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THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

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Abstract

Since 1919, the recognition of children's rights has begun to find an international echo, when the League of Nations "came to life", the name of which links to the Geneva Declaration of 1924. Adopted in 1989, by the Convention on the Rights of the Child, the principle of the best interests of the child is still an imprecise, subjective notion if we consider its application, but so necessary, even in the absence of precise regulatory criteria.

Keywords: *best interests of the child, children`s rights, Geneva Declaration, Declaration on the Rights of the Child, Convention on the Rights of the Child (CRC).*

1. Introduction

„There is only the authority of love, the natural one, that we naturally have since birth, preserved only by love. Authority is not what I want to impose, but just what others recognize in me."[1]

In the absence of a legal definition, determining the notion of „best interests of the child" may present major difficulties. This happens because this notion can be defined differently, depending on the legal situation to which it refers, above all in family law[2] (separation from parents, adoption, deprivation of family environment), but also in relation to juvenile justice (separation from adults in detention, presence of parents at court hearings for penal matters involving a juvenile).

The Convention on the Rights of the Child (hereinafter CRC) does not simply expose a list of rights. Of course, the CRC is the enumeration of those rights to which the child is entitled, but for sure it is also much more than this. If we admit that, in the past, the Geneva Convention (1924) and the Declaration on the Rights of the Child (1959) considered the child as „an object in need of attention and protection"[3], however, since 1989, when the CRC was promulgated, the child has been understood to be a subject of rights. As a result, the CRC has become a reference document for the development of European child rights.

In this spirit, legal acts concerning children are followed, almost without exception, either by explicit references to the CRC or by implicit references in the form of references to the rights of the child, such as: the „best interests of the child" (article 3 – the best interests of the child as a primary consideration in all actions concerning children), the child's right to participate in

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[1] S. Baştovoi, *The price of love*, Cathisma, Bucharest, 2018, pp 80-81.

[2] See also C.-M. Crăciunescu, *The best interests of the child in in the exercise of parental authority exclusively by one of the parents, in Parental authority. Between greatness and decadence*, Solomon Publishing House, Bucharest, 2018, pp 3-25.

[3] See J. Zermatten, *The Best Interests of the Child. Literal Analysis, Function and Implementation*, Working Report, 2010, Institut International des Droit de l`Enfant, p. 2.

decisions that affect him (article 12) or the right to be protected against discrimination of any kind (article 2).

It is important to mention, among other things, the role of the European courts in interpreting and ensuring the respect for children's rights in Europe.

The Court of Justice of the European Union (hereinafter CJEU) referred to the fact that its decisions[4] have been grounded also on the general principles on the rights of the child, also incorporated into the CRC (such as the „best interests of the child" and the right to be listened), especially in the context of international kidnapping cases.

Unlike the CJEU, the European Court of Human Rights (hereinafter ECHR) has a rich jurisprudence on child rights. ECHR jurisprudence on family life recognizes interdependent rights such as the right to family life and the right of the child that his best interests have a higher priority. It recognizes that children's rights are sometimes contradictory. For example, the child's right to respect for family life can be limited to guaranteeing his superior interest. Furthermore, the Council of Europe has adopted various other instruments dealing with issues related to personal relationships, child custody and the exercise of children's rights.

Thus, in the Maslov case against Austria[5], the applicant had been convicted of several delinquencies during the minority period. The ECHR affirmed that the obligation to take into account the best interests of the child includes the obligation to facilitate its reintegration, in accordance with Article 40 of the CRC, as regards the expulsion measures against a juvenile delinquent. The ECHR has also received complaints from children about the impossibility of establishing the identity of their biological fathers. The ECHR has observed that establishing a legal relationship between a child and the alleged biological father goes into the sphere of private life. Thus, the authorities may have a positive obligation to intervene in the action to establish paternity, in the best interests of the child, when the legal representative of the child (in this case[6], the mother) was unable to represent the child properly, for example, because of a serious disability.

2. Meanings of the expression „the best interests of the child shall be a primary consideration". Rule of procedure and foundation for a particular, independent right

First of all, this concept was interpreted as a rule of procedure[7]. That means, whenever a decision is to be taken and that decision will affect a specific child or a group of children, the decision-making process must carefully consider both, positive and negative, impacts of the decision on the child or on the children concerned, and must give to this impact a primary consideration when weighing the different interests at stake.

On the other hand, this principle is nevertheless considered one of the foundations for a particular right. And is clearly that, seen like this, the principle represents the guarantee that it will be applied whenever a decision is to be taken concerning a child or a group of children.

In fact, no one really knows what are the best interests of a particular child. However, the principle of the best interests

[4] See CJEU, C-491/10 PPU, Joseba Andoni Aguirre Zarraga/Simone Pelz, 22.12.2010.
[5] See ECHR, Case Maslov/Austria, no. 1638/0323, 23.06.2008.
[6] See ECHR, Case A.M.M./Romania, no. 2151/10, 14.02.2012, points 58-65.
[7] See J. Zermatten, *op. cit.*, p. 7.

of the child must respect what the Committee on the Rights of the Child established[8] in the General Comment no. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment:

«26. When the Committee on the Rights of the Child has raised eliminating corporal punishment with certain States during the examination of their reports, governmental representatives have sometimes suggested that some level of „reasonable" or „moderate" corporal punishment can be justified as in the „best interests" of the child. The Committee has identified, as an important general principle, the Convention's requirement that the best interests of the child should be a primary consideration in all actions concerning children (art. 3, para. 1). The Convention also asserts, in article 18, that the best interests of the child will be parents' basic concern. But interpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's human dignity and right to physical integrity.»[9]

So, this principle must respect the importance of every child as a human being in development, an individual with opinions, all that seen in the global spirit of the CRC, with an interpretation that could not deny other rights of the CRC (for example, the right to protection against harmful traditional practices and corporal punishment).

„Best" and „interests", as a whole, mean that the final goal should and must be the well-being of the child, as defined through the Convention, especially in the Preamble and in the Article 3 of the CRC (paragraphs 2 and 3).

Moreover, as an author has observed[10], there is a subtle, but highly relevant nuance in the second part of the expression of this principle („shall be a primary consideration"). We clearly see that a literal analysis reveals us that this text refers to „*a* primary consideration" and not to „*the* primary consideration". That means, indeed, that this terminology implies that the best interests of the child will not always be the single, overriding interest and that there may be other competing interests at stake.

However, in accordance with the opinion expressed by the same author[11], in at least two particular situations, the drafters of international human rights instruments have used „*the*" when referring to the paramountcy of the best interests of the child:

- Article 21 of the CRC: „States parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration (…)";

and

- Article 23 (2) of the UN Convention on the Rights of Persons with Disabilities: „States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases *the* best

[8] Geneva, 15 May-2 June 2006.
[9] See *https://resourcecentre.savethechildren.net/node/10263/pdf/gc8.pdf*.
[10] See J. Zermatten, *op. cit.*, p. 11.
[11] *Idem*, p. 12.

interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities."

In these cases, the best interests of the child become the sole determining factor when considering a solution, or, „in certain circumstances, such an adoption or for children living with disabilities, the higher standard is applicable".[12]

3. „Best interests of the child" in other articles of the CRC

This expression is also included in a number of other articles of the CRC[13], as a reference point that must be considered in particular situations.

Article 9 of the CRC put the principle promulgated by Article 3 of CRC in relation to the right of the child to live with his parents, also referring to the rule that the child must maintain personal relationships and direct contact with both parents, unless this threatens the best interests of the child (situations that include an open conflict between the child and one or both parents, or the cases when a child and his parents may become separated as a result of an official decision, necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence, but only when such a decision takes into account the best interests of the child).

Article 18 establishes the principle according to which the two parents must be involved with the education of the child; this is called the common responsibility for education.

Article 20 of the CRC provides that the child who is deprived, temporarily or permanently, of his family environment or in whose own best interests cannot be allowed to remain in that environment shall be entitled to special protection and assistance provided by the State. States Parties, in accordance with their national laws, shall ensure alternative care (*inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children for such a child).

According to the article 21 of the CRC, „States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary; (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; (e) Promote, where appropriate, the

[12] See G. Van Bueren, *Pushing and pulling in different directions – The best interests of the child and the margin of appreciation of States, in Child Rights in Europe*, Council of Europe, 2007, p. 32.
[13] See https://www.ohchr.org/documents/professionalinterest/crc.pdf.

objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs."

Article 37 of the CRC looks at general principles which should govern the administration of juvenile justice[14], in particular the exclusion of torture, punishments or inhuman treatments and the prohibition of capital punishment. Also this article impose that the child be treated with humanity and, if the child is deprived of freedom, he must be detained separately from adults, except if the opposite proved to be preferable for the best interests of the child (this might be the case if the child is imprisoned with one of his parents or a mother who gives birth while she is confined).

As a conclusion, we observe that the principle of the best interests of the child is a general principle which must be applied in all activities related to implementation of the entire CRC.

4. „Best interests of the child" – roles and fields of application

The concept of the best interest of the child, such as it is defined by the CRC, but also for example in the Convention of the Hague on international adoption, was seen as a concept that has two „traditional" roles, one that seeks to control and one that finds solutions (criterion of control and criterion of solution[15]).

Control criterion means that the best interest of the child is applied to oversee that the exercice of rights and the obligations towards children be correctly carried out, fulfilled. It is the entire field of child protection that is concerned with this aspect of control (family law, child protection services, situations of alternative care and cases of migration).

Regardind the solution criterion, the concept of the interest of the child itself must intervene to help the people that need to make the right decisions for children. The solution chosen should be selected because it is in the interest of the child. It is an essential bridge between the right, the theoretical concept, and the reality.

Many attempts have already been made to specify, supplement and to „objectify" the concept of the best interests of the child.

For example, in Canada, the draft amendment to the „Divorce Act" which wishes that the child's interests be judged according to elements'[16]:

1. the nature, the stability and the intensity of the relationship between the child and each person concerned with the procedure;
2. the nature, the stability and the intensity of the relationship between the child and other members of the family where the child resides or implicated in the care or the child's education;
3. the child's leisure activities;
4. the capacity of each person to offer a framework for life, education and all care for the child;
5. the child's cultural and religious bonds;
6. the importance and advantages of joint parental authority, ensuring the active

[14] See also Article 40, as a continuation of the Article 37.
[15] See P. Pichonnaz, Le bien de l'enfant et les secondes familles (familles recomposées), in Le Bien de l'enfant, Verlag Ruegger, Zürich/Chur, 2003, p. 163; H. Fulchiron, De l'intérêt de l'enfant aux droits de l'enfant in Une Convention, plusieurs regards. Les droits de l'enfant entre théorie et pratique, IDE, Sion, 1997, p. 30 and following.
[16] N. Bala, *The best interests of the child in post-modern Era: a central but paradoxical Concept*, in Law Society of Upper Canada, Special Lectures, 2001, quoted by J. Zermatten, *op. cit.*, pp. 18-19.

involvement of the two parents after separation;
7. the importance of the relationship between the child and his/her grandparents or other members of the family;
8. the proposals of the parents;
9. the capacity of the child to adapt him/herself to the parent's views;
10. the capacity of the parents to facilitate and ensure the maintenance of the child's relationships with other members of the family;
11. all previous incidents showing violence by a relative towards the child;
12. the exclusion of preference shown to one parent because of their sex;
13. the demonstrated willingness of each parent to take part in educational meetings;
14. any other factor that could influence decision-making.

As we can see, it is a long list that is not exhaustive and the 14 elements are not hierarchically ordered. These points remain to be examined largely open „and consequently only have a relative influence, as well they allow for a more concrete approach and offer a working method to better comprehend, *in casu*, the interests of the child"[17].

Other countries have taken identical steps. A particular product of the Anglo-Saxon legal system, an attempt to objectivize the concept, England's „Children Act" of 1984 provides that the judge must take into account[18]:

- the views of the child;
- his/her physical, emotional, educational needs;
- the effect of change on the child;
- his/her age, sex and personality;
- the pains which he/she has already suffered or could suffer;
- the ability of each of the child's parents to meet the child's needs.

5. Conclusions

It is very important that any cause involving a child can find a solution best suited to the best interests of the child, so that his development will not suffer. It is also clear that the child must be heard, so the decision maker in question has an obligation to hear if the child is able to form and communicate his views if the case affects him.

Nevertheless, it is evident that the principle of the best interests of the child is one of the most important of the CRC, but, in the same time, it is the most difficult to explain.

We need to clarify this concept; we cannot deal only with the assumption that everyone is acting in the best interests of the child. If we do not clarify, it is possible to risk that this principle be emptied of content, legislative and social reality.

Also, we must consider another aspect: the potential impact on children of relevant legislation. Therefore, the State parties to the CRC have an obligation to take seriously their commitments.

And, above all, maybe it is the perfect time to keep in our minds the fact that, in the absence of the „authority of love", this principle and for sure the whole mechanism that turns the wheels of his profound understanding will become meaningless.

[17] See J. Zermatten, *op. cit.*, p. 19.
[18] Children Act, quoted by the Canada Justice Department (website: http://Canada.justicde.gc.ca), entry Child and Custody Access.

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FROM INTANGIBLE ASSETS TO INTELLECTUAL PROPERTY: DELINEATING THE INTELLECTUAL PROPERTY COMMERCIALIZATION FROM THE LEGAL PERSPECTIVE

Osman Bugra BEYDOGAN[*]

Abstract

The economic attribute of intangibles in the contemporary world is of inarguable significance. Correspondingly, intellectual property rights present the most value-intense, and the most refined, element of the intangible capital. This attribute is largely owed to the legal recognition to which they are subject, as distinct from the other sorts of information assets that are also of economic value. The said legal recognition intrinsically entails a strong protection and enforcement of the rights as well as a transactional value to the rights. Intellectual property rights thus became the most significant corporate assets and their quiddity has notably evolved into a commercial nature. Meanwhile, on the legal basis, the principal theories regarding the rights over intangibles have been historically pertained to individualist approaches as opposed to the -evolved- commercial nature by which these rights are today identified. In addition, the classification among intellectual capital elements themselves are more subtle than ever in connection to the immense growth of knowledge-based economies. On that note, throughout this study we strived to discuss the significance of intangibles in creating value, and relatedly, the position of intellectual property rights with reference to the legal identity they are backed up with. Secondly, we focused on the nature of said legal identity, more specifically through the concept of property rights in the classical sense; whether intellectual properties are qualified as properties within the conventional legal meaning. Finally, we sought to answer, respectively: why these rights are more mercantile -or commercial in nature- than the tangible assets; and what is the area depicted by the term 'commercialization' when it comes to the legal perception of intellectual property commercialization.

Keywords: *intellectual property, commercialization of IP rights, intangible assets, commercial nature of IP, legal perception on IP commercialization.*

1. Introduction

When commercialization of intellectual property rights came under legal scrutiny, the economic aspects and business dynamics pertaining to this often fall out of the scope due to the very nature of the said kind of study. However, in order to interpret and create IP legislations, the knowledge of multidisciplinary angles that form the overall characteristics of intellectual property is a prerequisite. In dealing with this prerequisite, we build upon the stance that the intangibles, unlike tangible capitals, are the essential and perpetual source of value in view of the fact that they are inexhaustible. Clearly however, not every intangible encapsulates the same intensity of value, in this way, the term "intangibles" in itself is too ambiguous to create an intellectual property legislation around. Therefore, it is necessary to establish the position of intellectual property rights among intangibles. In this connection, we

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are going to emphasize that, besides other features, one major determinant to differentiate the intellectual property rights from the other sorts of knowledge assets is the legal identity that the former is provided with by the IP laws. Correspondingly, we argue that this identity is not quite reflective of a classical sense of proprietary rights despite being called so. It rather exhibits *sui generis* characteristics. In view of the value embedded in them and that of the property-right-like legal identity they are backed up with, IP rights not only enable the controlling of the dissemination of value, thus creating a competitive advantage, but they also form a sort of currency to the extent that they have transactional power. All considered, we purport IP rights are the subject of business and commerce but have very little to do with individuals, regardless of the fact that they are, in essence, created by individuals. This reveals, first, that in most instances intellectual properties are manufactured for commercial purposes, therefore they are purposively and intrinsically subjected to commerce. Secondly, even if not initially created for commercial purposes, the monopolistic and exclusionary effect of intellectual property rights confers certain commercial value, at least to the extent that it prevents the others from exploiting the incorporating intellectual property (i.e. inventions, trademarks, designs, literary and artistic works) for commercial purposes.

Having taken this wide array of economic and commercial connotations into the equation, we suggest IP rights encapsulate both static (potential) and kinetic (dynamic) commercial importance. Frankly however, not every step of the commercialization continuum is identified as, or results from a legal matter; even if it is a legal matter, it does not necessarily always fall in the domain of intellectual property law. The wide continuum of commercialization also entails pure business industrial aspects which do not clearly interest the focus area of IP laws. Consequently, the legal aspects of intellectual property commercialization tend to blend in with (or melt into) the broad definition of commercialization. Having argued that commercialization of IP rights has to refer to more than just squeezing out some money from one`s ideas, we attempt to define the scope of intellectual property commercialization for the purposes of legal scrutiny and from a legal perspective, to which we tend to ascribe a two-layer meaning.

2. Intangibles as the Fundament of Creating Value

At the North end of the world where nature is not particularly generous in giving out to its inhabitants the building materials, igloos (also known as snow house, snow hut) came to rescue of humankind and became the ultimate way of survival against blizzards and brutal winter conditions. As the snow blocks act like good insulators, the interior temperature could be kept at survivable level with body warmth only. Hence, igloos proved efficient in counteracting cold. Nevertheless, as the raw material of these shelters, namely snow, is fairly delicate and at the end of the day this makes the shelter quite fugacious especially when the temperature alterations towards positive occur. Further, the humidity created inside the shelter by the human respiration will form a thin layer of ice on the inner face of walls, as a result of which the whole insulation function will be impaired. In a nutshell, the life of the shelter, in the best scenario, is unlikely to exceed several weeks. In the wake of such a prospect, it is probable that a question is aptly posed: whether an already-built igloo or the constructional knowledge as to the making

of it is more valuable? In most instances, the answer would conceivably be the latter.

Regarding the value, the appearance of which in the above example is a snow house, there is the one-time value on one hand and a perpetual source of value on the other. This simple and rather primitive analogy is however viable in most cases where the value of intangibles and physical substance compete, especially at business level as we sought to discuss later.

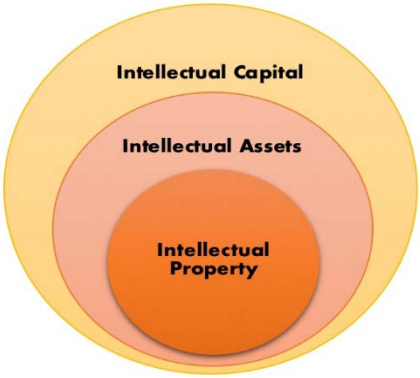
With that being said, in an attempt to perceive the power of intangibles within the frame of value creation, pinning down true characteristics of the intangible in question likely be vital. To this end, an often-overlooked nuance between information and knowledge has primarily to be taken into consideration. *Information* pertains to facts provided or learned by something or someone mostly in the form of raw data, whereas *knowledge* features a subset of information and pertains to information and skills acquired with the help of education, experience, etc.[1] In a scrutiny of the power of intangibles and their evolution into intellectual properties, we believe, taking "knowledge assets" in a broader sense and "intellectual assets" in a relatively narrow sense as reference points, rather than "information assets", is plausible. This is mainly because intangibles, at least those which are eligible for intellectual property quality, are seldom in the form of raw information -the value of which is arguable-, but they are rather compounds of information, skills and experience. Moreover, the latter postulate is also consistent with the creation of literary and artistic works which has a lot to do with skills and experience.

However, given the advancements in information technologies, science and with the world immensely digitalized in various realms, the conception of intangibles *inter se* embodies more ambiguity than ever. With this being the case, the hierarchical connection between intellectual capital, intellectual asset and intellectual property should necessarily be demonstrated. Intellectual capital, among others, forms the broadest term including the knowledge, information as well as intangible factors of other sorts. As Poltorak & Lerner put it, intellectual capital is what an enterprise is left with after all of its tangible assets has been stripped off.[2] Accordingly, the total sum of knowledge in an enterprise including those possessed by the employees and existing information, regardless of their value, will collectively constitute the intellectual capital of the entity in question. Intellectual assets, on the other hand, present a subset of intellectual capital factors that are identified, captured, and documented so that they are enabled for access.[3] In addition, it is necessary to note that the knowledge assets, of which we previously made mention, may more conveniently be deemed a part of intellectual assets insofar as they are cleared of trivial information and as they are subject to inter-organization sharing and transfer. In the same vein, knowledge assets could be adequately described as a set of knowledge that has a present or future value possessed by an individual enterprise.[4] Finally the narrowest and most valuable subset of this intangible chain consists of intellectual

[1] Ian Lurie, *Information is free. Knowledge is not*, this document is available online at https://www.portent.com/blog/random/information-is-free-knowledge-is-not.htm, (last access: 14.05.2020).
[2] Alexander Poltorak, Paul Lerner, *Essentials of Intellectual Property: Law, Economics and Strategy*, Second Edition, John Wiley & Sons Publishing, New Jersey, 2011, p. xxvi.
[3] *Ibidem.*
[4] This description has been based on and put forward in the light of "information asset" definition of Arena & Carreras suggested in Cristopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing, New York, 2008, p. 42.

properties which also delineate our main domain of scrutiny. This category of intangibles differentiated from the broader sense of intellectual assets by the legal protection attributed to them under applicable laws.

Although intangibles of any hierarchical level are pertinent to value creation thus greatly important to business, it is suggested that the aim concerning intangibles is often to convert them into a more valuable subsequent subset of intangibles, consequently to generate intellectual property out of intellectual capital.[5] Accordingly, the value created by intangibles gradually increases in every subset as moved from the edge of the circle to the center. Through this flow, value creation normally occurs in each and every level. The magnitude and intensity of the value created will inherently vary depending on the level it is created at. Nevertheless,



value in most cases will be determined by domestic and global market forces over the time. As such, sometimes relational databases, for instance, may be of more significant value than a computer software with a limited area of use.[6]

With the significant shift of the economic tendency from a product-driven one to a knowledge-based one, not only are intangibles *per se* of tremendous value but they are also the very foundation of value. Monetary and tangible assets (i.e. hard assets), in a way, serve as auxiliary factors to reify the intangibles into profit-generating goods and services. Accordingly, they are used to make, use and sell products and services based on intellectual property.[7] In this sense, intangible assets function as a bridge between hard assets and intellectual properties.[8] It is necessary, however, to note that despite financial capitals being less important than social and human capital for achieving, and especially for sustaining, a competitive advantage -as a sort of emergence of value-, they are often crucial for acquiring or establishing the resources that are needed to exploit opportunities[9], especially when rather traditional businesses are at issue.

Putting their significance in conjunction with corporate elements aside, the very nature of intangibles is apt to portray a perpetual foundation of value. In the most simplified fashion, this may be said to stem from following qualities:

I. Knowledge, unlike material assets, resides in the human brain. Thus, the value attributed to it is not owed to a

[5] Alexander Poltorak, Paul Lerner, *Essentials of Intellectual Property: Law, Economics and Strategy*, Second Edition, John Wiley & Sons Publishing, New Jersey, 2011, pp. xxviii.
[6] Cristopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing, New York, 2008, p. 42.
[7] Russell Parr, *Intellectual Property; Valuation, Exploitation, and Infringement Damages*, 5th Edition, John Wiley & Sons, New Jersey, 2018, p. 40.
[8] *Ibidem.*
[9] Michael Hitt, Duane Ireland, David Sirmon, Cheryl Trahms, *Creating Value for Individuals, Organizations, and Society*, published in "Academy of Management Perspectives", Vol. 25, no. 2, pp. 57-75.

physical substance. As long as the mental capacity of humankind exists, so does the knowledge that is of value.

II. Owing to the lack of physical substance, intangibles are excluded from exhaustion. Hence, knowledge cannot run out due to overwhelming use.
III. They are easily transformed, modified, built upon and compounded with other knowledge without requiring substantial investments. Also, new knowledge may make a near obsolete technology current.[10] This makes intangible assets cumulatively valuable.
IV. It is also knowledge that can yield tangible property so long as the materials are available.
V. The worth of all goods and services produced based on certain knowledge holistically are embedded in the value of the original knowledge. Therefore, it is pointedly more value-intense than the products -including the services- generated.

As a result of these traits, knowledge and intangible asset-based businesses can create much more wealth than traditional financial assets-based businesses, because outgoings which are costs in traditional businesses turn into investments in knowledge businesses and create future revenue- generating assets.[11]

On the other hand, the value created does not necessarily accrue only to businesses but it may also cater to customers and, in a wider perspective, to the society. Accordingly, it is possible to behold the value created by the medium of intangibles both on the micro and macro level. As regards to performance on the micro level, such elements of intangible capitals as brand value, management skills, reputation, intellectual properties along with know-how, R&D activities, inter-organizational relations, process quality etc. collectively figure an indicator for the creative and innovative strength as well as potential of a given business, therefore, determine its market value[12] possibly greater than its book value. Meanwhile, products and services as well as customer relations quality of which have been enhanced with the help of said intangible capitals, eventually resulting in satisfaction, will form the benefit of customers from the value created.

Where the value creation at the macro level is concerned, knowledge-based industries and businesses have their significant impact on fostering innovation and competition which, in turn, leads to employment, improvement in gross national product -inasmuch as they are more wealth-intense than conventional businesses and industries- and results in a greater per-capita income.[13] Also, intellectual properties often figure a concrete policy tool for the governments, through which they seek to shape economic and at some instances social dynamics in the global market which is more knowledge-based now than ever. The recent joint analysis report[14] disclosed by the European Patent Office (EPO) and the

[10] Cristopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing, New York, 2008, p. 56.
[11] Daum Juergen, *Intangible Assets and Value Creation*, Wiley, West Sussex, 2003, pp. 6.
[12] Annette Kur, Thomas Dreier, *European Intellectual Property Law; Text, Cases and Materials*, Cheltenham – Massachusetts 2013, p. 9.
[13] *Ibidem.*
[14] *Intellectual property rights intensive industries and economic performance in the European Union, Industry-Level Analysis Report*, October 2016, this document is available online at https://euipo.europa.eu/tunnel-

European Union Intellectual Property Office (EUIPO) pertaining to economic performance of IP rights intensive industries in the EU mirrors a stream of macro impacts and economic contribution of knowledge-based industries.[15] Accordingly; IPR-intensive industries are shown to have generated 27.8% of all jobs in the EU during the period 2011-2013. When indirect jobs are taken into account, the total share of IPR dependent jobs rises to comprise 38.1% of all jobs. The worth of economic activities conducted by IPR-intensive industries amounted to 42,3% of EU GDP.

In the same vein, U.S. Patent and Trademark Office (USPTO) reported that, in 2014, IP-intense businesses figured 38.2% of total U.S. GDP, meanwhile supporting 45.5 million jobs that amounted to 30% of all employment.[16]

As far as intangibles present the foundation of creating value in variety of realms and on distinct levels, intellectual property rights constitute the most advanced and legally institutionalized reflection of intangibles.

3. Intellectual Properties Through the Lens of the Concept of Property

Historically, intellectual property rights have often been explained and justified through the theories of material (or classical) property. In this way, they are extensively modeled after property rights in tangible goods.[17] Indeed, the rights of both types veritably present similarities. Accordingly, the former one establishes the rights over the physical goods pertaining to the determination of its use, whereas the latter vests the same authority in its owner, in the context of intangibles. Therefore, just like it is the case in classical property, intellectual properties can be bought, sold, assigned and put up as collateral and inherited. This is where IP rights approximate material property rights the most. In this fashion, physical attribution, or dependency on a material substance, seems to be the distinction between the two types of rights. This is unlikely to be falsified. As is well known, intellectual properties are shaped by the intellectual capacity and creativity, and outcome of these facilities in intangible and legally protectable form. They lack physical substance, thus do not have weight or height; they are odorless and tasteless[18], all in all, they are immaterial. However intellectual creations, in order to be the subject of IP rights, have to be expressed or externalized in a convenient medium. Depending on the type of the creation, this expression or externalization may be a composition of colors, a poem, a song, a packaging or a machinery prototype. Differently from classical property, however, intellectual properties exist independently from the medium they have been reified into; thus, they are subjected to a distinct legal regime than the material good they are embedded in.

web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/performance_in_the_European_Union/performance_in_the_European_Union_full.pdf, (last access: 12.05.2020).

[15] In the said report, IPR-intensive industries have been defined as the ones that have an above-average use of IPR per employee, in comparison to other IPR-using industries.

[16] USPTO, *Intellectual Property and the U.S. Economy: 2016 Update*, available online at https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf, (last access: 14.05.2020).

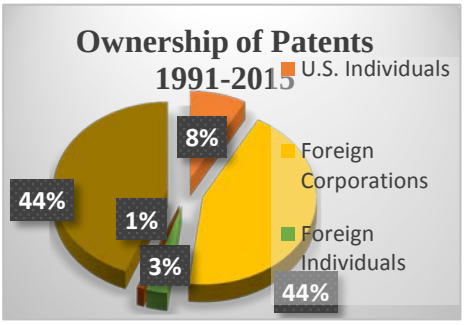
[17] Annette Kur, Thomas Dreier, *European Intellectual Property Law; Text, Cases and Materials*, Cheltenham – Massachusetts 2013, pp. 2.

[18] It is necessary, however, to note that the mediums through which the intellectual properties are externalized may have with, height, color, etc.

Another crucial divergence becomes apparent in the context of continuity of the rights. Property rights on material goods - save for the exceptions stemming from specific laws e.g. expropriation- are sustained as long as the owner retains the ownership intention. Thus, such property rights are not time-limited. Conversely, protection by intellectual property rights pertains to a definite time. Copyrights, for example, are protected for the lifetime of the author and another 50 years after the author`s death as pursuant to the Berne Convention.[19] Patents are granted for 20 years; designs are often protectable for 5 years and renewable 4 times, thus 25 years in total; meanwhile, utility models and trademarks enjoy protection of 10 years, which can be renewed indefinitely.[20]

In addition, the absolute exclusionary effect of classical property rights does not necessarily encompass the concept of intellectual property. In other words, IP rights, unlike material property rights, are concerned with striking an optimal balance property interest (exclusionary) and non-property (access) interest.[21] Said quality thus, underlies the rationale of definite time protection, and is also quite apposite to functions of IP rights on a macro level, as later discussed in connection with justification theories of IP rights. By limiting the exclusivities by time, this enables the opportunity to build upon previous knowledge thus preserves the intellectual productivity as well as the progress in sciences and arts.

At the end of the day, having regard to disharmonious features of the two concepts we strive to exhibit, the property metaphor may not always be feasible to explain the



notion of IP rights, and it is suggested that it may be even misleading.[22] With this being the case, it is necessary to bear in mind that IP rights have their unique characteristics, and without regarding them, the conventional understanding of proprietary rights is unlikely to suffice to elucidate this realm.[23]

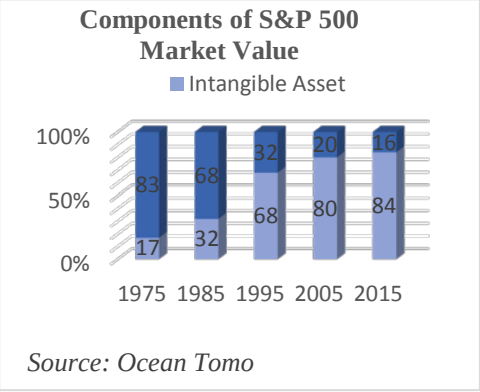
4. Why More Commercial Than Tangible Assets?

A possible answer to this question has its bearings in the cognition that we earlier strived to exhibit in the context of value creation, flowing from the fact that intangibles are the primary foundation of innovation not only on the micro level but

[19] Fifty years of protection after the lifetime of the author is set as a lower limit, meaning the signatory countries have flexibility to impose longer protection periods. In most cases, especially in the EU, protection is granted for the lifetime of the authors and an additional 70 years.
[20] Trademarks are maintainable indefinitely provided that the renewals take place in every 10th year, nevertheless, this requires an action, hence they are circumstantially indefinite rather than indefinite in nature.
[21] Annette Kur, Thomas Dreier, *European Intellectual Property Law; Text, Cases and Materials*, Cheltenham – Massachusetts 2013, p. 2.
[22] *Ibidem.*
[23] Sami Karahan, Cavit Suluk, Tahir Sarac, Temel Nal, *Fikri Mulkiyet Hukukunun Esaslari*, Seckin, Ankara, 2013, p. 4.

also in the wider perspective. Correspondingly, intellectual properties, with the protection they enjoy and with the legal regime they are subjected to, present a much more significant impact in this in comparison to intangible assets in a broader sense. As Arena and Carreras articulate: if knowledge is the basis of value creation in today`s economy, then intellectual property is one of its primary currencies and the means of extracting that value.[24]

Nevertheless, it cannot be overstated that the archaic theories striving to justify and pin down the rationale of intellectual property rights, as we will touch upon through this study, have been largely based on individual artistic and inventive activities



Source: Ocean Tomo

and often on their flourishing impact on artistic and scientific progress. A more down to earth perception -or actuality- of intellectual properties, however, indicates the fact that they are rather business tools in the micro, and policy tools on the macro level than a sophisticated fashion of rights given to individuals so as to award their intellectual and creative endeavors. Not to mention that the majority of creative works are today extensively business oriented, hence, carried out within organizational and institutionalized settings.

The above statistical data from the United States pertaining to patent ownership profile based on the patents granted between 1991-2015, demonstrated on the right,[25] turned out corroborative to this premise. Accordingly, 88% of patents granted within this period are owned by foreign and United States corporations, meaning, individuals remain as a minor stakeholder in terms of patents. This is the case for trademarks as well. Though trademarks, in principle, can be owned by individuals, due to their core function, they hardly associate with individual ownership.

As we pointed earlier, knowledge is an inexhaustible source of value creation, not exclusively but extensively at a business level. This is the case not only for IP-intensive businesses but also for rather traditional material-property oriented businesses. Take the example of Coca-Cola™, though the said company engages in rather conventional, non-IP-intense production, by the end of 2018, the price-to-book ratio has been realized as 11,04.[26] That means the current market value of the company is more than eleven times greater than its book value. This positive gap has been mostly created by the trademarks of the company. Regardless of whether it is traditional or IP-intense, businesses of various types today, somewhat, have to lean towards intellectual properties in so far as the wealth and the capitalization is extensively centered around intangibles.

[24] Cristopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing, New York, 2008.
[25] See. Russell Parr, *Intellectual Property; Valuation, Exploitation, and Infringement Damages*, 5th Edition, John Wiley & Sons, New Jersey, 2018, p. 26.
[26] Coca-Cola Co Price to Book Value on 31 December 2018
based on YCHARTS data; available at *https://ycharts.com/companies/KO/price_to_book_value*, (last access: 13.05.2020).

Approvingly, the study suggested that this tendency is increasingly continuous.[27] In this direction, intangible assets in 2015 comprised 84 percent of market value, leaving the hard assets far behind at the rate of 16 percent *(See the chart above)*.

Hence, those without access to intellectual property will stagnate for a while in low-profit commodity businesses and eventually fade out of existence.[28] This is also inevitable taking into account the fact that the value emerges not only from the possession of the knowledge but arises more significantly from the exclusion of the others. The power of intellectual properties, correspondingly, resides in the fact that they are the major instruments through which the rights holders are able to control the dissemination of the knowledge and the value. In terms of intellectual assets -in which IP rights are embedded-, the question "who owns the knowledge" is of explicit importance. What is more important however is the question of "who is deprived of the knowledge". Competitive strength and value arise rather from whom the information is concealed from than who possesses it, namely monopoly.

Most evident, and perhaps the ultimate, way of successfully remaining competitive in business resides in opening up to new markets and keeping up with demands in it, in the meantime offering as broad a product range as possible. Nevertheless, as we are to detail throughout this study, the execution of these strategies will often amount to substantial investments, thus to costs, meanwhile still accommodating serious risks. This very point is also where intellectual properties serve as the most efficient business tools. Companies are seeking to expand product lines, increase market share, minimize new product development costs, expand market opportunities internationally, and reduce business risks. Companies are also seeking to create corporate value for investors. All of this is accomplished by exploiting patents, trademarks, trade secrets, and copyrights.[29] In the simplest example, companies desiring to enter new markets often resort to licensing their trademarks so as to get their products produced in the target market by another manufacturer or get their services provided by another provider that already exists in the target market, thus avoiding the investment in manufacturing and possibly distribution infrastructure in the targeted market. Various businesses also quite commonly form an IP-based enterprise and pool their relevant IP rights, mostly their patents, so as to easier generate more advanced or unprecedented products and which they would not be able to come up with on their own.

Finally, the proprietary characteristics of intellectual property rights is a big help for them to substitute the currency in the business sphere, or be the currency itself. Appropriately, by means of sales, leasing and collateral, they are interconvertible with monetary currency (transactional characteristic). Further, with the recent tendency, intellectual properties are gathered in the portfolios of intellectual property merchant banks, which establish an IP exchange market of sorts through which IP rights are even bought and sold by means of auctions.

[27] Ocean Tomo, *Intangible Assets Market Value Study 2017*, available online at http://www.oceantomo.com/intangible-asset-market-value-study, (last access: 13.05.2020).
[28] Russell Parr, *Intellectual Property; Valuation, Exploitation, and Infringement Damages*, 5th Edition, John Wiley & Sons, New Jersey, 2018, p. 5.
[29] *Ibidem.*

5. Delineating Commercialization

Commercializing is a means of extracting the value encapsulated in intellectual property rights, by linking them to products or processes.[30] As far as IP rights are concerned, commercialization is often perceived as squeezing money out of them or converting them into money. This postulate is partially relevant; converting them into money firstly, by manufacturing/offering and marketing the IP protected goods and services and secondly by selling the rights themselves are certain forms of commercializing. It is crucial, however, to note that the said aspects pertain respectively to trade of IP protected substance and the transactional feature of IP rights. Commercialization activities certainly involve making money from intellectual outcomes, though the activities with such orientation are more accurately be defined as monetization.

Conversely, commercialization consists of a greater area of activities, in a way forming a superset that covers a cluster of activities including monetization. Nearly any type of activity aimed at making a commercial use of the intellectual property in question may be roughly identified as commercialization. Thus, its scope may be defined as the process of bringing intellectual property to the market in order to be exploited.[31] WIPO, in its Guide on Intellectual Property Commercialization[32], defined its scope as *"a continuum of activities and actions that provide for the protection, management, evaluation, development and value-creation of ideas, inventions, and innovations to implement them in practice. Prototypes and implemented processes lead to the development of products and services by entrepreneurs, startups, existing companies as well as governments resulting in economic and societal benefits"*. Clearly adopting a broader concept of commercialization, emphasis has been put both on micro (or business) level and macro (social) level functions of IP rights. In this direction, attributing the concept of commercialization solely to monetizing is very likely to remain shallow, and it would not properly lead to merited scrutiny as to legal aspects of it.[33] Admittedly on the other hand, a great deal of the activities involved in the continuum of commercializing intellectual property rights may not have a direct contact with the realm of intellectual property law. Although intellectual property rights are existentially linked to the intellectual property laws under which they were granted, once they came into existence their management and exploitation is driven by the business strategies of the right-holder, whereby a wide array of choices and sub-elements such are those regarding manufacturing, marketing, competition etc. become determinant. Consequently, the term of intellectual property commercialization is often perceived to have fallen in the scope of business and economics than that of intellectual property law and that is even more so when the corporate aspects are at the stake.

[30] Cristopher Arena, Eduardo Carreras, *The Business of Intellectual Property*, Oxford Publishing House, New York, 2008, p. 59.

[31] European IPR Helpdesk, *Fact Sheet Commercialising Intellectual Property: Licence Agreements*, available online at https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Commercialising-IP-Licence-Agreements.pdf, (last access: 15.05.2020).

[32] United Nations Committee on Development and Intellectual Property (CDIP), *Guide on Intellectual Property (Ip) Commercialization*, available online at https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_16/cdip_16_inf_4.pdf, (last access: 15.05.2020).

[33] Quite contrary to this broad understanding of commercialization propounded in this document, respective paragraph of executive summary containing this definition starts with following postulate that clearly indicates the monetization: "Commercialization of intellectual property (IP Commercialization) is making money out of one's ideas."

Therefore, the highly commercial nature of intellectual property and rights attributed thereto tend to inhibit the possibility of setting a sharp divide between the legal and commercial aspects of intellectual property rights. As a matter of fact, it is *per se* arguable whether such a divide can possibly be drawn between those aspects. Furthermore, when the task is to identify the implications of intellectual property commercialization for the purposes of law and jurisprudence, this elusive divide represents a particular challenge. Last but not the least, it is also phonetically eccentric when the commercialization of the rights - which are in fact readily commercial in nature- is spoken off.

Having acknowledged the magnitude of the scope of the term of 'commerce' hence that of 'commercialization', intellectual property commercialization may nevertheless be somewhat identified in respect to those aspects that coincide the domain of intellectual property law.

6. Identifying the Concept of Intellectual Property Commercialization from the Legal Perspective

From the outset, the legal relations and status emerging from the commercialization continuum defines the borderlines of the legal perception of intellectual property commercialization. Clearly however this definition also indicates an ambiguously vast domain. Alternatively, the definition could be relatively narrowed down to 'the interface with intellectual property laws of the process of making intellectual property and IP rights a subject of commerce'.

In either case, no distinct and crystal-clear concept *prima facie* outstands. Nevertheless, these definitions maintain two potential connotations. Firstly, for a relation or a status involved in the intellectual property commercialization continuum it has to be of a prevalent legal nature. That is to say, pure commercial matters such as product development, manufacturing, business strategies, marketing choices etc. usually do not present any specific or direct province for intellectual property law. Secondly, with regards to the dissociation of intellectual property rights from the goods or services on which they are embodied, commercialization of intellectual property also entails two different facets. We shall roughly address these two aspects as (i) commercialization of intellectual property; (ii) commercialization of intellectual property rights and briefly describe these below.

Prior to that however, it is crucial for our purposes to elucidate the differential between the intellectual property (IP) and the intellectual property rights (IPRs). The former term (IP) refers to the outcome or product of the human intellect that is susceptible of intellectual property protection and is somehow externalized, meaning that it is not merely an abstract thought, idea or concept. From that view point, an invention, a work of art or a design appears to be the creative outcome of the human intellect, hence it should fall within the scope of the aforesaid term. The latter term (IPRs) on the other hand entails the exclusive rights that are granted by law to the proprietor of the rights in respect to their intellectual property. On that note, an invention, a work of art or a design will respectively be the subject of patent rights, copyright or design rights given that they conform with the substantive requirements and that -when necessary- the formal procedures are fulfilled.[34]

[34] The general principle in pursuant to Article 5(2) of Berne Convention is a formality-free protection for copyright. Further, under different jurisdictions, unregistered trademarks and designs may occasionally avail of intellectual property protection.

Although this divide does not necessarily always retain a vital importance; in fact, the use of intellectual property (IP) for intellectual property rights (IPRs) and vice-versa is often only a matter of preference and is intended to address the same phenomena, it nevertheless comes useful in exhibiting different facets of commercialization.

6.1. Commercialization of Intellectual Property (IP)

As was highlighted above, in the rudimentary sense intellectual property commercialization is perceived as the venture of making money from intellectual creations. Plausibly, the latter most commonly transpires by way of incorporating these creations -which are incidentally protected or protectable under intellectual property rights- onto goods and marketing them thus making profit. Likewise, a similar pattern may apply to services as far as the underlying intellectual outcome is susceptible to being provided as a service.

Therefore, with reference to the distinction we laid above, what is visibly commercialized through this a pattern is not the intellectual property rights as such but rather the intellectual property, more particularly the goods and services that correspond to (or embody or incorporate) the underlying intellectual property. Accordingly, the definition of intellectual property commercialization from a legal perspective that follows from this pattern may be: The exercise of intellectual property rights in the context of commerce, specifically by way of trading goods and providing services that incorporate the IP in question. Thereby the focus is said to be around the goods and services that incorporates the intellectual property. Evidently this shall lead to an immense area of activity, even more so once it is conceived that almost every fashion of goods or services that are commercially available embody at least one intellectual property and that the more technology gets involved in the products, the bigger the number of embedded intellectual properties gets. In the same vein, the legal aspects of commercialization shall cover the vast area of relations arising from the exercise and the breach of the commercial nature of exclusivities that are part of IP rights. These relations primarily pertain to manufacturing (the breach of which results in counterfeit products), imports and exports (parallel import cases being probably the largest battlefield over which international trade and IP rights clash) and distribution of the goods or services that embody the relevant IP rights. Insofar as each specific type of intellectual property right confers different exclusivities on its holder, the relations and disputes arising from their exercise and breach and correspondingly the actual scope of the legal aspects of intellectual property will inherently vary. Nevertheless, the definition and the breadth of legal aspects of intellectual property commercialization of this fashion may be confined to 'the legal relations and the disputes that are originating from the exercise and breach of intellectual property rights in the context of trade of goods and provision of services that incorporate intellectual property rights.'

6.2. Commercialization of Intellectual Property Rights (IPRs)

The second modality of intellectual property commercialization is largely constructed upon the transactional value of intellectual property rights. This follows that the value embedded in the intellectual property prerogatives also serves, as it were, as a corporate currency.

Accordingly, this manner of commercialization activities, which could also plausibly be addressed as IP right transactions, take the intellectual property rights as their subjects, instead of the goods or services on which IP rights embodied. In other words, this modality pertains to making profit from the intellectual property rights themselves rather than incorporating the IP protected substance into goods and services and commercially benefiting therefrom.

On an analogy, commercialization of IP rights amounts to a peculiar type of commerce, the subject commodity of which consists of intellectual property rights i.e. patent rights, design rights, trademarks, copyrights etc. Such transactions tend to take various forms, although these are not of limited number, the foremost types are briefly pinned down below:

I. IP rights assignment: IP assignment refers to the transactions that transfer the ownership (title) of IP rights such as patents, design rights, trademarks, copyright and related rights from their present owner (assignor) to another party (assignee); hence the latter becomes the new owner of the intellectual property right at stake. In a way, intellectual property assignment creates a legal impact that is equivalent to sales of IP rights insofar as it transfers the title from one party to another and is typically made in return for an agreed pecuniary consideration.

II. IP licensing: Connotes the agreements on the basis of which the IP right holder (licensor) authorizes a third party (licensee) to exploit the intellectual property for a limited time and on the agreed terms; and he/she in return receives the agreed consideration. The parties to the agreement enjoy a great deal of liberty in determining the scope of the license and it is not necessarily holistic. That is to say the authorization granted by the right holder may be limited to certain prerogatives among the bundle of rights covered by that particular IP right (such as right to reproduce the copyrighted material, or right to distribute); or the whole bundle of rights recognized for that specific type of intellectual property may be licensed.[35] Also, the limits to the scope of license may be set by other factors such as geographical limitations, field of use, right to sub-license etc. Furthermore, the consideration that is accorded to the licensor is not necessarily monetary; it might also be in the form of another commercial benefit, or quite often it is a cross license.

III. Franchising: Although franchising infers a business model, it has its roots in intellectual property licensing. The contractual settings of franchising are centered around the core business which is in possession of a cluster of intellectual property rights and seeks to expand (franchisor) and a third party (however typically a multiple number of third parties) who seeks to benefit from the said business model, good reputation and intellectual properties of the core business (franchisee). Accordingly, the franchisor authorizes the franchisee to use its intellectual properties, that emblematically being trademark, know-how and copyright; furthermore, it undertakes the duty of providing assistance and training as to the said business model, meanwhile retaining supervision and control over the performance of the franchisee. The franchisee on the other hand, gets under the duty of paying the franchisor

[35] With the exception of moral rights to literary and artistic works due to their non-economic quiddity.

the agreed consideration and providing the preset quality standards, while replicating the business model of the franchisor, in a way acting as an extension of the core business, building upon its well founded reputation, customer portfolio and intellectual property value.

IV. Joint ventures and Spin-offs: Joint ventures refer to the initiatives that are aimed at collaboratively bringing into the market, hence commercializing, the knowledge assets that are owned by different parties. Collaboration in this context may be organized contractually or by establishing a separate entity that is to undertake the collective project in question.[36] The main benefit to each participant is likely to be the allocation of the risk entailed and collective and accumulated benefit from the knowledge assets, that include intellectual property rights, that the collaborators bring into the joint venture. Accordingly, each party will be able to derive significant economic benefits from the commercialization existing intellectual properties of one another as well as from the intellectual properties that are resultant from the joint venture as such. The parties, having been able to avail themselves of the experience, expertise, technology and more importantly the intellectual properties of one another, will undoubtedly have a less costly and more rapid access to the end result/product.

Moreover, universities and research organizations are the fundamental sources of innovation technology and knowledge in general. Such intellectual outcomes and knowledge assets not only possess significant corresponding economic value but they also retain immense potential for the scientific, industrial and intellectual -likewise cultural- progress of the society. For that reason, the necessity of paving a way for transfer of knowledge from universities to industry and to the public becomes apparent. Spin-off is the mechanism that facilitates intellectual property commercialization in the said direction. It refers to a brand-new corporation that is created by the parent organization -which may be universities, research organizations or another corporation- so as to bring its innovation into the market. Thus, spin-offs serve as a mediator and an effective means of technology transfer between the research environment and industrial sector.[37]

V. Collateral function: Over the discussions above we have extensively referred to the economic and commercial value embedded in intangible assets in general and in intellectual property rights in particular. Value of the latter is captured, institutionalized, protected and enforced by intellectual property laws, to which they owe their very existence. Therefore, although the actual worth varies depending on the type of intellectual property right and on the intellectual property in question as such, the presence of certain value is objective. This follows that, once there is objective economic value attributed, they are susceptible to use as collateral

[36] Robert Goldscheider,, Alan Gordon eds., *Licensing best practices: Strategic, territorial, and technology issues*, John Wiley & Sons, New Jersey, 2006., p 212.

[37] European IPR Helpdesk Fact Sheet, *Commercialising Intellectual Property: Spin-offs*, available online at www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Commercialising-IP-Spin-offs.pdf, (last access: 15.05.2020).

to secure financing, typically under a lending agreement. Accordingly, on the occasion that intellectual property rights are used as collateral, the borrower promises the rights of his intellectual property -such as a patent, trademark, copyright, or design rights- if he/she fails to repay his loan.[38] This connotes a capitalization of the potential and predictable value of intellectual property rights for commercial purposes, hence commercialization thereof. It is also observed that, although its full potential has yet to be realized, securitization of intellectual property rights tends to gain incremental importance as the global economies persistently grow closer to knowledge-based models.[39]

VI. Capital function: Founding capital of commercial entities such as limited liability companies and joint stock companies is not necessarily comprised only of cash capital but also *inter alia* in-kind capitals could be brought by the shareholder as capital contribution. Prerequisite for in-kind contribution to qualify as founding corporate asset is subsumed under the headers of economic value, negotiability (transmissibility) and monetizability. Capitalization of the objective value embedded in intellectual property rights, by the same token as in abovementioned collateral function, may also, depending on the jurisdiction, qualify in-kind capital in the context of commercial entities.[40] This evidently forms a method of commercialization of intellectual property rights through capitalization thereof.

7. Conclusion

In the light of the ground we strived to lay, it may be articulated that: knowledge is the main foundation of value; IP rights are the fixation or instrumentalization of value; whereas commercialization equates to the extraction of value. In a way knowledge encapsulates the existing and potential value and the wealth likewise, whereas tangibles no longer present the capital and wealth, quite contrarily they remain rather primitive in this equation.

Intellectual properties present the most advanced and possibly the most qualified form of intangible assets as they are backed up and institutionalized by the IP laws. In this sense, IP laws figure the set of principles through which a certain balance is intended to be struck. As much as IP rights are the source of monopolistic powers of the right-holder, they have a number of more sophisticated goals which often contrast the monopolistic interest of right-holders. Said -more sophisticated- objectives of IP laws are most apparent in macro level. In this context, monopoly IP rights built upon has to be limited in favor of artistic and inventive

[38] Brian Jacobs, *Using intellectual property to secure financing after the worst financial crisis since the Great Depression*, published in "Marquette Intellectual Property Law Review" vol. 15, 2011, p.451.

