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DIRECT EFFECT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This article explores the concept of direct effect of the European Convention on Human Rights. In order to discuss this and related issues the authors have selected two opposite approaches to direct effect of the ECHR, the one of the Italian Constitutional Court and the other of the Serbian Court of Cassation as manifested in two similar cases Scordino and Crnišanin. The two opposite approaches might show how distinct international legal traditions of the two countries (dualist and monist) addressed the direct effect of the ECHR. While the response of the Italian Constitutional Court has been at the expense of legal economy and efficiency, the response of the Serbian Court of Cassation has been to neglect democratic element in determining the relationship between an individual and a general interest in human rights protection. The authors challenged both approaches with suggestions how deficiencies of both systems can equally be addressed despite their differences by relying on the concept of direct effect that was engineered by the European Court of Justice.

Key words: *European Convention on Human Rights. Direct effect. Efficiency. Democracy. Fair balance.*

1. INTRODUCTION

It has been generally accepted that domestic law governs domestic enforcement of international treaties.¹ There are a number of countries

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¹ M. Dixon, R. McCorquodale, *Cases and Materials on International Law*, Oxford University Press, Oxford 2003, 104.

that permit 'direct effect' of human rights treaties, especially those concerning civil and political rights.² Certain specific features of the international regime of the European Convention on Human Rights (hereinafter: the ECHR or the Convention) press Contracting Parties to facilitate direct effect of the Convention. A direct effect enables national courts to apply the ECHR provision directly and, thereby, circumvent a time consuming process of harmonizing national provisions with the ECHR which would include decision of a constitutional court and act of legislature. The indirect effect facilitates a fine adjustment of domestic provisions with the ECHR. Both direct and indirect effect expedite enforcement and contribute significantly to the efficiency, legal economy and uniform application of the Convention in 47 Contracting Parties.

In this article we aim to stress the importance of direct effect of the Convention and examine it against the relationship between legislative and judicial powers in national human-rights regimes. Such human rights protection structure relies on legal economy, efficiency and legitimacy of human rights protection, which includes appreciation of democratic standards in the course of attaining balance between an individual and general interest in human rights protection. In order to demonstrate how to achieve such balance, we compare two different judicial approaches to direct effect of the ECHR: one of the Italian Constitutional Court in the case *Scordino* (2007) with the other of the Serbian Court of Cassation in the case *Crnišaniin* (2011).

Although Italy and Serbia belong to different international legal traditions (that is, Italy is considered to have a dualist regime while Serbia is a monist one), these two jurisdictions nevertheless manifest a noticeable degree of convergence in respect of indirect effect of the ECHR. However, the standpoints of the two courts in these two cases disclose a considerable difference regarding direct effect of the ECHR. We argue that both approaches are not free from serious weaknesses. We contend that the standpoint of the Italian Constitutional Court endangers the efficiency and legal economy of domestic enforcement of the ECHR prolonging legal process by engaging legislature without a good reason, whereas the stance of the Serbian Court of Cassation jeopardizes democracy in determining the relationship between an individual and a general interest in human rights protection by avoiding legislature when the latter was needed. Further, we argue that application of the concept of direct effect in line with *Van Gend en Loos* could cure deficiencies in both approaches.

We begin with an overview of the general framework for domestic enforcement of the ECHR. After a discussion on the concept of direct and

² T Buergenthal, "The Evolving International Human Rights System", *American Journal of International Law (AJIL)* 4/2006, 783, 805.

indirect effect, we shall compare the two cases – the Italian case *Scordino* and the Serbian case *Crnišaniin* – as both were decided by the ECtHR, as well as responses of the two national courts to the respective judgments of the ECtHR. The 2011 Opinion of the Serbian Court of Cassation and the 2007 Decision of the Constitutional Court of Italy will be critically assessed for on the basis of different judicial responses to the concept of direct effect.³

2. DOMESTIC ENFORCEMENT OF THE ECHR: GENERAL FRAMEWORK

Domestic enforcement of the ECHR⁴ is herein referred to as national legal mechanisms and processes, which give the Convention legal effect within domestic legal orders.⁵ The Convention is distinguished by its object and purpose—human-rights protection—and by an exceptionally effective control mechanism which consists of the ECtHR and the Committee of Ministers of the Council of Europe. The special character of the regime has been reflected in the Court’s qualification of the Convention as ‘a “constitutional instrument of European public order” in the field of human rights’.⁶ Although the Convention is intended to produce equal legal effects in all Member States, the Convention falls short of imposing uniform standards for ensuring equal effects.

³ For an extensive overview of a critical appraisal of *Scordino* case in theory, see Section 7 and accompanying footnotes.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) CETS No.005.

⁵ There is a vast body of literature on this subject: e.g., R. Beddard, “The Status of the European Convention on Human Rights in Domestic Law”, *International & Comparative Law Quarterly (ICLQ)* 16/1967, 206; S. Karel Martens, “Opinion: Incorporating the European Convention: The Role of the Judiciary”, *European Human Rights Law Review* 1/1998, 5; *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (eds. T. Barkhuysen, M. van Emerik, P. Hein van Kempen), Martinus Nijhoff Publishers, The Hague–London 1999; G. Ress, “The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order”, *Texas International Law Journal* 40/2004 2005, 359; H. Keller, “Reception of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Poland and Switzerland”, *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht* 65/2005, 283; F. Hoffmeister, “Germany: Status of European Convention on Human Rights in domestic law”, *International Journal of Constitutional Law* 4/2006, 722; A. S. Sweet, H. Keller, “The Reception of the ECHR in National Legal Orders” *Yale Law School, Yale Law School Legal Scholarship Repository* 1/2008 http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1088&context=jsr_papers, 17. February 2015.

⁶ *Loizidou v Turkey* App. no. 15318/89 (ECtHR, 23 March 1995) para 75; *Bosphorus Hava Yolları Turizmve Ticaret Anonim Şirketi v Ireland* App. no. 45036/98 (ECtHR, 30 June 2005) para 156.

