



*Third International Young Researchers
Conference on Law*



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Third International Young Researchers Conference on Law

“Hëna e Plotë” Bedër University is proud to announce the organization of the 3rd edition of the Young Researchers Conference on Law, to be held on April 18-19, 2014 in Tirana, Albania.

Continuing in its mission, to form a platform to bring together law students from all over Europe and the World, with the sole purpose of creating an academic atmosphere, among the new generation of lawyers on the bases of harmony, mutual respect and cooperation, this year’s conference will provide law students and young lawyers with a wide variety of topics to present their research and discuss about new developments in different areas of law.



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Zuzanna Glowacka

*Centre for Interdisciplinary Postgraduate Studies,
University of Sarajevo, Bosnia and Herzegovina*

Is a Good Citizen a Heterosexual Citizen? The Status of Same-Sex Partnerships in Selected EU Countries

Abstract:

Homosexual marriage is often considered an oxymoron due to the legal definition which is mainly based on traditional and religious premises according to which marriage is and has always been a heterosexual union. Same-sex marriages and same-sex civil partnerships are basically grounded on the concern that they could be a threat to a classical model of family, undermining the opposite-sex marriage. Although many countries have already established legally recognized forms of partnership providing homosexual couples rights and benefits similar or even identical to prerogatives owned by heterosexual marriages, legalization of same-sex relationships is still a vivid and controversial element of public debate, especially in countries where the influence of church is noticeable. Civil unions have their origins in a need of legal regulation and recognition of the status of homosexual couples, and in the majority of cases they provide rights and obligations similar to those that opposite-sex marriages have.

This paper presents the legal background of civil partnerships according to the Universal Declaration of Human Rights, the European Convention on Human Rights, and other documents. It argues the traditional model of family and presents legal solutions related to homosexual partnerships and their status in the European Union. The paper deepens the problem of civil partnerships in three selected EU countries: Poland, Croatia and Greece, and describes the current situation of citizens regarding their sexual orientation. The deepen analysis of the legal situation in three EU countries show that the problem of discrimination is still present and vivid. The most dramatic situations seems to be in Poland since there are no regulations regarding neither same-sex nor opposite-sex partnerships. Unmarried people who are in lasting relationships cannot be entitled to any prerogatives owned by spouses. The situation in Croatia is alarming mainly because of the ultra-conservative tendencies, visible especially in the last referendum case. Existing law doesn't provide any real rights, and it's not satisfying enough for the representatives of sexual minorities. Nevertheless, there is still hope that discriminating laws will be changed in the future, as the decision of the Court in Strasbourg showed in *Vallianatos and Others v. Greece* case.

Although the tendency is basically changing, the rights of homosexual citizens related to legal family foundation and marrying are still limited in many European countries what violates the basic human rights such as freedom from discrimination or the right to

privacy and family life. Unfortunately, the division between developed societies which treat homosexual citizens the same way as heterosexual ones providing them equal rights, and the regions, where the discrimination is still present due to the religious and cultural prejudices.

According to the national constitutions all citizens are equal but apparently the equality does not apply to homosexual ones. If legalizing same-sex marriage is against the will of majority, the state should provide a legal alternative for citizens who are deprived of their rights. Apart from the theoretical sources, the paper refers to legal documents, non-governmental organization reports and statements of publicly influential persons.

Keywords: *civil unions in EU, homosexual marriages, same-sex partnerships*

Introduction

Hannah Arendt once said that the right to marry whoever one wishes is an elementary human right compared to which even the right to attend an integrated school regardless of one's skin or color or race is a minor postulate (Arendt, 1959, p. 49). According to the "traditional" interpretation of the Article 16 of the Universal Declaration of Human Rights, marriage is defined as a relationship between men and women that cannot be limited due to the race, nationality or religion. The right to found a family, which is a natural and fundamental group unit of society, is as well interpreted as the right solely of opposite-sex partners. Both arguments appear whenever a same-sex marriage or same-sex civil partnership is being reconsidered. Nevertheless, it has to be emphasized that the Declaration was written in 1948 when homosexual relationships were illegal, and homosexuality was perceived as a disease. Logical analysis of this article shows that it is not specified that marriage has to be a legalized opposite-sex relationship. In this case, men and women have a right to marry — homosexuals are simply not taken into consideration.

Homosexual marriage is often considered an oxymoron due to the legal definition which is mainly based on traditional and religious premises according to which marriage is and has always been a heterosexual union. Same-sex marriages and same-sex civil partnerships are basically grounded on the concern that they could be a threat to a classical model of family, undermining the opposite-sex marriage. Although many countries have already established legally recognized forms of partnership providing homosexual couples rights and benefits similar or even identical to prerogatives owned by heterosexual marriages, legalization of same-sex relationships is still a vivid and controversial element of public debate, especially in countries where the influence of church is noticeable.

This paper presents the legal background of civil partnerships according to the Universal Declaration of Human Rights, the European Convention on Human Rights, and relevant documents. It argues the traditional model of family and presents legal solutions related to homosexual partnerships and their status in the European Union. The paper deepens the problem of civil partnerships in three selected EU countries: Poland, Croatia and Greece, and describes the current situation of citizens regarding their sexual orientation. Since their status in countries mentioned above is at least "unsettled", it provokes a question if we encounter a violation of human rights and, according to the national constitutions, citizen's rights.

Apart from the theoretical sources such as works of Andrew Sullivan or John Witte Jr., the paper refers to legal documents, non-governmental organization reports and statements of publicly influential persons.

1. A Right Every Person Possesses: The Right to Found a Family

The belief that exclusively heterosexual marriage is strongly rooted in tradition and religion seems to be still vivid across the world. The most common definition says that it is a legal union of one man and one woman, and this argument is frequently raised and emphasized by the opponents of same-sex marriages or legalized partnerships. Theological meaning and purposes of marriage in Christianity are interpreted in the spirit of the Christian faith by the Catholic Church, the Orthodox Church, the Protestant

churches, as well as other denominations. Catholic and Orthodox doctrines consider marriage one of the sacraments, and Protestantism — the holy covenant concluded by divine institution between one woman and one man. Majority of Christian denominations teach that God instituted marriage already in paradise as indissoluble, heterosexual and monogamous union between a woman and a man, strengthened with mutual vows of undying fidelity (Witte 1997).

1.1 The common definition of marriage and family — the influence of tradition and religion on the perception of these notions

In the conservative way of thinking, family, in contrast to other forms of social life, is directly determined by the order of nature. It is a community based on a lasting, legalized relationship of a man and a woman (marriage), and the kinship of parents and children. This is why legalization of relationships between same-sex people is treated by many people as a form of sexual deviance. Those kinds of relationships are incompatible with the role of the family as the giver of life. Such relationships undermine the biological and moral basis of existence of society (Turowski 1997, p. 10).

Hillary Clinton stated that marriage has got historic, religious, and moral content that goes back to the beginning of time (Sullivan 2000, p. 20). Richard F. Duncan, a professor of the constitutional law at the University of Nebraska, claims that “homosexual marriage is an oxymoron” (Duncan 1996, p. 589). However, Andrew Sullivan argues that marriage is something unchangeable. In fact, the fundamental understanding of this definition has changed over the years, mostly in ways that we would perceive as the better regarding the equality between the genders. Sullivan also indicates that the presumption of marriage as an opposite-sex union is based on granting different and uneven, legal rights within marriage for men and women. Interestingly, he remarks: “No one is proposing that faith communities be required to change their definitions of marriage. The question at hand is civil marriage and civil marriage only. In a country where church and state are separate this is no small distinction. Many churches, for example, forbid divorce. But civil divorce is still legal” (Sullivan 2000, p. 23).

According to the traditional notions, the main purpose of marriage and setting a family is procreation. Conservatives emphasize that gays and lesbians cannot have children what is against nature. In this case, why is intercourse between sterile heterosexual couples accepted, but not intercourse between homosexuals? None of them are reproductive acts (Finnis 1994, p. 1066). Connecting marriage only with its reproductive purpose could be problematic: sterile people should not have right to marry (Anderson 2013, p. 759). It seems to be shocking and inconceivable, but based on the same or similar reasons; homosexuals are often deprived of setting families in a legal way, not necessarily marriage but other legalized forms. Heterosexual, infertile marriages are socially accepted, and their sexual activity is treated as a sign of a deep intimacy (Mirrus 2011). However, intimacy and romantic love are not commonly associated with same-sex couples, and the right to marry as a logical predicate to procreation has been an influential part of the public debate on same-sex marriages.

From this point of view, marriage seems to be not a free constitutional right but a right which has its origin in social interest in childbearing in a traditional family setting that provides the continuity of the society. Nevertheless, in accordance with conventions and

declarations on human rights, marrying and starting a family is a free choice of people — it's a right, not a duty.

1.2 Definition of marriage and family according to the documents related to human rights

As it was already said, according to the Article 16 of Universal Declaration of Human Rights, men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. It is also stated that the natural and fundamental group of society is family and that it has an entitlement for the protection by society and the State¹. Although conservatives often use it as a justification for banning same-sex marriages, praxis shows that for more than a decade UN treaty bodies and many other inter-governmental bodies focused on human rights prohibit discrimination based on gender or sexual orientation.

The definition of family appears also in the International Covenant on Economic, Social and Cultural Rights: the Article 12 recognizes family as "the natural and fundamental group unit of society", and requires parties to accord it "the widest possible protection and assistance"². According to the International Covenant on Civil and Political Rights, the same as in UDHR, the family is the natural and fundamental group unit of society and has to be protected³. Men and women of marriageable age have a right to marry and found a family. In the Article 2, it is emphasized that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status⁴.

In the Article 12 of the European Convention on Human Rights it is stated men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right⁵. However, in the debate on the same-sex partnerships and marriages, the Article 8 of ECHR is used more often in regard to family and relationships. The article states that everyone has the right to respect for his private and family life, his home and his correspondence. "Family life" is a space ideally free from the state intervention. The European Court of Human Rights provided a broader interpretation, stating that prohibition of private consensual homosexual acts violates this article. As Amnesty International reports, non-discrimination on grounds of sexual

¹ Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

² International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force 3 January 1976, in accordance with article 27.

³ International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) 993 U.N.T.S. 3, *entered into force* 3 January 1976.

⁴ *Ibid.*

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11. Rome, 4.XI.1950.

orientation has therefore become an internationally recognized principle and in many countries it resulted in bringing domestic laws in this field, including partnership rights.

1.3 Civil Unions and their aim

Civil partnerships originate from a need of legal regulation and recognition of same-sex couples' status. They basically provide rights and obligations similar to those that opposite-sex marriages have. In some countries, e.g. France, they are also open to heterosexual unions as an alternative to civil marriage. In most cases, civil partners gain privileges such as the same property rights, the same exemptions on inheritance tax, social security and pension benefits as married couples. They have also a possibility to get parental responsibility for a partner's children as well as reasonable maintenance, tenancy rights, insurance and next-of-kin rights in hospital and with doctors. There is a process similar to divorce for dissolving a civil partnership (The Guardian 17 February 2011). In few countries, legalized homosexual partnerships have been superseded by same-sex marriage.

Analyzing the map of the world, it can be seen that in the period of more than past 10 years, more and more countries have started to recognize same- and opposite-sex partnerships as well as homosexual marriages, classifying these phenomena as a sign of mental development and respect for human and civil rights. However, the world is clearly divided into regions (Western Europe, Americas, Oceania), where mature society recognizes homosexual people the same as heterosexual citizens what means that they should be guaranteed equal rights, and the regions, where the discrimination is still present because of the religious and cultural prejudices (Eastern Europe, Middle East, Asia, Africa).

In some EU countries, citizens can formalize their relationship without marriage, giving it the form of registered partnership. It means that two people living together as a couple can register their partnership with the relevant authorities in the country of residence. There are huge differences between EU countries in this regard, not only in relation to the offered privileges, but also the extent to which partnerships can be recognized abroad (if they can be recognized at all). The first country in the world which recognised the same sex partnership was Denmark (in 1989) and since then numerous EU countries legalised same-sex civil unions, nevertheless there are huge legal differences in this regard, not only in relation to the offered privileges, but also to the extent to which partnerships can be recognized abroad (if they can be recognized at all). For instance, we can distinguish civil partnerships with rights similar to those belonging to marriages (Germany, Ireland, Luxembourg, Finland, the United Kingdom, Austria) and more limited ones (e.g. Croatia, Hungary). Although few of EU states has gone even further allowing same-sex couples to marry (France, Belgium, the Netherlands, Spain, Portugal, Sweden), there are EU countries that do not recognize civil partnerships in any form or with many limitations, and this will be discussed in further detail in the following chapter.

2. The Status of Same-Sex Partnerships in Selected EU Countries

The supporters of civil unions state that in most cases they provide practical equality for same-sex couples and solve such problems as hospital visitation rights or transfer of property caused by lack of legal recognition. It seems to be more practical to provide same-sex couples legal rights to avoid controversies according to the traditional definition

of marriage and family, mainly based on the religious source of these terms. Civil unions seek to resemble marriage as closely as possible for same-sex couples without using the term “marriage” and do so within jurisdictions which allow marriage for opposite-sex couples. Nevertheless, depriving homosexuals of the right to marry or calling their partnership a “marriage” is still problematic. This chapter presents the situation in 3 selected EU countries: Poland, Croatia and Greece.

2.1 Poland

The Preamble of the Polish Constitution states clearly that the holders of Polish citizenship have equal rights and obligations, regardless their sexual orientation. Homosexuals are not listed as limited in any rights or privileges that are possessed by other citizens. All citizens are meant to function on the equal rules and strengthen the rights of communities.⁶ The estimated data shows that there are approximately up to 2 million homosexual citizens (including bisexuals)⁷ what makes them a significant minority in Poland, and it cannot be ignored. They cannot be deprived of the right to live according to their own inclinations and beliefs; nevertheless the state has not yet implemented demands raised by them regarding the legal regulation of their relationships.

Granting rights to legalize same-sex relationships and providing them a status equal or similar to a marriage is considered a groundbreaking moment in the process of eliminating legal discrimination against homosexuals. It would significantly contribute to the stabilization of homosexual relationships and prevent people from dramatic experiences which refers especially to foreigners that cannot legalize their status and obtain the right for legal residence in Poland. Under the conflict of law rules of the private international law, legalization of same-sex relationship abroad by Polish citizen does not produce any legal effect under the Polish law. Polish citizens wishing to enter into a same-sex partnership or marriage abroad with the citizen of a country that provides such a possibility may encounter problems in obtaining a certificate stating the absence of circumstances excluding the marriage (Gazeta Wyborcza 25 August 2008). Couples living in cohabitation incur higher financial costs and they need to make each additional formal procedures. This includes normalization of taxes (personal income tax, inheritance tax and gift tax). According to the regulations that are currently in force, homosexuals cannot benefit from any special entitlements from being in a stable, long relationship, even if they engage in a common household. In the eyes of the law, they are treated almost as people with no mutual ties whatsoever. They cannot make use of the prerogatives owned by spouses.⁸ It should be emphasized, that it is not only a question of legal regulation of

⁶ The Constitution of the Republic of Poland of 2nd April, 1997.

⁷ It is said that around 4 to 10% but no accurate number can be given. It is extremely difficult to measure due the fact that while conducting the survey, not every respondent wants to answer such intimate question, even if the survey is confidential.

⁸ According to the current interpretation and practical application of the provisions of the Constitution and the Family and Guardianship Code, marriage is a form of a bilateral agreement. The right to its accession is based on age, unmarried status, no contraindications such as kinship, incapacitation, gender sites, the presence of the registrar or priest and two witnesses. There are material and non-material rights and obligations of the spouses that can be distinguished. Non-material rights and obligations include: living together, mutual help, faithfulness and cooperation for the good of family, while the

the relation both between partners, and partners and society, but also a need to change the attitude of Polish society towards homosexuals.⁹

In 2003, Senator Maria Szyszkowska from the Democratic Left Alliance proposed a bill legalizing same-sex civil partnerships, similar to French PACS¹⁰; it was approved by the Senate but never was voted upon in the Parliament because Włodzimierz Cimoszewicz, the Speaker of the Parliament from the Democratic Left Alliance, surprisingly has not put it in the agenda. This meant that, in accordance with the principle of discontinuity, the project was lost. The bill sought to equate the people in terms of their rights regardless of their sexual orientation. Therefore, its aim was to adapt law to obligations of the democratic state: respect for human freedoms, outlook pluralism and tolerance. It has been stated that the situation in which people who are non-denominational, atheists, or agnostics have to subordinate their life to the dominant conception of marriage in accordance to the canon law cannot be maintained. The solutions proposed in the bill have not violated the existing rules related to heterosexual marriages.

Since then, there have been few attempts to legalize civil unions, both same- and opposite-sex ones. At the beginning of 2013, the Parliament was developing the law that would enable entering into formal partnerships, but all bills were rejected by the Lower House. The hot discussion on the legal admissibility of the legalization of civil unions, which is the essence of the dispute between supporters of changes and their opponents, revealed the attitude of the conservative part of society towards the law. Regrettably, it reflects in narrowing down the rights and civic freedoms.

The main argument against civil union was based on the Article 18 of the Polish Constitution which states that marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood shall be placed under the protection and care of the Republic of Poland.¹¹ In fact, even if – according to this article – the opposite-sex marriage is under protection and care of the state, there is no limitation of legalizing same-sex partnership or even homosexual marriage because there is no actual definition of marriage. The Constitution establishes the principle of heterosexuality of marriage as a legal norm providing it protection and care but does not set the rules of heterosexual marriage, and only declares the protection and care for heterosexual marriages, without excluding same-sex marriages or *a fortiori* – same-sex civil unions. Ryszard Piotrowski, the constitutionalist from the Faculty of Law of University of Warsaw, says that the Article 18 does not apply to partnerships, but some form of marriage and family. It cannot be interpreted in isolation from the other articles but in conjunction with them. In particular, it should not be interpreted that the legislation of the status of marriage is

material ones contribute to meeting the needs of the family. It has to be emphasized that each of these responsibilities can be carried out both by same- and opposite-sex couples.

⁹ According to the survey from February, 2013 which was conducted by the Public Opinion Research Center (CBOS), 33% of respondents approves the legalization of same-sex, and 60% is against. Robert Biedroń, the first Polish politician who openly revealed his homosexuality, believes that 33% result is still a good outcome, especially due to the fact that there is no government program of anti-gay discrimination — the whole promotion of civil partnerships was conducted only by non-governmental organizations.

¹⁰ The Bill on Registered Partnerships, 10 December 2003.

¹¹ The Constitution of the Republic of Poland of 2nd April, 1997.

synonymous with exclusion of partnerships of a different nature — it is anti-constitutional interpretation (Gazeta Wyborcza 29 January 2013).

The opponents of homosexual unions consider the attempts to legalize them to be an attack: on the traditional model of family and the traditional division of roles, although establishing civil partnerships is only a formalization of already existing types of families. As Jarosław Makowski writes, today the category of family, understood as the union of a man and a woman, is used in political battles a club discriminative towards other form of human relationships. And yet Christians, talking about secular marriage in a secular country, should not have any problems to rely on strictly liberal arguments. Just as the state cannot tell people in what and how they should believe, it cannot tell who they have to love, tie with or live (Gazeta Wyborcza 31 May 2011).

2.2 Croatia

After the first LGBT pride which took place in 2003, the ruling coalition agreed and passed a law on same-sex partnerships. Homosexual partners who have been living together for at least 3 years obtained similar rights as opposite-sex unions in terms of financial support and inheritance; nevertheless other rights included in the family law were omitted. It practically did not give same-sex families any rights, causing discrimination in everyday life. Those partnerships can't be registered; no rights in terms of taxation, health insurance or joint properties are included¹². Project on registered partnerships was proposed in 2005 but didn't come into force.

7 years later, Zoran Milanović, Croatian Prime Minister, presented the idea of further expanding the rights for same-sex couples replacing the existing law. In November 2012 the government declared that homosexuals will be able to register their relationships. Representatives of the association "Korak"¹³ said that it is completely unacceptable that now, after almost 10 years since the adoption of the first law on same-sex unions, the government prepares a list of human rights of homosexual couples from which it crosses out one group of rights that are not accepted by the Church or a particular part of the voters (CroL. LGBT News Portal 16 February 2012). Right for family pension, absence from work in the case of illness or death of a partner, health insurance per partner and inheritance are just some of the rights that are now unavailable to same-sex couples. It is worrying, especially regarding the fact that in eyes of the law: the Constitution says that Power in the Republic of Croatia derives from the people and rests with the people as a community of free and equal citizens¹⁴. In the Article 14 it is specified that all people shall enjoy their rights and freedoms, regardless of characteristics such as language, religion, national origin etc. Sexual orientation is not listed but there is one open category — "other"¹⁵.

¹² Ured za ravnopravnost spolova. Zakon o istospolnim zajednicama.

¹³ Women's Group Karlovac "STEP" is a non-governmental, non-profit, non-political organization which operates in the area of Karlovac and Karlovac County for the protection and promotion of women's rights and children's rights, with an emphasis on victims of domestic violence.

¹⁴ The Constitution of the Republic of Croatia (consolidated text). Basic Provisions.

¹⁵ The Constitution of the Republic of Croatia (consolidated text). Protection of Human Rights and Fundamental Freedoms.

Although changes in the law should be applied soon, the idea of introducing new regulations, in particular the concept of step-child adoption, or even full adoption supported by Croatian People's Party – Liberal Democrats, caused a big public debate which eventually led to referendum over constitutional definition of marriage. A conservative organization “In the Name of Family” managed to gather more than 700,000 signatures demanding a referendum. The initiative was supported by conservative political parties and the Catholic Church. Their amendment was defining marriage as legalized relationship between a man and a woman. Unlike the case of Polish Constitution, such definition doesn't leave any leeway for interpretation and becomes a constitutional prohibition against same-sex marriages.

Despite the fact that the project encountered resistance from the left-wing coalition, and the opponents have claimed that the issue is too sensitive to be put to a referendum, it eventually took place on the 1st of December 2013. The government, human rights activists and main public figures have all spoken out against the referendum, urging people to cast vote against the change, nevertheless, the result was predictable: 946,433 voters voted “for”, 481,534 voters — “against”; 37.90 % of entitled to vote participated in the referendum, there was 0.57% of invalid ballots (Večernji list 2 December 2013). After the referendum, the activists from Zagreb Pride said that the Parliament had constitutional, moral and every other responsibility to consult the project with the Constitutional Court at the time when the order and the fundamental values of the constitution were threatened (Prijedlog ocjene ustavnosti 12 November 2013).

President Ivo Josipović stated he was rather disappointed than surprised by the results of the referendum. He also said that he hopes that it would not lead to new divisions in society and further policy of discrimination. Although the referendum is completed so that the new entry will be implemented into the Constitution, Josipović claimed that he expects that everyone would vote for the law that will regulate the rights of same-sex unions (Večernji list 1 December 2013). Nevertheless, Zagreb Pride is not satisfied with the new bill and says that is still too conservative. The activists are disappointed that for homosexual citizens the draft law on civil partnership is incomplete in two important segments and as such does not constitute a formal equality. They are disappointed as well because of the fact that the Ministry of Public Administration and all the members of the working group rejected the proposal for a life partnership for all couples, including opposite-sex ones. They also admitted that recognition, regulation and protection of family life provided by the draft law on civil partnership is a step forward for lesbian, gay, bisexual and transgender citizens of Croatia and it fulfills a democratic standard. Nevertheless, they expect that the parliamentary procedure will extend rights included in the proposed law on civil partnership to the right for adoption. In their opinion, the right to equal treatment and non-discrimination life partners and spouses is inevitable (Prijedlog Zakona o životnom partnerstvu je konzervativan i treba ga poboljšati 12 December 2013).

2.3 Greece

According to the Greek Constitution, all people shall have the right to participate actively in the social, economic and political life of the country, and to freely develop their personality. It states that all citizens are protected, regardless their nationality, race, language or religious beliefs. Under protection of the state is not only the family in its common sense but also marriage, motherhood and childhood. It is emphasized that every

person's home is a sanctuary, and private and family life of the individual cannot be violated¹⁶. Noticeably the last paragraph is similar to the Article 8 of the European Convention of Human Rights which both with the Article 14 (Prohibition of discrimination) were mentioned as breached in the application of Greek citizens against the Hellenic Republic. At the same time, the Greek Constitution grants a special status to the Orthodox church which should probably be considered as – if not one of the reasons – then at least, indicators of the directions in which the decisions concerning liberalization of some rights are being undertaken. The lawmaking concerning private matters of the citizens (rights of married and non-married couples) remains quite traditional in Greece. As late as in 2008, the bill regulating cohabitation was passed, however it excluded *expressis verbis*, same-sex couples from the benefits available for the opposite-sex cohabitants.

It is noteworthy, that the introduction of the law raised a vivid reaction of the religious Orthodox authorities of Greece. The Church of Greece spoke out officially against it. In a press release issued on 17 March 2008 by the Holy Synod, it described civil unions as “prostitution”. The Minister of Justice, meanwhile, addressed the competent parliamentary commission in the following terms: “... We believe that we should not go any further. Same-sex couples should not be included. We are convinced that the demands and requirements of Greek society do not justify going beyond this point. In its law-making role, the ruling political party is accountable to the people of Greece. It has its own convictions and has debated this issue; I believe this is the way forward.”¹⁷

On 11 November 2008 on the subject of civil unions the Minister of Justice merely stated that “society today [was] not yet ready to accept cohabitation between same-sex couples”.¹⁸ The bill on civil unions has however been charged as biased. On November 7, 2013, the ECtHR confirmed the accusation and ruled that excluding same-sex couples from the benefits afforded by the law is discriminatory.

The centre-right party, New Democracy with Konstantinos Karamanlis as the head of the movement and consequent Prime Minister (currently it is the Antonis Samaras who is in charge of the party, and the leader of the Government of Greece), has been constantly stating it is against introduction of a law legalizing and sanctioning same-sex civil unions. Nea Dimokratia has only proposed several rights to unmarried, opposite-sex couples. It should be stated though that even the Panhellenic Socialist Movement, PASOK, the centre-leftist party under the leadership of George Papandreu, which presented in 2006 a proposal for the recognition of cohabitation relationships failed to introduce strict and clear definition which would allow homosexual couples to be granted equal rights. Further developments led to a ban of same-sex couples from equal treating by PASOK. The retouched draft of a bill, from November 2008 made no progress in the matter. This means that any law supporting introduction of equal rights for LGBT couples was impossible to pass the legislation process (only far leftist parties, like i.e. Synaspismos, have supported same-sex cohabitation relationships and marriages, they were and are not able though, in terms of parliamentary voting strength, to win the case without the support of i.e. PASOK, that is, one of the big ruling parties).

¹⁶ The Constitution of Greece.

¹⁷ CASE OF VALLIANATOS AND OTHERS v. GREECE. (Applications nos. 29381/09 and 32684/09).

¹⁸ *Ibid.*

Even if OLKE, gay rights group pointed out a loophole in the 1982 law legalizing civil marriage between “persons” with no reference to their gender, it seems that the quest of changing the status quo without any external interference (i.e. that of European Institutions) should be considered as difficult to be conducted. However, some small symptoms of changes should be noticed as well. For example, before the 2009 elections, PASOK supported the idea of same-sex registered partnerships and in 2010 the new Minister of Justice, Haris Kastanidis announced a formation of a new, special committee designed to prepare the needed legislation. Committee, established on 29th July 2010 began its work with discussing the liberalization of the Family Law concerning opposite-sex couples, while the question of homosexual couples has been postponed. In February 2013, a consequent Minister of Justice, Antonis Roupakotis confirmed that the government considers widening the range of partnership law to include same-sex concubinate couples. This was subsequently confirmed after the lost case of Greek state (the aforementioned 7th November 2013 ECtHR *Vallianatos and Others v. Greece* case) by PASOK.

Conclusion

Although the tendency is basically changing, the rights of homosexual citizens related to legal family foundation and marrying are still limited in many European countries what violates the basic human rights such as freedom from discrimination or the right to privacy and family life. Unfortunately, the division between developed societies which treat homosexual citizens the same way as heterosexual ones providing them equal rights, and the regions, where the discrimination is still present due to the religious and cultural prejudices.

As it was mentioned in the first chapter, from the conservative point of view, family is strictly determined by the order of the nature, what leads to the statement that legalization of relationships between same-sex people, and homosexuality in general, is a form of sexual deviance. Conservatives emphasize that those kinds of relationships contradict the childbearing role of the family. Marriage becomes more a duty towards society than a right. Although “family life” is a space where an individual organizes his/her private life and family life in an autonomous way, without the state intervention, the right to having it is often breached.

Civil unions have their origins in a need of legal regulation and recognition of the status of homosexual couples, and in the majority of cases they provide rights and obligations similar to those that opposite-sex marriages have. They are recognized in many EU countries, however, there are huge differences between laws and privileges they conclude. The deeper analysis of the legal situation in three EU countries show that the problem of discrimination is still present and vivid. The most dramatic situations seems to be in Poland since there are no regulations regarding neither same-sex nor opposite-sex partnerships. Unmarried people who are in lasting relationships cannot be entitled to any prerogatives owned by spouses. The situation in Croatia is alarming mainly because of the ultra-conservative tendencies, visible especially in the last referendum case. Existing law doesn't provide any real rights, and it's not satisfying enough for the representatives of sexual minorities. Nevertheless, there is still hope that discriminating laws will be changed in the future, as the decision of the Court in Strasbourg showed in *Vallianatos and Others v. Greece* case.

According to the national constitutions all citizens are equal but apparently the equality does not apply to homosexual ones. If legalizing same-sex marriage is against the will of majority, the state should provide a legal alternative for citizens who are deprived of their rights.

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Evgenia Polychronidi

*Department of Law and Political Science,
Lumière Lyon 2 University, France*

People displaced for environmental reasons: Violated rights and viable solutions

Abstract

The phenomenon of environmentally displaced persons dates thousands of years. Nevertheless, only in 1985, it was Essam El-Hinnawi that made it widely known under the term “environmental refugees” in his Report for the Program of the United Nations for the Environment (UNEP), where he openly referred to the creation of a new type of refugees caused by climate change. Today, the phenomenon affects many regions all over the world with inestimable demographic, social, political and economic consequences. According to recent UN estimations, the number of environmentally displaced persons will reach a billion by 2050.

Only some of the rights of people in question endangered are their right to life and security, to physical and mental health, their right to have access to food and housing, dressing, water, medical care, social assistance, as well as the freedom of movement within and outside their city or country and right to return. Moreover, other violations taking place concerning this phenomenon are the one that deprives them from their right to a healthy environment, to be informed and educated, right to natural resources, to development, to property and to its protection.

For the time being, no permanent solution has been given to the problems arisen from the phenomenon in question. Several academics have, from time to time, presented their suggestions, including the adoption of a new international Convention, the establishment of bilateral Agreements, the creation of an Additional Protocol to already existing UN Conventions or even a wider interpretation of the terms “refugee” or “migrant”.

An approach of this social, economic, political and demographic problem from a legal scope will try to reveal if, why or why not these suggestions are plausible and how could this issue be efficiently solved in national, supranational, European and international levels.

Keywords: *climate refugees, environmental migrants, human rights law, international law*

1 Introduction

Environmental change has for long been one of the prevailing factors of population displacement. Archaeological elements providing a solid ground to support this argument date already back to the ice age. More specifically, a theory of population movements in the area of Bering Strait, today separating the American and Asian continents, explains that 13 000 years ago, a layer of ice was blocking the water underneath the passage and either kept the sea level low or even connected the two continents, letting, this way, migration flows from Asia to America. Scientists further believe that some thousands of years later, between the 8th and 13th centuries AC, a meteorological phenomenon called «Medieval Climatic Optimum»¹, allowed the one hand, Polynesians to colonise the archipelagoes of the Pacific ocean, the Vikings, on the other, to reach Ireland, North America and travel as far as the Bay of California. More specifically, during this phenomenon, the number of storms appeared to be limited than usual and thus for skies were clear, facts that contributed to the development of navigation by the above-mentioned peoples². Another typical and more popular example refers to the area of Mesopotamia. It is widely accepted that the first civil societies of Mesopotamia were developed back in the 7th century BC, when people moved from limited mountainous areas to spacious fluvial ones, following the increasing demand in natural resources, as the population was quickly growing in numbers³.

Nowadays, modern examples show how intensified climate change continues to hold an important position among the migration factors. In Africa, for example, Lake Chad, once alimentary source for four countries of a total of 20 million inhabitants, Chad, Niger, Nigeria and Cameroon, has lost 90% of its surface since the 1960's: covering 25 000 km² in 1963, today its surface is no more than 2 500 km²⁴.

In Asia, Bangladesh and its impressive geomorphology give a typical example: with three long rivers running down the whole country, Ganges, Meghna and Brahmaputra and some 800 smaller tributaries, under normal circumstances, during the rainy season, one third of the country is underwater every year and around 500 000 of inhabitants are being temporarily displaced. Nevertheless, during the last decades, a combination of this fact with the rise of sea level and the subsequent salinisation of river water result to the

¹ Climatic phenomenon, which affected the European and American continents. It lasted from the 8th until the 13th century AC. Scientists believed that during the phenomenon, the temperature stayed in a relatively high level, for the period, in comparison to our days. It finished by the end of the 15th century, leading to the so-called «little ice age», of which the results were perceivable until the end of the 18th century, MANN M. E., Medieval Climatic Optimum. in: M. MacCRACKEN, J. PERRY "The Earth system: physical and chemical dimensions of global environmental change" Encyclopedia of Global Environmental Change (2002) vol. 1, p. 514

² C.E.M PEARCE, F.M. PEARCE *Oceanic Migration – Paths, Sequence, Time and Range of prehistoric migration in the Pacific and Indian oceans* (Springer 2010) p. 266

³ O. BROWN "Climate change and forced migration: Observations, projections and implications; Fighting climate change: Human solidarity in a divided world", occasional paper of the Human Development Report Office for the Human Development Report 2007/2008 of United Nations Development Program, p. 14

⁴ "Africa's vanishing lake Chad" <<http://www.un.org/africarenewal/magazine/april-2012/africa%E2%80%99s-vanishing-lake-chad>> last accessed: 10/01/2013

destruction of agricultural activities. Added to this, the country is also facing territory loss, as its coastal areas and islands submerge. Since 1990, around 100 000 residents have been permanently displaced from Kutubdia island to the southeast area of the country, whereas another 500 000 followed in 2005, this time after the submersion of half of Bhola island⁵. In China, until this day, at least six million people have been displaced due to soil erosion⁶.

On the other side of the planet, Alaska is among the first to suffer. Its coastal village Newtok is already abandoned by its residents, after an aggravating erosion during the last few years. A lawsuit conducted and filed on the behalf of the Newtok community against several oil companies accusing them for the deterioration of climate conditions in the area is pending since 2008 before the San Francisco's District Court⁷. In Mexico, a million people are being displaced every year for environmental reasons⁸. In the Pacific Ocean, the small state islands also count losses. Kiribati, Carteret and Tuvalu have been organising and leading displacement projects for more than ten years now, after constant submersion of their territory and the following homelessness of their people.

Numbers referring to persons displaced for environmental reasons –described herein after as environmentally displaced persons or EDPs- published by international institutions are shocking: Both the World Bank and the International Federation of Red Cross and Red Crescent in their Reports of 1998 and 2001, respectively, stated that, at that given time, the registered number of environmentally displaced persons was overcoming the one of war refugees. The latter's Report “on world disasters” mentioned 5 000 “environmental refugees” per day⁹. The English branch of Red Cross estimates that approximately 58% of current 43 million refugees have been displaced for environmental reasons. This percentage corresponds to one person per 250 inhabitants. According to the United Nations, the number of EDPs will probably reach a billion by 2050¹⁰.

2 People Displaced for Environmental Reasons (EDPs): Plurality of Definitions

Made widely known by Essam El-Hinnawi in 1985 in his Report for the United Nations Environment Program (UNEP), where he referred to the creation of a new type of refugees due to climate change, the « environmental refugees », until today, almost 30 years afterwards, no consensus has been given on the use of a common term. Hereinafter, we have tried to collect and present some of the terms used during the last forty years. The classification has been made according to their source, the term used, its definition or the

⁵ “DK GreenRoots: Climate Refugees Land of Enchantment” 04/07/2009.
<<http://www.dailykos.com/story/2009/07/04/745198/-DK-GreenRoots:-Climate-Refugees>> last accessed: 10/01/2014

⁶ Ibidem

⁷ Ibidem

⁸ R. STOJANOV “Environmental Migration: How can be estimated and predicted?” (03/02/2004) Department of Geography Faculty of Science Palacky University, Olomouc, Czech Republic

⁹ International Federation of Red Cross and Red Crescent “World Disasters Report - Focus on Recovery” (2001) p. 6

¹⁰ O. BROWN “Migration and climate change” IOM (2008) Migration research series no.31 p. 1

broader description needed, the causes, and the rights or status suggested, where available:

- **1970 Olson**¹¹ - Refugees differ from other, spontaneous or sponsored migrants – they are externally forced to leave – a change in their environment makes it impossible to continue life as they have known it
- **1985 El Hinnawi**¹² - environmental refugees – they are forced to leave their traditional habitat, temporarily or permanently – because of temporary or permanent environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life
- **1990 USA Immigration and Nationalities Act, 244§1-** Alien, national of a foreign state or having no nationality – possible causes: earthquake, flood, drought, epidemic, or other environmental disaster resulting in a substantial, but temporary, disruption of living conditions in the area affected – attribution of temporary protected status/right not to be removed from the US during the period in which such status is in effect
- **1991 SUHRKE, VISENTIN**¹³ - there is a distinction between environmental refugees and migrants - the latter choose freely and rationally to leave their country/ refugees are obliged to – in order to save themselves and escape a sudden or pressing ecological danger
- **1995 MYERS, KENT**¹⁴ - environmental refugees – they flee their country or are « internally displaced » on a semi-permanent or permanent basis – because of drought, soil erosion, desertification, deforestation, and other environmental problems, that make them no longer able to gain a secure livelihood
- **1996 Norwegian Refugee Council**¹⁵ - environmentally displaced persons - displaced within their own country of habitual residence or having crossed an international border temporarily or permanently – environmental degradation,

¹¹ Social Science Research Council (SSRC). "Migration and Development: Future Directions for Research and Policy" Migration & Development Conference 28/02–01/03/2008 New York

<http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B12bf3577-2461-de11-bd80-001cc477ec70%7D.pdf> last accessed: 10/01/2014

¹² E. EL-HINNAWI "Report for the UN Environmental Program" in B. DOCHERTY, T. GIANNINI "Confronting a rising tide: a proposal for a Convention on climate refugees" Harvard Environmental Law Review (2009) vol. 33, pp. 349-403, p. 363

¹³ A. SUHRKE, A. VISENTIN A. "The Environmental Refugee: A New Approach", *Ecodelcision*, (1991) n° 2 Montreal pp. 73-84

¹⁴ N. MYERS, J. KENT "Environmental Exodus, an emergent crisis in the global arena" *Climate Institute magazine* (1995) p. 14

<<http://www.climate.org/PDF/Environmental%20Exodus.pdf>> last accessed : 10/01/2014, later translated in French as «eco-réfugiés»

<<http://www.goodplanet.info/debat/2008/08/29/eco-refugies-un-probleme-de-securite-en-emergence/>> last accessed : 01/04/2014

¹⁵ Norwegian Refugee Council "Climate change-related displacement and the European response", International Symposium on Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migration, 21-24/04/1996, IOM, Geneva

deterioration or destruction is a major cause of their displacement, but not necessarily the sole one

- **2000 LONERGAN**¹⁶ - displaced population – population being displaced not with their own willing - primary factors are political instability, economic tensions, ethnic conflicts, and environmental deterioration
- **2002 GONIN, LASAILLY- JACOB**¹⁷ - refugees of the environment - peoples obliged to leave their place of residence, on which they depend for their survival – because of environmental destruction or degradation/ natural or human causes often overlapping each other, like volcano eruptions, earthquakes, typhoons, droughts or floods
- **2002 BATES**¹⁸ - classification of environmental refugees in disaster refugees (a), expropriation refugees (b), deterioration refugees (c) – persons fleeing any environmental harm, categorized by type: natural or technological disasters (a), permanently and intentionally relocated by economic development or war (b), gradual environmental degradation (c)
- **2004 Toledo Initiative**¹⁹ - refugees - displaced by or fleeing - environmental causes – rights suggested: assistance to victims including information, education, action on prevention, refuge, resettlement, repatriation and restoration of damaged homelands
- **2004/301 Finnish Aliens Act, Section 88a (323/2009)** – alien - cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe or a bad security situation, which may be due to an international or internal armed conflict or a poor human rights situation – they have the right to residence permit on the basis of humanitarian protection
- **2005:716 Swedish Aliens Act, Section 2** – alien - person otherwise in need of protection [...] unable to return to the country of origin because of an environmental disaster – they are given asylum

¹⁶ S. LONERGAN “Environmental Degradation and Migration and Sustainable Development: A Southern Perspective, a two-part meeting in the AVISO Policy Briefing Series”, Global Environmental Change and Human Security (GECHS) Project University of Victoria 13/04/2000

<http://www.wilsoncenter.org/index.cfm?topic_id=1413&categoryid=a82ccae6-65bf-e7dc-46b3b37d0a3a575f&fuseaction=topics.events_item_topics&event_id=7309> last accessed: 14/09/2012

¹⁷ P. GONIN, V. LASAILLY- JACOB “Refugees of the environment: A new category of forced migrants?” [original title in French : “Les réfugiés de l’environnement Une nouvelle catégorie de migrants forcés?”], *Migrations et environnement Revue européenne des migrations internationales* (2002) vol. 18 n°2 pp. 139-160

<<http://remi.revues.org/1654>> last accessed: 01/04/2014 « réfugiés de l’environnement; des populations obligées de quitter leur lieu de résidence, dont elles sont tributaires pour leur survie; En raison de la destruction ou de la dégradation de l’environnement. Les dommages relèvent de causes naturelles et humaines qui souvent s’imbriquent étroitement. Ils fuient des lieux dévastés par le volcanisme, les tremblements de terre, les typhons, les sécheresses ou les inondations », free translation

¹⁸ B. DOCHERTY, T. GIANNINI “Confronting a rising tide: a proposal for a Convention on climate refugees” *Harvard Environmental Law Review* (2009) vol. 33 pp. 349-403

¹⁹ H. WIJNBERG, S.M. LEIDER The Toledo Initiative on Environmental Refugees and Ecological Restoration (2004) <www.reseau-terra.eu/IMG/doc/Toledo_Initiative.doc> last accessed: 10/01/2014

- **2007 Australia climate refugees Amendment Bill, second reading**²⁰ - climate change refugees - people affected by climate change, they can no longer live where they are, or not enough of them can, or the available land can no longer manage that level of population, and they need to flee – causes: climate change induced disasters – they have a right to visa
- **2007 BIERMANN and BOAS**²¹ - climate refugees - people who have to leave their habitats, immediately or in the near future – because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity
- **2007 Forced Migration online and International Association for the Study of Forced Migration (FMO and IASFM)**²² - disaster-induced forced migration - people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects
- **2007 RENAUD et al. UN University**²³ - they distinguish three categories: environmentally motivated migrants (a), environmentally forced migrants (b), environmental refugees (c) – these persons may respectively leave a steadily deteriorating environment (a), have to leave in order to avoid the worst (b), flee the worst, including natural disasters (c)
- **2008 BRONEN**²⁴ - climigration - when a community is no longer sustainable - exclusively because of climate-related events and permanent relocation is required to protect people/ the critical elements are that climatic events are ongoing and repeatedly impact public infrastructure and threaten people's safety so that loss of life is possible
- **2008 MORTON, BONCOUR, LACZKO**²⁵ - environmental migrants - individuals, communities and societies - they choose or are forced to migrate – because of damaging environmental and climatic factors
- **2008 Declaration on climate migrations, Greens/EFA group, European Parliament**²⁶ - displaced people - people forced to leave their homes, temporarily or

²⁰ A. BARTLLET Senator Queensland Migration (climate refugees) Amendment Bill 2007 second reading, Parliament, portfolio: Environment and Animal Welfare, related: Immigration and Multicultural Affairs (09/08/2007)
<http://www.democrats.org.au/speeches/index.htm?speech_id=2245&display=1> last accessed: 14/09/2012

²¹ F. BIERMANN, I. BOAS definition given within the limits of the Global Governance Project (2008) <<http://www.glogov.org/?pageid=80>> last accessed: 01/04/2014

²² Definition given by the IASFM and adopted by the FMO
<<http://www.forcedmigration.org/about/whatisfm>> last accessed: 10/01/2014

²³ B. DOCHERTY, T. GIANNINI “Confronting a rising tide: a proposal for a Convention on climate refugees”, op.cit. and F. RENAUD et al. “Environmental Degradation and Migration, online handbook Demography“, Berlin Institut für Bevölkerung und Entwicklung (2008) <<http://www.berlin-institut.org/online-handbookdemography/environmental-migration.html>> last accessed : 10/01/2014

²⁴ R. BRONEN “Alaskan communities' rights and resilience“ Forced Migration Review no 31, Refugee Studies Centre Oxford (2008) p. 30

²⁵ A. MORTON, P. BONCOUR, F. LACZKO “Human security policy challenges” Forced Migration Review no 31, Refugee Studies Center Oxford (2008) p. 5

²⁶ Declaration on climate migrations, Conference on Climate migrations organised in the European Parliament Brussels by the Greens/EFA group (11/06/2008)

permanently/ they might remain within their country, but might also be forced immediately or in the long term to leave it, depending upon the nature and the magnitude of the environmental degradation/ population movements can be diffuse and continuous or massive and specific, in reaction to a brutal climate event, also seasonal, temporary or definitive - due to the impacts of climate change that put their existence at risk or seriously affect their living conditions – they are in need of legal protection, suggestion for the creation of an international fund.

- **2008 RENAUD, BOGARDI, DUN, WARNER**²⁷ - refugees - people precipitously fleeing their place of residence, regardless of whether or not they cross an international border – because of an environmental stressor - same rights as refugees under Geneva Convention
- **2008 PRIEUR et al.**²⁸ - environmentally-displaced persons - individuals, families and populations - sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, temporary or permanent, at the outset or throughout, from their habitual residence and requires their relocation and resettlement - rights to : information and participation, assistance, food and water aid, housing, health care, juridical personality, respect for the family, education and training, work, safe shelter, reintegration, return, prolonged shelter, resettlement and nationality (in case of permanent displacements), keep families united, grant of the status of environmentally-displaced person
- **2009 LOCKE in PERKISS et al.**²⁹ - environmental refugees - people who are forced to leave their habitual homes, or choose to do so, either temporarily or permanently - for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions
- **2009 BURTON, HODGKINSON**³⁰ - persons displaced by climate change - persons forced to migrate, temporarily or permanently, as a consequence of global warming
- **2009 DOCHERTY, GIANNINI**³¹ - climate change refugees – people, whom climate change forces to relocate across national borders/ there are six elements to be met for a refugee to be considered a victim of climate change: i) forced migration, ii)

<<http://www.efmsv2008.org/file/Declaration+on+climate+migration>> last accessed: 10/01/2014

²⁷ F. RENAUD, J. BOGARDI, O. DUN, K. WARNER *Environmental Degradation and Migration*, online handbook Demography, Berlin Institut für Bevölkerung und Entwicklung (09/2008)

²⁸ M. PRIEUR et al. "Draft Convention on the International Status of Environmentally Displaced Persons" *Law Review*, Sherbrooke University (2008) no 39

²⁹ S. PERKISS, G. BOWREY, N. GILL, "Environmental Refugees: An accountability perspective, a comment on Second Reading in the Australian Federal Parliament of the proposed Migration (Climate Refugees) Amendment Bill 2007" (2009) <<http://ro.uow.edu.au/commpapers/941>> last accessed: 10/01/2014

³⁰ T. BURTON, D. HODGKINSON "Towards a Convention for Persons Displaced by Climate Change: A discussion note on the relationship between adaptation and displacement (draft)" <<http://www.hodgkinsongroup.com/documents/DH%20TB%20LSE%20presentation.pdf>> last accessed: 10/01/2014

³¹ DOCHERTY B., GIANNINI T. (2009) "Confronting a rising tide: a proposal for a Convention on climate refugees", op.cit.

temporary or permanent relocation, iii) movement across national borders, iv) disruption consistent with climate change, v) sudden or gradual environmental disruption, vi) a “more likely than not” standard for human contribution to the disruption – suggestion for the creation of a new legal instrument/ in order to be effective, it should ultimately contain the following nine components, which, in turn, fall into three broad categories: guarantees of assistance, shared responsibility, and administration: a) guarantees of assistance: 1) standards for climate change refugee status determination, 2) human rights protections, 3) humanitarian aid, b) shared responsibility: 4) host state responsibility 5) home state responsibility, 6) international cooperation and assistance, c) administration of the instrument: 7) a global fund, 8) a coordinating agency, 9) a body of scientific experts

- **2011 UNICEF**³² - refugee - someone who has been forced to leave their country because they are unable to live in their home or they fear they will be harmed. This can be due to a number of reasons, including fighting or natural disasters, like earthquakes and floods

- **2012 NOWAK, HAFNER** in Geneva International Model United Nations (GIMUN) Sixth General Assembly³³ - environmental refugees - citizens and persons with permanent residence who had to leave their home either within their State of origin or across borders, temporarily or permanently - the decisive, immediate trigger for leaving is environmental change induced by human or natural causes which poses a serious threat to their loves or livelihoods

- **2012 IOM, Refugee Policy Center**³⁴ - environmental refugees - persons displaced within their own country of habitual residence or having crossed an international border - environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one

3 Environmentally Displaced Persons: Their Violated Rights

Losing home, work, origins, often family... Endangering health, security, life... Environmentally Displaced Persons put in danger too many of their rights, many of which are fundamental and considered as given in many modern societies. More explicitly, as Benoît Mayer has noticed³⁵, violation of human rights for EDPs begin already in the country, where they have to flee from and continue throughout their long journey to displacement, as well as in the hosting country. Below is an indicative list of these rights – references are only given in relation to the UDHR, although the below-mentioned rights are predicted and protected in several legal texts:

³² MARSHALL L.W. (2011) 'Toward a new definition of 'refugee': is the 1951 convention out of date?' Vol. 37 EJTES p. 61-66

³³ Geneva International Model United Nations (GIMUN) (2012) Sixth General Assembly: legal, topic b: the changing legal status of nations and people losing their homeland due to environmental changes: drafting an international response
http://gimun.org/sites/default/files/users/4/legal_study_guide_-_gimun_2012.pdf (last accessed: 10/01/2014)

³⁴ Ibidem

³⁵ MAYER Benoît, Sustainable Development Law on Climate Change, legal working paper for International Law and Climate Migrants: a human rights perspective, International Development Law Organization and the Centre for International Sustainable development Law (CISDL), series 8, March 2011

- First generation rights: the right to life and security (art.3), prohibition of torture (art.5), as well as their right to property (art.17)
- Second generation rights: the right to an adequate standard of living, including adequate food, clothing and housing, the right to health, to medical and social care (art.25)
- Third generation rights, indirectly predicted and protected by the UDHR in art.22 and having emerged to a separate category in recent years: social and cultural rights, and further implied the right to a healthy environment, to natural resources and to social and economic development. While the displacement takes place, EDPs are often affronted with the violation of their right to freedom of movement and freedom to choose one's residence (art.13), an unfortunately always current issue.

Finally, by the time EDPs reach a destination, added to all affected rights already presented, further come violations in the basis of discrimination (art.2 and 7), further concerning the right to family and matters related to family reunifications (art.16), as well as the right to work (art.23) and to political participation (art.21). The latter can be subject to restrictions, as nationality is often a prerequisite, fact that enlightens the loss of nationality and the right to it (art.15), when it comes for EDPs originating from submerging states.

A group of rights usually underestimated is the cultural rights (art.27). Cultures threatened of extinction, like those of the small state islands, is among the priority issues, which should be taken into account and protected accordingly.

4 Environmentally Displaced Persons: Viable Solutions

4.1 Already existing and applied solutions

Several countries, which have already faced or are still facing the phenomenon of EDPs, were obligated, at a certain point of time, to find a quick and efficient solution. Herein after are some of the political solutions implemented for the issue, soon followed by a legal provision, listed by country:

- **USA:** In their Immigration and Nationalities Act are foreseen the cases of either entering the country under temporary protected status (TPS) or staying in its territory under the deferred enforced departure (DED) status, already put into force several times until this day. According to data published by the Congressional Research Service, only for the year 2008, more than 320,000³⁶ were awarded either of these statuses. What is worth to be mentioned is that not only individuals, but also states can submit a demand for the application of the Temporary Protective Status provisions for their nationals before the US Authorities.
- **Sweden** and **Finland** offer a protective status exclusively to EDPs, as aforementioned in section c. Nevertheless, until this day, the law has never been applied. The rest of Scandinavian countries suggest a purposive reading of their legislation for this reason. **Denmark**, for example, has granted residence permit to Afghan families with young children, suffering from famine due to a long drought season affecting the country

³⁶ E. KARMA, R.E. WASEM "Temporary Protected Status: Current Immigration Policy and Issues" *CRS Report for the American Congress Order Code RS20844* (18/09/2008)

at that period³⁷ from 2001 to 2006, according to the “survival criterion” predicted by the Aliens Act of 1993 §9 adapted to this case by a ministerial decision of 1999³⁸. In **Norway**, during the parliamentary debate of 2006 on the adoption of a new Aliens Act, the Minister of Immigration recognised the need of a specific legal provision, giving the possibility to grant residence permits to foreign nationals on the basis of “humanitarian” criteria, including natural disasters³⁹.

- **Belgium** put the issue of “environmental refugees” on the table in 2006, when the deputy Philippe Mahoux suggested the adoption of a resolution « aiming at the recognition of the environmental refugee status in international conventions ». The suggestion encouraged the government to promote, in the UN level, the recognition of a specific status for people fleeing environmental disasters in international conventions. The Report, presented by Margriet Hermans on behalf of the Commission of International Relations and Defense before the Belgian Senate, was unanimously signed⁴⁰.

- **New Zealand** has developed the “Pacific Access Category” Project⁴¹. Having already been put into force in the past for Samoa nationals, today it is applied in cooperation with the governments of Tuvalu, Kiribati, Tonga and Fiji. A “win-win” project, according to the Kiribati President Anote Tong, this so-called migration project allows to 75 Kiribati, 75 Tuvalu, 250 Tonga and 250 Fiji nationals to migrate to New Zealand per year, together with their companions and children. Nevertheless, its severe restrictions, on the one hand, among which the age limit, set from 18 to 45 years old, a basic knowledge of the English language, the declaration of an income that allows

³⁷ V. KOLMANNSSKOG “To what extent can existing forms of legal protection apply in climate change-related cross-border displacement?” paper presented at the Oxford University Workshop on Environmental Change and Migration (08-09.01.2009) <http://www.nrc.no/arch/_img/9448543.pdf> last accessed: 10/01/2014

³⁸ “Der kan i helt særlige tilfælde gives humanitær opholdstilladelse til enlige kvinder og familier med mindre børn fra områder, hvor der efter ministeriets opfattelse hersker ekstremt vanskelige levevilkår, f.eks. som følge af hungersnød eller som følge af helt uforudsigelige forhold (overlevelseskriteriet)..” p.6 free translation <http://www.nyidanmark.dk/resources.ashx/Resources/Lovstof/Praksisnotater/2006/Notat_9bpraksis_november2005.pdf> last accessed: 10/01/2014

³⁹ V. KOLMANNSSKOG, F. MYRSTAD (2009) “Environmental Displacement in European Asylum Law” *European Journal of Migration and Law* (2009 Martinus Nijhoff Publishers, Brill editions) no 4 vol. 11, p. 1 <http://www.nrc.no/arch/_img/9429378.pdf> last accessed: 10/01/2014

⁴⁰ M. HERMANS Proposition for a resolution for the recognition of the status of environmental refugees in international convention, Report in the name of the Commission of external relations and defence [original title in French: Proposition de résolution visant à la reconnaissance dans les conventions internationales du statut de réfugié environnemental, Rapport fait au nom de la Commission des relations extérieures et de la défense] 3 – 1556/2, Belgium Senat, Session 2005-2006 (21.03.2006) <http://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfi_d&MItypeObj=application/pdf&MIvalObj=50334813> last accessed: 01/04/2014

⁴¹ More on this project: <<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>> last accessed: 01/04/2014

applicants to cover the living cost of the hosting country and a job offer needed as prerequisites, the visa application fee of 50 New Zealand dollars, an unbearable amount for many candidates, on the other hand, turn the project for many candidates into an “unaffordable dream”⁴².

4.2 Suggested solutions

As presented above, the current lack of a unanimously used term for EDPs not only does not help, but also creates confusion with the existing legal terms. From a legal scope, both the terms “refugee” and “migrant” have a specific definition. More specifically, as per the term “refugee”, according to the Geneva Convention relating to the Status of Refugees of 1951, it only applies to persons who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their nationality and are unable or, owing to such fear, unwilling to avail themselves of the protection of that country; or who, not having a nationality and being outside the country of their former habitual residence as a result of such events, are unable or, owing to such fear, unwilling to return to it”.

On the other hand, the International Federation of Red Cross and Red Crescent Societies also give a clear definition of who can be considered as a migrant, stating that the term refers to “people who leave or flee their home to go to new places to seek opportunities or safer and better prospects. The term migrant therefore is broad and can include asylum seekers, refugees, internally displaced people, migrant workers and irregular migrants”⁴³.

As far as EDPs are concerned, as shown in practice, they can be displaced either within the borders of the same country or towards another, whereas the kind of environmental change, which leads to their displacement, varying from gradual, sudden, temporary or permanent, are also factors to be considered, for the formation of a suitable term.

Given the merging importance of the problem, during the last few years, academics have presented several ideas of legal protection of EDPs. Some support that a whole new Convention exclusively adapted to the phenomenon should be adopted; others argue that the plethora of legal texts calls for a broadening of the application field of already existing texts or the creation of Protocols additional to existing texts.

Simms and Conisbee support that the notion of ‘fear of persecution’ of the Geneva Convention should be *lato sensu* interpreted, so as to include the so-called ‘climate refugees’⁴⁴. The reason why the decision-making centres avoid such a solution lies indeed in the fact that the status of refugees attributes a broad range of rights to the persons

⁴² J. McADAM “Environmental Migration Governance” *Research Series* paper 1 (University of New South Wales 2009)
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412002> last accessed: 10/01/2014

⁴³ International Federation of Red Cross and Red Crescent Societies, Policy on Migration (2009) <www.ifrc.org/Docs/pubs/who/policies/migration-policy-en.pdf> last accessed: 01/04/2014

⁴⁴ A. SIMMS, M. CONISBEE “Environmental Refugees, the case for Recognition” (29/08/2008) <<http://www.goodplanet.info/en/debates/2008/08/29/environmental-refugees-the-case-for-recognition/>> (accessed: 31/03/2014)

concerned. Given the large estimated number of potential EDPs, in combination with the numbers of asylum seekers nowadays, the developed countries would have to take responsibility for a rather big number of persons, for which they may not have been prepared.

Other plausible solutions suggested are presented herein after:

- **2004 Toledo Initiative**⁴⁵ - adoption of an International Convention - Environmental refugees - Technical cooperation, assistance and education of victims, ecological restauration, annual conference of the members of Initiative
- **2006- 2008 COUNIL**⁴⁶ (quoting MAGNINY 1999) - International Multilateral Treaty (Magniny, Cournil) or bilateral conventions (for the State Islands, Cournil) - legal instrument inspired by a UN suggestion in 1947, responsible to clarify the definition of ecological refugees - Specific permanent Fund (responsible for matters of hygiene, food supply, housing, treatment) - a technical instrument to assist population to move, when imminent degradation - Magniny: temporary, Cournil: depending on the case, if internally or externally displaced, integrates international law customs, principle of proximity for the bilateral conventions
- **2007 COUNIL, MAZZEGA**⁴⁷ - Inspiration from Internally Displaced Persons Convention - Additional Protocol on IDP Convention, whose notion and doctrine are pertinent for the protection of the victims of ecological disasters, if elaborated with complementary norms, such as the rights to assistance, non-discrimination to the assistance, protection of women and children, public security of displaced persons, access to housing, right to a decent life, to treatment, to education, to facilitation of administrative procedures, to a correct management of property rights after ecological disasters, free circulation in the country, local integration, possibility to aspire to a return or a re-installation in other areas, etc.
- **2008 Limoges and Sherbrooke Universities**, Draft Convention on the international status of environmentally-displaced persons⁴⁸ - International Convention - High Authority as main instrument - Global Fund - Scientific council, secretary assisting

⁴⁵ "The Toledo Initiative on Environmental Refugees and Ecological Restoration" Toledo Spain (09-10/06/2004)

<http://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=0C CMQFjAA&url=http%3A%2F%2Fwww.reseau-terra.eu%2FIMG%2Fdoc%2FToledo_Initiative.doc&ei=JAFWUOXiNseW0QX7qYHwCw&usg=AFQjCNGdnSWBtMIUj2ANuaFtkpnb-gSygQ&sig2=_PGAWq8nUPgCtQjeFuXeUw> last accessed: 01/04/2014

⁴⁶ C. COUNIL "A la recherche d'une protection pour les « réfugiés environnementaux »: actions, obstacles, enjeux et protections", *Asylon(s)* no 6 Exodes Ecologiques (11/2008) <<http://www.reseau-terra.eu/article843.html>> last accessed: 18/10/2012

⁴⁷ C. COUNIL, P. MAZZEGA "Réflexions prospectives sur une protection juridique des réfugiés écologiques" *Revue Européenne des Migrations Internationales* (2007) no 1 p. 20-23 <<http://remi.revues.org/3541>> last accessed: 16/09/2012

⁴⁸ More information on the Draft Convention on the International Status on environmentally displaced persons:

<<http://www.cidce.org/pdf/Draft%20Convention%20on%20the%20International%20Status%20on%20environmentally%20displaced%20persons.pdf>> last accessed: 01/04/2014

the international Agency - the international Agency has the status of an organization similar to the UN - environmentally displaced persons - principles of common but differentiated responsibilities, proximity, proportionality, effectiveness, Parties conference every two years, national reports, provision for additional protocols

- **2008 SIMMS, CONISBEE⁴⁹** - Protocol additional to the Geneva Convention - global Committee - sponsored by the UN, reporting to the UN Security Council and the General Assembly - broaden either the term "refugee" or the "well-grounded fear of persecution"

- **2008 ACKETOFT** Council of Europe⁵⁰ - elaborate a Framework Convention for the Recognition of Status and Rights of Environmental Migrants if deemed necessary and introduce an additional Protocol on the right to a healthy and safe environment to the European Convention on Human Rights/ meanwhile, interpretation and application of *non refoulement* principle under art.2 and 3 of the ECHR/ alternatively, extension of Guiding Principles on Internal Displacement - effective co-ordination structure pulling together the various international agencies - system of funding at a european level by the EU - in certain cases, 2001 EU Council Temporary Protection Directive 49 and 2004 EU Council Qualification Directive 50 applicable

- **2008 BIERMANN, BOAS⁵¹** - separate, independent legal and political regime created under a Protocol on the Recognition, Protection, and Resettlement of Climate Refugees to the United Nations Framework Convention on Climate Change - executive Committee - separate fund "Climate Refugee Protection and Resettlement Fund" - coordinating secretariat, possibly as a subdivision of the climate secretariat in Bonn - network of existing agencies, incl. UNDP and the World Bank, UNEP, UNHCR; - climate refugees - principles such as common but differentiated responsibilities and the reimbursement of full incremental costs - objective of a planned and voluntary resettlement and reintegration/ climate refugees seen and treated as permanent immigrants to the regions or countries that accept them/ the climate refugee regime must be tailored not to the needs of individually persecuted people (as in the current UN refugee regime) but of entire groups of people, such as populations of villages, cities, provinces, or even entire nations, as in the case of small island states/ regime targeted mostly towards the support of governments, local communities and national agencies to protect people within their territories, international assistance and funding for the domestic support and resettlement programs of affected countries that have requested it/ protection seen as a global problem and a global responsibility. State parties would be entitled to propose areas under their jurisdiction for inclusion on the list of affected areas

- **2008/2009 BURTON, HODGKINSON⁵²** - Multilateral independent Convention - Intergovernmental Agency - Climate change [internally and externally]

⁴⁹ A. SIMMS, M. CONISBEE "Environmental Refugees, the case for Recognition" idem

⁵⁰ T. ACKETOFT "Environmentally induced migration and displacement: a 21- century challenge" Recommendation 1862/2009, Council of Europe Parliamentary Assembly
<<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta09/errec1862.htm>> last accessed: 01/04/2014

⁵¹ F. BIERMANN, I. BOAS "Protecting Climate Refugees: The Case for a Global Protocol" *Environment magazine* (11-12/2008) no 6, p. 8- 16

<<http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>> last accessed: 01/04/2014

⁵² D. HODGKINSON et al. (n.d.) "The hour when the ship comes in: a convention for persons displaced by climate change"

displaced persons (CCDP) - principles of equity, common but differentiated responsibilities, humanitarian law, refugee law, human rights

- **2009 DOCHERTY, GIANNINI**⁵³ - International convention inspired by the Geneva Convention - legal instrument - global Fund - coordinating Agency, group of experts - people displaced outside of their country due to climate change - only for displaced outside of their country's borders.

5 Conclusion

As shown, climate change-induced migration is a plurifactoral phenomenon, leaving, thus for, Environmentally Displaced Persons outside of the *stricto sensu* set criteria of the terms “refugee” and “migrant”, therefore outside of the application field of all relevant existing legal provisions. At the same time, wide interpretation of legal terms can easily lead to haziness, ending up to the exact opposite results than the aiming ones.

In November 2012, the very promising Nansen Initiative was launched. As announced by Antonio Guterres, UN High Commissioner for Refugees (UNHCR) at the opening of the 63rd Session of its Executive Committee, this state-driven project based in Geneva plans to hold consultations with both state and non-state actors in geographic areas affected by climate change induced displacements and aspires to organise a global dialogue and finally formulate a protection agenda⁵⁴.

The precious interaction of state and non-state actors in the formation of International Law has always been enriching, challenging and most of the times fruitful. While waiting for the outcome of this project, the community of International Law needs to realise that, before any political, economic, social, legal, demographic implications this phenomenon may cause, all persons concerned and affected by environmental change need to have a solid, clear, sufficient and foremost efficient protection. As Norman Myers had put it some years before «[...] we cannot continue to ignore environmental refugees simply because there is no institutionalised mode of dealing with them»⁵⁵.

<http://www.ccdpconvention.com/documents/hour_when_ship_comes_in.pdf> last accessed: 01/04/2014

⁵³ B. DOCHERTY, T. GIANNINI “Confronting a rising tide: a proposal for a Convention on climate refugees”, *idem*

⁵⁴ More information on <<http://www.nanseninitiative.org/>> last accessed: 31/03/2014

⁵⁵ N. MYERS “Environmental refugees: an emergent security issue” *13th Economic Forum* (23-27/05/2005) Prague <<http://www.osce.org/eea/14851>> (last accessed: 10/01/2014)

Melih Uğraş Erol

*Independant Researcher, PhD Thesis will be defended at
Utrecht University, the Netherlands*

Reading the Alevi Community's Human Rights Violation Allegations with Case Studies

Abstract

Anatolian Alevis form a religious community in the Republic of Turkey that asserts their human rights are being violated. Alevis propose at least two topics as their matter: the places of worship and religious education at schools. They claim that they are facing discrimination because Turkey is neglecting and not supporting *cem* houses, where most Alevis pray, while the State does support mosques and imams. As the second issue Alevis claim that the state, by way of the religious educational system of Turkey imposes the Sunni Islam on existing religious diversity and does not respect the parental choices on religious education. Claims are either that the state should be neutral, or should include religious diversity into the lessons. However, the scope of both violations of the human right to religious freedom appears to be felt differently among Alevis. My research is conducted using two methods: desk research and fieldwork. The legal documents of international human rights law and Turkey's domestic legal regulations disclose the legal bases of Alevis human rights violation allegations, confirmed by the European Court of Human Rights. On the other hand, the interviews and case studies held in three regions of Turkey facilitated understanding the varieties of Alevis experiences. The research shows that the challenges and human rights violation claims of Alevis are experienced differently depending on the region. The research also shows and tries to explain the gap between Alevis matters at the State level while Alevi-Sunni relations at local levels in common events and daily life do not always experience much tension.

Keywords: *Alevis, Turkey, Human Rights*

1. Introduction

Alevism has been debated among many scholars and Alevis for several years. While some understand Alevism as a part of Islam with their diverse understanding some evaluated Alevism as being outside Islam. The concept of Alevism goes back to the Turkmen's as Irène Mélikoff, a well-known scholar on Turkology, mentioned in her '*Hacı Bektaş Efsaneden Gerçeğe*'. She draws upon the interaction of Shamanism and Islam to explain the Alevism's roots. Cem Şener, another expert, has written in his book *Alevism and Questions* that:

'In Islam, after the Prophet Muhammad went to Heaven various religious interpretations have come about. These interpretations, in around the year of 800 in especially the period of Abbasid, religious denominations and tariqats came about, and these are mentioned as the name of various religious functionaries. Alevism is an original interpretation of Islam that defends the uniqueness of God, being Prophet Muhammad and being holy of Caliph Ali. It's very different from Sunni's interpretation.'¹

There are several diversifications on defining Alevism within the historical retro. However as I defined in my article on Alevi Identity, Alevism can be 'designated as broadly as possible as a socio-cultural and spiritual belief system that is inherently syncretistic.'² No matter how Alevism is defined the reality is that Alevis differ from the Sunni Islam belief system in Turkey. In general without enlarging the religious debates of Alevis it shall bear in mind that Alevis' worshipping is distinct from that of the Sunnis. Mainly Alevis pray with the 'cem' that can evaluate as the circle namaz at cem house. Earlier in the history of Alevis, such an establishment as cem house was not relevant because they used to pray in one of the attendees' house. Alevis reject some set of rituals and believe that 'the complete set of Namaz, Ramadan fast was integrated to Islam in the era of Emevis.'³ The differentiation of Alevis brings the allegations of being discriminated in the State. The discrimination and difficulties that Alevis have suffered concentrate on basically two matters: the places of worship and the Sunni character of the religious education dictated by the State. The discrimination allegations of Alevis focus on these two matters. The effectual way to understand how these two problems matter is to observe Alevis in their daily life from a bottom-up perspective. This could only be done through observatory (ethnographic- anthropological) research method. In the three regions of Turkey with observatory research method I endeavored to comprehend the difficulties of Alevis.

2. What is the Matter of Alevis?

As Alevis are praying with the ceremony called cem at cem houses the Turkish governments have never accepted the community as one of the religious minorities in Turkey or one of the religious communities. In many reports of the European Union (EU) the Commission mentioned that the Alevi community is facing with discrimination and still have problems with enjoying the fundamental human rights and freedom. The EU

¹ Cemal Şener, *Alevism with Questions* (1st, Pozitif, İstanbul 2009) 15.

² Melih Uğraş Erol, 'Remaining Loyal Despite their Diversity: The Diversifying Identity of the Alevi- Bektashi Community and Their Continuing Loyalty to the Republic of Turkey ' [2012] *International Review of Turkish Studies* 44.

³ *Supra note* 1, 25.

mentions in its progress reports periodically that ‘a legal framework in line with the ECHR has to be established, so that ... the Alevis community can function without undue constraints’.⁴ From the perspective of human rights in the 2013 progress report EU declared that:

No concrete steps have been taken to follow up the opening in relations with the Alevis community in 2009. Cem houses were not officially recognized as places of worship and Alevis experienced difficulties in establishing new places of worship. The Turkish Presidency of Religious Affairs (Diyanet) took the view that mosques are the only place of worship in Islam. Alevis groups have been critical about the information on Alevis in the revised religious culture and ethics textbooks. Alevis’ perception is that they are discriminated against, including in the civil service and the education system.⁵

As from the guidance of the EU reports it can be elaborated that the Alevis community’s places of worship, the cem houses, are not accepted by the State. Cem houses do not receive funding from the State budget like the mosques do. The problem gets more serious as Alevis’ taxes partially go to fund the mosques where only the Sunni belief is practiced. The Turkish Presidency of Religious Affairs does not accept Cem houses as being the place of worship. The Presidency declared that Alevism is an interpretation of Islam. Only mosques are the communal places of worship for the follower of Islam, so accepting and funding the cem houses as a place of worship is impossible. The other problem of Alevis is about the compulsory religious culture and ethics lessons. Alevis citizens claim that these lectures discriminate against the Alevis citizens with making them attend the lectures without the exemption option. The content of the lectures are claimed to impose Sunni belief on Alevis children. An Alevis family had taken the decision from the European Court of Human Rights (ECtHR) related with the religious culture and ethics lectures in Turkey. In the decision of the Court it had been held that the current lectures are violating the European Convention on Human Right (ECHR). The case had started with an Alevis family’s application to the school to make their daughter exempted from the lecture. With all of the rejections that came from the State authorities and domestic courts the family applied to the ECtHR. At the end of the case the Court declared that ‘the Court considers that the exemption procedure is not an appropriate method and does not provide sufficient protection to those parents who could legitimately consider that the subject taught is likely to give rise in their children to a conflict of allegiance between the school and their own values.’⁶ At the end of the case the Court found that the lectures are not conducted in an objective, critical or pluralist manner and held that there has been a violation of Article 2 of Protocol No. 1. Further to the places of worship debate Alevis had taken further step for the religious lectures matter. When the lectures textbooks are analyzed it can be found that the lectures are more on the center of Sunni Hanefi sect of Islam. However following the case in ECtHR Alevism related issues have been introduced to the religious culture and ethics lessons. But has the issue ended for Alevis? No. They allege that no one has consulted with any of the Alevis organizations while preparing the new religious education textbooks where Alevism was introduced. Alevis doubt the objectivity and sufficiency of the information given on their belief system in these textbooks. Alevis are asking whether a few pages (not more than 30) in thousands of pages for a lecture that is being thought for 12 years are sufficient to solve the matter.

⁴ Turkey Progress Report (EC) SEC(2009)1334 [2009] 22.

⁵ *Ibid.*, 55.

⁶ *Hasan and Eylem Zengin v. Turkey* [2007] para.76 (European Court of Human Rights).

As the matters of Alevis are still persisting there have been some initiatives to solve and debate the problems of Alevis. With the name of 'Alevi Opening' many issues about Alevis' problems has been debated including topics such as discrimination, religious education and cem houses. Since 2009 a series of meetings has been held however the only result achieved was to agree that Alevis have problems and no further step has ever been taken since then. In research I conducted to understand what Alevis experience in daily life I followed a method of case study. Visiting several locations of Turkey facilitated the research to find out in what perspective had the human rights law violation allegations reflected in the lives of Alevis. The results of the fieldwork in provinces I visited revealed that all respondents have some difficulties in common. This paper will show the data and evaluations gained through the fieldwork.

3. Case Studies on Alevis in Turkey

The size of Turkey's Alevi population is not exactly known, however they are clearly in a minority position when compared with Sunnis. This religious minority group, regardless of, spread to lots many cities and district of contemporary Turkey. The Alevi population migrated to the urban area such as Istanbul, Ankara and Izmir beginning from the 1960s. So, while the hinterland of Alevism is still rural areas and villages, presently there are many Alevis residing in urban areas. The urbanization practice of Alevis resulted in their dispersion all over Turkey, and even to Europe. When mapping the Alevi population, it should be considered that the information couldn't be precise or detailed. Incidentally, some zones of Turkey host many groups of Alevis. Excluding the cities of Istanbul, Ankara and Izmir, the districts where Alevis predominantly inhabit are Amasya, Tokat, Çorum, Yozgat and Sivas, in the central and southern parts of Turkey.⁷ In the southeastern parts of the Republic, Alevis reside commonly at Kahramanmaraş, Malatya, Gaziantep and Hatay, while in the western region there are Alevi populations in the Aydın, Izmir, Çanakkale and Balıkesir districts. When the population distribution is evaluated ethnographically, groups identified as Kurdish or Zaza speaking Alevis, are most often found in the southern and eastern parts of Turkey, around the city Tunceli.

Beside the numerous Alevi populated districts, the case studies in this research concentrate on the Black Sea, Central Anatolia and Aegean regions. Several cities and areas subjected to the research as; Amasya, Merzifon Municipality, Oymak village and Yassıkalı village; Tokat, Taşçıiftlik village; Yozgat, Bahadın Municipality; Nevşehir, Iliceek village, Izmir, Yakapınar village and Hamza Baba village, and Aydın, Kızılcapınar village. While determining the location of the case studies, specific facts were considered. One of the most important was the customary and population dynamics. The common characteristic of the population in these regions is Anatolian Alevism. In these zones, people are striving to simultaneously maintain Turkish and Alevi customs and cultures. In addition to demographical history some of these places have mystical and religious symbolism for Alevis, which has influenced the process of selection of the locations of the case studies. Sacred places and tombs of holy persons for Alevis are located at Hacı Bektaş Veli in Nevşehir, Hamza Baba in Izmir, Hamdullah Çelebi and Baba İlyas Horasani in Amasya (with many other tombs). To avoid issues of ethnicity, areas in which Alevi identity overlaps with other identities, i.e. Kurdishness, the area in the South-East of Turkey have not been considered for case studies in this research, in spite of the high

⁷ David Shankland, 'Maps and the Alevis: On the Ethnography of Heterodox Islamic Group' [2010] British Journal of Middle Eastern Studies.

destiny of Alevis in these areas. Studying Alevism and human rights in the selected districts avoided incorporating ethnicity discussions related to the Kurdish problem. The human rights position of Alevis can be determined more accurately by focusing on the Alevi identity, free from any ethnical perspective.

3.1 Black Sea Region, Amasya

Amasya, located in northern Turkey, had a population of 323.079, in 2011. The Alevi-Bektashis' in Amasya hold to their convictions and traditions as far as possible. Bektashi baba's and holy personalities used to live in Amasya, emphasizing the historical consequence of Amasya for the Alevi-Bektashis. There are numerous sacred places, such as tombs of dervishes. For example, Hamdullah Çelebi, one of the leaders of Bektashis, was exiled to Amasya province in 1827 by the Ottoman Sultan Mahmut the Second, and is buried in a tomb constructed there in 1847. People believe that there are almost 100 sacred tombs and graves in the area. Alevis, with their ancient name Kızılbaş, are mainly located in the city centre, Merzifon, Gümüşhacıköy, Uygur, Göndez, Yağcıabdal, and Hasabdal districts. The proportion of Alevi majority villages in the region is approximately 30%.

Province	Total Village	Alevi Village
Amasya Centre	98	34
Göynücek	38	16
Gümüşhacıköy	44	25
Hamzaönü	17	10
Merzifon	69	20
Suluova	39	2
Taşova	47	0
Total	352	107

Statistics of Amasya Branch Office of the Cem Foundation.

According to the statistics, in the central eastern part of Turkey the Alevi population remain high, especially at Amasya and Tokat provinces. The selected case study city of Amasya, conducted both in the city of Amasya and its surrounding towns: Merzifon, Yassıçal and Oymak (Kreymir) village. Those interviewed were high profile Alevi citizens, including, association leaders, activists, dede's, an imam and an Alevi researcher-writer. The objective of the case study in Amasya is to analyse the human rights and freedoms conditions of Alevi-Bektashis in the city; one of the most heavily Alevi populated region of Anatolia. People in Amasya region may avoid discussing the situation on Alevi rights and freedoms in the province, due to being marginalized in the society. Literate and intellectual people were even occasionally apprehensive about discussing Alevi human rights and freedoms, stating only that 'we must live, subsist, satisfy our families necessities.' People in the city of Amasya generally lack self-assurance, however, villagers are less reserved on the subject of Alevism and human rights. As they indicated, people in urban area face greater pressure from authority, the State. Despite this reluctance, some Alevi-Bektashis gave detailed descriptions of violations of their human rights and freedoms in the region. One of the most significant association in Amasya that focus on Alevism is the Hamdullah Çelebi Association. These associations' point of views, as the definition of Alevism, can differ however the unity among these organizations occurs in Amasya.

Hamdullah Çelebi, Mehmet Hamdi, was born at Hacıbektaş, 1767, and the Bektāşi lodge in 1824. The abolishment of Janissary and closure of lodges followed the trial before a special court of Hamdullah Çelebi and his 8 fellows because of their belief system administered by the Sultan II. Mahmut.⁸ The court adjudicated Hamdullah Çelebi and the rest to capital punishment. Sultan II. Mahmut committed the death penalty to exile; Hamdullah Çelebi was exiled to Merzifon and then Amasya.⁹ Hamdullah Çelebi passed away in 1836, and he was buried at the place still marked today by his tomb in Amasya.

The Hamdullah Çelebi Association was founded in 2005 and initiated the first cem house of Amasya. In 2010, the construction of the cem house commenced, and in 1.5 years cem house's construction accomplished with the donations from both Alevi and Sunni citizens, even from congregations that hold contrary ideologies. The municipality have supported the construction, providing metal and cement, while citizens and adherents of Alevism contributed to the rest of the construction. The State support was only municipality's metal and cement, and a dede voiced his indignation by stating 'the State do not see us as its citizens ... the cem house is constructed by ordinary citizens.' The construction's plan constitutes a large hall to perform cem ceremonies, office rooms, a dinning hall in the ground floor, kitchen, storage, study rooms, and a morgue and a place for the funeral ceremonies. The total cost of cem house was approximately 400.000 TL. The construction has substantial debts to pay, but Mr. Ahmet Çelebi, the president of the Hamdullah Çelebi Association, feels optimistic and still rejects State participation to the construction. Mr. Çelebi was enthusiastic about worshipping in the first cem house in Amasya in winter 2012. People around could not perform cem ceremonies for two years, and earlier prayers were conducted in private houses. Mr. Çelebi recounted the collisions, conflicts, complications experienced during the construction, and that economic woes of the construction centred on labour cost, heating and natural gas systems. Voluntaries will work for a while before they became paid workers. Mr. Çelebi, the manager of the construction, articulated their desire to be exempted from electricity and water bills, as the mosques are. The municipality gave a few materials for the construction, though the State assimilatory policy and applications continues, as making mosques to Alevi villages. Mr. Çelebi cited the case of Gönöz village and Yassıçal province, where mosques are constructed. A dede from Yassıçal district asserts that 1/3 of the area is to be Sunni with in 15-20 years. Mr Çelebi and the dede from Yassıçal are considering the prospects of Alevism. They demonstrate that in near future, if no one performs in the near future the institution of dede, the future of Alevism will be in danger. For Mr. Çelebi, an activist, assimilation and tacit compulsion on Alevis is conducted by the State institution, such as in schools. State neutralization of their religion is espoused among the Alevis in the association. Alevi citizens reside in the neighbourhood harmoniously together with Sunnis, however, also here at the Alevi district, people grouse on the system and governance. They instance the school's conversion to a vocational religious high school with the new education system of 2012, in a district where most Alevi children used to attend the school. Mr. Çelebi regards this application as intentional due to the sensitive location of the school.

As in the Cem Foundation, people here, in the other part of the city, are apprehensive about the future of Alevism. Mr. Çelebi reminisces that 'earlier, there were a few people

⁸ İsmail Özmen, *Hamdullah Çelebi'nin Savunması* (1st, Belen, Ankara 2007).

⁹ *Ibid.*

going to courts, problems were solved in cem ceremonies, unlike today.' So, Alevis convictions about their belief system are dwindling, and assimilation attempts impair their faithfulness to traditions. Hereupon the subject of assimilation and construction mosques to Alevi villages, Mr. Çelebi and other people narrated the history of mosque of Uygur village, a 200 years old mosque. A dede in Uygur used to perform both dede's and imam's duties on an unpaid basis prior the State appointment of an imam. The imam respects Alevis and villagers' traditions, as in funeral ceremonies namaz. The association constructed a new mosque in Uygur, and applied to the mufti office to open a mosque with a cem house under it. The response was that the mosque should be constructed first. Mr. Çelebi therefore thwarted the mosque's construction.

Mr. Çelebi contemplates the solutions to the problem of accepting cem house's as places of worship, and religious leaders' inculcation of a sense of clemency. Mr. Çelebi considers that after Emevi's governance, people began to pray in their homes so not accepting cem house's as places of worship is unjustified, since, cem house's origin is the Prophet Muhammad. For Mr. Çelebi, president of the first Foundation which constructed to first cem house in Amasya, the past ceremonies and cem are collective facts, and amongst all the confusion and misinformation, he suggests the possibility that mosques could be assigned for cem ceremonies on Thursday evenings.

Hamdullah Çelebi's cemetery abutted the cem house. To restore Hamdullah Çelebi's grave, the association invoked the Directorate of Foundations, and meeting with no response, the association decided to restore it by their own means. The institution declared that the plans had been drawn up inaccurately and refused permission. The association provided a revised plan to the Directorate, and awaits a decision.

3.2. Central Anatolia Region, Bahadın Township

The Bahadın municipality located at the city Yozgat between the cities Tokat and Nevşehir, and with 2580 inhabitants, it is one of the ancient Alevi settlements in the province. Bahadın was acknowledged as municipality in 1968 and the Bahadın Municipality, Culture and Solidarity Association has been established in Berlin, Den Haag and Ankara. Every year, a cultural festival was organized in the district (the 17th at August 2013). The Municipality of Bahadın, in cooperation with Ankara University, was been awarded 148.000 Euro from the European Commission for the project 'Bahadın'da, Working Women's Project.' 110 women from the district were trained in organic viticulture and winemaking. People of Bahadın strongly oppose the ruling party, and the main opposition party governs the municipality. The municipality claims it is not being granted necessary support because it opposes the government and claims that the State authorities' intentionally ignore the municipalities' requests. Mr. Haydar, one of the administrators of the Municipality and an activist Alevi, alleges discrimination on these bases. The Municipality's funds remain deficient so the Bahadın Culture Association's donations have an influence on the Municipality. Migrations from Bahadın (to Europe and Ankara) increase the amount of donations. As one of the young immigrants Mr. Özcan, who lives at Germany, states once people in Bahadın reach their teenage years, immigration begins.

A cem house built, in memory of Eyüp Aktürk who died in a fire accident, by his family living in Germany at 2007. The family met all of the expenses of the construction. A mosque as well exists in Bahadın, which no one (not even the elders) knows when it was

built. People suggest the mosque used to be a madrasah and small mosque before the foundation of the Turkey. The restoration of the mosque was accomplished in 1953. Only few people from Bahadın attend namaz at Fridays, and at other special days, religious festivals, Bayram. The mosque's water and electricity are exempted from charge, due to its statues. In contrast the electricity bill of the cem house is paid by the support of the congregation. The Municipality favours the cem house by not charging for the water cost. Elders complain that cem ceremonies could not be performed for many years because of dedes' corruption. Dedes' financial concerns become more important than their religiosity. An elderly resident of Bahadın remember the years, approximately 20 years ago, when, in every street, villagers used to perform cem. For him, due to the lack of enthusiasm for Alevism, and the role of migration people do not pray as in the past. Nowadays people commonly only make their effort to perform the cem ceremony once a year in Bahadın.

The school of the Municipality reveal the rate of literacy in Bahadın. As in each school in Turkey, compulsory religious lessons are taught in Bahadın. Mr. Haydar remarks that the lessons have an impact on the children's belief systems, creating a conflict between the knowledge conveyed by the school and by the family. From Mr. Haydar's perspective, the Alevism taught in the textbooks is more Islamic, compared to Anatolian Alevism, which is a more lifestyle and culture. Mr. Haydar emphasises out that people of Bahadın struggle against the assimilation policy in the schools by tutoring their children in Alevism at home. Concerns over assimilation in the schools have escalated with the new education system's elective courses on Prophet Mohammed's life and the Quran. The perceived threat is that elective lessons may contradict Alevi's culture and belief system.

The pessimist judgments on the upcoming of Alevism are being expressed in the Bahadın district. Mr. Haydar mentions (and the others approve) the general idea, which is that 'struggling will be perplexing... not aimed to develop Alevism, but only defend it.' An elder in Bahadın (from the group that rests near the cem house) chided gently 'we are like orphans ... although you, I all of us support the Islamic testimony of faith, we are still being discriminated against.' The elders commonly consider Alevis face discrimination by the State. People of Bahadın emphasize, however, the assimilation policies would not succeed in their organized community, they emphasize that the State shall not coerce or pressurize Alevis.

4. Conclusion

As can be witnessed from the case studies there are complications that Alevis facing in diverse provinces of the country. In Amasya while Alevi citizens construct their own cem house with their own means, in Bahadın Municipality both local residents and people of Bahadın living abroad supported their township. The centre complications of Alevis seem to be with the State's policies and implementations. Not being recognized as a religious community, not sharing the tax that they pay for their places of worship, facing with religious education that aims to assimilate Alevis are the centre of the problems. Alevi and Sunni citizens do not face with serious complications in their proper life the matter arises due to the applications of the State. The only solution for Alevi problems appears as to be changing the State's politics towards the Alevi citizens. Alevis demand to be accepted as one of the religious communities in the country and live as equal citizens. Acceptance of cem houses as places of worship and providing them with financial and lawful protection, demolishing the religious education lessons' compulsory character or

making the lessons completely objective are the only solutions that the community put forward.

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Emina Begić

*European Regional Master's Degree in
Democracy and Human Rights in South
East Europe, University of Sarajevo and University
of Bologna, Bosnia and Herzegovina*

Reducing social exclusion and marginalization of Roma children through education: Comparison of Bosnia and Herzegovina and Serbia

Abstract

The main goal of this paper is to analyse the current situation of educational provisions for the Roma minority in Bosnia and Herzegovina and Serbia within the framework of the *Decade of the Roma Inclusion* initiative. The discrimination toward Roma has historical roots. Prejudice and stereotypes perpetrate the cycle of social exclusion, marginalization and discrimination. This paper is relevant because the effects of long-term marginalization of Roma people and children are obvious in all spheres of their life. Since *Decade of Roma Inclusion* initiative was launched in 2005 situation regard position of Roma within a democratic society is improving. The paper is divided into four chapters. The first chapter will provide the theoretical framework of my study, with specific focus on social and political context of Roma marginalization. The second and third chapters are devoted to the analysis of the legal framework and its implementation in B&H and Serbia respectively. In the fourth chapter, the comparison is elaborated. The focus of paper is devoted to *Decade of the Roma inclusion* because it has an aim to enhance Roma children education. Every child has a right to formal education. A very high number of Roma children do not attend primary school and that is indicator of social marginalization of Roma children. In the research process, I have concluded that the situation of Roma children and education in B&H and Serbia is improved because they became a part of initiative and implemented action plans. In addition, Serbia has accomplished more in comparison to B&H. The positive fact is that both countries do not place Roma children in „special schools. “The education is a tool to fight over discrimination and prejudice. Also, it gives a meaning to life. The education reduces poverty and improves access to health and medical protection. There should not be any kind of educational segregation. The Roma children should not be a part of exclusive education. *Decade of Roma Inclusion* is working to ensure the quality of mainstream education. Each member country of this initiative is trying to work with governments in order to make a national action plans and to provide a chance to education for Roma children. The obvious changes in educational systems across world: schools that will accept all and thereby enhance development of each child are possible. But first of all we need to have a education for human rights, about the human rights and through the human rights. To respect difference and to be proud of multiculturalism has to be our goals-goals of democratic societies and its citizens.

Keywords: Roma children, education, *Decade of the Roma Inclusion*, Bosnia and Herzegovina, Serbia

Introduction

The main goal of this paper is to analyse the current situation of educational provisions for the Roma minority in Bosnia and Herzegovina and Serbia within the framework of the *Decade of the Roma Inclusion* initiative. Discrimination toward Roma people is not a recent subject of public interest. Prejudice and stereotypes perpetrate the cycle of social exclusion, marginalization and discrimination. The focus of this paper will be devoted to Roma Inclusion because it has an aim to enhance Roma children education.

This topic has an enormous relevance because it has an aim to explain problem that has taken a serious development and cause a violation of children's rights. Every child has a right to formal education. A very high number of Roma children do not attend primary school and that is indicator of social marginalization of Roma population, especially children. Every child is born with equal right to normal development, freedom, education, protection and should not be exposed to any form of abuse or violence.¹ Furthermore, every child has a right to education and primary level education is compulsory.²

According to the World Bank, educational enrolment in Central and South East Europe (CSEE) among primary-school age Roma children is on average a quarter of the corresponding rate for non-Roma children.³ In South-Eastern Europe, gaps in enrolment are the greatest in Albania, Bosnia and Herzegovina and Montenegro, ranging from 45 to 50 per cent. Some 20 per cent of Roma children in Bulgaria and 33 per cent in Serbia never go to school (Ivanov,2006).⁴ In Slovakia, Roma children are 18 times more likely than non-Roma to not finish eighth grades in eight years, and in Hungary, 80 per cent take longer than eight years to complete primary education. Of those with less than eight grade levels, nearly all are entirely or functionally illiterate.⁵

Roma education gaps also have an important gender dimension. The primary school enrolment rate for Roma girls is just 64 per cent, compared to 96 per cent for girls in non-Roma communities in close proximity to Roma who face similar socio-economic conditions.⁶ Many Roma children in South East Europe learn in ethnically segregated school and classes. Segregated schools have more overcrowding and poorer facilities (Unicef, 2007).⁷

The main argument has to explain to which extent the phenomenon marginalization of Roma children in terms of education is present in B&H and Serbia. My claim is that there is better situation in Serbia in comparison to B&H regard Roma children education.

¹ World Bank report

² Convention of a Right of child,Unicef

³ World Bank report

⁴ Andrey Ivanov, A.I. (2006) ' At Risk:Roma and the displaced in SEE ',UNDP Regional Bureau for Europe

⁵ Barany Z. (2002) ' The East European Gypsies: Regime change, marginality and ethno-politics ' Cambridge University Press, Cambridge, p. 170

⁶ Niall O'Higgins,N.H., Andrey Ivanov, A.I. (2006.) ' Education and employment opportunities for the Roma ' ,Comparative Economic Studies

⁷ 'Breaking the cycle of exclusion,Roma children in SEE ' (2007) , Unicef

The paper will be divided into four parts. The first chapter will provide the theoretical framework of my study, with specific focus on social and political context of Roma marginalization. The second and third chapter will be devoted to the analysis of the legal framework and its implementation in B&H and Serbia respectively. In the fourth chapter I will draw the comparison between the two countries taken into examination.

1. Social and political context of Roma population in Europe

8-10 million of Roma people, out of 12 million world-wide, live in Europe, and as such represent the continents biggest minority. In some countries, such as Bulgaria and Romania, they amount to as much as 12 percent of the total population.⁸ Roma population throughout Europe experience discrimination based on their race, ethnicity, culture and many another characteristics that distinguish them from other ethnic groups. Roma communities are stigmatized and marginalized. The poverty and low-socio-economic status are considered to be main contributors to the higher levels of marginalization of Roma population and communities. Furthermore, the problem of segregation of a Roma population, especially children, is a wide-spread phenomenon. Approximately three million Roma children in schools across EU are discriminated and fighting Roma exclusion is one of the most pressing political, social and human rights issues that need to be tackled.⁹ Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized children can lift themselves out of poverty and obtain the means to participate fully in their communities.¹⁰

In many countries including Slovakia, Hungary and Germany exclusion from education is present since primary school. In Romania, Roma children are nearly always educated in more poorly resourced schools than non-Roma children; they are nearly always educated by less-qualified teachers; they are often treated differently and worse than non-Roma children by their principles, teachers, and classmates.¹¹ The Czech Republic experiences severe problems with segregation of Roma children in „special classrooms“, where children are not receiving a proper quality of knowledge.¹²

This phenomenon has to be tackled in order to meet democratic requirements of inclusion and avoid what has been dubbed as “democratic deficit”. According to the EU Framework for National Roma Integration Strategies up to 2020, many of the estimated Roma in

⁸ National geographic chanel documentary
<http://channel.nationalgeographic.com/channel/american-gypsies/articles/a-history-of-the-romani-people/> (viewed 21.2.2014)

⁹ Lila Farkas , L.F (2007) ‘ *Segregation of Roma children in education*’

¹⁰ United Nations Economic and Social Council, *The right to education* (Art 13)

¹¹ Aram A. Schvey, A.A.S., Martin S .Flaherty, M.S.F. and Tracy E.Higgins, T.E.H. (2005)
‘ The children left behind :Roma access to education in contemporary Romania’ Fordham
International Law Journal

¹² Jana Straková, J.S., Jaroslava Simonová J.S. and Pavla Polechová ,P.P.(2011) ‘
Overcoming school failure. Background report for the Czech Republic’ Institute for
Information on Education

Europe face prejudice, intolerance, discrimination and social exclusion in their daily lives. They are marginalised and live in very poor socio-economic conditions (Guazzo).¹³

„The level of participation of the Roma in the “democratic life of the Union” varies from country to country, but it is on average far lower than the level of participation of other minorities“.¹⁴ The EU Framework encouraged Member states to ensure that all Roma children complete at least primary school.¹⁵ With a view to combating discrimination and adopting relevant measures, the EU Framework stated that Member states should ensure that all Roma children have access to quality education and are not subject to discrimination or segregation.¹⁶

Research and monitoring carried out by the European Roma Rights Centre shows that segregation of Roma children into separate and/or substandard education continues to be the most widespread violation with respect to the right to education.¹⁷ To reduce the spreading of democratic defects in terms of Roma children education means actual implementation of laws. Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights set out detailed formulations of the right to education. Article 13 contains a general statement that everyone has the right to education and that education should contribute to the full development of the human personality. It also specifically claims that primary education shall be compulsory and available free to all.¹⁸

Research shows that Roma children account for a large proportion of children not enrolled in primary school (Unicef,2007).¹⁹ Many Roma children in SEE learn in ethnically segregated schools (Unicef,2007).²⁰ The segregated schools are poorly resourced with shortage of equipment and less skilled and motivated teachers.²¹ The role of governments in terms of changing social position of Roma children is crucial. The awareness of government regard this phenomenon is improving because of “*Decade of Roma Inclusion*” initiative.