[39] Dov Solomon, Miriam Bitton, *Intellectual property securitization*, published in "Cardozo Arts & Entertainment Law Journal" vol.33, 2015, p. 127; *Ibidem*. p. 463.

[40] For instance, Turkish Commercial Code enounces intellectual property rights to qualify as an in-kind capital contribution. It reads as follows:
Article (127):
Unless otherwise is stated by law, the following may be contributed to commercial companies as capital:
(i) Cash, receivables, negotiable instruments and shares of capital companies,
(ii) *Intellectual property rights*, (emphasis added)
(iii) Movables and immovables of any kind,
(iv) Right of usufruct over movable and immovable property.

progress and of a fair accession to the knowledge and of competition. Limitations - of finiteness- of these rights, along with lacking physical substance, is the most marked point where they steer away from the proprietary concept, therefore IP right do not fully exhibit the characteristics of property rights in classical meaning.

Admittedly, in most instances, creative activities are hardly engaged in with the sole impetus of inventive or artistic pleasure but they are rather carried out on professional level, typically within a contractual relation. Naturally, the end products of these creative activities end up being a part of the aim of profit making, thus, more of a corporate subject anything else. In this connection, intellectual property rights are primarily business tools that subsist the main instrument to control the dissemination of the precious knowledge and the values created arduously, thus they are guarantors of competitive strengths of the businesses under the possession of which they remain. And they are of course key elements to implement various business strategies as specific regards to market accessions and mitigation of R&D costs. Further, intellectual property rights subsist the currency itself that is used in business and commerce owing to the capacity of being bought, sold and put as collateral. That may be called the transactional function of IP rights.

Finally, as far as commercializing these rights is concerned, the terminology of commercialization should be well defined. Although commercializing is often defined as making money out of them, this is only one component of a wider continuum. Hence, this continuum pertains to bringing intellectual properties into the market to be exploited[41] which certainly encapsulates their statutory and contractual legal aspects as well. Consequently, having put the legal aspects of intellectual property commercialization in main focus, the scope of the term should be perceived in two layers. Firstly, the commerce in goods and services that incorporate intellectual properties, hence come to interface with IP rights. Secondly, it connotes the legal vehicles of commercializing; (i) the sales or assignment of IP rights; (ii) other business contracts that do not alter the ownership of the intellectual property rights but are aimed at commercial exploitation thereof; principally but not exclusively, intellectual property licensing, franchising as well as commercial initiatives which entail legal transaction such as establishing joint ventures and spin-off companies; (iii) legal transactions in the center of which stands the transactional value (can also be referred to as negotiability, commodity value or currency aspect) of intellectual property rights, for instance, securitizing the external financial support by using the IP rights as collateral or bringing intellectual property rights into the companies as capital.

On the final note it may be maintained that although intellectual property and the rights attributed to them are majorly commercial in nature and their economic/commercial reverberations are occasionally more profound than legal ones, their existence is nevertheless inextricably dependent to IP laws that create the identity of intellectual property. Correspondingly commercial and legal aspects of intellectual property very frequently come into the scene simultaneously. Having accepted 'commercialization' as a large continuum that covers almost every step taken with a view to bring into commercial use or open up to public whatever being

[41] European IPR Helpdesk, Fact Sheet, *Commercialising Intellectual Property: Licence Agreements*, available online at https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Commercialising-IP-Licence-Agreements.pdf, (last access: 13.05.2020).

commercialized, corresponding legal aspects are, admittedly, ambiguously ample. Nevertheless, in the light of above discussion we tend to suggest intellectual property commercialization should not be perceived as narrow as mere act of making money from intellectual property, meanwhile as far as it is seen from the intellectual property law stand point it should also not entail the entire continuum that knowledge-based industries commence, especially those that pertain to pure business strategies and concerns and pure industrial matters even though various other legal status and relations might naturally emerge therefrom.

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THE VIDEO SURVEILLANCE MATTER IN THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE

Cornelia Beatrice Gabriela ENE-DINU[*]

Abstract

Nowadays, the personal data protection issue is becoming more and more prominent, both in the state institutions and in the private sector. The economic agents and public institutions are required to follow clear rules in what concerns the personal data processing both in terms of the employees and in terms of the individual requesting access to certain goods or services. However, how do we appreciate the concept of personal data protection when balanced with the protection of life, personal property or privacy? This question is becoming more and more present and the answer is absolutely required when we discuss about the video surveillance of living spaces, courtyards and common use space or private parking. Another sensitive aspect interferes when video surveillance involves an area of public space.

Keywords: *personal data protection, monitoring, protection of life, protection of property, video surveillance, legitimate interest, proportionality.*

1. Terminological matters

In terms of the personal data processing, the legitimate interest is the most flexible to the processing subject, but the choice of this subject should be appropriate and adjusted to each type of processing. The legitimate interest is an appropriate basis for processing when data subjects reasonably expect that the use of their personal data and the processing thereof have a minimal impact on privacy. If the data controller chooses to process personal data on the basis of the legitimate interest, it must undertake the responsibility to protect the rights and interests of the individuals.

Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) provides in article 6 paragraph (1) letter (f) a basis for processing where: *"Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."*

The concept of legitimate interest referred to in Regulation (EU) 2016/679, entails a wide range of concepts, from personal or third-party interests, commercial interests, as well as social benefits. GDPR specifically mentions the use of data on customers or employees, marketing, fraud prevention, inter-group transfers or IT security as potential legitimate interest. At the same time, it can be stated that there is a legitimate interest when information on potential criminal activities or security threats is disclosed to the authorities. As it could be applied in a wide range of circumstances, it is up to the data controller to balance own legitimate interests and the

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need to process personal data against the interests, rights and freedoms of the individual, by taking into account the particular circumstances of the case. To demonstrate a legitimate interest requires to demonstrate that the controller (or a third party) has a certain clear or specific benefit from the processing of the data. It is not sufficient for the processing to be based on vague or generic interests, its purpose and the desired result must be precisely identified. Although any purpose can be relevant, this purpose must be "legitimate". Any unethical or illegal interest is not a legitimate interest.

The "necessary processing" is another concept the European legislation in the field of the personal data processing operates with, a relevant concept in this study. This concept of "necessary processing" applies to situations where the use of personal data is made for the purpose of the identified legitimate interests. This does not mean that it must be absolutely essential, but it must be a pursued and proportionate way of achieving the goal. It must be analyzed on a case-by-case basis whether the processing is proportionate and appropriate to achieve its purposes and whether there is a less intrusive alternative, so that the purpose to be achieved by other reasonable means, without processing the data in this way. A very clear difference must be made between the processing which is necessary for the established purpose and the processing which is necessary only due to the method chosen to pursue that purpose. In the background of certain legitimate interests, it may be argued that certain non-essential matters of processing are required in order to achieve the purposes. However, this is valid only if the specific purpose behind these features is clearly identified and the processing is not disguised behind a business purpose that could be achieved in another way. The processing must be necessary for the specific purpose. If we cannot demonstrate that the processing really helps to achieve the legitimate interest, then we cannot discuss the concept of "necessary processing". Furthermore, if the processing is not a reasonable way of achieving the targeted purpose, the concept of legitimate interest does not apply.

2. The ECOJ practice relevant in the field of the video surveillance

2.1. Firstly, we will try to analyze a ECOJ Judgment[1] on the operation of a camera system, as a result of which a video recording of people is stored on a continuous recording device such as a hard disk drive, installed by an individual on his family home for the purposes of protecting the property, health and life of the home owners, but which also monitors a public space. It should be noted that the case was settled by the Court before the entry into force of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC but it is of practical importance in terms of the way in which the Court analyzed and interpreted concepts applicable in the field of personal data protection, also regulated in the current normative act. The circumstances of the case are extremely common in practice, so that it is useful to know the opinion of the ECOJ in this area.

The subject of the case is the request for a preliminary ruling under article 267 TFEU filed by the Supreme Administrative Court (Czech Republic) concerning the interpretation of article 3 paragraph (2) of

[1] ECOJ, Judgment of the Court (Fourth Chamber) Case C-212/13.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995[2] on the protection of individuals with regard to the processing of personal data and on the free movement of such data . Article 3 of the aforementioned directive provides the following: "(1) This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. (2) This Directive shall not apply to the processing of personal data: - in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defense, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law; - by a natural person in the course of a purely personal or household activity"[3]. The issue analyzed by the Court is also regulated by Regulation (EU) 2016/679 in art. 2 para. 2 letter c

In the aforementioned case, Mr. R. installed and used a camera system located under the eaves of his family home. The system allowed only a visual recording, which was stored on recording equipment in the form of a continuous loop, that is to say, on a hard disk drive. As soon as it reached full capacity, the device would record over the existing recording, erasing the old material. No monitor was installed on the recording equipment, so the images could not be studied in real time. Only Mr. R had direct access to the system and the data. The surveillance system recorded the entrance to his home, the public footpath and the entrance to the house opposite. Given these circumstances, Mr. R. was sanctioned by the Office for personal data protection for infringing Law no. 101/2000, since as a data controller, he had used a camera system to collect, without their consent, the personal data of persons moving along the street or entering the house opposite. It was also noted that the data subjects had not been informed on the processing of such data and that Mr. R. had failed to fulfill the obligation to notify the authority on the respective processing.

The question referred to the Court by the national court was whether the operation of a camera system installed on a family home for the purposes of the protection of the property, health and life of the owners of the home can be classified as the processing

[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 was repealed by Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

[3] Currently, the material scope of the GDPR regulations are included in art. 2 of Regulation (EU) 2016/679 which provides the following:" (1) This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system. (2) This Regulation does not apply to the processing of personal data: a) in the course of an activity which falls outside the scope of Union law; b) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU; c) by a natural person in the course of a purely personal or household activity; d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. (3) For the processing of personal data by the Union institutions, bodies, offices and agencies, Regulation (EC) No 45/2001 applies. Regulation (EC) No 45/2001 and other Union legal acts applicable to such processing of personal data shall be adapted to the principles and rules of this Regulation in accordance with Article 98. (4) This Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive."

of personal data "by a natural person in the course of a purely personal or household activity" for the purposes of art. 3 para. (2) of Directive 95/46 [..], even though such a system also monitors a public space. In its considerations, the court notes that there should be established whether the operation of a camera system, as a result of which a video recording of people is stored on a continuous recording device such as a hard disk drive, installed by an individual on his family home for the purposes of protecting the property, health and life of the home owners, but which also monitors a public space, amounts to the processing of data in the course of a purely personal or household activity, for the purposes of the provisions of art. 3 para. 2 second indent of Directive 95/46.

The first aspect analyzed by the Court entails the fact that the image of a person recorded by a camera constitutes personal data within the meaning of art. 2 letter (a) of Directive 95/46, inasmuch as it makes it possible to identify the person concerned. Secondly, the Court notes that, as can be seen, in particular from recitals (15) and (16)[4] of Directive 95/46, video surveillance falls, in principle, within the scope of that directive in so far as it constitutes automatic processing. The Court notes that according to settled case-law, the protection of the fundamental right to private life guaranteed under Article 7 of the Charter of Fundamental Rights of the European Union, requires that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary. The Court rules that a personal data processing falls under the scope of the derogation referred to in art. 3 para. (2) second indent of the Directive only if the respective processing is carried out exclusively in the personal or domestic scope of the person performing it.

On the other side, it is noted that that video surveillance such as that at issue in the main proceedings covers, even partially, a public space and is accordingly directed outwards from the private setting of the person processing the data in that manner, it cannot be regarded as an activity which is a purely 'personal or household' activity for the purposes of art. 3 para. (2) second indent of Directive 95/46.

Notwithstanding, the Court concludes that the application of the provisions of art. 7 letter (f), with art. 11 para. (2) and with art. 13 para. (1) letter (d) and (g) of the directive enables, where appropriate, to take into account the legitimate interests pursued by the controller, such as the protection of the property, health and life of his family and himself.

Despite the fact that Directive no. 95/46 was repealed by Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, the judgment ruled by the Court decides on an important and sensitive issue in the field of personal data processing, respectively that of the video surveillance and the significance that video surveillance has on individuals' privacy in the sense that in case a video surveillance system is installed in an individual's home for the purposes of protecting life and property, to

[4] Recitals (15) and (16) of Directive 95/46 provide the following: (15) whereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question; (16) Whereas the processing of sound and image data, such as in cases of video surveillance, does not come within the scope of this Directive if it is carried out for the purposes of public security, defense, national security or in the course of State activities relating to the area of criminal law or of other activities which do not come within the scope of Community law.

the extent that the images collected are outside their own space, such a processing can be considered as a processing of data in the course of a purely personal or household activity. This interpretation also appears in the domestic legislation by means of Decision no. 52 of 31 May 2012[5] of the National Authority for the Supervision of Personal Data Processing.

2.2. Another important aspect in the field of the video surveillance of household was decided by the Court[6].

Therefore, in October 2018, Bucharest Tribunal decided to suspend the proceedings for the litigation between TK, on the one side, and Asociația de Proprietari (Association of co-owners) and to refer a request for a preliminary ruling to the ECOJ, under article 267 TFEU. The ECOJ answered to the request of Bucharest Tribunal by means of Judgment of 11 December 2019, thus establishing a new reference case in the field of data protection when discussing about video surveillance.

In fact, the request has been made in proceedings between TK and the Asociația de Proprietari bloc M5A-Scara A (Association of co-owners of building M5A, staircase A, concerning TK's application for an order that the association takes out of operation the building's video surveillance system and remove the cameras installed in the common parts of the building. TK lives in an apartment which he owns, located in building M5A. At the request of certain co-owners of that building, the association of co-owners adopted, at a general assembly held on 7 April 2016, a decision approving the installation of video surveillance cameras in that building. In implementation of that decision, three video surveillance cameras were installed in the common parts of building M5A. The first camera was pointed towards the front of the building, whereas the second and third cameras were installed, respectively, in the ground-floor hallway and in the building's elevator. TK objected to that video surveillance system being installed on the ground that it constituted an infringement of the right to respect for privacy. TK brought an action before Bucharest Tribunal requesting that the association of co-owners be ordered to remove the three cameras and to take them out of operation definitively, failing which a penalty payment would be imposed. TK argued before the referring court that the video surveillance system at issue infringed EU primary and secondary law, in particular the right to respect for private life both under EU and national law. He also stated that the association of co-owners had taken on the task of data controller for personal data without having followed the registration procedure in that regard provided for by law. The association of co-owners stated that the decision to install a video surveillance system had been taken in order to monitor as effectively as possible who enters and leaves the building, since the elevator had been vandalized on many occasions and there had been burglaries and thefts in several apartments and the common parts. The association also stated that other measures which it had taken previously, namely the installation of an intercom/magnetic card entry system, had not prevented repeat offences of the same nature being committed.

[5] Decision 52/2012 of the ANSPDCP (National Authority for the Supervision of Personal Data Processing) provides the following: Art. 3 The processing of personal data by means of the use of the video surveillance systems is performed under the observance of the general rules referred to in art. 4 of Law no. 677/2001, as further amended and supplemented, especially of the principle of proportionality of purpose. Art. 4 Video surveillance can be performed mainly for the following purposes: .....c) to ensure the security and protection of persons, goods and valuables, of real estates and public utility installations, as well as of the enclosures affected by them.

[6] Judgment of the Court of 11 December 2019 in case C-708/18.

Bucharest Tribunal decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- "Are Articles 8 and 52 of the Charter and Article 7 letter (f) of Directive 95/46 to be interpreted as precluding provisions of national law such as those at issue in the main proceedings, namely Article 5(2) of [Law No 677/2001], and Article 6 of [Decision No 52/2012 of the ANSPDCP], in accordance with which video surveillance may be used to ensure the safety and protection of individuals, property and valuables and for the pursuit of legitimate interests, without the data subject's consent?"
- "Are Articles 8 and 52 of the Charter to be interpreted as meaning that the limitation of rights and freedoms which results from video surveillance is in accordance with the principle of proportionality, satisfies the requirement of being 'necessary' and "meets objectives of general interest or the need to protect the rights and freedoms of others", where the controller is able to take other measures to protect the legitimate interest in question?"
- "Is Article 7 letter (f) of Directive 95/46 to be interpreted as meaning that the "legitimate interests" of the controller must be proven, present and effective at the time of the data processing?"
- "Is art. 6 para. (l) letter (e) of Directive 95/46 to be interpreted as meaning that data processing (video surveillance) is excessive or inappropriate where the controller is able to take other measures to protect the legitimate interest in question?"[7]

In relation to these questions, the Court ruled that art. 6 para. (1) letter (e) and art. 7 letter (f) of Directive 95/46/CE of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, read in the light of art. 7 and 8 of the Charter of Fundamental Rights of the European Union, must be interpreted as not contradicting national provisions which authorize the installation of a system of video surveillance, such as the system at issue in the main proceedings, installed in the common parts of a residential building, for the purposes of pursuing legitimate interests of ensuring the safety and protection of individuals and property, without the data subject's consent, if the processing of the personal data performed by means of the video surveillance system in question fulfills the conditions provided by the aforementioned art. 7 letter (f), an aspect the verification of which is incumbent on the referring court.

Art. 7 letter (f) of Directive 95/46 lays down three cumulative conditions so that the processing of personal data is lawful, namely, **first**, the pursuit of a legitimate interest by the data controller or by the third party or parties to whom the data are disclosed; **second**, the need to process personal data for the purposes of the legitimate interests pursued; and **third**, that the fundamental rights and freedoms of the person concerned by the data protection do not take precedence [8].

As regards first condition, art. 7 letter (f) of Directive 95/46 does not require the data subject's consent. Such consent, as a condition to which the processing of personal data is made subject, appears, however, only in article 7 letter (a) of that directive. In the present case, the objective which the controller essentially seeks to achieve when he or she installs a video surveillance system such as that at issue in the main proceedings, namely protecting the

[7] Item 27 of Judgment of the Court of 11 December 2019 in case C-708/18.
[8] In this respect, see Judgment of 4 May 2017, Rīgas satiksme, C-13/16, EU:C:2017:336, item 28.

property, health and life of the co-owners of a building, is likely to be characterized as a 'legitimate interest', within the meaning of article 7 letter (f) of Directive 95/46.

As regards second condition, relating to the need to process personal data for the purposes of the legitimate interests pursued, the Court has pointed out that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary. That condition requires the referring court to ascertain that the legitimate data processing interests pursued by the video surveillance at issue in the main proceedings — which consist, in essence, in ensuring the security of property and individuals and preventing crime — cannot reasonably be as effectively achieved by other means less restrictive of the fundamental rights and freedoms of data subjects, in particular the rights to respect for private life and to the protection of personal data guaranteed by Articles 7 and 8 of the Charter.

In this respect, the condition relating to the need for processing must be examined in conjunction with the 'data minimization' principle enshrined in art. 6 para. (1) letter (c) of Directive 95/46, in accordance with which personal data must be 'adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed".

The proportionality of the data processing by a video surveillance device must be assessed by taking into account the specific methods of installing and operating that device, which must limit the effect thereof on the rights and freedoms of data subjects while ensuring the effectiveness of the video surveillance system at issue. Therefore, the condition relating to the need for processing implies that the controller must examine, for example, whether it is sufficient that the video surveillance operates only at night or outside normal working hours, and block or obscure the images taken in areas where surveillance is unnecessary.

Lastly, as regards **the third condition** laid down in art. 7 letter (f) of Directive 95/46, relating to the existence of fundamental rights and freedoms of the data subject whose data require protection, which might override the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, the assessment of that condition requires a balancing of the opposing rights and interests concerned which depends on the individual circumstances of the particular case in question, and in the context of which account must be taken of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter.

In this context, the Court has held[9] that art. 7 letter (f) of Directive 95/46 precludes Member States from excluding, categorically and in general, the possibility of processing certain categories of personal data without allowing the opposing rights and interests at issue to be balanced against each other in a particular case.

Thus, Member States cannot definitively prescribe, for certain categories of personal data, the result of the balancing of the opposing rights and interests, without allowing a different result by virtue of the particular circumstances of an individual case[10].

3. Conclusions

In the light of the analysis of the case-law of the ECOJ in the field of video surveillance in private spaces, we can conclude that it can be performed without violating the rules on personal data

[9] Item 53 of the Judgment of the Court of 11 December 2019 in case C-708/18.
[10] In this respect, see Judgment of 19 October 2016, Breyer, C-582/14, EU:C:2016:779, item 62.

protection if certain conditions required by the legislation in force are met and if these general rules are appreciated in relation to each particular case.

From the perspective of the conditions that must be analyzed when the video surveillance of private space is discussed, it is necessary to identify the way in which the image of a person recorded by a video camera represents a personal data, insofar as it allows the identification of the data subject. Another aspect concerns the identification of the processing performed by surveillance insofar as it is an automatic processing.

Another aspect that should be identified and analyzed in this field is that the derogation from the protection of personal data made by video surveillance is carried out within the limits of what is strictly necessary. In this respect, a derogation "within the limits of what is strictly necessary" is deemed to be carried out exclusively in the personal or household scope of the person performing it.

An important conclusion emerges from the analysis of the case-law of the ECOJ in the situation of the partial extension of video surveillance to public space, an activity that apparently cannot be considered as an exclusively "personal or household" activity. Notwithstanding, the Court held that, in such situations, the surveillance can be performed if the legitimate interests of the controller, consisting, among others, in the protection of the property, health and life of the controller and his family, are taken into account.

In what concerns the concept of "legitimate interest", this may be used as a basis for processing if the purpose essentially pursued by the data controller when establishing a video surveillance system is the protection of the property, health and life of the co-owners of a building. In this context, it is necessary to verify whether the data processing legitimate interest pursued by video surveillance, which consists essentially in ensuring the security of property and persons and in preventing the commission of criminal offences, cannot be reasonably achieved, with the same efficiency, by other means that would be less intrusive for the fundamental rights and freedoms of the data subjects, in particular the right to privacy and to the protection of personal data. From this perspective, it should be noted that the need for processing must be assessed together with the "data minimization" principle, according to which personal data must be adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed.

For every situation in which video surveillance of private spaces is used, in particular of common use spaces within residential areas, it is necessary to balance the opposing rights and interests in question, depending on the specific circumstances of the respective case, in which the importance of the data subject must be taken into account. In this field, the opposing rights and interests take into account the existence of the fundamental rights and freedoms of the data subject, on the one hand, and the legitimate interest pursued by the data controller or third parties to whom the data are communicated, on the other hand. Given that this balancing of the opposing rights and interests in question may differ from one particular case to another, the Court opposes a Member State to establish general rules definitively determining the result of the balancing of opposing rights and interests, without enabling the analysis of specific elements generating a different result depending on the special circumstances of a specific case.

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PREVIOUS AND RECENTLY INTRODUCED STANDARDS IN THE STRASBOURG CASE-LAW RELATED TO THE HEALTH CARE OF PERSONS OF UNSOUND MIND

Bernadett FALUSI*

Abstract

With the judgement of the Grand Chamber in the key case of Rooman v. Belgium (2019), the European Court of Human Rights has undoubted reached another milestone in its case-law. The reason for the former statement basically lies in the re-evaluation and reinterpretation of relevant principles of assessing medical treatment during the compulsory confinement of persons of unsound mind. This, in contrast to earlier practice, has resulted in emphasizing the therapeutic function of medically justified deprivation of liberty in order to reintegrate the person concerned within the shortest time possible, and also, an absolute rejection of their therapeutic abandonment. This has notably extended the standards of health care under the aegis of the ECHR, and the Court has already referred to those consistently in its subsequent cases. Therefore, this study aims to provide a comprehensive overview of the previous, and also the recently introduced, standards in the Strasbourg case-law, related to the health care of persons of unsound mind, together with the correspondingly developing positive obligations of State Parties.

Keywords: *persons of unsound mind, medically justified deprivation of liberty, therapeutic function, appropriate facility, AAAQ standards.*

„In a field as sensitive as that of a psychiatric committal, within the framework of the European Convention, (…) *unremitting vigilance is required to avoid the abuse of legislative systems and hospital structures."*[1]

1. Introduction

From a human rights perspective, the term *persons of unsound mind* as indicated in Article 5(1)(e) of the European Convention on Human Rights (ECHR) refers to a particularly vulnerable group within society. In spite of the insignificant number of cases, it turns out to be problematic to name a State Party to the ECHR that has not yet been the subject of at least one individual complaint procedure regarding the medically justified deprivation of liberty of persons of unsound mind. Furthermore, violation has been found to have occurred in the vast majority of those cases by the European Court of Human Rights (the Court), thus the matter has relevance throughout the European region.

This paper focuses on the remarkable number of cases, in which not only compulsory confinement, but also medical treatment during compulsory confinement were assessed by the Court. From one point of view, the recently reached milestone in

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[1] Judgement in the case of *Nielsen v. Denmark*, App. no. 10929/84, dated: 28 November 1988, issued by ECtHR, Separate opinion of Judge Pettiti, http://hudoc.echr.coe.int/eng?i=001-57545 (last access: 19.08.2020).

the relevant case-law can be considered a new step in implementing social and human rights models in cases where persons of unsound mind are concerned, but another important aspect cannot be disregarded. By emphasizing the therapeutic function of medically justified deprivation of liberty in order to the achieve the reintegration of the person concerned within the shortest time possible, the Court has extended the standards of health care under the ECHR in the key case of *Rooman v. Belgium.* Despite using the notion of appropriate facility, the exact elements of this can be identified with those that have already been present in universal human rights disputes, and are generally known as AAAQ. The latter expression is an abbreviation, standing for availability, accessibility, acceptability and quality, together which together make up the content of the right to health care. However, in comparison with contemporary legal literature, the right to equal access to health care may be considered the most - although not unanimously - accepted concept,[1] which has also been examined through the practice of the Court.[2]

This study therefore aims to provide an overview of the previous and recently introduced standards in the Strasbourg case-law, related to the health care of persons of unsound mind together with the correspondingly developing positive obligations of State Parties. Importantly, the investigation was limited to those cases in which the serious mental disorder of the person concerned has been - at least allegedly - a pre-existing one, and not one which has developed due to the circumstances of detention. This category includes both types of cases: those in which the dangerous nature of the individual *per se* has justified detention, and those

in which this dangerous nature exists alongside a lack of criminal liability.[3]

Part 2, after recognising the lack of a definition of persons of unsound mind in international law, places it under the umbrella term of persons with disabilities, and also draws attention to the term mental disorder. References to their theoretical backgrounds are also made in relation to both terms. Finally, I turn towards the approach of the Court. *Part 3* focuses on medically justified deprivation of liberty, and gives a short summary of its gradually expanding State obligations. In *Part 4*, the development of positive obligations to *fulfil* health care is presented, up to the most recent case-law, using the concept of health care standards. *Part 5* contains the summary and conclusions.

2. The lack of a definition of persons of unsound mind in international law

The ECHR has not provided any definition for persons of unsound mind in the last seventy years.[4] However, as Ana Elena ABELLO JIMÉNEZ pointed out in a critical

[1] Amrei Müller, "The Minimum Core Approach to the Right to Health. Progress and Remaining Challenges," in the Healthcare as a Human Rights Issue, Normative Profile, Conflicts and Implementation, eds. Sabine Klotz - Heiner Bielefeldt - Martina Schmidhuber - Andreas Frewer (Bielefeld: Transcript Verlag, 2017), p. 66.

[2] Maite San Giorgi, The Human Right to Equal Access to Health Care (Cambridge: Intersentia Publishing Ltd., 2012), pp. 143-180.

[3] For an example, see: Juhász Andrea Erika, A mentálisan beteg fogvatartottakkal mint speciális fogvatartotti kategóriával szemben megvalósuló embertelen, megalázó bánásmód: II. rész: Az Emberi Jogok Európai Bíróságának esetjoga, "Magyar Rendészet," no. XV. vol. 1/2015. p. 113-124.

[4] Ana Elena Abello Jiménez, *Criminalizing Disability: The Urgent Need of a New Reading of the European Convention on Human Rights*, "American University International Law Review," no. XXX. Vol. 2/2015. pp. 286-287.

assessment which also urged a paradigm shift, this wording can undoubtedly be traced back to the *medical model*.[5] Nevertheless, no other international legal instruments provide a decisive definition on this term.

The first of all to mention is the quasi universal *UN Convention on the Rights of Persons with Disabilities* (CRPD).[6] Elements of the *human rights model* emerge amongst the objectives expressed in Article 1, namely the protection of the dignity and human rights of persons with disabilities. This article also gives a comprehensive definition, based on the *social model.*[7] It states that "[*p*]*ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*" However, this supportable and compehensive approach gives no details or further explanation of the aforementioned types of disabilities in question.

Fortunately, Paul HUNT (UN Special Rapporteur on the right to health, 2002-2008) brings us closer to a clarification at a higher level. His definition of persons with disabilities is also as broad as possible, taking into account a number of concepts. Within this definition, three main categories of mental disability can be identified. One of them is the major mental illnesses and psychiatric disorders, another comprises more minor mental ill health and disorders otherwise called psychosocial problems, and the last but not least important are intellectual disabilities.[8]

Under the aegis of the Council of Europe, Article 7 of the *Convention on Human Rights and Biomedicine* (Oviedo Convention, 1997) provides the legal framework for the protection of persons suffering from a mental disorder of a serious nature. Similarly to the CPRD, the Oviedo Convention also provides no detailed definition of the term in question.

Progress in interpretation has been made in the *Recommendation Rec(2004)10 of the Committee of Ministers to member states on the protection of the human rights and dignity of persons with mental disorders* (Recommendation), often cited by the Court. As Article 1(1) of this non-legally binding document stipulates, the Recommendation aims to protect the human rights and dignity of persons with mental disorder in general, but with particular focus on persons undergoing involuntary placement or treatment. Article 2(1)-(2) of the same Recommendation states that the term "*mental disorder is defined in accordance with internationally accepted medical standards,*" emphasizing that a "*lack of adaptation to the moral, social, political or other values of society, of itself, should not be considered a mental disorder*."

[5] Abello Jiménez, *Criminalizing Disability…*, p. 291.

[6] *Convention on the Rights of Persons with Disabilities* (UN Doc. A/RES/61/106; adopted on 13 December 2006, New York) https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_61_106.pdf (last access: 19.08.2020).

[7] Abello Jiménez, *Criminalizing Disability…*, p. 287.

[8] Paul Hunt - Judith Mesquita, *Mental Disabilities and the Human Right to the Highest Attainable Standard of Health*, "Human Rights Quarterly," no. XXVIII. vol. 2/2006. p. 335-336.; Paul Hunt, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (UN Doc. E/CN.4/2005/51, 11 February 2005) p. 19. https://www.refworld.org/docid/42d66e770.html (last access: 19.08.2020).

The *Draft Additional Protocol to the Oviedo Convention*[9] has recently been adopted in cooperation with UN Special Rapporteurs in 2018, taking into account relevant provisions of international documents, *inter alia* the International Covenant on Economic Social and Cultural Rights.[10] Among its separate section of definitions, Paragraph 4 indicates that the term "*'mental disorder' is interpreted in accordance with internationally accepted medical standards*," thereby manifestly referring back to the medical concept in this respect.

Along with the aforementioned, a definition of persons of unsound mind has neither been concretized by the Court. There are several reasons for this. First of all, there is the view which has been unchanged from the outset, that considers the concept of mental disorder as a constantly changing one, thus every single case needs to be observed according to the current state of medicine.[11] Hence, positioning the term 'unsound mind' within the relative concept of 'mental disorder,' allows the conclusion that the Court follows the medical model and this explains why it refrains from giving any exact legal definition.[12] Secondly, the Court considers the assessment and determination of whether someone is a person of unsound mind as being the competence of State authorities. Therefore, the Court confines itself to review the conformity of domestic public authority decisions with the ECHR.[13] Such an assessment raises the issue of medically justified deprivation of liberty as a prerequisite question, which is described in more detail below.

3. Medically justified deprivation of liberty

Medically justified deprivation of liberty is a preventive measure for persons of unsound mind.[14] In addition to the existence of voluntary health care services in most cases, a recurring and often hardly specified question from a legal point of view is: under which circumstances may State Parties intervene with compulsory medical treatment of the individual? The Court recognizes the right to self-determination in health-care, i.e. the right to be free from non-consensual medical interference. At this point, it is also worth mentioning that referring to the case-law of the German

[9] Draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment as revised by the 13th DH-BIO (Strasbourg, 23 – 25 May 2018), Definitions/4. 'Mental disorder.' Personal jurisdiction does not extend to persons subjected to criminal law procedures. See: *Ibidem*. Art. 2. paras. 1-3., https://rm.coe.int/inf-2018-7-psy-draft-prot-e/16808c58a3 (last access: 19.08.2020).

[10] Draft Explanatory Report to the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment, para. 3., https://rm.coe.int/inf-2018-8-psy-er-e/16808c58a4.
(last access: 19.08.2020).

[11] For examples, see: Judgement in the case of Winterwerp v. the Netherlands, App. no. 6301/73, dated: 24 October 1979, para. 37., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-57597 (last access : 19.08.2020); Judgement in the case of Anatoliy Rudenko v. Ukraine, App. no. 50264/08, dated: 17 April 2014, FINAL 17/07/2014, para. 102., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-142421 (last access: 19.08.2020).

[12] It should be noted that the Court also reflects the social model and the human rights model in its case-law.

[13] For an example, see: Judgement in the case of Mifobova v. Russia, App. no. 5525/11, dated: 5 February 2015, FINAL 5 May 2015, para. 52., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-150792 (last access: 19.08.2020).

[14] Comp.: Detention for the reason of criminal liability is a repressive measure. This distinction is important to mention because both types of cases are brought before the Court.

Constitutional Court, the Court adopts the approach that persons of unsound mind not only have the entitlement to receive health care in the interest of recovery, but also the right to refuse it.[15] However, as well as in cases involving anyone with a mental disorder, restrictions on the rights of persons of unsound mind can be justified,[16] but only when justified by very weighty reasons. Human rights responses in international or national legal systems basically link justification to the generally accepted criteria of dangerousness, that is, self-threatening or public-threatening behaviour of the individual concerned.

The Court has summarized the aforementioned in the case of *Plesó v. Hungary*, taking into account the results of one European Union survey carried out in fifteen European countries. The Court concluded that the existence of a mental disorder was a basic condition for compulsory placement under the domestic legal systems examined. With regard to the justification of deprivation of liberty, two concepts can be distinguished. Followers of the medical (i.e. *parens patriae*) approach states that the only factor to be examined is the dangerousness criterion, which may take the form of self- or public threatening attitudes. Somewhat differently, in States following the police-power approach, two factors may be relevant, namely the protection of public order and the protection of the rights or safety of others.

The practice of the Court is partly similar to the previous approaches. With regard to the justification of deprivation of liberty for persons of unsound mind (Article 5(1)(e) of the ECHR), a set of three conditions, collectively referred to as the Winterwerp-criteria was elaborated in 1979,[17] and applied since then. This clearly shows the use of the medical model in related cases. The interpretation of the three substantive elements was further nuanced by later practice, although this did not affect their basics. Firstly, the deprivation of liberty shall be based on the objective opinion of a medical expert, with the sole exception of a case justified on grounds of urgency. Secondly, it must be based on the type or severity of the mental disorder,- which creates a need for the deprivation of liberty in order to exclude the risk of threat to oneself- or the public, or in cases where it is not possible to cure or alleviate a severe mental condition in the absence of clinical care. Thirdly, consideration must be taken of the persistent nature of the psychotic state, which also exists when deprivation of liberty is ordered.

Outlining the relevant case-law, when deprivation of liberty by public authorities occurs, the corresponding obligations of the State Parties are threefold. The most clearly evident is, the obligation to *respect* under Article 1 of the ECHR, i.e. intervention shall be made only in medically justified cases. The obligation to *protect* first appeared in the case of *Storck v. Germany*,[18] establishing that appropriate legal guarantees are needed for persons of unsound mind during their involuntary placement and treatment - including health care – to protect them against arbitrariness. Last but not least, there

[15] Judgement in the case of *Plesó v. Hungary*, App. no. 41242/08, dated: 2 October 2012, para. 66., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-113293 (last access: 19.08.2020).

[16] For examples, see: CESCR General Comment no. 14. *'The Right to the Highest Attainable Standard of Health (Art. 12)*' (UN Doc. E/C.12/2000/4, 11 August 2000) https://www.refworld.org/pdfid/4538838d0.pdf (last access: 19.08.2020).

[17] Judgement in the case of *Winterwerp v. the Netherlands*, … para. 38.

[18] Judgement in the case of *Storck v. Germany*, App. no. 61603/00, dated: 16 June 2005, paras. 100-108., 137-150., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-69374 (last access: 19.08.2020).

is the obligation to *fulfil*, to which the recent case-law of the Court gives a new emphasis.[19]

4. Standards of the right to health care during medically justified deprivation of liberty

The approach to medical treatment during medically justified deprivation of liberty developed gradually in the practice of the Court. The examination of detention conditions and health care can be verified retrospectively to the judgement in the case of *Aerts v. Belgium*, which was significant because it laid down the foundations for examining issues related to the conditions and state of health of prisoners and other detainees.[20] Subsequently, case-law has developed in a substantially parallel and mutually reinforcing way in respect of prisoners and other detainees, as vulnerable groups in a similar position. As Ingrid NIFOSI-SUTTON has indicated earlier, a closer analysis of the practice of the Court shows that cases in reality are true right to health cases, involving serious breaches of, *inter alia*, the right to access medical care, one component of the normative content of the right to health as defined by the UN Committee on Economic, Social and Cultural Rights.[21]

Although this parallel development has been going on for a long period of time, I am of the opinion that a dichotomizing approach has recently been accepted by the Court. The turning point was the Grand Chamber key case of *Rooman v. Belgium* in 2019, in which the Court explicitly stated that greater emphasis should be placed on health care and recovery of persons of unsound mind under compulsory medical care than previously.[22] The specific significance of this statement arise for the reason that, with regard to the dual function of medically justified deprivation of liberty, this aforementioned therapeutic function was always treated as secondary to the so-called social protection function. Accordingly, the re-evaluation and reinterpretation of the relevant principles by the Court resulted in higher standards of health care in case of those persons in comparison to any other type of detainees.

With regard to the detention of persons of unsound mind, the Court stated that there is a close link between the lawfulness of detention and the provision of health care appropriate to their mental state. In my view, this emphasis was particularly important because, as has already been mentioned, the case-law on prisoners has provided additional dynamism in the examination of cases of medically justified deprivation of liberty. The common segment in both categories is the factor of dangerousness to society which justifies deprivation of liberty.

Nonetheless, as established by the separate provisions of the ECHR, the relationship between deprivation of liberty

[19] For a similar basis, but different arguments, see: Lawrence O. Gostin - Lance Gable, The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health (Washington DC: Georgetown University Law Center, 2004), p. 22.

[20] Judgement in the case of Kudła v. Poland, App. no. 30210/96, dated: 26 October 2000, para. 94., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-58920 (last access: 19.08.2020).

[21] Ingrid Nifosi-Sutton, The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective, "Harvard Human Rights Journal," no. XXIII. vol. 1/2010. p. 67.

[22] As to the factual background of the case: psychopharmacological and psychotherapeutic treatment of the applicant should have taken place in German language, however, in the facility in question, no German-speaking doctor, therapist, psychologist, welfare officer or custodial staff member was employed for years.

and health care is to be treated differently in the case of prisoners. To this latter group, deprivation of liberty is a primary consideration, even if a serious illness would justify out-of-prison care, as it would be more appropriate. Still, the State Party is obliged to provide adequate care in prison conditions.[23] This applies to every prisoner, including prisoners with several mental disorders, as well. However, this adequate care at best equals only mere access to basic health care services.

Distinctly, health care and other measures taken involving persons of unsound mind during their involuntary placement are intended to at least maintain, but preferably to improve their state of health. Through re-evaluation and reinterpretation, the Court has ruled that, as a result of the gradual development of State obligations in its practice, from now on the persons concerned are *entitled* to the appropriate medical environment and real therapeutic measures, with a view to preparing them for their release, regardless of the institution in which the detention takes place. "*Any detention of mentally ill persons must have a therapeutic purpose, aimed specifically, and in so far as possible, at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness*."[24]

However, while noting that specific circumstances are also relevant in each case, the Court also set out the standards for appropriate health care and treatment of those affected by Article 5(1) of the ECHR in the context of compulsory confinement of persons of unsound mind. As formed in the case of *Rooman v. Belgium*, together with the subsequent case-law, it can be summarized as follows.

1. The existence of an individualized program for reintegration, taking into account the special circumstances of the person concerned.
2. The implementation of an individualized program for reintegration purposes (2a) in an appropriate facility (i.e. *availability* and *physical accessibility*); (2b) by providing adequate health care, namely (2bi) creating a suitable health environment for the implementation of the therapeutic plan (*availability and physical accessibility* of medical personnel, medicines and other tools), (2bii) and with real therapeutic measures (*quality*), including the development of an individualized therapeutic plan, medication (psychotropic substances) and therapeutic treatment (consultations) as well (*acceptability*).[25]

All of these criteria have been unanimously accepted by the Grand Chamber. Moreover, full agreement with the above principles was confirmed by all of the related dissenting opinions.[26]

[23] Juhász Zsuzsanna, "*Mentális egészség és a mentálisan sérült fogvatartottak*" in *Emberek őrzője: Tanulmányok Lőrincz József tiszteletére, 1. kötet*, eds. Hack Péter - Koósné Mohácsi Barbara (Budapest: ELTE Eötvös Kiadó, 2014), p. 113-115.

[24] Judgement in the case of *Rooman v. Belgium*, App.no. 18052/11, dated: 31 January 2019, para. 208., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-189902 (last access: 19.08.2020).

[25] Judgement in the case of *Rooman v. Belgium*, ... paras. 146-148.

[26] Judgement in the case of *Rooman v. Belgium*, … Partly concurring and partly dissenting opinion of Judge Lemmens, para. 1.; Partly dissenting opinion of JudgeNussberger, para 2.; Joint partly dissenting opinion of Judges Turković, Dedov, Motoc, Ranzoni, Bošnjak and Chanturia, para. 3.; Partly dissenting opinion of Judge Serrghides, para. 2.

What follows is a discussion of the re-evaluated and reinterpreted principles and related standards in a more detailed manner.

a) Appropriate facility in a narrow sense

The Court vests the notion of appropriate facility with a broader and a narrower sense. As to the *broader interpretation*, an appropriate facility includes all the standards listed above. However, in the *narrower* sense, only the *availability* and *physical accessibility* of the facility itself need a closer examination. Availability in this context is equivalent to the existence of appropriate facility with sufficient capacity, while physical accessibility means that no obstruction can be identified during the admittance of the person concerned in a timely manner.

Before demonstrating examples of non-compliance with these standards, it is important to note that the appropriateness of the facilities in question has already been examined by the Court in its early case-law under the requirement of legality (Article 5(1)(e) ECHR).[27] At the beginning, only psychiatric wards of hospitals, clinics,[28] psychiatric institutions, or other similar institutions were considered appropriate to treat persons of unsound mind.[29] Based on the practice to date, the category of "other similar institutions" includes (public) social homes.[30] However, it should be added, that the assessment of legality cannot be considered automatic even for the listed facilities. Indeed, it is not certain that an institution which is adequate in the narrower sense, such as a psychiatric institution, meets all the criteria of an appropriate institution in the broader sense. Consequently, it may not be suitable for providing adequate healthcare to the person concerned.[31]

On the other hand, since the case of *Morsink v. the Netherlands*, the practice of recent years has allowed extension of the narrower interpretation of appropriate facility, by examining the lawfulness of the preventive detention of perpetrators relieved of criminal liability because of serious mental disorders, and ordering involuntary placement. Thus, an institution considered *a priori* inadequate, such as a custodial clinic[32] or the psychiatric wing of a prison,[33] can also

[27] For an example, see: Judgement in the case of *Ashingdane v. the United Kingdom*, App. no. 8225/78, dated: 28 May 1985, para. 44., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-57425 (last access: 19.08.2020).

[28] Judgement in the case of *S. v. Estonia*, App. no. 17779/08, dated: 4 October 2011, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-106584 (last access: 19.08.2020).

[29] Oliver Lewis, *Protecting the Rights of People with Mental Disabilities: The European Convention on Human Rights*, "European Journal of Health Law," no. IX. vol. 4/2002. p. 297.

[30] From recent case-law: Judgement in the case of *Červenka v. the Czech Republic*, App. no. 62507/12, dated: 13 October 2016, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-167125 (last access: 19.08.2020); Judgement in the case of *Hadžimeljić and others v. Bosnia and Hercegovina*, App. nos. 3427/13, 74569/13 and 7157/14, dated: 3 November 2015, issued by the ECtHR, http://hudoc.echr.coe.int/eng?i=001-158470 (last access: 19.08.2020); Judgement in the case of *Kędzior v. Poland*, App. no. 45026/07, dated: 16 October 2012, FINAL 16 January 2013, issued by the European Court of Human Rights, http://hudoc.echr.coe.int/eng?i=001-113722 (last access : 19.08.2020); Judgement in the case of *D.D. v. Lithuania*, App. no. 13469/06, dated: 14 February 2012, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-109091(last access: 19.08.2020); Judgement in the case of *Stanev v. Bulgaria*, App. no. 36760/06, dated: 17 January 2012, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-108690 (last access: 19.08.2020).

[31] For an example, see: Judgement in the case of *Rooman v. Belgium*, ... para. 242.

[32] Judgement in the case of *Morsink v. the Netherlands*, App. no. 48865/99, dated: 11 May 2004, para. 65., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-61754 (last access: 19.08.2020).

[33] For an example to the opposite situation, see: Judgement in the case of *Proshkin v. Russia*, App. no. 28869/03, dated: 7 February 2012, FINAL 09 July 2012, para. 78., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-108961 (last access: 19.08.2020).

be assessed as satisfactory by the Court, but only if it also meets the requirements of appropriate facility in the broader sense.

In the case of *Rooman v. Belgium*, the Court did not examine the adequacy of the psychiatric institution in question, as in principle it complied with all the relevant standards. According to this, a more incisive example is the case of *Strazimiri v. Albania*, in which the Court did not find the prison environment suitable as an appropriate institution in the narrow sense and also noted the *total hiatus of the availability of any appropriate facilities*. The applicant, having been released from criminal liability because of his serious mental disorder, and been subjected to involuntary placement by the domestic court at the same time, spent his long-term imprisonment in a prison hospital. According to the decision of the Court, the prison hospital could not be considered appropriate, as the domestic mental health legislation would have required the applicant to be placed in a specialized health facility, forming part of the integrated health care system. Moreover, both national and international human rights control mechanisms confirmed that there was no special facility for the treatment of persons of unsound mind in the State Party concerned. Consequently, the Court found an infringement related to the fact that the public authorities had not done enough to remedy this structural deficiency in the long period of approximately eight years between the adoption of the relevant domestic law in 2012 and the Court decision in 2020.[34]

However, if any appropriate facility is available, but lack adequate capacity, it cannot be ruled out that the public authority ordering the deprivation of liberty initially designates an inappropriate facility or placement in such a facility for a shorter period of time. If, according to a medical expert's opinion, a person concerned cannot be provided with adequate care in one facility, but suitable facilities are available, public authorities are obliged not only to seek and consider alternatives, but also to transfer the individual to an appropriate institution. The Court acknowledged that taking action by public authorities needs time, considering the differences between *available institutional capacities* and *capacity needs*.[35]

At this point, the question arises: what amount of time does the Court consider to be excessive to maintain this kind of involuntary placement in an inadequate facility? In the case of *Aerts v. Belgium*, despite ordering the transfer by domestic authorities, the lack of capacity in the designated and appropriate psychiatric institution resulted in a seven-month delay in transfer. Until then, the applicant was detained in a prison psychiatric wing, which *in abstracto* - and also *in concreto* - proved to be inappropriate.[36] Although the Court found the *lack of capacity in an adequate number* unacceptable, it neither specified the aspects of its assessment, nor gave any reasoning in this respect.

This shortcoming was overcome in the case of *Morsink v. the Netherlands*. The applicant was sentenced to fifteen months imprisonment at a custodial clinic. However, he was placed in a pre-trial detention centre due to the capacity constraints of the appointed custodial clinic. That decision was extended several times by domestic authorities. The applicant was eventually admitted to the designated institution after a

[34] Judgement in the case of *Strazimiri v. Albania,* App. no. 34602/16, dated: 21 January 2020, para. 121., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-200452 (last access: 19.08.2020).
[35] Judgement in the case of *Rooman v. Belgium*, ... para. 198.
[36] Judgement in the case of *Aerts v. Belgium,* App. no. 61/1997/845/1051, dated: 30 July 1998, paras. 47-49., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-58209 (last access: 19.08.2020).

total delay of fifteen months. The State Party affirmed this was not an isolated case during the period under review: however, the Government had taken the necessary policy measures and increased capacity by twenty percent between 1998 and 2002. The State Party also expressed its opinion that the existing gap between the capacities available in custodial clinics and the capacities required should be considered acceptable, in order to manage and balance public expenditures.[37]

The Court seemed to accept this argument under the notion of reasonable balance of competing interests to a certain extent, as "*it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place is immediately available in the selected custodial clinic. It accepts that, for reasons linked to the efficient management of public funds, a certain friction between available and required capacity in custodial clinics is inevitable and must be regarded as acceptable.*"[38] However, in the present case, the structural problem of lack of capacity was already noticed by the public authorities in 1986 and there were no exceptional and unforeseeable circumstances which would have allowed the delay in transfer. Thus, in the majority view of the Court, declaring the admission to the custodial clinic with a delay of fifteen months as acceptable would have undermined the essence of the right protected by Article 5 of the ECHR.

It should be added that judge LOUCAIDES in his concurring opinion explained that reasonable time - as introduced in Article 6 of the ECHR - should be applied in similar cases, instead of the reasonable balance of interests, as it would be better reasoning against State Party arguments based on difficulties of implementation and eliminate the risk of arbitrariness.

However, the Court upheld the majority decision in its subsequent case-law. This is clearly shown for example in the case of *Brand v. the Netherlands*, where the Court presented essentially the same reasoning in its judgement as before.[39]

As indicated in other cases, *when capacities in adequate number would be available otherwise*, the domestic authorities should also be aware of further *obstacles of physical accessibility*, which may result in an unacceptable delay in transfer. For one example, the applicant in the case of *Mocarska v. Poland* spent almost a year and two months in a detention centre, about eight months of which occured after a domestic court decision to release him from criminal liability in a psychiatric institution. More than a month later, the same court asked the Psychiatric Commission, the latter being the competent domestic expert body, to designate an appropriate facility for the applicant. Another month passed before the response of the Psychiatric Commission, in which it requested expert reports on the applicant. An institution was proposed one and a half months later and three more weeks elapsed before the domestic court ordered the transfer of the applicant to that institution. The designated facility then indicated that it could not receive the applicant immediately due to a lack of

[37] Judgement in the case of *Morsink v. the Netherlands*, … para 55.
[38] Judgement in the case of *Morsink v. the Netherlands*, … para. 67.
[39] Judgement in the case of *Brand v. the Netherlands*, App. no. 49902/99, dated: 11 May 2004, FINAL 10 November 2004, issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-61755 (last access: 19.08.2020).

capacity, thus the transfer had to be delayed a further two months and twenty-six days.[40]

The Court concluded, with particular reference to the inclusion of a national expert body in the domestic process and its responsibility, that an eight-month interval was not in conformity with the standards,[41] indicating that the national bodies should have take measures with far shorter deadlines in order to avoid generating obstacles of physical accessibility.

