

MULTILEVEL EUROPEAN CONSTITUTIONALISM: THE MACEDONIAN PERSPECTIVE

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The three levels

As it has been already observed¹ it is possible to derive the concept of European Constitutional Law applying it to three levels: that of the EU which involves institutional, legal and value principles of constitutional character; that of ECHR with its substantial constitutional content, (both being forms of transnational constitutionalism, constitutionalism beyond the state)² and that of national constitutions, as primary sources of common principles of democracy, rule of law and protection of fundamental human rights which Europeans share as a common constitutional heritage. Strong convergence of constitutions of European states in fundamental orientations and their commitment towards mentioned principles, contribute to cooperative interaction among these levels, although serious tensions in the mutual relationship has emerged.

No matter the failure of the project to adopt the Treaty establishing a Constitution for Europe and reformulations of notions in the Lisbon Reform Treaty, abandoning the notion of a Constitution, the constitutionalisation (without a constitution) of the Treaties and the functioning of principles of primacy and direct effect of EU law, as a substantial substratum of that process, by no means is called into question.

Mutual interactions among these three levels of European constitutionalism show different patterns if directions of impact are changed. While European constitutional principles and values emerging from national constitution are selected and transposed *bottom up* into the body of founding principles of the EU (art. 6 TEU) and their impact on integration and EU constitutionalism cause no question at all, principles that emerge in the supranational legal system that affect national constitutions, such as primacy of EU law, on a contrary, do. Despite the satisfaction of the German Constitutional Court with the level of protection of fundamental rights given by the ECJ (Solange II), there is still, at least theoretical possibility that EU law could be subject to control from the point of view of the Basic Law if the standard of protection is not met by the ECJ. In a similar *top down* way, the ECHR and the jurisprudence of the Court in Strasbourg affects both national constitutional law and jurisprudence, and the EU law. The status of the ECHR within the constitutional order of members of the Council of Europe is one well known aspect of this, which particularly affects constitutional courts. Another aspect is the application, explanation and spreading of general principles of law, such as the principle of proportionality, by the ECtHR into legal systems and jurisdictions where it has not existed, such as the case with my country, Republic of Macedonia, making them transnational. Also, there is the finality of the interpretation of the conventional rights and principles by the Strasbourg Court and the constructive dialog between this court and national courts in effect ends with its final say. Let's mention *Kudla V. Poland* in respect of the right to effective remedy for breaches of the right to trial within reasonable time, with serious effect over national legal orders, or *von Hannover v. Germany*, which marks the prevalence of the Strasbourg interpretation of the right to privacy over the *constitutional* interpretation of the same right by the Constitutional Court. The status of ECHR as a primary *constitutional* source for fundamental rights in Europe goes also in respect of the EU, both at normative (art.6.2 TEU) and jurisdictional level. Because the scope of protection

¹ Arnold, Rainer, *The Emergence of European Constitutional Law*, EJCL, 2006

² See Tsagourias, Nicholas ed. *Transnational Constitutionalism : International and European Models; Introduction – Constitutionalism : a theoretical roadmap*, Cambridge University Press, 2007

of rights in the EU is limited only to situations of implementation of EU law, it is possible to have different outcomes between ECJ and ECtHR in similar cases, such were *Grogan* and *Open Door v. Ireland* respectively. However, converging tendencies are certainly a result of the impact of the ECtHR case-law which has been increasing over time, leading even to reconsidering previous judgement by the ECJ (concerning searching of business premises which were not considered as “home”). In the seminal decision in *Bosphorus v. Ireland* the ECtHR made a move towards a theory of recognition of the effectiveness of a comparable systems of protection of human rights, as long as that system protects fundamental rights in a manner which can be considered at least equivalent to that for which the Convention itself provides.³ It not only resembles the Solange in terms of scrutinisation of comparability, but also in terms of *who* is setting the standard.