1.1 Roma in transition: Moving forward?

The period of transition from communism to democracy brought enormous changes. The position of Roma in the period of communism was better with regards to employment, education, housing and health. Geraldine Verspaget argues that nowadays situation of Roma people is changed. Roma people lack opportunities to work and to educate

¹³ Gabrielle Guazzo ‘Roma people participation in a civil democracy processes ‘Guidelines and report’

¹⁴ ibid

¹⁵ ibid

¹⁶ European Roma Rights Centre
http://www.errc.org/en-research-and-advocacy-roma-details.php?article_id=4238&page=8 (viewed 05.02.2014)

¹⁷ European Roma Rights Centre
http://www.errc.org/en-research-and-advocacy-roma-details.php?article_id=4238&page=8 (viewed 05.02.2014)

¹⁸ ibid

¹⁹ ‘Breaking the cycle of exclusion, Roma children in SEE’,2007,Unicef

²⁰ ‘Breaking the cycle of exclusion, Roma children in SEE’,2007, Unicef

²¹ ibid

themselves and their children. Their fundamental human rights are endangered. They also experience serious racist discriminations and attacks.²²

Within the communism the economy was organized and planned by the state. In such society, Roma people were able to find more jobs without having any special skills. The World Bank study from 1985 describes the following situation in Yugoslavia: 20% of Roma were employed in agricultural sector, 50% in industrial and 30% in other areas of employment.²³ The high employment level of Roma in many Communist countries did not mean social integration. Most often the Roma were employed as workers in factories, being restricted to the lowest positions. Serving as a “flexible and compliant reserve pool of unskilled workers”, their position was “akin to that of migrant workers in the West, needed for their labour but undesired as citizens.”²⁴

To conclude, the transition process itself seemed to be a sword with two blades. Roma people without possessing special skills were employed but were not socially integrated within a society. Nowadays, the situation can be considered more difficult. Many people who are not national minorities lack employment. Many educated people lack employment as well. The point is clear, despite the fact Roma being minority, lack of education is crucial factor for their unemployment. The cycle of violation of their rights to education has to be broken down.

There is no precise information how many Roma children attended educational institutions during the period of communism, since there is no official data regarding this issue. However, Roma students are characterized by poor school enrolment, high dropout rates, and limited participation in higher education. Furthermore, the Roma children are subject to many educational disadvantages such as less-qualified and often unmotivated teachers, fewer and less current textbooks, segregated classrooms, and the intolerance from parents of non-Roma children (Turcut, 2013).²⁵

It took some 15 years for post 1989 Europe to recognize that more efforts to effective Roma inclusion were needed and Roma Decade was launched. The new democratic system is trying to advocate Roma being recognized as an ethnic minority and cultural group. This democratic system should allow Roma moving from label known as “disadvantaged group”.

Nowadays, education is crucial for every person to develop his/her full potential. The free market economy requires different abilities from workers. The Roma should have a right be equally involved in process of education that leads to employment.

1.2 Addressing the Democratic Deficit: The Roma decade

²² Will Guy, W.G. (2001) ‘Between past and future: the Roma of Central and Eastern Europe’

²³ Elena Marushiakova, E.M., Vesselin Popov, V.P. State policies under communism. Council of Europe.

²⁴ Will Guy, W.G. (2001) ‘Between past and future: The Roma of Central and Eastern Europe’

²⁵ Alexandra Daniela Turcut, A.D.T. (2013) ‘Education-The Roma as marginalized minority in Romania’

The situation of Roma in society is changing and societies with their governments are taking important steps to include Roma people as equal members of society. An important initiative in this sense is the project known as *Decade of Roma inclusion 2005-2015*. The project has an aim to improve education, health, employment opportunities and housing within the Roma community in order to break the cycle of poverty and improve the socio-economic status of Roma people.

Decade of Roma inclusion has twelve state members: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Macedonia, Montenegro, Romania, Serbia, Slovakia and Spain. Slovenia and the United States have observer status.²⁶

Each member country has its own action plan how to integrate Roma people within democratic society. Every member country faces similar but still different challenges regard Roma people inclusion. Principle operational elements of the Decade are: National Action Plans, policy coordination, exchange of experiences, revision and demonstration of progress, participation of Roma and provision of information and expert support.²⁷ The four aspects that have to be improving while integrate Roma people within society are education, employment, health and housing.

In the following two chapters the analysis will focus on efforts or lack thereof made by Bosnia and Herzegovina and Serbia with regards to education of Roma children.

2. Bosnia and Herzegovina and Roma education

Roma are the largest national minority group in B&H and are the most socially, economically and politically marginalized group in the country.²⁸ In post-war B&H, Roma face a series of difficulties exercising the full range of fundamental human rights guaranteed under the B&H Constitution.²⁹ B&H became member of Roma Decade in 2008. B&H has to provide participation for Roma people in political sphere (government), solving problems regard education, employment, housing and health. Furthermore, the goal is to reduce stereotypes and prejudices.

The previous census in Bosnia and Herzegovina was in 1991 and only about 8.000 Roma declared them as Roma.³⁰ According to statistical data from 2006, there are 40-50.000 Roma people living in B&H (Unicef,2007).³¹ But Roma community in B&H raised their voices during census campaigns to declare themselves as Roma people. That is a huge improvement of their awareness regard socio-political participation in this country.

²⁶ Roma Decade Initiative

<http://www.romadecade.org/about-the-decade-decade-in-brief> (viewed 26.01.2014)

²⁷ Roma Decade Initiative

<http://www.romadecade.org/about-the-decade-decade-in-brief> (viewed 26.01.2014)

²⁸ OSCE <http://www.oscebih.org/default.aspx?id=53&lang=bs> (viewed 05.02.2014)

²⁹ OSCE <http://www.oscebih.org/default.aspx?id=53&lang=bs> (viewed 05.02.2014)

³⁰ Roma Decade, *B&H 2012 Progress Report*
http://www.romadecade.org/cms/upload/file/9276_file4_decade-progress-report-bh.pdf

³¹ Breaking the cycle of exclusion, Roma children in SEE, 2007, Unicef

In B&H educational setting, Roma children encounter a wide range of problems, including financial barriers, which further results with a low, almost insignificant attendance rate in primary schools nationwide.³²

Legal framework

According to the Framework Law on Primary and Secondary Education in B&H, every child has a right of access and equal possibility to participate in appropriate educational process, without discrimination on whatever grounds. Equal access and equal possibilities means ensuring equal conditions and opportunities for everyone, to start and further pursue education. Furthermore, the language and culture of any significant minority in B&H shall be respected and accommodated within the school to the greatest extent practicable, in accordance with the Framework Convention for Protection of National Minorities.³³

According to the Pledge 1 of the Education Reform Agenda, all children in B&H have to attend primary schools. In addition, educational institution have to make sure that all children who originate from national minorities must be included into this framework. This especially refers to Roma children. All children must be offered support in order to meet their need and that they are able to finalize their education successfully. Lastly, there is a need to draft an action plan that would include children who need financing with regard to textbooks and transportation.³⁴

The important authorities of B&H to implement laws and to improve situation of Roma are B&H Ministry for Human Rights and Refugees, B&H Ministry for Civil Affairs, Entity and Cantonal Ministries of Education, Entity and Cantonal Ministries of Social Welfare, Pedagogical Institutes, the Institute for Education and Municipal Authorities) to fulfil the mentioned legal and political commitments.³⁵

Implementation: The action plan

In 2010, B&H adopted revised action plan on Roma education. The results shown increase in enrolment of Roma children in education (primary, secondary and universities). The rate of drop out from education decreased.³⁶ According to data from 2011, 2.884 Roma children were enrolled to primary schools, 216 to secondary education

³² Human Rights Watch, 2012, *BiH: Roma, Jews Face Political Discrimination*

³³ Roma Decade Initiative
http://www.romadecade.org/cms/upload/file/9296_file3_action-plan-on-the-educational-needs-of-roma-and-members-of-other-national-minorities.pdf (viewed 10.2.2014)

³⁴ Roma Decade Initiative
http://www.romadecade.org/cms/upload/file/9296_file3_action-plan-on-the-educational-needs-of-roma-and-members-of-other-national-minorities.pdf (viewed 23.01.2014)

³⁵ Roma Decade, *B&H 2012 Progress Report*
http://www.romadecade.org/cms/upload/file/9276_file4_decade-progress-report-bh.pdf (viewed 23.01.2014)

³⁶ Roma Decade, *B&H 2012 Progress Report*
http://www.romadecade.org/cms/upload/file/9276_file4_decade-progress-report-bh.pdf (viewed 23.01.2014)

and 17 Roma students attended universities. In B&H, there are no segregated "Roma" pre-schools, primary or other schools.³⁷

Roma children do not attend special schools/classes in unless their health situation requires such education. In total, 65 Roma children attended special schools in 2011 (33 of them in Mostar and 27 in Sarajevo), due to their health problems.³⁸ In 2011, only 47 or 1,6% Roma children abandoned primary education. In relation to previous years it was considered as progress after adoption of the revised Action Plan. 43 Roma children left secondary schools and drop rate was 2,37%, what also can be considered as progress in comparison with previous years.³⁹ The statistical data for 2012, 2013 and 2014 are not published yet.⁴⁰

3. Serbia and Roma education

In October 2011, national census was held in Serbia. The total number of Serbian citizens declaring themselves as Roma amounts to 147 604, i.e. 2.05% of the total population, while according to the 2002 census, the number of Roma in Serbia was 108 193 (1.44% of the total population)⁴¹. The situation is improving because of active role of country in „Decade of Roma Inclusion 2005-2015.”⁴² Serbia was one of the state founders of Roma Decade.⁴³

Poverty and education are interconnected and influence each other. Because of high rate of poverty, many Roma children drop out from school before they are able to finish their elementary education. That is the case if they attend school at all. For example in Serbia, Roma children are getting assigned to the separate schools for children with disabilities and for kids with special needs even though there is not a single evidence of handicap.⁴⁴

Legal framework

The Law on Elementary Education claim that elementary education compulsory national minorities have the right to education in their native language, on all levels.⁴⁵ Law on the Foundations of the Education System in 2009 and the introduction of inclusive education claims that all children have to be enrolled to formal elementary schools.⁴⁶ Serbia is

³⁷ Roma Decade, *B&H 2012 Progress Report*

http://www.romadecade.org/cms/upload/file/9276_file4_decade-progress-report-bh.pdf
(viewed 23.01.2014)

³⁸ ibid

³⁹ ibid

⁴⁰ ibid

⁴¹ Roma Decade Initiative www.romadecade.org

⁴² Roma Decade, *Serbia 2012 Progress Report*
http://www.romadecade.org/cms/upload/file/9276_file8_progress-report-rs.pdf (viewed 25.01.2014)

⁴³ <http://www.emins.org/sr/publikacije/evropa-plus/arhiva/serija3/1011/index.html>

⁴⁴ Ibid.2

⁴⁵ Publication Ministry of Education and Science, Serbia.

⁴⁶ Roma Decade, *Serbia 2012 Progress Report*
http://www.romadecade.org/cms/upload/file/9276_file8_progress-report-rs.pdf
24.01.2014)

state party to all the most relevant International Human Rights Instruments for the protection of the Right to Education. Those instruments are Universal Declaration of Human Rights, International Covenant on Economic Social and Cultural Rights Convention on the Rights of the Child and UNESCO Convention against Discrimination in Education.

According to Universal Declaration of Human Rights and ICESCR everyone has a right to education. Education shall be free and elementary education is compulsory. Education shall protect human rights and fundamental freedoms. According to Convention on the Rights of Child education is necessary to promote development of a child. **UNESCO Convention against Discrimination in Education** claims following the term "discrimination" includes any exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education.⁴⁷

Implementation: The action plan

The Strategy for Education up to year 2020 has been developed and adopted. The development of action plans for all levels of education is in progress. The government is preparing to adopt laws that apply to Roma inclusion: the Law on Primary Education, Law on Secondary Education and Law on Adult Education.⁴⁸ Serbia involves many organizations to support Roma children education: UNICEF, the Fund for Open society and Centre for Interactive Pedagogy. In cooperation with the UNICEF, a project is underway to extend the possibilities for free preschool education for children 4 to 5.5 years old in order to prepare Roma children for preschool.⁴⁹

Ministry of Education, Science and Technology Development provides free textbooks from grades I to IV for all elementary school students. All Roma children enrolled in schools for children with special needs without a decision by an Inter-departmental commission are included in regular classes of primary school.⁵⁰ Regarding special school and Roma children education, the Ministry of Education has sent all special schools a recommendation to make an achievement/performance plan of Roma children so to enable the children to enrol to formal secondary schools.⁵¹

⁴⁷ Unesco report <http://www.unescobkk.org/education/right-to-education/rights-based-approach-to-education/right-to-education-in-international-instruments/> (viewed 20.01.2014)

⁴⁸ Roma Decade, *Serbia 2012 Progress Report*, http://www.romadecade.org/cms/upload/file/9276_file8_progress-report-rs.pdf (viewed 25.01.2014)

⁴⁹ *ibid*

⁵⁰ Roma Decade, *Serbia 2012 Progress Report*, http://www.romadecade.org/cms/upload/file/9276_file8_progress-report-rs.pdf (viewed 25.01.2014)

⁵¹ Roma Decade, *Serbia 2011 Progress Report*, http://www.romadecade.org/cms/upload/file/9300_file10_serbia_decade-progress_report_2011-f.pdf (viewed 25.01.2014)

The subject-matter Roma Language with Elements of Roma Ethnic Culture has been introduced into primary schools.⁵² The Career Orientation project from elementary to high-school is introduced to prepare students for future jobs. Important initiative are intercultural activities to decrease prejudice.⁵³ "School without Violence", is one of the initiatives to stop discrimination and violence and to encourage positive educational settings.⁵⁴

The data show a significant improvement in the situation among the Roma population in relation to the rate of elementary school attendance in the past 5 years (the rate has increased from 74% to 88%). There is no correct and precise data on children dropping out of mandatory schools. The Draft Education Strategy (to be implemented by 2020) states that taking into consideration the national average, the situation seems to have improved over the last five years.⁵⁵

A number of different resources have been introduced into the primary and secondary education (pedagogical assistants, individualized education plans, tutoring, extracurricular activities, other inclusive measures).⁵⁶

Comparison

In both countries, there are no special and segregated classrooms. Roma children are enrolled in schools for children with disabilities and special needs only if there are evident signs of psycho-motor disturbances (problem with psycho-physical development).

In Serbia, there is important free initiative for pre-school preparation in order to ease Roma children involvement in future education. In B&H, so far, this initiative is not present. In Serbia, Ministry of Education, Science and Technology Development is offering a free text-books for the lowest grades of elementary school. In B&H, there are no written evidences for this project in encouragement of Roma children education.

In Serbia, there are programmes to reduce violence in schools and discrimination for Roma children and to foster positive educational environment. Similarly, the Career Orientation programme is introduced to help children choose their future jobs. Furthermore, the subject Roma Language with Elements of Roma Ethnic Culture has been introduced into primary schools. Similar initiatives were not written in progress reports for B&H.

⁵² Roma Decade, *Serbia 2012 Progress Report*

http://www.romadecade.org/cms/upload/file/9276_file8_progress-report-rs.pdf (viewed 25.01.2014)

⁵³ ibid

⁵⁴ ibid

⁵⁵ Roma Decade, *Serbia 2011 Progress Report*,
http://www.romadecade.org/cms/upload/file/9300_file10_serbia_decade-progress_report_2011-f.pdf (viewed 27.01.2014)

⁵⁶ Roma Decade, *Serbia 2012 Progress Report*

http://www.romadecade.org/cms/upload/file/9276_file8_progress-report-rs.pdf (viewed 27.01.2014)

Based on statistical data we can see that there is evident increase of Roma children in the education system in both countries. The most significant statistical data will be probably published in future progress reports. It is important to mention that dropout rate in B&H is decreased since revised action plan has been implemented. In Serbia, there is also decrease in drop out from school but there are no precise statistical data.

Both countries have to continue in implementation of action plans. The barriers should be overcome. There should be more progress in B&H regard this situation. The education is investment in a future. Long-term education increase ability to find job, earn salary and be satisfied with personal success and reduce poverty.

Conclusion

The effects of long-term marginalization of Roma people and children are obvious in all spheres of their life. The Roma are suffering different forms of exclusion worldwide. Since *Decade of Roma Inclusion* initiative was launched in 2005 situation regard position of Roma within a democratic society is improving. This initiative has an aim to include Roma people within democratic framework while improving their education, employment, health and housing. The specific focus of this paper is related to the education and Roma children. The education is a tool to fight over discrimination and prejudice. Also, it gives a meaning to life. The education reduces poverty and improves access to health and medical protection.

As it is already mentioned, education is fundamental right and primary education is mandatory for every child despite his/hers cultural, ethnical and any other background. Every child deserves the best possible quality of education. There should not be any kind of educational segregation. The Roma children should not be a part of exclusive education. They are suppose to be equal and by those means they deserve to be included in a mainstream education. The children from minorities are not suppose to go to schools for children with disabilities only because they belong to a different ethnic group.

Decade of Roma Inclusion is working to ensure the quality of mainstream education. Each member country of this initiative is trying to work with governments in order to make a national action plans and to provide a chance to education for Roma children. Every child is unique and important and due to this Roma Decade is removing barriers and trying to accomplish inclusion of Roma children within educational settings.

The situation of Roma children and education in B&H and Serbia is improved because they became a part of initiative and implemented action plans. The situation is still not the best. The progress will be obvious within following years. Serbia has accomplished more in comparison to B&H. The action plan of Serbia is more advanced and written in-depth. The positive fact is that both countries do not place Roma children in „special schools.“

The obvious changes in educational systems across world: schools that will accept all and thereby enhance development of each child are possible. But first of all we need to have a education for human rights, about the human rights and through the human rights. To respect difference and to be proud of multiculturalism has to be our goals-goals of democratic societies and its citizens.

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progress_report_2011-f.pdf](http://www.romadecade.org/cms/upload/file/9300_file10_serbia_decade-progress_report_2011-f.pdf) (viewed 25.01.2014)

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Neda Mullalli

*PhD Students at the Department of Legal Studies
Central European University, Hungary*

Chapter 9 of the U.S. Bankruptcy Code – A Powerful Tool in the Hands of Distressed Municipalities

Abstract

On July 18, 2013 the city of Detroit filed for municipal bankruptcy protection, under Chapter 9 of the U.S Bankruptcy Code. With an estimated debt of \$18-20 billion, this filing constitutes the largest in the history of Chapter 9 and provides a new argument to the debate on the utility of such chapter. Given that municipal bankruptcy procedures are little known in European countries and not only, the current paper will provide the reader with an account of Chapter 9 on Municipal Debt Adjustment, and its unique features. The paper argues that said chapter is not a dead letter law, as claimed by a group of scholars. On the contrary, Chapter 9 provides municipalities with a debt adjustment procedure that is tailor-made to fit their specifics, as political subdivisions of a State. In a time when many U.S. municipalities find themselves in financial trouble, its unique features make of Chapter 9 a useful and powerful tool in the hands of distressed municipalities.

Keywords: *Bankruptcy law, municipal debt adjustment, Chapter 9 of the U.S BY Code.*

Introduction

As governmental units, municipalities constitute legal persons of a special nature. This special nature has a bearing on the features of laws on municipal debt restructuring. First, a municipality's main purpose is to provide services to the community, as opposed to private corporations who operate driven by the profit motive.¹ Because of their obligation to provide public services, municipalities usually do not undergo liquidation.² With this in mind, the only alternative left,³ in terms of bankruptcy law, in order to alleviate the financial burden of insolvent⁴ municipalities, is to restructure their debts. Second, a governmental unit is under the control of the State in whose territory it is situated. Municipal bankruptcy law has thus to strike a balance between providing relief for insolvent municipalities while at the same time, guaranteeing the rights of States over their political subdivision. Given that municipal bankruptcy laws are not really known in European countries, the current paper will focus on Chapter 9 of the U.S. Bankruptcy Code,⁵ hereinafter Chapter 9, as the example *par excellence* of such type of law. Through analyzing said chapter, often compared to Chapter 11 of the U.S. BY Code, this paper will highlight its unique features, providing thus an explanation as to the reasons why an insolvent municipality chooses to make use of Chapter 9. The main argument of this paper is that its unique features and tailor-made procedure make of Chapter 9 a viable legal solution and perfectly suitable alternative to an insolvent municipality. Moreover, the current paper argues that the rare use of Chapter 9 is not to be attributed to its lack of effectiveness but rather to considerations concerning the consequences of a municipal debt adjustment procedure, and the special nature of Chapter 9, as a last-resort type of solution.

¹ Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crisis*, 88 B.U. L. REV. 633, 673 (2008).

² Liquidation is a bankruptcy procedure under which the non-exempt assets of the debtor are sized and subsequently sold by a court appointed trustee or administrator. The proceeds recovered from such sale are used to pay the debtor's obligations towards his creditors, while the remaining part of the money, if any, is returned to the debtor. At the end of the procedure, the debtor is discharged of its debts. Under the U.S. Bankruptcy Code, liquidation is regulated by Chapter 7. For more information see DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 17-21; 30-49 (New York The Foundation Press, 2010) (1992) arguing that Chapter 11 cannot solve the problems of "an unsound business venture".

³ Usually bankruptcy law provides two procedures for its insolvent subjects. The first one is liquidation and the second one is reorganization. The adjustment of the debts of a municipality is a reorganization procedure. This means that the debtor is left in possession of all its assets and its liabilities are reorganized according to a proposed plan of adjustment which is usually executed through a time frame of several years. Meanwhile, the debtor continues to operate and gain profit.

⁴ The insolvency of a debtor is usually determined through the balance sheet test, the cash flow test or both of them. Under the balance sheet test, the debtor is considered insolvent when the value of its assets is not sufficient to cover its liabilities, while under the cash flow test the debtor is insolvent if he is unable to pay his debts as they become due. For more information see PHILIP R. WOOD, *PRINCIPLES OF INTERNATIONAL INSOLVENCY* 6-1, 109 (Sweet & Maxwell 1995); ROYSTON MILES GOODE, *THE PRINCIPLES OF CORPORATE INSOLVENCY LAW* 86-87 (3rd Ed. Sweet & Maxwell 2005).

⁵ 11 USCA § 901 *et sequel*.

The structure of the paper is the following: Section 1 provides the historical background as a result of which Chapter 9 was enacted. In section 2, the focus shifts to Chapter 9 as we know it, beginning with an illustration of the creditors' remedies against an insolvent municipality. After this prelude, the paper analyzes the provisions of Chapter 9 and identifies its unique features, those features due to which insolvent municipalities chose to file for the adjustment of their debts. In its last section, the paper dissects the critiques to Chapter 9, and presents its conclusions.

1. Historical background

It is not unusual for severe financial crises to act as triggers of legal reforms. It was one of such crises, namely the Great Depression of 1929, which evidenced the need for the enactment of a legal procedure for the adjustment of U.S. municipalities' debts. In the pre-crises period municipalities' budgets were heavily dependent upon property taxes. During the Great Depression, there was massive nonpayment of such taxes and a fall in real estate prices, as a result of which around 4770 local government units defaulted.⁶ At the time there was no bankruptcy procedure available for municipalities, thus the latter tried to negotiate common law composition agreements⁷ with their creditors. Their efforts, however, were often in vain due to the fact that such agreements had to be approved by all the creditors and were of non-binding nature.⁸ Thus it was not unusual for a group of dissenting creditors not to approve the composition agreement, regardless of the consent of most creditors, and to insist on being paid in full.⁹ Obviously, this opportunistic behavior, often referred to as the holdout problem,¹⁰ was not acceptable for the municipality and the majority of creditors and thus very few of the agreed upon compositions were actually executed.¹¹ In these circumstances, a solution was needed in order to make sure that a dissenting minority would be bound to the will of the majority of creditors who approved the composition agreement. State law was not of help in solving

⁶ Thomas E. Harvey, *Municipal Debt Adjustment*, 33 BUS. LAW 221-239, 221 (1977).

⁷ See BLACK'S LAW DICTIONARY DEFINING a composition as "An agreement between a debtor and two or more creditors for the adjustment or discharge of an obligation for some lesser amount". Available at http://international.westlaw.com/result/default.wl?mt=LawSchoolPractitioner&db=BLA CKS&vr=2.0&ss=CXT&scxt=WL&rp=%2fWelcome%2fLawSchoolPractitioner%2fdefault.wl&cxt=RL&fmqv=c&eq=Welcome%2fLawSchoolPractitioner&service=Search&rld b=CLID_DB38822284182611&rldi=1&fn=top&fcl=True&query=COMPOSITION&method=TNC&utid=25&sri=321&spa=intceu2000&origin=Search&rld=CLID_QRYRLT1440294182611&sv=Split&tf=507&tc=6&nstartlistitem=14&rs=WLIN13.10>, last accessed on November 26, 2013.

⁸ Thomas E. Harvey, *Municipal Debt Adjustment*, 33 BUS. LAW 221-239, 221 (1977).

⁹ Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 364 (2010).

¹⁰ In *Ashton v. Cameron County Water Improvement District No.1*, 56 Sup. Ct. 892, 900 (1936), Judge Cardoso in the dissenting opinion framed the hold-out problem as following: "Experience makes it certain that generally there will be at least a small minority of creditors who will resist a composition, however fair and reasonable, if the law does not subject them to a pressure to obey the general will".

¹¹ Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 362 (2010).

this situation because the Contracts' Clause in the U.S Constitution prohibits states from enacting laws that would impair the contractual rights of their citizens.¹² With state law out of the picture, the only option that would have allowed U.S municipalities to solve the aforementioned hold-out problem was for the Congress to enact a federal law for this purpose. Thus in 1934 the Congress enacted sections 78-80 of the Bankruptcy Act,¹³ also known as the Sumner-Wilcox bill, which constitute the first municipal debt adjustment legislation in the U.S. Compared to today's Chapter 9, these provisions were fairly simple, limited in scope and of temporary nature.¹⁴ Their main purpose was to solve the hold-out problem by providing the municipalities with a legal tool to make their debt adjustment agreements binding on dissenting creditors.¹⁵

However, even though the bill paid special attention to provisions¹⁶ aimed at guaranteeing state sovereignty,¹⁷ the Supreme Court of the United States declared it unconstitutional,¹⁸ based on the fact that its provisions might have materially restricted the municipalities' control over their fiscal affairs.¹⁹ Given that a municipality is a part of the state, the result of allowing the interferences contained in such provisions, would be that neither the state, nor its municipalities would be free to manage their own affairs, which would in turn amount to a violation of state sovereignty by means of federal law.²⁰

¹² The U.S Constitution's Contracts Clause provides, in part, that "No State shall ... pass, any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." U.S. Const. art. 1, §10.

¹³ Ch. 345, 48 Stat. 798 (May 24, 1934).

¹⁴ George H. Dession, *Municipal Debt Adjustment and the Supreme Court*, 46 YALE L. J. 215 (1936), explaining that the sections in question were initially enacted as an emergency measure that would expire within two years.

¹⁵ Michael W. McConnell, Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 450 (Spring 1993).

¹⁶ Section 80 (c) (11) of the 1934 Act provided that: "Upon approving the petition or at any time thereafter the judge shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) interfere with any of the political or governmental powers of the taxing district, or (b) any property or revenues of the taxing district necessary in the opinion of the judge for essential governmental purposes, or (c) any income producing property, unless the plan of readjustment so provides."

¹⁷ Section 80 (k) of the 1934 Act provided that: "Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any political subdivision thereof in the exercise of its political or governmental powers, including expenditures therefore, and including the power to require the approval by any governmental agency of the state of the filing of any petition hereunder and of any plan of readjustment and whenever there shall exist or shall hereafter be created under the law of any State any agency of such State authorized to exercise supervision or control over the fiscal affairs of all or any political subdivisions thereof, and whenever such agency has assumed such supervision or control over any political subdivision, then no petition of such political subdivision may be received hereunder unless accompanied by the written approval of such agency, and no plan of readjustment shall be put into temporary effect or confirmed without the written approval of such agency of such plans."

¹⁸ *Ashton v. Cameron County Water Improvement District No. 1*, 56 S.Ct. 892 (1936).

¹⁹ *Ashton v. Cameron County*, 530-531.

²⁰ *Id.*

In light of such a decision, in 1937 the U.S Congress enacted sections 81-84 of the Bankruptcy Act,²¹ which were upheld by the Supreme Court in *United States v. Bekins*.²² Since that time, the law on municipal debt adjustment has undergone several changes,²³ most of which were of technical nature. For the purposes of this paper, the most important changes, those who shaped what we have come to know as Chapter 9 today, are the ones that took place in 1976. Before such amendment, the 1937 act was the 1937 act was mainly focused on solving the hold out issue and was thus limited in scope. One problematic aspect of this act was that amongst other filing criteria, it required that the plan of composition be pre-approved, in writing, by the creditors owning not less than 51% in amount of securities affected by the plan in question.²⁴ This requirement basically limited the use of Chapter 9 only to the cases where the debtor and creditor had already agreed on the composition plan.²⁵ Furthermore, the Act provided neither for an automatic²⁶ stay, nor for the avoidance of fraudulent transfers.²⁷ As a consequence of this cluster of features, the number of Chapter 9 filings was minimal, with the majority of applicants being small municipalities, whose insolvency was usually due to a one time event.²⁸

²¹ Ch. 657, 50 Stat. 653 (August 16, 1937).

²² *United States v. Bekins*, 288 U.S. 329, 58 S. Ct. 811 (1938). In this decision, the Supreme Court concluded that the act incorporated adequate guarantees to State sovereignty. Thus, rather than an interference with the latter, the 1937 Act constituted a co-operation between the Federation and the States, in order to provide municipalities with the relief that States themselves could not.

²³ In 1946 Chapter 9 became a permanent part of the U.S Bankruptcy Act. The New York city's major financial crises brought by, in 1976, the most radical amendment to Chapter 9. Later on, in 1978, section 901 was added to Chapter 9, to the effect that now the latter incorporated by reference other provisions of the Bankruptcy Code, in particular those applicable to Chapter 11. Thus changes of Chapter 11 by the 1978 Act, were to be reflected in Chapter 9 as well. Other amendments were those of 1988, which made possible for the liens on special revenue bonds to survive bankruptcy, and that of 1994, which provided for the municipalities having specific state authorization to file for Chapter 9, instead of a general authorization which by implication would apply as well to filing for Chapter 9. As a result of the Bankruptcy Abuse Prevention and Consumer Protection Act enacted by the Congress in 2005, several exceptions to the automatic stay were incorporated in Chapter 9. Last, in 2010, as a result of the Bankruptcy Technical Corrections Act, section 901, which enumerates the Bankruptcy Code provisions that Chapter 9 incorporates by reference, now includes also sections 333 and 351.

²⁴ Ch. 657, 50 Stat. 653, §83 (a) (August 16, 1937).

²⁵ Prepackaged bankruptcy is a shorter bankruptcy procedure applicable in the case when the debtor and its creditors have already agreed on the plan of adjustment and all of its details. In such situations, the only thing the bankruptcy court has to do is to confirm the plan formally and thus provide it with legal binding effect.

²⁶ Section 83 (c) of the 1937 Act, provides that upon notice, the judge *may* stay the commencement or continuation of litigation against the petitioner, its officers or inhabitants.

²⁷ Thomas E. Harvey, *Municipal Debt Adjustment*, 33 BUS. LAW 221-239, 226 (1977).

²⁸ Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 360 (2010).

It took New York City's financial crisis in 1976 to evidence the unsuitability of Chapter 9 in addressing the particularities presented by the complex insolvency case of a major municipality, such as that of New York City.²⁹ In the latter case, the large number of creditors and the fact that most of them were holders of bearer bonds,³⁰ made their identification and the subsequent pre-approval of the petition, highly impractical.³¹ In order to cure these inefficiencies, Chapter 9 was amended one more time in 1976.³² Compared to the 1937 Act, the new provisions did not require the pre-approval of the composition plan, facilitating thus the initiation of the debt readjustment procedure. Upon filing, the new Act provided for the automatic stay of all lawsuits against the municipality.³³ More importantly, the 1976 Act provided the petitioner with additional powers such as those of rejecting collective bargaining agreements, hereinafter CBAs, as executory contracts,³⁴ avoiding fraudulent transfers³⁵ and issuing certificates of indebtedness.³⁶ These features, direct to the conclusion that the 1976 amendment points at a shift in the purpose of Chapter 9. Differently from its predecessors, whose main aim was to solve the hold-out problem, the 1976 Act now incorporated a fully fledged reorganization procedure, very similar to that of Chapter 11³⁷ of the U.S Bankruptcy Code.³⁸

2. The Current Chapter 9

An attempt to explain Chapter 9 without previously touching upon creditors' remedies, outside of the federal bankruptcy framework, would be incomplete to say the least. Such information, as provided in section 2.1, is necessary in order to understand why it makes sense to discuss the rationale that rests behind an insolvent municipality's choice to file under Chapter 9. Once the reader has achieved this understanding, section 2.2 will

²⁹ Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act, 1976* DUKE L. J. 1157, 1158 (1976); See also Thomas E. Harvey, *Municipal Debt Adjustment*, 33 BUS. LAW 221-239, 224 (1977).

³⁰ As opposed to a registered bond, where the name of the bond holder is registered in the debtor's books and is thus identifiable at any point in time, a bearer bond is payable to the person holding it, whoever it might be. Because of this feature the debtor does not know the identity of the holders of bearer bonds, making the negotiations with the latter problematic.

³¹ Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act, 1976* DUKE L. J. 1157, 1158 (1976).

³² Pub. L. No. 94-260 § 1, 90 Stat. 315 (1976).

³³ Thomas E. Harvey, *Municipal Debt Adjustment*, 33 BUS. LAW 221-239, 229 (1977).

³⁴ Thomas E. Harvey, *Municipal Debt Adjustment*, 33 BUS. LAW 221-239, 231 (1977).

³⁵ *Id.* at 232.

³⁶ *Id.*

³⁷ Chapter 11 consists of a procedure that allows corporations in financial distress to reorganize their debts, while remaining in possession of their assets. The main purpose of such a procedure is to preserve a viable business, whose assets are more profitable when put to use, as compared to being sold. For more information see DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 18-22 (New York: The Foundation Press, 2010) (1992) arguing that Chapter 11 cannot solve the problems of "an unsound business venture".

³⁸ Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 362 (2010).

proceed with a thorough analysis of the municipal debt adjustment procedure under Chapter 9, while at the same time highlighting its unique features.

2.1 Creditors' Remedies

The average U.S. citizen had probably already forgotten about Chapter 9 until when in June 2013 the U.S. witnessed the country's largest municipal bankruptcy to date.³⁹ With a debt amounting to \$18 billion, Detroit found solace in Chapter 9 of the U.S. Bankruptcy Code, and its eligibility for such protection was officially confirmed as of December 3, 2013.⁴⁰

Question arises as to *why* Detroit or any other municipality that has made use of Chapter 9, decided to do so. For the truth is that Chapter 9 is not indispensable to an insolvent municipality. In order to justify the previous statement, let's have a look at the creditors' remedies against a municipality that refuses to serve its debt. The first and most obvious tool in the hands of the creditors of a municipality is litigation. Creditors can always sue the municipality and try to recover their money. However, even if such litigation is successful, the creditors would face problems at the enforcement stage. Either by express statutory provisions or based on common law doctrine, the property of municipal bodies devoted to public use is immunized from execution.⁴¹ Once the public property for public use is out of reach, what's left is very little. That is why in practical terms, creditors' litigation does not represent such a critic problem to municipalities, as it does to corporations, whose assets can be seized at any moment, if it were not for the automatic stay provided by Chapter 11.

But while the execution of obligations upon municipal bodies' property devote to public use is not effective in the municipal context, the judicial remedy of mandamus is.⁴² This second tool in the hands of creditors, namely the mandamus, is a court order that requires the performance of a duty which derives from the position held by the person to whom the order is directed, or from operation of law.⁴³ Individual creditors can make use of such a tool, by asking the court to issue a mandamus to levy taxes against a municipal official. Despite the limitations inherent to its scope⁴⁴ and nature,⁴⁵ the writ of mandamus can represent a real issue for an insolvent municipality.

³⁹ Matthew Dolan, *Record Bankruptcy for Detroit*, THE WALL STREET JOURNAL, July 19th, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323993804578614144173709204> >, last accessed on December 17th, 2013.

⁴⁰ Ashley Woods, *Detroit Bankruptcy Ruling By Judge Steven Rhodes Gives City Chapter 9 Protection*, Huffingtonpost, December 3, 2013, available at http://www.huffingtonpost.com/2013/12/03/detroit-bankruptcy-decision-ruling-rh201od3es_n_4376775.html?utm_hp_ref=detroit-bankruptcy>, last accessed on December 4,

⁴¹ Jeff B. Fortham, *Methods of Enforcing Satisfaction of Obligations of Public Corporations*, 33 COLUM. L. REV. 28, 28-29 (January 1933).

⁴² Note, *Creditors' Remedies in Municipal Default*, VOL. 1976 DUKE L. J. 1363, 1375 (1976).

⁴³ *Id.* at 1376.

⁴⁴ FRANCIS J. LAWALL & J. GREGG MILLER, *DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH 9* (LexisNexis 2012)

A third option for the creditors would be to require from the court that said municipality be placed under involuntary judicial receivership, as an equitable relief.⁴⁶ In such case, the court would appoint a receiver, which would play the role the trustee plays in Chapter 11, namely monitor and administer the affairs of the debtor. However, in the municipal context, the appointment of a receiver would be problematic because it might amount to interference into the political affairs of the municipality.⁴⁷ Keeping in mind the reasoning of *Ashton v. Cameron County*,⁴⁸ the likelihood of courts authorizing receiverships is not very high, unless there is statutory authority to do so, or consent by the state or municipality.⁴⁹ Additionally, unless specifically authorized by state law, the receiver might lack the power to levy taxes and that would make the latter's appointment, not practical.⁵⁰

At the end of this analysis of creditor remedies it can be concluded that, with the exception of mandamus,⁵¹ *de facto* municipalities cannot be reached by creditors' collection efforts.⁵² Thus the creditors grab race to get the assets of the debtor, which is one of the main reasons why corporations file for Chapter 11, does not represent a credible threat in the context of municipalities. If in addition to the aforementioned conclusion, we add one more factor, namely that a Chapter 9 filing usually results in the municipality's difficult access to capital markets, then we are back to the question posed earlier in this section. If the creditors' collection efforts do not pose a substantial risk to insolvent municipalities, meaning that the benefits of the automatic stay are not the main driving force behind such choice, and if a Chapter 9 filing results in higher credit costs, then why do insolvent municipalities decide to resort to Chapter 9 in the first place? What are the benefits and the unique features of this chapter that make it attractive for municipalities in financial distress? The following section aims at providing an answer to this question.

2.2 Unique Features

2.2.1 Initiation of the procedure and eligibility criteria

arguing that the writ of mandamus is applicable only in the case of already authorized taxes.

⁴⁵ The mandamus imposes a personal obligation on a specific state official. As a result, creditors might face difficulties with finding who to direct the mandamus to, if the relevant positions are vacant, or if the official to whom an already issued mandamus is directed, no longer serves as an employ of the municipality.

⁴⁶ Jeff B. Fortham, *Methods of Enforcing Satisfaction of Obligations of Public Corporations*, 33 COLUM. L. REV. 28, 53 (January 1933).

⁴⁷ *Id.*

⁴⁸ *See supra* section 1, notes 21-23.

⁴⁹ FRANCIS J. LAWALL & J. GREGG MILLER, *DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH* 8 (LexisNexis 2012).

⁵⁰ *See Note, Creditors' Remedies in Municipal Default*, VOL. 1976 DUKE L. J. 1363, 1375 (1976).

⁵¹ *See supra* note 42 at 54.

⁵² FRANCIS J. LAWALL & J. GREGG MILLER, *DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH* 9 (LexisNexis 2012).

A careful observer will most probably notice right away that Chapter 9 is fairly short as compared to other chapters of the U.S. Bankruptcy Code, hereinafter the Code. This however does not mean that the municipal debt adjustment procedure is not properly regulated. In fact, the small number of provisions is mainly due to the fact that Chapter 9 incorporates other provisions of the Code, by reference.⁵³ One of such provisions is § 109, according to which in order to be a debtor under Chapter 9, a given entity has to meet five criteria.⁵⁴ *First*, in order to be eligible to apply for Chapter 9, the entity has to be a “municipality”.⁵⁵ Political subdivisions, public agencies or instrumentalities of the state constitute “municipalities” under Chapter 9.⁵⁶ Given that the code does not provide any definition for definition for the three aforementioned terms, their meaning is vague and to be found in the relevant case-law.⁵⁷ The *second* eligibility requirement is that the municipality must have *specific authorization* to be a debtor under Chapter 9, issued *from the State* in whose territory it is located.⁵⁸ Such specific authorization can be granted either through statutory provisions or through acts of State officials or organizations, which have such competence under State law.⁵⁹

⁵³ 11 U.S.C. § 901.

⁵⁴ According to 11 USCS § 109 (c) an entity may be a debtor under chapter 9 of this title if and only if such entity: (1) is a **municipality**; (2) is specifically **authorized**, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter; (3) is **insolvent**; (4) **desires to effect a plan** to adjust such debts; and (5)(A) has **obtained the agreement of creditors** holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; (B) has **negotiated in good faith with creditors and has failed to obtain the agreement** of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; (C) is unable to negotiate with creditors because such **negotiation is impracticable**; or (D) **reasonably believes that a creditor may attempt to obtain a transfer that is avoidable** under section 547 of this title.

⁵⁵ 11 U.S.C. § 109 (c) (1).

⁵⁶ 11 U.S.C. § 101 (40).

⁵⁷ FRANCIS J. LAWALL & J. GREGG MILLER, DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH 21 (LexisNexis 2012) “[I]t is generally accepted that cities, counties, parishes, towns, villages, boroughs and the like are “political subdivisions” of a state...[T]he defining characteristic of a “political subdivision” appears to be its ability to exercise various sovereign powers as the power to tax, the power of eminent domain or the police power...[S]ome courts have analyzed whether an entity is a public agency by looking at “whether the authority or agency is subject to control by public authority, state or municipal”; The determination of whether an entity is an instrumentality of the state is made through a three-prong test. The first two prongs ask whether the entity displays the characteristics mentioned above with regard the political subdivisions and public agencies, while the third prong assesses how the State itself designated and treated the agency.

⁵⁸ 11 U.S.C. § 109 (c) (2).

⁵⁹ FRANCIS J. LAWALL & J. GREGG MILLER, DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH 25-27 (LexisNexis 2012).

This requirement is one of the unique features of Chapter 9, which originates from the case law regarding the constitutionality of such chapter.⁶⁰ In *United States v. Bekins*, the Supreme Court upheld the 1937 amendment of the Bankruptcy Act, mainly because it contained a new provision which allowed the States to control whether their municipalities could file under Chapter 9 or not.⁶¹ Thus, requiring the municipality to be authorized by the State⁶² in order for it to make use of Chapter 9, serves as a guarantee of the exercise of State's control over its municipalities, seen as part of its sovereign powers.

While insolvency does not constitute a filing pre-requisite under other chapters of Title 11, it does constitute one in Chapter 9.⁶³ Thus the *third* eligibility requirement under Chapter 9 is that the municipality has to be *insolvent*.⁶⁴ Under section 101 (32) (c) the term "insolvent" means "[F]inancial condition such that the municipality is generally not paying its debts as they become due...or [is] unable to pay its debts as they become due".⁶⁵ By analyzing the aforementioned provision, one can conclude that in order to determine the insolvency of a given municipality, Chapter 9 uses the cash flow test⁶⁶ and prospective cash flow test, which are based on the illiquidity of the debtor. The reason for such a choice is that the balance sheet test,⁶⁷ based on the comparison of assets and liabilities, is not suitable in the case of municipalities because of the fact that municipal assets are difficult to evaluate and cannot be subject to liquidation.⁶⁸ As a consequence, the use of the balance sheet test would actually never result in a finding of insolvency.

The *fourth* eligibility requirement under section 109 (c) is that the municipality must desire to carry out a debt adjustment plan.⁶⁹ Such requirement bears an element of good faith, as the municipality must genuinely desire to adjust its debts, instead of using Chapter 9 as a dilatory technique against its creditors.⁷⁰ In order for the *last* eligibility requirement to be satisfied, the debt adjustment plan has to be approved by creditors holding at least a majority in amount of the claims of each impaired class.⁷¹ If that is not

⁶⁰ See *supra* sub-section 3.1.1 explaining the historical background of Chapter 9.

⁶¹ Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act*, 1976 DUKE L. J. 1157, 1159 (1976).

⁶² See Christopher Smith, *NOTES & COMMENTS: Provisions for Access to Chapter 9 Bankruptcy: Their Flaws and the Inadequacy of Past Reforms*, 14 BANK. DEV. J. 497, 502 (1998) (explaining how this requirement has changed after the 1994 amendments to Chapter 9, from a requirement of general authorization to one of specific authorization from the respective State).

⁶³ DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 8 (New York The Foundation Press, 2010) (1992) arguing that Chapter 11 cannot solve the problems of "an unsound business venture".

⁶⁴ 11 U.S.C. § 109 (c) (3).

⁶⁵ 11 U.S.C. § 101 (32) (c).

⁶⁶ See *supra* note 4 explaining the meaning of cash flow test.

⁶⁷ See *supra* note 4 explaining the meaning of the balance sheet test.

⁶⁸ Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 HASTINGS L. J. 1, 23 (2002).

⁶⁹ 11 U.S.C. § 109 (c) (4).

⁷⁰ FRANCIS J. LAWALL & J. GREGG MILLER, *DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH* 30 (LexisNexis 2012).

⁷¹ 11 U.S.C. § 109 (c) (5).

the case, the municipality has then to prove that despite good faith negotiations, it has failed to reach an agreement with its creditors or negotiations are impracticable or that it reasonably believes a creditor might try to carry out an avoidable transfer.⁷²

As illustrated by the aforementioned requirements, Chapter 9's eligibility criteria is quite burdensome compared to other chapters of the Code.⁷³ It is because of this complex entry requirements that section 109 (c) is often referred to in the literature, as the "gatekeeper of Chapter 9".⁷⁴ However, once the municipality passes the hurdles posed by section 109 (c), its position during Chapter 9's debt adjustment procedure is very advantageous.⁷⁵

These advantages begin with Chapter 9 providing for strictly voluntary filing: only the municipality and it alone can decide to resort to Chapter 9 protection. Compared to Chapter 7 and Chapter 11, which provide also for involuntary filing, Chapter 9 provides an arrangement that is tailor-made to the specifics of the municipal context. By not allowing creditors to initiate a debt adjustment procedure against a State's political subdivision, such as a municipality, Chapter 9 provides a guarantee to State sovereignty. Once the municipality has made the choice to apply under Chapter 9 and it meets the eligibility criteria, the first steps of the procedure are the filing of the petition⁷⁶ along with a list of creditors.⁷⁷ Upon filing of such petition, Chapter 9 grants the debtor an automatic stay upon all creditor litigation.⁷⁸ In addition to the general automatic stay applicable to Chapter 11 debtors,⁷⁹ Chapter 9 provides for a broader automatic stay which precludes not only litigation against the municipality itself but also litigation against officers or inhabitants of the municipality and most importantly, litigation having as object the enforcement of liens arising out of taxes.⁸⁰

Through this provision, Chapter 9 excludes the use of the writ of mandamus, once the petition has been filed, giving the municipality a breathing spell from probably the only effective creditor remedy against it. For this reason, the broad automatic stay offered by Chapter 9 constitutes one of the incentives why municipalities choose to file under such chapter.

2.2.2 The debt adjustment plan

With the automatic stay in place, the municipality is free from the pressure of its creditors and can work on its debt adjustment plan. The uniqueness of Chapter 9 is clearly displayed also at this stage of the debt adjustment procedure. Thus, differently from Chapter 11, where any party in interest has the right to propose a debt adjustment plan, if the debtor does not present one in due time,⁸¹ under Chapter 9 the debtor has the

⁷² *Id.*

⁷³ See Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 356 (2010).

⁷⁴ *Id.*

⁷⁵ *Id.* at 357.

⁷⁶ 11 U.S.C. § 301.

⁷⁷ 11 U.S.C. § 924.

⁷⁸ 11 U.S.C. § 922.

⁷⁹ 11 U.S.C. § 362.

⁸⁰ 11 U.S.C. § 922.

⁸¹ 11 U.S.C. § 1121.

exclusive right to file such plan.⁸² Once again, Chapter 9 displays here a feature tailored to the specific nature of a municipality, as a state organ. The voting requirements for the debt adjustment plan are the same as those prescribed by Chapter 11. Thus a class of creditors is deemed to have approved the plan if the creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class, vote in favor.⁸³ In addition, each impaired class of creditors has to accept the plan. If such requirements are not met, the bankruptcy court may “cram-down” the dissenting, class if at least one impaired class has accepted the plan and the latter is fair and equitable⁸⁴ and does not discriminate unfairly against non-accepting classes.

Coming to the confirmation of the debt adjustment plan by the bankruptcy court, we see once again that Chapter 9 displays a far more complex provision, as compared to its Chapter 11 equivalent. Hence in order to be confirmed, the plan has to comply with the provisions of the Bankruptcy Code⁸⁵ and those of Chapter 9.⁸⁶ In addition, amongst the series of requirements prescribed by § 943 (b) 3 to 7, the most important are that there should be no impediments to the implementation of the plan, the plan should account for the payment of priority claims and last, the plan should be in the best interest of creditors and it should be feasible.⁸⁷

As with the initiation of the procedure and the eligibility requirements, the requirements related to the debt adjustment plan, under Chapter 9, are drafted keeping in mind the nature of municipalities, as political subdivisions of a State. Thus in order to accommodate the request for non-interference with the affairs of a municipality, Chapter 9 does not allow any other party to present the debt adjustment plan. The municipality has the exclusive right to file such plan, as it thinks best.

Moreover, based on state sovereignty-related considerations, Chapter 9 imposes limits on the powers of the bankruptcy court and expressly provides for the reservation of State powers. Thus “[C]hapter 9 (inserted by the author) does not limit or impair the *power of a State to control...a municipality* of or in such State in the exercise of the *political or governmental powers* of such municipality”.⁸⁸ In order to guarantee such State’s control over its municipality, in section 904 Chapter 9 provides that “[U]nless the debtor consents or the plan so provides, the *court may not, by any stay, order, or decree...interfere with* any of the *political or governmental powers* of the debtor, any of the *property or revenues* of the debtor or the debtor’s *use or enjoyment of any income-producing property*”.⁸⁹

⁸² 11 U.S.C. § 941.

⁸³ 11 USC § 1126(c).

⁸⁴ In order for the debt adjustment plan to be fair and equitable, the latter should provide creditors will all they can reasonably expect under the circumstances. In other words, the arrangement that the plan offers to the creditors has to be better than the alternatives.

⁸⁵ 11 U.S.C. § 1123 (a) (1) through (5) according to which the plan must designate classes of claims, it must specify unimpaired classes and their treatment, must provide the same treatment for each claim belonging to the same class, unless the holder of claim has agreed to a less favorable treatment and last, the plan should provide the adequate means for its implementation.

⁸⁶ 11 U.S.C § 943 (b) (2).

⁸⁷ 11 U.S.C § 943 (b) (3) to (7).

⁸⁸ 11 U.S.C § 903.

⁸⁹ 11 U.S.C § 904.

Conform section 904, Chapter 9 indeed provides the court with very limited powers. Hence the court cannot go too far in assessing the financial state of the municipality, it cannot impose any measures on it, it cannot appoint a trustee and it cannot make changes to the debt adjustment plan. The powers of the court are basically limited, at least *de jure*,⁹⁰ to decisions concerning the eligibility of a given municipality for Chapter 9 protection, and the confirmation of the debt adjustment plan. The fact that Chapter 9 does not provide for a trustee, with some exceptions, also stems out of concerns regarding state sovereignty. If the trustee in Chapter 9 would enjoy the extensive powers it has under Chapter 11, he would have to investigate thoroughly into the financial affairs and assets' structure of the municipality, would be entitled to propose the debt adjustment plan and would have avoidance powers. Given that a trustee is appointed by the bankruptcy court, all of these activities would constitute a violation of section 904. For this reason, Chapter 9 allows the court to appoint a trustee only when the municipality itself, as a debtor in possession, refuses to take action by using its avoidance powers.⁹¹

Taken together, all of the aforementioned sections of Chapter 9 constitute the guarantee that the municipal debt adjustment procedure will not infringe State sovereignty and will not interfere with the State's control over the governmental and financial affairs of its municipality. At the same time, by limiting the powers of the court and almost eliminating the trustee, Chapter 9 grants the municipality a smooth and comfortable debt adjustment procedure, without much outside interference.

This "privileged" position of municipalities under Chapter 9 is clear in several respects. *First*, as already mentioned, Chapter 9 provides the municipality with a fairly broad automatic stay which applies to litigation against the debtor itself, litigation against officials and inhabitants of the municipality, and also to the enforcement of liens arising out of taxes.⁹² *Second*, due to the limited powers of the court and very limited role of the trustee, the municipality is generally allowed to manage its own financial affairs. This freedom of action extends to the point where a municipality, as a debtor in possession, can act outside of the ordinary course of business, without the interference of the court.⁹³ *Third*, in Chapter 9 the municipality can incur debt on a super-priority basis.⁹⁴ New money is treated as an administrative expense, thus the creditors that provide the municipality with funding during the debt adjustment procedure, have priority over other administrative expenses.⁹⁵ *Fourth*, the possibility of rejecting executory contracts under Chapter 9⁹⁶ is arguably one of the most important reasons for municipalities to file for the adjustment of their debts. In the municipal context, the two main types of contracts

⁹⁰ But see *infra* in Critique for a different take on such a conclusion.

⁹¹ In such a case, the Bankruptcy Court acts upon the request of a creditor. See 11 U.S.C § 926.

⁹² 11 U.S.C § 922.

⁹³ Such rights derive from the fact that section 901 of Chapter 9 does not incorporate the prohibitions of section 363 of Title 11.

⁹⁴ 11 U.S.C § 901 incorporating § 364 (c), (d), (e) and (f).

⁹⁵ 11 U.S.C § 364 (c) (1).

⁹⁶ Section 365 of the U.S. Bankruptcy Code, regulating the rejection of executory contracts and unexpired leases by the trustee, is incorporated in Chapter 9, through section 901 of the latter.

which may fall under the category of executory contracts are collective bargaining agreements, hereinafter CBAs, and pension “contracts”.

In Chapter 11, the debtor in possession or the trustee may reject CBAs only in conformity with the requirements of section 1113 of the Code.⁹⁷ Because of the application of such section, the burden of proof for the purpose of rejection of CBAs is quite heavy on a Chapter 11 debtor.⁹⁸ However, section 1113, which regulates the rejection of CBAs, is not applicable to Chapter 9. In determining whether the municipality has satisfied the requirements for such rejections, the bankruptcy courts in *In re County of Orange*⁹⁹ and *In re City of Vallejo*¹⁰⁰ referred to the *Bildisco* standard.¹⁰¹ According to this standard, a municipality can reject a CBA if it shows that the CBA burdens the estate, the equities balance is in favor of rejection and the debtor’s reasonable efforts to negotiate a voluntary modification, have failed.¹⁰²

But while collective bargaining agreements are widely accepted as executory contracts, when it comes to pensions, the question is unsettled. First, pensions are not considered a contractual right in all jurisdictions.¹⁰³ Second, even in those jurisdictions that do consider pensions as contractual rights, it is not clear whether they constitute executory contracts.¹⁰⁴ A Chapter 9 case regarding this issue is yet to materialize, but based on the few relevant Chapter 11 cases, it would seem that unvested pension benefits constitute executory contracts, while vested benefits do not.¹⁰⁵ While these cases are not determinant in the municipal context, they might be used by analogy to future municipal debt adjustment cases, in order to justify the rejection of pension rights as executory contracts. In this regard, Judge Rhodes who is in charge of Detroit’s Chapter 9 filing, has recently declared that pensioners will be treated as all the other creditors, signaling to potential pensions’ restructuring as part of Detroit’s debt adjustment plan.¹⁰⁶ It will be interesting to see whether pensions will be treated as executory contracts or whether the court will use another legal artifice in order to justify their restructuring.

⁹⁷ 11 U.S.C § 1113.

⁹⁸ The bankruptcy court will authorize the rejection of CBAs if the debtor proves that the proposal made to the employee unions complies with the requirements of § 1113 (b) (1), the proposal was rejected by the employee representatives “without good cause”, and “if the balance of the equities clearly favors rejection of such agreement”.

⁹⁹ *Orange Co. Employees Ass’n v. County of Orange (In re County of Orange)* 179 B.R. 177 (Bankr. C.D. Cal. 1995).

¹⁰⁰ *In re City of Vallejo*, 403 B.R. 72 (Bankr. E.D. Cal. 2009), *aff’d*, *IBEW, Local 2376 v. City of Vallejo (In re City of Vallejo)*, 432 B.R. 262 (E.D. Cal. 2010).

¹⁰¹ *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

¹⁰² *Id.*

¹⁰³ FRANCIS J. LAWALL & J. GREGG MILLER, DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH 64 (LexisNexis 2012).

¹⁰⁴ FRANCIS J. LAWALL & J. GREGG MILLER, DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH 65 (LexisNexis 2012).

¹⁰⁵ *Id.* at 66.

¹⁰⁶ Ashley Woods, *Detroit Bankruptcy Ruling By Judge Steven Rhodes Gives City Chapter 9 Protection*, Huffingtonpost, December 3, 2013, available at <http://www.huffingtonpost.com/2013/12/03/detroit-bankruptcy-decision-ruling-rhodes_n_4376775.html?utm_hp_ref=detroit-bankruptcy>, last accessed on December 4, 2013.

Keeping in mind that the restructuring of obligations deriving from CBAs and pensions are usually the most difficult to negotiate outside of bankruptcy, being able to reject them,¹⁰⁷ as executory contracts, provides one of the greatest incentives for the municipalities' use of Chapter 9. Finally, one of the most important advantages of Chapter 9 is that once the debt adjustment plan is confirmed, the municipality is discharged of its debts.¹⁰⁸ Thus Chapter 9 gives the municipality an opportunity to start afresh and recover, free of its past debts.

In conclusion, this section highlighted Chapter 9's unique features along with the ways in which the latter grants "privileges" to a municipality that chooses to undergo the debt adjustment procedure. Such tailor-made approach indicates that Chapter 9 is a suitable and functional tool, ready to be used by insolvent municipalities, if need be. This latter conclusion, however, is frequently challenged based on arguments that question the efficiency of Chapter 9, in its current form. For this reason, the last section of this paper will be devoted to refuting such argument.

2.3 Critique

In the previous section of this paper, the author argued that the unique elements of Chapter 9 and its tailor-made nature constitute arguments in favor of the suitability and viability of such option for insolvent municipalities. Moreover, Chapter 9 constitutes an important and efficient tool in the hands of financially distressed municipalities. These conclusions however, are not to be interpreted either as the ultimate wisdom, or as widely accepted by experts of the field. For the truth is that the critiques and suggestions regarding Chapter 9 abound and are of different nature. Thus, there are authors, such as Clayton Gillette, who have seen Chapter 9 as a tool in the hands of municipalities, strategically used by the latter in order to gain leverage in bail out negotiations with the State.¹⁰⁹ In order to avoid such strategic use of Chapter 9, the suggestion is for the bankruptcy court to have the powers to impose financial measures on the municipality.¹¹⁰ On this very same line of argument, there are also suggestions of having a bankruptcy court with extended powers, which operates under the auspices of *state law*, instead of those of federal law, as it is now.¹¹¹ Directly opposite to such suggestions, there are authors who claim that the powers of a Chapter 9 bankruptcy court are *de facto* too broad,

¹⁰⁷ 11 U.S.C § 365.

¹⁰⁸ 11 U.S.C § 944.

¹⁰⁹ Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 283-330 (2012). The author argues that a municipality's Chapter 9 filing is usually associated with fears of contagion or broader systemic risk. In order to avoid such consequences, the federal or state governments are willing to bail out the municipality in trouble. Given that the municipality is aware of the likelihood of being bailed out, it might use the threat of a Chapter 9 filing, in order to obtain less severe conditions for their bailout agreements with the government.

¹¹⁰ Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 330 (2012).

¹¹¹ Michael W. McConnell, Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 474-477 (Spring 1993).

and that certain decisions of such court might constitute an interference with the State's governmental powers.¹¹² In addition to such critiques, there is a third one according to which the small number of Chapter 9 filings indicates its inefficiency, and proves that Chapter 9 is essentially nothing more than a "dead letter" law. While there are certainly merits to all the critiques presented until now, it is the author's opinion that the last one constitutes the strongest claim against Chapter 9. Therefore, in the following paragraphs this paper focuses only on this critique, trying to provide alternative explanations to the rare use of Chapter 9.

2.3.1 *A matter of life and death*

In the previous section, the paper illustrated how Chapter 9 offers insolvent municipalities significant benefits associated to very few restrictions, interpreting such fact as telling, in terms of the efficiency of such chapter. If this assumption were correct, then it would be reflected in the number of Chapter 9 filings. However, reality is that there have been fewer than 650 Chapter 9 filings from 1937 to 2013.¹¹³ This figure is striking and according to many critics, it is an indicator of the inefficiency of Chapter 9 in solving the financial problems of insolvent municipalities.¹¹⁴ Omer Kimhi, for example, argues that Chapter 9 is mostly used by small towns and special purpose districts which face

¹¹² Michael W. McConnell, *Extending Bankruptcy Law to States*, in WHEN STATES GO BROKE, THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS, 234 (Peter Conti-Brown & David A. Skeel Jr., eds., Cambridge University Press 2012). The author argues that there are two kinds of such decisions. The first one regards the eligibility of the municipality to apply for bankruptcy procedures. In order to deliberate on this issue, the bankruptcy court will have to assess whether said municipality is insolvent or not. Given that such assessment will inevitably rely on whether the court is satisfied that the municipality has exhausted its taxing power and cut all necessary expenses, such decision might be considered as conferring to the court excessive authority over a municipality, and by consequence over the sovereign state in whose territory said municipality is situated.

The second decision, regards the best-interest-of-the-creditors standard in relation to the approval of the debt adjustment restructuring plan. In the context of private bankruptcy, the court makes such decision using as threshold the value that creditors would receive in case of liquidation of the debtor. But given that a municipality cannot undergo liquidation, in order to determine the meaning of the best interest of creditors test, the bankruptcy courts turn to case law and previous cases define this standard based on the exhaustion of the city's taxation power. As in the first type of decision, here again in order to come to a decision in the framework of a bankruptcy procedure, the court would be interfering with the fiscal affairs of the state. Based on the ruling in Ashton, such interference would be unconstitutional.

¹¹³ FRANCIS J. LAWALL & J. GREGG MILLER, DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIER MONOGRAPH 5 (LexisNexis 2012).

¹¹⁴ Michael W. McConnell, Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 470 (Spring 1993) (arguing that in its current form, Chapter 9 is barely useful to insolvent municipalities); Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351 (2010) (arguing that Chapter 9 is ill suited to solve the economic problems of general municipalities and thus should be used only for the purpose it was initially enacted, namely, to provide a solution to the hold out problem).

illiquidity problems, due to a one-time event.¹¹⁵ However, the argument goes, when it comes to general purpose municipalities¹¹⁶ which suffer from economic distress, as opposed to financial one, Chapter 9 fails to deliver results.¹¹⁷ Using the analogy with corporate bankruptcy, the author argues that a bankruptcy procedure is helpful only when the entity has illiquidity problems of temporary nature. In this case, through bankruptcy, such entity gets a chance to start fresh, upon the condition that the latter can survive in the market. But when the entity's revenues are constantly lower than its costs, such entity suffers from economic problems, which are much deeper and difficult to cure, as compared to financial ones. In this case, bankruptcy cannot provide a solution because economic problems are usually caused by external factors, such as socio-economic or political changes, which do not depend on the municipality. Solving such problems, would require structural reforms and governmental measures, with both of them not depending on a bankruptcy court decision, but rather on the State's decisions.¹¹⁸ Said differently, Kimhi does not believe Chapter 9 can rehabilitate a general purpose municipality undergoing economic problems and thus it would be better to use such chapter conform its original purpose, namely only in order to solve the hold-out problem.¹¹⁹ Finally, he suggests a State oversight model as the necessary tool to help such municipality recover.

While I certainly agree with the differentiation between problems of economic and financial nature, I do not agree with the author's exclusionist approach. True, Chapter 9, and for that matter, all the other chapters of the U.S. BY Code cannot solve economic problems of insolvent debtors.¹²⁰ However, the purpose of bankruptcy procedures is to offer the debtor a chance to discharge part of the debt incurred and start fresh, without the financial burdens of the past. If the cause of insolvency was temporary illiquidity, the debtor will very likely be financially healthy again. If however, the cause of insolvency was of an economic nature, the debtor will become insolvent again, unless measures are taken to correct the deficiency in its assets' structure or business operation. These measures are indeed under the competence of the municipality itself or the State under whose territory such municipality falls, as Kimhi argues.

¹¹⁵ Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 360-362 (2010) arguing that many small municipalities resorted to Chapter 9 because the payment of damages for a lost lawsuit, resulted in their illiquidity. Amongst municipalities who turned illiquid because of such events, the author enumerates the Village of Hillsdale, the city of Reeds Springs, the town of Tyrone.

¹¹⁶ In *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, Omer Kimhi differentiates between general purpose and special purpose municipalities. General purpose municipalities are those municipal corporations that offer broad governmental services. Cities, counties, towns and townships are general purpose municipalities. On the other side, special purpose municipalities are municipal corporations that offer a specific type of governmental service. Special districts providing services related to water supply, sewage system, electricity etc., come under this category.

¹¹⁷ *Id.* 374.

¹¹⁸ *Id.* 390.

¹¹⁹ Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351 (2010).

¹²⁰ DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 59-60 (New York The Foundation Press, 2010) (1992) arguing that Chapter 11 cannot solve the problems of "an unsound business venture".

But the fact that States have the necessary competences to correct the economic defaults of their municipalities does not constitute an argument against the benefits of a Chapter 9 bankruptcy procedure. The latter is beneficial in as much as it provides the municipality with the possibility to devise a strategy, free from the pressure of possible creditors' litigation and to ultimately have part of its debts discharged. While financial oversight boards, established through state legislation, can impose financial and fiscal measures upon the municipality, assisting its recovery, they cannot preclude creditors' litigation, nor can they discharge the debts of the municipality. For these reasons, Chapter 9 and State oversight models, together, constitute the formula for the financial and economic recovery of a municipality. Chapter 9 might pave the way in the case of ex-post State's intervention or serve as a last resort in the case of an unsuccessful ex-ante strategy.

In the form it is now, Chapter 9 is no panacea for the all the problems of an insolvent municipality and nor should it be. It is with this understanding that we now turn to our main question, which is still lacking an answer: If Chapter 9 is such a well-thought solution, tailor made for insolvent municipalities, then why are municipalities using it so rarely?

It is the author's opinion that there are many factors that have a say on this issue. First, the rare use of Chapter 9 could be due to the difficulty in complying with the eligibility criteria of said chapter. This difficulty, however, is not necessarily a badly-thought feature of Chapter 9. While meeting the eligibility criteria is certainly a challenge, they also serve the purpose of a "customs point" check for those municipalities who might want to use Chapter 9 in order to get their debts discharged, without having first exhausted all the means at their disposal to pay their creditors back. Said differently, a relatively complex filing process serves to reduce the moral hazard that can be associated to a Chapter 9 procedure, which as explained, offers several favorable features to an insolvent municipality.

Certainly, lowering the threshold for the use of Chapter 9 would arguably result in more municipalities' filings, but at what cost? At the cost of rejections of CBAs, pension benefits, sale of properties, reduction of public services, unemployment, and all of this when other solutions might be available. Chapter 9 would have had a more liberal set of eligibility criteria, had this been the intention of the U.S. legislator. But as explained earlier in this paper, such criteria are in fact quite burdensome. Based on this, one must conclude that the strict criteria of Chapter 9 serve the purpose of granting the protection of such chapter only to those insolvent municipalities that genuinely have no other choice. And if a municipality is really using Chapter 9 as its last resort, the strictness of its eligibility criteria should not constitute an insurmountable problem.

Last, another factor that can explain the rare use of Chapter 9 is related to the results of such a filing, in terms of creditworthiness of the municipality and its access to capital markets. As explained in the introduction of the present chapter, filing under Chapter 9 usually results in additional cost of credit for the municipalities and in the lowering of their credit rating. As a consequence, the municipality has more difficulties in finding the financial resources it needs to fund its activities and has to pay additional money for receiving loans. For these reasons, the officials of a municipality have to ponder very well on whether the municipality should to file under Chapter 9 and face the aforementioned consequences. However, as with the complex eligibility requirements, such hesitation in

making the decision to file under Chapter 9 is not to be interpreted negatively either. A municipal debt adjustment procedure is not to be undertaken lightly and without due consideration of its consequences. In this light, the small number of filings is arguably an indicator of prudent decision-making by municipal officials, rather than of the inefficiency of Chapter 9 itself.

Conclusion

The purpose of this paper was to analyze Chapter 9 of the U.S. BY Code, in order to provide an understanding on how a municipal debt adjustment law works. In conclusion of such analysis it results that Chapter 9 contains unique features, tailor-made to the nature of municipalities, as political subdivisions of a State. Due to such features an insolvent municipality undergoing a debt adjustment procedure enjoys several “privileges”. Amongst them, this paper identified the broad automatic stay, the strictly voluntary filing, the limited power of bankruptcy courts, the autonomy the municipality enjoys during a Chapter 9 procedure, the possibility of rejecting executory contracts and finally, the possibility of discharging its debts and starting anew. All of these benefits provide insolvent municipalities with incentives to file for Chapter 9 protection and constitute proof of the suitability and functionality of such chapter. As to the claim concerning the inefficiency of Chapter 9, as demonstrated by the small number of filed petitions, the paper argued that this connection is not direct. In fact such rare use can be explained keeping in mind the serious implications of a Chapter 9 filing, in terms of creditworthiness and access to capital markets, and the nature of said procedure as a last-resort type of solution. Seen from this perspective, the small number of petitions indicates the prudent approach of municipal officials who have to make the decision to file, and confirms the intent of the legislator to limit the availability of Chapter 9 only to the cases when it is indispensable.

In light of the current global financial crises, as a result of which many U.S. municipalities find themselves in financial trouble, Chapter 9, alive and well as showed by the recent filing of motor city, constitutes a powerful tool in the hands of insolvent municipalities.

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Lidiia Gribinichenko

*Department of Business Law, Perm State
National Research University, Russia*

Economic Partnerships as a Way to Attract Foreign Venture Capital Investment

Abstract

The problem of the formation and development of a business venture is particularly acute because of comprehensive processes of globalization, the growth of technological progress, the development of innovative industries. Russia takes the third place as the most attractive country for direct investment in the ranking that was created by participants of the UNCTAD in 2013. So, now particularly urgent task is creation a legal mechanism ensuring maximum rights of venture businessmen and reducing their legal risks. The appearance of such a legal mechanism will facilitate active cooperation of Russian and foreign investors in innovation, development of economic partnerships. To implement this task, a new variety of commercial entity - economic partnership was introduced in the Russian legislation by the Federal law of December 3, 2011 № 380-FZ.

The purpose of my article is to analyze the specific features of the economic partnership as a tool for attracting investments into the Russian innovation, its main characteristics that distinguish a partnership from other existing Russian and foreign legal entities. At the moment this legal form of business is the most flexible kind of legal entities in Russia as a finance and corporate model. It takes an intermediate position between business partnerships and companies, which combines features of these legal forms. We have identified the following main benefits of the economic partnership for venture capitalists: the ability of the stepwise entering of contributions to the company; the opportunity to participate in several business projects; the liability of the members of the economic partnership is limited by cost of their contributions; absolute freedom of decision-making. Thus, not only the partnership, but also other persons may participate in its management on the basis of special agreements. In addition to these, there are other legislative establishments, aimed at stimulating investment activity. All of these ensure maximum corporate privacy, lack of transparency of management decisions, and minimal state intervention in the functioning of the organization, which corresponds to the interests of investors.

It should be noted, that the construction of "economic partnership" has a tradition of use in other foreign legal systems. Economic partnerships conventionally can be considered as the Russian equivalent of "Limited Liability Partnership" UK and "Limited Liability Company" USA. Thus, this legal form of business is familiar to many foreign investors.

So, at the moment economic partnership, on the one hand, is the most effective tool to attract foreign venture capital investment that meets the interests of Russian start-ups, and on the other hand - the most reliable and safe way to invest their capital by foreign investors in the development of Russian business venture projects. This legal form is the most convenient one for foreign investors own businesses in the Russian Federation, and imports of foreign capital in the Russian economic partnerships which already exist.

Keywords: *venture capital investments, legal entity, economic partnership*

Investments and investing are the basis of any market economy. In this regard, one of the priority tasks of the state is to create a legal environment conducive to the formation of a favorable investment climate, and to take effective measures to ensure the maximum interests of both domestic and foreign investors. Above all, their investment risks should be reduced. It seems that the achievement of this task requires the creation of a special institutional framework for investment activities in general and venture activities in particular.

Effective legal institutions in the field of innovation have been absenting quite a long time in Russia. Special federal laws governing investment relations were fragmentary and often contradictory. Most of the guarantees established for investors were declarative in nature and require more detailed regulation.

The situation changed with the adoption of the Federal Law of December 3, 2011 № 380-FZ "About Economic Partnerships" (further - 380-FZ)¹, which introduced a new kind of commercial entity - economic partnership. The purpose of this innovation is to create favorable conditions for attracting investments into the Russian economy. The legal structure of the economic partnership meets the needs of Russian and foreign venture capital investors and current practices in international business. A specific feature of the 380-FZ is the large array of non-mandatory standards that provide flexibility to management of the economic partnership.

The paper analyzes in detail the legal status of economic partnership. The first chapter is devoted to a comparative legal research business partnerships and other foreign and Russian entities which can be used in the venture activities. The second chapter is the study of existing practice law in the Russian Federation, including the judiciary, in the sphere of legal regulation of 380-FZ.

1. Economic Partnership and Other Foreign and Russian Legal Entities in the Sphere of Innovation

1.1 Economic Partnerships and "Intermediate" Legal Constructions in Foreign Legal Systems

Legal structure of the economic partnership has a tradition of use in other foreign legal systems. The international experience shows that in order to implement investment projects there are most commonly used legal forms that are intermediate between the corporations and partnerships. Economic partnerships can be roughly considered as the Russian equivalent of "limited liability partnership" UK (LLP), "limited liability company" USA (LLC) and limited partnership shares to Germany Kommanditagesellschaft auf Actien (KGaA). Although, of course, there are some differences between these entities. Some of them will be analyzed below.

The legal status of the LLP was established in the Limited Liability Partnership Act. A heated debate about the need for a legal mechanism for the protection of the rights of creditors who may be harmed because of unlimited liability partners preceded the adoption of the law. The basis of this mechanism is the norm, which establishes the

¹ Federal Law "About Economic Partnerships", 2011 № 380-FZ

obligation partners to disclose information about their participation in the partnership property to demonstrate the degree of risk they are willing to bear for the obligations of a legal entity. In this regard, LLP is a more transparent structure, rather than Russian economic partnerships. It is the common fact that LLP partners have limited liability for the debts of a legal entity within the value of their contribution, as well as in the economic partnership. However, the model also provides LLP possibility of additional responsibilities of the partners, that the partners have agreed in advance with the amount of the partnership's assets are insufficient to satisfy the claims of creditors in the process of liquidation(Kibenko, 2003).

LLP with partnerships combines personal relationships of its partners, with companies - limited liability partners. In the public part of the LLP legal regulation, namely the scope of taxation, it must be emphasized that LLP profits is not subject to corporate tax; income and expenses received by the results of LLP, are reflected in the tax returns of its members, avoiding double taxation.

The U.S.A. has the richest history of the formation of venture business, which originates from the middle of 20th century, when there was an urgent need to reverse the gap that existed between science and industry (Campbell, 2004). State support has played a special role in the development of a business venture in the United States. It was expressed in the creation of special infrastructure, implementation of concessional lending, etc. This is due to the prevailing doctrine of the Interior (internal affairs), which justifies the need for an integrated approach to solving business problems, combining economic, political, legal and other factors. Difficulties of the study of Corporate law of the United States, are linked with the presence of a two-tier system of legal regulation of legal entity - federal and state. It should be noted that the analysis of the different types of legal persons with regard to the U.S.A. federal legislation is not entirely complete, because on the federal level only model laws may be taken. In particular, in 1996, the Uniform Limited Liability Company Act was passed. In fact, Corporate law is administered by the states, and state laws often differ in substantial ways, and can contradict each other.

Let us analyze the two main legal forms of a business venture, widely circulated in the United States, - LLC and LLP. It is necessary to mention that LLP in the UK and U.S. laws have different content. Despite many similarities, LLC and LLP have significant differences. The first LLP legal model has been introduced into state law in Texas in 1991 (Young, 2007). The last state to enact legislation on LLP, became Wyoming. LLP is different from the classic partnership and has a number of attributes of a legal entity, in particular, it can have its own property, to speak on their behalf as a plaintiff and a defendant in court. The Charter is virtually absent in LLC, and LLP, and order management and distribution of profit is determined by the special legal agreement concluded partners (partnership agreement). LLP legislation in different states has its own characteristics. In this case, the two main models of liability partners are allocated by American jurists (Rosin, Closen, 2000). First, it is partial-shield from personal liability, when one partner is not responsible for the illegal actions of other partners, but shall be liable for the obligations arising from the ordinary activities of the partnership. Secondly, it is full-shield. This model provides a full exemption from liability of partners for obligations of the partnership. This legal liability, structure was first sealed in Minnesota, now widespread in the states and retains Uniform Partnership Act. However, the model does not waive consideration of the interests of partnership's creditors. For example, California law contains a requirement that the responsibilities of each partner having a

license to engage in certain professional activities should be insured for an amount not less than U.S. \$ 100,000. An alternative to the above requirement is written evidence that equity partnership at the end of the financial year is not less than the minimum size, in particular the \$ 10 million U.S. for partnerships providing legal services².

The first LLC was recognized by the laws of Wyoming in 1977. Vermont, Massachusetts and Hawaii became the last state laws appeared LLC (Martin, 2001). The appearance of LLC was not due to the need to implement innovative projects. Specific features of the LLC is to combine the limited liability of the participants, typical corporation, and relative freedom of managerial decision-making inherent in the partnership. Structured management, which is reflected in the presence of various organs, is away in LLP. Members can manage the LLC, both independently and invite hired managers whose powers are assigned to so-called management agreement (operating agreement). Despite the fact that the laws of most states do not require this document, in fact it has an agreement in each LLC, as it is the main act, which regulates the relations of participants (Mancuso, 2011). The by-laws, the traditional corporation, is not into LLC. This LLC is similar to the Russian economic partnership, but in economic partnership freedom of organization management partnership is almost absolute, in addition to the economic partnership opportunities to participate in the management of a legal entity are represented by third parties. In the external relations of the participants are entitled to act on its behalf. Compared with other existing "intermediate" legal forms in LLC failure in certain cases from the principle of limited liability is the most complex and very difficult process. This legal model for the organization and conduct of business venture provides the most complete protection to its members (Warda, 2007).

Two options for taxation in the states have proliferated. First, members of the company may decide to pay taxes in accordance with the requirements that apply to corporations. Second, as in the previously discussed LLP, profit received by a limited liability company, is recognized as income of the partners to be included in the tax return. Pass-through taxation occurs. This is not a legal entity, but its members are subject to taxation. The second option is the most common in the United States.

Thus, comparing the LLC and LLP in the United States can come to the following conclusions: legislation LLC has more discretionary rules compared with the legislation on LLP and provides participants with more authority. Thus, under certain circumstances, the member of a company can be excluded from management decisions, while the partner cannot be deprived of the right to participate in management. In addition, under the laws of most states the partner is right to withdraw from the partnership cannot be limited, whereas in relation to limited liability companies there is no such legislative establishment.

Limited liability companies are widely spread in the United States. This legal entity model is often used to hold assets as opposed to operating companies directly carrying out business activity (Sutton, 2004). In addition, in the U.S., this legal form of business is used by persons engaged in activities subject to licensing, in particular doctors, lawyers, etc., through the creation of so-called professional limited liability companies (PLLC).

² URL: <http://www.ss.ca.gov/business/llp/llp.htm>, viewed: 10/03/2012.

The comparative legal analysis of economic partnership and German legal model KGaA is the most interesting, because the Russian civil law concept on legal entities has German roots. KGaA, a limited partnership of shareholder, is an organization of corporate type, which is the union of capital, permitted to issue shares. This legal form of business from the classical joint stock company (AG) is characterized by the fact that the status of its members is not defined solely by the category (type) of shares owned. Thus, one or more shareholders have a special status of a general partner, which not only provides them with certain preferences, but at the same time imposes on them certain responsibilities. Preferences express in the fact that the other shareholders in relation to general partner in internal relations act as limited partners. Encumbrance consists of unlimited liability for the debts of a partnership. Thus, the relative freedom of management decisions implemented within the corporate legal relationships is associated with the increased responsibility of general partner in the stock commands. In the economic partnerships responsible partners for the obligations of the partnership are limited by the size of their contributions. Therefore, German KgaA and Russian economic partnership have significant differences in terms of the constitutive features of responsibility and freedom of decision-making. It seems that the comparison of economic partnership with the shareholder of a limited partner, where Limited Liability Company (GmbH & KGaA) acts as complimentary, is the most correct.

So, a Russian legislator went to cut the tradition of using the German experience in improving the legislation on legal entities by making economic partnership rather on the American LLC and British models LLP, than German. Economic partnerships absorbed all the best features of famous foreign forms of business, have been widely used in innovation, maximum guarantees the rights of investors are established in the 380-FZ. Legal regime of economic partnerships, familiar to foreign investors, provides favorable conditions for the organization and conduct of business venture. Currently economic partnership meets the highest standards.

1.2 Economic Partnerships - the Best Form of Organization for a Business Venture in Russia

The emergence of a new kind of commercial entity in the system of legal entities in Russia is due primarily to the absence of a previously existing Russian civil law legal form that meets the needs of venture activity.

In particular, economic partnerships deterred entrepreneurs, especially the fact that a general partner shall be liable for the obligations of the partnership with their personal belongings. Availability of fiduciary relationships between the parties, the dependence of the legal structure of their personal involvement are essential feature of these legal entities. In addition, this legal form of business does not provide for exit of members of the partnership. Finally, the investor has the right to participate in only one general partnership or limited partnership. Thus, it can control only one business project, and this fact is very unattractive to venture capitalists. Generally, it should be noted that economic partnerships represent a rudiment, as this legal structure has long ceased to respond to the needs of modern business practices. In the form in which business partnerships now exist, it will not be used not only by venture capitalists, but also Russian businessmen.

The popular Russian legal form is business companies. However, their legal regime does not provide for the stepwise implementation funding. Adaptation of business companies

for the organization business venture requires making extensive conceptual changes in group of legal acts that determine their legal status. In addition, strict mandatory regulation does not allow to implement traditional foreign investors' contractual forms and methods of balancing the interests of participants in the economic society based on their actual participation in the business.

Thus, the emergence of the economic structure of the partnerships has been caused by the objective reasons - lack of current legislation in the right mode, which can be used to organize the venture business projects and the inability to modify existing legal forms under these purposes, the presence of positive foreign experience on the use of "intermediate" entities in innovation. Knowledge-intensive industries attractive for investors due to the high risks, the legal regime of companies and associations provide priority over the rights of creditors participating organizations on its liquidation. The 380-FZ also provides a higher degree of intellectual property protection, significantly reduces the risky nature of venture activity.

2. Legal Status of Economic Partnerships

2.1. Concept and Features of the Legal Nature of Economic Partnership

What is an economic partnership? Let us to refer to the 380-FZ and analyze the main features of the commercial entity. As already noted, the economic partnership incorporated all the best features of famous foreign entities' laws and orders. However, the adoption of the 380-FZ cause mixed reactions among domestic jurist and practitioners. So, MSU professor D.V. Lomakin indicates the imperfection of the legal machinery of the act, says, that Law on Economic Partnerships provides the appearance of a new organizational form of legal entity, which not only does not match the legal entities, but is outside of it (Lomakin, 2012).

Nevertheless, most civilists positively evaluate the appearance of a legal structure of economic partnership. In particular, Professor S. Grishaev notes, that the enactment of the Economic Partnerships will create the necessary preconditions for increasing the amount of innovation, including venture capital, business projects carried out by Russian and foreign investors (Grishaev, 2012).

According to Art. 2 to the 380-FZ an economic partnership is a commercial organization, consisting of two or more persons, in the management of which, in accordance with this Federal Law, the partners and other persons on the basis of the agreement on the management of the partnership are involved in management of the partnership We can distinguish from this definition the following features of economic partnership:

1. It is a commercial organization, the primary purpose of which is profit. The explanatory note to the bill states that features of preparation, implementation and termination of innovative business project are determined by the specific requirements that apply to the legal form entity that is used by actors as the organization of innovation (including venture capital) business³. It is noteworthy that these entities have a common legal capacity. From the text of the Federal Law does not follow that its legal status is determined by the nature of innovation. In fact, in the system of legal entities in

³ URL: [http:// www.duma.gov.ru](http://www.duma.gov.ru), viewed: 10/03/2014.

Russia it is a new kind of commercial entity, which can be used not only for the implementation of business projects, but in general for the organization of any business in the territory of the Russian Federation. This fact led to criticism from domestic jurists to 380-FZ.

It should be noted that the order of the President of the Russian Federation to Government of the Russian Federation for purpose of creation favorable conditions for the development of venture capital financing to develop projects of federal laws aimed at the development of legislation detailing and improving of legal forms, demanded the implementation of innovative projects, served as the basis for the emergence of this law. MSU professor D.V. Lomakin indicates that the in Federal Law one of the ideas sound previously insolvent, which is that a common mechanism of legal regulation submits the decision of a private, narrow-profile tasks of individual participants in civil commerce, was embodied (Lomakin, 2012).

However, giving economic partnership general legal capacity will solve the following problems. It is well known that a business venture is conjugate with a high risk by investors. Risky nature of venture capital operations connects with the fact that an investor who invested their money in the innovation sector, has no guarantees, firstly, that the product will be created, and secondly, that the created product will move to self-sufficiency. According to research by the University of Tennessee (USA, 2011) 36% of startups cease to exist before the expiration of three years from their inception. General Director of the Russian business accelerator Fastlane Ventures (FLV) Marina Treschova thinks that only one project of ten survives in the venture business (Shamakina, 2013). It seems that giving general legal capacity of economic partnerships will ensure the effectiveness of its activities as the project companies will receive additional financial resources through the implementation other, than innovative, types of business activity. it will help to ensure that the project company will be able to quickly move to self-sufficiency.

2. Economic partnership is a commercial organization, made up of two or more persons. It can be both physical and legal entities, including foreign ones. It is not permissible to create economic partnerships with one person. The 380-FZ sets the maximum number of participants border partnership, according to Art. 4 of the 380-FZ number of participants should not exceed 50 persons.

3. Not only the partnership, but also other persons on the basis of special agreements can participate to manage the economic partnership. The idea of participation of third persons in the management is not new. In Russia and in foreign legal systems institution of independent managers is known and widespread. However, powers the control of third parties does not arise out of the employment contract, but from the special in nature of a civil contract - an agreement about management of the partnership. It is a fundamental difference between economic partnerships and other legal form. Needless partnership can be a party to such an agreement, that it is mandated by statute. This possibility follows from paragraph 2 of Art. 6 of the 380-FZ.

4. The presence of a special agreement, which defines the limits and scope of authority of partners and third parties, is the fourth constitutive and perhaps the most important feature. In fact, this agreement replaces a traditional Charter of legal entity. It follows from Art. 9 FL, analysis of this article suggests that the Charter has declarative

nature and seats up to those occasions when the organization has not agreement about the management of the partnership. Charter should contain only information about the procedure and should be elected sole executive body of the partnership, the order of its activities and decision-making (Section 7 Part 2 of Art. 9). However, the presence of the Charter in the economic partnership in any case remains a requirement.

Assessments of the legal nature of the economic partnership are ambiguous. Several researchers consider partnership as a corporate organization. In particular, A.N. Besedin E.A. Kozina are convinced that economic partnership is the corporate commercial entities (Besedin, A.N., Kozina, 2013). In their arguments they rely on the fact that the concept of civil legislation of the Russian Federation bases on the membership as criteria for selection of corporation they believe that lack of reference to economic partnerships in the Project Civil Code changes Section 1, Art. 65 is the omission of technical format.

We are convinced that the legislature specifically lowered economic partnerships in the enumeration of legal forms relating to corporations. The 380-FZ really sets the fixed membership - from 2 to 50 participants. But we should not forget that not only the participants, but also by third parties, whose number is not fixed, participate in the management of economic partnership. Moreover, the scope and limits of the rights of participants and third persons have largely contractual in nature, not corporate.

2.2. Benefits of Economic Partnership for Venture Capitalists

Let us try to determine why the legal regime of economic partnership creates the most favorable conditions for the development of venture capital financing. We have identified the following benefits of the economic partnership for venture capitalists.

First, it is the ability of the stepwise making contributions to the company and the imposition of sanctions when there are failing. 380-FZ does not provide requirements for the formation and change in share capital of the legal entity, but at the same time indicates the possibility of the Government to establish the Russian standards of capital adequacy of a partnership engaged in certain activities. This approach provides the flexibility of legal regulation and gives the opportunity to appeal to the courts for participants. It corresponds to the intensively developing market economy and the growing demand of scientific and technical knowledge. Second, it is the presence of "corporate shield" with the minimum reporting requirements. Under part 2 Art.2 of the 380-FZ economic partnership members are not liable for the obligations of a legal entity and bear the risk of losses, associated with the implementation of the partnership, to the extent of their contributions in proportion to their size. Thus, participants in the venture business minimize the risks associated with its implementation.

The third specific feature of economic partnership is absolute freedom of decision-making. Management is carried not on a corporate, but on a contractual basis, because the administrative powers are determined by a special contract - an agreement about management of the partnership. As mentioned above, not only the partnership, but also other persons may participate in its management on the basis of special agreements. It should be noted, that no one of the famous foreign legal forms does not provide for third parties such opportunities of a management entity. Because the agreement is not a constituent document, information about him and the provisions contained therein are not entered in the Unified State Register of Legal Entities, it is kept by the notary on the

location of the partnership. This ensures maximum corporate privacy, lack of transparency of management decisions, and minimal state intervention in the functioning of the organization, which corresponds to the interests of investors. Norm, prohibiting placement partnership advertise their activities, also aims at ensure confidentiality venture business project.

Lack of stringent requirements for the internal organizational structure is a characteristic feature of economic partnerships. The partnership may provide any management model. The only requirement is the presence of the sole executive body. Presence of other bodies is not necessary, if the agreement about the management does not provide their existence. Only the sole executive body without a warrant is entitled to act in relations with third parties on behalf of the economic partnership. Giving details of the sole executive body, the extent of its powers can be done by issuing the sole executive body of the partnership agreement in writing to become acquainted with the agreement about management of the partnership that is kept by the notary, details of which with all the changes are in the charter of partnership. Signature of the sole executive body of the partnership for such consent must be witnessed by a notary. It should be noted that other bodies partnership if its formation is provided by the agreement about the management of the partnership, may not act on behalf of a partnership in its relations with third parties.

In order to prevent possible abuses by the sole executive body of Section 5, Art. 18 of the 380-FZ provides that the decision of partnership management body taken in violation of this Federal Law, other legal acts of the Russian Federation, the charter of a partnership, the agreement about the management of the partnership and violates the rights and legitimate interests of the partnership may be declared invalid by a court at the request of partnership members.

Fifth, the legislator provided in certain cases the possibility to set the priority of some participants to creditors and some participants over others in the liquidation of partnership.

Sixth, the investor has the opportunity to participate in several business projects that are not covered in economic partnerships.

These are the main advantages that a large investor receives when organizing a business venture in the form of economic partnership, in addition to these, there are other legislative establishment, aimed at stimulating investment activity. As regards taxation, the tax legislation does not provide any features in the regulation of the legal status of economic partnership as the taxpayer.

2.3. The Practice of Using Economic Partnerships for the Organization of Business Venture

Currently, this legal form of business venture in Russia starts to use. In particular, the CEO A. Chubais said about the transformation of "RUSNANO" in economic partnership soon (Zakon.ru Publisher, 2013). Deputy Director of the Legal Department of JSC "RUSNANO" A.K. Nesterenko in her interview for zakon.ru said, that RUSNANO and all venture capital community welcomes the emergence of a new organizational form of legal entity aimed to prepare and implement a business venture projects. She is convinced that Russian Venture Company" and "Skolkovo", and many other participants in the

innovation process will take advantage of this opportunity. Investment partnership agreement is good for a start, for the early stages of business formation. Economic partnership is a form for innovative business venture on the stage of expansion. Speaking about foreign investors, she said, that They are interested to know more about these forms, understand the opportunities, risks , and understanding to use them (Bagaev, 2012).

Due to the fact that this law was adopted relatively recently, stable jurisprudence in its scope has not yet developed. Analysis of a small existing jurisprudence in this area shows that there are difficulties in understanding the legal nature of the economic partnership, in its delimitation from other legal forms, in particular non-profit partnerships. Thus, in the N A40-149317/2013 the suit Nonprofit Partnership "A" Open Joint Stock Company "B" defendant unreasonably refers to the fact that his relationship with the Partnership are classified as corporate relations, and so special, but not the general rules to be applied. He refers to the provisions of the Federal Law "About economic Partnerships" N 380- FZ of 03.12.2011⁴.

Another example - Resolution of the Federal Volga District of 03.12.2013 in case N A06-1732/2013, which indicated that the appellate court did not consider that economic partnership is not the union of commercial organizations. Economic partnership is a commercial organization, made up of two or more persons⁵.

Currently the countries of Southeast Asia, China and Europe show an active interest in economic partnerships. Analysis of judicial practice help to suggeststhat certain difficulties in making decisions about the entity participating in the economic partnership exist. Often, these decisions are disputed. Currently, according to the Federal Tax Service 17 economic partnerships, 4 of them - in 2013 and 13 in 2014, are reported. There are positive trend in the amount of use of economic partnerships for the implementation of business projects⁶.

However, current legislation effective has not measures to protect creditors of the economic partnership. As rightly pointed D.V. Lomakin, that Russian legislator to create the conditions for successful development of the innovation process freed participants from these increased risks. Paraphrasing famous dictum M.V. Lomonosov we can say that if some risks decrease, then the other will certainly arrive. It seems that the assumption that the other is creditors of economic partnership is not so far from the truth (Lomakin, 2012). This problem needs to be resolved. Let us refer to the experience in the UK and submit the Federal Law norm, establishes the duties of participants to determine the amount of money by which creditors will levy in case of insufficiency of funds in the process of liquidation.

We obtained the following conclusions. Business partnership is a kind of "intermediate" form, which combines some features of business partnership and companies. Intermediate forms were widely spread in foreign legal systems, this development of legal structures in our country is the most logical and consistent.

⁴ Resolution of the Ninth Arbitration Court of Appeal of 24.02.2014 N 09AP-1402/2014 A40-149317/2013, ATP ConsultantPlus.

⁵ Resolution of the Federal Volga District of 03.12.2013 in case N A06-1732/2013, ATP ConsultantPlus.

⁶ URL: <http://egrul.nalog.ru/#>, viewed: 26/03/2014.

Despite existing mixed assessment of jurists, economic partnership is the most convenient and flexible organizational form for the organization by foreign and domestic investors their business venture. It is caused primarily by the presence of a large array of discretionary rules governing the legal status of economic partnership that allows the participant to choose a convenient management model, in contrast to business entities where the internal structure is strictly regulated. Moreover, the relationship between participants of partnership builds not more than corporate basis, but on a contract that allows more timely make managerial decisions. There are numerous references to the acts of the Government in the 380-FZ. Many issues, such as setting standards of capital adequacy of partnerships engaged in certain activities, defined at the acts of the Government of the Russian Federation. This will ensure the timely and effective legal regulation; meet the needs of a changing market. There are dynamics of growth in the use of the variety of commercial legal entity for the organization's own business venture. As for the criticism of economic partnerships, now difficult to speak about the problems that can arise when using economic partnerships, because the judicial practice in the field of legal regulation has not yet emerged. In any case, economic partnership incorporated all the best features of "intermediate forms" that exist in foreign legal systems, and those minor imperfections that can be appeared in the law practice will be promptly corrected by the legislator with regard to the established jurisprudence.

Thus, at the moment an economic partnership, on the one hand, is the most effective tool to attract foreign venture capital investment that meets the interests of Russian start-ups, and on the other hand - the most reliable and safe way to invest their capital by foreign investors in the development of Russian business venture projects. This legal form of business is not original. It is familiar to many foreign investors, so in the Russian Federation an economic partnership is the most convenient and efficient legal structure for the organization and conduct of business venture by foreign investors, both independently and jointly with Russian entities and citizens.

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Orjana Mullisi

Master of Law, KULeuven, Belgium

Albanian Regulation in the WTO

Abstract

This study will focus on Albanian case in the WTO from the moment of accession till recently. The first part will present and explain some key features of WTO to help us understand how it works and based on what principles. After creating an idea of WTO framework we continue with the second part that is Albania under WTO rules (trade policies, market access, trade outcomes ect). The third and last part will be an analysis of what was achieved and what still remains to be done under WTO scheme.

The membership of Albania to the WTO was approved on 17 July 2000 the same date of Croatia accession therein and it was very significative since it meant opting for reform instead of reaction, openness rather than isolation as Director General also pointed out. So Albania was finally ready: ready for a new chapter, ready for a new role in international arena, ready for peace, prosperity and wellbeing of its citizens.

Trade has a very important role in the economic development of the country. Albania is a net importing country. Imported products exceed exported ones several times. The objective of Albanian Government in trade policy area as mentioned in Trade Policy Review on 24 March 2010 aims to:

- a) liberalize trade,
- b) harmonize the Albanian legislation with international trade rules;
- c) harmonize it with the European Common Commercial Policy, etc.

In this context, Albania has prepared, adopted and implemented some very important laws such as:

1. Customs Code of the Republic of Albania, with all its implementing provisions;
2. law for customs duties, with harmonized nomenclature of goods classification;
3. the law on standardization;
4. law on antidumping;
5. law on conformity assessment, etc.

Under WTO scheme Albania is part of (RAMs) - Recently Acceded Members ie: countries that negotiated and joined the WTO after 1995 seeking lesser commitments in the negotiations because of the liberalization they have undertaken as part of their membership agreements

Keywords: *Albania, openness, reform, trade, WTO*

1. Introduction

The paper on the Albanian commitments and legal framework on WTO scheme is not an easy task to assess all the opposite it is a complex exercise, as the complex legal corpus of this institution. For this reason this paper will try to give some important elements of the relation that exist between a developing country such as Albania and an international organization whose aim is to liberalize international trade. This approach should be considered a first attempt not at all an exhaustive one.

