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The Impact of the European Convention on Human Rights and the Jurisprudence of the European Court of Human Rights on the Constitutional Judiciary of Hungary, Poland and Romania

Wpływ Europejskiej Konwencji Praw Człowieka oraz orzecznictwa Europejskiego Trybunału Praw Człowieka na sądownictwo konstytucyjne Węgier, Polski i Rumunii

Abstract

One of the defining characteristics of contemporary legal systems is their *multi-centric* nature, manifested in the growing influence of international and supranational law on domestic legal orders. This phenomenon is particularly evident in the field of human rights protection. Such influence pertains primarily to the sources of law but also extends to the jurisprudence of courts and tribunals operating at both the universal and regional levels. By way of example, Article 46 of the European Convention on Human Rights provides that the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Among the bodies obliged to take Convention standards into account in their adjudicative practice are constitutional courts. Accordingly, the primary aim of this article is to analyse and

compare the impact of the norms enshrined in the European Convention on Human Rights and in national constitutions on the jurisprudence of constitutional courts in the states indicated in the title.

Key words: European Convention on Human Rights, case law, inter national agreement, constitution, Constitutional Tribunal

Streszczenie

Jedną z cech charakteryzujących współczesne systemy prawne jest ich „multicentryczność", która wyraża się w coraz większym wpływie prawa międzynarodowego i ponadnarodowego na prawo krajowe. Zjawisko to jest szczególnie zauważalne w sferze ochrony praw człowieka. Wpływ ten dotyczy w pierwszej kolejności źródeł prawa, ale także orzecznictwa sądów i trybunałów o charakterze uniwersalnym lub regionalnym. Tytułem przykładu, z art. 46 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności wynika, że strony zobowiązują się do zastosowania się do ostatecznego wyroku Trybunału we wszystkich sprawach, w których są stronami. Jednymi z organów zobowiązanymi do uwzględniania w swojej działalności orzeczniczej standardów konwencyjnych są sądy konstytucyjne. Dlatego też głównym celem artykułu jest analiza i porównanie wpływu norm Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności oraz konstytucji krajowych na działalność orzeczniczą sądów konstytucyjnych we wskazanych w tytule państwach.

Słowa kluczowe: Europejska Konwencja Praw Człowieka, orzecznictwo, umowa międzynarodowa, konstytucja, Trybunał Konstytucyjny

Introduction

It follows from Article 27 of the Vienna Convention on the Law of Treaties that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"[1]. These provisions lead to the conclusion that a state – as a party to an international agreement

[1] *The Vienna Convention on the Law of Treaties* (*VCLT)* was adopted on May 22, 1969 in Vienna, and opened for signature on May 23, 1969. It entered into force on 27 January 1980, i.e. in accordance with Article 84, 30 days after the deposit of the 35th instrument of ratification or accession. Polish text: Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1968, Journal of Laws of 1990 No. 74, item 439 [Annex], 440.

– is obliged to introduce appropriate changes to its legislation that will ensure the fulfilment of its obligations, which is reflected in the advisory opinion of the Permanent Court of International Justice, which stated, inter alia, that "a state which has validly entered into international obligations should introduce into its legislation the changes necessary to ensure the fulfilment of its obligations"[2]. This does not mean that the principle of *pacta sunt servanda* is contrary to the principle of the sovereignty of states. Each state sovereignly decides on the obligations it incurs, because it is not obliged to conclude an international agreement. However, if a state has decided to become a party to an agreement, it must consequently shape its legal system in such a way that it is consistent with its obligations in the international arena. These provisions implicitly indicate the obligation to comply with the obligations incurred, but also the hierarchy of sources of law in a given legal system, and the obligation to adapt national law to international law in the event of a conflict of norms (explicitly)[3].

The obligation to comply with international agreements is of particular importance in the field of human rights protection. Indeed, the provisions on fundamental freedoms and human rights are one of the areas in which the interaction between the different levels of regulation is most visible and crucial from the point of view of the status of the individual. Many regional (e.g. European Convention on Human Rights, African Charter on Human and Peoples' Rights) and universal/global (e.g. Universal Declaration of Human Rights, International Covenant on Civil and Political Rights) international agreements concern freedoms, rights and duties of man and citizen, included in genere and in specie, i.e. their individual categories in subjective or objective terms, e.g. freedoms, rights and responsibilities of children or employees.

When examining the mutual influence of different levels of human law regulation, it should be noted that the inclusion of the provisions of international human rights conventions in national constitutions is a global trend. This trend is one of the most significant manifestations of

[2] Permanent Court of International Justice, Exchange of Greek and Turkish Populations, Advisory Opinion of 21 February 1925, Publications of the Permanent Court of International Justice (1922-1946), Series B, No. 10, http://www.icjcij.org/pcij/serie_B/B_10/01_Echange_des_populations_grecques_et_turques_Avis_consultatif.pdf.

[3] W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie*, 8th edn, revised and supplemented by S. Sawicki, Warsaw 2001, p. 35.

the internationalization and globalization of national constitutions[4]. Indeed, the so-called convergence of rules governing fundamental human rights at national level is the result of the interaction of different laws at national, regional and global level within the framework of multi-level constitutionalism and the constitutional dialogue between institutions at these three levels.

In addition to all these regulatory frameworks, a relatively wide network of institutions (e.g. courts, commissions) has also been created to interpret the relevant rules and monitor their application. With regard to guarantees concerning the freedoms, rights and obligations of man and citizen, it is difficult to overestimate the role of the European Court of Human Rights in Strasbourg and the constitutional tribunals/courts of individual countries.

The aim of this scientific article is to analyze and compare the impact of the norms of the European Convention on Human Rights (hereinafter referred to as the ECHR) and the national constitutions of Hungary, Poland and Romania on the jurisprudence of their constitutional courts. It should be borne in mind that, in accordance with Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the parties undertake to comply with the final judgment of the Court in all cases to which they are parties. Therefore, the obligation to implement the final judgment rests with the defendant State, which should take all necessary steps to implement each judgment[5]. After the analysis of the relevant constitutional provisions constituting the basis (the state's obligation to comply with the Convention obligations in the field of human rights protection), practical examples will be presented from which the perception of the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR) by national constitutional courts can be decoded. It should be borne in mind that the purpose of the Convention is to establish minimum requirements concerning fundamental freedoms and rights, and – in accordance with Article 53 of the

[4] T. Toader, M. Safta, *Contencios constituțional*, Bucharest 2020, p. 443.