The structure and functioning of this multileveled setting of constitutionalism in Europe suggest at least that not only transnational constitutionalism rests on constitutional principles common to all member states, but also EU and ECHR create and promote constitutional principles that become common as transnational. Apart from the principle of *proportionality*, one of such a quality could be the principle of *multilevel* judicial protection of fundamental rights and their absolute priority, *based on comparable standards*. This inevitably implies the principle of *transparency* which must enable the citizens of Europe to avail themselves of such multilevel system of protection of human rights. Another principle which appear to be common for all three levels is *constitutional review of acts and measures* in order to secure the supremacy of acts with constitutional validity, as it is widely accepted that both ECJ and ECtHR adopts *constitutional* decisions. Finally, it seems that the principle of *primacy* of transnational law over municipal order in certain fields is necessary to be recognized as a common principle, as well as the primacy of *constitutional interpretation* (of a transnational *constitutional* act) given by transnational judiciaries.

The relationship between international and national law as a general context

The relationship between national and international law is regulated by two related articles of the Constitution of 1991 and Amendment XXV thereto. According to art. 118, international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law. The Parliament ratifies international agreements (art. 68) by law. Amendment XXV foresees that courts make judgements on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. It is clear that ratified international treaties enter into Macedonian legal system according to the monist doctrine; they are directly applicable and have direct effect (if contain provisions of such a quality); they are ranked at least at the level of national laws, but with a stronger validity, since *lex posterior derogat legi priori* is excluded as a principle; they are below the Constitution; and, in case of conflict between national law and ratified international agreement, the latter prevails. On the other hand, the Constitution doesn't specify the position and the applicability of other concluded, but not ratified, international agreements in the domestic legal system, which logically incited some authors to pose the dilemma if the Constitution really has dualistic approach to them, arguing in favour of the monist approach, which could be attained by the courts using appropriate line of interpretation.⁴

³ See Jacobs, Francis, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice*, in : *The Future of the European Judicial System in a Comparative Perspective*, Nomos Verlag, 2006

⁴ Georgievski, Saso, *The effect of international agreements concluded in symplified form in the Macedonian legal order: in between the dualist and monist regime* (tekst in Macedonian - Primenata na megunarodnite spogodbi skluceni vo poednostavena forma vo poredokot na Republika Makedonija : megu dualistickiot imonistickiot rezim),

In the light of the aforementioned, SAA, which entered into force in April 2004 after its ratification by the Member States of the EU, has a status of any other ratified international agreement in the Macedonian legal system, with same consequences, and this must be clear. However, the Supreme Court did not give a judicial solution of the mentioned dilemma while deciding the case where direct applicability of the Interim Agreement on Trade, concluded simultaneously with the SAA, was at issue. Namely, the Interim Agreement entered into force between the parties immediately, in 2001, it was not ratified in the Macedonian Parliament and remained in force until SAA entered into force. In a case for damages before the courts against customs authorities, a party asks for direct application of the Interim Agreement which, in their opinion, should prevail over national law i.e. governmental regulation. The courts, including the Supreme Court, found that the Interim Agreement is part of the SAA (as a matter of fact it only makes a reference to it-art.128), and therefore should be treated as *ratified* international agreement and accordingly applied it directly, which, under that assumption, is perfectly correct. Georgievski in this respect rightly observes that this decision of the Supreme Court adds nothing new for the solution of the dilemma, suggesting that the Court should have treated the Interim Agreement as non-ratified agreement and should have given its opinion on its direct application under that assumption. Another author⁵ finds very positive the court's methodology for identification of the Interim Agreement as ratified and hopeful for possible readiness of our courts to treat the decisions of the Association and Stabilisation Council as being directly applicable and as having direct effect. I am mentioning this case not in order to enter into debate about the treatment of non-ratified international agreements, but to substantiate that ordinary courts in Macedonia would *a fortiori* apply the SAA directly and as a prevailing source of law over national legislation, if such a case would come before them. However, it seems that our courts have not applied the SAA yet, and I have no reports that courts use *EU friendly* method of interpretation of law. Such lack of case-law prevents a meaningful observation of other important aspects of the legal force of the SAA. For example, we could have had judicial attitude on the delicate provisions of the SAA that provide for evaluation of certain practices in the sphere of competition according to criteria which derives from the implementation of the rules of the EC Treaty, which implies direct application of Community law even before accession to EU. Likewise, the dilemma about Council decisions remains open without judicial response.