Not for a reason attributable to the capacity of the health care system, but because of a delay created exclusively by public authorities, infringement was also found in the case of *Proshkin v. Russia*. In that case, the domestic court ordered medically justified deprivation of liberty at the same time as the release from the criminal liability of the person concerned. Subsequently, it took more than five months for the authorities to obtain the necessary Latvian travel visa for his transfer to the designated psychiatric hospital located in the Russian exclave, Kaliningrad. Moreover, the lack of the necessary identification documents only came to light later, which resulted in a total delay of six months for the transfer to the designated facility. During this time, the standard of *physical accessibility* of the appropriate facility had not been fulfilled, since the deprivation of liberty was carried out in a detention facility, contrary to the decision of the domestic court.[42]

First of all, the Court reiterated its reasoning of reasonable balance as indicated in the case of *Morsink v. the Netherlands*. It then stated that the domestic authorities were required to take into account the need to obtain visa and identity documents and there was no exceptional or unforeseeable circumstance which would have allowed a six-month delay. In addition, the Court emphasized that the domestic authorities have the competence to designate the appropriate facility and did not intend to interfere in their decision. Nonetheless, it noted that the State Party had failed to present any argument that the transfer would be justified by the fact that there was no hospital in the Russian area that could admit the person concerned.[43] This allows the conclusion that, in principle, there could have been spare capacity in other facilities, which could be considered adequate in the narrower sense, thus the admission of the applicant could have been achieved in a significantly shorter period of time. However, this opportunity was not taken into account at all during the domestic procedures, thus raising the question of the responsibility of the relevant national court.

As a final question of importance, it should be noted that it is beyond question that the delays in the transfer to the appropriate institution in a narrow sense were evidently excessive in all of the above referred cases. Nevertheless, the least excessive period of time assessed so far by the Court relates to the case of *Pankiewicz v. Poland*, demonstrating a strict approach of the forum, with an analysis more closely linked to the individual. In that case, the domestic court ordered that the applicant be released from criminal liability and placed in a psychiatric hospital. However, there was no spare capacity in the hospital in question. After one month and twenty-six days, the domestic court decided to extend the pre-

[40] Judgement in the case of *Mocarska v. Poland*, App. no. 26917/05, dated: 6 November 2007, FINAL 06/02/2008, paras. 10-24., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-83076 (last access: 19.08.2020).
[41] Judgement in the case of *Mocarska v. Poland*, … paras. 45-49.
[42] Judgement in the case of *Proshkin v. Russia*, … para. 30., 34-36.
[43] Judgement in the case of *Prohskin v. Russia*, … paras. 80-81.

trial detention ordered earlier, during the investigation phase. A further twenty-four days later, the same court decided to designate another hospital with free capacity as the location of the involuntary placement. It took another four days to transfer the applicant to the newly designated facility.[44] This meant a total delay of two months and twenty-five days, while the applicant spent his deprivation of liberty in a general detention centre.

Although the State Party considered this time of delay to be acceptable and in line with the standards developed by the Court, the latter argued that the State Party did not provide a detailed justification for the delay and did not clarify that the applicant was receiving adequate medical care in the general detention centre. In this respect, a delay that is not particularly excessive at first glance cannot be considered acceptable, either.[45] Besides, with regard to the expert opinion proposing psychiatric treatment, the delay in admission to a psychiatric hospital and the initiation of health care was found to be clearly detrimental to the applicant.

These support the conclusion that the *access to a prima facie appropriate institution in a timely manner* in order to initiate the health care of the person concerned is a basic standard in cases of compulsory confinement of persons of unsound mind.

b) Appropriate facility in a broader sense – including suitable medical environment and real therapeutic measures

As the cited contemporary case-law indicated, neither *availability* nor mere *physical accessibility* in themselves - and not even both occurring together - are sufficient to satisfy the notion of appropriate facility in the broader sense. In addition to the aforementioned standards, a suitable medical environment and real therapeutic measures are also essential. The focus has been noticeably extended with consideration of the individual health care needs of the person concerned, examining the *quality and acceptability* of health care during compulsory confinement.

First of all, the Court emphasizes that its role is not to analyse the content of the treatment that is offered and administered. The choice of the form and content of a specific therapeutic treatment and medical programme remains essentially a matter for the public authorities.[46]

Besides, compared to other detainees, the scope of treatment of persons of unsound mind during involuntary placement must reach beyond the level of basic health care. More specifically, the Court found it essential from now on "*to verify whether an individualised programme has been put in place, taking account of the specific details of the mental health of the individual concerned with a view to preparing for possible future reintegration into society*."[47]

An example of the lack of personalized therapeutic treatment occurs not only in the case of *Rooman v. Belgium*, where, due to language barriers, therapeutic consultation had failed for several years, but also in the case of *Strazimiri v. Albania*, in which the Court specified the nature of the violation according to healthcare as follows: "[*t*]*he Court cannot accept* […] *the state of therapeutic abandonment.*"[48]

[44] Judgement in the case of *Pankiewicz v. Poland*, App. no. 34151/04, dated: 12 February 2008, FINAL 12/05/2008, paras. 16-19., issued by ECtHR, http://hudoc.echr.coe.int/eng?i=001-85004 (last access: 19.08.2020).
[45] Judgement in the case of *Pankiewicz v. Poland*, … para. 45.
[46] Judgement in the case of *Rooman v. Belgium*, ... para. 209.
[47] Judgement in the case of *Rooman v. Belgium*, ... para. 209.
[48] Judgement in the case of *Strazmiri v. Albania*, … para. 109.

In their joint opinion, Judges Turković, Dedov, Motoc, Ranzoni, Bošnjak and CHANTURIA mentioned as a shortcoming of the Grand Chamber decision in the case of *Rooman v. Belgium* that the majority opinion did not transfer the principle of a comprehensive therapeutic plan from the established practice under Article 3 of the ECHR to the list of principles under Article 5(1)(e).[49] The Court clearly included this in the scope of the investigation in the case of *Strazimiri v. Albania*.

Finally, the Court ruled that an aggravation of the condition of a psychotic patient deprived of his or her liberty does not necessarily lead to a violation of Article 5(1)(e). However, this is conditional on the public authorities taking all necessary measures to overcome the obstacles to care.

5. Summary and conclusions

Although recognizable progress has been made, the lack of a term for persons of unsound mind in international law still exists. This circumstance and the medical approach of the term unsound mind leads the Court to maintain that domestic authorities have the competence to assess and decide whether someone is a person of unsound mind or not.

However, over the past few decades, the Court has developed and gradually expanded the related State obligations to respect, protect and fulfil. Due to the important reassessment and reinterpretation of principles in the case of *Rooman v. Belgium* new standards within the obligation to fulfil were highlighted. They are interpreted under the notion of *adequate facility*, for which the Court has developed a broader and also a narrower interpretation.

According to recent case-law, adequate facility in the narrower sense may include not only *a priori* adequate facilities, which are part of the public health system in general, but also *a priori* inadequate facilities, with particular attention to prison health care. Nonetheless, as the decisions of the Court show, a prejudicary manner can be misleading, thus the special conditions of the individual concerned needs close examination in any type of facility on a case-by-case basis.

Nevertheless, the notion of appropriate facility in the narrow sense rests on the standards of *availability* and *physical accessibility*, demanding that public authorities overcome structural deficiencies and any lack of capacity (Government) and order the transfer from an inappropriate to an appropriate facility (courts and other competent domestic authorities).

Immediate transfer is not expected, but the Court delineates a rather strict deadline for every measure required to be taken, to achieve compatibility with the ECHR. Nor can an argument based on structural deficiencies and lack of capacity be accepted as a reference to an exceptional and unforeseeable circumstance (*availability*). Nor does a government policy measure involving an expansion of capacity in itself, but which is protracted for a longer period of time, seem to make delayed transfers, if any occur, acceptable.

This motivates the authorities - either national courts or expert bodies involved in the decision in individual cases - to take into account the issue of capacity and to designate an appropriate institution that also has free capacity at the time of the decision. Under the relevant case-law, the Court basically did not impose any other criteria for decision-making. Mentioning the specific example of the case of *Strazimiri v. Albania*, in which there was a structural deficiency in the public health system, the

[49] Judgement in the case of *Rooman v. Belgium*, ... Joint partly dissenting opinion of Judges Turković, Dedov, Motoc, Ranzoni, Bošnjak and Chanturia.

Court mentioned that a transfer from the prison hospital to a civilian psychiatric institution (i.e. non-public health sector) should have been considered (*availability*). And if other state authorities responsible for the enforcement of the court decision are also involved, they are obliged to take all other necessary measures to ensure the admission as soon as possible (*physical accessibility*).

Regarding the proportionality of deprivation of liberty, another important element is the consideration of the possibility of deinstitutionalisation, also based on expert opinion, which also serves the purpose of social reintegration.

The notion of *adequate facility* in a broader interpretation also includes not only mere access to basic health care services, but also entitlement to an appropriate health environment and real therapeutic measures (*quality and acceptability*). With this important development, the Court has clearly taken a position recognizing the right to health care with a view to future reintegration for persons of unsound mind who are deprived of their liberty, raising the level of guarantees against circumstances which jeopardize their particular vulnerability. Another promising aspect is that the Court has already referred to the aforementioned principles consistently in its subsequent cases.

The outcome of this research invites us to focus attention on the progressive, step by step realization of the right to health care in the legal sphere, as well as presenting key examples of its enforceability in the European region.

Hopefully, these developments in the interpretation of the Court will add new dynamism to further clarification of the right to health care standards in the field of international human rights, either for other vulnerable groups or in general.

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THE EUROPEAN UNION-JAPAN ECONOMIC PARTNERSHIP AGREEMENT: BACKGROUND AND CERTAIN ASPECTS

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Abstract

The article deals with the Economic Partnership Agreement signed between the European Union and Japan. This can be considered a major initiative in the field of European Union external relations, and a significant expression of the free trade principle in the international arena. The study includes a survey of the background to the Agreement and the EU-Japan relationship in general. Furthermore, certain parts of the Agreement are looked it, including those relating to state-owned enterprises and various services.

Keywords: *European Union, Japan, Economic Partnership Agreement, state-owned enterprises, services.*

1. Introduction

The European Union, being an international actor in its own right, has a myriad of agreements with various countries around the world. These vary in terms of the degree to which they intensify and strengthen relations with respective third countries. Some of these agreements relate to the EU's more immediate neighbourhood, while others have been made with states further afield in more distant parts of the world. One recent agreement which the European Union entered into which is particularly noteworthy is the Economic Partnership Agreement with Japan. Here there shall be an overview of the background to both EU-Japan relations in general and the signing of the Economic Partnership Agreement. Additionally, certain aspects of the Agreement shall be analysed here, including those dealing with state-owned enterprises, postal and courier services, public procurement, international maritime transport services and telecommunication services.

2. EU-Japan Relations and the Signing of the Economic Partnership Agreement

In 1959 the then European Economic Community and Japan established official diplomatic relations.[1] From the period of the 1960s to the 1980s certain tensions existed with regards to trade.[2] This included the EEC seeing the economic rise of Japan with

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[1] The Mission of Japan to the European Union: "Japan and the EU: Valuable Partnership for the future", Speech by H.E. Takekazu KAWAMURA Ambassador of Japan to the European Union At the Bulgarian Diplomatic Institute In Sofia, 12 June 2008, https://www.eu.emb-japan.go.jp/former%20amb%20speeches/bulgaria_speeches.html (last access 2019.07.07).

[2] César De Prado: *Towards a Substantial EU-Japan Partnership*, European Foreign Affairs Review, 22 no. 4 (2017), 435, http://cadmus.eui.eu/bitstream/handle/1814/51204/CdP%202017%20EU-JP%20EFAR%2022_0401.pdf?sequence=3 (last access 2019.07.07).

suspicion, as the Japanese became competitors to be reckoned with in relation to various products and goods.[3] However, from the period of the 1990s there was an improvement in relations, with an attempt to increase economic dialogue and to create a more definite framework for the relationship.[4]

To illustrate how much the relationship has developed since earlier times, now at present Japan is considered to be one of the European Union's closest partners, being its second largest Asian trading partner, while for Japan the EU is its third biggest partner in trade.[5] The European Union exports to Japan more than 65 billion euros worth of goods per annum, and over 600, 000 jobs are connected to Japan, while Japanese companies have created over 500, 000 jobs in the European Union.[6] As for Japan's export of goods to the European Union, these total to around 70 billion per annum.[7] In recent years there has also been a signficant increase in the area of services, for example, from 2015 to 2017 the European Union exports to Japan increased from 28 billion euros to 34.7 billion euros.[8] With regards to Japan's export of services to the European Union, these increased from 2015 to 2017 from 16 billion to 18.3 billion euros.[9]

Without doubt the greatest and most significant aspect of the EU-Japan relationship is the Economic Partnership Agreement. This has been described as the world's biggest trade deal, covering 635 million people and close to one third of the world's GDP.[10] As to the more immediate background to the signing of the Economic Partnership Agreement, the negotiations for the Agreement officially began on 25 March 2013, and on 6 July 2017 an agreement was reached between the two in principle.[11] Later, on 8 December 2017 negotiations were completed.[12] On 17 July 2018 at the EU-Japan Summit both parties signed the Economic Partnership Agreement[13] and on 12 December 2018 it was approved by the European Union Parliament.[14] In February

[3] Axel Berkofsky: *The EU and Japan: a partnership in the making*, European Policy Centre Issue Paper, February 2007, no. 52, 9, https://www.files.ethz.ch/isn/30653/EPC%20Issue%20Paper%20No%2052.pdf (last access 2019.07. 07).
[4] De Prado: *op. cit*, 436.
[5] European Union External Action: EU-Japan Relations, 1, https://eeas.europa.eu/sites/eeas/files/eu-japan_factsheet_april_2019_6.pdf (last access 2019.07.04).
[6] *Ibidem.*
[7] *Ibidem.*
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[10] BBC News: *EU-Japan trade: Five things about the world's biggest deal*, 1 February 2019, https://www.bbc.com/news/business-47086737 (last access: 2019.07.06).
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[12] European Commission: Joint State by the President of the European Commission Jean-Claude Juncker and the Prime Minister of Japan Shinzo Abe, Press Release Database, Brussels, 8 December 2017, http://europa.eu/rapid/press-release_STATEMENT-17-5182_en.htm (in access 2019.07.06).
[13] European Council/Council of the European Union: EU-Japan summit, Tokyo, 17/07/2018, https://www.consilium.europa.eu/en/meetings/international-summit/2018/07/17/japan/ (last access 2019.07.11).
[14] European Parliament: European Parliament non-legislative resolution of 12 December 2018 on the draft Council decision on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership,

2019 the Agreement entered into force.[15] The European Union Commission President Jean-Claude Juncker said that "*Almost five centuries after Europeans established the first trade ties with Japan, the entry into force of the EU-Japan Economic Partnership Agreement will bring our trade, political and strategic relationship to a whole new level*".[16]

It is believed that the Agreement will aid exporters and investors from the European Union in relation to the Japanese market, and also in protecting the values and standards of the EU.[17] Jean-Claude Juncker stated that it is predicted that as a result of the free trade agreement, the level of trade between the European Union and Japan is to increase by 36 billion euros.[18] The deal between the European Union and Japan must also be seen in the broader context of trade liberalization around the world and certain debates with regards to this, with it being said that the Agreement sends a "*powerful signal that two of the world's biggest economies reject protectionism"*.[19] It is believed that the Economic Partnership Agreement increased in its importance as a result of negotiations being suspended between the United States and European Union with regards to the Transatlantic Trade and Investment Partnership (TTIP), and the subsequent placing of tariffs on steel and aluminium products by the US.[20]

It should also be noted that, in addition to the Economic Partnership Agreement, the European Union and Japan signed the Strategic Partnership Agreement.[21] Negotiations towards this end began in 2013, and the signing, as in the case of the Economic Partnership Agreement, took place in Tokyo on 17 July 2018.[22] This is to act as the instrument acting as the basis of the overall bilateral relationship and framework,[23] with a particular emphasis on security.[24] It also affirms the common values that the European Union and Japan share.[25]

07964/2018 – C8-0382/2018 – 2018/0091M(NLE), 12 December 2018, Strasbourg, http://www.europarl.europa.eu/doceo/document/TA-8-2018-0505_EN.html (last access 2019.07.11).

[15] European Union External Action: op. cit., 1.

[16] DW: *EU Parliament approves 'world's largest' free trade deal with Japan*, 12 December 2018, https://www.dw.com/en/eu-parliament-approves-worlds-largest-free-trade-deal-with-japan/a-46699492 (last access 2019.07.11).

[17] European Commission: Key elements of the EU-Japan Economic Partnership Agreement, 12 December 2018, http://europa.eu/rapid/press-release_MEMO-18-6784_en.htm (last access 2019.07.04).

[18] Kyodo News: *Juncker sees EU-Japan trade expanding by up to $40 bil. with FTA*, 28 June 2019, https://english.kyodonews.net/news/2019/06/205f7326edac-juncker-sees-eu-japan-trade-expanding-by-up-to-40-bil-with-fta.html (last access 2019.07.06).

[19] European Commission: In Focus: EU-Japan Economic Partnership Agreement, http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/ (last access 2019.07.06).

[20] André Sapir, Sonali Chowdhry and Alessio Terzi: *The EU-Japan Economic Partnership Agreement*, 3 October 2018, Bruegel, http://bruegel.org/2018/10/the-eu-japan-economic-partnership-agreement/ (Accessed 2019.07.07).

[21] Delegation of the European Union to Japan: EU-Japan Strategic Partnership Agreement (SPA), 1 February 2019, https://eeas.europa.eu/delegations/japan_en/57491/EU-Japan%20Strategic%20Partnership%20Agreement%20(SPA) (last access 2019.07.06).

[22] European External Action: EU Japan Strategic Partnership Agreement, 1, https://eeas.europa.eu/sites/eeas/files/factsheet_eu-japan_strategic_partnership_agreement_japan.pdf (last access 2019.07.07).

[23] Delegation of the European Union to Japan: Strategic Partnership Agreement Between the European Union and its Member States , of the one part, and Japan, of the other part, https://www.mofa.go.jp/files/000381942.pdf (last access 2019.07.06).

[24] European Union External Action: EU Japan Strategic Partnership Agreement, *op. cit.*, 1.

[25] European Commission: EU-Japan trade agreement on track to enter into force in February 2019, Press Release, 12 December 2018, Brussels, http://europa.eu/rapid/press-release_IP-18-6749_en.htm (last access 2019.07.11).

3. Specific Provisions of the Economic Partnership Agreement

In terms of the main achievements of the Economic Partnership Agreement, with regards to the European Union, the EPA has removed 99% of tariff lines and 100% in relation to imports, while in Japan's case 97% of tariff lines have been liberalized, while the figure stands at 99% with regards to imports.[26] The Agreement includes such measures as the elimination of duties placed on a large number of cheese types, including Gouda and Cheddar; the ability to bring about a substantial rise in the amount of beef exported to Japan and more opportunities for pork exports; the removal of tariffs on certain industrial products where the European Union is highly competitive; the European Union can now more easily export cars to Japan as the latter is now committed to international car standards; and, which shall be examined here, the opening up of services markets.[27] Additionally, the Agreement allows European Union companies to access the procurement markets of 54 cities of Japan, and also lifts procurement obstacles with regards to railroads,[28] an area in which much interest exists.[29] This will also be surveyed here.

The European Union exports around 28 billion euros worth of services to Japan per annum.[30] The new Economic Partnership Agreement will allow firms from the European Union to provide services to Japan more easily.[31] However, it should be noted that the Agreement does not require that the European Union and Japan privatise and deregulate public service provision.[32] Furthermore, the two entities preserve the right to regulate in this particular area.[33] Several services covered in the EPA shall now be surveyed.

With regards to telecommunication services, the principle of competitive markets and their advantages is recognised, yet at the same time it is acknowledged that regulatory necessities may differ according to the market in question, and thus the parties are given under the Agreement certain flexibility in the implementation of the obligations in this area.[34] The EU and Japan are to ensure that the service suppliers of the other party are provided access to and use of public telecommunications transport networks and services according to the

[26] European Commission: The Economic Impact of the EU-Japan Economic Partnership Agreement (EPA), *op. cit*, 1.
[27] European Commission: EU-Japan trade agreement on track to enter into force in February 2019, *op. cit*.
[28] *Ibidem.*
[29] Kimura Fukunari: The Significance of the Japan-EU Economic Partnership Agreement, Nippon.com, 17 October 2018, https://www.nippon.com/en/currents/d00437/the-significance-of-the-japan-eu-economic-partnership-agreement.html (last access 2019.07.11).
[30] European Commission: Key elements of the EU-Japan Economic Partnership Agreement, *op. cit*.
[31] Ibidem.
[32] European Parliament – Directorate-General For External Policies/Policy Department: Study – The EU-Japan Economic Agreement, 18, http://bruegel.org/wp-content/uploads/2018/10/EXPO_STU2018603880_EN.pdf (last access 2019.07.06).
[33] European Commission: Key elements of the EU-Japan Economic Partnership Agreement, op. cit.
[34] European Commission: Annex to the Proposal for a Council Decision on the signing, on behalf of the European Union, of the Economic Partnership Agreement between the European Union and Japan, Brussels, 18.4.2018, COM(2018) 193 final, Agreement between the European Union and Japan for an economic partnership, Article 8.43(1), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0193&from=GA (last access 2019.07.06).

principle that they are reasonable and are not discriminatory.[35]

In relation to postal and courier services, this is dealt with in Sub-Section 3 of the Agreement. Both the European Union and Japan retain the right to define the concept of universal service[36] obligation in this area, which is not to be considered as an anti-competitive measure, so long as its administration is executed in a "*transparent, non-discriminatory and competitively neutral manner*", and which is not burdensome beyond necessity with regards to the definition of universal service by the signatory parties.[37] The Agreement further stipulates that the EU and Japan, in relation to any postal and courier services which are subject to any universal service obligation in their own territories, are not to engage in such activities as excluding each others enterprises' business activities via cross-subsidising, among other measures.[38] Furthermore, it is prohibited under the Agreement to unjustifiably differentiate between customers, including mailers of large volumes or consolidators, where similar conditions exist in relation to charges and provisions with regards to acceptance, delivery, redirection, return and the amount of days that are needed for the delivery for the supplying of a service which is subjected to any universal service obligation.[39]

The issue of international maritime transport services is also addressed in the EPA. It states that each party is to uphold the principle "*of unrestricted access to the international maritime markets and trades on a commercial and non-discriminatory basis*"[40] and that they are to grant to ships flying the flag of the other party or operated by the other party's service providers treatment which is no less favourable than that accorded to its own ships in relation to such activities as accessing ports, using infrastructure and services of ports, and other related activities.[41] Each party is also to allow each other's international maritime transport service suppliers to establish and operate enterprises in its territory according to conditions of establishment and operation which are to be no less favourable than those granted to the service suppliers of each respective party.[42] Each party is also to make available to each others respective international maritime transport suppliers, on a basis both reasonable and non-discriminatory, various services at each others ports, including pilotage, towing and tug assistance, anchorage, and berth and berthing services, among others.[43]

The issue of state-owned enterprises is also addressed in the Economic Partnership Agreement.[44] According to the Agreement, it does not prevent either party from

[35] Article 8.44(1). Additionally, according to the same article, both signatory parties must ensure that the terms and conditions are "*no less favourable than those which the supplier of those public telecommunications transport networks and services provides for its own like services under like circumstances*".
[36] According to Article 8.36(2)(b), universal service is defined as the "*the permanent supply of a postal service of specified quality at all points in the territory of a Party at affordable prices for all users*".
[37] Article 8.37(1).
[38] Article 8.37(3)(a).
[39] Article 8.37(3)(b).
[40] Article 8.69(a).
[41] Article 8.69(b).
[42] Article 8.69(c).
[43] Article 8.69(d).
[44] According to Article 13.1(h), this is defined in the Agreement as an enterprise which is engaged in commerical activities where either the EU or Japan "*directly owns over 50 per cent of the share capital; controls, directly or indirectly through ownership interests, the exercise of more than 50 per cent of the voting rights; holds the power to appoint a majority of members of the board of directors or any other equivalent management body; or has the*

establishing or maintaining state-owned enterprises, or granting special rights or privileges to enterprises or designating monopolies.[45] Furthermore, the parties are not to either require or encourage such enterprises to act in a way which is inconsistent with the Agreement.[46] Additionally, the Agreement stipulates that neither party shall treat each others enterprises in a discriminatory manner with regards to the purchase of goods and services.[47]

As to the issue of public procurement, according to Article 10.1 of the EPA the WTO Agreement on Public Procurement is made part of the Agreement. According to the Agreement neither the European Union nor Japan is allowed to exclude a supplier established in the other party from being a participant in any procedure for tenders on the basis that there is a legal requirement that a supplier has to be either a natural person or legal person.[48] Furthermore, the procuring entity is not allowed to impose on the relevant party the condition that they have relevant prior experience acquired on the territory of that particular party.[49]

As already stated above, the Economic Partnership Agreement lists 54 Japanese cities, the procurement markets of which shall now open up to the European Union. To be more specific, these are Japan's "*core cities*" (known as Chūkakushi in Japanese) which have populations of around between 300,000 and 500,000 people.[50] This is a significant enlargement of Japan's public procurement market to the European Union.[51] Additionally, as has also already been stated, Japan's railway sector will also become more accessible to the EU. It is worth noting in relation to this topic that in the past European suppliers were essentially blocked from access to this particular market as a result of the WTO GPA's Operational Safety Clause (a previously contentious and problematic matter between the parties) application by Japan.[52] This clause is no longer applicable in the area of goods and services procurement for contracts over the amount of approximately 480,000 euros.[53]

4. Conclusion

With the signing of the Economic Partnership Agreement between the European Union and Japan, the relationship between these two entities has been further strengthened and solidified. The relationship has moved signficantly from the Cold War era, to the point where the two have now signed the world's largest trade agreement with each other. By analysing certain provisions of the Economic Partnership Agreement in this study we see the significant developments and changes that the Agreement brings to the EU-Japan relationship, and the specific opportunities that it affords to the signatory parties. The

power to legally direct the actions of the enterprise or otherwise exercises an equivalent degree of control in accordance with its laws and regulations.".

[45] Article 13.4(1).

[46] Article 13.4(2).

[47] Article 13.5(1).

[48] Article 10.5(1). However, according to the same article there is an exception to this, which is that this does not apply with regards to procurement when it is within the scope of the Act on Promotion of Private Finance Initiative of Japan (Law no. 117 of 1999).

[49] Article 10.5(2).

[50] EU-Japan Centre for Industrial Cooperation: Government Procurement and the EU-Japan EPA, https://www.eu-japan.eu/government-procurement-and-eu-japan-epa (last access 2019.07.11).

[51] *Ibidem.*

[52] *Ibidem.*

[53] *Ibidem.*

Agreement strongly signifies the European Union and Japan's commitment to free trade and liberalization at a time where such arrangements have been questioned within certain sections of the international community, and thus, in a sense, the EPA also acts a significant statement as to the principles that both the European Union and Japan wish to uphold in the international arena.

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"HANDCUFFS" FROM A HUMAN RIGHTS POINT OF VIEW IN TURKISH CRIMINAL LAW

Pinar MEMIŞ KARTAL•

Abstract

Handcuffing, one of the forms of treatment does not normally give rise to an issue under the certain articles of ECHR. The limits of handcuffing are important in view of fundamental rights. The use of handcuffs must be justified by the legal authority. The handcuff is a kind of measure and has been imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence. Accordingly, the purpose of the handcuf in no way denotes contempt or lack of respect for a person. Nor is this measure designed to humiliate or debase a person. The publicity connected with the treatment is limited to a person's supporters getting a glimpse of the person in handcuffs. This study briefly provides the status of handcuffs in Turkish legal regulations and certain judicial decisions.

Keywords: *Turkish criminal law, handcuffs, human rights, apprehension, minors.*

1. Overview

Handcuffing, one of the forms of treatment does not normally give rise to an issue under Article 3 of the ECHR. The using handcuffs has been imposed in connection with lawful arrest or detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, fort the ECHR it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or try to abscond or cause injury or damage. Also, *the nature of the treatment or the fact that the victim is humiliated in his own eyes may be a relevant consideration*[1] says ECHR.

Being among the fundamental rights and freedoms, bodily integrity and personality rights of a person may be restricted only in compulsory cases, without prejudice to their essences, based on the causes stipulated under the relevant articles of the Constitution and by application of law. We must consider the human rights are subjective rights and that they are essential for the life, freedom and dignity of human beings; they are also fundamental for the free development of human personality[2]. The matter we would like to discuss in this article is about whether handcuffing a person who

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[1] See *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, p. 16, § 32, and *Raninen*, cited above, p. 2822, § 56,
https://hudoc.echr.coe.int/eng#{"fulltext":["öcalan"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-69022"]}.

[2] Damaschın Mircea, "The Juridical Nature Of The Right To a Fair Trial" in: LESIJ, Nr.XVIII, Vol:2/2011, p.26 (pp.23-33).

is charged with a crime may be characterized as a compulsory case. Handcuffing the suspect or the accused who is the subject of the criminal procedure has been a matter that has engaged the attention of legal practitioners who advocate human rights, as well as people from other disciplines[3]. The limits of handcuffing are important in view of the presumption of innocence. Handcuffs are used to prevent the suspect or the accused from hurting himself/herself, as well as posing a danger for others and the environment and, therefore, their usage has gained recognition. However, it should also be remembered that while, on one hand, there exists the right to put handcuffs on someone, on the other hand there is the right to request not to be handcuffed in the context of presumption of innocence. And the limit of this is the presence of a compulsory case.

From past to present, several concepts regarding human rights have been changed and other fundamental rights have arisen from within those that had been defined as fundamental rights. And in our opinion, one of them is the presumption of innocence[4]. In the Western Europe, until the mid-18th century, the dominant approach was to consider the objective of criminal procedure as the punishment of the accused, and it was deemed impossible to presume that the accused was innocent or not guilty until the end of the trial. In this period when legal evidence system was adopted, the burden of proof rested with the accused and all inhuman treatments towards this person applied for the sake of getting a confession were legitimate[5]. Such approach was started to be abandoned towards the end of this century, and under the influence of liberal and philosophical movement, scientists from both classical and positive schools emphasized that the objective of the criminal procedure was to protect the accused[6]. Expressing the change in the approach observed in the period, Montesquieu, one of the important philosophers of the era, also asserted that freedom did not exist where the innocence of the citizens was not secured[7].

This change experienced as well as the metamorphosis of human rights caused the emergence of various claim rights, as a result of which several rights have become prominent and comprehensible. The concept that we will also tackle here is "handcuffs from the perspective of presumption of innocence".

2. Concept

The reason of emergence of the concept of the right to request not to be handcuffed can be explained by the requirement to give as much consideration

[3] In his article dated June 21, 2008 in Milliyet Newspaper, Çetin Altan wrote, *"…there were times that 70 handcuffed people were placed in a vehicle with a capacity of 40 people. There was a dungeon at the lowest basement floor of the 'Courthouse' in Sultanahmet. Handcuffed suspects arriving from penitentiary institutions were withheld there and when their turn came up to appear before the Assize Court, they were taken before the court through the secret staircase that used to be inside the walls between the dungeon and the courtroom..."* see; http://www.milliyet.com.tr/Default.aspx?aType=YazarDetay&ArticleID=878901&AuthorID=53&Date=21.06.2008 ; accessed on January 20, 2011.

[4] Spataru-Negura, Laura-Cristiana, *Protectia Internationala A Drepturilor Omului, Note De Curs*, Hamangiu Publishing House, 2019, Bucharest, pp. 150-151.

[5] Foucault Michel, Hapishanenin Doğuşu *(The Birth of the Prison)*, translated by Kiliçbay Mehmet Ali, İmge Kitabevi Publishing House, 2. Ed., November 2000, pp. 213-216.

[6] Dönmezer Sulhi/ Erman Sahir, Nazari ve Tatbiki Ceza Hukuku, Genel Hükümler *(Theoretical and Applied Criminal Law, General Provisions)* v. I, Beta, Istanbul 1994, p. 29 et seq.

[7] Montesquieu (Charles de Secondat), "De l'Esprit des Lois", 1748, Edition Gallimard, 1995, Tome I, Livre XII, CH.II, p.377.

as possible to the human dignity of the suspect or the accused who has become the subject of the criminal procedure under the suspicion of a crime. This new concept, which we may consider as an extension of the presumption of innocence that is one of the hard-core rights among the fundamental principles of law contained in the right to a fair trial,[8] emphasizes once more the importance of human dignity and honour. As a matter of fact, the person who is in the capacity of suspect or accused is investigated or prosecuted with a charge for a certain act that constitutes a crime, and there is no final judgment yet established against them indicating their guilt. Under these circumstances, it is clear that treating them as guilty and transporting them from one place to another in a handcuffed position does not accord with the presumption of innocence.

This claim right that we have demonstrated as the right to request not to be handcuffed is actually associated not only with the presumption of innocence, but also, more directly, with the personality rights, protection of the dignity and honour of the concerned person, and the right of the person not to be exposed to degrading treatment. Thus, compatibility between restriction of one's movement ability in a manner that offends their personal rights merely due to the crime they are charged with, and the concept of human dignity is arguable.

It is important to ask why handcuffs are used, although it was ascertained that their use is directly related with fundamental rights. The main reason of the use of handcuffs is that they are a security device applied by the law enforcement officers. Being identified as a type of precaution for cases which necessitates law enforcement officers to use force, handcuffs are supplementary tools[9]. According to another opinion, use of handcuffs on a person, in other words, use of a device that restricts their movement ability, is an indication of the use of force by law enforcement officer[10]. The objective of handcuffing an apprehended person is to prevent the escape of the suspect or the accused when there is such a suspicion for his/her escape[11].

Given that a pair of handcuffs is a device, it is not mandatory to use it as a rule. Nevertheless, law enforcement officers may apply the measure of handcuffing an attacker who poses a danger to themselves and others, who may escape, who is deemed to be an outlaw or who has escaped at the time of his/her apprehension, during his transportation after the apprehension[12]. The limits of the use of force by law enforcement officers are defined by the Constitution. Under Article 13, Article 15 and Article 17 of the Turkish Constitution, the cases in

[8] Memiş Pınar, Adil Yargılanma Hakkının Unsuru Olarak Masumiyet Karinesi *(Presumption of Innocence as a Component of Right to a Fair Trial)* , GSÜ SBE *(Galatasaray University, Social Sciences Institute)* Kamu Hukuku Yüksek Lisansı *(Public Law Graduate Degree)* Yayınlanmamış Yüksek Lisans Tezi *(Unpublished Grade Degree Dissertation)*, January 2003, pp.72-73.

[9] Yenisey, Feridun; Uygulanan ve Olması Gereken Ceza Muhakemesi, Hazırlık Soruşturması ve Polis *(Practiced and Expected Criminal Procedure, Preliminary Investigation and the Police)*, 3. Ed., Beta Yayınevi Publication House, Istanbul,1993, p.219.

[10] Dönmezer, Sulhi; Kolluğun Zor Kullanma Yetkisi ve İnsan Hakları-Kolluğun Silah Kullanma Yetkisi *(Power of Law Enforcement to Use Force and Human Rights - Power of Law Enforcement to Use Weapon)*, Publication of Turkish Criminal Law Association, Beta, Istanbul 2005.

[11] Centel Nur/ Zafer Hamide, Ceza Muhakemesi Hukuku *(Criminal Procedure Law)*, Beta 16. Ed., Istanbul, 2019.

[12] Yenisey Feridun, Kolluk Hukuku *(Law Enforcement Law)*, 2. Ed., Beta, Publication House, Istanbul, 205, p. 70. *"Yenisey states that handcuffs should be used in compulsory cases by placing the hands of the suspect or the accused behind their back in order to prevent them from posing a danger for themselves or others"*.

which the exercise of fundamental rights and freedoms will be limited and suspended are specified. Accordingly, being among the fundamental rights and freedoms, bodily integrity and personality rights of a person may be restricted only in compulsory cases, without prejudice to their essences, based on the causes stipulated under the relevant articles of the Constitution and by application of law[13]. These limitations shall not be contrary to the wording and spirit of the Constitution, the requirements of the democratic order of the society and the secular Republic, and the principle of proportionality.

3. Handcuffs in Legal Regulations

Determination of the legal grounds of handcuffing is important primarily in terms of personality right and secondly in terms of presumption of innocence. Having emerged as one of the fundamental characteristics of law since 1215 Magna Carta and 1679 Habeas Corpus, the presumption of innocence is one of the fundamental rights which is contained in the right to a fair trial and which involves the principle of *in dubio pro reo* - when in doubt, in favor of the accused.

The presumption of innocence indicates the idea that a person who becomes the subject of a criminal investigation or prosecution on the grounds of suspicion of a crime should be considered innocent until sentenced by virtue of a final court decision. The principle stipulated in Article 38 of the Constitution of Republic of Turkey which states, "No one shall be deemed guilty until proven guilty in a court of law" has been expressed in Article 6 of the European Convention on Human Rights (ECHR) as "Everyone charged with a criminal offense shall be presumed innocent until proven guilty according to law". This principle is stipulated also in international instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These are the reasons why the presumption of innocence does not accord with the use of handcuffs. The appropriateness of use of handcuffs is arguable in an approach that considers the person to be innocent until a final court decision is given. In order to avoid the use of handcuffs arbitrarily, in violation of the presumption of innocence, the use of handcuffs should be stipulated by laws and, at the same time, be legitimate[14].

When considering the use of handcuffs as a police tool for the use of force, it makes sense to think that the issue might have first been regulated under the Law No. 2559 on the Powers and Duties of Police Officers. Hence, Article 16 of the Law on Powers and Duties of Police Officers stipulates that if police officers encounter any resistance while carrying out their duties, they are entitled to use force for the purpose of and to the extent required for eliminating this resistance, and 2nd paragraph of the same article defines the use of force as,"*Within the scope of the entitlement to use force; bodily force, physical force, and provided that the necessary legal conditions exist, weapons, may be used in order to immobilize those who resist, by being applied in a gradually increasing manner and in proportion to the nature and degree of resistance"*. It is noted that sub-paragraph b) of the 3rd paragraph of the same article defines physical force and states that handcuffs are also included among the tools used to exercise physical force.

[13] İnceoğlu Sibel, İnsan Hakları Avrupa Sözleşmesi ve Anayasa (European Convention of Human Rights and Constitution), 3. Ed., Beta Publication House, Istanbul, 2013, p.7.
[14] Memiş, pp. 72-74.

Another relevant provision in the Turkish legislation dated 2005 is the handcuffing by the police in criminal proceedings as specified in Article 93 of the Code of Criminal Procedure No. 5271[15]. This provision, which considers handcuffing to be acceptable only under certain conditions,[16] stipulates as follows; "*Individuals who have been apprehended, or who have been arrested and are being transported from one place to another, may be handcuffed if there are indications that they may escape or that they pose a danger to life or bodily integrity of themselves or others.*[17]*"*.

The law does not prescribe how the handcuffs should be applied. Nevertheless, authority to handcuff a person has been set forth in Article 7 of the Regulation on Apprehension, Detention and Interrogation dated 2005, and accordingly the authority to handcuff a person has been prescribed by the provision that reads as follows: *"Individuals who have been apprehended, or who have been arrested and are being transported from one place to another, may be handcuffed if there are indications that they may escape or that they pose a danger to life or bodily integrity of themselves or others."*[18]. It is clear that in the apprehension measure, law enforcement officers may use force, and place handcuffs when necessary, only if the person shows resistance and the circumstances also necessitate doing so. Otherwise, there may be a violation of the presumption of innocence due to "wrongful apprehension"[19].

After specifying the persons who may be so handcuffed, the issue is further clarified by stipulating that children cannot be handcuffed. It is then a principle that children shall not be handcuffed[20]. It is further stipulated in Article 18 of the Law on Protection of Children[21] dated 2005, that children cannot be handcuffed. In parallel with this, Article 19/paragraph c /item 10 of the Regulation on Apprehension, Detention and Interrogation stipulates that handcuffs or similar devices may not be used for children, and law enforcements officers may take the necessary measures only in compulsory circumstances, in order to prevent children from escaping or from posing a danger to the life or bodily integrity of themselves or others[22]. In our opinion, a juvenile who is pushed into crime should not be handcuffed. The objective should not be to protect the society from such juvenile who is rebelling against the society but to protect the juvenile and reintroduce them to society.

Another regulation regarding handcuffing concerns the convicted persons

[15] The Code of Criminal Procedure no. 5271 dated 2005, see Official Journal Issue Date: 17/12/2004; Official Journal Issue no. : 25673.

[16] Yenisey Feridun/ Nuhoğlu Ayşe, Ceza Muhakemesi Hukuku *(Criminal Procedure Law)*, Seçkin, Ankara, 8. Ed., 2020, p.332.

[17] Yenisey/ Nuhoğlu, p.332.

[18] For the Regulation on Apprehension, Detention and Interrogation, see Official Journal Issue Date: 01/06/2005; Official Journal Issue no. : 25832.

[19] Memiş, p. 73-74.

[20] Öztürk Bahri/TEZCAN Durmuş/ Erdem Mustafa Ruhan/Gezer Sirma Özge/ Kirit Saygilar Yasemin/ Akcan Alan Esra/ Özaydin Özdem/Tütüncü Erden Efser/Villemin Altinok Derya/ TOK Mehmet Can, Nazari ve Uygulamalı Ceza Muhakemesi Hukuku *(Theoretical and Applied Criminal Procedure Law)*, Seçkin, 13. Ed. Ankara, 2019, p. 849.

[21] For the Law no. 5395 dated 2005 on Protection of Children, see Official Journal Issue Date: 15/7/2005; Official Journal Issue no. : 25876.

[22] Özbek Veli Özer/ Doğan Koray/Bacaksız Pınar, Ceza Muhakemesi Hukuku *(Criminal Procedure Law)*, Seçkin, 12. Edition, Ankara 2019, p.272.; Şen Ersan, "Kelepçe *(Handcuffs)*", https://www.haber7.com/yazarlar/prof-dr-ersan-sen/1188054-kelepce, accessed on 01/10/2020.

under the Code No. 5275 dated 2005 on Execution of Sentences and Security Measures[23]. Article 50 and Article 115 of the Code No. 5275 stipulates the conditions in which convicted persons may be handcuffed.

4. Handcuffs in Judicial Decisions

In Turkish Law, it is clear that handcuffs shall be used in limited cases, that otherwise, it should be considered within the scope of mistreatment of persons by exceeding the limit in the use of force. As per the decision of Criminal Law Department No.1 of the Turkish Court of Appeals, granted on 11.11.1970 (3191/3085)[24], the act committed by the gendarmerie *(military police)* by shooting and killing the accused after the accused's attempt to escape by freeing himself from the handcuffs while being transported, while he was accompanied by two gendarmerie officers, was considered as self-defence and the fact that the gendarmerie used excessive force against the attempted escape was not taken into account.

The European Court of Human Rights ("ECtHR") evaluates the issue within the framework of Article 3 of the European Convention on Human Rights ("ECHR") and grants a decision on violation in the case of disproportional use of handcuffs when the use thereof is not compulsory[25]. The criteria that are specified by the ECtHR while evaluating the use of handcuffs were stated in *Öcalan v. Turkey* (application no: 46221/99)[26] case as follows; *"Handcuffing, one of the headings of complaint raised in the present case, does not give rise to a violation of Article 3 of the Convention when it is used in connection with a lawful apprehension or detention and does not indicate public exposure or a use of force that exceeds what is reasonably considered necessary in the circumstances. In this regard, it is of importance to determine whether or not there is sufficient reason to believe that the person concerned would resist arrest or try to escape or cause injury or damage. In this context, the public nature of the behaviour may be considered as a criterion. In addition, the public nature of the treatment or the fact that the victim is humiliated before their own eyes may be a relevant factor to consider"*[27].

Another decision of the ECtHR that may be mentioned in this respect is *Raninen v. Finland*, dated December 16, 1997 (152/1996/771/972)[28]. Raninen was arrested for not fulfilling his military duty and he was handcuffed after the trial when he was being taken to his troop[29]. As per his petition, Raninen walked by the people in handcuffs from the moment he went out of the courthouse until he got on the vehicle and remained handcuffed for 2 hours, the time needed to reach to his troop. Raninen filed a

[23] For the Code no. 5275 dated 2005 on Execution of Sentences and Security Measures, see Official Journal Issue Date: 29/12/2004; Official Journal Issue no. : 25685.

[24] KILIÇ Ali, Kolluğun Zor Kullanma Görevi ve Yetkisi *(Duty and Power of Law Enforcement Officers to Use Force)*, Ankara University SBE *(Social Sciences Institute)* Kamu Hukuku YL*(Public Law Graduate Degree)* Yayınlanmamış Yüksek Lisans Tezi *(Unpublished Graduate Degree Dissertation)*, 2003, p. 85, footnote.251.

[25] SPATARU-NEGURA, Protectia İnternationala A Drepturilor Omului, p. 126-134.

[26] For the judgement of the the case Öcalan v./ Turkey *(Application no. 46221/99)*, see https://hudoc.echr.coe.int/eng#{"fulltext":["öcalan"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-69022"]} and for the definif judgement see https://hudoc.echr.coe.int/eng#{"itemid":["001-142086"]}.

[27] *Ibidem.*

[28] Fort the judgement of the case see https://hudoc.echr.coe.int/eng#{"itemid":["001-58123"]}.

[29] For more detail, see, Spataru-Negura, *Protectia İnternationala A Drepturilor Omului*, p. 133.

lawsuit stating that he was subjected to a degrading treatment pursuant to Article 3 of the ECHR, and the ECtHR determined that "*bringing someone before the public and making him walk in front of his supporters in handcuffs is a degrading treatment which damages his dignity and reputation*".

In its Erdogan/Turkey decision, the ECtHR decided that the applicant was rightful in his application, determining that there exists no conditions requiring the acceptance of his exposure to public in handcuffs or making of a search while he was in handcuffs and concluding that this was done to intimidate and to damage the reputation of the concerned person[30].

5. Conclusion

In conclusion, handcuffing an accused while he or she is being brought to a hearing, keeping him or her handcuffed during the hearing in some cases, and handcuffing an apprehended person is not a fact that can be overlooked and disregarded on every occasion. It is mandatory to recognize handcuffs as a device that may be used in exceptional, necessary and compulsory cases. It is clear that, despite being regulated in the laws, handcuffing, except where it is compulsory, is an inhuman treatment and damages the concerned person's dignity. During the enforcement of the apprehension measure, the person should be handcuffed only if there is suspicion that they may escape or they pose a danger to the life or bodily integrity of themselves or others[31]. The fact that use of this device should not be resorted to unless it is compulsory, should be considered primarily in terms of bodily integrity, personality rights, and presumption of innocence.

Although it is not possible in today's world to put forth an idea suggesting to abolish the use of handcuffs completely, at least the exceptional nature of this tool should be taken into consideration and it should be noted that there exists a right to claim for it not to be used in each and every case. Doctrine says for understand the human rights "*we will never find the perfect typologies, in order to achieve a real typology, it takes a lot of work synthesis"* [32].

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[30] Özbek/Doğan/Bacaksiz, p. 272.
[31] Öztürk /Tezcan /Erdem/Gezer Sirma/ Kirit Saygilar / Akcan Alan/ Özaydin/Tütüncü Erden/Villemin Altinok/ Tok, p. 452.
[32] Spataru-Negura Laura-Cristiana, "Old and New Legal Typologies" in LESIJ, no.XXI, Vol 2/2014, p.62 (pp.48-63).

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ROBOTICS AND LAW - THE LINKS BETWEEN ROBOTICS AND LABOR LAW, IN PARTICULAR THE LEGAL PERSONALITY OF EMPLOYEES I

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Abstract

Recently in the fields of labour law the researchers focus connection points between robotics and law, including labor law, and raise potential problems and their answers. There are lot of types AI, or robots, but robots that may have labor law relevance, those, which move physically in the same space as humans in the workplace. These robots are called collaborative robots. Collaborative robots were developed to be able to perform a specific task in the same worksplace with a human at the same time. The study examines issues related to occupational safety, employer power, employee individual and collective will, and employee legal personality in the context of the emergence of robotics.

Keywords: *labour law, collaborative robots, artificial intelligence, flexibility, security.*

1. Introduction

Pessimistic predictions about the negative effects of automation unrest and technological change on employment are becoming more widespread. Many different organizations and researchers have already tried to calculate, estimate how many employees 'work is endangered by automation. However, research and forecasts agree on only one thing, namely that automation cannot be stopped, and the development of robotics and other technologies will fundamentally reshape the labor market and labour law.

When collaborative and autonomous robots work with humans in the same workspace, there are basically three main issues to be considered in labor law regulation and to study them is important regarding the challenges the labour law regulation has to face. of view. *On the one hand*, how is the balance between the protective nature of labor law and flexible employment conditions changing? *On the other hand*, how does the employer's power prevail in the interactions of the robot, artificial intelligence and humans, and how can the individual and collective will of employees be interpreted afterwards? Therefore, it is well grounded to take a commitment on the issue of protection during technological development, as well as to examine the development of decisions and their impact on employment and labor law, including liability.

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Thirdly, the present study also deals with future ideas and policy-making, in which the question for me is whether the broad concept of the employee's legal personality is still sustainable, and if so, how it can be interpreted. The role of the social welfare system, employment policy and education policy in the future visions of the next 25 years are of particular importance.

The first part of our study deals with automation as a phenomenon, and after that the first issue will be detailed, namely how the balance between the protective nature of labor law and flexible employment conditions has been changing recently in light of automation.

2. Automation as a phenomenon

"*Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.* "[1] (Excerpt from the Schuman Declaration)

There has been a paradigm shift in the economy. The period of the Industrial Revolution is long overdue, and its models have become obsolete: we have entered the digital age. If we are looking for the answer to the question of how the characters have changed, we have to look at the changes in the *game*, too, including *the playing field* and *the rules of the game*.

We might even have thought of labor law as having perpetual concepts, but almost everything seems to be shaken fundamentally. The concept of the employee[2] is changing and so is the structure of the employer[3], new working conditions

[1] Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. Declaration of 9th May 1950 delivered by Robert Schuman. European Issue no.204 10th May 2011.

[2] See about persons with similar legal status to the employee: Gy. Kiss: A munkavállalóhoz hasonló jogállású személy problematikája az Európai Unióban és e jogállás szabályozásának hiánya a Munka Törvénykönyvében. *Jogtudományi Közlöny*, 2013/1, pp.4-8., T. Prugberger: Az önfoglalkoztatás intézménye a nyugat-európai és a magyar munkajogban. *Magyar jog*, 2014/2, pp. 68-69., T. Gyulavári: A gazdaságilag függő munkavégzés szabályozása: Kényszer vagy lehetőség? *Magyar Munkajog E-folyóirat*, 2014/1, pp. 17-20. T. Gyulavári: *A szürke állomány. Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán*. [The Grey zone. . Economically dependent work at the frontier of employment and self-employment] Jogtudományi Monográfiák 6. Pázmány Press, Budapest, 2014. B. Szekeres: A szürke zóna védelme Németországban. "Jogalkotás és jogalkalmazás a XXI. század Európájában" *Doctoral student conference, University of Miskolc, Faculty of Law, March 11*., 2016; B. Szekeres: A munkavállalóhoz hasonló jogállású személyek munkajogi és kötelmi jogi védelme a német jogrendszerben. *Spring Wind Conference, Political Science and Law Section; Labor Law, Agricultural Law Subsection, University of Óbuda, Budapest, April 15-17, 2016*; B. Szekeres: A munkavégzési viszonyok változásai, in: *XI. Ph.D. - Konferencia előadásai (szerk.: KONCZ, I., SZOVA, I.), [XI. Ph.D. - Conference lectures ed.: KONCZ, I., SZOVA, I.]*, Conference place and time: Budapest, Hungary, 30.10.2015 Budapest: Association of Professors for the European Hungary, pp. 78-85, B. Szekeres, B.: Gondolatok a munkavállalóhoz hasonló jogállású személyek helyzetéről - a munkajog és a polgári jog kapcsolatáról, *Miskolci Jogi Szemle*, 2016/12. (2.), pp. 561-569., N. Jakab: *A munkavállalói jogalanyiság munkajogi és szociális jogi kérdései- Különös tekintettel a megváltozott munkaképességű és fogyatékos személyekre*, [Labor and Social Law Issues of Legal Personality of Employees - with special regard to People with Disabilities and Work Disabilities] Miskolc, Bíbor Publishing, 2014.