[5] M. Wróblewski, *Wykorzystanie Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności i orzecznictwa Europejskiego Trybunału Praw Człowieka w sferze ustawodawczej oraz postępowaniu przed Trybunałem Konstytucyjnym*, [in:] *VII Seminarium Warszawskie. Obywatel w Radzie Europy i Unii Europejskiej. Nowe wyzwania po dwudziestu latach od przystąpienia przez Polskę do Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*, Warsaw 2014, p. 102; L. Garlicki, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do art. 19–59*, Vol. II, Warsaw 2011, p. 353.

Convention – national provisions providing greater protection than analogous provisions of the Convention have priority of application[6].

In this context, it is particularly important to examine how the constitutional courts of the Central and Eastern European countries referred to in the title relate to the provisions of the ECHR and the principles established by the ECtHR. In a classic dichotomy, the constitutional court should look for such measures that would be aimed at a friendly interpretation of constitutional provisions concerning individual freedoms and rights in accordance with the direction of the decision made by the Court in Strasbourg. A contrario, the constitutional court should not "go against the grain" of Strasbourg jurisprudence. However, such a situation is possible, for example, when the constitutional (national) system of protection of a given freedom or right provides a higher standard than the European Convention.

This comparative analysis should also take into account a number of specific aspects, such as the historical, social and political specificities of each country. One such peculiarity, for example, is the period of Soviet-style dictatorship in the countries of the region under study, which was a major obstacle to the ratification of the ECHR[7].

The framework of the study (scientific article) assumes that it is only a contribution to further comparative and legal research, especially the case law of Central and Eastern European countries. All the more so because these issues have been repeatedly taken up from the perspective of the legal systems and jurisprudence of individual countries.

The impact of the ECHR and the jurisprudence of the ECtHR on constitutional jurisprudence in Hungary

In Hungary, the relationship between international law and national law is governed by Article Q). (2) and (3) of the Constitution of Hungary of 25 April 2011. According to these points:

[6] B. Banaszak, M. Jabłoński, *Sądownictwo konstytucyjne i sądownictwo Europejskiego Trybunału Praw Człowieka*, *Acta Universitatis Wratislaviensis* No 3109, 2009, pp. 11-12.

[7] M. Poniatowski, *Treść prawa do odpowiedzialności rodzicielskiej w orzecznictwie Europejskiego Trybunału Praw Człowieka*, [in:] P. Sobczyk (ed.) *Treść prawa do odpowiedzialności rodzicielskiej. Doświadczenia – Analizy – Postulaty*, Budapest 2022, p. 23.

"(2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in laws".[8]

It is clear from those provisions that the Hungarian Fundamental Law does not provide for the primacy of international law over national law. That precedent was set solely on the basis of the case-law of the Hungarian Constitutional Court[9]. At the same time, however, it is a fact that the aforementioned article of the Fundamental Law clearly states that "in ensuring consistency between international law and domestic law, international law is the standard, the basis for adaptation, because ensuring consistency between these two sets of norms is in the interest of fulfilling the obligations under international law"[10] On that basis, the ECHR serves as a reference point for the interpretation of the Fundamental Law which the Constitutional Court must take into account when examining possible violations of fundamental rights.

In addition, the Hungarian Fundamental Law regulates a number of fundamental human rights and freedoms in a way that is textually identical to the provisions of the ECHR or bases its provisions on the clauses of the relevant provisions of the ECHR (e.g. prohibition of torture, presumption of innocence)[11].

At the same time, the question arises about the legal effect of the principles expressed in the jurisprudence of the ECtHR. Article Q). Paragraphs 2 and 3 of the Constitution are, in fact, the constitutional expression of the principle pacta sunt servanda in relation to international agreements. On the basis of this principle, 'the Constitutional Court should be guided by the Strasbourg case-law and the level of protection of fundamental rights, even if this would not necessarily result from its

[8] Article Q). (2) and (3) of the Hungarian Basic Law. Available in English at: https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178.

[9] R. Uitz, *Nemzetközi emberi jogok és a magyar jogrend*, [in:] A. Jakab, G. Gajduschek (eds.), *A magyar jogrendszer állapota*, Budapest 2016, p. 180-181; P. Kovács, *Az Emberi Jogok Európai Bíróságára és más nemzetközi intézményekre való hivatkozás az Alkotmánybíróságon és a Nemzetközi Büntetőbíróságon: hasonlóságok és különbségek*, Miskolci Jogi Szemle, No. 1, 2020, pp. 148-149.

[10] T. Molnár, *A nemzetközi jog és a magyar jog viszonya*, [in:] A. Jakab, B. Fekete (eds.), Internetes Jogtudományi Enciklopédia [Online], Available at: http://ijoten.hu/szocikk/a-nemzetkozi-jog-es-a-magyar-jog-viszonya (Accessed: 15 June 2024).

[11] P. Kovács, *Az Emberi Jogok…*, p. 74.

"precedential decisions""[12]. Moreover, "although the judgments of the ECtHR have declaratory effect, its case-law may be helpful in the interpretation of constitutional rights declared in the Fundamental Law or international treaties and in the assessment of their scope and content[13]. In addition, in a 2013 ruling, the Hungarian Constitutional Court stated that "the Constitutional Court accepts the level of legal protection afforded by international legal protection mechanisms as a minimum standard for the enforcement of fundamental rights."[14]

On the basis of all these principles, an interesting dichotomy can be observed in the relationship between the jurisprudence of the ECtHR and the Constitutional Court of Hungary. On the one hand, the judgments of the European Court of Human Rights are not binding on the Constitutional Tribunal in themselves. On the other hand, the Constitutional Court cannot completely ignore the relevant jurisprudence of the ECtHR[15]. The latter observation is also evidenced by the fact that the principles contained in the judgments of the ECtHR are deeply integrated into the case-law of the Constitutional Tribunal with regard to many fundamental rights.

From the relevant case-law, it can be seen that the Hungarian Constitutional Court is interested in the case-law of the European Court of Human Rights[16]. At the same time, however, the terms used by the Constitutional Tribunal in relation to the jurisprudence of the ECtHR (e.g. "takes into account", "supports this view") also indicate the lack of universally binding force.