Therefore, the issue here is whether implementing legislation is required and possible. The ECHR does not contain a provision comparable to Article 2 (2) of the International Covenant on Civil and Political Rights⁷ or Article 2 of the Inter-American Convention on Human Rights⁸ which explicitly require implementing legislation. Still, it is difficult to argue that the founders of the Convention thought that domestic legislation would not have any role for national enforcement of the Convention and that the Convention always would produce direct effect as such. National legislation is certainly an important and primary tool for providing domestic effect of the ECHR.

Although Contracting Parties use their internal legal mechanisms to enforce the ECHR, they have been pressed to adapt these mechanisms to specific requirements of the international regime of the ECHR which has exerted a substantial influence on the internalization of the Convention.

The international regime of the ECHR is unique in many respects but, foremost, in its capacity to be effective. This regime consists of the compulsory jurisdiction of the ECtHR and the supervisory role of the Committee of Ministers which monitors execution of Court judgments.⁹ Other international regimes—established by universal human-rights treaties¹⁰—are rather conciliatory by nature and, as such, are incomparable with the compulsory system of the ECHR. Victims prefer the binding ef-

⁷ Art 2(2) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), states: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.

⁸ Art 2 of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention) reads: “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or substantially other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms”.

⁹ D. Anagnostou, A. Mungiu Pippidi, “Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter” *European Journal of International Law (EJIL)* 25/2014, 205.

¹⁰ Human Rights Committee established by the ICCPR (n 11), Committee on the Elimination of Racial Discrimination (established by International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195), Committee against Torture (established by Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85), and the Committee on the Rights of the Child (established by Convention on the Rights of the

fect of judgments of the ECtHR to the efficiency of the procedures of UN treaty bodies. This atmosphere of effectiveness transcends the legal sphere and becomes an element of European politics which—together with the activism of NGOs—compels Contracting Parties to search for adequate methods for internal enforcement of the Convention.

Another quality of the international regime of the ECHR is the role of the Court's interpretation of the Convention for the purposes of domestic enforcement. The provisions of the ECHR are very broad and case law of the ECtHR has a decisive role in their interpretation. Moreover, the ECtHR interprets the Convention as a living instrument. According to the ECtHR: 'A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement [...]'.¹¹ Case law of the ECtHR plays a crucial role in the domestic interpretation of the Convention in all Contracting Parties to the Convention.

Aware that their acts have to be in accordance with ECHR provisions as interpreted in the case law of the ECtHR—and frequently facing broad national provisions which allow various interpretations—national courts at times may perceive that they do not have any other possibility but to interpret and apply national provisions relying on relevant ECHR provisions and ECtHR case law. Some dualist Contracting Parties have formally recognized the importance of the interpretative function of the Convention in their internal legal systems. The British Parliament formally has instructed domestic courts to follow case law of the ECtHR.¹² Ireland has adopted a similar solution.¹³

Regarding the direct effect of its case-law the ECtHR was quite explicit: In its Recommendation Rec(2004)6 of 12 May 2004, the Committee of Ministers welcomed the fact that the Convention had become an

Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3).

¹¹ *Christine Goodwin v The United Kingdom* App. no. 28957/95 (ECtHR, 11 July 2002) para 74, *Chapman v the United Kingdom* App. no. 27238/95 (ECtHR, 18 January 2001) para 93, *D.H. and Others v the Czech Republic*, App. no. 57325/00 (ECtHR, 13 November 2007) para 181, *Sampanis et autres c Grèce* App. no. 32526/05 (ECtHR, 5 June 2008) para 72.

¹² See Article 2(1) of the UK Human Rights Act 1998 s 2(1), <http://www.legislation.gov.uk/ukpga/1998/42/section/2>, 25 February 2015.

¹³ See Article 2(1) Republic of Ireland's European Convention on Human Rights Act 2003, <http://www.irishstatutebook.ie/2003/en/act/pub/0020/print.html>, 25 February 2015.

It should be mentioned here that the British and Irish legislation is limited to the ECHR and has not been extended to other human rights treaties, such as International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and others.

integral part of the domestic legal order of all States Parties while recommending that member States ensure that domestic remedies existed and were effective. In that connection the Court would stress that although the existence of a remedy is necessary it is not in itself sufficient. Domestic courts must also be able, under domestic law, to apply the ECtHR case-law directly and their knowledge of this case-law has to be facilitated by the State in question.¹⁴

The issue of an indirect effect which comprises each-and-every reference of a national judge to the ECHR or ECtHR case law, when a national judge interprets domestic provisions— that is, when the Convention itself is not a sole basis of the domestic decision—will be discussed later. However, such references to the ECHR and case-law of the ECtHR appear equally important in internal judicial procedures of monist and dualist Contracting Parties and they are converging elements in domestic enforcement of the Convention in Contracting Parties of different international legal traditions.

In spite of convergences regarding indirect effect of the ECHR, differences still exist in respect of direct effect. This includes situations in which an ECHR provision and/or ECtHR case law conflict with a domestic provision and the two cannot be reconciled by interpretation by domestic courts.

3. DIRECT EFFECT OF EU LAW AND INTERNATIONAL LAW

The concept of direct effect in EC law has been engineered by the Court of Justice of the European Communities (hereinafter: the ECJ) in the *Van Gend en Loos* case half a century ago.¹⁵ The ECJ faced the issue whether Article 12 of the 1957 EEC Treaty could produce direct effects in the internal legal order of a Member State. The ECJ held affirmatively noting that Article 12, which prohibited the increase of custom duties, comprised ‘a clear and unconditional prohibition which is not a positive but a negative obligation’. The ECJ went on to explain that: “This obligation [...] is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects’.¹⁶

¹⁴ *Ibid.*, para 239.

¹⁵ Case 26 62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR1.