[3] The most important changes are as follows: more and more employers' organizations appear as investment and risk communities, therefore organizational and management methods are also changing: risks and losses are minimized (*just-in-time, lean management*), the transformation of business and employers' interest network and accordingly there is also a change in employees' interests the representation; all the decisions of the often cross-border controlling and controlled companies affect employees and new consultation and information mechanisms

appear[4], the need of the employee for protection also changes.

Moreover, humanity is on the threshold of an era when robots, bots, androids, and other forms of artificial intelligence with increasingly sophisticated technology may lead to a new industrial revolution, which is likely to affect all sections of society, including employment and working conditions.[5]

Martin Ford points out that people have always feared the machine revolution, being afraid that jobs would disappear and it will cause long-term unemployment. Historically, skepticism, of course, has a basis, however, at the same time, technological development has a great potential.[6] Adaptation, and as a result, "rebirth," has created an economic and social environment in which there has been and is an additional opportunity for development and prosperity.[7] At the same time, of course, we also have to deal with adverse effects. Long-term unemployment and lower demand for employees can have a devastating effect, which of course comes at a price in the economy, too. The balance between productivity, rising wages and

must be built accordingly. The study of the changing employer structure goes beyond the scope of my research, but this will be the subject of my research in the future. See Gy. Kiss (2013) pp. 3-4., See also H. Collins – K. D. Ewing – A. Mccolgan: *Labour Law*. Cambridge University Press, Cambridge. 2012, pp. 38-44; R. Rogowski – R. Salais – N, Whiteside: *Transforming European Employment Policy- Labor Market Transitions and the Promotion of Capability*. Edward Elgar Publishing, Cheltenham, 2012. pp. 229-242.

[4] See Jobs, Jobs, Jobs Creating more employment in Europe, Report of the Employment Taskforce chaired by Wim Kok, November 2003, pp. 8-9.
http://www.ciett.org/fileadmin/templates/eurociett/docs/Kok_Report_2003_Jobs_Jobs_Jobs.pdf (23.06.2014) See also: M. Frey: The Employment Strategy of the European Union. 2004. http://econ.core.hu/doc/mt/2004/eng/Frey_I.pdf (23.06.2014) pp. 145-193. Green Paper Modernizing labor law to meet the challenges of the 21 st century, Brussels, 22.11.2006 COM(2006) 708 final, 3. M. Frey, (2004) pp. 162-164. Time to move up a Gear The European Commission's 2006 Annual Progress Report on Growth and Jobs, 6. See also Council and Commission Joint Employment Report 2005/2006, 6, 12-13. http://aei.pitt.edu/40091/1/COM_(2006)_30_3.pdf (24.06.2014).
R. Blainpain – F. Hendricks (eds.): *Labor Law between Change and Tradition.* Liber Amicorum Antoine Jacobs. Kluwer Law International, The Netherlands. 2011.

[5] McKinsey Global Institute (2017) 14. The speed of automation is influenced by several factors. During this transitional period, even if jobs are lost, new ones will in any case be created, to which the employee must adapt. See also: P8_TA (2017) 0051 Civil law rules on robotics. The Resolution of the European Parliament as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics (2015/2103 (INL)) (2018 / C 252/25) Preamble B.
Between 2010 and 2014, sales of robots grew by an average of 17% per year and by 29% in 2014, the largest annual increase to date, with the main drivers of growth coming from automotive component suppliers and the electrical / electronics industry; whereas the annual number of patent applications related to robotics has tripled in the last decade. P8_TA (2017) 0051 Civil law rules on robotics. The Resolution of the European Parliament as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Recital D.

[6] M. Ford: *Rise of the robots: technology and the threat of a jobless future*, New York, Basic Books, 2015, ix.-x. McKinsey Global Institute (2017) 3.

[7] The optimistic view is that a factory that saves money on labor through automation or introduces lower prices that make its products more attractive, and increased demand may allow more employees to be hired. It can generate more profits or lead to a higher salary. This can lead to increased investment or increased consumption, which in turn can lead to more production and thus more employment. Amazon offers a more modern example of this phenomenon. The company has increased the number of robots working in its warehouses from 1,400 to 45,000 in the past three years. During the same period, the pace of recruitment did not change. It is important that we do not have to talk about the disappearance of certain professions. You need to look at professions according to which ones can be replaced with robots in parts and which ones can't be replaced at all. See S. Kessler: The Optimist's Guide to the Robot Apocalypse, March 9, 2017, available at https://qz.com/904285/the-optimists-guide-to-the-robot-apocalypse/ (March 7, 2020).).

consumer spending will collapse: we will also have to reckon with inequality in terms of income and consumption.[8] Policy makers have a huge role to play in addressing these issues, as timely preparation can alleviate employees 'difficulties during the transition period.

And preparation is certainly possible, as automatization does not happen overnight. The McKinsey Global Institute estimates that by 2055, the conditions for the technology transition will be in place, but the actual transition may still lag behind in time.[9] However, We find it important to note that labor shortages generate automation of work processes.[10] Automating activities allows businesses to improve performance by reducing errors, improving quality and speed, often beyond human capabilities. Automation also contributes to productivity, so it can adequately offset the decline in the working-age population.[11]

However, this does not mean that there is no need for human labor.[12] At the current level of technological development, the more automated a production line is, the less flexible it is. An example for this is the production of cars in different colors. The less automated a production line is, the easier it is to change and produce more kinds of products. The automated production line currently lacks intelligence. However, with the development of artificial intelligence[13], this will also change. The real change will occur when robots capable of making their own decisions perform their activities in interaction with humans.

Technical, economic and social factors determine the pace and extent of automation. As it is calculated, by 2055 half of today's workflows can be automated, and conditions can speed up or slow down this process by plus or minus 20 years. In the global economy, nearly $ 16 trillion is paid in wages for activities that can be automated. While less than 5 percent of all occupations use fully automated technologies, about 60 percent of all occupations have activities that consist of at least 30 percent automated activities. It is estimated that the number of occupations that will change in the future is

[8] M. Ford (2015) xvi.-xvii. Of course, technology will not shape the future in isolation. Rather, it will be interweaved with other major social and environmental issues, with challenges such as population aging, climate change and resource depletion. There will be a sudden shortage of employees as the baby boom generation leaves the labor market, however, automation will appear as a counterweight. See also McKinsey Global Institute: A future that works: automation, employment and productivity. January 2017, Executive Summary, 1. At the macroeconomic level, based on modeling, automation may globally result in growth of up to 0.8 to 1.4 percent annually.

[9] See McKinsey Global Institute (2017) pp. 12-13.

[10] As Martin Ford points out. See M. Ford (2015) pp. 42-46. McKensey Global Institute: A future that works: automation, employment and productivity. January 2017, Executive Summary, 1.

[11] See McKensey Global Institute (2017) Executive Summary, iii.

12 See also McKinsey Global Institute (2017) pp. 3. See more: G. Mélypataki: A munka digitalizálódása a munkajogi alapelvek tükrében. Miskolci Jogi Szemle: A Miskolci Egyetem Állam- És Jogtudományi Karának Folyóirata Xv : 3. pp. 97-104. , 8 p. (2020), G. Mélypataki – Zs. Juhászné, Riczu:Labour Law and Employment Policy Implications of Digitizing Work and Inroducing Robotics. *Hantos Periodika* 1 : 1 pp. 57-74. , 18 p. (2020).

[13] See Artificial Intelligence, a non-human intelligence program in the context of a program running on an artificially created machine system, designed to operate systems that are capable of independent decision-making independent of human intervention and thus can trigger elements of each workflow. https://ec.europa.eu/digital-single-market/en/artificial-intelligence (9 March 2020) file: /// C: /Users/Dr.%20Jakab%20N%C3%B3ra/Downloads /AIDefinitionpdf%20(1).pdf (March 9, 2020) See also : T. Klein – A. Tóth (szerk.): *Technológia jog – Robotjog – Cyberjog*. [Law of Technology – Law of Robots – Law of Cyber] Wolters Kluwer Hungary Kft., Budapest, 2018, pp. 184.

larger than the number of occupations that will be eliminated through automation.[14]

As regards the effects of automation, therefore, a distinction must be made between *employment as a whole* and *labor law regulations*. With regard to the impact on employment, the European Parliament draws attention to the Commission's forecast that by 2020 Europe will face a shortage of ICT professionals of up to 825000 and that 90% of jobs will require at least basic digital skills.[15]

And within labor law regulation, it is *robotics* and *artificial intelligence* that determine regulatory challenges. What do We mean by these?

From a labor law perspective, robots that move physically in the same space as humans do in the workplace are important. These robots are called *collaborative robots*. Collaborative robots have been developed to be able to perform a specific task in a common workspace with a human at the same time. Man controls and supervises production processes while the robot takes over the strenuous work. The sensitive, light-built collaborative robot is able to work together with man, hand in hand, without a protective fence, with the help of innovative security solutions. Looking to the future, the goal is that the robot shall relieve workers of the burden of monotonous work and support the execution of precision operations. This innovative technology also has economic benefits and has been shown to result in significant performance gains. To this end, however, it is important to carefully plan workflows and establish proper communication between man and the machine.[16]

The use of such robots obviously affects the occupational structure. It really requires different knowledge and digital skills from employees. However, the use of these robots raises serious *occupational safety issues*. In the case when the robot does its work in a space separated by a protective fence from humans, we can talk about an effect on employment, but we cannot talk about labor law effect (cases of coexistence and cooperation[17]). However, when working in a common space, several questions arise: *is the robot a dangerous plant? Is it a hazardous technology according to Act XCIII of 1993 on Occupational Safety and Health? How are the robot operator and the human being responsible for the damage caused?* Labor and civil liability issues also need to be resolved, which has not yet succeeded. The consequences of damage in the interaction between robots and humans must be reconsidered. In this, the European

[14] McKinsey Global Institute: A future that works: automation, employment and productivity. January 2017, Executive Summary, iii. The same writes on p. 2: *"As processes are transformed by the automation of individual activities, people will perform activities that are complementary to the work that machines do (and vice versa). These shifts will change the organization of companies, the structure and bases of competition from industries, and business models."* McKinsey examined the ability for automation of 2000 work activities in cases of 800 different occupations based on data from the U.S. Department of Labor. See McKinsey Global Institute (2017) 4-16.

[15] P8_TA (2017) 0051 Civil law rules on robotics. The Resolution of the European Parliament as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Paragraph 41.

[16] See the information of the Hungarian Chamber of Engineers. https://www.mmk.hu/informaciok/hirek/kollaborativ-robotok (downloaded: March 9, 2020).

[17] In the case of coexistence: the robot has no contact with humans, the workspace is separated, contact is possible but unpredictable and unlikely. In the case of cooperation: the robot and the human have a direct relationship, the workspace is the same, the work processes are separated in time, contact is possible but unpredictable and unlikely. In the case of collaboration: the robot and the human have a direct connection, the workspace is the same, the work processes take place at the same time, there is a continuous direct connection. Hungarian Chamber of Engineers. https://www.mmk.hu/informaciok/hirek/kollaborativ-robotok (downloaded: March 9, 2020).

Parliament's resolution as of 2017 provides guidance. Today, when collaborative robots are used in the workplace, international standards are applied and occupational safety rules are of chief importance in regulation - understandably.[18]

However, in the European Parliament's resolution, collaborative robots have artificial intelligence as regards future conceptions: that is, they make autonomous decisions, learn and adapt. These robots should be treated as "humans" in the collaborative plant and workspace[19] in order that any liability issues that may arise should be resolved. At the end of the day, they need to be rewarded, and if they make a mistake, they should be punished in order to learn. Regarding these robots, it may not be possible to maintain human control in all cases.

3. Flexibility and security?

The mechanization of agriculture has, logically, rerouted the worker towards cities and factories with mass-production.[20] Automation and globalization have paved the way for new forms of work, when the worker needs to have digital skills. Over the last nearly twenty years, discourses on the future of labor law have fundamentally determined the development of dogmatics in

[18] MSZ EN ISO 10218-1: 2011 Robots and robotic devices. Safety requirements for industrial robots. Part 1: Robots, MSZ EN ISO 10218-2: 2011 Robots and robotic devices. Safety requirements for industrial robots. Part 2: Robotic systems and their coordination, MSZ EN ISO 12100: 2011 Safety of machinery. General principles of design. Risk assessment and risk reduction, MSZ EN ISO 13850: 2016 Safety of machinery. Emergency stop. Design principles., MSZ EN ISO 13855: 2010 Safety of machinery. Arrangement of safety devices taking into account the approach speed of (human) body parts, ISO / TS 15066 Technical specification.
The use of collaborative robots reduces the following risks: the risk of injury to hands and arms; no sharp, puncture surface. The edges and edges are rounded, including tools and workpieces. Human responsibility. There is no need for a complicated entitlement system, therefore the incidence of injuries and accidents due to negligence is reduced. Design. It is easy to mobilize and requires little space. As a result, the risk of personal injury during installation and relocation is low. Stay in scope. Anyone can be in the immediate vicinity of the robot, without physical fencing. Dangerous obstacles. Preventable, no cluttered wiring harness and robot cell. Workloads. They can be triggered and stretch injuries can be prevented. Monotonous workflows. They can be triggered and supported, thereby reducing a person's psychological burden.
New risks arising from the use of collaborative robots: moving machine parts. If the machine shifts to speed and people are in the collaborative workspace, they may be pushed by moving machine parts. Improper use. Parts of the machine can push workers and cause minor injuries (body parts such as hands, arms). Human intervention in protective equipment. Workpiece injury, e.g. pinch, fall, blow. Energy. Damage caused by energy stored in the machine structure, e.g. in case of collision and entrapment. Psychosocial factors. Increase in load. Hungarian Chamber of Engineers. https://www.mmk.hu/informaciok/hirek/kollaborativ-robotok (downloaded: March 9, 2020).

[19] Collaborative plant: the state in which a robot specially designed for this process works together with the robot operator in the collaborative workspace. Collaborative workspace: A place within the operating range of a robot where the robot, including the workpiece, and the operator can perform work at the same time during the technological process. Quasi-static connection: contact between the operator and a part of the robot, where a part of the operator's body can be pinched between the moving parts of the robot or another fixed or moving part of the robot cell.

[20] In the context of the decline in agricultural employment during the Industrial Revolution, we expected a significant proportion of agricultural workers to become unemployed. But that's not what happened. Instead, employment in other sectors increased over the same period as the decline in agricultural employment happened. People started to work in factories, and then computers, airplanes, and transport of freight also appeared — occupations that were almost unimaginable in 1900. See also S. Kessler: The Optimist's Guide to the Root Apocalypse, March 9, 2017, available at: https://qz.com/904285/the-optimists-guide-to-the-robot-apocalypse/ (March 2020) 7.)

labor law.[21] In the development of labor law, consequently, new forms of work have questioned the need for the fundamental function of labor law: the protection of the worker. The question arose with a good reason: *is the task of the law still to ensure job security, or has that time passed and should it rather be to protect income and employability?* The response of labor law to this was the introduction of the concept of '*flexicurity*'.[22] In the debate on flexicurity, We believe that the European Pillar of Social Rights (hereinafter referred to as the 'Pillar') provides guidance. Like the Schuman Declaration, it is a declaration, however, it takes a position on the essential elements of security. In both declarations, it is important to preserve solidarity as an indisputable value, a norm. When we talk about the effects of robotics and artificial intelligence on employment and labor law regulation, We think that responses to technological challenges must be interpreted on the part of the working person within the framework of safety walls. In what follows, We address the issue of flexibility and security from the focus of automation and artificial intelligence.

The Preamble to the Pillar emphasizes that "*Economic and social development are closely interlinked and the creation of a European Pillar of Social Rights should support efforts to form an employment model through improving the competitiveness of a more inclusive and sustainable Europe and strengthening investments, job creation and social cohesion.*"[23] When analyzing the Pillar, it is already striking that we are talking about principles rather than rights.[24] The development of the social dimension,

[21] See S. Deakin – G. S. Morris: *Labor Law*. Sixth Edition. Hart Publishing. Oxford and Portland, Oregon, 2012. pp. 30-37. 131-190., M. Freedland – N. Countouris: *The Legal Construction of Personal Work Relations*. Oxford University Press, Oxford., 2011, ILO (1997) Contract Labor - Fifth item on the agenda Report V (1) to the 86th Session of the International Labor Conference 1998, Geneva. S. Deakin – F. Wilkinson: *The Law of the Labor Market. Industrialization. Employment and Legal Evolution.* Oxford University Press, Oxford, 2005.; R. Blainpain – F. Hendricks: *European Labor Law*. Kluwer Law International Bv, The Netherlands 2010.; B. Veneziani: The Employment Relationship. In: Hepple, B. - Veneziani, B. (ed.): *The Transformation of Labor Law in Europe. A Comparative Study of 15 Countries 1945-2004.* Hart Publishing. Oxford and Portland, Oregon. 2009; S. Deakin: The Contribution of Labor Law to Economic and Human Development. In: G. Davidov – B. Langille (ed.): *The Idea of Labor Law*. Oxford University Press, Oxford, 2011. pp. 156-178; M. Freedland – N. Countouris: The Legal Characterization of Personal Work Relationships and the Idea of Labor Law. In: Guy Davidov - Brian Langille (ed.): *The Idea of Labor law*. Oxford University Press, Oxford 2011, pp. 190-208.; A. Bronstein: *International and Comparative Labour Law.* Palgrave Macmillan, International Labour Organisation. 2009. pp. 1-22.

[22] See Y. Stevenst – van B. Buggenhou (1999-2000): The Influence of Flexibility as a Motor of Changing Work Patterns on Occupational Pension as a Part of Social Protection in Europe. *Comparative Labor Law & Policy Journal*, 21. pp. 331-370; Stone, K. V. W.: Flexibilization, Globalization, and Privatization: Three Challenges to Labor Rights in our Time. In. Bercusson, B. - Estlund, C. (ed.): *Regulating Labor Law in the Wake of Globalization. New Challanges, New Institutions.* Hart Publishing, Oxford and Portland, Oregon. 2009. pp. 115-136 .; J. Michie. – M. Sheehan: Labor 'flexibility' - securing management's right to manage badly? In: Brendan Burchell - Simon Deakin - Jonathan Michie - Jill Rubery (ed.): *Systems of Production, Markets, Organizations and Performance.* Routledge, London and New-York. 2005,pp. 178-191.

[23] Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights; 6. (The English text can be found at: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social -rights-20-principles_en) (For the English text, see: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/ european-pillar-social-rights-20-principles_en).

[24] The Pillar embodies the principles and rights of a fair and well-functioning labor market and welfare systems of Europe in 21st century. It reaffirms existing rights and highlights principles that address the challenges of economic, technological and social development. *Hendrickx* said that because of its effect of this, we must be careful. It certainly has a new, political momentum, which is different from the pre-Millennium documents. F. Hendrickx:

which has been emphasized since the Paris Declaration, is indeed a condition for a competitive and sustainable Europe, in which the principles laid down in the Pillar aim to create *an employment model. However, in the development of the employment model, automation must be considered as another stage of economic and social development in the next 25 years.*

Change is not necessarily bad. The potential arising from this is also confirmed by the European Parliament, which states that the development of robotics and artificial intelligence can offer an opportunity to change human life and working methods and increase levels of efficiency, savings and safety.[25] Moreover, the widespread use of robots does not necessarily lead to labor replacement automatically, though in labor-intensive sectors, lower-skilled jobs are likely to be more exposed to the risk of automation. This trend could bring production processes back to the European Union: whereas researches have shown that employment is growing significantly faster in occupations that use computers to a greater extent; whereas the automation of work provides an opportunity for people who do monotonous work to switch to more creative and meaningful tasks; whereas automation requires governments to invest in education and to execute other reforms in order to prioritize the development of the skills that tomorrow's workers will need.[26]

The workers of tomorrow really need to have new abilities and skills[27], however, robotics and artificial intelligence will not change people's basic needs. Jobs will be classified according to the criteria of whether or not the workflow can be replaced by a robot.[28] Nonetheless, We are convinced that the *working person*, even when working with robots with artificial intelligence, *still needs protection*. *The questions are what kind of protection this is and whether the full adaptation of technological results in a sector will change the level of protection.*

When we are trying to achieve a balance between flexible working conditions and security in the present labor law debates, We think it is the Pillar that can help. In my view, the minimum level of a *life worthy of a working person* has been formulated in the Pillar, in which the value of work is unquestionable, and which is also *timeless* in

European Labor Law and the Millennium Shift: From Post to (Social) Pillar. In: F. Hendrickx, –V. Stefano (eds.): Game Changers in Labor Law. Shaping the Future of Work. *Bulletin of Comparative Labor Relations - 100*. Kluwer Law International BV, Netherlands, 2018. pp. 60-61.

[25] … And to provide a higher level of services; whereas, in the short and medium term, robotics and artificial intelligence promise efficiencies and savings not only in production and trade, but also in areas such as transport, medical care, rescue, education and training; agriculture, while making it possible to avoid exposing people to dangerous conditions, such as the clean-up of areas contaminated with toxic substances,… P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution as of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Recital E.

[26] P8_TA (2017) 0051 Civil law rules on robotics. European Parliament resolution of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Recital J. Sarah Kessler: The optimist's guide to the robot apocalypse, March 9, 2017, available at: https://qz.com/904285/the-optimists-guide-to-the-robot-apocalypse/ (March 6, 2020).

[27] See M. Ford (2015) xv.-xvi. In the past, automation technology was more of a specialization in one employment sector, therefore workers had to switch to another industrial sector. Today's situation is quite different. Information technology is indeed technology with a general purpose and its impact is ubiquitous. Almost every industry will be less labor intensive as the new technology becomes part of the business model.
Martin Ford analyzes the phenomenon of automation in certain sectors at great length. He points out that the service sector and agriculture are the most exposed to the replacement of manual labor by robots. See M. Ford (2015) 5-27.

[28] See M. Ford (2015) xvi.

the employment and economic changes caused by technological development.

A work-based society is one that can truly remain *competitive* in the 21st and the subsequent centuries. The European Commission in the Pillar and the European Parliament in the resolution provide guidance on how and under what conditions this should be executed. First, We will examine the model of the Pillar.

We see the employment model outlined by the Pillar as *a social and labor market program*. In our opinion, an employment model has been developed in the Pillar in which *the degree of compromise between flexibility and security has become visible.* The Pillar sets out what the European Union considers to be a minimum level of social protection in order to maintain and enhance competitiveness, as Member States can also promote social rights in a more ambitious way than the way the rights laid down in the Pillar define. It can be stated from the Pillar that the joint realization of economic and social development can take place along the following principles: *equal opportunities and employment rights*[29], *fair working conditions*[30], *social protection and social inclusion*[31]. These can be considered as *the mainstays* of the employment relationship in the development of the employment model. The spread of innovative forms of work is guaranteed only if a minimum of protection is provided[32].

[29] The employment model is based on equal opportunities. In this context: Everyone has the right to quality and inclusive education, training and lifelong learning. Equal treatment and equal opportunities for women and men must be ensured in all areas. Everyone has the right to equal treatment in employment, social protection and education, and to have access to goods and services which are available to the public. Besides, everyone has the right to active support for employment, that is, we have reached the employment policy leg of the social and labor market program. It is clear from the provisions that the jobseeker must be provided with services that will lead him back to the labor market as soon as possible. The principles of the transit labor market are also set out in this section. Everyone has the right to timely and personalized assistance to improve their employment or self-employment prospects. This includes the right to support for job search, training and retraining. Everyone has the right to social protection and training during a career change. Young people have the right to continuing education, apprenticeships, traineeships or a fair job offer within 4 months of becoming unemployed or leaving education. Unemployed people have the right to personalized, continuous and consistent support. The long-term unemployed are entitled to a personalized, detailed assessment no later than the 18th month of unemployment.

[30] The section on fair working conditions describes the basic rules of the labor law, in which the following principles and rights are the mainstays: secure and flexible employment, wage protection, information on employment conditions, protection against dismissal, social dialogue and employee participation, work-life balance, a healthy, safe and well-designed work environment and data protection.

[31] Alongside the employment policy and labor law regulatory legs of the social and labor market program, the social protection system is emerging. I myself see employment policy as part of the social protection system, but it seems to be separate here. Social protection and social inclusion involve important building blocks of the social dimension: Childcare and child support, Social protection, Unemployment benefit, Minimum income, Old-age income and old-age pensions, Health care, Social inclusion of people with disabilities, Long-term care, Housing and assistance to the homeless, Access to basic services.

[32] It is important to distinguish between different types of self-employment when planning EU activities to promote self-employment, as well as when designing policies, either to encourage self-employment or to protect self-employed workers more effectively. Eurofound (2016), *Exploring the fraudulent contracting of work in the European Union*, Publications Office of the European Union, Luxembourg. Executive summary, 2. The impact of digitization is confirmed by another report: Eurofound (2017), *Aspects of non-standard employment in Europe*, Eurofound, Dublin. 3. See also:
De Stefano, V. (2016): The rise of the "just-in-time workforce": on-demand work, crowd work and labor protection in the "gig-economy". *Comparative Labor Law and Policy Journal*, Vol 37 (3) 471-503; Finkin, M. (2016): Beclouded Work in Historical Perspective. *Comparative Labor Law and Policy Journal*, 37 (3) 603–618; Kovács, E. (2017): Regulatory Techniques for 'Virtual Workers'. *Hungarian Labor Law E-Journal*, 2. 1-15; Schiek, D. – Gideon, A. (2018): Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier?

Digitalization and automation are expected to further increase the diversity that currently exists in working conditions.[33]

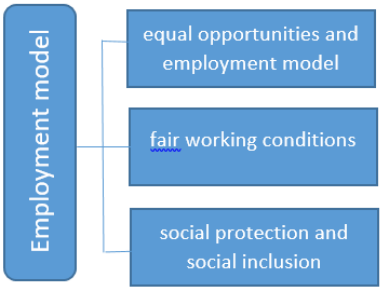

Figure 1 Mainstays of the Employment Model of the Pillar

Within the framework of these mainstays, the issues of automation must also be interpreted, since the basis of working conditions is man. As a result of technological development, the creation of rules to protect the working person may remain one of the main objectives: the definition of a minimum level of protection in which the human right to human dignity is most fully exercised. In this minimum of protection, We continue to consider the principle of equal opportunities, fair working conditions and, from an employment point of view, the principles of social inclusion and social protection to be essential.

The European Parliament's resolution as of 2017 also outlines the value system

International Review of Law Computers & Technology, 32 (3) 1-20, https://www.researchgate.net/publication/324449617_Outsmarting_the_gigeconomy_through_collective_bargaining_-_EU_competition_law_as_a_barrier_to_smart_cities; Smith, R. - Leberstein, S. (2015): *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy*. New York, National Employment Law Project, http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf 2015; Florisson, R. - Mandl, I. (2018): *Digital age Platform work: Types and implications for work and employment - Literature review*. Eurofound, Publications Office of the European Union, Luxembourg 1 .; Cherry, M. - Poster, W. (2016): *Crowdwork, Corporate Social Responsibility, and Fair Labor Practices.* Saint Louis University Legal Studies Research Paper no. 2016-8, https://ssrn.com/abstract=2777201.

[33] I also consider it important to be careful to avoid employment relationships that lead to the exclusion of workers, precarious work, even by improper exercise of rights under atypical contracts. Precarious work, according to an EU study as of 2013, involves instability, a lack of labor protection, characterized by social and economic vulnerability. *Social protection rights of economically dependent self-employed workers*; Study; (2013); Directorate General for internal policies; Policy department A: Employment policy; 14. Precarious work is nothing more than unstable work. On the sociological side of the topic, see: http://ujegyloseg.hu/rossz-fizetes-letbizonytalansag-itt-a-prekariatus/; (Downloaded: March 5, 2018).

"The development of employment relationships which lead to precarious working conditions must be prevented, inter alia, by prohibiting the abuse of non-traditional employment contracts." *Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights*; https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en (Downloaded: March 5, 2018).

For the concept of self-employment, see Gy. Kiss, (2013), T. Prugberger (2014), Szekeres, B.: *Munkajogon innen - munkaviszonyon túl.* Miskolci Egyetem, Deák Ferenc Állam- és Jogtudományi Doktori Iskola, 2018, pp. 55-68. Szekeres, B.: Fogalmi zűrzavar a munkajogtudományban: az önfoglalkoztatás problematikája. *Publicationes Universitatis Miskolcinensis Series Juridica Et Politica* XXXVI/2, pp. 472–484. Recently, digitization has significantly increased the pace of change. Companies and businesses need to adapt their economic activities more quickly to different markets in order to carry out new product cycles or seasonal activities and to deal effectively with fluctuations in business volume and turnover. In many cases, businesses prefer new forms of employment and contracts, such as on-call work, voucher-based employment and temporary work, in order to be able to respond to these needs. Other forms of self-employment or employment, such as platform-based work, also create new opportunities for people to enter or remain in the labor market and to supplement their income from their main job. See Council Recommendation on access to social protection for workers and the self-employed, COM (2018) 132final 1.

without which technological development will generate dangers. These are as follows: human dignity, equality, justice and fairness, non-discrimination, information-based consent, the protection of privacy and family life, and the principle of data protection, as well as other fundamental principles and values of EU law, for example, the principles of non-stigma, transparency, autonomy, individual responsibility and social responsibility.[34]

In our view, the predicted technological changes do not change this protection, either. And the only reason for this is that *these principles are fundamental to man himself*. And the working person does not disappear, he must 'merely' adapt - as always - to change. The question arises in us with good reason: *will the change in the decision-making power transform our perception of protection?* The definition of the minimum level of protection must not change in any way, however, the principles of flexibility in labor law, such as the principle of fair consideration, will only be relevant to man.

4. Conclusions

Thus, in the first part of the study, one of the three planned questions was answered. We have found that when collaborative and autonomous robots work with humans in the same workspace, it is justified to examine three additional issues in labor law regulation. On the one hand, how the balance between the protective nature of labor law and flexible employment conditions is changing. On the other hand, robot and artificial intelligence, as well as how employer death prevails in human interactions, and how employee individual and collective will can be interpreted thereafter. That is why it is justified to take a position on the issue of protection during technological development, as well as to examine the development of decisions and their impact on employment and labor law, including liability.

We addressed the issue of protection, namely it was important to see where it can be found under the pressure of the economic and social changes. *As a result of technological development, the creation of rules to protect the working person may remain one of the main objectives*: the definition of a minimum level of protection in which the human right to human dignity is most fully exercised. In this minimum of protection, we continue to consider the principle of equal opportunities, fair working conditions and, from an employment point of view, the principles of social inclusion and social protection to be essential.

Second part of the study will discuss the importance of the decision-making power and future visions ont he autamtion..

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[34] P8_TA(2017)0051 Civil law rules on robotics. European Parliament resolution of 16 February 2017 with recommendations to the Commission on civil law rules on robotics Point 13.

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THE ROLE OF THE TRADE UNIONS REGARDING MIGRANT WORKERS IN EUROPE

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Abstract

Labour migration in Europe gets bigger and bigger than every century. Migrant workers are entering into EU from third countries and most of them from within EU. Anyway EU shall make the strong and good legislations on the protection of the migrant workers. When the workers face their rights' infringement or violations, they need to have some specific organizations or union to negotiate and stand for them. Trade unions are the main platform for the collective bargaining between workers and employers. But some countries don't give the migrant workers the chance to enter into and participate in the trade unions. My purpose to research about the role of trade union in EU is to find out the rights of the migrant workers in trade unions in EU as it is the big enlargement regions and there are so much great and developed businesses as the incentives of the foreign workers. Most of the workers around the world are interested in working within EU. EU tried to protect their workers in line with their conventions or protocols which are under International Labour Standards. EU has the labour court to solve the cases the workers are facing. But before the step of EU labour court, there is a negotiation between the two sides as a preliminary step.

Keywords: *Trade Unions, EU, Migrant workers,*

Introduction

EU is an enlarged union that allows free movement within the whole region. Along with being an enlargement of EU, free movement and migration cause EU complicated and as a consequence of the enlargement of EU, regarding free movement and migration it is complicated and confused for EU to make the fair legislation as the EU will endeavour not to lose the rights of native people and make the discretion not to violate the rights of foreign people. Among the free movement, labour migration creates many issues for the EU, including European citizens and the third country citizens who are trying to migrate to work within the EU. It is interesting how it is possible to manage and control the issues of labour migration. The EU has various kinds of job opportunities for other regions, ASEAN or America or Africa. It makes EU a big migration flows every year and more crowds of workers including migrant workers. Migration flows among EU countries and from the third countries are not easily controlled with the policy and legislation because of the enlarged European Union.

Trade unions have an important role related to the cases of migrant workers. Initially, trade unions are for the workers, but no one notices whether migrant workers can join and get the protection from the trade union or not. I have divided this paper into three chapters to clarify my thoughts about the trade union and the migrant workers in EU. Chapter I says the definitions relating to

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the essence of this paper. Definitions are trade union, migrant worker and collective bargaining and the relevant labour market itself. They are also the key words of this paper. Chapter II provides the history of the trade unions in EU. When I write the article on trade union and migrant workers in EU, firstly, I need to express where the trade union comes from. The history is vital in explaining and comparing the current situation and can make the article clear. Chapter III implies the relation between trade unions and migrant workers. The reason of stating their relation is that some trade unions in the world do not protect or concern migrant workers in relation to their fundamental rights in employment.

Trade union is essential for every workers to negotiate and solve their obstacles. In this paper you can see how much the trade unions is important to the workers. How about for migrant workers do trade unions serve? Because it is the strength for every worker in their employment, they always rely on trade unions.

My hypothesis for this paper is that if trade unions stand strong with migrant workers in equal ways and migrant workers would equally get the protection and the rights, they should be entitled through these organizations; consequently, the alliance between the States would be also supportive.

I applied comparative methods and case study method in this paper, because comparative method is essential to all context and the policies among the States. Furthermore, the case study is effective in writing and describing the role of the trade union and migrant workers. Therefore, these two methods are very important in my paper.

1. Definitions

Cambridge dictionary says trade union is an organization that presents the people who work in a particular industry, protects their rights, and discusses their pay and working conditions with employers.[1] Labour unions or trade unions are organizations formed by workers from related fields that work for the common interest of its members. They help workers in issues like fairness of pay, good working environment, hours of work and benefits. They represent a cluster of workers and provide a link between the management and workers.[2] Collin English Dictionary expresses about trade union that it is an organization that has been formed by workers in order to represent their rights and interests to their employers, for example, in order to improve working conditions or wages.[3] Moreover, it is an organization, usually in a particular trade or profession that represents workers, especially in meetings with employers.[4] There is one more definition that states that they are associations of workers and are formed with the intention of protecting the workers against exploitation of the employers and to improve the workers' working conditions.[5] By seeing the definitions mentioned above, it is clear that trade unions are organizations to protect and

[1] Definiton of Trade Union, Cambride Dictionary, https://dictionary.cambridge.org/dictionary/english/trade-union.
[2] Definition of Trade Union, The Economic Times ,Glossary, Economic. https://economictimes.indiatimes.com/definition/Trade-Union
[3] Definition of Trade Union, Collins English Dictionary, https://www.collinsdictionary.com/dictionary/english/trade-union
[4] Definition of Trade Union, Longman Dictionary of Comntemporary English, https://www.ldoceonline.com/dictionary/trade-union
[5] Smriti Chand, Trade Union: Its meaning and definition, http://www.yourarticlelibrary.com/trade-unions/trade-union-its-meaning-and-definition-trade-union/26118

represent the workers against losing their rights at their workplace.

The European Convention on the Legal Status of Migrant Workers provides the definition of migrant workers. According to that migrant worker means a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment.[6]Migrant workers are defined as people who work in a region or country different from their usual place of residence.[7] Another definition states that 'migrant workers' is used in a narrower sense to refer to those who migrate from their country of birth to other places for employment.[8] According to the definitions expressed above, migrant workers are people who are working in a country different from their own country. Their intention is to get more money than in their original country.

Cambridge dictionary states that it is as the system in which employees communicate as a group with their employers to try to agree on matters such as pay and working conditions.[9] Industrial disputes between the employee and employer can also be settled by discussion and negotiation between these two parties in order to arrive at a decision.[10] Merriam-Webster dictionary expresses about the collective bargaining as a negotiation between an employer and a labour union usually on wages, hours and working conditions.[11] ILO defines it as all negotiations that take place between an employer, a group of employers or one or more employers and one or more workers' organization for determining working conditions and terms of employment, regulating relations between employers and workers, and regulating relations between employers or their organizations and workers' organization.[12] It is prominent of this definition as expressed above that collective bargaining is a negotiation between employers' organization and workers' organization based on their rights and their disputes arisen through the employment.

The Economic Times defines labour market as the place where workers and employers interact with each other. In the labour market, employers compete to hire the best, and the workers compete for the best satisfying job.[13] According to another definition it is a market which brings together those persons seeking work (the supply of labour) and firms, government and other organizations seeking to fill job

[6] Chapter I , Article- 1, Definition, European Convention on the Legal Status of Migrant Workers, ETS93–Legal Status of Migrant Workers, 24.XI.1977.

[7] Nurulsyahirah Taha, How portable is social security for migrant workers? A review of the literature, Definition Concept, P.5.

[8] Pong-Sul Ahn, Migrant Workers and Human Rights, Out-Migration form South Asia, 2004, p.2.

[9] Definition of Collective Bargaining, Cambridge Dictionary,https://dictionary.cambridge.org/dictionary/english/collective-bargaining

[10] Vaibhav V, Collective Bargaining: Definition Types, Features and Importance, Definition of Collective Bargaining,http://www.economicsdiscussion.net/collective-bargaining/collective-bargaining-definition-types-features-and-importance/31375

[11] Defitition of collective bargaining, Merriam-Webster, since 1828,https://www.merriam-webster.com/dictionary/collective%20bargaining

[12] International Labour Organization, Part I Scope and Definitions, Article 2 , C154- Collective Bargaining Convention, 1981 (no.154) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312299

[13]Definition of Labour Market, The Economic Times, Glossary,https://economictimes.indiatimes.com/definition/labour-market

vacancies (the demand for labour).[14] The labour market, also known as the job market, refers to the supply and demand for labour force in which employees provide the supply and employers the demand. It is a major component of any economy and is intricately tied in with markets for capital, goods and services.[15]Another dictionary defines it as the market in which employers look and compete for workers and in which workers look and compete for employment.[16] So labour market means a business place that can give the opportunities of jobs to the workers and fill the vacancies of the employments of the employers. It is a kind of negotiation between the employers and employees to be fair and just in giving the remuneration on the side of the employers and in giving the effort and the skills on the side of employees.

2. Trade Unions in Europe

Every region has developed countries that can offer job vacancies for the workers from other member countries. Mainly, the developed countries can only give job opportunities to the foreign workers, so the workers need the protection of their rights only in their receiving countries and not in the sending countries. When they need to get protection, it will make sure, firstly what kinds of rules and regulations have been promulgated and how they will be protected. Especially, they should have the representative to claim their rights instead of claiming one by one.

Therefore, trade unions are essential to all workers and migrant workers around the world. The EU is a large organization established by so many member states. Free movement of migration is allowed within the EU, which causes labour migration and unfair conditions at the workplaces. The past economic recession created in EU member countries unemployment situations and some human rights violations between employers and employees. The enlarged group of EU had to make a solution for that big issue and tried to give the fair rights relating to the problems of employers and employees.

As workers' central political actors, trade unions represent workers' interests within the political system of the EU as "intermediary organizations". [17] Although, trade unions in Europe started to develop in the late nineteenth century, it took more time to the industrial conflict and collective bargaining in their institutionalization. Since 1945, the membership development is raised more and more until today.[18] The effectivity of the trade union is high to all workers. The reasons why trade union is being useful and essential to the workers within EU have been stated. Besides co-operation at the national or regional level, trade unions increasingly utilize transnational union structures such as the European Trade Union Confederation (ETUC) and industry-wide European federations to deal with cross-border mobility issues. For instance, the European Federation of Building and Wood Workers (EFBWW) and the European Federation of

[14] Definition of Labour Market, The Free Dictionary By Farlex,https://financial-dictionary.thefreedictionary.com/labour+market

[15] WILL KENTON, What is Labour Market?, Economy, Economics, Investopedia, https://www.investopedia.com/terms/l/labor-market.asp

[16] Definition of Labour Market, Collins Dictionary,https://www.collinsdictionary.com/dictionary/english/labour-market

[17] Martin Seeliger and Ines Wagner, How Trade Union Organizations at the European Level Form Political Positions on the Freedom of Services, MPIfG Discussion Paper 16/16, 2016.

[18] Bernhard Ebbinghaus and Jelle Visser, Trade Unions in Western Europe Since 1945, January 2001.

Food, Agricultural and Tourism Trade Unions (EFFAT) have recently intensified their efforts to combat social dumping practices in the EU and to enforce local labour standards.[19] Therefore, ETUC is an organization, which controls the trade unions in the EU. When we analyze trade unions in the EU, firstly, the European Trade Union Confederation needs to be clarified and initiated as it is the foundation of European trade unions.

2.1. European Trade Union Confederation

Over the years, the European Union (EU) wished to influence their region with the workers. Therefore, the ETUC was started to form for speaking a single voice and taking in EU decision-making on behalf of European workers. Since 2008, Europe's economic and financial crisis and the introduction of austerity policies have reinforced the need for a body to defend workers' interests at EU level.[20] Trade unions in EU rely on ETUC consideration and decision and ETUC is for the workers within Member States. If going back to the history of ETUC, European Coal and Steel Community (ECSC) needs to be examined to trace. Under ECSC, the first organization of the affiliates of International Confederation of Free Trade Union (ICFTU) could be created. In 1957, European Economic Community was established through the Treaty of Rome. In 1958, European Trade Union Secretariat could be formed by the meeting of ICFTU's European affiliates. At about the same time the International Confederation of Christian Trade Unions (ICCTU) set up a European organization. In 1968, ICCTU changed its name into World Confederation of Labour. In 1969, European Trade Union Secretariat was changed into European Confederation of Free Trade Union (ECFTU). The Trade Union Committee for the European Free Trade Area (EFTA-TUC) could be created in 1968. With this organization, the number of the European trade union bodies increased to five the European level trade union bodies. Denmark, the Republic of Ireland and the United Kingdom by 1970s made discussions about six times in the EC and EFTA countries about outcome the decision to establish an entirely new European trade union organization spanning both the European Community and the EFTA Member States and the agreement for a single unified trade union organization at European level. From these discussions, European Trade Union Confederation was established in 1973.[21]

The chief founders of European Trade Union Confederation are Bruno Storti (CISL), Georges Debunne (FGTB), Thomas Nielsen (LO Denmark), Heinz-Oskar Vetter (DGB) and Victor Feather (TUC). The proposal for establishing European Trade Union Confederation was firstly discussed in Frankfurt in June 1971, and the negotiation in a meeting was held in Norway from 5thto 6th of November, 1971. At that time, the drafting of basic principles for the cooperation of EU Member States was created from the first discussion.[22] It is the very first effort and effective way to develop the trade unions in EU. Based on the drafting of the basic principle the next step can be

[19] Torben Krings (Johannes Kepler University Linz), Unorganisable'? Migrant workers and trade union membership, Conference Paper, September 2014.
[20] European Trade Union Confederation (ETUC), 2nd November 2017, https://www.womenlobby.org/article296
[21] European Trade Union Confederation, published by the Trade Union Division of the Directorate-General for Information, European Communities (DG X Information) - 200 rue de Ia Lol. 1049 Brussels- Belgium.
[22] Christophe Degryse and Pierre Tilly, 1973-2013 40 years of history of the European Trade Union Confederation,European Trade Union Institution, 2013, p.19.

made to create developed rules and principles.

National trade union federations and European trade union federations are included in the ETUC. European trade union federations are organizations of trade unions within one or more public or private economic sectors. They represent the interests of the workers in their sectors at the European level, principally in negotiation. All trade unions related to member federations always connect to each other. The negotiation shall be made with employer organizations.[23] With the Constitution of ETUC, European trade union federations are the main organizations standing for the workers and the real responsibility in serving for the ETUC. Social dialogue is often made in the case of the worker affairs to get human and workers' rights. It is an effective way to solve the problems of worker affairs. Without social dialogue or negotiation, the confederation cannot go on and can miss the correct way. Therefore, the ETUC cooperation for the trade unions in Europe is essential to take part into the organization. Its vital service is to take into consideration the workers' rights.

European Trade Union confederation (ETUC) has a long history and is still active nowadays. It was 1973 when the ETUC was started to be created. On the other hand, it was after the Second World War when Western Europe was being rebuilt again and it was the period of the origin of the ETUC.[24] Rebuilding of Western Europe was a kind of attempt to develop economies that allows the free movement of labour migration. The ETUC currently has 89 member organizations from 39 European countries. By establishing the ETUC, trade unions can participate in the role of labour migration management and be a kind of effort to the solution between the workers and employers. The ETUC's statute identifies its aims as representing and promoting the economic, social and cultural rights of the workers on a European level and strengthening democracy in Europe.[25] The main purpose behind the creation of the ETUC was to build a lobbying organization to counter the increasing activity of multinational companies in the European market.[26] The objective of the ETUC is the interest of the workers in Europe and to maintain an important social dimension in the EU that protects the interests of all citizens.[27] The ETUC believes that workers' consultation, collective bargaining, social dialogue and good working conditions are the keys to promote innovation, productivity, competitiveness and growth in Europe. In consulting, collective bargaining, social dialogue and good working condition, ETUC plays an important role in pointing out the solution and making decision between workers and employers.[28]

The ETUC cooperated with the European Commission in the legislation that leads the ideal framework for labour regulation, but the unionist from the sectoral federations criticized as they favor the national legislative area.[29] On the side of

[23] ETUC Constitution, https://www.etuc.org/sites/default/files/publication/files/ces-congrecs_2015-statuts-uk-ld_def_1.pdf.
[24] Christophe Degryse and Pierre Tilly, p.13.
[25] Willy Buschak, The European Trade Union Confederation and the European industry federations, http://library.fes.de/library/netzquelle/english/eugew/history/pdf/buschak.pdf
[26] Martin Seeliger and Ines Wagner, Workers United? How Trade Union Organizations at the European Level Form Political Positions on the Freedom of Services, p.5.
[27] Level Three, Trade Unions and Europe, Study Guide, English for European Trade Unionists,p.5.
[28] European Trade Union Confederation (ETUC), 2nd November 2017, https://www.womenlobby.org/article296
[29] Martin Seeliger and Ines Wagner, How Trade Union Organizations at the European Level Form Political Positions on the Freedom of Services, MPIfG Discussion Paper 16/16, 2016,pa2.

unionists who highlight the national legislative area, they disagree the legislation at EU level or international level. Nevertheless, the EU is a big organization that is formed by many Member States and has to legislate at EU level by considering on both the developed and the less developed countries. When the national legislation is led within the EU, it is sure that it is not fair and perfect that the legislation is based on the nation-state.

Migration and refugee flows, European crisis and its aftermath, environmental issues and post-Brexit political concerns are recent events and problems of trade unions in Europe. But trade unions in Europe can show the real and good consequences not only at the national and transnational level. After the formation of the ETUC, several guidelines of the ETUC emerged that can develop the labour migration situation. Those guidelines are a number of milestones in his historic journey. [30] In fact, it is too hard to stand and serve in the cooperation with the ETUC, since the 39 European countries have the ideological diversities in accordance with their tradition, their economic sectors and other reasons. However, they can greatly cooperate within European unions by their provisions and steps.

3. Trade Unions and Migrant Workers in Europe

Since trade unions are European organizations, the workers from European Member States can be given the protection of their rights with the reason of the regional integration between Member States. Free movement of labour migration is an important part of European organization in developing their economies and financial affairs. By allowing free movement of labour migration, European Union can be entitled their shared interests with the growth of their regional economies and can share their workers in the requirement of the vacancies of the factories or industries. It is a solidarity of an enlargement of the European Union, that affects the harmonization of the rules and regulations with regard to labour migration. Therefore, there are no big issues in respect of workers come from EU Member States. With the great contracts, the great interests, the full rights like the given citizens, they can more safely work in the employment than migrant workers, who come from non-European countries.

However, the EU has many migrant workers earning in their regions because of job opportunities for the third countries. In this paper, migrant workers mean the ones from non-European countries. To what extent does the EU give the rights to the migrant workers when they work within EU? This question is a very important and interesting question for them. When they face the infringement of their rights from the employment, it has to point out whether ETUC or trade unions can represent them to claim their rights or not. The chapter will show how to connect the advantages or disadvantages of participating in trade unions, and my theoretical point of views.

3.1. Three dilemmas relating to trade unions and migrant workers

Basically, three dilemmas for trade union and migrant workers have been theorized by some authors and articles in EU. The three dilemmas are the following:

1. Should trade unions resist employers' efforts or cooperate in recruiting workers from abroad or not?

[30] Andrea Ciampani and Pierre Tilly (eds), National trade unions and the ETUC: A history of unity and diversity, European Trade Union Institute, Brussels, 2017.

2. Should migrant workers be regarded as an integral part of the trade union rank and file and therefore be actively recruited as members with the same rights as any other worker?
3. Should trade unions exclusively represent the common interests of native and migrant workers, treating all workers the same way? Or should they develop targeted policies and strategies that care to the special interests and needs of migrant members?[31]

The above questions can establish the solutions connecting to the issues between trade unions and migrant workers. These are the real problems for European Union although; the trade unions' rights are different in every Member State. Critically, the problematic issues can be confronted in every developed country and region received so many foreign workers in their employment industries or factories.

The first dilemma is concerned with the resisting employers' efforts or recruiting workers from abroad. Rinus Pennix and Judith Roosblad express that if trade unions do cooperate, it could depress wages of union members and trade unions' bargaining power might be weakened. In addition, economic growth would be slow.[32] In times of plentiful national supply of labour, trade unions are likely to oppose the recruitment of migrant workers; while in times of labour shortages, unions will probably be more willing to cooperate.[33] The recruitment of workers from abroad adds not only to the quantitative supply of labour but also brings about qualitative changes in the workforce. As labour migration became permanent and 'guest workers' transformed into ethnic minorities, there has been a certain convergence in union attitudes insofar as they increasingly aimed to recruit migrant workers into unions and eventually also recognized the need for some special policies tailored towards the needs of migrants.[34] Trade unions can resist employers in recruiting foreign workers when the employers need the laborers for their labour supply. Trade unions may be the main platform to recruit workers from abroad and internally and to negotiate between the workers and employers. But it is not the best way to solve the problems between the workers and employers. Since the objective of trade unions is to represent the workers in the case of the violation of their rights in the employment. In resisting employers' efforts, trade unions cannot serve the workers to get fair and just working conditions in the employment, as it has to help the employers in recruiting workers and resisting for their benefits. According to Rinus Pennix and Judith Roosblad's commentary, the economic growth can be slow by cooperating with the employers in recruiting. On the other hand, if trade unions cooperate with them in the way of not taking care of bargaining power, it will not be the organization for the workers' favour to represent their complaint. Furthermore, as the workers' rights will be violated and got their rights properly, the labour supply will be bigger and bigger and the economic expansion will be gradually affected. Therefore, for this dilemma, it is better that trade unions should not participate in the recruitment of the foreign workers not to lose their rights in the employment.

