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COURT OF PRACTICE OF THE REPUBLIC OF MACEDONIA AND COURT PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS: A NEED FOR SYMBIOSIS?[1]

Abstract

The recent Report on Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017, led by Reinhard Priebe and issued on 14 September 2017, notes that there is a need for achieving greater uniformity of court practice. The latter was also noted by the European Union within its latest progress reports on the Republic of Macedonia. Within the process of achieving greater uniformity of court practice, the court practice of the European Court of Human Rights must not be neglected. This was emphasized in the latest European Union reports on the progress of Republic of Macedonia as well. However, the use of the court practice of the European Court of Human Rights by the courts in the Republic of Macedonia is not satisfactory. This paper aims to show that there is a need for symbiosis to be reached between the court practice of the Republic of Macedonia and the court practice of the European Court of Human Rights. This will be done mainly through analysis of the relevant national legal frame. In addition, it will also be shown that uniform court practice that is in compliance with the court practice of the European Court of Human Rights is important not only for the legal security, but also for the Euro-integrative processes of the Republic of Macedonia.

Keywords: Court practice, European Convention on Human Rights, European Court of Human Rights, Republic of Macedonia

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INTRODUCTION

The European Convention on Human Rights ("ECHR" or "Convention") was ratified by the Parliament of the Republic of Macedonia ("RM") (Law on Ratification of the European Convention on Human Rights) and became part of the legal system of RM. It is directly applicable and has direct effect. The European Court of Human Rights ("ECtHR") formed its court practice through the process of application and interpretation of the Convention. It is almost impossible for a member state to fulfill the obligations that arise from the Convention without applying the court practice of the ECtHR.

However, the use of the ECtHR court practice by the courts in the RM is not satisfactory (Lazarova Trajkovska, 2013; Center for Legal Research and Analysis, 2015). The higher national courts, such as the Supreme Court, have begun to refer to the ECtHR court practice to a certain extent (Decision Vkzh1 No.9/2015 from 10.03.2015; Judgment Kvp. KOK1 Kvp.br.5/2014 from 21.05.2015; Decision Kr. No.61/2015 from 24.11.2015; Decision Vkzh2 No.2/2016 from 16.03.2016). Yet, the national courts, in general, are still quite restrained as regards the use of the ECtHR court practice in its judgments (Lazarova Trajkovska, 2013; Center for Legal Research and Analysis, 2015). Moreover, it seems that there is no single perception and interpretation by the national courts regarding the status, treatment and manner of using of the ECtHR court practice (Center for Legal Research and Analysis, 2015).

In the recent Report on Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017, led by Reinhard Priebe and issued by the European Commission on 14 September 2017 ("Priebe Report 2017"), it was noted that there is a need for achieving greater uniformity of court practice in RM. In that regard, the role of the Supreme Court of RM was emphasized as well, having in mind its constitutional competence to ensure uniform application of laws by the courts (Constitution of the Republic of Macedonia, Article 101) and thus ensure uniformity of court practice. The need for greater uniformity of court practice in RM was noted by the European Union ("EU") as well, within its latest reports on the progress of RM as a candidate country for EU membership (European Commission, 2014; European Commission, 2015; European Commission, 2016). The necessity for improved reasoning and transparency of court judgements was also noted in the EU reports (European Commission, 2016).

Within the process of achieving greater uniformity of court practice, the role and the importance of the ECtHR court practice must not be neglected. In fact, the latter was emphasized in the latest EU reports on the progress of RM as well, i.e. that "greater and more consistent use of court practice of superior courts and the European Court of Human Rights" needs to be achieved (European Commission,

2014). Also, in similar sense, the Priebe Report 2017 notes the following: "The process of drawing up a judicial strategy to be implemented … has been initiated … The proposals identified by GRECO and the Venice Commission and in the 2015 report of this group need to be implemented … as do the measures necessary to comply with judgments of the European Court of Human Rights".