¹⁶ *Ibid.*

Van Gend en Loos is truly a landmark decision, which gave a strong impetus to strengthening the efficiency of EC law.¹⁷ In reaching for individuals and national courts directly,¹⁸ the ECJ set standards for the direct effect of EC Treaty provisions. The provisions capable of producing direct effect—just like it was the case with Article 12 of the EEC Treaty—must be ‘clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure’.¹⁹

The concept of direct effect has gone through changes and evolutions²⁰: the conditions were made less stringent and direct effect ceased to be reserved only for *Treaties* as primary sources of EU law—being expanded to encompass EC *legislation* – secondary sources of EU law.²¹ While originally it was perceived by the ECJ that only negative obligations would be capable of producing direct effect, later on direct effect was expended to positive obligations.

What can impede direct effect would be—as the ECJ found in the 1982 *Becker* case—where a certain margin of appreciation is left to the State,²² even if this margin of appreciation or discretion regarding the implementation is minimal.²³ The case law on direct effect remains abundant and seems to set the so-called ‘double test’ which requires the examination of both the nature and purpose of an international norm (arguably looking for the original intent of contracting parties), on one hand, and examination of the wording of the norm in order to ascertain whether it is operational.²⁴ For the purpose of the present article, it is important to note that effects of international treaties, in which the EU is a Contracting Party, in domestic legal orders of State Members are exempted from their national provisions on application of international treaties. The ECJ found

¹⁷ B. Rakić, “O smislu “saradnje” ili “dijaloga” između Suda pravde EU i sudova država članica”, *Anali Pravnog fakulteta u Beogradu (Anali PFB)* 2/2013, 75.

¹⁸ “[T]he ECJ looks through the veil of sovereignty and observes two important actors: the individual citizen, and the national court”. E. Benvenisti, G. W. Downs, “The Premises, Assumptions, and Implications of *Van Gend en Loos*: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions” *EJIL* 1/2014, 85, 86.

¹⁹ P. Craig, G. de Búrca, *EU Law, Text, Cases and Materials*, Oxford University Press, Oxford 2011, 186.

²⁰ Joined cases C 401/12P, 402/12P and 403/12P *Council and Others v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (Opinion of Advocate General Jääskinen, 8 May 2014) paras 58–84.

²¹ P. Craig, G. de Búrca (2011), 182.

²² Case 8/81 *Ursula Becker v Finanzamt Münster Innenstadt*, [1982] ECR 53.

²³ Joined cases C 100/89 and C 101/89 *Peter Kaefer and Andréa Procacci v French State* [1990] ECR I 4647.

²⁴ F. Martines, “Direct Effect of International Agreements of the European Union” *EJIL* 1/2014, 129, 138, 140–144 (providing an overview of the ECJ case law on the application of a double test).

that these treaties may produce direct effect in domestic legal systems of State Members in accordance with its concept of direct effect of the EU law²⁵ regardless of national impediments or conditions for domestic application of international treaties.

The concept of *direct effect* is not limited to EU law. It covers also international law and was born in the US under the name of *self-executing treaties*.²⁶ The concept rises from different backgrounds—national and supranational respectively— but it has been equally engineered by national courts as well as by supranational ones.²⁷

Direct effect doctrine provides for both application of international law as well as for the possibility of refusing its application. Refusal to provide direct effect to certain norms does not always result in detrimental outcomes nor should it necessarily be ascribed an ‘anti-liberal’ sentiment. The rationale of *Van Gend en Loos* does not make direct effect an ‘open-ended’ concept, and its essence can guide national courts in rendering their decisions regarding applicability of EU law and international law.

The concept of direct effect has its extended variant titled as *indirect* effect. Where a decision of a national court regarding an alleged individual right is based exclusively on an international provision that should be defined as direct effect of the international provision. However, where a decision of a national court concerning this individual right is based on a national provision, but where a national court interprets a national provision using an international provision to find its precise meaning, the issue is how to define a role of the international provision. It is a case where a determination of an individual right is the result of co-effect of two provisions – national and international or supranational. The effect of an international provision in these situations is termed as an *indirect* effect, which the authors herein also refer to as *harmonious* or *friendly* approach to interpretation of a national provision with its international

²⁵ Case C 469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA*. [1995] ECR I 4533.

²⁶ Direct effect of international law in general, and treaties in particular, seems to be a general problem for domestic courts. Even if a constitution gives a general permission for application of treaties by national courts, there is always a problem whether each and every treaty is capable of producing direct effect. U.S. Constitution and doctrine of self executing treaties devised by U.S. courts prove the existence of this global dilemma: U.S. Constitution allows for application of treaties whereas the doctrine of self executing treaties limits the scope of this Constitutional provision. Relevance of the U.S. Constitution for general discussion on direct effect here is twofold: doctrine of self executing treaties resonates the direct effect doctrine, and it precedes the discussion on direct effect of treaties both within EU and ECHR context. For a detailed discussion on self executing treaties in the U.S. legal system, see C. M. Vázquez, “The Four Doctrines of Self Executing Treaties” *AJIL* 89/1995, 695.

²⁷ *Ibid.*, 119.

counterpart, or parallel application of domestic and international law. Under subtitle ‘Indirect Effect: Development of the Principle of Interpretation’ Craig and de Búrca’s Textbook argues: ‘The second way in which the Court of Justice encouraged the application and effectiveness of directives, despite denying the possibility of direct horizontal enforcement, was by developing a principle of harmonious interpretation, which requires national law to be interpreted ‘in the light of’ directives. There is a similar principle used in the context of international law and international agreements, whereby the Community is required to interpret secondary EC legislation in their light’.²⁸

Nollkaemper sees a decisive role of an international law in interpretation of national provision as a sort of direct effect: ‘The common ground between cases where a court decisively relies on an international right in the construction of national law, and thereby protects that right, on the one hand, and cases where courts rely on such rights directly (without resorting to interpretation), on the other, may be more important than the distinctions. It would be too limiting to exclude cases involving consistent interpretation *prima facie* from the category of cases in which national courts successfully mediate a conflict between a state and individuals by relying on international law—a category to which *VGL* [*Van Genden Loos*] also belongs’.²⁹

Judge Tulkens seems to share this view. He has observed: ‘It is broadly accepted—and this cannot be over-emphasized—that the object of the Convention is to be directly applicable in the domestic law of the member States. Today, in almost all the member States of the Council of Europe, the domestic judicial authorities, when ruling on rights and freedoms, refer to the European Convention on Human Rights and the national constitution in parallel’.³⁰

In the 2004 General Comment the UN Human Rights Committee refers to the interpretative effect of the Covenant for the application of national law: ‘The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law’.³¹

²⁸ P. Craig, G. de Búrca, *EU Law, Text, Cases and Materials*, Oxford University Press, Oxford 2003, 211.