[31] Stefania Marino, Rinus Penninx and Judith Roosblad, Trade unions, immigration and immigrants in Europe revisited: Unions' attitudes and actions under new conditions, European Work and Employment Research Center, University of Manchester, UK, 2015.
[32] *Ibidem.*
[33] Stefania Marino, Rinus Penninx and Judith Roosblad, Trade Unions and Migrant Workers (New Contexts and Challenges in euorpe), 2017,ILERA Publication Series, ILO, p.4.
[34] Torben Krings , *Ibidem.*

The second dilemma is whether migrant workers should be regarded as an integral part of the trade union rank and file and therefore be actively recruited as members with the same rights as any other worker or not. Rinus Pennix and Judith Roosblad state their comment about that question that on the formal ideological level, none of the unions excluded migrant workers, but the practice of inclusion differed markedly across the seven countries. Firstly, the degree of organization of migrant workers turned out to be much more determined by structural (national) characteristics of the trade unions than by characteristics of migrants themselves. Secondly, being a member of the union does not always mean having the same rights.[35] From my point of view, migrant workers should be regarded as an integral part of trade union rank as they need to get and claim their rights through trade union and it is better than their right to organize. Integration of trade unions rank causes the native workers not in favour of their special rights than migrant workers, which may be high wages or good opportunities for jobs. In case the migrant workers are members of trade unions, they will get the common rights together with the native workers. Every country can give the special rights only to the native workers and not to migrant workers. It is globally a formative norm no one can deny. Therefore, migrant worker should be allowed to be members of trade union, but on the other hand, they should accept the traditional norm and try not to lose their human rights and not to face the infringement of their rights from the employment. If migrant workers are not allowed to be members, in case there are some problems, they cannot claim their rights, they cannot get the opportunities and to accept the precarious jobs, that they cannot get the fair salary fully from the employers. To get the workers' rights, trade unions need to have the right to organize migrant workers or to have right to participate in trade unions. Finally, if migrant workers even cannot be members of trade unions, they should get the right to organize themselves. This way, they should be accepted as the representatives of the migrant workers in trade unions, not as members. By participating in the negotiation of trade unions, the native workers and migrant workers will not lose their rights.

The third dilemma is whether trade unions should exclusively represent the common interests of native and migrant workers, treating all workers the same or they should develop targeted policies and strategies that care about the special interests and needs of migrant members. The second dilemma's answer will decide if the third dilemma will be moved forward. The inclusion of migrant workers in the trade unions can continuously and critically keep thinking about the third dilemma. The special versus general treatment dilemma manifested itself most clearly in the internal organization of trade unions. The awareness that it was difficult for migrant workers to be properly represented within the union organization has in many cases led to special commissions and secretariats, but generally, they have remained marginal within the unions. In all countries, trade union policies towards immigration and migrants proved to be influenced by national contextual factors such as the public discourse, institutional arrangements, legislation, etc.[36] National contextual is an important role in criticizing the third dilemma according to Rinus Pennix and Judith Roosblad. There is no need to develop for the special interests of migrant

[35] Stefania Marino, Rinus Penninx and Judith Roosblad, Trade Unions and Migrant Workers (New Contexts and Challenges in Euorpe), 2017, ILERA Publication Series, ILO, p. 5.
[36] Stefania Marino, Rinus Penninx and Judith Roosblad, p. 6.

members in the trade unions. Nevertheless, migrant workers and native workers should be treated in the employment although native workers shall get the special rights migrants do not get. However, under human rights laws, all the workers have to be equal in the employment. It does not mean in the public or out of the employment. If migrant workers have high skills supporting to the jobs to get the best interests of the employment, they should be given the common interest, such as the salary, job positions, the same bonus for overtime, etc. Eventually, migrant workers should get the right to participate in the trade unions and get the common interest in conformity with their skills. They should not get the same rights out of the employments in comparison to the native workers.

The three basic dilemmas are essential questions for establishing the good perspectives in European trade unions. They were started and pointed out by Rinus Pennix and Judith Roosblad as real and fundamental questions. In order to build the systematic and influential trade unions, negotiations will be made between the authorities and initiatives based on these three dilemmas. If migrant workers are not allowed to be members of trade unions in the second dilemma, the third dilemma cannot be moved forward. Consequently, the second and the third dilemmas are connected to each other and the third dilemma relies on the second one. The very great thing is that migrant workers should be able to participate in the trade unions as the representatives of all migrants, which does not mean that they should get the equal rights and interests comparable to the natives. Regarding the native workers, we can state that they are European citizens working within the boundaries of Europe. Therefore, they have to get the protection of their full rights under the conventions, laws and regulations of EU region.

In fact, migrant workers' unionization rates invariably are slower than that of native workers. In general, across Western Europe, trade unions have lost their significant influence over the last 25 years, or at least it seems that they are severely weakened. Migrant workers who may be in greatest need of union representation because of their vulnerable status lag behind local workers in their rate of unionization. The gap between the unionization rates of the locals and the migrants is one reflection of the extent to which the incorporation of migrant workers into the labour market, and their acquisition and exercising of certain economic and social rights, remains problematic.[37]

From a trade union perspective, the best way to ensure that pay and working conditions are protected is to get migrant workers organized. Trade unions face multiple challenges at the beginning of the twenty-first century, including economic internationalization, the rise of the service sector, new forms of 'atypical' employment and an erosion of collective forms of activism.[38] Until today, trade unions' obstacles do not seem going forward the easy way in the case of the affairs of migrant workers. Since the twenty first century, the trade unions cannot decide to recruit, make the migrant workers organized and facilitate in the collective bargaining.

Migrant workers are also human beings and have the right to organize under Human Rights Laws. Especially, they face discrimination at several workplaces more than based on gender, sex, ethnicity, religion, etc. Most migrant workers have to work 3 D jobs, so a lot of rights are being failed without getting the chance to claim.

[37] Anastasia Gorodzeisky and Andrew Richards, Trade unions and migrant workers in Western Europe, European Journal of Industrial Relations,2013, http://ejd.sagepub.com/content/19/3/239.
[38] Torben Krings , *Ibidem.*

By establishing the organization of migrant workers, the claim can be done through their representatives. It means that trade unions are the only chance for them in participating as members of it. As mentioned above if they are allowed to be members of trade unions, the natives will lose their rights and not favour than the migrants. Therefore, two organizations into trade unions will be split between migrant workers and native workers. Each organization represents for each member and getting the good bargaining from trade unions.

3.2. Migrant Workers and ETUC

The ETUC have been working together with Union Migrant Network for the migrant workers. Union Migrant Network was launched in 2015 and comprises a network of trade union contact points across the EU. A network assists migrant workers to support integration into the world of work and into host communities, and to promote equality, fairness and non-discrimination. Although, migrant workers can get the chance to take part under the Network, several challenges for trade unions can still be found. The factors, that migrant worker are working in some informal sectors and have difficulties with their language; culture and community, there are challenges for trade unions in their efforts. [39] It is hard to overcome these challenges within a short time. It will take a long time to pass the difficulties by making social dialogue. Social dialogue causes trade unions stronger in the negotiation with the employers's and workers' organizations. The apex bodies of trade unions at national and international levels should, in their role as social partners, continuously engage with, and seek to influence national and global policy in relation to migrant workers. Support from trade unions and consultation with employers and workers' organizations in Spain led to the adoption of new rules (in April 2005). Without the support of social partners, no government could risk embarking on such a major operation.[40]

The European Trade Union Confederation (ETUC) adopted a proactive position in March 2005. One of the key elements of proactive approach for migrant workers is the following :

"To provide for a clear legal framework of equal treatment in working conditions for all lawfully employed third country nationals as compared to nationals, and respect for the host country's rules and regulations and industrial relations system."[41]

By reviewing this approach, we can know the ETUC agenda for migrant workers. It is clear that this approach establishes for working condition to get a clear legal framework of equal treatment. Nevertheless, migrants are still facing the inequality in the working conditions. Thus, the question is whether the ETUC can stand or give the right to equality for all workers, natives and migrants.

4. Conclusion

In this paper, I have expressed the topic of trade unions in Europe and migrant workers. Migrant workers in Europe do not mean EU-citizens from European Member Countries, but just all the workers coming from the countries, which are not European countries. EU-citizens are regularly

[39] European Trade Union Institute, HesaMag Magazine, Migrant workers in Fortress Europe, Special edition with ETUC insert, file:///C:/Users/DELL/Downloads/HesaMag_20_Migrants_EN_Special_edition_ETUC_EN.pdf.
[40] International Labour Office, Geneva, In search of Decent Work – Migrant workers' rights:, https://www.un.am/up/library/Search%20of%20Decent%20Work_eng.pdf.
[41] *Ibidem.*

employed as employees or workers. This paper intends to think about critically how to connect European trade unions and migrant workers. Regarding the migrant workers, we can state that they are weaker in getting their rights than native workers. Moreover, they cannot get the collective bargaining fully about their employment rights contrary to native workers.

European Trade Unions Confederation is standing for the interests of workers relating to the labour market and their employments' rights, by negotiating with the employer organizations or by creating social dialogue. It has two federations, national trade union federations and European trade union federations. The main federation is European trade union federations, which are open to all the national trade unions to cooperate. The ETUC has developed some milestones and good consequences in the cases of work affairs, economic sectors, political diversity, ideological diversity, etc. For the European Union, this institution makes to be fair referring to the working conditions and wages. Nevertheless, the vital responsibility of the ETUC is to protect the interests of the native workers. The stand for migrant workers is still weakened despite the adoption of the proactive position for them in May 2005.

The labour migration inflows get bigger and bigger these days. Being rather big, the crucial fact to do is to make protection of all the migrant workers within their region. How can the migrant workers be protected? Firstly, they need to get the right to organize and the right to participate in the organization of workers. Secondly, they should be enrolled as the members of trade unions in Europe. Thirdly, they should be entitled to the rights of negotiation, fair rights to participate like native workers, although, they cannot get the same rights like natives.

I stated in chapter II just about the nature of the trade unions in Europe, including the European Trade Union Confederation. The reason why I stated it is that only trade unions in Europe can support and help in the efforts of collective bargaining of migrant workers. Therefore, the trade unions' agenda needs to be transparent. There is no specific provision of the Constitution of the ETUC to support the migrant workers. It cooperates with Union Migrant Network for the interests of migrant workers. Their effort about migrants is still not strong enough.

Chapter III expresses the discussion of three dilemmas well-known in Europe. As the first dilemma, trade unions should take part in recruiting migrant workers because it can make migrants to negotiate between workers and employers in the future easily. My opinion on the second dilemma is that migrant workers should be taken into consideration as the members of the trade unions because the support of the trade unions is very essential to them in the collective bargaining without losing the fundamental rights in the employment or working conditions. In addition, for the third dilemma, equal treatment between native workers and migrant workers needs to be considered carefully. The current age is concerned with the social diversity, solidarity between member countries and regional integration. It is natural to favour the native workers in the employment regarding wages. The rights of migrant workers will be less than the natives' as they are not from any member countries of European Union. However, the negotiation, participation and the right to organize into trade unions should be allowed and not favoured only to native workers.

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COMPOSITION OF THE GERMAN FEDERAL CONSTITUTIONAL COURT

Nge Nge AUNG*

Abstract

German Federal Constitutional Court (hereinafter: FCC) is famous for its effective competencies and constitutional interpretation according to the current political affairs within the legal framework. Nevertheless, the formation of the Court is not consistent with the international recommendation of judicial independence because of the Federal Constitutional Court, Federalism, Separation of Powers, Selection of Judges, Judicial independence. Judges cannot participate in the appointment procedure even under the Basic Law, 1949. Just the legislature; Bundestag and Bundesrat select the judges and the federal president appoints appoint them. Therefore, this research explores why the judges cannot take part in the appointment process of the members of the FCC and how it is reasonable under German constitutionalism.

Keywords: *Federal Constitutional Court, Federalism, Separation of Powers, Selection of Judges, Judicial independence.*

The research methodologies I used in this paper are qualitative research methods and textual analysis.

The research aim is to learn the German way of practicing the separation of powers and federalism without sharing the power to the judiciary to select the Constitutional Court's judges.

The research conclusion is to conclude the independence of the FCC from the influence of the executive and legislature, especially the selection mechanism following the international legal standard.

Separation of powers under the German concept emphasis the protection of interests of citizens relative to the state and to prevent the state from becoming all-powerful. State power is divided into three functions and they are allowed to the competencies to limit and control each other.[1]

German constitutionalism is famous not only for the Weimar and but for the Basic Law because there are several great changes and differences between those two laws depends on the times and circumstances. The Weimar Constitution made points of the Republic of Reich, the composition of government with the President, a Chancellor and a Parliament, the minimum voting age is twenty, the seven-year term of office for the President, fundamental human rights, and so on.[2] The present Basic Law establishes the Federal Parliamentary Democracy and highlights the federalism because of the lander, parliamentary democracy represented by the Bundestag and Bundesrat.

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[1] Federal Ministry of the Interior. (2014). The Federal Public Service. P-14. (Accessed on 29 Oct 2020). Retrieved from www.bmi.bund.de/download/publikationen/federal-public-service.pdf.

[2] History. (2020). The Weimar Republic. (Accessed on 23 Oct 2020). Retrieved from https://www.history.com.

Judicial power is practiced by the lower courts and six federal courts of

1. The Federal Constitutional Court [3]
2. The Federal Court of Justice in Karlsruhe (Civil and Criminal cases)
3. The Federal Labor Court in Erfurt (Labor cases)
4. The Federal Administrative Court in Leipzig (Administrative Cases)
5. The Federal Social Court in Kassel (social security and social welfare cases)
6. The Special Finance Court in Munich (Tax cases)[4]

The judicial powers are vested in the judges and it shall be exercised by the Federal Constitutional Court, by the federal courts established by the Basic Law, and by the courts of the lander.[5]

Despite all courts have the authority and the responsibility to review the constitutionality of government actions and the legislation within their competencies, only the Federal Constitutional Court in Karlsruhe can pronounce the unconstitutionality of legislation. Other courts shall suspend the proceedings if they find a statute is against the Basic Law and the case must be submitted to the FCC.[6]

The FCC is famous in Europe and the European Union because of its independence in the constitutional adjudication in the political affairs within the legal framework.[7] The classical area for examining the relationship of judges to politics is a constitutional review.[8]But, the Court is not a political body on the ground that its sole standard of review is the basic law.[9]Likewise, the Court is very famous for its discretionary power to adjudicate human rights protection and the interpretation of the Basic Law of Germany. German legal system became independent under the Basic Law 1949, and before this constitution, there was a Weimar Constitution 1919, and the Courts and legal system of Germany were also not significant like the other illiberal countries. However, the Basic Law describes that the structure and jurisdiction of the FCC in broad terms but the composition of the court; appointment process, tenure of the terms, and numbers of justices are left to the legislature by enacting the Act on the FCC in 1951.[10]

In Europe, the Austria Constitutional Court is the first establishment of a separate constitutional court in 1920 and 1946 in Italy. German FCC was set up in 1951 and it is the highest tribunal and an apex court

[3] Article 92, Basic Law for the Federal Republic of Germany, 1949.

[4] Article 95(1), Basic Law for the Federal Republic of Germany, 1949. See also Fiano O' Connell & Ray McCaffrey. (2012). Judicial Appointment in Germany and the United States, Research and Information Service, Northern Ireland Assembly. Retrieved from www.niassembly.gov.uk/globalassets/Documents/ RalSe/…

[5] Federal Ministry of the Interior. (2014). *Supra note 1.*
Retrieved from www.bmi.bund.de/download/publikationen/federal-public-service.pdf.

[6] Britannica, Germany-Justice. (Accessed on 27 Oct 2020).
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[7] Prof.Dr.Jur. Thomas Henne. (2019). The History and Structure of German Basic Law- The Fundamental Structural Principles of the Federal Republic of German. Introduction to German basic Law Lectures (6-10/5/2019), University of Debrecen, Faculty of Law.

[8] John. Bell. (2006). Judiciaries within Europe, Cambridge University Press. P-5. (This book is downloaded from the John Bell Online Library).

[9] The Federal Constitutional Court. (2020).
Retrieved from www.bundsverfassungsgericht.de.

[10] Georg Vanberg. (2000). Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of powers, Comparative Politics, Vol 32(3), P 336 (333-353).

under the judicial hierarchy.[11] Furthermore, it is the first court of the republic and the unique constitutional organ that can protect the violation of basic rights guaranteed by the Basic law of Germany. [12]Any citizen may, on the exhaustion of his or her legal process through the ordinary courts of law, claim legal remedy to the FCC. And the decisions of the Court have a binding effect on the constitutional institutions of the Federation, the Lander, other federal and ordinary courts, and authorities as well.[13] German democracy has given a new elite role to the judiciary as guardian of fundamental rights.[14]After the legal concepts in the former constitution was changed and the sector of the FCC turned crucial with the emergence of the new Basic Law 1994. The drafters of the Basic Law already had the experience of good and bad to create a new constitution and they knew very well to change the Weimar constitutional notions to sophisticated ideology. Therefore, the aims and purposes of the original framers are always taken into consideration in interpreting the Basic Law in Germany and their contributions in the previous time are still honorable and memorialized until at the present in German legal history.

1.1 Structure of the Federal Constitutional Court

The FCC is both a court and a constitutional organ which is composed of two senates. One Senate is chaired by the President of the Court and the other is chaired by the Vice-President. Each senate has eight judges and half of them are elected by the Bundestag and Bundesrat. They may not be members of the Bundestag, Bundesrat, Federal Government, or of any of the corresponding bodies of land.[15]The first senate is called the fundamental rights senate and it is dealt with the constitutional complaints. The second one is the court for state matter and concerned with the federation and lander and proceeding on disputes between constitutional organs and with the constitutional complaints also.[16] The Act on the FCC mentions the competencies of the First Senate for judicial review proceeding in which the main issue is the alleged incompatibility of a legal provision with fundamental rights of equal citizenship, ban on extraordinary courts, fair trial, and deprivation of liberty under the Basic Law and the constitutional complaints with some exceptions under the laws relating to the FCC. The Second Senate has competence for judicial review proceedings and constitutional complaints not assigned to the First Senate. Where there is doubt as to which Senate has jurisdiction in a given case, a plenum comprising the president and vice president of the Court and two judges

[11] Hans G. Rupp. (1969). The Federal Constitutional Court in Germany: Scope of its jurisdiction and procedure. *Notre Dame Law Review*, Volume 44:4(3), P-548.
Retrieved from http://scholrship.law.nd.edu/ndlr/vol44/iss4/3.
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[13] Article 31(1), Act on the Federal Constitutional Court, 1951.
[14] John Bell. (2006). Judiciaries within Europe, Cambridge University Press. P- 109.
[15] Article 94(1), Basic Law for the Federal Republic of Germany, 1994.
[16] The Federal Constitutional Court. (2019).
Retrieved from www.bundsverfassungsgericht.de.

from each Senate decides.[17] Both panels have different competencies and they are independent of each other. Each judge is elected to one penal only and each panel has a quorum if at least six justices attend.[18] The important cases are decided by the entire body.[19] Nevertheless, the decisions of each Senate are always decisions of the FCC.[20]The most important competencies concerning the control of government and parliament are the abstract and concrete judicial review and the constitutional complaint.[21] Regarding the significance of the German FCC, the Justice Wiltraut Rupp-v. Brunneck recommended that the Court is a political organization of State, on the same level as the Federal Executive and Legislative branch (Bundestag and Bundesrat). Thus, the Court's highly responsible task is only one part of the whole functioning of the state organization and requires cooperation with these other organs of state. Such a view does not diminish the Court's importance as an institution to safeguard the separation of powers and to protect individual rights.[22] The Court has presumed as a true guardian of the constitution Germany's modern democracy as to the protection of basic rights.[23]

The present allocation of competencies between the Senates subject to the statutory framework and Orders of the Plenary modifying. It seems that the Second Senate has a variety of responsibilities relating to the disputes between the Federation and the Lander, proceeding for the political parties, and electoral complaints, judicial review, constitutional complaints and it has the competence for the specific areas of law such as asylum law, the right of residence, nationality law, the law about the civil service, military service law, and alternative civilian service law, material and procedural criminal law including the enforcement of measures for the deprivation of liberty, proceeding on administrative fines, income and church tax law and proceedings that specifically linked to the interpretation and application of international law. The First Senate conducts especially for the judicial proceedings and constitutional complaints.[24]

1.2 Appointment and nomination of the Judges

The appointment and nomination procedure of a Supreme Court's or Constitutional Court's judges plays one of the important roles to measure how the judiciary is independent and to be interested in Constitutional law of a given state. In the Constitutional history of German Federal

[17] Constitutional Law of 15 EU Member States. (2004). Lucas Prakke, Constantijn Kortmann (Eds), Kluwer, Deventer, P-357.
[18] Article 15, the Act on the Federal Constitutional Court, 1951.
[19] See *supra note 1*.
[20] The Federal Constitutional Court. (2020).
Retrieved from www.bundsverfassungsgericht.de.
[21] Christine Landfried. (1985). The Impact of the German Federal Constitutional Court on Politics and Policy Output, Cambridge University Press. P 522 (pp522-541).
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Retrieved from https://www.jstor.com/stable/89311.
[23] Konrad Adenauer Stiftung. (2020). Landmark Decision of the Federal Constitutional Court in the Area of Fundamental Rights. (Accessed on 7 Oct 2020).
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[24] Allocation of Competences- German Federal Constitutional Court. (2020).
Retrieved from www.bundsverfassungsgericht.de.

Constitutional law, the appointment and nomination processes are conducted mainly by the Bundesrat and Bundestag.[25] The models of judicial appointments in Germany are subject to political involvement at various levels. [26]As a result, the judiciary is seemed not to be independent of the influence of the legislature and executive. Nevertheless, judicial power is vested theoretically in the judges and the Federal Courts, federal courts provided for in the Basic law and the courts of the Lander.[27]

The four systems of appointment examined by the United States Institute of Peace are that:

1. Appointment by political institutions
2. Appointment by the judiciary itself
3. Appointment by a judicial council (which may include laymen)
4. Selection through an electoral system [28]

The modes mentioned above are the procedures of appointment discovered by the United State Institute of Peace and addition to the Italian legal scholar, G. Oberto studied that the four typologies of appointments as follow:

1. Nomination by the executive
2. Election
3. Co-option
4. Appointment by a committee consisting of judges and academics following a competitive process.[29]

According to Professor John Bell remark relating to the appointment process of Germany, "there is a split between those landers which has a judicial appointments committee and those which have appointments by the Minister of Justice. In consequence, judges are elaborated in an advisory capacity by way of their representative organ."

There is no exact norm concerned with the appointment of Constitutional Courts' judges in Europe. The approaches of judicial appointments cannot be the same depending on the different legal systems.[30] However, legislature and executive always take part in the procedure of judicial appointment in most of the countries whether parliamentary systems or non-parliamentary systems they apply. The appointment procedure in the part of the highest court or constitutional court should be taken into consideration enormously because of their pivotal position in the interpretation and safeguarding of the constitution and protection of constitutional rights as well. Even though, some European countries that have been established Judicial Council to perform judicial appointments independently assisting the composition of the Constitutional Court under the international standard, some constitutional conflicts can still happen like Poland's constitutional crisis in 2015.

According to the opinion of Jean Michael on the appointment of the judges is based on the very fundamental principle of the German Constitution: federalism and democracy. Half of the 16 judges are elected by the Bundesrat, the Federal Council represents the German Lander in the federal legislative process. Hence, half of the judges are elected by the representatives of the Lander's governments. A German legal

[25] Article 94, the Basic Law for the Federal Republic of Germany 1949.
[26] See *supra note 1*.
[27] Article 92, *Ibidem.*
[28] United States Institute Peace. (2009). Judicial appointment and Judicial Independence.
Retrieved from www.usip.org.
[29] John Bell. (2006). Judiciaries within Europe: A Comparative Review, Cambridge University Press, Cambridge.
[30] Paul Bovend'Eert. (2018). Recruitment and Appointment of judges and justices in Europe and the US: Law and Legal Culture. (Accessed on 7 Sep 2020).
Retrieved from www.nvvr.org.

scholar concluded that it is an essence of the principle of federalism. According to him, the rest are elected by the Federal Parliament, Bundestag and it stands for the principle of democracy as it is a constitution's main democratic organ.[31] The notable thing is that the main parties need to reach a consensus on judiciary appointments to make sure a nominee gets a majority.[32]

Regarding the outstanding recommendation of Dieter Grimm, "the election requires a two-thirds majority and it has opened into an informal agreement between the two big political parties of the Christian Democrats (CDU) and Social Democrats (SPD), agree informally each other to elect judges and the small political parties can transfer their powers of nomination judges to the big ones following to the system of coalition governments. The system is criticized for the lack of clarity because the nomination is followed by negotiation among the big political parties. However, setting up the high qualifications to become a Constitutional Court's justice is a constitutional standard to avoid at most participation of the partisan persons in the constitutional adjudication."[33]

The federal judges are appointed by the President after being elected. The judges are elected for life tenure by the Judges Election Committee that is formed based on the Lander and the Bundestag. The Justices of the Federal Constitutional Court are elected by the legislature and there is no judicial council in this case. [34] Hence, legislature and executive so-called political institutions manage the appointment proceeding in Germany. Reelection is possible for the latter.[35] Besides, under the Act on the Federal Constitutional Court, a Selection Committee formed by the Bundestag proposes a list of the justices and they need to get the majority votes of the members of the Bundestag to become members of the Federal Constitutional Court. The requirement of two-thirds majorities prevents a politically one-sided composition of the Court and even of each panel.[36]The Bundestag shall elect a Selection Committee which shall be composed of twelve members from itself.[37] This Selection Committee can be considered to be unconstitutional because the composition of judges has to conduct by the Bundesrat and Bundestag under the first paragraph of Article 94. The Court declared that the appointment of judges by the Selection Committee on behalf of the Bundestag is constitutional as the Court wanted to avoid issuing a ruling of its formation was unconstitutional for many years.[38] The FCC declared the appointment of judges by the Selection Committee on behalf of the Bundestag is constitutional as the Court wanted to avoid its formation was

[31] Martin Heidebach. (2014). The election of the German Federal Constitutional Court's judges – A lack of Democracy? *Ritsumeikan Law Review*, no.31, P 153 (Pp153-160).
Retrieved from www.ritsumei.ac.jp.
[32] Jean-Michel Hauteville. (2018). Why even Germany's Federal Constitutional Court has a political problem.
Retrieved from www.handelsblatt.com/English/politics/handelsblatt.
[33] Dieter Grimm. (2017). Federal Constitutional Court of Germany (Bundesverfassungsgericht), Oxford University Press (2020). (Accessed on 30 Oct 2020). Retrieved from https://oxwn.ouplaw.comlaw.com/10.1093/law-mpeccol/law-mpeccol-e528.
[34] *Supra note 16*.
[35] Hans G. Rupp. (1969). P-549.
[36] Rudolf Streinz. (2014). The Role of the German Federal Constitutional Court, *Ritsumeikan Law Review*, No 31. P-102 (Pp94-118). Retrieved from www.ritsumei.ac.jp/acd/cg/law/rlr31/09streinz.pdf.
[37] Article 6, Act on the Federal Constitutional Court, 1951.
[38] Rudolf Streinz. (2014). P-102-103.

unconstitutional. In this way, the Court makes politics in the spirit of consensus and decides in harmony with the powerful factors of political life, according to the finding of Preuss.[39] The appointment by the political bodies like Bundestag and Bundesrat makes the FCC democratically legitimacy.[40] Nonetheless, the Court has limited democratic legitimacy only when it decides on policy-making and constitutional interpretation.[41] There were some complaints from those who had not chosen by the Bundestag after the selection process.[42]The judiciary wanted to remove political interference from the process. Nevertheless, the legislature set aside that approach according to the worry that the judiciary would be insulated from the democratic concerns of the democratic authorities.[43] It was connected to the promotion of federal judges by the consent of the federal minister with an advisory opinion by the judicial council. Several scholars pointed out there is an advisory board conducting the judges to appoint the federal judges and it seems not transparency. And emphasizing again on the previous authors; Fiona O' Connel & Ray McCaffrey, the core political parties and the legislature rejected the judges' proposal of judicial self-government by showing the reason for violating the fundamental principles of the parliamentary regime and the democratic responsibility of the judicial function.[44]

In Europe, the legislatures appoint judges of the Constitutional Courts in Germany, Poland, and Hungary. Regarding German to the German appointment system, although all sixteen judges are appointed by the Bundestag and Bundesrat, six of them, each three from both Senates, have to be judges of one of the federal supreme courts:[45] It is to make sure that judges of the Federal Constitutional Court are well-established experience.[46] The President and Vice President of the Court are elected in the same manner alternately by the Bundestag and Bundesrat. They may not both preside the same panel.[47] The other federal judges are appointed by a committee formed by the Ministry of Justice and Consumer Protection, all state ministers of justice, and an equal number of members elected by the Bundestag.[48] According to the career nature of judges, they habitually start their occupations at a court of the first instance in the employment of one of the lander. The Ministry of Justice within the lander

[39] Christian Landfried. (1994). The Judicialization of Politics in Germany, *International Political Science Review*, Vol 15(2), P-118(113-124). (Accessed on 10 Nov 2020).
Retrieved from https://www.jstor.org/stable/1601559.
[40] Rudolf Streinz. (2014). p. 103.
[41] Christine Landfried. (1994). p.119.
[42] Jenny Gesley. (2016). How Judges are selected in Germany.
Retrieved from www.blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/
[43] Fiona O' Connel & Ray McCaffrey. (2012). Judicial Appointments in Germany and the United States, Research and Information Service Research Paper, Northern Ireland Assembly. P-9. (Accessed on 4 Nov 2020).
Retrieved from www.niassembly.gov.uk/.../2012/justice/6012pdf.
[44] Carlo Guarnieri. (2006). Appointment and Career of judges in continental Europe: the rise of judicial self-government. P-175. (pp 169-187).
[45] Katalin Kelemen. (2013). Appointment of Constitutional Judges in a Comparative Perspective- with a proposal for a New Model for Hungary, *Acta Juridica Hungarica*, Vol 54(1), P-17 (pp 5-23).
Retrieved from www.akjournals.com
[46] Dr. Gotthard Wohrmann. (2001). The Federal Constitutional Court: an Introduction. (Accessed on 27 Oct 2020).
Retrieved from https://www.iuscomp.org/gla/literature/inbverfg.htm.
[47] Article 9 and 15, the Act on the Federal Constitutional Court, 1951.
[48] Article 95(2), the Basic Law for the Federal Republic of Germany, 1949.

organize the recruitment process, provided that the appointment for the social and labor courts because they are under the jurisdiction of the Ministry of Labor and Social Affairs. That is why some legal scholars remarked that the advisory boards including judges may take part in the appointment of the justices of the FCC.

According to the author Katalin Kelemen, the appointment of constitutional court judges is a point to secure the independence of the judiciary, but in practice, judges are relied on political parties to become constitutional court justices. In this case, political beliefs should be the same as the parties and judges those who have been chosen by the parties concerned. Even in the U.S., a Supreme Court judge directly appointed by the President (Trump) did not follow the President's policy after selection but initiative to the public benefit.[49]The judges retain and demonstrate their independence after their election.[50] Nevertheless, those judges who have been appointed by the politicians are protected by the constitutional laws at the domestic level and European legal standard in Europe and the European Union.[51] However, there were already some conflicts regarding the independence of the judiciary in Poland and the violations of the principle of irremovability of judges in Hungary.

The Venice Commission recommended the split model or mixed model of appointment giving an example of the German style of appointment conducting by the representatives from the sixteen landers of Bundesrat and a two-third majority of Bundestag even though the judiciary cannot participate in the appointment mechanism.[52] The real style should be an equal appointment between the legislature, executive, and judiciary and it is named as the split model.[53]

Regarding the separation of powers, the famous justice of the U.S., James Madison, concluded that the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may just be pronounced the very definition of tyranny.[54]

There are the qualifications that are fundamentally important to the procedure of selecting and appointing of Federal Constitutional Court's justices. Hence, the author, justice chief, Supreme Court of New Jersey, Arthur T. Vandervilt, quoted as "The Law as administered cannot be better than the judge who expounds it […] the best organization of the courts will be ineffective if the judges who man it are lacking the necessary qualifications".[55] Therefore, the Constitutional Court's judges are nominated by the Bundestag and Bundesrat (the legislature) because Germany practices the federal parliamentary democracy and is appointed by the Federal President.[56]

[49] BBC News. (Accessed on 5 Oct 2020).
Retrieved from www.bbc.co.uk.
[50] Rudolf Streinz. (2014). p.103.
[51] Katalin Kelemen. (2013). p.6.
[52] Katalin Kelemen. (2013). p.9.
[53] According to Katalin Kelemen, there are three models of appointment such as the split, the collaborative, and the parliamentary.
[54] James Madison. (1788) Federalist no.47, the Particular Structure of the new Government and the Distribution of Powers Among Its Different Parts, *The New York Packet*.
Retrieved from https://guides.loc.gov/federalist-papers/text 41-50.
[55] Recruitment, Professional Evaluation and Career of Judges and prosecutors in Europe: Austria, Frances, Germany, Italy, The Netherlands, and Spain. (2005). ed, Giuseppe Di Federico, Bologna, Italy. No page number, I just referred to the quote of the author and it is the page before the preface.).
[56] Article 5 and 10, the Act on the Federal Constitutional Court, 1951.

German notions are based on John Locke's theory of division the sovereignty between the legislature and executive and the federative; not absolutely shared to the judiciary. It is corresponding to the France founding father of separation of powers, Montesquieu. The scholars explored and focused on the three prime branches should not interfere with each other and they should not take a seat more than one branch. It means that they did not express the separate functions and responsibilities of the judiciary to appoint and select their members themself to the highest courts independently. On the other hand, some legal scholars proved that there is no absolute separation among the three great branches; they seem especially meant for the judiciary than the others. Thus, it can be said that the legislature and executive are political institutions because of their existence before they can form a government always are political parties. For the judiciary, judges those who appointed as justices of the Highest or Constitutional Court are also the judges who came from the different layers of subordinate courts, prosecutors, and judicial officers and law professors from a University serving their occupations. As a result, the role of the judiciary usually stands for legal justice and the rest: the legislature and executive naturally represent political justice. As far as I understand based on the knowledge, I have accumulated all my life, this is the possible reasoning of the reason that the judiciary is always behind the other branches in the hierarchy and it can also lead to the lack of complete separation of powers for the judiciary to get participation in selecting judges for the members of the FCC in most of the countries and Germany. In conclusion, the federal-state' powers in Germany between the legislature, executive, and judiciary are deemed to be lack sharing. Hence, some legal and political scholars criticized that Germany accepts the cooperation of powers only.

1.3 Analysis of the Theoretical Independence of the Judiciary

Judicial independence in Germany is guaranteed in the chapter of the Judiciary like judges shall be independent and subject only to the law; judges shall not be dismissed, suspended, or transferred involuntarily; they cannot be forced retire before the expire of their official term of office only by the cause of a judicial decision and by the laws. On the other hand, judges may be transferred from one court to another court and removed from the office with the full salary if the court structure is changed.[57] Consequently, the impeachment procedure is prescribed for the federal judges.[58] Nevertheless, the majority vote is called for the commitment of the impeachment procedure.

On the other hand, judicial independence can be understood as part of a scheme of a separated power that guarantees the rule of law.[59] Judicial independence also can become up with a term of the freedom of the individual judges from fear, coercion, reward, or any other undue influence that might interfere with the judges' actions.[60] Many European countries have given judges a greater role in the administration of the court system and its resourcing. Judicial independence and judicial self-government

[57] Article 97 (1) and (2), the Basic Law for the Federal Republic of Germany, 1949.
[58] Article 98 (1 to 5), *Ibidem.*
[59] International IDEA. (2017). Judicial Appointments. 2nd edition, Stockholm, Sweden. (Accessed on 3 Nov 2020). Retrieved from http://www.idea.int
[60] International IDEA. (2017).

are often connected. European Judges Charter provides that "the administration of the judiciary must be carried out by the judges and independent of any other authority."[61] The degree of judicial independence will tend to be greater where judges hold the majority of seats and are directly elected by the judiciary.[62] Similarly, the guarantee of judicial independence would be far-reaching if the higher judicial councils were entrusted with enough authority.[63] Independence of the judiciary is one of the foundations of the rule of law.[64] The standard of judicial independence should be measured with the International Convention of the Universal Declaration of Human Rights (hereinafter; UDHR) that is the first and central one to protect the fundamental freedoms of human beings in the civilization age. In Europe, the European Convention on Human Rights is also based on the UDHR and it is the most reliable law for the protection of people in Europe. The distinguished thing to point out from the Convention regarding the independence of the judiciary is that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[65] Here, the term independent and impartial tribunal can be defined finally as the Supreme Court or Constitutional Court of a State as that kind of court has jurisdiction of hearing the cases of constitutional complaint that are arisen because of the violation of constitutional rights by a public authority or organization including the ordinary courts.

2. Conclusion

In summary, related to the degree of the independence of the judiciary in the composition of the German Federal Constitutional Court, the appointment procedure is distinguished to show there is no transparency and expressly consistent to the international standard of judicial appointment recommended in the basic principles of the United Nations and the Universal Declaration on the Independence of Justice (Montreal Declaration). According to Ginsburg, "Appointment mechanisms are designed to insulate judges from short-term political pressures yet ensure some accountability."[66]In additions, the study of the International IDEA, the appointment process should include (1) the independence of the judiciary from the legislature and executive, (2) securing the representativeness and inclusiveness of the judiciary especially about gender, status, ethnicity or origin and (3) judges should be qualified.[67] Regarding point(2), justice Susanne Bear became a judge of the First Senate and it is also uniformed with the United Nations basic principle on the

[61] John Bell. (2006). Judiciaries within Europe: A comparative Review, Cambridge University Press, Cambridge, UK. P-22.
[62] Carlo Guarnieri. (2006). Appointment and career of judges in continental Europe: the rise of judicial self-government. p.176.
[63] *Ibidem.*
[64] Judges Charter in Europe (European Association of Judges), 1997.
Retrieved from www.icj.org.
[65] Frans van Dijk and Geoffrey Vos. (2018). A Method for Assessment of the independence and Accountability of the Judiciary, *International Journal for Court Administration*, Vol 9(3), P 3 (Pp 1-21). (Accessed on 26 Oct 2020)
Retrieved from www.researchgate.net/publication/330224643/A-Met.
[66] International IDEA. (2017).
Retrieved from https: www.idea.int/sites/default/files/…PDF file.
[67] *Ibidem* p-3.

independence of the judiciary.[68]She is the first lesbian to work on the FCC. Also, she is a Professor of Public Law and gender studies with the faculty of law at Humboldt University of Berlin.[69] She is one of the judges who prohibit wearing the headscarves in the German classrooms expressing religious belief by outer appearance is not consistent with their freedom of faith and their freedom to profess belief.[70] Furthermore, judicial independence requires that a legal system protect its judges from governmental, business, personal, or social pressures that could force a judge to deviate from her interpretation and application of the law.[71] This indication is related to the competencies of the Court and its independence of applying them to that of the appointment procedure.

The funding of the Constitutional Court is independent significantly as the Plenary of the Court has the power to submit the budget annually and the FCC has organizational autonomy. Furthermore, the term and tenure of the judges are twelve years, and it remains stable. There are no noted cases related to the violation of the norms of judicial independence at the international level and the European extent. In my opinion, the FCC is well-known not because of the federal composition of the Court with the absence of sharing the equal power to the judiciary, but because of the prominent competencies; the technical solutions to protect human dignity all its best by lively interpreting the Basic Law.

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[69] Michael Wrase (2019). Gender Equality in German Constitutional Law, Discussion paper, WZB Berlin Social Science Center, Berlin, Germany. P-9. (Accessed on 3 Nov 2020). Retrieved from www.bibliothek.wzb.eu/pdf/2019/p19-005.pdf.

[70] 1 BvR 47/10, /BvR 1181/10.

[71] *Ibidem* p.-6.

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ANALYSIS OF THE INCREASING ROLE OF NGOS IN INTERNATIONAL PUBLIC LAW

Patricia Casandra PAPUC*

Abstract

In this paper we offer an analysis of the increasing role of NGOs in international public law and assess whether NGOs can be considered subjects of international law.
We give a brief overview of how modern NGOs came into being in the 19th century, and how they gained prominence on the world stage with the growth of international public law in the 20th.
Using the examples of Interpol and the International Federation of the Red Cross, we give our view on the debate concerning whether these as NGOs can be considered subjects of international law.
As we subscribe to the definition of professor Besteliu that NGOs must be a creation of „legal personalit[ies] registered in the domestic legal order of a state" we come to the conclusion that, although the importance of NGOs has grown tremendously in an international legal context, currently no NGO can be subject of international law.

Keywords: *NGOs, international public law, United Nations, Interpol, International Federation of the Red Cross.*

1. Introduction

As Non-Governmental Organisations (NGOs) are growing in size and scope around the world, so is the academic interest on the area. Within the legal field of studies, and in particular that of international public law, this leads to some interesting questions and debates addressing the role NGOs are playing in this context.

The purpose of this paper is to offer an analysis of the increasing role NGOs take on in international public law. We will offer this analysis by giving a brief overview of how NGOs have been incorporated as actors on the international scene. Furthermore, we will explore the extent of this incorporation by answering the question: can NGOs be considered subjects of international law?

In order to do this, we will look at the origin of NGOs and try to offer a definition of NGOs before analysing how NGOs and international public law have grown alongside each other throughout the 20th century, looking to the creation of the League of Nations and the United Nations.

Finally, we will weigh in on the debate on whether NGOs can ever be considered subjects of international law. Currently, some scholars argue that Interpol and the International Federation of the Red Cross are examples of this. However, in this paper we will argue that this is not the case since NGOs can only be indirect contributors to the creation of new norms and not to any actual law.

2. The historical context that led to the establishment of NGOs

Entities resembling what today would be considered NGOs have always existed in

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one form or another because people have always been part of associations designed to support different ideals, whether they are social, political or economic.

Because of this we cannot know for sure exactly when the first non-governmental organisation was formed, but what we do know is that NGOs became known in the middle of the 19th century.

According to Szazi Eduard (*NGOs:* first known NGOs are from the 19th century. One

fought against slavery (The Anti Slavery Society) and another fought for the right to life (The International Committee of the Red Cross).

NGOs had an important role also in creating international public law, for example the NGOs that did lobbying for the creation of the *Institute of International Law*[1].

The Institute of International Law also promoted the creation of an Arbitration Court which advised countries on signing numerous treaties, among which we can mention the *Hague Peace Conferences.*[2]

The Peace Conferences in The Hague were perfect occasions for NGOs to lobby in order to support their causes; lobbying still being one of the main tools that NGO use in order to accomplish their mission.

A very important moment for NGOs in international law is the moment when the

League of Nations was created.

NGOs have collaborated with the League of Nations in various fields such as: education, refugees, minority issues, finances and many more.

In the 20th century, NGO have also had a contribution in drafting important international conventions, from human rights, to the environment and many others.

The most important moment for NGOs was the moment when they were formally recognised by the United Nations. Article 71 of the UN Charter mentions that: „*The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned*."

An interesting fact is that in the preliminary version of the UN Charter there was no provision describing the collaboration between the UN and private entities, but the lobbying groups insisted so much on this provision that it was finally included during the San Francisco Conference where the UN Charter was signed.

As a consequence of this, the NGO concept started becoming used by the UN and from the 1970s it became a concept used and known at a global level.

However, even if the NGO concept is used at a global level, there is still no universal definition of it.

So in the next part of the article we plan to present the most important

[1] The Institute of International Law was founded in Gent, on the 8th of September 1973 by eleven famous lawyers. The institute is a learning platform and the mission of this platform is to promote the progress of international law. The Institute was also offered the Nobel Prize for Peace. More informations can be consulted here: http://www.idi-iil.org/en/

[2] The Peace Conferences from the Hague (1899 and 1907) represent a number of treaties and international declarations which were signed during the two peace conferences. Together with the Geneva Conventions , the Hague Conventions represent the first treaties that explain the rules of how to conduct war and war crimes are forbidden for the first time in history. More informations can be seen here: https://www.britannica.com/event/Hague-Conventions

definitions that have been given to NGOs in time and we will also try to give our own definition of the concept.

3. Attempts to define NGOs

Throughout history there have been many attempts to define NGOs.

The Encyclopaedia of Public International Law defines the NGO as: *„a private organisation not established by a government or intergovernmental agreement, which are capable of playing a role in international affairs by virtue of their activities, and whose members enjoy independent voting rights*"[3]

In Stromquist's opinion, NGOs: *„do not belong to state structures, they are voluntary organisations that belong to civil society which operate in the field of services for groups or disadvantaged group of people socially speaking, for the implementation of programs aimed at consolidating local communities and promoting sustainable development in collaboration with the state or other entities*".[4]

On the other hand, P. Wahl defines NGOs as: *„voluntary associations, independent from the state and from political parties, charitable and non profit, which accept members regardless of race, ethnicity, religion and sex*"[5]

The International Law Dictionary defines an NGO as a *„private international organization that serves as a mechanism for cooperation among private national groups in international affairs*"[6]

The World Bank defines NGOs as: "*private organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services, or undertake community development*"[7]

NGOs are defined from a sociological perspective as: "*self-governing, private, not-for-profit organizations that are geared toward improving the quality of life of disadvantaged people. They are neither part of government nor controlled by a public body".*[8]

As we already mentioned it is very difficult to give a definition to NGOs. But there are some characteristics of what NGOs cannot be. For example NGOs cannot be criminal organisations.

Lester Salamon and Helmut Anheier mentioned 7 criteria to define NGOs in their paper: *„ Social Origins of Civil Society"*[9]:

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[3] Sabattini, Francesca, *"The Role of NGOs in International Law"*, paper 2013/2014, pag 3, document available at: https://tesi.luiss.it/13185/2/sabattini-francesca-sintesi-2014.pdf

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[8] Cakmak, Cenap, *"Civil Society Actors in International Law and World Politics: Definition, Conceptual Framework, Problem"*, pag 9, document available http://wwwdata.unibg.it/dati/corsi/68030/38344-CIVIL%20SOCIETY%20ACTORS%20IN%20INTERNATIONAL%20LAW%20AND%20WORLD%20POLITICS.pdf

[9] *"Social Origins of Civil Society"*,work which was quoted at this article: https://www.scribd.com/doc/75662984/Rolul-organizatiilor-neguvernamentale

- Institutionalise
- State separation
- Non distribution of profit
- Autonomy
- Volunteering
- Not having a religious mission
- Not being part of a political party

According to professor Besteliu, an international non-govermental organisation can be defined as: *„ an international association created by a private or a mixed initiative, groups of natural or legal persons with different nationalities, which has a legal personality registered in the domestic legal order of a state and which does not pursue lucrative goals*".[10]

We subscribe to the definition given by professor Besteliu. Furthermore, we would also add the 7 criteria described above by Salamon. In our opinion, the members of an NGO must also have the same goal in mind.

4. NGOs in the UN system

NGOs have been playing a key role in the UN system for some time now.

We now plan to present the most relevant legal documents that describe the role of NGOs in the UN system.

The first document which created a formal structure between the United Nations and NGOs was article 71 from the UN Charter.

4.1. Article 71 from the UN Charter

Article 71 of the United Nations Charter: „*The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations… Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.*"

Even if also during the League of Nations NGOs were consulting the member states of this organisation, still the introduction of article 71 in the UN Charter represents a very important step in our opinion. It is the first multilateral treaty where the international community recognises the importance of NGOs in international relations.

4.2. ECOSOC Resolution 1296/1968

From the preamble of the ECOSOC Resolution 1296 the UN makes its intention of growing its partnership with NGOs clear: „*Recognising that arrangements for consultation with non-governmental organisations provide an important means of furthering the purposes and principles of the United Nations, Considering that consultations between the Council and its subsidiary organs and the non-governmental organisations should be developed to the fullest practicable extent*".[11]

According to this ECOSOC Resolution, the role of NGOs can be divided into three categories:

a) NGOs which are covering part of the activities conducted by ECOSOC;
b) NGOs which have a special mandate and which are only interested in some activities conducted by ECOSOC, where they can have relevant contributions;
c) NGOs that are in the roster system; these types of NGOs can be consulted

[10] Article 71 of the The United Nations Charter, the document is available here: http://legal.un.org/repertory/art71.shtml

[11] ECOSOC Resolution 1296 (XLIV) adopted on 23rd of May 1968, document available here: https://www.globalpolicy.org/component/content/article/177/31832.html

ad hoc.

4.3. ECOSOC Resolution 1996/3

This ECOSOC Resolution defines NGOs as: „*any international organisation not established by a governmental entity or by an intergovernmental agreement*." [12]

The ECOSOC Resolution 1996/31 explains the types of consultations that exist between NGOs and the UN: the general consultative status, the social consultative status and including the NGOs in the roster. What is then the difference between them?

The first category refers to the general consultative status. This type of status applies to big NGOs, which have various activities regulated by ECOSOC.

The second category refers to special consultative status. This type of status only applies to NGOs that have some skills, in some of the activities which are regulated by ECOSOC.

The third category refers to including NGOs in the UN roster. The NGOs which are included in the roster can have occasional contributions to the work conducted by ECOSOC.

5. The role of NGOs in international law

The role of NGOs is becoming more and more important in international law. According to Charnovitz from Yale University „*This is especially true in environmental affairs where NGOs regularly take part in multilateral conferences and monitor the implementation of treaties*".[13]

The importance is also recognised in the 1993 Vienna Declaration which stresses „*the important role of NGOs in the promotion of all human rights and in humanitarian activities at national, regional and international levels […] to the promotion and protection of all human rights and fundamental freedoms*"[14]

The lobbying activities by NGOs have increased in the last 20 years within the UN system. We can give examples such as The Rio Declaration on Environment and Development,[15] World Conference on Human Rights,[16] World Conference on Women,[17] United Nations Conference on Human Settlements,[18] The Fourth Conference on Landmines,[19] and World Summit on Sustainable Development.[20]

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[12] ECOSOC Resolution Nr 1996/31, document available here: http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm

[13] Charnovitz, Steve, " *Two centuries of participation: Ngos and international governance*, 18 Mich, J INT"1 L 183 (1997), pag 3, document available at : https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1466&context=mjil

[14] Marcinkute, *Lina " The Role of Human Rights NGOs : Human Rights Defenders or State Sovereignty"*, the Baltic Law and Politics Journal, , pag 9, document available at : https://www.degruyter.com/downloadpdf/j/bjlp.2011.4.issue-2/v10076-011-0012-5/v10076-011-0012-5.pdf

[15] The Rio Declaration on Environment and Development http://www.unesco.org/education/pdf/RIO_E.PDF

[16] World Conference on Human Rights, more informations on this website: https://www.ohchr.org/en/aboutus/pages/viennawc.aspx

[17] World Conference on Women, more informations on this website: http://www.un.org/womenwatch/daw/beijing/

[18] United Nations Conference on Human Settlements, more informations on this website:: http://www.un.org/en/events/pastevents/UNCHS_1996.shtml

[19] The Fourth Conference on Landmines, more informations on this website: https://www.africa.upenn.edu/Urgent_Action/apic_12296.html

[20] World Summit on Sustainable Development, more informations on this website: https://sustainabledevelopment.un.org/milesstones/wssd

Furthermore, the *Cardoso Report* [21] reiterates the importance of the partnership between the UN and NGOs. There are voices who claim that NGOs have to be included in the daily activity conducted by the General Assembly but also other important events.

The Cardoso Report also mentions the importance of involving civil society more in the General Assembly and the Security Council.

Because our aim in this paper is to emphasise the increasing role of NGOs in international public law, in the next part of the paper we plan to present the Red Cross and the Interpol.

Both the Interpol and the Red Cross are considered by some to be subjects of international law, together with states and intergovernmental organisations. We do not agree with this argument but we do consider that these NGOs represent the best examples of NGOs which help develop international law.

5.1. Interpol

The status of Interpol as an NGO is disputed within the academic community. The debate centres around the membership structure of the organisation; while some treat Interpol as an intergovernmental organisation, others argue that it is a non-governmental organisation because its members are official police bodies (which are public legal persons of national law) and not states directly (public legal persons of international law). For the purposes of this paper, we subscribe to the view that Interpol is an NGO for this reason.[22]

Interpol's role is to facilitate the work conducted by police forces across the globe. In order to achieve this, Interpol has a complex infrastructure.

The mission of Interpol is to connect police departments from across the globe and help them communicate and share information in the most efficient way possible. Interpol's motto reads: *„Connect the police for a safer world"*.[23]

As we said before, Interpol is considered by some as a subject of international law. It is considered a subject of international law because it ensures mutual assistance between all the authorities working in criminal law, and which are creating a new criminal law framework across the globe.

Interpol could not function without the protection given by international law. Its daily activities are conducted under the framework of its constitution, a legal document which was agreed upon by the founding states in 1956 and which has binding force.

Interpol's constitution defines its scope, objects and reiterates the importance of police cooperation across the globe.

The constitution also defines and explains the structure of the organisation, its budget and its partnership with other organisations, focusing also on the respect for the Universal Declaration of Human Rights.