This paper aims to show that there is a need for symbiosis to be reached between the Macedonian court practice and the ECtHR court practice. Namely, the ECtHR court practice needs to be properly integrated in the legal system generally. Otherwise, everything will be reduced only to plain form, whereby there will be lack of substantial elaboration and application of the numerous standards and tests that are developed and applied by the ECtHR. This will be mainly accomplished through analysis of the national legal frame relevant to the status, role and manner of usage of the Convention and the ECtHR court practice. It will also be shown that uniform court practice that is in compliance with the ECtHR court practice is important not only for the legal security of citizens, but also for the Euro-integrative processes of RM.

1. Status of the Convention and the ECtHR Court Practice in Macedonia

The ECHR, as an international treaty that was ratified by the Parliament of RM (Law on Ratification of the European Convention on Human Rights) and became part of the legal system of RM according to the monistic doctrine, is directly applicable and has direct effect. The direct enforceability of the international agreements before the national courts and the advantage of the international agreements in case of a conflict with provisions of the law is provided for in Article 118 of the Constitution of RM ("Constitution"), according to which "international agreements ratified in accordance with the Constitution are part of the internal order and cannot be changed by law" (Koljackova, 2008).

However, international human rights treaties enjoy a higher degree of legal effect compared to other international agreements. This status is due to the fact that, under Article 8 of the Constitution, fundamental rights and freedoms of the man and the citizen, recognized in international law and set down in the Constitution, are considered as one of the fundamental values of the constitutional order of RM (Koljackova, 2008: 21).

Having regard to Article 8, Article 98 and Article 118 of the Constitution, it could be noted that the place of the ECHR, within the hierarchical structure of the legal system of RM, can be located somewhere between the Constitution and the laws. Namely, the hierarchical position of the ECHR is placed under the Constitution, but above the laws. The rights and freedoms protected by the Convention are applied parallel with the basic rights and freedoms of the man and the citizen that are protected by the Constitution (Koljackova, 2008: 21).

The court practice of the ECtHR, formed as a result of the interpretation and application of the Convention by the Court, represents a necessary knowledge in the context of fulfilling the obligations of a member state to the Convention and application of the Convention as part of the internal legal order. Namely, the ECHR cannot be reduced only to its text, but the text must be considered together with its interpretation by the ECtHR. In this sense, it would be wrong to use the Convention only in its textual context, as the domestic laws are commonly used, without reference to the ECtHR court practice (Spirovski, 2007: 7).

Namely, even if the obligation to execute a certain judgment of the ECtHR is limited to the parties in the particular case (Grabenwarter, 2014: 107), it can still be claimed that Article 1 of the Convention, under which the parties should provide to everybody within their jurisdiction the rights and freedoms guaranteed by the Convention, implies that in securing the rights protected by the Convention, the states should consider the interpretation of the Convention by the Court, by giving an erga omnes effect to the judgments of the Court (Forst, 2013: 4). In this regard, the judgments of the Court have an "indicative effect" for the other member states (Grabenwarter, 2014: 107).

In this context, it is worthwhile to note that the Constitutional Court of RM, in its Decision U.No.31/2006 of 1.11.2006 and the Resolution U.No.31/2006 of 20.09.2006, accepted ECHR as a criterion in the interpretation of the constitutional rights, by which it may be said that it has acknowledged a certain constitutional rank to the Convention. Namely, ECHR has been accepted as a "criterion for interpretation of constitutional rights even in the sense of their certain limitation that is not expressly permitted by the Constitution, but it is allowed in the Convention, provided that it concerns a right whose execution may, under certain circumstances, threaten other rights or values" (Spirovski, 2007: 8-9). All this in fact further emphasizes the importance of having knowledge of and respecting the court practice of the ECtHR.