The primary aim of this paper is to analyze Albanian legislation within the framework of WTO but this task cannot be assessed without having an idea first of what WTO consist.

The conclusions and recommendations in the end will be an analysis and a summary of what was quoted in the paper as a whole.

2. Understanding WTO

Undeniably a process of globalization has taken place on the last decades. Countries and people around the world have become more integrated and eager to cooperate more and more.

Those emphasizing the benefits of globalization maintain that this is a good thing because it results in increased consumers' choices and access, enables countries to use resources more efficiently and promotes economic growth. Critics maintain that this phenomenon has exposed vulnerable economies to economic and financial shocks, led to unemployment and strained the ability of poor countries and population to adapt. Recently the World Trade Organization, the descendant of the General Agreement of Trade and Tariffs (GATT) the only international organization dealing with trade rules between nations through negotiations, has become an important point of globalization controversy.

After the Second World War, free trade was seen as an important mechanism for world peace and a crucial factor for world economy. Of a great importance was the creation of three organizations which would maintain international economic cooperation named: International Monetary Fund (IMF), the World Bank (International Bank for Reconstruction and Development) and the International Trade Organization (ITO). These organizations were negotiated during the Bretton Wood Conference. However the US Congress refused to ratify ITO and as an intermediate solution GATT 1947 was created – yet it survived for 47 years and until 1995 it was the primary multilateral mechanism for regulating agricultural trade among nations.¹ The main objective of GATT was the reduction of barriers to international trade.

The WTO's creation on 1 January 1995 marked the biggest reform of international trade since after the Second World War. It also brought to reality — in an updated form — the failed attempt in 1948 to create an International Trade Organization.²

¹ S. Thournsbury *“Technical Regulations as barriers to Agricultural trade - Agricultural trade and General Agreement on Tariffs and Trade”* chap.2 <http://scholar.lib.vt.edu/theses/available/etd-92998-84637/unrestricted/ch2gs.pdf>

² WTO Home Page *“The GATT years: From Havana to Marrakesh”*
http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm

It is an organization for trade opening. It is a forum for governments to negotiate trade agreements. It is a place for them to settle trade disputes. It operates a system of trade rules. Essentially, the WTO is a place where member governments try to sort out the trade problems they face with each other. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations. The bulk of the WTO's current work comes from the 1986–94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT). The WTO is currently the host to new negotiations, under the 'Doha Development Agenda' launched in 2001. Where countries have faced trade barriers and wanted them lowered, the negotiations have helped to open markets for trade. But the WTO is not just about opening markets, and in some circumstances its rules support maintaining trade barriers — for example, to protect consumers or prevent the spread of disease. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives. The system's overriding purpose is to help trade flow as freely as possible — so long as there are no undesirable side effects — because this is important for economic development and well-being. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be 'transparent' and predictable. Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements.³

The WTO is seen as a positive step for the global economy. The World Trade Organization has a very important function to liberalize trade between its members and to set the rules for trade barriers. It is important today because it's not only customs tariffs, which may pose problems for traders, but it's all kind of regulatory areas, such as product standards, or labelling, or standards for health of foods. So being in the centre of world trade, the organization makes sure that same rules are applied between its members, and therefore traders have legitimate expectations when trading with another WTO member that won't be arbitrary but will follow the rule of law.⁴

The WTO agreements are lengthy and complex because they are legal texts covering a wide range of activities. But a number of simple, fundamental principles run throughout

³ WTO Home Page "*Understanding the WTO: Who we are*"
http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm

⁴ The voice of Russia "*WTO 'balances interest' in historic global trade deal*" http://voiceofrussia.com/2013_12_08/WTO-balances-interests-in-historic-global-trade-deal-7821/ 8 December 2013

all of these documents. These principles are the foundation of the multilateral trading system.⁵

a) Non-discrimination

A country should not discriminate between its trading partners and it should not discriminate between its own and foreign products, services or nationals.

b) More open

Lowering trade barriers is one of the most obvious ways of encouraging trade. These barriers include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively.

c) Predictable and transparent

Foreign companies, investors and governments should be confident that trade barriers should not be raised arbitrarily. With stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition — choice and lower prices.

d) More competitive

Discouraging ‘unfair’ practices, such as export subsidies and dumping products at below cost to gain market share; the issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade.

e) More beneficial for least developed countries

Giving them more time to adjust, greater flexibility and special privileges; over three-quarters of WTO members are developing countries and countries in transition to market economies. The WTO agreements give them transition periods to adjust to the more unfamiliar and, perhaps, difficult WTO provisions.

f) Protect the environment

The WTO’s agreements permit members to take measures to protect not only the environment but also public health, animal health and plant health. However, these measures must be applied in the same way to both national and foreign businesses. In other words, members must not use environmental protection measures as a means of disguising protectionist policies.

2.1 WTO structure and legal framework

Legal texts or agreements reached in WTO framework may be divided in 6 main groups:⁶

⁵ WTO Home Page “*Understanding the WTO: What we stand for*”

http://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm

- umbrella agreement(WTO foundation agreement);
- agreement for each of the three trade fields covered by WTO (goods, services and intellectual property);
- rules for disagreements solution;
- rules for governments trade policies review.

Agreements for two largest fields – goods and services – are structured according to a triple scheme which contains:

- general principles: General Agreement on Goods (GATT), General Agreement on Trade and Services (GATS) and Trade Related Aspects of Intellectual Property Rights (TRIPS)
- relevant agreements and annexes
- list of commitments made by the countries for the market liberalization. For GATT, commitments take the form of compulsory commitments and tariffs and quotes combinations for some agricultural products. For GATS, commitments show how much access has been given to services bidders for specific sectors. This means that the countries have the right to deviate from MFN principle. In this case the countries should show where they will not apply it.

Table 1. Understanding the WTO: The Agreements
(Source: WTO home page)

In a nutshell

The basic structure of the WTO agreements: how the six main areas fit together — the umbrella WTO Agreement, goods, services, intellectual property, disputes and trade policy reviews.

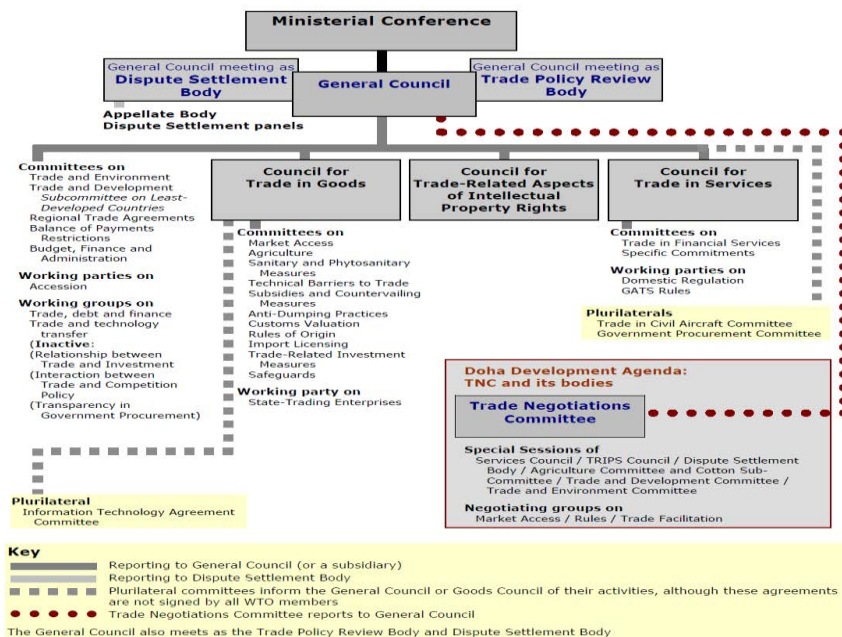
<i>Umbrella</i>	AGREEMENT ESTABLISHING WTO		
	Goods	Services	Intellectual property
<i>Basic principles</i>	GATT	GATS	TRIPS
<i>Additional details</i>	Other goods agreements and annexes	Services annexes	
<i>Market access commitments</i>	Countries' schedules of commitments	Countries' schedules of commitments (and MFN exemptions)	
<i>Dispute settlement</i>	DISPUTE SETTLEMENT		
<i>Transparency</i>	TRADE POLICY REVIEWS		

Speaking about WTO structure The Ministerial Conference is the highest organ of the WTO. It is normally composed of all the Ministers of Trade of the Members of the WTO. The Ministerial Conference has supreme authority over all matters, as expressed under Article IV:1 WTO Agreement.

⁶ Engjell Shkreli "Albania and the WTO: Survey on Commitments" Albanian Center for International Trade, February 2004

The General Council is composed of representatives of all the members – normally country delegates based in Geneva. Effectively, the General Council is the single most powerful body within the WTO and it has the same powers of the Ministerial Council, when the Ministerial Council is not operating. The General Council also acts as the Dispute Settlement Body and the Trade Policy Body (Article IV:2-4 WTO Agreement).

The Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) have been established with specific spheres of responsibility. In fact, there are separate agreements within the framework of WTO that define and confine their operation (Article IV:5 WTO Agreement). The Committee on Trade and Development, the Committee on Balance-of-Payments Restrictions and the Committee on Budget, Finance and Administration have self-evident functions (see Article IV:7 WTO Agreement). Likewise the Director-General and the Secretariat operate on a purely administrative basis. However, it should be stated that the Director-General and the staff of the Secretariat shall be exclusively international in character and they shall not seek or accept instructions from any government or any other authority external to the WTO (Article VI:4 WTO Agreement).⁷



⁷ Open Educational Resources The law of World Trade Organization – Organizational Structure of WTO

Figure 1. WTO legal structure⁸
(Source: WTO Home Page)

2.2 From GATT to WTO: what was changed and what remained untouched

WTO has significant implications for the accession negotiations as compared with that of the GATT in particular with respect to nonapplication (an existing member of the GATT, or now the WTO, does not extend trading rights and privileges to the new member). The key principles of the GATT are incorporated and strengthened in the WTO. This principles include non-discrimination encompassing [MFN (Most Favoured Nation – Article I of the GATT – equal treatment for trading partners) + National Treatment (Article III of the GATT – once custom duties on imports have been paid, the imported products must be treated the same as domestic products) + Article XI of the GATT (quantitative restrictions on import and export are prohibited)]. The WTO, the single undertaking strengthens these rules by limiting special and differential treatment for developing countries, by removing special exceptions such as grandfather rights for policies that contravened GATT obligations but predated GATT membership and by subjecting all members to almost all agreements. Many developing countries were formal participants in the GATT system, but in practice the developed countries had obligations to them while developing countries had few effective obligations to the developed countries. Although there will still be some elements of special and differential treatment within the WTO scheme the trading rules will apply on a truly global basis across many developing economies.⁹ The creation of WTO has several implications for the accession of new members. The accession protocol provides the following¹⁰:

- no quantitative restrictions on exports and imports;
- agreed tariff schedules in the industrial and agricultural sectors;
- agreed services schedule;
- adequate and effective protection of intellectual property as provided in TRIPs agreement.

Table 2. What was done and undone from GATT to the WTO

	Accession negotiations	Non discrimination			Investments	Accession obligations	Article XXXV-non application only for political reasons
GATT	Non application rule	MFN Art.I	National Treatment	Prohibition of quantitative	TRIMS	Less obligations	Negotiate bilaterally No-nonapplication

⁸ WTO Home Page “WTO legal structure”
http://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf

⁹ Muray G. Smith “Accession to the WTO: Key Strategic Issues” chap.10, Institute for International Economics

¹⁰ *Ibid* 9

			Art.III	restrictions Art.XI				n
WT O	Transfo rmed	preserved	preserved	Strengthened	No rules	Implications	More obligations	Negotiate bilaterally Yes-nonapplication

3. Albania under WTO scheme

When seeking membership to the WTO Albania was considered to be an economy in transition (former centrally planned economy). The accession negotiations seek to bridge the Cold War fault lines and if successful, would integrate some of the most autarkic economies into the global economy. Perhaps the most dramatic development of the late 20th century is the spasmodic reintegration of the centrally planned economies into the world economy.¹¹

The EU distinguishes among three groups of countries for safeguard and antidumping purposes: a) non market economies, none of whom are WTO members; b) a second group of transition economies part of which is Albania and c) all other countries that are considered "market economies".¹²

Albania agreed to assume its WTO obligations upon accession. In addition, it signed two plurilateral agreements on government procurement and on trade in civil aircraft. Albania's accession package includes market-access commitments on goods and services. Albania applied for GATT 1947 membership in 1992. Negotiations on Albania's terms of accession to WTO started in earnest in 1998. The WTO General Council adopted the final results of these negotiations on 17 July 2000. Albania became 138th member of the World Trade Organization on 8th September 2000. WTO Director-General Mike Moore greeted the event by saying:¹³

I welcome Albania into the multilateral trading system. Membership promises a more prosperous future and raised living standards for all Albanian citizens. I also believe that, by encouraging the trade links between countries, the WTO can help foster greater peace, stability and development in south-eastern Europe. Albania's membership brings this Organization ever closer to being a truly 'World Trade Organization'.

¹¹ Muray G. Smith "Accession to the WTO: Key Strategic Issues" chap.10, Institute for International Economics

¹² Harry G. Broadman "From Disintegration to Reintegration: Eastern Europe and Former Soviet Union in International Trade" World Bank Publications 2006

¹³ WTO Home Page "Albania joins WTO"
http://www.wto.org/english/news_e/pres00_e/pr189_e.htm WTO NEWS: 2000 Press Releases, Press/189

Table 3. Groups in the Negotiations¹⁴
Source: WTO Home Page

Recent new members (RAMs)	<p>Recently acceded members (RAMs), ie, countries that negotiated and joined the WTO after 1995, seeking lesser commitments in the negotiations because of the liberalization they have undertaken as part of their membership agreements. Excludes least-developed countries because they will make no new commitments, and EU members</p> <p>Issues: General</p>	<p>WTO members (19): Albania, Armenia, Cabo Verde, China, Chinese Taipei, Ecuador, Former Yugoslav Republic of Macedonia, Georgia, Jordan, Kyrgyz Republic, Moldova, Republic of, Mongolia, Oman, Panama, Russian Federation, Saudi Arabia, Kingdom of, Tonga, Ukraine, Viet Nam</p>
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¹⁴ WTO Home Page “Groups in Negotiations”

http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm

<p>“W52” sponsors</p>	<p>Sponsors of TN/C/W/52, a proposal for “modalities” in negotiations on geographical indications (the multilateral register for wines and spirits, and extending the higher level of protection beyond wines and spirits) and “disclosure” (patent applicants to disclose the origin of genetic resources and traditional knowledge used in the inventions). The list includes as groups: the EU, ACP and African Group. * Dominican Rep. is in the ACP and South Africa is in the African Group, but they are sponsors of TN/IP/W/10/Rev.2 on geographical indications</p> <p>Issues: Intellectual property (TRIPS)</p> <p>Documents:</p>	<p>WTO members (109): Albania, Angola, Antigua and Barbuda, Austria, Barbados, Belgium, Belize, Benin, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Côte d’Ivoire, Cabo Verde, Cameroon, Central African Republic, Chad, China, Colombia, Congo, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, Estonia, European Union (formerly EC), Fiji, Finland, Former Yugoslav Republic of Macedonia, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Hungary, Iceland, India, Indonesia, Ireland, Italy, Jamaica, Kenya, Kyrgyz Republic, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritania, Mauritius, Moldova, Republic of, Morocco, Mozambique, Namibia, Netherlands, Niger, Nigeria, Pakistan, Papua New Guinea, Peru, Poland, Portugal, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Slovak Republic, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Kingdom, Zambia, Zimbabwe</p>
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Albania applies a liberal trade regime while its foreign trade has been liberalized since 1990 and follows the guidelines set by the European Union and World Trade Organization. Albania applies WTO rules on import licensing. As a result of this liberalization and an on-going process of harmonization of Albanian customs rules with the EU system, imports and exports of commodities are not generally subject to special authorization requirements. Exceptions apply to quotas or control requirements imposed through different bilateral or multilateral agreements signed by Albania. Licenses are also required for specific commodities with restricted circulation within the country such as military or strategic goods, radioactive materials and psychotropic substances, drugs etc. Albania committed to:

- liberalize its tariff regime by employing a tariff reduction process (bound rates and sectorial initiatives);
- to perform all commitments derived by the agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Standards (SPS);
- Albanian Customs Code emphasizes that custom valuation will take place in compliance with the requirements of WTO;
- Albania is a member of WIPO (World Intellectual Property Organization) since 1992 and it has recognized some international agreements in this area. Albania

has committed to implement the entire TRIPS Agreement and the legislation regarding author's copyrights. Albania has also signed the respective memorandum related to intellectual Property Regime.¹⁵

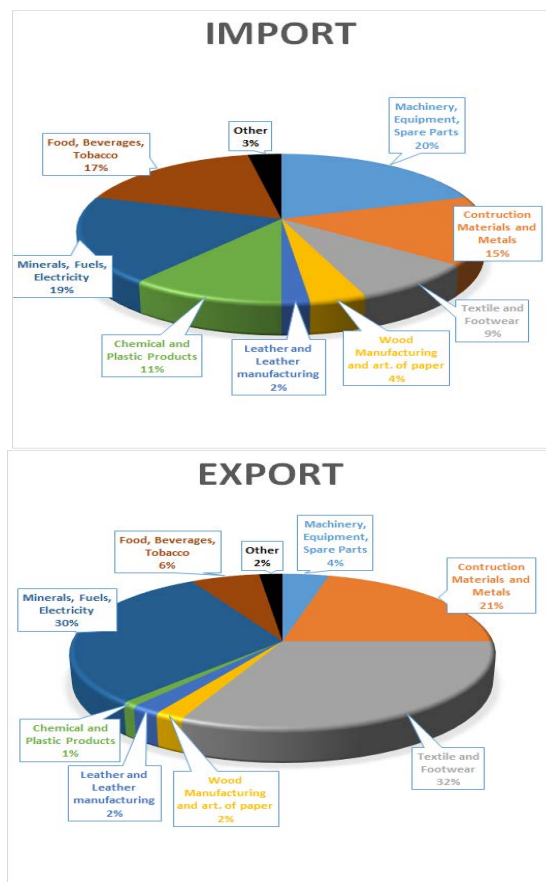


Figure 2. Trade Agreements

Source: (Albanian Investment Development Agency, 2012)

By joining the WTO, Albania had to align its trade legislation with international and WTO rules. Custom tariffs apply on the Combined Nomenclature of Classification of Goods. This Classification is in compliance with the European Community Combined Nomenclature of Classification of goods. The tariff system is very simple. The most-favored-nation tariff system applicable is: 0%, 2%, 5%, 6%, 10% and 15%.

¹⁵ Albanian Investment Development Agency "Trade Agreements"

http://aida.gov.al/?page_id=315

Under FTA-s, Albania applies Preferential Import Tariffs for CEFTA parties, EFTA parties, EU Member States and Turkey. In case of industrial products (chapters 25-97 of Classification of Goods Nomenclature) the tariff is 0%, while for agricultural products they are, as set out in the relevant agreements. Favorable Tariff Treatment – FTT, is also applied. It provides reduction or relief from import duties chargeable by reason of nature of goods.¹⁶

3.1 Policy Trade Review¹⁷

Surveillance of national trade policies is a fundamentally important activity running throughout the work of the WTO. At the centre of this work is the Trade Policy Review Mechanism (TPRM). All WTO members are reviewed, the frequency of each country's review varying according to its share of world trade.¹⁸

Over the past decade Albania has maintained an ambitious programme of economic, legal and institutional reform. In so doing, it has continued a remarkable process of transformation from a closed, centrally-planned economy in the early 1990s to one that is liberal, market-orientated and private-sector driven today. Key forces shaping the pace and direction of change have been Albania's accession to the WTO in 2000 and, more recently, measures taken to achieve its priority objective of European Union membership. Both processes have made a major contribution to transparency, predictability and coherence in policy making process and economy.

A) Economic and business environment

Albania's economy is characterized by a highly productive and growing services sector, a shrinking agriculture sector, and a very small manufacturing sector focused mainly on footwear and clothing production. It has reduced government debt, increased tax revenue, and kept inflation low. Almost all of Albania's trade is with other economies in the region and this is reflected in the regional trade agreements (RTAs) it has signed with the European Union, CEFTA 2006 countries, Turkey, and EFTA. Under these RTAs, imports of manufactured products are mainly duty free, but liberalization of agricultural products is less ambitious. Although Italy has traditionally been Albania's main trading partner, Albania has increased and diversified its imports and exports, mainly to other countries in the region. While agriculture's importance in terms of contribution to GDP and employment has declined steadily, agriculture remains the main source of employment within the country.

¹⁶ Albanian Investment Development Agency “*The Albanian Custom system*”
http://aida.gov.al/?page_id=1424

¹⁷ Summary of World Trade Organization “*Trade Policy Review – Report by the Secretariat Albania*” **WT/TPR/S/229**, 24 March 2010

¹⁸ WTO Home Page “*Trade Policy Reviews*”
http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm

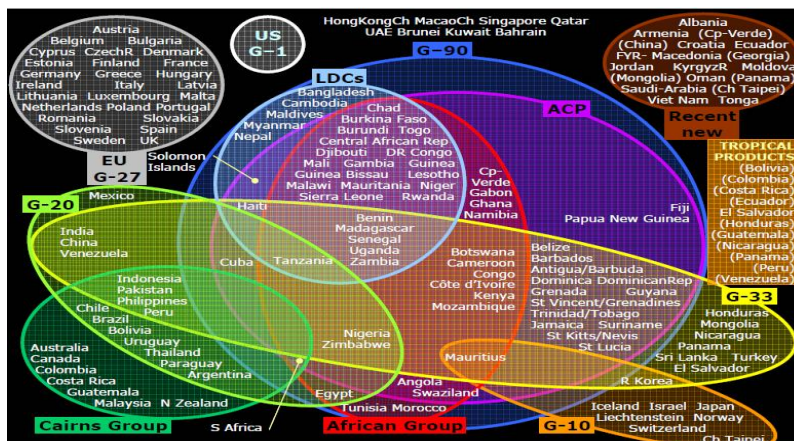


Figure 3. Agriculture groups' intersection¹⁹
(Source: WTO Official Page)

B) Trade Regime

Market Access

Albania has been an active participant in the WTO since its accession in 2000: It has an impressive record of making timely notifications. This is particularly evident in the area of services. Albania has never been involved in a dispute under WTO rules. All tariffs are *ad valorem* and no tariff-rate quotas are applied. Albania has taken GATS commitments in 111 of the 160 services subsectors. Albania applies few non-tariff measures. There are no prohibited imports, except for products considered to be hazardous to public health, and import licensing is used mainly for SPS purposes, security, protection of the environment, and for compliance with obligations under international conventions. The Albanian SPS and TBT regimes essentially follow those of the EU. New legislation on anti-dumping and countervailing measures as well as safeguards was introduced in 2007. However, no actions under these laws have been taken by Albania to date.

Key Legislative Developments

Over the review period, Albania has enacted a number of laws over that should help to sustain an efficiently functioning market economy as well as self-impose constraints on government spending. Together with legislative and regulatory reforms in other areas, these have been largely driven by Albania's desire to become more closely integrated into the European Union. Key legislative developments can be described as follows:

- In 2006, Albania signed the Stabilization and Association Agreement (SAA) with the EU which, in addition to commitments to liberalise trade between the European Union and Albania, also contains provisions on the gradual alignment of Albania's current and future laws with the *acquis communautaire*.

¹⁹ WTO Official Page "Negotiation and cooperation among countries in agriculture sector" www.wto.org/english/tratop_e/dda_e/groups_e.pdf

- Albania submitted its application for EU membership on 28 April 2009, and the authorities have indicated that they hope negotiations may be completed by 2014
- The adoption of a law on competition protection in 2003, and the creation of the Competition Authority of Albania represent important steps towards enhancing competition
- Albania adopted new legislation on Government Procurement in 2006, which provides for open tendering on a competitive basis. In an effort to increase transparency, since the beginning of 2009 all procurement procedures and transactions, with a few exceptions, have been done electronically.
- Under the 2006 Law On State Aid, Albania has introduced strong disciplines for the provision of incentives (excluding agriculture and fisheries), which have been streamlined in recent years and are generally applied on a national-treatment basis.
- Most of Albania's intellectual property laws were modified during its process of accession to the WTO. More recently, new industrial property and copyright legislation has been passed, to conform to EU directives.

C) Investment regime

Albania is open to foreign investment, which is permitted on the same terms as for domestic investors, with an exception relating to land ownership. Foreign investments are not subject to conditions prior to authorization. The right to private property is protected by the Constitution, and Albania is obliged by law to uphold international arbitration awards related to foreign-investment-related disputes. By the end of 2009, the vast majority of state enterprises had been privatized. Albania does not maintain any state trading enterprises within the meaning of Article XVII of the GATT 1994. As part of its reform process, Albania has used privatization and encouraged investment to address some of the major weaknesses in its economy.

Albania, a formerly closed, centrally-planned state, is making the difficult transition to a more modern open-market economy. The agricultural sector, which accounts for almost half of employment but only about one-fifth of GDP, is limited primarily to small family operations and subsistence farming, because of a lack of modern equipment, unclear property rights, and the prevalence of small, inefficient plots of land. Complex tax codes and licensing requirements contribute to Albania's poor business environment. Energy shortages and antiquated infrastructure also makes attracting foreign investment more difficult. With help from EU funds, the government is taking steps to improve the poor national road and rail network, a long-standing barrier to sustained economic growth. The country will continue to face challenges from increasing public debt, having exceeded its former statutory limit of 60% of GDP in 2013. Strong trade, remittance, and banking sector ties with Greece and Italy make Albania vulnerable to spillover effects of debt crises and weak growth in the euro zone.²⁰

Table 4. Trade in Albania
(Source: Observatory of Economic Complexity)²¹

²⁰ Central Intelligence Agency "The World FactBook-Economic Overview"
<https://www.cia.gov/library/publications/the-world-factbook/fields/2116.html>

²¹ Observatory of Economic Complexity "Learn More About Trade in Albania"
<http://atlas.media.mit.edu/profile/country/alb/>

Top 5 Products exported by Albania	Crude Petroleum (16%), Leather Footwear (10%), Footwear Parts (5.4%), Semi-Finished Iron (4.4%), and Chromium Ore (4.4%)
Top 5 Products imported by Albania	Leather Footwear (9.4%), Refined Petroleum (4.4%), Wheat (4.3%), Non-Knit Men's Suits (3.1%), and Rolled Tobacco (2.7%)
Top 5 Export destinations of Albania	Italy (45%), Turkey (5.7%), Greece (5.6%), Spain (5.2%), and China (5.1%)
Top 5 Import origins of Albania	Italy (25%), Greece (7.0%), China (4.7%), Germany (4.6%), and Russia (4.2%)

3.2 Albanian Commitments

Albanian commitments in WTO framework should be considered in five fields three primary and two secondary as follows:²²

A) Trade in goods (GATT)

Albanian commitments to approximate the legislation with that of EU, may be summarized as follows:

– Albania is committed that *all kinds of laws and rules, and tariffs, payment of taxes in goods trade will be in conformity with WTO agreement, since the membership moment.*

The application will also be in conformity with WTO rules;

– In every case, *before the membership, Albania should make amendments in the legislation related to:*

a) sanitary e phytosanitary measures,

b) technical rules in trade,

c) procedures of imports licensing, with the purpose that its legislation be considered in conformity with WTO rules;

– Albania is committed to apply all WTO agreements, including that of sanitary and phytosanitary measures and technical rules in trade, *without a period of transition;*

– Albania is committed *not to apply antidumping, counterbalancing and security measures, without having completed the respective legislation* without bringing it in line with WTO;

– In answering to the interest of the member countries, Albania is committed specifically to questions concerning *the customs assessment and the rules of origin.*

B) Trade in services (GATS)

The General agreement on Trade and Services (GATS) contains the basic principles of trade in services, such as the most favoured nation *with exceptions, concessions in markets, granting the national treatment status, the demand for transparency,* to mention only some.

²² Based on: Engjell Shkreli "Albania and WTO: Survey on Commitments" Albanian Centre for International Trade February 2004

Commitments of Albania to approximate the legislation in the field of services may be considered in two levels:

- preparation of the legal framework for the creation of *inquiry points*, as one of the basic principles of trade in services, and
- the treatment of public companies and companies with special privileges and exclusivities in accordance with WTO rules

The Albanian offer characteristics in the services market may be summarized as follows:

- In principle Albania has accorded *the status of the most favored nation* for almost all kinds of services, with the exception of some transport and audiovisual services, for which it makes preferential treatment. The preferential treatment is conditioned by bilateral or multilateral agreements;

- Though *market access* is not an obligation, the parties make concessions. In the case of Albania, markets access may be considered as a rule. Limitations concerning the markets access have in their origin: (i) restrictions in physical person's movement, (ii) restrictions in capital exports, (iii) restrictions in telecommunications markets and (iv) other restrictions;

- According the status of the *national treatment*, may be also considered as a rule.

- (i) Restrictions in the national treatment have in their origin
- (ii) restrictions in hospital and professional medical services,
- (iii) restrictions in legal services,
- (iv) restrictions in insurance services,
- (v) restrictions in cinema and theatre services

C) Intellectual property (TRIPS)

In the moment of membership, Albania was considered to be in accordance with the Agreement on Intellectual Property. Albania was committed to apply the Agreement on Intellectual Property with no transitional Period

D) Commitments for transparency

Transparency is one of the main principles of WTO. This element is achieved in two ways:

- (i) the governments should inform WTO and member countries on the measures, policies and special laws by regular notifications, and
- (ii) WTO undertakes regular reviews of member countries trade policies, or the ones called reviews of trade policies.

In the above context, Albania is committed to make the notifications required by each and every agreement that is part of WTO legal structure.

E) Multilateral agreements

Albania has signed two other agreements that on government procurement and on trade in civil aircraft.

There exists the possibility to apply for WTO waivers. In 2004 and 2005 two waiver decisions suspended specific commitments which Albania had undertaken with respect to trade in services and trade in goods. The first decision relieved Albania until 31 December 2004 from its market access commitments undertaken under article XVI of GATS with respect to public voice telephone services. Albania had requested the waiver because its economic situation following the war in Kosovo and the September 11 attacks in New York City seriously impeded its ability to privatize the telephone sector as planned by January 2003. The second waiver, granted to Albania in 2005, suspended its obligation to implement certain tariff concessions according to the commitments undertaken in its GATT schedule. To support its request for a waiver Albania had referred to a loss in custom revenue if the tariff concessions were implemented according to the implementation plan which Albania had committed when it acceded to the WTO Agreement. The loss in revenue would be a strain on its budget and endanger macroeconomic stability. Albania had also pointed to the need for infant industry protection. The waiver decision which was granted upon this request did not affect the tariff rates bound in Albania's schedule, but merely extended the time limits for the staging of implementation of certain tariff concessions. It set different dates for the implementation of interim and final bounds tariff rates. In the decision to grant the waiver an important factor was that Albania had committed to – and in fact already applied – very low tariff rates.²³

4. Conclusions and recommendations

Albania has made commitments not only to approximate the legislation with that of WTO but also to apply to it consistently. Albania has made the commitment not to use the antidumping, counterbalancing and security measures without completing the national legislation and without bringing it in line with WTO agreements. In the conditions when the legislation in these fields is very incomplete (the legal framework on antidumping is incomplete, the legal framework on counterbalancing and security measures does not exist entirely), Albania which has accepted to respect the international trade rules of the game is in disadvantage compared to other countries that are using these measures successfully. Albania has witnessed that there are difficulties in respecting the commitments made WTO framework. It is clear that WTO continues to be still considered by the groups of interest as a '*hasty step*'. Meanwhile, respect of Albania's commitments in this framework is a question of principal importance.²⁴

Albania stands for a good legal framework but when it comes to implementation everything gets stuck. Implementation process is the stumbling block that impedes the country to improve and make further progress. So legislation does exist but it is not applied. Let us recall that in order to be effective, the liberalization has to fair but to be fair it has to be applied between countries having the same development scale and we know that in WTO that is not so. Members of WTO are divided in three categories taking into consideration their development degree: Developed countries (DCs), Developing Countries, and Least Developed Countries (LDC). So the question arises: How is it going to be a fair liberalization process if the countries vary so much? Easy, by having

²³ Isabel Feichtner "*The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law*" Cambridge University Press 2012

²⁴ Engjell Shkreli "*Albania and WTO: Survey on Commitments*" Albanian Centre for International Trade February 2004

exceptions to the rules and by forcing to a certain extend Developed Countries to take more in consideration the necessities of the countries in need. Most importantly each country should try hard to comply with the rules and apart adopting measures also implementing and applying them.

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Ioannis Apostolakis
*Ph.D. Candidate, School of Law,
University of Glasgow, United Kingdom*

Competition Law and E-commerce: The Law and Economics of Online Distribution Agreements

Abstract

There is no denying that the rapid growth of the Internet has brought about a real revolution to virtually every aspect of our lives, and distribution of goods and services has, naturally, been no exception. The increasing number of online retailers has led to a dramatic change in the pattern of trade, as more and more manufacturers opt for online distribution as one (if not the only) way of putting their products in the marketplace. Similarly, the development of internet retail has altered people's shopping habits: consumers enjoy unlimited and effortless access to a wide variety of goods and services, instantly receive notifications about the latest deals and promotions, and take advantage of the different price-comparison websites. The growth of e-commerce has overall produced significant pro-competitive effects. As a general proposition, online retailers incur lower total costs than traditional 'brick-and-mortar' outlets, a benefit which can be passed on to consumers in the form of lower prices. Additionally, the global Internet usage guarantees that products are accessible to every potential customer, even in areas where the establishment of traditional outlets would have – for various reasons – been impossible. As a result of this highly effective distribution channel, economic efficiency and consumer welfare, the primary objectives of competition law, are substantially enhanced. As with every distribution scheme, however, online distribution agreements may also contain clauses that restrict competition and, thus, fall within the scope of Article 101(1) of the Treaty on the Functioning of the European Union. It is not uncommon, for example, that the parties to a vertical arrangement agree that the manufacturer's products will not be sold below a specified price. Despite any pro-competitive justifications, vertical price fixing (or 'resale price maintenance') has traditionally been treated by the European Commission as a 'hardcore' restraint. In addition, the Court of Justice of the European Union adopted a similar, stringent approach to general bans on internet sales in its 2011 *Pierre Fabre* judgment: the Court held that an outright prohibition on online sales in the context of a selective distribution system would be regarded as having as its object the restriction of competition and would, therefore, be condemned under EU competition law. The purpose of this paper is to assess critically the application of competition law to restrictions on online distribution agreements. More specifically, we shall attempt to shed light on the economic rationale behind a manufacturer's decision to fix the resale price of its products on the one hand, and to prohibit Internet sales, on the other. We shall then examine to what extent the law and its enforcement by the Commission and the Courts comply with the underlying economic principles.

Keywords: EU competition law, online sales, vertical restraints

1 Introduction

The rapid invasion of the Internet into the everyday lives of billions of people worldwide has brought about a real revolution to practically every aspect of our lives, by which the customers' shopping habits have, naturally, also been affected. E-commerce – the “mercantile face of the Internet” (Kirch, 2006) – changed the pattern of trade in most industries and, consequently, many antitrust law scholars have been concerned with the future of the application of the competition rules in this new environment.

Undoubtedly, e-commerce is not only here to stay, but has also become an ever developing alternative to the traditional patterns of commercial transactions. In the UK, almost 80 percent of the companies use the Internet as a distribution channel (Robertson, 2012) and, additionally, in 2014 online retailing is expected to account for 13.5 percent of all retail sales, increased by 15.8 percent in comparison to 2013 (the EU average is 7.2 percent of all retail sales, 18.1 per cent higher than the year before) (Centre for Retail Research, 2014).

The increasing significance of e-commerce is indeed not surprising at all if we take into account the important benefits that consumers are presented with. Never before had shopping been so quick and efficient: consumers have the chance to choose from a wide variety of products that are being made available on numerous online outlets, and these outlets are merely a couple of clicks away from each other. Moreover, access to these outlets is available 24/7, unlike the limited opening hours of the so-called ‘brick-and-mortar’ shops. The Internet also offers consumers the unique opportunity to check and compare prices for the same product on websites based in different countries, prices which, additionally, are usually lower online than in traditional outlets (due to the lower costs incurred by the online retailer). Last but not least, consumers can take advantage of the different customer-orientated websites in order to read reviews of products or find out about the best deals before making a purchase. As a result, e-commerce can be said to increase consumer welfare by offering lower prices, convenience in shopping and a broader selection of goods and services to customers in comparison to traditional sales methods.

In the light of this substantial change in the pattern of trade, characterised by the introduction of the Internet as an alternative channel for the distribution of a wide range of goods, it would be useful to examine the impact of online retailing on the application of EU competition law. More specifically, in the following paragraphs we shall attempt to assess critically the approach taken to agreements entered into between a manufacturer and its retailers (‘vertical agreements’). We shall concentrate on the two types of vertical agreements the antitrust treatment of which is likely to be – or has already been – influenced by the changes in business practices: selective distribution agreements and agreements imposing minimum or fixed resale prices.

2 The Application of the EU Competition Rules to Distribution Agreements in General

Article 101(1) of the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’) prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices... which have as their object or effect the prevention,

restriction or distortion of competition”. In the seminal *Consten and Grundig* case,¹ the Court of Justice of the European Union (hereinafter ‘TFEU’) clarified that the Article 101(1) prohibition covers not only anti-competitive arrangements between competitors, but also restrictive agreements between undertakings operating at different stages of the production and distribution chain.²

The term ‘vertical agreements’ generally refers to distribution agreements entered into between the manufacturer and independent dealers who undertake to resell the contract products or services to either other economic operators also engaged in the distribution of the goods in question (e.g. retailers) or to end users. They constitute a ubiquitous commercial practice, through which manufacturers establish their control over their distributors’ actions with regard to the resale of the goods produced or the services provided by the former. To this purpose, vertical agreements may include various clauses restricting the distributors’ commercial freedom, which may take the form of either price or non-price restrictions. The former refer to restrictions on the resale price charged by the distributors, whereas the concept of non-price restraints includes a broad range of practices that can take various forms, the most common of which are: (i) exclusive distribution, which refers to agreements by virtue of which the goods are resold only from a limited number of outlets in each territory; (ii) selective distribution agreements, whereby a dealer can obtain access to the manufacturer’s distribution system on the condition that it meets certain qualitative criteria; and (iii) single branding agreements whereby the distributor undertakes to “concentrate its orders for a particular type of product with one supplier”.³

From an economic perspective, besides their anti-competitive effects, both price and non-price restraints may generate considerable efficiencies and may, in fact, stimulate *interbrand* competition, namely competition between firms supplying different brands of the same good or service. As a general proposition, in the absence of market power, vertical non-price restraints are considered as benign and are not caught by Article 101(1) TFEU unless they result in the partitioning of the internal market through the imposition of export bans or in the foreclosure of competitors. On the other hand, vertical price fixing, although restricting price competition between distributors of the same manufacturer’s products (‘*intra*brand’ competition), may be used by a supplier who seeks to enhance the efficiency of its distribution network. In view of these assumptions, the first part of analysis that follows shall concentrate on the approach taken to the antitrust treatment of restrictions of online sales in the context of a selective distribution network. We shall then examine the ‘free rider’ argument against the prohibition of minimum or fixed resale price maintenance under Article 101(1) TFEU, in the light of the various efficiencies generated by online retail.

¹ Cases 56 and 58/64 *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

² *Ibid*, “[c]ompetition may be distorted within the meaning of Article [101](1) not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. For this purpose, it is irrelevant whether the parties to the agreement are or are not to a footing of equality as regards their position and function in the economy”.

³ Guidelines on Vertical Restraints [2010] OJ C130/01 (hereinafter “Vertical Guidelines”), at para. 129.

3 Selective Distribution

Unlike in the case of exclusive distribution, a selective distribution agreement consists in the establishment of a distribution network, in which the number of dealers is restricted not on the basis of the number of territories, but rather on the basis of “selection criteria linked in the first place to the nature of the product”.⁴ Additionally, in the context of a selective distribution system, goods and services can be sold only to other members of the distribution network as well as end users; in other words, the manufacturer is free to prohibit any sales to non-authorised dealers.⁵ Another difference between exclusive and selective distribution is that, in the case of the latter, the supplier cannot prohibit members of the network to actively sell to end users. The concept of “active sales” refers to the active approaching of individual customers or of a specific customer group through various means, such as advertisement, promotions, unsolicited e-mails, etc.⁶ By contrast, a sale is ‘passive’ when it consists in the dealer’s response to unsolicited requests of individual consumers.⁷ Any such clause would amount to a ‘hardcore’ restriction of competition, which would trigger the application of Article 101(1) TFEU. Moreover, the parties to the agreement will not be able to benefit from the respective Block Exemption Regulation,⁸ even though they can seek individual exemption under Article 101(3) TFEU.

A selective distribution system can be either ‘purely qualitative’, namely in the cases where dealers are selected on the basis of objective criteria dictated by the nature of the product, or ‘quantitative’, if a specific limit in the number of dealers is set by the supplier.⁹ In its seminal judgment in the *Metro* case,¹⁰ the CJEU held that only a purely qualitative selective distribution system can be found to be compatible with Article 101(1) TFEU. And this can happen only where three requirements are satisfied. First, the nature of the product in question must necessitate a selective distribution system. Second, the criteria used for the selection of dealers should be of qualitative nature, laid down uniformly for all potential dealers and should not be applied in a discriminatory manner. Finally, the criteria should not go beyond what is necessary for the product in question.

With regard to the first condition, i.e. the nature of the product, it has been established from the Court’s case law that the products the nature of which would justify a selective distribution network can be divide in two broad categories: technically complex products and luxury products. More specifically, products which have been held to meet this requirement are: televisions,¹¹ hi-fis,¹² cameras,¹³ personal computers,¹⁴ clocks and watches,¹⁵ gold and silver products,¹⁶ perfumes,¹⁷ dinner services,¹⁸ and cars.¹⁹

⁴ *Ibid*, at para. 174.

⁵ *Ibid*.

⁶ *Ibid*, at para. 51.

⁷ *Ibid*, at para. 52.

⁸ See Article 4(b) of Regulation 330/2010.

⁹ Vertical Guidelines, at para. 175.

¹⁰ Case 26/76, *Metro-SB-Grossmärkte GmbH v. Commission* (No. 1) [1977] ECR 1875.

¹¹ Case 75/84, *Metro v. Commission* (No. 2) [1986] ECR 3021.

¹² *Grundig* [1985] OJ L233/1.

¹³ *Hasselblad* [1982] OJ L161/18.

¹⁴ *IBM* [1984] OJ L118/24.

¹⁵ *Junghans* [1977] OJ L30/10.

More specifically, in its judgment in the *Leclerc* case,²⁰ a landmark case concerning a selective distribution network for cosmetic products, the General Court held that such a distribution system fell outside Article 101(1) TFEU since it was a legitimate requirement in order for the prestige image of the brand to be preserved, as well as in order for the consumers' perception of the products as prestigious to be safeguarded. The only condition set out by the Court was that the qualitative criteria for the selection of retailers of luxury cosmetic products do not go beyond what is necessary to ensure that those products are suitably presented for sale.

3.1 The *Pierre Fabre* case²¹

Pierre Fabre Dermo-Cosmétique was a manufacturer of cosmetics and personal care products which were sold mainly through pharmacists on both the French and the European markets. In 2007, Pierre Fabre had a market share of 20% on the respective market for France and was selling its products through a selective distribution network. The respective distribution agreements stipulated that the goods should be sold exclusively in a physical space and in the presence of a qualified pharmacist, thus imposing a ban on the online sales of Pierre Fabre's products.

Following an investigation, the French Competition Authority (*Autorité de la Concurrence*) ruled that the aforementioned practice infringed both Article L. 420-1 of the French Commercial Code and Article 101(1) TFEU, and, more specifically, held that an overall prohibition of Internet sales amounted to a restriction of competition by object, unable to benefit from the Vertical Agreement Block Exemption Regulation (then Reg. 2790/1999). The French Competition Authority further found that the agreements were not eligible for an individual exemption under Article 101(3) TFEU, since the four requirements of the said provision were not met.

Pierre Fabre challenged this decision before the Paris Court of Appeals (*Cour d'appel de Paris*), which decided to file a reference for a preliminary ruling by the CJEU under Article 267 TFEU, asking whether a general and absolute ban on Internet sales in the context of a selective distribution network constitutes a 'hardcore' restriction of competition for the purpose of the application of Article 101(1) TFEU, whether a selective distribution contract containing such a clause may benefit from the block exemption, and whether Article 101(3) TFEU could be applicable when the Block Exemption Regulation is not.

The Court started by noting that "[f]or the purposes of assessing whether the contractual clause at issue involves a restriction of competition 'by object', regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context

¹⁶ *Murat* [1983] OJ L348/20.

¹⁷ *Parfums Givenchy* [1992] OJ L236/11; *Yves Saint Laurent* [1992] OJ L12/24; *Groupement d'Achat Edouard Leclerc v. Commission* [1994].

¹⁸ *Villeroy & Bosch* [1985] OJ L376/15.

¹⁹ *BMW* [1975] OJ L29/1.

²⁰ Case T-19/92, *Groupement d'Achat Edouard Leclerc v. Commission*

²¹ Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence*.

of which it forms a part”.²² It then pointed out that, in the context of a selective distribution system, agreements that *de facto* prohibit a method of marketing products that does not require the physical movement of the customer are to be considered as restrictive of competition by object, unless the restriction can be objectively justified.²³

Despite reiterating that the operation of a selective distribution system is compatible with Article 101(1) TFEU, as long as dealers are selected on the basis of objective criteria of a qualitative nature, and notwithstanding the fact that it accepted that in the present case this requirement had in fact been met,²⁴ the Court went on to examine whether “whether the restrictions of competition pursue legitimate aims in a proportionate manner”.²⁵ The CJEU underlined that, in the light of the freedoms of movement, it has not accepted in previous cases arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products put forward to justify a ban on internet sales. The Court further rejected *Pierre Fabre*’s argument that the prohibition was essential for the maintenance of the prestigious image of its products: “[t]he aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU”.²⁶ In the light of these assumptions, the CJEU concluded that, for the purposes of the application of Article 101(1) TFEU, in the context of a selective distribution system, an overall ban on online sales will be held to restrict competition by object, unless the relevant clause is objectively justified.

Finally, the Court confirmed that, as a hardcore restriction of competition, a general ban on Internet sales cannot benefit from the Vertical Agreements Block Exemption Regulation. It could, however, be exempted, on an individual basis, under Article 101(3) TFEU, if the referring court finds that the conditions laid down in that provision are met.

It has been argued that *Pierre Fabre* could be interpreted as meaning that the aim of preserving a luxury image is not sufficient to justify the use of a selective distribution system in the first place (Knibbe, 2012); thus, essentially, the CJEU overruled the General Court’s previous decision in *Leclerc*, and limits the categories of goods the nature of which would render a selective distribution network essential. We believe that a more accurate approach would be that the Court, committed to promote the use of the Internet as a means for the strengthening of interstate trade, regards e-marketplaces as a valuable opportunity in the service of the “single market imperative”.

Nevertheless, *Pierre Fabre* is undoubtedly susceptible to criticism from a competition law standpoint. The Court’s treatment of bans on Internet sales is almost frustratingly formalistic. The essence of the Court’s reasoning is given in – literally – five sentences, without any reference to economic theory whatsoever. But even so, reading through the decision one would almost struggle to identify the legal arguments behind the classification of the prohibition on Internet sales as a “hardcore” restriction of competition, so that it now falls in the same category of restraints as horizontal price

²² *Ibid*, at para. 35.

²³ *Ibid*, at paras. 38-39.

²⁴ *Ibid*, at paras. 41 and 43.

²⁵ *Ibid*, at para. 43.

²⁶ *Ibid*, at para. 46.

fixing, horizontal market sharing and bid rigging, namely restraints that are by their very nature detrimental to competition.

4 Resale Price Maintenance

The concept of 'resale price maintenance' refers to vertical arrangements whereby the manufacturer imposes on its dealers a fixed or minimum price for the resale of its products. It is apparent that RPM agreements restrict price competition in the downstream market, since they prevent distributors from offering discounted resale prices. Furthermore, an industry-wide operation of RPM schemes may facilitate collusion in both the upstream and the downstream markets: vertical price-fixing could be employed by a cartel with the purpose of monitoring its members' adherence to its rules. An additional concern raised by RPM is that it can be used by a manufacturer with significant market power in order to foreclose its rivals' access to downstream outlets, as dealers will normally enter into an agreement that guarantees a larger profit margin.²⁷

Ever since the 1960's, however, antitrust economists have been arguing that restrictions of intrabrand competition may be indispensable for the enhancement of interbrand competition. In the case of price restraints, it has been stated that "by enhancing the pricing power of the retailer, the manufacturer induces the retailer to engage in activities that stimulate demand" (Scherer, 1983). Commentators have put forward several arguments to justify the pro-competitive effects of vertical price fixing.

The most prominent justification for RPM is the 'free rider' argument suggested by Telser in a seminal article published in 1960. Telser argued that sales at the retail level depend on both the product's price and the product-specific services provided by the retailer. Customers value the additional services, but, given the chance, they would rather buy the product at a lower price. In the absence of RPM, retailers offering those special services would inevitably charge more than those who do not, due to the higher costs that the former incur. As a result, it is highly likely that a customer will be convinced to purchase a certain product by taking advantage of the pre-sales services provided by one retailer, but will eventually buy the product at a lower price from a competing dealer that offers no such services. In that way, a dealer takes a free ride on the 'full-service' competitor's promotional efforts. Accordingly, fewer or no dealers will provide pre-sale services, which in turn will cause a reduction in the sales (Telser, 1960).

In its 2007 *Leegin* decision,²⁸ the US Supreme Court overruled the almost century-long harsh treatment of RPM schemes, under which vertical price-fixing was being condemned as *per se* illegal.²⁹ In *Leegin*, the Court held that a rule of reason analysis was more appropriate, acknowledging the pro-competitive potential of RPM agreements: instead of an outright ban on such arrangements, the Court embraced the need for a case-by-case appraisal of the effects produced by the agreement in question. Where any beneficial effects of an RPM agreement outweigh its negative impact on competition – or, alternatively, where such a restraint is found to be ancillary to an otherwise legitimate

²⁷ For a complete list of the possible anti-competitive effects of resale price maintenance, see the Guidelines on Vertical Restraints, *supra* note 3, at para. 224.

²⁸ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007).

²⁹ The *per se* illegality of resale price maintenance was introduced in *Dr. Miles Medical Co. v. John Park and Sons Co.*, 220 U.S. 373 (1911).

business purpose – the RPM agreement under investigation will be found to fall outside the scope of Section 1 of the Sherman Act.

Despite the U.S. precedent, resale price maintenance is still regarded as a ‘hardcore’ restraint under EU competition law. The Commission, although expressly acknowledging their efficiency-enhancing potential,³⁰ persists in stating that RPM agreements “are presumed to restrict competition... [and are] unlikely to fulfil the conditions of Article 101(3)”.³¹ This approach is also reflected in the Vertical Agreements Block Exemption Regulation which, in Article 4(a), specifically excludes vertical price-fixing from the benefit of the exemption.³² Nevertheless, in the years following Leegin, various commentators, particularly from the other side of the Atlantic, although acknowledging the validity of the ‘free-rider argument’, have suggested that the evolution of e-commerce makes it more likely for resale price maintenance to be employed for anti-competitive purposes (e.g. Nixa, 2009; Lao, 2010).

The first point to be considered is that Internet does indeed enhance price competition, as it provides consumers with the unique ability to compare prices that are readily available online. Since browsing online is an effortless way for consumers to gather the necessary information on the products that they are interested in, it minimises their search costs and reduces information asymmetries. It is interesting that, although e-commerce does not eliminate non-price competition (based, e.g., on product differentiation) an empirical study has shown that online consumers generally tend to be more price sensitive (Chevalier and Goolsbee, 2003). In addition, online outlets offer lower prices than their brick-and-mortar competitors, as the costs incurred by the former are, for the most part, fixed, contrary to the variable costs incurred by high street retailers.

It should, however, be noted that the Internet makes the free rider problem more prevalent. Online retailers are the best example of free riders, as they almost always offer lower prices than brick-and-mortar shops and this difference in price usually reflects the lower costs incurred by online outlets offering virtually no sales-specific services. It is common practice for consumers nowadays to visit a high street outlet in order to acquire the necessary information about a specific product, which they will subsequently purchase online at a lower price. It is obvious that the free rider rationale is valid only in the case of products for which the provision of pre-sales services is necessary and valued by the consumers. For a large number of products, however, physical access to the product is not a decisive factor for the purchase, as customers need only some basic information that is readily available online. Sales-specific services, such as technical support, elaborate showrooms or assistance by trained personnel is required for only a limited category of products; and it is only for such products that free rider issues may arise.

In the light of the aforementioned assumptions, a question of crucial importance rises: was the U.S. Supreme Court right to abandon the rule of per se illegality of resale price maintenance or is the stringent European approach to such agreements more appropriate? In other words, in view of the real revolution in the pattern of trade brought about by the Internet, which essentially consists in the stimulation of price competition, through the introduction of a new type of retailers in the marketplace and the promotion of *intertype*

³⁰ Guidelines on Vertical Restraints, *supra* note 3, at para. 225.

³¹ *Ibid*, at para. 223.

³² Regulation 330/2010 OJ [2010] L 102/1.

competition (Nixa, 2010), is RPM more likely to be employed for anti-competitive purposes?

It is true that the immediate result of an RPM agreement will be the restriction of the competitive constraints exercised by the Internet as an alternative channel of distribution. Online retailers will not be as competitive, since they will not have the ability to charge lower prices than brick-and-mortar outlets. As has already been mentioned, this raise in the online prices may actually invigorate interbrand competition by preventing online retailers from taking a free ride on the investments of their competitors. But in the cases of numerous products for which the provision of pre-sales services is not essential, RPM may in fact be used for anti-competitive purposes, such as the strengthening of manufacturer or retailer cartels: as retail prices are readily available online, members to a cartel may easily monitor the other cartelists' adherence to the terms of the collusive agreement.

However, the free rider problem is not the only justification for RPM. For example, with regard to the category of goods for which pre-sale services are not essential, an alternative theory has been developed. By deciding to stock a particular product, a reputable retailer attests that this product meets certain qualitative standards which are in conformity with the retailer's own reputation. This type of indirect 'quality certification' may be subject to free riding, just like the aforementioned tangible services; more specifically, less established outlets may take advantage of the enhanced reputation attributed to the product through its distribution from more prestigious stores. In order for the reputable retailer to be encouraged to endorse the product, the manufacturer finds recourse to RPM, indirectly compensating the dealer through the increased difference between the retail and the wholesale price (Goldberg, 1990).

Moreover, RPM can be used as a very effective tool for a new firm that attempts to penetrate a market or for existing players that seek to launch new products. It is generally not very likely that a retailer will take the risk to stock either the products of unknown brands or novel goods, the customer demand for which is still unknown. A larger profit margin, guaranteed by means of RPM, will act as an inducement for the retailer to stock products the success of which is rather uncertain. Finally, an additional justification is that RPM facilitates resale density, especially with regard to relatively inexpensive goods, or goods with limited shelf life. Online outlets are not appropriate for these types of products, due to their shipping costs, which may exceed the actual value of the product, or the time needed for the shipped product to reach the customer. On such occasions, it is good for the manufacturer to have its products sold from brick-and-mortar shops, and in particular not exclusively from large retail outlets, but also from, say, easily accessible convenience stores. However, large outlets offering discounts will attract a considerable amount of purchasers. Economic theory suggests that not all consumers have the same willingness to search more in order to spot the lower price. As a result, the convenience stores will lose those consumers who would travel longer in order to profit from a better price, and they will find it unprofitable to stock the manufacturer's products. Thus, by fixing the resale price of such goods, the manufacturer can ensure that its goods will be available everywhere (Hovenkamp, 2005).

The above analysis shows that RPM can in fact also produce pro-competitive effects, namely the stimulation of competition between producers. RPM agreements can be employed in order to induce an established retailer invest in the promotion of a non-

established product; in such cases, consumers are better off as they are presented with an alternative option which would probably not be available in the absence of RPM. Although online trade does promote price competition and vertical price fixing has a substantial restrictive effect, we think that the potential pro-competitive effects of RPM would justify a case-by-case appraisal by the European Commission, rather than a general prohibition.

5 Concluding Remarks

The previous paragraphs dealt with the issue of the antitrust treatment of vertical restraints in the age of e-commerce. Following the examination of the European Commission and Courts' enforcement priorities, it can be concluded that the competition law enforcers' main concern is that online trade remain unrestricted. To this purpose, not only is it forbidden for manufacturers to impose minimum or fixed resale prices for their goods or services, as this would limit the Internet's effect in stimulating price competition, but also the imposition of an overall ban on internet sales is treated as a hardcore restraint.

It is undeniable that e-commerce has brought about a substantial change in our everyday transactions and that online retailers have been exercising a significant competitive constraint upon traditional outlets. However, it has already been demonstrated that, according to economic theory, a general prohibition on either RPM schemes or restrictions in the context of a selective distribution system may result in a number of pro-competitive arrangements being caught by Article 101(1) TFEU. For this purpose, we think that an effects-based, case-by-case analysis of the competitive effects of the agreement in question would in fact be more efficient than the formalistic prohibition currently in force.

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Fabian Zhilla (PhD)*

Indeed corruption is not a taboo topic, but one that policy makers, businesses, civil society organizations, media and donors from all regions are confronting openly.¹

Corruption and its Controversies

Introduction

Corruption is perceived as one of the main malicious phenomena for the economy world wide. After the cold war it gained attention of many international organisations. This is because the consequences of corruption are pervasive for the welfare of the nations. Corruption's effects are both economic and political. Corruption may increase poverty, erodes public confidence in government, provokes political scandals, hinders private investments and likely to keep the society undeveloped in a prolonged stagnation. Corruption is widely conceived by many researchers as producing negative effects for the society. However, there are still many controversial issues surrounding this phenomenon which may be seen critically. Some consider the "positive" aspect of corruption. What can constitute corruption in public sector cannot be seen as such in the private sector. This research intends to explore some interesting points where corruption is involved in order to broaden the prospect of a critical analysis of the role of corruption in society. To do that, this research will see corruption in the context of the economy, in public investments and foreign aid.

In fact each of the topics above is crucial and yet may require a comprehensive research. What makes them part of the same subject is the controversial role of corruption in each of them. Research shows that corruption may not be as harmful for the society in certain stages of development. And yet foreign aid or public investments may have an adverse effect in the social welfare of the state by feeding corrupt political elite.

In the first part, the paper begins with the influence of the institution position (i.e. public or private) in justifying the motive of the action. The position of parties in a transaction which may involve corruption is crucial for perceiving that action as corrupt or not. In the

*Fabian Zhilla has completed his PhD on judicial corruption and its links to organized crime at King's College London in 2012. Fabian teaches Business Ethics at Canadian Institute of Technology. At the moment he is researching the typology of organized crime groups in Southeast Europe with case study Albania. Fabian can be contacted at fabian.zhilla@cit.edu.al.

¹ USAID, (1999) 'A Handbook on Fighting Corruption' USAID, Center for Democracy and Governance, Washington D.C. Available at http://209.85.135.104/search?q=cache:-IQi86HPKUEJ:www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnace070.pdf+Klitgaard+and+corruption&hl=sq&ct=clnk&cd=1#11

second part, the research deals with some harmful effects of corruption in the economy as whole and on public investments in particular. But it also shows that the developing stage of the society should be considered very carefully before defining corruption as a malicious phenomenon. In the last part of the paper we critically analyze foreign aid as an aiding assisting the developing countries in their state building. We show that some time foreign assistance plays a negative role as it extends the power of corrupted regime to capture the state.

The Concept of Corruption in Public and Private Sector

According to Oxford Dictionary² corruption is defined as: “Perversion or destruction of integrity in the discharge of public duties by bribery or favor; the use or existence of corrupt practices, esp. in a state, public corporation, etc”. Or ‘the love of money is corruption of state’ (Jowett, Benjamin 1875)³. In other words corruption is regarded as a misuse of public trust, a situation which public officials use as a ‘golden’ opportunity to maximize their private income. It is also considered as a breach of official duty. Bureaucrats take advantage of their public position and put control on public goods.

Corruption may appear different however when it comes to private sector. The concept of ‘respecting’ someone in a business relation is likely to be approached differently in a public service engagement. Whereas in the private sector a gift might be highly appreciated and hardly prejudiced, gift-giving in public administration may question the intention of gift-giver whether he is ‘fishing’ a favor from public service or his gift is given solely as a sign of respect. If the owner of a private enterprise helps his friend who manages another company by offering a subcontract to him, this favor can be defined as unjust favor if the same happens to a state agency. To note is that every citizen is equal before the law and has the right to be provided equally with all sorts of public services. However, yet private businesses look for less bureaucratic procedures something that helps them to respond more quickly to the market demands.

On the other hand, public administration is not driven by the same market concept. In a free market economy, government uses bureaucracy as an element supposedly to institutionalize public services thus making them legal. Therefore, what a private company pays to a public servant for smooth the procedures and call it facility payment; in public administration this is likely to be confined as bribery or kickoff.⁴ The form of corrupted relations between private and state agencies is a significant indicator of the status of corruption in a society. Whether it is a bottom up corruption, meaning that private business ‘coerce’ to corruption, or a top down way, where the driving force for corruption are state agencies, this differs in different societies.

To sum up, the concept of corruption is not uniform and this is depended on the relation between private and public institutions. Both parties have different intentions

² Oxford Dictionary Online; accessible at http://dictionary.oed.com/cgi/entry/50050860?single=1&query_type=word&queryword=corruption&first=1&max_to_show=10

³ Ibid, a citation taken by Jowett, Benjamin “*The dialogues of Plato*” tr. 1871 (1875), *Thucydides* tr. 1881

⁴ Ackerman-Rosse, Susan. (1999) “*Corruption and Government; Causes, Consequences and Reform*” Cambridge University Press p.91

and so is their perception on the transaction that may involve some sort of corruption. For instance, where the concept of favor exchanges sound reasonable to a private business, this is not the case with public institutions. In other words what is approached as corrupt action by state institutions this may not be perceived similarly by the private businesses. In this regard defining corruption requires first, to establish what are the parties involved and their intentions and then classify actions as corrupted or not.

Corruption Effects on the Society

Majority of the analysts stipulate that the effects corruption on a society is diabolic. They go even further providing that corruption may be as deadly as HIV/Aids virus.⁵ However, in this section, the research intends to bring another prospect of analyzing corruption. In the first part of this section we will deal with some negative effect of corruption in the mainstream economy. In the second part the research is likely to challenge the fact that corruption always hinders the social welfare. We argue that in some stages corruption may play the adverse effect such as enhancing the development of an emerging economy.

Detrimental Effects of Corruption to Economic Growth

Government is in charge for collecting and distributing of tax revenues of the state, bearing the responsibility to administrate them properly. Allocation of these funds is in total discretion of public officials who usually divert them to private business that is willing to purchase them in exchange of kickbacks.⁶ In other words substantial part of government investments goes to infrastructure where private companies bid for them in open tenders or public procurements. The corrupted public administration instead of fair and transparent competition allows illegal payments to determine the winner of these lucrative projects. It is the detrimental effect of corruption to market deformation which hampers the development of the economy.

Many international organisations⁷ when refer to economic problems of corruption they focus mainly on bribery leverage to specific sectors such as judiciary, public administration, political parties, tax revenues and so forth.

According to Susan Ackerman⁸ the negative impact of bribery is extensive as it pernicious the economy in every corner. She states that;

⁵ See *The Guardian*, 22 May 2006 paraphrasing Bono, Anti-Poverty Campaigner saying "Corruption is as deadly as the HIV/Aids virus- it's a cancer, whether it is the 12 official signature needed on a license, the policeman taking bribes at the border or the tractor that is paid for but not delivered."

⁶ See supra note 4 pp.9

⁷ For more see Organisation for Economic Co-operation and Development (OECD) "Anti-Bribery Report 2006" and "Global Corruption Barometer 2006" of Transparency International.

⁸ For more see supra note 4 pp.9-10

First, *bribes strike the market* which means that government can legalise allocation of scarce benefit to private sector thus impeding them from a free competition. In other words, if government is bribed then market will not be driven by the ratio between the demand and supply but by the best price offered by private parties to public administration for an easy access to public goods.

Second, *bribes act as motivation* bonuses to public officials. Especially in developing countries where administration employees have low salaries, bribes may slow their incentive to perform public duties correctly for every one and direct their service only to them that offer the bribe.

Third, *bribes lower costs*. Private business can switch tax payments, custom duties or other utility bills to bribes if they result to be less expensive than paying regular governmental charges.⁹

Forth, *bribes help criminal activities* to develop. Illegal business or criminal organisations purchase their 'freedom' by corrupting police forces or other sectors of the state.¹⁰

However, according to Khan¹¹ 'predation corruption' is the riskiest form of corruption for developing countries. Predation corruption is the typical scenario of patron-client system. Here public officials use their discretion power to gain in private what is public. It is not forced by any economical obstacle, nor from lack of financial resources; it is pure greed and a top down corrupted system from senior state agents to the common public servants.

Role of Corruption on Public Investments

Many public investments such as highroad, hospitals, airports, enlargements of ports, water pipes lines, just name a few, are very expensive, therefore very attractive for public officials to maximise their illicit incomes. Therefore corrupt actions may endanger even advantages identified by the economic experts when it comes to the role of public investment in the economic growth. They say that a strong economy needs capital and capital flow raises as more public investments are made.¹² In this respect a state which has high public investments is deemed to develop its economy quickly. In contrast Vito and Hamidi points out that:

Such corruption increases the number of capital projects undertaken and tends to enlarge their size and complexity. The result is that, paradoxically, some public investment can end up reducing country's growth because, even though the share of public investment in gross domestic product (the total of all goods and services produced in a

⁹ ibid

¹⁰ ibid

¹¹ See Khan H. Mustaq (2006) "Governance and Anti-Corruption Reforms in Developing Countries: Policies Evidence and Ways Forward". Available at <http://www.g24.org/khan0906.pdf>

¹² Tanzi Vito and Davoodi Hamid (1998) "Roads to Nowhere: How Corruption in Public Investment Hurts Growth" International Monetary Fund Papers, Washington D.C. Available at <http://www.imf.org/external/pubs/ft/issues12/index.htm>

country in a given year) may have risen, the average productivity of that investment has dropped.¹³

In short the role of corruption in emerging economies is complex. It is not limited in one sector or in a period of time. What makes corruption hampering the development of economy are different factors like deformation of the free market and adverse effects on the public investments pursuant to the economic growth. However in the following part we will see that negative elements of corruption may be questioned if other social factors are involved.

Corruption Is Not Always Bad

There is no standing scheme on corruption nor is it clear or unique; it varies from country to country, from culture to culture and from one historical period to another.¹⁴ There are various opinions about the impact of corruption in society. According to empirical studies some scholars have not seen corruption *per se* as the main factor for distortion of the society. What is significant they say is what the purchased product is in exchange of the payoff. Many economists and political scientists do not consider the small effects of the bribe's amount given to a common public official as significant but what really concerns them most is "the betrayal of ideals". In other words the legacy which corruption installs on the functioning of the society and its impact on ethical and moral norms.¹⁵ For instance political corruption can be more dangerous for open public than a small bribe given to a public employer. Where, the former form risk capturing of the state, the latter may have limited effects on the economy as a whole.

Nonetheless, bribes can also be seen as having positive roles in the early stages of emerging economies. In many Eastern Asian countries the economic boom could not have been successful without some sort of corruption. J. Edgardo Campos in his editing volume (*Corruption: The Boom and Bust of East Asia*, 2001), points out that; "Rents and corruption have been essential to the credible enforcement of contracts and thus to the large inflows of investment."¹⁶ In addition, China, Vietnam and India have experienced

¹³ The economists distinguish current budget from capital budget. The former mostly deals with salaries, pensions, maintenance and the latter is used solely for investments purposes. They say that current budget can be covered by governmental revenues and in managing the capital budget, government is free to borrow where it can. It is merely this part of the budget where executive has direct access and uses to maximize illegal incomes. See also *ibid*.

¹⁴ Corruption has been present in all type of societies; from Ancient Greeks up to Postmodern Democracies. It is recognized and experienced from all religion in different ways. For more see Huntington P. Samuel, and Harrison E. Lawrence (2000) "*Culture Matters: How Value Shape Human Progress*" Basic Books, New York, USA p.112-113

¹⁵ Miller L. William, Godelan B. Ase and Koshechkina Y. Tatyana (2001), "*A Culture of Corruption?: Coping With Government in Post Communist Countries*" Central European University Press, p.14

¹⁶ This citation was taken from Filomeno S. Sta. Ana III (2006) "YELLOW PAD: Fighting corruption needs more than a 'spray gun'" *Business World*, October 2, 2006 Monday, Pg. S1/5,

a steady increase of investments and economic growth in spite of corruption. In this regard Khan has classified corruption in developing countries from an interesting perspective.¹⁷

First, intervention of government in certain processes of economic development has been wrongly perceived as malicious and as creating an additional possibility for public sector to accelerate corruption. In fact involvement of the state through rent seeking¹⁸ instead of market liberalisation or privatisation has been central in order for government to maintain a stable welfare and to control corruption. As the result Asian countries for instance yielded successful results, especially in the technology implementation policy.

Second, corruption is not always a derivative of greed and inappropriate use of power by public servants. Fiscal constraints like trade protection or customs policies for supporting indigenous agriculture, are an important factor to enhance and develop the economy. If the economy is stable so is the political system. However, while in developed countries salaries are high and unemployment rate is low, emerging economies, however face off-budgets and jobs shortage. In this regard the risk of patron-client relationship is high. Here public servants obey to his 'patron' and the latter in exchange turns a blind eye for the pay-offs to the former by privates as compensations for low salaries. Therefore, it can be assumed that probably the stage of development and economic factors may condition the government to tolerate petty bribes in order to maintain political stability.

Third, lack of abilities to protect property rights is also another symptom of corruption in developing countries. However, as above mentioned, economic power is again the core reason. Khan underlines that the cost applied for an immediate reform to property rights protection can affect the economy and disrupt the system as the productivity is low and unable to cover the costs of property rights protection. In addition commenting Khan in this category, Filomeno S. Sta Ana points out that;

But as the examples again of China or Vietnam show¹⁹, informal institutional arrangements, including innovative incentive mechanisms, can substitute for the lack of formal property rights, with satisfactory outcomes to both the individual and the collective.²⁰

¹⁷ Khan H. Mustaq (2006) "Governance and Anti-Corruption Reforms in Developing Countries: Policies, Evidence and Ways Forward". Available at <http://www.g24.org/khan0906.pdf>

¹⁸ By rent-seeking Khan means that state uses regulation and legalizing to stabilise the market and these can inevitably produce corruption as business should pay the 'rent' amount other than legal fees or tax but at least this can entail a sort of control in the market. For more see *ibid* at pp. 17-19.

¹⁹ See the evaluation of WB made to China and India as their indicators in economic growth and power reduction are impressive where in many other countries these issues are still a great challenge. For more see "Annual Review of Development Effectiveness 2006", World Bank, Washington D.C. p. xii

²⁰ For more see Filomeno S. Sta. Ana III (2006) "YELLOW PAD: Fighting corruption needs more than a 'spray gun'" *Business World*, October 2, 2006 Monday, Pg. S1/5

To sum up, in an emerging economy corruption may facilitate economic enhancement in early stages of the democracy²¹. Many developing countries like China and India, known for their extensive corruption, yet are not struggling with their permanent economic growth. This is an important indicator showing that probably corruption may not be as bad to society as many analyst use to define. This doesn't mean that corruption should be solely framed as having a positive role in emerging economies. However, the rationale behind is that studying corruption may be more accurate if other social factors like political system, democracy maturity, history and culture are to be taken into account.

Corruption in Development Assistance

Development assistance is playing a crucial role in assisting developing countries to enhance their socio-economic process. Development assistance differs in motives, actors and budgets.²² It generally transfers large amounts of capitals from donors to recipients in terms of goods and foreign exchanges. National governments have the advantage of being directly involved in the management of these projects and this discretion may lead them to misuse foreign aid. The question arises what is the relation between foreign aid and corruption?

Foreign aid can help corrupt regimes to retain their power and control. Since foreign aid goes from one government to another, notes Thomas J. Di Lorenzo, 'it inevitably diverts resources from the activity of production to the activity of "rent seeking" or attempts to acquire governmental funds'. He further continues that 'it creates a giant patronage machine, in other words, with all the attendant corruption that such things have always entailed.'²³ Hence corruption remains a great concern in developing projects.²⁴ The reason is that national government has limited budget and low salary for their employers. As development projects involve tenders, procurement and administrative procedures, public officers find difficult to resist the temptation of bribes which usually is equal or more to their annual salaries. In this respect instead of allocating the aid to development projects, public workers use them for their unjust enrichment. Looking to vulnerability of the foreign aid to corruption, many people have questioned the way foreign aid is organised. Mark Thornton points out that:

Alas, Americans are united in their opposition to foreign aid—and with good reason! Foreign aid, military aid, debt relief, economic

²¹ Democracy is defined as 'Government by the people; that form of government in which the sovereign power resides in the people as a whole; or A state or community in which the government is vested in the people as a whole (Oxford Dictionary Online), Or 'The democracy is a system of governance, but which is free is an individual. An individual is free not just because the system of government is democratic but because none of other organizations of society can fiercely restrict that individual.' (Weaver H. James 1996). See also that democracy is openness.(Wintraub Sidney1991). This includes economic and political openness.

²² For more see Tisch J. Sara, & Wallace B. Michahel (1994) "The What, Why, and Who of Foreign Aid", Westview Press Inc, Colorado, USA, p 49-87

²³ Di Lorenzo, J Thomas (2005), "A Foreign Aid Disaster in the Making", Lodwig von Mises Institute, Available <http://www.mises.org/story/1715>.

²⁴ Ibid pp.102

development assistance, and even disaster assistance money—all with "strings attached" to ensure proper behavior—are associated with "fraud, waste, and abuse."²⁵

On the other hand, many potential donors argue that occasionally corruption is an instrument used to protect their business in developing countries.²⁶ E.g. in 1994, French companies estimated to have paid bribes amounting to FF 10 billion and German companies more than \$3 billion per year in 1996.²⁷ Yet many donors condition the aid by requesting recipients to fulfil various criteria such as enhancing of democratic values²⁸ and strengthen public institutions²⁹ aimed at increasing transparency, accountability and reduction of corruption. Donors assert that weak governments are unable to manage and enforce anti-corruption reforms. Can aid directed at strengthening of state institutions be at risk in a fragile democracy?³⁰ Providing foreign aid to empower state institutions in the main stream economy may endanger private sector's position as former can extend the power through regulation or enforcement agencies to control the market. This controversial disadvantage of foreign aid is explained by Jim Saxton who points out that:

Literature dealing with foreign economic aid recognizes that government-to-government foreign economic assistance often can (inadvertently) promote those conditions that foster corruption. This is especially the case when a significant degree of corruption is already present in recipient countries.³¹

²⁵ See Thornton Mark (2002) "Corruption and Foreign Aid", Ludwig von Mises Institute, available <http://www.mises.org/story/1093>

²⁶ See Tanzi Vito (1998) "Corruption Around the World, Causes, Consequences, Scope and Cure" IMF Working Paper, WP/98/63, p. 5 International Monetary Fund, Washington D.C., available at <http://www.imf.org/external/pubs/ft/wp/wp9863.pdf>

See also Ackerman Susan *supra* note 3 pp.177 which notes that "many developed countries resist efforts to control corruption because they believe that pay off in developing countries benefit their own domestic business"

²⁷ *Ibid* pp. 7

²⁸ According to USAID research in the role of foreign aid provided by USAID in fostering democracy they find it that "USAID Democracy and Governance obligations have a significant positive impact on democracy, while all other U.S. and non-U.S. assistance variables are statistically insignificant" For more

see USAID Final Report on "EFFECTS OF U.S. FOREIGN ASSISTANCE ON DEMOCRACY

BUILDING: Available

http://blackboard.gwu.edu/webapps/portal/frameset.jsp?tab=courses&url=/bin/common/course.pl?course_id=_101218_1

²⁹ See how World Bank places emphasis on institution-building rather than e.g. in infrastructure work. For more see at World Bank "Reforming Public Institutions and Strengthening Governance; A World Bank Strategy. Washington, DC; World Bank, November 2000 xi-xx

³⁰ For a definition of democracy see *supra* note 21

³¹ Saxton Jim (1999) "Can IMF Lending Promote Corruption" Joint Economic Committee Studies, United States Congress. Available <http://www.house.gov/jec/imf/corrupt.htm#endnot29>

The 'foreign aid fear' of Saxton is based on the Tanzy's hypothesis arguing that extended power of government in economy may lead to corruption. The 'extend power' usually refers to increase of taxation, raise of public spending and extension of regulation on part of the government. Thus, Tanzi claims that the above areas where corruption is mostly present can gradually become norm of behavior especially in countries with no democratic traditions. The government may have a different perception of enforcing the rule of law. They can presume that corruption can be reduced by limiting of public spending including salaries to officials based on assumption that public workers take bribes (routine perception), rather than punishing them (rule of law perception).³² In this context, the role of foreign aid in reducing corruption remains questionable. Evidences gathered by Alesina and Weder showed that corrupt governments don't appear to get less aid. In contrary boost of aid in developing countries was accompanied by raise of corruption. Alesina and Weder points out that:

The variable "changes in aid has a negative and statistically significant coefficient, indicating that an increase in aid is associated with an increase in corruption and vice versa in that corruption appears to be persistent, since the log dependent variable is highly significant."³³

In short foreign assistance can play a crucial role in improvement of socio-economical factors of a developing country. However it should also be mentioned that foreign aid can stimulate corruption or strengthen corrupt political regimes. Of note is that according to Alesina and Weder the ratio between foreign assistance and corruption stands positive meaning that increase of aid has been associated permanently with raise of corruption.

Conclusion

Corruption is already entrenched in the economy world wide. Approaching corruption and its consequences to the society may entail various factors in order to sort out phases where corruption is likely to hamper the development and phases where it may not. Thus the role of corruption in the society is controversial. Corruption may distort the free market or make public investment inefficient to increase economic growth. On the other hand corruption may facilitate development in emerging economies in early stages of democracy. Further corruption for instance is likely to be like a side effect of curing 'pills' for socio-economical enhancement such as foreign aid. Therefore in order to have a clear picture of corruption's role in the society it may be more accurate if many social factors like political system, democracy maturity, history and culture are to be taken into account. In short it is difficult to be stick with the approach that corruption produces only negative effects to the society but on the other hand is also hard to support the contrary. In this regard corruption looks a controversial phenomenon which needs to be analysed based on the particular economic or political stage of the underlined country or region.

³² See supra note 26 pp. 6

³³ Alesina Alberto & Weder Beatrice (2002) 'Do Corrupt Governments Receive Less Foreign Aid?', *The American Economic Review*, Vol. 92, No. 4 (Sep., 2002), pp. 1126-1137

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Tomasz Królasik

*Institute of History of Law,
University of Warsaw, Poland*

French origins of modern civil law in Poland

Abstract

The Duchy of Warsaw, created in 1807 from parts of Polish lands seized in 1772, 1792 and 1795 by Prussia and Austria, was the very first form of a Polish state that introduced modern civil law: the Napoleonic Code as well as the French Code of Civil Procedure. These two significant legal acts were objects of admiration for many, and were supposed to civilize, on a legal field but not only, such European states as Poland (the Duchy of Warsaw), Germany (i.e. the Kingdom of Westphalia), the Netherlands and others. French private law was one of the elements constituting Napoleon's Empire, which in fact included many countries and territories, and, at the moment of collapse, was far from real unity. After all, The Vast Empire consisted of different nations, and states fell as soon as the imperial army. On the contrary, French civil law, embodied by the Napoleonic Code and the Code of Civil Procedure of 1806, did not share the same fate. It was adopted by other European countries through the 19th century and influenced almost all continental systems of law *non ratione imperii sed imperio rationis*.

The Napoleonic Code and the Code of Civil Procedure were enforced in 1808, resulting in a significant reform of law in Poland. Thereafter, the distinction of estates still existed and agriculture was dominated by a manorial system with serfdom on Polish territory. The Napoleonic Code introduced principles of equality in the eyes of the law and capitalistic contract law. Marriage was regulated as a secular contract that was concluded in the presence of an Official of Civil Registry and could be dissolved by a civil court (by divorce or annulment). A wife depended on her husband, and there was differentiation between children from marriages and extramarital unions.

Next to the revolution in family law, that the Polish Catholic Church was opposed to, there was a great change in civil procedure. The French Code of Civil Procedure of 1806 replaced traditional Polish law, which was based on customs that were not as formal and rational as French law. The struggle to combine a Polish approach with modern western law is easily evident in the field of enforcement proceedings. Polish citizens and Polish courts experienced problems with new means of judicial enforcement, such as judicial sale by auction, office of court bailiff, and judicial control of bailiff's actions. They were gradually being solved through both case law and alterations to the French law.

In my paper I would like to present the results of my research, which was based on a collection of the Duchy's civil court records. It confronts the traditional image of the reception of French law in Poland, which is based only on legal text, with daily practices and interpretation executed by judges.

Keywords: *enforcement proceedings, Family Law, French Code of Civil Procedure 1806, French law in Poland, Napoleonic Code*

1. Introduction

By tracing the origins of current Polish civil law, most scholars and researchers end up with German, Austrian and Russian foundations. These three neighbouring empires, which seized Polish lands three times in the 18th century and finally took Poland's independence in 1795, had a great influence on the Polish legal system in the late 19th and 20th centuries. Nevertheless, between 1808 and 1815 under the Duchy of Warsaw, Poles adopted two significant legal acts that did not originate from Polish legal tradition or from the legal tradition of Poland's neighbours: the Napoleonic code as well as the French code of civil procedure. It must be noted that French codes were in force much longer than it was supposed in 1808, and survived the collapse of both the Napoleonic hegemony in Europe and the short existence of the Duchy of Warsaw.

French civil law was introduced in a newly created State that was far away from the reality of 19th century France. Poland, under the form of the Duchy of Warsaw, was primarily a religious Roman Catholic nation that, contrary to France, did not carry out a social - economic revolution. The division on three Estates was still a matter of fact, and the economy was based mostly on agriculture dominated by a manorial system with serfdom. At the same time, the Governing Committee of the Duchy came up with the idea to introduce the fruits of French thought on codification on Polish territory.

Hence, the period of the Duchy of Warsaw should be perceived as a dividing line regarding history of civil law in Polish legal tradition. Two sorts of provisions applied at the time will be presented as exemplary: family law and enforcement proceedings as a part of civil procedure.

In comparison with the former Polish Customary law or *Formula processus* (procedure of land law of 1523), French civil law represented the enlightened ideas of modern completed codification, and embodied the rule of equality in the eyes of law and capitalistic contract law. Moreover, the Napoleonic Code contained provisions on family law regulating marriage as a civil contract between (not necessarily equal) parties that in some circumstances could be dissolved by divorce. Introducing civil marriage and the possibility of divorce was found by the Polish Roman Catholic Church to be an unacceptable revelation that should be fought with any means¹.

In the field of proceedings, French law brought formal and precise rules to Polish territory that Polish procedure lacked. Its result is more evident in the area of enforcement proceedings. According to civil courts' records from 1808-1812, the number of executions of judicial warrants increased every year, becoming an effective means of execution. Most institutional solutions adopted during the Duchy of Warsaw survived until our time, and became a part of the civil tradition. The most substantial example still exists in the office of komornik (fr. *Huissier de Justice*, eng. Bailiff).

2. Primary legal Sources and documents

¹ About the relations between Roman Catholic Church and the State of the Duchy of Warsaw in foregoing epoch: *Szcześcieleńia korespondencja władz duchownych z rządem Xsięstwa Warszawskiego: służąca do history Kościoła polskiego*, Warszawa 1816; E. Ziółek, *Między tronem I ołtarzem: Kościół I państwo w Księstwie Warszawskim*, Lublin 2012.

My research was conducted based on two types of sources: text of legal acts *i.e.* the Napoleonic Code, the French Code of Civil Procedure, and subsidiary to them, regulations and dispositions (ordinances) enforced by the Government and the King. The main research was carried out with the support of a collection of records from Trybunał Cywilny Kaliski (civil court in Kalisz)², which was the only complete collection of court records from the epoch surviving the Second World War (most court records were intentionally set on fire by Nazis Germans during the Warsaw Uprising in 1944).

2.1 *The Napoleonic Code and code civile de procedure*

The Constitution of the Duchy of Warsaw was granted on 22 July, 1807, by Napoleon. Article 69 of the Constitution provided the Napoleonic Code as the civil law for Polish territory effective from May 1808. The Constitution didn't speak of introducing any other French law, however, in the opinion of Feliks Łubieński, The Minister of Justice, other French codes connected with the Napoleonic Code were to take effect in the Duchy of Warsaw in the case of foregoing article 69 as a part of complex system (Bardach, Senkowska-Gluck, 1981). In particular, it concerned the code of civil procedure, introduced through the instruction of the Minister of Justice on 23 May, 1808, and commercial code, introduced by an act of the Sejm (Parliament) on 24 March, 1809.

2.2 *Records of civil courts in Kalisz*

Most researchers exploring the subject of the legal history of the Duchy of Warsaw limit their studies to published texts of legal acts. First, they analyse the Napoleonic Code and Code of civil procedure. Collections of courts' records from the epoch were used very rarely. The reason is the limited number of verdicts that survived to our time that, in the opinion of researchers, could distort the general view of legal practice during the Duchy of Warsaw. For example, records of the highest court in the judicial hierarchy – Appellate court of the Duchy of Warsaw (Sąd Apelacyjny Księstwa Warszawskiego) – were lost for good as the Central Archives of Historical Records in Warsaw was set on fire by Nazis.

At this point, it must be highlighted that the records of the civil court in Kalisz are complete because, during the Second World War, from 1943, they were kept in Poznan unlike the records of other civil courts, which were kept in Warsaw. It is certain that the view that emerges from that source cannot provide us with information on the legal practice in the entire Duchy of Warsaw, but we may assume *per analogiam* that cases ruled in Kalisz may be representative of other departments. My research was conducted based on records from the years 1808-1812, including 12 units of court hearings (from around 50 to 150 hearings each) which proceeded in the first division. The civil court in Kalisz was divided into two divisions. The first division heard cases through an accelerated procedure, which was suitable for most cases within enforcement proceedings. The number of cases and hearings increased every year. For example, only in 1811, almost 211 out of 300 cases may be qualified as related with enforcement proceedings. Divorce cases are relatively rare (11 per year) but when compared with French statistics that rate seems to be approximate (Pomianowski, 2014).

² AGAD, Trybunał Cywilny Kaliski (henceforward L AGAD, TCK).

3. Changes of civil procedure from the example of the enforcement proceedings field

The French code of civil procedure, which was created in 1806, was enforced two years later on Polish territory. The instructions of the Minister of Justice of the Duchy of Warsaw included the statement that “the code shall be in force only temporarily and replaced as soon as possible by Polish regulation” (Zawadzki, 1863). Yet, it stayed in effect even as late as 1876 (with changes) in part of Poland (outside of the Prussian or Austrian partition) until it was replaced by the Russian code of civil procedure on the territory of the Russian partition. The original French text was defined as authentic (official) even after the Polish translation was published in 1810 by Antoni Łabęcki (Łabęcki, 1810).

The code included 1042 articles, and enforcement proceedings were regulated by the provisions of title V, “On execution of judgments,” in articles 517 to 811 in a highly detailed and formal way. The fundamental base for enforcement was the court’s judgment or other official acts appended with the enforcement clause (for example notary agreements). The code introduced the office of *hussier de justice* as the enforcement authority and provided two elementary ways of execution: either against movable or immovable propriety. For the first time in Polish legal history, sale by auction was adopted as the main means of judicial execution.

3.1 Enforcement authority: Burgrabia and Komornik

The French position, *hussier de justice*, was translated into polish as “burgrabia” in 1808. It was changed by the decree of October 14, 1811, for “komornik”. Henceforth, the office of komornik was present in the Polish legal system. A komornik was the key figure of enforcement proceedings, and the scope of his duties included informing parties about ongoing enforcement, foreclosing movable and immovable property and preparing sales by auction that were conducted in proceedings in cooperation with the civil court. The French code of civil procedure (and decree of the Duchy of Warsaw issued in 1809) stated that a *hussier de justice*³ had to deliver court’s documents of all sorts to the parties involved. That duty was the grounds for numerous problems and irregularities, because *hussiers de justice* couldn’t combine two different duties. One of the most common examples was the situation of a *hussier de justice* who didn’t deliver a lawsuit or appellation to a third-party⁴. On one hand, the hearing had to be made null and void⁵. On the other hand, the enforcement proceedings had to be suspended⁶, and all enforcement actions taken before or after the appellation was filed had to cease or were deemed invalid⁷. Finally, those two functions were separated in 1811 when burgrabia was replaced by komornik (enforcement proceedings) and woźny (delivery of judicial documents)⁸. The Code’s formality required that every action taken by the *hussier de justice* was on record in protocol. There was no full *hussier’s de justice* protocol among

³ I will use french original term *hussier de justice* instead of burgrabia or komornik for better clarity.

⁴ AGAD, TCK, vol. 8, p. 379, p. 389.

⁵ AGAD, TCK vol. 8, p. 367.

⁶ AGAD, TCK vol. 6, p. 559.

⁷ AGAD, TCK vol. 7, p. 231.

⁸ The decree of October 14, 1811.

records of the court in Kalisz, but in one case a part of protocol from a movables foreclosure was quoted⁹. It shows that all of the premises and objects were described in a very precise manner. It has to be signed by a proper *hussier de justice* otherwise the recorded action was found null by the civil court¹⁰. The most common fault was signature of *hussier's de justice* employee instead of his.

3.2 Adverse claims within enforcement proceedings according to the records of the civil court in Kalisz

The most frequent type of case on enforcement proceedings issues was a model that started as a result of lawsuit including a motion to stop or cancel foreclosure. Code of civil procedure didn't specify who should be a plaintiff so usually we meet both figures: creditor and *hussier de justice* altogether. It didn't mean that their liability was joint and several as it was a court that decided whether creditor or *hussier de justice* was liable for civil damages. There was no specified complaint to the *hussier de justice* action (as it is nowadays in Poland according to Polish civil code) therefore the creditor was sued even if responsibility of *hussier de justice* was obvious and evident.

It should be noticed that the reason of adverse claims was negligence¹¹, omissions¹² or even wrongdoing¹³ of *hussiers de justice*. *Hussiers de justice* were sued very rarely for a delay. Only in four cases between 1808 and 1812 a delay was a base for lawsuit filed by creditor as well as by debtors. More frequently *hussiers de justice* issued warrants of foreclosure (polish: decyzja o zajęciu, zawiadomienie o zajęciu) of propriety without factual presence at the place of foreclosure¹⁴. Similarly, the enforcement was repealed and had to be repeated if foreclosure was made by *hussier's de justice* employee¹⁵. The evidence could be either protocol with all participants' signatures or, theoretically, hearing of witness (I have not found any case alike). In other cases plaintiffs tried to prove *hussier's de justice* intentional wrongdoing, very often with cooperation with a creditor due to accelerating the enforcement and depriving a debtor from possibility of stopping it. *Hussiers de justice* didn't inform a debtor about enforcement proceedings or even about foreclosure. It should be highlighted that any foreclosure before prior notification (polish: zawiadomienie) was null and void (regarding immovable propriety it had to be 30 day notice and in case of movable goods one day notice was enough). If there was any doubt that notification has been delivered or foreclosure has been undertaken without informing debtor then a court verified confirmation of receipt or protocol.

4. Family law in the Napoleonic Code: theory and judicial practice

Provisions of titles V and VI of the Napoleonic Code (articles 144 to 311) introduced civil marriages and divorce to the Polish legal system for all citizens for the first time in history. Even though both institutions were derogated in 1825 for Roman Catholics (majority of citizens), they experienced several years of usage that left an impression on

⁹ AGAD, TCK vol. 6, p. 179.

¹⁰ AGAD, TCK vol. 5, p. 1.

¹¹ AGAD, TCK vol. 2, p. 72.

¹² AGAD, TCK vol. 7, p. 263.

¹³ AGAD, TCK vol. 6, p. 559.

¹⁴ AGAD, TCK vol. 8, p. 106.

¹⁵ AGAD, TCK vol. 9, p. 221.

social memory. The strong reaction of the Roman Catholic Church and conservative groups was supposed to prevent society from undergoing any changes in this matter despite its legal basis (Góralczyk, 2008). The crusade against foregoing provisions of the Napoleonic code not only succeeded after several years, but also created a very specific approach in the Polish legal tradition¹⁶. According to historians' traditional point of view, new provisions did not result in the phenomenon of mass divorce, furthermore it was claimed that only several divorce verdicts were issued by courts of the Duchy of Warsaw at all (Grynwaser, 1951). This theory was questioned by recent research according to which a number of divorces in the Duchy may have exceeded 2000 instead of 16 (Pomianowski, 2013).

The issue of civil marriage was crucial for the Roman Catholic Church, due to the fact that the newly re-established Polish state couldn't provide enough clerks and civil officers. In this situation, priests were ordered to administer civil marriages as well as religious marriages (Walachowicz, 1984; Szaniawski, 1811). Treating priests in this way was unacceptable for the Church, because of the possibility that priests may also be forced to administer a civil marriage to a couple even if one of the parties was a divorced Catholic, creating grounds for a conflict of conscience for a priest-civil clerk. It was a pivotal issue, recurrent in inflamed discussions between the Government and Ignacy Raczyński, the head of the Polish Roman Catholic Church. To emphasize the theoretical nature of the dispute, it should be noted that we have no confirmation that any such case happened during the Duchy of Warsaw (Pomianowski, 2013).

In the matter of divorce in the Napoleonic Code, there were several bases from which to pronounce the dissolution of a marriage. The Napoleonic Code provided three grounds on which one spouse could demand divorce in the case of a fault perpetrated by the second party. According to article 229, a husband could demand divorce as a result of any adulterous act on behalf of the wife, but she was capable of demanding divorce only if her husband committed adultery by bringing a concubine into their common residence (article 230). That regulation expresses the equality of marriage in the Napoleonic Code. Article 231 stated that any spouse could demand divorce for outrageous conduct, ill-usage or grievous injuries (*exces, sevices ou injures graves*) exercised by the second spouse. Moreover, according to article 232, condemnation of one of the parties to infamous punishment was another ground. Finally, in case of mutual consent, a couple could also petition for divorce, however, they had to agree that their common life was insupportable and prove it (article 233).

Apart from legal theory, the traditional point of view stated that those provisions were rather a dead letter of law (Grynwaser, 1951, Walachowicz 1984, Sobociński, 1964). According to research conducted by dr Piotr Pomianowski, the marital issue in the civil courts of the epoch shows quite a different image of the practice. His work proves that civil courts had a rich experience within civil proceedings regarding divorce. Between 1808 and 1812, the civil court in Kalisz alone saw several dozen divorce actions filed. In fifty two cases, the Court made a final decision as to the merits, and divorce was ruled in forty three. The global number of divorce cases combined with isolated cases from other

¹⁶ Most significant examples: T. Walachowicz, Kościół Katolicki w prawodawstwie Księstwa Warszawskiego, Lublin 1984; J. Dutkiewicz, Watykan wobec Księstwa Warszawskiego i Królestwa Kongresowego 1807-1831, Warszawa 1963; H. Grynwaser, Kodeks Napoleona w Polsce. Pisma, Wrocław 1951.

courts, (which did not have complete records and survived as private copies of verdicts etc.) renders the result of eighty cases confirmed with historical sources. The courts in the Kalisz statistics show that the divorce efficiency rate is as relatively high as 86% of the total (Pomianowski, 2013).

As it was proven, the most common legal basis for judgments of divorce was article 231 of the Napoleonic Code at thirty three times (Pomianowski, 2014). The article concerned outrageous conduct, ill-usage or grievous injuries. These general notions allowed for common grounds for varied forms of physical violence i.e. beating, choking, pinching or kicking as well as verbal insults¹⁷. A significant difference between theory and practice was a broad interpretation of jurisprudence. For example, in one case, the court ruled that the destruction of a wife's gloves in some circumstances could be found as a grievous injury or insult¹⁸. More importantly, the Court recognized a husband's act of adultery, which took place outside the common residence¹⁹, as a grievous injury, weakening the discrimination of women in the Napoleonic Code. In that case, legal grounds for divorce wasn't found in article 230, but in 231, with special interpretation applied. On the grounds of article 230, divorces were issued nine times as a result of a husband's adultery, while concubines lived in the common residence. Most of those concubines were maids or home staff (Pomianowski, 2014).

The provisions of the Napoleonic Code didn't allow for abandonment as grounds for divorce. Yet Six divorce verdicts against wives were ruled as a result of their decision to leave their husbands and join other men.

The records of the court in Kalisz show that in a majority of divorce cases, the plaintiff was a wife that wanted to be set free from the patriarchal power of her husband. It is also understandable, regarding the fact that a widow or divorced woman had a far better legal position, because, for example, she didn't need a man's approval for her court actions.

Women who were found guilty of adultery could be condemned to confinement in a house of correction for a period of isolation lasting anywhere from three months to two years. In one isolated divorce case, a wife was sentenced to prison. It should be noted that this regulation didn't concern husbands who committed adultery (Pomianowski, 2013).

Conclusions

A general overview of court's cases connected with enforcement proceedings proves that enforcement proceedings law adopted by the Duchy of Warsaw was strictly formal and detailed. However, that formality was used to protect parties and in the first place it encumbered *hussiers de justice*. The key element of the judicial enforcement system was a protocol that played the very important role at every stage of the enforcement process. Unfortunately, protocols created by *hussiers de justice* didn't survive among court records. Civil court in Kalisz was a court of second instance therefore its records show problems regarding enforcement proceedings and cases which were ineffective or against the letter of law in first instance. It is also the only way to examine enforcement

¹⁷ AGAD, TCK, vol. 295, f. 21; 296, p. 430; 297, p. 225; vol. 292, p. 136, 292, 355; vol. 292, p. 429; vol. 297, p. 225, vol. 297, p. 355.

¹⁸ AGAD, TCK vol. 9, f. 114v.