²⁹ *Ibid.*, 108.

³⁰ Dialogue between judges, European Court of Human Rights (Council of Europe, 2007), <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Seminar+documents/Dialogue+between+Judges/>, 14. March 2015.

³¹ UN HR Committee General Comment No.31: ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29. March 2004. at its

Terminology is a matter of convention. Since a term *indirect effect* has been already used to denote this particular type of effect of supranational or international provision, we also use this term. Still, it could indicate something completely opposite to direct effect. If the meaning of direct effect is that supranational or international provision produces effect directly without intermediation of national law, then indirect effect might be understood as effect via national law. In a little bit different context Sophie Robin-Olivier uses a term of *combined effect*. Another term, arguably better than *indirect effect*, would be also *co-effect*.

4. A COMPARATIVE ANALYSIS OF THE TWO CASES

The Italian Constitutional Court (*Corte costituzionale*) and the Serbian Court of Cassation (*Vrhovni kasacioni sud*) have provided different responses to comparable issues regarding direct effect of the ECHR. Both the Italian Constitutional Court decision and the Serbian Court of Cassation Opinion have been triggered by judgments of the ECtHR involving Italy and Serbia respectively. The Italian and Serbian high-court approaches are comparable on many points. They address violations of the right to a fair trial, protected by Article 6 of the ECHR and violations of the right to property, guaranteed by Article 1 of Protocol 1 to the ECHR. The violations were triggered by inadequate domestic legislation, the 1990s legislation on compensation for expropriation and the 2001 Pinto Act in Italy, and the 2007 amendments to the 2003 Privatization Act in Serbia. The Committee of Ministers of the Council of Europe recognized the similar domestic deficiencies and was equally concerned with the problems of ineffective implementation of the ECHR in both countries.³²

2187th meeting', *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.7, (12 May 2004) 196, para 15.

³² An agent of the Republic of Serbia before the European Court for Human Rights delivered to the Serbian Court of Cassation on 8 December 2010 the Report of the Committee of Ministers of the Council of Europe adopted at its 1100th session held from 30 November to 3 December 2010 devoted to the supervision of the enforcement of the Court's judgments. This report stated that some general issues regarding the improvement of the efficacy and transparency of the Court's judgments have been discussed, including measures for improvement and implementation of INTERLAKEN declaration and action plans, as well as measures that might affect the enforcement of judgments entered into against Serbia. The Report seems to suggest that as far as Serbia is concerned, a certain class of cases – judgments adopted in relation to inefficient enforcement of domestic judgments in matters of debts owed by social companies, will be allocated to judgments under stringent supervision. In relation to this the Agent concludes that action plans are to be drafted by all involved authorities, which will ultimately be under scrutiny of the Committee of Ministers of the Council of Europe. 'Konačni tekst pravnog shvatanja o sprovođenju izvršenja sa odvojenim mišljenjem od 22. februara 2011', *Vrhovni kasacioni sud*

We shall begin with a brief overview of the facts of the cases before the ECtHR, which provoked different responses of supreme national courts to issues arising from the ECtHR judgment and then address divergent views taken by the courts in Italy and in Serbia. The principal focus will be on the assessment of the shortcomings of both approaches.

4.1. The Scordino case (Italy)

The *Scordino* case arose out of the national expropriation case where the applicant (and subsequently his heirs) challenged the legislation on the basis of which they originally were awarded only 50% of the fair-market value of their property and where this amount of compensation was additionally taxed with 20% tax rate. While challenging national legislation and national judicial decisions Italy adopted Law no. 89 (2001) (Pinto Act) to tackle the issue of the breach of the right to a fair trial within reasonable time as this was the common problem in Italian judiciary. Thereafter applicants expended their claim to the Pinto Act due to the excessive length of expropriation proceedings. The compensation received under both headings of their complaints was dissatisfactory for the applicants (50% of the fair-market value and EUR 2,400 for excessive length of the proceedings).

They turned to the ECtHR which found, in its Chamber's judgment, that Italy was liable for the breaches alleged by Scordino because the compensation awarded for the expropriated property 'did not bear a reasonable relation to the value of the expropriated property. It follows that the fair balance was upset'.³³ After having been petitioned by the Italian Government, in 2006 the Grand Chamber affirmed the liability of Italy. The Grand Chamber paid special reference to Article 46 of the Convention (the effect of ECtHR judgments) given the number of applications which were pending before the Court raising the same issue as in

(2011) No.1,74 95,(Legal Opinion of the Supreme Court of Cassation on the Enforcement Procedure, with Dissenting Opinion attached thereto) available in Serbian language at http://www.vk.sud.rs/assets/files/bilteni/bilten_2011_1.pdf, 25 February 2015. Regarding Italy, in the report CM/Inf/DH(2004)23, revised on 24 September 2004, the Ministers' Deputies made the following indications regarding an assessment of the Pinto remedy: '[...] 109. In the framework of its examination of the 1st annual report, the Committee of Ministers expressed concern at the fact that this legislation did not foresee the speeding up of the proceedings and that its application posed a risk of aggravating the backlog of the appeal courts. [...] 112. It should be pointed out that in the framework of its examination of the 2nd annual report, the Committee of Ministers had noted with concern that the Convention had no direct effect and had consequently invited the Italian authorities to intensify their efforts at national level as well as their contacts with the different bodies of the Council of Europe competent in this field'. *Scordino v. Italy (II)*, App. no. 36813/97 (ECtHR, Grand Chamber, 29 March 2006) para 71.