Because the respect for human rights is such an important thing for the Interpol, it collaborates frequently with other international criminal tribunals in order to process the data of people in the most lawful way possible.

[21] Rossi, Ingrid, "*NGOs in International Law: Has regulation come to a halt*? " , The International Law Institute, 2008, article which can be consulted at the following website:https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP123e.pdf

[22] Runjic, Ljubo, "*The legal nature and status of Interpol in the context of contemporary international law"*, Conference paper: 22nd International Scientific Conference on Economic and Social Development – " *Legal Challenges of Modern World* ", at Split, Croatia (June 2017)

[23] Interpol website: https://www.interpol.int/About-INTERPOL/Vision-and-mission

Furthermore, the Interpol also collaborates with other entities in order to achieve its mission. We can give the example of the United Nations or the European Union, not to mention the help offered by the signatory sates, which signed among themselves different documents meant to facilitate the trade of sensitive information.

Without this support the Interpol could never accomplish its mandate.

Also, according to its constitution, the Interpol can sign international agreements on its own behalf; this right has been used by the organisation in the past.

However, even if the Interpol is contributing to the creation of international public law norms, due to the structure already described, we do not consider this sufficient for the organisation to be a subject of international law.

5.2. The International Federation of the Red Cross

The International Federation of the Red Cross is an independent and neutral organisation which offers assistance to victims of arm conflicts as well as other types of violence.

The International Federation of the Red Cross is formed by the Red Cross and the Red Crescent and its members consist of national Red Cross societies.

The International Federation of the Red Cross is regulated through the Geneva Conventions from 1949, the Geneva Protocols and the Statute of the organisation.

The main activities of this organisation are to organise humanitarian actions meant to respond to different emergencies across the globe, while respecting international humanitarian law.

6. Conclusion

NGOs started getting prominence in the 19th century with the establishment of recognised civil society groups fighting for causes such as the abolition of slavery and, noticeably, the international Red Cross movement.

With the introduction of intergovernmental organisations in the 20th century (most importantly the League of Nations followed by the United Nations) and, as a consequence, of modern international law, NGOs started enjoying special status under these new legal frameworks. In 1945 the UN Charter became the first official document to recognise NGOs in an international context.

However, the definition of an NGO to this day is still not clear, with various definitions are used for different purposes. Core to the argument we use in this paper is that NGOs are a construct of legal personalities of national law which is what separates them from intergovernmental organisations.

As we have seen in this paper, the closest definition of NGOs as established in international law comes from the ECOSOC Resolutions. However, this definition only works by way of exclusion („*no governmental entity or intergovernmental agreement*") and does thus not offer a definition as such, but it relates nicely to our argument that NGOs are separated from intergovernmental organisations on these exact terms.

The ECOSOC Resolutions also identify the different ways in which NGOs can enter into partnership with UN agencies and thus play an important part in the increasing role of NGOs in international public law.

This leads to the discussions we have addressed as to *how* big a role NGOs play in international public law and more specifically: if NGOs can now be considered

subjects of international public law. In this context, some scholars have argued that two NGOs specifically present an example of this, namely the International Federation of the Red Cross and Interpol.

However, as we have argued in this paper, we do not share this view as subjects of international law must be a construct of legal personalities of international law, and both Interpol and the Red Cross are per definition not. And seeing as these two are the most prominent examples of NGOs which by some are considered subjects of international law, we can conclude that, according to the arguments we put forward in this paper – and although NGOs have enjoyed an increasingly special status within international law for several centuries now – NGOs can still not be considered subjects of international law.

Further research in this topic would monitor future legal developments in the area of NGO mandates and compositions, as well as changes to the creation of international public law.

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ENVIRONMENTAL PROTECTION DERIVED FROM THE EUROPEAN CONVENTION FOR HUMAN RIGHTS AND FROM THE EUROPEAN SOCIAL CHARTER

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Abstract

The present study started from our wish to present to the large audience the case-law of the European Court of Human Rights and of the European Committee of Social Rights regarding the environment protection. Although the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the revised European Social Charter do not expressly guarantee a right to a sound, quiet and healthy environment, both instruments offer a certain degree of protection with regard to environmental matters, as we shall demonstrate within the present study with the evolving case-law in this area.

As regards the reason why we have chosen for this research both instruments, note should be made with regards to the fact that the European Social Charter completes the Convention for the Protection of Human Rights and Fundamental Freedoms, and should be interpreted as creating fundamental economic, social and cultural rights. Although contested sometimes, because of its construction, as having a limited purpose, different than the Convention for the Protection of Human Rights and Fundamental Freedoms, we consider that it was conceived like this in order to offer flexibility, giving the chance to the States to choose the rights they will guarantee.

We consider that disseminating the case law of both international bodies would contribute to strengthen environmental protection at the national level.

Keywords: *environmental protection, Convention for the Protection of Human Rights and Fundamental Freedoms, European Social Charter, Council of Europe, European Court of Human Rights, European Committee of Social Rights.*

1. Introductory Considerations

It is indisputable that "human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings"*1*, therefore all individuals have the right to complain if the domestic authorities*2*, natural or legal persons violate their individual rights under the Convention in certain conditions.

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[1] Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs (Introduction in the problem of international human rights law)*, ERA Publishing House, Bucharest, 2000, p. 4.

[2] The domestic authorities can breach individual rights through juridical acts, material and juridical facts, material and technical operations or political acts; in this respect, please see Marta-Claudia Cliza, *Drept administrative (Administrative Law)*, part 2, Pro Universitaria Publishing House, Bucharest, 2011, p. 14 and following, and Marta Claudia Cliza, *Revocation of Administrative Act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 627.

Throughout the time, the legal doctrine has divided the catalogue of human rights resulting from international instruments into several categories of rights, depending on several criteria[3]. The most important criterion is the nature of rights, according to which we can distinguish the following: civil rights[4], political rights[5], economic and social rights[6], as well as cultural rights[7].

Unlike the civil and political rights which are first generation rights, the economic, social, and cultural rights are second generation rights, which entail the positive intervention of the States in order to create the material and social conditions required for the fulfilment thereof.

Although a long time neglected, nowadays the environment has become an important concern to mankind. Although it has been protected by the international law, no general framework convention has been created and no generally accepted definitions are available. Of course that there are several international treaties and political documents which govern different specific environmental issues (e.g. like climate change, biodiversity) and which impose to the states various legal obligations regarding the environment protection.

For the theme of the present study, we have researched in the case-law of both above mentioned institutions of the Council of Europe - the largest human rights organization of Europe, consisting of 47-Member States of the European continent, renowned for many human rights regulations.

The most important regulations in this field are:

a) the ***Convention for the Protection of Human Rights and Fundamental Freedoms*** (hereinafter "*the Convention*") designed to protect, in the first place, civil and political rights of human being, democracy and the rule of law. The human rights protection mechanism enshrined in the Convention (i.e. the European Court of Human Rights) is considered the most advanced in the world, its effectiveness being due to the right of individual applications (art. 34 of the Convention) as a consequence of the acceptance of the binding force and execution of judgments of the European Court of Human Rights (art. 46 of the Convention).

b) the ***European Social Charter*** (initial or revised version – hereinafter referred to as "*the Charter*") designed to protect fundamental social, economic, and cultural rights. This treaty is deemed to be the social Constitution of Europe. On May 3rd, 1996, the European Social Charter was subject to a review in order to adapt it to the social and economic developments, thus allowing its scope to be extended to a new series of economic and social rights.

Having in view the purpose of our present research, we underline that at the Council of Europe's level, neither the

[3] Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului (International Protection of Human Rights)*, Hamangiu Publishing, Bucharest, 2019, p. 12.

[4] The category of civil rights includes, for example, the right to life, the right to liberty and security of person, the right not to be arbitrarily arrested, detained or expelled, the right to citizenship.

[5] The category of political rights includes, for example, the right to freedom of thought, conscience and religion, the right to vote and to be elected, the right of asylum.

[6] The category of economic and social rights includes, for example, the right to work, the right to equal pay for equal work, the right to safe and healthy working conditions, the right to paid leave, the right to health (which implies a person's right to enjoy the best physical and mental health that he/she can achieve).

[7] The category of cultural rights includes, for example, the right to education, the right to benefit from scientific and technical progress, the right to benefit from the protection of patrimonial and non-patrimonial rights deriving from its own creations.

Convention, nor the Charter were drafted to provide a general environment protection (or definition) as such. Both regional instruments mentioned above do not explicitly define the term "environment" or guarantee a right to "a sound, quiet and healthy environment".

However, we emphasize that, after the careful analysis of the evolving case-law of the European Court of Human Rights (hereinafter "*the Court*") and of the decisions and conclusions of the European Committee of Social Rights (hereinafter "*the Committee*"), it appears that both the Convention and the Charter, indirectly, offer protection with regard to environmental issues, as we shall demonstrate further.

For instance, the Strasbourg judges have examined different complaints brought by individuals who invoked the fact that a breach of an individual right foreseen in the Convention or in an additional protocol has resulted from different adverse environmental factors (e.g. industrial pollution, noise levels from airports). Those complaints[8] seem to increase in number, from year to year.

Of course that it is very important to determine under the umbrella of which articles of the Convention could arise the interpretation arguments related to the environment protection.

On one hand, according to the analysed case-law of the Court, the following articles of the Convention could be invoked: the right to life (Article 2), the right to prohibition of inhuman or degrading treatment (Article 3 of the Convention), the right to a fair trial and to have access to a court (Article 6 of the Convention), the right to respect for private and family life as well as the home (Article 8 of the Convention), the right to receive and impart information and ideas (Article 10 of the Convention), the right to an effective remedy (Article 13 of the Convention), the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol no. 1 to the Convention).

On the other hand, according to the case-law of the Committee, the right to a healthy environment should be interpreted as a component of the right to protection of health (Article 11 of the Charter).

In the present study, we shall mention the most relevant cases of the above-mentioned international bodies, but please bear in mind that these examples and considerations are not exhaustive.

2. Environmental Protection Principles Derived from the European Convention on Human Rights

As mentioned above, although the Convention does not expressly provide a right to a sound, quiet and healthy environment, several environmental factors can affect the individual rights foreseen in the Convention or in the additional protocols. This is due to the fact that the Court has always adopted an evolutive approach of the interpretation of the rights and freedoms foreseen in the Convention, the judges considering this European convention as a living instrument. Needlessly to say that the Court affords the national authorities of the state a wide margin of appreciation in order to decide and to implement measures in this area. This fact

[8] On the other side, it is important to have in mind also the European Union. For an interesting study on the European Union law infringements that caused damages to individuals, please see Roxana-Mariana Popescu, Case-Law Aspects Concerning the Regulation of States Obligation to Make Good the Damage Caused to Individuals, by Infringements of European Union Law, in the Proceedings of CKS eBook, Pro Universitaria Publishing House, Bucharest, 2012, pp. 999-1008.

is also determined by the subsidiarity principle.

We shall analyse further on the relationship between the rights enshrined in the Convention and the environment:

a) The environment and the obligation to respect human rights

Article 1 of the Convention provides that:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[9]

The Convention applies according to the general principles of international law, to the territory of the States. In cases when a Contracting Party is not being able to exercise authority on a part of its territory, the scope of jurisdiction shall be reduced[10]. Additionally, please note that in exceptional circumstances, certain acts of the States, producing effects outside their territories could constitute an exercise of their jurisdiction. Such circumstances raise the issue of exercising effective overall control over a foreign territory or authority. Even if it is not a case of extraterritorial jurisdiction, in the event of extradition or expulsion, the measures have effect outside the Convention's territory, but they can be attributed to a Contracting Party which shall be responsible for breaching the Convention (if the case).

b) The environment and the right to life

Article 2 of the Convention provides that:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."[11]

Therefore, Article 2 of the Convention imposes negative and positive obligations on the Contracting States. According to the positive obligation imposed by this article, the public authorities have to take appropriate steps in order to guarantee the rights foreseen in the Convention, in relation to the agents of the respective State or with other (private) persons that are not connected directly with the respective State.

As mentioned in the Court's judgment in the case Makaratzis v. Greece, *"[s]o far, the Court has considered environmental issues in four cases brought under Article 2, two of which relate to dangerous activities and two which relate to natural disasters. In theory, Article 2 can apply even though loss of life has not occurred, for example in situations where potentially lethal force is used inappropriately*" [12].

Therefore, the positive obligation may apply in case of dangerous activities (e.g. nuclear tests, explosions on the municipal rubbish tip) carried out by public authorities

[9] The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 6, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[10] Case of *Ilaşcu and Others v. Moldova and Russia,* Grand Chamber judgment 8 July 2004, paras. 313, 333, available at http://hudoc.echr.coe.int/eng?i=001-127836.

[11] The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 6, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[12] Case of *Makaratzis v. Greece*, Grand Chamber judgment dated 20 December 2004, para. 49, available at http://hudoc.echr.coe.int/eng?i=001-67820.

or by private companies. The obligations of the public authorities must be analysed based on the harmfulness of the dangerous activities in case and on the foreseeability of the risks to life[13].

In every case involving dangerous activities, the Court shall analyse if the public authorities knew or ought to have known that there was, in the case at stake, a real and immediate risk to the lives of people living in places affected by dangerous activities. In such cases, the authorities have obligations under Article 2 of the Convention to protect those people by taking appropriate preventive measures, including to inform those persons of the risks they are exposed by living there. The national legislation and the administrative framework do not have to be defective (e.g. regulations governing the licensing, incorporation, operation, and supervision of potential risk activities[14], maintaining a warning infrastructure).

Needless to say that this positive obligation has to be respected even in case of natural disasters[15] (which are *per se* beyond human control), the public authorities being obliged to prevent the loss of life through several possible actions (e.g. warning the population, implementing emergency relief polices, carrying out appropriate judicial enquiries[16]).

In case of loss of life due to an infringement of the right to life, the public authorities must provide in the case an adequate response, the applicants being able to follow the domestic procedures to obtain satisfaction. This adequate response includes the duty of the public authorities, *ex officio,* to carry out a prompt, independent and impartial investigation which to ascertain how the incident/accident took place, why life was lost, and what was wrong in the regulatory system (legislative or administrative).

In case of dangerous activities, the Court considers that if the domestic authorities failed to take all appropriate measures to avoid loss of life, it might not be sufficient civil, disciplinary or administrative remedies, criminal offence charges being required[17]. Discussions can be made regarding if the loss of life has been unintentional or not – human error for example.

c) The environment and the right to liberty and security

Article 5 of the Convention provides that:

"*1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his

[13] Case of *L.C.B. v. the United Kingdom*, judgment dated 9 June 1998, paras. 37-41, available at http://hudoc.echr.coe.int/eng?i=001-58176; case of *Öneryıldız v. Turkey*, Grand Chamber judgment dated 30 November 2004, para. 73, available at http://hudoc.echr.coe.int/eng?i=001-67614.

[14] Case of *Öneryıldız v. Turkey* [GC], para. 90; case of *Budayeva and Others v. Russia*, judgment dated 22 March 2008, paras. 129 and 132, available at http://hudoc.echr.coe.int/eng?i=001-85436.

[15] Case of *Budayeva and Others v. Russia*, para. 135.

[16] *Ibidem*.

[17] Case of *Öneryıldız v. Turkey* [GC], paras. 92-93; case of *Budayeva and Others v. Russia*, paras. 139-140.

committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."[18]

Even though a few years ago we could not have imagined that environmental protection could impact the interpretation of Article 5 of the Convention, the Strasbourg judges have underlined that in case of serious offences against the environment causing ecological disasters (e.g. massive spilling of oil), the interest of the public consists in to bring those responsible to justice. Therefore, an important environment damage may justify arrest and detention[19].

d) The environment and the access to justice and the existence of an effective domestic remedy

Article 6 paragraph (1) of the Convention provides that:

"*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*"[20]

According to this article, each individual has the right to initiate judicial or administrative proceedings for protecting his or her rights. The right to a fair trial includes the right of access to a court, the right to see executed a final and enforceable court

[18] The Convention for the Protection of Human Rights and Fundamental Freedoms, pp. 8-9, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[19] Case of *Mangouras v. Spain*, Grand Chamber judgement dated 8 January 2009, available at http://hudoc.echr.coe.int/eng?i=001-100686.
[20] The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 9, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

decision, and the right to respect the court decisions.

Article 6 of the Convention will be applicable if there is a direct link[21] between an environmental issue and a civil right that has be invoked, because mere tenuous connections and/or remote consequences shall not be sufficient.

Based on Article 6 of the Convention, the environmental associations are entitled to bring proceedings in the domestic legal systems, in order to defend the interests of their members, going beyond the general public interest – to protect the environment[22].

In complex environmental matters involving environmental policy questions, the Court underlined that the decision-making process of the domestic remedies have to respect the rights and interests of individuals under Articles 2 and/or 8 of the Convention – in case they were not respected, those individuals have to be able to appeal to a court[23].

e) The environment and the respect for private and family life

Article 8 of the Convention provides that:

"*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[24]

According to this article, "the respect for the right to private life, family life, the respect for the domicile of a person and the secrecy of his/her correspondence impose, first of all, negative obligations on the part of the state authorities"[25]. Besides these negative obligations, the public authorities have positive obligations, which are necessary for ensuring effective respect for private and family life.

Along the decades, although no explicit right to a clean and quiet environment exists in the Convention, the Court found in several cases that "severe environmental pollution" due to noise, emissions or smells can affect people's lives and can prevent them from enjoying their homes, fact that can violate Article 8 of the Convention[26]. The simple environmental degradation is not sufficient, in principle, to attract the violation of Article 8, because the

[21] Case of *Balmer-Schafroth and Others v. Switzerland*, Grand Chamber judgment dated 26 August 1997, para. 40, available at http://hudoc.echr.coe.int/eng?i=001-58084.

[22] Case of *Gorraiz Lizarraga and Others v. Spain*, judgment dated 27 April 2004, paras. 46-47, available at http://hudoc.echr.coe.int/eng?i=001-61731.

[23] Case of *Taşkın and Others v. Turkey*, judgment dated 10 November 2004, para. 119, available at http://hudoc.echr.coe.int/eng?i=001-67401.

[24] The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 11, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[25] Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole (The European Convention on Human Rights. Article-by-article Commentary)*, second edition, C.H. Beck Publishing House, Bucharest, 2010, p. 597.

[26] Case of *Hatton and Others v. the United Kingdom*, Grand Chamber judgment dated 8 July 2003, para. 96, available at http://hudoc.echr.coe.int/eng?i=001-61188; case of *Moreno Gómez v. Spain*, judgment dated 16 November 2004, para. 53, available at http://hudoc.echr.coe.int/eng?i=001-67478; case of *Giacomelli v. Italy*, judgment dated 2 November 2006, para. 76, available at http://hudoc.echr.coe.int/eng?i=001-77785; case of *Borysiewicz v. Poland*, judgment dated 1 July 2008, para. 48, available at http://hudoc.echr.coe.int/eng?i=001-87213; case of *Deés v. Hungary*, judgment dated 9 November 2010, para. 21, available at http://hudoc.echr.coe.int/eng?i=001-101647 .

degradation must in a direct and serious manner affect the private life of a person, his/her family life or his/her home. Therefore, a causal link between the environmental pollution and the negative impact on the person must exist and the environment degradation has to attain a high threshold depending on different criteria (e.g. intensity, duration, effects).

It is interesting that a violation of Article 8 of the Convention, based on environment pollution, can be successfully invoked by a prisoner arguing that the cell is his/her "living space"[27].

Under this article, the State has a positive obligation to adopt reasonable and sufficient measures to protect the rights of individuals to respect for their private lives and their home, as well to a healthy protected environment[28].

Arbitrary interference by the public authorities is not allowed, positive measures should be taken by the authorities when environmental harm is caused by the representatives of the State or by private actors. Environmental risks must be presented to the public and the authorities need to make sure that measures taken by the State must be properly implemented to prevent environmental disturbance.

Of course that if the public authorities decisions interfere with the right enshrined in Article 8, a fair balance must be struck between the interest of the community and the interest of a certain individual. We underline, however, that the Court recognizes the State a wide margin of appreciation. The "onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community"[29].

However, it is interesting that the States can invoke environment protection as a legitimate aim allowing the domestic authorities to restrict the right foreseen in Article 8 of the Convention[30].

f) The environment and the freedom of expression

Article 10 of the Convention provides that:

"*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in

[27] Case of *Brânduşe v. Romania*, judgment dated 7 July 2009, para. 67, available at http://hudoc.echr.coe.int/eng?i=001-92073.

[28] Case of *Tătar v. Romania*, judgment dated 27 January 2009, para. 107, available at http://hudoc.echr.coe.int/eng?i=001-90909.

[29] Case of *Dubetska and Others. v. Ukraine*, judgment dated 10 February 2011, para. 145, available at http://hudoc.echr.coe.int/eng?i=001-103273; case of Fadeyeva and Others v. Russia, judgment dated 9 June 2005, para. 128, available at http://hudoc.echr.coe.int/eng?i=001-69315.

[30] Please see case *Chapman v. the United Kingdom*, Grand Chamber judgment dated 18 January 2001, para. 82, available at http://hudoc.echr.coe.int/eng?i=001-59154.

confidence, or for maintaining the authority and impartiality of the judiciary."[31]

According to the Court, Article 10 of the Convention gives to the individuals the right to receive and to share information and ideas on the environment, because it is a topic of general public interest.

Relevant for this relationship is the case *Steel and Morris v. the United Kingdom*[32] in which the Court, by the damages awarded to the applicants due to the lack of fairness in the domestic procedures, recognized that their freedom of expression had been violated.

The right enshrined in Article 10 is not an absolute right, therefore the authorities have to prove that their interferences fulfil the three cumulative conditions foreseen in paragraph (2): (i) legal basis for their action, accessible law and foreseeable effects, (ii) the action pursues one of the specific interests provided in paragraph (2) and (iii) the action is necessary in a democratic society meaning that the means chosen by the authorities have to be proportionate to the interest they are pursuing.

Please note that in the case law of the Court, the judges decided that the information on environment issues provided by groups or activists is very often very sensitive, therefore the level of protection shall be high[33].

Each time the authorities decide to engage in dangerous activities which represent a treat to the health of the individuals, an effective and accessible procedure for information of the individuals must be established[34]. If environmental studies or health impact assessments are carried out, then the results of the respective studies must be available for the interested individuals[35].

g) The environment and the domestic effective remedy

Article 13 of the Convention provides that:

"*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*"[36]

This article guarantees everyone that, if he or she has an arguable claim regarding the violation of a right foreseen in the Convention, an effective remedy before a national authority (not necessarily a judicial authority) exists. The State benefits of a large margin of appreciation.

The meaning of this rule is to avoid the cases to arrive in front of the Strasbourg Court, given that the individual could obtain relief at the domestic level, by presenting its case to impartial members.

From the analysis of the case law implying environmental matters, it can be noted that remedies were sought by applicants under Article 2 of the Convention (right to life), Article 8 of the Convention (respect for private and family life) or Article 1 of Protocol 1 (protection of property).

[31] The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 12, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[32] Case *Steel and Morris v. the United Kingdom*, judgment dated 15 February 2005, para. 89, available at http://hudoc.echr.coe.int/eng?i=001-68224.
[33] E.g. case of *Vides Aizsardzības Klubs v. Latvia*, judgment dated 27 May 2004, available at http://hudoc.echr.coe.int/eng?i=001-66349.
[34] Case of *McGinley and Egan v. the United Kingdom*, judgment dated 9 June 1998, paras. 97 and 101, available at http://hudoc.echr.coe.int/eng?i=001-58175.
[35] Case of *Brânduşe v. Romania*, para. 63.
[36] The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 13, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

h) The environment and the protection of property

Article 1 of the Protocol 1 provides that:

"*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[37]

Under this article, each individual has the right to enjoy peacefully his or her possessions, being also protected for unlawful deprivation of property. The value of a property might be reduced due to environment issues or even it might become impossible to be sold (which could amount to a partial expropriation).

Protection of the environment can be, according to the Strasbourg judges, a general interest restriction[38] imposed by the public authorities and even massive infringements to the right of property can be justified[39]. However, the restrictions must be lawful and proportionate to the legitimate aim pursued. In assessing if the fair balance test has been respected, the State is granted a wide marge of appreciation which means that the interference has to be disproportionate.

In its case-law, the Court acknowledged that "*[w]hile the fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of that right, the obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances. Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals' possessions from weather hazards than in deciding on the measures needed to protect lives*"[40].

Additionally, please note that under this article, from the environment protection perspective, certain environmental standards may be required to be ensured by the domestic authorities – meaning positive measures to protect this right[41] especially in case of dangerous activities[42].

3. Environmental Protection Principles Derived from the European Social Charter and the Revised European Social Charter

Also relevant for our analysis is the activity of the European Committee of Social Rights (hereinafter "*the Committee*") is a quasi-judicial body formed of fifteen independent members. Through a reporting procedure and a collective complaints procedure, the Committee rules on the

[37] The Convention for the Protection of Human Rights and Fundamental Freedoms, p. 33, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[38] Case of *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, para. 57, available at http://hudoc.echr.coe.int/eng?i=001-57711.
[39] Case of *Depalle v. France*, Grand Chamber judgment dated 29 March 2010, available at http://hudoc.echr.coe.int/eng?i=001-97978; case of *Brosset-Triboulet and Others v. France*, Grand Chamber judgment dated 29 March 2010, available at http://hudoc.echr.coe.int/eng?i=001-98036.
[40] Case of *Budayeva and Others v. Russia*, para. 175.
[41] Case of *Öneryıldız v. Turkey* [GC], para. 134; case of Budayeva and Others v. Russia, para. 172.
[42] *Idem.*

conformity of domestic law and the European Social Charter, having already created an important "case-law".

Despite the criticism of the declarative value of the Charter's Part I, it is obvious, however, that it is the most evolved catalogue of economic, social and cultural rights.

We underline that the text of the Charter completes the Convention for the Protection of Human Rights and Fundamental Freedoms and must be interpreted as creating fundamental economic, social and cultural rights. This is due to the fact there cannot be complete isolation between civil and political rights, on the one hand, and economic, social, and cultural rights, on the other hand.

As regards the relationship between the environment and the right to the protection of health, please have in mind that the following provisions of the Charter are relevant for the present analysis:

"Part I

11. Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

(…)

Part II

(…)

Article 11 – The right to protection of health

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:

– to remove as far as possible the causes of ill-health;

– to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;

– to prevent as far as possible epidemic, endemic and other diseases."[43]

According to the dynamic interpretative approach[44] of the Committee, the Charter is a living instrument having as a purpose the protection of rights not merely theoretically, but also in fact. Based on this interpretation, according to the Committee, Article 11 of the Charter includes the right to a healthy environment[45] and is complementary[46] to Articles 2 and 3 of the European Convention on Human Rights. In each judgment, in order to decide if a Contracting State violated its obligations under Article 11 of the Charter as regards the environmental protection, the Committee will analyse the margin of discretion of the State, if the State managed to strike a reasonable balance between the general interest and the interests of the individuals affected.

In the famous *Marangopoulos* judgment, the Committee underlined that environmental protection is one of the key components of the right to health enshrined in Article 11 of the Charter[47]. Based on this right, the Contracting States are responsible for the activities that harm the environment, no matter if the activities are carried out by the national authorities or by private companies. We consider correct the appreciation of the Committee regarding the private companies because each Contracting

[43] Th European Social Charter is available at https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93.
[44] Inspired from the reasoning in the case of *Tyrer v. The United Kingdom*, judgment dated 25 April 1978, para. 31.
[45] ECSR, case of Marangopoulos Foundation for Human Rights (MFHR) v. Greece, decision dated 6 December 2006, paras. 195-196, available at http://hudoc.esc.coe.int/eng/?i=cc-30-2005-dmerits-en.
[46] Idem, para. 202.
[47] Marangopoulos v. Greece, para. 195.

State is required to ensure compliance with the Charter's undertakings.

As regards pollution, please bear in mind that steps should be taken gradually, within a reasonable time, by each Contracting State in order to overcome it. For instance, in order to overcome air pollution, the Contracting States should include in their strategy specific measures such as: developing and updating regularly the environmental legislation, taking specific steps to prevent air pollution (e.g. introducing threshold values for CO2 emissions), creating supervisory machinery for applying the environmental rules, educating and informing the public about the environmental issues.

Increased attention should be given by the States in order to prevent nuclear accidents and to protect the communities living in such areas of risk. Moreover, please note that the Contracting States should also protect their population against the nuclear accidents' consequences on their territory, even though they happened abroad.

4. Final Considerations

Although the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the revised European Social Charter do not expressly guarantee a right to a sound, quiet and healthy environment, both instruments offer a certain degree of protection with regard to environmental matters, as we have demonstrated within the present study with the evolving case-law in this area.

The European Social Charter completes the Convention for the Protection of Human Rights and Fundamental Freedoms, and should be interpreted as creating fundamental economic, social and cultural rights. Although contested sometimes, because of its construction, as having a limited purpose, different than the Convention for the Protection of Human Rights and Fundamental Freedoms, we consider that it was conceived like this in order to offer flexibility, giving the chance to the States to choose the rights they will guarantee.

Human rights and economic and social development are interdependent. At the European level, the European Social Charter is the equivalent of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Council of Europe's wish being that of establishing two conventions on the fundamental human rights, for civil and political rights, on the one hand, and for economic, social and cultural rights, on the other hand.

Needlessly to say that the case-law of the European Court of Human Rights contributes to the convergence of these two international conventions and this is obvious from analysing the right to a healthy environment.

Increased attention has been lately paid to the European Social Charter, one argument being the establishment of an academic network on the European Social Charter in order to draft a volume of comments on the articles of the European Social Charter and for a better visibility of the activity of the European Committee of Social Rights (in French, *Réseau académique sur la Charte sociale européenne et les droits sociaux* - R.A.C.S.E.[48]). R.A.C.S.E.'s members (e.g. the authors of the present study) are mainly renowned university professors from European university centres, as well as lawyers and practitioners of law, whose work is related to the topic and practice of human rights and, in particular, of the European Social Charter, familiar with the work of the European Committee of Social Rights.

[48] For more information please see https://www.racse-anesc.org/en/.

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THE ADMINISTRATIVE RESPONSIBILITY IN THE LIGHT OF THE NEW LEGISLATIVE CHANGES

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Abstract

The entry into force of the administrative Code in the summer of 2019 enriched the legislation in administrative law with an unitary normative act which contains many disjointed normative acts, from many administrative law branches. Traditionally, the adinistrative responsibility was analized through its three components: administrative-disciplinary responsibility, administrative-contraventional responsibility and administrative-patrimonial responsibility. The purpose for this study is to analize the conception of the administrative Code on the administrative responsibility and to show the novelty on this judicial institution.

Keywords: *administrative responsibility, the administrative Code, public authorities, administrative act, the principle of legality.*

1. Introduction

The thematic of this study was formerly analyzed in another paper dedicated to responsibility in administrative law but at that moment there was no administrative coding[1]. The adopting of the administrative Code[2] through emergency Government ordinance no. 57/2019 was a very important moment for the romanian administrative law, through this coding a real reformation was witnessed. Well, it is not about an accord between the national legislation with the communitary acquis[3], nor about the revision of the Constitution but it represents an adaptation of the law maker's will to the social necessities and the daily struggles in the administrative public authorities' activities[4]. The administrative Code, as it is written in it, "regulates the general frame for the organization and functioning of the authorities and public administration's institutions, the personnel status in these institutions, the administrative responsibility, the public services and some rules regarding the state's and administrative-territorial public and private property". Furthermore, for administrative responsibility, the subject for the current study, the Constitution's lawmaker

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[1] Elena Emilia Stefan, *Judicial responsibility. Special view on administrative law responsibility*, Prouniversitaria Publishing House, Bucharest, 2013.

[2] Government's emergency ordinance regarding the Administrative Code no. 57/2019, published in Official Journal no. 555 from 5th of July 2019, last modified through GEO no. 164/2020 regarding the completion in GEO no. 57/2019, published in Official Journal no. 898 from 2nd of October 2020.

[3] About communitary acquis, see Augustin Fuerea, *European Union study book*, 6th edition, revised and added, Judicial Universe publishing house, Bucharest, 2016, pp. 37-38.

[4] More about this in Roxana Mariana Popescu, *EUCJ jurisprudence regarding the "Ecj Case-Law On The Concept Of „Public Administration" Used In Article 45 Paragraph (4) Tfeu"*, in CKS e-book 2017, pp. 528-532.

consacrated in art. 52[5] with the marginal denomination: "the right of the damaged person by a public authority". The organic law that article 52 of the Constitution refers to is the administrative contentious Law no. 554/2004[6].

2. Content

2.1. The administrative responsibility regulation in the adiminstrative Code

The administrative Code regulates the administrative responsibility in Part VII denominated: "The administrative responsibility", articles 563-579. For the first time in our law system, the administrative and judicial responsibilities are defined in a Code, in administrative law domain. In Title I "General dispositions" 5 articles (563-567) analyze the following problem: the judicial responsibility, the forms of the judicial responsibility in public administration, the administrative responsibility, the forms of the administrative responsibility and the principles of the administrative responsibility.

Thus, according to the article 563, *judicial responsibility* is: a "form of the social responsibility established by the state, following the breach of the given norms through an illicit fact and that determines the bearing of the corresponding consequences by the guilty party, by using constriction force from the state for the purpose of reestablishing the right order, thus harmed". Also, as a novelty, the forms of the judicial responsibility in public administration are regulated, article 564 stating that: "commiting some illicit facts by the personnel mentioned by article 5 letter gg), during their attribution, attracts administrative responsibility, civil or criminal as applicable".

As it is mentioned in special literature: "we must make the distinction between **responsibility that comes to the public administration personnel**, this being civil, disciplinary or criminal, as applicable and the administrative responsibility that evoques the forms of responsibility specific for administrative law. The first one, according to article 564 from the Code is attracted by the *commiting of illicit facts by the personnel mentioned by article 5 letter gg)* – demnitaries, public functionary, contract personnel and other categories of personnel established by law, and is **administrative, civil or criminal** responsibility as applicable[7]". In the same article 564 (line 2) we find a sending note regarding the two forms of responsibility – civil and criminal that employ according to the specific legislation.

The current study does not analyze the administrative jurisdictions problem, seen as a jurisdictional control over the administration although we do not exclude that in a future research this subject could also be followed. Also, we notice in recent

[5] Article 52 states: *"The harmed person in his right or a legitimate interest, by a public authority, through an administrative act or by not solving a request in legal term, has the right to obtain the recognition of the right or the legitimate interest, the annulment of the act and the reparation of the damage.*
The conditions and limits of this right are established by organic law.
The state answers patrimonially for the prejudices caused through judicial errors. The state's responsibility is established by law and does not remove the responsibility of the magistrates that did their job maliciously or grave negligence".

[6] Administrative contentious law no. 554/2004 published in Official Journal no. 1154 from 7th of December 2014, last modified through GEO no. 57/2019 regarding the administrative Code.

[7] Verginia Vedinas, *Noted Administrative Code. Novelties, comparative examination, explanation notes*, Universul Juridic Publishing House, Bucharest, 2019, p. 347.

special literature the point of view according to which: "the judicial instances are the ones that, normally, achieve justice, without a special abilitation law being requiered, *special jurisdictions* are allowed to be formed to solve, in the limits and conditions of the law, some categories of litigations, context in which we can speak of "common law jurisdictions" and "exceptional jurisdictions" (...)[8].

The administrative responsibility definition is found in two places in the administrative Code: in article 5 "*general definitions*", (line 1) letter ii) and another article whose marginal denomination is "*administrative responsibility*" – article 565 (line 1):

- Article 5 (line 1) letter ii): "form of judicial responsibility that consists of an ensamble of rights and obligations of administrative nature that, according to the law, are born following the commiting of an illicit fact through which, normally, norms of administrative law are breached";
- Article 5 (line 1): "administrative responsibility is that form of judicial responsibility that consists of an ensamble of connected rights and obligations of administrative nature that, according to the law are born following an illicit act by which, normally administrative law norms are breached".

Also, in Title I on one hand it is mentioned that the responsibility is established according to the form of guilt and the effective responsibility at breaching the law and on the other hand the fact that administrative responsibility can be completed with other forms of judicial responsibility.

2.2. The principles of the administrative responsibility according to the administrative Code

The lawmaker established in article 567 three principles of the administrative responsibility: the principle of legal responsibility; the principle of justice or proportionality responsibility and the celerity principle.

Regarding the *legality principle*, this is not a specific principle for the administrative law, it being found in all branches of law and also being mentioned in the Constitution. In this aspect, article 5 (line 1) mentions: "*In Romania, respecting the Constitution, its supremacy and of laws, is mandatory*" and article 16 denominated "*rights equality*" that in (line 2) mentions: "*Nobody is above the law*".

As it has been shown in special literature, "the fundamental law regulates the legality principle as one of the essential elements of public administration that finally signifies the administration's submission to the Constitution and the law and it represents a warranty of the administrated ones against abuses or mistakes resulted following the authorities' actions"[9]. Moreover, the Romanian Constitutional Court, in its jurisprudence stated that: "The obligation to abide the laws, mentioned in article 1 (line 5) from the Constitution, does not presume, by its content, the insurance of an inflexible frame.

[8] Ioan Lazar, *Financial-fiscal measures and the European Union policy in the states helping domain*, Hamangiu Publishing House, Bucharest, 2018, p. 18

[9] Ioan Lazar, *Administrative jurisdictions in financial matter*, Universul Juridic Publishing House, Bucharest, 2011, p.84.

The legislative intervention is necessary to adapt the normative acts to the economic, social and politic existing realities and to ensure a unitary legislative frame, that contribute to a better applicability of the law and alienation of any equivocal situations or inequities in law applicability[10]" or: "article 1 (line 5) from the Constituion institutes the obligativity of respecting the laws without distinguishing between romanian citizens and foreign or persons without citizenship[11]".

The principle of legality responsibility establishes that: "administrative responsibility can only operate in the conditions and cases mentioned by law, in the limits established by it, according to a procedure conducted by the authorities vested in this purpose". Moreover, the principle of legality responsibility must be regarded in correlation with the *principle of legality* mentioned in article 6 from Title III "*General principle applicable to public administration*". According to this, "*authorities and public administrations' institutions and also their personnel have the obligation to act according to the applicable legal specifications and treaties and international conventions to which Romania is part"*.

The principle of justice or proportionality responsability presumes: "the correlation of the applied sanction with the social danger degree of the illict fact and the extinction of the damage, in case a damage was produced, with the established form of guilt, by a correct individualisation".

The principle of celerity shows that: the "moment of the applicability of the sanction must be as close as possible to the moment of the manifestation of the illicit fact, without any useless delays for the social resonance of the applied sanction has to be maximum encreasing its prevention effect".

2.3. The forms of administrative responsibility

The administrative Code establishes that the administrative resposibility can be disciplinary, contraventional or patrimonial. Moreover, our entire doctrine analyzes the three forms of administrative responsibility, in fact being a normative recognaissance under the dome of a sole normative act. The administrative Code's lawmaker vision does not want to surprise because it takes after the doctrine that for years in a row, without an administrative codification, mentioned this thing[12]. Not least, of the three forms of forementioned responsibility, only administrative - contraventional responsibility benefitted before entry into force of the administrative Code as regulation, qualified in common law in contraventions matter, as an example Government ordinance no. 2/2001 regarding the judicial regime of contraventions[13].

[10] The Romanian Constitutional Court decision no. 1237 published in the Official Journal no. 785 from 24th of November 2010.

[11] The Romanian Constitutional Court decision no. 1228 published in the Official Journal no. 783 from 23rd of November 2010.

[12] Antonie Iorgovan, *Administrative law treaty*, Volume II, AllBeck publishing house, Bucharest, 2005; Verginia Vedinas, *Administrative law*, XII edition, Judicial Universe publishing house, Bucharest, 2020; Dana Apostol Tofan, *Administrative law*, volume II, edition 4, CH Beck publishing house, Bucharest, 2017; Catalin Silviu Sararu, *Administrative law. Current problems of the public law*, CH Beck Publishing House, Bucharest, 2016; Rodica Narcisa Petrescu, *Administrative law*, Hamangiu Publishing House, Bucharest, 2009 etc.

[13] Government ordinance no 2/2001 regarding the judicial regime of contraventions, published in the Official Journal no 410 from 35th July 2001, last modified through Law no. 2013/2018 regarding measures of efficiency of acquitting contraventional measures, published in Official Journal no. 647 from 25th July 2018.

2.3.1. Administrative - disciplinary responsibility

As the special literature also mentions, "prior to the Code there was no regulation regarding the general regime for responsibility denominated administrative-disciplinary responsibility – other than article 566 that mentions the disciplinary responsibility. Dispared dispositions applicable in the matter were found in Law no. 188/199 or in Law no. 393/2004, in the parts that were consacrated for administrative-disciplinary responsibility for the public functionaries and the local elected officials[14] (...)".

The administrative-disciplinary responsibility[15] is defined in article 568 (line 1) as: a "form of the administrative responsibility that occurs in case of a disciplinary misconduct, in the sense of a breach from demnitaries, public functionaries and ones assimilated to them of service duties and of conduct norms mentioned by law". Also, in the administrative Code there is mentioned that the administrative-disciplinary responsibility is established with respecting the contradictoriality principle and the right to defend oneself and is subjected to the administrative contentious instances in conditions given by the law.

The disciplinary misconduct in the administrative Code represents: "*the fact done with guilt by public functionaries, demnitaries and their assimilates that consists of an action or inaction through which the obligations that come to them from the service report, respectively from the exercise of their mandate about this and that affects their socio-professional and moral status*". About the subjects of the administrative - disciplinary responsibility, according to article 570 from the Code they are: active subject and passive subject. The active subject of the administrative-disciplinary responsibility is: "public administration authority or any other entity assimilated to this towards which the consequences of a disciplinary misconduct are turned over and in whose competence the doer's responsibility enters" and the passive subject of the administrative-disciplinary responsibility is: the "person that did a disciplinary misconduct".

About the individualisation of the administrative-disciplinary sanction (article 571), the following rules are mentioned: "The causes and the gravity of the disciplinary misconduct will be accountable and also the surroundings in which this was done, by the author's form of guilt and the consequences of the misconduct, by general behaviour in the exercise of service atributions and, if necessary, by the existence in his history of other administrative-disciplinary sanctions that were radiated by law (...)".

2.3.2. The administrative - contraventional responsibility

About the administrative - contraventional responsibility, the administrative Code only has one article, article 572, in which we find the definition: "the administrative - contraventional responsibility represents a form of administrative responsibility that occurs in case of an identified contravention according to the specific legislation in the contraventions domain". Thus, the new administrative Code does not bring many novelty elements regarding this form of responsibility but it has a sending note to the common law, and that is GO no. 2/2001

[14] Verginia Vedinas, *op.cit.*,2019, p.349.

[15] The administrative Code abrogated Law no. 188/1999 regarding the Status of the public functionaries, normative act appliable to this form of responsibility.

regarding the judicial contraventions regime. Moreover, the special literature also stated: "the prior regulation, but also the new one that refers to these aspects is represented by GO no. 2/2001 regarding the judicial regime of the contraventions that represent the common law in this type of administrative responsibility matter, the only one that benefitted of a frame law by now[16]".

2.3.3. The administrative-patrimonial responsibility

The definition for the administrative-patrimonial responsibility is found in article 573: "*a form of administrative responsibility that consists of the state's obligation or, if necessary, the administrative-territorial units to repair the damages caused to a private or judicial person for any judicial error, through an illegal administrative act or by an unjustified refuse of the public administration to solve a request regarding a right admitted by law or a legitimate interest*".

Also, the administrative Code in article 577 states the four cumulative conditions that must be met to engage the administrative-patrimonial responsibility: "the administrative act is illegal; the illegal administrative act causes material or moral prejudices; the existence of causality report between the illegal act and the prejudice; the existence of public authority guilt and/or of its personnel".

The administrative Code refers to the forms in which the administrative-patrimonial responsibility is engaged: "the authorities exclusive responsibility and that of the public institutions for the prejudices of material or moral nature done following organizational or functional deficits of some public services; the solidary administrative-patrimonial responsibility for prejudices caused about the highlighting public goods and services; patrimonial responsibility of authorities' personnel or public institutions about delegated attributions".

In article 574 the conditions of authorities' and public institutions' are mentioned for the prejudices of material or moral nature done following the organizational or functional deficits of some public services: "the existence of a public service that by its nature contains the risk of producing some prejudices for the beneficiaries; the existence of a material or moral prejudice, as requiered, of a private or judicial person; the existence of causality between using a public service that by its nature contains the risk of producing some prejudices and the damage done to the private or judicial person by case".

In article 575 the conditions that attract administrative-patrimonial responsibility for prejudices caused by administrative acts are mentioned. "Public authorities and institutions respond patrimonially, from their own budget for moral or material damages caused in three situations: through administrative acts; by unjustified refuse to solve a request; by not solving a request in due time". Also, "if the payment of some damages for the prejudice or for delaying is requested, in the situations in which the intentional guilt of the demnitary, the public functioner or contractual personnel is proven, it responds patrimonially in solidarity with the public authority or institution if it did not respect the legal provisions specific for the attributions established in the job description".

Article 567 mentions how the judicial regime of the solidary administrative-patrimonial responsibility works for prejudices caused about highlighting public goods and services. Thus, the administrative Code states that "public authorities and

[16] Verginia Vedinaș, *op.cit.*, 2019, p.350.

institutions and their personnel, whose guilt has been proven, respond patrimonially in solidarity for the damages done to the public or private domain following the public service organization or functionning by not respecting the law".

Also, article 578 mentions that "the public authorities and institutions personnel who has written delegations responds for prejudices caused following the exercise of their delegated attributions and the delegation act must contain the limits" but: "the delegation act that is emitted without respecting the law is null and exonerates the delegated person".

3. Conclusion

As it was shown in this study, the unification of the administrative law legislation under one dome is undoubtedly a win for the public administration activity. Furthermore, strictly under the aspect of administrative responsibility regulation in a distinct part of the administrative Code is a first step towards creating a new unitary normative frame and confirming the traditional administrative law literature that analysed in all the administrative law courses the administrative responsibility. Concluding, the administrative Code comes and confirms what the traditional literature analysed and presented, the three forms of responsibility in the administrative law: the administrative-disciplinary responsibility, the administrative - contraventional responsibility and the administrative - patrimonial responsibility.

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REQUIREMENTS OF THE EUROPEAN UNION IN THE MATTER OF PRESUMPTION OF INNOCENCE. ROMANIAN STANDARDS

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Abstract

In the present study, we take into account the analysis of the presumption of innocence, a fundamental principle of enforcement of the criminal procedural law, from the perspective of the regulations of the European Union and of the national regulations. It was examined the domestic legal framework, respectively Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Keywords: *presumption of innocence, right to be present at the trial, right to a fair criminal trial, European Union, Romanian Code of Criminal Procedure.*

1. Introduction

In recent years, the European Union's concern has become obvious for strengthening the legal framework of the Members States with a view to regulate certain minimum standards the purpose of which is the fair conduct of criminal trials. In this context, according to the existing provisions of the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, taking into account the proposals of the European Commission, certain directives were adopted with reference to the maintenance and development of an area of freedom, Security and justice, as follows: Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings[1], Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime[2], Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty[3], respectively Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[4].

This is the context in which on 9 March 2016 it was adopted the Directive (EU) 2016/343 on the strengthening of

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[1] Published in the Official Journal of the European Union L 142/1 of 1 June 2012.

[2] Published in the Official Journal of the European Union L 315/57 of 14 November 2012.

[3] Published in the Official Journal of the European Union L 294/1 of 6 November 2013.

[4] Published in the Official Journal of the European Union L 132/1 of 21 May 2016.

certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (hereinafter referred to as Directive)[5], with the aim of "strengthening the right to fair trial in criminal proceedings by establishing minimum common rules with regard to certain aspects of the presumption of innocence and of the right to be present at the trial". In compliance with Article 14 of the Directive, the Member States are required to fully transpose the European provisions in the domestic laws by 1 April 2018, and they shall immediately notify the European Commission to this end.

Under such circumstances, on 30 October 2020, the European Commission requested several Member States (Bulgaria, Croatia, Cyprus and Romania), by certain reasoned opinions, to fully enforce the EU rules regarding the strengthening of the presumption of innocence and of the right to be present to trial, considering that the concerned States proceeded to the partial transposition of the provisions of the Directive[6]. Effectively, certain deficiencies were identified with regard to the public references to guilt, the manner in which the suspected or accused persons are presented before the criminal judicial authorities, respectively the right to be present at the trial. The concerned States were given a two-month deadline to answer the findings of the European Commission, and they may be sued in the Court of Justice of the European Union, in the absence of such an answer.

2. The presumption of innocence - general aspects.

Even if there have been manifestations specific to this principle since Antiquity[7], the presumption of innocence had an express regulation only in the 18th century, in the French Declaration of the Rights of Man and of the Citizen of 1789, and Article 7 set forth that any person is presumed innocent until he or she is declared guilt („*tout homme étant présumé innocent jusqu'á ce qu'il ait été déclaré coupable*").

At present, the presumption of innocence is enshrined in the most important international documents, such as the Universal Declaration of Human Rights of 1948 (Article 11), the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 [Article 6 para. (2)] [8], the International Covenant on Civil and Political Rights of 1966[9], the Charter of Fundamental Rights of the European Union of 2007[10].

As regards domestic laws, it is required to mention, first, the provisions of Article 23 para. (11) of the Constitution of Romania[11],

[5] Published in the Official Journal of the European Union L 65/1 of 11 March 2016.
[6] For details, see https://ec.europa.eu/romania/news/20201030_infringements_justitie_ro (accessed on 14 November 2020, at 17.00).
[7] Justinian's Digest of the year 533 contained the rule of law "*ei incumbit probatio qui dicit, non qui negat*" – the burden of the proof lies upon him who affirms not he who denies (for details, I. Neagu, M. Damaschin, *Treaty on criminal procedure. General part*, the 3rd edition, Universul Juridic Publishing House, Bucharest, 2020, p. 95-101; Gh. Mateuț, *Criminal Procedure. General part*, Universul Juridic Publishing House, Bucharest, 2020, p. 70-74).
[8] Romania adhered to the Convention by Law no. 30/1994 (published in the Official Journal no. 135 of 31 May 1994).
[9] Romania ratified the International Covenant on Civil and Political Rights by Decree no. 212/1974 (published in the Official Journal no. 146 of 20 November 1974).
[10] The decision of the preparation of this document was made by the European Council at Köln (3-4 June 1999). Therefore, the Charter of Fundamental Rights of the European Union was adopted at Nice, on 7 December 2000. The last version in Romanian was published in the Official Journal of the European Union no. C 202 of 7 June 2016.
[11] The Constitution of Romania was republished in the Official Journal no. 767 of 31 October 2003, following the amendment and supplement by Law no. 429/2003, published in the Official Journal no. 758 of 29 October 2003.

according to which "until the judgment of conviction remains final, the person is considered innocent". As regards the criminal procedural laws, until 2003, the legal basis of the presumption of innocence resided in Article 66 para. (1) of the Code of Criminal Procedure adopted in 1968, in compliance with which the suspected or accused person was not required to prove his or her innocence.

The enshrining of the presumption of innocence as a fundamental principle of the enforcement of the criminal procedural law was made by Law no. 281/2003, a regulation by which the previous Code of Criminal Procedure was supplemented by the introduction of Article 52, having the following content: "Everyone is considered innocent until proven guilty under a final criminal judgment". In the present Code of Criminal Procedure (hereinafter referred to as, Code of Criminal Procedure), which became effective on 1 February 2014, the principle of the presumption of innocence is found in Article 4. We shall further examine, by using the comparative method, the provisions of the Code of Criminal Procedure in the matter of the presumption of innocence and the provisions of the Directive, in order to determine the degree of compliance of the domestic laws with the requirements of the EU document.

3. A comparative analysis of the regulation of the presumption of innocence in the Romanian criminal procedural law, respectively of the provisions of the Directive

According to Article 2 of the Directive, the rules shall be applicable to natural persons being suspected or accused within criminal procedures, in all stages of the criminal procedures, from the time when a person is suspected or accused of committing an offence or an alleged offence until the time when the judgment establishing that the respective person has committed the offence under consideration remains final. The text under consideration includes a series of remarks, taking into account the provisions of the Code of criminal procedure, as will be specified below.