Taking all this into account, according to László Blutman, it is not individual judgments, but principles derived from the jurisprudence of the ECtHR "that shape the interpretation of the Constitution in a binding manner[17]. Nevertheless, in Blutman's interpretation, these principles can

[12] A. Köblös, *Judgments of the European Court of Human Rights in the Decisions of the Hungarian Constitutional Court*, Law, Identity and Values, No. 1, 2022, p. 88; R. Uitz, *Nemzetközi emberi…*, p. 181.
[13] A. Köblös, *Interpretation of Fundamental Rights in Hungary*, [in:] Z. J. Tóth (ed.), *Constitutional Reasoning and Interpretation of the Constitution. Analysis of Some Central European Countries*, Budapest–Miskolc 2021, p. 89.
[14] Decision 36/2013 (XII.5.) AB. Cf. A. Köblös, *Judgments of the European…*, p. 90.
[15] R. Uitz, *Nemzetközi emberi…*, p. 186.
[16] Z. Kémeri, *A strasbourgi bíróság és a magyar bíróságok gyakorlata az európai konszenzus tükrében*, Jog–Állam–Politika, No. 3, 2017, p. 171.
[17] L. Blutman, *A nemzetközi jog használata az Alkotmány értelmezésében*, Jogtudományi Közlöny, No. 7–8, 2009, s. 315.

shape the interpretation of the Constitution only if their conclusions are based on a synthetic and comprehensive approach[18].

On the other hand, however, many Hungarian constitutionalists, including judges of the Constitutional Court, have criticised the binding interpretative role of the ECtHR's rules. One of the harshest criticisms was formulated by former judge of the Constitutional Tribunal Béla Pokol in a dissenting opinion to the ruling issued in 2019. He also suggested that the draft decision should present the relevant case-law of the ECtHR for internal use only."[19]

The position of András Bragyová, also a former judge of the Hungarian Constitutional Court, is a bit more nuanced than that of Pokol. In an opinion in accordance with the 2011 Decision[20]. Bragyova stated that in a case in which the Constitutional Court and the European Court of Human Rights come to different conclusions, "the Constitutional Court should reconsider these conclusions," hovewer it is "not obliged to comply with the case law of the European Court of Human Rights."[21]

Furthermore, referring to the reference to the case law of the European Court of Human Rights in the Constitutional Court's rulings, Bragyova stated in 2014 that: "If the court has taken into account something that has somehow influenced its decisions, it is rightly not to be concealed. Only in this way does the Constitutional Tribunal fulfil its obligation to explain the reasons for its decisions. […] I also agree that the Strasbourg case-law should not constitute a binding point of reference for the interpretation of Hungarian constitutional law, but is an important and indispensable source and, above all, an element of self-control"[22].

At the same time, taking into account these allegations, it should be noted that, as a result of the evolution of the case-law of the ECtHR, it is no longer true that the case-law of national constitutional courts provides a higher level of protection[23]. In this regard, it is particularly useful in some cases to incorporate the principles established by the

[18] L. Blutman, *A nemzetközi jog használata…*, p. 315.
[19] Decision 1/2019 (II.13.) AB. Cf. Köblös, A., Judgments of the European Court of Human Rights in the Decisions of the Hungarian Constitutional Court, *Law, Identity and Values*, No. 1. p. 90.
[20] A. Bragyova, *A szakmai vita és érvelés esélye fennmaradt. Halmai, G. interviews Justice András Bragyova*, Fundamentum, No. 1–2, 2014, p. 90.
[21] Decision 166/2011 (XII.20.) AB. Cf. Köblös, A., Judgments of the European Court of Human Rights in the Decisions of the Hungarian Constitutional Court, *Law, Identity and Values*, No. 1., p. 89. This opinion was also supported by Judge Egon Dienes-Oehm.
[22] A. Bragyova, *A szakmai vita és érvelés...*, p.71
[23] P. Kovács, *„Az Emberi Jogok...*, p. 146.

European Court of Human Rights into the case-law of the Constitutional Court, as this can also bring us closer to achieving a more comprehensive protection of fundamental human rights and freedoms.

According to some researchers, the ambivalent attitude towards the jurisprudence of the ECtHR "may result from the fact that some members of the Constitutional Tribunal respect the approach of a 'minimum standard' and others do not. Tensions within the body can be alleviated by giving a special role to the judgments of the ECtHR provided for in the interpretation of the Fundamental Law"[24].

Taking into account all these opinions formed in the legal literature and jurisprudence of the Constitutional Court of Hungary, it can be concluded that "Judgments of the European Court of Human Rights do not become pro forma part of the national legal order"[25]. However, the Hungarian Constitutional Court must take into account, as a binding interpretative point of reference, the principles laid down by the ECtHR when interpreting the provisions of the Fundamental Law. The Hungarian Constitutional Court reached a similar conclusion in a ruling issued in 2013, in which it stated that: "Although the judgment of the ECtHR has only declaratory effect, it nevertheless plays a role in the interpretation of fundamental rights, determining their content and scope."[26]

On the basis of the recent case law of the Constitutional Tribunal, several rulings can be distinguished in which the Constitutional Tribunal has relied heavily on the principles established by the European Court of Human Rights. For example, in one case, the Constitutional Court inferred, inter alia, from the principles of the European Court of Human Rights that the relationship between a child and a separated parent falls within the concept of family life and is therefore protected.[27] Moreover, it may be noted that the Constitutional Court prefers to refer to the provisions of the ECHR and to the principles established by the ECtHR when examining possible violations of the freedom of expression.[28]

At the same time, it can be noted that in the above-mentioned judgments of the Hungarian Constitutional Court, the principles formulated by the ECtHR have always served to support the findings of the

[24] A. Köblös, *Interpretation of Fundamental…*, p. 204.
[25] T. Molnár, *A nemzetközi jog.…* [Online].
[26] Decision 4/2013 (II.21.) AB. Justification [19].
[27] Decision No 3067/2021 (II. 24.) AB. Reasoning [21].
[28] e.g. Decision 1/2019 (II. 13.) AB. Justification [35], Decision 23/2019 (VII. 18.) AB. Reasoning [86].

Constitutional Court. On the other hand, the case-law of the Hungarian Constitutional Court also includes rulings in which the Court has stated that its considerations on a given issue differ from the principles set out in the case-law of the ECtHR. For example, in a 2014 ruling, the Constitutional Court indicated that "A distinction between civil and criminal cases, such as that which appears in the case-law of the ECtHR, with regard to the right to a fair trial, cannot be found in the case-law of the Constitutional Court."[29]

Also in a relatively recent ruling, the Hungarian Constitutional Court came to an interesting conclusion regarding the relationship between the jurisprudence of the European Court of Human Rights and Article Q. of the Hungarian Fundamental Law. According to the Constitutional Tribunal, "this is a constitutional requirement, in accordance with Article Q). (2) of the Basic Law, according to which, if the ECtHR, in a final judgment binding Hungary in a specific individual case, finds an infringement of Article 1 of the First Additional Protocol to the ECHR on the ground that the benefit which should have been paid to the applicant ... has not been paid, the period of insurance resulting from the non-payment of the benefit must also be taken into account.'[30] It can be underlined that, in line with this principle, the Constitutional Court has essentially provided a framework for the impact of the ECtHR's judgments on Hungary on the Hungarian constitutional justice system.