¹⁹ AGAD, TCK vol. 9, f. 297v.

proceedings because of the lack of other official historical sources (except the official departmental press). The records of, at least, several dozens of *hussiers de justice*, working in the Duchy of Warsaw, were lost.

The court practice regarding the divorce was forgotten in the Polish legal tradition as a result of derogating it from Polish legal system, finally, in 1852, when in the last part of Poland – Free City of Cracow – the Napoleonic Code was derogated. However, recent studies based on the court records prove that during the Duchy of Warsaw divorce cases were relatively frequent comparing to the traditional point of view. More importantly historical sources provide us with new information about relations between women and man in 19th century Poland showing relatively common usage of the divorce.

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Kameel Premhid*

**Department of Politics and International
Relations, University of Oxford, United Kingdom;
Research Fellow, Helen Suzman Foundation*

A South African Perspective on Institutional Independence: The case of the Directorate of Priority Crime Investigation

Abstract:

South African Courts have, of late, made two noteworthy judgments that create a new standard for institutional independence. By examining the history of the Directorate of Priority Crime Investigation ('DPCI') through the *Glenister* judgment of 2011 and the *HSF* judgment of 2013, it is clear that, in future, when questions of institutional independence are considered, these judgments create the new framework against which independence will be measured. By doing so, South African Courts have created a uniquely South African, though widely applicable, standard of independence which, if properly applied, can bolster good governance.¹

Keywords: *Accountability, Corruption, Institutional Independence, Police, South Africa*

¹ This abstract has been amended since the original call for papers.

1. Introduction and Background

Corruption is inimical to the progress of any nation.² The ability for a state to police itself and others who engage in corrupt activities is paramount to ensuring that public money does public good. Institutional independence is thus crucial in order for state agencies engaged in anti-corruption activities to carry out their mandate without fear or favour in combatting this social ill.

Given the prevalence of corruption in South Africa,³ the decision of ruling African National Congress ('ANC') to abolish the relatively independent and highly successful Directorate of Special Operations ('DSO'), i.e. the 'Scorpions', and replace it with a unit which later became known as the Directorate of Priority Crime Investigation ('DPCI'), i.e. the 'Hawks' was dumbfounding.

This was especially given that the Hawks were to be located within the South African Police Service ('SAPS') over which the ruling party could exercise more political control. These concerns were heightened by the fact that there existed a significant discrepancy between the specialisation, training, independence, remuneration and security of tenure ('STIRS')⁴ of the DPCI and SAPS – all of which, it was alleged, would have had a negative impact on the any unit located within the SAPS to be as successful as the Scorpions were.⁵ Further, the fact that high-ranking members of the ANC, including President Jacob Zuma, were implicated in corruption investigations being conducted by the Scorpions, and their success in securing convictions, seemed to explain why they found themselves in the ANC's crosshairs.⁶

Setting the politics aside, this paper examines the history of the DSO/DPCI, the *Glenister*⁷ and *HSF*⁸ judgments and what general lessons can be drawn. It argues that these two judgments, taken together, establish a new test for institutional independence in South Africa. This test, which effectively has two stages – firstly, whether an obligation exists to create an independent institution; and, secondly, whether the institution in question is objectively independent – if properly applied, is a significant boon to ensuring institutions are independent and able to properly fight corruption.

² See <http://www.unodc.org/islamicrepublicofiran/en/impact-of-corruption.html>.

³ See <http://www.bdlive.co.za/opinion/columnists/2014/04/02/denialists-dont-get-it-that-apartheid-was-all-bad>.

⁴ See <http://www.bdlive.co.za/articles/2012/04/24/paul-hoffman-mps-must-show-loyalty-to-the-constitution-not-to-the-anc>.

⁵ See <http://www.legalbrief.co.za/article.php?story=20101015083047392>.

⁶ Bruce, David, 2008. '*Without Fear or Favour: The Politics of Justice*'. SA Crime Quarterly (No 24, June 2008). Centre for the Study of Violence and Reconciliation. Available online: <http://www.csvr.org.za/docs/policing/brucecq24.pdf>.

⁷ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

⁸ *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2013 WCHC.

2. The History of Anti-Corruption Entities ('ACEs') in South Africa

While various ACEs may have existed in pre- and post-1994 South Africa, the real focus of establishing a network of ACEs, as part of a concerted effort to address corruption, must start with a discussion of the Scorpions. In this section, this paper discusses the development of the Scorpions and its successor, the Hawks.

2.1 The Directorate of Special Operations ('DSO')

The DSO, more commonly known as the Scorpions, was a unique feature of the South African state apparatus. It was the first cohesive entity, since democracy, charged with solely investigating and prosecuting organised crime, including corruption. Much like other agencies tasked with similar responsibilities in other countries, and in accordance with international best practise, the Scorpions were a multidisciplinary agency capable of conducting both police and legal work.

While this may seem like an insignificant feature the ability to see a case through, in-house, from start to finish, in combination with more favourable STIRS for the Scorpions, provided adequate independence, motivation and possibility to achieve successful convictions. It drew on some of the country's finest policemen, lawyers, forensic, and intelligence experts and quickly established itself as an unrivalled elite crime-fighting unit.

The Scorpions was a unit within the country's National Prosecuting Authority ('NPA'). This structural difference to the Hawks (discussed later), it is suggested, is a key factor in understanding the difference in success between the two.

By being located within the NPA, the Scorpions enjoyed special protection in terms of section 179 of the Constitution. Given the degree of political interference in the prosecution of political trials, especially those of ANC members prior to democracy, it stands to reason that in government, one of the key priorities of the ANC would be to depoliticise the prosecutorial services. Thus, the previous politically-appointed head of the prosecutorial services, the Attorney-General, was replaced with a wholly independent National Director of Public Prosecutions whose appointment and removal was strictly governed by the Constitution. This tightly defined and strictly applied criteria is an often referred to theme within the context of the Hawks litigation.

The Scorpions was one of the units within the NPA (the others including the National Prosecuting Services (NPS), the Witness-Protection Programme, the Asset Forfeiture Unit (AFU) and specialised units such as the Sexual Offences and Community Affairs Unit and the Specialised Commercial Crime Unit).⁹ Each of the units had specific responsibilities. The Scorpions were governed by the National Prosecuting Authority Act, 32 of 1998, which was the enabling statute which underpinned most of the Scorpions' operations. The DSO was headed by a Deputy National Director of Public Prosecutions.

The main responsibility of the Scorpions included being responsible for the running of and being answerable for its own operations. This included, but was not limited to, seeking authorisation for, reviewing and reporting on all investigations and prosecutions.

⁹ Policy in this regard has changed over time.

Given the nature of its mandate, it also investigated and pursued prosecutions with respect to drug and human trafficking, (governmental) corruption and white-collar crime.

2.2 The Directorate of Priority Crime Investigation ('DPCI')

The biggest problem faced by the Scorpions was, ironically, their success. In thoroughly investigating and prosecuting corrupt government officials, the Scorpions earned the ire of the ruling party and its affiliates. After successfully prosecuting Schabir Shaik, the financial advisor to then Deputy President Zuma, it was only a matter of time before the Scorpions were to go after Zuma himself.¹⁰

The Shaik/Zuma incident was not the first instance of ANC politicians who were implicated in or convicted of fraud and corruption.¹¹ Due to a series of factors, primarily the rise of Zuma's political fortunes, the ANC and its allies increasingly turned on the Scorpions accusing it, variously, of being unaccountable, pursuing a political agenda and/or acting the aegis of Apartheid-era operatives. After Zuma's political ascendancy was secured through his and his faction's election to the leadership of the ANC at its 2007 Polokwane Conference the ANC, in government, soon turned a party decision, made at that same conference, to disband the Scorpions and integrate it into the police force.

Thus, in 2008, the ANC in Parliament passed, by a majority of 252 – 63,¹² the National Prosecuting Authority Amendment Act of 56 of 2008. This Act had the effect of abolishing the Scorpions and, eventually, replacing it with the Hawks under the jurisdiction of the SAPS. What was notable about this is that all the characteristics which made the Scorpions an elite crime fighting unit were now removed. The Hawks would no longer retain the STIRS (the most important being independence); would no longer be protected by section 179 (thus falling within the ordinary command and control structures of the SAPS and the National Commissioner – a political appointee); and, most devastatingly, be subject to greater political control by the Minister of Safety and Security¹³ (i.e. the ruling party). The inherent danger with this is that any ruling party, presently the ANC, could abuse this command and control and stymie any investigations aimed at itself; and in so doing erode the rule of law. may do so.

3. Litigation

The decision to abolish the Scorpions was widely criticised. The Official Opposition, the Democratic Alliance (DA), accused the ANC of abolishing the Scorpions so as to protect

¹⁰ See <http://mg.co.za/article/2013-07-24-zuma-did-not-explain-why-spy-tapes-should-be-confidential-insists-da> for case history.

¹¹ See <http://www.citypress.co.za/politics/graphic-the-ancs-naughty-executive-committee/>.

¹² See http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=53&catid=52:Human%20Security&Itemid=114.

¹³ See <http://mg.co.za/article/2009-05-22-zuma-takes-nononsense-approach-to-crime>.

Zuma, specifically, and ANC politicians, generally.¹⁴ Most notably, in what was a South African first, businessman Hugh ‘Bob’ Glenister¹⁵ privately funded public interest litigation against the Government. Glenister was represented by the Institute for Accountability in Southern Africa (IFAISA).¹⁶ The *Glenister* litigation occurred in several rounds.¹⁷ Only those specifically related to the Scorpions/Hawks are focused on here. Glenister was joined at two stages by the Helen Suzman Foundation (‘HSF’),¹⁸ once as an amicus curiae before the CC and once as an applicant, *suo jure*, being heard at the same time, before the WCHC.

3.1 Glenister v President of the Republic of South Africa and Others¹⁹

In a judgment handed down on 17 March 2011, the CC made its seminal ruling finding that the legislation creating the Hawks, specifically Chapter 6A of the South African Police Service Act,²⁰ was unconstitutional. This case was brought by Glenister with the HSF acting as an amicus curiae.

3.1.1 Majority Judgment

In the majority judgment, handed down by Deputy Chief Justice Dikgang Moseneke and Justice Edwin Cameron,²¹ the CC found in favour of Glenister and the HSF. In this regard, the CC made two key findings:

“First(ly), it (held) that *the Constitution* imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. While (it was) not in express terms ... that a corruption-fighting unit should be established, (the) scheme taken as a whole impose(d) a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption. This obligation is sourced in the Constitution and the international law agreements which are binding on the state. The Court point(ed) out that corruption undermine(ed) the rights in the Bill of Rights, and imperils our democracy. Section 7(2) of the Constitution imposes a duty on the state to “respect, protect, promote and fulfil” the rights in the Bill of Rights. When read with s 8(1) (which provides that the rights in the Bill of Rights bind all branches of government), section 39(1)(b) (which provides that Courts must consider international law when interpreting the Bill of Rights) and section 231 (which provides that an international agreement that Parliament approves “binds the Republic”), this provision places an

¹⁴ See <http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=107651&sn=Detail&pid=71619>.

¹⁵ See http://af.wikipedia.org/wiki/Hugh_Glenister.

¹⁶ See <http://www.ifaisa.org/>.

¹⁷ See http://www.ifaisa.org/current_affairs-glenister.html.

¹⁸ See <http://www.hsf.org.za/>.

¹⁹ Note 7 above.

²⁰ Act 68 of 1995.

²¹ Note 7 above. Majority judgment, Moseneke DCJ and Cameron J with Froneman J, Skweyiya J and Nkabinde J concurring.

obligation on the state to create an independent corruption-fighting unit.

A number of international agreements on combating corruption have been approved by Parliament and are binding on the Republic. These require that states create independent anti-corruption entities. *Implicit in section 7(2) is the obligation that the steps the state must take to protect and fulfil constitutional rights must be reasonable. To create an anti-corruption unit that is not adequately independent, thereby ignoring binding international law, is not a reasonable constitutional measure.*

Second(ly), the Court (found) that the DPCI (did) not meet the constitutional requirement of adequate independence. Consequently the impugned legislation does not pass constitutional muster. *The main reason for this conclusion is that the DPCI is insufficiently insulated from political influence in its structure and functioning.* This is because the DPCI's activities must be coordinated by Cabinet – the statute provides that a Ministerial Committee may determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences. This form of oversight makes the unit vulnerable to political interference. Further, the Court holds that the safeguards that *the provisions* create *are inadequate to save the DPCI from a significant risk of political influence and interference.*

In addition, the conditions of service of the unit's members and in particular those applying to its head make it insufficiently independent. Members thus have inadequate employment security to carry out their duties vigorously; the appointment of members is not sufficiently shielded from political influence; and remuneration levels are flexible and not secured. *These aspects make the unit vulnerable to an undue measure of political influence.*

*Hence, the Court ... (declared) the offending legislative provisions establishing the DPCI constitutionally invalid to the extent that they do not secure adequate independence, and suspends the declaration of constitutional invalidity for a period of eighteen months to give Parliament the opportunity to remedy the defect.*²²

3.1.2 Minority Judgment

The minority, in a judgment handed down by Chief Justice Sandile Ngcobo,²³ found conversely. The minority, in advancing reasons as to why they would have dismissed the case of Glenister and the HSF, found that:

²² See <http://www.saflii.org/za/cases/ZACC/2011/6.html>. Minor amendments and emphasis added.

²³ Note 7 above. Minority judgment. Ngcobo CJ with Brand AJ, Mogoeng J and Yacoob J concurring.

“section 7(2) of the Constitution, while giving rise to a positive obligation on the state to fight corruption and organised crime, does not specifically impose an obligation on the state to establish an independent corruption-fighting unit. It ... holds that, insofar as such a constitutional obligation is found, the structural and operational autonomy of the DPCI is secured through institutional and legal mechanisms that are adequately designed to prevent undue interference and safeguard the independence of the DPCI.”²⁴

3.1.3 Precedent

While it is important to note that both the majority and the minority agreed that the legislation could not be violated for (a) a failure on Parliament’s behalf to facilitate public involvement; and, (b) its location alone,^{25, 26} the disagreement between them is significant.

The minority took a conservative view, finding that neither the international obligations nor the Constitution created an obligation to create an ACE. Further, the minority found that even if it did, there was no basis of complaint given that Parliament and the Executive were well within their right to establish the DPCI as they did. The minority were not of the opinion that the ACE, as it was created prior to being invalidated by the majority, was not adequately independent to perform its function.

The majority, conversely, found that the Constitution and international agreements did compel the government to establish an ACE and that, further, said ACE was to be created with sufficient independence, free from political interference, so that it could do its job without fear and favour. The way in which the majority evaluated this was to establish whether the ACE, i.e. the Hawks, was structurally independent within the framework of the government and whether the members of the Hawks themselves were independent. In both regards, the majority found the Hawks, as it was then, wanting.

The majority were at pains to emphasise that the decision as to where to locate the ACE was a policy decision. The majority readily accepted that it would violate the principle of the separation of powers for the Court to dictate to Parliament or the Executive where, specifically, the ACE should be located. This is owing to the fact that the Court was not best placed to make such a policy decision which was polycentric in nature. The majority, however, did not think that it was contrary to the separation of powers for the CC to invalidate such a policy decision made by Parliament or the Executive given that the Constitution specifically empowered the judicial arm of government to do so: it was the upper guardian of ensuring that the Constitution was the supreme law of the land and that all conduct was consistent with it.²⁷

²⁴ Note 22 above.

²⁵ Note 7 above.

²⁶ Most of the CC’s attention was directed to argument presented by the HSF focusing on international law obligations.

²⁷ Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC). Majority Judgment.

This is significant because *Glenister*, thus, establishes the precedent for evaluating independence. The first aspect is that of structural independence: this means that the position of the ACE, *per se*, is not a determining factor of independence itself. Rather, as the majority accepted, the ACE can be located anywhere provided that the ACE is, when objectively measured, independent. The second aspect, which augments that of structural independence, is personal independence: this means that the conditions of service and the conditions in which members of the ACE operate also require specific attention.²⁸ Personal independence has a significant ability to influence the way in which important anti-corruption work needs to be carried out.

Glenister and the HSF, thus, succeeded in their application and, by a majority of 1, managed to invalidate the disbanding of the Scorpions and the establishment of the Hawks.

3.2 Helen Suzman Foundation v President of the Republic of South Africa and Others^{29 30}

In 2013, the Western Cape High Court ('WCHC') delivered a unanimous judgment in favour of the HSF. The HSF, again, along with businessman Hugh Glenister, who filed a separate application, approached the Court to have the South African Police Service Amendment Act ('Amendment Act')³¹ declared unconstitutional.

The HSF argued that the Amendment Act, which was specifically introduced to address the concerns raised by the CC in *Glenister*,³² fell short of the standard of 'adequate independence' that it had previously determined necessary for an ACE.

3.2.1 Nature of the Dispute^{33 34}

Cloete J, delivering the unanimous judgment of the WCHC, with Desai J and Le Grange J concurring, summarised as follows:

"In Glenister the CC found that the creation and location of a separate anti-corruption unit within the South African Police Service

²⁸ Note 4 above. This refers to the so-called 'STIRS'.

²⁹ Note 8 above. Delivered by Cloete J with Desai J and Le Grange J concurring.

³⁰ See <http://hsf.org.za/resource-centre/hsf-briefs/saps-amendment-act-case-confirmation-proceedings-and-application-for-leave-to-appeal>.

³¹ Act 10 of 2012

³² Note 7 above.

³³ Note 8 above. Some argument was made as to the non-joinder of Parliament. The Court, at paragraphs 16–18, 20, 22–23, upheld the HSF's argument that this was not an issue given: (a) the substance of the Act, and not procedure, was being challenged; (b) Counsel for the Government, the Government being a party in the matter, notionally included Parliament in terms of case law; and (c) Rules of Procedure, specifically that of the CC and the Uniform Rules, also supported this suggestion.

³⁴ *Ibid.* Paragraphs 4–7; 10–12; 122. The respondents failed to properly distinguish between the challenges brought by the HSF and Glenister. Cloete J was at pains to separate and, at times, contrast the very different approaches taken by the HSF and Glenister.

‘(SAPS)’ is not in itself unconstitutional. The essential question is whether the anti-corruption unit enjoys sufficient structural and operational autonomy so as to shield it from undue political influence. Accordingly, at issue in this case is not the location of the DPCI within the SAPS structure, but whether the SAPS Amendment Act provides the DPCI with sufficient insulation from undue political interference.’³⁵

It was interesting that the Court needed to re-emphasise this point. On the papers, it was clear that the Respondents, to some extent, attempted to re-argue the merits of *Glenister* itself. They argued, incorrectly, as the WCHC was to find, that the applicants had taken specific issue with the fact that DCPI was located within the SAPS. They further argued that ‘independence’ was not an objective concept and that it had to be examined relative to the actual location of DPCI itself. As such, given that the police structure was different to that of the NPA, it meant that independence would have to be understood in terms of Chapter 11 of the Constitution which afforded the Police Commissioner and, additionally, the Minister of Police greater control of the entire force, inclusive of the DPCI.

However, in finding that the Applicants could not argue the merits of a particular model for where the Hawks should be located or how it should operate, according to their own preferences, the Court similarly found that the Respondents were also constrained to only arguing the merits of the model that the Government presented. The Court rightfully held that making a determination as to location is the legitimate policy purview of the Executive and Parliament. However, this did not mean that something which the CC had already pronounced upon, like the fact that independence would be measured objectively, could be jettisoned because the models before the Court in each case was different.

Cloete J held that:

“... it is necessary to remind ourselves that, just as we must fulfil our duty to declare invalid laws which fail to pass constitutional muster, we must equally guard against falling into the trap of seeking to satisfy hypersensitivity or paranoia. The very location of the DPCI within the SAPS has already been found by the CC to be constitutionally permissible. As a lower court it is not for us to take issue with that or to entertain debates about whether the DPCI should be located elsewhere. What we are required to do is to assess, objectively, whether Ch 6A of the SAPS Amendment Act provides the DPCI with ‘insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit’ (*Glenister* at para [216]). This is the yardstick to determine whether the DPCI ‘has an adequate level of structural and operational autonomy secured through institutional and legal mechanisms, to prevent undue influence’ (*Glenister* at para [206]). If it does, then public confidence should follow. If it does not, the converse applies.”³⁶

³⁵ *Ibid.* Paragraph 24. Emphasis added.

³⁶ *Ibid.* Paragraph 30. Emphasis added.

3.2.2 Challenges

The Court adopted the framework of the HSF's attacks on the Amendment Act and answered each one individually.³⁷ Each of the HSF's attacks were sustained as follows:

3.2.2.1 Appointment

The Court recognised that the original problem with the appointment procedures was that no criteria existed. Despite the Legislature taking action to remedy this by including criteria for the appointment, the new complaint was that the criteria was now too broad and that it conferred an unfettered power of appointment on the Minister. This is inimical to independence as it potentially allows the Minister to abuse that power.

The Court agreed that this was unjustifiably broad and did not provide sufficient guidelines to the delegee as to how they may exercise their powers in a manner that is consistent with the Constitution. Notwithstanding the contradictions between the Respondents, as to whether the delegated power was discretionary or peremptory, the Court found that any reliance on the so-called *Simelane*³⁸ case by the Respondents was misguided.

The *Simelane* case, in the Court's view, supported the proposition that the criteria for appointment must match the statutory purpose for which it was promulgated. With that in mind, the unfettered power of the Minister to appoint the Head of the DPCI, unlike the limited powers of the President to appoint a head of the NDPP, did not further the DPCI's need for adequate independence.³⁹

3.2.2.2 Parliamentary Oversight

Given that the oversight the Head of the DPCI was subjected to was concentrated within the Executive branch of Government, Cloete J stated that:

“the question that arises is whether the ordinary, reasonable citizen can trust the DPCI to investigate state corruption fully and fearlessly if the Head is appointed, without any meaningful guidelines or constraints, by the Minister with Cabinet. Indeed, Cabinet comprises the political heads of all of the government departments that the DPCI might have to investigate...”

it is vital that the person appointed has no taint – whether perceived or otherwise – that he or she occupies office due to ministerial preference. One immediately apparent solution would be to require that Parliament approves the appointment. This would ensure that such appointment is subject to sufficient scrutiny, by a transparent

³⁷ *Ibid.* Paragraph 32.

³⁸ *Democratic Alliance v President of South Africa and Others*, 2013 (1) SA 248 (CC). Additionally, see: <http://mg.co.za/article/2012-10-05-59-menzi-simelanes-appointment-ruled-invalid>.

³⁹ Note 8. Paragraphs 35 – 46.

and representative institution, to safeguard both the actual and perceived independence of the Head...⁴⁰

Thus, in finding in favour of the HSF's contentions, Cloete J stated that *"there is no apparent purpose in excluding Parliamentary oversight from the appointment process of the Head of the DPCI."*⁴¹

The Court rejected the comparison of the appointment procedure for judges and magistrates with the Head of the DPCI, as advanced by the Respondents, on the grounds that magistrates and judges were granted constitutionally protected independence and that the appointment criteria and procedures applicable to them was more constrained, unlike the case with the Minister's and Cabinet's powers with respect to the Head of the DPCI.⁴²

3.2.2.3 Extension of Tenure

The Court held that even though the extension of an incumbent's tenure may be subject to certain conditions, the fact that their tenure may be renewed by election of the Minister undermines the adequate level of independence required for the DPCI and its Head. The Respondents' arguments that the conditions under which a term may be renewed provided sufficient safeguards were thus rejected. As Cloete J stated:

"Whatever the practical advantages of the power to extend the Head's tenure, the renewability of the term at the behest of the Minister is intrinsically inimical to independence. It is clear ... that it is renewability as such, rather than the insufficiency of conditions or constraints imposed on renewability, which jeopardises independence. Renewability thus has no valid place in the scheme of a unit that is constitutionally required to be adequately independent... (Further an) element of ministerial discretion into the extent, if not the fact, of the extension, in that it states that the further term 'shall not exceed' certain fixed periods, thus clearly implying that it may, at the discretion of the Minister, be shorter than those fixed periods. This gives rise to the potential for favouritism or, at the very least, public perception of potential favouritism... Consequently, a contextual interpretation of the impugned provisions reveals that they purport to vest the Minister with the power to extend the tenure of the Head. The latter's term is thus renewable at the pleasure of the Minister, and to that extent the Head's independence is eroded. This erosion is not saved by the fact that the Minister's power is subject to conditions,

⁴⁰ *Ibid.* Paragraphs 48, 50 and 52. Despite the HSF's attempt to convince the Court that 'in consultation with' did not mean that the functionaries had to agree with each other, given the use of the term 'in concurrence with the Cabinet' elsewhere in the legislation, the Court was unconvinced in light of the CC jurisprudence which held the opposite. The WCHC felt not much turned on this contention. Emphasis added.

⁴¹ *Ibid.* Emphasis added.

⁴² *Ibid.* Emphasis added.

namely a maximum time limit, the incumbent's consent and the incumbent's health (as assessed by the Minister)."⁴³

3.2.2.4 Suspension and Removal

The Court, upon concessions made by Respondents' counsel in oral argument, established that there were two different mechanisms by which the Head of the DPCI may be dismissed. While the remedy to entrench security of tenure for staff of the DPCI was secured, the same measures were starkly inadequate for the Head. This was especially evident with respect to the mechanism that allowed the Minister to dismiss the Head of the DPCI. Not only did the Court find that there were fewer substantial constraints on the Minister's power to dismiss, there were also far broader reasons for suspension and dismissal which could be abused.

Whereas Parliament may have ill-will in its decision to remove the Head of the DPCI (i.e. in terms of the other conceded mechanism), the fact that it needed to do so by a two-thirds majority, the same margin by which certain sections of the Constitution could be amended, indicated the discrepancy in protection afforded to the Head. This discrepancy is also most clearly illustrated by the inclusion of a fourth nebulous ground for dismissal, namely incapacity to carry out their duties 'efficiently', that only the Minister enjoys and not Parliament. Apart from the fact that the term efficiently is not defined, the subjective determination of what is efficient further impugns the provision. This is made worse by the fact that, like with Parliamentary Oversight, above, Parliament plays no substantial role in the Minister's dismissal processes.

This means that the Minister, who may also be the subject of an investigation being conducted by the DPCI, could abuse their power even further. Even if the Minister did not abuse their powers, the framework created by the Amendment Act creates a sufficient threat to emoliate an incumbent Head and that is what the Court took exception to. The Court held, further, that even though an *ex post facto* review of dismissal and suspension may be conducted, and thus any illegal conduct be set aside, the legislation should not be allowed to pass with such deficiencies in the first place. *Ex post facto* review should not allow poor legislation to pass.⁴⁴

3.2.2.5 Jurisdiction

The Court found that while the revised provisions relating to jurisdiction may have been an improvement from the original legislation, which designated such decisions to be made by the Ministerial Committee, the matter of jurisdiction was still improper.

The Court found that "despite the wording (of) the impugned legislation (it) doe snot ensure the DPCI's jurisdiction is exclusive or primary or that certain key crimes, such as corruption and organised crime, must be referred to the DPCI by the SAPS if they are perpetrated in more than one province. Indeed, there is nothing to prevent the SAPS from investigating such crimes without the involvement or even the knowledge of the DPCI ... This undermines the finding in Glenister that the Constitution requires that corruption is

⁴³ *Ibid.* Paragraphs 68, 70, 72 – 73. Emphasis added.

⁴⁴ *Ibid.* Paragraphs 75 – 88.

investigated by a body that is sufficiently independent, both functionally and institutionally.⁴⁵

The Court found that the change in how the guidelines are drawn up, i.e. that the Minister alone is responsible for them and not the Ministerial Committee, is still “inimical to independence... The ... guidelines, coupled with the ‘crept in’ provisions in s 16, have the very real potential to constrain the DPCI’s work or even to direct the DPCI towards, or away from, particular targets. That is antithetical to the very purpose of the DPCI as well as the constitutional requirement for an adequately independent corruption and organised crime fighting unit. It also militates against a unit that is reasonably perceived to be sufficiently independent.”⁴⁶

Further, while the Respondents contend that the construction of the Amendment Act and other pieces of corruption-related legislation mean that virtually all corruption-related activities fall under the DPCI’s jurisdiction, the Court took a different view. The Court found that even though Parliament is now relied on to pass the guidelines that direct the DPCI’s work:

“Parliament is also a political body and it should not be tasked with deciding on what cases the DPCI should or should not pursue where its own members may be subject to investigation. The nub of the matter is this: the DPCI’s mandate, i.e. to fight corruption, is a constitutional requirement. It is not something which should ultimately be left to politicians to determine. The statutes governing the work of the NDPP, the Auditor-General and the Public Protector – all of which were found in Glenister to be instructive in considering the requirement of adequate independence – do not permit similar external interference by political actors. While it is so that the Minister must determine policing policy in terms of s 206(1) of the Constitution, it is nonetheless incumbent upon the legislature to find a way to meaningfully address the constitutional requirement of adequate independence for the jurisdiction of the DPCI.”⁴⁷

All of the Respondents were unsuccessful in this regard. As Cloete J stated: “The position therefore is that in relation to this crucial aspect of the legislation – the very mandate of the DPCI to investigate corruption – not even the respondents are at one with each other.”^{48 49}

⁴⁵ *Ibid.* Paragraphs 89 – 107. Emphasis added.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ In terms of South Africa law, the HSF will have to have the WCHC judgment confirmed by the CC. It has applied to have the issues, listed above, for which it was successful confirmed. It has also applied to cross-appeal certain adverse findings made by the WCHC. These are: (a) financial control; (b) integrity testing; (c) conditions of service and (d) co-ordination by the Cabinet. The grounds for appeal are more fully set out in the HSF’s Heads of Argument. What is interesting to note is that the adverse findings do not negate the overall finding of the WCHC, namely that the Amendment Act is unconstitutional and needs to be remedied, but rather that the WCHC disagreed with the

3.2.3 Precedent

The decision of the WCHC is a victory for the rule of law. *Glenister*⁵⁰ had the effect of establishing a requirement that our Government to establish an adequately independent ACE. The WCHC decision reaffirms that any measure which is introduced to meet that standard is open to constitutional scrutiny and that where it is found wanting, as it the case with the Hawks currently, it will not be allowed to continue. In this decision the WCHC demonstrated how, after the principle of independence was found to be the measure against which all institutions were to be evaluated, through examining structural or personal independence, it could determine whether the standard in question was met. In this case, the Hawks were sent back to the drawing board.

4. The Meaning of Independence

As has been alluded to, independence can be understood in two ways.

Firstly, it can refer to structural independence. This refers to the degree to which any entity is isolated from the (undue) interference of another. This can also be directly seen in terms of the 'separation of powers' principle.

For example, with respect to the judiciary, structural independence refers to whether the judiciary is created sufficiently independent from the influence of the other branches of state, i.e. whether the judiciary can make decisions free from the influence of the government.

Importantly, this does not mean that the institution in question is absolutely independent and that it is answerable to no other entity. Rather, as per the concept of 'check and balance of power', it means that other entities can intervene but only in legitimate circumstances. Again, as with the judiciary, we see that while judges need to be independent in office they are, in fact, appointed by a body that contains politicians which they may need to sit in judgment of.

While a strict application of the balance of power may suggest that this is unjustifiable given that the judiciary may need to sit in judgment of the government and, thus, the government should have nothing to do with judicial appointments as this is a clear conflict of interest, our constitutional design does not suggest so. Rather, it suggests that such 'conflict' is acceptable as an involvement such as this provides an important check on the judiciary's power. A failure to do so may mean that the judiciary becomes a power unto itself, thus violating our Constitution.

Institutional independence by its nature requires it to be a balancing act. An institution can be independent while being subject to the authority of another provided that when it is

HSF's argument that in the way in which these particular aspects are drafted they necessarily undermine the independence of the DPCI. The HSF is set to argue that they do and has raised argument as to why the CC should grant the HSF leave to cross-appeal and find it its favour. I respectfully submit that, for the reasons pursued by the HSF, the WCHC did, in fact, misapply itself and that the CC should find in the HSF's favour.

⁵⁰ Note 7 above.

being subject to such authority the superior entity is constrained by the law as to how it may exercise its authority. This important balancing act is particularly important in the context of increasing executive authority.⁵¹

Secondly, it can refer to personal independence. This refers to the conditions under which members of the specific entity serve.⁵² These are important because the conditions under which people serve determine the extent to which they are able to carry out the mandate given to the entity and thus fully utilise the institutional independence they may be given by law.

The combination of these aspects means that entities can carry out their mandate without undue influence from other organs of state. This is especially the case where, an ACE, for example, may need to investigate organs of state, particularly high-ranking Ministers. Without either aspect – i.e. being sufficiently structurally isolated from a Minister's reach and personally independent, to the extent that remuneration, etc, depends on the Minister themselves – the institution is powerless. Moreover, it also ensures that power is not overly concentrated in a single entity of the government (usually the executive or the legislature) which is then able to circumvent being accountable to either another organ of state. Thus, independence specifically given to the DPCI can be seen to strengthen democracy as it ensures that government fulfils its mandate and cannot escape some form of remonstration where it fails to do so.⁵³ In each of these cases, these advantages have overarching political, economic and social benefits to the society that respects the Rule of Law.⁵⁴

5. Possible Problems with Institutional Independence

In addition to the problems raised by the Respondents in both *Glenister*⁵⁵ and *HSF*,⁵⁶ there are, potentially, philosophical problems with institutional independence. They both have to do with the majoritarian nature of democracy.

5.1 Counter-Majoritarian Dilemma

Firstly, some may suggest that an institution's independence may be inimical to democracy in that it creates a counter-majoritarian dilemma. The idea is that a democratically elected government is given a popular mandate to implement its political programme of action. Independent institutions may, in cases where they exercise their independence in a way that adversely affects the majority party's ability to implement that programme, undermine a ruling party's ability to do so. This is counter-majoritarian in the sense that actions which are supported by the majority, as represented by the majority party, are not given effect to.

⁵¹ Corder, H. 2009. *Judicial Authority in a Changing South Africa*. University of Cape Town.

⁵² Note 4 above is an example, i.e. the so-called 'STIRS'.

⁵³ Ackerman, B. 2000. The New Separation of Powers. *Harvard Law Review*. Vol 113, No 3. pp 623 – 729.

⁵⁴ Leon, T. 2008, *On the Contrary: Leading the Opposition in a Democratic South Africa*. Johannesburg and Cape Town: Jonathan Ball Publishers. Pg 411.

⁵⁵ Note 7 above.

⁵⁶ Note 8 above.

5.2 Democratic Deficit

Secondly, and related to the problem highlighted above, some may suggest that independent institutions also suffer from a democratic deficit. This refers to the situation when supposedly democratic institutions may, in their operations or practise, undermine the principle of democratic accountability: i.e. these institutions escape being accountable to the democratically-elected representatives of the people who act as the guardians of a democratic society.

5.3 Response

Neither of these concerns are wholly surprising. Given South Africa's unique political history – where the majority were denied political power – it makes sense that political power and the concomitant ability of the majority to achieve its ends is most highly valued. However, to represent South Africa's democracy only in terms of majority/minority power would betray the full 'miracle' achieved in 1994. South Africa's experience under Apartheid specifically showed that political power can be abused even in a system where there may be competitive elections. Accordingly, South Africa's Constitution deliberately empowered its Courts to act as the upper guardian of the Constitution so that there could be a check on political power – especially in between elections. By specifically granting its Courts the power to review and invalidate legislation that it found to be inconsistent with the Constitution, the supreme law of the land, the country's constitutional negotiators made an explicit acknowledgment that democracy is not solely about majority will: the Courts would be a vital institution that would keep both majority and minority in check, with the Constitution as its guiding document. The Courts are but one institution that requires adequate independence in order to fulfil this mandate.⁵⁷

Each of these critiques highlight the balancing act that the liberal democratic systems of government attempt to achieve between obeying the will of the majority as its source of legitimacy whilst at the same time being aware of the special protections that need to be put in place to guard against majority abuse of power.⁵⁸

As with the case of judges, the South African constitutional framework is designed in such a way so as to ensure that there is adequate democratic input while at the same time ensuring institutional independence. While Judges may not be directly elected,⁵⁹ the appointment process that is used in South Africa does allow a degree of political input. It values this as being necessary and desirable: political representatives are, after all, representatives of the people. But, the Constitution simultaneously protects the judiciary from political interference so that, once appointed, judges can do their job without fear or favour. By requiring special majorities for a judge's removal, fixing remuneration by statutes, etc, our Constitution both acknowledges and tries its best to resolve the tension between accountability to democratically-elected institutions and remaining sufficiently independent from them.

⁵⁷ In South Africa, this is particularly relevant. Chapter 9 of the Constitution deliberately creates such institutions to protect, promote and uphold democracy.

⁵⁸ Joyce, P. 2006. *Teach Yourself: Politics*. Reading, Berkshire. Hodder Education.

⁵⁹ See s174 and s178 of the Constitution of the Republic of South Africa.

Given the nature of elected office, it stands to reason that parties vying for power are, to some extent, engaged in a process of being most attractive to the highest number of bidders. Depending on the particularities of the state in question that means various things including, for example, not acting in the public interest when a choice needs to be made between what is easy and what is necessary. The fact people appointed to independent institutions do not face the same incentive structure as politicians means that their decision-making is more likely to be in the public interest.

This poses the question as to whether there is an inevitability for a degree of tension between independent institutions and the executive. The answer to this question is, simply, yes. However, that is not to say that such a tension cannot be productive or that such existing is itself a bad thing. Rather, (1) this degree of tension will only exist in a system of government where there is a supreme Constitution and specific independent institutions are created that variously have the power to review the acts of the other branches of government but also there is no reciprocal arrangement; and (2) that the tension is a manifestation of the separation of powers.⁶⁰

As with the case of the judiciary, Section 165(3) of the Constitution explicitly protects the Courts from the interference of external persons on its decision-making processes. This is owing to the fact that the Constitution is supreme and the Courts are empowered to give effect to its meaning whilst the other branches of state are bound by and subject to the authority of the Courts.⁶¹ This means that even though the other branches of the state may be given more ‘electoral power’ they are not as powerful as the Courts and are often thwarted by it.⁶² Inherently this means that the government of the day may face difficulty in securing its electoral power at the next election if it is unable to fulfil its electoral promises. This, if severe enough means that there will be tension between the judiciary and the executive.

However, for the reasons above and those to come, we can see that this tension is to the benefit of society. This can be summarised in the following way:

⁶⁰ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)* in which the Court held that the Separation of Powers is implicit within the Constitution and must be adhered to, at paragraphs 45, 54, 77, 106 – 113, 115, 117, 122 – 123, 125, 141, 151.

⁶¹ s165(5) of the Constitution of the Republic of South Africa. Further, the case *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W) is an example of the Courts giving meaning to the Constitution via their interpretation. In this landmark ‘test-case’ “the High Court indicated that ... where the respondents abide the decision of the court and make no attempt to justify an infringement of rights, this attitude cannot be decisive on the matter. The court itself must determine as best it can if there is anything to be said in favour of the law.” [Currie and De Waal. 2001. *The New Constitutional and Administrative Law*. Juta Law. Vol 1. pg 339.]

⁶² This can even be the case where the Constitution is not supreme as with *Harris v Minister of the Interior* 1952 (2) SA 428 (A); *Minister of the Interior v Harris* 1952 (4) SA 769 (A) and *Collins v Minister Of The Interior And Another* 1957 (1) SA 552 (A).

“the Court to issue a declaration of rights and that the doctrine of the separation of powers requires that the Court make no order which would have the effect of requiring the executive to pursue a particular policy, the Court acknowledged that ‘there are certain matters that are pre-eminently within the domain of one or other of the arms of government’, and that all branches of government ‘should be sensitive to and respect this separation. This does not mean, however, that Courts cannot or should not make orders that have an impact on policy.’”⁶³

This means that where the government through its incompetence or lack of care pursues an action that is detrimental to the same public that gives it its position of strength, can be held to account, despite its support, by the Courts who look after the interests of afflicted citizens.⁶⁴ This results to a greater net benefit to society when they comply with the order.⁶⁵

While I readily acknowledge that other independent institutions, like the DPCI, have a different function to fulfil and thus may have its independence varied accordingly, it is clear that institutional independence is both desirable and beneficial.

6. Principle

While the CC is yet to determine the *HSF* matter, the findings of the CC in *Glenister* and that of the WCHC in *HSF* make it clear that where a binding legal obligation exists, which enjoins the state to create an independent institution (irrespective of what area of governance it may operate it), the state is obliged to act in accordance with it; and, where it purports to do so, its policy decisions must be measured against an objective standard of independence.

In the context of increasing governmental power and the erosion of institutional independence, these findings could not be more relevant. The standard created by these two judgments thus crucial for the combating of corruption, specifically, and good governance, generally. Whatever the political stripe of the government of the day, these two judgments are a critical tool for ensuring the rule of law prevails. This is not only important to a newly democratized state like South Africa, but for other transitioning states too.

6.1 Application

This test is of particular relevance. Given the passage of the Legal Practice Bill, now the Legal Practice Act, which seeks to bring significant government control over the legal

⁶³ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

⁶⁴ Advocate Paul Hoffman SC of the Institute for Accountability in South Africa writing in the *Business Day* (21st August 2009) quoting Conradie JA in *Jeyiya's* case (2004 (2) SA 611) and Cameron JA in *Ngxuzza's* case (2001 (4) SA 1184) in the *Business Day* on the 21st August 2009.

⁶⁵ This should happen anyways given s165(5) of the Constitution of the Republic of South Africa 1996.

profession and similar moves in the media industry, via the Protection of State Information Bill and the Media Appeals Tribunal, increasing governmental power over critical centres of discourse threatens the health of South Africa's democracy. While it remains to be seen what shape the challenges to these threats will take, it is clear that both *Glenister* and the *HSF* matters are hugely persuasive in favour of independence.

Provided that it can be shown that there exists an explicit or implicit obligation on the state to maintain an independent legal and/or media profession and that where any moves to reconstruct said professions can be construed as undermining such independence, when objectively tested against the established principles, it is possible that these pernicious pieces of legislation can be felled.

7. Conclusion

Whatever the politics of the decision to disband the Scorpions and replace it with the Hawks, the *Glenister* and *HSF* decisions will, in time, come to be viewed as being vitally important for good governance in South Africa. They both demonstrate that while our Courts may be constrained in determining day-to-day policy, by determining the framework in which the Government exists, they are capable of ensuring that good governance is given effect to. The fight against corruption is multi-faceted and ever-changing. Those involved in it can take solace that they have not only aided their cause specifically but they have aided the cause of the rule of law more generally as well. South African Courts have created a uniquely South African, though widely applicable, standard of independence which, if properly applied, can only bolster good governance.

Zahra Mousavi

*Ph.D. candidate, Law Department, University of Amsterdam, The Netherlands;
Lecturer, Law Department, The Hague Applied University*

Return Directive and French Policy for Detention of Illegally staying Third Country Nationals

Abstract

The Return Directive 2008/115/CE, dated 16 December 2008, ‘on common standards and procedures in Member States for returning illegally staying third country nationals’, does not prevent Member States from applying criminal sanctions, including imprisonment for illegal entry or stay of third country nationals to the extent that they are not inconsistent with the rights of those nationals, and inconsistent with the Return Directive. The purpose of the Directive is not to coordinate the national legislation of Member States on their residence policy toward illegally staying third country nationals, but to set common standards for return of the illegally staying third country nationals within EU Member States. It provides for detention with a maximum of 6 months (Article 15 (5)), and in some conditions up to 18 months (Article 15 (6)). France in some cases has issued return order and at the same time kept the illegal staying third country national in detention for a period more than what is provided in the relevant legislation with no clarification on the grounds for detention. For example in the *Achughbabian* Case a return order was issued for Mr. Achughbabian upon which he was given a period of 1 month to leave the country voluntarily. As a consequence of his refusal to leave, he was ordered to return with no consideration of voluntarily return period, and kept in detention under the French Law. Extension of detention beyond 48 hours was requested from the juge des libertés et de la détention of the Tribunal de grande instance de Créteil. He filed objections on the basis of *El Dridi* judgment. His objections were dismissed and extension of detention was approved. Subsequently he filed an appeal to the Cour d’appel de Paris. The Court terminated the detention and referred a question on the impact of the Return Directive on national law, in particular Article L.621-1 of CESEDA, to the European Union Court of Justice (EUCJ). EUCJ judgment and subsequent Opinions of the Court of Cassation are very important. French practice for punishment of the illegally staying migrants is justified under CESEDA; pre-removal detention is also justified under the Directive. This article intends to analyse the EUCJ judgment of *Achughbabian* with a clear indication of what is the practical and legal problem with this type of treatment of illegal residents who are subject to Return Directive. Moreover, it deals with the question that what is the duty of France and other Member States in similar situations in order to act in compliance with the Return Directive, and in compliance with the decision of the EUCJ, when it comes to the detention of any third country national who is illegally staying in their territory. The article also goes further to review how France improves its policy and law, and to suggest what remains to be done in future.

Keywords: *asylum and immigration, detention, French Legislation on illegal entry and stay (CESEDA), illegally staying, Return Directive 2008/115/EC.*

1. Introduction

All conditions set for detention of returning third country nationals, who are illegally staying in the territory of a Member State, are provided in the Return Directive 2008/115/CE dated 16 December 2008 'on Common Standards and Procedures in Member States for Returning of Illegally Staying Third Country Nationals'¹ (hereinafter to be referred to 'the Return Directive' or 'the Directive'). It should be noted the Directive is not aimed at coordinating the national legislation of Member States on their residence policy toward illegally staying third country nationals, but to set common standards for return of illegally staying third country nationals within Member States. In other words, the detention under the Directive only relates to illegally staying third country nationals who are subject to return procedure, and it does not cover the situation of other illegal migrants, e.g. those who are in appeal process. Moreover, it also does not covers any other form of detention except for the purpose of return, e.g. detention to prevent unauthorised entry into the country; or any other group except illegally staying third country nationals.

Having said so, in *Achughbabian Case*,² the European Union Court of Justice (EUCJ), in reply to the question raised by the Court of Appeal of Paris, clarifies the impact of the Return Directive on French national legislation, particularly on Article L. 621-1 of CESEDA. This article intends to review the judgment of the EUCJ in *Achughbabian case* in the light of the Directive. It goes further to review how France improves its policy after *Achughbabian* judgment, and what remains to be done in future. The aim is to provide a clear answer to the core question of what is the duty of France and other Member States in similar situations in order to act in compliance with the Return Directive, and in compliance with the decision of the EUCJ, when it comes to detention of any third country nationals who is illegally staying in their territory.

Therefore, first part of this article deals with the legality of detention in international, EU, and national levels. In national level, French criminal code on detention will be specifically introduced. Second part is devoted to the case review and analysis of *Achughbabian* judgment. Finally, the current status of French policy and legislation towards illegally staying third country nationals and impact of the *Achughbabian Case* will be reviewed. In conclusion, suggestions for improvement of the detention policy towards illegally residents who are subject to Return Directive will be offered.

Legality of the Detention in International, EU, and National levels

International, EU, and national laws authorise detention of asylum seekers and illegal migrants. From international law perspective, the 'International Covenant on Civil and Political Rights' (hereinafter to be referred to as ICCPR)³ and the 'Convention for the Protection of Human Rights and Fundamental Freedoms' (hereinafter to be referred to as ECHR)⁴ are among basic documents that deal with detention of asylum seekers and illegal migrants. In EU level, there are only few Directives that set common standards for

¹ Return Directive, 2008.

² EUCJ, *Achughbabian Case*, 2011.

³ 1966.

⁴ 1950.

detention,⁵ among them it can be referred to the Return Directive. In national level, Member States not only may, but also as it will be shown, have to include detention in their legislation and to enlist the justifying grounds and conditions of detention therein. In next section, justifying grounds for detention under relevant laws in all three levels will be reviewed. It should be emphasized that this review will limit its observation in line with the pre-removal detention, Return Directive, and the legislation of France as core concerns of the discussion.

Grounds for Detention under ICCPR and ECHR

ICCPR and ECHR both recognize the right to liberty and security of person. ICCPR and ECHR indicate that nobody should be deprived from his liberty, unless with a procedure set by law. ICCPR requires that the grounds for detention to be established by law, and provides no specific list of grounds for detention. However, the ECHR recognizes 6 grounds for detention.⁶ These grounds are as follows: “a) ... after conviction by a competent court; b) ... for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; c) ... for the purpose of bringing ... [person] before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; d) ... for the purpose of educational supervision [of a minor] or his lawful detention for the purpose of bringing him before the competent legal authority; e) ... for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; and f) ... to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”⁷

The European Court of Human Rights in *Bouamar* Case states:

Here the main issue to be determined in the instant case is whether the disputed placements were ‘lawful’, including whether they complied with ‘a procedure prescribed by law’. The Convention here refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness ...⁸

Therefore, ‘lawfulness’ requires that the deprivation of liberty to be prescribed by law and in line with the purpose of the Article 5, and in line with the grounds for deprivation as indicated in Article 5 (1) of ECHR.⁹

In short, illegally staying third country nationals may be detained for illegal entry as well as for removal under ICCPR, if provided by law, and under Article 5 (1)(f) of the ECHR.

⁵ Reception Conditions Directive (recast, 2013); Procedures Directive (recast, 2013); Return Directive, Dublin III Regulation (recast, 2013).

⁶ ECHR, 1950, Article 5 (1); ICCPR, 1966, Article 9.1.

⁷ ECHR, *ibid.*

⁸ ECtHR, *Bouamar* Case, 1988, at para. 47.

⁹ *Ibid*, at para. 50.

Article 5 (1)(f) of the ECHR also requires Member States to enlist grounds for detention in their national laws.

2.2 Grounds for Detention under the Return Directive

The Return Directive authorizes detention of illegally staying third country nationals for the purpose of removal. That means Member States may detain illegally staying third country nationals only for preparation of the return or for carrying out the removal process.¹⁰ It should be noted that due to the fact that detention interferes with personal liberty, Member States has to respect safeguards for prevention any unlawful and arbitrary detention. Articles 15 and 16 of the Directive deal with the detention and its conditions. Pre-removal detention is authorized in specific cases, when less coercive measures for return are not sufficient, and if: “a) there is a risk of absconding; or b) the third country national avoids or hampers the preparation of return or the removal process.”¹¹

Unaccompanied minors and families with minors can also be kept in detention as a measure of last sort, and of course as short as possible.¹² Detention should be necessary and proportionate.¹³ It has to be executed with due diligence and for a short period.¹⁴ Proportionality and due diligence are general and to some extent vague terms, because the Directive defines no specific criteria for them. As to the period, Member States may set a maximum of 18 months altogether with extension period.¹⁵ The maximum of 6-month detention can be extended for up to another 12 months, if the required grounds are met, that means, if there is: a) lack of cooperation by third country national; or b) delay in obtaining the necessary documents from third countries.

For the purpose of pre-removal detention, specialized facilities have to be provided. If this is not achievable, Member State has to keep the illegally staying third country national separate from ordinary prisoners.¹⁶

Pre-removal detention should be justified and implemented in compliance with the Directive. It should be ‘ordered by administrative or judicial authorities’, and ‘in writing with reasons being given in fact and in law’.¹⁷ Member States were required to ‘bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2010’.¹⁸ Member States were supposed to communicate those measures to the Commission.

It can be concluded that pre-removal detention of illegally staying third country nationals *per se* is neither illegal nor violation of human rights, if the criteria and the conditions of detention are satisfactorily met.¹⁹

¹⁰ Return Directive, Article 15 (1).

¹¹ *Ibid.*

¹² *Ibid.*, Article 17.

¹³ *Ibid.*, preamble, at para. 16.

¹⁴ *Ibid.*, Article 15 (1).

¹⁵ *Ibid.*, Article 15 (5) and (6).

¹⁶ *Ibid.*, Article 16 (1).

¹⁷ *Ibid.*, Article 15 (2).

¹⁸ *Ibid.*, Article 20.

¹⁹ ECHR, Article 5 (1)(f).

2.2 Grounds for Detention under National Legislations

Member States, whether for conformity with international obligations, or for compliance with regional obligations, or for fulfilment the requirements provided in their national legal systems, set grounds for detention in their national legislation. Grounds have to be foreseen. The more specific and concrete guidance and clarification, the less arbitrary detention. Detention should be decided by the administration or court authorities. Some national legislations require a hearing to be held before any decision on detention of third country nationals. In France, this hearing may be held in the waiting zone of the airport.²⁰

In general, 7 categories have been recognized as grounds for detention of third country nationals within territories of Member States: a) to prevent unauthorised entry in compliance with the Schengen Borders Code;²¹ b) to effect removal in compliance with the Return Directive; c) to punish irregular entry, exit, or stay, as imposed in Immigration Law of Latvia, or in Act of Aliens in Poland; d) to establish identity and nationality; e) to prevent absconding, as provided in the Return Directive; f) for disrespect of alternatives and non-departure after voluntary period is expired; g) for public health, public order, or national security considerations.

2.3.1 Detention of illegally staying third country nationals under French National Law

Under French national law, third country national may be punished for illegal entry or stay in the territory of France. Public prosecutor has discretion to decide on prosecution of the criminals for above mentioned crimes. Prosecutions for illegal entry or for stay in the territory of France with required conditions will be performed in according with the French Code of Criminal Procedure.

On provisions on 'detention for illegal entry', one may refer to L-211-1 and L-311-1 of CESEDA. Provisions on detention for 'illegal stay' are in L-221-1 to L 224-4 of the CESEDA. Provisions that deal with 'migrants detained in premises not falling under the prisons administration' are provided in L 551-1 to L 555-3.²²

In France, there are different grounds for detention. However for the purpose of this research, the attention will be paid only to detention of illegally staying third country nationals. Legal period of detention of immigrants subject to removal in first laws was 12 days, it extended to 32 days in 2003, and up to 45 days in 2011. In practice, 10-day detention applies.

For better understanding of the discussion on possibility of non-compliance of French legislation with the Return Directive, some relevant Articles of CESEDA, in the version in force at the time of *Achughbabian* case, are enlisted hereinbelow.

Article L.211-1:

²⁰ CESEDA, Article 222-4.

²¹ Schengen Borders Code, 2006.

²² CESEDA, 2011.

In order to enter France, any foreign national must hold ... the documents and visas required by the international conventions and the regulations in force ...

Article L.311-1:

Any foreign national aged over 18 years wishing to stay in France must, after the expiry of a period of three months from his entry into France, hold a residence permit.

Article L.551-1:

The detention of a foreign national in premises not falling under the prisons administration may be ordered where that foreign national:

...

3. Although subject to a deportation order ... issued less than one year previously, or having to be deported pursuant to a prohibition from French territory under the penal code, cannot immediately leave French territory; or

...

6. Although subject to an obligation to leave French territory imposed ... less than one year previously and in respect of which the one-month period for voluntarily leaving the territory has expired, cannot immediately leave that territory.

Article L.552-1:

Where a period of 48 hours has elapsed since the detention decision, application must be made to the juge des libertés et de la détention [liberty and custody judge] for extending the detention.

Article L.621-1:

A foreign national who has entered or resided in France without complying with the provisions of Articles L.211-1 and L.311-1 or who has remained in France beyond the period authorised by his visa commits an offence punishable by one- year's imprisonment and a fine of EUR 3750.

The court may, further, prohibit a convicted foreign national, for a period which may not exceed three years, from entering or residing in France. Prohibition from the territory automatically entails deportation, where appropriate at the expiry of the term of imprisonment.

Article 62-2 of the Code of Criminal Procedure provides:

Police custody is a coercive measure decided upon by a police officer, under the control of the courts, whereby a person reasonably suspected on one or more grounds of committing or attempting to

commit an offence punishable by imprisonment is held at the disposal of investigators.

It is noteworthy to mention that some of these provisions were amended on 2011 by 'law on immigration, integration and nationality'.²³ However, Article 621-1 of CESEDA remained as it is. The legal and practical problem of these articles will be explained here and in case review of the next part.

According to Article L.551-1 and following CESEDA, a foreigner, who cannot leave the French territory immediately, may be detained by the administrative authority in premises that are not managed by the prison administration for a period of five days, unless he is under house arrest in application of Article L. 561-2. This is not in line with Article 15 of the Return Directive that provides:

Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process.

Enforcement of the detention of Articles L.551-1 and L.621-1 to a illegally staying third country national who is subject to detention for return under Return Directive proves non-transparency and leads to justified doubts on France compliance with the Return Directive.

3. Case review: *Achughbabian*²⁴

Mr. Alexander Achughbabian is an Armenian national who entered France on 9 April 2008 and applied for residence permit. The application was rejected on 28 November 2008. The rejection was confirmed on 27 January 2009. He was notified of the rejection accompanied by an order to leave French territory within 1-month (voluntarily departure) on 14 February 2009. He refused to leave the territory.

On identity checks in public highway on 24 June 2011, according to the police record, he stated that he was born in Armenia. Mr. Achughbabian denies that statement. He was suspected to commit a crime subject to Article L.621-1 of CESEDA, so he was in police custody. On 25 June 2011, a deportation order and an administrative detention order were issued.

On 27 June 2011, an extension of detention beyond 48 hours was requested from the *juge des libertés et de la détention* of the Tribunal de grande instance de Créteil, under Article L.552-1 of CESEDA. Mr. Achughbabian filed objections on the basis of *El Dridi* judgment.²⁵ In that Case, the EUCJ held that Return Directive precludes legislation of a Member State which provides for detention as punishment of illegally staying third country national on the sole grounds of 'staying' on the territory, without any valid grounds, and without any order to leave the territory within voluntary period. He states

²³ Law No. 2011-672.

²⁴ EUCJ, *Achughbabian* Case, 2011.

²⁵ EUCJ, *El Dridi* Case, 2011.

that detention provided for in Article L.621-1 of CESEDA is incompatible with the EU Law. The Court ordered the extension, and dismissed objections raised by Mr. Achughbabian.

Subsequently, he filed an appeal before the Cour d'appel de Paris. The Court, before any decision making in that regard, terminates detention of Mr. Achughbabian, and refers the following question to the EUCJ for a preliminary ruling:

Taking into account its scope, does Directive [2008/115] preclude national legislation, such as Article L.621-1 of [CESEDA], which provides for the imposition of a sentence of imprisonment on a third-country national on the sole ground of his illegal entry or residence in national territory?

EUCJ, in its judgment, emphasizing on the purpose of the Return Directive, that is to deal with the return of illegally staying third country nationals rather than harmonising the national rules on stay of foreign nationals in entirety. It decides:

Therefore, that directive does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national rules on residence.

... [D]irective does not preclude a third-country national being placed in detention with a view to determining whether or not his stay is lawful.

...

... [T]he competent authorities are required, in order to prevent the objective of Directive 2008/115, ... from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay of the person concerned. Once it has been established that the stay is illegal, the said authorities must ... adopt a return decision.

It goes further to state:

... Directive 2008/115 does not preclude either national legislation, such as Article L.621-1 of Ceseda, in so far as the latter classifies an illegal stay by a third-country national as an offence and provides for penal sanctions, including a term of imprisonment, to prevent such a stay, or the detention of a third-country national in order to determine whether or not his stay is legal ...

The EUCJ further examines whether or not the Directive precludes a legislation such as Article L.621-1 of CESEDA that is capable of leading to an imprisonment of a third country national who is in return procedure under the Directive. Basically criminal legislation and criminal procedures fall within the jurisdiction and discretion of Member States, but the might be affected by the EU Law. Neither Article 63 (3)(b) EC (Article 79 (2)(c) TFEU), nor the Directive precludes Member States from their discretion in criminal

matters. Yet, Member States have to adjust their legislations in a manner to ensure they are in compliance with the EU Law. The Court refers to *El Dridi* Case, where it was ruled that Member States may not apply criminal legislation capable of jeopardizing the aim of the Directive and depriving its effectiveness.

The Court observes that because the return decision of 14 February 2009, on the basis of voluntary departure, was no longer operative on 24 June 2011, a new return decision was issued on 25 June 2011 in the form of deportation order without considering a period for voluntary departure. As the Court states, the question here is whether the situation of Mr. Achughbabian should be considered as a person who is not fulfilling his return obligation of voluntary departure, or as a person subject to return decision without voluntary departure period.

Both assumptions are covered by Article 8 of the Directive that obliges Member States to take all necessary measures for removal of the person. This measure, and coercive measure, should be effective and proportionate. Detention of sentence of imprisonment during the return process does not contribute to removal. It cannot be considered as a measure or coercive measure within the meaning of Article 8 of the Directive.

National legislation of France that provides for detention of illegally staying after the expiry of the period of 3 months, from entry into French territory, is capable of leading to detention a person who is subject to standards provided in Articles 6, 8, 15, and 16 of the Directive. This person as a matter of priority is subject to return procedure, and can be detained. French legislation hampers the application of the Directive, and delays the return.

If a illegally staying third country national commits any offense, excluding illegally staying, he is not subject to the Directive under Article 2 (2)(b). This is not the case for Mr. Achughbabian. There is not proof that he has committed any offence except illegal stay, therefore the Directive is applicable to his situation. It is interesting to mention that even though he is not sentenced to the penalties provided for Article L.621-1 of CESEDA, still recognition his crime of 'illegal stay' is based on the findings of this Article. Hence, the question on the compatibility of this Article with EU Law is relevant. Because the government never withdrew the proceedings of prosecution for 'illegal stay'.

The Court adds that Member States are not precluded from penalizing illegally staying third country nationals, before carrying removal under the Directive. In brief the Court rules:

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as:

- precluding legislation of a Member State laying down criminal penalties for illegal stays, in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive and has

not, being placed in detention with a view to the preparation and carrying out of his removal, yet reached the end of the maximum term of that detention; and
- not precluding such legislation in so far as the latter permits the imprisonment of a third country national to whom the return procedure established by the said directive has been applied and who is staying illegally in that territory with no justified ground for non-return.

The Court of Justice therefore interprets the Return Directive as precluding the French legislation insofar as this measure consists of detention, during the process of forced removal, of illegally staying third country nationals.

4 Aftermath of the *Achughbabian* Case

Pursuant to the Judgment of the EUCJ in *Achughbabian* Case, the Criminal²⁶ and Civil Chambers²⁷ of the Court of Cassation of France stated in their decisions that the 'custody in remand' for irregular stay is unauthorized. Therefore, foreigners subject to identity checks would no longer face criminal sanctions. After the modification of the procedures of police custody in 2011, these measures are only applicable to persons likely to face a prison sentence. Hereinbelow, the opinion of the Criminal Chamber of the Court of Cassation and new set of rules will be reviewed.

4.1 Opinion of the Court of Cassation

In its Opinion, Criminal Chamber of the Court of Cassation²⁸ states that:

It follows from Article 62-2 of the Code of Criminal Procedure from the Law No. 2011-392 of 14 April 2011 [that] a measure of custody can be decided by a police officer, if there is reasonable suspicion that the person has committed or attempted to commit a felony or a misdemeanor punishable by imprisonment. In addition, the measure must obey one of the objectives necessary for the conduct of criminal proceedings.²⁹

It goes further to suggest that:

[A] national of a third State in question, for the sole offense under Article L. 621-1 of the code of entry and residence of foreigners, does not incur the imprisonment where it has not previously been subjected to coercive measures referred to in Article 8 of the Directive, that he cannot be placed in custody in connection with a procedure carried this one head.³⁰

²⁶ Court of Cassation, Criminal Chamber, Opinion of 5 June 2012, No. 9002.

²⁷ Court of Cassation, Civil Chamber, Judgments Nos. 959 and 965 of 5 July 2012.

²⁸ Court of Cassation, Criminal Chamber, supra note 26.

²⁹ *Ibid.*

³⁰ *Ibid.*

And it concludes:

A third State could not, in the state prior to the entry into force of the Act of 14 April 2011 law, be placed in custody on the occasion of a procedure carried out for illegal entry or under the procedure of *flagrante delicto*, placement in custody being possible, in accordance with Articles 63 and 67 of the Code of criminal Procedure then in force only during the investigation of offenses punishable by imprisonment. The same principle should prevail when the survey was conducted by other procedural forms.³¹

In brief, if an illegally staying third country national commits a crime or if he is suspicious to commit a crime, he can be detained by the order of police officer. Also, when an illegally staying third country national is already subject to coercive measures provided in Article 8 of the Return Directive, he will not be detained by the administrative authority in premises that are not managed by the prison administration for a period of five days, while he is unable to leave the French Territory immediately, under Article L.551-1 and following CESEDA. And this is so, because the detention provided in French legislation as punishment hinders the purpose of Directive and delays the return. It clearly shows that French Court of Cassation realizes that there should be a clear distinction between detention as punishment and pre-removal detention.

4.2 Development of French Legislation on Punishment of Persons for Illegal Entry or Stay

French national law was afterwards amended. As from 31.12.2012, illegal *stay* of third country nationals was abolished. That means detention of third country national on the sole ground of staying on the territory despite his illegal situation is unauthorized. However, third country nationals may be subject to criminal penalties in the following cases: a) illegal *entry* into French territory, for which the maximum penalties are 1 year detention, € 3,750 fine, and 3 year re-entry ban into French territory; b) illegal *stay* on French territory *without a legitimate reason*, after being subject to detention or house arrest which ended *without the execution of a removal order*. The maximum penalties for this crime are 1-year detention, € 3,750 fine, and 1-year re-entry ban into French territory; and c) *non-compliance with a refusal of entry or a removal order or returning* on French territory after being *subject to a re-entry ban* into French territory. The maximum penalties of this crime are 3-year detention, and 10-year re-entry ban into French territory.³² The removal order has been added to the second and third categories. This clear-cut leads to a flawless distinction between pre-removal detention and detention as punishment, and it prevents hindrance of purposes of the Return Directive.

5. Conclusion

Development of French policy and law towards detention in this context should be considered as a milestone in EU Migration Law. We learnt EUCJ decision can act as guidelines for Member States to find out how properly and fully comply with their obligations under Return Directive; and how make a balance between enforcing their

³¹ *Ibid.*

³² CESEDA, 2013.

discretion in penalizing illegally staying migrants and implementing the common standards of Return Directive. Analysis of practical and legal problems of France in treatment of illegal staying third country nationals who are subject to return process is a lesson for all Member States whose national legislation fails to comply with the Directive. This is not the end; most of the Member States have huge number of illegal migrants. As reported, among Member States, France has highest number of asylum seekers per year. In 2008, this figure was about 35'160.³³ In mid-December 2013, the number of illegal migrants of France was 350,000.³⁴ Therefore, an efficient monitoring system is needed for control of pre-removal detention, in order to prevent any arbitrary detention in France and in all Member States.

³³ Immigration Detention and the Rules of Law, 2013.

³⁴ See <http://www.west-info.eu/france-a-legalization-for-irregular-immigrants/>.

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(12.17.2013),

Enkelejda Koka¹,
Andrea Mazellu²

¹Department of Law, University of New York Tirana, Albania

²Research Student, University of New York Tirana, Albania

European External Borders: Keeping out the 'unwanted' at ALL costs

Abstract

EU external sea borders are filled with the dead bodies of irregular migrants dying en route of a dangerous journey crossing the Mediterranean Sea for a better life. The reporting and documentation of deaths in EU borders since 1993 up to 2012 reveal a record of 19.142 victims. These figures do not include the unreported number of migrants that have disappeared at sea. In 2013, 695 victims were officially recorded to have died in their attempt to reach the island of Lampedusa, Italy. In a time of high technology and intense surveillance systems in the Mediterranean, how can irregular migrants lose their lives despite the alerts to the coastguards of the EU Member States for their distress at sea? The Southern EU Member States have a duty to assist persons in distress at sea codified in various international conventions, namely: The International Convention on Maritime Search and Rescue 1979 (SAR Convention); the International Convention for the Safety of Life at Sea 1974 (SOLAS Convention); and the International Convention on Salvage 1989; and the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982). It applies to any master of a navigating vessel, be it a governmental or private fishing vessel. The status of these individuals at distress at sea does not matter. What matters is that they are found to be in distress. The observed practice by the Southern EU Member States (especially Italy and Malta) is 1) not to attend to calls of distress in time, 2) avoid the boarding of irregular migrants on EU vessels and 3) return these migrants back to country of departure. The aim is to avoid international responsibility for disembarkation of migrants found at distress to a place of safety and not to be found in breach of the *non-refoulement* principle for returning migrants to third countries known to be human rights violators. Upon coming on board of EU vessels, irregular migrants are subject to legal guarantees in accordance with International and EU law and the principle of *non-refoulement*. Due to the lack of clear disembarkation rules for those migrants rescued on sea at EU or national level, various inconsistent practices are exercised by these EU Member States to avoid international responsibility. The most worrisome practice is that of reacting slowly to calls or alerts by migrants in distress at sea. The direct consequence of such practice has been the deaths of hundreds of migrants every year in EU shores. These practices are contrary to the international instruments designed to provide either international protection to those in need, or to ensure that everyone is protected of their life despite their status as a citizen or a migrant (be it regular or irregular).

Keywords: *external sea borders, search and rescue, distress at sea, non-refoulement, EUROSUR*

Introduction

EU external sea borders are filled with the dead bodies of irregular migrants dying en route of a dangerous journey crossing the Mediterranean Sea for a better life. The reporting and documentation of deaths in EU borders since 1993 up to 2012 reveal a record of 19.142 victims (Fortress Europe, 2013). These figures do not include the unreported number of migrants that have disappeared at sea. In 2013, 692 victims were officially recorded to have died in their attempt to reach the island of Lampedusa, Italy (De Bruycker et al, 2013, pg 22). In a time of high technology and intense surveillance systems in the Mediterranean, how can irregular migrants lose their lives despite the alerts to the coastguards of the EU Member States for their distress at sea?

The EU has seen a rise of irregular migrant crossing the southern EU external borders for the year 2013 since the Arab Spring of 2011. In addition, 2013 is referred as one of the deadliest year for irregular migrant deaths at EU external borders. The month of October 2013 has been the subject of various migrants and refugees death incidents in the South Mediterranean spurring in a 'blood bath' (Open Democracy, 2013). On October 3, 2013 the Italian and International media reported the deaths of 363 migrants in Italian coast of Lampedusa. The irregular migrants, nationals of Somalia and Eritrea, found themselves in distress only 550 m from the coastline of Lampedusa when their motor broke down. Migrants tried to call for help through their ship's horn. Although fisherman boats passed by, neither stopped to render assistance to these helpless migrants from 3.30 am to 6.40 am when coastguards were informed of their distress. It took the coastguards at least 45 minutes to come to the assistance of these irregular migrants although they were situated only 550 m away from the coastline. It was only when a blanket was put on fire on the boat that fishermen came to the assistance of these desperate migrants. As a consequence, the ship sank due to irregular migrants moving all to one side of the ship. On 11 October 2013, 8 days after the first tragedy for the month of October, another ship of irregular migrants sank near the Italian islands. The ship filled with 206 irregular migrants sank around 100 nautical miles from Malta in which 27 bodies were recovered (The New York Times, 2013).

Europe was shocked about this tragedy. Many European politicians from Germany, the Netherlands, Austria, Denmark expressed resentment about the tragedy. The October 3 tragedy of Lampedusa was the second largest tragedy since 2011 where 1500 people died in the Mediterranean Sea. Pope Francis words on this tragedy were "this is a disgrace" especially for the political class of European Union (BBC news, 2013). The Major of Lampedusa Giusi Nicolini cried out into saying "These bodies are all speaking. We need to stop this" (BBC news, 2013). The head of the Council of Europe's parliamentary assembly, Jean-Claude Mignon, stated on the same day of the tragedy: "A terrible human tragedy is taking place at the gates of Europe, and not for the first time. We must end this now. I hope that this will be the last time we see a tragedy of this kind, and I make a fervent appeal for specific, urgent action by member states to end this shame." (The Guardian, 2013)

Could this tragedy be prevented? According to a migration specialist with Human Rights Watch, Judith Sunderland words on October 3, 2013 were: "What's chilling is to think that this could have been prevented". (The Guardian, 2013) In order to answer this question, we must first analyse these occurring incidents in light of States' responsibilities under international law on search and rescue.

International Law on Search and Rescue

States and any shipmaster navigating on seas have an imposed duty to assist persons in distress at sea as embedded in customary international law. The duty to assist persons in distress has also been codified in the International Convention on Maritime Search and Rescue 1979 (SAR Convention)¹; the International Convention for the Safety of Life at Sea 1974 (SOLAS Convention)²; and the International Convention on Salvage 1989³; and the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982)⁴. This duty applies to any navigating vessel, be it governmental or private, to rescue any person at sea regardless of their immigration status.⁵

The SAR Convention provides a definition for the terms ‘search’, ‘rescue’ and ‘distress’. ‘Search’ means “an operation, normally coordinated by a rescue co-ordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress”.⁶ ‘Rescue’ means “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”.⁷ ‘Distress’ is defined as a “situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance”.⁸

To best apply the provisions of these Conventions and perform the duty of search and rescue of persons in distress at sea, States are provided with a manual: the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual)⁹ made up of three volumes divided as follows: Volume I on organization and management, Volume II on mission co-ordination, and Volume III which is all about mobile facilities involved in the rescue performance.

Under the SAR Convention, Mediterranean EU states have the responsibility to clearly identify and then establish search and rescue zones (SAR Zones). The aim of establishing SAR Zones is to ensure efficient coordination and responsibility for any search and rescue operation in the respective areas belonging to each State. This way, any overlapping in SAR Zones would be prevented. Italy and Malta have established their respective SAR zones and have adopted Search and Rescue Coordination centres which are responsible for identifying boats in distress and coordinate rescue operations. Malta,

¹ International Convention on Maritime Search and Rescue (SAR Convention), 1979, No. 23489; note: Malta has not ratified the 2004 amendments on disembarkation of persons found in distress at sea; all Mediterranean coastal states have ratified SAR apart from Egypt and Israel.

² International Convention for the Safety of Life at Sea, 1974, SOLAS, Treaties and International agreements, No. 18961, Article 98; note: all coastal Mediterranean states are parties, except for Bosnia Herzegovina.

³ International Convention on Salvage 1989, Article 10; note: Malta and Cyprus not ratified the Convention. Egypt, Syria and Tunisia are parties. Turkey is not a party.

⁴ United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982), Article 98.

⁵ SAR Convention 1979, Chapter 2.1.10

⁶ SAR Convention 1979, Annex 3, Chapter I at 1.3.1

⁷ SAR Convention 1979, Annex 3, Chapter I at 1.3.2

⁸ SAR Convention 1979, Annex 3, Chapter I at 1.3.13

⁹ SAR Convention 1979, Annex, Chapter II at 2.1.4

an island consisting of 246 km² has established a SAR Zone of 250,000 km² (SAR Malta, 2014). The Maltese SAR Zone overlaps with that of Italian SAR due to its large coverage.

These overlaps have often been the subject of many disputes and disagreements between the Italian and Maltese authorities on who is responsible for reacting to distress calls in those grey areas of overlaps. As a consequence, neither Coast Guard authorities commence a rescue operation in the belief that it does not fall within their established SAR Zone. This is not a case of a simple disagreement of SAR zones, as the respective States establish their respective obligations upon their free will. In addition, the SAR Convention imposes an obligation on Search and Rescue Coordination Centres to work amongst them in the efficient coordination of rescue authorities on sea and promptly identify the responsible authorities for conducting the rescue operation.¹⁰

State Practice

What happens in practice is that States choose the situations in which they wish to take action or be part of a rescue operation and at the same time do away with those rescue operations which would impose further international obligations upon them. Once persons in distress are rescued, States or shipmasters have an obligation to disembark the rescued persons to the nearest 'place of safety'.¹¹ The place of safety does not only mean that persons found in distress at sea should just be disembarked at a place where they are physically safe, but it also implies a place where the state of disembarkation guarantees and respects their fundamental rights. The problems arise when interpreting what a 'place of safety' means. States seem to provide diverse interpretations of place of safety. Their focus seems to be on how to discharge their international responsibility and the solution has been and continues to be: transferring this responsibility to another State. These different interpretations result from a failure of clearly defining the term 'place of safety' by the SAR Convention.

In an attempt to provide a better understanding of what 'place of safety' means, guidelines have been issued in that respect. 'Place of safety' means a place which not only guarantees the basic human needs such as food, shelter or medical care, but also a place where their human rights are respected.¹² The SAR State in which the boat is found in distress has the primary responsibility to decide where these rescued persons should be disembarked. In reaching a decision, the first thing to be considered is which port is nearest from the whereabouts of the distressed boat. However, the decision to disembark in the nearest port must take into account the nationality of these irregular migrants and whether the place of disembarkation respects fundamental rights. States are bound not to return any person to a country where there is a risk of being subjected to ill treatment contrary to the principle of *non-refoulement*.¹³

¹⁰ UNCLOS 1982, Article 98(2); SOLAS Convention 1974, Chapter V, Regulation 7; 2004 Amendments to the SOLAS and SAR Conventions

¹¹ the amended SAR Convention 1979, Annex 5, pg 3, 3.1.9, MSC 78/26/Add.1

¹² International Maritime Organization (IMO), *Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea*, 20 May 2004, point 6.12

¹³ Article 3 ECHR 1950, Article 3 CAT; Article 19(2) Charter of Fundamental Rights and Freedoms of the European Union; note: *Non-refoulement* applicable to all migrants: and the Refugee Convention 1951, Article 33 applicable for refugees.

The principle of *non-refoulement* arises at the moment that States are informed by irregular migrants as being refugees or due to their fears for being subjected to 'torture or other acts of cruel, inhuman or degrading treatment or punishment'.¹⁴ It is often the case that rescued migrants arrive from third countries such as Eritrea, Ethiopia, Iraq, Syria known as countries producing refugees (Bruycker, 2013, pg 22). They normally depart from Libya, often used as a country of origin and departure.

At the moment that competent authorities in the Italian or Maltese SAR Zones are alerted of a boat in distress, it is common knowledge that these migrants first must be disembarked to the nearest safe port which means disembarkation in Libya, Italy or Malta. Libya is not a signatory to the Refugee Convention 1951.¹⁵ In accordance with the principle of *non-refoulement* States must not return irregular migrants back to Libya without first assessing their individual circumstances.¹⁶ What this means is that once Maltese or Italian Coast Guards come to the rescue of irregular migrant boats in distress, they have no choice but to disembark them into EU territory. Once in EU territory, these irregular migrants must be given access to legal guarantees in accordance with EU and International law. In other words, by answering a call for distress at sea, Italy and Malta take upon them immediate responsibility for these rescued persons. For the year 2013, Italy received more than 45,000 irregular migrants crossing EU external borders irregularly by sea (IOM, 2013). Out of this total 42,900 landed in Italy and 2,800 in Malta (IOM, 2013). According to Frontex Risk analysis for the third quarter of 2013, there were 42,618 detections crossing external borders irregularly at the EU level (Frontex, 2013). Italy and Malta bear the highest burden of irregular migration flows at EU level. It is for this reason that Italy and Malta sometimes become hesitant in rescuing boats in distress at sea.

In order to avoid diverse interpretations to the SAR Convention, the International Migration Organisation (IMO) proposed in 2004 that the Convention be amended to provide clear rules on disembarking rescued persons to a 'place of safety'. Malta has strongly rejected the disembarkation of rescued persons to a 'place of safety' (IMO, 2009). It insists that rescued persons should be disembarked to the nearest safe port which in majority of times happen to be either in Libya or in Lampedusa, Italy. Since Malta has rejected to be bound by the new SAR Convention amendments, we must return our attention to its obligations at EU level on search and rescue operations and any specific rules on disembarkation.

Search and Rescue framework at the EU level

So far, at the EU level, there has not been any clear definition or guidelines as to what constitutes a 'place of safety' or disembarkation. In 2010, the EU Council adopted the 'external sea border rules' setting out guidelines on interception, rescue and

¹⁴ CAT 1984, Article 3

¹⁵ Refugee Convention 1951, Status as at 30.03.2014, available at: https://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en; Human Rights Watch, *Italy/Libya: Forced Return of Migrants Violates Rights*, 7 May 2009, available at: <http://www.refworld.org/docid/4a07ccfa2.html> [accessed 30 March 2014]

¹⁶ *Hirsi Jamaa and Others v Italy*, application no. 27765/09, GC ECtHR, paragraph 162

disembarkation.¹⁷ These guidelines were adopted in the form of a Decision based on Article 12(5) of the Schengen Borders Code.¹⁸ Although the guidelines provided a good attempt from the Commission to avoid diverse interpretations by Member States on search and rescue issues, these guidelines did not outlive their implementation days. The European Parliament requested the Court of Justice of the EU (CJEU) to annul the Council Decision for being adopted under the incorrect decision making procedure. The external sea borders rule was adopted under a Comitology procedure in accordance with Article 12 (5 SBC).¹⁹

CJEU decided to annul the Council Decision on the external sea borders rule holding that the subject area should be adopted under the ordinary decision making procedure decided by the EU legislature, namely the European Parliament and the Council of the European Union.²⁰ The Commission adopted the wrong legal basis when adopting the Decision. It contained essential elements of basic legislation which should have been decided only by the EU legislature and not be delegated to a Comitology. The Commission is re-proposing the 'external sea borders rule' in the form of a Regulation containing the same guidelines as those issued in Council Decision 2010/252/EU. The Regulation provides specific rules on Detection, interception, Rescue and Disembarkation.²¹ These rules largely reflect the International law rules on Search and Rescue and rendering assistance to ships in distress at sea.

What is worth emphasizing is the fact that this Regulation provides clear rules on where disembarkation should take place. Rescue Coordination Centres must decide in close cooperation with one another on the port or place of safety taking account of the following factors: 'the distance to the closest ports' or 'place of safety', the 'risks and the circumstances of the case'.²² Due account must be given as to whether the third country which is the closest port of safety respects fundamental rights. In the event that a Member State disembarks rescued persons to a third country which is known to be a human rights violator, these Member States will be in breach of the principle of *non-refoulement*.

This Regulation is still under consideration within the EU Legislature. Interestingly, the six Mediterranean States Spain, France, Italy, Malta, Greece and Cyprus are contesting the applicability of Articles 9 'Search and Rescue' and Article 10 'Disembarkation' rules. They are arguing that the consequences of these articles are to over regulate the area of law. The Regulation should instead emphasise that the Member States should abide by the

¹⁷ Council Decision 2010/252/EU

¹⁸ Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006 and its amended Regulation (EU) No 610/2013

¹⁹ Council Decision 2006/512/EC of 17 July 2006 (OJ 2006 L 200, p. 11, the 'second "comitology" decision and Article 12(5) SBC 2006

²⁰ Case C-355/10, *European Parliament v Council of European Union*, 5 September 2012

²¹ Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, COM(2013) 197, Brussels, 12.4.2013

²² *Ibid*, Article 10(4)

international law rules on ‘search, rescue and disembarkation’ as stipulated in the Conventions of SAR, SOLAS and UNCLOS.²³ In the arguments set out by the delegations of these six Member States in October 2013, they state that there has always been a clear understanding of the international legal framework on these rules between States.²⁴ It seems that the Member States memory is too short and they tend to forget their disagreements when common interests dictate.

In August 2013, Malta and Italy were not willing to allow a commercial ship to disembark 102 irregular migrants in their territories. Malta and Italy requested the commercial ship to disembark these irregular migrants to Libyan port for being the closest safest port as the migrants were rescued 45 nautical miles from Libya (Migrants at Sea, 2013). The commercial ship refused to disembark the migrants in Libya and instead headed off to Malta as these migrants were of Eritrean and Ethiopian nationality, known as producing refugees. Malta and Italy refused access to their territorial waters to the commercial ship despite various calls by the EU Commissioner on Justice and Home Affairs, Cecilia Malmström, for Malta to accept these migrants and not request their return to Libya which would be in breach of international law (EU Commission Press Release, 2013). It was only after a few days of disagreements that Italy finally provided access to its port for disembarkation purposes. According to the SAR Convention and IMO guidelines, at the moment that a commercial ship has rescued persons and due to their status of being potential refugees it cannot disembark them to their country of departure, neighbouring States must ensure that these persons are disembarked promptly to a place of safety and relieve the shipmaster of his responsibility.²⁵

Despite various international conventions on search and rescue and rules on disembarkation, the observed practice by Italy and Malta is to 1) not attend to calls of distress in time, 2) avoid the boarding of irregular migrants on EU vessels and 3) return these migrants back to country of departure. Upon coming on board of EU vessels, irregular migrants are subject to legal guarantees in accordance with International and EU law and the principle of *non-refoulement*. The aim is to avoid international responsibility for disembarkation of migrants found at distress to a place of safety and not to be found in breach of the *non-refoulement* principle for returning migrants to third countries known to be human rights violators.

Illicit Practices and its Consequences

The direct consequence of such illicit practices has been the deaths of hundreds of migrants every year in EU shores. These practices are contrary to the international instruments designed to provide either international protection to those in need, or to ensure that everyone is protected of their life despite their status as a citizen or a migrant (be it regular or irregular). What is even more shocking is the fact that so far Italy's or Malta's practice has been to rescue and push back migrants to third country of departure.

²³ Inter-institutional file: 2013/0103(COD), Council Doc. 14612/13, Brussels, 10 October 2013 prepared by Greek, Spanish, French, Italian, Cyprus and Maltese delegations

²⁴ Ibid

²⁵ IMO, Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea, FAL.3/Circ.194, 22 January 2009

From the latest tragedy, we notice that the practice of competent national authorities for rescue operations is not to attend distress calls on time and either purposely or negligently arrive late on the scene. Referring back to the 3rd and 11th October 2013 tragedies, the incidents took place in the Maltese Search and Rescue Zone. The Coast Guards arrived at the scene 45 minutes late even though the boat was only 550m from Lampedusa coastline. In the second incident, the boat was 100 nautical miles from Malta and the coastguards managed to save more irregular migrants than what they could near their coastline.

Another question that was posed during these incidents was the fact that the boat was found to be in distress from 3.30 to 6.40 when the coast guards received information on boats distress. The boat was situated 550m from the coastline within the territorial waters of Lampedusa. In accordance with UNCLOS 1982, states are sovereign within their territorial waters consisting of 12 nautical miles from the baseline.²⁶ Member States have high surveillance systems in place in their territorial waters. It is hard to imagine how it could have occurred that 550m off the coastline, the boat was undetected for three hours. It is suggested that the migrants' lives were put in danger due to Member State negligence or unwillingness to rescue migrants on their territory and subsequently be found responsible for their existence in accordance with international law.

The European reaction to these tragedies was through arguing that the implementation of further surveillance tools known as EUROSUR, a European Surveillance System in Southern Mediterranean, would be the solution to this problem. EUROSUR became operational from 1 December 2013 in the Southern Mediterranean Countries covering the Member States, third countries territorial waters as well as the high seas.²⁷ The estimated costs for the establishment and implementation of EUROSUR invested by the EU for the period 2014-2020 amounts to EUR 244 million (EU Commission Press Release, EUROSUR, 2013). In a study performed to estimate the costs of EUROSUR, it was put forward that a partially centralized system would amount to EUR 338.7 million, i.e. EUR 94.7 million more than the Commission estimation (Hayes, 2012, pg 49).

The Commission argues that EUROSUR will support search and rescue operations and will contribute towards the saving of lives at sea. However, the Commission does not indicate how EUROSUR will assist in solving the issue in which this paper identifies, namely: boost the Member States willingness to rescue migrants at sea despite the legal implications of becoming responsible for them. EUROSUR objective is to act as a pool of information exchange and providing near real time situational awareness pictures on what is happening in the territorial or high seas of EU Member States and third countries in the Mediterranean.²⁸

Instead of working towards a common solution on releasing the Southern Mediterranean States such as Italy, Malta, Greece, Spain from a large number of irregular migrants coming from land and sea borders, the EU invests into technological surveillance tools and other preventative measures to detect and return back irregular migrants to country entry or of departure. The most appropriate solution to these issues would be the revision of the Dublin II Regulation which seems to be the main reason for the illicit practices

²⁶ UNCLOS 1982, Article 2 and 3

²⁷ Regulation (EU) No 1052/2013 of the European Parliament and of the Council establishing the European Border Surveillance System (Eurosir)

²⁸ Regulation (EU) No 1052/2013, Article 1

conducted by these Southern Mediterranean States. In accordance with Dublin II regulation, the responsibility to assess asylum applications rests on those States in which the applicant first entered into. The first State of entry might be that of a safe country of origin or an EU Member State. Due to their geographical area Italy, Malta, Greece and Spain are the most affected States by these Regulation. Every year they are swamped with asylum applications and large number of migrant flows. There have been numerous attempts by these Southern Mediterranean States to revise Dublin II Regulation and ask that this burden is shared between the EU Member States in the spirit of Solidarity (European Commission News, 2012). The fact that there have been long delays into the revision of Dublin II Regulation and the Member States lack of agreement, provide a clear explanation of the risen issues in this paper.

The EU Southern Member States are not receiving any solution as to obtaining a relief from the burden they are confronted with. Other EU Member States do not wish to share this burden. The median solution to this apparent problem has been to invest millions into preventing irregular migrants from departing the third country or detecting and returning them back before reaching EU territory. Although, these measures seem adequate at EU level, they are not in accordance with International law especially under the Refugee Convention and the principle of *non-refoulement*. The illicit Member State practice suggests that a blind eye is being turned on complying with international law. They are often hiding behind the argument that the principle of *non-refoulement* does not apply on the high seas, despite the UNHCR comments that the principle of *non-refoulement* is applicable in the high seas (UNHCR, p 12).

The real problem to the apparent willful negligence of these Member States is that they are not held accountable for their practices despite the ECtHR ruling in the case of *Hirsi v Italy*, not to return irregular migrants without first examining their individual circumstances.²⁹ The detection, interception and return back of irregular migrants seem to be in the best interest of all EU Member States. The end result, is keeping the ‘unwanted’ out of EU territory at all costs. Even if these means sacrificing the lives of a few irregular migrants at sea; acting as a deterrent for further irregular migrants embarking upon such dangerous journeys.

However, these Member States seem to forget that the right to life is sacred and the most protected right within the human rights framework. It is enshrined in Article 2 European Convention on Human Rights (ECHR 1950), Article 6 of International Covenant on Civil and Political Rights (ICCPR) 1966, Article 2 of EU Charter of Fundamental Rights and Article 3 of the Universal Declaration of Human Rights. Letting irregular migrants to die at sea in order to deter others from embarking on the same journey, is in direct violation of International and EU law. Some of the comments amongst many NGOs and scholars in the aftermath of the tragedy were: “If the deaths of more than 16,000 people does not wake up the conscience of Europe, what will?” (Open Democracy, 2012) This strong statement coming from the European network against nationalism, racism, fascism and in support of migrants and refugees, UNITED, questions the Nobel Prize Europe obtained in 2012 (European Commission News, 2012). A Nobel Prize winner cannot infringe human rights of individuals or standing still in watching how irregular migrants and refugees die in an attempt to reach EU territory for a better life or because they are fleeing political, religious and ethnic persecution.

²⁹ *Hirsi Jamaa and Others v Italy*, application no. 27765/09, ECtHR GC, paragraph 162

Conclusion

Europe is spending millions of Euros into sophisticated technology and undertaking operational measures to stop irregular migrants from either departing or reaching EU territory. The aim is to avoid any international responsibility for these persons which might be in need of international protection. In order to avoid international responsibility, Italy and Malta seem to be resistant into rescuing irregular migrant boats in distress. The direct consequences of such preventative measures are the resulting deaths of thousands of irregular migrants. In 2013 alone there were 692 irregular migrants deaths in the Mediterranean sea. These deaths were directly contributed to the Member States delay or lack of coordination in commencing rescue operations.

The seemed willful negligence of coast guards not to arrive promptly on the assistance of distressed boats suggest a pick and choose rescue call depending on the status of distressed persons at sea. These deaths are “a a gruesome consequence of EU border and immigration control policies that follow the logic of security and restrictionism over human rights and international maritime law” (Open Democracy, 2013).

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Konstantin Petrov

Faculty of Law, Mari State University, Russia

Correlation of transboundary harm and responsibility: The concept of strict state liability

Abstract

The current interest to the problem of state liability lies some recent occasion of transboundary harm and damaging environment which became more frequent in association with economic development especially developing states. The question of state responsibility has become acute considering tendency to protection of environment and preservation of natural recourses.

The analysis of research is based on the various sources of international law including international conventions and legal practice, soft law and opinions of highly-qualified publicists etc.

The purpose of my work is to examine and investigate some of the basic issues concerning the concept of strict state liability, its origin and subsequent development. In the article, the author also explores the dependence between the occurrence of strict state liability and preliminary state actions including precautionary measures, principles of good faith and due diligence.

Furthermore, the author explores the difference between liability for actions of private companies and companies acted under state control as well as actions of state agents. Determining their relationship with state is significant for the matter of liability and consequently the payment of compensation. Therefore, the author provides correlation of state and civil liability for transboundary harm and environmental pollution; researches of their application in real life founding on the state practice as well as on international case law.

A survey of state liability led to the conclusion that strict liability of State for the transboundary harm caused by private persons is not well established in international law. There is still no international convention that shows a direct affirmation of this concept. International precedents and publicists also held controversial positions. Nevertheless, some important steps was made for solution of this matter, in particular the International Law Commission (ILC), which was established to develop and codify international law, has come out strongly in favour of strict state liability on several occasions. Moreover, we can find a support of this concept in numerous international declarations. As the decision of highly-mentioned problem, this concept should be enshrined in the international convention but with delimitation on strict liability of state in certain strictly determined cases and supplementary responsibility in others.

Keywords: *Strict state liability, transboundary harm, private company, compensation, environment*

Introduction

International law is an actively developing sphere which is still has a lot of unresolved questions. We decided to choose the issue concerning responsibility of states, transboundary harm and environment for many reasons. Firstly, because of recent incidents such as Deepwater Horizon oil spill in the Gulf of Mexico, nuclear disaster in Japan and others. Secondly, such sorts of disaster influence on the whole humankind through damaging of environment.

In frameworks of survey, we investigated correlation of sovereignty and abuse of rights, measures and principles directed to prevention of transboundary harm and matters of responsibility and payment of compensations under modern international law. The special attention will be paid to quietly controversial concept of strict state liability.

I. Correlation of Sovereignty and Transboundary harm. Duty of cooperation.

a) Territorial sovereignty vs. abuse of rights

The principle of territorial sovereignty is an essential principle of international law. Nevertheless, in modern world the sovereignty is not unlimited. State sovereignty cannot be exercised in isolation because activities of one state often bear upon sovereign rights of other states. (Brownlie, 2008) In nowadays state's freedom of action is limited by prohibition to abuse rights of other states. This principle got the strongest support in international legal practice.

The Permanent Court of International Justice in *The Island of Palmas Case* made the following statement: «Territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States»¹ The further practice reaffirmed this view, in *The Land Lanoux* arbitration the *ad hoc* Tribunal declared that territorial sovereignty is a part of presumption and it must bent before all international obligation.²

Under international law,³ States will not cause, while performing activities within their territories, damage to the territory of other States and their environment. Moreover, States under an obligation to ensure that activities within their control or jurisdiction do not infringe rights of other states and do not damage environment.⁴

All this allows us conclude that today under general international law, a well-recognized restraint on the State's freedom of actions (on the ground of its independence and territorial supremacy) is to be found in the prohibition of the abuse of the rights which state enjoys by it virtue of international law.

b) Economic development and transboundary harm

¹ *The Island of Palmas Case* (The United States v. The Netherlands), PCIJ, 1928

² *Lake Lanoux Arbitration* (France v. Spain) (1957) 12 R.I.A.A. 281, para.

³ Declaration of the United Nations Conference on the Human Environment [hereinafter *Stockholm Declaration*] art.21, 11 I.L.M. 1416 (1972); Rio Declaration on Environment and Development [hereinafter *Rio Declaration*], article 2, 31, I.L.M. 874 (1992)

⁴ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ, 1996

All States have the right to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy.⁵ In realization this principle and in accordance of the UN Charter⁶, States have the sovereign right to exploit their own resources.⁷ This right founding on the territorial sovereignty of State, however proceeding from above it is necessary to correlate uncontroversial right of State for economic development by exploitation of natural resources and rights of other (often neighbouring) states.

The ancient Roman maxim *sic utere tuo ut alienum non laedas* (Xue Hanqin 2003) prohibits causing transboundary harm.⁸ It should be added in this connection that international law also provides responsibility of States for cause of damage to another state.⁵⁰⁹ It follows from what has been said above that economic development of one state which can include exploitation of natural resources or implementation a large scale project (construction of factory or hydropower plants) should be realized with respect to interests of other states. Obviously, this is impossible without proper cooperation between countries and as the matter of it will be elucidated in the subsequent chapter.

c) Cooperation for prevention transboundary harm in a good faith

Transboundary harm often bears a global character and cause damage to a vast number of states. This fact stipulates a necessity of interaction and cooperation of states. According to Charter of the UN state is under general duty to cooperate with other States in sphere of its international relations¹⁰ particularly for the preservation and protection of environment.¹¹ All obligations imposed by the treaties shall be performed under the principle of good faith¹² implying the duty of every State to consider other States'

⁵ Charter of Economic Rights and Duties of States, A/RES/29/3281, 12 December 1974, Article 5

⁶ *Charter of the United Nations [hereinafter UN Charter]*, 24 October 1945, 1 UNTS XVI. Article 1(2)

⁷ Rio Declaration, Principle 2

⁸ *The Corfu Channel Case (United Kingdom v. Albania)* 1949 I.C.J. 4, 22; *Case Concerning Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* Order of 13 December 2013, p. 10;

⁹ Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, G.A.Res. 61/36, UN GAOR, 61 Sess., 64 mtg., Supp. No. 10, U.N. Doc. A/RES/61/10, at 106 (2006), article 4.; Articles on Responsibility of States for Internationally Wrongful Acts, G.A./RES/56/83 12, UN GAOR, 56 Sess., 85th mtg., Supp. No. 10 at 43, U.N. Doc. A/56/10 (2001) [hereinafter ARS], article 1

¹⁰ *UN Charter*, Art.1(3); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN GA Res.2625, Annex, 25 UN GAOR, Supp. (No.28), U.N.Doc. A/5217 at 121 (1970).