³³ *Scordino v. Italy (II)* App. no. 36813/97 (ECtHR, Chamber, 29 July 2004), para 102.

the *Scordino* proceedings. The Court affirmed the binding nature of its judgments under Article 46, one of effects of which was: ‘that where the Court finds a violation, the respondent State has a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects’.³⁴

The Grand Chamber also ordered general measures which would remove systematic violations of the Convention identified by the ECtHR in the present case³⁵ and further opined: ‘In that connection the Court’s concern is to facilitate the rapid and effective suppression of a malfunction found in the national system of human rights protection’.³⁶ The Grand Chamber reaffirmed the obligation of Member States to ensure the compatibility of their domestic law with the Convention.³⁷

4.2. The Crnišanin case (Serbia)

A Serbian case that followed, *Crnišanin*, raised a comparable issue as did the proceedings in *Scordino*. Crnišanin case arose out of the suspension of enforcement proceedings against the socially-owned companies in restructuring that resulted from the amendments of the Privatization Act. The disgruntled judgment creditors lodged their applications with the ECtHR and the Strasbourg Court found Serbia in violation of Article 6 of the ECHR and Article 1 of Protocol 1.³⁸ The logic of the European Court was that Serbia had failed to ensure the finality of judicial judgments and the result was the violation of the right to property. The Court ordered the enforcement of these judgments and awarded non-pecuniary damages to the applicants. Although the issues in this case potentially affected a number of prospective applicants or other pending applications, the Court did not make any reference to them nor did it decide to make use of the ‘pilot judgment’ procedure.³⁹ Although the debts of

³⁴ *Scordino*, Grand Chamber (fn. 32), para 233.

³⁵ *Ibid.*, para 237.

³⁶ *Ibid.*, para 236.

³⁷ *Ibid.*, para 234.

³⁸ *Crnišanin and others v. Serbia* App nos 35835/05, 43548/05, 43569/05 and 36986/06 (ECtHR, 13 January 2009) paras 8–10.

³⁹ The pilot judgment procedure was developed as a technique of identifying the structural problems underlying repetitive cases and of imposing an obligation on a State to address these problems. Where the Court receives several applications that share a root cause it can select one for priority treatment and its task is not only to decide whether the violation of the ECHR occurred but also to identify the systematic problem and to give the State clear indications how to resolve it.

socially-owned companies belong to the category of systematic problems⁴⁰ but the Court decided to deal with it on case-by-case basis.

4.3. Response of the Italian Constitutional Court

Since compensation criteria for expropriation of land provided for in the Italian legislation⁴¹ fell short of standards of adequate compensation as required by Article 1 of Protocol 1 of the Convention, their application in *Scordino* was found by the ECtHR to be in breach of the right to property. Under three separate referral orders by the Italian Court of Cassation in 2006 and 2007, the Italian Constitutional Court declared the relevant Italian legislation unconstitutional in its landmark 2007 decisions (Nos. 348 and 349).⁴² Within a month, the Italian legislature responded by harmonizing the domestic legal provisions with Article 1 of Protocol 1: adopting legislation changing the criteria of compensation so as to provide for full compensation (equal to market value) except when the expropriation constitutes part of a wider socio-economic reform.⁴³

While the Italian Constitutional Court failed to attract attention by rendering these two 2007 decisions on the unconstitutionality of these provisions of domestic Italian legislation, it did attract attention by its general exclusion of direct effect of the ECHR, that is, it excluded possibility for domestic courts to apply the ECHR directly either in the absence of a domestic provision or by replacing the conflicting domestic provision. The case law of Italian courts prior to decisions 348/349 had not been uniform on the issue of direct effect of the ECHR and a trend had been emerging of the non-application of domestic legislation which was contrary to the ECHR in Italian municipal and higher courts.⁴⁴

⁴⁰ Please see the discussion on debts of socially owned companies as being a systematic problem for Serbia in the Report of the Committee of Ministers (fn. 32).

⁴¹ Art 5, Law (8 August 1992) No.359, *Gazzetta Ufficiale della Repubblica Italiana* (1992) No.190.

⁴² Italian Constitutional Court decisions: (2007) No.348 finding Art 5 *bis* (paras. 1 and 2), Law (1992) No.359 unconstitutional; and (2007) No. 349 holding Art 5 *bis* (para 7 *bis*) of Law Decree (1992) No 333 (compensation criteria set for unlawful expropriation of land) likewise unconstitutional. All decisions of the Italian Constitutional Court are available at www.cortecostituzionale.it, 1 March 2015.

Italian Constitutional Court decision (2007) No.348), *Gazzetta Ufficiale della Repubblica Italiana* (2007) No. 348; and Italian Constitutional Court decision (2007) No.349 *Gazzetta Ufficiale della Repubblica Italiana* (2007) No. 349.

⁴³ 2008 Budget Law; as cited by F. B. Dal Monte, F. Fontanelli, “The Decisions No.348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System” *German Law Journal* 9/2008, 902. In case of such reforms, a 25% reduction in compensation can be applied.

⁴⁴ G.. Cataldi, “Italy”, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (ed. D. Shelton), Oxford University Press, Oxford 2011, 340; and F. B. Dal Monte, F. Fontanelli, 913.

