

HARMONIZATION OF MACEDONIAN LEGAL ORDER IN THE FIELD OF HUMAN RIGHTS AND FREEDOMS WITH THE EUROPEAN ORDER IN THE CONTEXT OF THE EURO-ATLANTIC ASPIRATIONS

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***Abstract:** In the past decades, Republic of Macedonia on its way to the European Union has made significant reforms in the overall socio-economic, political, cultural and social system. The foundation of these European-oriented reform processes is human freedoms and rights, their promotion in practice and providing protection according to European standards and principles. Among other things, the reform process has been implemented through the multi-annual harmonization of the national legislation with the European acquis in all the areas of the society. The regulation that refers to human freedoms and rights is of a particular importance to the structure of harmonization and approximation. In addition, it can be said that this process has two opposite tendencies in our country: on the one hand, there is a strongly expressed declarative will of the political establishment for the Europeanization of the Macedonian legal system, and, on the other, there are continuous violations of the human freedoms and rights by the institutions that, at the very same time, are being Europeanized. This dilemma has a security, social, economic and wider national significance on the way to the EU and NATO. The establishment of an effective system for protection of fundamental freedoms and rights is determined by the constellation of the social, political, economic, cultural conditions and relations, and it has an impact on the democratization of the national institutions and the strengthening of citizens' confidence in their credibility and integrity. The harmonization of the national regulations and the daily adaptation of the institutions are unthinkable without a consistent respect for human freedoms and rights.*

***Key words:** reforms, regulation, approximation, institutions.*

Introduction

The process of harmonization of national legislation with European aquis has its genesis and development tendency in our country. Evolutionarily, with the adoption of the Constitution of 1991 in the period of independence of the Republic of Macedonia, the foundation for the ratification of the norms of international law was laid. "Their respect is one of the fundamental values of the constitutional order of the Republic of Macedonia, regulated in Article 8 of the Constitution."³ Namely, in our country "monism has been accepted as a constitutional technique of implementing international treaties and they are directly applicable in our legal system."⁴ This constitutional foundation was further concretized by the signing of the Stabilization and Association Agreement in 2001, the submission of an application for EU membership in 2004, the acquisition of the status of a candidate country for EU membership in 2005, and numerous other documents and processes. Our country's progress in meeting political criteria: stability of institutions that will guarantee democracy, the rule of law, protection of human rights and respect for and protection of minority rights which occur in the path of harmonization and approximation. However, it is indisputable that starting from "the ontological nature of law as a unity of meta-legal and social substance, the idea of law (trans-experiential law) and legal reality (experiential, positive law), basic human

freedoms and rights are not some goal and value distanced from it, but are interpreted in the very essence of law and represent the material criterion for its correctness."⁵ For transitional and post-conflict societies such as Macedonia, "human rights also define the goals of transition, bring moral significance and hope to social change and individual activity in them and have the potential to reduce fear and insecurity by saying what is good and valuable."⁶

In reality, this primary postulate is related to the security dilemma - can human freedoms and rights be compromised in the interests and interests of national security? Is there an overriding security interest over the interests of protecting human dignity and integrity? These questions are very serious, and their answers are complex, bearing in mind that in the past there have been cases of abuse of intelligence and security with a specific derogation of human freedoms and rights. As an example, we can cite the famous case of El Masri, which revealed serious allegations against members of the Macedonian secret police in terms of respect for human rights and freedoms.⁷ More recently, the well-known "Sopot" case, which was started by a regular public prosecutor's office but ended by a decision of the Special Public Prosecutor's Office with two opposing public prosecutor's decisions, one of which is a conviction and the other, which is final, is: withdrawal of the charge because the testimony on which the verdict was based on the witness was extorted, and he survived mental and physical torture.⁸

³ Klimovski S., et al. *Constitutional Law, Enlightenment AD*, 2010, p. 34.

⁴ Treneska-Deskoska R., *Constitutionalism and Human Rights*, Skopje, 2006, p. 244-246.

⁵ Kambovski V., *Foreword, European Human Rights Standards and Their Implementation in the Legal System of the Republic of Macedonia*, Proceedings of the Scientific Debate, Skopje 2008, p. 9-10.

⁶ Grazina S., *From Rights to Myths: Transformation in Post-Communist Europe*, bo

Andras S., (ed.) *Western Rights? Post-Communist Application*, Kluwer Law International, 1996 y. p. 87.