In general, it can be concluded that "Although the Constitutional Court has adopted a position interpreting the Fundamental Law in accordance with Hungary's obligations under international law, the Constitutional Court is not fully involved in the interpretation developed by international courts"[31].

The impact of the ECHR and the jurisprudence of the ECtHR on constitutional jurisprudence in Poland

The title issue has been the subject of many studies in Poland devoted to both the applicable provisions of the European Convention on

[29] Decision 30/2014 (IX.30.) AB. Justification [48].
[30] Decision 10/2020 (V. 28.) AB. Decision [1].
[31] A. Köblös, *Interpretation of Fundamental…*, p. 234.

Human Rights and the Constitution of the Republic of Poland, as well as the jurisprudence practice of the Constitutional Tribunal[32]. Therefore, concluding the findings of the Polish doctrine in this area, it is necessary to pay attention to several issues that are important from the point of view of comparative law.

There is no provision in the Constitution of the Republic of Poland of 2 April 1997 that (in comparison with the Constitution of Romania, which will be discussed in the next section of the study) directly refers to the impact of the provisions of the European Convention on the system of Polish law (especially with regard to the status of the individual) and the activities of state authorities, i.e. legislative, executive and judicial authorities, including the Constitutional Tribunal. Nevertheless, the Polish constitution-maker devoted relatively much attention to the issue of international agreements, their observance and their place in the system of sources of law. Article 9 of the Constitution of the Republic of Poland, which results in the obligation of the Polish state to comply with international law binding on it, and Article 87(1), in which ratified international agreements are recognized as a source of universally applicable law, are of fundamental importance in this respect. Moreover, the provisions of Chapter III of the Constitution provide for special procedures for the ratification of international agreements, depending on the subject matter of the agreement.

It should be noted that the legal definition of an international agreement is contained in Article 2 of the Act of 14 April 2000 on international agreements[33], in which an international agreement is understood as "an agreement between the Republic of Poland and another entity or entities of international law, regulated by international law, regardless of whether it is included in one document or a number of documents, regardless of its name and regardless of whether it is concluded on behalf of the state, government or minister in charge of the government administration department competent for matters, covered by the international agreement'.

The European Convention for the Protection of Human Rights and Fundamental Freedoms in Poland has the status of a ratified international

[32] A. Syryt, *Wpływ Europejskiej Konwencji na orzecznictwo polskiego Trybunału Konstytucyjnego*, [in:] E. Karska (ed.), *The Impact of the European Convention on Human Rights Protection Systems and International Criminal and Humanitarian Law*, Warsaw 2013, pp. 218-235.

[33] Journal of Laws No. 39, item 443, as amended. d.

agreement as prior conformity expressed in a statute, which means that, in accordance with Article 91(2) of the Constitution of the Republic of Poland, it is a normative act directly applicable and having priority in the event of a conflict with statutes[34]. As follows from the Constitution of the Republic of Poland and as indicated by representatives of the doctrine, the European Convention may be a model for review in proceedings before the Constitutional Tribunal, the European Convention may be subject to review before the Constitutional Tribunal and may have an impact on the interpretation of the content of provisions of other normative acts[35].

The Convention may therefore be benchmark of control statutes and substatutory acts (in particular regulations), with the exception of reviews within the framework of the so-called individual constitutional complaint referred to in Article 79 of the Constitution of the Republic of Poland. This is because the basis for a constitutional complaint may be the infringement by the challenged provisions of the challenged provisions only of constitutional freedoms or rights. As the Constitutional Tribunal pointed out in its decision of 3 April 2007, "it is inadmissible to examine the challenged provision with international agreements in the course of a constitutional complaint"[36]. The position of the jurisprudence and doctrine that this is one of the fundamental problems with regard to the European Convention as a model for the review of the constitutionality of law in Poland should be shared[37]. However, it is important to be aware that the vast majority of individual freedoms and rights enshrined in the Polish Constitution are modelled on the European Convention, which

[34] The European Convention was ratified by the President of the Republic of Poland on 15 December 1992 and entered into force on 19 January 1993. Resolution of the Constitutional Tribunal of 16 January 1996, file no. W 12/94, OTK ZU 1994, No. 1 item 4 and others.

[35] J. Podkowik, *Stosowanie Konwencji…*, p. 95-110. Syryt points to the following three spheres of influence of the ECHR on the activity of the Constitutional Tribunal: "1) the ECHR may be a model for review in proceedings before the Constitutional Tribunal; 2) the ECHR may be an element of the justification of the Tribunal's ruling; 3) The Constitutional Tribunal may refer to the rulings of the European Court of Human Rights by indicating that these rulings have an impact on the resolution of the case considered by the Constitutional Tribunal. This interaction can be parallel, and the above-mentioned spheres can interpenetrate" - A. Syryt, *Wpływ Europejskiej…*, p. 220.

[36] "Pursuant to Article 79 of the Constitution, the basis for a complaint may only be the infringement of constitutional freedoms or rights by the challenged provisions. Therefore, the provisions of the Convention cannot serve as a standard for review in such proceedings. (cf. e.g. the decision of the Constitutional Tribunal of 31 May 2005, ref. no. SK 59/03, OTK ZU no. 5/A/2005, item 61)". Decision of the Constitutional Tribunal of 3 April 2007, file ref. no. SK 85/06, OTK ZU 2007, no 4A, item 40.

[37] A. Pudło, *Problemy wynikające z orzecznictwa ETPC i TSUE oraz krajowych sądów konstytucyjnych*, *Zagadnienia Sądownictwa Konstytucyjnego. O istotę Państwo w 90 rocznicę powstania Konstytucji Marcowej*, No. 1(5), 2013, p. 96.

was ratified by the Republic of Poland before the adoption of the Constitution[38]. The exception of an individual constitutional complaint does not apply to applications and questions of law submitted to the Constitutional Tribunal, since it follows from Article 188(2) of the Constitution that the Constitutional Tribunal adjudicates on the conformity of statutes with ratified international agreements, the ratification of which required prior consent expressed in a statute[39]. According to Piotr Mostowik, among others, due to the provisions of Article 188(2) of the Constitution (but also Article 188(3) and Article 193), in some cases "the Tribunal applies an international standard directly to the assessment of national law" [40]. On the other hand, even outside the cases provided for in Article 188(2), the Constitutional Court refers to the judgments of the ECtHR when interpreting the content and limitations of certain fundamental human rights and freedoms or in cases in which it has to examine a conflict between two or more fundamental rights[41].