Thus, first of all, by "suspected person", within the meaning of the Directive, we shall understand the suspect in the criminal proceedings, the person in relation to whom it was ordered to further conduct the criminal prosecution, subsequently to the initiation of the criminal prosecution *in rem.* As such, the right to be presumed innocent shall actually arise upon ordering the further conduct of the criminal prosecution against a certain person, in compliance with Article 305 para. (3) of the Code of criminal procedure. "Accused person" shall mean the defendant, against whom a charge in criminal matter may be filed by initiating the criminal proceedings.

Secondly, considering the holders of the presumption of innocence, the phrase "in all stages of criminal proceedings" means the period of time elapsed from the further conduct of the criminal prosecution against a certain person and the moment when the judgment according to which the defendant's guilt was established, has remained final. Therefore, the scope of this principle shall not interfere with the entire duration of the criminal proceeding, as during a possible stage of enforcement of the criminal judgment of conviction (or waiver of the punishment application or deferral of the punishment application) the presumption of innocence cannot be relied on anymore, as it is rebutted by the effect of finding the defendant's guilt.

As regards Article 4 of the Directive, which also determined the formulation of the opinion dated 30 October 2020, we consider that its transposition in the domestic laws

shall not be made by amending the Code of criminal procedure, as the most part of the obligations aim at the public authorities in general, since their activity cannot be regulated under the criminal procedural rules. Hence, according to para. (1), Member States are required to take the necessary steps in order to warrant that, since the guilt of a suspected or accused person has not been proven according to law, the public declarations given by the public authorities and the judicial decisions other than those relating to guilt, shall not refer to the respective person as being guilty. In this respect, we indicate the constant manner of the criminal prosecution bodies of informing the public about the initiation or conduct of certain criminal files by press releases containing express references to the presumption of innocence ("We indicate that the further conduct of the criminal prosecution is a stage of the criminal proceedings regulated by the Code of criminal procedure, the purpose of which is to establish the procedural background of producing evidence, an activity which cannot, in any event, defeat the principle of the presumption of innocence")[12]. Otherwise, the interest in informing the public about the conduct of certain criminal cases (especially, in the stage of criminal prosecution) is recognized by para. (3) of Article 4 of the Directive, according to which "the obligation laid down in paragraph (1), not to refer to the suspected or accused persons as if they were guilty, shall not prevent the public authorities from providing any information publicly regarding the criminal procedures when this is strictly necessary for any reasons related to the criminal investigation or in the public interest".

As regards the measures which are required in the case of breach of the obligation of not referring to a person suspected of having committed an offence as being already guilty, these cannot be established under the Code of Criminal Procedure but, eventually, by Law no. 304/2004 on the judicial organization or other normative acts under which the activity of other public judicial or non-judicial authorities or of the press institutions is organized[13].

The same solution is required, in our view, as regards the transposition at the domestic level of the provisions of Article 5 of the Directive, according to which adequate measures are necessary to guarantee that the suspect or defendant shall not be presented as if they were guilty, either before the courts of law, or in other public circumstances, by using certain measures of physical constraint. Thus, for example, the obligation not to present to the public the image of a person immobilized by enchainment, under the circumstances in which he or she benefits from the right to be presumed innocent, rests not only with the criminal prosecution bodies, but with the police bodies within the centres of custody and provisional detention, in the custody of which the suspect or defendant deprived of liberty is, respectively, of the servants of the

[12] See the website of the National Anticorruption Directorate (https://www.pna.ro), of the Directorate for Investigating Organized Crime and Terrorism (https://www.diicot.ro), of the Public Prosecutor's Office attached to the High Court of Cassation and Justice (https://www.mpublic.ro), accessed on 15 November 2020.

[13] As an example, we consider Law no. 218/2002 on the organization and functioning of the Romanian Police (republished in the Official Journal no. 170 of 2 March 2020), Law no. 254/2013 on the execution of custodial sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal trial (published in the Official Journal no. 514 of 14 August 2013), the Regulation on the organization and functioning of the centers of custody and provisional detention, as well as the measures needed for their safety, approved by the Order of the Minister of Internal Affairs no. 14/2018 (Official Journal no. 212 bis of 8 March 2018) etc.

National Administration of Penitentiaries (insofar as the deprivation of liberty takes place during the trial stage in penitentiaries). It is interesting to indicate the fact that in the literature[14], the "immobilization" is defined as a binding police measure, undertaken for the purpose of making impossible for a person to run or have an aggressive behaviour towards the policeman or other persons, to start or continue a violent action. In this context, there is a possibility that the suspect or defendant should be immobilized, either in order to be presented before the criminal judicial authorities, or to be transported, in order to avoid a possible attempt to run or to behave violently towards other persons. However, in this context as well, it is necessary to avoid the exposure of the suspect or defendant before the public in any circumstances of immobilization, most of the times by using handcuffs. Moreover, para. (2) of Article 5 of the Directive consecrates the right of the States to apply measures of physical constraint, if required by any circumstances specific to the case.

In compliance with Article 6 para. (1) of the Directive, the burden of proof for establishing the guilt of the suspect or defendant shall rest with the criminal prosecution bodies. The requirement is fully met through the agency of the provisions of Article 99 para. (1) of the Code of Criminal Procedure, according to which "in the criminal proceedings, the burden of proof mainly belongs to the prosecutor", respectively to the criminal investigation body. Additionally, according to para. (2), "the suspect or defendant benefits from the presumption of innocence, and he is not required to prove his innocence (...)". Moreover, the requirement for the regulation of the rule *in dubio pro reo*, resulting from Article 6 para. (2) of the Convention, ("Member States ensure that any doubt relating to guilty is in favour of the suspected or accused person, including when the court assesses the possibility of the respective person's acquittal"), is met, first of all, as a result of the regulation with the principle laid down in Article 4 para. (2) of the Code of criminal procedure ("After taking of the entire evidence, any doubt regarding the conviction of the judicial bodies shall be interpreted in favour of the suspect or defendant"). Thus, the rebuttal of the presumption of innocence may only be made by certain guilty evidence, as the national case-law firmly found that "the doubt is equivalent to some positive evidence of innocence"[15]. The provisions relating to the *in dubio pro reo* rule are also acknowledged by other criminal procedural rules. In this respect, we consider Article 103 para. (2) the final sentence of the Code of criminal procedure ("the sentence is only ordered when the court is convinced that the accusation was proven beyond any reasonable doubt") or of Article 396 para. (2)-(4) of the Code of Criminal Procedure ("The sentence is passed if the court finds, beyond any reasonable doubt, that the act exists, it constitutes an offence and was committed by the defendant. (3) The waiver of the application of the penalty shall be passed if the court finds, beyond any reasonable doubt, that the act exists, it constitutes an offence and was committed by the defendant, according to Articles 80-82 of the Criminal Code. (4) The deferral of the application of the penalty shall be passed if the court finds, beyond any reasonable doubt, that the act exists, it constitutes an

[14] E. Neață, M. Pruteanu, *Elements of police strategy and operational procedures regarding the intervention of the public order and safety structures (Elemente de tactică polițienească și proceduri operaționale privind intervenția structurilor de ordine și siguranță publică*), Hamangiu Publishing House, Bucharest, 2013, p. 98.

[15] The High Court of Cassation and Justice, Criminal Chamber, decision no. 3465/2007, in I. Neagu, M. Damaschin, *op. cit.*, p. 99.

offence and was committed by the defendant, according to Articles 83-90 of the Criminal Code").

As regards the regulation of the right to silence and of the right not to incriminate oneself, as provided for in Article 7 of the Directive, the national legal framework is fully adapted to the European requirements. It is firstly noticed the enshrinement of two distinct rights, namely the right to silence, respectively the right of the suspected or accused persons not to incriminate oneself. As regards the right to silence, the present Code of criminal procedure contains numerous provisions to this end. We consider Article 10 para. (4) of the Code of criminal procedure ("Before they are heard, the suspect and the defendant should be instructed that they have the right not to give any statement"), Article 83 letter a) the first sentence of the Code of criminal procedure („During the criminal proceedings, the defendant is entitled not to give any statement, his attention being drawn that he refuses to give any statements, he shall not suffer any unfavourable consequence") or Article 374 para. (2) of the Code of Criminal Procedure ("The president of the panel of judges shall notify the defendant in relation to the right not to give any statement"). Furthermore, the right to non self-incrimination is consistently regulated in the Romanian criminal procedural law. Hence, according to Article 83 letter a) the 2nd sentence of the Code of Criminal Procedure, the defendant has the right to be informed that in the event that he gave statements, they could be used as means of evidence against him. In other words, the exercise of the right to silence also involves the possibility to avoid self-incrimination. According to Article 78 of the Code of Criminal Procedure, in conjunction with Article 83, the right to silence and to non self-incrimination is also recognized to the suspect.

In this matter, it is also relevant the assumption in which the procedural regime of a person is modified during a criminal trial, in the sense that the concerned person is initially heard as witness and subsequently he or she becomes suspect or defendant. In this case, according to Article 118 of the Code of Criminal Procedure, the witness statement cannot be used against him. The rule shall also be applicable to the situation in which the person is initially heard as suspect or defendant and subsequently, it is required his or her hearing as witness (for example, when the splitting is ordered, and the defendant who recognized his or her guilt in the file in which the splitting has been ordered, is heard as witness in the casefile made up as a result if that splitting). With reference to this legal text, it is necessary to mention as well, the Decision of the Constitutional Court no. 236/2000, under which the privilege of the right to silence and to non self-incrimination has been extended and as regards the witness, in the event that any accusations in criminal matter in the respective casefile may be filed against him[16].

We also mention the provisions of Article 7 para. (4) of the Directive, according to which Member States may allow to their judicial authorities that, upon passing judgments, they should take into account as well, the cooperative behaviour of the suspected and accused persons, any rules existing in the domestic laws either in the form of judicial circumstances, or as component elements of the procedure of the agreement of recognition of the guilt or of the abbreviated procedure of recognition of the guilt.

[16] The Constitutional Court of Romania, decision no. 236/2020, published in the Official Journal no. 597 of 8 July 2020.

4. Right to be present at trial. Right to a new trial

Other procedural rights were also approached in the Directive, which are not in a necessary interdependence relationship with the presumption of innocence. We consider the right to be present at trial (Article 8), respectively the right to a new trial (Article 9). Actually, the non-observance of these rights implicitly determines the impossibility of exercising all the other rights of procedure, among which the right to be presumed innocent until establishing the guilt under a final criminal judgment.

The existence of a set of criminal procedural rules meeting the European requirements is noticed in this matter. Recently, we mention the provisions of Law no. 228/2020[17] by which the Code of Criminal Procedure was supplemented for ensuring the exercise of the right to be present at trial and of the right to a new trial. Hence, the institution of the criminal trial suspension (both of the criminal prosecution, and of the judgment of the case) was supplemented by the establishment of the obligation of the judicial body to verify whether the hearing of the suspect or of the defendant being seriously ill cannot be made at the place where he or she is, or by videoconference. Moreover, with reference to the right of the defendant convicted to a new trial, according to law, Article 557 was supplemented with para. (1^2), according to which at the same time as the handing over of the writ of execution, the convicted person is notified, under signature, in writing, about the right to request the reopening of the criminal trial, in the case of judgment by default.

5. Conclusions

The analysis of the text of the Directive and of the domestic laws in the matter of ensuring the presumption of innocence shall determine the finding, in principle, of the fulfilment of the minimum standards enshrined in the document of the European Union within the Romanian criminal procedural laws. In this respect, we consider the regulation under the Constitution of the presumption of innocence, its enshrinement with a status of fundamental principle of the criminal proceedings according to the provisions of the Code of Criminal Procedure (to which a set of relevant rules are added in the matter of evidentiary hearing, respectively of the method of settlement of the criminal action), respectively of Law no. 304/2004 on the judicial organization. Furthermore, it is noticed the relevant application of the presumption of innocence in the practice of the Romanian courts of law, especially as regards the *in dubio pro reo* rule.

Under such circumstances, the deficiencies found by the European Commission in the matter of presumption of innocence (public references to guilt, the manner in which the suspected or accused persons are presented before the criminal judicial authorities), may be remedied by regulating certain obligations of the judicial or non-judicial authorities or institutions (administrative police, penitentiary authorities, mass-media, etc.). In other words, in this respect, it is not required to amend the criminal procedural laws, as the organization of the activity of the judicial or non-judicial authorities or institutions is ensured by any distinct normative acts, upon which the Romanian legislator should

[17] Law no. 228/2020 for the amendment and supplement of certain normative acts in the criminal matter for the purpose of transposing certain directives of the European Union, published in the Official Journal no. 1019 of 2 November 2020.

intervene, in order to transpose the minimum requirements of the examined Directive.

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THE REGIME FOR THE EXECUTION OF PENALTIES BY POLITICAL PRISONERS IN ROMANIA DURING THE COMMUNIST PERIOD

Constantin Marc NEAGU[*]

Abstract

This article analyzes the regime for the execution of penalties by political prisoners in Romania during the communist period (1947-1989). With the benefit of hindsight, one could state that the communist political regime has left its mark, among other things, on the conditions of imprisonment of those convicted of political crimes. Among the most frequent crimes for which the political detainees were convicted we can mention: activity against the working class, the crime of breaching the constitutional order or the crime of conspiracy against the social order.

Keywords: *penalties; execution regime; political prisoners; communist political regime; political crimes, penitentiary, political detainees.*

The greatest philosophers of the world have envisaged justice as a transposition of the moral principles of justice and equity. 'When justice disappears,' wrote Kant, 'there is no value for people to live on earth.'

In the history of state organization, legal systems have reflected the political regimes that have existed and that have drawn up the legal norms applicable in the respective community, in tune with the development of legal sciences. From this perspective, the future of legal sciences should take into account the past of legal sciences, considering its effects through the fair or unfair application of justice, including the totalitarian periods, in which states having a dictatorial political regime understood to divert the law from its supreme purpose, namely equity and morality.

'In the implementation that communist ideology, rooted in the anarchist and socialist movement, experienced in the USSR, there were two means of manipulation that used lies and violence, with their multiple forms of manifestation. There is an obvious change of perspective between Marxist communism and Bolshevik communism, although both declare the same ends and have overlaps in most respects. The difference is that Marx saw the birth of the proletarian revolution as a natural process resulting from the crises caused by technological developments, so that the involvement of the political factor was somewhat secondary, whereas in the Leninist vision the political revolution is the trigger. Communism in the USSR was established under the auspices of Lenin and evolved under the relentless leadership of Stalin, who developed repression applied as state policy in the countries that became Soviet satellites, after the Second World War.'[1]

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[1] https://www.historia.ro/sectiune/general/articol/ Temniţele şi închisorile comuniste din România - câteva referinţe despre numărul lor, activitatea, volumul de încarcerare, capacitatea şi dispunerea lor geografică (*Communist Jails and Prisons – some details about their number, activity, number of detainees, imprisonment capacity and their geographical position*), article by Stelian Gombos

In Romania, once the communist regime was established as the result of the fraudulent 1946 elections, the new political regime aimed at eliminating the Romanian political opposition and elite, by abusively applying the norms of criminal law. The regime change in Romania was done according to the Soviet model and by Soviet cadres. The *Securitate* (the Romanian secret police in the communist era), the strong arm of the communist party, was doubled by the *Miliție* (the name of the police in the communist era), another repressive institution that, at the level of communes and villages, took over the prerogatives of the Securitate. In the early years, the *Securitate* personnel were mostly made up of people from the periphery of social life, aided by Soviet advisers. The native cadres who were to apply Soviet policy were trained in Moscow, where they studied various fields which they were about to pursue on their return to Romania. If in between the 1945 and 1960 torture and beatings were the main tools of the *Securitate*, later their methods were to be refined, as surveillance and denunciation became the prevailing repressive tools, nonetheless yielding the same results.

The Institute for the Investigation of Communist Crimes and the Memory of Romanian Exile (IICCMER) set up on November 25, 2009, by merging the Institute for the Investigation of the Crimes of Communism in Romania (IJCCR), established in 2005, with the National Institute for the Memory of the Romanian Exile (INMER) , founded in 2004, published not only the files of the political detainees, but also information on the penitentiary system organized for the political opponents who were part of privileged categories, namely: ministers, leaders of political parties (especially the Liberal Party and the National Peasant Party), clerics, intellectuals, prominent members of the Romanian political life, bourgeois, big industrialists and landowners.

Between 1947 and 1989, the penitentiaries and labor colonies of Romania represented the places where tens of thousands of people were detained and their only fault was the fact that they did not agree with the new political and social order imposed by the Romanian Communist Party. These people entered a penitentiary system that considered them even more dangerous than ordinary criminals (due to the stigma of being a political prisoner) and they had to abide by all harsh rules. At least one criminal record was drawn up for each political detainee. The penitentiary files / criminal registration files with specific details were kept in the archives of the General Directorate of Penitentiaries (today the National Administration of Penitentiaries) and centralized at the Jilava penitentiary.

A penitentiary file had a standard form, which varied depending on the period in which this document was drawn up for the detainees. In fact it was a cardboard sheet, with headings both on the front and on the back. In addition to the identification data of each person (name, surname, date of birth, place of birth, parents and domicile), as well as the administrative ones related to the conviction (deed and brief description of it with the related article, arrest warrant, court decision, duration and type of punishment), there were also details related to the situation of the respective political prisoner (occupation, wealth, social origin and political affiliation). The most important feature of these files is the division of detainee data between the period before and the period after the installation of the 'people's democracy' regime.

The most frequent texts of law, based on which these persons were convicted, are art. 193/I, art. 207 and art. 209 of the Romanian Criminal Code in force at that time. Art. 193/I – activity against the

working class – was a secret article, comprised in decree no. 62/1955 and unpublished, which had a very wide scope and thus any kind of accusation could be included here; art. 193 belonged to Part I ('High Treason') of Chapter I ('Crimes and Offenses against the External Security of the State'). Another frequently used text of law was art. 207 – the crime of overthrowing the constitutional order – and had the following content: 'The person who performs violent acts in order to change the constitutional form of the People's Republic of Romania, as well as the one who instigates the inhabitants to rise up against the constitutional powers of the Republic, commits the crime of violating the constitutional order and is punished with severe detention from 5 to 10 years and civic degradation from 3 to 5 years.' Also, for the conviction of the citizens who fell into the categories that had to be eliminated, art. 209 of the Romanian Criminal Code was applied – crime of conspiracy against the social order, which stated as crimes the following: 'preaching orally the change of the democratic form of government of the State; making propaganda for the violent overthrow of the existing social order of the State; forming or organizing secret associations with the purpose described in the previous paragraph, whether or not they have an international character; working by violent means to produce terror, fear or public disorder, in order to change the economic or social order of the State; entering in contact with an international person or association from abroad or from the country, in order to receive instructions or assistance of any kind for the preparation of an overthrow of the democratic order of the State; helping, in any way, an association from abroad or from the country, which would aim to fight against the economic or social order of the State; affiliating or becoming a member of such an association; initiating, organizing, activating or participating in fascist, political, military or paramilitary organizations; or, without being members of such organizations, making propaganda or taking action in favor of those organizations, their members or the aims pursued by them.' This was the most common classification applied to those convicted of political crimes and was punishable by forced labor from 15 to 25 years and civic degradation from 2 to 10 years.

The files of 35 personalities known to the general public, who went through communist detention, were also published by the Institute for the Investigation of the Crimes of Communism and the Memory of the Romanian Exile. These are mainly politicians belonging to the interwar period, but also post-communists, intellectuals, anti-communist fighters and well-known dissidents, prelates of various denominations and even former communists who fell into disfavor with the regime. In alphabetical order, these people are the following: Arşavir Acterian, Vasile Aftenie, Aurel Aldea, Valeriu (Bartolomeu) Anania, Maria Antonescu, Constantin Argetoianu, Petre Amăuţoiu, Toma Amăuţoiu, Gheorghe Arsenescu, Nicolae Balotă, Petre Mihai Băcanu, Ioan Bălan, Ecaterina Bălăcioiu, Oliviu Beldeanu, Aurelian Bentoiu, Mişu Benvenisti, Aristide Blank, Matei Boilă, Gheorghe Boldur-Lăţescu, Constantin (Bebe) Brătianu, Gheorghe Brătianu, Gheorghe Calciu-Dumitreasa, Mircea Cancicov, Dumitru Caracostea, Nicolae Carandino, Virgil Carianopol, Victor , Radu Câmpeanu, Tit Liviu Chinezu, Decebal Zelea-Codreanu, Lena Constante, Constantin Titel-Petrescu, Corneliu Coposu, Nichifor Crainic and Gheorghe Cristescu-Plăpumarul.

The Romanian elite was also denigrated and compromised through the mass media of that era, which was fully

controlled by the Romanian Communist Party; invective such as 'fascists', 'war criminals', 'traitors' was used to stigmatize the political leaders in which the population still saw hope for the country's recovery from the terror of the new political regime set up by the 1946 fraudulent elections. Going through the experiment of prisons and forced labor in communist camps and colonies meant the destruction of the interwar political class, the elimination of the intellectual elite, the extermination of a large number of Orthodox or Greek Catholic clergy, and, in general, repression against all those who opposed the establishment of 'people's democracy.' Starting with March 1945, the Romanian Communist Party unleashed systematic terror against political opponents, reproducing the model of the Soviet Gulag on the Romanian territory[2].

During the communist regime, in Romania there were 44 main penitentiaries and 72 forced labor camps for political detainees, in which over 3 million Romanians worked and suffered, out of which 800,000 people died. They were under the coordination of the General Directorate of Penitentiaries (with all the changes of title that it has known over time). Along with the central leadership of the General Directorate of Penitentiaries, those responsible for the decisions regarding the treatment applied in the places of political detention were: the commanders of penitentiaries, camps and labor colonies and their deputies, as well as the political officers who ensured the 're-education' of detainees according to the directives of the Romanian Communist Party. The detention camps in the communist era could be likened to Nazi labor camps because the methods of exterminating political opponents were similar, but with a very different purpose: the communist regime wanted to dismantle the Romanian interwar intellectual, cultural and political elite, whereas the Nazi regime aimed at eliminating citizens on ethnic, religious and racial grounds.

The purpose of re-education was to indoctrinate the targeted elements with the Marxist-Leninist ideology, which would have resulted in the absence of active or passive resistance to the Communist Party. For this reason, the main target of re-education was political detainees. Re-education was carried out either by peaceful means of persuasion (communist propaganda), or by violent means (such as the re-education carried out in Pitești Penitentiary). The theoretical basis of communist re-education stemmed from the principles enunciated by Anton Semionovich Makarenko, a Soviet pedagogue born in Ukraine in 1888. Having received theoretical training by attending a one-year pedagogy course, from 1920 to 1932, he was first in charge of a colony of vagabond juvenile delinquents, and then of a colony for minors. The principles he used in the education of these children were later included in his works, *The Pedagogical Poem*, *the March of the Year '30*, respectively. Makarenko's pedagogy practically conforms to communist ideology. First, it is based on the collective body, a central notion of the Soviet pedagogy, and not on the individual[3]. This is in contrast with the capitalist, bourgeois, individual-centered pedagogy. The collective body is seen as a type of

[2] https://www.iiccmer.ro/ (www.crimelecomunismului.ro)

[3] https://www.historia.ro/sectiune/general/articol/ Temniţele şi închisorile comuniste din România - câteva referinţe despre numărul lor, activitatea, volumul de încarcerare, capacitatea şi dispunerea lor geografică (*Communist Jails and Prisons – some details about their number, activity, number of detainees, imprisonment capacity and their geographical position*), article by Stelian Gombos

organization with ideological characteristics, and unique leadership, similar to the communist party. But the main idea of this pedagogy lies in the distinction made between education and re-education[4].

According to the estimates made by Florin Mătrescu in his book, *The Red Holocaust*, the number of people who suffered under the communist regime in Romania exceeded 3 million. Re-education penitentiaries were characterized by the application of torture methods in order to convert the prisoners to communist ideology. They operated in Suceava, Piteşti, Gherla, Târgu Ocna, Târgşor, Braşov, Ocnele Mari and the Peninsula. The prisons for the extermination of the political and intellectual elite were in Sighet, Râmnicu Sărat, Galaţi, Aiud, Craiova, Braşov, Oradea, Piteşti. Labor camps were located at the Danube-Black Sea Canal (Peninsula, Poarta Alba. Salcia, Periprava, Constanţa, Midia, Capul Midia, Cernavoda, etc.), the labor colonies were situated in Balta Brăilei. Triage and transit prisons were in Jilava, Văcăreşti. Investigative prisons operated in Rahova, Malmaison, Uranus. Women's prisons were set up in Mărgineni, Mislea, Miercurea Ciuc, Dumbrăveni, and juvenile penitentiaries existed in Târgşor, Mărgineni, Cluj. Hospital penitentiaries operated in Târgu Ocna and Văcăreşti[5].

Serious human rights abuses and violations were systematically carried out in all communist prisons and camps in Romania. The harshest methods of torture were applied and the most frequently used were: hitting the sensitive parts of the body; crushing nails; pulling hair from one's head; shovel beating; treating wounds with salt; crucifixion; systematically beating one's soles with a whip, wooden or rubber objects; burning one's soles; beating with sandbags; keeping one's feet in the ice until becoming frostbitten. For example, in the Black Valley Peninsula camp, the 'frog' method was applied: after returning from work, the detainees were forced to leapfrog, with their hands on their hips, while carrying another prisoner on their back. Moreover, in the aforementioned camp, the convicts were forced to spend a whole night crammed in pairs, in a box without a roof.

Another method used against detainees was forced labor. Working conditions in communist camps and settlements were harsh. The detainees were put to work until exhaustion, given that the workloads were increased from day to day and the food was a kind of porridge, devoid of any protein. Failure to comply with the daily workload led to the punishment of the 'lazy prisoner' by beating him, hanging him upside down or sending him on solitary confinement. In the early 1950s, about 80,000 people 'worked' in the forced labor camps (out of which 40,000 were on the Danube-Black Sea Canal). Also, forced labor camps and deportation centers existed throughout the country, but most of them were located in the southeastern part of the Romanian Plain and southern Dobrogea (Salcia, Urleasca, Sălcioara, Jegalia, Perieşi, Grădina and Satul Nou[6]).

The *'Piteşti Phenomenon'* was a re-education experiment that consisted in the mental destruction of the individual. This 'operation' began in 1949, in Pitesti prison. The *Securitate* devised a plan to liquidate the moral resistance of political prisoners,

[4] https://ro.wikipedia.org/wiki, with quotes from Stănescu, Mircea (2010). *Reeducarea în România comunistă. Voi. I* (Re-education in Communist Romania), Polirom Publishing House, Iaşi

[5] https://www.historia.ro/sectiune/general/articol/ Temniţele şi închisorile comuniste din România - câteva referinţe despre numărul lor, activitatea, volumul de încarcerare, capacitatea şi dispunerea lor geografică (*Communist Jails and Prisons – some details about their number, activity, number of detainees, imprisonment capacity and their geographical position*), article by Stelian Gombos

[6] https://www.historia.ro/sectiune/general/Fenomenul Piteşti, article by Mihai Dragnea

following the model of Anton Makarenko. The experiment ended in 1952. This plan involved re-educating all political opponents in the communist spirit, by erasing everyone's old identity and replacing it with a new identity, typically a Bolshevik one. The detainee was not to be 'cured' after his release, as he was supposed to acquire communist behavior. Ceaseless suffering caused the detainee to lose his personality and human dignity, resulting in inner weakness, which favored the implementation of communist social conscience in the detainee's psyche. Thus, the torture of detainees was a means, not an end. Going through continuous torturing, the detainees resorted to denunciation to escape: they offered the names of the so-called 'collaborators' of the former political parties, especially those of the Iron Guard. Thus, those who were denounced were in their turn arrested by the *Securitate* and sent to Pitești, for re-education. Consequently, some of the detainees became 'executioners' (torturers)[7].

Numerous political detainees went through the sufferings put into practice in the *Pitești Phenomenon*. Some of them did not survive, but there were detainees who resisted torture and personality annihilation, keeping their faith and hope, according to the testimonies submitted after 1989. An eloquent reminder of the torture used in the *Pitești Phenomenon* was the case of a political party leader, head of the National Peasants' Party list in the 1946 elections, who was a magistrate, lawyer, politician and landowner. Complying with the legal norms regarding the provisions of the Romanian Government Emergency Ordinance no. 24/2008 and Law no. 187 / 07.12.1999 establishing the National Council for the Study of Security Archives, the case will be marked with the initials A.S. Between 1950 and 1952, this statesman (A.S.) was imprisoned in the labor camp at the Danube-Black Sea Canal, nicknamed 'the tomb of the Romanian bourgeoisie and landlordry.' During the same period, he was deprived of his liberty, by being imprisoned in various places of detention, as well as interned at the salt mines from Ocnele Mari, based on nominal decisions issued by the Romanian Ministry of Internal Affairs. The arrest and the deprivation of liberty was performed by bodies belonging to *Securitate* and the Romanian Ministry of Internal Affairs, which had the power to establish the places of detention for the political detainee, usually a 'journey' through the most feared prisons: Fort 13 from Jilava and Pitești Prison. Deprivation of liberty and investigations were applied and carried out without issuing any legal warrant. Another administrative measure undertaken in the last part of A.S.'s detention period was that of forced imprisonment in the Central Psychiatric Hospital no. 9, with the deprivation of liberty, to make sure that his personality changed accordingly, as a result of the 'treatments' he had undergone (brainwashing injections, various experiments). According to his criminal investigation files, A.S. was obliged to undergo these treatments after his being released, for many years. The members of his family had to follow a compulsory residence order: they were placed in a location having as neighbors or occupants of the same space persons who were *Securitate* informants, often recruited from among former detainees or family friends.

The policy of exterminating politicians and leaders or prominent members of political parties was carried out by directives and secret notes issued by state security. As a consequence, their assets were confiscated, then they were thrown in prisons, and their

[7] Ioanid, Ion (2013). *Închisoarea noastra cea de toate zilele, Volumul I 1949, 1952-1954* (Our Daily Prison, Volume I 1949, 1952-1954), Humanitas Publishing House, Bucharest, p. 9.

ostracized families were left without any means of existence. Moreover, the stages of the political detainees' trials had to be reported to *Securitate* bodies by the Military Tribunals or the law courts (the court hearings that were set and the sentences that were delivered).

The communist detention places were described by those who have survived in various articles and books published after 1989. Thus, in his book *Our Daily Prison*, Ion Ioanid mentions that: 'The cell was about two and a half meters by two. Along the wall on the left, there were two iron bunk beds. In the back of the cell there was a radiator. The beds consisted of a straw mattress, sheets, blanket, pillow filled with straw and a pillowcase. It was very hot in the cell and it smelled of diesel. The door was made of thick wood and had a peephole. My hands were tied with a string and a crowbar was passed under my knees, after which, with a sudden movement, I was lifted by the ends of the crowbar into the air. The ends of the crowbar were placed on two iron bars protruding from the wall and thus, hanging upside down, I was presenting my bottom in the most advantageous position and they covered it with a wet cloth. There came the first blow ... it was as if I was hit with a club. As far as I can remember, the pain of the blow was not as great as the fear. After a few blows, not many, I think about six or seven, I started screaming. Someone asked me if I had decided to tell the truth. I said yes and I was taken to the investigation room. The basement meetings repeated three times. I was beaten twice in the same way as the first time, except that the number of blows rose to about twenty. At the third sitting in the basement, while they were hitting me, my handcuffs untied and I hung up like a trapeze artist by the crowbar under my knees. Instinctively, with my free hands, I snatched my glasses from my eyes and I could see for a few moments the scene: partially plastered brick walls and in a corner, a pile of potatoes. Of the three individuals who were in the basement, one held in his hand the club with which he had hit me, and as for another one I recognized him as one of the guards in the prison cell corridor. Immediately, one of them rushed at me, swearing, and brutally tied a wet sackcloth, which was on the floor, over my face. He tightened it so strongly that it broke my lip, which began to bleed. Then the operation continued, being hung in the same position, with my head down, as there followed a series of blows to the soles, with a crowbar – about ten, I guess. I remember that apart from the pain on the spot where the crowbar hit me, as well as the stinging on the entire sole, as I was somehow thwacked by the boot which was too loose, I could feel the blows in the back of my neck and on the top of my head[8].'

Another example worth including in this article is the way in which Mihai Dionisie was tortured in 1949, when the *Securitate* had begun collectivization. Still a high school student at the time, he witnessed the operations that forced people to give up all their property: land, grain and animals. All the goods had to be taken to the newly-established collective farms, and whoever did not obey was threatened to end up in the *Securitate* van. At the time of his arrest, Mihai Dionisie was only 17 years and eight months old. He was considered an 'enemy of the people' and imprisoned in the *Securitate*'s basements for nine months, after which he was taken to Galaţi Penitentiary. On December 5, 1952, Bucharest Military Tribunal sentenced him to eight years in prison. Apart from that, he served two more years in prison for refusing to become a *Securitate* collaborator. For the first time he lived the horrors of communism

[8] https://www.historia.ro/sectiune/general/articol Mărturii din temniţele iadului comunist (*Confessions from the prisons of communist hell*), article by Corina Misăilă

in Galaţi Penitentiary, which was run by a diabolical man – Petrache Goiciu, who instituted an extremely rigorous detention and work regime (important leaders of the National Peasants' Party, Iuliu Maniu, Ion Mihalache and many others, experienced Goiciu's terrifying methods of punishment). 'We were each isolated in a cell, we could only communicate with each other through Morse code. When they detected our communication system, the 'taming' started and we were beaten until we began bleeding. You could not still be much of a man after such tortures', confessed Mihai Dionisie. 'One of the cruelest methods of beating was that performed on the soles of the prisoners' feet: the detainees were barefoot and beaten with wooden or metal sticks. In Galați, there were three main beating methods: *the carpet*, *the rotisserie* and *the boxing ring*. The detainees were enveloped in a carpet and then kicked everywhere – that was the carpet method. The prisoners were required to crouch on a metal bar, then their hands and feet were tied to the bar, and they were kicked while being spinned – this was the roaster. The third method of torture was the boxing ring – they put the prisoner in the middle and they kept asking him: 'Why did you do that, you bastard? You won't get out of here alive!' and they brutally hit him,' the former political prisoner recalled. After Galaţi Penitentiary there followed the 'death prison' – Gherla. Because he dared to communicate with another detainee, he was thrown into solitary confinement, where he spent 100 days. 'I was fed every three days and the only food was cabbage juice. I was sleeping on the floor, which was cold, damp and moldy. I was sick. I had become a living corpse,' said former political prisoner Mihai Dionisie.

Another political detainee, Ioan Hotico from Leud, Maramureş made the following confession: 'In March they took us to Jilava, they put us there, about 240 people, in a cave. There was water flowing on the walls and we slept on the concrete. But luckily they didn't keep us there long and they divided us up and took us to the Danube – Black Sea Canal, to Cape Midia. What a mess there was! And we worked for 12 long hours ... we were so hungry and even more! Many times you were given an order and you couldn't accomplish it. The guardian would report you and administer you 25 blows – he would undress you completely and cover you with a wet sheet and then he would start hitting you with a rubber stick like this ... all over your body.'[9]

Due to the beatings they received daily, many political detainees mentally cracked. The tortured had to count the blows that were applied to him. Each time, the executioner told the tortured person that he had miscalculated and started the beating all over again. The unfortunate man's back looked as if he had been skinned alive. His legs twitched uncontrollably, as if he was dying. When he fainted, a bucket of water was poured over him. Mentally crippled, the victim wanted to be physically mutilated. When the victim asked the aggressor to kill him as soon as possible, as not to prolong that terrible torment, the torturer replied conceitedly: 'I am not an assassin. I do important research for science's sake, and you, as you are only a scumbag bandit, you should be delighted that you have been chosen as teaching material. Only God gives and takes life. Because He has better things to do, I have taken over His duties. I speak every night with Jesus. If He tells me that you must live, you will live. If not, only then will I have to send you to heaven. I am the

[9] http://www.rador.ro/2014/12/21 Comunismul cu față inumană. Mărturii. Închisorile, lagărele de muncă (*Communism with an inhuman face. Confessions. Prisons, labour camps*).

hand that executes God's orders. I am the specialist engineer in the technique of suffering.'[10]

Stephane Courtois, who coordinated *The Black Book of Communism*, to which several European academics contributed, published in France in 1997, considers that Communism and Nazism are not very different as totalitarian systems. He claims that communist regimes killed 'about 100 million people as compared to the 25 million killed by Nazism.' Courtois claims that the methods of mass extermination followed Soviet methods.[11]

Conclusion

Knowing the penitentiary regime from the sad era of communism in Romania, the methods of extermination of political

In the 21st century, in modern Romania, which is a member of the European Union, the penitentiary system must not only respect the coordinates of civilization, which impose decent conditions of detention, in order to reintegrate prisoners into normal social life after serving sentences, but also respect fundamental human rights. This does not mean forgetting the past full of suffering and terror that existed in communist prisons, on the contrary, we should try to cherish the memory of all the political detainees who had to go through that atrocious experience. convicts is useful to resume legal proceedings for effective compensation of survivors or their descendants, for democratic society to prove, in a real and concrete way, the desire to correcting the injustices committed in the past towards the Romanian elite.

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ROMANIAN COURTS HOLDING JURISDICTION IN THE IMPLEMENTATION OF THE PROBATION MEASURES

Andrei-Dorin BĂNCILĂ*

Abstract

The new law of enforcement of sanctions and non-deprivation procedural measures, namely Law no. 253/2013 regulates "the jurisdictional nature of execution". This jurisdictional nature of the enforcement of sanctions and non-deprivation procedural measures reflects through the involvement of the courts in the resolution of a significant number of issues related to enforcement.
Courts, either by judges delegated with administrative or judicial-administrative competences, or by judges in full capacity and who performs purely judicial duties specific to the judicial function, are called upon to perform activities designed to ensure the enforcement of the precepts contained in the court order or to regularize the actual execution by solving the incidents that arise during the execution.

Keywords: *probation measures, the enforcement court, the judge delegated with the enforcement, the clerk delegated to the criminal enforcement department, the execution, the annulment and the revocation of the postponement of the punishment, the suspension of the execution of the punishment under supervision or the conditional release.*

Introductory remarks

The new law on the enforcement of sanctions and non-custodial procedural measures, namely Law no. 253/2013 on the execution of sentences, educational measures and other non-custodial measures ordered by the judicial bodies during the criminal proceedings, reminds of the "jurisdictional nature of the execution", giving it an entire chapter[1].

This jurisdictional nature of the enforcement of sanctions and non-custodial measures is reflected by involving the courts in many enforcement matters.

In the following, we will see that the courts, whether by judges delegated with administrative or judicial-administrative competences, or by judges constituted in full court, who perform exclusive judicial functions specific to the judicial function, are called upon to perform activities designed to ensure the enforcement of the precepts comprised in the judgments or regularize the actual execution by solving the incidents that arise during the execution.

In this first part, it is useful to specify that we will approach the courts only from the perspective of their competences in relation to the execution of the probation measures, leaving in the authors' charge, above all, the rules of criminal procedural law and those of judicial organization to deepen the organization and functioning of the courts and from other perspectives.

1. The enforcement court

Of the relevant legislative provisions we find that the first entity with competences in connection with the execution of educational measures is **the enforcement**

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[1] Chapter III of Title I from Law no. 253/2013.

court. This is defined by the provisions of art. 553 Code of Criminal Procedure and it is, with only one exception, the court that handled the case in first instance. The only court that can not be a court of enforcement is the High Court of Cassation and Justice, which, when judging in first instance, has legally delegated most of the specific jurisdiction to the Bucharest Court of Appeal or the military court law.

In connection with this legal delegation of functional competence, we feel the need to have some discussions. Art. 553 par. (3) final thesis of the Code of Criminal Procedure is rather imprecise, using the singular form when referring to the military court law, without indicating its full name (as it does with regard to the civil court), although, according to art. 56 para. (1) letter a) and par. (2), referring to Annex 2 of Law no. 304/2004 regarding the judiciary organization, the military courts in the country are four: the Military Courthouse of Bucharest, the Military Courthouse of Cluj, the Military Courthouse of Iasi and the Military Courthouse of Timisoara. In order to answer the question which of the four military courthouses are competent to enforce a criminal judgment on a case before the High Court of Cassation and Justice, some authors[2] propose to choose the solution according to the relevant provisions of art. 41, which regulate territorial jurisdiction for crimes committed on the territory of the country or on Romanian flag vessels or aircraft registered in Romania. In particular, given the order of preference which is deduced from the provisions of art. 41 par. (5), we believe that the military court of execution in the case of first instance judgments of the High Court, is the one in whose circumscription the criminal act was committed or the one in whose circumscription the first Romanian harbour is situated, where the ship is anchored and the offense committed or the first place of landing on the Romanian territory of the aircraft in which the offense was committed.

We believe that these provisions can be added to the art. 42 of the Code of Criminal Procedure, useful in the case of crimes committed outside the territory of the country.

Even if, as I have shown, we agree with the provisions of art. 41 Code of Criminal Procedure, to which we add those of art. 42 Criminal Code, *de lege ferenda* we believe that a legislative amendment would be required to align the military enforcement order in the first instance judgments of the High Court to the type of the civil enforcement order.

In support of this proposal we call the historical perspective in relation to the teleological one.

Thus, in the old Code of Criminal Procedure the Territorial Military Courthouse was designated as a military court to execute the first instance judgments of the High Court of Cassation and Justice, which was abolished by the provisions of art. 20 of Law no. 255/2013 for the implementation of the new Code of Criminal Procedure, but also the fact that, according to art. 21 par. (1) of the same law, the cases before the disbanded Territorial Military Courthouse of Bucharest were taken over by the Military Courthouse of Bucharest. Also, the teleological argument that subsisted in the designation of the Bucharest Courthouse as a civil court for the execution of the first instance judgments of the High Court, namely that of the spatial approximation of the two courts, is found, in a stronger word, also as regards the election of the Military Courthouse of Bucharest as a military court for execution of the first instance judgments of the High Court.

[2] L. Postelnicu and C. Meceanu, in the *Code of Crminal Procedure. Comments on teh articles*, coordinated by M. Udroiu, C.H. Beck Publishing House, Bucharestti 2015, p. 1453.

In conclusion, we consider that the Military Courthouse of Bucharest should be designated as the military court to execute the first instance judgments of the High Court of Cassation and Justice.

The enforcement body has two main types of functional competencies in relation to the execution of probation measures: *enforcement competences* and *enforcement competences to regulate (by solving some of the incidents during the actual execution).*

Some of their competences in relation to the execution of the probation measures are enforced by the court of enforcement and they are exercised by its judges who are constituted in court. These are, in general, *those competencies to regulate execution* by solving some of the incidents that occurred during the actual execution, which require a simplified trial.

This category of competences includes, in the first place, those related to the contestation of execution for the cases provided by art. 198 par. (1) letter (a), (b) and (d) of the Code of Criminal Procedure.

In the same category of competence it was included expressing the agreement to leave the country since the person whom was given a solution for deferment of penalty or a solution of suspended sentence under supervision sentence has the obligation not to leave the territory of Romania without the consent of the court.

Also, according to the provisions of art. 48 of the Law no. 253/2013, corroborated with those of art. 87, art. 95 and art. 103 of the Code of Criminal Procedure, in the course of enforcement, the enforcement authority is competent to amend the content of some of the obligations imposed on the supervised person, to impose new ones or to order the cessation of the execution of some of the previously ordered ones.

2. Judge delegated whit the enforcement

The competences for the enforcement of criminal judgments in general of those who institute probation measures are in particular exercised by the executing court through the judge whom it delegates to carry out a series of activities necessary to ensure compliance to the individuals at the court's discretion. Thus, according to art. 554 par. (1) Code of Criminal Procedure, the court of enforcement "delegates one or more of its judges to conduct the enforcement".

The activity of the judge delegated to execution is, as it results from the very "delegate" particle governed by the *rule of specialization*, according to which it is necessary for the duties in question to be exercised by trained and experienced judges in criminal matters. The rule of specialization is also deduced from the provisions of art. 29 par. (2) of the Rules of Internal Order of the Courts, approved by the Decision of the Plenum of the Superior Council of Magistracy no. 1375/2015, which gives the possibility of partial or total relief of the delegated judge to the execution of the trial.

The activity of the judge delegated to the execution is also governed by the *rule of continuity*, expressly provided by art. 29 par. (3) of the Law no. 253/2013, also enshrined in the provisions of art. 29 par. (4) of the Internal Rules of the Courts, which requires that the judge delegated to the execution remains, as a rule, the same throughout the period of execution. This rule of continuity, which is a transposition in the matter of the enforcement of criminal judgments of the principle of continuity that governs the entire court activity, acquires a special importance in the conditions of diversification of the competences of the judge delegated to execution, to whom we will refer in the following.

In the context of the new regulations that illustrate the configuration of the

institution of the judge delegated to the execution, its functional competence is made up of two categories of attributions: *administrative* (through which the functional competencies of the executing enforcement authority, which we have referred to above and which were entirely delegated to the judge in question, materializes) and *jurisdictional-administrative* (which gives the delegated judge a part of the competence of the enforcement instance regarding the regularization of the execution by solving some of the incidents during the actual execution).

The administrative tasks of the judge delegated with the execution are those through which he carries out the activity of enforcement of the criminal decisions.

The tasks in question are subsumed, according to art. 15 letter a) of Law no. 253/2013, as regards the probation measures, in order to ensure enforcement by communicating to the probation service and other community institutions involved in the execution of sentences and non-custodial measures, the children of the judgments they had the respective punishments or measures.

This task is reflected by an activity which is also known as the preparation *works of execution*, a phrase which is legally enforced by the provisions of the Rules of Internal Order of the Courts.

Of course, in carrying out this activity of mainly administrative and technical nature, the judge delegated to the execution is helped by the *clerk delegated with the execution*, a clerk whose special task is precisely to constitute real support for the judge delegated with the execution.

Besides, the importance but also the complexity of this administrative and technical activity to carry out criminal enforcement work is underlined by the need to delegate some of the judges and court clerks to deal exclusively or predominantly with this activity.

In the courts with a high workload, several judges and court clerks can be delegated with execution, and they carry out their work in the context of a functional court dismemberment called the *criminal enforcement department*.

The *execution works* (or under the equivalent designation of *enforcement*) include those activities that the delegated judge and the clerk delegated to the criminal enforcement department performs after the moment the judgment becomes enforceable in order to ensures the fulfilment of the provisions that are likely to be executed. It must be said that the meaning of the syntagma in question is quite broad, comprising not only the works which refer to the enforcement of the sanctions, the obligations, the express prohibitions contained in the provisions of the judgments, but also the works referring to the achievement of more distant effects of criminal proceedings, such as consequences (dismissal from the office, for example) or prohibitions not expressly contained in the provisions of the judgments and intervening as a result of provisions of the law (*opelegis*).

The execution work to be carried out in order to ensure that the provisions contained in the judgments are complied with, are: issuing various procedural documents (such as the mandate to execute the imprisonment or life imprisonment, such as the ban on leaving the country if we refer to custodial sentences); the drawing up of various addresses or other correspondence documents in connection with the enforcement activity; the communication of various procedural documents or extracts from them to the authorities with responsibility for the enforcement of judgments; transmission of data and extracts from judicial documents; the return, consisting of sending an address to an authority to which, previously, was sent or

submitted procedural documents extracted from them or data relating to the enforcement of judgments; the request for information, which is an execution work complementary to the return; verification, which is a work of execution similar to the request for information and which is expressly provided by art. 154 par. (4) of the Rules of Internal Order of the courts regarding the situation of the collection of fines sent for execution; the referral, which is an enforcement work whereby unjustified delays in the execution of criminal judgments (as in the case of referrals under Article 154 (5) of the Rules of Court Internal Courts) or it is intended to clarify certain aspects of enforcement (as in the case of the referrals referred to in Article 554 (2) of the Penal Code and Article 29 (1) (f) of the Rules of Procedure of the courts).

In connection with the latter enforcement work, consisting in informing the executing court to clarify the unclear aspects of execution or to remove the obstacles to execution, a serious problem was raised in the doctrine regarding the incompatibilities that may arise when the judge who seizes is also entrusted with the resolution of the referral.

In view of the many aspects that may lead the delegated judge in charge of enforcement to bring the matter to court for clarification or to remove obstacles to enforcement, the answer to the question raised can only be that the degree of involvement of the delegated judge must be analysed in the expression of a point of view on the matter raised by the court of enforcement[3].

The judiciary-administrative competences of the delegated judge with the execution are a new category of tasks introduced with the latest reform of criminal and criminal law enforcement in our country, which took place in 2014 with the entry into force of the new criminal codes and enforcement laws.

This category of tasks of the delegated judge with the execution is also an expression of the judicial nature of the execution of sanctions and non-custodial measures, expressly enshrined in Law no. 253/2013 and to which I referred to the beginning of this work.

The development of the functional competences of the delegated judge with the execution by winning this new category of judicial-administrative attributions is natural in the context in which the alternative ways of executing sentences and measures depriving of liberty have been significantly diversified in the context of the new criminal law.

This diversification meant the rethinking of the criminal execution paradigm, by strengthening the role of the probation counselor in supervising the execution, by involving the community institutions in execution, but also by widening the competences of the delegated judge with the execution, which, according to the provisions of art. 14 par. (3) of the Law no. 253/2013, guides and controls the oversight process carried out by the probation service or the other authorities responsible for the execution of sanctions and non-custodial sentences.

In order to carry out its new guidance and control functions, the following administrative-judicial tasks were associated with the delegated judge with the execution:

The task to solve the incidents arising during the execution and which are not within the jurisdiction of the enforcement instance by the judges constituted in common law. In this subcategory there are tasks such as:

- the payment of the penalty in

[3] D. Lupascu, *Theoretical aspects and judicial practice on enforcement of principal sentences*, University of Bucharest - Faculty of Law, doctoral dissertation, unpublished, p. 98.

monthly instalments, attributed by art. 22 par. (1) and (2), with respect to the convicted natural person, and by art. 25 par. (2) and (3) of Law no. 253/2013, on the convicted legal person;
- granting permissions during the execution of the complementary punishment of prohibition of certain rights, attributed by art. 31 of the Law no. 253/2013;
- the designation of an institution in the community in which the unpaid work is performed if its execution is no longer possible in any of the two institutions in the community specified in the decision of the court of first instance, art. 51 par. (2), in case of delay of punishment, and art. 57 par. (2) of the Law no. 253/2013, in the case of suspended custodial supervision.

The task to solve complaints against the probation counselor's decisions, generally governed by art. 15 lit. f) and art. 17 par. (4) of the Law no. 253/2013. We will list below some situations, for executing the measures of probation, the probation officer shall take decisions which may form the subject of complaints competence appointed judge:

- the decision by which, according to art. 50 par. (1) of the Law no. 253/2013, the probation adviser establishes the course to be followed and the institution in the community in which the course is to be carried out, in case the supervised person is obliged to attend a school or vocational training course;
- the decision by which, according to art. 51 par. (1) of the Law no. 253/2013, the probation counselor establishes in which of the two institutions in the community specified in the judgment the community service work and the specific type of activity are to be performed, assuming the supervised person is obliged to perform unpaid work for the benefit of the community;
- the decision by which, according to art. 53 par. (1) of the Law no. 253/2013, the probation adviser establishes the program or programs to be followed and, where appropriate, the institution or institutions in the community in which they are to take place, if the supervised person is required to attend one or more social reintegration programs, conducted by the probation service or organized in collaboration with community institutions;
- the decision by which, according to art. 54 par. (1) of the Law no. 253/2013, the probation counselor establishes the institution in which the control, treatment or medical care is to be carried out, in case the supervised person is obliged to undergo control measures, treatment or medical care and where the institution has not been established by the court decision.

The task of judicial fines is provided, with a general norm value, through the provisions of art. 15 lit. g) of Law no. 253/2013.