The Italian Constitutional Court held that a provision of the ECHR would not automatically suspend contrary domestic provision because of a difference between the EU and the Council of Europe and, accordingly, between EU law and the ECHR. The Constitutional Court found a legal basis for supremacy and direct effects of the EU law in Article 11 of the Constitution which provides that Italy may accept ‘limitations of sovereignty necessary for an order that ensures peace and justice among Nations...’.⁴⁵ Since the Constitutional Court considered that Italian membership in the Council of Europe and ratification of the ECHR does not entail any limitations of Italian sovereignty, it concluded that Article 11 did not apply and, consequently, that the ECHR cannot produce legal effects equal to EU law.⁴⁶

4.4. Response of the Serbian Court of Cassation

The core problem in the ECtHR’s 2009 *Crnišaniin* decision was the provisions of the Serbian Privatization Act that suspended enforcement of final judgments against ‘socially-owned’ companies undergoing restructuring.⁴⁷ Acting upon the initiative of the Ministry of Human and Minorities Rights – Sector of Representation before the ECtHR, the Court of Cassation adopted the legal opinion in February 2011.⁴⁸ According to this non-binding opinion, enforcement of monetary claims originating from employment and established by a final judgment against a debtor, a subject of privatization in process of restructuring, will not be stayed and those stayed will be continued and finished.⁴⁹ The Court of Cassation stated that the opinion was guided by standards and principles envisaged in judgments of the ECtHR in accordance with Article 18 of the Serbian Constitution.⁵⁰ The Court of Cassation referred also to the *Crnišaniin* case and other ‘cloned’ cases; that is, cases related to the same problem of non-enforced final judgments whose enforcement was delayed by the Pri-

⁴⁵ Italian Constitutional Court decision (2007) No.349 (n 76) para 6(1).

⁴⁶ *Ibid.*, para 3(3); cited in F. B. Dal Monte, F. Fontanelli, 904.

⁴⁷ Initially, the postponement was limited to one year, but after the 2007 amendments of the Privatization Act, such postponement was granted until the finalization of economic restructuring.

⁴⁸ The final text of the Legal Opinion in relation to the Enforcement (with Dissenting Opinion) has been published in the Bulletin of the Supreme Court of Cassation, Konačni tekst pravnog shvatanja o sprovođenju izvršenja sa odvojenim mišljenjem od 22. februara 2011, *Vrhovni kasacioni sud, Bilten* (2011) No.1, 74, available (in Serbian) at http://www.vk.sud.rs/assets/files/bilteni/bilten_2011_1.pdf, 25 March 2015.

⁴⁹ *Ibid.*, 81.

⁵⁰ Article 18(3) of the Serbian Constitution: ‘Provisions on human and minority rights shall be interpreted ... pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation’.

vatization Act. The Opinion refers also to Article 25 of the revised European Social Charter which obliges Contracting Parties to secure effective enforcement of the rights of workers and to protect their claims in the case of insolvency of an employer.⁵¹

There are three major pillars of the Court of Cassation opinion – Article 1 of Protocol 1, Article 6 of the ECHR and priority of employment claims. All these pillars find their grounds in international instruments: the first two have been based solely on the ECHR, whereas the third was foreseen by the revised European Social Charter. The Court of Cassation observed that undue delays in enforcement of final judgments distort the fair balance between the right of an individual and general interest of community, which is necessary to justify limitations of the right to property in favor of the public interest.⁵²

4.5. Response of the Serbian Constitutional Court

The Constitutional Court of Serbia faced the issue of conformity of the disputed provision of the Privatization Act with the Constitution on two occasions. First, the Constitutional Court rejected constitutional review claim finding that the limitation of the right to property was justified by legitimate aim of transformation of socially owned property into private property.⁵³ The Constitutional Court understood the restructuring as a part of the privatization process that was deemed to be finalized within reasonable time. When the Serbian Privatization Act was amended again in 2012⁵⁴ extending the ban on enforcement deadline until 30 June 2014, the Constitutional Court *proprio motu*⁵⁵ reviewed the constitutionality of this amendment. This time around the Constitutional Court found that this provision of the Privatization Act was contrary to constitutionally guaranteed rights such as the right of property, the principle of the finality of judgments and the principle of the rule of law. The main reason which led the Constitutional Court to change its position was the excessive prolongation of the process of transformation of socially owned capital in companies in restructuring into private capital which distorted a balance between private claims and socially justified aim of transformation of property. The Constitutional Court believed that the legislative power had a possibility to establish a fair balance between the right to property of

⁵¹ *Ibid.*, 80.

⁵² *Ibid.*, 78.

⁵³ Ruling of the Constitutional court of Serbia IUz 98/2009 of 23 June 2011 (*Rešenje Ustavnog suda IUz 98/2009*).

⁵⁴ Act on amendments of the Privatization Act (*Zakon o izmenama i dopunama Zakona o privatizaciji, Službeni glasnik RS* br. 119/2012).

⁵⁵ Ruling of the Constitutional court of Serbia IUz 95/2013 of 13 June 2013 (*Rešenje Ustavnog suda IUz 95/2013*).

private persons, on one hand, and the justified aim of transforming of the social property and saving companies in restructuring from bankruptcy, on the other. To illustrate such possibility, the Constitutional Court referred to the Bankruptcy Act which provides for a possibility of re-organization of an insolvent company. The re-organization has to be in favor of both creditors and debtors so as to enable favorable settlements for creditors as well as the continuation of debtor's business.⁵⁶

This indeed was the problem of systematic nature as it involved 153 companies in restructuring. Following the decision of the Constitutional Court, National Assembly of the Republic of Serbia adopted amendments of the Law on Privatization⁵⁷ which provided for a special procedure for affected creditors setting the short deadline of thirty days for submission of their monetary claims to the Privatization Agency which in turn had additional 90 days to review the claim and submit the proposal to claiming creditors. Failure to strike a deal triggered right of each creditor to initiate the enforcement procedure against the company undergoing restructuring. However, within three months following new amendments, the National Assembly of the Republic of Serbia adopted again a new Law on Privatization⁵⁸ which ordered all privatizations be ended by 31 December 2015. This new law again introduces moratorium on enforcement procedures against companies-in-restructuring⁵⁹ setting the expiry date of the ban on enforcement for 180 days following the deadline for privatization.⁶⁰

5. A CRITICAL APPRAISAL OF DIFFERENT APPROACHES TO STRICT CONCEPT OF DIRECT EFFECT

A critical appraisal of two different approaches to direct effect of the ECHR points to the imbalance between legal economy and efficiency of human rights protection, on one hand, and democracy in determining the relationship between an individual and a general interest in human rights protection, on the other .