Interestingly, "the Convention and the jurisprudence of the European Court of Human Rights are invoked by the participants of the proceedings before the Constitutional Tribunal as an additional argument justifying the violation of constitutional freedoms and rights, even if the Convention itself is not indicated in the petitum of the application, question of law or constitutional complaint".[42] It can also be noted from the jurisprudence of the Constitutional Court that, like the constitutional courts of Romania or Hungary, it refers to the judgments of the ECtHR primarily in cases in which it uses them to confirm its own conclusions. On the other hand, there are far fewer references when it seeks to nuance its findings by taking into account the principles set by the ECtHR (Wiśniewski, 2020, p. 161)[43].

Despite the possibility of indicating the provisions of the European Convention as a model for the protection of freedoms and rights before

[38] Wróblewski wrote, inter alia: "Due to the importance of the Convention, which has been present in the Polish legal system for 20 years, it can be said that the Constitutional Tribunal, in addition to the constitutional review, also regularly reviews the conventionality of legal provisions" - M. Wróblewski, *Wykorzystanie Konwencji…*, p. 107.

[39] Article 188(2) of the Constitution of the Republic of Poland.

[40] P. Mostowik (ed.), *Międzynarodowe prawo rodzinne. Filiacja. Piecza nad dzieckiem. Alimentacja*, Warsaw 2022, p. 451.

[41] P. Mostowik (ed.), *Międzynarodowe prawo*…, p. 450.

[42] A. Syryt, *Wpływ Europejskiej*…., p. 220 passim.

[43] A. Wiśniewski, *The Impact of the European Convention of Human Rights on the Polish Legal System, Polish Review of International and European Law*, Vol. 9, No. 1 (2020), p. 153–184.

the Constitutional Tribunal, applicants use it extremely rarely. According to the statistics of the Polish Constitutional Court, only in a few cases per year[44].

The European Convention may also be subject to the inspection, which results from Article 188(1) of the Constitution[45] and Article 193 of the Constitution[46], and indirectly also from Articles 8 and 87(1) of the Constitution, which establish the Constitution as the supreme law of the Republic of Poland. Nevertheless, so far the Convention has not been subject to constitutional review by the Constitutional Tribunal.

The European Convention may also affect the interpretation of provisions of other normative acts, in particular constitutional rights expressing freedoms or subjective rights[47].

A separate issue from the one presented above – i.e. the relationship between the provisions of the European Convention and the Polish Constitution – although related to it is the impact of the jurisprudence of the Tribunal in Strasbourg on the jurisprudence of the Constitutional Tribunal in Warsaw. This influence is referred to in the case law and literature on the subject as a dialogue, which is an exchange of ideas, concepts and values used in case law[48].

The Polish Constitutional Tribunal adjudicates in accordance with the assumption expressed, inter alia, in the judgment of 18 October 2004: "respect for Poland's international obligations and care for the coherence of the legal order (shaped both by domestic law and – to the extent permitted by the Constitution – by international agreements and supranational law) require that there should be no discrepancies between the law (the content of provisions, principles of law, standards of law) shaped by various centres of adjudication on the validity of the law, bodies applying and interpreting the law. The decision of the ECtHR, relating to an individual case [...] and determining (as a result of the review proceedings

[44] More specifically, it appears as follows: In the years 2018-2022 (no official data for 2023-2024), the European Convention was the benchmark for review in 1 case (2020), subject to review in two cases (2021, 2022). The total number of judgments issued by the Constitutional Tribunal is 124. For more information, see: ipo.trybunal.gov.pl, accessed July 30, 2024.

[45] Article 188(1) of the Constitution of the Republic of Poland: "The Constitutional Tribunal adjudicates on the following issues: 1. the conformity of laws and international agreements with the Constitution".

[46] Article 193 of the Constitution of the Republic of Poland: "Any court may refer to the Constitutional Tribunal a question of law as to the conformity of a normative act with the Constitution, ratified international agreements or a statute, if the resolution of a case pending before the court depends on the answer to the question of law."

[47] J. Podkowik, *Stosowanie Konwencji…*, p. 100.

[48] A. Pudło, *Problemy wynikające…*, p. 93.

in Strasbourg) that Poland violated the standard [...], must therefore have an impact on the assessment of the provisions conducted by the Polish constitutional court"[49]. In the opinion of the Constitutional Tribunal, "it is extremely important to determine the truly necessary scope of the ECtHR's ruling on the internal legal order, in order to make changes in the name of preventing future violations of human rights. The point here is to determine the scope of the situation to which the ECtHR's ruling refers (factual situations, situations created by law) so that the changes in domestic law concern the scope of necessary and adequate changes."[50].

In the jurisprudence of the Constitutional Tribunal, and consequently also in the Polish literature on this issue, there is a concept of "relying on the jurisprudence of the ECtHR". This "reinforcement" is primarily visible in the operative part of the judgment, in which the Constitutional Tribunal points to specific provisions of the Convention. Moreover, in justifying its position, the Polish Court cites the jurisprudence of the Court in Strasbourg on specific issues.

The Polish Constitutional Tribunal is of the opinion that the Convention and the jurisprudence of the European Court "should be used adequately, i.e. in those procedural situations when it is actually necessary. This jurisprudence may incline to a restrained and restrained use of the Convention as a standard of review in proceedings before the Constitutional Tribunal."[51] As an example of the Constitutional Tribunal's adequate approach to the jurisprudence of the ECtHR, the literature on the subject cites ([52], for example, the application filed on 23 November 2012 by the Commissioner for Human Rights for declaring the inconsistency of Article 212(2) of the Act of 6 June 1997 on the Penal Code (Journal of Laws No. 88, item 553, as amended) insofar as it includes the expression "or deprivation of liberty for up to one year" to Article 54(1) in conjunction with Article 31(3) of the Constitution and to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. On 11 June 2013, the Constitutional Tribunal discontinued the proceedings due to the inadmissibility of issuing a judgment (file ref. no. K 50/12). This provision had previously been subject to constitutional

[49] Decision of the Constitutional Tribunal of 18 October 2004, file no. P 8/04, OTK ZU 2004, No. 9, item 92.
[50] Judgment of the Constitutional Tribunal of 18 October 2004.
[51] Judgment of the Constitutional Tribunal of 18 October 2004.
[52] M. Wróblewski, *Wykorzystanie Konwencji…*, p. 108-109.

review by the Constitutional Tribunal in the judgment ref. no. P 10/06. In the Tribunal's opinion, "although in the judgment ref. no. P 10/06 in the operative part of the Convention, Article 10 of the Convention did not appear as a standard for review, it is clear from the justification of that ruling that in that case the review of Article 212(2) of the Penal Code was carried out, inter alia, through the prism of Article 54(1) of the Constitution perceived in conjunction with Article 10 of the Convention."