The relationship between international and national law has been treated by the Constitutional Court in a highly controversial way. The Macedonian Constitution does not expressly provide for a competence of the Constitutional Court to review the constitutionality of international treaties. However, since the Constitution places ratified treaties into the body of the internal legal order in a rank below the Constitution, the Court from the early nineties somehow splitted between two options: either to keep with the constitutional provision listing its competences where international treaties are not mentioned as an object of review (article 110), or to build its competence on a theory that since ratified international treaty becomes part of the domestic legal order, it must, as any other regulation, be in accordance with the Constitution, and therefore reviewable by the Court. The first attitude prevailed during the first years, leading to rejection of six initiatives for review of laws for ratification of international treaties concluded by the State. However, the latter theory finally prevailed among majority of judges in 2002. The Court repealed the law on ratification of a bilateral agreement, for the agreement contained

Zbornik vo cest na Mile Hadji Vasilev, Uneverzitet "Sv.Kiril i Metodij", Praven fakultet "Justinijan prvi", Skopje, 2004

⁵ Petrusevska, Tatjana, "EU law and the courts in the Republic of Macedonia" (in Macedonian-Pravoto na Evropskata Unija i sudovite vo Republica Makedonija), vo : Zakonska ramka na sudskata reforma vo Republika Makedonija, Univerzitet Sv. Kiril i Metodij, Praven Fakultet Justinijan Prvi, Skopje, 2006

provisions breaching the Constitution, but did not repeal the said provisions of the agreement, finding that it would have been in breach of international law. The effect of the decision was that the international agreement ceased to be part of the domestic legal order, not losing its legal force in international law. This case inevitably opened a discussion on possible reform directed to introduction of *a priori* review of constitutionality of international treaties, as probably the most appropriate technique to protect both the constitution and the credibility of the state in international relations. However, the majority of the present composition of the Court, draw back to the previous stance, accepting a reasoning, among other things, that the control of constitutionality in case of international agreements is carried out by the Parliament in the process of their ratification, after which they become part of the domestic legal order and are self executing. It is interesting that this alleged function of the Parliament to exercise constitutional review of international treaties is equally non-existent in the Constitution as it is the competence of the Court to review the constitutionality of international agreements.

On the other hand, the Court does not accept to take a ratified international agreement as a criterion for legality of regulations either, which is normally expected.⁶ The Court consistently rejects applications which either challenge the constitutionality of ratified international agreements, or the *legality* of sublegislative regulations i.e. their conformity with the SAA, which is at least a law, because there is no explicit constitutional provision for such a competence. In a particular case,⁷ unfortunately I would say, the Court rejected to review the conformity of a ministerial regulation exactly with the SAA. The applicant claimed that the regulation impose quantitative restrictions on trade of petrol products between Macedonia and EC which was allegedly against the SAA provisions lifting and bannig such restrictions. In a most recent case, deciding on an application which claimed that a ministerial regulation that impose campain “*by Macedonian*” through certain fiscal measures was against the SAA, which bans imposing quantitative restrictions on trade or measures of equivalent effect, the Court reiterated its stance (a majority one) that it has no competence to decide in that respect. It is a pity that the Court did not changed its approach, since it would have been an opportunity to invoke the judgement of the ECJ in the case 249/81 (“*by Irish*”) and to use the interpretation that such measures amounts to quantitative restrictions on trade between the Republic of Macedonia and the EC. The Court, again, took the view that the mentioned article 110 of the Constitution does not give it an explicit competence to review the conformity of regulations with international agreements, ignoring that ratified international agreements are laws too.

Finally, in a case where applicant claimed that a domestic law was against the SAA, and in that perspective also against the constitutional provision which forbids ratified international agreements to be changed by law, the Constitutional Court found itself non-competent to review the conformity of a law with an international agreement.⁸ Although there has been opinions that the Court should undertake this competence,⁹ since according to the Constituion the international law prevails over domestic legislation, one has to bear in mind that according to the Constitution laws must be in accordance only with the Constitution, regardless of the fact that in a case of conflict in a concrete situation ratified international law will prevail. The Constitutional Court could review the conformity of a law with ratified international agreement only if such

⁶ Petrusavska, T. *Pravoto na Evropskata Unija i sudovite vo Republica Makedonija* (“EU law and the courts in the Republic of Macedonia”), in: *Zakonska ramka na sudskata reforma vo Republika Makedonija*, Univerzitet Sv. Kiril i Metodij, Praven Fakultet Justinijan Prvi, Skopje, 2006

⁷ U.br.5/2005 of 16.11.2005, www.usud.gov.mk

⁸ U.br.132/2005 od 16.11.2005

⁹ Petrusavska, T. *supra*

competence is constitutionally foreseen, as it is the case in some countries, or if an international agreement has a constitutional rank i.e. is part of the constitution, or a separate constitutional act.