¹¹ *Declaration of the United Nations Conference on the Human Environment* December 1972, A/RES/2994, principle 24; Rio Declaration, principle 7

¹² *Vienna Convention on the Law of Treaties*, preamble (May, 23 1969) 1155 U.N.T.S. 331.

rights.¹³ The obligation to cooperate in good faith is fundamental,¹⁴ especially when the interests of the other State are “[a]t stake.”¹⁵ Furthermore, it is widely recognized that the principle of good faith is a sufficient guarantee against any risk.¹⁶

Here it is necessary to reveal the general forms of cooperation. We can point out the following sorts of cooperation: obligation to exchange data and information,¹⁷ notification about planning activities, consultations with states whose interest can be infringed and entranced into negotiation in good faith.¹⁸

It has a special meaning in international environmental law following the concept a “common interest”. This concern relates with interests of the whole humankind and the world in safeguarding for future generations the natural resources as well as health environment.¹⁹

The doctrine gave us the following definition - “[r]espect for human rights, economic development and environmental protection have been unified in the concept of sustainable development as a common concern of humanity” (Kiss & Shelton, 2007)

The modern international law basis on the idea that safeguarding the earth’s ecological balance has come to be considered an essential interest of all states, as it aims to protect the international community as a whole.²⁰

We must conclude that in modern stage of development, cooperation has the especially important role for the future of mankind in common, that’s why states should pay more attention to interstate interaction.

II. International obligations beyond the duty of cooperation

a) International obligations with respect to due diligence and precautionary principle

The main principles of international law concerning transboundary harm, protection of environment, conservation of natural resources are well-established by treaty law,

¹³ *Fisheries Jurisdiction Case (United Kingdom v. Iceland)* 1974 I.C.J. 3, 31; *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* 1969 I.C.J. 3, 47.

¹⁴ *The MOX Plant Case (Ireland v. United Kingdom)*, Order of 3 December 2001, ITLOS Case No. 10, para. 82

¹⁵ *MOX Plant Case*, Separate Opinion of Judge Wolfrum.

¹⁶ *La Bretagne Arbitration*, Dispute Concerning Filleting within the Gulf of St Lawrence (Canada/France) Award of 17 July 1986, I.L.R (1990), Vol. 591, at 614

¹⁷ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Res/56/82, UN GAOR, 56th Sess., 85th mtg., Supp. No. 10 at 370, U.N. Doc. A/56/10 (2001), cmt.17 to art. 4, 8, 12

¹⁸ Charter of Economic Rights and Duties of States 1974, Article 3

¹⁹ Stockholm Declaration, article 6

²⁰ Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997, ICJ, para 53

international case law and soft law. Nevertheless, some principles are still emerging and obviously they do not possess the same status.

The principle of “due diligence” is one of the general in international law and it plays an especially significant role in prevention of transboundary harm and protection of environment. This principle invokes obligation of state “...to act reasonably and in good faith and to regulate public and private activities subject to its jurisdiction or control that are potentially harmful to any part of the environment.”²¹ It does not mean that states are under an absolute duty to prevent all harm, but rather under obligation to prohibit those activities known to cause significant harm to other states or environment.

The other tenet concerns precautionary measures. This principle is not strictly supported in international law. (Unger, 2001) Nevertheless, basis on some evidences we can presume existence of customary law rule. Founding on the opinion of ICJ judges in the *North Sea Continental shelf* case the custom is a general practice accepted as a law.²² In respect with that there are a lot of proofs of established state practice²³ and opinion of ICJ can be recognized as *opinio juris*.²⁴ This principle also was got support in soft law in particular it was included in the Rio Declaration.²⁵ International Law Commission (ILC) also supporting this position claimed that the states “...shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.”²⁶

But what does precautionary principle really mean? The explanation of that was done by Judge Weeramanthy in French Nuclear Test case. He asserted that this is a principle, which places a clear burden on a State to carry out a precautionary lawful activity to establish that no essential damage will ensure as a result of such activity.²⁷ Concrete application of this principle often differs from treaty to treaty if there was one, but usually it includes exchanging information, notification of other States about planned measures (activities), the establishment of joint procedural mechanisms, the provision of emergency information, the obligation to enter into consultations both with concerned States and proper entity (scientific organizations, international authorities) and environmental impact assessments. Strict application of these provisional measures will allow to prevent potential dangers and avoid significant harm.

²¹ Supra n. 22, page 91

²² Supra note 15

²³ *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 S.C.C. 647, paras. 11, 13, 14; *A.P. Pollution Control Board v. Prof.M.V.Nayudu* (1999) 2 S.C.C. 718; *R. v. Crown Zellerbach Canada Ltd.*, [1988], 1 S.C.R. 401; *Case C-180/96 R, UK v. Commission*, Order, E.C.J. (1996) E.C.R I-3903.

²⁴ *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. [hereinafter *Gabcikovo-Nagymaros Case*]p. 62, 68; 113; *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. [hereinafter *Pulp Mills Case*], p. 42.

²⁵ Rio Declaration, principle 15

²⁶ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Res/56/82, UN GAOR, 56th Sess., 85th mtg., Supp. No. 10 at 370, U.N. Doc. A/56/10 (2001), cmt.17 to art. 3

²⁷ *Nuclear Tests Case (Australia v. France)*, International Court of Justice (ICJ), 20 December 1974, Dissenting opinion by Judge Weeramanthy

It enables us to draw a conclusion that there should be more control over performance highly-mentioned principles since they are a good guarantee against transboundary harm.

b) Providence of proper Environmental Impact assessment (EIA).

All human actions, especially human interaction with nature, involve some risk of causing harm to other people (or states) as well as environment in general. For avoiding such negative effects some special mechanisms were created. One of them and likely the most effective is environmental impact assessment.

Under Rio Declaration also as opinion of ICJ in *Gabcikovo-Nagymaros Project* case the EIA is a national instrument for proposed activities that are potentially hazardous for environment and it is a subject to a decision of a competent national authority.²⁸ Furthermore ILC emphasized the necessity of impact assessment of the possible transboundary harm. One scholar has identified eight principles for the design of an effective impact assessment process. (Barlett, 1997) The principles are:

- 1) An integrated approach;
- 2) Clear and automatic application of all requirements to all significant undertakings;
- 3) Critical examination of purposes and comparison of alternatives;
- 4) Legal, mandatory, and enforceable requirements;
- 5) Open and participatory process;
- 6) Consideration of implementation issues, including monitoring and compliance enforcement;
- 7) Practical and efficient execution; and
- 8) Links to broad policy concerns, such as the economy, agriculture, transportation, and urban development.²⁹

The Espoo Convention is an important achievement which sets out in detail the procedural and substantive aspects of the required EIA in a transboundary context. The treaty also listed activities that are “likely to cause significant adverse transboundary impact.”³⁰ The idea of enumeration a limited list of activities was a controversial decision since it in certain way restricts application of EIA. Non-listed activities may be subject to the Convention requirements only if the parties agree. Consequently, some potential danger activities can avoid assessment. The other problem is that only 44 states signed and ratified this convention. Moreover, the procedures differ from one country to another.

Thus we arrived at the following conclusion that the assessment of risk is a widely-recognized instrument which is sufficient guarantee for prevention transboundary harm. Nevertheless, certain steps in this direction are still should be done. In particular, more close cooperation by concerned states in providing EIA, extension occasions of providing this assessment and implementation some rules of international law relating with that in national legislation.

²⁸ Rio Declaration, principle 17; *Gabcikovo-Nagymaros Case*

²⁹ *Ibid*

³⁰ Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25., 1991, 1989 U.N.T.S. 310, Appendix I

III. The concept of Strict state liability

a) Responsibility in international law

State responsibility is a fundamental principle of international law, founding on the nature of the international legal system and the concepts of state sovereignty and equality of states. (Shaw, 2008) Under international law, the law of state responsibility determines the consequences of a state's failure to abide by its international obligations. According to international law, states are liable for international law violations that are attributed to them. It was specifically emphasized by ILC in Articles on Responsibility of States³¹ and confirmed in international case law.³²

Therefore, there are two elements of invocation responsibility for action or omission of state – violation of its international obligation which is attributable to this state. If the issue of breach of obligation is clear (it includes violations of its treaty obligation, customary law rule and general principles of law), the matter of correlation of international wrongful act and conduct of a state. Following the state practice as well as position of ILC there are cases when states can be recognized liable even these actions (omission) were directly committed by the state itself. In common states are responsible for actions of entities and persons realizing government policy or acting as authorities of that state.³³ It was reaffirmed by numerous legal precedents.³⁴

The more complicated question was specifically appointed in article 8 of the Articles on State responsibility. It concerns liability of state for conduct of persons and group of persons directed or controlled by the state. This article deals with two circumstances. The first involves private person acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons acting under the state's direction or control.

Under international law the actions of private company is attributable to a State when this company is state-owned (at least partly) or its conduct was authorized by a State.³⁵ However, the question of liability of state for actions of private companies if it is not fulfilled its duty with respect to international obligation, is still open. It will cover in the subsequent chapters. In general, responsibility requires a state to cease the violation and provide reparations for any harm caused to another state.³⁶ Furthermore PCIJ highlighted that this is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation.³⁷

³¹ Articles on Responsibility of States for Internationally Wrongful Acts, G.A./RES/56/83 12, UN GAOR, 56 Sess., 85th mtg., Supp. No. 10 at 43, U.N. Doc. A/56/10 (2001), article 2

³² *Rainbow Warrior case* (New Zealand v. France) ITLOS (1990) 82 I.L.R. 500, *Phosphates in Morocco* (Italy v. Fr.), 1938 P.C.I.J. (ser. A/B) No. 74 (June 14)

³³ *Supra* n. 37, articles 4-7

³⁴ *Rainbow Warrior case*, *supra* 38; *The Corfu Channel Case*, *supra* 10

³⁵ ARS, articles 7, 8

³⁶ *Supra* n. 22, p.19

³⁷ *Case Concerning the Factory at Chorzow* (Germany v. Poland), 1928 P.C.I.J. Ser. A No.17, p. 29

Additionally, there is liability for hazardous activity. An activity is considered to be hazardous when it is “not prohibited by international law”³⁸ and when it is conducted “in the territory or otherwise under the jurisdiction or control of a State”³⁹ involving “a risk of causing significant transboundary harm”⁴⁰ “by the physical consequences”.⁴¹ This harm also should be compensated.⁴²

b) Strict state liability: Historic background and existence in modern world

In previous Chapter we concerned the occasions when responsibility of states arose because of committing international wrongful act. However, state can be held strictly liable for transboundary harm under the concept of strict state liability. According to this concept States are recognized strictly responsible for harm from all private projects, whether accidental or not.

Primary the strict liability is a doctrine relates with civil law and having roots from the nineteen's century case⁴³. Subsequent legal practice chose the path of support this concept in civil affairs. The matter of strict liability of states is more complicated question. Strict state liability is a logical consequence of the *Trail Smelter* arbitration of 1941. In this case Canada was held liable and obliged to pay compensation for the harmful cross-border pollution of a private smelter located on its territory, in spite of the lawfulness of the smelting activity at international law. Arbitral Tribunal highlighted that Canada was required to take protective measures. This lets us to precautionary measures, cooperation and assessment of risk. It is possible to assume that Canada could avoid responsibility if it undertook necessary measures for prevention harm. Finally, Tribunal concluded that no State has the right to use or permit the use of its territory in such a manner as to cause injury to another state.⁴⁴

Nearly seventy years later, however, *Trail Smelter* remains the only case law that directly implicates strict state liability.(Scovazzi, 2001) Nevertheless, the ideas contain in that case get a certain prolongation in international legal practice. In particular, the International Court of Justice in the Corfu Channel case decided that Albania was liable for mines which exploded within Albanian waters and which resulted in the damage to British naval vessels. Noteworthy that mines were laid by a third state but court presumed that Albania is responsible in any event since it was its territory.⁴⁵ Undoubtedly, this situation is not identical to the *Trail Smelter Dispute* but it has similar traits. In both cases states were responsible for damage caused from their territory and obliged to pay compensation to state-victim. Interestingly, that in both cases the court emphasized that states do not have the right to use territory in manner as to cause damage to another state.

Despite the lack of case law with respect to this concept, “[t]he corpus of non-judicial support for this principle has continued to grow.” (Sheffield, 2011) The Stockholm

³⁸ *Supra* 30, article 1.

³⁹ *Id* article 2 (c)

⁴⁰ *Id* article 1

⁴¹ *Id*

⁴² *Supra* note 11

⁴³ *Rylands v Fletcher*, House of Lords [1868] UKHL 1, (1868) LR 3 HL 330

⁴⁴ *Trail Smelter Case (US v. Canada)* (1941) 3 R.I.A.A. 1911, 1965

⁴⁵ *Supra* note 10

Declaration on Human Environment applied in 1972 involves provision claimed that states have responsibility to ensure that activities occurring within their jurisdiction do not cause harm in other states.⁴⁶ Principle 22 shows us, through implementation the doctrine “abuse of rights”, that some sort of state liability is already exist. However, only one international convention contains provision concerning full responsibility of state and it has a doubtful application to our matter.⁴⁷ Furthermore, the International Law Commission which was established to develop and codify international law expresses its support for this principle in several occasions. In particular, the ILC’s draft articles 1996 provide strict state liability for transboundary harm caused by certain activities; nevertheless it provides not full but equitable compensation. Later in 2004 ILC made a claim in a report to General Assembly for the existence of strict liability of state as an international custom. However, this is very controversial statement. There are still no a strong and clear *opinion juris* and state practice is ambiguous.

Some practice is against strict state liability at all, like the Chernobyl Nuclear Power Explosion which invoked a harmful radiation across Europe, but there were no demands for compensation under international law. Others as the Mura River incident, in contradiction show support. In 1956 the several Austrian hydroelectric facilities polluted the Mura River. Yugoslavia demanded compensation for environmental damage and Austria acquiesced. Therefore, absence of uniform state practice is also against the existence a customary law rule.

According to above there is still no strong support of this principle under international law. There are still no any multilateral convention, customary law also have not formed yet, however this principle was recognized by subsidiary resources and soft law.

c) Full and supplementary liability of state and private companies for transboundary harm

Earlier, we compare the common grounds of liability under modern international law and quietly controversial concept of strict state liability. To summarize, states are responsible for their own actions and behavior of its organs, agents and state-owned company. Consequently, private companies bear civil liability for its own action. This system is clear and simple enough however, it does not cover the whole potential situation and do not provide guarantee of reparation and compensation for victims and damaged entity.

For better understanding, where the hole reserves, let’s simulate the following situation. There are two states (A and B) divided by strait. The state A is traditionally interesting in fishing and exploitation of living natural resources, the other one develops non-living natural resources (oil, gas etc.) The private-owned company of state B decided to construct an artificial island inside the territory of state B for exploitation of gas field located nearby. Creation of island was required a lot of land which was dredged by this company from the international waters where a lot of fish hesitated. State B authorized this project but did not applied EIA to dredging work, it also refused to cooperate with state A with regard to this project as well as provide more detail assessment in spite of numerous claims of state A. During dredging works the landslide happens which caused

⁴⁶ Stockholm declaration, principle 21

⁴⁷ Convention on International Liability for Damage Caused by Space Objects, 961 UNTS 187; 24 UST 2389; 10 ILM 965 (1971), article 2

dissociation of gas and significant harm to the fish stocks. There is arising the question, who is a liable for this damage, private company or state?

Under modern international law the state should not bear a responsibility since it was a private-owned company and moreover state B undertook some precautionary measures but at the same time did it with lack of due diligence and good faith. Therefore the state B is obliged to provide payment of compensation to victims by this private company and can be recognized partly liable for this harm, but actually it's unlikely since international law does not provide such obligation. Therefore it brings us to the situation, when states are not motivated to provide a proper assessment in cases when presuming harm will damage a territory of another state knowing that responsibility will lie on the private company. In regard with highly-mentioned provisions, it looks logical to determine differentiation between cases of full and supplementary liability, especially with respect to payment of compensation.

The sort of liability depends on many factors. Firstly, how it was mentioned earlier, from the subject who caused the transboundary harm. Secondly, it's founding on the conduct of parties. The International Court of Justice claimed in the Pulp Mills Case that obligation to undertake all necessary measures for reducing a risk of transboundary harm is custom of international law.⁴⁸ As we determined above, this measures includes application of EIA, precautionary measures, and cooperation with potentially affected states in a good faith. These principles are widely recognized and their noncompliance can lead responsibility for international wrongful act. How it was done in Pulp Mills case, where Uruguay was judged liable for violation of procedural obligation.

However, these rules cannot be applied directly to our simulated situation since some precautionary measures were made and state has no attitude to the private company. Private company bears responsibility by itself and state will be liable only for lack of due diligence. But what exactly does this means? The partly answer was given by ILC in Draft Principles on the Allocation of Loss in the case of Transboundary Harm Arising Out of Hazardous Activities. According to principle 4, states under an obligation to "ensure that prompt and adequate compensation is available for victims of transboundary damage caused hazardous activities located within its territory or under their control or jurisdiction" by "the imposition of liability on the operator... or entity".⁴⁹ Only if these measures are insufficient state should "ensure that additional financial resources are available".⁵⁰ However, even then states may not open its own funds. Virtually, these Draft Principles suggest a subsidiary liability of states in cases where private company or other entities causes damage. In other words, it entails State's liability in amounts of money that the operator is unable to pay.

⁴⁸ *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. 14, 55

⁴⁹ Draft Principles on the Allocation of Loss in the case of Transboundary Harm Arising Out of Hazardous Activities, principle 4 (1,2)

⁵⁰ *Id*, principle 4 (5)

Furthermore the concept got a certain support in state practice and international case law.⁵¹ For instance, Indonesia based its requirement to Australia founding on this concept after the Montana oil spill incident in the Timor Sea since Australia was a host state for the platform. At the same time, East Timor found its claims on the strict state liability.

Therefore, state practice indicates that the availability of civil remedies for transboundary harm has stopped the growth of strict state liability at international law. Generally, civil liability displaced state responsibility, thus strict liability is a subsidiary one which coming into play only when civil remedies are not enough.

Conclusion

Economic development of states as well as the mankind in common required a realization of large scale projects. However, they are often hazardous activities which potentially can cause transboundary harm. That is why the prevention of this damage and withdrawing of its consequences is an important issue in modern world. International law made significant steps in development of procedural measures, applying to a various projects. These measures in most of situations help to avoid undesirable consequences but sometimes they do not. In respect with that the question of responsibility and payment of compensation arise. International law provides a proper rules concerning responsibility. Nevertheless, some issues are still open.

The concept of strict state liability may close these gaps. However, it is not widely accepted and supported in international law. In my opinion, the principle of strict liability should get a strong support in international law by including provisions concerning of that in treaty law. It seems to me that this concept can ascent to the level of custom only if some severe disaster (such as nuclear one) happens and civil remedies will be inadequate to compensate harm. Until then this concept is only a controversial theory which has a certain historic support but insufficient real power.

⁵¹ Nuclear Damage Compensation Facilitation Corporation Act (Act № 94) (2011) (Japan); G.A. Res. 68/114, UN GAOR, 68th Sess., 68th mtg., U.N. Doc. A/RES/68/114 (2013); *F.A. Akpan and Vereniging Milieudefensie v. Royal Dutch Shell Plc. and Shell Petroleum Development of Nigeria Ltd.*, Rb Hague 30 January 2013 NJF 2013/99.

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Natalia Mileszyk

Institute for Law and Society, Poland

The Protection of Fundamental Rights Online: Freedom of Expression and Intermediary Service Providers' Secondary Liability in the European Union

Abstract:

The blocking of twitter users, unwanted content on webpages or controversial comments on blogs – these are only a few examples how private actors censor content online. In the European Union the issue becomes more burning and widespread, since the E-Commerce Directive makes the implementation of notice and take down procedure a defense against secondary liability of Intermediary Service Providers (ISPs). The impact of this procedure on limitation of freedom of expression is significant - the authors of publications are deprived of the right to prove if the content should never be blocked. Due to the fact that human rights do not bind private entities (ISPs are not responsible for human rights protection) the state should regulate possible interference of ISPs in such a way that their discretion is minimal.

The paper analyses the legal framework of ISP liability in the European Union and chosen member countries. It finds that EU member states within the process of regulating ISP liability did not fully take into consideration their fundamental rights obligations. The paper concludes that the state has positive obligation to legislate ISP secondary liability in order to protect freedom of speech and other fundamental rights from arbitrary decisions by ISPs and EU member states failed in this respect. The paper supports this contention with an examination of both legislative measures and judicial decisions.

So far the question of legal liability for Internet Service Providers for unlawful user generated content was mostly discussed from an economic or technical perspective – human rights aspects were neglected. The paper, by closely examining the legal framework and practice in the European Union and member states sheds new light on the rarely acknowledged issue of the interrelation of ISP liability and freedom of expression, privacy and freedom of the media – ISP secondary liability creates a challenge how to balance these values.

Keywords: *ISPs' secondary liability, freedom of expression, EU law, Internet*

1 Introduction

The Internet influences various aspects of our everyday life, ranging from the work environment, through access to services to the way we spend our leisure time. Primarily the Internet was perceived as a chance to create a zone for exercising various fundamental rights without any states' interference.¹ The reality and practice in the 21st century has shown the opposite. Abuses of digital rights are more common and widespread than ever: data retention, internet access blocking and criminal prosecution to name only a few examples.

The paper deals with Intermediary Service Providers' secondary liability in the European Union (hereinafter ISP liability) and its constitutional aspects related to fundamental freedoms. Seemingly, it is a only technical regulation related to e-commerce. I argue that in EU member states a positive obligation of the state concerning the legislation process of ISP liability in the area of fundamental rights exists.

The impact of this procedure especially on limitation of freedom of expression is significant. First of all, the authors of publications are deprived of the right to prove that the publication should not be the subject to the notice and take down procedure. Furthermore, there is a threat that ISPs will be discriminative in their activity and create additional requirements for persons willing to use their hosting services.² Due to the fact that fundamental rights do not bind private entities (ISPs are not responsible for human rights protection) the state should regulate possible interference in such a way that discretion is minimal.

The matter of fundamental rights dimension of ISP secondary liability is well-established among American scholars.³ It might be explained by the developed, compared to the EU, regulation of secondary liability in the Digital Millennium Copyright Act and very extended protection of ISPs – they might be held liable only in very restricted cases of copyright infringement. Unfortunately, so far only a few European authors emphasized the importance of evaluation of the E-Commerce Directive from a fundamental rights perspective,⁴ which seems surprising especially taking into account that in the EU ISPs might be responsible in case of any violations.⁵

¹ Norris, Pippa, "Digital Divide: Civic Engagement, Information Poverty, and the Internet Worldwide", Cambridge: Cambridge University Press, 2001, pp. 232-33.

² Iulia-Barcelo, Rosa and Kamiel Koelman, "Intermediary Liability in the E-Commerce Directive: So Far so good, but not enough", *Computer Law and Security Report* 2000-4, pp. 231-239.

³ E.g. Balkin, Jack M. "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society", *New York University Law Review*, Vol. 79, No. 1, 2004; Mann, Ronald J. and Seth Belzley, "The Promise of Internet Intermediary Liability", *William and Mary Law Review*, Vol. 47, October 2005.

⁴ E.g. Cheung, Anne and Rolf Weber, "Internet governance and the responsibility of Internet Service Providers", Summer 2008, 26 *Wisconsin International Law Journal* 403; Tambini, Damian, Danilo Leonardi and Christopher Marsden, "Codifying Cyberspace : Communications Self-Regulation in the Age of Internet Convergence, New York: Routledge, 2008, p. 281.

⁵ The general conclusion from Splinder, Gerard (ed.) "Study on liability of Internet Intermediaries", 12 November 2007, Markt 2006/09/E, Service Contract

The paper has two-fold construction. Firstly, the E-commerce Directive and ISP liability regulations both on community and national levels are discussed. This analyse gives the ground for further evaluation of constitutional and fundamental rights concerns raised by ISP liability mechanism. Examples provided and questions asked lead to the conclusion that the current practice and legislation creates an unacceptable situation of legal uncertainty for all stakeholders involved: ISPs, Internet users, and protected rights holders. The paper finishes with proposed legislative changes how to approach ISP liability taking into account greater fundamental rights awareness.

Intermediary Service Providers' secondary liability is definitely not an issue associated by the majority with fundamental rights. Nevertheless the aim of the paper is to evaluate this legal, seemingly business construction, from a constitutional angle.

2 ISP liability in the European Union

This part is dedicated to building the understanding of ISP secondary liability as a regulation playing the fundamental principal role in the way business nowadays works. Without answering the preliminary question: "how responsible are those who provide Internet Service for the actions of those who use those services?"⁶ it is impossible to elaborate on the impact of the whole ISP secondary liability regime for fundamental rights.

2.1 The E-Commerce Directive⁷

The E-Commerce Directive, introduced in 2000, is the main legislative measure adopted to create common internal e-market.⁸ The definition of information society services is derived from the directive laying down a procedure for the provision of information in the field of technical standards and regulations.⁹ The notion means "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". Therefore the scope of the Directive covers only services provided without simultaneous presence of the parties involved, by means of electronic processing and data storage such as wire, radio or optical means and such services can be provided only after individual request of the recipient.

ETD/2006/IM/E2/69, http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf, last accessed on 15 March 2014.

⁶ Smith, Emerald: "Lord of the Files: International Secondary Liability for Internet Service Providers"; *Washington & Lee Law Review* 68(3), 2011; p.1555.

⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, pp. 1–16.

⁸ Article 1 of the E-Commerce Directive - "seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States".

⁹ Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, Official Journal 217/18, art. 1(2).

Secondary liability online rose to a high position on the agenda of the EU due to very prosaic reason – in the Internet, which mostly facilitates anonymous activities, it is always easier to sue an ISP than any user.¹⁰ Moreover, due to the well-developed data protection regime in EU, sometimes this is even the only possible solution for somebody whose right was infringed.¹¹

Before the E-Commerce Directive, the rising popularity of the Internet forced states to face various legal challenges. The question how to treat ISPs was one of them. Many countries relied on publishers' liability rules.¹² Such an approach was vividly criticized taking into consideration a lack of publisher (ISP) scrutiny.¹³ Some other countries adopted specific liability legislations.

2.2 A legislative safe harbour – explanatory note

A legislative safe harbour provision is one which creates exceptions from to liability. The general rule is that ISPs can be held secondary liable¹⁴, with three exceptions provided by the E-Commerce Directive. Each exception names the entities which might be excluded from liability and enumerate conditions which must be fulfilled to benefit from each safe harbour provision.¹⁵

¹⁰ Okoń, Zbigniew, „Oskarżony: ISP odpowiedzialność dostawcy usług internetowych” [Accused: ISP. Liability of service providers]; 1 December 2000; available at: <http://www.internetstandard.pl/artykuly/277675/Oskarzony.ISP.odpowiedzialnosc.dostawcy.uslug.internetowych.html>; last accessed on 2 March 2014.

¹¹ Pacek, Grzegorz Jarosław; „Wybrane zagadnienia związane z odpowiedzialnością dostawców usług hostingowych” [Chosen aspects of ISP secondary liability]; *Monitor Prawniczy* 4/2007; p.2.

¹² High Court, Queen's Bench Division (UK), *Godfrey v Demon Internet Service* [2001] QB 201; the case is related to defamatory content posted on a newsgroup, the Court found that ISP can be liable as publisher for libel since “posting” equals “publicizing”.

¹³ Splinder, Gerard (ed.) “Study on liability of Internet Intermediaries”, 12 November 2007, Markt 2006/09/E, Service Contract ETD/2006/IM/E2/69, http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf, accessed on 15 November 2013, p. 47.

¹⁴ Secondary liability is „liability that does not arise unless the primarily liable party fails to honor its obligation”, the definition from Black's Law Dictionary, Thomson/West, 2005.

¹⁵ The directive provides liability exceptions to three types of intermediaries, namely “mere conduit ISP” (article 12), “catching providers” (article 13) and “hosting providers” (article 14). The scope of legislative safe harbour for each type depends on the level of involvement in the content online. “Mere conduit” providers deliver services related to data transmission by network access or transmission service. Due to their purely technical role they cannot be held liable as long as their conduct is passive (there is no interference in transmission of data by ISPs by selection or modification). “Catching providers” store data only for a short time and in an automatic way. An example of such a type of ISPs is a proxy server, which stores copies of webpages accessed by a user. As long as its role remains purely passive and in accordance with conditions of access to information, an ISP is exempted from liability. “Hosting providers” store and provide access to data and are not liable under the condition that:

It is worth emphasizing that the E-Commerce Directive does not create common liability regime for all Member States.¹⁶ It only constitutes additional liability exceptions – therefore ISPs can still face different liability regimes in various parts of the EU. Moreover, it covers only “service providers”, not “content providers”,¹⁷ therefore safe harbour provisions can be applied only in the case of user generated content.

It is also significant that article 15, applicable for all types of providers, forbids countries to impose general obligation to monitor and to actively track illegal content, leaving ISPs in a simply passive role. The rule was explicitly introduced in almost all EU member states¹⁸ and confirmed by many courts, such as the German Federal Court¹⁹ or the Austrian Supreme Court.²⁰ A different approach will definitely jeopardize the role of the internet as a communication tool by hindering the work of ISPs.²¹

2.3 A legislative safe harbour for hosting providers – Article 14 of the E-Commerce Directive

Article 14 of the Directive solves the issue of hosting providers’ liability, so services related to data storing and accessing, such as in the form of webpages. Some authors distinguish two types of hosting providers – storing materials provided by the user, such as complex webpages of the company and storing materials provided by users as a part of multi-user platform, such as discussion groups.²² Both types of providers are covered by the directive, but the directive creates different thresholds for civil and criminal liability. Criminal liability is exempted when “the provider does not have actual knowledge of

“(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”

¹⁶ Van Eecke, Patrick and Maarten Truyens “Liability of online intermediaries“ in: “Legal analysis of a Single Market for the Information Society” (SMART 2007/0037), study of European Commission, available at:<http://ec.europa.eu/digital-agenda/en/news/legal-analysis-single-market-information-society-smart-20070037>; p. 27.

¹⁷ Rennie, Michèle, “Electronic Commerce: A Review of The European Commission’s Proposed Directive”, *Computer and Telecommunication Law Review*, 4/1999, p. 96.

¹⁸ With exception of Sweden, where in Act on Responsibilities of Electronic Bulletin Boards there is an obligation placed on ISPs to monitor bulletin boards – an exception based on recital 48 of the Directive.

¹⁹ Bundesgerichtshof (Germany), Internet-Versteigerung I, Urt. v. 11 March 2004, Az.: I ZR 304/01 – MMR 2004, 668; the court decided that the owner of auction platform is not obliged to monitor items for sale.

²⁰ Supreme Court of Austria, *Online Gästebuch case*, 6 Ob 178/04a; not only the court confirmed that the general obligation to monitor is against the E-Commerce directive, but also pointed at the clash of such a concept with freedom of expression.

²¹ Iulija-Barceló, Rqsa; “Online Intermediary Liability Issues: Comparing E.U. and U.S. Legal Frameworks”; *European Intellectual Property Review*, issue 3/2000; p. 105.

²² Kot, Dawid; „Dyrektywa Unii Europejskiej o handlu elektronicznym i jej implikacje dla prawa cywilnego” [The E-Commerce Directive and its implications for civil law], *Kwartalnik Prawa Prywatnego*, 1/2001; p. 93.

illegal activity or information” and civil when it “is not aware of facts or circumstances from which the illegal activity or information is apparent”. Both kinds of liability are exempted when the ISP “upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information”. Therefore, it is not enough to prove that ISP could have known about illegal activity – the threshold of knowledge is higher.

The directive does not address the issue of breaching the contract between ISPs and the user for taking down/blocking the content.²³ Except for creating a general framework of ISP legislative safe harbour, any procedural guarantees or schemes of notice and take down procedure are not provided in the directive and its impact on fundamental rights.

2.4 Interpretation question marks related to the E-Commerce Directive

Many scholars and experts raise the question of ambiguity and uncertainty of language used in the E-Commerce Directive.²⁴ The problem creates interpretation question marks not only while discussion liability regime,²⁵ but also while assessing the scope of the whole directive.

As described above, safe harbour provisions are created for information society services, which are, according to the definition in the directive “normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”. So far “remuneration” was interpreted as a wide range of economic activities in accordance with article 50 CE Treaty.²⁶ Nevertheless, some activities were excluded from the scope of the provision, such as public education and governmental services.²⁷ The question which will probably arise one day is what about services, webpages and portals (or even access to external networks) provided by public universities or governmental institutions – are they covered by liability exceptions or not?

²³ Chissick, Michael; “Electronic Commerce: Law and Practice”; Sweet & Maxwell, 2002; p. 322.

²⁴ Van Eecke, Patrick and Maarten Truyens “Liability of online intermediaries “ in: “Legal analysis of a Single Market for the Information Society” (SMART 2007/0037), study of European Commission, available at: <http://ec.europa.eu/digital-agenda/en/news/legal-analysis-single-market-information-society-smart-20070037>, the whole document.

²⁵ Sterling, Adrian, “World Copyright Law”; Sweet & Maxwell; 2008; p. 547: “no rules are laid down in the Directive as to what constitutes actual knowledge, or how the service providers might obtain it”.

²⁶ This was decided e.g. in judgment of the Court of Justice of European Union of 27 September 1988.; *Belgian State v René Humbel and Marie-Thérèse Edel*.; Case 263/86 and in the judgment of the European Court of Justice of 7 December 1993; *Stephan Max Wirth v Landeshauptstadt Hannover*; Case C-109/92.

²⁷ The catalogue was created in recital 19 of Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations.

It is already well established in CJEU jurisprudence that “remuneration” does not have to be directly related to the user – income can come e.g. from commercials.²⁸ The controversy can be caused by a business model of hosting providers such as Wikipedia (online wiki) or Flickr (photo-sharing site). Do they “normally” provide for remuneration? The answer is not clear – as examples of more and more popular “freemium” online model²⁹ they do not benefit economically, neither from users’ fees nor commercials. Does this mean that they are excluded from benefitting from the liability regime provided in the E-Commerce Directive?

The other very controversial notion is “passiveness” – to benefit for legislative safe harbour any ISP has to remain passive. The concern what “passive” means was tackled by CJEU. The first decision worth noticing is *Louis Vuitton v. Google France*³⁰ which concerns Google Adwords.³¹ Louis Vuitton and other companies sued Google for trademark infringement – competing companies bought words related to original ones and therefore were promoted next to Google search related to e.g. new Louis Vuitton bag. The court decided that Google cannot be held liable since Google Adwords is an automatic system and can benefit from protection under article 14. Any service provider cannot be held liable if its role is passive “*in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores*”.³²

The Court had a chance to elaborate on notion of “passiveness” also in *E-Bay v. L’Oreal case*.³³ E-Bay, as one of the main online marketing platform, was sued by L’Oreal in the United Kingdom³⁴ for trademark infringement – it was (and still is) possible to buy on e-Bay the counterfeits with L-Oreal logo, not-for-sale cosmetics samples or original products without proper packing. Comparing to the first discussed case, the court did not decide that E-Bay generally plays “passive role”, but distinguish mere providing of sale platform from promoting and optimizing the presentation of products (in such situations eBay cannot benefit from liability exemption).³⁵ Moreover, the Court introduce the

²⁸ Judgment of the Court of Justice of European Union of 26 April 1988, *Bond van Adverteerders and others v The Netherlands State*, case 352/85.

²⁹ Van Eecke, Patrick and Maarten Truyens “Liability of online intermediaries” in: “Legal analysis of a Single Market for the Information Society” (SMART 2007/0037), study of European Commission, available at: <http://ec.europa.eu/digital-agenda/en/news/legal-analysis-single-market-information-society-smart-20070037>, p.12.

³⁰ Judgment of the Court of Justice of European Union of 23 March 2010: *Google France SARL and Google Inc. v Louis Vuitton Malletier, SA and Others*; Joined Cases C-236/08 to C-238/08.

³¹ *A commercial system operating on very simple business model – once you pay for certain word, your ads will be shown alongside with Google search related to this word.*

³² Para 114.

³³ Judgment of the Court of Justice of European Union of 12 July 2011; *L’Oreal SA and Others v eBay International AG and Others*; C-324/09.

³⁴ And not only – the proceedings were initiated in many other European countries, see: “L’Oreal v eBay – clarification of online marketplace operators’ liability for its users’ trademark infringement”, available at: <http://www.herbertysmithfreehills.com/-/media/HS/T2909111725.pdf>, last accessed on 15 March 2014.

³⁵ Para 123.

threshold of what "diligent economic operator should have realized"³⁶ as a situation in which article 14 cannot be applied.

There is no doubt that the E-Commerce Directive was introduced with the intent to protect further development of innovation in the e-commerce sphere. Unfortunately, providing liability regime with open for interpretation notions and without clear application procedures makes efforts fairly unproductive.

2.5 An overview of national laws implementing the ISP legislative safe harbour provision

The E-Commerce Directive is legally binding on the effect, but methods and forms of achieving its aims were left to the member states.³⁷ Therefore all provisions to be enforceable require transposition and implementation into member states' legal systems. 12 out of 15 member states managed to transpose the directive by the formal deadline of 17 January 2002.³⁸ What's interesting is that many countries transposed quasi-literally section 4 of the directive,³⁹ but still the outcome of implementation is perceived by many as controversial.⁴⁰

The notification, as a precondition of knowledge, is particularly important for the understanding and operating of the whole safe harbour system. There are countries where a mere letter or an e-mail are sufficient to initiate the whole procedure. The majority of countries do not have formal notification procedure,⁴¹ although some introduced statutory criteria.⁴² The way notice and take down procedure is established also varies. In France and Lithuania the procedure is optional, whereas in Hungary and Finland its scope is limited to IP infringements.⁴³ In Spain⁴⁴ and Italy⁴⁵ the notice must be confirmed by a

³⁶ Para 120.

³⁷ Margot Horspool and Matthew Humphreys; "European Union law"; Oxford University Press, 2010; p. 114.

³⁸ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce); COM/2003/0702; p.6.

³⁹ With few exceptions, such as Germany – in the Telemedia Act (Telemediengesetz, BGBl. I S. 179, 26 February 2007) the term "knowledge" instead of "factual knowledge" is used, in Portugal (in para 16 of Decreto-Lei - Law-Decree no 7/2004 of 7 January 2004 on e-commerce) the safe harbour cannot be applied when a ISP should be aware of the illegal content.

⁴⁰ Christou, George "The EU and Internet Commerce Regulation" in: George Christou and Seamus Simpson "The new electronic marketplace : European governance strategies in a globalising economy"; Edward Elgar Publishing Limited 2007, p. 119.

⁴¹ E.g. Denmark or Germany.

⁴² E.g. Portugal.

⁴³ According to article 15 of Finnish Law (Act on provision of information society services, 458/2002, 5 June 2002), the situation varies depending on what kind of infringement ISP have to face – in situation of "clear criminal offences" action has to be taken promptly, in IP cases only notification from party claiming infringement places the duty to take action – in other cases the court decision is necessary

court or an administrative authority to be binding for an ISP, although still the situation of the content author is not regulated (if he should be notified, given any way to appeal decision etc.).

There are countries, such as the United Kingdom, where the requirements for notification were established as guidelines for courts, not implementation measures. Regulation 22⁴⁶ provides that any court should take into consideration all relevant circumstances, such as a known name of a notice sender and the accuracy of information provided in the notice.⁴⁷ Different actions are expected to be taken by ISPs in various legislations. Some countries, such as Finland⁴⁸ and Lithuania⁴⁹ oblige ISPs to block access to potentially illegal content, without obligation to take down the publication. A different approach was introduced in the Slovak Republic, where ISPs has to remove content. In Belgium ISPs have not only block or remove the content, but also notice the competent authority about allegedly infringing content.⁵⁰

The notion of “notice and take down” it is not introduced by the Directive, is not even mentioned literally in the text. Finland is an example of a state that decided to regulate notice and take down procedure in a codified way.⁵¹ The Directive was transposed in the Act on the Provision of Information Society Services.⁵² While discussing transposition of article 14, contrary to other member states, constitutional concerns were raised.⁵³ The original governmental proposal of the notice and take down procedure was claimed to be violating freedom of expression provided by section 12 of the Finnish Constitution. While redrafting provisions on notice and take down two opposite approaches clashed (ISPs opted for court orders as a legal base for any action against content of webpages, copyright holders favoured a self-regulatory model and leaving broad scope of discretion

⁴⁴ Article 16.1(b) of the Spanish Law of Information Society Services and Electronic Commerce (Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico, 34/2002, 11 July 2002).

⁴⁵ Article 14 of Legislative Decree No 70 of 9 April 2003 (Decreto Legislativo 9 aprile 2003, n. 70).

⁴⁶ Part of The Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.

⁴⁷ See Queen's Bench Division (UK), *Bunt v. Tilley & Others* [2006] EWHC 407 (QB). Great Britain – British Telecom was not held liable for defamatory content in the situation when the notice did not contain information on illegal nature of the content nor specific location of the content – Mr Justice Eady stated : “I am also prepared to hold as a matter of law that an ISP which performs no more than a passive role in facilitating positing on the internet cannot be deemed to be publisher at common law” (para 36).

⁴⁸ Section 15 of Act on provision of information society services, 458/2002, 5 June 2002, unofficial translation by Ministry of Justice available at: <http://www.finlex.fi/en/laki/kaannokset/2002/en20020458.pdf>.

⁴⁹ Article 14 of Law on Information Society Services of the Republic of Lithuania, 25 May 2006, No. X-614.

⁵⁰ Belgian E-Commerce Act of 11 March 2003, article 21§2.

⁵¹ Other examples might be Lithuania and Hungary.

⁵² Act on provision of information society services, 458/2002, 5 June 2002.

⁵³ Christou, George and Semaus Simpson; “The new electronic marketplace: European governance strategies in a globalizing economy”; Edward Elgar Publishing Limited, 2007; p. 122.

for ISPs). In the end a compromise was achieved and the regulation similar to the American was introduced: notice and take down must be authorized by a court (except copyrights cases where a reliable notification is enough to take down the content).

In many EU countries the formal requirements of the procedure were left in ISPs hands (so called self-regulation). In Austria, the Austrian Internet Service Providers Association⁵⁴ introduced a code of conduct specifying the requirement of notice and take down procedure.

Some countries decided to introduce a co-regulation approach to notice and take down. The Federal Computer Crime Unit⁵⁵ is a body created in Belgium based on agreement of the biggest ISPs' organization and Ministries of Justice from 1999. All possibly illegal content has to be notified to the Crime Unit which makes a decision on further actions (informing prosecution, taking down, blocking access).

2.6. Conclusions

The above examples show that national legislations implementing the E-Commerce Directive varies significantly. The European Union, compared to US and very detailed regulation provided in Digital Millennium Copyright Act, decided to approach the issue of ISP secondary liability in a more flexible way.⁵⁶ But leaving such a broad discretion in states' hands results in creating a situation, when it is very difficult to assess when ISPs can be held liable.⁵⁷ On the one hand there is no obligation to monitor, on the other what 'factual knowledge' means is disputable.

The legal situation in the EU might be summed up by words of Kim Walker: "The issue of when a host was liable has been getting a bit vague and some hosts in Europe have been getting a little bit upset".⁵⁸ Such an uncertain and disputable situation related to assessment of business legal framework makes the issue of ISP secondary liability very controversial from a constitutional perspective. All question marks also influence fundamental rights protection – this is the main assumption of the next part.

3. ISP Liability – Fundamental Rights Concerns

Addressing the Internet's ambiguous power to foster fundamental freedoms as well as to create new avenues of abusing this freedom requires carefully balanced legislation. The

⁵⁴ More information available at the webpage of the Austrian Internet Service Providers Association: www.ispa.at.

⁵⁵ More information available at: <https://www.ecops.be/webforms/Default.aspx?Lang=EN>.

⁵⁶ Smith, Emerald; "Lord of the Files: International Secondary Liability for Internet Service Providers"; *Washington & Lee Law Review* 68(3), 2011, p.1588.

⁵⁷ Litwiński, Paweł; „Zasady odpowiedzialności pośredników w dostarczaniu informacji w internecie” [Rules of liability of ISP]; *Monitor Prawniczy* 24/2002, p.7.

⁵⁸ Pfanner, Eric; "YouTube can't be liable on copyright, Spain says", *New York Times*; published on 23 September 2010; available at: <http://www.nytimes.com/2010/09/24/technology/24google.html>, last accessed on 13 March 2014.

ISP secondary liability regime was introduced in the EU to address the question of liability online. There is a global consensus that ISPs should not be held absolutely liable for any user's illegal content.⁵⁹ Without a doubt, altered approach will have a "chilling effect" on ISPs' commercial activities which are indispensable for the functioning of the Internet.

The fact that both EU and national legislations leave ample room for ISPs' discretion about the form of the procedure and when such a procedure should be launched has led large companies to establish their own notice and take down procedure. As examples, Google⁶⁰ and Facebook⁶¹ regulations can be mentioned. They prescribe what information should be given by users as well as internal corporate procedure for deciding on effectiveness and reliability of a notification. Neither of them provide any form of notification of users whose content was deleted or procedure of 'put back' in the case where the author proves that the content is not illegal. Such a situation raises various questions from a fundamental rights perspective.

3.1 The question of self-regulation on the Internet – risk of privatization of censorship

Self-regulation⁶² is understood in the EU as an example of an alternative method of regulation (contrary to the traditional legislation) being very useful in the situation of new technologies, very detailed and technical legal questions, or those in which many stakeholders are involved. It must also be borne in mind that EU legislation is subsidiary,⁶³ therefore self-regulation is a preferable approach to creating a legal framework.

Sometimes self-regulation might result in a higher degree of fundamental rights protection, although most often the scenario is reversed.⁶⁴ Self-regulation, especially in media, is perceived by many as much more effective tool and less restrictive measure than the one provided by states.⁶⁵ On the other hand, the issue becomes highly debatable when

⁵⁹ Sutter, Gavin, "Internet Service Providers Liability" in: Mathias Klang and Andrew Murray (eds.) "Human Rights in the Digital Age", London GlassHouse, 2005, p.71.

⁶⁰ Removing content from Google, available at: <http://support.google.com/bin/static.py?hl=pl&ts=1114905&page=ts.cs>, last accessed on 7 March 2014.

⁶¹ Facebook Statement of Rights and Responsibilities, available at: <https://www.facebook.com/legal/terms>, last accessed on last accessed on 7 March 2014.

⁶² The E-commerce Directive enhances the self-regulatory approach to the ISP liability and notice and take down procedure: "drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organizations, designed to contribute to the proper implementation of Articles 5 to 15".

⁶³ The principle of subsidiarity is defined in Article 5 of the Treaty on European Union, Official Journal C 115/13.

⁶⁴ Garfield, Alan E., "Promises of Silence: Contract Law and Freedom of Speech", *Cornell Law Review*, Vol. 83, 1998, pp. 343-360.

⁶⁵ Tambini, Damian, Danilo Leonardi and Christopher T. Marsden, "Codifying Cyberspace : Communications Self-Regulation in the Age of Internet Convergence", New York: Routledge, 2008, 2008, p.269.

states hand over to private entities the regulation on fundamental rights.⁶⁶ The mechanism shifts public functions from authorities to private entities.

Various authors⁶⁷ have emphasized that the censorship phenomena online has shifted from states to private actors such as users, readers, ISPs. Users, operating in real societies, are bound by some social and moral norms that they try to impose online by the choice of content to which they want to have access— such practice results in individual self-regulation, not infringing access to the information of others. On the other hand, actions related to content taken by ISPs somehow influence the Internet for all users and might be perceived as mass self-regulation. Of course, the first type is acceptable and more favourable than the second, which makes ISPs' powers dangerously similar to states'.

3.2 Assessment of ISP liability compliance with procedural guarantees

Notice and take down procedure is sometimes mistakenly perceived as a relation between only private actors – ISPs and individual users. According to the traditional approach to fundamental rights enshrined in European constitutional law and international treaties, fundamental rights apply vertically to public authorities vis-à-vis the individual.⁶⁸ With such an assumption, fundamental rights cannot be invoked directly in the relationship between ISPs and their users because it is a purely private sector relationship. However, ECtHR referred in a few cases regarding Article 10 to the German concept of *Drittwirkung* – the horizontal application of human rights.⁶⁹ As was stated in *Fuentes Bobo v. Spain*,⁷⁰ the state is obliged to protect freedom of expression from threats by individuals and companies. The same approach was confirmed in the more recent *Palomo Sanchez and Others v. Spain*⁷¹ and in the Resolution on the Protection of Freedom of

⁶⁶ Starr, Sandy, "Putting freedom back on the agenda: why regulations must be opposed at all costs", in: Christiane Hardy and Christian Möller (eds.) "OSCE Spreading the Word on the Internet - 16 Answers to 4 Questions", available at: <http://www.osce.org/fom/13871>, last accessed on 7 November 2013.

⁶⁷ As Newey, Adam, "Freedom of expression: censorship in private hands" in "Liberating Cyberspace : Civil Liberties, Human Rights, and the Internet", edited by Liberty, Pluto Press, 1999, p.15.

⁶⁸ Garlicki, Lech, "Relations between Private Actors and the European Convention on Human Rights in The Constitution" in András Sajó and Renáta Úitz (eds.) "Private Relations: Expanding Constitutionalism", Utrecht: Eleven International Publishing, 2005, p.129.

⁶⁹ Harris, O'Boyle & Warbrick, "Law of the European Convention on Human Right", Oxford University Press, 2009, pp.446-447.

⁷⁰ European Court of Human Rights, *Fuentes Bobo v. Spain*, application no. 39293/98, judgment of 29 February 2000, para 38.

⁷¹ European Court of Human Rights, *Palomo Sanchez and Others v. Spain*, Application no. 28955/06, 28957/06, 28959/06, 28964/06, judgment of 12 September 2011, para 60 - in the case a trade union activist was dismissed by a private company after a critical publication in a newsletter. Even if the court has not found the violation (the disciplinary measure of dismissal was found not disproportionate), it has underlined that the state is responsible for "a failure on its part to secure the applicants the enjoyment of the rights enshrined in Article 10 of the Convention".

Expression and Information on the Internet and Online Media⁷² and Declaration of the Committee of Ministers of 29 September 2010 on network neutrality.⁷³

ISP secondary liability results in factual censorship which influences mostly freedom of expression. Every time stricter liability regimes are imposed on IPSs, ISPs are forced to take on a role of regulatory agents. Users are thereby deterred from extending the scope of freedom of expression due to the fear of being cut off by ISPs.⁷⁴ This demonstrates that not enough safeguards were established to protect fundamental rights.

3.3 Rule of law considerations

Looking at notice and take down procedure from a broader, rule of law context forces us to question the system as depriving the Internet user of any rights and guarantees. ISPs take decisions only on the basis of the notification and the user cannot present his opinion on the issue, which will result in infringing his fundamental right. Of course the presumption of innocence and right to defence are notions deriving from criminal procedure, but it seems preferable to create the space for adversarial debate before deciding that the content is illegal. Moreover, the decision-making competence is shifted from judiciary body to private entity.⁷⁵ This is an ISP deciding if the statement should be perceived as defamatory or the content as breaching copyright.

Moreover, EU legislation seems to be disproportionate when the rights and guarantees of parties are evaluated. The conduct of the person notifying and ISPs are prescribed, but any obligations or rights of users whose content is taken down are not mentioned. Obviously, he can always try to bring civil complaint, but the comparison of efforts and money-consumption of both judicial proceedings and notice and take down procedure proves that the right to get his freedom of speech acknowledged and protected is more burdensome compared to how easy it is to block or delete content online.

⁷² "The Assembly calls on the member States of the Council of Europe to: ensure, in accordance with Article 10 of the Convention and the case law of the European Court of Human Rights, respect for freedom of expression and information on the Internet and online media by public as well as private entities, while respecting the protection of privacy and personal data" - Resolution of the Parliamentary Assembly of the Council of Europe, no. 1877 (2012) on The protection of freedom of expression and information on the Internet and online media, available at: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18323&Language=en>, last accessed on 7 March 2014..

⁷³ "As regards procedural safeguards, there should be adequate avenues, respectful of rule of law requirements, to challenge network management decisions and, where appropriate, there should be adequate avenues to seek redress" - Declaration of the Committee of Ministers on network neutrality, adopted by the Committee of Ministers on 29 September 2010 at the 1094th meeting of the Ministers' Deputies, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1678287>, last accessed on 7 March 2014.

⁷⁴ Newey, Adam. "Freedom of expression: censorship in private hands" in "Liberating Cyberspace: Civil Liberties, Human Rights, and the Internet", edited by Liberty, Pluto Press, 1999, p. 34.

⁷⁵ Tambini, Damian, Danjlo Leonardi, and Christopher T. Marsden, "Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence", New York: Routledge, 2008, p.271.

3.4 Legal certainty concerns

Moreover, both EU and national legislations leads also to legal certainty critique. Many notions are undefined, such as “credible notification” or “expeditious time” when ISPs are obliged to act. This results in ISPs’ decisions to block access to infringing materials without any hesitation or consideration of the legality or illegality of the content.⁷⁶ Ultimately, the notice and take down scheme is incompatible with guarantee rights developed by the European constitutions and, moreover, withdraws judicial protection of fundamental rights, introducing private censorship dependent on private entities’ reasoning and law interpretation.

3.5 Legitimacy and accountability

It is often underlined while assessing ISP liability regimes that the entire framework which puts ISPs in a position of control lacks legitimacy and accountability. Any limitation of fundamental rights should be overseen by public law mechanisms and we cannot find such in private terms of service of ISPs, which usually outline the bases for taking down or blocking content. Such legal basis cannot in all certainty be named legislative. Therefore the legal grounds for taking down any content should be provided by states in legislative measures and those principles should be only applied by ISPs. Thus, the current situation is altered and ISPs are empowered to not only to apply regulations, but also to create them.

Lambers has introduced the term of “tilting” into the narrative on ISP liability.⁷⁷ His idea is that classical vertical state-individual characteristic of fundamental rights is transformed: the third party – the private entity ISP – has inserted itself between the two parties traditionally involved.

Such a shift is problematic from a perspective of legitimacy and accountability. While the state is bound by constitutional provisions and its actions must always have legal grounds, ISPs, as an examples of private entities, are not subject to the same high standards of judicial scrutiny.⁷⁸ Therefore we can observe especially freedom of expression becoming less protected by constitutional provisions and governed more by private law instead. Of course, there is vivid discussion in doctrine whether ISPs should in such situations be

⁷⁶ Sutter, Gavin “Internet Service Providers Liability”, in: Mathias Klang and Andrew Murray (eds.) “Human Rights in the Digital Age”. Edited by Mathias Klang and Andrew Murray, London : GlassHouse, 2005. p.77.

⁷⁷ Lambers, Rik „Code and speech. Speech Control through network architecture” in: Egberts Dommering and Lodewijk Asscher (eds.) “Coding regulation: Essays in the Normative Role of Information Technology”, The Hague, 2006, pp. 115-118.

⁷⁸ T.J. McIntyre, „Assessing internet blocking system” in: Ian Brown (ed.) “Research Handbook on Internet Governance”, UK, 2013, p.293.

perceived as private bodies⁷⁹ or entities accountable for human rights violation on the same level as countries.^{80 81}

3.6 Conclusions

The development of the Internet frequently leads to novel legal challenges⁸² – but the case of regulating ISP liability does not call for implementation of any new solutions, simply for the member states' application of the standards already established by European constitutions and international treaties. The European Data Protection Supervisor is aware that low standards of guarantee rights equals a threat to substantive rights.⁸³ He calls for harmonization of the notice and take down procedure on the

⁷⁹ According to Mueller, such an approach makes it possible for users „to vote with their feet“ and once they are not satisfied with the level of fundamental right protection offered by one ISP, they can simply change the company, vide: Mueller, Milton, „Networks and States: the global politics of Internet governance“, Cambridge 2010, p. 61.

⁸⁰ Edward on the other hand claims that notice and take down procedure makes ISP accountable the same way public authorities are for human rights violation, Edwards, Lilian, „Pornography, censorship and the Internet“, in: Lilian Edwards and Charlotte Waelde (eds.) „Law and the Internet“, Oxford, 2009, pp. 45-47.

⁸¹ The problem was also noticed on international political level: „There is concern that voluntary blocking mechanisms and agreements do not respect due process principles within the states in which they are used. In the absence of a legal basis for blocking access to websites, platforms and Internet content, the compatibility of such agreements and systems with OSCE commitments, Article 19 of the Universal Declaration, Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights is arguably problematic. Although the authorities' good intentions to combat child pornography and other types of illegal content is legitimate, in the absence of a valid legal basis in domestic law for blocking access to websites, the authority or power given to certain organizations and institutions to block, administer and maintain the blacklists remains problematic. Such a 'voluntary interference' might be contradictory to the conclusions of the Final Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE and in breach of Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights unless the necessity for interference is convincingly established. Akdeniz, Yamanand, „Freedom of expression on the Internet: study of legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in OSCE participating states“, Organization for security and co-operation in Europe, available at: <http://www.osce.org/fom/80723>, last accessed on 7 March 2014, p.24.

⁸² Sutter, Gavin „Internet Service Providers Liability“, in: Mathias Klang and Andrew Murray (eds.) „Human Rights in the Digital Age“. Edited by Mathias Klang and Andrew Murray, London : GlassHouse, 2005. p.83

⁸³ EDPS formal comments on DG MARKT's public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries, Brussels, 13 September 2012
available at:
http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2012/12-09-13_Comments_DG_MARKT_EN.pdf, last accessed on 10 March 2014.

community level – in other cases the level of protection will differ in various countries, which can result in problems taking into account the global character of the Internet.

The notice and take down procedure is not the only example of a situation where countries are unable to secure fundamental freedoms according to the constitutional standards. Another example worth mentioning are IP rights, access to information or states' attempts to combat unlawful activities on the Internet. All these situations are alarming from a procedural perspective – the prerogatives of private actors expand, while diminishing the role of the judiciary in protecting fundamental rights.

4. **Final Remarks**

As showed above, ISP liability is without doubt the issue most relevant for fundamental rights protection, especially when freedom of expression is at stake. Various allegations towards the current state of the game can be named, as issues of the rule of law, legal certainty, legitimacy and transparency. The legal framework of ISP liability as constructed nowadays shows an interesting trend of privatization of censorship powers online. Various private entities were given competence to decide not only about freedom of expression, but in the same time put in positions of judges –the system lacks the mechanisms of public scrutiny or judicial review. Such an approach results in depriving users of procedural guarantees, which was disapproved in March 2008's Recommendation 97.⁸⁴ The recommendation of the Committee of Ministers is that users should have at least minimal procedural guarantees, such as challenging the decision to take down the content or seek remedies. But the practice can be concluded with the statement of American Civil Liberties Union: "notice and take down procedure violates due process concepts that are also enshrined in international, regional, and national guarantees around the world".⁸⁵ Users are deprived of any measures to enforce their freedom of expression, both against public authorities and private actors.

Assessing fundamental rights implications of ISP liability from private censorship and obligations of private entities is certainly a legitimate approach, but still not well established in the literature – the debate is ongoing. Nevertheless, assessing the problem from classic, horizontal approach to fundamental rights citizens-states is probable and appropriate. It should be concluded that nowadays legislation and judicial practice of member states of the EU do not secure enjoyment of right to free speech online. Countries, obliged to comply with both EU obligations of economic nature and

⁸⁴ Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters:

Adopted by the Committee of Ministers on 26 March, 2008 at the 1022nd meeting of the Ministers' Deputies, available at: [http://www.coe.int/t/dghl/standardsetting/t-cy/T-CY%20CMRec\(2008\)6%20E.pdf](http://www.coe.int/t/dghl/standardsetting/t-cy/T-CY%20CMRec(2008)6%20E.pdf), last accessed on 8 March 2014.

⁸⁵ American Civil Liberties Union, Press Release, "ACLU Joins International Protest Against

Global Internet Censorship Plans," 9 September 1999, available at: <https://www.aclu.org/human-rights/aclu-joins-international-protest-against-global-internet-censorship-plans>, last accessed on 15 March 2014.

fundamental rights standards did not establish sufficient safeguards of freedom of expression in ISP liability regime. The lack of specific and certain legislation results in great discretion of ISPs and very uncertain legal systems. There is no reason to claim that member states violate a negative aspect of freedom of expression – they are not direct censors of online content. But due to the poor legislation, countries made it possible for other entities to censor online speech, which is a violation of positive aspects of freedom of expression, namely creating proper legal framework.

Moreover, the ISP liability legal framework is not transparent, sufficiently securing freedom of expression. The existing legislation strengthens private censorship online and is not in accordance with the rule of law, legitimacy, transparency and accountability requirements. To conclude, the current practice and legislation creates an unacceptable situation of legal uncertainty for all stakeholders involved: ISPs, Internet users, and protected rights holders.

Very radical voices in the debate claim that it should never be possible for an ISP to take any content down: “Business operators should never be entrusted with(...) guidelines defining the limits of the right to free speech and offering procedural guarantees against censorship(...) which belong to the very core of the fundamental rights of democratic people”.⁸⁶ I do not agree with such an approach – without doubt the Internet works due to the existence of private entities. The challenge for states is to create such legal frameworks which make it possible for ISPs to secure both free speech and other fundamental rights without ISPs being put in the position of pseudo-judiciary bodies. ISPs simply lack knowledge, know-how, the will and competence to decide on fundamental rights issues.

Clearly, there are many legal situations where EU member states’ courts decide differently on the same legal issue – but in the case of ISP liability this is especially alarming due to two reasons. Firstly, the Internet is a borderless channel of communication and other liability exemptions cannot be applied in different jurisdictions. It is simply ineffective and can have a “chilling effect” on Internet growth. Additionally, ISP legislative safe harbour, as demonstrated in the paper, influences freedom of expression protection and it is unacceptable that the standards of protection are so different in various member states.

In my opinion there are two ways to tackle ISP secondary liability to make a legal framework more fundamental rights aware and both need to be implemented simultaneously. Firstly, amendments are needed at national levels of EU Member states. Verbatim implementation of the directive appeared to be insufficient. Moreover, even if the EU is not party to the ECHR yet, it is desirable to introduce legal changes at EU level.⁸⁷ Both national and community measures should introduce:

⁸⁶ Frydman Benoit and Isabelle Rorive, *Regulating internet content through intermediaries in Europe and the USA*, *Zeitschrift für Rechtssoziologie* 23 (2002), issue 1, p.59.

⁸⁷ Such a conclusion was also reached by Vaciago, Giuseppe and Silva Ramalho “The Variety of ISP Liabilities in the EU Member states”, *Computer Law Review International* 2/2013, p.37 – but they based their conclusion on the principle of free movement of services.

- an open-ended catalogue of ISP being able to benefit from safe harbour. The directive should not be limited to only 3 types of ISP – the current question mark is what about cloud computing, web 2.0 services, web services, wiki's, and content sharing services;
- a harmonized and balanced notice and takedown procedure, with provided procedural guarantees for Internet users;
- a “Put back” procedure is necessary – once the content is taken down without legitimate reasons;
- very specific language of regulation, with certain and clear definitions;
- measures to facilitate fundamental -rights oriented self-regulations.

I am well aware that the issue of ISP liability is a broad and complex problem which needs to be evaluated from different, not only freedom of expression, perspectives, such as: technical constrains, business conditionings, data protection, and privacy law enforcement. Moreover, this is a very interrelated issue, unable to be separated from the concerns related to self-regulation online or jurisdiction in the Internet. However, in both political and academic discourses on this issue the role of freedom of expression has been neglected – this paper shows how significant the freedom of expression perspective is in the discourse on the future of ISP secondary liability in the EU.

Phd.Julejda Gërxhi

Department of Law, "Pavaresia"

University Vlore, Albania

Implementation of Functional Mechanisms in Favor of Gender Equality in Vlora's Region

Abstract

The matter of the gender equality is today a universal, political, ethical, social and psychological problem. The aim of the study is an evaluation of the political, economic, social, and cultural rights of women in Vlora's region, starting from the legal imperative request that Albania sanctions officially the equality among men and women, but it is not really practiced in reality.

The study is based on filling out the questioners formatted with the purposes and the aims of the study. The information collected from the results of the dates of the people questioned (from the age, gender, area, education, the rapport of the women with the world of the work point of view), enables us not only to do an linear analyze of the gender equality in Vlora's region but to have some important oriented results for the job in the future about all the factors and the people that have a role and responsibility in this important process.

The study creates a clearer picture of the of the actual level of the "gender equality" of the problems, ways and forms used politically, to have a softening impact on the negative, resistant inherited events of the gender equality that's very common in the Vlora's society, even though it has been under a lot of changes is still based on a strong masculine mentality.

The study aims to stay not to far from the politics and it's important impacts on the women's war process for equality. It is proved that the women's feelings and their war for gender equality is not conditioned from their political preferences.

Keywords: *social policy, law, discrimination, responsibility, gender equality.*

1- Purpose and indicators

The purpose of the study is to achieve a situation assessment of inequalities that appear in many areas of political, economic, social and cultural of the country, especially in the area of assessing the level of implementation of legal and institutional mechanisms to ensure gender equality in Albania generally, but specifically in the region of Vlora.

An important will take addressing the problems of gender balance in decision-making, the efforts that society, politics, but women themselves are doing and that much more should make for economic empowerment, which constitutes one of the main bases for approaching real gender equality. [4]

The study is a document that has a value orientation where the work focuses more entities that have responsibility and duty to develop policies, programs, strategies and concrete actions to positively influence the process of the 'step by step ' a new intensive work to improve gender equality indicators in Albanian society, revealing yet strong masculine nature of it. This study will provide a modest contribution to build a new strategy necessary to boost the pace of improvement of the situation of women in politics, decision-making, economic, social, cultural, inclusion and its integration as the equal, free and not discriminated by old prejudices and new taboos.

The problem of "gender equality" has become a major issue for all Albanian politics of all arms, and this objective should be placed on the priority of their agenda to turn the "gender issue" permanent interest in politics, and no treatment rhetorical campaigns. The situation becomes more dramatic when it comes to recognizing the terms of international law relating to "gender equality" and our obligations internationally.

Improving the situation that has to do with freedom and equal rights of women [1] (Article 18, equality before the law) in society is related to many factors, political, legal, moral and institutional strengthening in these conditions so state legal awareness and raising awareness, strengthening of mechanisms that affect the implementation and monitoring of the social application of equal rights and freedoms, regardless of gender, should have practical effect.

2- The realization method of study.

a. Territorially

The study is based on the system of "survey "through questionnaires formatted in accordance with the purposes and goals of the study. He fell from more developed areas, to the more rural. It is normal that the entirety of the survey conducted , the city of Vlora have the highest percentage of respondents, as well as the number of people living in this city is larger. So in a way, this geography test is formatted correctly by quantified and can allow you to analyze the problems of women and gender equality at the regional level.

The issue is not separate from the geographic perspective. This issue regardless of the nuances which appears in the city and in the countryside, is problematical for the whole society, and should be treated as national gender issues and as a problem for all women of Albania. The position of women, its problems are not perceived in the same socio-

cultural level in these two terrains that have known differences and specifications development.

The interest rate differential and different perceptions "between the same gender", their issues, between rural and urban women is obvious. Indicators of "gender equality" and the violation of the rights of women in rural areas, are deteriorating.

b. From an educational viewpoint:

The study has assessed as a very important component of the educational level and cultural respondents to recognize the impact that education and culture gender perception and social assessment of the problem of gender equality in layers the Albanian society.

According to the survey, it seems than most cultured and educated society is, the more it becomes reflective and perceptive social problems of women and socio-political issues of gender equality.

In general, the structure of educational attainment is mixed. So the interpretation of the data from this perspective is favorable to the broad social analysis, closer to the reality of the Albanian society.

c. From the perspective of the age :

Obviously it is not possible that in a random survey to ensure equal distribution to provide a test of "public age" equally. Quantity of age, who participated, is ranked in accordance with the connection and sensibility that has an "age group" set, the problem of gender equality. Perceptions age naturally affect the totality of social perception of gender equality in our society. This degree perception and awareness, sensitivity and reaction to this phenomenon is not and cannot be the same and equal at different ages.

The data obtained and evaluated from the standpoint age, appear to lower the age groups 15-17 years and above 60 years. This "diagram age" is no accident. The period of adolescence, has taken full view of the global occurrence, as cheaper periods of human life, in which they are free from domination masculine mentality of the past. It seems that adolescents are signs of a new social position equal between men and women, because of intense expansion of cultural horizons of teenagers, which is breaking more "masculine taboo" of the past. The survey represents the heart of the social group from 18 to 50 years old.

At this time slot normally begin to appear gender and social perceptions, created bipolar gender and sexual relations, created significant moral respect and emotional , in which gender relations seem open between men and women . In this period occurs marriage as the most stable relationship of the couple, family and establish responsibilities arise for its operation.

In this age period is the social world of competition, market adjustment and the world of work, start to look and realized differentiated gender relations (between people belonging to different sex) professional career, finding work, which have a special importance in the economic status of women in the family. For all these reasons, it seems that the interest of the group aged 18 to 50 years has been so high. The interest of women to be more active

in determining the results of the study and assessment of the current level of gender equality has been higher than in men. (In every two - three respondents, two are female and one is male). Low presence of men in this survey for a major social problem that is one of the indicators of inertia still strong masculine mentality. It seems that our society is still far from masculine and true parameters of an "open society", the civilian equivalent of the gender perspective.

d. In view of the employment relationship:

"The level of employment" as a social instrument, it is not easy to use to measure the degree of "social inclusion" of women in employment. This is because the issue of employment is no longer a matter of state directly, but is exclusively private, that has to do with human freedom and his right to be employed or not employed in the public sector, private or self-employed.

Employment in a democratic society is a private matter of the individual (Article 49 the Constitution of the Republic of Albania)

3. Analysis of the situation from a gender perspective.

a. 1. Women and decision-making

It is very important that the Albanian society is aware and accepts that this problem is social disadvantage against women. In fact most of the survey participants are of the view that the participation of women in politics and decision making is very low. The fact that the men are of the opinion that the participation of women in politics and decision-making is low, is a positive indicator that should be used in the fight to change the mentality that inhibits activation with all its potentials, the woman in life , in work , in society in politics and decision making.

What are the causes of importance, which hampers a wider participation of women in politics and decision-making?

- A significant negative impact has yet powerful masculine mentality according to which politics and decision men's issues.
- Lack of time, loads of excess violence and lack of equal sharing duties and responsibilities within the family, has limited ability and equal participation of women in political and social life
- Level of education and its impact on the current level of gender equality in society, positive and favorable factor for women.
- Low self-evaluation of women.
- Tough political fight.
- War within a species.
- Membership of women in the political parties.

What are the most effective ways to increase the participation of women in decision-making?

- Respect quotation system.
- Increasing women members of political parties.
- Increased levels of women in party leadership forums.

- Design and implementation of government programs for women.
- Establishment of ancillary services, social.
- Training and qualifications of the other.

In the perception of possible ways to increase the participation of women in politics and decision-making, women decide how street view, design and implementation of government programs to support women, men are of the opinion that the priority in this regard is to increase the participation of women in political leadership forums.

a. Gender equality and political parties

To understand more accurately the reality of women's equality in the political field, helps the fact that the question of whether "are equally supported by political parties as candidates for the parliamentary women and men candidates" has a profound negative response.

The reality of the political parties themselves, there are still indications of low participation and representation of women on their main forums, according to political affiliation, political parties need to worry about this reality.

b. Economic empowerment of women

Gender inequality also appears in economic terms, to be considered as a special priority of state support for improving the situation of women in employment and business. The role of women in this regard is significantly inferior to men. From the study it is necessary for the state to contribute more active in terms of women's employment, especially in the public sector.

c. Personality of women and girls and the problem of sexual harassment in the work place.

It is one of the phenomena of concern that affects her dignity and personality. [10] In our society is not yet developed the culture of public reaction and the denunciation of those who harass and seek sexual benefit because of office or ownership. This action is not reported for fear of losing their jobs, confidence in the justice system and pressure employers. [6] Assessing the personality of women, strengthening personal dignity and spirit responsive to such an action that affects the core of her soul as a human being, but as gender affiliation, public denunciations of those who harass and placing them before the law without hesitation conditions would be necessary to improve the situation and curb this ugly phenomenon.

d. Wife and social care.

Ways in which women are recognized by specific social legislation and its positive impacts are primarily the media, [8] mainly electronic media and print. Very influential in this regard have been numerous trainings organized by women, surfing the internet, etc...Causes which not favoring woman in her low participation in political and public life are poverty, lack of social infrastructure that enhances family burdens and obstacles that women from stereotypical roles and tasks, traditionally attributed to women and girls (jobs home and care for children).

e. Women and health care.

Women's knowledge of reproductive health issues and family planning are continuous expansion [5] . Leading role in the dissemination of knowledge on reproductive health and sexual education have tools electronic and print media, which are used more, not only as a means of entertainment, but also an instrument for the dissemination of specific knowledge relating to education and sexual and reproductive hygiene. Today, it is positive that the perception of violence against women is not an issue of her private life, but public issue, which concerns not only personal health, physical and mental health of women, but is indicative of the health and social Albanian society in general.

f. Education and eliminating gender disparities.

Education remains one of the important tools that modern society has on hand as a tool for awareness throughout society, the importance of a society which creates equality indeed, avoiding gender discrimination and abuse, while respecting the rights of women to have equal opportunities with men in every aspect of life .Arises for the development of education as a factor of social assistance and instrument affecting the improvement of gender equality in our society.

At school the basics of culture thrown a fair society, equal gender point of view, open, in which cultivated undifferentiated attitude between boys and girls due to the change of gender identity and sexual affiliation different.

g. Women and Media.

What are the ways of obtaining information?

- 1) Print and electronic media.
- 2) Institutional web site/internet
- 3) Trainings/seminars/conferences
- 4) Relatives/friends/society
- 5) Publishing (leaflets, brochures)
- 6) Other

Media has a big role in cultivating extremely concepts of fair and balanced for gender equality. Results of the public perception of the role of the media have created the idea that the media itself has no knowledge of complete, accurate, clear and legal standards of modern society, gender equality and inalienable rights of women in society.

This situation makes it imperative need for an accelerated process of education of journalists, equipping them with extensive knowledge, accurate sociological, psychological and legal interpreters to be accurate and clearly problematic nature of political, economic, social, educational, health and civil, dealing with the guarantee of the rights of women to equality.

Recommendations:

The issue of gender equality should be seen as issues related to political, economic, social, and cultural rights of women, not only in society but also in the family environment.

- Knowledge of current legislation and legal protection to guarantee they create freedoms and equal rights of women in politics, economy, education, health, public and private life and take new initiatives and legislative efforts to improve regulated of existing legislation to bring it, gradually, in conformity with best standards of the European Union.
- Civil society must change the axis of work, women's associations must find better their role as instruments of mediation between the state and women as "interest group". They should be better interlocutor defense lawyers and their interests and equality "warriors" to speak up and protect women from all unrighteousness.
- The issue of gender equality in political decision-making is a prerequisite for democratization of Albanian society and indicator development and emancipation of our own society.
- The rights of women to look not just gender rights but human rights.
- Increased awareness of women's own rights and their role in achieving equality gender.
- Increased role of women as social factors" in the development of society as much as by husband discrimination practices and eliminate gender stereotypes on this role.
- Strengthening women's economic autonomy and to improve health care them
- Development of strategies and policies nature "pro - gender" with clear objectives and feasible in the field of education to ensure a non-discriminatory education for girls and boys, and laid the foundations of the concept of gender equality through the development of textbooks and school programs analyzed from a gender perspective, increase attendance school for girls and boys at all levels of education throughout the country, to increase the level of teaching, etc.
- Strengthening the role of education and publicity of print and electronic media, which can become powerful allies of Albanian women in her battle for equality and social justice in war with all the obstacles and prejudices with which she faces.

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Hossein Yousefi

*Islamic Azad University
North Tehran Branch, Tehran, Iran*

Protection of privacy with regard to the European Court of Human Rights

Abstract

Privacy is a concept, whose domain is different in each society according to the cultures and beliefs. As a result there is not any obvious and absolute definition of this concept in the encyclopedias.

With the development of technology, cases of the violation of privacy have increased. New mass media, printed media with high circulation and internet, increase the possibility of sharing the information vastly; as a result, new ways of breaking the privacy have come into existence.

The European Convention for the protection of Human Rights and Fundamental Freedoms in the 8th article has paid attention to this right. On the Contrary, the 10th article of law has spoken about the freedom of expression which places freedom of information and "right of society to know", in the opposite of regard to privacy.

In this research, we are going to survey different cases and procedures in the European Court of Human Rights, and the junction of privacy and freedom of information is mentioned and as a result the actual meaning of protection of privacy will be denoted.

Key words: *Protection of privacy, Freedom of information, European Court of Human Rights*

1. Introduction

Right of privacy, is one of citizenship rights issues that its base is in the person's identity. This right is a concept that its domain is different in any society, due to different cultures and beliefs. Because of this, there hasn't been any complete and clear definition in any encyclopedia so far.

Attention of Privacy, as one of most fundamental Human Rights issues is derived from attention to human dignity and values based on freedom kinds. Nowadays, it has been on of focal topics in information society and one of most important issues of Human Rights in new age. By technology advancement, cases of privacy violations have also been increased. New media, newspapers in high circulation and internet, have increased the ability to share information widely and consequently there have been new ways to enhance privacy violations.

Media are frequently reporting some news about dissemination of films, pictures and writings from private lives of people. This kind of dissemination from private aspects of people lives will be result in desecration of people whether it is accurate or indisposition, intentional or unintentional and montage or original cases. Whereas, protection of people's honor is basically accepted by world public opinion, International organizations and documents and also constitution of many countries.

In this research, we want to state the rate of convergence between concepts of privacy and freedom of information by surveying different records and judicial procedures in European Court of Human Rights. Hereby, the actual concept "privacy protection" will be clarified and this question can be replied: "where is the position of privacy protection in procedures of European Court of Human Rights?"

2. Overview

Privacy of people and its protection is an important and discussable issue in different countries especially in developed countries. Although, the vast and invisible domain of privacy concept results in problems about discussion of one unit concept in all of countries, but for the main discussion , concept identifying and accepted definition of it will be necessary. Furthermore, the fundamental and basic nature of this right requires that supporting reasons should be considered.

2.1. History of Privacy

Privacy as the protection of personal integrity is a fundamental civil right in modern democracies, and a tradition with a long history. Some writers and scholars of law, state that privacy history is attributed to the ancient Greek and Roman times, and its origin is related to the need of respecting the right of ownership over the material. Some people state that it has not a long history dating back to the other categories of human rights, such as the right of life. They claim that in the past, there was no much difference between private life and public life. They believe that this right has been established in the late twentieth century.

In 1765 AD, English "Lord Kamdan", legislated a law upon which a license was required to enter people's houses and confiscate their written notes,. One of the UK Parliament

named "William Pitt" wrote in this regard: "Even the poorest people, in their humble cottage could disobey the orders of the king. The cottage of this poor man could be very humble, and the roof could be leaking, the storm may enter, but the King of England can not enter it, and no one has dared the king's forces near the ruins of the house and step into."¹

Over the centuries, different countries by legislating different laws have protected privacy. In 1858, a law has been legislated in France that foreboded the dissemination of private matters of people and considered penalties for privacy breakers.

Also, in 1889, the Norwegian legislation banned the dissemination of information about individuals and their private affairs. Of course, talking about the modern concept of privacy, dates back to legal debates about influence of journalists into private lives of famous people in the United States of America.² In other words, privacy in the modern sense is one of new concepts of the rights that is still developing and completing in concept. This concept and protection of that was introduced in a joint article by "Samuel Warren" and "Louis Brandeis" for the first time in 1890.

Primary forms of privacy violating, had been done more as physical form, like assault, rape or eavesdropping, and perhaps one of the reasons for the delay in recognition of privacy as a fundamental right, is the emergence of new technologies in modern era and violation of privacy by the innovative tools that faced legal challenges.³

In other words, with the advancement of technology, privacy violations has been also increased and expanded. Technologies like the printing press and the Internet have increased the ability to share information on a wide range and resulted in existing new ways to increase privacy violence.⁴ Article was written by Samuel Warren and Louis Brandeis, is greatly in response to increase newspapers and emitted photos by the new technology of printing.

2.2. Concept of Privacy

Defining the concept of privacy in any part of the world, requires studies of sociology, anthropology, philosophy and many other sciences. Without such studies we may not achieve an appropriate definition of privacy.

Privacy and private individuals are non offensive area of human life that have always been considered by scholars. From the beginning of human life, they have tended to define their own territorial out of reaching the other people. The following, the concept of privacy in international documents and doctrine are discussed.

¹ Pitt, William, Earl of Chatham, Speech on the Excise Bill in Bartlett's Familiar Quotations, 10th ed. 1919; see also e.g. Entick v. Carrington, 95 Eng. Rep, 1765, 807 K.B.

² Moore, Barrington. "Privacy: studies in social and cultural history", New York: Sharpe, 1984, PP. 285-288.

³ Ronald B. Standler " Privacy Law in the USA", created September 1996, last revision 24 May 1998, available at: <http://www.rbs2.com/privacy.htm>

⁴ Swire, P. P, "Information Privacy, Official Reference for the Certified Information privacy Professional", iapp publication, 2007

2.2.1. Concept of Privacy in International Documents

The right of privacy has been considered in different regional and international documents that any of these documents and conventions have considered this right from a particular aspect. Some of conventions, documents and articles that have pointed to privacy, are as follows in order of years:

1) Declaration of Independence of America by Thomas Jefferson (1776): the second sentence of this Declaration of defining Human Rights notes: "We hold these truths self-evident, that all men are created equal and the Creator has endowed them with certain inalienable rights, that includes right of life, liberty and search of happiness."⁵

2) Declaration of Human Rights and Citizenship of France (1789): Declaration of Human Rights and French citizenships includes 17 articles and combination of individual and nation considerations. In Article 12 of the Declaration states: "The security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the good of all and not for the personal advantage of those to whom they shall be entrusted."⁶

3) Article 12 of the Universal Declaration of Human Rights states that: "no one shall be subjected to arbitrary interference with his person, family, home or correspondence or shall be molested her honor. Everyone has the right to be protected of the law against such interference or attacks."⁷

4) European Convention on Human Rights and Fundamental Freedoms (1950): Article 8 of the Convention provides: "1 - all have the right to be respected of their privacy, family life, home and correspondence. 2- No government official should use this right to be violated, except in accordance with law and if it is necessary for the interests of national security, public safety, economic well-being, preventing the disorder or criminal, preserve ethical health, or for protecting Rights and freedoms of others in a democratic society."⁸ The Convention entered into force in 1953.

5) International Covenant on Civil and Political Rights (1966): Article 17 (1) of the International Covenant on Civil and Political Rights, has not directly opposed to the definition of privacy, but there is inference from the opposite concept that it is necessary to specify certain and defined rules for entering privacy, article 17 of mentioned Convention provides: "1 - No person in private life, family, home or correspondence, arbitrary interventions (without permission) or to be unconstitutional, illegal and dignity

⁵ See: United States Declaration of Independence, available at: <http://www.humanrights.com/what-are-human-rights/brief-history/declaration-of-independence.html>

⁶ See: Universal Declaration of Human Rights and the French citizen 1789, available at: <http://www.facinghistory.org>

⁷ See: The Universal Declaration of Human Rights, available at: <http://www.un.org/en/documents/udhr>

⁸ The European Convention For the protection of Human Rights and Fundamental Freedoms, European Treaty series No. 5, 213, UNTS221

should not be molested. 2 - Everyone has the right to be protected by law against such interference or attack."

6) Resolution No. 428 of the Council of Europe (1970): In Section C of the resolution, necessary measures to protect the privacy of individuals have been mentioned. In this regard, Referring to the conflict between the domain of freedom right of information and freedom of speech with guaranteed right of privacy in Article 8 of the European Convention on Human Rights, the right of the former has not preferred than the latter and has not known the permit for violation of privacy⁹

7) Lawyers Congress, Stockholm (1977): The Congress states that respect for private life is necessary for human happiness and represent a general definition, which is particularly important. The resolutions of the Congress stated that: " Everyone has the right to live and be protected against such plans :

- A) Any interference in the private lives of his family and domestic.
- B) Any violation of physical or mental health or spiritual, moral freedom.
- C) Any violation of his honor and reputation.
- D) Any interpretation of the words and his actions are harmful.
- E) Non appropriate disclosure of his private life that is uncomfortable for him.
- F) The use of his name, identity and photo.
- G) Any activity in order to spy on him, stalk him down, putting him under surveillance and thus miss out on him.
- H) Confiscation of his correspondence.
- I) Use of Telecommunications oral or written with malice in him
- J) Disclose information given to him or taken contrary to the Privacy Rule of his profession."

8) The Council of Europe Convention for the Protection of Privacy (1981): According to this, countries in Union Europe should legislate regulations to protect the privacy of their citizens. Meanwhile, according to the treaty, the data collected, must have these conditions:

- 1. It should be obtained through legal means.
- 2. It should be achieved for specified and legitimate purposes and should not be used against defined targets.
- 3. The information should be correct and wherever necessary, it should be up to date.
- 4. Data are collected only when needed.
- 5. Collecting personal information of people which disclose their ethnic and racial origins, political opinions, religious, sexual relations and also in the field of health, is not possible unless provides the internal law of required support.

9) The Cairo Declaration of Human Rights (1990): Article 18 of the Islamic Declaration of Human Rights regarding to the security right of the private lives of individuals, has decreed: "1 - Every person has the right to live comfortable due to his life, property, honor and religion. 2-Every person has the right to be independent in his private affairs of life (housing, family, property, and communications), and tarnishing the reputation of the spy and monitor his or her affairs, is not permitted and must be protected against any coercive intervention.

⁹ See: Resolution 428, 1970, Council of Europe, available at: <http://assembly.coe.int>

10) Charter of Fundamental Rights of the European Union (2000): In article 7 of the Charter, has been emphasized on respecting to private and family life, home and communications of people.

2.2.2. The concept of privacy in doctrine

Privacy is one of concepts that seem there is no Encyclopedian definition of it. Although, many lawyers and experts have provided several definitions, but providing a clear and complete definition of it seems to be difficult because of ambiguous domain and challenged its concept. Furthermore, the growth of information and communication technologies that are related to privacy resulted in more difficulty in providing a clear concept of it.

Difficulty of providing a clear definition of the concept of privacy has been discussed by many scholars in this field. "Arthur Miller's" state that it is hard to define privacy because it is very vague and fragile. Also, "William Beaney" believes that even the most earnest advocates of the right of privacy must admit that there are serious problems in defining the nature and scope of this right.¹⁰

As defining privacy is difficult, it has led some theorists do not believe an independent identity for privacy and the protection of privacy is what they are called, is referred to other established rights. Therefore, there are 2 approaches. The first is dedicated to countries like France, Germany and some countries that follow "Romano-Germanic" system that studies privacy right with a critical opinion. The second approach is conceptually independent of other individual rights. This approach is devoted to the Anglo-Saxon countries that follow the system of "common law".

Samuel Warren and Louis Brandeis, the first spokesmen of privacy, defined this right to a "right of privacy or Let to be alone" based on the principle of honorable character. A principle that is a part of a more general right as named security right or "right of a person on his own personality." "Colin Bennett" a political scientist believes that the above definition of privacy, deals with the human dimension of this concept based on dignity, individuality, integrity and personal of people.¹¹

However, there are drawbacks for above definition: First, this definition is not comprehensive because it doesn't include some cases like the gathering of family or personal relationship. In those cases "loneliness" is not considered but it is privacy of people. Secondly, all items of privacy, is not applied. Because if one person observes the other without disruption lonely, that person will not have the right to protest.

"Ellis Smith" has defined privacy as: "our desire to a physical space where we can be free from harassment and assault, and may not be subjected to shame and responding and the control of timing, the way of disclosing personal information about ourselves will be in our hands."

¹⁰ Solove, Daniel, "Conceptualizing Privacy", California Law Review, Vol. 90, 2002, p.p. 1088-89

¹¹ Ronald B. Standler, Privacy Law in the USA, created September 1996, last revision 24 May 1998. available at: <http://www.rbs2.com/privacy.htm>

In this definition the word "desire" is used while: First, the desire is not the legal sense. Secondly, desire, depends on people. If there is violation of privacy of a person, there will be a desire by others. Thirdly, if we consider "desire" as a measure of privacy, generally human desires to be free from harassment and assault of others in public domain.

"Edward Bloustein states that privacy is a criterion to distinguish people from each other and believes if human is forced to share every minute of his life with others, will be deprived of human dignity and individuality. Thus, his feelings are not genuine because is raised apparently and his value will be like material objects.¹²

"O - L – Godkin" believes that privacy is the right to decide on how much access is permissible to information, feelings, thoughts, actions and personal dignity of an individual for others. (Limited access to other's itself). Also, "Charles Fried" former prosecutor of United States of America believes that privacy is not merely this issue that there is not information about us in the minds of others. But rather that we have control over information about ourselves.

According to what has been mentioned, it appears that difficulty of providing a comprehensive definition of privacy, has led scholars in this field to the citing specific examples and providing a clear definition has remained silent. Despite the difficulties and the problems, we need to provide the appropriate definition for this field.

To provide a comprehensive definition for privacy, it could be mentioned: "privacy is a part of life that person is free from interpellation and legal penalty and any decision about it, informing and observing is only by himself and involving the others or access it without his permission is not permitted."

3. Privacy and Procedures of European Court of Human Rights

In the early seventies, world countries legislated broad laws to protect the privacy of individuals. Around the world, popular movement was created for legislating comprehensive laws for privacy of people which aims to create a framework to protect the privacy of individual human beings.

In 1995, the European Union that was aware of shortcomings rules and many difference in safety rules of Member States, legislated an instruction that supported all European citizens against the misuse of personal information. The guidelines, entitled "Protection of personal against dissemination of data and the free circulation of this information" was considered a benchmark for national law of the Member States of the European Union and forced each of these countries making amendments until October 1998 to enact.

Guidelines of the European Union obligated Member States that any personal information of European citizens that may be used in non-European countries, should be covered. This issue resulted in increasing pressure to transfer these rules outside European countries.

3.1. European Convention on Human Rights

¹² Bloustein, Edward, "Privacy as an Aspect of Human Dignity", an Answer to Dean Prosser, NYULR, N. 39, 1964, PP. 962-71

European Convention on Human Rights, with full and correct title "European Convention for the Protection of Human Rights and Fundamental Freedoms", was developed in 1949 with the aim of promoting cultural and political life of Europe and promotes human rights, democracy and the rule of law in Europe.

The Convention is one of the most important and most prominent of human rights documents that are very important step towards the implementation of the approach based on UN Universal Declaration of Human Rights in 1948. The most prominent feature of this document is recognizing the right of individuals to appeal individuals who are entitled to complain the European Court of Human Rights enshrined in the Convention.

Complaints and supervising the implementation of the European Convention of Human Rights rules that was anticipated to be in two-stage, this system changed in 1998 with into force of Protocol No. 11. It means that European Court of Human Rights will address directly, without the intervention of the European Commission of Human Rights in cases of violations of the rights and freedoms enshrined in the Convention.

Article 8 of the European Convention on Human Rights states that privacy of people should be protected from the invasion of others and governments should respect this right. European Court of Human Rights as one of the mechanisms by which European Union legislation must be implemented, states that Privacy is a broad concept in several votes which includes physical and psychological integrity of a person.¹³

Article 8 has been legislated in order to respect for private and family life and correspondences of a person. Most of legal procedures are in connection with the definition of the concepts "private life", "domestic life", "Home" and "correspondence". According to what was mentioned, we survey concept, scope, and records related to any section of this article separately.

3.1.1. First Clause of Article 8 of the European Convention on Human Rights

Article 8 of the European Convention on Human Rights, states that the privacy of people should be protected from any invasion and knows it a right that must be supported and protected. In the first clause of this article states: "Everyone shall have the right to be respected to his privacy and family life, home and correspondence. The following are the resolution of the case referred to in this clause, separately and survey the procedures of the European Court of Human Rights.

3.1.1.1. Private life

Private life is a domain of people lives that includes personal relationships and it is opposite of his social, public and professional relations. Sometimes it seems difficult to distinct between places that are part of private individuals and recognition between those places is a problem even for the European Court of Human Rights.

¹³ See: CEDE 21 Oct. 1981, *Dudgon C/Royaumc-uni&41*. & CEDE 6 Fever, 2001, *Bensaid C/Royaumc-uni&47*.

The concept of private life was considered in the case of *Niemietz v. Federal Republic of Germany* in 1992.¹⁴ Demanding person said that searching his lawyer's office is in violation of the rights set forth in Article 8 of the European Convention on Human Rights. In contrast, the German government believed that the protection of privacy in private life as one of the first paragraph of Article 8 is not included in the law office of a lawyer. In their opinion, the convention is different from the concept of private life and home, business or profession. In other words, private life doesn't include professional and business activities.¹⁵

Regarding to the definition of the concept "private life", the Court stated in paragraph 29 of this case: "The Court knows providing a comprehensive definition of the concept of private life neither necessary nor possible. However, the court knows limitation of the sphere of private life to personal and internal issues of a person. Right to respect for private life must be to a certain degree that could lead to the development of personal relationships with others and the concept of private life separates from concept of social affairs and the professions of a person.

The existing policy is only related to his professional activities in mentioned case. In the other words, only professional activities are considered as an exception for protections available in article 8 because generalization of that to the other cases will lead to injustice and inequality as distinction between professional and nonprofessional activities of a person is difficult for these kinds of interferences. In fact, the court has failed to specify the border of private life and professional activities about telephone line that is used both business activities and private calls.¹⁶

For example, in the case *Halford against Great Britain* in 1997,¹⁷ it was voted that eavesdropping on private phone call that was done to the office, could jeopardize the right to respect private life of people.

The concept of private life has been also mentioned in several cases. Including, in the case of *X and Y v. the Netherlands* in 1985,¹⁸ the court argued that the rape of a woman with a physical disability has clearly endangered the concept of private life based on Article 8 of the European Convention on Human Rights.

Also, in opinion of the court about case of *Costello-Roberts v. United Kingdom* in 1993,¹⁹ was that corporal punishment by a teacher in a primary school shall not constitute a violation of Article 8. The court may decide of considering the severity of aggression. As

¹⁴ *Niemietz v. Federal Republic of Germany*, 251 Eur. Ct. H.R. (ser. A) (1992), available at: <http://www.hrcr.org/safrica/labor/Niemietz.html>

¹⁵ Wadham, J and Mount Field, H, "Blacks guide to the Human Rights Act 1998", Black stone press, London, 2000, p 104.

¹⁶ See the *Huvig v. France* judgment of 24 April 1990, Series A no. 176-B, p. 41, para. 8, and p. 52, para. 25. And, see the *Chappell v. the United Kingdom* judgment of 30 March 1989, Series A no. 152-A, pp. 12-13, para. 26, and pp. 21-22, para. 51.

¹⁷ Anthony, G, "UK PUBLIC LAW AND EUROPEAN LAW", Hart publishing, Oxford, 2002, p 68.

¹⁸ Wadham, J and Mount field, H (1999) .op.cit, p. 104

¹⁹ *Ibid*, P .104

it was mentioned, complainant student didn't act inconsistent with the physical and intellectual integrity as included in article 8.

Article 8 may also cover the public sphere through the environmental damage. For example, the Commission claims that a person had complained about the amount of air traffic on his home in case of *Rayner v. the British* in 1986.²⁰ This person claimed that aircraft noise would violate the rights set forth in Article 8 in relation to respect for private life and his home. Commission admitted that the complaint is within the scope of Article 8 of this case and ruled that this case is included indirect entry that is inevitable result of this matter. However, the Commission argued and decided that intervention is justified and authorized the contents of the second paragraph of Article 8.

Private life, in one of the cases was stated against the UK, included sexual activity as well. In other words, in this case, sex was considered as an element of privacy. In case of *Dudgeon v. United Kingdom* in 1981,²¹ the court recognized sexuality as the most personal aspects of a person's private life as in this case and stated that punishment of behavior of all homosexuals in Northern Ireland is unethical and violation of their personal life.

The court believed that a law that would allow to punish homosexuals is violation of the first clause of Article 8. Also, in case the *S v. England* in 1986, the Commission voted on the relationship between a gay couple that was within the scope of their private lives. In case of *Smith and Grady v. the British* in 2000²² was voted that the operation which had been done by Minister of Defense on discipline and cohesion of the sexual relationships of members, along with their dismissal of the system has been a severe interference of their private lives.

The Commission was of the opinion that the age difference between homosexuals and heterosexuals is a violation of the rights set forth in Article 8 in case of *Sutherland v. the United Kingdom* in 1998.²³ On the other hand, in case of *Laskey, Jaggard and Brown v. UK* in 1997,²⁴ the court where the plaintiff was imprisoned because of Sodomasochistic activities, and producing a video of him, commission didn't see any conflict due to clause 1 of article 8.

In this case, police saw video film of the plaintiffs and 44 other gay man's actions. Although these acts were done with their consent, but they were accused acts such as rape and assault and battery. In this case, all plaintiffs were sentenced to imprisonment and the sentence had been commuted for them, their conviction was upheld on appeals court. In this case, the court found no proof that this action is an unjustified interference with their right to respect their private life.

It seems that article 8 of the European Convention on Human Rights is also including to protect the rights of transgender people that is an aspect of private life. This issue is in

²⁰ Ibid, P. 104

²¹ Ibid, P. 105

²² Ibid, P. 106

²³ Ibid, P. 107

²⁴ Ibid, P. 108

order to recognize the new gender after a sex change. In case of *B v. France* in 1992,²⁵ the court ruled that the French government, has violated the first clause of Article 8 of the European Convention when refused to provide allow evidence of change to plaintiff person.

Protection of private life in the first clause of Article 8 of the European convention includes the rights of individuals in relation to non-disclosure of private information to third parties.²⁶ It is also necessary to include disclosure of confidential medical information in legal proceedings. Furthermore, providing a patient's medical information to the authorities to verify the claim for social security and disability benefits as health insurance is covered by the first clause of Article 8. In both of these cases, a violation of Article 8 has been fulfilled, but in each case the subject is justified by the fact that an action may be regarded under somewhat different conditions as a violation of Article 8.

3.1.1.2. Family Life

Family life is one of the aspects of privacy that is firstly protected by the Universal Declaration of Human Rights. Territory and sphere of family life, including issues related to respect the privacy of the family, the rights of parents in relation to children, marriage and its issues, adoption and more.

Article 8 of the European Convention on Human Rights, has recognized the right to respect family life of people. And respects that as a privacy issues and Except in exceptional cases mentioned in the second clause of this article, believes that any aggression to this right is unauthorized and lawsuit of European human rights.

European Court of Human Rights concerning the violation of the right to respect private life, with issues such as changing the name of the person for religious purposes, forbidding homosexuality as considered one of the most severe form of privacy, the expulsion of land which led to separate one from the other family members and similar issues.

Nowadays, family relationships are considered beyond formal relationships and legitimate arrangements. For example, in the case of *Mrs. Paula Marckx v. Belgium* in the 1979's,²⁷ As Mrs. Marckx was single when the birth of her daughter, there was no relationship between this mother and child based on Belgian civil law rights. While the court believed that there is conflict between Belgian civil rights and the rights set forth in the first clause of Article 8 voted that bilateral inheriting between parents and children from each other is one of private life results. Of course, Belgium corrected its civil law in this area in 1987.