A more far-reaching approach of the Constitutional Court, as part of the above-mentioned adequate approach to the jurisprudence of the Starsburg Court, is silence. It happens that the applicant refers to the Strasbourg rulings in the justification of the application or at the hearing, and the Polish constitutional court remains silent on this subject, even in the justification of its ruling. In M. Wróblewski's opinion, such "omission in the justification of the judgment of the European case law indicated by the applicant makes it difficult to assess whether it was referred to in a relevant way and whether the Strasbourg standard is in fact implemented by Poland"[53].

In the jurisprudence of the Polish Constitutional Tribunal, in the field of protection of human rights and freedoms, one can distinguish references to the standards of the European Convention on several levels. First, these are the general principles on which the convention system is based, such as equality or freedom, and the proportionality that goes with it. Secondly, the Constitutional Tribunal interprets particular freedoms and rights enshrined in the Convention and the Constitution, with reference to the jurisprudence of the Court in Strasbourg.

Therefore, the jurisprudence of the ECtHR cannot be neglected in the process of applying the Constitution. As part of its review of the constitutionality of norms, the Constitutional Court considers itself bound by the standards arising from the jurisprudence of the ECtHR and considers it necessary to take into account the effects of the Strasbourg judgments in order to eliminate possible conflicts between the ECHR and the Constitution.

To conclude, both the principle of compliance by the Republic of Poland with international law (Article 8 of the Constitution of the Republic of Poland) and the jurisprudence practice of the Constitutional Tribunal result in the principle of cooperation between the Constitutional

[53] M. Wróblewski, *Wykorzystanie Konwencji…*, p. 108-109.

Tribunal and the European Court of Human Rights[54]. As Jan Podkowik noted, "The application of the European Convention by the constitutional court and its reference to the Strasbourg judicatures should also be perceived as undertaking a dialogue aimed at ensuring the uniformity of jurisprudence and, ultimately, as the realisation of legal certainty and legal security for individuals"[55]. Therefore, the Polish Constitutional Court applies (or at least attempts to apply) the so-called welcoming interpretation of Polish law with regard to the European Convention on Human Rights and Fundamental Freedoms.

It should also be noted that the jurisprudence of the Polish Constitutional Tribunal has an impact on the judicial activity of the Tribunal in Strasbourg, but only with regard to the Polish cases under consideration, and not all of them[56]. Therefore, the dialogue conducted by the European Court of Human Rights and national constitutional courts (tribunals) is described as a one-way dialogue.

The impact of the ECHR and the case-law of the ECtHR on constitutional jurisprudence in Romania

Title II of the Romanian Constitution of 21 November 1991 defines fundamental human rights, freedoms and duties[57]. Among these provisions, a special role has been assigned to the regulations concerning the relationship between national and international human rights laws, which are described in detail in a separate article of the Constitution.

Article 20 of the Romanian Constitution provides:

"International treaties on human rights

(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the: Universal

[54] M. Granat, *Rola, znaczenie i stosowanie międzynarodowych instrumentów prawnych w orzecznictwie konstytucyjnym*, [in:] H. Groszyk, J. Kostrubiec (eds.), *Pro scientia et disciplina. Księga Jubileuszowa z okazji 50-lecia Studenckiego Koła Naukowego Prawników Uniwersytetu Marii Curie-Skłodowskiej*, Warsaw 2009, p. 54.

[55] J. Podkowik, *Stosowanie Konwencji….,* p. 55 passim.

[56] Some examples of such rulings are: Hutten-Czapska versus Poland, Kędzior versus Poland, Orchowski versus Poland.

[57] The Constitution of Romania.

Declaration of Human Rights, the convenants and other treaties Romania is a party to.

(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions."[58]

In accordance with the provisions of this Article, international treaties and conventions which have been ratified by Romania shall have constitutional interpretative value and shall take precedence over provisions of national law, unless such national provisions are more favourable in terms of content. With regard to those provisions, it should be noted that the rules contained in Article 20 do not infringe the principle of national sovereignty, since primacy applies only to international conventions ratified by Romania which have become part of national law by ratification[59]. At the same time, Article 20 imposes a constitutional obligation on public authorities, including courts. As part of this obligation, public authorities must interpret and apply constitutional norms on fundamental human rights and freedoms in accordance with international treaties and conventions[60]. It is clear from the provisions of the Constitution that divergences between national and international norms on the protection of fundamental human rights and freedoms are in principle inadmissible, but if they do occur, the interpretation of the law must give precedence to legal harmonisation[61].

Moreover, by defining the relationship between the relevant national and international standards in the field of fundamental human rights and freedoms, Article 20 essentially sets out the framework for cooperation between the Constitutional Court of Romania and the ECtHR. The provisions of this article include international conventions and treaties that have been ratified by Romania as an inseparable part of the so-called "constitutional bloc" and as such these international norms serve as a reference point for constitutional justice[62]. In the light of the above,

[58] Article 20 of the Romanian Constitution. Available in English at: https://www.presidency.ro/en/the-constitution-of-romania, accessed February 20, 2024.

[59] M. Andreescu, A. Puran, *Drept constituțional. Teoria generală şi instituții constituționale, Jurisprudență constituțională*, Bucharest 2020, p. 232.

[60] M. Andreescu, *Aplicarea dispozițiilor art. 20 din Constituția României, republicată, în materia recursului penal reglementat de dispozițiile art. 141 alin. (1) Thesis a doua din Codul de procedură penală,* Revista Dreptul, No. 6, 2012.

[61] M. Andreescu, A. Puran, *Drept constituțional...*, p. 286.

[62] T. Toader, M. Safta, *Contencios constituțional...,* , p. 443, 448.

some scholars believe that "Article 20 of the Constitution [...] provides a legal basis for direct reliance on international human rights treaties both before the Constitutional Tribunal and before ordinary courts.".