In conclusion, the case-law of the Constitutional Court implies that, in effect, it is indifferent to international law in terms of its status and rank in the hierarchical structure of legal acts, treating it as if it is outside of the constitutional order, and leaving the solutions for possible conflicts between domestic and international law to be found by ordinary judges in concrete cases brought before them.

In a different fashion, however, the Constitutional Court makes efforts to adhere to standards of international law in general, especially to the ECHR and to EU friendly interpretation of domestic law. In this context, international law has been invoked as a source for additional argumentation of the Court to corroborate its own interpretation of laws or the Constitution in various fields, and there is a growing tendency in using this method. In relation to the EU law, except for the SAA as EU law, the Constitutional Court has taken even regulations and directives as supranational law to guide its interpretation of impugned domestic laws as in line with EU law.

Constitutionalisation of the ECHR

It is beyond doubt that international human rights treaties, from a substantial point of view, regulate exclusively constitutional issue, i.e. have “constitutional” content¹⁰ and therefore it is legitimate to ask the question: should not they have different status in the domestic constitutional order than other international treaties.

The duty to treat international human rights treaties in the constitutional order of the Republic of Macedonia in a different manner, and not only through the prism of formal hierarchical relations, derives at least from two reasons relating to substantial aspects. First, freedoms and rights of a man and a citizen recognized in international instruments are, in a great deal, incorporated in the provisions of the Constitution, which take more than 1/3 out of the total number of articles, and, second, according to the article 8 paragraph 1 line 1 of the Constitution, the fundamental freedoms and rights of the individual and citizen, recognized in international law and determined in the Constitution, represent one of the fundamental values of the constitutional order of the Republic of Macedonia.

For some authors, these facts are basis for for treating a human rights treaty, particularly the ECHR, as an act “which has the same legal effect as the Constitution of the Republic of Macedonia, since there is a high level of identity between these two documents” and that “from the aspect of the international law, the European Convention has above the Constitution effect in the legal order of the Republic of Macedonia, i.e., the effect of a constitution in a material sense.”¹¹ However, these facts could not at the same time eliminate the meaning of the formal requirements for incorporation of international treaties in the internal legal order. The very fact that the Constitution has made a reception of a body of human rights enshrined in an act of international law, is not sufficient to give it a constitutional rank, although gives such a rank to its substratum – the freedoms and rights. For example, at the time of adoption of the Constitution in 1991, Republic of Macedonia was neither member of the Council of Europe, nor a High Contracting Party to the Convention, so that ECHR was not part of the internal legal order, although the Constitution made an almost full reception of

¹⁰ G. Malinverni, *The status of human rights treaties in domestic legal systems*, The Status of International Treaties on Human Rights, Science and Technique of Democracy No.42, Venice Commission, Council of Europe Publishing, 2006

¹¹ S. Skaric, *The European Convention and the mechanisms for protection of rights and freedoms in Macedonia*, The Functioning of the Control Mechanisms Under the ECHR, Information meeting, Skopje, December, 1998, Council of Europe, Information Center Skopje

the material provisions of the Convention. ECHR became, as an act, part of the internal legal order and direct source of law (for the courts) only in 1997, after its ratification by the Parliament.