In the case of *B v. the UK* in 1988,²⁸ the court interpreted definition of "family life", when the presence or absence of family life was raised in the case as a question, the court

²⁵ Ibid, P. 109

²⁶ Ibid, P. 110

²⁷ O Halloran, k, "The Politics of Adoption: International perspectives on law, policy and Practice" SPRINGER, NEYYORK, 2009, P 116.

²⁸ *B v. The United Kingdom*, Application No. 9840/82, Judgement of 8 July 1987, available at: <http://www.humanrights.is>

stated that family life is a fact which depends on actual and practical personal relationships.

In the case of *Crohn v. Netherlands* in 1994, the Court was on this opinion that living together can be a condition of family relationships as a principle under Article 8, However, exceptionally other factors may determine the family relationships that can exist 'family bond' between individuals. The court generally considers family as man, woman and their children.

Homosexual relationships with each other is not recognized as family life, in accordance with principles of family support based on first clause of Article 8, although it can be protected according to the principles of private life. In the case of *X v. British* in 1997, the court sentenced that the right to protect of family life highlighted in the first clause of Article 8, doesn't include a gay couple life.²⁹

The parent's right to family life that is protected by first clause of Article 8 can be violated by public officials. One of them is interfering in family affairs or care of children or block parents to access child caring. These actions are violations for family privacy. The Court concluded that Article 8 had been violated in the case *W and B* against the UK in 1987 and also the case *R* against the UK in 1988. The reason was that the local authorities had prohibited the parents from looking after their children in hearing procedure.

3.1.1.3. Home

Home is a place which a person selects it for living. There is no difference if he lives there completely or lives there temporarily and returns home again. It also doesn't matter who is the owner is not the owner. In the case of *Gglv v. the UK* in 1986, the couple who had a job because of that they lived in another city, and could not have lived permanently in their home. After returning to their home, the court refused awarding new living right to the couple refused and stated that it is not their house any more. But the Strasbourg court stated that the action of the local court is a violation of Article 8 of the European Convention on Human Rights and voted that the right of re-creating place "living at home" has been existed there.

The concept of life in home and private life may be overlapping and sometimes it is difficult to distinguish between these two concepts. In the case of *Niemietz v. Federal Republic of Germany* that was earlier mentioned in part of "private life", the court has also extended the concept of privacy to some workplaces. The court protected a case which office of a lawyer had been inspected by Police because it was included by privacy. Lawyer's office was protected because the court accepted private life is not one dimension but it consists of home and also office of lawyer in other place and time and any undue inspection and assault will be as violation of privacy.

In *McLeod's* case against the British in 1999, the court ruled that the police has the right to enter private residences based on his jurisdiction under common law to prevent breaches of public safety that is a legal action accordance with the purposes of the second clause of Article 8. However, based on the issues and evidence, the Court inferred that the police action is justified, but inappropriate, and in violation of the rights and privacy of

²⁹ Wadham, J, and Mount Field, H, (1999) op.cit. p .106.

home. Complainant was a woman that her former husband was entered previous house with the police in order to collect items were compiled based on the local court order.

Strasbourg Court stated that the police has violated woman's right of privacy with entering to her former home. The reason of the Court was this issue that the probability of a danger to public safety has been zero and very low. Therefore, their action was deemed inappropriate and in violation of the first clause of Article 8 as violating the privacy of home.

3.1.1.4. Correspondences and Communications

The right of respecting correspondences and communications of people means that people can relate each other without interfering officials and others. In this regard, the European Court of Human Rights in the case of *Malone v. the British* in 1984³⁰ stated that the rules must be specified by government which justifies interventionist actions and this item should be specified for people by clarifying these rules. In other words, governments are required to make clear to people, whether the people are entitled to their privacy practices and associated research.

The case of *Malone* was in 1977 that he was accused of dealing in illegal substances and stolen vehicles, by his Phone Controller. But he was acquitted of the charge by the jury in late 1979. During the investigation it was determined that the eavesdropping was carried out with the UK Home Office license, so Mr. *Malone* lawsuited in the Supreme Court because eavesdropping was illegal and violation of his privacy.

Malone Court rejected the claim, provided that such eavesdropping was conducted in accordance with the law, and it is not illegal. Because of this, *Malone* complained the British government in 1983 to the European Court of Human Rights. European Court of Human Rights condemned British government for violating the provisions of Article 8 of the European Convention on Human Rights.

Furthermore, European Court of Human Rights investigated a similar issue in the case of *Halford v. Britain* in 1977, which was introduced in section of private life. In this case the plaintiff was a former police assistant, who had complained that his calls to phone out of his office was been hearing so that the collected information can be used against him in court for sexual offenses. Court ruled that Article 8 on respect for private phone that has been carried out of the complaint office to out has been violated because it has not been based on the rule of law.

Regarding Correspondence and communications of prisoners and support it on the basis of Article 8, there are often significant issues in legal precedents. The European Court has stated in several cases that there are legal restrictions on prisoners' rights under the violence of first clause of Article 8. But in some cases these restrictions are justified under the second clause of Article 8. In this regard in the case of *Gelder v. England* in 1975, the court was of the opinion that the prisoner has the right to have correspondence with his lawyer without any intervention. The court ruled that no justification should be in restricting the defendant's relationship with his lawyer. While the factors of prison may

³⁰ Donald Wilson, J, " The United kingdom confronts the European Convention on Human Rights" University Press of Florida, U.S.A, 1997, P 134

take actions illegal interfering, the court stated that Strasbourg court will inspect if there have been any interference in case *Silver v. England* in 1983 to ensure that it is conducted in accordance with the second clause of Article 8 or not.

3.1.2. Second clause of Article 8 of the European Convention on Human Rights

Second clause of Article 8 of the European Convention on Human Rights sought to express exceptions to the principle of privacy protection that is listed in the first clause of this article. In the second clause of this article has been stated: "No government official should use this right to be violated, unless according to law and if this issue will be necessary for the interests of national security, public safety, economic well-being of the country, prevention of disorder or criminality, maintaining health, morals, or for the protection of the rights and freedoms of others, in a democratic society."

Second clause of Article 8 does not mean that any interference with the privacy of individuals who have been in the form of threads contained in this section is justified. But intervene in the privacy of private and family life, home and correspondence, must be justified based on exceptions and necessity of this intervention and also should be based on legitimate purposes. Therefore, the exceptions listed in this paragraph are allowed only if the above conditions are adhered. In other words, execution of limitations and exceptions to privacy protection is accepted in case of necessity of admission on the basis of the "law" and a "democratic society", be felt.

The concept of "based on law" is being mentioned in the second clause includes following as summary:

- 1) There is a specific legal rule and system that allows interference.
- 2) In addition of existence of a rule and particular law system, access is important. This means that an individual can be aware of its existence with an appropriate manner and access it.
- 3) The law must be clear and expressive, and citizens can understand better and clearer what the purpose of law is.

In this clause, in addition to the actions of the government and public institutions should be "based on law", the government measures to private individuals should also be such that it acts in a democratic society. Necessity of those actions to protect the rights of the public should be felt. The sample is allow the state to intervene in the privacy and even international, like terrorist actions that can be considered private in relation to terrorist acts condemned in all communities, and to maintain public safety which government intervention is needed.

Necessity of police interfering is also one of the concepts that defining the circle and the sphere looks difficult. The case of *Sunday Times v. the UK* in 1979, court allowed intervention based on need only with two conditions:

- 1) Involvement is associated with damage to public order.
- 2) Follow the interference must be proportionate to the legitimate aims.

The important concepts of the Strasbourg Court in several cases have been raised, are the "appropriateness". That is a criteria which shows government intervention is necessary in a democratic society or not.

In other words, being "proportionality" means that if it has been determined that the person abuses and violates of his social obligations and if there would be necessary for interfering to his privacy, enforcing law should be proportion to his act and shouldn't be unlawful interference. In other words, the government should not involve in law enforcement, disproportionately in the privacy of the individuals.³¹

Proportional criteria, is the underlying concept of a fair trial. Convention approach is whether the interference by the government based on the right in the second clause of Article 8 has been done, has specific constraints that based on this constraint, the interference is proportionate for following of legitimate goals. This means that even if the intervention is based on the rights contained in the Convention and according to legitimate objectives, if the violation of the legitimate aims set out in clause II, such interference is not acceptable as no proportionality.

"Lord Diplock" a famous English judge has stated about appropriateness of the criteria: "It is a decision that is unreasonable and disproportionate which challenges acceptable logical principles and moral standards that any reasonable person doesn't make such a decision".³² Convention, introduces creating interference with the rights protected by the three criteria of legitimate objectives, the appropriateness and necessity of the interference in a democratic society. In this regard, legal procedure has interpreted that the interference criteria is a "pressing social need". This is more difficult than the criteria of "some rational reasons": the tendency of government to protect the legitimate goals doesn't allow to limit proportional right of individuals.

An example for the need of necessity doctrine of legal procedure is case of *Dudgeon v. U.K* in 1981. Plaintiffs in this case challenged the law that was executed in Northern Ireland about homosexual sex of 2 people that both of them were satisfied. The court stated that the government intervened in the case to the applicant's right to respect and violate for his privacy enshrined in Article 8 of the European Convention on Human Rights.

3.1.3. Freedom of expression and privacy

The right of freedom of expression and freedom of information or the right of society to know is one of the principles of human rights that is recognized and has been stressed in Article 10 of European Convention on Human Rights. European Court of Human Rights has placed a prominent position for supporting freedom especially freedom of speech based on Article 10 of its votes and has created a special judicial procedure in this field by an extended interpretation.

Article 10 of the European Convention on Human Rights provides: "1- Everyone has the right of 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 geographical boundaries. This clause doesn't prevent governments demand to get permission to release news or television and film companies. 2- Exercise of these freedoms, since they are associated with their duties and responsibilities, may be required

³¹ See: *McLeod v United Kingdom* (1999) 27 E.H.R.R. 493.

³² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 375 at p. 410.

formalities, conditions, restrictions or penalties as are prescribed by law and to protect the interest of national security in a democratic society and are necessary for Territorial integrity or public safety, to prevent the establishment of chaos or committing crimes, protect the health and morals of the people, protection of the reputation or rights of others, to avoid disclosure of confidential information or maintaining the authority and impartiality of the judgment sets."

According to the above article, the first clause of this Article, has enumerated the freedom of expression elements, including freedom of conscience, freedom of thought and freedom of information and data information. Also, as in the second clause of Article 8, second clause of this article also discusses the limitations and exceptions to the principle of freedom of expression.

One of things that freedom of information or public right to know is limited to is "support the reputation or rights of others" or the "protection of privacy of individuals". In other words, we can say, the right to privacy recognized in Article 8 of the Convention, in some cases interact the right to know and freedom of information.

Privacy maintaining particularly in the fields of Information and Privacy of individual rights is the most important because it is associated with prestige and personality of people. Therefore, the European Court of Human Rights judges should decide about the case in which the rights enshrined in Articles 8 and 10 are associated and equalize between them.

By surveying votes of European Court of Human Rights, it becomes clear that the ideas in the face of the court cases involves freedom especially freedom of expression with a good view of the broad interpretation of the first clause of Article 10 of the European Convention of Human Rights and they had a narrow interpretation of the vote regarding to exceptions of clause 2.

However, since there is contrasted issue between the rights in these two articles, the interpretation of the European Human Rights Court judges from clause 2 of article 10 will narrow if the privacy is Politicians and political figures. Thus, the opinion of judges of European Court of Human Rights is different in cases which privacy of normal individuals is considered. This issue was raised in the case of *Baskaya and Okcuoglu v. Turkey* in 1999, which the court. Distinguished between political figures and normal citizens and that the actions of government should be judged by public opinion and this is one of requirements of democratic governments.

4. Conclusions

Privacy as a concept in which a character, dignity and physical integrity of the person, and the type a person uses to "be himself" and amplifying his senses under national law is considered in democratic societies. While the laws of countries try providing public safety and welfare of the community, decide to equalize violating factors of the privacy of individuals and restrict them.

Dynamic realm of privacy needs for complete and extensive rules, so that the fundamental human right in the Universal Declaration of Human Rights and the European Convention on Human Rights and other international instruments would be supported and practical

protection. Developed legal systems inspired by the natural need of human beings to be protected of their private life, have done significant measures to enhance the protection of fundamental principles of human rights.

Sentences of the European Court of Human Rights in the field of privacy shows that the court protects privacy and dignity of human beings is going to create procedures and rules that obligates countries to execution of human rights.

In the procedure of European Court of Human Rights, protecting privacy as a principle is accepted and the court tries to narrow interpretation of exceptions of the right so that completely supports privacy right of people. The principle of freedom of expression and the right to know the court where the original conflict with the right to privacy regarding to principle of expression freedom and the right of society to know, the court has supported this right if isn't against the privacy right of normal people. The majority of their votes are in favor of the right to freedom of information and freedom newspapers. In other words, the Court has balanced between opposition of Article 8 (right to privacy) and Article 10 (freedom of expression and freedom of information) of the European Convention on Human Rights Privacy. International privacy, between political figures and politicians with respect to the separation of the common people and equalize between these issues with the conflict that seems.

Inga Kotlo

*European Regional Master's Degree in Democracy
and Human Rights in South East Europe,
Center for Interdisciplinary Postgraduate Studies,
University of Sarajevo, Bosnia and Herzegovina*

Cultural Rights: The Complexities and the Value

Abstract

Cultural rights, as established by the Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Article 27 of the Universal Declaration of Human Rights (UDHR), represent an important segment in realizing the universal claim of humankind on freedom and dignity, through ensuring the respect of the right to take part in the cultural life and to enjoy the benefits of scientific progress and its applications. Even though they were formally awarded with the same status as other rights, it can be easily noticed that they are often marginalized. First, the very framework in which they exist is neglected – the economic, social and cultural rights are perceived as “second-generation rights” in the hierarchy of human rights. Moreover, within this framework cultural rights are the most neglected segment, or as Eide puts it: they seem to be “a residual category”. However, we must bear in mind that the states parties are under equal obligation as for all other rights to take steps to achieve progressively the full realization of the rights recognized in the Covenant. These steps must be taken both individually and through international assistance and cooperation. After all, serious commitment to ensuring the protection of cultural rights carries a considerable benefit for the society, because cultural rights strongly influence the development within states. This was emphasized by many authors, including Amartya Sen who argues that “development and culture are linked in a number of different ways, and the connections relate both to the ends and to the means of development”. It is not surprising that the World Bank, as a leading development agency, has in recent years started taking considerable interest in the way in which cultural factors can influence the process of development. Hence, even though we are facing a truly complex task, it is of both individual and communal value to achieve proper protection of cultural rights.

Keywords: *Cultural rights, The International Covenant on Economic, Social and Cultural Rights, Human rights*

1. Introduction

Cultural rights, as established by the Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Article 27 of the Universal Declaration of Human Rights (UDHR), represent an important segment in realizing the universal claim of humankind on freedom and dignity, through ensuring the respect of the right to take part in the cultural life and to enjoy the benefits of scientific progress and its applications.

Even though they were initially awarded with the same status as other rights, it is easily noticeable that they are often marginalized. First, the very framework in which they exist is neglected – the economic, social and cultural rights are perceived as “second-generation rights” in the hierarchy of human rights. (Note: a holistic approach to human rights is strongly encouraged especially after Vienna Declaration 1993 which stated that “all human rights are indivisible, interrelated and interdependent“.) Furthermore, within this framework of economic, social and cultural rights, the cultural rights seem to be the least considered, or as Eide puts it, “a residual category“.

Why are cultural rights so sporadically and superficially elaborated even today? Does this mean that cultural rights are considered as less significant than the economic and social rights in the International Covenant of Economic, Social and Cultural Rights (ICESCR)? The scattered literature suggests a number of reasons which explain but by no means justify the status quo. The reluctance of dealing with the cultural rights issues is certainly connected to the complexity and comprehensiveness of the term “culture“ which demands a very diverse (and thus supposedly costly) approach to protect it.

Hence, in order to get a wider picture first, the chapter 1 will offer a brief overview of the creation and development of the International Covenant of the Economic, Social and Cultural Rights, its status in comparison to the International Covenant of the Civil and Political Rights, as well as the perceived differences between the civil and political and economic, social and cultural rights.

In the second chapter, we shall focus on the cultural rights – their content and development. In addition, we shall become acquainted with the key factors which may underlie the general reluctance of dealing with the cultural rights, or elaborate the reasons why they are not properly addressed.

The third chapter will, however, emphasize their importance or indicate the reasons why they should be properly addressed.

This paper tries to shed more light on this largely unexplored topic through referring to the public documents, declarations, conventions (such as Universal Declaration of Human Rights 1948, ICESCR 1966, Vienna Declaration 1993) as well as publications of international bodies (Economic, Social and Cultural Rights Committee's General Comments, recent Concluding Observations), and the interpretations and the findings published by some of relevant authors from the cultural rights field (Asbjorn Eide, Rodolfo Stavenhagen, Gillian MacNaughton and Diane Frey, M. Baderin and R. McCorquedale, Amartya Kumar Sen etc.).

2. The troublesome path of creation of ICESCR

In order to better understand the reasons of the negligence of cultural rights, it is helpful first to grasp the bigger picture, or to get acquainted with the development of the framework within which these rights are created – The International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), which together with the International Covenant on Civil and Political Rights (ICCPR, 1966 and its two Optional Protocols) and the Universal Declaration of Human Rights (UDHR, 1948) constitute the International Bill of Rights.

From the very start, the idea of ICESCR arouse such controversies and difficulties which resulted in a 20-year long process of drafting, and carrying a signpost of "a probable failure" (Baderin & McCorquodale, 2007). The initial decision of the Human Rights Committee was not to include the economic, social and cultural rights in the Covenant at all, but this decision was overruled by the General Assembly. Thus, the HRC drafted a single Covenant of 73 articles grouped in 6 parts which covered both sets of rights: civil and political on one side, and the economic, social and cultural on the other. However, the destiny of ESC rights again changed its course due to the fact that some states indicated their unwillingness to commit to provisions of these rights. Hence, it was finally decided that there will be 2 Covenants drafted. Both of these were adopted on December 16, 1966, but their date of entry into force somewhat varies: the ICESCR entered into force on January 3, 1976, while ICCPR on March 23, 1976. (Isn't it peculiar that, despite the prediction of states' unwillingness, the ICESCR entered into force two months before the ICCPR?)

What caused these tremendous perplexities regarding the creation and development of ICESCR? The Human Rights Committee's standpoint was that the ESC rights were marked with complexity and inclarity regarding their justiciability, the structure and scope of their relevant legal obligations, and their application. Furthermore, certain states didn't perceive the ESC rights as real human rights to be addressed promptly, but as societal goals which should be achieved progressively and which demanded variety of methods carrying a higher financial burden. Also, the loose implementation procedure which consisted of submitting periodic reports about the adopted measures and the achieved progress in respecting ESCR to the Economic and Social Council was an additional obstacle for the ESC rights to receive the status equal to the one CP rights already had. These periodic reports, naturally, needed to be reviewed by someone, but it took three years after the ICESCR's entry into force for the ECOSOC to establish the Working Groups of governmental experts. The Working Group later on suggested a step for improvement, which was approved and realized in 1985 – they have become a Committee on Economic, Social and Cultural Rights comprising 18 independent experts who serve in their "personal capacity" and who are voted by states parties for four-year terms. This act definitely had a significant effect on ICESCR's status, because after this point the ESCR Committee finally gained the relevance as other bodies which supervise compliance with human rights treaties, even though the Committee was still subject to the power of ECOSOC, and without the security of being a treaty-based body (Baderin & McCorquodale, 2007).

The whole described troublesome process and the overall neglect was taking place in spite of the fact that a number of official documents and treaties have stood up in defence of the economic, social and cultural rights, ever since the creation of the Universal Declaration

of Human Rights (1948) which included specific ESC rights (Articles 22 to 27). The UN Charter, also, stated it shall promote "higher standards of living..., and international cultural and educational cooperation". In various occasions the General Assembly underlined that "[w]hen deprived of ESC rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man."¹, and reaffirmed the position that "the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent" (Baderin & McCorquodale, 2007). In addition, the Preamble of both Covenants recognize that: "[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights."² At last, Vienna Declaration, 1993 proposed in the Article 5 that: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."³

Finally, after the Vienna Declaration, 1993, the holistic approach is strongly recommended with its key principles of universality, inalienability, interdependence, indivisibility and equality of all human rights, which reject the traditional hierarchical distinctions between CP ("first-generation") and ESC ("second-generation") rights. In short, these principles confirm that all people are entitled to human rights at all times, that no one can (in)voluntarily surrender their human rights due to the fact that "one cannot stop being human no matter how badly one behaves or how barbarously one is treated", as Jack Donnelly puts it; that all the individual articles implicate each other; that the realization of each right may support or reinforce the realization of another right; that they represent an indivisible structure in which the value of each right is significantly augmented by the presence of many others; and that all are inherent to human dignity, and thus they are equal and cannot be ranked in hierarchical order (MacNaughton & Frey, 2011).

3. Cultural rights: content and complexities

As previously suggested, cultural rights represent the most neglected segment within the framework of economic, social and cultural rights.

Cultural rights are rooted in the Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is currently ratified by 161 country, with the following text:

¹ GA resolution 421 (V), 4 Dec 1950. See also Baderin, M. & R. McCorquodale: "The ICESCR: 40 Years of Development" in Baderin & R. McCorquodale „ESCR in Practice“ (2007), p.5

² ICCPR and ICESCR, Preamble

³ Vienna Declaration and Programme of Action, Art. 5, 25 June 1993

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.⁴

Also, they have been similarly prescribed by the Article 27 of the Universal Declaration of Human Rights (UDHR):

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.⁵

Although the initial articles provide only modest proposals, the subsequent literature (General Comments No. 21, No. 17 e.g.) have shed more light to the topic of cultural rights, especially since the late 1990's onwards, when their status as a "residual category" as Eide frames it, has decreased if only for a bit. For example, one of the most comprehensive reviews on the cultural rights is the General Comment No.21 (published in November 2009) which underlines that "[t]he full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world" and further clarifies the scope of terms occurring in the Article 15 of the ICESCR, including the term "everyone" which "may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such".⁶

⁴ Article 15 ICESCR, 1966

⁵ Article 27, UDHR, 1948

⁶ Committee on Economic, Social and Cultural Rights, Forty-third session, 2–20 November 2009, General comment No. 21, (art. 15, para. 1 (a), of the ICESCR)

However, if we browse the ESCR Committee's Concluding Observations, in desire to roughly examine the extent to which the cultural rights are dealt with, we may find a fairly mixed picture. As an illustration, we may take the fifty-first session's concluding observations and recommendations on how Albania, Austria, Belarus, Belgium, Bosnia and Herzegovina, Djibouti, Egypt, Gabon, Kuwait, and Norway comply with the standards of the International Covenant on Economic, Social and Cultural Rights. From a glance at the documents found on the official website of the Office of High Commissioner for Human Rights we may conclude that the topic of cultural rights spans from completely unaddressed to moderately addressed. A fine example for the first case can be the Concluding Observations of the 4th periodic report of Belgium with its (loosely translated) remark that "[t]he Committee regrets the fact that it was not provided with the adequate information on the impact of measures taken on both the federal and regional levels on the enjoyment of cultural rights by different minorities living on its territory. (art. 15)" and thus "[t]he Committee requests the State party to intensify its efforts to ensure that the various minorities living on its territory can fully enjoy their cultural rights".⁷ For the latter case, however, we may find the example of the Fifth periodic reports submitted by Norway (October 2012) in which the cultural rights are fairly elaborated in approximately 30 paragraphs which is in accordance with the approximate number of paragraphs dedicated to other specific rights, such as right to health, right to education etc.⁸

The notion of cultural rights is certainly the most complex, or as Lyndel Prott stated: "any attempt to talk about cultural issues in terms of rights may be slippery and difficult", and thus the process of clarifying their content and corresponding obligations is notably slower than in case of some other rights.

Firstly, it is a fairly difficult task to define the very term "culture"; culture is not a static concept: it changes all the time. To this fact, we may add the fact that the number of cultures existing in the world is very high and hard to determine; the World Commission on Culture and Development speaks of approximately 10,000 distinct societies living in roughly 200 states.⁹

Furthermore, there are at least three approaches in which we may define culture. In the classic highbrow sense, culture implies traditional canon of art, literature, music, or the creative products available only to the elite. In the pluralist sense, alongside to products of high culture, the umbrella term *culture* includes also the mass phenomena, or in other words products and manifestations of creative and expressive drive. The anthropological sense, on the other hand, suggests that culture is not only the product of creativity but also the society's underlying and characteristic pattern of thought (O'Keefe, 1998). Whatever definition we take, but preferably the anthropological one which is the most coherent with the ESCR Committee's view that culture is "broad, inclusive concept encompassing all

⁷ Observations finales concernant le quatrième rapport périodique de la Belgique, November 29, 2013 (only French version available at the official website), p.6

⁸ ESCR Committee's Concluding Observations of the Fifth periodic report submitted by Norway, 29 October 2012

⁹ Our Creative Diversity: Report of the World Commission on Culture and Development, 1995

manifestations of human existence“¹⁰, we may conclude that precisely the culture is the factor which “enabled man to raise himself above the level of the beast“, and that existence of the solid structure of culture and the proper respect of cultural rights is a precondition of the further advancement of an individual and the society as a whole.

Cultural rights are, self-evidently, closely linked to other rights, as it is shown in, for example, the Convention on the Rights of the Child (CRC, 1989), which serves as one of the finest examples of integration of different rights belonging to two different sets. In CRC the freedom of thought, conscience and religion (Article 14) and other civil rights stand side by side with the ESC rights to health (Art 24), to adequate standard of living (Article 27), to education (Article 28), and to culture (Article 30). Oddly enough, this Convention was rapidly ratified by 193 states (all United Nations member states), which could lead us to conclusion that the intertwining of the two sets of rights no longer represents a problem, and that their status is equally valued. However, the practice continues to show that cultural rights are still largely marginalized.

4. The Value of Cultural Rights

In the world which struggles with a wide range of serious and complex issues, cultural rights tend to be put aside as the least important ones, partly due to the mild and flexible language used in the core Articles of the ICESCR which served to some states as an “escape hatch”. Namely, the cultural rights, as well as the other economic and social rights, are to be *achieved progressively*, gradually, and in accordance with the *available resources*. Having in mind that fewer than 1 billion of people live in the “advanced democracies”, and the remaining 5 billion live in the countries classified as “low income” or “lower middle income” by the World Bank (Harrison 2000), we may anticipate that the number of the governments which claim that there exists a lack of available resources left to deal with cultural rights is considerably high.

However, again, we must bear in mind that the states parties are under equal obligation as for all other rights to take steps to achieve progressively the full realization of the rights recognized in the Covenant. These steps must be taken both *individually and through international assistance and cooperation*. If an underdeveloped state seeks no international assistance, that can serve as an indicator of their unwillingness to comply with the prescribed Article. Similar can be claimed for the economically powerful states which deny to help the developing states in the realization of ESC rights, because they do have certain level of obligation to assist the them. But why, in the end, do we need our cultural rights to be respected?

Let’s first focus on the individual, as an atom or the smallest unit of the society. According to Rawls, the individual is viewed as a conscious and purposive agent who acts in order to achieve certain goals or purposes, based on beliefs (s)he has about what is worth having, doing or achieving. These beliefs are always a matter of selection of what we believe to be most valuable from the various options available. Being aware of the options available to us and their significance is the precondition of making intelligent judgements about how to lead our lives. Our range of options is, naturally, determined by our cultural heritage. Thus, secure cultural structure and the protection of cultural rights is

¹⁰ Committee on Economic, Social and Cultural Rights, Forty-third session, 2–20 November 2009, General comment No. 21, (art. 15, para. 1 (a), of the ICESCR)

extremely important because it inevitably provides a fertile ground for human development. (Kymlicka, 1989)

Naturally, individuals with their personal development, as members of a community, contribute to its overall development. As an example, we may observe the community of black Americans during the mid-century period. Their underachievement was certainly a consequence of the denial of economic, social and cultural options. After breaking down the barriers to opportunity, and changing the attitudes about the race on the part of the whites, there was a mass movement of blacks into the middle class and its economic, social and cultural activities. (However, it should be noted that a racial gap still exists in the sphere of advanced education, income and wealth. (Harisson, 2000)

The relation between individual freedom and the achievement of social development was closely examined by Amartya Sen who concluded that people's achievements are strongly influenced by "economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives". (Sen, 2000)

This strong link between respect for economic, social and cultural rights and development within states was further emphasized by, again, Amartya Sen who argues that "development and culture are linked in a number of different ways, and the connections relate both to the ends and to the means of development. It is not surprising that the World Bank, as a leading development agency, has in recent years started taking considerable interest in the way in which cultural factors can influence the process of development." (Sen, 2000)

Suitably, the UN Declaration on Right to Development also clarified that development of the state depends largely on the human development, while precisely human development is the principal objective of the ESC set of rights.¹¹

5. Conclusion

The peculiar case of cultural rights, with its broad range of complexities regarding the very definition of the term "culture" and the diverse phenomena within, should be elaborated more in depth. The troubles regarding cultural rights are, luckily, at least partially reduced with the theoretical literature which subsequently interpreted the modest proposals given in the core documents. However, there is still a long way to go in order to give the cultural rights the deserved status of being shoulder-to-shoulder to all other rights.

It is certainly true that we are faced with an ever-changing complex and comprehensive notion which forms a significant part of our own (both personal and communal) identity. But this should only be a reason more why it is essential to put our hands deeper in the field and clarify its scope and implementation procedures, as well as the measures and indicators for progress examination.

It is also true, as we've witnessed it, that this task requires a significant amount of time. However, this should not be an excuse to throw cultural rights aside as "spitting in the

¹¹ UN Declaration on Right to Development, 1986

wind“, because it is of individual and universal value for cultural rights to be properly addressed. By doing so, we are ensuring that the cultural diversity is protected which is the precondition of maintaining and enriching the collage of life experiences and opportunities which, in bottom line, makes human life dignified and worthwhile. In addition, as it is repeatedly argued, the culture is involved in both the ends and the means of development, and thus cultural rights are clearly essential for achieving the highest possible level of human development.

Thus, the diverse complexities arising from dealing with cultural rights mustn't be used as an argument against their purposiveness and essentiality, because as O'Keefe (1988) argues, if diversity is sought to be protected, it should not come as a surprise that the means of doing so will also be diverse.

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Marina Gjorgievska

*European Regional Master's Degree in Democracy and
Human rights in South East Europe, University of Sarajevo
and University of Bologna, Macedonia*

Corporate Citizenship: New Concept for Human Rights Promotion and Protection

Abstract

The state has a central role when it comes to the protection and promotion of human rights. It creates laws and gives instructions for their implementation and sanctions for their failure, adopts international laws and declarations. However, the Universal Declaration of Human Rights (hereafter UDHR) states that every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”.¹ Therefore, businesses are included in UDHR, even though the private sector is not explicitly mentioned.²

If the business cares and respects human rights in the company, the satisfaction and the productivity of the workers will increase significantly, which in turn leads to improvement of the business itself.³ At the same time, the community will have a positive view of the particular corporation or firm, will use its products or services, knowing that these are the result of an environment where the employee is valued and respected.⁴ Corporate Citizenship, as a new concept for human rights

¹ The Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/> (viewed 12/03/2014).

² Marc Probst, M.P. (2007), ‘Human security and business - a contradiction in terms?’, In: Benjamin K. Leisinger, B.K.L., and Marc Probst, M.P. (ed.), *Human security & business*, 21-43, Ruffer & rub.

³ Christopher Bauman, C.W.B., and Linda J. Skitka, L.J.S. (2012), ‘Corporate social responsibility as a source of employee satisfaction’, In: Arthur Brief, A.B., and Barry Staw, B.S. (ed.), *Research in Organizational Behaviour*, 63-86, Elsevier Ltd.

⁴ Klaus M. Leisinger, K.M.L. (2007), ‘Corporate responsibility for human rights’, In: *Human security & business*, 44-73, Ruffer & rub.

protection and promotion is very important, because it is a tool which gives directions to businesses how to act regarding people and in which way to contribute to the community and human rights protection and promotion.

Although the literature covers a wide variety of approaches and theories about corporate citizenship and human rights, the aim of this paper is to analyze how corporate citizenship developed and examine the importance of the business sector for human rights protection and promotion. In order to do so, I will answer the following questions: why businesses are accepting to be corporate citizens, why they are inserting this concept in their annual working plans and develop different implementation strategies.

Keywords: *Corporate citizenship, corporate social responsibility, human rights, protection and promotion of human rights.* Introduction

Introduction

The state has a central role when it comes to the protection and promotion of human rights. It creates laws and gives instructions for their implementation and sanctions for their failure, adopts international laws and declarations. However, the Universal Declaration of Human Rights (hereafter UDHR) states that every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”.⁵

Therefore, businesses are included in UDHR, even though the private sector is not explicitly mentioned⁶. Encouraged by this idea, in 2003, UN Sub-commission on the Promotion and Protection of Human Rights published a document entitled: *“Draft norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”*.⁷ These norms are a compendium of human rights standards of particular relevance to companies. While they confirm that the main responsibility for human rights lies with the state, there are nonetheless important areas in which companies have special obligations: non-discrimination, the rights to security, employment rights, the

⁵ The Universal Declaration of Human Rights. <http://www.un.org/en/documents/udhr/> (accessed 12/03/2014).

⁶ Marc Probst, M.P. (2007), ‘Human security and business - a contradiction in terms?’, In: Benjamin K. Leisinger, B.K.L., and Marc Probst, M P. (ed.), *Human security & business*, 22-43, Ruffer & rub.

⁷ Ibid.

promotion of economic, social and cultural rights, and the rights to development in accordance with company capacities.⁸

The term ‘corporate citizenship’ (hereafter CC) has been used increasingly by corporations, consultants and scholars to echo, underscore, extend, or re-orient certain aspects of corporate social responsibility. However, the introduction of this terminology raises important questions about the role of corporations, particularly at a time when there are growing demands for a critical review of the institutions of business and society.⁹

If the business cares and respects human rights in the company, the satisfaction and the productivity of the workers will increase significantly, which in turn leads to improvement of the business itself.¹⁰ At the same time, the community will have a positive view of the particular corporation or firm, will use its products or services, knowing that these are the result of an environment where the employee is valued and respected.¹¹ CC, as a new concept for human rights protection and promotion is very important because it is a tool which gives directions to businesses how to act regarding people and in which way to contribute to the community and human rights protection and promotion.

Although the literature covers a wide variety of approaches and theories about CC and human rights, the aim of this paper is to analyse how corporate citizenship developed and examine the importance of the business sector for human rights protection and promotion. In order to do so, I will answer the following questions: why businesses are accepting to be corporate citizens, why they are inserting this concept in their annual working plans and develop different implementation strategies.

In the first chapter I provide short historical background of the concept of corporate citizenship. In the second chapter I focus on states’ responsibility towards human rights protection and promotion and shared responsibility with non-state actors. In the third chapter I focus on potential of CC.

⁸ Ibid.

⁹ Jeremy Moon, J.M., Andrew Crane, A.C. and Dirk Matten, D.M. (2003), Can corporations be citizens? Corporate citizenship as a metaphor for business participation in society (2nd Edition). ICCSR Research Paper Series, Nottingham: International centre for corporate social responsibility.

¹⁰ Christopher Bauman, C.W.B., and Linda J. Skitka, L.J.S. (2012), ‘Corporate social responsibility as a source of employee satisfaction’, In: Arthur Brief, A.B., and Barry Staw, B.S. (ed.), *Research in Organizational Behaviour*, 63-86, Elsevier Ltd.

¹¹ Klaus M. Leisinger, K.M.L. (2007), ‘Corporate responsibility for human rights’ In: *Human security & business*, 44-73, Ruffer & rub

1 Corporate citizenship

Even though this new term was accepted, the older terms and concepts are still in use, i.e. Corporate Social Responsibility, Corporate Sustainability, Corporate Responsibility. Kraus and Britzelmaier claim that, however, comprehensive and commonly accepted definitions of these terms have not yet been found.¹² In this chapter I will give a concise definition of the concept corporate citizenship and present the main stages of its development.

2.1 Defining corporate citizenship

Corporate citizenship has emerged as a prominent term in the management literature dealing with the social role of business¹³ and that businesses should not be interested only in economic profit, but they should be considered as citizens in society who have their rights, but at the same time duties towards the state.¹⁴ Carroll, for example, describes four firm social responsibility categories among which are the ethical responsibilities. She continues by saying that "The four-part framework provides us with categories for the various responsibilities that society expects businesses to assume."¹⁵

Gardberg and Fombrun describe corporate citizenship as "the portfolio of socioeconomic activities that companies often undertake to fulfil duties as members of society".¹⁶ McIntosh holds that:

Corporate Citizenship [...] involves corporations becoming more informed and enlightened members of society and understanding that they are both public and private entities. [...] They are created by society and derive their legitimacy from the societies in which they operate. They need to be able to articulate their role,

¹² Patrick Kraus, P.K., and Bernd Britzelmaier, B.B. (2012), "A literature review on corporate social responsibility: definitions, theories and recent empirical research", *International Journal of Management Cases* (Access Press UK).

¹³ Dirk Matten, D.M., and Andrew Crane, A.C. (2003), *Corporate Citizenship: Towards an extended theoretical conceptualization*. ICCSR Research Paper Series, International centre for corporate social responsibility.

¹⁴ Jeremy Moon, J.M., Andrew Crane, A.C. and Dirk Matten, D.M. (2003), *Can corporations be citizens? Corporate citizenship as a metaphor for business participation in society* (2nd Edition). ICCSR Research Paper Series, Nottingham: International centre for corporate social responsibility.

¹⁵ Archie B. Carroll, A.B.C. (1979), *A three-dimensional conceptual model of corporate social performance*, *Academy of Management Review*, 4, 500.

¹⁶ Naomi A. Gardberg, N.A.G., and Charles J. Fombrun, C.J.F. (2006), *Corporate citizenship: creating intangible assets across institutional environments*, Vol. 31, 2 In: *Academy of Management Review*, 329–346.

scope and purpose as well as understand their full social and environmental impacts and responsibilities.¹⁷

Waddock states that: 'Corporate citizenship really means developing mutually beneficial, interactive and trusting relationship between the company and its many stakeholders – employees, customers, communities, suppliers, governments, investors and even non – governmental organizations (NGOs) and activists through the implementation of the company's strategies and practices. In this sense, being a good corporate citizen means treating all of the company's stakeholders (and the natural environment) with dignity and respect, being aware of the company's impacts on stakeholders and working collaboratively with them when appropriate to achieve mutually desired results'.¹⁸

Corporate citizenship is about companies taking into account their complete impact on society and the environment, not just their impact on the economy. It is about business assuming responsibilities that go well beyond the scope of simple commercial relationship.¹⁹

Companies that take corporate citizenship seriously can improve their reputation and operational efficiency, while reducing their risk exposure and encouraging loyalty and innovation. Overall, they are more likely to be seen as a good investment and as a company of choice by investors, employees, customers, regulators and joint venture partners.²⁰

The core of CC concept is to activate private sector and encourage businesses to contribute to the community, to fulfill the responsibilities expected by stakeholders. I find Waddock's definition most suitable and can best serve the interest of human rights. If company cares about all stakeholders and their rights and is actively trying to promote and protect them during every day work, than all sides will be pleased. I can conclude that CC is company's obligation towards the society/citizens and what society/citizens have been expected to be fulfilled by the

¹⁷ Malcolm McIntosh et al, M.M. (2003), "Living corporate citizenship – Strategic routes to socially responsible business", Prentice Hall, London. Quoted in Jeremy Moon, J.M., Andrew Crane, A.C. and Dirk Matten, D.M. (2003), Can corporations be citizens? Corporate citizenship as a metaphor for business participation in society (2nd Edition). ICCSR Research Paper Series, Nottingham: International centre for corporate social responsibility.

¹⁸ Sandra Waddock. S.W. (2003), The Journal of Corporate citizenship, issue 9 <http://www.greenleaf-publishing.com/content/jccsampl.pdf> (accessed 11/03/2014).

¹⁹ Rafique Qaiser Yasser, R.Q.Y. (2011), Corporate Citizenship: A New Peak, <http://ssrn.com/abstract=1828602> or <http://dx.doi.org/10.2139/ssrn.1828602> (accessed 11/03/2014).

²⁰ Ibid.

businesses. In continuance, after the historical development, I will speak only about the Human Rights issue linked to CC.

2.2 Historical development

Kraus and Britzelmaier trace the origins of Corporate Social Responsibility (hereafter CSR) in the 1930s when E. Merrick Dodd stated that managers have social responsibility towards the society²¹. Since then a lot of theories and definitions have arisen for conceptualizing of this term. I will mention the follows "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large"²².

While the terminology of CC has been around for many years it was seldom used prior to the 1980s. A massive growth in usage of CC can be found in the last two decades²³. The need for a new term, i.e. CC, emerged because CSR implies that "responsibility" is "concept which is not present in business, or even worse, which is opposed to business".²⁴ The word "responsibility" was "reminding businesses of something additional they should or even must do".²⁵ Citizen, on the other hand, means to be like the others, to be part from the society, to find your place. Citizenship then focuses on rights and responsibilities of all members of the community, which are mutually interlinked and dependent on each other.²⁶

The businesses rather than adding new responsibilities and activities to their own agenda, simply chose to base it around being a "good corporate citizen".

²¹ Patrick Kraus, P.K., and Bernd Britzelmaier, B.B. (2012), "A literature review on corporate social responsibility: definitions, theories and recent empirical research", *International Journal of Management Cases* (Access Press UK).

²² The World Business Council on Sustainable Development, (2000), *Corporate Social Responsibility: Meeting changing expectations*, <http://www.wbcsd.org/pages/edocument/edocumentdetails.aspx?id=82&nosearchcontextkey=true> (accessed 10/3/2014).

²³ Andrew Crane, A.C., Dirk Matten, D.M. and Jeremy Moon, J.M. (2008), *The Emergence of Corporate Citizenship: Historical Development and Alternative Perspectives* (Chapter 2) (2008). In: Andreas Georg Scherer, A.G.S., and Guido Palazzo, G.P. (ed.), *Handbook of Research on Global Corporate Citizenship*, 25-49, Cheltenham (Edward Elgar).

²⁴ Dirk Matten, D.M., Andrew Crane, A.C. and Wendy Chapple, W.C. (2003), "Behind the mask: Revealing the true face of corporate citizenship." In: *Journal of Business Ethics*, no. 45, 109-120.

²⁵ Dirk Matten, D.M., Andrew Crane, A.C. and Wendy Chapple, W.C. (2003), "Behind the mask: Revealing the true face of corporate citizenship." *Journal of Business Ethics*, no. 45, 109-120.

²⁶ *Ibid.*

2 Corporate citizenship and connection with human rights protection and promotion

According to Weiss, the international community has undergone changes due to globalization and close integration of states. These changes along with the influence of non-state actors have a significant impact on state responsibility. Although states remain central to state responsibility, other non-state actors have played important roles in carrying out state responsibilities. Among these organizations include international organizations, corporations, nongovernmental organizations, ad hoc groups. Individuals have also played a significant role in shaping state responsibility. Over the years, treaties have been entered into by states to regulate this relationship. These treaties and international organizations have a significant impact on development of the doctrine of state responsibility.²⁷ The above mentioned is also valid with reference to the role of businesses (as a non-state actors) for promotion and protection of human rights.²⁸

3.1 Business for human rights protection and promotion

Wells and Elias²⁹ explain how non state actors started to be more responsible for human rights protection and promotion. They argue that even though at the beginning just the states were responsible for human rights, in the private sector there were numerous examples of firms or their suppliers taking advantage of local workforces, through low pay, long hours, and poor working conditions as well as suppressing trade union rights.³⁰ States were unlikely to take action against multinational corporations in order to protect labor standards and human rights because of fears of losing much needed foreign investment. During the time, it became obvious that except state, the private sector also, can violate the human rights. From that point, the idea to include business in the society raised.

Beginning in the early 1990s, a handful of companies began unilaterally to adopt statements of general business principles, which purposed to institutionalize the company's commitment to good practices. In 1991, for example, Levi Strauss

²⁷ Maranga Kennedy, M. K., (2011), "The Changing Role of State Responsibility: Comparative Approach." *Journal of Global Affairs and Public Policy* Vol. 1, No. 1, (accessed 11/03/2014).

²⁸ Benjamin K. Leisinger, B. K. L., and Marc Probst, M. P. (2007), *Human security & business*. Vol. I. Rüffer & rub.

²⁹ Celia Wells, C. W., and Juanita Elias, J. E. (2005), *Catching the Conscience of the King: Corporate players on the International Stage*. In: *Non-State Actors and Human Rights*, 141-175, Oxford University Press.

³⁰ *Ibid*.

adopts its 'Global Sourcing and Operating Guidelines', which declared that 'we will favor business partners who share our commitment to contribute to improving community conditions'. The company's well publicized decision to withdraw from Myanmar in 1992 gave effect to these policies.³¹

The following guidelines, principles, declarations are essential for the protection and promotion of the human rights. According to me, their value is very high, because are official documents created by important stakeholders and important influential international bodies and so, provide directions for establishing and fostering the relationship between: businesses and human rights, citizens and governments. OECD Guidelines for Multinational Enterprises, the ten principles of UN Global compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the UN Guiding Principles on Business and Human rights³² and EU recommendations for businesses to be social responsible, are encouraging business sector actively to care for the protection and promotion of human rights and are offering more formal approach.

The demand for socially responsible corporations' increases also from sources other than regional or global organizations; stakeholders are now more aware of their individual powers (sometime collective movements) against companies that do not care to accomplish their social responsibilities. For example, investors who find out about a company's negative corporate citizenship practices could withdraw funds, boycott its products or services or speak out against that company among family and friends' as well broad costing media swell these news all over the world in hours.³³

Regarding human rights protection and promotion, Probst states that there are nonetheless important areas in which companies have special obligations: non-discrimination; the rights to security, employment rights, the promotion of economic, social and cultural rights to development in accordance with company

³¹ Ralph G. Steinhardt, R.G.S. (2005), Corporate responsibility and the international law of human rights: the new lex mercatoria, In: Non-State Actors and Human Rights, 177-226, Oxford University Press.

³² Communication from the commission to the European parliament, the Council, the European economic and social committee and Committee of the region. A renewed EU strategy 2011-14 for Corporate Social Responsibility,(2011).

³³ Rafique Qaiser Yasser, R.Q.Y. (2011), Corporate Citizenship: A New Peak, <http://ssrn.com/abstract=1828602> or <http://dx.doi.org/10.2139/ssrn.1828602> (accessed 11/03/2014).

capacities.³⁴ He adds that company's sphere of influence is divided into three areas: the situation at the workplace or within the company and in subsidiaries of the parent company (direct investments); the situation outside the workplace (for example relations and suppliers and customers); and the situation in the society in which the company operates.

Leisinger is talking about – “can” norms (norms above national laws and above morally expected). Acknowledgment of “can” norms is desirable from a human development point of view and the respective corporate deliverables (e.g. corporate philanthropy, pro bono research, community programs and other non-for-profit endeavors) may be equated with excellence in corporate citizenship.³⁵

3.2 Voluntary basis

The idea behind CC and its voluntary acting is that companies are not obliged by the law and are not existing sanctions for not acting responsibly toward society. Governments and international bodies take more action toward increasing the awareness within the companies about their possibilities and role for the wellbeing of the society.

The Global Compact, [and other similar norms and declarations] offers a soft law approach to corporate wishing to signal their willingness to comply with basic human rights, labour, and environmental standards.³⁶ Soft law is “soft” in the sense that it does not by itself create legally binding obligations: it derives its normative force through recognition of social expectations by states and other key actors.³⁷

Leisinger, based on Ruggie's report argues that “self-regulation by business through company codes and collective initiatives, often undertaken in collaboration with civil society” is resulting in “innovation and policy diffusion”.³⁸

³⁴ Marc Probst, M.P. (2007), "Human security and business - a contradiction in terms?", In: Benjamin K. Leisinger, B. K. L., and Marc Probst, M. P. (2007), Human security & business. Vol. I, 21-43, Rüffer & rub.

³⁵ Klaus M. Leisinger, K.M.L. (2007), "Corporate responsibility for human rights", In: Benjamin K. Leisinger, B. K. L., and Marc Probst, M. P. (2007), Human security & business. Vol. I, 44-73, Rüffer & rub.

³⁶ Katharina Pistor, K.P. (2007), "Human rights and corporate governance", In: Benjamin K. Leisinger, B. K. L., and Marc Probst, M. P. (2007), Human security & business. Vol. I, 202-219, Rüffer & rub.

³⁷ Tripartite declaration

³⁸ United Nations. Draft Interim Report on the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises. Prepared by John Ruggie, J.R. (2006), Quoted in Klaus M. Leisinger, K.M.L. (2007),

Leisinger, furthermore, states that there are a number of good reasons for assuming corporate responsibility to respect and uphold human rights: reinforcing company's societal "license to operate", having more motivated and productive employees and at the same time becoming more attractive to highly qualified talent, better opportunities for collaboration between potential partners, thus gaining an advantage in the established markets, and finally shouldering responsibility is the best argument against political demands for additional regulation.³⁹

Even though the idea of CC is promoted by international bodies as voluntary acting, there is still a question if business will meet the demand for human rights protection and promotion, at the end of the day.

3 The future of CC

Even though a large number of companies incorporated CC as an integral part of their functioning, still a large number of businesses have a hard time accepting it. Additionally in this chapter I will discuss the challenges and issues of CC.

4.1 Best practices

The UN Global Compact is the largest "corporate citizenship" initiative in the world. Almost 5000 companies have signed the initiative whereby they voluntarily commit themselves to adhere to ten principles in the areas of human rights, labour rights, the environment and anti-corruption.⁴⁰

Ruggie conducted a survey on respect for human rights among the companies in the Fortune 500. His survey found that a large number of companies surveyed take into account human rights aspects in their corporate social responsibility policies, in particular the right to non-discrimination, health and safety standards as well as prohibition of child and forced labour and the rights of privacy.⁴¹ However, only

"Corporate responsibility for human rights." In: Human security & business, 44-73. Ruffer & rub, 2007.

³⁹ Klaus M. Leisinger, K.M.L. (2007), "Corporate responsibility for human rights." In: Human security & business, 44-73. Ruffer & rub, 2007

⁴⁰ Dorothee Baumann, D.B., and Andreas Georg Scherer, A.G.S. (2010), MNEs and the UN Global Compact: An Empirical Analysis of the. IOU Working Paper Series, Zurich: Institute of Organization and Administrative Science.

⁴¹ Marc Probst, M.P. (2007), "Human security and business - a contradiction in terms?", In: Benjamin K. Leisinger, B. K. L., and Marc Probst, M. P. (2007), Human security & business. Vol. I, 21-43, Ruffer & rub.

few companies have an explicit human rights policy. Such a policy is essential in order to fully evaluate the attendant risks and opportunities.⁴²

Therefore, it is needed and recommended each business to create their own specific paper in the form of code of conduct/ethic code at least, that will go in favor of the human rights and being corporate citizen.

4.2 Challenges to CC

The biggest discussion regarding CC today is the creation of legal framework. Hauser states that voluntary initiatives have limits.⁴³ They are insufficient because they work only for well intentioned.⁴⁴ Moreover, the multiplicity of codes and standards is counterproductive: companies take “self-service,” picking up some of the rights and leaving others, like for instance, the right to collective bargaining and freedom of association. Voluntary initiatives generally offer very limited leverage for victims of abuse.⁴⁵ They do not allow a systematic review of the human rights performance of companies, which would enhance their capacity to put in place corrective procedures.⁴⁶

Similarly, recent studies have shown that the business world has not succeeded in persuading the public that companies are serious about corporate social responsibility in practice.⁴⁷ The research published by Observer newspaper, reveals high levels of scepticism among leaders from different sectors.⁴⁸ These leaders believe strongly that only legislation is effective. They want laws to compel companies to act responsibly.⁴⁹

Falk argues that multinational companies have no ‘established moral obligation beyond their duties to uphold the interests of their shareholders’; the efforts they to ‘improve their public image in relation to human rights are a manner of self-

⁴² Ibid.

⁴³ Daniele Gosteli Hauser, D.G.H. (2007), "Actions speak louder than words" In: Benjamin K. Leisinger, B. K. L., and Marc Probst, M. P. (2007), Human security & business. Vol. I, 179-200, Rüffer & rub.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Mary Robinson, M.R. (2008), "Beyond good intentions: corporate citizenship for a new century." In: Frank J. Lechner, F.J.L. and John Boli, J.B. (ed.), The Globalization Reader, USA, UK and Australia: Blackwell Publishing Ltd.

⁴⁸ Mary Robinson, M.R. (2008), "Beyond good intentions: corporate citizenship for a new century." In: Frank J. Lechner, F.J.L. and John Boli, J.B. (ed.), The Globalization Reader, USA, UK and Australia: Blackwell Publishing Ltd.

⁴⁹ Ibid.

interest that does not reflect the existence or acceptance of a moral obligation'; and even the long term compliance with the standards contained in voluntary codes of conduct would take a long-time to 'ripen into a moral obligation'.⁵⁰ He concedes that a 'framework of international legal obligations' for corporations would help protect human rights.⁵¹ As human rights are universal, is it the time to have universal law regulation concerning CC, if we take into account different governments, different economies all around the world?

So, more emphasize should be put on: intensifying the work between all international bodies, governments and businesses and creating new common strategy to improve the impact of CC for human rights protection and promotion.

4 Conclusion

Corporate Citizenship is mutual long lasting cooperation between businesses, citizens and governments. It is a concept which is defending the human right. Businesses are accepting to be corporate citizens by inserting this concept in their annual working plans as responsible citizens in their own society. They are striving toward this by developing different implementation strategies encouraged by ethical reasons, while increasing their positive business' status and picture in the society.

CC is an investment in the future of the company and society. Companies that take corporate citizenship seriously can improve their reputation and operational efficiency, while reducing their risk exposure and encouraging loyalty and innovation. Overall, they are more likely to be seen as a good investment and as a company of choice by investors, employees, customers, regulators and joint venture partners.

It can be concluded that CC is company's obligation towards the society/citizens and what society/citizens expect have to be fulfilled by the businesses. Even though the idea of CC is promoted by international bodies as voluntary acting, there is still a question, if business will meet the demand for human rights protection and promotion by acting voluntarily. There is a need and recommendation to each business to create their own specific paper in the form of code of conduct/ethic code, at least, that will go in favor of the human rights and

⁵⁰ Richard Falk, R.F. (2004), "Human rights", Foreign Policy, Quoted in Philip Alston, P.A. (2005), The 'not-a-cat' syndrome: Can international human rights regime accommodate non-state actors? Vol. XIII/3, In: Non - State Actors and Human Rights, edited by Philip Alston, P.A. Oxford: OXFORD University Press.

⁵¹ Ibid.

being corporate citizen. More emphasize should be put on: in intensifying the work between all international bodies, governments and businesses and creating new common strategy to promote and improve the impact of CC for human rights protection.

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Patrycja Jankowska

Faculty of Law, University of Warsaw, Poland

How to assert your Rights at the European Level? What kind of Human Rights are ensured in Legal Documents and How Individuals can protect themselves

Abstract

Nowadays, the issues of human rights protection seems to be very popular in Europe. However, what do the terms “human rights” and “international human rights law” exactly mean? What kind of human rights are ensured in legal documents ratified by our countries? Why are the human rights issues so important and how the individuals protect their rights? First of all, human rights should be protected at the national level. Unfortunately, sometimes national legal systems are not effective enough to protect human rights, which lead to the creation many international organizations. There are international governmental organizations (global and regional one) and non-governmental organizations (“NGOs”). The most important intergovernmental, global organization is the United Nations. This reputable institution promotes international co-operation and builds an international system of human rights protection by inter alia creating the Universal Declaration of Human Rights or establishing the Human Rights Council. Recently it developed the Complaint Procedure which allows organizations as well as individuals to bring human rights violations to the attention of the Council. Within the UN many countries have ratified more specialized treaties and have assumed obligations and duties under international law to respect, protect and fulfill human rights. Moreover, the individuals are able to claim their rights with a help of regional organizations. The Council of Europe which lead to the introduction the European Convention on Human Rights. The states which have ratified the Convention are obliged to secure and guarantee the fundamental rights enforced by European Court of Human Rights. The European Court of Justice, the highest court of European Union, is a similar organization. The key goal is an equal application of the Charter of Fundamental Rights of the European Union across all EU member states. Additionally, there are non-governmental organizations which support the victims in protecting their human rights, such as Amnesty International or Human Rights Watch. The goal of this paper is try and convinced you that these institutions are able to protect the human rights and ensure good enough legal protection for European citizens.

Keywords: *Human rights protection, International law, International human rights law, Europe*

1 Introduction

Nowadays, the issues of human rights protection seems to be very popular and vivid in Europe. The desire for the protection of human rights is deeply-rooted in human nature. First of all, human rights should be protected at the national level. Unfortunately, sometimes national legal systems are not effective enough to guarantee their protection. Human rights also require to be controlled by higher instance. This has led to creation of many international organizations. It gives individuals an opportunity to assert their rights, if they are violated at the national level. Globally there are many organizations human rights protection on their agendas. There are also several distinguished coherent regional human rights regimes like: African, American, Asian, European and Oceanian. In this paper I would like to focus on the human rights protection at the European level.

What are human rights?

Formulating an adequate definition of human rights is quite problematic. According to "The Encyclopedia of Human Rights Issues since 1945": "Human rights is an international term that refers to certain moral and legal entitlements, which all human beings are said to have". Human rights are universal and inalienable which means that they belong to every human being and cannot be taken away. Moreover, the rights are interdependent and indivisible, whether they are political or civil. Another feature of human rights is the equality and the non-discriminatory nature which ensures that they apply to everyone regardless of gender, color, race, age etc. There are three generations of human rights. The first generation centers around Civil and Political Rights, which protect individuals against the interference of state. Examples include: the right to fair trial, freedom of speech, vote, assembly or freedom from torture. The second generation involves Economic, Social and Cultural Rights. That group protects individuals when their rights are interfered with by third parties, examples include the right to education, healthcare, housing, employment and social security. The third generation is Collective Rights like the right to prosperity, economic development, healthy environment, clean air, water, etc. Only the minimum catalogue of human rights is defined by international law. Participating states are obliged to abide by them. Moreover, states are expected to implement more detailed legal provisions to regulate human rights at the national level.

What is international human rights law?

The end of the Second World War was the turning point in the development of an international system of human rights protection. In 1945 in San Francisco the United Nations organization watching the human rights was established. Many rights are jointly recognized by the international society. Numerous binding treaties, documents and agreements adopted by many countries since 1945 contributed to the body of international human rights. Customary international law which lays down the rules of law taken out of the consistent acting of states. Other instruments have been adopted at the regional or national level. States which ratified the human rights treaties are obliged to respect these rights and ensure that the domestic regulations are compatible with international law. If the rights are violated at the national level, the international legislation should provide a remedy for that kind of abuses. The establishment of the rule of law at the national and international level is crucial in respecting human rights.

Why should we protect them?

In view of main characteristics of human rights like universality, equality and lack of discrimination infringing them could a great many problems. There are a lot of examples of people suffering while their basic rights were violated e.g.: genocide in Rwanda in 1994 or the Srebrenica massacre in 1995. There were even established special tribunals (International Criminal Tribunal of Rwanda, International Criminal Tribunal for the former Yugoslavia) to judge people involved in the violation of human rights.

How to protect human rights according to the international law?

There are many ways to protect human rights. Citizens of countries, which ratified the treaties are entitled to protect their rights. There were created some international institutions to assert human rights and also many organizations attend to protection of human rights. The legal basis are numerous treaties and documents signed by many countries. To be more effective some of these institutions formed special courts or tribunals to execute the human rights. The most important organizations which attend to protection of human rights are international governmental organizations (global and regional one) and non-governmental organizations (“NGOs”).

2. International protection

The United Nations

The United Nations (UN) is an intergovernmental organization established in 1945 to promote international co-operation. This is very active organization because currently there are 15 peacekeeping operations and one political mission. This organization has a strong influence on co-operation between states in human rights issue. With the addition of South Sudan in 2011, there are 193 United Nations member states, including all undisputed independent states apart from Vatican City. The fact that many states are members of UN causes wider control of violations of human rights in the world. The first step toward building an international system of human rights protection was taken on December 1948 in Paris when the UN General Assembly adopted the Universal Declaration of Human Rights. In the preamble of the Declaration was proclaimed:

as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among, the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

The Declaration was the first document in the history which enclosed rights that every human being should enjoy and everyone should respect and protect them – civil, political, economic, social and cultural rights. In 1948 it had big influence not only on development of international law but also on incorporation of its principles in national constitutions. The UDHR ensure the following rights and freedoms e.g.: the right to life, liberty and security of person (art. 3), freedom from torture and cruel, inhuman or degrading treatment or punishment (art. 5), the right to recognition everywhere as a person before the law (art. 6), the right to be equal before the law (art. 7), the right to freedom of movement and residence (art. 12), the right to seek and to enjoy in other countries asylum

from persecution (art. 14), freedom of thought, conscience and religion (art. 18), the right to work (art. 23), the right to an adequate standard of living (art. 25), the right to education (art. 26), the right to freely participate in the cultural life of the community and others (art. 27). Within the United Nations the Universal Declaration of Human Rights is the main documents concerning international human rights protection issue. The regulations expressed in the UDHR are specified in more specialized documents have been written such as conventions. The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its two Optional Protocols (the Optional Protocol to the International Covenant on Civil and Political Rights and the Second Protocol to the International Covenant on Civil and Political Rights) aiming at the abolition of the death penalty together create the International Bill of Human Rights . The International Covenant on Economic, Social and Cultural Rights along with the International Covenant on Civil and Political Rights were adopted in 1966 by the United Nations. This documents specify the catalogue of human rights enclosed in the Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights contains many rights and freedoms but inter alia: the right to life (art. 6), freedom from torture and cruel, inhuman or degrading treatment or punishment (art. 7), the right to liberty and security of person (art. 9), the right to liberty of movement and freedom to choose his residence (art. 12), the right to a fair trial (art. 14), criminal law cannot be retroactive (art. 15), the right to marry and to found a family (art. 23), the right of the child to such measures of protection as are required by his status as a minor (art. 24) or rights of persons belonging to ethnic, religious and linguistic minorities (art. 27) . On the other hand the International Covenant on Economic, Social and Cultural Rights ensures the following rights e.g.: the right to work (art.6), the right of everyone to the enjoyment of just and favorable conditions of work (art. 7), the right to social security and social insurance (art. 9), the right to found a family (art. 10), the right of everyone to an adequate standard of living (art. 11), the right of everyone to education (art. 13) or the right of everyone to take part in cultural life (art. 15) .

Within the United Nations exist a lot of bodies which are involved in human rights protection. They are divided by charter-based bodies and treaty-based bodies. I would like to mention some of them, which are the most important in my opinion. After becoming a party of international treaty, state is obliged to respect, protect and fulfill human rights. State assumes an obligation to refrain from violating of human rights, protect people against abuses and take an action to implement the basic human rights form international law to national law.

The examples of the charter-based bodies in the United Nations are Human Rights Council (which replaced the Commission on Human Rights), Universal Periodic Review, Commission on Human Rights, special procedures of the Human Rights Council, Human Rights Council Complaint Procedure. The Human Rights Council was created by the General Assembly in 2006 by replacing the former Commission on Human Rights. This is the subsidiary body of General Assembly. It is responsible for promotion and protection of human rights, for addressing the infringing of human rights in the world and make recommendation on them. The Human Rights Council has an ability to discuss the human rights issues which took place throughout a year. This charter-based body set up some procedures which help to assess human rights system in Member states of the United Nations. One of this mechanism is Universal Periodic Review. This procedure is driven by states under the auspices of the Human Rights Council. It consists in the declaration

made by states, which submits what kind of action have been taken to improve the human rights situation in their countries. Noteworthy is as well Complaint Procedure. The complaint can be submitted by individuals, groups, or non-governmental organizations who are victims of human rights violation. Moreover there exists another charter-based body – the special procedures of the Human Rights Council. This body is composed of the independent experts. The special procedures undertake country visits, attend to individual cases, send communications to States and others in which they bring alleged violations or abuses to their attention, engaged in the development of human rights standards, engage in advocacy, attend in raising public awareness or provide advice for technical cooperation .

There are many bodies based on more specialized treaties. The examples are: the Human Rights Committee (which monitors the implementation of the International Covenant on Civil and Political Rights, 1966) the Committee on Economic, Social and Cultural Rights (which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights, 1966), the Committee on the Elimination of Racial Discrimination (which monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965), the Committee on the Elimination of Discrimination against Women (which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women, 1979), the Committee Against Torture (which monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984), the Committee on the Rights of the Child (which monitors the implementation of the Convention on the Rights of the Child, 1989), the Committee on Migrant Workers (which monitors the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990) or the Committee on the Rights of Persons with Disabilities (which monitors the implementation of the Convention on the Rights of Persons with Disabilities, 2006). All the treaty bodies (except of the Committee on the Elimination of Discrimination against Women) are serviced by the Office of the High Commissioner for Human Rights . The very important treaty-based body is the Human Rights Committee. It was established in 1976 to ensure this rights included in the International Covenant on Civil and Political Rights. It is composed of 18 experts. The Committee monitors implementation of the Covenant and two Optional Protocols. The main objective is to develop constructive dialogue with states and promote the provisions of the Covenant. The most important functions of the Committee are gathering and studying the periodic reports. This reports on action are prepared by states. The Committee elaborates as well the meaning of articles of the Covenant and considers a decision in situations when the individuals claim that they rights were violated or state claim that another state is acting not in accordance with the regulations from the Covenant .

International Criminal Court

I would like to shortly mention one more organization which is International Criminal Court. The Court is independent and permanent court. The main aim of the Court is to judge people accused of the most serious crimes like genocide, crimes against humanity and war crimes. This institution is more connected with humanitarian law but in my opinion is noteworthy because of its great role for the society. However, international humanitarian law is a branch of human rights issue. The International Criminal Court was established in 1998 by the Rome Statute. This is the first permanent international criminal

court. It is based on treaty, joined by 122 countries. After ratification by 60 states the Rome Statute entered into force in 2002 . This is last resort court – what means that the case cannot be brought to the Court if it is investigated or prosecuted by national judicial system. The main aim of this institution is to judge the perpetrator of the most serious crimes committed to the international community. Its headquarters is in the Hague in the Netherlands. The institution is founded basically by State Parties. According to the Rome Statute, the Prosecutor, any State Party or the United Nations Security Council are able to initiate an investigation. There have been brought 21 cases in 8 situation before the International Criminal Court . Many investigation were brought in the context of situation for instance in Uganda, the Democratic republic in the Congo, the Republic of Kenya, Central African Republic, Mali, Libya. Really important is that the Court reached consensus on exact definitions of genocide, war crimes and crimes against humanity.

3 Regional protection:

Regional systems of international human rights law supplement both national and international human rights law. This paper will focus on the European regional systems of protecting human rights. The two main pillars of the system in Europe are the Council of Europe and the European Union.

Council of Europe

This is the oldest international organization. The Council was founded in 1949 and it has 47 member states. The organization consists of mainly European countries. Its seat is in Strasbourg, France. The organization promotes co-operation between countries in areas of democratic development, human rights, cultural development. The aim of the organization, expressed in article 1(a) of the Statue, which stipulates that:

The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.

The Council of Europe does not create binding laws. However, one of its achievements is the European Convention on Human Rights, adopted in 1950. The states which have ratified the Convention are obliged to secure and guarantee fundamental rights, such as e.g.: right to life (art.2), prohibition of torture (art.3), prohibition of slavery (art. 4), right to liberty and security (art.5), right to fair trial (art.6), right to respect for private and family life (art. 8), freedom of thought conscience and religion (art. 9), freedom of expression (art.10), right to marry (art. 12), right to an effective remedy (art. 13). The Convention is an instrument to protect the human rights of individuals because the domestic courts are obliged to apply this document at national level. The state parties, which ratified the Convention, should have incorporated it into the national legislation. The implementation is overseen by the Council of Europe. The European Convention on Human Rights created the European Commission on Human Rights as a monitoring body and the European Court of Human Rights which enforce human rights provisions and additionally civil and political rights set out in the Convention and its protocols. There are 47 judges on the Court elected for a nonextendible nine-year term. The number of judges is the same as the number of the States Parties to the Convention. The judges cannot be involved in an activity which could compromise impartiality and independence. They are supposed to be of high moral character and have high and adequate qualifications. As far

as the application is concerned, it could be lodged by a person, group of individuals, NGO or company whose rights are violated or application could be brought by state against another state . The Court cannot take up cases on its own. Rulings are binding for the concerned states and the member states are obliged to implement them. According to the statistics, in 2013 there were allocated 65 900 application in judicial formation. What is interesting, in that year article 5 – right to liberty and security – was the most frequently violated article. The second problem among the countries which ratified the European Convention on Human Rights is the length of proceedings . The State Parties should have more control over the infringements of human rights in their territories.

The Council of Europe also promotes human rights by other mechanisms, inter alia the European Commission against Racism and Intolerance, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Committee of Social Rights etc. I would like to draw your attention to the European Committee of Social Rights, composed of nine independent experts, who monitor the European Social Charter. This document is considered as a counterpart of the European Convention of Protection of Human Rights and Fundamental Freedoms. The members of Council of Europe signed the European Social Charter in 1961. The document ensures the fundamental human rights in the field of social and economic rights like: social protection, health, housing, employment and education .

The European Union

The European Union was established in 1993 by the Treaty of Maastricht. Presently it has 28 members states. The main objective of the EU is to strengthen relations between the member states, promote economic progress, develop the fields of justice, freedom and security, respect human rights, build and maintain the EU law. The European Union developed some mechanisms to protect human rights. This organization has a separate document concentrating on the human rights issue – the Charter of Fundamental Rights of the European Union, which entered into force in 2009. The Charter does not create new rights but reiterates the already existing ones, like political, social or economic rights. Citizens or residents into EU law are able to benefit from these rights. The Charter applies to the EU institutions like European Parliament, European Commission, the Court of Justice of the European Union or European Central Bank. The Charter must be complied with by national courts. The individuals, whose rights (included in the Charter) are infringed are able to complain to the national courts, European Court of Justice and to European Ombudsman. The European Court of Justice is the highest court in European Union which interprets the EU law .

It was established in 1952 and is headquartered in Luxembourg. It employs one judge per member state, and currently there are 28 judges . There also exist some programs which complement the activity of the European Union. One of them, connected with human rights issues is the European Instrument for Democracy and Human Rights. Between 2007-2013 this program made available over EU 1.1 billion for projects supporting democracy, freedom of association or freedom of speech .

4. Protection given by non-governmental organizations:

Apart from international organizations there are also many non-governmental organizations attending in protection of human rights worldwide. I would like to elaborate on two of them.

The Human Rights Watch which is the world's independent organization. This nonprofit institution is dedicated to protect human rights around the world. It came into being in 1988, after restructuring the Helsinki Watch which was established in 1978 by Robert L. Bernstein, Aryeh Neier and Jeri Laber. The Human Rights Watch headquartered in New York. This institution is divided into 5 departments: Africa, Americas, Asia, the Middle East and the territory of Organization for Security and Co-operation in Europe. The organization not only supports victims, prevents discrimination and protects from inhumane treatment in wartime but also brings justice to people who harm other human beings and holds them accountable. The Human Rights Watch is well-known also for targeted advocacy, impartial reporting, effective use of media and co-operating with local human rights groups. Their workforce is approximately 400 people in 90 countries. The Human Rights Watch publishes reports on the condition of human rights in particular countries. In order to lobby for changes in policies, emphasize the development of human rights and to promote human rights the representatives of the organization meet with the United Nations, governments, regional groups or local human rights groups.

Another interesting non-governmental organization is Amnesty International. This organization has over 3 million members, supporters and activists around the world. "A Guide to Human Rights. Institutions, Standards, Procedures" states that the objective of the organization is "striving to promote and protect the human rights enshrined in The Universal Declaration of Human Rights". There were organized many campaigns by Amnesty International: to free all prisoners of conscience, to ensure fair and prompt trials for political prisoners, to abolish the death penalty, torture and other cruel treatment of prisoners etc. Amnesty International was established in London by a lawyer Peter Benenson. His article "The Forgotten Prisoners" published in The Observer in 1961 – was a cornerstone of the Amnesty International. The article widely supported by international society. Since then the new organization has taken up more than 200 cases. Amnesty International was awarded the Nobel Prize for its campaign against torture and discrimination.

5 Summary

The rights of the individuals are constantly violated all over the world. The international protection system, which is above the national one, is absolutely essential these days. The international society created some mechanisms which are able to control the situation in countries. Very crucial is to give the individuals one more option to assert their rights, which they are eligible for. The international and regional system which I described try to prevent the human rights abuses in Europe. Even the fact that so many organizations are involved in human rights protection, it is hard to answer unambiguously for the question is this system sufficient and effective enough to asserts the rights to the individuals.

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Federica Di Pietro

Department of International Law, University of Pavia, Italy

The application of Islamic family rights in the Mediterranean

Abstract

The economic and industrial development of Western countries has meant that the migratory phenomenon, characterized by the displacement of people from economically weaker countries to the West has become ever more frequent.

In general, we can say that among the different groups of immigrants who come to Europe in search of work, those from the Islamic world are the ones that face the greatest difficulties of integration. This problem is due to the nature of the Islamic religion, which is the reference point of the Muslim world and is an integral part not only of social life, but also of the legal aspects of daily life. The whole life of believers is in fact completely assimilated to the teachings contained in the sacred text, the Koran, to which they are called to follow during the entire life.

The key element to keep in mind in order to understand the reasons for the identification of religious prescriptions with Islamic law, known as Sharia, or "way" in Arabic, is the fact that God is seen as the unique legislator and as such, its teachings are considered immutable over the centuries.

The Islamic family law differs in several aspects from family law in the Western States: for example, while Islam allows polygamy, it is forbidden in Western legal systems. The diversity in conceiving the right to family occur in particular in relation to applications for the recognition of some Islamic institutions such as polygamy and repudiation deemed incompatible with the laws of the western states.

The goal that we aim to achieve with the following article is the study of migration policies put in place by the Mediterranean countries that have faced the major immigration from Muslim countries. Throughout the article we will analyse the decisions taken by France, Spain and Italy in the field of family law and recognition of judgments of polygamy and repudiation. The study of private international law will then perform an examination of the most important case law on Islamic law within each of the three countries analysed.

In general, from the examination of the case law we will see that it is impossible to draw a common line of the decisions taken within the states at the time of giving recognition to judgments of polygamy and repudiation pronounced in Muslim countries of origin of applicants. However, the work of the courts, which have been shown to prefer an ad hoc approach, depending on the cases brought to their attention, seems to be the best way to protect the interests of those involved in the game. The use of attenuated public order seems to be one of the most effective legal instruments among those offered by the private

international law in order to ensure effective protection of those considered most vulnerable, such as women and children.

Keywords: Polygamy, Repudiation, Islamic law, marriage, immigration.

Introduction

In recent years, Western Europe has experienced an exponential increase in the arrival of migratory flows from Africa, Eastern Europe and Asia, which are largely composed of people belonging to different ethnic groups fleeing hunger, war, political persecution, social exclusion and discrimination in their countries of origin to seek protection, better living conditions and new opportunities for their personal projects with greater safety and dignity¹.

The actual numbers of migrants are difficult to quantify with certainty, because many of them come to the destination countries clandestinely, evading police controls and regulations. This happens because human trafficking networks take advantage of those who live in very difficult situations by exploiting their fear of being detained and deported back to their own country once they arrive in Europe².

Along with the growing movement of people from different cultures, the need to confront different cultural models and values, which include very distant socio-political family relationships from those that regulate the typical Western legal system is becoming even more necessary. Thus, immigrants who manage to cross the borders of European countries bring their respective traditions, customs and indigenous beliefs, while representing their identity as individuals and as members of a particular ethnic group.

Due to this cultural diversity, there have been several contrasts and tensions between divergent moral values, especially in relation to immigrants who are willing to transplant their own hometown's worldviews to European destinations where they have moved. In this sense, one of the areas where there are more conflicts is family law, especially in relation to the institutions of Islamic law, such as polygamy and repudiation. Those two institutions do not have a link within Western legal systems, and they are often in contrast with the higher principles underpinning European states for example, monogamy³.

Although the doctrine and in particular Mancini, were in favour of overcoming the barriers that divide the West and the Islamic world, it is also necessary to emphasize the need to respect the principle of national sovereignty, with the consequent state obligation to respect and ensure the full enjoyment of their own legal standards, disregarding foreign laws when they are incompatible with the State principles' law⁴.

¹ "Immigration to Europe: how many foreign citizens live in each country?", 2009, at <http://www.theguardian.com/news/datablog/2010/sep/07/immigration-europe-foreign-citizens>, viewed 31/03/2014.

² Eurostat, European Commission, "Migration and Migrant population statistics", march 2013, at www.epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics, (last accessed on 31st march 2014).

³ See Krause H. D. (2006), "Comparative Family Law, Past Traditions Battle Future Trends – and vice versa", in M. Reimann, R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxfordat p. 1099.

⁴ See P. S. Mancini, "Della nazionalità come fondamento del diritto delle genti", Turin, 1851 at p. 63.

Along those lines, the paper will examine the judicial decisions of some of the European countries facing the Mediterranean sea, such as France, Spain and Italy, which are reached by the largest number of immigrants of the Islamic faith coming from North African countries. In order to do this it is necessary to conduct a critical review of the concept of family at an international level in order to establish the defining elements of the legal institution that are different and common between Islamic and Western Countries.

In this regard, it is important to underline that among different groups of immigrants that come to Europe, those from Islamic countries are the ones with whom can surge the major difficulties of social integration. This problem is due to the nature of the religion Islam, which is the central point of reference for the identity of the Muslim world. The religion Islam is an essential part of life not only concerning society but also related to the legal aspects that govern it. The life of the believers is, in fact, completely assimilated to the teachings contained in the Holy Scriptures that the faithful are obliged to fulfil in the course of its existence⁵.

1.

Already in the common pre-Islamic faith, a community of believers united by their religious values, called Umma⁶ has been created in Islam. Likewise, today, the term that for many has come to mean 'the Arab nation' lends itself well to indicate the universal Islamic community beyond national borders. If we add that many Muslim immigrants decide to keep their nationality at birth while living in a foreign country, we can understand the scale of the difficulties of Western States who receive them trying to ensure their harmonious integration within their respective socio-legal systems. The solution is given by trying to find points of contact and reconciliation between the preservation of values of Islamic law and respect for the rules structuring the Western secular states.

In this regard, it is important to remember that Islam, unlike Catholicism and other religions, permeates every aspect of human life in relation. That is, not only limited to the theological, ethical or ritual disciplinary issues, but covers all aspects of daily life. In fact, the key element to consider in order to understand the reasons for the identification of religious prescriptions with Islamic law, known as Sharia, or "path" in Arabic, is the fact that God is seen as the sole legislator and as such, the teachings given by Him are considered immutable⁷.

From these precepts, it follows that the political organization of Islamic countries is based on Islam teachings and therefore its essential purpose is to preserve the obligations which have been shown by God, which then shape both the pillars of religion as one's own state.

2.

According to this we can underline that the area of law in which the major conflicts between Islamic law and Western law countries are present, is family law. It is important

⁵ See Hallaq W. (2005), "The origins and Evolutions of Islamic Law", CUP, Cambridge, at p. 17-18.

⁶ Sura III, 104 and 110.

⁷ On this issue, it is worth recalling that Islamic law is based on the total assimilation of the divine teachings, revealed to Muhammad by the Archangel Gabriel called "Night of Destiny" at the end of the month of Ramadan in the year 610 AD.

to briefly define what the differences between the European and the Islamic conception of family are. In particular, while according to Islamic law, the family is based only on the union of a man and a woman, in Europe we have seen a change in the meaning given to the term family and at its regulation as a legal institution⁸. Marriage, which was the starting point of family relationships has always had a double meaning which includes both the legal aspect and the spiritual and religious one. However, especially in the late nineteenth century, the concept of family and the concept of marriage have undergone profound changes.

The sociocultural reasons for these changes are many and very different, so we witness a growing number of divorces today, a decline in birth rates and an increasing number of couples who choose to live together without getting married or reproducing. According to an authoritative doctrine, it is clear that current forms of family "are characterised by a mixture of contradictory longings traditional and new expectations, in which a multiplicity of forms of life, love and relationships have been constructed from pieces borrowed here and there and is hoped for by some, by others and vigorously endured opposed by many"⁹.

The need to regulate new types of family has led European countries to question the possibility of introducing in its legal system some types of connections coming from other cultures in order to protect other family models that were not previously treated as such by national law. Here, we must bear in mind that it is precisely in the law where traditions, religion and cultural values are more alive and dynamic.

In short, for Muslims, marriage is a legal institution aimed at regulating the social order seen in Islam as a legal act is preferable to perform. Recall that this institution represents to the faithful a moral obligation to act to ensure their physical and spiritual happiness, and a means to procreate and avoid illicit relationships¹⁰.

In turn, two of the institutions of family law through which the cultural clash between Western and Islamic principles guiding amplified couple relationships are polygamy and repudiation¹¹. In the case of polygamous marriage, the conflict stems from the disparity between men and women in that structure and the clearest manifestation is that while the husband is allowed to have more than one wife simultaneously, the wife is denied that prerogative.

⁸ See Milliot L. (1987), "Introduction a l'etude du droit musulman", II Ed., Sirey, Paris, at p. 258-259.

⁹ See Beck-Gernsheim E. (2000), "Was Kommt Nach Der Familie?, Einblicke in neue Lebensformen", 2nd Edition, München, at p. 10.

¹⁰ In this regard, it should be noted that the Qur'an, in verse 24, 32 calls on Muslims to join in wedlock.

¹¹ See Rehman J., "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the theory and practice of polygamy and Talaq", *International Journal of Law and the Family*, volume 108, April 2007.

This difference in treatment between men and women, inherent to polygamy has been strongly condemned by the international community that considers that it is an Islamic institution that devalues women attacking their human dignity¹².

On a regional level, the European Court has been called upon to give its concept on specific cases involving applications for family reunification, opting, as a rule, to delegate to the discretion of states in setting their respective jurisdictions of the content and scope on having polygamous marriages abroad.

In this regard, it is worth mentioning the specific restriction on this subject adopted by the European Commission on Human Rights from the 90s when it denied the efficacy of polygamy within the scope of the right to family reunification, by endorsing a rejection residence permit in the Netherlands requested by the son of the first wife of a Moroccan who lived there with his second wife¹³.

After confirming the earlier decision taken by the Dutch authorities, the Commission has affirmed that such requests come only with respect to one woman and her children, thus denying the validity of polygamous marriage as such within Europe. It founded the legitimacy of the decision of the Netherlands in the provisions of art. 8th, paragraph 2 of the European Convention on Human Rights¹⁴ and it said, that States enjoy freedom of choice on immigration in relation to "le lien qui étroit between the politique de contrôle de l'immigration considérations et les d'ordre public".

The importance of these decision leading cases is that the Commission decided to argue that reaching legal effects in protecting the family must yield to the maintenance of public order pictured here is a superior interest to the State, sufficient to justify the discrimination treatment given by the Netherlands to children born into these families after the first wedding.

Some years after the decision of the Commission, we see a convergence between the principles developed by the Court of Justice and the European Court of Human Rights, which were in favour of the power of the State to intervene in the private life of a family, while stressing the uniqueness of this choice finds support only in relation to the right of States to control the entry, residence and expulsion of aliens¹⁵.

In particular, the Court of Justice has taken as the basis of the argument the contents of the Family Reunification Directive 2003/86/EC, that establishes on the issue of polygamous marriages, that States may impose restrictions on recognition of legal families lead to

¹² In this regards, please read on a regional level, the resolution No. 1293 of 2002 on the situation of women in the Maghreb of the Parliamentary Assembly of the Council of Europe, and, on the global one, the general observations of the UN human Rights Committee and CEDAW.

¹³ A. A. v. The Netherlands, Decisions and Reports 72, Application n. 14501/89.

¹⁴ European Convention on Human Rights, Rome, 1950, http://www.echr.coe.int/Documents/Convention_ENG.pdf, viewed 31/03/2014.

¹⁵ C-540/03 European Parliament v. Council, judgment of 27.06.2006, at http://www.ec.europa.eu/dgs/legal_service/arrets/03c540_en.pdf, viewed 31/03/2014.

these, by selecting among all spouses to choose one for family reunification, without specifying which one¹⁶.

For its part, the Court has spoken on the same line, stating that Article 8 of the ECHR can not be interpreted as meaning that a Member State has the obligation to respect the choice by married couples their common residence and to authorize family reunion in its territory. Given the clearly unfavourable position for the recognition of the effects of polygamous marriages by international agencies designated to ensure the observance of human rights, it is easy to say that the refusal of the international community is mainly due to reasons of sexual discrimination.

However, although there have been some requests for recognition of judgments concerning polygamous marriages, in most cases polygamous marriages constitute a mere preliminary matter, especially in cases of dissolution of marriage, inheritance, association and damages have not always led to consistent results in terms of recognition of the effects of polygamy on national law and between European States.

Certainly the most controversial clashes between European States and Islamic Countries regarding polygamy issues are mostly related to the issue of family reunification of polygamous wives and the definition of the situation of the spouse.

In addition to polygamy, European countries are also not favourable to repudiation. This institution of Islamic law provides that marriage can be dissolve by husbands, not allowing women the opportunity to express themselves. Also, in many cases the repudiation happens without involving a judge who can safeguard the respect of procedural rights¹⁷.

As is the case of polygamy, in repudiation women are relegated to a lower position than the husband who can break the marriage at will, simply by saying three times the term "talaq"¹⁸. In general, French, Spanish and Italian courts agree that the refusal to recognize the judgments of divorce is due to the existence of an infringement of the right to equality of spouses, as well as the lack of a fair trial.

However, in the light of these considerations and in accordance with the private international family law, European States have been treated as far as possible to give life to the effects of judgments of divorce in relation to aspects which are not contrary to the requirements of national legislation and especially not in contradiction with the limit of public order.

4.

The first of the three countries we mentioned before, that had to deal with Islamic family law has been France. France, was for historical reasons, one of the European Countries

¹⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. *Official Journal L 251*, 03/10/2003 P. 0012 – 0018, <http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0086:EN:HTML>, viewed 31.03.2014.

¹⁷ See Ephroz K. N. (2003), "Women and Law: Muslim Personal Law Perspective", Rawat Publications, Jaipur, at p. 29.

¹⁸ See Zubaida S. (2003), "Law and Power in the Islamic world", I. B. Tauris & Co., New York.

where immigrants of the Islamic faith moved toward looking for a job and new opportunities to build a better life. Those immigrants were coming especially from Maghreb Countries and they took with them their culture and traditions.

The first case in which the problem of recognition of polygamous marriages in France emerged dates back to 1910. The *Cour d'Appel* of Algiers had been called upon to decide whether the second wife of a Moroccan couple and the children could claim succession rights. With a far-sighted decision that laid the groundwork for the subsequent theory of public attenuated, the Court held that it was necessary to recognize the effects of validity of a marriage contract between strangers, in a foreign country based on the application of their national laws¹⁹.

On the other hand, the Court stated that a foreigner already married could not contract a second marriage in France, even with a compatriot.

Post the premise that in France polygamous marriages are prohibited, with the judgment Chemouni, the judges of the French *Cour de Cassation* have proven to fully adhere to the theory of public attenuated order.

The Chemouni case, in fact, marks the first position taken by the French *Cour de Cassation* concerning polygamy, which at the end of a complex process of the case, acknowledged the effects of a polygamous marriage contracted abroad, as celebrated without evasion of the law²⁰. The case concerned a Tunisian national who married many spouses with whom he had several children. Later, the Tunisian decided to move to France to live only with his first wife. The second wife decided to take legal action in order to get the right to food for her and for the children.

If initially the French courts showed themselves averse to recognize the effects of polygamous marriage as contrary to the principles of the State, on appeal, the instance of the woman was upheld by the *Cour de Cassation*, which held that the woman sought only to see recognized its right to "une qualité de sa créance alimentaire découlant of épouse légitime", acquise qualité sans fraude, en Tunisie, en conformité avec sa loi compétente nationale."

Finally, on a reference, the Tribunal de Grande Instance de Versailles stated that the woman's request to enforce the maintenance claim was "in conformity with the law of nations and to the notions of morality generally accepted by all civilized nations", showing a net stance in favour of the use of the theory of public attenuated order that it was not called into question in the judgments that followed.

The Chemouni case gives us the opportunity to mention the doctrine of attenuated public order that has been developed by French jurisprudence in the 90s and was taken up by the *Institute de Droit International*, during the meeting in Cracow in 2005²¹. Briefly, according to the theory of "attenuated" public order it is possible to give recognition to situations that have been taken abroad in respect of foreign rules, in contrast to what would happen if they were produced in the own State, according to the *lex fori*.

¹⁹ *Cour d'Appel* of Algiers, 9 february 1910 (1913), *Rev. DIP.*, at p. 103.

²⁰ *Arret Chemouni* (1958), *Rev. crit. DIP.*, at p. 110.

²¹ See generally the *Annuaire de L'Institut de Droit International* (Yearbook of the Institute of International Law) (2005), ed. Pedone, Paris.

5.

After having seen France, it is interesting to see Spain's position on polygamy. In general, we can affirm that the celebration of polygamous marriages by State authorities is prohibited by Spanish law because it violates some of the most important constitutional rights and principles guaranteed by the Constitution²².

Having said that, although it appears an obvious rejection by the legislature to recognize polygamous marriages outright, the orientation of the law was to give recognition to the effects arising from polygamous marriages under civil law.

Firstly, the organic *Ley 4/2000 de 11 de enero, sobre derechos de los y libertades extranjeros en España y su integración social* provides, under Article 17, the possibility to be reunited with the resident's spouse, proving that there is not legal separation and that the marriage was not celebrated in circumvention of the law²³. The article continues by pointing out that in no case reunification with more than one spouse is admitted, even if the State of nationality of the spouses allows polygamy.

With regard to the requests made by the reunification of a polygamous husband, Spanish law provides that the spouse can only be reunited with the last wife. It should be noted, however, that this decision is contrary to what is stated in Directive 2003/86 of the European Union of 22 September 2003 on the right to family reunification of immigrants. The directive, in fact, while not recognizing the validity of polygamous marriages, says that the polygamist husband is free to choose whichever of the wives to rejoin.

In Italy's case, the first case that judges had to settle dates back to the eighties and concerns the request of a Moroccan citizen, resident in Italy, to join the two wives and their respective eleven sons.

Following the rejection of the instance given by the investigator of Bologna, the husband turned to the TAR Emilia Romagna that issued a judgment which dismissed the petition for opposition to public order. The judges motivated their choice on the basis of the contrast that the polygamous marriage had in relation to art. 556 cod. pen., relative to the crime of bigamy and discrimination that the institute produced between man and woman, both contrary to the principles of equality between the spouses established art. 29 of the Constitution, and with the art. 5 Protocol. 7 of the European Convention of Human Rights that Italy had ratified²⁴.

Over the years the position of the Italian jurisprudence has changed in favour of the institution of polygamy with the objective to provide greater protection for the benefit of the child. For example, after about six years after the judgment of the Administrative

²² In particular the polygamous marriage are incompatible with Article 1, 10., 14 and 32 of the Spanish Constitution. Finally, please, note that the polygamous marriage is also contrary to Article 46 of the Civil Code, which enshrines the principle of monogamy as unavoidable for the valid celebration of civil unions in Spain.

²³ *Ley orgánica 4/2000 de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*.
<http://www.boe.es/buscar/act.php?id=BOE-A-2000-544>, viewed 31/03/2014.

²⁴ T.A.R. Emilia Romagna, *ordinanza 10 gennaio 1989 n. 15*.

Court of Emilia Romagna, the Court of Appeal of Turin decided in favour of the request for reunification made by a Moroccan citizen and his two wives, by whom he had previously had two sons²⁵. In general, we can say that things have clearly changed from the first case law and the feeling is that in the decisions taken by the Italian judges, the real need of the families are being considered, more than only going against polygamy as a prohibited institution.

6.

After having taken a look over polygamy and its recognition in Western States we can follow with repudiation. As we said before, the greatest difficulties related to the recognition of repudiation are due to the nature infringes the principle of equality between men and women and the fact that the institution may be pronounced by the husband without requiring the presence of an authority judicial authority to assess its validity²⁶.

Among European states located in the Mediterranean, France is certainly the country that first was called upon to take a position on the matter of divorce. From what emerges from an examination of French jurisprudence of the forties and fifties, the tendency of the judges had been to move towards a closing net against the Islamic Institute.

The first case is dated 1956 and concerned the request for recognition of a divorce judgment issued in America. The Court considered that it was a case of repudiation, although formally presented to the courts under the guise of a divorce and therefore the second marriage contracted by the woman in England was not considered to be valid²⁷.

The general approach of the French case law in the sense of repudiation has, however, is not to recognize the nuances depending on whether the institution is pronounced in France or abroad. In the latter case the French courts have drawn a distinction depending on the nationality of one or both spouses whether or not French.

To begin with, the trend in French case law is that it does not recognize the rulings' effectiveness of repudiation if it is pronounced in French territory by Islamic religious authority in the territory. According to the judges the only competent authority to issue an order of dissolution of marriage is the French one, since it was not assigned any jurisdiction in matters relating to the ministers of Islamic worship.

That case-law is confirmed by the judgment of the *Cour d'Appel de Paris*, which was expressed in the way not to recognize as valid the divorce pronounced at the request of her husband Imam of the Mosque of Paris while his wife was abroad at the time. The woman, after she became aware of the incident of the spouse and once back in France had in turn filed for divorce from her husband, who had responded by pleading repudiation pronounced before the Imam²⁸.

²⁵ *Corte di Appello di Torino, decreto del 18 aprile 2001* (2001), *Diritto e famiglia*., at p. 1492.

²⁶ See Van Loon H. (2010), "The Accommodation of Religious Laws in Cross-Broder Situations: The Contribution of the Hague Conference on private International Law", *Cuadernos de Derecho Transnacional*, Vol. n. 1, pp. 261-263.

²⁷ The last decision on the case was taken by the *Cour de Cassation*, 22 January 1951 (1951), *Revue critique*.

²⁸ *Cour d'Appel de Paris*, Paris, 7 luglio 1956 (1960), *Revue critique*, at p. 354.

After examining the case, the judges of the *Cour d'Appel of Paris* refused to give validity to the repudiation as they felt that it was an act pronounced in French territory by an authority not competent in the matter and stated the principle that it would also be followed in subsequent judgments, according to which the provisions relating to the dissolution of marriage shall be issued exclusively by the French judicial authorities.

The line followed by the Spanish courts in recognition of repudiation does not differ much from that held by the French jurisprudence although it must be stressed, even though there are far less cases than those in France. The common element in the vision of Spanish and French in respect of the institute is to recognize the fact that repudiation is an institution that sees women relegated to an inferior position compared to the figure of her husband, who can divorce his wife at his liking and sometimes for a superficial reason, regardless if this legislation in the State of affiliation of the spouses provides otherwise.

In general, the French courts and the Spaniards agree that the rejection of repudiation is characterized by a lesion of the right to equality of the spouses and to the extent that a fair trial be necessary to the application of the public policy, former art. 12 , c. 3 of the Spanish *Código Civil*²⁹. However, in light of these considerations and in accordance with the private international law of the family, in Spain as in France judges have tried where possible to give effect to the effects of the judgments of dismissal in relation to the aspects that are not contrary to the requirements of national legislation and especially those not conflicting with the limit of their public policy.

Also, in both countries in order to facilitate the improvement of relations between states, some agreements were signed over the years with the Kingdom of Morocco, Tunisia and Algeria on cooperation and judicial matters with civil, commercial and administrative aims to promote recognition of repudiation³⁰.

In general, we can say that the trend of the Spanish courts has been to examine the demands of repudiation case, case by case. This has meant that the judges have evaluated the individual instances brought before the courts in Spain by the applicants in different ways depending on the circumstances and the different circumstances relied on by the spouses.

Starting with an example that shows how sometimes the Spanish case law has proven to be in favour of recognition of the Islamic institute, we remember the decision of the Supreme Court issued in 1998. According to the court, a refusal of the act of repudiation would have been counter-productive and would have caused an injury to his divorced

²⁹ *Código Civil Español*, <http://www.civil.udg.es/normacivil/estatal/cc/indexcc.htm> viewed 31/03/2014.

³⁰ To reference a few: see the *Accords de sécurité sociale entre la France et la Turquie*, décret n. 73-1075, 27 November 1973. <http://www.cleiss.fr/pdf/convturquie.pdf> and the *Convenio con Marruecos sobre asistencia judicial, reconocimiento y ejecución de resoluciones judiciales en materia de derecho de custodia y derecho de visita y devolución de menores*, 30 may 1997. www.migrarconderechos.es/legislacionMastertable/legislacion/Convenio_menores_marruecos

wife. In particular, the husband had remarried and over the years had not shown signs of wanting to withdraw the divorce to his wife³¹.

The judges concluded that if the woman had not obtained recognition of repudiation she would have difficulties because of the previous marital contract and therefore came to the conclusion that under these circumstances it "must be taken into consideration the fact that the wife has requested enforcement and the fact that it is largely spent the period of time that the original legislation provides for the revocation of repudiation by the husband who, among other things, has also remarried."

From what emerges from this statement, the Spanish judges gave evidence to assess in each case the circumstances that led to divorce, and to put first, above any rigid formalism, the best interests of the woman.

Moving on to analyse the situation in Italy, among the institutions of Islamic family law, repudiation is definitely that which has been the highest number of legal proceedings, however, contrary to what happened in France, but in a similar way to Spain, the cases of repudiation pronounced until now in the country were very few. The judgments of Italian demand for recognition of divorce are almost always ended with a decision to refuse to allow applicants in order for reasons contrary to public policy in particular due to the discrimination that comes to producing against women, which is given the possibility of asking only for a divorce. It also highlights, as was shown earlier by the examination of the judgments of the other countries examined so far, the lack of a judicial authority to give validity to the rejection, and finally, the fact that it is an institution in which the choice of ending the marriage bond comes from the fact that the woman is not allowed to express herself / her feelings.