1.1. The Convention and the ECtHR Court Practice in National Legislation

The importance of respecting and using the court practice of the ECtHR and its integration into the legal system of RM, as part of the process of reaching greater uniformity of court practice in RM and its compliance with ECHR and ECtHR court practice, is recognized and acknowledged by the legislator. Namely, an increasing number of laws contain provisions that emphasize the importance of the Convention and the judgments of the ECtHR in the context of the legal system of RM and the application of law, while some even explicitly provide for respecting ECHR and ECtHR court practice in the interpretation and application of law.

1.1.1. Law on Courts

Within the jurisdiction of the Supreme Court of RM ("Supreme Court'), foreseen by the Law on Courts, it is stipulated that the Supreme Court is competent "to decide upon the request of the parties and other participants in the proceedings upon the infringement of the right to trial within a reasonable time" (Law on Courts, Article 35), whereas that should be done "in accordance with the rules and principles determined in the European Convention on Human Rights and starting from the court practice of the European Court of Human Rights" (Law on Changing and Amending the Law on Courts, Article 3). Namely, the Supreme Court "shall decide whether the lower court violated the right to trial within a reasonable time, taking into consideration the rules and principles determined in the European Convention on Human Rights, and in particular the complexity of the case, the conduct of the parties and the conduct of the court which acted" (Law on Changing and Amending the Law on Courts, Article 4).

It appears from these provisions that the Supreme Court decides upon violation of the right to trial within a reasonable time, primarily, under the provisions of the ECHR and the practice created in its interpretation, particularly in relation to Article 6 of the ECHR, which guarantees the right to trial within a reasonable time. In this manner a kind of symbiosis is created between the court practice of the Supreme Court and the court practice of the ECtHR.

In the context of locating the legal provisions that provide for the respect of the ECHR and the court practice of the ECtHR in interpretation and application of the law, another provision of the Law on Courts should be mentioned, which provides for the possibility of direct application of final and enforceable decisions of the ECtHR.

Namely, in case "when the court considers that the application of the law in the particular case is contrary to the provisions of an international agreement ratified in accordance with the Constitution, it shall apply the provisions of the international agreement, provided they can be applied directly" (Law on Courts, Article 18). Thereby, "the court in the specific cases enforces the final and enforceable decisions of the European Court of Human Rights, the International Criminal Court or another court, whose competence is recognized by the Republic of Macedonia, provided that the decision is appropriate for execution" (Law on Courts, Article 18). Apart from the direct application of the ECtHR decisions, these provisions of the Law on Courts implicitly provide direct enforcement of the provisions of the ECHR as well, as an international agreement, in case the law is applied contrary to the Convention.

1.1.2. Law on Civil Liability for Insult and Defamation

In the Law on Civil Liability for Insult and Defamation, by which a decriminalization of insult and defamation has been performed and which regulates the civil liability for damages to the honor and reputation of any physical or legal entity by insult or defamation (Law on Civil Liability for Insult and Defamation, Article 1), whereby the freedom of expression and information is guaranteed, the significance of the ECHR and the court practice of the ECtHR is confirmed and highlighted, as well as the necessity for the laws to comply with the Convention and the court practice created in the interpretation of the Convention.

Namely, the law provides that "restrictions on freedom of expression and information are legally regulated by setting strict conditions for civil liability for insult and defamation in accordance with the European Convention on Human Rights (Article 10) and the practice of the European Court of Human Rights" (Law on Civil Liability for Insult and Defamation, Article 2). In this context, it is further provided that "if the court, by applying the provisions of the law, cannot resolve a certain issue related to the determination of liability for insult or defamation, or if it considers that there is a legal gap or conflict of law provisions with the European Convention on Human Rights, based on the principle of its precedence over the domestic law, it shall apply the provisions of the European Convention on Human Rights and the views of the European Court of Human Rights contained in its judgments" (Law on Civil Liability for Insult and Defamation, Article 3).