It follows from the interpretation of Article 20 that international conventions, including the ECHR, may be used as a point of reference in constitutional judiciary, both by applicants and by the Constitutional Court. Already in a ruling issued in 2000, the Romanian Constitutional Court stated, in essence, that by ratifying the European Convention on Human Rights, Romania had made it part of its national law, which makes it obligatory to refer to its provisions in the same way as to the provisions of the Constitution.[63] Moreover, the Constitutional Tribunal, in interpreting Article 20, also stated that not only the ECHR, but also the jurisprudence of the ECtHR has mandatory interpretative value.[64]

It is therefore apparent from the interpretation of Article 20 that the ECtHR is more than a mere partner in the constitutional dialogue, since its case-law serves as a mandatory request for a preliminary ruling for the Constitutional Court of Romania[65]. In practice, such a relationship between the Constitutional Court and the ECtHR is mainly achieved by incorporating the general principles expressed by the ECtHR into the rulings of the Constitutional Court of Romania. By looking at the case-law of the Constitutional Court, it can be noted that the Constitutional Court of Romania, when examining a possible violation of fundamental human rights, examines (also) the compatibility of national legislation with the principles laid down by the ECtHR, and thus with the provisions of the ECHR.

The incorporation of the principles of the European Court of Human Rights into the Romanian constitutional judiciary also has long-term consequences. On the one hand, the practice of the European Court of Human Rights is also evolving, thus contributing to the development of the jurisprudence of the Constitutional Court of Romania. On the other hand, such capitalisation of the principles of the ECtHR may lead to "the constitutional sanctification of new guarantees of human rights and fundamental freedoms". For example, the non-retroactivity exception

[63] Decision No 146/2000 of the Constitutional Court of Romania, published in Official Gazette No 566 of 15 November 2000.

[64] Decision No 81/1994 of the Constitutional Court of Romania, published in Official Gazette No 14 of 25 January 1995.

[65] T. Toader, M. Safta, *Contencios constituțional...*, p. 443.

was extended to more favourable administrative law, during the 2003 amendment of the Constitution, taking into account the relevant principles of the ECtHR[66]. Another example can be observed in connection with the evolution of the principle of equal rights, which "took on a new meaning in Romanian law thanks to the influence that the practice of the Strasbourg Court has had"[67].

In addition, the provisions of Article 20 require a different interaction between the Constitutional Tribunal and the ECtHR, as the provisions of this article require the Constitutional Court to examine the content of various national and international human rights laws in individual cases. This examination is necessary because, according to the provisions of the Constitution, in the event of a discrepancy between national and international legislation, the standard ensuring the highest level of protection must be applied, regardless of whether that highest level of protection is contained in a national or international legal standard. Accordingly, Article 20 requires the Constitutional Court to compare the provisions of the ECHR, as interpreted by the ECtHR, with the Romanian national legal rules. It must be emphasised, however, that, by that comparative activity, the Constitutional Court does not become an interpretation of the ECHR, but merely examines its content in order to ensure the highest level of protection. The interpretation of the ECHR is based on the case-law of the ECtHR.

According to some researchers, the main criterion on the basis of which the Constitutional Tribunal compares the content of national and international human rights laws is the level of limitation of the exercise of a given fundamental right. However, neither the doctrine nor the case-law are sufficiently clear as to the criteria for comparison[68].

Comparing the ECHR with national legislation, the Constitutional Court has stated that national legislation applies, for example, to the right to a pension. In its 2010 ruling, the Constitutional Court emphasised that, according to the provisions of the Romanian Constitution, the right to a pension is a fundamental human right (Article 47(2)) and therefore the State has certain constitutional obligations to fulfil. Therefore, with

[66] T. Toader, M. Safta, *Contencios constituțional...*, p. 443.
[67] I. Muraru, E. S. Tănăsescu, *Articolul 20. Tratatele internaționale privind drepturile omului*, [in:] I. Muraru, E.S. Tănăsescu (eds.), *Constituția României. Comentariu pe articole*, Bucharest 2008, p. 173.
[68] M. Andreescu, A. Puran, *Drept constituțional....*, p, 286.

regard to the right to a pension, Romanian national legislation provides a higher level of protection than the ECHR.[69]

In addition, several conclusions can be drawn from the latest case law of the Constitutional Court of Romania. On the one hand, it is clear from that case-law that the Constitutional Court of Romania refers, in essence, to the principles laid down by the ECtHR in order to support its own findings. Moreover, it can be noted that, in addition to its own previous case-law, the second main point of reference for the Constitutional Court of Romania is the principles developed by the ECtHR. However, the Constitutional Tribunal usually does not indicate directly that the cited judgment derives from the jurisprudence of the European Court of Human Rights, but only mentions the name of the cited case in parentheses after the quoted principle.

In addition, the Constitutional Court also intends to incorporate, as far as possible, in its own judgments the principles set out by the European Court of Human Rights in its judgments concerning Romania. For example, when examining possible violations of free access to justice, the Constitutional Court often refers to Lungoci v. Romania, where the European Court of Human Rights has ruled that free access to justice cannot be absolute, so that restrictions are permissible if they do not affect the essence of the law, pursue a legitimate aim and there is proportionality between the aim pursued and the limitations.[70]

On the other hand, it may be noted that the Romanian Constitutional Court does not refer to the case-law of the ECtHR only to support its own arguments, but also includes the interpretation of the content and imitation of certain fundamental human rights and freedoms. In this regard, for example, when examining the constitutionality of the measures taken to prevent the spread of the coronavirus pandemic, the Constitutional Court of Romania has often incorporated the conceptual definitions given by the ECtHR into its own practice (e.g. the definition of deprivation of liberty was based on the principles established by the ECtHR in Khlaifia and Others v. Italy and De Tommaso v. Italy[71]).

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[69] Decision No 872/2010 of the Constitutional Court of Romania, published in Official Journal No 433 of 28 June 2010.

[70] In this regard, see, for example, Decision of the Constitutional Court of Romania No 569/2021, published in Official Gazette No 88 of 28 January 2022; Decision No 753/2021 of the Constitutional Court of Romania, published in Official Gazette No 546 of 3 June 2021.

[71] Decision No 458/2020 of the Constitutional Court of Romania, published in Official Journal No 581 of 2 July 2020.

Last but not least, it can also be noted that in cases of possible violation of fundamental human rights or freedoms, petitioners with the unconstitutionality exception often also invoke a violation of the ECHR. In this regard, the interconnection of certain provisions of the ECHR with the Romanian Constitution is often already evident in the petitioner's interpretation.