From the examination of the first case law on the subject it is clear that the judgements of the Italian courts have been unanimous in opposition to the institution of Islamic divorce on the edge of public order in force in our country³². It should be noted, in particular, the sentence pronounced by the Court of Appeal of Turin in 1948 in which there is a strong tone of disappointment used against an institution that the institution considered "repugnant to the moral and legal mentality of the people who have reached a higher degree of civilization and that they have an ethical concept of marriage and social well higher than that they have the peoples of the west³³."

Fortunately, as brought to light by an authoritative doctrine, the harshness of the statements used by the judges of the Court of Appeal of Turin in defining the Islamic

³¹ *Tribunal supremo (sala de lo civil), Auto de 21 de abril de 1998 (2000), Anuario español de derecho internacional privado*, at p. 853-856.

³² *Corte d'Appello di Roma, 29 october 1948 (1949), Foro padano*.

³³ The case concerned the request for recognition of repudiation pronounced by the Sharia Court of Damascus. According to the Court of Appeal of Rome, the request was rejected because the divorce had been pronounced before the religious authorities appointed to ascertain the dissolution of marriage in the absence of the bride. The Court stated that the repudiation could not be compared in any way to divorce because, while the latter is required by Islamic law and is based on mutual consent or alternatively spouse or of a cause of dissolution of marriage required by law, to instead, the repudiation takes the form of a unilateral act to be pronounced by the husband to his wife.

Institute of divorce today “would surely be judged intolerant and intolerable³⁴.” However, these sentences make the idea of the strong closure of the Italian public opinion towards the end of the 40s of Islamic family law in general and find fulfilment in the rejection by the Court of Appeal of Rome instance of recognition of divorce for reasons of public order.

7.

In general, the study of the main case laws showed that it is not possible to draw a common guideline for the conduct of France, Spain and Italy. Nevertheless, the element in common among all the countries we have examined is the approach taken by the courts in respect of requests for recognition of polygamous marriages or acts of repudiation. The judges in fact have tried as much as possible to give recognition to situations that would otherwise have been deemed unacceptable within the western states through the use of the limit of public order in an attenuated form. In conclusion, we can look to the case law as to the medium that was used to coordinate Islamic Law and western law systems between them, through the instrument of law. To cope with the big changes that Western societies are undergoing it is not possible to stay in the close position, but rather, it is necessary to show signs of openness to legal systems other than stay in our own positions. For this to happen it is necessary to safeguard one country's specific values, but at the same time, examine on a case by case basis what are the rights worthy of protection and which are the interests involved in order to find a meeting point for cultures different from the Western one.

³⁴ See Campiglio C. (2008), “Il diritto di famiglia islamico nella prassi italiana”, *Rivista di diritto internazionale privato e processuale*.

Suvana Jasharllari
*Universiteti i Tiranës,
Fakulteti Juridik, Shqipëri*

Zhvillimi ligjor në Europën Jug-lindore pas rënies së komunizmit

Abstrakt

Demokracia është një nga sistemet drejtuese e cila i ka rrënjët e veta në lashtësi. Si pasojë e zhvillimit të vrullshëm të njerëzimit, ajo u zhvillua dhe u përqafua nga shumë vende të cilat e morën si model qeverisës. Po në gamën e gjerë të formave të qeverisjes, u shpërfaqën edhe ato sisteme autoritare të cilat kryesisht u përqafuan nga vendet e Evropës jug-lindore pas mbarimit të Luftës së Dytë Botërore.

Këto vende u emërtuan si vende të bllokut komunist dhe deri pas rënies së komunizmit në to, trajtimi dhe studimi bëhej më klasik, thjesht si trajtim sistemi demokratik me atë jo demokratik. Kur demokracia u përqafua nga vendet e këtij blloku (komunist), lindi nevoja e thellimit të analizës krahasuese, e cila në vetvete ishte e re në marrëdhëniet ndërkombëtare dhe kishte nevojë për një pamflet të qartë të mënyrës dhe formës se si këto vende kishin mundur të zhvilloheshin ose jo nën diktatin komunist.

Synimi kryesor i këtij punimi është pikërisht trajtimi i ecurisë së zhvillimit të ligjit si rregullator normativ i një vendi dhe se si ai u bë garant respektimi i të drejtave të njeriut, të barazisë ligjore që u bë baza e modeleve të sistemeve politike, zgjedhore dhe qeverisëse në vendet e Evropës Juglindore.

Problemi kryesor haset që në emërtimin shtete jug-lindore. Kuptimin e gjejmë natyrshëm në aspektin gjeografik dhe në atë politik i cili është edhe më i rëndësishëm për t'u trajtuar. Gjeografikisht këto vende janë pjesë e Europës juglindore dhe ska gjë të keqe që të etiketohen si të tilla, por politikisht ato janë shtete "joperëndimore", "jo demokratike" dhe kjo sigurisht lidhet ngushtë me formën qeverisëse që ato përqafuan, formë kjo që u pa e padepërtueshme për dekada të tëra, si pasojë e mbylljes së këtyre vendeve nën perden e hekurt të rregjimit komunist.

Ky punim merr në konsideratë një analizë krahasuese të mirefilltë ligjore të shteteve ish komuniste dhe në veçanti trajton edhe rastin e Shqipërisë. Kjo do të bëhet e mundur duke shqyrtuar nismat ligjore dhe implementimin e tyre në legjislacionet e këtyre vendeve. Pjesë e kësaj analize do të jetë edhe raporti i marrëdhënieve institucionale brenda vendeve të ish bllokut dhe më gjerë raporti me vendet perëndimore si pjesë e një revanshi politik shumë kompetitiv për kohën.

Pjesa e fundit e punimit do të përmbajë konkluzionet, duke konfirmuar se pothuaj dy dekada pas rënies së komunizmit në vendet e Europës jug-lindore dhe vendosja në to e sistemit demokratik, këto vende janë karakterizuar nga një progres politik dhe institucional. Kjo periudhë postkomuniste u shoqëruar nga dy faza domethënëse në formën e konsolidimit të demokracisë : faza e parë nga gjetja e një identiteti të ri politik demokratik që pothuaj ishte fazë tranzicioni dhe trajtimi i tij edhe brenda vendeve të ish bllokut ishte i ndryshëm si edhe nga faza e dytë që u shoqërua me ngurtësim përfundimtar demokratik si formë qeverisëse dhe nisjes së rrugës së gjatë të integritetit në Europën tanimë jo si të etiketuar komuniste, por e bashkuar nën siglën e vetme, atë demokratike dhe progresiste.

Fjalë kyçe: *Demokrati, Integriteti Europian, Konsolidimi politik, Ligji, Vende postkomuniste*

1 Hyrje

Pjesë e ndryshimeve të viteve '90 sigurisht që ishte edhe shembja e sistemeve të fundit totalitare në Europën Juglindore, proces i cili u pasua nga vendosja në to të sistemit demokratik. Ky zhvillim rotacioni sistemes pati impakt pozitiv në vendet që implementuan demokracinë si formë qeverisëse. Ndjeshmëria publike dhe suporti nga vendet tashmë me demokraci të konsoliduar, u pa si fillim i mbarë në rrugën e gjatë të pranimit të sistemit të ri si më i miri dhe i duhuri në ecjen para.

U pa e domosdoshme vënia në praktikë e legjislacioneve që bazë të tyre kishin respektim të lirive dhe të drejtave të individit, respektimit të ligjit dhe barazisë ligjore, koncepte të cilat në vendet e Europës Juglindore dikur komuniste ishin mohuar dhe privuar. Ndryshimi ishte i menjëhershëm dhe sigurisht jo i lehtë për t'u adaptuar menjëherë edhe pse u pa entuziazëm për një rifillim konsolidimi të një shteti ligjor dhe të drejtë për të gjithë.

Por jo gjithëkoha u duk të ishte e lehtë sepse menjëherë pasoi rrjedha e zhvillimit demokratik, tanimë ishte koha e periudhës trazitore shumë e rëndësishme për të arritur standartet e një demokracie të shëndoshë. Kjo periudhë nuk pati kohëzgjatje dhe adaptim të njëjtë në të gjitha vendet duke patur parasysh edhe faktin se nuk ndodheshin në kushte të njëjta politiko-sociale dhe se degradimi nga sistemi paraardhës kishte lënë shenja në formën dhe mënyrën se si ato operonin në pranimin e një demokracie të njëjtë dhe të bazuar në ligje, zbatimi i së cilave do të ishte i njëjtë për të gjithë.

Koncepti i shtetit ligjor ishte i ri dhe për fillimet e demokracisë së brishtë të atyre viteve ishte i domosdoshëm të implementohej në praktikën e legjislacioneve të këtyre vendeve. Gjithë praktika ligjore e deriatëhershme ishte mbi bazën e ideologjisë komuniste dhe drejtohej nga partia-shtet që shfaqte imponimin e saj sidomos në formën diktatoriale të respektimit të ligjit. Prandaj u bë jetik ndryshimi i menjëhershëm i paketës ligjore për të bërë të mundur garantimin e lirive dhe të drejtave të njeriut mbi baza të shëndosha ligjore dhe funksionimin e shtetit mbi këto norma ligjore.

2 Trashëgimia politike në vendet juglindore

E gjithë periudha e pasuar pas rënies së komunizmit në vendet e Europës Juglindore, pati karakteristikë të vetën tranzicionin si formë anarkie e kalimit nga një regjim në tjetrin. Kështu pati periudha kohore gjatë të cilave shoqëritë e këtyre vendeve provuan krizën e identitetit në çdo sferë duke u përshtatur tanimë me vullin demokratik botëror. Shumë i rëndësishëm mbetet fakti se në asnjë mënyrë nuk duhet parë e veçuar gjithë rrjedha e zhvillimit të tyre të shumëanshëm nga ajo që ato mbartin, përkatësisht trashëgimisë dhe kulturës politike. Kështu, sipas Hanisch kjo e fundit përkufizohet si “përzjerje e orientimeve, qëndrimeve dhe marrëdhënieve në proceset dhe strukturat politike. Ajo shpreh pikëpamje relevante politike që kanë për botën qytetarët, grupet e mëdha sociale dhe elitat funksionale.”¹

Studues si Merkel, Sartori apo Offe e vlerësojnë kulturën politike si tregues të nivelit të demokracisë dhe të aftësisë së një shoqërie për t’iu përshtatur parimeve dhe vlerave të sistemit të ri. Studuesja polake Ana Volk - Poveska në studimin mbi demokracinë dhe ekonominë e tregut në Evropën Lindore shkruan se “kultura politike e shoqërive që braktisën komunizmin është e mbushur plot me paradokse, të cilat lidhen me karakterin edhe thelbin e proceseve të periudhës transitore”. Ato mund të gjenden në konfliktin midis sistemit politik dhe interesave të shoqërisë, në konfliktin midis qëllimeve dhe mjeteve, në konfliktin e lojalitetit integruar, etj. Për pasojë, lindja e një kulture politike që përmban “norma të vjetra dhe përvoja të reja, mund të krahasohet me kalimin nëpër një shteg të panjohur, ku është i nevojshëm kualifikimi i vazhdueshëm”.

Ekzistojnë disa teori që bëjnë klasifikimin e vendeve ish-komuniste dhe dallimin e tyre në pjesën qëndrore . Njëra prej tyre bazuar në faktorin strukturor, duke iu referuar vendeve ish-sovjetike, e lidh atë me trashëgiminë, historinë dhe kulturën e këtyre vendeve.² Vendet postkomuniste me shpërndarje më të madhe të pushtetit politik dhe të aktorëve me veto në procesin e vendimmarrjes politike kanë arritur të krijojnë më shpejt një sistem të stabilizuar dhe efektiv, sesa vendet në të cilat pushteti politik është më i përqendruar.³

3 Periudha tranzitore

Në kufirin kohor të 15 muajve (1989-1990), të gjitha vendet e Evropës Juglindore dolën nga sistemi njëpartiak dhe hodhën bazat kushtetuese për krijimin e sistemit politik demokratik, të bazuar në sistemin shumëpartiak e konkurrues. “Vala e katërt e demokratizimit” erdhi me ritëm të shpejtë dhe në formën e efektit domino të nisur më parë në Gjermaninë Lindore, në Poloni, Hungari e Çekosllovakia, - vende të tjera ish-komuniste.

¹ Hanisch, Ernst. (1994). Der lange Schatten des Staates, Österreichische Gesellschaftsgeschichte im 20. Jahrhundert, Österreichische Geschichte 1890-1990, von Herwig Wolfram, Ueberreuter, Wien, 23

² Brzezinski, Zbigniew. (2001). The Primacy of History and Culture, Journal of Democracy, The Johns Hopkins University Press, Vol.12, Nr 4

³ Hellman, Joel. (1996). Competitive Advantage: Political Competition and Economic Reform in postcommunist Transitions, APSA, San Francisco, 3-4

Gjithsesi, ndryshimi ndodhi aq shpejt, sa që midis proceseve të ndodhura në vende të ndryshme gjejmë tipare të përbashkëta të procesit të ndryshimit, siç edhe modele identike të realizimit konkret të vullnetit politik e kushtetues për ndryshim. Për të nxjerrë më në pah dallimet dhe modelet e procesit të periudhës tranzitore, do të duhet të shihen të dhënat, modelet dhe karakteristikat e përbashkëta ose dallimet edhe me modele të njëjta historike, siç janë periudha tranzitore drejt demokracisë në vendet e Evropës Qëndrore.

Studiuesit kanë bërë një klasifikim formal të vendeve me reforma të suksesshme dhe atyre më pak të suksesshme në Evropën Lindore. Sipas njërit prej klasifikimeve mbështetur në indikatorët e transformimit të përcaktuara nga Banka Evropiane për Rindërtim dhe Zhvillim (EBRD), në raportet e saj për periudhën e periudhës tranzitore, rezultoni se në listën e shteteve të vjetra (që kanë ekzistuar si entitete shtetërore përpara 1990), Shqipëria, Bullgaria e Rumania klasifikohen vende me reforma të ngadalta. Në të njëjtën kategori bëjnë pjesë edhe vendet e tjera rajonale që dolën nga shpërbërja e federatave lindore, si: Serbia, Bosnja, Maqedonia, etj.

Kjo renditje faktikisht përputhet në tërësinë e saj edhe me raportet e këtyre vendeve ndaj procesit integruar.⁴ Vendet me reforma të shpejta, përfshirë ato të Evropës Juglindore, siç janë Sllovenia, e kaluan shpejt fazën e periudhës tranzitore duke u anëtarësuar në BE. Shtete të tjera, që bëjnë pjesë për rreth tetë dekada në bashkësinë federative të këtyre vendeve, për shkak të ritmit të reformave dhe konflikteve etnike dhe sociale, patën vonesa të dukshme edhe në procesin integruar.

Klasifikimet bëjnë dallime midis vendeve të ndryshme, por kur është rasti i Shqipërisë apo ndonjë vendi tjetër rajonal, cilësimet janë thuajse të njëjta. Për shembull, në një studimin për gjendjen politike dhe sjelljen e liderëve në vendet paskonfliktit, studiuesit Levitsky dhe Way arrijnë në përfundimin⁵ se, në 2005 Bullgaria, Kroacia, Rumania e Serbia janë vende në kategorinë e “demokracisë”, Shqipëria dhe Maqedonia në kategorinë e “autoritarizmit të paqëndrueshëm”, dhe modele si Rusia në kategorinë në “autoritarizmit të stabilizuar”.

2.1 3.1 Periudha tranzitore dhe teoria e rotacioneve demokratike

Në teoritë politike ka pikëpamje të ndryshme në lidhje me kushtet që duhet të plotësojë një vend për ta konsideruar të mbyllur fazën e periudhës tranzitore drejt një demokracie funksionale. Vetëm partitë konkurruese dhe zgjedhjet brenda standardeve demokratike nuk janë garanci për këtë. Për rotacionet e njëpasnjëshme paqësore dhe demokratike, diferenca midis vendeve në analiza bëhet edhe më e dukshme.

Në Poloni, Valesa ishte një hero popullor, por ai rikandidoi, humbi dhe pranoi vendimin qytetar, duke u larguar nga jeta politike. Vendin e tij e zuri një figurë që vinte nga elitat e

⁴ 56 Merkel, Wolfgang. (2008). Plausible Theory, Unexpected Results: The Rapid Democratic Consolidation in Central and Eastern Europe, in: Heinrich Best/Agnieszka Wenninger (eds.): Landmark 1989. Central and Eastern European Societies Twenty Years after the System Change, Münster: LIT-Verlag, 22.

⁵ Levitsky, Steven & Way, Lucan A. (2006). The Origins and Dynamics of Hybrid Regimes in the Post-Cold War Era, Journal of democracy, Stanford, 21.

reja komuniste. Në Bullgari, Zhevel, gjithashtu, pranoi humbjen dhe u tërhoq nga jeta aktive konkurruese, duke realizuar rotacion normal të pushtetit. Edhe Çekia, Sllovenia, etj, përfshirë edhe Maqedoninë, arritën të krijojnë rotacion normal të pushtetit midis Presidentëve, midis qeverive të majta dhe të djathta.

Në Rumani, Kroaci, Shqipëri, Malin e Zi, Serbi, etj, nuk ndodhi kështu. Në Serbi, çështjet e debatit zgjedhor përfunduan në mënyra të dhunshme me masa represive ndaj kandidatëve rivalë dhe figurave të opozitës demokratike. Në Shqipëri, kriza e vitit 1997 ishte në një farë mase edhe produkt i krizës zgjedhore. Në Rumani, gjithashtu pati probleme të demokracisë, kurse në Kroaci, presidenti drejtoi me dorë të fortë deri në momentet e fundit të jetës së tij.

Si moment i parë konsiderohen vitet 1990-1991 kur u ndryshua sistemi dhe bashkë me të (me zgjedhje, me marrëveshje apo me imponim) u krye edhe rotacioni i pushtetit nga komunistët tek forcat e reja politike. De facto rotacionet politike ndodhën më vonë, kryesisht në mesin e viteve '90. Për shkak të specifikave në ish-Jugosllavi dhe luftërave me natyrë etnike, rotacionet e para politike në disa prej republikave përbërëse, sidomos në Serbi dhe Malin e Zi u bënë shumë më vonë sesa vendet e tjera. Në rastin e Bosnjës, Kroacisë dhe Sllovenisë, procesi i parë politik ka të bëjë me proces pavarësimi, ndaj, edhe zgjedhjet aty nuk ishin tërësisht votime për rotacion ose jo të pushtetit të brendshëm, sesa garanci për vendimmarrjen e pavarur jashtë kontekstit federativ jugosllav.

Për të bërë një vlerësim përmbyllës së dy dekadave të transformimeve demokratike le të krahasojmë ecurinë demokratike me elementët e sigurisë dhe stabilitetit. Ky klasifikim është bërë nga Fondi për Paqen dhe revista Foreign Policy dhe ka si qëllim hartimin e indeksit të "shteteve të dështuara".⁶ Nga klasifikimi rezulton se Bosnja konsiderohet shteti i vetëm në Evropën Juglindore me potenciale të dukshme të paqëndrueshmërisë (vendi 69-të në botë dhe me potencial 80,9%). Vendi i vetëm që bën pjesë në grupin e vendeve më të stabilizuara në botë është Sllovenia me vetëm 35.5% risk.

Katër vende të tjera të Evropës Qendrore kanë sistem dukshëm të stabilizuar, dhe ato janë disa gradë (8-10%) para vendeve me statusin e vendit të stabilizuar, siç janë katër vendet ballkanike, Kroacia, Bullgaria, Rumania dhe Mali i Zi. Shqipëria është i vetmi vend në rajon që bën pjesë në grupin e vendeve që ndodhen midis zonës së kufirit ndarës dhe asaj me sistem të stabilizuar, kurse Turqia, Serbia dhe Maqedonia ndodhen në limitet ndarëse të vendeve në rrezik dhe atyre me sistem të qëndrueshëm.

4 Proceset zgjedhore dhe e drejta e zgjedhjes në Europën Juglindore

Një nga treguesit me rëndësi të ecurisë demokratike të një vendi është aftësia e tij për të zhvilluar zgjedhje të lira, të barabarta dhe periodike. Të gjitha dokumentet kushtetuese të vendeve të Evropës Juglindore kanë sanksionuar parimin e zgjedhjeve periodike. Ky parim nuk vjen në kundërshtim me rrethanat kur vendet vendosin të aplikojnë zgjedhje të parakohshme ose të jashtëzakonshme parlamentare.

⁶ FFP and Foreign Policy. Failed States Index 2011: Remarks on Index Highlights, NY 2011.

Kudo në Evropën Lindore dhe Juglindore proceset zgjedhore gjatë sistemit komunist kanë qenë tërësisht formale, nën kontrollin e plotë të shtetit njëpartiak. Sistemi i votimit ishte ai mazhoritar, duke krijuar zona elektorale në varësi nga numri i popullsisë ose ndarja territoriale, me kandidatë të emëruar nga hierarkia e lartë partiakë e regjimit.

Nga të gjitha kriteret e transformimeve demokratike kriteri i përfaqësimit dhe rregullave të sjelljeve demokratike mbetet më i vështiri, dhe njëherësh, sfida kryesore e të gjitha vendeve ish-komuniste. Fillimisht, proceset zgjedhore kaluan përmes dy modeleve: procese me nivel të lartë manipulimi në ato vende ku regjimi i vjetër, duke ndryshuar emrin e forcës politike, ruajti kontrollin e Parlamentit dhe përfaqësimit politik. Kështu ndodhi në Shqipëri, Bullgari, Serbi dhe disa vende të tjera.

Modeli i dytë ishte ndryshimi i shpejtë i sistemit përmes zgjedhjeve që fituan kredenciale, për shkak se, më shumë se zgjedhje konkurruese, u shndërruan në referendume popullore pro dhe kundër sistemit të ri. Kështu ndodhi në zgjedhjet e para vërtetë konkurruese në shtetet ish-komuniste në Evropën Qëndrore, por edhe në disa shtete ballkanike, si Sllovenia, Kroacia, Shqipëria më 1992, Rumania, etj.

Brenda normave kushtetuese dhe ligjore, secili vend mund të vendosë vetë nëse është koha për zgjedhje të reja ose nëse mandati parlamentar vijon deri në kufijtë kohorë të përcaktuar nga legjislati. Në fazën e deritanishme të periudhës tranzitore në vendet e Evropës Qëndrore dhe Juglindore janë regjistruar mesatarisht nga 7 procese zgjedhore parlamentare për secilin vend. Po kaq procese zgjedhore janë zhvilluar edhe për zgjedhjet lokale.

Në disa vende aplikohen zgjedhje të drejtpërdrejta presidenciale dhe, në vendet e anëtarësuara në BE, aplikohen edhe zgjedhjet evropiane. Praktikata e deritanishme kanë treguar se, një herë në dy vjet, çdo vend zhvillon zgjedhje (parlamentare ose lokale) duke u dhënë mundësi aktorëve politikë të jenë gjithnjë në faza parazgjedhore ose zgjedhore. Në këtë bilanc zgjedhor mund të konstatohen disa modele të aplikimit të zgjedhjeve “periodike” parlamentare.

5 Ndryshimet ligjore në Shqipëri pas rënies së komunizmit

Ajo që u vu re në fillimet e viteve '90, pas rënies së komunizmit, ishte diversiteti i vrullshëm i zhvillimit. Si pasojë e qasjes me sistemin demokratik, u bë e domosdoshme implementimi i ligjeve dhe normave të reja. Duke kaluar nga sistem totalitar njëpartiak në atë shumëpartiak u pa e nevojshme reformi i infrastrukturës ligjore. Kështu pranimi më 1991 nga Sekretari i Parë i Partisë së Punës, Ramiz Alia, i sistemit shumëpartiak u pasua nga miratimi i një kushtetutë të përkohshme.

Ndryshimet demokratike që ndodhën në fillim të viteve '90 shënuan kthesë rrënjësore në historinë e shtetit shqiptar dhe të institucioneve të tij. Orientimi demokratik i shtetit kërkonte kryerjen e një reforme institucionale të thellë, e cila duhet t'i hapte rrugë shndërrimeve demokratike për ndërtimin e shtetit të së drejtës dhe respektimit të të drejtave të njeriut.

Parimet themelore që udhëhoqën këto ndryshime demokratike u shpallën fillimisht me ligjin nr.7491 dt.29.04.1991 “Për dispozitat kryesore kushtetuese”, më pas me ligjin nr.7561 dt.29.04.1992 Për disa ndryshime e plotësime në ligjin nr.7491 dt.29.04.1991 “Për dispozitat kryesore kushtetuese”.

Në kuadër të këtyre ndryshimeve u krijua edhe Gjykata Kushtetuese, si një nga institucionet më të rëndësishme për garantimin e rendit të ri kushtetues që po instalohej në Shqipëri. Që në fillim ky institucion u konsiderua nga ligjvënësi si autoriteti më i lartë që garanton respektimin e Kushtetutës dhe bën interpretimin përfundimtar të saj. Ligji i mësipërm përcaktonte edhe statusin e gjyqtarëve kushtetues, kompetencat e atributet, subjektet që e vinin në lëvizje dhe fuqinë detyruese të vendimeve të saj.

Ligji kushtetues nr.7561, datë 29.04.1992 Për disa ndryshime e plotësime në ligjin nr.7491, datë 29.04.1991 Për dispozitat kryesore kushtetuese mbi bazë të të cilit u krijua dhe Gjykata Kushtetuese kërkonte nxjerrjen e akteve të tjera për rregullimin e veprimtarisë së saj. Më 15.07.1998 Kuvendi miratoi ligjin nr.8373 Mbi organizimin dhe funksionimin e Gjykatës Kushtetuese të Republikës së Shqipërisë, i cili krijoi një bazë ligjore për çështjet e veprimtarisë së Gjykatës Kushtetuese. Më 28.11.1998 hyri në fuqi Kushtetuta e Shqipërisë, në të cilën Gjykata Kushtetuese zuri përsëri një pozitë institucionale të rëndësishme.

Në mënyrë të përmbledhur mund të themi se veprimtaria e Gjykatës Kushtetuese ndahet në dy periudha: periudha e parë përfshin kohën gjatë së cilës ajo ka funksionuar në bazë të Dispozitave Kryesore Kushtetuese, ndërsa periudha e dytë përfshin kohën pas hyrjes në fuqi të Kushtetutës së re dhe ligjit për Gjykatën Kushtetuese.

Që nga krijimi i saj Gjykata Kushtetuese ka dhënë vendime të natyrave të ndryshme duke u shprehur për kushtetutshmërinë ose jo të normave ligjore apo akteve normative të institucioneve qëndrore dhe vendore, interpretimin e Kushtetutës, parimet kushtetuese për një proces të rregullt ligjor. Një nga vendimet më të rëndësishme të saj ka qenë V-65/99, me anë të të cilit dënimi me vdekje i parashikuar nga Kodi Penal u shpall i papajtueshëm me Kushtetutën.

Fitorja e demokracisë pas viteve '90 shënoi jo vetëm një hapje të plotë të Shqipërisë ndaj vendeve të civilizuar perëndimore, por në kushtet e ekonomisë së tregut, të lëvizjes së lirë të njerëzve dhe të përshpejtimin të ritmeve të jetës u krijua një ambient i favorshëm për konfrontimin e shoqërisë civile me probleme sociale, që tashmë janë evidente në të gjitha shoqëritë e civilizuar.

Ndryshimet e thella që përkojnë me vendosjen e demokracisë pas viteve '90 në vendin tonë sollën si pasojë përhapjen në masë të plagëve sociale të tilla si kriminaliteti, droga, prostitucioni, etj. Në varësi të kushteve të krijuara, lindi nevoja e ndryshimeve në fushën juridike nëpërmjet përmirësimit të legjislationit dhe në lidhje me kriminalitetin dhe veprat penale të kryera në fushën e lëndëve narkotike. Në kuadër të kësaj tashmë ligji penal dhe hartuesit e tij e panë dhe vlerësuan qënien njerëzore për atë që ishte: një njeri të ndreqshëm dhe të aftë për t'u përmirësuar. Kështu nga funksioni primar sanksionues që kishte ligji penal si më i rëndësishëm u pa tanimë qëllimi parandalues i tij.

Kjo valë reformash ligjore ndodhi edhe në drejtimin civil, por më i dukshmi i atyre viteve i cili faktikisht zgjati në kohë, ishte çështja në lidhje me tokën dhe pronësinë mbi të. Kështu parlamenti i parë pluralist miratoi Ligjin “Për dispozitat Kryesore Kushtetuese” në të cilën sanksionohej se “Ekonomia e vendit bazohej në shumlojshmërinë e pronave, iniciativën e lirë për të gjithë subjektet ekonomike”.⁷ Në bazë të ligjit kushtetues Parlamenti miratoi ligjin nr.7501 datë 19.07.1991 “Për Tokën”. Ky ligj e ndau token në tre kategori: toka bujqësore, toka jo bujqësore dhe toka të zëna me pyje, kullota e livadhe. ⁸Pas viteve ’90 toka nuk konsiderohej më pronë ekskluzive e shtetit dhe në kuadër të kësaj dhe për të venë në vend një të drejtë të shkelur lindi nevoja e rregullimit ligjor për të mundësuar kthimin dhe kompesimin e pronave ish-pronarëve. I gjithë procesi i realizimit në praktikë u karakterizua nga mangësi dhe hasi në problematika të shumta dhe si dëshmi e kësaj shërbejnë proceset gjyqësore të zhvilluara brenda dhe jashtë vendit. Kalimi nga pronë shtetërore në pronësi private, pas zhvillimeve demokratike post komuniste, i hapi rrugën koncepteve dhe ideve të reja për mënyrën e trajtimit dhe shfrytëzimit të kësaj prone.

2.2 5.1 Rilindja e parlamentarizmit (1991)

Pas 5 dekadash në Shqipëri shfaqen shenjat e para të rilindjes së parlamentarizmit. Pas një periudhe 67 vjeçare mblidhet parlamenti i parë pluralist i dalë nga zgjedhjet e 31 marsit 1991 (250 deputetë). Ligji “Për dispozitat kryesore kushtetuese”, i miratuar në këtë vit solli ndryshime në kuadrin e organizimit demokratik të shtetit. Ai u plotësua gradualisht nga një sërë ligjesh të tjera kushtetuese, deri në miratimin e një kushtetute të re tërësore. Më 21 tetor 1998 Kuvendi Popullor miratoi Kushtetutën e re, të hartuar edhe me ndihmën e organizmave ndërkombëtarë.

Kushtetuta e re krijoi mundësinë për të kuptuar më mirë sistemin politik në Shqipëri dhe rolin e aktorëve të tij. Emërtimi Kuvend Popullor ndryshohet në Kuvend i Shqipërisë (njëdhomësh, 140 deputetë). Pas hyrjes në fuqi të Kushtetutës, Kuvendi, si organi më i lartë i Pushtetit ligjvënës, vazhdoi procesin e hartimit dhe miratimit të ligjeve.

Gjatë këtyre viteve roli i Kuvendit është rritur ndjeshëm në krijimin e një kuadri kushtetues e ligjor, si premisë për vendosjen e shtetit juridik. Ai është kthyer në institucionin më të rëndësishëm të zhvillimit të jetës politike në vend. Veprimtaria legjislative është bërë një nga instrumentët më aktivë në konsolidimin e institucioneve të shtetit dhe të integrimit euroatlantik.

6 Konkluzione

Panorama e paraqitur përmes këtij referimi, na bëri të mundur që të shohim të trajtuar progresin ligjor post komunist në vendet e Europës Juglindore pas rënies së këtij regjimi. Sigurisht që këto zhvillime nuk mund që të shihen të shkëputura nga konteksti i ndodhjes së ngjarjeve. Me rënien e komunizmit u arrit jo vetëm një shembje izolimi, por më pozitivja e gjithë kësaj ishte hapje me botën demokratike dhe implemetimi i saj edhe në ato vende që me vite kishin ndërjer forcën e dhunës dhe mohimit të së drejtave të njeriut.

⁷ E drejta Agrare e Shqipërisë, prof.dr. Paskal Haxhi, fq.83, Tiranë 2008

⁸ Ligji nr.7501 datë 19.07.1991 “Për Tokën”

Rajoni i Evropës Juglindore, ashtu si edhe të gjitha vendet e tjera ish-komuniste, kanë shënuar progres të jashtëzakonshëm politik dhe institucional. Implementimi i demokracisë u bë i mundur me dy fazat kryesore që i ndeshëm në vendet e Europës Juglindore pas shembjes së komunizmit në to : faza e parë ajo e tranzicionit e cila për karakteristika specifike të vendeve të ndryshme pati edhe tipare të ndryshme përsa i përket kohëzgjatjes dhe formës së kalimit dhe faza e dytë ajo e lënies pas të periudhës trazitore dhe hyrjen në rrugën e ngurtësimit të demokracisë dhe integritetit të këtyre vendeve në Unionin Europian.

Shumë i rëndësishëm mbetet futja në praktikë e një formë të re të respektimit të individit dhe të drejtave të tij si edhe mënyra e kalimit nga një shoqëri e mbyllur në një më të afër Europës së qytetëruar, asaj me parime demokratike dhe respektimit të një shteti ligjor.

Pjesë e konkluzioneve është teza se, në tërësi, në vendet e Europës Juglindore çështja e demokratizimit ka qënë delikate për vetë trajtën e transformimit të saj në vende të ndryshme. Gjithashtu mundemi që të shohim edhe atë që është karakteristike : arritja e proceseve progresive ligjore në funksion të demokracisë funksionale, respektimin integral të drejtave të njeriut, sidomos të pakicave kombëtare dhe minoriteteve, zgjerimin e demokracisë direkte, kalimin nga modelet qeverisëse të liderëve të “fortë” tek modeli i institucioneve të forta, si dhe nevoja për konsolidim më të madh të parimit kushtetues të ndarjes dhe balancës së pushteteve.

Ajo që mbetet e rëndësishme në ditët e sotme, kur pothuaj secili nga këto vende ka kaluar pjesën e integritetit në një demokraci funksionale është pikërisht ruajtja e standarteve përmes funksionimit të shtetit ligjor ku secili individ është i barabartë para tij. Mbetet impenjative aspirata e atyre vendeve përfshirë edhe Shqipërinë apo vende të tjera të rajonit të cilat vazhdojnë rrugën drejt plotësimit të kushteve që lidhen edhe me reformimin ligjor, për të bërë të mundur hyrjen në komunitetin më të të madh europian, Unionin Europian si edhe garancinë se sistemi demokratik i adaptuar tashmë prej më shumë se 20 vitesh ka standartin e duhur për t’i rradhitur edhe vendet e Europës Juglindore dikur ish-komuniste, sot si vende demokratike të Europës së lirë dhe të bashkuar.

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Ligji nr.7501 datë 19.07.1991 “Për Tokën”

Jonaid Myzyri

Universiteti i Tiranës, Fakulteti i Drejtësisë

Lobimi në BE dhe rasti shqiptar

Abstrakt

Teksa lobimi në Bashkimin Europian është shndërruar në një ndër instrumentet kyçe në procesin e vendimarrjes, gjithnjë e më shumë vendet kandidate po i kushtojnë rëndësi teknikave të lobimit. Duke mbajtur në vëmendje teknikat lobuese dhe standardin e lobimit në BE, përmes këtij punimi synojmë të sjellim mënyrën se si ka lobuar Shqipëria. Duke marrë në studim periudhën 23 vjeçare të demokracisë në Shqipëri, synojmë përgjigjen e disa pyetjeve si: Si ka lobuar Shqipëria në BE gjatë të gjitha fazave të integritit? Cilat strategji lobuese kanë funksionuar dhe cilat jo? A duhet të ndryshojë strategji lobimi qeveria shqiptare në “epokën” e euroskepticizmit? Përmes këtij punimi synohet njohja me teknikat e lobimit të ndjekur nga Shqipëria ndër vite, si të grupuara, por gjithashtu edhe të veçuara me institucione specifike, si Komisioni, Parlamenti dhe Këshilli. Në përfundim të punimit do të paraqesim një qasje të re për teknikat e lobimit në BE që duhet të ndjekë qeveria shqiptare në kuadër të proceseve integruese.

***Fjalë kyçe:** Bashkimi Europian, integritim, euroskepticizmi, lobim, Shqipëri*

1. Hyrje

Me rritjen ndjeshëm të lobimit dhe të shndërrimit të tij në një mekanizëm të procesit të vendimarrjes në Bashkimin European, gjithnjë e më shumë është rritur interesi për të përkufizuar vetë lobimin. Në aspektin gjuhësor, fjala lobim rrjedh nga fjala latine “lobium” që nënkupton *sallën e hyrje, hollit*. Ndaj kuptimi i parë i dhënë lobimit, vjen nga “lobby” në kuptimin e korridoreve ngjitur me sallën e parlamentit ku mund të takohen më lehtë anëtarët e parlamentit¹. Sigurisht që me kalimin e viteve lobimi si proces në përgjithësi dhe në funksion të studimit, lobimi si një ndër instrumentët e rëndësishëm të demokracisë dhe të politikës vendimarrëse në Bashkimin European ka zgjeruar edhe kuptimin e tij. Vetë institucionet ndërkombëtare e kanë pranuar lobimin jo vetëm si fenomen (*de facto*), por gjithashtu janë munduar të kryejnë rregullime ligjore (*de juro*) për të ruajtur dhe baraspeshën mes lobimit dhe demokracisë. Këshilli i Evropës është ndër të parët insitucione që është munduar ti japë një shpjegim termit lobim. Në raportin e qershorit 2009, Këshilli i Evropës, pasi e njeht dhe legjitimon veprimtarinë lobuese, e përkufizon lobimin si “ përpjekje për të ndikuar në politikë, në vendimarrje, me qëllim marrjen e rezultateve të dëshiruara nga autoritetet shtetërore ose nga përfaqësuesit e zgjedhur. Vetë Bashkimi European, i cili ka një histori të gjatë me lobimin në të gjitha nivelet e institucioneve, ka hedhur hapat e parë të krijimit të një përkufizimi ligjor mbi termin lobim. Me krijimin e Regjistrat European të Transparencës si një mekanizëm që u mundëson njohjen e qytetarëve europianë se cilat grupe influencojnë në politikën e BE-së², Këshilli Evropian jep një përpjekje për të përmbledhur atë çka kuptohet me “lobim”. Megjithatë jo drejtpërdrejtë, Regjistri European i Transparencës (European Transparency Register), jep një përkufizim të gjithë atyre subjekteve që duhet të regjistrohen. “Të gjithë organizatat dhe individët të vetëpunësuar, të angazhuar në aktivitete të cilat drejtpërdrejtë ose tërthorazi ndikojnë në formulimin ose zbatimin e politikave apo të vendimarrjes në Bashkimin European janë të detyruara të regjistrohen³. Komisioni i Venecias në raportin e vitit 2010 mbi “Kornizën ligjore të lobimit për vendet anëtare të Këshillit të Europës” përkufizon lobimin si *akte të individëve apo grupeve të ndryshme me një interes të veçantë, me synim ndikimin në vendimet e marra në nivel politik*.⁴ Kjo theksohet edhe në raportet e "Organisation for Economic Cooperation and Development" (OCED) ku theksohet se “nuk ekziston një konsensus mbi përkufizimin e termit lobim”⁵

2. Lobimi në Bashkimin European

Megjithatë në fillim të punimit saktësuam se rrënjët e lobimit i lidhim me eksperiencën amerikane të lobimit, vlen të theksohet se Bashkimi Evropian na jep një strukturë krejt

¹ Ian Mc Lean, Fjalor Politik, Oxford fq 312 pg 2, Shtëpia e Librit dhe Komunikimit, Tiranë, 2001

² Për më shumë shih <http://ec.europa.eu/transparencyregister/info/about-register/whyTransparencyRegister.do?locale=en>, vizituar më 10 shkurt 2014

³ Memo nr 11446, Komisioni Evropian “Q's & A's: Transparency Register”, Brussel 23.06.2011

⁴ Raport, Komisioni i Venecias “ Report on the legal framework for the regulation of lobbying in the Council of Europe Member States” Studimi Nr 590/2010, Strausburg, 31 Maj 2011.

⁵ Raport, OCED, *Lobbyists, Governments and Public Trust*, Volume 2, shtator 2012

ndryshe lobimi, lobimin në tre nivele⁶. Përmes “ligjërimit” të nocionit të “barazpeshës”, Komisioni ka integruar në procesin e vendimarrjes një numër të madh Grupesh Këshillimi (të paktën 400), të cilët janë të përbërë nga përfaqësues të shoqërisë civile apo grupe të ndryshme interesi si psh. konsumatorë, ekologjistë, etj). Roli i tyre është tepër i rëndësishëm në shprehjen e opinioneve në propozimet legjislativ. Niveli i dytë i lobimit kryhet në PE. Lobistët janë të akredituar pranë PE dhe mund të punojnë pranë tij në mënyrë transparente. Niveli i tretë i lobimit është sigurisht edhe më praktik, kjo pasi asnjë institucion në Bruksel nuk merr vendim pa patur më parë mendimin, komentin apo kundërshtimet e grupeve të ndryshme të interesit. Komisioni është një vend qendror për aktivitetet lobuese të grupeve të interesit për shkak të rolit të tij qendror në procesin legjislativ të BE-së⁷ Komisioni ka të drejtë formale për të iniciuar procedurën legjislativ dhe në këtë mënyrë është njëkohësisht përgjegjës për hartimin e draft-propozimit legjislativ⁸. Si i tillë Komisioni shndërrohet në një ndër vendet e para ku nisin edhe përpjekjet e lobuesve për të ndikuar, që në fazat e para të draft-propozimit. Nga ana tjetër, Parlamenti Evropian, me rritjen e fuqisë vendimarrëse të tij, është shndërruar gjithnjë e më shumë “tërheqës” nga grupet e interesit për të zhvilluar veprimtari lobuese. Në nivelin e Këshillit të Ministrave, çështja vështirësohet edhe më shumë. Në këtë stad grupet lobuese e kanë më të vështirë të kenë aksesin si në nivelin e Ministrave ashtu edhe në nivelin COREPER⁹. Sigurisht që kjo hallkë nuk mund të mbetet pa ndikimin e lobistëve, të cilët, në rast se duan të influencojnë në vendimet e Këshillit, atëherë do ti duhet ti drejtohen qeverive kombëtare, do të jenë ato më pas që ndryshojnë pozitën në Këshill.¹⁰

2.1 Strategjitë e lobimit në BE

Për të kuptuar strategjinë e lobimit të ndjekur nga qeveria shqiptare dhe jo vetëm gjatë periudhës së tranzicionit, në kuadër të integritetit europian, pikë së pari duhet të ballafaqohemi me strategjitë kryesore të lobimit që ndiqen në Bashkimin Evropian. Studiuesit vlerësojnë se janë katër strategji¹¹ kyçe të lobimit në Bashkimin Evropian; strategji negative lobuese, strategji mbrojtëse lobuese, reaktive lobuese dhe proaktive lobuese. Sigurisht secila prej këtyre strategjive mbart tipare të veçanta. Duke nisur nga strategjia negative e lobimit e cila ka në themel të saj bllokimin, refuzimin pa dhënë një alternativë tjetër¹², strategjia mbrojtëse nga ana tjetër vendos në plan të parë mbrojtjen e çdo avantazhi të fituar duke kundërshtuar çdo ndryshim në legjislacion. Strategjia reaktive (statike) e lobimit karakterizohet nga mungesë veprimesh, ku palët presin sa më shumë të jetë e mundur para se të veprojnë; pushtet të dobët vendimarrës, pushtet të dobët përsa i përket nismave dhe për lobimin në tërësi. Por gjithësesi kjo strategji cilësohet si ndër strategjitë e lobimit “politikisht korrekt”. Përsa i përket strategjisë së fundit të lobimit, atë

⁶ Gueguen D. “European Lobbying” botimi i dytë, 2007, fq.20

⁷ Greenwood, J. Interest representation in the European Union. Basingstoke, PalgraveMacmillan. Viti 2003 fq. 44

⁸ Bouwen, P. "Corporate lobbying in the European Union: the logic of access." in: Journal of European Public Policy vol. 9(N. 3) viti 2002 fq. 365-390.

⁹ Për më shumë shiko Nenin 240 Traktati i Funksionimit të Bashkimit Evropian, ish neni 201 TKE

¹⁰ Greenwood, J. (2003). Interest representation in the European Union. Basingstoke, Palgrave Macmillan /44

¹¹ Gueguen D. “European Lobbying” botimi i dytë, 2007, fq.118-145

¹² Ibid. fq 118-145

proaktive (iniciatore), është e njohur përgjithësisht në aplikimin e saj në situata emergjente, pranë një afati i cili është në limite të tij. Kjo strategji mbështetet gjerësisht me veprime iniciatore, përfshirjen e një shpirti partneriteti, e të gjitha këto me një qëllim të vetëm, realizimin e synimit. Kjo strategji ndërthuret edhe me elementë personalë të lobuesve duke nisur nga *kredibiliteti në lobim, argumentet e paraqitur dhe kredibiliteti personal i lobuesit*. Paraqitja shkurtimisht e strategjive kryesore lobuese në Bashkimin Europian do të na vijë në ndihmë në analizën e strategjisë lobuese së ndjekur nga Shqipëria ndër vite.

3. Shqipëria dhe lobimi në Bashkimin Europian

Duhet të theksojmë se lobimi në Bashkimin Europian, krahas tipareve të lartpërmendura ka edhe dy tipare të veçanta. Së pari, lobimi në Bashkimin Europian varet shumë nga fuqia e shtetit në arenën ndërkombëtare¹³ së dyti, influencimi në Bruksel është personal¹⁴. Sigurisht që Shqipëria nuk mund të bëjë përjashtim, jo vetëm nga rregullat standard të lobimit në Bashkimin Europian, por edhe nga faktorët dhe tiparet e tyre që ndikojnë drejtpërdrejtë në lobim. Gjithashtu, lobimi i Shqipërisë në Bashkimin Europian kurrësesi nuk mund të shihet i ndarë edhe nga vetë situata politiko-ekonomike e Bashkimit Europian dhe rritjes gjithnjë e më shumë në dukje të euroskepticizmit europian. Duke patur gjithnjë në vëmendje faktin se lobimi varet shumë edhe nga cilësitë e lobuesit, kredibilitetin ndaj lobuesit dhe ndaj shtetit në përgjithësi, jo në pak raste, lobimi i Shqipërisë në Bashkimin Europian është lidhur ndjeshëm edhe me situatën ekonomike-politike të Shqipërisë.

4. Strategjitë e lobimit të Shqipërisë ndër vite

Nga vendosja e marrëdhënieve diplomatike me Komunitetin Ekonomik Europian¹⁵ e deri më sot, Shqipëria dhe klasa e saj politike ka ndryshuar. Megjithë evoluimin jo vetëm të politikbërjes në nivel vendor (në Shqipëri), por edhe në Bashkimin Europian, qeveritë shqiptare ndër vite nuk e kanë kuptuar rëndësinë e hartimit në formën e një axhende ose të një politike kombëtare lobimi. Ndër vite qeveritë shqiptare çështjen e lobimit e kanë cilësuar si dytësore dhe është lënë përgjithësisht në dorë të kanaleve diplomatike. Nga intervista personale e realizuar me znj. Vjollca Lleshi,¹⁶ Drejtore¹⁷ e Drejtorisë së Jetësimit të Prioriteteve dhe Sekretariatit Europian, pranë Ministrisë së Integritetit Europian, konfirmohet se “Aktualisht nuk ka një strategji të mirëfilltë të miratuar me fokus lobimin në BE. Ministria e Jashtme është institucioni që mund të ketë hartuar ndonjë dokument lidhur me këtë çështje”. Pra, si element thelbësor nënvizojmë faktin se ndër vite qeveritë Shqiptare nuk kanë patur një strategji të mirëfilltë lobimi, kjo për vlerësimin tonë, për shkak të mos njohjes së rëndësisë së lobimit në Bashkimin Europian. Natyrshëm lind pyetja, nëse kanë lobuar qeveritë shqiptare ndër vite me institucione të

¹³ Kuptimi i dhënë nga autori, Gueguen D. Counter-power “European Lobbying” botimi i dytë, 2007

¹⁴ Nw origjinal, In Brussels, influence is personal” Tony Long Director, WWF European Policy Office

¹⁵ Vendosur në vitin 1991

¹⁶ Interviste e drejtpërdrejtë zhvilluar me e-mail znj. Vjollca Lleshi, Drejtore e Drejtorisë së Jetësimit të Prioriteteve dhe Sekretariatit Europian, pranë Ministrisë së Integritetit Evropian, Mars 2014

¹⁷ Detyrë e ushtruar në kohën e zhvillimit të intervistës Mars 2014

Bashkimit Evropian ose jo? Sigurisht që është lobuar, por strategjia e lobimit, duke nisur nga vendosja e personave lobues dhe deri tek zbatimi në praktikë është bërë pa një koordinim kombëtar dhe plan konkret.

Ministria e Integritetit Evropian konfirmon se “është Ministria e Jashtme që organizon takime lobuese, nëse organizon, përmes përfaqësuesve të saj në vendet e BE-së”. Duke marrë në studim sjelljen lobuese të Shqipërisë ndër vite evidentojmë katër forma kryesore të lobimit;

1. Lobim diplomatik
2. Lobim politik
3. Lobim nga një shtet anëtar
4. Lobim nga persona me influencë

4.1 Lobimi diplomatik

Në vlerësimin tonë, gjatë këtyre viteve, Ministria e Punëve të Jashtme ka kryer veprimtarinë e saj lobuese në dy nivele, nivel ambasadorësh (MPJ-ambasadorë të vendeve anëtare,) dhe në nivel përfaqësuesish të MPJ dhe anëtarë të kabineteve qeveritare të shteteve anëtare. Në nivelin e parë përfshijmë lobimin mes: përfaqësuesve të Ministrisë së Punëve të Jashtme të Shqipërisë dhe Ambasadorëve të Plotfuqishëm të vendeve anëtare të Bashkimit Evropian; Ambasadorëve Fuqiplotë të Republikës së Shqipërisë, në vendet anëtare të Bashkimit Evropian, ndërsa në nivelin e dytë takime mes Ministrisë së Punëve të Jashtme me homologë të vendeve anëtare të Bashkimit Evropian. Aktualisht në Tiranë, kanë selitë e tyre diplomatike ¹⁸, 18 nga 28 vende anëtare të Bashkimit Evropian. Këto takime lobuese mbartin disa karakteristika. Së pari, kryen në nivel politik, duke shmangur ekspertët, së dyti reflektojnë një strategji lobuese proaktive të shtetit shqiptar. Karakteristikat e këtyre takimeve lobuese janë të tilla që kryen pranë limitit të afateve në të cilat priten të merren vendime nga Insitucionet e BE-së për Shqipërinë. Kjo strategji reflektohet me veprime iniciatore, përfshirjen e një shpirti partneriteti, e të gjitha këto me një qëllim të vetëm, realizimin e synimit.¹⁹ Duke nisur nga muaji tetor i vitit 2013 deri më 17.12.2013, referuar publikimeve të Zyrës së Shtypit të Ministrisë së Punëve të Jashtme, zyrtarë të Ministrisë së Punëve të Jashtme të Shqipërisë kanë zhvilluar 5 takime me ambasadorë të vendeve anëtare të Bashkimit Evropian. Ndërsa nga periudha 18.12.2013- deri më 03.03.2014 janë zhvilluar 4 takime në nivel ambasadorësh të vendeve anëtare të Bashkimit Evropian duke patur në fokus integritimin e Shqipërisë në Bashkimin Evropian. Gjithashtu nga lobimi në nivel politik me përfaqësues të Ministrisë së Punëve të Jashtme dhe përfaqësuesve të qeverive të vendeve anëtare (nivel homologu, mes ministrave, apo përfaqësuesve të lartë), rezultojnë se nga muaji nëntor e deri më 17.12.2013 janë zhvilluar 7 takime lobuese, përfshirë edhe një tur takimesh në disa vende të Bashkimit Evropian²⁰, ndërkohë nga 18.12.2013 e deri më sot 03.03.2014 janë zhvilluar vetëm 2 takime lobuese.

¹⁸ Botim, MPJ , Protokolli Shtetëror, Lista e Misioneve Diplomantike http://www.punetegashtme.gov.al/files/userfiles/diplomatic_list_february_2014-21.pdf vizituar më 25/2/2014

¹⁹ Gueguen D. “European Lobbying” botimi i dytë, 2007 fq 123

²⁰ Për më shumë shih <http://www.punetegashtme.gov.al/zyra-e-shtypit/lajme/ministri-bushati-niset-per-nje-vizite-ne-hollande-dhe-luksemburg>

Vlerësojmë, se qeveritë shqiptare ndër vite, e sidomos fokusuar në periudhën e fundit lobuese tetor 2013 – mars 2014, përmes kanaleve diplomatike të Ministrisë së Punëve të Jashtme kanë ndjekur një **strategji miqësore pro aktive lobuese**, duke pasqyruar kushtet e përcaktuar nga doktrina mbi këtë strategji, duke vlerësuar se mund të zhvillohet në çdo fazë të procesit të hartimit të draftit, si për të ndikuar në Komision ashtu edhe në Këshill.²¹ Përmes veprimeve iniciatore, qeveria shqiptare është kujdesur që gjithnjë në afim të afateve të pasqyrojë jo vetëm plotësimin e kriterëve të vendosura nga vetë institucionet e Bashkimit Evropian, por edhe vijimin e reformave të ardhshme. Sigurisht në këtë stad ngrihen disa pyetje. Përmes strategjisë lobuese drejtuar nga Ministria e Punëve të Jashtme, **së pari** në cilin institucion vendimarrës të Bashkimit Evropian mund të ndikojë qeveria shqiptare dhe **së dyti** cilat janë anët pozitive dhe negative të kësaj strategjie. Përsa i përket pyetjes së parë duhet të nënvizojmë se tre janë institucionet, Parlemenit, Komisioni dhe Këshilli ku qeveria shqiptare mund dhe duhet të ndikojë përmes strategjisë së saj lobuese, por dy institucione mbeten kyçe si Komisioni dhe Këshilli. “Çdo shtet Evropian i cili respekton vlerat e përmendura në Nenin 2 dhe është i angazhuar për nxitjen e tyre, mund të kërkojë të bëhet anëtar i Bashkimit. Parlamenti Evropian dhe Parlamentet Kombëtare njoftohen për këtë kërkesë. Shteti kërkuar ja drejton kërkesën Këshillit, i cili vepron unanimisht pasi konsultohet me Komisionin dhe pasi merr pëlqimin e Parlamentit Evropian i cili vepron me shumicën e deputetëve që e përbëjnë. Merren në konsideratë kushtet e pranueshmërisë të miratuara nga Këshilli Evropian”.²²

Qeveria përmes lobimit diplomatik gjen hapësirë **të loboje në antarët e Këshillit**, duke qenë përfaqësues të shteteve anëtare,²³ gjithësesi kjo nuk është një sipërmarrje e lehtë. Eksperiencia e fundit tregoi se megjithëse qeveria shqiptare kishte një pritshmëri të lartë në marrjen e statusit të vendit kandidat në mbledhjen e 17 dhjetorit të vitit 2013, Këshilli e shtyu për në muajin qershor të vitit 2014.²⁴ Natyrshëm lind pyetja se përse kjo formë lobimi nuk ka funksionuar në rastin shqiptar. Së pari studiuesit vlerësojnë se “ ka një problem në lidhshmërinë e sotëm. Ditët e “lobistëve diplomatikë” u ka ardhur fundi”²⁵. Së dyti lobimi në BE, e sidomos lobimi proaktiv (iniciator) është i lidhur ngushtë me tre elementët të rëndësishëm, transparencia, besueshmëria dhe ndërtimi i një aleance mes palëve lobuese²⁶. Për vetë faktin se veprimtaria lobuese në nivel diplomatik drejtohet nga MPJ, pasqyron në një farë mënyre kredibilitetin, transparencën dhe besueshmërinë e shtetit shqiptar nga vendet anëtare të BE. *Prima Facia*, besueshmëria e shtetit shqiptar ndër vite në opinionin e vendeve anëtare të BE ka ardhur në rritje, por gjithësesi ende vlerësohen se korrupsioni dhe transparencia mbeten dy ndër problemet më të rëndësishme të Shqipërisë.²⁷ Megjithëse ndër parimet kyçe të negocimit dhe lobimit është ndarja e **personit nga problemi**²⁸ në vlerësimin tonë në lobimin diplomatik kjo vijë ndarëse është e vështirë për tu përcaktuar.

²¹ Gueguen D. “European Lobbying” botimi i dytë, 2007 fq 124

²² Neni 49, Traktati i Lisbonës, ish neni 49 TBE

²³ Ibid. Neni 16

²⁴ Vendim, KE, Mbledhja Nr 3287, 17/12/2013, Bruksel. Për më shumë, lexo http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genafi/140144.pdf

²⁵ Gueguen D. “European Lobbying” botimi i dytë, 2007 fq 119

²⁶ Ibid. fq 123

²⁷ Raport, Progres Raporti Vjetor 2013 i Komisionit, shiko fq 7

²⁸ Fisher R. dhe Ury W. Getting to yes, botimi i dytë, fq 13

Problemi i dytë po në lidhje me lobimin në nivel diplomatik lidhet me numrin e prioriteve që ndër vite ka patur qeveria shqiptare. Kështu gjatë viteve 2009-2010 qeveria shqiptare u desh të lobonte jo vetëm për marrjen e statusit të vendit kandidat, por njëkohësisht edhe për liberalizimin e vizave. Sigurisht që kjo “tërheqje” vëmendje nga njëra anë e lobimit për marrjen e statusit të vendit kandidat dhe riorientimit të prioritetit drejt përfitimit të procedurës së liberalizimit të vizave ka impaktin e saj. Sipas teorisë të lobimit, në lobim shumë prioritetet = asnjë prioritet. Në lobim **termi prioritet duhet të jetë gjithnjë në numrin njëjës.**²⁹

4.2 Lobimi politik

Teksa lobimi diplomatik i Shqipërisë fokusohet në dy institucione të rëndësishme si Komisioni dhe Këshilli, lobimi në nivel politik fokusohet përgjithësisht në Parlament dhe në Këshill. Vlerësojmë se lobimi politik është realizuar në dy nivele, në nivelin e kreut të qeverisë dhe në nivel të grupeve parlamentare/ kryetarit të partive opozitare ose maxhorancës në Shqipëri me partitë e të njëjtit kah politik. Kështu, partitë politike shqiptare, qoftë të majta apo të djathta shpeshherë e kanë përdorur këtë lloj lobimi për të kërkuar ndikim në institucionet BE në favor të Shqipërisë.

Lobimi në nivel politik përcjell disa veçori. Në rradhë të parë lidhet ndjeshëm me kahun politik mbizotërues në PE. Lobimi përmes ndikimit politik karakterizohet nga dy veprime të njëpasnjëshme. Së pari është kërkesa e partive politike në Shqipëri³⁰ drejtuar partive të të njëjtit kah në Parlamentin Europian dhe kjo pasohet me veprimtarinë lobuese të partive në Parlamentin Europian. Strategjia lobuese në nivel politik përgjithësisht jep rezultat në vendimarrjen e Parlamentit Evropian. Lobimi i kryer nga Partia Demokratike e Shqipërisë³¹ në kuadër të marrjes së statusit të vendit kandidat në PE ishte efektiv³², duke patur parasysh se 36%³³ e anëtarëve të PE i përkasin partive të djathta (Partive Popullore Evropiane).

4.3 Lobimi nga një shtet anëtar

Në historinë e lobimit të Shqipërisë në kuadër të integimit Europian, nuk kanë qenë të pakta rastet kur qeveria shqiptare është asistuar dhe ndihmuar nga vende anëtare të Bashkimit Europian. Vlerësojmë se ky lobim mbart në vetvete disa karakteristika. Së pari shfaqet në formën e një strategjie lobuese proaktive (iniciatore), ku përgjithësisht vendi që jep mbështetjen merr dhe nisma lobimi me shtetet anëtarë dhe me vetë përfaqësuesit e tij si shtet në Komision dhe në Këshill. Ky lloj lobimi shfaqet përgjithësisht në formën

²⁹ Gueguen D. “European Lobbying” botimi i dytë, 2007 D. fq 101

³⁰ Për më shumë shih <http://top-channel.tv/english/artikull.php?id=6326>

³¹ Artikull, Gazeta Shqip, Basha lobon në PEE për Statusin <http://gazeta-shqip.com/lajme/2013/11/13/basha-ne-pee-lobon-per-statusin-kandidat-te-shqiperise/> vizituar më 25/2/2014

³² PE miratoi me unimitet rezolutën për dhënien e statusit të vendit kandidat në dhjetor 2013. Për më shumë shih <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0556&language=EN>

³³ Për më shumë shih të dhënat statistikore të përbërjes së PE [http://www.europarl.europa.eu/aboutparliament/en/00082fcd21/Results-by-country-\(2009\).html](http://www.europarl.europa.eu/aboutparliament/en/00082fcd21/Results-by-country-(2009).html)

“nga lart-poshtë” duke u zbatuar parimi se “shefat flasin me njëri-tjetrin”³⁴ Ky lobim shfaq disa avantazhe. **Së pari**, ky lobim *shmang ekspertët* në kryerjen e lobimit, *ka më shumë ekonomi dhe jepet mundësia* që shteti lobues, anëtarë i Bashkimit Evropian të llojë pikërisht në institucionin vendimarrës. Lobimi në këtë rast varet nga disa faktorë kumulativë *si fuqia e shtetit* në arenën ndërkombëtare³⁵, si edhe *marrëdhëniet e shtetit* lobues me vendet e tjera të Bashkimit Evropian. Lobimi aktiv nga shtetet anëtare të Bashkimit Evropian të jep mundësinë e një lobimi të shpejtë dhe efektiv. Rëndësia e një shteti lobues në favor të Shqipërisë shikohet edhe në aspektin, se qoftë edhe vetoja e një shteti të vetëm, bën të pamundur vendimarrjen në Këshill³⁶.

Italia si një ndër partnerët strategjik ndër vite ka qenë ndër shtete lobuese në procesin e integritetit Evropian të Shqipërisë. Kjo është konfirmuar si në takimet lobues në nivel diplomatik ashtu edhe në nivelin politik. Kështu, disa ditë para Vendimit të Këshillit nëse Shqipëria do të merrte ose jo statusin e vendit kandidat në Dhjetorin e vitit 2013, Kryeministri i Italisë, Enrico Letta deklaroi qendrimin zyrtar të qeverisë Italiane, se shteti i tij do të llojë në favor të Shqipërisë. Italia nuk ka mbetur i vetmi vend i cili ka lobuar në favor të Shqipërisë. Çekia është një tjetër vend anëtar i Bashkimit Evropian. Sipas një sondazhi të vitit 2008 rreth 25 % e të anketuarve çek do të mbështesnin Shqipërinë në proceset integruese të Bashkimit Evropian.³⁷ Sigurisht që lobimi Çek në favor të Shqipërisë është lidhur dhe me interesa ekonomike, duke përmendur kompaninë çeke CEZ³⁸ e cila zotëron monopolin e tregut të shpërndarjes së energjisë elektrike në Shqipëri. Lobimi Çek në kuadër të procesit të liberalizimit të vizave ishte i frytshëm. Shqipëria në dhjetor të vitit 2010 përfitoi nga vendimi i Këshillit Evropian mbi liberalizimin e vizave.

Përveç rasteve të lobimeve individuale të shteteve anëtare të Bashkimit Evropian, praktika e vitit 2013 na sjell edhe një qasje të re të lobimit të shteteve. Lobimi në grup i vendeve anëtare të Bashkimit Evropian për kalimin e Shqipërisë të fazave integruese. Kështu në një letër dërguar z. Linkevičius President i Këshillit të Përgjithshëm dhe Marrëdhënieve me Jashtë dhe znj. Ashton, Përfaqësuesja e Lartë për Politikën e Jashtme dhe Sigurinë, përfaqësuesit e 8 shteteve, duke nisur nga Austrisë, Bullgarisë, Kroacisë, Estonisë, Hungarisë, Irlandës, Italisë dhe Sllovenisë i bënin thirrje në grup në mbështetjen e Shqipërisë në marrjen e statusit të vendit kandidat, duke vlerësuar realizmin e reformave nga ana e shtetit kërkues.³⁹

³⁴ Për më shumë shih Gueguen D. “European Lobbying” botimi i dytë, 2007 “the bosses speak to each other!” fq 103

³⁵ Fuqia shpesh përkufizohet si aftësia për të bërë që një aktor tjetër në kushte të tjera nuk do ta kishte (ose të mos bëjë atë që do ta kishte bërë. Për më shumë shih Dahl, Robert A. Modern Political Analysis 2 end Eglewood Cliffs, NJ Prentice Hall, 1970.

³⁶ Këshilli Vendosi me Unanimitet

³⁷ Studim, Komisioni Evropian “Attitudes towards European Union Enlargement” Eurobarometwr, 2006 , pwr mw shumë shih http://ec.europa.eu/public_opinion/archives/ebs/ebs_255_en.pdf

³⁸ Studim, Komisioni Evropian “Attitudes towards European Union Enlargement” Eurobarometwr, 2006 , fq 43.

³⁹ Për më shumë lexo përmbajtjen e plotë të letrës mbështetëse http://www.punetejashtme.gov.al/files/news_files/Letter_to_Ms._Ashton.pdf, http://www.punetejashtme.gov.al/files/news_files/Letter_to_Mr._Linkevi%C4%8Dius.pdf

4.4.1 Lobimi nga persona me influencë

Rregulli i artë i lobimit në Bashkimin Evropian është se “lobimi ka karakter personal”⁴⁰. Lobimi i drejtpërdrejtë nga persona me influencë në vendimarrjen e institucioneve të BE, është një formë lobimi tejte e suksesshme jo vetëm në rastet e lobimit në favor të vendeve jo anëtare, por edhe në rastet e lobimit për vetë vendimarrjen e brendshme të BE-së. Kjo formë lobimi është një qasje e sjelljes lobuese amerikane, ku persona me influencë ndikojnë drejtpërdrejtë në persona të tjerë me influencë në lidhje me një vendimarrje të caktuar. Kështu, kjo formë lobimi ishte e suksesshme kur Jacques Chirac “ushtroi presion” mbi Romano Prodi për të kundërshtuar çdo reformë në CAP.⁴¹ Lobimi i kryer nga persona me influencë në vendimarrjen e Bashkimit Evropian mbart disa avantazhe. Së pari, ky lobim mund të kryhet në çdo periudhë, megjithëse tipike e kësaj forme lobimi është kryerja e tij afër afateve të para përcaktuar. Personat me influencë mund të aplikojnë si strategjinë negative të lobimit, ku njëra palë mund ti kërkojë palës tjetër të ruajë një qëndrim të mbajtur pa dhënë një alternativë tjetër⁴², si edhe me *strategjinë proaktive* (apo iniciatore) të lobimit duke u fokusuar në arritjen e rezultatit. Avantazhi i dytë i lobuesve individual, si persona me influencë, qendron në faktin se në ndryshim nga format e tjera të lobimit, *ato mund të ndikojnë në vendimarrjen e Bashkimit Evropian në çdo nivel*, duke mos patur kufizim. Një person me influencë mund të ndikojë si në vendimarrjen e Këshillit, Komisionit apo edhe Parlamentit, kudo ku personi ka njohje dhe kontakte të mjaftueshme për të ndikuar në vendimarrje.

Megjithëse ende Shqipëria nuk ka patur një politikë të konsoliduar lobuese nga persona me influencë në arenën ndërkombëtare e mbi të gjitha në vendimarrjen e Bashkimit Evropian, nuk kanë qenë të pakta rastet, kur kjo formë lobimi është kryer në favor të saj. Kështu, në korrespondencën zyrtare me Nr Prot 5690 datë 16.08.2011 të Ministrit të Drejtësisë z. Eduard Halimi, shprehen konsideratat më të larta për diplomatin z. Haim Reitam “në procesin e lobimit për përmirësimin e imazhit të Shqipërisë si një shtet demokratik, model për Paqe dhe Prosperitet për Ballkanin dhe të gjitha vendet që aspirojnë për Paqe dhe qytetërimin”- duke nënvizuar se Ministria e Drejtësisë është e gatshme “për të mirëpritur çdo nismë në përmbushjen e aspiratave të integritetit të Shqipërisë në Bashkimin Evropian”⁴³

Rasti tipik kur persona me influencë, përmes strategjisë proaktive të lobimit pro Shqipërisë dhe që ka dhënë rezultat, ka qenë lobimi i anëtares së PE-së. Znj. Tanja Fajon në kuadër të procesit të liberalizimit të vizave ndaj Shqipërisë. Znj Fajon është nderuar

⁴⁰ Në original, In Brussels, influence is personal” Tony Long Director, WWF European Policy Office

⁴¹ Për më shumë Gueguen D. “European Lobbying” botimi i dytë, 2007 fq.103

⁴² Ibid. fq 117

⁴³ Korrespondencë zyrtare, Letër drejtuar z. Haim Reitam nga Ministri i Drejtësisë Shqiptare z. Eduard Halimi

me një çmim dhënë nga një grup mediatik⁴⁴ në Shqipëri për procesin e lobimit të ndjekur pro Shqipërisë si edhe me Çelësin e Artë të Tiranës.⁴⁵

Gjithashtu, qeveria Shqiptare, megjithëse nuk ka një plan konkret apo strategji kombëtare lobimi në Bashkimin Evropian, e ka parë me interes kryerjen e lobimit nga ana e personave me influencë në dobi të integritetit. Kështu në takimin e datës 3 tetor 2013, Kryeministri i Shqipërisë z. Edi Rama me ish Kryeministrin e Mbretërisë së Bashkuar z. Tony Blair, konfirmuan se z. Blair ka nisur tashmë një fushatë lobuese⁴⁶ në favor të Shqipërisë⁴⁷.

Një formë tjetër e lobimit nga persona me ndikim në arenën ndërkombëtare është edhe **lobimi kulturor**. Lobuesit kulturor, megjithëse nuk kanë mundësi të ndikojnë drejtpërdrejtë në vendimarrjen e Bashkimit Evropian, ato shfaqen me një rëndësi të lartë në *përmirësimin e imazhit* të vendit në arenën ndërkombëtare. Shkrimtari i njohur shqiptar Isamil Kadare jo në pak raste ka përdorur influencën e tij për të lobuar në kuadër të integritetit të Shqipërisë në Bashkimin Evropian, duke e cilësuar Bashkimin Evropian “shtetin natyral të Shqiptarëve”⁴⁸

5. Përfundime

Lobimi në institucionet e Bashkimit Evropian po merr gjithnjë e më shumë një rëndësi të lartë. Shtetet anëtarë, grupet e interesit apo edhe qoftë individët mundohen të ndikojnë në politikat vendimarrëse të BE-së. Format e organizimit të grupeve lobuese janë të ndryshme, duke nisur nga OJF, grupe ekspertësh, grupe interesash etj.

Praktikisht grupet lobuese ose lobuesit në Bashkimin Evropian mund të llobojnë në çdo fazë të vendimarrjes dhe pranë insitucioneve të veshura me kompetenca ligjvënëse dhe vendimarrëse. Tre janë institucionet kyçe ku mund të lobohet në BE; në Këshill, Komision dhe PE-ian. Lobimi në Bashkimin Evropian nuk është i lidhur vetëm me aftësitë personale të lobuesit apo financime por edhe me faktin se sa mirë lobuesi/grupet e lobimit njohin funksionimin e institucioneve të BE-së.

Në rastin e lobimit për politika vendimarrëse brenda shteteve anëtare të BE, situata dhe strategjitë lobuese janë më të qarta, ndërsa në rastin e lobimit të shteteve në fazat e antarësimit në BE strategjitë janë më pak të qarta. Kjo, pasi shtetet përgjithësisht e ndërtojnë lobimin përmes kanaleve diplomatike. Rasti shqiptar i marrë në studim, është një prej tyre.

⁴⁴ Për më shumë shih

<http://www.top-channel.tv/artikull.php?id=225457>

dhe

[http://fm-](http://fm-dritanhoxha.al/new/faqe.php?id=4&l2=4&gj=)

[dritanhoxha.al/new/faqe.php?id=4&l2=4&gj=](http://fm-dritanhoxha.al/new/faqe.php?id=4&l2=4&gj=)

⁴⁵ Artikull në shtyp Për më shumë shih <http://infoarkiva.com/lajme/artikull/iden/1046941960/titulli/Fajon-Shqiptaret-e-meritojne-vendimin-per-vizat>

⁴⁶ Për më shumë shih <http://www.bbc.com/news/uk-politics-24387295>

⁴⁷ Për më shumë shih <http://kryeministria.gov.al/al/newsroom/lajme/rama-blair-per-ngritjen-e-njesise-se-specializuar-per-realizimin-e-prioriteteve>

⁴⁸ Deklaratë pwr media, Delegacioni i BE në Shqipëri, http://eeas.europa.eu/delegations/albania/press_corner/all_news/news/2012/20121005_en.htm

Në historinë e tranzicionit mbi 20 vjeçar të Shqipërisë dhe përpjekjeve të saj në kuadër të antarësimit në BE, krahas plotësimit të kriterëve të vendosura nga BE, nuk mund të lihet pa anashkaluar dhe nevoja e një analize të strategjisë së saj lobuese.

Lobimi i Shqipërisë është karakterizuar nga dy elementë kryesorë, mungesa e një strategjie kombëtare lobuese në BE dhe kryerjen e lobimit kryesisht përmes kanaleve diplomatike. Megjithatë jo të koordinuara qeveria shqiptare ka lobuar në katër forma kryesore në Bashkimin Europian.

Së pari ka lobuar përmes lobimit diplomatik, i cili, kryesisht ka qenë një lobim pro aktiv (iniciator) dhe i kryer në kushtet e emergjencës, pra në afrimin e afateve të vendosura nga BE ose pranë vendimarrjes së instancioneve kryesore të BE-së. Përmes lobimit diplomatik është synuar ndikimi në vendimarrjen e Këshillit dhe të Komisionit. Kjo formë lobimi shfaq dy probleme. Së pari është një formë lobimi e vjetër, pasi tashmë lobimi u lihet në dorë ekspertëve dhe së dyti kjo formë lobimi lidhet ngushtë me cilësitë personale të lobuesit dhe të opinionit që kanë shtetet anëtare ndaj klasës politike shqiptare. Kjo pasi, shtetet anëtare të BE, shpesh herë e kanë të vështirë të ndajnë problemin nga cilësitë e personit apo të shtetit që lobon.

Së dyti Shqipëria ka ndjekur strategjinë e lobimit politik dhe kjo është lënë në dorë të partive politike, të cilat bashkëpunojnë me partitë e të njëjtit kah në PE. Kjo strategji lobuese mbart një problem në vetvete e cila lidhet me raportin e partive mbizotëruese në PE dhe me kahun politik që ka mazhorancën në Parlamentin Shqiptar. Kjo strategji synon ndikimin e drejtpërdrejtë në PE, por është sakaq e lidhur edhe me rezultatet e zgjedhjeve në PE dhe në parlamentin shqiptar.

Së treti, Shqipëria ka zgjedhur strategjinë e lobimit nga një shtet anëtarë i BE ose nga një grup shtetesh. Kjo strategji ka rezultuar pozitive në rastet e lobimit në Këshill duke ndikuar drejtpërdrejtë në vendimet e tij.

Së katërti qeveria shqiptare ka vendosur në strategjinë e saj lobuese, lobimin nga persona me influencë në vendimarrjen e BE. Lobuesit e Shqipërisë ka në qenë si shtetasit shqiptar (rasti i shkrimtarit Ismail Kadare), por gjithashtu edhe diplomatë apo ish kryeministra, si Tony Blair. Kjo strategji lobimi mbart në vetvete avantazhin se lobuesit mund të përdorin çdo strategji, në çdo nivel insitucional si edhe në çdo kohë të procesit vendimarrës.

Me rritjen e euroskepticizmit Europian, vlerësojmë se është tejmas e rëndësishme hartimi i një strategjie kombëtare lobuese. Duke patur një koordinim mes lobimit diplomatik, politik, nga shtetet anëtare dhe nga lobuesit me influencë do të kemi një ndikim më të gjerë në politikën vendimarrëse të Bashkimit Evropian përsa i përket antarësimit të Shqipërisë në BE. Vlerësojmë se më shumë peshë në strategjinë e lobimit tu jepet lobuesve me influencë në Bashkimin Evropian. Kjo pasi lobimi në BE lidhet shpesh me cilësitë e lobuesve, fakti se sa lobuesit njohin mënyrën si funksionon Bashkimi Europian dhe mbi të gjitha me kredibilitetin personal.

Marrëveshja e lidhur së fundmi nga Shqipëria me ish Kryeministrin Blair vlerësojmë se duhet të shtrihet edhe në persona të tjerë me influencë. Gjithashtu vendosja e një fondi lobues në kuadër të lobimit kulturor, do të ishte me shumë rëndësi për Shqipërinë. Kjo do të shërbente në ndërtimin e një imazhi të ri të Shqipërisë për vendet skeptike të BE-së.

Gjithashtu vlerësojmë se strategjia e lobimit të Shqipërisë duhet shtrirë në kohë, mundësisht sipas një axhende kombëtare vjetore të miratuar dhe të mos mbetet spontane. Gjithashtu vlerësojmë se Ministrisë së Integritit Evropian duhet ti jepen më shumë kompetenca në strategjinë e lobimit.

Një lobim i zhvilluar nga Ministria e Integritit do të ishte një lobim në nivel ekspertësh. Gjithashtu vlerësojmë se Shqipëria ka has formave të deritanishme të lobimit, mund të shikojë mundësinë e zgjerimit të lobimit edhe me grupe lobuese në BE. Sigurisht që kjo do të mbart një faturë financiare për shtetin shqiptar, po aq sa mbart edhe rreziku i mos antarësimit të shpejtë në Bashkimin Evropian.

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Desara Dushi

*European Regional Master's Degree in Democracy
and Human Rights in South East Europe,
University of Sarajevo and University of Bologna, Albania*

Fight against Corruption: a Comparison between Albania and Croatia

Abstract

"Get things done" and "keep people employed". This has become the strategy of the informal economy in the 21st century. It's weird but that part of people who perpetrate corruption, both givers and receivers seem to believe that it helps in improving the economy and that it maintains harmony in the government by endowing nepotism and patronage.

Corruption is a problem which all governments, at any level of development, have to deal with. The reason why I chose this topic is because corruption is now considered to be one of the most difficult challenges of the South East European countries towards becoming members of the European Union and strong action is necessary as soon as possible. I chose to compare Albania and Croatia as two countries with different levels of corruption, one having a high level of corruption, and the other improving day by day in the fight against it. I think this comparison serves so that Albania can learn from the measures taken and improvements made by Croatia, and implement them in the country as an important step not only for democratization and EU accession but also for a better economy.

In this paper I will address in a comparative way the progress of Albania and Croatia in the fight against corruption, regarding EU accession and how does this affect Albania's progress in becoming a member state and how it affected in Croatia becoming a member state in 2013. The timeframe of the investigation will be since the entrance into force of the Stabilization Association Agreement (SAA) in both of these countries. Analyses of these countries will be based on two important variables, legal framework and law implementation. The system used for analyzing the adopted anti-corruption measures will rely mainly on two types of assessment methods: the findings from worldwide recognized evaluators and the Progress Reports by the European Commission.

Keywords: *corruption, EU accession, integration, implementation, progress report.*

Introduction

"Get things done" and "keep people employed". This has become the strategy of the informal economy in the 21st century. It's weird but that part of people who perpetrate corruption, both givers and receivers seem to believe that it helps in improving the economy and that it maintains harmony in the government by endowing nepotism and patronage.

Corruption is a problem which all governments, at any level of development, have to deal with. The reason why I chose this topic is because corruption is now considered to be one of the most difficult challenges of the South East European countries towards becoming members of the European Union and strong action is necessary as soon as possible. I chose to compare Albania and Croatia as two countries with different levels of corruption, one having a high level of corruption, and the other improving day by day in the fight against it. I think this comparison serves so that Albania can learn from the measures taken and improvements made by Croatia, and implement them in the country as an important step not only for democratization and EU accession but also for a better economy.

In this paper I will address in a comparative way the progress of Albania and Croatia in the fight against corruption, regarding EU accession and how does this affect Albania's progress in becoming a member state and how it affected in Croatia becoming a member state in 2013. The timeframe of the investigation will be since the entrance into force of the Stabilization Association Agreement(SAA) in both of these countries. These countries were chosen as specific case studies based on the "the most similar case design"¹ by analyzing two important variables with same importance for both countries, legal framework and law implementation.

The case of Albania regarding the process towards accession in EU is somewhat different from that of Croatia since Albania still shows inability to deal with corruption issues. On the other hand, the determined efforts of Croatia to cope with corruption issues fastened the process of accession, by finalizing with Croatia becoming the newest EU member state on 1st July 2013.

In the first chapter Albania will be briefly introduced, by then going on with the presentation of the Albanian legal framework against corruption, and its recent amendments. Then their implementation will be analyzed, whether it has been effective or not. Albania's progress in the fight against corruption will be analyzed according to the annual progress reports of the European Commission and according to international evaluators.

Croatia's situation will be addressed in the second chapter. Also here, legal framework and law implementation will be analyzed. Same indicators will be used for the analysis of Croatia's situation, international evaluators together with the European Commission annual Reports.

¹ A type of comparison based on the differences among two states, disregarding similarities.

Corruption is a complex phenomenon and difficult to define. It has been defined in many different ways but each lacking some aspect. However, the most common definition is that of the World Bank: “*the abuse of public office for private gain*”.² This definition does not mention corruption in private sectors, but this does not mean that it does not exist. What about when someone gives preferential treatment to a friend in his business dealing? And what about when a parent gives a donation to the school in order to prevent the expulsion of the child? The abuse of power cannot necessarily be for private gain, it can also be for the benefit of one’s party, family, friends, and so on.³ Corruption can be in the form of bribes, fraud, theft, political and bureaucratic, isolated and systemic, and corruption in private sector.⁴ Even though there is lack of an international definition of corruption, each country has created its own definition of corruption which usually is almost similar with World Bank definition, but in a more broad way.

1. Corruption Alert: Albania sliding backwards due to inadequate implementation of anti-corruption strategy

Republic of Albania is located in South Eastern Europe. The country has a population of round 3.2 million.⁵ It is a democratic state since in 1991 when the Socialist Republic was dissolved. Albania is a parliamentary republic. It has been a potential candidate for accession to the European Union since June 2003 and it formally applied for EU membership in April 2009.⁶ Progress has been made but there are still things to be done. The process is not finished yet.

Corruption in Albania is a really concerning problem. It touches every sector, public and private. By looking at the annual progress reports of the European Commission, fight against corruption is one of the main recommendations of EU for Albania. Even though legal framework for anti-corruption has been amended recently, still level of corruption is high because of low implementation rate of this framework. Based on Transparency International, the general perception is that in 2013 the level of corruption in public sector has started to decrease, and out of 100, Albania has a score of 31,⁷ by so ranking in the 116th place out of 177 countries and territories.⁸ Whereas in 2009, when applying for EU

² The World Bank, n.d. <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> (viewed January 26, 2014).

³ Vito Tanzi, *Corruption around the world: causes, consequences, scope and cures*. International Monetary Fund, (1998).

⁴ The World Bank, n.d. <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> (viewed January 26, 2014).

⁵ The World Bank, n.d. <http://data.worldbank.org/indicator/SP.POP.TOTL> (viewed January 25, 2014).

⁶ BBC NEWS, n.d. <http://news.bbc.co.uk/2/hi/europe/8023127.stm> (viewed January 25, 2014).

⁷ A country or territory’s score indicates the perceived level of public sector corruption on a scale of 0 - 100, where 0 means that a country is perceived as highly corrupt and 100 means it is perceived as very clean. - See more at: <http://www.transparency.org/cpi2013/results#sthash.SOqZg21M.dpuf>

⁸ Transparency International, n.d. <http://www.transparency.org/cpi2013/results> (viewed January 25, 2014).

membership, Albania scored 32 points ranking in 95th place. However, as it can be understood, the situation of corruption in Albania is not so good.

1.1 Anti-corruption strategy, Legal framework

Since an analysis of corruption usually starts from the perception of it prevailing in a , I would start by telling that according to TI in 2013 the level of corruption has slightly decreased (see Graph 1) . Albanian government is doing great efforts in fulfilling the recommendations of EU in order to become the next member state of the Union. In the following paragraphs, it will be shown the timeline of the anti-corruption measures taken by Albania since in 2005.

In December 2005 Albanian Council of Ministers decided the creation of The Anti-Corruption Task Force. The Task Force has strategic tasks such as setting priorities and strategies for the fight against corruption, approving action plans, collaborating with the private sector and civil society and improving transparency in the fight against corruption.⁹ Albania ratified the United Nations Convention against Corruption (UNCAC) in 2006. In the same year the Department of Internal Control and Anti-Corruption (DIACA) in the Council of Ministers was established, responsible for administrative and anti-corruption control in executive power institutions and ministries. This year Albania signs Stabilization and Association agreement.

After that, in 2007 Joint Investigative Unit to Fight Economic Crime and Corruption (JIU) was created for the investigation and prosecution of public corruption and other financial crimes. Since its creation, JIU has opened 200 cases and convicted for corruption some high-ranking figures, including the Deputy Minister of Transportation and the General Secretary of the Ministry of Labour.¹⁰ In 2008 Albanian Government introduces new strategy for the fight against corruption 2008-2013. In order to support this ambitious strategy, the Council of Europe launched a new technical assistance Project against corruption in Albania (PACA) in 2009.¹¹ The same year SAA agreement enters into force.¹²

According to Greco's Third Evaluation Report of 2009 (GET), the provisions against corruption in the Albanian Criminal Code meet to a great extent the requirements of the

⁹ (Council of Ministers Decision No.795 dt 19.12.2005 On the creation of Anti Corruption Task Force 2005), see english version:

http://km.undp.sk/uploads/public/File/AC_Practitioners_Network/albania_decision_on_A_C_task_force.pdf (viewed 06 February 2014)

¹⁰ Business Anti-Corruption Portal, Albania, Public Anti-Corruption Initiatives . n.d. <http://www.business-anti-corruption.com/country-profiles/europe-central-asia/albania/initiatives/public-anti-corruption-initiatives.aspx> (viewed February 06, 2013).

¹¹ Council of Europe, Action against economic crime, PACA: Project against Corruption in Albania. n.d.http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/Albania/PACA_en.asp (viewed February 06, 2014).

¹² European Commission, Enlargement, Albania. n.d. http://ec.europa.eu/enlargement/countries/detailed-country-information/albania/index_en.htm (viewed February 06, 2014).

Criminal Law Convention on Corruption.¹³ However, according to this report there is no definition of “public official”; no explicit reference to members of international parliamentary assemblies, no court decision concerning bribery of members of international parliamentary assemblies. Criminal Code provisions do not explicitly mention foreign and international officials and there are no sanctions for bribery in private sector. These provisions do not explicitly refer to foreign jurors as well as domestic and foreign arbitrators either.

Referring to Global Integrity 2010, Albanian legal framework for whistleblower protection meets international best-practice standards. Civil servants who report cases of corruption are protected against negative consequences however there are cases when they get punished, mainly through unofficial means.¹⁴

In 2012 new articles were added to the Criminal Code, criminalizing active and passive bribery of foreign public officials, members of foreign public assemblies, employees of public international organisations, members of international public assemblies and members of parliamentary assemblies (Articles 244/a and 259/a, respectively), as well as active and passive bribery of judges and officials of international courts (Articles 319/a and 319/d, respectively), active and passive bribery of foreign jurors as well as domestic and foreign arbitrators (Articles 319/b, 319/c, 319/dh and 319/e, respectively).¹⁵

In the Albanian parliamentary elections of June 2013, the Socialist Party came into power. The new government introduced a new action plan for the fight against corruption and organized crime. This action plan includes the creation of a free telephone number and an email address where citizens can complain bribery cases.¹⁶

The necessity of seizing corruption in Albania arises from the international policy of the Republic of Albania, as well as from strengthening the social awareness of the harmfulness of corruption. Successful law implementation is one of the indicators of efficiency of anti-corruption policy, which will be discussed in the subchapter below.

¹³ "Council of Europe, GRECO Third Evaluation Round (2008) Evaluation Report on Albania on Incriminations (Theme I)." Strasbourg, 2009. See at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2008\)7_Albania_One_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2008)7_Albania_One_EN.pdf) (viewed 06 February 2014)

¹⁴ Global Integrity, Albania Report, Whistleblowing Protections . n.d. https://www.globalintegrity.org/global_year/2010/ (viewed February 06, 2014).

¹⁵ (Ligj Nr. 23/2012 Për disa shtesa dhe ndryshime në Ligjin Nr. 7895, Datë 27.1.1995 “Kodi Penal I Republikës Së Shqipërisë”, të ndryshuar 2012) (Law Nr. 23/2012 For some changes in the Law Nr. 7895, 27.1.1995 “The Criminal Code of Republic of Albania”, changed.

¹⁶ (Vendim nr. 988, datë 8.11.2013 Për miratimin e planit të veprimit për luftën kundër Korrupsionit dhe Krimin të Organizuar. Decision no. 988, date 8.11.2013 For the approval of the Action Plan for the fight against Corruption and Organized Crime 2013)

1.2 Legal framework in practice, implementation

In 2005 Albania was perceived as the most corrupt country in Europe.¹⁷ Task Force's effectiveness in practice was weak due to the political interference.¹⁸ According to the EC progress report of 2012, DIACA, established in 2006, does not have sufficient independence, authority, and administrative capacity to fulfill its tasks.¹⁹

The government strategic plan for the fight against corruption 2008-2013 supported by PACA project resulted in improving the implementation of anti-corruption policies. According to the EC 2009 Progress Report, implementation of the governmental strategy has started but there is lack of implementation mechanisms and there are no monitorable indicators and resources.²⁰ In this report is stated that GRECO recommendations are not completely fulfilled yet.²¹ Still according to the report, even though legal framework has been developed, implementation remains low and there is no track record of verdicts and sanctions in corruption cases.

According to the GET, Albanian provisions meet to a great extend the provisions of the Convention, however, despite the relevant criminal legislation, its implementation is still weak. According to the EC, in 2012 moderate progress was made in strengthening the legal framework. Implementation of anti-corruption strategy is slow, and corruption continues to be a very serious problem.²²

Rhetoric in EC Progress Report for 2013 seems to be more positive. It declares that there have been improvements in the fight against corruption and that all recommendations of third GRECO evaluation round were successfully fulfilled.²³ Law implementation has been improved and this is noticed also by the increased number of convictions. In the first six months, convictions at district courts increased by 21% compared to the same period in 2012, and at appeal courts convictions more than doubled.²⁴ However corruption remains a serious problem, and there is still work to be done.

¹⁷ OSCE. *Analysis of the Criminal Justice System in Albania*. Report by the Fair Trial Development Project. Tirane: Pegi, (2006), pg 168. also found at: <http://www.osce.org/albania/22211>, (viewed 06 February 2014)

¹⁸ Global Integrity Report Albania 2010. n.d. <https://www.globalintegrity.org/global/the-global-integrity-report-2010/albania/2010/> (viewed February 06, 2014).

¹⁹ European Commission, Albania 2012 Progress Report, Brussels 2012, . n.d. http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/al_rapport_2012_en.pdf (viewed February 06, 2014).

²⁰ European Commission, Albania 2009 Progress Report, Brussels 2009. n.d. http://ec.europa.eu/enlargement/pdf/key_documents/2009/al_rapport_2009_en.pdf (viewed February 06, 2014).

²¹ Ibid.

²² European Commission, Albania 2012 Progress Report, Brussels 2012, . n.d. http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/al_rapport_2012_en.pdf (viewed February 06, 2014).

²³ European Commission, Albania 2013 Progress Report, Brussels 2013. n.d. http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/al_rapport_2013.pdf (viewed February 06, 2014)., pg. 9

²⁴ Ibid, pg. 40

As can be concluded, law amendments and strategies are not enough for the fight against corruption. Legal framework can be almost perfect, but when it is not put into practice, it does not have any effect at all. In a country where laws do not function properly, people start losing faith in their government, and this causes that even when a new strategy is introduced, people see it with lots of doubt.

2. Croatia's run towards EU due to successful anti-corruption strategies implementation

The Republic of Croatia is located at the crossroads of Central Europe, Balkans, and the Mediterranean. The country's population is round 4.3 million.²⁵ Croatia was part of Yugoslavia until 1991, when the country declared its independence. Now Croatia is a unitary democratic parliamentary republic. Croatia sent the request for the membership in EU at the beginning of 2003 and negotiations started at the end of 2005. On 1st July 2013 Croatia became the 28th member state of the European Union.

According to Transparency International Corruption Percentage Index, when starting the negotiations with the EU, Croatia was on 70th place scoring 34 point.²⁶ During the recent years, the country has made huge improvements in the fight against corruption, which can be noticed also by the change in perception, which shows that in 2013 Croatia ranks in the 57th place with a score of 48.

2.1 Anti-corruption legal framework

In 2005, when starting the negotiations with EU, Croatia had already signed international conventions regarding corruption, and was also a member of GRECO. After starting negotiations, in 2004-2005, the state adopted the second anticorruption plan, PACO-Impact Project,²⁷ created by the Council of Europe. In 2006 EU recommended to Croatia to adopt the anticorruption strategy as part of the fulfillment of *acquis* and to adjust its laws in accordance with that. Croatian Parliament adopted the National Program for the Fight against Corruption the same year.²⁸ From this immediate fulfillment of recommendations, can be understood that Croatia was determined to access the EU, and that EU pressure in Croatia was strong.

In the EC Progress Report of 2007 was stated that "legal framework to combat corruption has been further improved, however, no indictment or verdict has been issued in any high-

²⁵ The World Bank. n.d. <http://data.worldbank.org/indicator/SP.POP.TOTL> (viewed January 25, 2014).

²⁶ Transparency International, Corruption Percentage Index 2005. n.d. http://archive.transparency.org/policy_research/surveys_indices/cpi/2005 (viewed February 04, 2014).

²⁷ Council of Europe/Human Rights and Rule of Law. n.d. http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/PACO%20Impact/PacoImpact_en.asp (viewed January 31, 2014).

²⁸ Damir Grubisa, "Anti-corruption Policy in Croatia: Benchmark for EU Accession." *Politicka misao* 47, No. 5 (2010): 69-95. 78

level corruption case”²⁹. This report influenced Croatian government which decided to put more efforts in combating the high level corruption. In 2008 were made amendments to the Law Preventing Conflicts of Interest in Public Office, in order to reduce corruption risks. In 2009 was taken the Anticorruption initiative which brought to the foundation of Police National Office for Suppression of Corruption and Organized Crime – PSUSKOK.³⁰ Further on at the end of this year, the new Labor Act entered into force, in, the new Labor Act entered into force, in a provision of which whistleblower protection is secured against dismissal for individuals who report instances of corruption in good faith.³¹

In 2010 was initiated the Anti-Corruption Strategy along with the Action Plan.³² In 2011, a new law on the financing of political activities and election campaigns was adopted, which increased transparency and the penalties for noncompliance with the law.³³ The new Criminal Code of 2013 criminalizes active and passive bribery committed between a local company and a foreign official. It has also increased the penalty for receiving and giving bribes. Actually, Croatia is trying to implement laws on giving and receiving gifts and laws governing instances of conflict of interest for public officials, in order to continue reducing corruption rate.

2.2 Fast implementation, an open road towards EU

At the end of 2005, after entrance into force of SAA, the high level of corruption in Croatia was noticeable through international evaluators. Based on Transparency International Corruption Percentage Index, in 2005 Croatia was on the 70th place, with the score of 3.4.³⁴ In this period corruption started becoming one of the government’s main priorities, this because Croatia had just made the request for the membership in the EU and fight against corruption was one of the main recommendations of EU.

At the same year when Croatia started negotiations with EU, the EC stated that Croatia “determines a strategic approach for the combat against organized crime and corruption.”³⁵ In 2006 the state started the second anticorruption action, PACO Impact Project. The change in the corruption index is noticeable from 2007 onwards.

²⁹ European Commission, *Croatia 2007 Progress Report*, Brussels 2007,

http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/croatia_progress_reports_en.pdf (viewed 3 February 2014)

³⁰ Munir Podumljak “Country Report Croatia.” In *EU Approach to Justice Reform in South-eastern and Eastern Europe*, edited by Cristia Ghinea and Laura Stefan, 94-128. Bucharest: Romanian Center for European Policies, (2011). 105

³¹ Business Anti-Corruption Portal, “Public Anti-Corruption Initiative”, . n.d. <http://www.business-anti-corruption.com/country-profiles/europe-central-asia/croatia/initiatives/public-anti-corruption-initiatives> (viewed February 03, 2014).

³² Ibid.

³³ Ibid.

³⁴ Transparency International, *Corruption Percentage Index 2005*. n.d. http://archive.transparency.org/policy_research/surveys_indices/cpi/2005 (viewed February 04, 2014).

³⁵ Ibid.

In the attempt to prove its readiness to join the EU, in 2009 Croatia started a wide-ranging investigation into corruption, by resulting in the arrest of its ex-prime minister Ivo Sanader for taking bribes.³⁶ This resulted in the EC stating in its 2009 Progress Report that “the anti-corruption strategy has become more proactive.”³⁷ In the Report of 2010, the Commission admitted the efforts of Croatia by stating that: “There has been good progress in the fight against corruption. Implementation of the anticorruption strategy and the related action plan has continued.”³⁸

In 2012, Ivo Sanader was sentenced to 10 years in prison.³⁹ He is the most senior officer to be prosecuted for corruption in Croatia. This resulted in getting a positive opinion from the EC. Implementation of the new Criminal Code of 2013, is growing. The EC, in its final report before Croatia’s accession, has expressed a positive opinion regarding law implementation, by mentioning that Croatia has prosecuted also higher-level corruption cases, and that fight against corruption has been increased also in the law enforcement institutions.⁴⁰ However according to the EC the level of court sentences in corruption remains low.⁴¹ Even though just three months before becoming a member state, apparently EC has still recommendations for Croatia, and work needs to continue.

However it is to emphasize that the general trust of people in the government and legal system recently has been increased. This is noticeable by the TI’s Global Corruption Barometer 2013, which shows that 68% of respondents said that they would report instances of corruption and almost a third confirmed that they would make use of governmental hotlines for that purpose.⁴²

Shortly, at the beginning of the start of negotiations for membership, corruption was identified by EU as a serious problem in Croatia. But in the last report before becoming a member state, EC acknowledges the efforts of Croatian government in the fight against corruption, but still: “The fight against local-level corruption needs to be further enhanced”⁴³. This shows that despite the big efforts, just three months before becoming a member state, apparently EC has still recommendations for Croatia, and work needs to continue.