⁷ The European Court of Human Rights, acting on Prosecutor El Masri's lawsuit for inhuman and degrading conduct, violation of the right to liberty and security, privacy and family life, freedom of expression and right to a fair trial, charged our country and awarded EUR 60,000 in damages.

⁸<http://sky.com.mk/blog/2018/03/19/potresno-svedoshtvo-ja-voznemiri-makedonija-ona-shto-go->

Police abuses also affect citizens' confidence in the police system, and this problem "involves two aspects: first, the prevention of ill-treatment and torture by persons whose freedom of movement is restricted by the Macedonian police, and second, the fight against impunity."⁹ In security theory, they develop paradigms and doctrines that contribute to the development of human security as a concept of great importance for the development of human rights. "under the supervision and security measures understands and supports that mission."¹⁰

The final result of the harmonization process is the realization of the Europeanization of the area of human freedoms and rights and the establishment of the rule of law, not only in a declarative sense, but also in fact. This approach is a guarantee of the democratic development of society, because "democracy cannot function without the rule of law."¹¹

1. Natural - legal character of human freedoms and rights

The value system of rights, among other things, is characterized by numerous directions and elements of human consciousness and at the same time it is a reflection of the concrete reality, the reality with which man is surrounded. By

increasing differentiation in the normative system and expanding the range of interest, values become more abstract in order to encompass as many and varied contents as possible, even at the cost of making those values even more vague.¹² Everyday interaction between people, as the value expressed through the notion of cooperation, will signify continuity (as opposed to conflict) in development or freedom as the value expressed through the limitlessness of human creative potentials (as opposed to the dependency-independence) and thus the legitimacy of the system, through its daily adaptation to social flows. and tendencies, will not be questioned.¹³

As with freedom, natural human rights could be explained more as an essence of law itself than as values that are protected by law. They are not "recognized" by law, but right "recognized" as right insofar as they determine its content: legitimate is only a right that starts from the respect and full protection of human natural rights.¹⁴

The national conception in relation to natural law in the second half of the 20th century emphasized respect and protection of human freedoms and natural rights as a categorical imperative of the modern state.¹⁵ The idea of natural law in medieval philosophical thought, developed under the auspices of the church, has religious connotations (*ius divinum*) and manifests

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⁹ Krstevska K., Impunity Management - Standards of the European Committee for the Prevention of Torture and the State of Macedonia, European Standards for Human Rights and Their Implementation in the Legal System of the Republic of Macedonia, Proceedings of the Scientific Debate, Skopje 2008, p. 409.

¹⁰ Masleša R., Intelligence Theories, Hrestomatija, Sarajevo, 2010, p. 47.

¹¹ Vasovic V., Contemporary Democracies I, Belgrade, 2006, p. 73.

¹² Pusić E., Social Regulation, Zagreb, 1989, p. 198. (in this context, the author states that there are values-standards, that is, such value terms, which,

from the very beginning, even with the conscious intention of those who create them, do not have specific content, but simply denote only a positive evaluation of a particular behavior, that is, a certain attitude no matter what the content refers to).

¹³ Bajaldzhiev D., The notion of value - general and for some legal values, Proceedings: European Integration - Ideas, Statutes, Realization, University of Sv. Cyril and Methodius, Faculty of Law, "Justinian First", Skopje, 2002, p. 40.

¹⁴ Kambovski V., Philosophy of Law, Skopje, 2010, p. 235.

¹⁵ Perovic S., Freedom and Natural Law, Legal Life, Thematic Number: Law and Freedom, Volume 1, 2007/9, LVIII.

itself as an emanation of the will of God, which commands to do good while avoiding evil (*bonum faciendum, malum evitandum*). Natural law *kaolumen intellectus* is a gift of God, with the help of which man learns what should and what should not be done. If positive law is not harmonized with natural law, then it has no property of law, but an expression of force, naked power and arbitrariness (*legis corruption*).¹⁶

According to positive law theory, a person is born with certain freedoms and rights, which correspond to human nature: freedom of thought and belief, right to liberty, right to life, right to happiness, right to personal dignity, right to security, right to property, etc.¹⁷ The modern conception of human rights is only a simple declaration unless respect for the natural rights of man is ensured, bearing in mind that the norms relating to the natural rights of man are first and foremost incorporated in international law and the legal regime gradually it becomes part of the national system and expresses the relationship of the national and the supranational.