Therefore, it is necessary to interpret art. 8.1.1 of the Constitution in relation both with constitutional provisions which guarantee the freedoms and rights, and those which regulate the relation between national and international law. This particularly because art. 8.1.1 could be legitimately interpreted as having cumulative structure: fundamental value of the constitutional order are only freedoms and rights that are *simultaneously* “recognized in international law and determined in the Constitution”. This way of interpretation has serious effects if the constitutional character of the ECHR or other human rights treaty is conditioned by the identity of the content of those treaties with the human rights content of the Constitution. From this assumption it follows that the fundamental value of the constitutional order would have only those freedoms and rights determined in the Constitution, indeed identical with those recognized in treaties. But, then, what happens with those freedoms and rights that are not determined in the Constitution, but are recognized in international human rights treaties? Even in the light of this interpretation, however, it does not follow that they have not the same validity in the constitutional order. On a contrary, rights and freedoms that enter into the domestic legal order *via* ratification of an international treaty, gain inviolable value and become subject of judicial protection according to the general principle of primacy of ratified international treaties, but they do not become fundamental constitutional value of the constitutional order within the stringent meaning of the art.8.1.1. of the Constitution, which is the only defect of this interpretation.

The other line of interpretation, which this paper advocates, treats freedoms and rights as fundamental value of the constitutional order, no matter they are determined in the Constitution or in a ratified international treaty, and no matter they are not identical in both acts. In other words, this approach takes the Constitution and the international treaty as alternative and complementary (and/or) sources of *freedoms and rights* that represent fundamental constitutional value. However, if this interpretation is used to conclude that *international human rights treaties* at the same time become *acts* with constitutional rank, it would lead even to the point that they could be treated as a sole, independent constitutional norm, no matter their formal rank, even no matter if they have been ratified or not according to the Constitution, as a precondition to become part of the domestic legal order.

Therefore, it is important to demonstrate that it is possible to contend simultaneously that freedoms and rights recognized in the acts of international law represent a fundamental value of the constitutional order, but that those acts, still, are below the Constitution and do not represent a sole and separate source of constitutional law. This construction is the basis for widespread attitude in Europe, especially of Constitutional Courts, that ECHR bears a constitutional meaning as a subsidiary source for interpretation of *constitutional* freedoms and rights, a source of inspiration¹², or, more strongly, a basis and framework for interpretation of the Constitution, notably in the process of review of constitutionality of laws. Such a middle way between opposite positions is possible because it is based upon the difference between “ordinary” treaties and human rights treaties which consists in that, in a substantial sense, the former could be against the Constitution (no matter whether the constitutional court is competent to control it), whereby the latter is impossible to be contrary to the fundamental value of the Constitution, even if they are ranked below the Constitution: human rights treaties are always in accordance with the Constitution because it recognizes their substratum as its own fundamental value. In that sense, the Constitutional Court by no means could review the conformity of the ECHR or any other ratified international human rights treaty with the Constitution, while it is possible to do that with the other international agreements. But also, the Constitutional Court could not review the conformity of any domestic law with the ECHR as a separate constitutional act. According to the Constitution of RM, the Constitutional Court is competent to decide on conformity of laws only

¹² C. Costa, *Constitutional supremacy of human rights treaties*, *ibid.* supra note 10

with the Constitution, but not with international treaties, including human rights treaties, which is the case with some countries. Nevertheless, these constitutional provisions do not empower the Court to ignore the existence and, so to say, the constitutional meaning of the ECHR.

Again, the real effects and the real rank and status of the ECHR in the constitutional order may be evaluated along two lines: through the treatment of the Convention by the Constitutional Court and through its treatment by ordinary courts.

Apart from its competence for abstract review of legislation outlined above, the Constitutional Court is also competent for direct protection in cases of breach of certain constitutional rights. Art. 50.1 of the Constitution states that a citizen may invoke the protection of his/her *constitutional* rights before ordinary courts and the Constitutional Court. However, article 110.3 of the Constitution restricts this protective competence of the Constitutional Court only to those rights related to the:

- freedom of belief, conscience, thought and public expression of thought;
- political association and activity, and
- prohibition of discrimination among citizens on the grounds of sex, race, religion or national, social or political affiliation.

As a consequence of these constitutional provisions, two distinguished systems of protection of constitutional rights in concrete cases were established: one before the Constitutional Court exclusively protecting the rights listed in art. 110.3 by way of constitutional complaint (formally: request for protection of human rights), and the other before ordinary courts protecting all other constitutional rights, both systems ending before the Court of Human Rights in Strasbourg. Except in the scope, constitutional complaint in Macedonia fits with the concept of proper complaint, since it may be submitted either against concrete administrative or against a judicial act, and there is even no requirement for exhaustion of all remedies – it is sufficient to exhaust only an appeal procedure in order to have a final act in a particular set of procedure.