In particular, in the matter of the execution of probation measures, the delegated judge with enforcement may apply fines in cases such as those provided by art. 19 par. (1) of the Law no. 253/2013, where community institutions contributing to the execution of sentences and non-custodial measures do not fulfill or inadequately perform the duties assigned to them and to which the judge entrusted with

the execution may apply a judicial fine in an amount between 500 lei and 5,000 lei.

The task to empower community institutions with competencies in the execution of probation measures is another manifestation of the judicial nature of enforcement. The task is stipulated in art. 20 and art. 21 of Law no. 253/2013.

3. Court hearing at first instance to postpone punishment or suspension of custody

Besides the executing court, exercising its tasks regarding the execution of probation measures, as we have seen, either by the court hearing the execution or by judges constituted in panels court of common law, the law maker granted functional competences to *the court that pronounced at first instance the postponement of the punishment or the suspension of the execution of the punishment under supervision*. This category of courts is, as we will argue below, insufficiently complete and precisely outlined.

Through the provisions of art. 582 par. (2) and art. 583 par. (2) Code of Criminal Procedure, the court that issued in the first instance the postponement of the punishment or the suspension of the execution of the punishment under supervision, the competence to order the revocation of the postponement of the punishment and the revocation of the suspension of execution of the punishment under supervision in case of non-fulfilment of civil obligations in the court decision is explicitly granted.

Of course, in most cases, the court that ruled in first instance the postponement of the punishment or the suspension of execution of the sentence under supervision is the very first instance court and thus also the court of execution.

However, there are also situations in which there is no identity between *the court of enforcement* and *the court that pronounced in first instance the postponement of the punishment or suspension of the execution of the sentence under supervision*, the simplest example being given by the hypothesis of the enforcement of the rulings issued by the High Court of Cassation and Justice in the first instance.

However, the previous example is not the only one, because, depending on the solutions contained in the criminal judgments and depending on whether or not the appeals are to be filed, either the first instance judgment will be delivered or the decision of the first instance as amended by the appeal judgment or the judgment given in the appeal.

For a better understanding, we believe we can evoke perfectly possible examples in practice, as follows:

- the hypothesis of postponing the punishment or conviction with suspension of execution of the punishment under supervision in the appeal after acquittal or cessation of the criminal proceedings in first instance;
- the hypothesis in which the decision of the first instance was abolished, through which a solution other than the acquittal or cessation of the criminal trial was adopted, but no solution to defer punishment or conviction with suspension of the execution of the punishment under supervision has been adopted, and the control court re-judged and pronounced for the first time a solution for postponement of punishment or conviction with suspension of the execution of the punishment under supervision.

Assuming that we reasonably argued the existence of the situations in which the enforcement instance is not identical with the court that pronounced in first instance the postponement of the punishment or suspension of execution of the punishment under supervision, we return to the analysis of the provisions of art. 582 par. (2) and art. 583 par. (2) Code of Criminal Procedure.

The legal texts invoked are, in our opinion, *incomplete* and *inaccurate*.

We say that they are *incomplete* because they should have covered the assumptions of revocation in cases of non-execution of the probation measures, more precisely of any measures and obligations of supervision out of those stipulated in art. 85 par. (1) to (4) and art. 93 par. (1) - (4) Criminal Code.

Such an addition is necessary in the context in which the functional court competent to order revocation in such cases is not sufficiently precise determined by the provisions of art. 86 par. (4) letter b), corroborated with those of art. 88 par. (1) Criminal Code, and the provisions of art. 94 par. (5) letter b), corroborated with those of art. 96 paragraph (1) Criminal Code, but neither those of art. 56 para. (1) or art. 57 par. (2) of the Law no. 253/2013. After reading the legal texts mentioned above, which refer only to "court", without specifying whether the court or other court (for example, the court that ordered in first instance the postponement of the sentence or the suspension of custody) remains the question *which is the functional court competent to order the revocation of the postponement of the sentence or the suspension of the execution of the punishment under supervision in case of non-execution or inadequate execution of the probation measures.*

We say that the provisions of art. 582 par. (2) and art. 583 par. (2) Code of Criminal Procedure are *inaccurate* because they use imprecise attributes to actually identify the competent court to order the revocation of the postponement of the sentence or the suspension of the execution of the sentence under oversight in case of non-fulfillment of civil obligations, namely the *first instance adjudication* of the postponement of the sentence or suspension of the sentence under supervision. The literal interpretation of this attribute, which should be the first interpretation to be used but sufficient to attempt to discover the true intention of the law maker, will lead to the conclusion that there are also situations that remain uncovered, namely those in which the delay of the sentence or the suspension of the sentence under supervision are pronounced for the first time in the appeal procedures. In such a case, perfectly possible in practice, there will not be a *court to first adjudicate* the postponement of the sentence or the suspension of the execution of the sentence under supervision, but only a *court that finally pronounced* the solutions in question. Therefore, a further question arises as *which is the court competent to order the revocation of the postponement of the sentence or the suspension of the execution of the punishment under supervision in case of non-observance of the civil obligations, but also in case of non-compliance - the inadequate execution or execution of the probation measures, when the solutions in question were given in the first phase of the call.*

We can give an answer to the first of the two questions (namely, which is the functional competent court to order the revocation of the postponement of the punishment or the suspension of the execution of the penalty under supervision in case of non-execution or inadequate execution of the probation measures) in the sense that the functional competent court is the *enforcement court*, once reading the provisions of art. 15 letter e) of Law no.

253/2013, which gives the judge delegated with execution the duty to notify the *enforcement court* in the cases provided by the law, inter alia, for the "revocation of non-custodial sentences or measures".

For drafting answer to the second question (which court is competent to order the revocation of the postponement of the sentence or the suspension of the execution of the sentence under supervision in the case of non-compliance with civil obligations, and in the event of non-execution or inappropriate enforcement of the probation measures, were the solutions had been given for the first time in the appeal) also an example of jurisprudence[4] leads us, from which it follows that although the suspension of the execution of the sentence under supervision was condemned by the final court[5], competent to revoke the suspension for non-execution of the probation measures was declared the first instance[6], which is also a court of enforcement.

In support of the same answer, we can also rely on another case-law[7] example, from which it results that although the suspension of execution of the punishment under supervision was first issued in the appeal, the competence to solve the request to revoke the suspension for non-payment of civil damages belongs to the first instance court execution.

Since the criminal procedural provisions here analyzed underpin the same criticisms and under the Code of Criminal Procedure of 1968, whose pertinent provisions regarding the revocation of the conditional suspension of the execution of the sentence or the suspension of the execution of the sentence under supervision[8] were similar, we believe it is useful to show that the jurisprudence developed in the light of those provisions has held that "the examination of the request to revoke the conditional suspension of the execution of the punishment (for non-payment of civil damages, nn) belongs to the court which judged in the first instance the case with the offense for which the sentence was the suspension of conditional execution, even if that suspension was ordered as a result of the appeal being upheld by the higher court"[9].

Although it seems that the jurisprudence has somewhat surpassed the legislative inaccuracy and the lack of coverage of all the assumptions that can be encountered in practice, based on the fact that the revocation is a matter of regularization of the execution, we believe that we could formulate *a lege ferenda* proposal that the law maker explicitly stipulates (as we will see below that it did in

[4] By criminal sentence no. 11/2016 of the Court of Appeal of Târgu Mureş, the court, as executing court, declared competent to solve the petition regarding the revocation of the suspension of execution of the punishment under supervision, although this solution was given for the first time by the High Court of Cassation and Justice in appeal; the judgment is accessible in the electronic data base *Lege5*.

[5] As it is clear from criminal decision no. 4119/2011 of the High Court of Cassation and Justice - the Criminal Division, whereby the appeal as the last ordinary attack path according to the Code of Criminal Procedure 1986 reduced the penalty and changed the way of individualisation execution, effective enforcement, suspension under the supervision of the execution of the punishment; the court decision is accessible in the electronic database of the portal www.scj.ro.

[6] From criminal sentence no. 18/2010 of the Târgu Mureş Court of Appeal it results that this court has ruled on the merits of the case in the first instance; the judgment is not public.

[7] Criminal Sentence no. 27/2015 of the Bacău Court of Appeal, accessible in the electronic database of the portal *www.rolii.ro*, final by the criminal decision no. 705/2015 of the High Court of Cassation and Justice - Criminal Section, accessible in the electronic data base *Leg5*.

[8] See the provisions of art. 447 par. (2) of the Code of Criminal Procedure of 1968.

[9] Criminal Sentence no. 39/2005 of the Cluj Court of Appeal, cited by L. Lefterache in the *Annotated Criminal Code*, C.H. Beck Publishing House, Bucharest 2007, p. 292

the case of conditional release) that the enforcement authority has the functional competence to order the revocation of the postponement of the punishment or the suspension of the execution of the sentence under supervision, both in the case of non-civil obligations and in the case of non-execution or inadequate execution of probation measures, i.e the supervision measures and the obligations and prohibitions accompanying the two alternative ways of judicially identifying criminal sanctions.

Such legislative clarification would be particularly welcome, especially when the High Court of Cassation and Justice ruled on the substance of the case in first instance, where, *de lege lata*, the supreme court has the functional competence to rule on the revocation of the postponement of the punishment and the revocation of suspension of the execution of the punishment under supervision at least for the case of non-fulfillment of civil obligations, i.e a matter of regularization of the execution, in the context in which the principle established by the provisions of art. 553 par. (2) Code of Criminal Procedure is in the sense of relieving this instance the taks of the enforcement court.

4. The court that ordered conditional release

With regard to the execution of the probation measures ordered in the case of conditional release with a remaining period to be executed for 2 years or more, the law gives tasks of regularizing the execution of the competent court to order the conditional release. We would like to point out that, as regards the enforcement competences of judgments ordering conditional release, the competent court to order conditional release also acts as an executing court.

According to art. 587 par. (1) the competent court to order conditional release is always "the court in whose jurisdiction the place of detention is located"[10].

According to the provisions of art. 588 par. (3) Code of Criminal Procedure "the court mentioned in art. 587 par. (1) also rules on the revocation of conditional release" in two cases:

- when, during the surveillance, the conditional released does not exactly execute the probation measures and
- when, after the release, the released one commits a new offense discovered in the term of supervision and for which a sentence was pronounced for imprisonment even after the expiration of that term, and the competent court to order the revocation of the release (that is the court that judges, or judged in first instance the offense of revoking, as it results from the provisions of article 588 (2), the last sentence of the Code of Criminal Procedure) did not rule on the revocation.

The latter functional competence granted to the conditional release court to order the revocation of conditional release for the commission of a new offense in the period of custody of conditional release, when the court which judges the new offense did not itself order the revocation, it reflects another difference of regime between the revocation of conditional release and the

[10] With regard to this way of conferring jurisdiction on the issue of conditional release exclusively for the first category of courts in the judicial system, namely the courts in whose territorial jurisdiction the places of detention are located, we only have the duty to state that, within the Constitutional Court of Romania there are four complaints submitted that criticize the law maker's option, as it results from the analysis of the electronic portal of the constitutional court www.ccr.ro.

revocation of the postponement of the execution of the punishment or the suspension of the execution of the sentence under supervision, on the other hand, in these latter hypotheses, the court ordering the adjournment or the suspension without having revocation competences for committing new offenses within the surveillance terms.

As it can easily be seen in art. 588 par. (3) Code of Criminal Perocedure, the law maker uses the normative reference technique to designate the competent court to rule on the revocation of conditional release in the assumptions of the previous paragraph, which may rise difficulties in interpretation and application, since the text referred to reflects that "the court where the place of detention is", but at the time when the question of the revocation of conditional release is made, the convict may be either in a state of liberty or imprisoned at another place of detention, which may give rise to a question about which place of detention is concerned.

We believe that, as other author[11] has stated, the law maker wished to give, by questioning, the competence to rule on the revocation of conditional release in the hypotheses in question to the same court that ordered conditional release, but we believe, in order to remove any discussion, *de lege ferenda*, this intention should be expressed explicitly and directly.

From the analysis of the relevant legal provisions, we will find that the court that ordered conditional release does not have the functional jurisdiction to order the suspension of conditional release.

5. The court that judges or judged in first instance the offense that could lead to the revocation or annulment of the postponement of the punishment, the suspension of the execution of the sentence under supervision or the conditional release

Another court to which the law confers *competence to regulate the execution* of probation measures is, according to the provisions of art. 582 par. (1), art. 583 par. (1) and art. 588 par. (1) and (2) Code of Criminal Procedure, the court "that judges or judged in the first instance the offense that could lead to the revocation or annulment".

From reading these texts, undoubtedly it results that the law maker understood mainly to confer the functional competence to order the annulment or revocation of the three alternative means of enforcement to the court that "judges or judegd in first instance the offense that might entail the revocation or cancellation". This choice is a logical one, capable of promptly regulating the execution of the probation measures accompanying the postponement of the punishment, suspension of the execution of the punishment under supervision and conditional release.

But, as I have already pointed out, the law maker has shown inconsistency, choosing to regulate, without proper justification, a partially different regime from the point of view of the competent jurisdiction to order the annulment or revocation on condition of conditional release, on the one hand the hypothesis of the postponement of the punishment and suspension of the punishment under supervision, on the other. This different regime makes the provisions of art. 588 par. (2) Code of Criminal Procedure be inaccurate, as we will argue below.

The difference in question is that while in the case of postponement of the punishment and the suspension of the execution of the punishment under supervision, the competence to order the

[11] E. Dumbravă, *Conditional release in new codes*, Universul Juridic Publishing House, Bucharest 2016, p. 135.

annulment and revocation (when committing a new offense) belongs exclusively to the court that judges or judged in the first instance the offense and that could be the subject of the revocation or annulment, in the case of conditional release, the jurisdiction in question remains exclusive only to the court which judges or judged in first instance the offense which leads to the *annulment*, because, in the case of an offense involving the *revocation* of conditional release, the revocation is no longer the sole responsibility of the court which in first instance judges the offense in question, but it is also granted to the conditional release court, which, according to the provisions of art. 588 par. (3) the last sentence of the Code of Criminal Procedure, it becomes competent to order revocation when the court which in first instance ruled the offense of revocation has not ruled on that.

The difference of the regime in question makes, as I stated above, that the provisions of art. 588 par. (2) Code of Criminal Procedure be inaccurate. The inaccuracy consists in using (by the method of referring to the previous paragraph of the law) at a past time of the verb *to judge*, when identifying the court competent to order the revocation of conditional release. In other words, if the conditional release body has the functional competence to order the revocation of a new offense when the court that in first instance judged this new offense did not rule on the revocation, it means that it is inaccurate to say that the court that judges or *judged* in first instance the offense of revoking conditional release is competent to order revocation.

More specifically, the court in charge of prosecuting the offense of revoking conditional release may order revocation only if it makes a decision on the offense of revocation and if it has not done so in that context to become competent to order even the revocation of the conditional release.

So, we believe that, *de lege ferenda*, if the law maker keeps the option of devoting alternative competences, the provisions of art. 588 par. (1), (2) and (3) Code of Criminal Procedure should be correlated with each other in order to give a precise meaning to the provisions governing the functional competence to order the revocation of conditional release in the case of a new offense, so that what follows implicitly from the corroborated interpretation of the said texts results explicitly, namely that the court in charge of the prosecution of the offense that leads to the revocation of conditional release may order revocation only if it makes a ruling on the offense of revocation, otherwise the jurisdiction in question will lie with the court of conditional release.

Considering that, in the matter of conditional release, the court which ordered the release is competent not only to revoke the release in case of non-execution of the probation measures, but also to revoke a new offense if the court that judged the case in first instance the offense that would lead to the revocation did not rule on the revocation of conditional release, *de lege ferenda* it would also be useful to regulate such a functional competence of the enforcement instance if the court that in first instance judged the offense that might attract the revocation of the postponement of the punishment or the suspension of the execution of the punishment under supervision did not give rise to the revocation.

This would bring about a regime unification in terms of functional competence in the matter of revoking (and in case of a new offense) the postponement of the punishment and the suspension of the execution of the punishment under supervision on the one hand and the

revocation of conditional release, on the other hand.

6. Conclusions

In the matter of the enforcement of probation measures, but not only of them, there are several categories of courts that have different competences, such as: the enforcement court (either through the judges who are in full force, exercising exclusive jurisdictional tasks, or through the judge delegated with execution, which mainly exercises administrative powers), the court that gave in first instance the postponement of the punishment or the suspension of execution of the punishment under supervision, the court of conditional release and the court that judges or judged in first instance the offense that could lead to the revocation or cancellation of the postponement of punishment, suspended custody or conditional release.

Also after the analysis, including the reference to the case law, we have drafted some proposals of the law *de lege ferenda* that are meant to emphasize the need for the Romanian law maker to be more consistent when it regulates the competences of the courts in the enforcement of the probation measures.

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ENFORCEMENT OF THE RIGHT OF DEFENSE IN THE CRIMINAL TRIAL

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Abstract

One of the fundamental principles of the criminal trial is the principle of enforcing the right of defense, being not only an expression of the rule of law, but also a necessary condition for the efficient course of justice. The right of defense is a complex right, comprising all the possibilities provided by the legislator to the parties and subjects in the criminal proceedings, in order to defend their interests, and is expressed under three general aspects: the possibility of the parties to defend themselves in person during the criminal trial; the obligation of the judicial bodies to consider ex-officio aspects also favorable to the parties involved in the criminal trial; the possibility and sometimes the obligation to provide legal assistance during the criminal trial. The right of defense is a fundamental right, guaranteed by the Constitution, by the Criminal Procedure Code and by the international treaties. Any violation of the right of defense implies various penalties, including the most important sanction provided by the Criminal Procedure Code, respectively the absolute nullity of the acts taken in violation of this right, including the nullity of the decision pronounced under these conditions and retrial of the case.

Keywords: *the right of defense, defense in person, defense through attorney, penalties applied if the right of defense is not respected.*

1. Introduction

Enforcement of the right of defense represents a fundamental principle of the criminal trial and, at the same time, an essential component of the right to a fair trial and a balance is maintained between the individual interests of the people participating to the criminal trial and the general interest of the society to hold criminally liable all the persons who perpetrated a criminal offence if this right is respected.

Taking into consideration the importance of this right in the course of justice, through this study we intend to present the modalities through which this right is established both by the Romanian legislator and by the main international regulations, to underline the fact that it is a complex right, integrating all the possibilities granted by the legislator to the parties and main subjects in the proceedings in order to defend their interests. Thus, the national legislator underlined the importance of the right of defense, both by stipulating this right among the fundamental rights established by the Romanian Constitution and by a detailed presentation of this right in the Criminal Procedure Code. A special importance was equally assigned to the principle of enforcing the right of defense at the European level, eloquently stipulating the actual dimensions of this right, considering the fact that this principle represents an essential condition for the effective course of justice.

At the same time, in this study we will present the means through which this right can be exercised, as well as the guarantees

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provided by the legislator for the respect of this right and the penalties applied if this right is violated.

Taking into consideration the fact that the course of justice in a state of law can only take place by respecting the legitimate rights and interests of a person, through this study we intend to illustrate that the right of defense is not an additional institution, but it represents an essential and necessary right for any act of justice. Far from being exhaustive, this study can represent a supporting element for certain legal or practical clarifications related to enforcing the right of defense.

2. The right of defense- definition and regulation

The criminal trial represents "the activity regulated by the law, performed by the competent bodies, with the participation of the parties and of other persons, in order to promptly and completely establish the acts which represent offences, thus any person perpetrating an offence could be punished according to their guilt and no innocent person could be held criminally liable."[1]

Based on this definition, it results that a person who perpetrated an offense is held criminally liable by the judicial bodies only after a criminal trial.

This criminal trial is governed by certain general rules, by certain fundamental principles, which reflect the overall conception of the entire regulation.

One of the fundamental principles of the criminal trial is the principle of enforcing the right of defense, being not only an expression of the rule of law, but also a necessary condition for the efficient course of justice. The right of defense in the criminal trial represents an essential component of the right to a fair trial and a balance is maintained between the individual interests of the people participating to the criminal trial and the general interest of the society to hold criminally liable all the persons who perpetrated a criminal offence if this right is respected. The right to defense can be defined as "all the fair trial guarantees granted by the law to the parties or to the main subjects in the proceedings within a criminal procedure or criminal trial, in order to efficiently defend their legitimate rights and interests"[2].

Taking into consideration the importance of this right in the course of justice, it was established through several international law regulations. Thus, the Universal Declaration of Human Rights[3] defines the main rights of the human being, which also include several procedural rights: the right to a fair trial, the right to defense, the right to be a subject of law, the right to an effective remedy. Despite the fact that the Declaration is not an international treaty, implying legal consequences if its provisions are violated, it became a reference document for the States and its provisions were subsequently included in various international treaties. Article 11 point 1 of this document mentions that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial **at which he has had all the guarantees necessary for his defense**." This underlines the particular importance of the right of defense in a fair trial.

[1] Ion Neagu, *Tratat de procedură penală, Partea generală, Ediţia a-II-a*, Universul Juridic Publishing House, Bucharest 2010, p.19-20.
[2] Mihail Udroiu, *Procedură penală, Partea Generală, Ediţia 5*, C.H.Beck Publishing House, Bucharest 2018, p. 42.
[3] Passed on 16 December 1948, by the third session of the General UN Assembly.

Another extremely important international document, expressly establishing the right of defense of any person, is the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights[4], which, in Article 6 point 3, specifies the fact that "everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) to have adequate time and facilities for the preparation of his defense;
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

We notice the fact that this Convention establishes a detailed regulation of the right of defense, capable to highlight its considerable importance within a fair trial, specific to any democratic society. The text of law mentioned establishes both the right of an accused person charged with a criminal offence to defend himself in person during the proceedings against him (defense which implies several guarantees: information in a language which he understands, possibility to examine or have examined witnesses on his behalf under the same conditions as witnesses against him), as well as his right to be defended through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free, under certain conditions, however, without being an exhaustive enumeration of the guarantees which have to be provided to a person charged with a criminal offence during the criminal proceedings, since the texts mentions the fact that **"everyone charged with a criminal offence has the following minimum rights"**, and then the rights are enumerated. All these rights cannot be separately treated, but they represent all together an essential component of the right to a fair trial.

At the same time, the Charter of the Fundamental Rights of the European Union[5] reinstates the important of the right of defense, the document expressly establishing, in Article 48 paragraph 2, the importance of guaranteeing this right, stating that "respect for the rights of the defense of anyone who has been charged shall be guaranteed." Article 47, paragraphs 2 and 3 also establish this right, the Charter specifying that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

As previously mentioned, a special importance was given to the principle of guaranteeing the right of defense at the European level, eloquently shaping the actual dimensions of this right, considering

[4] This act represents a catalogue of fundamental rights, elaborated by the Council of Europe, signed on 4 November in Rome and enforced on 3 September 1953. The convention was ratified by almost all the Member States of the Council of Europe and Romania ratified this act through Law 30 in 1994.
[5] The Charter of the Fundamental Rights of the European Union was proclaimed by the European Commission, the European Parliament and the Council of the European Union, on 7 December 2002, within the European Council in Nice, being enforced on 01 December 2009, along with the Treaty of Lisbon.

the fact that this principle represents an essential condition for the effective course of justice.

The importance of this right is equally underlined at the national level by the Romanian legislation and the Constitution of Romania has a special place reserved for the right of defense. Thus, Article 24 of the above mentioned regulation specifies the fact that the right of defense is guaranteed and the parties are entitled to be assisted by an attorney, of their own choosing or appointed by the court.[6]

The Criminal Procedure Code specifies, at its turn, the enforcement of the right of defense among the basic rules of the criminal trial." Thus, article 10, called "right of defense", specifies that:

1. The parties and the main subjects in the proceedings have the right to defend themselves in person or to be assisted by an attorney.
2. The parties, main subjects in the proceedings and the attorney have the right to be given the time and facilities necessary for the preparation of the defense.
3. The suspect has the right to be informed promptly, and before being heard, of the offense the criminal investigation is looking into and the legal classification of the offense. The accused person has the right to be informed promptly of the offense brought against them by the prosecution, and the legal classification of the offense.
4. Before being heard, the suspect and accused person must be informed that they have the right to make no statements whatsoever.
5. The judicial bodies are under an obligation to ensure full and effective exercise by the parties and main subjects in the proceedings of their right to defense throughout the criminal trial.
6. The right of defense shall be exercised in good faith, according to the goal for which the law recognizes it.

The specification of these rights is not exhaustive and there are other dispositions in the Criminal Procedure Code aimed to guarantee an effective defense during the criminal trial (the right to examine the case file, the right to bring evidence, the right to be informed about his rights, the right to make requests, to claim exceptions). We can notice that the rights specified by article 10 from the Criminal Procedure Code actually represent a transposition in the national law of the dispositions under Article 6 from the European Convention on Human Rights, with the mention that part of the rights specified by Article 6 were also extended to other parties and main subjects in the proceedings, apart from the person charged with a criminal offence.

3. Content of the right of defense

As regards to the content of the right of defense, as established by the Criminal Procedure Code, as well as by the European Convention on Human Rights, we notice that it is not only reduced to the legal assistance from an attorney, as "The right of defense does not have to be confused with the existence of the attorney"[7]. The right of

[6] Such a regulation is also mentioned by Law no. 304/2004, on the judicial organization, whose article 15 specifies that "the right of defense is guaranteed. Throughout the entire criminal trial, the parties have the right to be represented, or, as applicable, assisted by an attorney, of their own choosing or appointed by the court, pursuant to the law."

[7] V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *Explicaţii teoretice ale Codului de procedură penală român, Partea generală, vol. I, ediţia a-2-a*, Academiei Publishing House,All Beck Publishing House, Bucharest, 2003, p. 49

defense is a complex right, comprising all the possibilities provided by the legislator to the parties and subjects in the criminal proceedings, in order to defend their interests. Thus, the doctrine specifies the fact that the right of defense is expressed under three general aspects: "the possibility of the parties to defend themselves in person during the criminal trial; the obligation of the judicial bodies to consider ex-officio aspects also favorable to the parties involved in the criminal trial; the possibility and sometimes the obligation to provide legal assistance during the criminal trial."[8]

3.1. Defense in person

Both Article 6 paragraph 3 from the European Convention on Human Rights and article 10 from the Criminal Procedure Code establish the right of everyone charged with a criminal offence to defend himself in person and the article from the Romanian Criminal Procedure Code also extends this right to the other parties and to the victim. However, the text from the Convention does not mention the conditions of exercising this right, leaving the contracting states the choice of the means allowing its effective performance and the Court has to examine if these means comply with the requirements of a fair trial.[9] Furthermore, the case-law of the European Court of Human Rights[10] indicated that it is necessary to guarantee "not only rights that are theoretical or illusory, but rights that are practical and effective (…) this is particularly so of the right of the defense in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive". Thus, the possibility of the parties and main subjects in the proceedings, to defend themselves in person in the criminal trial, is guaranteed by the national legislation, by establishing certain wide fair trial rights and guarantees in the Criminal Procedure Code.

In order to guarantee a concrete and effective defense, several specific rights are recognized for the suspect and for the accused person. Thus, articles 78 and 83 from the Criminal Procedure Code specify the main rights of the suspect, respectively of the accused person, among which:

a) **the right not to make any statements whatsoever** during criminal proceedings, and their attention shall be drawn to the fact that their refusal to make any statements shall not cause them to suffer any unfavorable consequences, and that any statement they do make may be used as evidence against them.

The right is also mentioned by article 10 paragraph 4 Criminal Procedure Code, which specifies the fact that, before being heard, the suspect and accused person must be informed that they have the right to make no statements whatsoever, as well as by article 99 paragraph 2 Criminal Procedure Code, which specifies that the suspect or accused person has the right not to contribute to their own incrimination and by article 118 Criminal Procedure Code, according to which the witness statement given by a person who had the capacity of suspect or accused person before such testimony or subsequently acquired the capacity of suspect or accused person in the same case, may not be used against them.

Thus, these legal dispositions establish the right to remain silent and the right not to contribute to their own incrimination, right

[8] Ion Neagu, op. cit.p. 102-103
[9] Corneliu Bîrsan, Convenţia europeană a drepturilor omului. Comentariu pe articole, Ediţia 2, C.H.Beck Publishing House, Bucharest 2010, p.551.
[10] See ECHR, judgment from 13 May 1980, case of Artico v. Italy, paragraph 33.

in relation to which the European Court of Human Rights constantly ruled that "even if Article 6 from the European Convention does not expressly mention the right of an accused person to remain silent about the offences held against him and not to contribute to his own incrimination, there represent generally recognized regulations, center of the notion of fair trial, established by Article 6 (...)."[11]

b) **right to be informed,** promptly and before being heard, about the offense the criminal investigation is looking into and the legal classification of the offense.

This right is also provided by article 10 paragraph 3 Criminal Procedure Code, according to which the suspect and the accused person have the right to be informed promptly and before being heard of the offense the criminal investigation is looking into and the charge for that offense, as well as by article 307 and article 309 paragraph 2 Criminal Procedure Code.

The above mentioned dispositions from the national law actually represent a transposition of the Directive 2012/13/EU, on the right to information in criminal proceedings[12], Directive which mentions, in its preamble in points 27 and 28 that "(27) Persons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defense and to safeguard the fairness of the proceedings. (28) The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defense."[13]

At the same time, this right is also established by paragraph 3, letter a from the European Convention on Human Rights, according to which the accused person has the right to be informed about the reason of his arrest and of any charge against him. In its case-law, the Court ruled that, in the criminal matter, "a precise and complete information about the offense the criminal investigation is looking into and the charge for that offense has to be interpreted in the light of the general right to a fair trial, guaranteed by article 6 paragraph 1 from the Convention."[14]

c) the right to consult the case file

This represents an essential component for the exercise of the right of defense in the criminal trial, as the suspect or the accused person could not build a precise and effective defense unless they have the right to study the case.

Thus, the case-file of the European Court[15] established that access to the case file and use of notes, including, if necessary,

[11] N. Volonciu (coordinator), A. Simona Uzlău, R. Moroşanu, V. Văduva, D. Atasiei, C. Ghighenci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chiriță, *Noul Cod de procedură penală comentat*, Hamangiu Publishing House, Bucharest, 2014, p. 31

[12] Published in the Official Journal of the European Union, no. L142 dated 01 June 2012

[13] See also Article 6 from the same Directive

[14] C. Bîrsan, op. cit.p. 544.

[15] Case Matyjek v. Poland, no. 38184/03, points 59 and 63 and Judgment of 15 January 2008, in case Luboch v. Poland, no. 37469/05, points 64 and 68.

the possibility of obtaining copies of relevant documents, represent important guarantees of the fair trial. The failure to afford such access has weighed, in the Court's assessment, in favor of the finding that the principle of equality of arms has been breached.

The right to access the case file is equally explicitly specified by Directive 2012/13/EU, on the right to information in criminal proceedings (directive transposed in the national law, mainly through the dispositions of article 94 Criminal Procedure Code), which specifies in Article 7 that : "(1) Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers. (2) Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defense. (3) Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defense and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered. By way of derogation from paragraphs (2) and (3), provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review".

As it can be noticed from the above mentioned text, the right to consult the case file does not appear as being an absolute right, as its exercise can be limited if it could prejudice an investigation, however, its limitation has to be concretely motivated by the judicial bodies (not in generic terms) and it has to be necessary and proportional to the purpose aimed, as equally provided by article 53 from the Constitution of Romania.[16] Similarly, there are the dispositions of article 94 paragraph 4 Criminal Procedure Code, according to which, during the criminal investigation, the prosecutor can restrict, on a motivated basis, the consultation of the case file if this could prejudice the ongoing investigation, but, after the initiation of the criminal action, such restriction may be ordered for up to 10 days. However, in all the cases, the attorney cannot be restricted the right to consult the statements of the party or subject in the proceedings he represents and within the procedures taking place before the judge of rights and liberties, concerning deprivation or restrictive measures of rights, the attorney of the accused person has the right to be informed about the entire material from the

[16] Pursuant to article 53 paragraph 2, Restriction can only be ordered if it is necessary in a democratic society. The measure has to be proportional to the situation which determined it, to be non-discriminatory applied and without harming the existence of the right or freedom.

criminal investigation case file. During the court proceedings, article 356 paragraph 1 Criminal Procedure Code specifies that the accused person can have the right to be informed of the actions under the case file, without establishing limitations of this right.

d) **the right to propose the production of evidence,** within the conditions of the law, to raise exceptions and make submissions**.**

Article 6, paragraph 3 letter d from the European Convention on Human Rights specifies the possibility of the accused person to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The right of the accused person to propose the production of evidence in the criminal trail is also established through the fact that article 306 paragraphs 3 and 4 Criminal Procedure Code specifies that the criminal investigation bodies have the obligation to collect and present evidence both in favor and against the suspect or accused person, as well as the obligation to rule, by reasoned order, on the request to produce evidence. At the same time, throughout the trial, the court shall produce evidence at the request of the parties or main subjects in the proceedings and the accused person has the right to challenge including the evidence administered during the criminal investigation and to obtain their new production.

Moreover, in its case-law[17], the European Court specified that an important aspect of fair criminal proceedings is the ability for the accused person to be confronted with the witnesses in presence of the judge who immediately decides the case. At the same time, it ruled that Article 6 paragraph 3 letter d establishes the right that, before an accused person is declared guilty, all the prosecution evidence has to be presented in principle before him, in public pronouncement, for a contradictory debate. However, this principle is not applied without exceptions, as the evidence can only be accepted under the reserve of the right of defense. As general rule, the accused person has to be provided with an adequate and sufficient possibility to challenge the prosecution's testimony and to examine witnesses against him, when they take the stand or afterwards. Two requirements result from this principle based on ECHR case-law: the first – the absence of a witness must be supported by a serious motive; the second – when a conviction is fully or considerably based on the depositions of a person, to whom the accused person was not able to ask questions or he could not request the examination, during the processing stage or during the debates, the right of defense can be restricted in a manner which is incompatible with the guarantees specified under Article 6.[18]

e) **the right to benefit free of charge from an interpreter**, when he does not understand, does not speak well or cannot communicate in Romanian language

f) **the right to use a mediator,** in the cases provided by the law

g) the right to be examined in the presence of his attorney, before ordering a custodial measure against the suspect or accused person.

Thus, article 209 paragraph 5 Criminal Procedure Code specifies that taking in custody may only be order after hearing the suspect or the accused person, in the presence of an attorney of his own choosing or an attorney appointed by court. At the same time, article 225 paragraph 4 Criminal Procedure Code specifies that the pre-trial

[17] Judgment of 18 March 2014, in case Beraru v. Romania, request no. 40107/04, point 64

[18] Judgment of 09 July 2013, in case Bobeş v. Romania, request no. 29752/05, points 36, 37.

arrest proposal shall only be made in the presence of the accused person, excepting the cases he is unjustifiably absent, he is missing, he avoids coming to court or cannot be brought before the judge due to health condition, force majeure or a state of necessity, the same guarantee being also established by the legislator for the house arrest measure[19] or for a restrictive measure, respectively the judicial control or the judicial control on bail.[20]

h) the right to be present at the trial

The judicial bodies have to order the summon of the suspect or of the accused person, in order to be present at the trial, as provided by the dispositions of article 353 paragraph 1 Criminal Procedure Code. For the persons deprived of liberty, their presence at the trial and summon at each trial term are mandatory. This right is also established through Directive 2016/343/EU, which, in Article 8, specifies that: "(1) Member States shall ensure that suspects and accused persons have the right to be present at their trial. (2) Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State. (3) A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned. (4) Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9. (5) This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defense are complied with (…).

i) communication of the copy of the indictment,

Pursuant to article 344 paragraph 2 Criminal Procedure Code, the certified copy of the indictment and, as applicable, a certified translation thereof, shall be communicated to the accused person at their place of detention or, as the case may be, the address where they live or the address where they requested to receive the procedural acts and the accused person shall also be informed of the object of the Preliminary Chamber procedure, their right to retain an attorney and the time within which, as of the communication date, they can file motions and exceptions in writing concerning the lawfulness of evidence gathering and conduct of criminal investigations by the criminal investigation bodies.

[19] Article 219 paragraph 5 Criminal Procedure Code specifies that the Judge of Rights and Liberties shall hear the accused person when the latter is present.

[20] Article 212 paragraph 3 Criminal Procedure Code, the measure of judicial control can only be taken after hearing the accused person, in the presence of an attorney of his own choosing or an attorney appointed by court. These dispositions being also applicable for the judicial control on bail, provided by article 216 paragraph 3 Criminal Procedure Code.

j) **during the debates, the accused person takes stand** in order to express opinions about the evidence produced in the case, as well as about the charges and individualization of the punishment.

At the same time, before ending the debates, the accused person takes his last stand, procedure during which he cannot be asked questions, in particular in view of exercising a proper defense. If new acts or circumstances are revealed, essential in order to settle the case, the court shall order that the court investigation shall be retaken. He can produce defenses both on the criminal side and on the civil side, challenging the allegations of the prosecutor or of the victim/party in civil claim.

k) **the accused party has the right to file the legal remedies** established by the legislator, respectively the ordinary legal remedies or, in certain cases, the extraordinary legal remedies.

During the ruling of the ordinary legal remedy of appeal (regardless if it is filed or not by the accused person), he has the right to file requests and raise exceptions, to request new evidence in defense, to debate all the appeal motifs filed in his defense or the motifs raised by the prosecutor, the victim or by other parties.

The suspect and the accused persons are not the only parties for whom the legislator established a series or rights and guarantees in view of concretely exercising the right of defense. Part of the rights established for them are also established under the same conditions for the other parties and for the victim. Thus, pursuant to the dispositions of article 81 Criminal Procedure Code, the victim has the right to consult the case file, to be summoned, to be present at the trial, to file evidence, to ask questions to the accused person, to witnesses, to expert, the right to use a mediator, to benefit from an interpreter, to be send in a language he understands the translation of any non-arraignment decisions, as well as other rights provided by the law (to file the legal remedies provided by the law, to make submissions during the debates about the evidence processed and about their lawfulness). At the same time, pursuant to the dispositions of articles 85 and 87 Criminal Procedure Code, the civil party and the party with civil liability benefit from the same rights, with the mention that for the party with civil liability, the rights shall be used within the limits and for the purposes of settling the civil claim.

Another component of the right of defense is also represented by the "obligation of the judicial bodies to consider, ex-officio, aspects favorable for the parties. This obligation actually represents an aspect for the manifestation of the active role played by the judicial bodies. If the parties do not act in order to valorize the evidence supporting their interests, the judicial bodies shall process such evidence ex-officio."[21]

3.2. Defense through attorney

As mentioned above, the content of the right of defense also includes the legal assistance of the parties by an attorney. This right is established by the Criminal Procedure Code through article 10 paragraph 1 Criminal Procedure Code, according to which the parties and main subjects in the proceedings have the right to defend themselves in person or to be assisted by an attorney, as well as through other provisions from the same Code.[22]

[21] I. Neagu, *op. cit*. p. 104.

[22] Article 81 paragraph 1, letter h, specifies that the victim has the right to be assisted or represented by an attorney; article 83 paragraph 1 letter c specifies that the accused person has the right to have an attorney of his own choosing

Considering the importance of this form of exercising the right of defense during the criminal trial, this right is also expressly provided through article 6, paragraph 3, letter c, which specifies that any accused person has the right to be assisted by an attorney of his own choosing and, in certain conditions, he has the right to be assisted, free of charge, by an attorney appointed by the court.

Similarly, Directive no. 2013/48/EU[23], on the right of access to a lawyer in criminal proceedings, specifies in its preamble the fact that Member States should ensure that suspects or accused persons have the right of access to a lawyer without undue delay and in any event, they should be granted access to a lawyer during the criminal proceedings before a court, if they have not waived this right.

Directive no. 2016/1919/EU[24] establishes, through Article 4, the rights of suspects or accused persons, who lack sufficient resources to pay for the assistance of a lawyer, have the right to legal aid when the interests of justice so require.

Therefore, legal aid represents a fundamental guarantee of the right of defense and implicitly one of the fundamental components of a fair trial, being provided by a person with legal qualification. Thus, article 1 from Law 51/1995[25] specifies that the profession of lawyer is free and independent, with autonomous organization and functioning, and the lawyer profession is only practiced by lawyers registered in the bar table where they belong, bar member of the National Association of Romanian Bars. At the same time, the activity of the lawyer is reiterated, among others, through legal consultations and requests, legal aid and representation before the courts, criminal investigation bodies (article 3 from Law 51/1995). Thus, it can be noticed that the lawyer profession can only be exercised by observing the law, being conditioned by the observance of certain requirements. Through the Decision no. 15/RIL/2015, the High Court of Cassation and Justice, ruling in appeal in the interest of the law, indicated that the legal aid granted to an accused party in the criminal trail by a person who did not acquire the lawyer quality within the conditions of Law no. 51/1995, *is the equivalent of his lack of defense.*

The right to be assisted by a lawyer invariably also implies an efficient communication between the lawyer and the person he defends and if such communication is not possible, the right to legal assistance is devoid of substance. Thus, the judicial bodies have the positive obligation to assure the effectiveness of this communication, as well as its confidentiality.

Directive 2013/48/EU, on the right of access to a lawyer, specifies in its preamble the importance of assuring the contact between the attorney and his client, and, through Article 4, it establishes that Member States shall respect the confidentiality of communication between suspects or accused parties and their lawyer and such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law. The obligation to respect

and, if he cannot afford one, in cases of mandatory legal assistance, the right to have an attorney appointed by court, the same right being also established for the suspect through the dispositions of article 78 Criminal Procedure Code, according to which the suspect has the rights provided by the law for the accused person, unless otherwise provided by the law.

[23] Published in the Official Journal of the European Union no. L 294 date 06 November 2013, p. 1-12.

[24] Published in the Official Journal of the European Union no. L 297 date 04 November 2016, p. 1-8.

[25] Published in the Official Journal, no. 113 date 06 March 2001

confidentiality not only implies that Member States should refrain from interfering with or accessing such communication, but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality (Article 33 from the preamble of Directive 2013/48/EU).

ECHR case-law[26] established that the right to be assisted by a lawyer does not only mean the assurance of the contact between the lawyer and the accused person, but it also implies a more complex matter, respectively the accused person has to be able to obtain the whole range of services specifically associated with legal assistance: discussion of the case, organization of the defense, collection of evidence, preparation for questioning.

If the legal assistance is mandatory, the simple appointment of the lawyer by the court is not sufficient to consider that the right of defense was respected, but the judicial bodies have the positive obligation to assure that the lawyer appointed by the court studied the case file and performs a practical and effective defense, as provided by ECHR case-law, not being sufficient to guarantee some theoretical or illusory rights, as we indicated above. At the same time, the judicial bodies have to oversee that the lawyer does not find himself in an incompatibility case, through certain qualities or functions exercised.

However, the right to legal assistance is not an absolute right, namely the legal assistance of a lawyer appointed by court is not mandatory in all cases, the rule established by the Romanian legislation stating that the legal assistance is mainly facultative. Nevertheless, there are certain cases when the judicial bodies have to take the necessary measures in order to assure legal assistance, cases which considered the assistance by a lawyer of certain persons/main subjects in the proceedings who find themselves in a more fragile position, position which has to be protected by assuring an efficient defense in a criminal trial. The mandatory legal assistance is established by the legislator in two separate texts of law, first of all for the suspect or accused person and secondly for the victim, civil party and party with civil liability.

3.2.1. Mandatory legal assistance of suspect or accused person.

The suspect or accused person has the right to be assisted by one or several lawyers, during all the stages of the criminal trial, as soon as starting the criminal investigation *in personam*, as well as in the preliminary chamber stage or during the ruling, including during the legal remedies.

Article 90 from the Criminal Procedure Code specifies the cases when the legal assistance of the suspect or accused person is mandatory, the enumeration is not limitative as there are also special cases which impose the obligation to assure this assistance. Pursuant to the text of law, the legal assistance is mandatory when:

l) the suspect/accused person is underage;

During the criminal investigation, the legal assistance is mandatory up to the date when he turns 18 years and during the course of trial throughout the entire ruling procedure (both in the court of first instance and in appeal) if he was still underage when he committed the offence (article 507 paragraph 3 Criminal Procedure Code).

m) he is admitted to a detention center or educational center;

n) he is detained or arrested (pre-trial detention or house arrest), even if in another case;

[26] Case Dayanan v. Turkey, judgment of 13 October 2009.

o) the safety measure of medical admission was ordered for the suspect/accused person, even if in another case;
p) in other cases established under the law;

The cases when the legislator establishes the need to assure legal assistance by a lawyer can be therein included: if the accused party wants to sign an agreement for the admission of guilt during the criminal investigation, within the procedures regarding the ordering, extension, duly cessation of preventive measures (judicial control, judicial control on bail, pre-trial arrest, house arrest; in the procedures related to the ex-officio debate of the lawfulness and substantiation of the preventive measures; in the procedure to settle the appeal against the court resolutions through which the judge of rights and freedoms, the preliminary chamber judge or the court rule on the preventive measures; in the procedure ordering the provisional medical admission, in the procedure for ordering, confirmation, replacement or cessation the provisional processual measures compelling to medical treatment or medical admission, sustained before the preliminary chamber judge following the ruling of not to refer the case to a trial court, if it is requested to replace the punishment by fine with the imprisonment punishment.

q) when the judicial bodies believe that the suspect or accused person could not prepare their defense on their own

These cases can include the elderly, the foreign citizens who do not know the procedural dispositions of the Romanian law, the persons suffering from mental or physical disabilities which may affect the preparation of their defense. At the same time, when assessing the possibility of a person to defend himself in person, the elements considered shall also include the complexity of the case, the criminal participation, the existence of a high number of offences.

r) During the preliminary chamber procedure and during the course of trial, in cases where the law establishes life detention or an imprisonment punishment exceeding 5 years for the offence perpetrated.

This case of mandatory legal assistance is also incident when the defendant is a legal entity.[27] The punishment provided by the law means the punishment stipulated by the text of law, incriminating the act perpetrated under consumed form, not considering the circumstances for the aggravation or mitigation of the penalty (article 187 Criminal Code). When assessing the incidence or non-incidence of this case of mandatory legal assistance, the court shall take into consideration the classification of the acts through the indictment, and if it will order the change into a charge for which the legislator provides a punishment exceeding 5 years, the legal assistance shall become mandatory since the order of the court to change the charge.

3.2.2. Mandatory legal assistance for the victim, civil party or party with civil liability.

Article 93 Criminal Procedure Code mentions, through paragraphs (4) and (5), the cases when the legal assistance is mandatory for these persons: when the victim or the civil party lacks mental competence or has limited mental competence or when, for various reasons, the victim, civil party or party with civil liability cannot prepare their defense in person.

Law no. 678/2001[28] establishes another case of legal assistance for the

[27] See also Decision no. 21/HP/2016 of the High Court of Cassation and Justice
[28] Published in the OFFICIAL JOURNAL no. 783, of 11 December 2001.

victim, during all the stages of the criminal trial, respectively when they are a victim of human trafficking.

4. Penalties applied if the right of defense is not respected.

The violation of legal dispositions concerning the mandatory legal assistance of the suspect, accused person, civil party or party with civil liability is punished with the absolute nullity, as stipulated by article 281 paragraph 1 letter e Criminal Procedure Code. We notice the fact that the text of law mentioned does not punish by absolute nullity the violation of the dispositions concerning the obligation to assure legal assistance to the victim, thus, despite the fact that we do not understand the reason for which the legislator made this distraction between the civil party and the victim, if the right to mandatory legal assistance of the victim is breached, another type of nullity shall intervene, respectively, the relative nullity if the conditions stipulated by article 282 Criminal Procedure Code[29] are met.

At the same time, if a case is tried in absence of the suspect or accused party, despite the fact that their presence was mandatory (i.e., they were under detention), the absolute nullity of the acts performed in violation of such dispositions shall nevertheless intervene.

The violation of the legal dispositions concerning the mandatory legal assistance for the suspect, accused person or other parties, as well as of dispositions concerning the absence of the suspect/accused person, when their presence was mandatory, can be invoked up to the completion of the preliminary chamber procedure, if such violation occurred during the criminal investigation stage or the preliminary chamber. The preliminary chamber judge shall exclude the evidence obtained in violation of the mentioned dispositions, or he will integrally return the case to the prosecutor, where he establishes that the overall criminal investigation was harmed by such violation. Nullity can be invoked in any stage of the trial, if the violation occurred in course of the trial or if the court was referred with an agreement for the admission of guilt, regardless of the moment when it intervened.

The absolute nullity of the decision and the case shall be retried also where the accused persons were assisted by the same lawyer, despite the fact that his interests were contradictory, because the court has the obligation to highlight the contrariety of interests and to provide them with the possibility to hire another lawyer for one of the accused persons, or to appoint an attorney by the court, if they do not have the possibility to hire another lawyer who could provide legal assistance along with the lawyer of their own choosing.

At the same time, if the right of a person to be present at the trial was breached, namely the person was not duly summoned, or, when, despite being duly summoned, the party could appear in person or inform the court thereupon, the court shall admit the appeal of the person, it shall reverse the ruling pronounced under these conditions and it will order the retrial of the case by the court whose ruling was quashed (article 421, point 2, letter a Criminal Procedure Code).

Another guarantee to exercise the right of defense is the possibility provided to the parties by the legislator to file an extraordinary legal remedy. Thus, if the

[29] Pursuant to article 282 paragraph 2 Criminal Code, "The violation of any legal dispositions except for the dispositions stipulated by article 281 shall cause the nullification of an act when failure to comply with the legal requirement caused farm to the rights of the persons or main subjects in criminal proceedings, which can only be removed by nullifying the act ."

ruling in appeal took place without duly summoning a person, or, when, despite being duly summoned, the party could appear in person or inform the court thereupon, or where the ruling in appeal took place without the participation of the accused person, although their presence was mandatory, or when the court did not hear the accused person, although the hearing was possible according to the law, these parties can file challenge for annulment, the decision pronounced in violation of these rights (essential components of the rights of defense) shall be quashed and a retrial of the appeal or of the quashed case shall take place.

Another guarantee established by the legislator if a person was convicted in absence, without being summoned at the trial and without being otherwise officially informed thereupon, or, despite being informed about the trial, the person was justifiably absent from the ruling of the case and could not inform the court thereupon, is represented by the possibility to reopen the criminal trial and subsequently quashing the decision pronounced under these conditions.

The right to respect the confidentiality of conversations between the lawyer and the client is also guaranteed through article 139 paragraph 4 Criminal Procedure Code, according to which the relationship between the lawyer and a person assisted or represented by them may be subject to electronic surveillance only when there is information that the lawyer perpetrates or prepares the perpetration of any of the offences mentioned under article 139 paragraph 2 Criminal Procedure Code. If, by error, the conversations between the lawyer and suspect/accused person he defends were intercepted, the evidence obtained this way cannot be used in any criminal trial and shall be destroyed forthwith by the prosecutor.

5. Conclusions

As already mentioned above, the right of defense is a fundamental right, guaranteed by the Constitution, by the Criminal Procedure Code and by the international treaties. The practical means to exercise the right of defense are largely stipulated by the Criminal Procedure Code.

Guaranteeing the right of defense represents a fundamental principle of the criminal trial and, at the same time, an essential component of a fair trial. Therefore, the legislator established various guarantees and legal means in order to assure the observance of this right. By recognizing this right, the legislator also established certain obligations for the judicial bodies (the obligation to have a lawyer appointed by court, if the legal assistance is mandatory, the obligation to verify if there are incompatibilities between the appointed lawyer and the person he represents, the obligation to rule on the requests of the persons/their lawyers, the obligation to assure that the lawyer studied the case file and performs a prompt and effective defense).

Any violation of the right of defense implies, as we mentioned above, various penalties, including the most important sanction provided by the Criminal Procedure Code, respectively the absolute nullity of the acts taken in violation of this right, including the nullity of the decision pronounced under these conditions and retrial of the case.

The right of defense is not an additional institution, but it represents an essential and necessary right for any act of justice, because the respect of this right creates a balance between the individual interests of persons participating to the criminal trial and the general interest of the society to hold criminally liable anyone who committed a criminal offense. By respecting this right, the suspect, the victim, the parties are capable of highlighting all the

circumstances of the act under investigation, thus no innocent person is held criminally liable and any person who committed an offence is punished pursuant to the law.

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