the Convention. In some cases, the Convention has a supra-constitutional importance. The practice of the Constitutional Court and the European Court, which is shown in the work on several examples, leads us to the conclusions that both the European Court and the Constitutional Court, each within their jurisdiction, but also acting interactively, significantly contributed to the strengthening of democracy, the rule of law and the protection of human rights. rights in Bosnia and Herzegovina. It is important that the Constitutional Court actively tries to adopt European standards in the protection of human rights, but it is also important to change its own practice based on the judgments of the European Court passed against Bosnia and Herzegovina. The Constitutional Court changes its practice in cases where the European Court found that in Bosnia and Herzegovina there is no effective legal remedy for the protection of a certain human right and the content of the human right guaranteed by the Convention, i.e. the Constitution, is interpreted in the way the European Court does. We can also see the influence of the decisions of the Constitutional Court on the positions of the European Court, because almost every change in the practice of the Constitutional Court is accompanied by a

change in the position of the European Court on whether there is an effective legal remedy in Bosnia and Herzegovina for the protection of a certain human right guaranteed by the Convention. The foregoing does not mean that there are no violations of human rights guaranteed by the Convention in Bosnia and Herzegovina and that it is sufficient to change one's own practice only on the basis of the judgments of the European Court issued against Bosnia and Herzegovina. It is important to continuously monitor all judgments of the European Court, which is still insufficiently done, and to immediately apply the newly set standards as an international contractual obligation that Bosnia and Herzegovina as a contracting party accepted by ratifying the Convention and recognizing the jurisdiction of the European Court in all cases concerning interpretation and application Conventions.

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