For a long time in the Court has dominated the attitude that the Convention and the case-law of the ECtHR can be taken only as an additional argument in the interpretation of constitutional norms which the Court uses in deciding cases which fall within its competence. At the same time, the Court stressed that ECHR, although it represents a part of the internal legal order, cannot be taken as a direct and autonomous legal ground on which the Court could base its decisions. This goes for both abstract review of constitutionality of legislation and direct protection of constitutional rights under art. 110 of the Constitution. Thus, this subsidiary utilization of ECHR (as well as with other acts of international law) took the form of “*so as it is*”, meaning to corroborate the legal positions of the Court. This could mean, of course, that the Court is free to make use of the Convention only when it is favorable to its stances. However, on the ground of the more profound interpretation of article 8.1.1. of the Constitution, the Court in 2006 underlined that *constitutional* rights and freedoms should be interpreted within the context of the Convention, since the fundamental freedoms and rights of the individual and citizen, recognized in international law and determined in the Constitution, represent one of the fundamental values of the constitutional order of the Republic of Macedonia. This meant that the Convention should be used not only as an additional argument, but as a criterion for the interpretation of the Constitution.¹³ The case was additionally peculiar, since the Court was dealing with a situation where the Convention was used to define the right to freedom of assembly as non-absolute one, whereby the contrary could appear from the constitutional provision taken alone (art. 21 of the Constitution stipulate that the exercise of freedom of assembly may be *restricted* only during a state of war or emergency). More precisely, the Court accepted that paragraph 2 of article 11 of the Convention is complementary to the relevant article of the Constitution and that the law which places restrictions on the right to freedom of assembly in strict accordance with art. 11.2 is not against the Constitution. It should be borne in mind that

¹³ U.br.31/2006 of 1.11.2006

this interpretative approach has nothing to do with the context of article 53 of the Convention, which safeguards the level of human rights existing under law or other agreement, because it was directed towards the definition of the said constitutional right, and not to its restriction. Here is the substance in Court's words:

“Despite the high ranking of the freedom of assembly in the corps of fundamental freedoms and rights of the citizen, the freedom of assembly in European legal culture is not an absolute right, which is obvious from the insight into the regulation of many states, as well as from international acts. This especially refers to assemblies that take place in outdoor public places, where due to the contact with the outside world it is usual to have regulation in order to create the necessary preconditions for the exercise of the very right to public assembly, on the one hand, and in order to maintain, that is, protect the rights and interests of others, which rights may very often collide. That is an expression of the validity of the general principle that the freedoms and rights of others are a limit for the exercise of the individual right and freedom, certainly when it comes to rights and freedoms that are capable of violating other ones. That principle is notably expressed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is exceptionally important for the domestic legal order. The absence of an explicit constitutional provision regarding the possibility of restricting the exercise of the right to assemble peacefully in regular, that is peacetime conditions, in the opinion of the Court, should not be interpreted in the sense that the right to assemble peacefully in regular circumstances is an absolute right that is exercised without any limits whatsoever and without any respect for the freedoms and rights of others. Such principle of absolute exclusivity exists neither in the European nor in international context, and the Court holds that it may not be established under the Constitution.

From Article 8 paragraph 1 line 1 of the Constitution, under which one of the fundamental values of the constitutional order are the basic freedoms and rights of the individual and citizen recognised in international law and defined by the Constitution, taking into consideration the meaning of the European Convention for the Protection of Human Rights and Fundamental Freedoms not only as part of the internal legal order of the Republic of Macedonia, but as a result of the general principles on which it lies and which it promotes, the Court judged that the interpretation of Article 21 of the Constitution should be based on those legal principles.

...Because of these very reasons, in the opinion of the Court, each restriction of the exercise of the freedom of public assembly must pass the test of proportionality, there must be a fair balance reached between the right of citizens exercising the freedom to assemble peacefully and the rights and interests of other citizens, that is, the other values and protected public interest as a legitimate goal of the restriction.”