The approach of the Italian Constitutional Court, which always and without exception requires the engagement of legislature, even when such

⁵⁶ Decision of the Constitutional court of Serbia IUz 95/2013 of 14 November 2013 (*Odluka Ustavnog suda IUz 95/2013*).

⁵⁷ Act on amendments of the Privatization Act (*Zakon o izmenama i dopunama Zakona o privatizaciji, Službeni glasnik RS* br. 51/2014).

⁵⁸ Privatization Act (*Zakon o privatizaciji, Službeni glasnik RS* br. 83/2014).

⁵⁹ *Ibid.*, Article 17: "Proceeds from the sale of capital and/or assets in the privatization process shall not be subject to forced execution".

⁶⁰ *Ibid.*, Article 94.

an engagement does not seem necessary, favors democracy in balancing an individual and a general interest in human rights protection over efficiency and legal economy, but with justification that does not seem quite persuasive. The Serbian Court of Cassation, by avoiding legislative branch even when the issue at hand required intervention of legislature and enactment of national law, favored efficiency and legal economy over the other two values.⁶¹ The proper balance between these values might be found in the concept of direct effect. Both approaches failed to appreciate benefits of the concept of direct effect.

Some scholars have criticized the approach of the Italian Constitutional Court according to which the ECHR is not directly applicable at the expense of contrary domestic legislation. Cataldi criticized the argument of the Constitutional Court that the ECHR “does not establish a supranational legal system and, therefore, does not create norms that are directly applicable in the contracting States”.⁶²

Cataldi and Iovane opine that: “It is hard to share the opinion that the ‘structure’ and ‘objectives’ of the ECHR or ‘the characteristics of specific norms’ are such as to bar the domestic judge from applying the ECHR to a specific case without passing through a preliminary ruling by the Constitutional Court. On the contrary, a two-step test is required when assessing the self-executing nature of a treaty norm: firstly, a verification on whether this norm was introduced into the domestic system; secondly, as recently highlighted by the *Corte di Cassazione*, a verification of the concrete possibility that this specific norm is actually relevant to the pending case. It was the negative result of the second part of the described test that rightly led the *Corte di Cassazione* to refer to the Constitutional Court the questions decided with the two 2007 decisions”.⁶³

We agree with the observation that the Italian Constitutional Court has been too restrictive in its acceptance of direct effect of the ECHR: as they argued, we also believe that the Italian Constitution leaves enough room for interpreting the ECHR in the same manner as the EU law. Constitutional arguments favoring direct effect of EU law could equally support direct effect of the ECHR.

On the other hand, we find that the Serbian Court of Cassation has wrongly extended the direct effect of the ECHR. The Court of Cassation usurped legislative power and created an imbalance in the national protection of human rights. This was far from necessary since the Conven-

⁶¹ *Nota bene*, that finding is limited to the *Crnišaniin* case and it should not be generalized. It does not represent general position of the highest courts in Serbia in relation to direct effect of international treaties or ECHR.

⁶² G. Cataldi, 341.

⁶³ *Ibid.*, 22.

tion itself does not require the circumvention of legislature in cases like this nor could this approach be justified by the concept of direct effect.

The Court of Cassation noted that the challenged provision of the Privatization Act disproportionately distributed the burden of general interest so that it fell solely on persons who had valid and enforceable claims arising out of the employment. We concur with this opinion. Nevertheless, setting aside the challenged provision and allowing enforcement procedures without any further regulation may redirect the disproportional burden to companies in restructuring and their employees. It can trigger bankruptcy of these companies and due to a significant number of employees serious social problems would inevitably arise. It is arguable that there were other possible approaches to the problem raised by the ECtHR judgments: to invite legislature to deal with the issue of both general importance and wide-ranging scale. The Privatization Act might be amended in line with the conception of re-organization in the Bankruptcy Act so that enforcement procedures would escape the liquidity of a company, if possible. Enforcement procedures might be conducted in several stages within a reasonable period of time in order to preserve a company. If that would not be possible, bankruptcy and liquidation would be the last resort. However, engineering such solutions falls out of the jurisdiction of the Court of Cassation as it belongs solely to the legislature.

Case law of the ECtHR supports balancing between an individual and a general interest within human rights protection. In the 1986 *James* case, the ECtHR stated that measures of economic reform or measures designed to achieve greater social justice may justify certain limitation of property rights.⁶⁴ Also, in the 1999 *Immobiliare Saffi* case, the ECtHR accepted that public-order problems may justify a provisional delay of execution of a judgment in exceptional circumstances.⁶⁵ In the 2004 *Broniowski v. Poland* case,⁶⁶ the Court accepted 20% of the market value as an adequate form of redress.⁶⁷ In the 2009 *Molnar Gabor v. Serbia* judgment,⁶⁸ the ECtHR again allowed public interest to come on board when it found that national legislation, which provided for conditions for repaying foreign currency deposits and accrued interests in commercial banks, following conversion of them to public debt due to collapse of commercial banks, was not contrary to the right of property although the

⁶⁴ *James and others v. The United Kingdom* App. no. 8793/79 (ECtHR, 21 February 1986), para 54.

⁶⁵ *Immobiliare Saffi v. Italy* App. no. 22774/93 (ECtHR 28 July 1999), para 69.

⁶⁶ *Broniowski v. Poland* App no 31443/96 (ECtHR 22 June 2004).

⁶⁷ I. Nifosi Sutton, "The Power of the European Court of Human Rights to Order Specific Non Monetary Relief: a Critical Appraisal from a Right to Health Perspective", *Harvard Human Rights Journal* 23/2010, 57, 58.