It is indisputable that every state at the national level is obliged to respect human freedoms and rights and to ensure their protection against harm and abuse, which includes the following: 1) Guaranteeing a unified, complete and indiscriminate treatment of freedoms and rights at the constitutional and legislative levels; 2) Subordination to international mechanisms of anti-national protection of fundamental freedoms and rights, through ratification of international human rights conventions and acceptance of the competences of international bodies and judicial instances; 3) Provision of internal legal mechanisms for the prevention of violations of human freedoms and rights (including an effective security and defense system, prevention of

corruption, efficient functioning of the Ombudsman, effective administration, etc.); and 4) Extending the powers of the courts to protect the integral and universal corpus of fundamental freedoms and rights.¹⁸

Knowledge and perseverance of the citizen as individual action on the one hand and public action as a collective action on the other are particularly effective instruments in cases where the flagrantly violates human freedoms and rights. This is because the police, as the executive body, are most afraid of informing the public about the injustice inflicted on the citizen and of his persistence in defending his own rights. This is why fear of government stimulates the violation of rights, not their protection. Conversely, the persistent struggle of the citizen against the violation of rights contributes to the fear of the citizen and the public.¹⁹

2. The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights - the source of European standards on human freedoms and rights

Every modern and civilized state is aware of the imperative character of the norms that recognize and guarantee the rights of all citizens under their jurisdiction. The roots of these guarantees and regulation are as old as the birth of modern democratic states, supplemented and enhanced by new developments in this direction.

The Program of Action and the Vienna Declaration, adopted at the 1993 World Conference on Human Rights, which, *inter alia*, establish that human rights and fundamental freedoms are the rights which

¹⁶Tadić Lj., *Philosophy of Law, Forward*, Zagreb, 1983.

¹⁷Zlatkova B., *cit. effort*, p. 491.

¹⁸Kambovski V., *cit. effort*, p. 131.

¹⁹Škarik S., *Constitutional Law, Second Book*, Skopje, 1995, p.223.

all human beings acquire by birth; their protection and promotion are the most important responsibility of governments.²⁰

”Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of life. In the context of the above, the promotion of the protection of human rights and fundamental freedoms at all national and international levels should be universally and unconditionally implemented.”²¹

The European Charter of Fundamental Rights is continually based on the Union's core value system of respect for national identity, a system of rule based on democratic principles and respect for fundamental rights. This is why assuming the so-called political conditionality upon accession to the EU, whose concept refers to the need to meet not only certain economic but also minimal political conditions, such as democratic institutions, the rule of law and respect for liberties and rights.²²

In its most complex form, European standards on fundamental freedoms and rights and their legal protection are enshrined in the 2009 EU Charter of Fundamental Rights, which amended the EU Treaty and the EU Functioning Agreement (the said Charter represents the Lisbon Reform Treaty, which entered into force of 2009, which amended the EU Treaty and the EU Functioning Agreement) The benefits of adopting the Charter of Fundamental Rights of the European Union

are numerous, but can be summarized in several points:

- Strengthening guarantees for the protection of human rights in the EU legal order, a condition which was not fulfilled before the adoption of the Charter on a legally binding act, in accordance with the Lisbon Treaty.
- The inclusion of the catalog of fundamental rights in the Lisbon Treaty will strengthen the visibility of the human rights guaranteed by the Union. Namely, the Charter does not aim to create new fundamental rights, but to make existing ones more visible and known in order to be more accessible and noticed by citizens.
- The Charter ensures consistent protection of rights and their smooth enjoyment in the European Union. At the same time, it codified existing rights, a process that resulted in the delimitation of the boundaries and spaces within which the discretionary powers of the European Court of Justice and the national courts of the Member States when acting in accordance with EU law or fundamental rights may extend.
- The Charter goes beyond the boundaries of EU internal policies and finds application on the international scene as well.²³

²⁰ Viena 14-25 June 1993. O.H. Document A / Conf.157 / 24 (Part 1) 20 (1993).

²¹http://amos.org.mk/building_local_capacities/me_gunarodni9.htm, 07/15/2018.