1.1.3. Law on Protection of Privacy

In the Law on Protection of Privacy, which stipulates protection of privacy of the citizens of RM, guaranteed by the Constitution and the ECHR, regarding the documents arising from the unlawful interception of communications carried out in the period between 2008 and 2015, and establishes a ban on possession, processing and publication of the previously mentioned materials (Law on Protection of Privacy, Article 1), a ground for the application of the provisions of the ECHR and the court practice of the ECtHR in the interpretation and application of the law is explicitly provided. Namely, in this case, it is explicitly stated that in the application of the law, the competent court is obliged to respect the ECHR and the judgments of the ECtHR (Law on Protection of Privacy, Article 5).

1.1.4. Decisions of the ECtHR as a Basis for a Retrial

Within the procedural laws there are provisions which foresee that the decisions of the ECtHR are basis for a retrial. Namely, such provisions are contained in the Law on Criminal Procedure, Law on Administrative Disputes and Law on Civil Procedure. The Law on Criminal Procedure stipulates that "the criminal proceedings

completed by a final judgment may be reopened in favor of the defendant if ... by a final judgment of the ECtHR, a violation of human rights and fundamental freedoms during the proceedings was found" (Law on Criminal Procedure, Article 449), while the Law on Administrative Disputes shortly provides that "the proceedings ended with a judgment or a decision shall be repeated upon the request of the party... upon a decision of the European Court of Human Rights" (Law on Administrative Disputes, Article 43).

Unlike the Law on Criminal Procedure and the Law on Administrative Disputes, the Law on Civil Procedure determines in details the conditions for retrial based on a decision of the ECtHR, which provides that "a party may, within 30 days from the finality of the judgment of the European Court of Human Rights, submit a request to the court in the Republic of Macedonia, which adjudicated in the first instance in the proceedings in which the decision that has violated the human rights and fundamental freedoms was adopted, for changing the decision by which this right or fundamental freedom has been violated" (Law on Civil Procedure, Article 400).

Moreover, unlike the Law on Criminal Procedure and the Law on Administrative Disputes, the Law on Civil Procedure explicitly provides that "in the retrial the courts are obliged to respect the legal standings expressed in the final judgment of the European Court of Human Rights, by which an infringement of the basic human rights and freedoms has been determined" (Law on Civil Procedure, Article 400).

2. The Importance of Uniform Court Practice and Compliance with ECtHR Court Practice for the Euro-integrative Processes

Currently, RM has a status of a candidate country for membership in the EU. In order to be admitted as a full member in the EU family, RM should completely meet certain criteria - economic, political and legal.

The political criteria or the so called "Copenhagen criteria" provide that in order to access to the EU membership the candidate countries are required to ensure stability of the institutions, guaranteeing the democracy, the rule of law, the human rights and respect and protection of the minorities. Moreover, these criteria are used by the European Commission as basis for preparing a detailed assessment of the situation in each candidate country in the formation of "opinion", as well in the preparation of the annual progress reports. Although all criteria are important, the political criteria represent conditio sine qua non in the direction of opening accession negotiations (Kassimeris & Tsoumpanou, 2008: 332).

As it was mentioned, in the recent EU reports on the progress of RM (European Commission, 2014; European Commission 2015; European Commission 2016), the need for achieving a greater degree of consistency of the court practice was pointed out. Namely, greater uniformity of court practice would contribute to the

improvement of the predictability and legal certainty, as an essential part of the rule of law principle, and thus contribute to the fulfillment on the part of the political criteria for EU accession.

The EU reports on the progress of RM also emphasized the use of ECtHR court practice in the context of achieving greater consistency of court practice in RM. In this regard, it should be kept in mind that the ECtHR court practice has been recognized as a source of human rights within the EU and in this respect it is used by the Court of Justice of the EU ("CJEU") (Škarić, 2009: 89), as the body in charge of implementing the EU law. Moreover, some of the general principles of the EU law, which are developed by the CJEU as part of its court practice and represent a source of EU law, are extracted directly from the ECHR. Thus, the compliance with the provisions of the ECHR and the ECtHR court practice means a compliance with the EU law as well.