Another important step towards substantial constitutionalisation of the ECHR in the constitutional system of the Republic of Macedonia is certainly the case where the Court decided on the constitutionality of a provision of the Criminal Code foreseeing the life imprisonment. The importance of this decision comes from the fact that for the first time the Constitutional Court invoked explicitly the case-law of the ECtHR and took it as a ground for building its own reasoning in interpretation of the constitutional right to freedom:

“The analysis of the more recent case law of the European Court for Human Rights in view of life sentence (Leger v. France, Judgment of 11 April 2006, Kafkaris v. Cyprus, Judgment of the Grand Court Chamber of 12 February 2008), demonstrates that the European Court does not find disputable the life sentence itself, in case the criminal legislation provides for the possibility for release on parole of the convict.

.. From the very contents of this article of the Constitution, in the opinion of the Court, it does not derive at all that this article provides for some additional condition whether the restriction of human liberty, that is, the deprivation of liberty is temporarily restricted or unrestricted, from where it could be concluded that the legislator, in principle, is free to prescribe

a prison term which is temporarily unrestricted, that is, which lasts until the end of the life of the convict.

*However, given the importance of human dignity as a fundamental human value that is universally protected, the Court found that such additional condition, which prohibits deprivation of liberty till the end of the life of the individual, should be looked for in the provisions of the Constitution that refer to the inviolability of physical and moral integrity of the individual and the prohibition of any form of torture, inhuman or degrading treatment and punishment (Article 11 of the Constitution), which in certain way obliges the legislator to provide for mechanisms enabling the person sentenced to life imprisonment to regain his freedom again”.*¹⁴

Similar processes can be seen also in the activities of ordinary courts. In the procedure before ordinary courts, ECHR, in a formal séance, does not defer from any other ratified international treaty, and shares all characteristics mentioned above: it is directly applicable, it has primacy over domestic legislation. The issue of its rank in constitutional terms is irrelevant, since ECHR is an autonomus source of judicial decision making. It is worth mentioning at this point that a very modest case-law could be found in the field of direct application of the ECHR by the ordinary courts, although it has been a domestic source of law since 1997. There has been only some sporadic mentioning of ECHR in court judgements, because of rather “dualistic” way of thinking of judges, namely, that the ECHR has been largely transposed into our domestic, notably criminal law, and that the implementation of the Convention goes without a need to invoke it directly, the case-law of the ECtHR being totally ignored. After a period of almost ten years of silence and incidental mentioning of the ECHR with regard to its direct application as a domestic source of law, the Convention and the case-law of the Strasbourg Court has been invoked for the first time in 2006 by the Supreme Court in two cases concerning the freedom of expression and criminal liability of journalists for defamation. Moreover, the Department of Criminal Offences of the Supreme Court on 29.06.2007, rendered a Legal Position that “*ECHR is part of the domestic legal order and is directly applicable. For each and every freedom and right foreseen in the Convention and whose protection is effectuated before the ECtHR, the courts in RM directly apply its judgements and, in accordance with the Law on Criminal Procedure, in the reasons of their decisions should invoke the case-law of the ECtHR*”.

Finally, amendments to the Law on Courts adopted in March 2008, introducing the competence of the Supreme Court to review the *trial within reasonable time* within the meaning of the art. 6 of the Convention, directs the Court to follow the rules and principles determined in the Convention, and the case-law of the ECtHR. It is interesting that an attorney at law already challenged this law provision before the Constitutional Court, on the grounds that, among other things, it introduces court decisions as sources of law, which was allegedly against the constitutional provision stipulating that courts make decisions on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution. The Court rejected such a reasoning finding that the impugned set of provisions of the law were adopted in transposition of international obligation of the State stemming from the Convention, and that they do not introduce a new source of law, but a source for standard of interpretation.

This, I would say, new approach to the treatment of the ECHR and the case-law of the ECtHR by the Constitutional Court, the ordinary courts and the legislature is important for the stronger *constitutional* effect of the Convention and for the gradual understanding of the legal society in Macedonia that the Convention is consisted of its norms taken together with their interpretation in the case-law of the Court in Strasbourg. It will not, however, place the Convention, much less the case-law of the ECtHR, formally as a separate and direct source of constitutional law, but will certainly enable a flow of new light in the process of defining what is really constitutional in the field of human rights in the Republic of Macedonia, thereby improving the convergence of national and transnational constitutionalism.

¹⁴ U.br. 28/2008 of 23.04.2008

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