⁶⁸ *Molnar Gabor v. Serbia* (App. no. 22762/05) ECHR 8 December 2009.

legislation set forth the period of 14 years for paying back these deposits.

A separation of powers does provide for the conditions for adequate human rights protection: legislature is first in setting the legislative framework, whereas judiciary, at least in European continental countries, contributes to human rights protection with progressive interpretations of human-rights acts as living instruments and through the individualization of human rights protection. The executive branch also plays an important role for implementation of human rights. However, a proper relationship between legislature and judiciary secures sound relationship among mentioned values – legal economy, efficiency and democracy in determining fair balance between an individual and a general interest in human rights protection.⁶⁹ Justice of the Supreme Court of the United Kingdom, the Baroness Hale of Richmond, stated ‘that certain judgments are better made by Parliament than by any court, whether in Strasbourg or in London’.⁷⁰

We have argued that there are occasions where national courts should decline to apply the ECHR directly for the sake of democratic articulation of a fair balance between an individual and a general interest in human rights protection, even when national legal framework seems to place judiciary at the forefront of national implementation of international human rights by granting direct effect of human rights treaties. Position and role of national courts will equally depend on the kind of the ECHR demands, and there are occasions when national courts should give priority to legislature, even though these occasions come in small numbers.

Bypassing constitutional court and legislature is justified only if the requirement set by the ECHR as interpreted by the ECtHR leaves no other option except the replacement of a domestic provision with the ECHR rule, in line with the concept of direct effect.⁷¹ If a provision of the ECHR, as interpreted by the ECtHR, governs the situation completely without leaving any margin of appreciation, that is, if it requires the achievement of only one precisely determined result, ordinary courts may step in and directly apply the norm of the ECHR. In such cases referring the issue of compatibility of domestic legislation with the ECHR to a

⁶⁹ *Ibid.*, para. 47.

⁷⁰ The Rt. Hon. The Baroness Hale of Richmond, DBE, PC, in European Court of Human Rights, *Dialogue between Judges 2011*, What are the limits to the evolutive interpretation of the Convention” (Council of Europe, Strasbourg, 2011) http://echr.coe.int/Documents/Dialogue_2011_ENG.pdf, 10 February 2015.

⁷¹ However, some authors argue that there is heterogeneous practice of direct effect. A. Nollkeamper, “The Duality of Direct Effect of International Law”, *EJIL* 25/1/2014, 108. See, also, G. Martinico, “Is the European Convention Going to Be “Supreme”? A Comparative Constitutional Overview of ECHR and EU Law before National Courts”, *EJIL* 23/2/2012, 401, 422, 423.

constitutional court and waiting for legislature to replace the contrary domestic provision with a provision harmonized with the ECHR is a futile effort, waste of time and opposite to legal economy, since the outcome of that legal process would be the same as it would be in a case of the replacement performed by an ordinary court. Legislature cannot do anything else but replace a domestic provision with the solution derived from a provision of the ECHR as interpreted by the ECtHR. In all other situations, when a provision of the ECHR as interpreted by the ECtHR does not regulate the situation completely and leaves a margin of appreciation to a Contracting Party, to adapt a provision of the ECHR to domestic circumstances, when the requirement may be satisfied by achieving a proximate result, national legislature has the best tools to harmonize domestic law with the ECHR.

We believe that both the Italian and Serbian approaches have been inappropriate. In cases where a provision of the ECHR in conjunction with the relevant case law of the ECtHR is clear, unconditional, without leaving any margin of appreciation and requiring only one possible result, the approach of the Italian Constitutional Court—involving control of constitutionality of domestic provision and legislative action—unnecessarily contravenes legal economy and efficiency of human rights protection. In cases where provisions of the ECHR taken together with the case law of the ECtHR were not suitable for direct effect, the approach of the Serbian Court of Cassation endangers democratic determination of fair balance between an individual and a general interest in human rights protection.

6. CONCLUSIONS

The international regime of the ECHR requires equal effect of the Convention in all Contracting Parties. This equality exists in relation to the results that Contracting Parties have to achieve, although the means themselves do not come under the same requirement of uniformity. Contracting Parties choose the means in accordance with their legal traditions through various constitutional arrangements. However, the uniformity of effects implies obligation of Contracting Parties to follow case law of the ECtHR. This has led to a widespread trend in Contracting Parties that their authorities look at provisions of the ECHR and case law of the ECtHR as a supplement to national law.

However, Contracting Parties use different means to resolve conflicts between domestic provisions and provisions of the ECHR as interpreted by the ECtHR. Some of them, like Italy, use the traditional avenue of constitutional review. The Constitutional Court has to establish that

national provision contradicts the ECHR and to repeal national provision. Then, legislature adopts a new provision to be in conformity with the ECHR. In other Contracting Parties, as in Serbia, provision of the ECHR, as interpreted by the ECtHR, automatically replaces contrary domestic provisions. Both methods may be criticized from the perspective of imbalance of legal economy and efficiency, on one hand, and democratic articulation of fair balance between an individual and general interests in human rights protection, on the other hand.

If a provision of the ECHR, as interpreted by the ECtHR, fully regulates a given situation, if it does not leave any margin of appreciation to Contracting Parties to adapt the provision to national circumstances, if it imposes just one and a precisely defined result that the ECHR Contracting Parties have to achieve, the principles of legal economy and efficiency require that every national court should apply this provision of the ECHR and suspend any contrary domestic provision. If this is not the case, if a provision of the ECHR and case law of the ECtHR leaves a certain margin of appreciation to the Contracting Parties, if it permits a few, no matter how close, alternative results, the automatic suspension of a contrary domestic provision would be erroneous and detrimental for the democratic determination of a fair balance between an individual and a general interest in human rights protection. In such a situation, a legislative power should be afforded an opportunity to adopt a new provision in accordance with the ECHR and to choose a result, which will protect the human rights of all concerned persons in the best possible way.