In addition, all member states of the EU are at the same time parties to the ECHR and therefore have accepted the jurisdiction and the practice of the ECtHR. Moreover, the EU itself will soon become a party to the ECHR on the basis of the Protocol 14 to the Convention and the Treaty of Lisbon.

CONCLUSION

The ECHR and the court practice developed by the ECtHR are part of the legal system of RM. Thus, they are directly applicable and have direct effect. In this sense, the ECHR and the ECtHR court practice need to be integrated within the national legislation and practice of the national courts. In other words, it is necessary to create a kind of symbiosis between the Macedonian court practice and the ECtHR court practice.

It could be noted that the national legislation, in general, highlights and confirms the importance of the ECHR and the ECtHR court practice. However, it should also be noted that the national laws provide for a certain degree of uncertainty, confusion and inconsistency regarding the status and treatment of the ECHR and the ECtHR court practice in the legal system of RM.

Namely, in some legal provisions the Convention and the ECtHR court practice are referred to declaratively, in terms of highlighting their importance; somewhere they are foreseen as a means for filling legal gaps and resolving a conflict or incompatibility of certain legal provisions with the provisions of the ECHR; somewhere they are used as a means of interpretation and application of laws; and somewhere their direct application is provided.

Furthermore, these different provisions have potential to open a dilemma whether the absence of a legal provision indicating that in the interpretation and application of certain legal provisions, the ECHR and the ECtHR court practice should be taken into account, implies that for certain issues they should not be considered. All these issues require further refinement, interpretation and, above all, harmonization.

Moreover, the practical effect of trying to integrate the ECHR and the ECtHR court practice in the national legislation in this manner is questionable to some extent. Namely, this kind of integration is rather formal and does not refer to the substance. Due to the latter, it is very likely that everything will be reduced only to plain form, without substantial elaboration and application of the various standards and tests developed and applied by the ECtHR. Apart of all this, an ambiguity could arise whether this means that the ECHR and the ECtHR court practice could be applied only in case if it is explicitly foreseen within the national laws.

The national procedural laws contain provisions which foresee that the judgments of the ECtHR are basis for a retrial. However, there are some differences among the procedural laws in this respect, which could cause ambiguities and misunderstandings. Namely, only the Law on Civil Procedure explicitly refers to the obligatoriness of legal standings expressed in the ECtHR judgements as regards the retrial before national courts. One could argue that there is a lack of clarity as to whether the difference between the procedural laws relating to the obligation for respecting the legal standings stated in the judgment of the ECtHR, which is a basis for a retrial, means that the courts should respect the judgments of the ECtHR in retrial only when they decide in civil proceedings. In any case, it is obvious that in respect to these provisions it is necessary to conduct further harmonization and refinement.

Finally, it could also be concluded that not only having uniform court practice, but also compliance of the Macedonian court practice with the ECtHR court practice is very important for the Euro-integrative processes of Macedonia. Namely, having in mind that the ECtHR court practice has been recognized as a source of human rights within the EU, as well as that some of the general principles of the EU law, which are recognized as a source of EU law, are extracted directly form the ECHR, it is clear that the compliance with the provisions of the ECHR and the ECtHR court practice means a compliance with the EU law as well.

One of the ways to accomplish the latter could be using regularly the ECtHR court practice by national courts as an additional means of argumentation when interpreting the law, in a manner that the court, in the rationale of its decision, would use as a reference ECtHR court practice, i.e. would refer to an ECtHR court decision.

Taking into account the aspirations of RM to join the EU family, the insistence of the EU for paying attention to the use of ECtHR court practice, in the context of achieving greater consistency of court practice in RM, is more than clear. Of course, the ultimate goal of all this is to provide greater legal certainty for all the citizens of RM.

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