²²Taskovska D., Political Conditions for Membership in the European Union, Proceedings: European Integration - Ideas, Status, Realization, University of Sv. Cyril and Methodius, Faculty of Law, “Justinian the First,” Skpje, 2002, p. 432 (democracy, the rule of law and respect for liberties and rights are becoming a prerequisite for the lowest

forms of cooperation (so-called development aid) and with non-European countries that are not even potential candidates for EU member states. Article 130 of the Maastricht Treaty provides that EU policy in the field of development assistance, aims to consolidate democracy, the rule of law and respect for liberties and rights, with general objectives, and the Lome Convention contains similar provisions.

²³http://studiorum.org.mk/evrodijalog/16/pdf/Evro_dijalog_br_16_6_H-Runceva.pdf

3. Balance between human freedoms and rights and higher security interests

Modern democratic institutions face the challenge of ensuring that human rights and national security and defense interests are respected at the same time. How to achieve this goal? How to ensure that the needs of citizens in the domain of human freedoms and rights are met at the same time, and thus their need for security, on the one hand, but also the need of the state to achieve national security goals? These complex issues only confirm the need to study and analyze this problem, which is increasingly surfacing, in the face of increasingly evident actions by the international community, as well as by individual states in the fight against terrorism and other current threats to national security as a whole. Leaving these security areas briefly and moving into the field of psychology, we can try to explain this situation by explaining mental conflicts when conflicting motives occur in man, namely the conflict of dual attraction: this conflict in reality consists of the hesitation we will choose when we two motives are equally appealing. In these situations, a person may become hesitant and thus become conflicted. But at one point, one of the motives (goals) becomes more attractive and the subject decides on it.²⁴ This interesting explanation in the field of mental conflict, applied in an attempt to answer the above questions, reveals the basis of the problem: the state has a duty to guarantee human freedoms and rights and at the same time guarantee national security. Since the state is an institution, not a human organism, we cannot talk about motives, mental conflicts, but we can analogously determine that the conflict in the interests of human rights and security must be resolved within the framework of

European values, universal values, meta-legal categories and general (constitutional) clauses. A long time ago, Aristotle wrote that justice is good to which the state strives, which is of general use.²⁵ Otherwise, the legal order allows the state apparatus for higher security purposes to act contrary to the interests and goods of all citizens, as opposed to the public interest or the public good.²⁶ Therefore, in explaining this complex relationship, it is necessary to start with the notion of the public good, in the definition of which we have previously explained the term good. The public good is not any interest a group may have. It is a common interest of all individuals, which identifies them in a lasting way in one essential sense, so that it partly becomes constitutive of the very identity of the members of the community and may form the basis of longer-term solidarity. The public interest (public good) of an individual as a member of a political community, that is, citizens of a state, rather than as a member of another community, is to solve important problems from the aspect of justice.²⁷ The interests of the individuals constituting the community are not immediate and ad hoc interests, but long-term in their durability and therefore constitute a constitutive interest of the community. In this context, the demand for respect for liberties and human rights is at the same time a universal demand for justice that applies to all individuals in the country. There is no just community if it is riddled with the demand for a universal principle of justice and the demands that flow from the common life of citizens as members of the political community. Universal standards of justice must exist and be respected in order for moral reasons

²⁴Josifoski D., *Criminal Psychology*, Skopje, 1995, p. 193

²⁵Aristotle, *Politics*, Belgrade, 1970, p. 3, 84.

²⁶Bajaldzhiev D., *Introduction to Law*, Law, Faculty of Law Justinian First, Skopje, 1999, p. 411.

²⁷*Legal Life*, no. 12/1996, Skopje, p. 91.

to be respected by political institutions and the political system as a whole.²⁸

The existence of an imbalance between the interest in respect for human rights and security, defense, intelligence, counterintelligence, police interests undermines human dignity as a social and legal value.