Taking into account the provisions of the Constitution and the jurisprudence of the Constitutional Court, it can be concluded that the provisions of the ECHR and the principles developed by the ECtHR are well integrated into the Romanian constitutional architecture and jurisprudence. When examining possible violations of fundamental human rights or freedoms, the Constitutional Court of Romania tends to refer to the case law of the European Court of Human Rights. The jurisprudence of the European Court of Human Rights therefore has an impact on the interpretation of the provisions of the Constitution itself. All these observations are a vivid reflection of how the decisions of the European Court of Human Rights and the case law of the European Court of Human Rights contribute to the internationalisation of the Romanian Constitution.

Summary and Conclusion

Comparative and legal research on the impact of the provisions of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights on the constitutional judiciary of Hungary, Poland and Romania leads to at least several conclusions.

The constitutions of all three countries under study recognize the binding force of international agreements ratified by a given state, in accordance with the principles resulting from the Vienna Convention on the Law of Treaties, confirmed at the constitutional level. However, only the Romanian Constitution explicitly provides for the primacy of international fundamental human rights laws in cases where there are discrepancies between international law and domestic law. This approach, namely the constitutional provision on the primacy of international fundamental human rights laws, is unique among the countries of Central and Eastern

Europe[72]. Unlike Romania, in the case of Hungary and Poland, the primacy of international human rights treaties is not explicitly provided for in the Fundamental Law. This precedent has been confirmed in the jurisprudence of the Constitutional Tribunal. From the point of view of the system of hierarchy of legal norms, the provisions of the Convention do not have a higher legal force than national constitutions, but they may have equal legal force. As a consequence, the system of human rights protection under the Convention and the Court in Strasbourg is subsidiary.

Moreover, there are also differences between the three countries examined in the application and implementation of the ECHR and the principles expressed by the ECtHR in the constitutional justice process. The Constitutional Court of Romania considers that the jurisprudence of the European Court of Human Rights has mandatory interpretative value. On this basis, the Constitutional Tribunal in its jurisprudence often refers to the principles formulated by the ECtHR, moreover, in several cases it defines certain concepts in the light of this case-law. Such application and implementation of the principles formulated by the ECtHR has not met with criticism either from the judges of the Constitutional Court of Romania or from academics. In the case of Hungary, the Constitutional Court's application of the principles formulated by the ECtHR is much more controversial among constitutional lawyers. Although the Hungarian Constitutional Court also tends to take into account the principles formulated by the European Court of Human Rights in its rulings, in many cases, as can be seen above, the application of these principles has been criticized even by judges in their dissenting opinions. The fact is, however, that the Constitutional Court of Romania, the Constitutional Court of Hungary also recognizes the interpretative value of these principles. Accordingly, the principles developed by the European Court of Human Rights in its case-law serve as a binding interpretative reference in both Romania and Hungary.

In Poland, on the other hand, "The reference to the Convention and ECtHR rulings in the justification of the Constitutional Tribunal's rulings is of an auxiliary nature. This is not a necessary condition for the Tribunal to issue a substantive ruling. Nor is it an argument determining

[72] K. Lukács, *The System of Sources of Law*, [in:] L. Csink, L. Trócsányi (eds.), *Comparative Constitutionalism in Central Europe*, Miskolc–Budapest 2022, p. 268.

the unconstitutionality or illegality of a given provision, legal norm or normative act"[73].

After the research carried out, it can be concluded that "the compatibility of the case-law of the constitutional courts with the so-called Strasbourg case-law is a perceptible requirement in many European constitutional courts[74]. However, as some scholars have noted, "the jurisprudence of the ECtHR is by its very nature applied by individual states on the basis of voluntary acceptance of the international principle of pacta sunt servanda"[75]. The application of the principles set out in the jurisprudence of the European Court of Human Rights has both positive and negative consequences. On the positive side, the reference to that case-law contributes to a uniform interpretation of fundamental human rights and freedoms and thus to legal certainty. On the other hand, the inclusion of the case-law of the European Court of Human Rights marginalizes national specificity[76]. In this way, the social, cultural and legal specificity of a given state is somehow neglected.

At the same time, many similarities can be observed between the jurisprudence of the ECtHR and the jurisprudence of national constitutional courts. The legal literature summarizes these similarities as follows: similar norms regarding the restriction of certain fundamental rights and freedoms; proportionality test; using similar legal concepts and institutions (e.g. the rule of law) and taking into account and referring to their own case law[77]."The commonly accepted thesis according to which the Constitutional Tribunal and other national courts should implement the convention standard in their own decisions is undoubtedly attractive and cannot be denied"[78].

Regardless of the alternatives indicated in the introduction to this study for the activity of constitutional courts in relation to the jurisprudence

[73] A. Syryt, *Wpływ Europejskiej…*, p. 233.

[74] P. Kovács, *Az emberi jogok európai bíróságának ítéletére való hivatkozás újabb formulái és technikái a magyar Alkotmánybíróság, valamint néhány más európai alkotmánybíróság mai gyakorlatában*, Alkotmánybírósági Szemle, No. 2, 2013, p. 73.

[75] M. Poniatowski, *Treść prawa…*, p. 23.

[76] Z. J. Tóth, *The Interpretation of Fundamental Rights in Central and Eastern Europe: Methodology and Summary*, [in:] Z. J. Tóth (ed.), *Interpretation of Fundamental Rights in Central and Eastern Europe. Constitutional Reasoning and Interpretation of the Constitution. Analysis of Some Central European Countries*, Miskolc – Budapest 2021, p. 91.

[77] Z. J. Tóth, *The Interpretation…*, p. 87-89.

[78] J. Podkowik, *Stosowanie Konwencji…*, s. 96.

of the Court in Strasbourg, the constitutional courts of Hungary, Poland and Romania independently assess specific cases.

It should be noted at the end of this study that regardless of the impact of the European Convention and the Court in Strasbourg on the constitutional judiciary of the member states of the Council of Europe, there is an opposite, but much more modest relationship, i.e. the influence of the courts and tribunals of the Member States on the jurisprudence of the Courts in Strasbourg and Luxembourg[79].

[79] B. Liżewski, *Wpływ orzecznictwa sądów konstytucyjnych na kształtowanie się unijnego systemu ochrony praw człowieka*, [in:] W. Witkowski (ed.), *W kręgu historii i współczesności polskiego prawa. Księga jubileuszowa dedykowana profesorowi Arturowi Korobowiczowi*, UMCS Publishing House, Lublin 2008, p. 595-608.

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