4. Human rights, democracy and security

Human rights are exercised in a particular system of government, and in those with a democratic background. It is important to note that within the framework of different democratic systems, there is a different level of realization of human rights. In this context, Professor S. Skaric explains that they have a wider scope for development in a participatory framework than in a representative democracy. Participatory democracy affirms the personal sovereignty of the citizen, and the representative sovereignty of the representative. The first form of democracy is more acceptable to human rights because the citizen can be an active factor, with the real possibility of extending his influence to the extreme limits of the universal. Participatory democracy is a society with fully informed and involved citizens in the decision-making process. Within such a democracy, the citizen is more successful in resisting abuse of power and corruption as dishonest or unlawful acts in exchange for money or for personal gain. In contrast, representative democracy is a form of elite rule, because, in essence, the electoral

aristocracy does not accept the direct participation of the people in the exercise of power.²⁹ It is a long-lasting process of system maturation, and at the moment when they reach the level of development of democratic values in which human rights have a special place, the foundations of a democratic order that are bounded by right and legal norm are laid. An example of this connection in the relation of democracies - human rights is the creation and increase of the number of democracies in the world in the last two centuries: in the beginning of the XIX century there were 12 democratic countries, in the beginning of the XX century 36, and in the beginning of the last decade of the XX century there were 65 democratic countries.³⁰ After independence, a democratic political system is developing in our country, in which respect for human rights is guaranteed by the highest legal norms - constitutional norms, which are further a source of legal and other norms of the legal regime. areas, and especially for the purposes of the police procedure and beyond for the purposes of national security: Vasilkovski et al. v. Macedonia (A.28169 / 08) - Violation of Article 5 § 3 (right to liberty and security, legality of length of detention, release pending trial); Mitreski v. Macedonia (11621/09) - violation of Article 5 § 4 (lawfulness of arrest and detention, accusatory procedure); Lazaroski v. Macedonia - Violation of Article 5 § 2, Count v. (reasonable suspicion of a criminal offense); violation of Article 6 paragraph 1 (accusatory procedure), violation of Article 6 paragraph 1 (fair trial), etc.³¹ The violation of human

²⁸Mukoska - Činko V., cited paper, p. 172-173 (the unity and stability of the system are achieved by satisfying these universal standards of justice, so recognition of the rights of groups in the system should strengthen its unity and stability, not undermine it. A just state must not be based on partial value systems, but should represents a neutral framework for their realization in accordance with the concept of the common good of the state,

especially that it has a neutral institutional framework to protect value pluralism.

²⁹Škarić S., Macedonia on All Continents, Peace-Democracy-Geopolitics, Skopje, 2000, p. 286.

³⁰Huntington S., Democracy's third wave, Journal of Democracy, Vol. 2, N. 2, 1991 y.

³¹See more: Collection of European Court of Human Rights Reference Judgments in Relation to Article

rights confirmed in European judgments shows that it is necessary to develop mechanisms for democratization, first of all representatives of the authorities and institutions of government as a determinant of conscientious and European the application of the legal norm on the one hand, and on the other these and many other violations show that their evidence in the European Court of Justice has a repercussion on the perception of the democratic level of development of our country by the European Union, which has special competences in this field. We can undoubtedly point out that politicization has its negative impact on these processes, but only if it is in the function of narrow-minded party interests to maintain power. In such situations, the realization of human rights is largely questioned. There is no greater threat and risk to human rights in one country than a party sword that can very easily violate the fundamentality of a system (social, security, cultural, political, economic, informatics, etc.). This is also a basic condition for the existence and nurture of political pluralism and a sign of the democracy and maturity of society and its citizens. Only through developed democratic political pluralism and especially the holding of free, fair democratic elections is the legal and legitimate political power in the country constituted.

Conclusion

European integration is a strategic priority. It is inconceivable without the development and implementation of European human rights standards. The implementation process itself is time consuming and complex, in fact it is also a European concept of human rights. All the more so when there is a case where states show a strong declarative willingness to guarantee human rights on the one hand, but at the

same time very poor practical implementation forwarded by subtle methods of derogation. formulating security goals and interests. There is no magic formula that can easily and easily strike a balance between human rights and security interests. Why? Because this relationship can be seen as a relationship between the private sphere, protected by law, and international agreements (human rights), and the state sphere (public interest in uncompromising maintenance of security at national and global levels). Or, more specifically, it can be understood as the relationship between normative and factual, viewed through the dynamism of both goals, and equal access to liberties and rights on the one hand, and security on the other. The application of European standards enables the Europeanization of the Macedonian social system, and in this context, of national security institutions, interests and goals, bearing in mind that the European concept is based on fundamental human rights, democratic rule and institutions, as well as the rule of law. If these values are not respected, harmonious development and future are impeded.

3,5,6 and 8 of the European Convention on Human Rights, Skopje, 2012, p.176 et seq.