³⁶ BBC News, n.d. <http://www.bbc.co.uk/news/world-europe-11969520> (viewed February 04, 2014).

³⁷ European Commission, *Croatia 2009 Progress Report*, n.d. http://ec.europa.eu/enlargement/pdf/key_documents/2009/hr_rapport_2009_en.pdf (viewed February 04, 2014).

³⁸ European Commission, *Croatia 2010 Progress Report*, http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/hr_rapport_2010_en.pdf (viewed 4 February 2014)

³⁹ BBC News, n.d. <http://www.bbc.co.uk/news/world-europe-20407006> (viewed February 04, 2014).

⁴⁰ "Monitoring Report on Croatia's accession preparations, Brussels 2013." European Commission, n.d. http://ec.europa.eu/commission_2010-2014/fule/docs/news/20130326_report_final.pdf (viewed February 04, 2014).

⁴¹ Ibid.

⁴² Transparency International, *Global Corruption Barometer 2013 Report*, n.d. <http://www.transparency.org/gcb2013/report> (viewed February 05, 2014).

⁴³ Ibid.

3 Comparison

Through the case study of corruption in Albania and Croatia, as presented in the above chapters, it is evident that both countries were faced with serious problems. However, the will of these countries to join the EU led them to the adoption of new laws and policies in order to adapt to the democratic values of the EU. In this chapter are compared the ways Albania and Croatia fight against corruption and the results achieved.

3.1 Similarities and differences in anti-corruption framework measures

Both countries, Albania and Croatia, were willing to join the EU and applied for that. Croatia started negotiations since 2005, whereas Albania just in 2009. Talking about similarities, both countries were ex-communist with authoritarian regime. So the notion of democracy was introduced late to both of them.

Similarities exist also in the conditions both countries needed to meet in order to join the EU. Also measures taken by these countries to meet the requirements are similar. Adjustments inside legislative system were necessary, and both countries tried to fulfill them. In the context of fighting against corruption, it is evident that both countries made efforts. When starting negotiations, Croatia had already established Office for Combating Corruption and Organized Crime (USKOK). Moreover, it had become a member of GRECO and had ratified international conventions regarding corruption combating.

The same can be stated for Albania also, as it had created the Anti-corruption Task Force and JIU to Fight Economic Crime and Corruption and had ratified international conventions. Further on, just one year before starting negotiations, Albanian government had introduced the Strategic Action Plan 2008-2013 for the fight against corruption. The only difference that should be noticed in this case is the timeframe; Albania is behind Croatia in every step of the way towards EU.

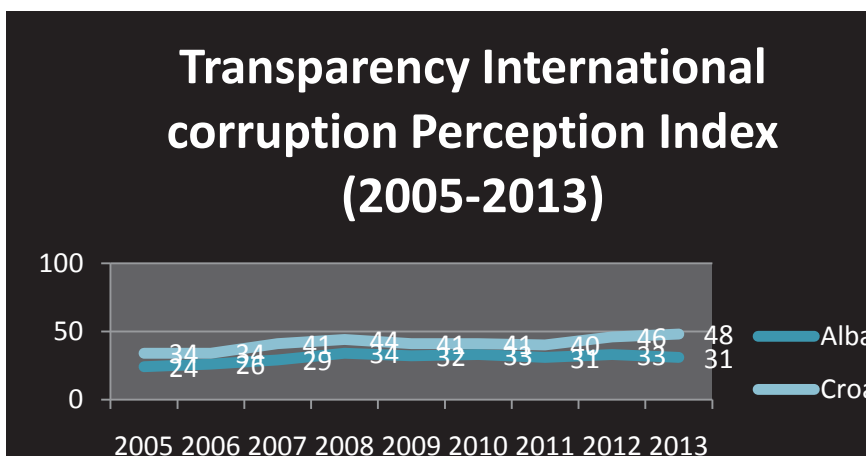
After entrance into force of SAA agreement in each country, in both countries are noticed efforts for compliance with EC recommendations. Both Albania and Croatia start the strategic action plans of EC, PACA and PACO-Impact, for strengthening the fight against corruption and improving law implementation. Moreover, both countries successfully fulfilled the GRECO recommendations and both amended their Criminal Codes by enhancing the provisions regarding bribery.

The main difference between these countries is the amount of time that takes for each country to fulfill the EU recommendations. It took Albania three years to fulfill GRECO recommendations, and it generally takes more than one year to fulfill EU recommendations. Whereas Croatia has fulfilled almost all EU recommendations within the next year after they were recommended. From this analysis can be noticed the difference in political climate in terms of corruption in both countries. It is clear that there is a lack in Albanian political will to fulfill the recommendations in proper time, this because of the inability of the government to fight corruption, or maybe because that government itself is involved with corruption. It seems like the government is not willing to fight corruption yet.

3.2 Similarities and differences in anti-corruption implementation

In the above chapters the system used for analyzing the adopted anti-corruption measures relies mainly on two types of assessment methods: the findings from worldwide recognized evaluators and the Progress Reports by the EC. Based on the findings of these indicators, it can be observed that both countries had high level of corruption in the period before starting negotiations. However, Croatia worked harder and faster than Albania, thus also their level of implementation differs. In the above graph is shown the perception index of corruption for both countries from 2005 till 2013, based on the data gathered by TI evaluator. Each country's score indicates the perceived level of corruption in public sector on a scale of 0-100, where 0 means that a country is perceived as highly corrupt and 100 means it is perceived as very clean.

As it can be noticed, during all this timeframe, Albania is perceived as more corrupt than Croatia. However it is clear that in both countries perception of corruption in the recent years has been decreasing. It can be concluded from this that anti-corruption measures implementations has been improving, by so increasing the faith of citizens in their government.



Graph 1: Transparency international corruption perception index (2005-2013)

The EC opinion regarding Albania has not had extreme changes throughout the membership process period since 2005 till 2013. During all these years, according to EC implementation of anti-corruption legal framework and strategies and action-plans has been low and weak. However, things started to change in 2013. In this year's report, there is a positive change; EC declares improved implementation and increased number of convictions. Seems like winds are changing in Albania.

On the other hand, the evaluation results for Croatia show that while situation at the begging of the membership process was at a standstill, towards the end of accession the decrease of corruption is noticeable. Taking all into consideration, it can be inferred that Croatia was willing to prevent corruption, which resulted in its rapid accession in the EU.

In contrast to this, Albanian attitude towards the implementation of anti-corruption measures influenced in the postponing of the candidate status.

Conclusions

Corruption is a problem which all governments, at any level of development, have to deal with. It has always existed in society, but recently it has become a big concern for the development of countries, especially the SEE countries. The levels of corruption in these countries effect to a large extend their process of accession in the EU.

This paper addressed the issue of corruption in two SEE countries, Albania and Croatia since their start of negotiations until 2013. These countries were chosen due to their differences in the level of corruption, in legal framework and in its implementation. The intention of this comparison is to show what Albania can learn from Croatia in measures for the fight against corruption.

Even though the level of corruption in Albania during the recent years has been decreasing, still the level is very high. There is a lot of improvement in the anti-corruption legal framework, a lot of amendments have been made but its implementation remains low. Albania's progress in the fight against corruption according to the annual progress reports of the European Commission has been increasing but still work needs to be done.

The situation in Croatia seems to be better than that in Albania. Croatia has done a lot of effort in the fight against corruption by amending the law and by successfully implementing it, with a great number of corruption cases resolved. This has been one of the reasons that fastened Croatia's integration process, by finalizing with it becoming the newest member state of EU in 2013.

It can be concluded that there is a lot of difference in the progress of these two countries in the fight against corruption and that Albania has a lot to learn from Croatia in this field. But does this mean that Croatia doesn't have problems with corruption anymore now that it has accessed the EU? Does corruption stop after entering the EU?

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**Phd.C. Saimir Shatku¹,
Msc. Stela Dako²,
Av. Elton Dushku³**

¹ Lektor Departamenti i së drejtës civile, Fakulteti i Drejtësisë,
Universiteti i Tiranës, Shqipëri

² Departamenti i së drejtës publike, Fakulteti i Drejtësisë, Universitet
i Tiranës, Shqipëri

³ Avokat publik për çështjet civile dhe administrative

Sfidat e së drejtës shqiptare të punës përballë të drejtës komunitare

Abstrakt

Në mes shumë ndryshimesh që solli, Traktati i Amsterdamit do të ndryshonte dhe mënyrën e të kuptuarit të marrdhënieve të punës, bazuar kjo dhe në ndryshimet që ndodhën në Evropë në kohën e miratimit të tij. Këto ndryshime që ndodhën i dhanë mbrojtje më të madhe punëtorëve të të gjitha shtetësisë, por në të njëjtën kohë ngarkuan me detyrime shtetet anëtare të BE-së. Kapitulli përkatës i Traktatit, por dhe legjislacioni dytësor që rrodhi prej tij, parashikuan një mbrojtje të të gjitha aspekteve të një marrdhënie pune. Rregulloret dhe Direktivat parashikuan forma të reja të punës, të padëguara më parë në legjislacionet e shteteve, por në të njëjtën kohë zgjeruan dhe gamën e të drejtave të mbrojtura nga legjislacionet e mëparshme. Shtetet filluan të merrnin masa, por u gjenden para problemeve të mëdha, ku ndër më shqetësuesit për vetë BE-në është diskriminimi, koncept ky i papajtueshëm me diversitetin. Ky punim do të analizojë evolucionin e të drejtës së punës në BE dhe do të jap një pasqyrë të plotë të legjislacionit dytësor të punës. Do të shohim se si ka ndryshuar marrdhëniet e punës me kalimin e kohës. A duhen domosdoshmërisht dy subjekte për të patur një marrdhënie? Gjatë analizës do të shtjellohen çështje shumë delikate, duke përfshirë këtu dhe mbrojtjen e të dhënave personale në një marrdhënieje pune, por ajo që përbën risi janë të ashtu quajturat, forma të reja të punës, si për shëmbull puna në shtëpi, ajo në distancë dhe puna telematike. Si do të paguahet, si do të llogariten orët e punës dhe a do të kemi problem me punën e zezë? Sa i fortë mund të jetë një shtet për ta parandaluar këtë fenomen, por në të njëjtën kohë kjo formë pune do të rriste punëzënia! Në fund do të analizojmë gatishmërinë dhe forcën e shteti dhe të legjislacionit shqiptar e atë komunitar, për të garantuar të gjitha aspektet e marrdhënieve juridike të punës. Si paraqitet situata aktuale dhe çfarë ndryshimesh duhet të ndodhin në Kodin e Punës? Sa i gatshëm është tregu shqiptar për të përballuar tryshninë që vjen nga BE por dhe nga vendet botës së tretë dhe nga punëtor më të kualifikuar se tanët, por shumë më të shtrenjtë në krah pune?!

Ky punim përcakton ndryshimet që duhet të ndodhin në Kodin e Punës për të patur një përballje sa më të lehtë. Sa kohë do të duhet për tu përshatur me gjithë këto ndryshime që në kohën e miratimit të Kodit të Punës dukeshin abstraksione?

Mendimet e paraqitura në punim janë të autorëve dhe jo të institucionit nga ata vijnë.

Fjalë kyçe: Punëtor, Format e reja të punës, Siguria në punë, Kushtet e punës

1.1 Lëvizja e lirë e punëtorëve dhe Marrëveshja e Stabilizim Asociimit (MSA)

Neni 310 i traktatit të komunitetit evropian parashikon se komuniteti mund të perfundojë me një ose disa shtete ose organizata nderkombtare marrëveshje të cilat krijojnë një asociim të karakterizuar nga të drejta dhe detyrime të përbashkëta. Duke patur parasysh marrëveshjet e asociimit të perfunduara deri më sot nga KE mund të themi se asociimi përfshin dy koncepte:

- Një marrëdhënie e cila përgatit vendet e treta për anëtarësim në BE dhe
- Një marrëdhënie e vecante për të vendosur marrëdhënie të ngushta ose të privileguara me vende jashtë komunitetit.

Kur flasim për lëvizje të lirë të punëtorëve se pari duhet të sqarojmë termin “punëtor.” GJED ka përcaktuar se termi punëtor do të jepet një përcaktim komunitar dhe se nuk mund të lihet ky përcaktim në dorë shteteve sepse çdo shtet do të mundohet ta modifikonte atë në favor të tij dhe të eliminonte sipas dëshires mbrojtjen që përcaktohet nga traktati për kategori të vecanta të personave. Lëvizje e lirë e punëtorëve varet, të vetëpunësuar, të papunë, të bizneseve në formën e personit juridik që ofrohen si faktorë prodhimi. Lëvizja e lirë e punëtorëve është e ndërtuar në 2 parime themelore.

- Trajtim i barabartë me shtetasit e shtetit të vet (kjo përfshin personat fizik të vetëpunësuar dhe personat juridik)
- Ndalimi i çdo lloji forme diskriminimi (kjo përfshin personat fizik varet apo punëtor). Siç kuptohet kemi të bëjmë me mobilitet profesional dhe gjeografik.

MSA është një marrëveshje që ka karakteristikat e saj dhe shtete që e nënshkruajnë atë nuk mund të përfitojnë tërësisht të gjitha të drejtat që përfitojnë shtetet anëtare të Komunitetit. Se pari duhet të kemi parasysh se kemi të bëjmë me shtete të Evropës Juglindore, tregu i brendshëm i të cilave nuk mund të jete plotësisht i përgatitur për të përballuar trysinë që do të ushtronte një treg tashmë i konsoliduar Evropian, prandaj është parashikuar që leshimet duhet domosdoshmërisht të jenë asimetrike që do të thotë se BE nga ana e saj do të “tërhojë” me shumë. Kjo vlen dhe për lëvizjen e lirë të punëtorëve.

1. Në përputhje me kushtet dhe modalitetet e zbatueshme në çdo Shtet Anëtar:

- *trajtimi i akorduar punonjësve që janë shtetas shqiptarë të punësuar ligjërisht në territorin e një Shteti Anëtar nuk përmban asnjë formë diskriminimi bazuar në kombësi, për sa u përket kushteve të punës, shpërblimit apo shkarkimit nga puna, krahasuar këto me shtetasit e tij;*
- *bashkëshorti/bashkëshortja dhe fëmijët rezidentë të ligjshëm të një punonjësi të punësuar ligjërisht në territorin e një Shteti Anëtar, me përjashtim të punonjësve sezonalë dhe të punonjësve që i nënshtrohen marrëveshjet dypalëshe nën përcaktimin e nenit 47, në rast se nuk parashikohet ndryshe nga marrëveshjet e tilla, gëzojnë akses në tregun e punës së Shtetit Anëtar përkatës, gjatë periudhës së qëndrimit të autorizuar për punësim të punonjësit. Shqipëria, në përputhje me kushtet dhe modalitetet në atë vend, u akordon të njëjtin trajtim siç përcaktohet në paragrafin 1 punonjësve të cilët janë shtetas të një Shteti Anëtar dhe janë ligjërisht të punësuar*

në territorin e saj, ashtu si edhe bashkëshortit/bashkëshortes dhe fëmijëve të tyre që janë rezidentë të ligjshëm në atë vend¹.

Këshilli i Stabilizim-Asociimit do të shikojë mundësinë për përmirësime të tjera, duke përfshirë lehtësira për akses në trajnimet profesionale, në përputhje me rregullat dhe procedurat në fuqi në Shtetet Anëtare, dhe duke marrë parasysh situatën në tregun e punës në Shtetet Anëtare dhe në Komunitet. Kjo është përcaktuar në nenin 47 të MSA-se për të parandaluar situatat e dumping social. Levizja e lire e punetoreve në komunitet do të varet nga vullneti i shteteve anetare, pasi priblemet që ato do të pëballojnë janë jo të vogla. Komuniteti ka gjetur këto rrugë të mesme për të mos kufizuar në mënyrë tepër të rrepte levizjen e njerezve në kërkim të punës, ai ka vendosur se shtetet mund të nënshkruajnë marrëveshje dy ose shumë palësh me ane të të cilave shteti i asociuar dhe shteti anetar të vendosin “rregullat e veta”, sepse ajo që përcakton MSA është një e drejtë minimum, pra mund të themi se për vendet e asociuara nuk bëhet fjalë për levizje të lire të punetoreve, por për levizje të tyre. Për më tepër kjo e drejtë nuk u njihet punonjesve sezonalë apo atyre të cilët shkojnë për të punuar në baze të marrëveshjeve bilaterale. Në rastin e punetoreve nuk kemi vetëm derogime për shkak të sigurisë publike, shëndetit publik, por vlen dhe një përjashtim tjetër që ka të bëjë me shërbimin publik (administratën publike). GJED shpesh ka theksuar se këto përjashtime duhet të interpretohen ngushtë.²

Në vitin 1951 në Evropë themelohet një organizatë e një lloji krejtësisht të ri me një pikepamje të dyfishtë: një zonë e tregtise së lire dhe një treg i përbashkët në të cilin do të leviznin lirisht mallrat, punetoret, kapitali dhe shërbimet. Secila prej këtyre paraqet vështirësitë e veta në realizimin e saj e megjithatë “baballarët e Evropës”³ ishin të vendosur ta bënin planin e tyre të funksiononte. Aktet baze në të cilat është mbështetur Bashkimi Evropian⁴ kanë marrë emërtime të ndryshme, por qëllimi që ato kërkojnë të realizojnë është i njëjti, një treg i përbashkët evropian ku “lirite” të levizin lirshëm. Ndërtimi i Tregut të përbashkët ndërmjet Shteteve anetare përben edhe themelin, zemrën e ndërtimit të komunitetit evropian.

Tregu i përbashkët është produkt i teksteve normative, i parimeve dhe i procedurave.

- *I teksteve.* Qysh prej viteve '50, kohë e traktatave themeluese, sistemi komunitar dhe ai i B.E me pas, ka punuar dhe po punon për të nxjerrë norma juridike (rregullore, direktiva, etj).
- *I parimeve.* Karakteristika institucionale e Tregut të përbashkët manifestohet në ndërtimin dhe promovimin e parimeve. Ketu një rol të madh ka dhënë Gjykata e drejtësisë, nëpërmjet jurisprudencës së saj. Si shembull do të sjellim parimin e nxjerrë nga i famshmi Casis de Dijon (1979), sipas të cilit një produkt i prodhuar rregullisht në një nga Shtetet anetare duhet të lejohet të shitet lirshëm në të gjithë hapësirën Komunitare.
- *I procedurave.* Funksionimi i Tregut të përbashkët bazohet thellësisht në procedurat e mbikqyrjes dhe të kontrollit, të cilat realizohen kryesisht nga Komisioni evropian dhe nga Gjykata e drejtësisë.

¹ Neni 46 i MSA-se

² GJED ka thënë se “përjashtimet e përvaktuara në nenin 39/4 (sot neni 45/4) është e lidhur me një pjesëmarrje direkte ose indirekte, në ushtrimin e pushtetit publik dhe funksioneve që kanë si objekt ruajtjen e intersave të përgjithshme të shtetit ose të pushtetit lokal”. 26 maj 1982 Komisioni kundër Belgjikës

³ Flasin për Zhan Monë dhe Rober Shuman

⁴ Termi që perdoret nga Traktati i Masiht-it dhe me vone.

Realizimi i kater lirive eshte pjese e Tregut te perbashket. Kjo kerkon heqjen e atyre pengesave te cilat ne nje forme apo ne nje tjeter , direkt apo indirekt do te favorizonin dike ne raport me dike tjeter. Komuniteti Evropian është më tepër sesa një zonë e tregtisë së lirë. Në fakt, procesi i ndërtimit të Evropës ka nxjerrë gjithmonë nevojën e mbajtjes së një balance midis përmasave ekonomike dhe shoqërore. Si rrjedhojë, politika shoqërore e Komunitetit mbulon shumë fusha, duke përfshirë lirinë e lëvizjes së punëtorëve, bashkërendimin e skemave të sigurimit shoqëror, mundësi të barabarta për burra dhe gra, shëndetin dhe sigurinë në punë, si dhe harmonizimin e disa akteve të ligjit të punës. Nxitja e një niveli të lartë punësimi është njëri prej objektivave të Komunitetit qysh prej

hyrjes në fuqi të Traktatit të Amsterdimit, në maj 1999, kur edhe u fut Titulli VIII “Punësimi” në Traktatin themelues të Komunitetit Europian. Elementet e ndryshme të kësaj politike shoqërore kanë zënë vendin e tyre shkallë-shkallë krahas zhvillimit politik, ekonomik dhe shoqëror të Komunitetit dhe mbi bazën e përshtatjeve të njëpasnjëshme të Traktatit (Akti Unik Evropian i vitit 1987; Traktati i Mastrihtit i vitit 1992: Protokollin për Politikën Shoqërore dhe Marrëveshja mbi Politikën Shoqërore, e shtuar në Traktat).

Miratimi më 1989 i Kartës së Komunitetit për të Drejtat Shoqërore Themelore të Punëtorëve ka qenë, gjithashtu, një tregues i rëndësishëm. Kjo deklaratë solemne vendos në numër parimesh që mbulojnë shumë aspekte të kushteve të jetës dhe të punës. Ajo i ka dhënë një shtysë të re politikës shoqërore, jo vetëm si një simbol politik që shpreh vendosmërinë për të përfshirë në politikën e tregut të brendshëm politikën shoqërore, por edhe në terma veprues, meqenëse është shoqëruar nga një program zbatimi të parimeve të saj. Për më tepër, gjithmonë ka pasur përpjekje për të përfshirë në zhvillimin dhe zbatimin e politikës shoqërore të Komunitetit partnerët shoqërorë. Marrëveshja për Politikën Shoqërore, e përfshirë në Traktatin e Maastrichtit, është hap i rëndësishëm përpara, ndërkohë që rregullat shoqërore në nivelin e Komunitetit tani mund të marrin dy forma: legjislation ose marrëveshje të negociuara në nivel evropian⁵. Politika shoqërore e Komunitetit nuk është e kufizuar vetëm në aspektet legjislativ, të cilat janë të vetmet që merren parasysh dhe që kufizohen vetëm në akte minimale për ngritjen e një tregu të brendshëm. Ato paraqiten edhe në dokumente të tjera që mbulojnë fushat e mëposhtme :

- bashkërendimin e skemave të sigurimit shoqëror;
- trajtimin e barabartë për burrat dhe gratë;
- shëndetin dhe sigurinë në punë;
- disa aspekte të ligjit të punës.

Ne kete punim do te ndalemi ne analizimin e levizjes se lire te punetoreve , e cila paraqet disa specifika te cilat nuk i hasim ne lirate e tjera. Se pari ketu kemi te bejme me levizje nerezish (jo mallrash apo sherbimesh) ndaj te cilave shtetet kane detyrime pozitive dhe negative , ketu shtuar fakti se qytetaret evropiane gezojne mbrojtje diplomatike nga i gjithë komuniteti. Mbrojtja e tyre sociale eshte nje aspekt tjeter i rendesishem te cilin po ashtu nuk e hasim tek lirate e tjera apo dhe njohja e diplomave dhe e specilizimeve te tjera pas universitare. Ne ditet e sotme krahu i punes eshte nje element i rendesishem dhe po fillon te krijojte nje treg te ri i cili me shume gjasa ne te ardhemen do te ndikojte ne zhvillimin e vendeve te lindjes tek te cilat krahu i punes eshte me i lire dhe keto shtet kane

⁵ Libri i Bardhë për Përgatitjen e Vendeve të Asociuara të Europës Qendrore dhe Lindore për Integrimin në Tregun e Brendshëm të Bashkimit Europian.

nje rritje demografike me te madhe se vendet e tjera te cilat po shkojne drejt plakjes. Si nje organizate mbikombtare sot BE po perdoret mekanizmat e saj per te balancuar kete treg , i cili mund te kete ndikimet e veta ne krizat qe do te pasojne ne BE. Ne shtetet anetare te BE-se po shfaqen sot dukshem forma te reja pune te panjohura me pare. Shteteve do t'i duhet te perballen me forma te reja te mbrojtjes sociale , disa nga kushtet e punes do te behen inekzistente , pra sa do te mund te perballoje kete situatë Unioni me nje numer te shtuar shtetesh? Termat e kontratave te punes po ndryshojne , po shtohet ndjeshem puna ne shtepi dhe “tele puna”⁶. Cfare kuptojme me forma te reja pune? Keto forma perfshijne nje marredhenie atipike pune , se ciles i mungon apo ka me tepri nje nga elementet te cilet ne i konsiderojme te domosdoshem per te patur marredheneien tipike te punes e cila si element primar te saj ka vartesine.⁷ Do te kemi forma te reja te punes ateherë kur dy persona jane te bashkepunesuar apo kur kemi mungese punetoresh. Pra kemi rrezim te kontratave standarte te punes. Eshte e rendesishme te theksojme se per keto forma te reja pune ende nuk kemi tekste te mirfillta apo studime te bera , sespse shpesh jane pare si forma heretike te cilat eshte me mire te evitohen sa me shume te jete e mundur.⁸ Sa i peket gjinise se atyre te cilet me se shumti kane ndihmuar ne shfaqjen e formave te reja te punes jane femrat. Ato me se shumti punojne me kohe vertikale⁹ apo horizontale¹⁰. Rreziku me evident qe keto forma te reja puna shfaqin konsiston ne faktin se ato mund te prodhojne nje treg te zi, sepse eshte shume e veshtire te nje shtet te percaktojë se dikush po punon ne shtepine e tij pa sigurim shoqeror. Ekzistenca e krizave ekonomike do te beje qe nje numer gjithnje e me i madh njerezish te pranoje te punoje i pasiguruar , duke ditur se me lart thame qe numrin me te madh te te punesuarve ne format e reja te punes e perbejne femrat. Nje nene beqare do te ishte e gatshme te punonte me kohe pune vertikale ne shtepine e saj pa u verejtur nga askush. E nejejta gje vlen dhe per studentet te cilet ne moshen e tyre nuk jane shume te interesuar te kene nje skeme ne tyren , sepse mbulimi me siguracion do te thote te te paguajne me pak. Disa autore i shohin keto forma te reja pune si nje menyre shume e mire tranzitore e cila do te coje drejt punezenies se plote , sepse te gjithë do te merren me dicka.¹¹

1.2 E drejta komunitare e punës dhe lëvizja e lirë e punëtorëve në BE.

Me te drejte komunitare pune do te kuptojme teresine e legjislacionit dytesor te BE-se ne fushen e marredhenieve te punes dhe te sigurise socilae ne pune. Ne kete rast kemi te bejme me Direktiva , Rregullore , Vendime dhe vendime te Gjykates Evropiane te Drejtesise (me tej GJED) cilat e kane zhvilluar me tej te drejten komunitare te punes. Te tera keto akte kane bere qe punetoret te cilet levizin ne kerkim te nje vemdi pune nga nje shtet ne nje tjetër te kene mundesi te trajtohen ashtu sic trajtohen shtetasit e shtetit anetar ne te cilin keta punetore shkojne per te punuar. Problemet me te shpeshta qe vihen re ne

⁶ New forms of Work. European Foundation for the Improvement of Living and Working Conditions

⁷ Cela K, E drejte e punes , Shtepia botuese ILAR , Tirane 2008 , faqe 23

⁸ Shih Valticos N., *Droit international de travail*, Dalloz, Paris

⁹ Me kete terme kuptojme nje kontrate e cila parashikon nje numer te caktuar oresh gjate se ciles do te zhvillohet puna, por keto ora mund te jene me nderprerje mes tyre.

¹⁰ Me kete term kuptojme nje numer te caktuar oresh te cilat duhet te zhvillohen gjate javes dhe nuk ka rendesi se kur keto kryhen , qofte dhe brenda dites.

¹¹ Shih Robinson O. and Wallace J, *Part-time Employment and Sex Discrimination Legislation in Great Britain*, Department of Employment (Research Paper no.43), London, 1984.

keto raste dhe ato qe GJED ka trajtuar me shpesh (per me teper shih Kreu IV) kane te bejne me dy aspekte : diskriminimin dhe vendosjen e masave te cilat pengojne levizjen e punetoreve.

Levizja e lire e punetoreve dhe e drejta e vendosje perfshijne:

- Levizjen e lire te punetoreve
- Te drejten e firmave, te papuneve dhe te bizneseve te pavarura qe te vendosen ne cilindo shtet anetar.
- Levizjen e lire te njerezve te papune.

Perveç se drejtes per te marre pune fitimprurese liria e levizjes perfshin ndalimin e diskriminimit per shkak te shtetesisë se tyre garantohet mosdiskriminimi ne page, ne kushtet e punes (kontratat e punes , marreveshjet kolektive , ligjin e aplikueshem etj). Neni 45 ish neni 39 perjashton nga kjo e drejte punonjesit e sherbimit civil (dmth pjestaret e administratave te policise , ushtrise , drejtesise dhe taxave.) GJED e ka vene objektiv te levizjes se lire te punetoreve per te nenkuptuar mobilitetin e plote te punetoreve dhe te familjeve te tyre, duke perfshire detyrimin ndaj shteteve anetare per te hequr cdo pengese qe do te veshtiresonte kete mobilitet. Ketu kemi te bejme me dy koncepte teper te ngjashme dhe qe shpesh eshte e veshtire ti ndash: diskriminim i drete per drejte dhe i terthorte. Dallimi thote GJED konsiston ne pasojen qe ajo sjell. Pra nqs per nje individ dhjets te nje shteti anetar do ti veshtiresohej punezenia per shkak te shtetesisë si pasoje e nje mase te marre nha nje tjeter shtet anetar(i ndryshem nga ai i shtetesisë) do te kishim te benim me diskriminim te terthorte. Pra dallimi konsiston ne pasojen qe sjell masa e marre , pavarsisht se ne pamje te pare duke se nuk ka vend per diskriminim.(psh njohja e gjuhes se shtetit prites) Perjashtim behet vetem per punonjesit e administrates publike. Per personat e tjere kufizime mund te vendosen per shkak te sigurise , shendetit dhe rendit publik , por te gjitha keto shkaqe do te ineterpretohen ngushte. Arsyetimi ekonomik eshte i papranueshem. Traktatet themelore e kane trajtuar te tere te drejten komunitare te punes si nje pjese integrale dhe te pandashme te tyre , por Traktati i Amsterdami ishte ai qe shenoi nje hop cilesor dhe beri shume ndryshime ne menyren se si do te konceptoheshin tash e tutje mmarredheniet e punes te atyre punetoreve te cilet kishin filluar te leviznin brenda komunitetit evropian¹². Ne traktatin e Amsterdami futet nje kapitull ne lidhje me angazhimin e fuqise punetore. Aplikimi i politikave te punesimit mbetet kryesisht nen pergjegjesine e shteteve anetare , por traktati vete ka vendosur nje kuader per keto politika :

- Ndjekja e objektivit ne nivel rritjeje te punesimit verifikohet nga zbatimi i te gjitha politikave te tjera te perbashketa.
- Keshilli Evropian shqyrton situaten e punseimit ne komunitet dhe nxjerr perfundime per kete teme mbi bazen e nje raporti te perbashket vjetor me Komisionin dhe keshillin e ministrave.
- Keshilli i ministrave eshte organi qe shqyrton ne detaje veprimet konkrete te qeverive ne favor te punesimit dhe dergon rekomandime ne rast nevojje.

Nje element mjaft i rendesishem per implementimin e Strategjise Evropine per Punesimit E perben dhe Fondi Social Evropian , i cili perben instrumentin eme te rendesishem

¹² Kujtojmë ketu qe ky traktat hyri ne fuqi ne vitin 1999 , pra rreth 2 vite para zgjerimit te madh te BE-se ne vitin 2001. Rregullimet e parashikuara ne Traktatin e Amsterdami u ruajtën dhe me tej ne Tarkatin e Nices.

financiar per veprimet strukturore te BE-se. Ky fond financon shtet anetare qe kane si qellim luften kunder papunesise , zhvillimin e burimeve njerezore dhe kohezionin ekonomik. Pas një periudhe ndërmjetëse 5-vjeçare pas hyrjes në fuqi të Traktatit të Amsterdimit (maj 1999), Komisioni ka të drejtën ekskluzive të nismës dhe zbatohet procedura e vendimmarrjes së përbashkët, përveç disa fushave të caktuara si, bashkëpunimi gjyqësor në çështje ligjore familjare, për të cilat Këshilli ende vepron me vendim unanim dhe Parlamenti Europian vetëm këshillohet.

Ps. Më poshtë po ju paraqesim tabelën dhe efektivitetin e lëvizjes së lirë të mallrave, shërbimeve, kapitalit dhe njerëzve ndër vite në euro-zonë.

Fushat e politikës	1950	1957	1968	1993	2007
Tregu i brendshëm/lëvizja e lirë					
Lëvizja e lirë e mallrave dhe shërbimeve	1	2	3	4	4
Lëvizja e lirë e kapitalit	1	1	1	4	4
Lëvizja e lirë e personave	1	2	3	4	4
Rregullat e konkurrencës	1	2	3	4	4
Standardet mjedisore	1	2	2	3	3
Rindarja/shpërndarja e financave					
Politikat bujqësore	1	1	4	4	4
Politikat rajonale	1	1	1	3	3
Kërkimet shkencore dhe zhvillimi	1	1	2	2	2
Politikat sociale	1	1	1	2	2
Sistemi arsimor	1	1	1	1	2
Politikat në sistemin e banesave	1	1	1	1	1
Politikat monetare dhe fiskale					
Përcaktimi i përqindjeve të interesit	1	1	2	3	4
Nxjerrja e valutës	1	1	1	1	4
Përcaktimi i përqindjes së tatimit mbi të ardhurat	1	1	1	1	1
Politikat e brendshme dhe ato ligjore					
Politikat e migracionit dhe të azil-kërkimit	1	1	1	2	3
Mbrojtja e të drejtave të qytetarëve	1	1	1	2	3
Sistemi policor dhe rendi publik	1	1	1	2	2
Politika e Jashtme					
Politika e tregtisë me jashtë	1	1	3	4	4
Politika e mbrojtjes	1	1	1	1	2
Ndihma për zhvillim	1	1	1	3	3

(Burimi: Simon Hix, The Political System of the European Union, Palgrave Macmillan, Basingstoke u.a. 2005, 20-21)

PËRFUNDIME

Direktivat e dhëna më lart ilustrojnë kuptimin e këtij koncepti, i cili mund të zbatohet për çështje të ndryshme që lidhen ngushtë me tregun e punës e lëvizjen e lirë. Ndër të tjera, këto direktiva merren, kryesisht, me përkufizimin e të drejtave që duhet të respektojnë shtetet anëtare në transpozimin e direktivave. Për këtë proces nuk duhet infrastrukturë e veçantë. Këto të drejta bëhen pjesë e trashëgimisë së të drejtave ligjore të punëtorit. Në këtë këndvështrim, masat e fazës së parë duhet të përfshijnë të paktën direktivat e 1975-ës dhe 1976-ës, të cilat janë me rëndësi të veçantë për punëtorët burra dhe gra dhe pasqyrojnë norma ndërkombëtare të pranuar në këtë fushë. Po kështu, mund të argumentohet që, gjithashtu, gjatë këtij procesi, duhet të merren parasysh direktivat e 1979-ës dhe 1986-ës për sigurimin shoqëror statutor dhe profesional. Sigurimi i një trajtimi të barabartë në shumë fusha të sigurimit shoqëror, ka një ndikim të jashtëzakonshëm mbi të punësuarit dhe shtetet. Në sistemet ish-komuniste, barazia e burrave dhe grave luajti rol të rëndësishëm në kuadrin e qëllimeve politike. Ndryshimi i tanishëm drejt ekonomive të tregut duket që po shkakton efekte negative përse i përket përfaqësimit të grave në tregun e punës dhe pozicionit të tyre për të kërkuar të drejtat. Bashkimet e pavarura të tregtisë dhe organizatat jo-qeveritare, të përkushtuara ndaj të drejtave të barabarta të burrave dhe grave, do të luanin një rol të madh në këtë drejtim. Zhvillimi i tyre duhet të mbështetet nga Programet LIEN dhe PHARE DEMOCRACY (13).

Punimi kishte në përmbajtjen e tij:

1. Evidentimi i mëtejshëm i rolit të legjislationit të së drejtës komunitare të punës mbi funksionimin dhe vendimarrjen në lëvizjen e lirë të punonjësve brenda dhe jashtë vendit (duke përfshirë, të vetpunësuarit, të punësuarit jashtë shtetit dhe zonës së Komunitetit Europian, të punësuarit në punën telematike, puna call senter etj).
2. Të mundësojë ekspertëve të së drejtës studiuesve ligjor, avokatëve dhe specialistëve social, se njohja e kuadrit ligjor të funksionimit të 4-lirive, që janë: Lëvizja e lirë e mallave; shërbimeve; njerëzve dhe kapitalit, rrit dhe progreson fuqinë e marrëdhënieve të rregulluara me ligj, të krahut të punës, si dhe të mekanizmave konsumat në fushën e të drejtës komunitare të punës.
3. Të promovojë interesin dhe përzgjatjen e kategorive dhe reparteve të reja të punës që përmban Kodi ynë i punës. Direktivat dhe rekomandimet e KiE dhe Be-së;

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Morava. Tirane 2010

Karta e të Drejtave Themelore e BE-së u shpall solemnisht nga Këshilli European në Nisë,
më 7 dhjetor 2000. Karta bazohet në Traktatet Komunitare, konventat
ndërkombëtare, si Konventa Europiane e të Drejtave të Njeriut (1950) dhe Karta
Sociale Europiane (1989), traditat kushtetuese të përbashkëta të Shteteve Anëtare, si
edhe deklarata të ndryshme të Parlamentit European

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the
European Community, signed at Lisbon, 13 December 2007

Libri i Bardhë për Përgatitjen e Vendeve të Asociuara të Europës Qendrore dhe Lindore
për Integrimin në Tregun e Brendshëm të Bashkimit European, 1970

Ph. D Cand. Matilda LIKAJ SHAQIRI

Department of Educational Sciences

Faculty of Educational & Philology

'Hëna e Plotë' Bedër University

Migration Policies, Migrants Rights and Social Integration in Europe: Case of Albanian Migrants in Greece and Italy

Abstract

Joly and Reeves (social scholars in migration field) claimed that migration is often cast as a “problem” to “control” in the domestic politics of richer countries, heightened by recent concerns with “national security”. Taking into consideration their claim, it is very important to say that migration phenomena complexity is not just from the migrant’s life’s perspective and their integration, but also migration policies and migrants rights of the host countries. From 1990’s till nowadays, Albanian migration has been a very complex phenomena that influenced Albanian and host societies. In nowadays Europe, compare with Albanian population, number of Albanian migrants is really very drastic. Also, the process of social integration of Albanian migrants is related with the host country policies and the migrants’ rights where they live. Also, it is going to analyze if there is any relation between migration policies, migrants rights and social integration during migration process in these societies. To have an effective analyze, in this study is going to be analyze the cases of Albanian migrants in Italy and Greece. For this reason the focus of this study is to analyze, the process of social integration of Albanian migrants in European societies.

Keywords: *Migration Policies; Migrants Rights; Social Integration; Albanian Migrants in Greece and Italy*

1-Introduction

The end of communism regime and the raise of democratization process helped Albanian society to be 'open border' toward all countries in the world, especially toward Western ones during 1990's. This phenomenon was quite new for Albanian society. The flow of Albanian migration was expended as a huge flood toward different states of the world, but especially toward European countries. The main policy focus of European Union is on managing inward migration, governments may also restrict internal movements and outward migration. But it was not same situation in early 1990's with Albanian migration. Because of this, Albanian migration situation faced as exodus and was quite different from other migration floods. The literature on migration remains very much state-centered, focused on developed countries and on economic development (especially in European Countries), with little attention to social development and integration issues. Migration involves a series of events that can be highly traumatizing of identity and problems of integration. Integration concept in this article has been analyze according to sociological and judiciary perceptive. Integration is one of the most important aims of public policy in host countries. However, integration policy, that is, a series of measures and legal provisions directly or indirectly intended to make things better for immigrants in various areas of life varies from country to country. The differences are obviously conditioned by a number of factors; a country's past, a nation state's configuration, political systems and cultures, institutional traditions, and so forth all of these can play a major role. Kaya divides integration policy into two types, direct and indirect. The first covers measures specifically designed to improve the position of immigrants; the second relies on measures which apply to everyone, but also have positive effects for immigrants¹. This article discusses the migration phenomenon and social integration and makes a sociological analyze on migration policies and migrants rights in Greece and Italy.

2- Migration Phenomenon and Social Integration

A group of people who are or are not forced to migrate but they want to leave their countries for different reasons such as political or political transition, education, better social and cultural life have been indentify as migrants. Migration all over the world is the excepted as documented or undocumented people movement, which are effected by political incorporation, economics, politics or historical associations. 'In general, the flows of people within these systems parallel flows of goods, capital, and information that are partially structured by international politics'². Ravenstein saw migration as an inseparable part of development, and he asserted that the major causes of migration were economic. Migration patterns were further assumed to be influenced by factors such as distance and population densities. According to Hein people are expected to move from low income to high income areas, and from densely to sparsely populated areas, that is, the general notion that migration movements tend towards a certain spatial-economic equilibrium, has remained alive in the work of many demographers, geographers, and economists ever since and, as we will see, is also the underlying assumption of push-pull theories³.

¹ B.Kaya; *The Changing Face Of Europe-Population Flows In The 20th Century*, Council of Europe Publishing, 2002, p.37

² D.S. Massey, "International Migration and Economic Development in Comparative, 1988, p. 24

³ H. De Hein *Migration Development: A Theoretical Perspective*, 2006, p.2

Migration is a very complex phenomenon in the perspective of socio-cultural and economic life. Human migration is the movement of people from one country to another for the purpose of taking up permanent or semi permanent residence, usually across a political boundary. For thousands of years people have migrate to search for food, survive conquer frontiers, colonize new territories, escape from war zone or political authorities and look for new and more rewarding and existing opportunities⁴.

According to a widely used definition, migrants are persons who have been outside their country of birth or citizenship for a long period of time and stay there for different reasons. On the migrant side, one can usefully distinguish three main groups: economic, forced and family migrants, which is a distinction based on the motivations for leaving one's country of origin. But it is very important to say that, migrants could not be classified on just three groups because there are so many people who are not forced to migrate but they want to leave their countries for political reason (such as political transition), for education and for a better socio-cultural activities. Joly and Reeves said that migration is often cast as a "problem" to "control" in the domestic politics of richer countries, heightened by recent concerns with "national security"⁵. 'There is a clear need to study migration impacts in societal context, and to see how migration as a process is an integral part of broader transformation processes embodied in the term "development", but also has its internal, self-sustaining and self-undermining dynamics, and impacts on such transformation processes in its own right⁶. So, is very important to say that emigration play a very important role not just for reorganization of life, but for society's cultural, social, economical and political perspective. According to this perspective is necessary and important to say that the problematic form of migration is reflected to the social relation of one society. Consequently, migration is very benefit for the economical conditions and is under the surveying of the host countries laws.

For this reason is very important to state that the adjustment of migrants into the host societies is related with their integration during their staying. But also the integration process is related with the state control and the rules that each state posses over this phenomena. Also, to analyze between integration of migrants and migration laws in host society, firstly it must be analyze of integration concept and integration process.

The concept 'integration' is used by social researches in migration field for referring the degree of involvement of migrants in hosted society as the other social actors. The term 'integration' is to emphasize respect for and incorporation of differences and the need for mutual adaptation. According to Fix, 'integration' reflects an appreciation of diversity instead of the homogeneity that 'assimilation' has come to connote⁷. Also integration is a process by which immigrants become accepted into society, both as individuals and as groups. The particular requirements for acceptance by a receiving society vary greatly from country to country; and the responsibility for integration rests not with one particular group, but rather with many actors: immigrants themselves, the host government, institutions, and

⁴ M. Likaj Shaqiri, *Migration as a complex phenomena of Identity ad social integration: A sociological view on Albanian Migration case*, Acedemic Journal of Interdisciplinary Studies, MCSER Publishing Rome-Italy, Vol.2, No.9, 2013, p. 614

⁵ L. Engle, *The World In Motion; Short Essays on Migration and Gender*, Geneva: International Organization for Migration, 2004, p.5

⁶ H. De Hein *Migration Development: A Theoretical Perspective*, 2006, p.6

⁷ M. Fix; W. Zimmerman & J. Passel, *The Integration of Immigrant Families in the United States*, Washington, D.C.: Urban Institute, 2001, p.50

communities⁸. Here is very important to claim that integration is not same concept with assimilation. Here the emphasis of assimilation is done on sameness. In fact, the word suggests that, to become full members of the host community, immigrants and their descendants must adopt its cultural standards. This also implies that immigrants must abandon their own culture (language, traditions, etc.), to adapt to the host community. Take linguistic assimilation. The assumption here is that immigrants should stop using their own language in order to become more proficient in the language of the host country or region. Integration, unlike assimilation, integration emphasizes respect for difference. It suggests a process of adjusting to, and joining, the host community without losing one's own culture or identity. Taking language again, it does not make dropping one's own language a condition of learning the new one: on the contrary, keeping up one's own language is respected, and even desirable, especially with family and friends. Most immigration countries today speak of integrating immigrants rather than assimilating them⁹.

Gray claimed that integration is adopted with the goals of the migration policies that involve the management of migration and migrant settlement. There is an implication that integration is about participation or involvement which takes place to a certain degree¹⁰. 'Since it is the root metaphor in terms of which successful migrant insertion into 'host' societies is imagined 'integration' will, here be understood to refer not only to the kind of social positioning/incorporation which an individual migrant might achieve but also and more fundamentally, to specific ways of understanding the social cohesion of the host society'¹¹.

Integration may be defined as a two-way process where new migrants and the hosted society's members have responsibility for wellbeing and social cohesion of society and the adoption with law of each country. This process requires change on both migrants and receiving community, because integration is a dynamic giving and taking process that takes place over time. In responding to migrants' needs, host societies are unlikely to be able to provide the ideal level of support, constrained by different factors. These factors can be listed as limited economical resources, community need, integration policies, education policies, willing to be integrated on the hosted societies etc. So the migrants have to deal with rooted set of existing values and norms, must accept learning different language, cultural values, traditions and norms, and must accept the different race and ethnicity. And also have to obey to the laws of the host country for being a part of it. For the members of hosted countries they need to accept diversity of migrants for helping social solidarity and cohesion of society. Because the migrant must bear the integration to the society and it will help social solidarity of hosted society and also not to break the public order. So the process of migrants' integration depends on the shift in the host societies' attitudes towards them.

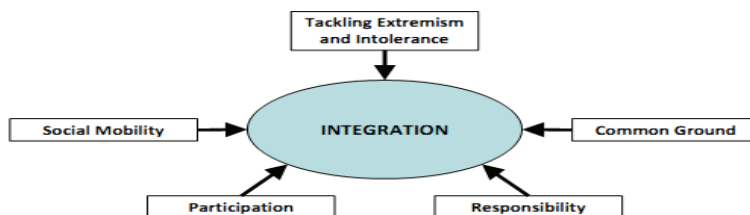
⁸ 2011, p.57 *Handbook on migration terminology (Russian-English)*; Mosca: IOM;

⁹ B. Kaya; *The Changing Face Of Europe-Population Flows In The 20th Century*, Council of Europe Publishing, 2002, p.36-37

¹⁰ B. Gray, *Migrant Integration Policy: A Nationalist Fantasy of Management and Control?*, *Translocations: The Irish Migration, Race and Social Transformation Review*, Volume 1, Issue 1, 2006, p.131

¹¹ Zammit, D. E. *Migration in the Mediterranean: Equalizing Strategies and Social Hierarchies in Migrant Integration*. *Journal of Mediterranean Studies*; Volume 17. No. 2, 2007. p. 170

Figure 1: Factors that Contribute to Migrants Integration¹²:



So migrants have to participate in the society social, cultural and political activities. Also they have to have the responsibilities of being the receive societies members. These will match the social mobility of member of receive society and migrants. But form both parts (migrants and the receive society's members) tackling extremism and intolerance will not get the integration of migrants integration.

According to Migrant Integration Framework Identities are six strategic pathways though which migrants and receive societies collaborate to facilitate migration integration. These pathways can be listed as language and education, economic mobility, equal treatments and opportunity, cultural and social interaction, civic participation and citizenship etc. All these elements are part of migration policies to adopt migrants with the public order and laws of the state. These pathways serve both as a tool for facilitating integration. These pathways form the dynamic of integration process. Here is very important to stress that general determinants of migrants integration are receive state polices. There must be social contracts between political system of a state and migrants. On one hand the success of integration will conduct with entry rules, membership rules and set entire for integration process. In other hand process of migrant integration must appear several patterns such as language, culture, identity and citizenships of migrants. These patterns form the integration continuum and sometimes non-incorporation. Consequently it is very important to say that integration process is and double standard phenomena between participating of migrants on the social life of the host society and adjusting the laws of the state. During the adjustment they have to take into consideration some important issues such as human rights, discriminations, xenofobism, racism etc. But in the next part of this study, we have to analyze this issue due to Albanian migration case.

3-A Sociological Analyze on Migration Policies and Migrants Rights in Greece and Italy

The collapse of communist regime helped Albanian people to migrate in different countries, especially to European ones. This was phenomena quite new for Albanian society and has been defined as the exodus and later as migration floods. According to Ikonomy, Albania, after 21 years (according to the study of the World Bank shows that the number of migrants abroad Albania is around 860,485 persons, or about 27.5% of the

¹² Policy Team, *Creating the conditions for integration, Communities and Local Government*, Policy Team, The National Archives, London, 2012, p.4

population)¹³ is still problems because of complexity of phenomena Albanian migrants had as migration target Greece and Italy. But in this study it is important to take into consideration the European Union too. Europe has become, de facto, an immigration continent. This is clear, not just in population figures, but also in changes in the pattern of migration. The large number of immigrants in certain towns, neighborhoods and schools reflects the fact that immigration is no longer “temporary” (the assumption till 1973), but “sedentary”. In other words, that immigrants are permanent, not fixed-term, residents. The urge to go home is still there, especially among first-generation migrants, but going home “for good” has become a myth -immigrants are here, and here they are going to stay. Family reunion and children born in the host country are two important factors in permanent residence. This is the basic situation, and it raises a number of social problems which affect immigrants directly¹⁴.

Later on, during the 1990s, the realization slowly developed that migrant workers were needed, and led to immigration policies which once again allowed for the ‘import’ of selected workers. Amongst the countries of Central and Eastern Europe which joined the EU in 2004, migration flows were much less dynamic, at least until the collapse of the Berlin Wall. As these countries rebuilt their economies and looked towards EU accession, they became increasingly attractive to migrants from both east and west¹⁵. While outflows from all these countries remain significant, from Eastern European and Balkan countries are still countries of net emigration. Obviously, developments in the area of management of migration and asylum are part of the country’s Europeanization or the EU-ization, which might be defined as “processes of construction, diffusion, and institutionalization of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’ and shared beliefs and norms to a European model of governance, caused by forms of cooperation and integration in Europe”¹⁶. In some of European countries, where different national immigration and asylum policies and practices are infused with historical legacies, diverse forms of social validity, cultural notions, and political importance, all influenced by relations with Albania. ‘Yet, European influence over these policies and practices is often intensely contested¹⁷. Consequently, in the dynamic context of Albania’s European integration, terms like ‘immigration and asylum’ and ‘Europeanization’, are subject to opposing interpretations in the minds of policy makers and government officers, as they emerge not only as a matter of policy but also as a matter of politics.

¹³ L. Ikonomi, *E drejta Migratore, Manual Trajnues*. Edited from World Bank, Migration and Remittances Factbook, 2009, p.15

¹⁴ B. Kaya: *The Changing Face Of Europe-Population Flows In The 20th Century*, Council of Europe Publishing, 2002, p. 35

¹⁵ European Commission, *Communication on Immigration, Integration and Employment*, 2003

¹⁶ S. Bulmer; C.Radaelli, *The Europeanization of National Policy*, Queens’ Papers on Europeanization, 2004, p.4

¹⁷ A. İcduygu, ‘EU-ization Matters: Changes in Immigration and Asylum Practices in Turkey’, in Thomas Faist and Andreas Ette (eds.), *The Europeanization of National Policies and Politics of Immigration*, London, Palgrave MacMillan Publishers, 2007, p. 212

At certain stages, this process has been subject to conditionality¹⁸, as a quid pro quo principle, which links incentives to demanded reforms in the management of migration and asylum to results in the EU's aim of exporting its institutions. In other stages, it is the socialization process, which is emphasized from a perspective of the meta-theory approach of social constructivism¹⁹ through which Albania has been persuaded by the EU to accept rules and regulations related to migration and asylum that the EU promotes as normatively legitimate. At other stages, there has been a process of differentiation²⁰ in which the EU has been forced to recognize the individuality of Albania, in terms of the specific political, judicial and economic situations in the country, as well as Albania's capacity and willingness for cooperation with the EU. Finally, there have been stages in which the principle of joint ownership²¹ prevails over the process and the EU supports Albania in the development of voluntary legislative approximation to meet jointly chosen EU norms and standards in the fields of migration and asylum. Mostly these policies and legislative laws contain the negative meaning on the Albanian migration.

During analyze of Albanian migrants rights, it is very important to take as reference Greece and its migration law. The 1991 Greek migration Law (1975/1991) was an extremely restrictive law aimed mainly at curbing immigration and consequently creating a large pool of predominantly Albanian immigrants in Greece between 1991 and 1998 following the fall of communism in Albania. It has been argued that Greek national identity has been a strong determining factor shaping the restrictive Greek immigration policy with regard to Albanian immigrants. Greek national identity has also influenced discourses in the Greek press and through this public opinion, leading to wide-ranging exclusion of Albanian immigrants in Greek society. Predominantly political manipulation of Greek national identity has contributed to the construction of Albanian immigrants in Greece as the Greek national 'other'²². Specifically this has been tied with historical antagonisms between Albania and Greece. These are based mainly on the religious antagonism between Islam and Christian Orthodoxy, the political antagonism between communism and capitalism, and territorial factors connected with a disputed territory in Southern Albania where a Greek minority resides and has for years been the focus of the neighboring Greek state's irredentism. The illegality of Albanian immigrants in Greece has been a significant contributing factor to their vulnerability. Illegality makes Albanians comparatively more vulnerable than other immigrant groups to being arrested by the police and being deported. Illegality has also created a suitable

¹⁸ F. Schimmelfennig; U. Sedelmaier, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe' in: Journal of European Public Policy, Vol. 11, No.4, 2004, p. 675

¹⁹ U. Sedelmaier, 'The European Neighborhood Policy: a comment on theory and policy'. in: Weber, K. et al. (eds.) Governing Europe's Neighborhood: Partners or periphery, Manchester: 2007, p.13

²⁰ M.A. Vachudova, 'Trade and internal market' in: Weber, K. et al. (eds.) Governing Europe's Neighborhood: Partners or periphery?. Manchester: Manchester University Press, 2007, p. 97

²¹ M.A. Vachudova, 'Trade and internal market' in: Weber, K. et al. (eds.) Governing Europe's Neighborhood: Partners or periphery?. Manchester: Manchester University Press, 2007, p. 114

²² M. Waite, 'Encounters with the Other: The Case of Greece'. Unpublished MPhil Dissertation, Institute for Development Studies, University of Brighton, 2003, p.25

environment for organized crime such as prostitution and drug trafficking²³. Illegality, finally, has been associated with criminality in the Greek press, leading to a stigmatization and discrimination against Albanian immigrants in Greek society more broadly. The failure of the Greek state to legalize immigrants on the other hand has been linked to the fact that the situation of illegality that prevailed allowed the Greek economy to benefit from the cheap labor provided by Albanian immigrants, without having to grant them legal rights. The debates leading up to the 1998 regularization or legalization of illegal economic immigrants in Greece, reflects the conflicting perspectives within the Greek state on the issue of immigration policy²⁴ argues that the Greek Ministries of Foreign Affairs, Defense and Public Order's opposition to the regularization was based on maintaining the long-accepted model of national identity in Greece. The Ministry of Labor and the Confederation of Greek Workers, Greece's largest trade union, on the other hand, strongly supported the regularization as a means of protecting the economic rights of Greek workers who had been displaced in certain sectors of the economy. This resulted from the preference Greek employers demonstrated towards illegal immigrant workers, associated with the lower costs of their labor as outlined above. Ultimately, however, two regularizations of illegal immigrants went forward in Greece; one in 1998 and the other in²⁵ the case of Albanian immigrants in Greece typifies the importance of deconstructing the source of vulnerability. Immigrants in Greece do not face vulnerability as a group per se. Immigrants from the European Union and Greeks of the diasporas for instance access rights in Greece comparatively freely. Rather, predominantly political actors controlling the space of the nation state, generate barriers both spatially, in terms of territorial borders, and socio-politically in terms of legal rights, which maintain a given status quo. The source of vulnerability for Albanian immigrants has been argued to be associated with antagonistic notions of Greek national identity, as well as the need for cheap immigrant labor to sustain the Greek economy. These factors have led to the delay as well as conflict within the Greek state over the legalization of Albanian immigrants²⁶. So let analyze the Albanian migration phenomena in Greece from the sociological perspective too. The migration and integration policies in these countries were quite different from each other. Greece applied 'Robert Park Model' of integration that is based on the assimilation and homogenization process. The migrant integration policies in Greece were focused on the changing in religion, norms, culture, language and identity ect. As the French policies, Greece applied nationhood policies for cultural assimilation. These policies were good just for receiving countries stabilization but not for Albanian migrants. These applications formed the risk and complexity of social identities and social capital of migrants. These stigmatization processes of migrant's identity bring out troubles on social capital too. Discriminations, misunderstanding, social conflict ect. were caused because of formation of 'difference' between Albanian migrants and Greek citizens. These caused the anomic situation of integration, social capital and social identity of migrants. So bridging ties of migrants 23 with V. KaGreek rydis, 'society's Criminalmembers ity of Imhad mito grabe nts form in Grby eece: Issues of

23 V. Karydis, , *Criminality of Immigrants in Greece: Issues of Theory and Anti-Crime Policy*, Athens: Papazisis, 1996, p.4

24 R. Fakiolas, '*Migration and Unregistered Labour in the Greek Economy*', in King, R., G. Lazaridis, and C. Tsardanidis (eds) *Eldorado or Fortress? Migration in 'Southern Europe*. London: Macmillan Press Ltd, 2000, p. 36

25 R. King, *The Mediterranean Passage: Migration and New Cultural Encounters in Southern Europe*. Liverpool: Liverpool University Press, 2001, p.20

26 E. Fultz; B. Pieris, *The Social Protection of Migrant Workers in South Africa*, ILO/ SAMAT Policy Paper No. 3, 1997, p. 5

using xenocentrism applications. Ksenocentrism means the judgment of own culture by taking as reference the other culture. This may cause the process of assimilation and the pathological adjustments of migrants.

So the other country that has hosted Albanian migrants is Italy. 'Overall, Italy has been one of the main labor importers in Europe during the last decade. In this period, migrant workers have given substantial contributions to Italian economy and society and labor migration has concurred in tackling serious demographic and labor market challenges. On the one hand, since the early 2000s the positive migratory balance has been the main factor determining the overall population growth, being the native population in constant decline in absolute terms²⁷.

On the other hand, migrant workers have helped to substantially reduce existing labor shortages particularly in low and medium skilled occupations, increasingly deserted by native workers. Most studies conducted over the past years have underlined the complementary, rather than competitive, role of migrant workers with respect to natives: the employment of immigrants in low skilled activities has substantially sustained natives' employment²⁸. 'The most striking effect of the immigration policy is found in the gap between the stated aims of policy makers and the outcome of their policies. It has been argued that this failure to enact and implement effective immigration controls is largely the result of the economic function of immigrants and the political limitations under which liberal democratic societies operate. It is our contention however here that one important factor that affects immigration policy implementation regards the organizational culture and structure of the relevant public services. It is thus worth making some preliminary remarks concerning the Italian case and the problems arising - and solutions occasionally adopted - in policy implementation.

Two first general observations are useful here:

a) One has to acknowledge that, as elsewhere, the regulation of flows and the provisions aimed at incorporating foreigners in Italy have been reflecting the political will on the issue. It is not in fact entirely clear whether it was the political perception that moved from an under-evaluation to an over-evaluation of the phenomenon in Italy and, consequently, instigated the intensively negative public opinion about immigration effects to the country; or whether it was the public alarm that necessitated the adaptation of immigration policy into becoming a strict and severe one in the recent years (this coincides with the Italian integration into the Schengen area);

b) Italy is in a period of transition: The state is going through changes in its political as much as in the institutional system. One field where very substantial transformations are underway is the administrative one. Efforts for modernizing the public administration have influenced the implementation and enforcement of immigration policy²⁹.

²⁷ E.Salis, *Labour Migration Governance In Contemporary Europe: The case of Italy*, Working Papers, LAB-MIG-GOV Project, 2012, p. 11

²⁸ European Commission, *Employment in Europe*, Brussels, Directorate-General for Employment, Social Affairs and Equal Opportunities, 2008,

²⁹ M. Veikou; A. Triandafyllidou, *Immigration Policy And Its Implementation In Italy A Report On The State Of The Art*, European University Institute, 2001, p. 25

Another place where Albanian migrants' number is so high is Italy. We can say that Albanian migrants in Italy integrate more than Albanian migrants in Greece. This happens as the results of migration policies, based on the 'Cultural Pluralist Model'. This model is based on the application of more tolerance of culture of origin countries of migrants, integration of migrant in receive countries and also ignore the idea of separation. So policies encouraged the maintained of difference of language (for Albanian migrants has been noted that the foreign language has never been an element for not being integrated, because Albanian migrants learn the language of host countries very fast), in culture and religion. These policies made possible Albanian migrants to be more integrated on the Italy. Also helps the bridging and bounding ties of migrants to be strong between migrants with each others, and migrants with the hosted society members. The social capital help migrants to be integrated easily and not forming the complexity in social identity.

It is very important to say that integration of Albania to European Union is bringing new reconstruction of migration process. According to Brody, the process of migration integration appears to follow one of several patterns. Each of these patterns of integration confronts the issues of culture, language, identity and citizenship in entirely different ways and can be envisioned as lying on a continuum with assimilation falling on one end of the 'integration continuum' and 'non-incorporation' or separation falling at the opposite end³⁰. The integration of migration within a host country is facing with the 'integration continuum' which may be also the process of assimilation and the acculturation of society. This process brings the challenges to the migrant's identity's anomies. For this reason, during all times migrants were challenging with the stigmatization or being optimize on the front stage of everyday life. Their most faced challenge is discrimination on their own ethnicity (such as Albanian migrants in Greece, France, Germany etc). Also may face challenges in social capital and social identity too.

But after the candidate for membership in European Union the Albanian migration flows and migrant consciences have been changed. Because of, the new policies focusing on decrease discrimination in host society and strong policies of Albania for protecting Albanian migrant's rights and social identity. 'Migrant workers enjoy equal treatment with nationals of the host countries for working conditions, payment of social security, union membership, regardless of nationality, race, sex and religion'³¹.

5-Conclusion

After the fall of communist regime Albanian migrants had as a target to migrate toward Greece and Italy. The migration and integration policies in these countries were quite different from each other. Also the integration problems of Albanian migrants were pretty much in number. Greece applied Robert Park Model of integration that is based on the assimilation and homogenization process. The migrant integration policies in Greece were focused on the changing in norms, culture, language and identity (especially religion identity). Greece applied as France nationhood policies for cultural assimilation too. These policies were good just for receiving countries stabilization but not for Albanian migrants. These formed the risk and the complexity of social identities to migrant. Also

³⁰ B. Brody, *Opening the Door, Immigration, Ethnicity and Globalization in Japan*, East Asia History, Politics, Sociology, Culture Institute, 2009, p. 20

³¹ OSCE, *Për emigrimin e shtetasve shqiptarë për motive punësimi*, LIGJ Nr. 9668, accessed on <http://www.osce.org/sq/albania/23700>, 2013

the stigmatization processes of identity make second generation to feel as the member of any society. Discriminations, misunderstanding, social conflict est. were caused because of formation of these 'difference' between migrants and Greek citizenships. These caused the anomic situation of integration and social identity of migrants. So the policies of migration in Greece are very stricter and contain discrimination. Also the migrant's rights in formal perspective seem to be very clear but in informal perspective they are unacceptable and impracticable.

Another place where Albanian migrants' number is so high is Italy. We can say that Albanian migrants in Italy want to integrate more than Albanian migrants in Greece. This has been caused because the migration policies were based on the Cultural Pluralist Model. This model is based on the application of more tolerance of culture of origin countries of migrants, integration of migrant in receive countries and also ignore the idea of separation. So policies encouraged the maintained of difference of language (for Albanian migrants has been noted that the foreign language has never been an element for not being integrated, because Albanian migrants learn the language of host countries very fast), in culture and religion. These policies made possible Albanian migrants to be more integrated on the Italy.

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Anjeza Bojaxhiu

Department of Political Science and International
Relations, Epoka University, Albania

An Evaluation of the EU's Involvement in State-Building: The Case of the Palestinian Territory

Abstract:

This paper evaluates the European Union's role in the state-building process in Palestinian Territory. It assesses the effectiveness of the projects and missions that the EU has undertaken therein after the Oslo Accords of 1993, in an attempt to create an independent Palestinian state, coexisting alongside Israel in peace.

Having delivered large amounts of financial aid and assistance towards state-building in Palestinian Territory and conflict resolution, it is questionable why the EU has to date failed to adequately resolve the long-lasting Israeli-Palestinian conflict. Therefore, this paper assesses the effectiveness of the EU funded initiatives, projects and deployed missions in the Palestinian Territory over the years. It discusses the reasons why they have been unsuccessful in putting an end to the Israeli-Palestinian conflict and it provides recommendations on what should change in the future state-building process in Palestine. This research emphasises the need to achieve security first and foremost in Palestinian Territory as a precondition to the creation of an independent Palestinian state; therefore equalising the achievement of security with the establishment of a capable Palestinian state. The quicker security and the rule of law is established, the quicker will the Palestinian independent state be formed.

Keywords: *EUBAM Rafah, EUPOL COPPS, European Union, Israel, State-building, Palestinian Territory*

1 Introduction

The Common Security and Defense Policy (CSDP) is a key component of the Common Foreign and Security Policy (CFSP) of the European Union (EU), which represents the sphere of EU policy dealing exclusively with defense and military matters. In the context of CSDP, a number of missions have been deployed in conflict zones around the world, including the Palestinian Territory. The EU has launched two missions in Palestinian Territory, namely the EU Border Assistance Mission for the Rafah Crossing Point (EUBAM Rafah) and the EU Coordinating Office for Palestinian Police Support (EUPOL COPPS). These two missions as well as many other EU-sponsored initiatives have played a significant role in the conflict resolution process and towards the attainment of the quest to build a capable Palestinian independent state as part of the two-state solution proposed by the international community. Nevertheless, it has become clear that the international community and more specifically the EU, which has contributed the most financially towards state-building, has neither been able to solve the conflict and achieve peace, nor has it constructed an independent Palestinian state to date.

This paper seeks to examine EU's involvement in the resolution of the Israeli-Palestinian conflict. It will try to assess the state-building process in Palestinian Territory. A careful assessment of the two missions deployed in Palestinian Territory as well as of other EU-funded initiatives in the areas of health and education, will also be provided. The reasons why these initiatives have failed to be translated into strong institutions and eventually in an independent Palestinian state will be examined. Finally, a conclusion on the role played by the EU together with recommendations for what should be done differently in the future will be provided.

2 EU's Role in Conflict Resolution and Peace Building in Palestinian Territory

Starting in the 1990s, immediately after the Oslo Accords of 1993, the EU has gradually assumed a greater role in conflict resolution and peace building in societies around the world which have been torn by conflict. Its foreign policy has focused on promoting, establishing and then helping consolidate democracy and the rule of law in such societies.

Furthermore, what makes the EU a particularly powerful actor in the area of conflict resolution is that the EU itself is founded upon the very same norms and ideas which it tries to promote and export abroad. The EU, therefore powerfully leads other societies by example first and foremost and not simply by military might. According to McCormick, these characteristics that the EU possesses make it arguably the world's most serious, credible and committed actor in the promotion of liberal rights and norms. Such liberal norms are part of the EU's "conditionality clauses". According to Youngs, the EU uses conditionality as a tool to prevent abuse and violation of such liberal notions (2004: 426). It is true that conditionality has been increasingly associated with the "Copenhagen Criteria" which determine a country's accession to the EU. Nevertheless, conditionality has other forms apart from political. It can be economic as well as political. Indeed the EU through economic assistance and incentives or at time through economic sanctions, tries to bring about necessary change in the political realm. It often uses conditionality to push reform and internal change in conflict zones as a means to the achievement of the greater role which is conflict resolution.

Furthermore, the EU's endeavour to resolve the Israeli-Palestinian conflict by promoting democracy in the Palestinian Territory, represents its strong trust in Kant's thesis that democracies do not fight one another, and that democratisation in turn leads to peace building and conflict resolution as has been the case in Europe post-1945. According to Solingen and Ozyurt, the European historic legacy is proof that stable and mature democracies are considered "better suited to deal with ethnic and religious fragmentation than non-democracies" (2006: 62). Youngs illustrates that the EU strategy foresees the establishment of democracy and democratic institutions as a tool to achieve the resolution of conflict (2004: 531). Consequently, the EU assumes that institution-building through provision of financial aid on the ground will eventually amount to the creation of a state which is stable and strong and therefore to conflict resolution and peace building.

The EU has gradually taken a leading role as a powerful international actor in the state-building and conflict resolution processes of many societies around the world. The EU is strongly committed to peace building and such commitment has been converted into a number of missions deployed in conflict zones around the world. The EU has been active in many areas, including democratisation, good governance, human rights, rule of law, peace building and peace keeping operations (European Commission 2006: 3).

The EU's focus as well as that of the international community is directed towards achieving security first and foremost as a pre-condition to the establishment of a stable state in conflict zones. When compared to other equally important areas that need to be achieved alongside security such as economic and political stability; security stands out because it needs to be established at the very beginning of the state-building process as a pre-condition for the very existence of the state. In the state-building process, security seems to be the foundation of the entire process, as without it, it would be very difficult to guarantee stability in other areas. Furthermore, according to Boutros-Ghali (1992), security is what guarantees the establishment of institutions capable of establishing peace and avoiding reversion back to conflict. That is also why the EU has installed so many security missions in conflict zones around the world, including the Balkans, Middle East and Africa. It is hoped that what these missions will accomplish by achieving security, is successful state-building.

3 State-building in the Palestinian Territory

Although the EU has always recognised the state of Israel as legitimate, its position in relation to the Palestinian question was not as clear from the beginning. Its foreign policy in relation to Palestine started to take shape with the Venice Declaration of 1980 which called for recognition of the Palestinian people's right to "self-determination" (European Council 1980). This has been considered as the beginning of the proposals for a two-state solution for the Israeli-Palestinian conflict. Nevertheless, it was not until 2002 that this two-state solution took real form in the words of the then American President, George Bush envisioning "two states, living side by side, in peace and security" (Bush 2002). The current US President, Barack Obama and his administration also support the two-state solution.

The European Union started to take a greater role in the resolution of the Israeli-Palestinian conflict in the 1990s. It was an enthusiastic supporter of the Oslo Accords in 1993, which represented the first ever peace agreement reached between the two sides of the conflict, both Israel and Palestine. Additionally, in 1999, the proposal of two-state

solution based on the 1967 borders started to be voiced increasingly more by the EU. According to Tocci, EU's vision for this independent Palestinian state was that it should be democratic, independent, sovereign and peaceful (2005: 3).

In spite of the fact that state-building has been considered by the international community, as the best option to resolve the Israeli-Palestinian conflict once and for all, it is well-known that this goal has yet to be achieved. In fact the rationale behind the Oslo Accords was that if democratic institutions were build and promoted in the Palestinian Territory, this would in turn result in an independent Palestinian state, in peace with Israel. Le More argues that "building Palestinian institutions was viewed by most within the international community as a first step towards the establishment of an independent Palestinian state" (Le More 2005: 27). In fact, there has been consensus after the Oslo Accords among the international community that the creation of a Palestinian independent state would be the solution to conflict in the Middle East. The US President Barack Obama has recently been engaged in peace talks with both the Israeli and Palestinian sides, stating to both that "a two-state solution is still possible" (Reuters 2014).

Obama's position on this sensitive matter has been complemented by the current EU Foreign Policy High Representative, Baroness Catherine Ashton. As a member of the Quartet on the Middle East, which is comprised of the European Union, United Nations, US and Russia, the EU has made its position clear on the Israeli-Palestinian conflict, by supporting a two-state solution. Baroness Ashton argued in a recent meeting of the Quartet

We will continue to ensure that we offer the support to ensure that this is the conclusion of an agreement between the Israelis and Palestinians that will see the two state solutions that we've long set out and defined (Ashton 2014: 1).

Additionally, a two-state solution has been considered to be the best option to put an end to the Israeli-Palestinian conflict even by Israeli authorities. In January 2014, Israeli President, Shimon Peres, in a meeting with US delegate, Biden affirmed the two-state solution by saying:

All of us are aware that we have to take the decision now. I believe there is a serious attempt to make the right decision and there is only one – two states for two peoples (Dvir 2014: 1).

State-building is arguably the best solution to the Israeli-Palestinian conflict, because on the one hand, the formation of an independent Palestinian state would fulfil the aspirations of Palestinians to have a state of their own and on the other hand, Israel would feel more secure if the independent Palestinian state would enforce law and order and offer security both internally and externally.

4 EU's Initiatives on the Ground

The EU has been actively involved in the state-building process of Palestine by supporting the democratic institutions and police forces, good governance and growth of the economy as well as sustainable Palestinian Authority finances (Solana and Ferrero-Waldner 2007: 2). As Stetter puts it, the EU is directly involved with Palestinian state-

building at every level of the process. In fact, Palestine is the country which has been the recipient of most assistance and aid from the EU (Stetter 2003: 159).

According to Youngs, the EU has delivered “over half the funding that supported the setting up of the Palestinian authority quasi-state institutions” (2006: 146). About 40 per cent of EU’s aid in the 1990s went to the sector managing construction and infrastructure in the Palestinian Territory, whereas the rest according to le More, went in support of education and building strong institutions (2008: 88). Although the Palestinian Authority (PA) has been heavily assisted by the EU in virtually every area, including health, education, the economy, democracy, institution-building, human rights, police-structures, it is not the most important actor in the political arena of the conflict.

From 1999 onwards, the EU has tried hard to take on a stronger political role in the creation and establishment of a Palestinian independent state. Nevertheless, its achievements in this regard have been limited. Although the EU has had the opportunity to take initiatives of its own, it has instead preferred to take a secondary role, depending primarily on the US as leading actor on the Israeli-Palestinian conflict. However, the EU’s and US administration’s divergent positions quickly became clear. On the one hand, the Bush administration was in favour of reforming the institutions before a final agreement could be reached in relation to the conflict. The EU, on the other hand, according to Youngs, supported the position that the process of democratisation in the Palestinian Authority should go hand in hand with the formation of an independent Palestinian state (2006: 152).

Over the years, both the EU and the US have exhibited different approaches in relation to peace-building and conflict resolution in the Middle East, and more specifically in Israel-Palestine. According to Le More, “(the) US decides, the World Bank leads, the EU pays and the UN feeds” (2005: 995). It has been argued that EU only has been able to be a member of the Quartet on the Middle East, due to its great financial assistance in the resolution of the Israeli-Palestinian conflict.

Nevertheless, it is important to state that in the 1980s it was inconceivable for the EU to interfere at all on the Israeli-Palestinian conflict. Post-1990s, the EU made great progress and has managed to use its economic assistance to gain more influence by becoming one of the main international actors which have a say on the resolution of the conflict. It could be easily argued that without the EU’s financial aid, the Palestinian Authority would probably have collapsed a long time ago. Only in 2013, the EU gave €168 million as financial assistance to the PA through the PEGASE mechanism (the European mechanism for Direct Financial Support to the Palestinian population) (European Commission 2013).

However a question still needs to be answered; what practical action has the EU taken on the ground toward conflict resolution and state-building in the Palestinian Territory?

5 EUPOL COPPS and EUBAM Rafah

In an effort to build strong institutions, which will result in a Palestinian capable state, the EU has paid great attention to the achievement of security first and foremost in the Palestinian Territory. In order to achieve this, two EU missions have been set up in the Palestinian Territory, namely, the European Union Coordinating Office for Palestinian Policy Support (EUPOL COPPS) and the European Union Border Assistance Mission,

Rafah (EUBAM Rafah). The first mission's goal is to assist the Palestinian Authority in establishing effective policing arrangements and it was deployed by request of the PA which was in dire need of assistance in the establishment of the rule of law (European Union Council Secretariat 2009b). The mission started its operation on 1 January 2006 with a first mandate of three years and it has been extended ever since and still operates in Palestinian Territory today largely due to its success and the existent need for more assistance from the EU in relation to policing and security in the region. EUPOL COPPS has three main tasks: to assist the Palestinian Civil Police in its work; to enable EU Member States' financial assistance to the Palestinian Civil Police and lastly to advise on politically related Criminal Justice elements (European Council 2005b). The mission's aim is:

to contribute to the establishment of sustainable and effective policing arrangements and to advise Palestinian counterparts on criminal justice and rule of law related aspects under Palestinian ownership, in accordance with the best international standards and in co-operation with the EU institution-building programmes (European Union Council Secretariat 2009b).

The second EU mission, EUBAM Rafah, was deployed after Israel's withdrawal from the Gaza Strip. EUBAM Rafah began to operate on 30 November 2005 and according to Del Sarto this was so as an attempt "to reconcile Israel's security concerns with both the Palestinian demands for an autonomous border management and the need for Gaza's economic recovery, which requires open borders" (2007: 71). Although the mission had a 1 year mandate, it has been extended every year due to demand and need for it. This mission's objectives are:

to provide a Third-Party presence at the Rafah Crossing Point in order to contribute, in cooperation with the Community's institution building efforts, to the opening of the Rafah Crossing Point and to build up confidence between the Government of Israel and the Palestinian Authority (European Union Council Secretariat 2009b).

This mission was relatively successful until Hamas (Ḥarakat al-Muqāwamah al-'Islāmiyyah - Islamic Resistance Movement) takeover of Gaza on 13 June 2007. After that, Israel did not allow EU observers to operate there, suspending therefore the EU operations at the Rafah Crossing Point. Nevertheless, EUBAM Rafah is still present and operates at certain times.

6 EU's Support in Other Areas

These two missions are not representative of all the EU's involvement in the state-building process in the Palestinian Territory. The EU has paid special attention to the development and enhancement of Palestinian health and education by financing various projects in these fields. The European Gaza Hospital was funded by the EU and it has been a great source of help for the Palestinian community therein providing them with much needed medical assistance. In cooperation with the Palestinian Authority's Ministry of Health and the European Gaza Hospital, the EU has organised a number of training sessions to the hospital's staff. Many other hospitals in Palestinian Territory have been the recipients of financial aid and technical support and assistance by the EU, including 6 hospitals in the Palestinian inhabited area of Jerusalem, generally referred to as East Jerusalem. The EU has also awarded special attention to the health facilities available to

the most vulnerable segment of the society in the Palestinian Territory, namely refugees, those suffering from disabilities as well as children and the older generation.

On the education front, the EU has also undertaken projects and initiatives which have not only improved the educational institutions towards state-building, but in fact have significantly improved the population's standard of life. In fact, the Palestinians according to statistics are among the most educated people of the world (Ahmad 2009: 1).

7 Has the EU been Successful in State-building in the Palestinian Territory?

According to Brynen, the amount of financial assistance that the EU has delivered to the Palestinian Authority over the years should have made "the West Bank and Gaza an 'easier' case of state-building" (2008: 217). Nevertheless, it is no news that results have been disappointing and neither peace nor a Palestinian state has been created. What are the reasons for this failure?

The first and arguably the most important reason why the situation is still so grim in spite of immense EU aid to the PA, is the continuous military occupation of Israel. The restrictions that Israel has been imposing on the Palestinian population, in the West Bank, but more so in Gaza, have been a great impediment and obstacle to the process of state-building. Israel has repeatedly claimed that it has to impose such restriction in order to "safeguard" its own security.

Secondly, the whole international community has its share in the inability to create a Palestinian state after so long. They have undermined the state-building process by demonstrating over the years a lack of clear priorities and vision, by overlooking institutional weaknesses in the hope of achieving peace. Moreover, the EU as one of the greatest donors aiding the Palestinian Authority in the process of state-building has its part in the failure to build a capable Palestinian state because it has failed to use its most powerful tool, conditionality. Although the EU is the largest trading partner of Israel, so far it has only produced statements to warn Israel against its damaging policies towards the Palestinian Authority, but has not taken any concrete action. Accordingly, as Asseburg and Perthes rightly argue, the EU has been in the role of a spectator, watching the demolition "of EU-financed administrative and security installations, and civilian infrastructure" (2009: 2). It has never applied any sanctions to Israel and to make things worse over the years different EU member states have also had different positions on how to react and respond to Israel's policies. While Belgium and Spain have pushed for sanctions against Israel in the past, Germany and Britain have been against such sanctions (Soetendorp 2002: 292).

Lastly, another obstacle to state-building in Palestine is that Hamas has been included in the European Union's terrorist organisations list. Although in 2006, Hamas won fair and free run elections in the Palestinian Territory, the EU together with the international community tried to undermine its influence. Irrespective of the international community's decision, Hamas is a key actor to the Palestinian question, and sooner or later the EU will have to accept this and include it in the conflict resolution and state-building process.

Furthermore, it is worth mentioning that the war and seize in Gaza the last few years has not only undermined the whole state-building process in Palestinian Territory but has

created a greater need for larger financial funds that will need to go towards humanitarian aid rather than towards the state-building process.

8 Conclusion

This paper has tried to assess the role of the EU in state-building and peace-building in the Palestinian Territory. The fact that this conflict remains unresolved to date even though large amounts of financial aid and assistance have been delivered from the international actors, most significantly the EU; reflects a failure on behalf of the international actors and the EU in particular, to adequately respond to the needs on the ground. The failure to create a Palestinian independent state is proof that the best policies have not been used to achieve peace in the area.

In spite of being responsible for financially aiding and technically assisting every aspect of the Palestinian state-building process, the EU has not been able to lead and determine the political realm of the conflict, seemingly just delivering financial aid, rather than pushing for change. It is important to ponder what is the EU exactly achieving with all this financial assistance? Is it peace? The inability to effectively build institutions which will result in a capable Palestinian state, is indicative of the fact that peace has not yet been achieved.

Most importantly, the EU has not employed its tool of conditionality in the Israeli-Palestinian conflict. Instead of taking action in the form of sanctions against Israel, all what the EU has been able to do is issue empty statements with no effect. Why does not the EU respond to these severe acts of Israel by imposing economic sanctions upon it to force it to comply with the state-building process that the Palestinian Territory should be undergoing?

Furthermore, Israel has certainly contributed the most to the failure of the state-building process in the Palestinian Territory, since with its restrictions in movement and the like it has permanently hindered economic development therein. Subsequently, even though the EU in particular has been trying to build institutions which will lead to a capable Palestinian state, this is not possible since what is in fact happening in the Palestinian Territory is a vicious cycle of EU construction and Israeli destruction, with the EU proceeding to construct again. If this cycle is not broken, by stopping Israel and forcing it to cease its occupation of the Palestinian Territories, the likelihood of a Palestinian state is not conceivable in the foreseeable future. Therefore, it is necessary for the EU to employ its most important tool of conditionality in relation to Israel in the future, in order to push it outside of Palestinian Territory. Without an end to the occupation, it is not likely that a two-state solution will be achieved.

Lastly, the EU's future involvement in the Israeli-Palestinian conflict resolution needs to continue and intensify. A greater effort should be directed towards the achievement of security in Palestinian Territory. Although there is international consensus that achievement of security will eventually lead to the establishment of an independent Palestinian state, security therein remains a challenge which needs to be addressed adequately. The continuation of the two EU missions, EUPOL COPPS and EUBAM Rafah are instrumental to the success of the EU in state-building in Palestinian Territory.

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Doc. Ermal Xhelilaj¹, Dr. Lorenc Danaj²

¹*Department of Nautical Sciences,
University "Ismael Qemali" Vlore, Albania*

²*Department of Law,
University "Ismael Qemali" Vlore, Albania*

The Impact of the Law of the Sea towards Global Ocean Policy Issues: Maritime Administration Perspective

Abstract

The implementation of the appropriate maritime policies, legal norms and the main principles of the international law of the sea, represented mainly by the Law of the Sea Convention (1982), for ensuring the quality of global shipping industry and seafarers, maritime environment protection, maritime safety and security, along with an effective economic management of maritime functional areas, are considered the main responsibilities of the maritime administration in nowadays. Nevertheless, the sustainable development of ocean resources and space at international level, as well as the management of the integrated maritime management practices are becoming currently an imperative task for the maritime administration, which based on the international law of the sea and domestic legislation, must play more active role towards these important matters for the international community. In this respect, the focal point of this study is to analyse the possible role and impact of this administration towards international ocean policy issues such as living marine resources, exploitation of oceanic mineral and energy resources, and ocean environmental protection, as crucial matters for the national interests of a coastal state as well as considered important key factors for the international system and for the international relations in general. The authors agree that the maritime administrations worldwide need to strictly implement the international law of the sea in order to cope with these recent changes global in nature in order to fulfil its main objectives.

Keywords: *Maritime administration, international law of the sea, Law of the Sea Convention, ocean policy, maritime security, ocean natural resources, living marine resources.*

1 Introduction

Whosoever commands the sea commands the trade: whosoever commands the trade of the world commands the riches of the world and consequently the world itself. This 17th century famous policy statement declared by Sir Walter Raleigh emphasizes the great importance of an effective administration of the ocean activities and resources, achieved through a comprehensive national ocean policy and the implementation of the international law of the sea. In light of these considerations, Maritime Administration is concerned with the policy making, regulatory and service provision functions of the government, as well as the effective implementation of the law of the sea that contribute to ensure that national maritime interests and are effectively protected, and international relations between the appropriate state and other international actors are implemented in a way that ocean resources and exploitation is implemented according to international law. Therefore, its main responsibility is the implementation of the political, social and economic philosophies and policies of the national Government, as well as the requirements of the international maritime conventions and the law of the sea towards an effective administration of the national and global maritime affairs.

The significance of the Maritime Administration and the implementation of the law of the sea is paramount because it promotes the progress and prosperity of the shipping industry and seafarers, and also the sustainable use, development and optimization of the ocean policy issues such as; living marine resources, exploitation of mineral and energy resources, and environmental protection. In this respect, an analytical discussion will be provided regarding the role and impact of Maritime Administration and the law of the sea in ocean policy issues; by analysing firstly the concept of Maritime Administration, secondly its approach toward international ocean policy issues, and finally discussing the legal framework which enables this organization to accomplish its national objectives.

2 The legal concept of the maritime administration and ocean policy

The concept of the Maritime Administration is a substantial matter to comprehend, therefore is essential first to recognize its position within Public Administration, then its definition, tasks, its maritime policy, and finally its structure. The Maritime Administration of a country with maritime interests is an integral component of its Public Administration, that although might be considered part of the executive division of the government, is considered as a “fourth power” due to the permanent specialized civil service that maintains and to autonomous authority in the policy-making process¹. In this regard, Maritime Administration is the maritime administrative side of the government, and its power lies upon the administrators as well as the politicians, indicating their ability to influence and make decisions. At the same time, the Maritime Administration implements the policies and the decisions made by the political system, and also the requirements of the international maritime legislation regarding maritime affairs. Hence, Maritime Administration, within the framework of the Public

¹ Plant, G (1998). *Maritime Administration: Public Administration*. Unpublished Lecture, Malmö, Sweden. p.2

Administration, effectively exercises the legislative and executive functions of the Government pertaining to the maritime realm.

National maritime administration means any authority which is established by a State in accordance with its legislation and which is responsible, inter alia, for the implementation of national and international laws concerning maritime transport and the standards of its flag ships (UNCCRS, 1986). Within the agenda of a country's overall maritime activities, the purpose of Maritime Administration is to provide the government with machinery which would permit it to perform satisfactory and efficiently those tasks pertaining to maritime shipping legislation, national maritime law and international maritime conventions (Vanchiswar, 1996). As such, the Maritime Administration might be defined as a governmental body which involves decision making, strategic planning, governmental consultancy, formulating objectives and goals, directing and supervising employees, exercising controls and enforcing the maritime jurisdiction (Plant, 1998). Consequently, it may be said that Maritime Administration is the action plan of the government which ensures that the national maritime interests are successfully protected.

With an increase focus on the sustainable development of ocean resources and space, as well as in the integrated maritime management practices, Maritime Administration's main task is the implementation of appropriate maritime policies for ensuring the quality of shipping industry and seafarers, maritime environment protection, maritime safety and security, along with an effective economic management of maritime functional areas. In this respect, the Maritime Administration implements maritime strategies covering its purpose and duties prescribed by the national maritime legislation, which are as follows: 1) Registration of ships. 2) Inspections and Certification of ships. 3) Manning of ships. 4) Prevention and combat of marine pollution. 5) Detention of unsafe ships. 6) Port state control. 7) Investigation into shipping casualties. 8) Registration of seamen. 10) Maritime training and education. 11) Issuance of the Certificates of Competency. 12) The adoption and implementation of International Maritime Conventions. 13) Advice to government on maritime matters. 14) Wrecks. 15) Crew matters (Vanchiswar, 1996, Cicin-Sain. & Knecht 1998).

Establishing an appropriate ocean policy is extremely important for the Maritime Administration because of its regulatory and enforcement functions, as well as its activities and responsibilities. Bearing in mind the common objective that a Government and its Administration has towards the protection of the national maritime interests is obvious that the development of Maritime Administration policies will derive from a Government's overall national philosophies. Thereby, the policies of a Maritime Administration will mirror the aims consistent with those of the Government for the shipping policy as a "totality of economic, legal and administrative affairs by which the state influences its fleet's position in the national and international economy", and with the overall maritime policy which includes approaches such as; international obligations, safety standards of national ships, safety of navigation, development of human resources, protection of marine environment, regional and international co-operation, development of shipbuilding and port development.²

² Vanchiswar, P.S. (1996). *Establishment/ Administration of Maritime Matters with particular reference to developing Countries*, Vol 1: Maritime Administration Maritime Safety Administration. Unpublished Lecture, Malmö, Sweden. p.49

The organizational structure of the Maritime Administration may vary in different countries as a result of the nature and extend of the responsibilities of this Administration and from the maritime development stage in the country. Hence, Maritime Administration's infrastructure is not automatically planned from the beginning but has developed as a result of circumstantial progress. In many countries, Maritime Administration is under the Ministry of Transportation's responsibility, but in other States, might be an independent authority.

An example of what has been previously stated is the organizational structure of the Swedish Maritime Administration. The Maritime Transportation Directorate as an integral part of the Ministry of Transportation and Communication, is the highest authority of the Swedish Maritime Administration, and is directed by the Minister in relation to the administrative, legal, financial, technical and social matters pertaining to the National Constitutional Law and to the Maritime Law of Sweden. Under the responsibility of the Directorate of the Maritime Transport are the following departments: 1- Maritime Transportation (maritime traffic, aids to navigation, manning of ships, and pollution prevention). 2- Maritime Registry (registration and classification of ships, registration of seafarers, and ship license). 3- Port Authority (port security, port activities, and port pollution prevention). 4- Vessel Survey and Inspection (inspection of ships, safety of ships and certifications of seafarers). 5- Maritime Transportation Studies (transportation strategy, infrastructure planning and international projects). 6- Legal Affairs (legal and policy consultancy).

3 The legal approach towards international ocean policy issues

Maritime Administration's approach towards ocean policy issues can best analyzed by identifying first the ocean issues, afterwards to discuss its main role in these issues, and finally to examine the groups and industries interested. Developing an ocean policy is essential for any state in order to manage national ocean interests in a coherent way to ensure the best satisfaction of the state's interests. In this respect, the setting of objectives for the effective utilization of marine resources, the assessment of obtainable capabilities, and the identification of the instruments for enhancing capabilities required to reach the objectives within the overall national development perspectives will constitute a rational ocean policy³. According to UNCLOS 1982, the national ocean space adjacent to the coast involves the Territorial Sea, Contiguous Zone, Exclusive Economic Zone, and Continental Shelf upon which Coastal States have rights, jurisdiction and obligations over their space and resources. It is the Maritime Administration's task to protect these rights and to enforce jurisdiction over these maritime zones regarding the protection of the ocean areas, as well as to promote rational use and development of their living resources. The main ocean policy issues of a coastal country stand on matters with great economic interests, which are, inter alia:

³ United Nations, (1991). UN Secretary General A/46/722: *Realization of benefits under the United Nations on the Law of the Sea: Measures undertaken in response to need of States in regard to development and management of ocean resources, and approaches for further actions*. Retrieved August 23, 2007 from Web:<http://daccessdds.un.org/doc/UNDOC/GEN/N91/469/01/IMG/N9146901.pdf?OpenElement>

Living Marine Resources, including activities such as; fishing, aquaculture, collection of marine mammals and gathering of other marine creatures, are a vital source of protein, vitamins and minerals for human consumption, accounting thus for about 20% of the total world food supply (Churchill & Lowe, 1999). Since these essential resources are considered natural common property, Maritime Administration is facing a big challenge to preserve these resources and prevent the over-fishing based on sustainable development policy.

Exploitation of Mineral and Energy Resources, such as oil, gas, gold and minerals, is another substantial issue with essential economic interest. Due to the high technological capabilities for exploration and exploitation “half of natural output produced by environment system is being utilized by humans, and the margin for error in economic activities that can inflict irreversible changes on the natural resource base will narrow”⁴. In this regard, the role of Maritime Administration in promoting and implementing policies for the improvement and optimal use of the sea-bed resources is more than crucial.

Ocean Environment Protection, which can be defined as the introduction by man of substances or energy into the marine environment, which results in the harmful effect of ocean living resources, hazard to human life, and hindrance to marine activities, is another issue of a great concern to Maritime Administration (Churchill & Lowe, 1999). The four main sources of marine pollution are shipping, dumping, seabed activities and land activities. For this reason, it is the duty of Maritime Administration to implement appropriate policies to prevent marine pollution and protect the marine environment. The optimization of resources and the ocean governance are also essential ocean policy issues.

In view of the exhaustibility of resources and environmental concerns caused by the human impact on the oceans, Maritime Administration’s main strategy to tackle these issues is to promote a sustainable use and development policy, aiming to protect national maritime interests in the ocean resources and space. In light of these considerations, the role of Maritime Administration is to participate, consult and contribute in the national maritime policy-making process regarding the adoption of appropriate rules, regulation and procedures in the protection of maritime interests. In addition, the implementation of national maritime laws and, the adoption and execution of international maritime conventions with regard to the sustainable use of ocean areas, protection of maritime environment and optimization of ocean resources, is another task of the Maritime Administration. Furthermore, considering the jurisdiction and sovereignty rights over the space and resources of the national maritime zones it is the responsibility of Maritime Administration to enforce the law against any unlawful act committed within these areas regarding ocean policy issues.

Another task of Maritime Administration is to adopt and implement Integrated Coastal and Ocean Management and Integrated Maritime Management Systems to address concerns regarding the preservation, sustainability, development, and the protection of the ocean resources and space, as well as to find a balance between human’s impacts on

⁴ Ma, S. (2007). *Maritime Economics*. World Maritime University, WMU Publications Malmö. Sweden. p.128

one hand, and the need for the protection of the ecosystem on the other (Cicin-Sain & Knecht 1998). In the fulfilment of its objectives is very important that Maritime Administration maintains close link with interested parties in the national ocean policy, such as; the Ministry of Economy, Ministry of Transportation, Ministry of Tourism, Ministry of Defence, Ministry of Foreign Affairs, Ministry of Communications, Ministry of Food and Agriculture, and Port Authorities. In this regard, the role of Maritime Administration is to operate as a coordination centre among these institutions, aiming toward an integrated national ocean policy for the protection of maritime interests (Walsh, D. 1977).

A further important matter regarding Maritime Administration's approach toward ocean policy issues is the influence of interested groups or industries upon Governmental law-making bodies regarding maritime affairs. In this respect, is essential first to identify the orientation of a Government toward ocean policy issues in order to understand its priorities. Countries such as U.S.A and Canada have clearly defined the significant position that ocean policy issues are representing to their national interests. In the maritime policy-making process of these countries an essential role are playing the interested industries in ocean affairs, such as Fishing, Oil, Mineral and Tourism Industries. All these important dimensions are playing an active role in the national ocean policy-making process by exercising influence upon Governmental law-making bodies in the adoption and implementation of the national maritime laws consistent with their interests regarding the exploitation of fishing resources, ocean environmental protection, and effective exploration of the sea-bed resources.

4 The implementation of the international law of the sea

The legal framework within which Maritime Administration operates is based on the constitutional law, and on the international maritime conventions adopted by the United Nations and the International Maritime Organization (IMO). The legal authority of Maritime Administration is characterized the most, as regulatory power to control certain activities by setting conditions, constraints, and limitations with regard to the sustainable use and development of the maritime property⁵. The constitutional law and international maritime legislation are the main legal platforms of Maritime Administration in performing its tasks. In the case of U.S.A, the Maritime Administration of this country in achieving its objectives, implements national maritime laws such as Merchant Shipping Act 1936, which stipulates the US policy on the encouragement and sustainable development of merchant marine; Maritime Transportation Security Act 2002, which imposes security and safety requirement on the maritime industry and; the Environment Maritime System 2008, aiming the protection of ocean and marine environment⁶.

⁵ Cicin-Sain, B. (1998). *Integrated Coastal and Ocean Management. Concepts and Practices*. Island Press, Washington D.C. Library of Congress, Cataloguing in Publication Data, U.S.A. p.98

⁶ U.S Department of Transportation, (2003). *Maritime Administration: Strategic Plan for Fiscal Year 2003-2008*. Retrived August 27, 2007
from: www.marad.dot.gov/Publications/Docs/MARAD_2003_2008_strategic_plan.pdf.

With regard to international maritime legislation, the Maritime Administration's ocean policy derives mainly from the doctrine of the United Nations Convention on the Law of the Sea 1982 (UNCLOS), which is considered the constitution of the oceans that has managed to establish the fundamental jurisdictional principles for the ocean resource management. The main principles behind UNCLOS are as follows: 1) Accommodating peacefully all users of the sea. 2) Protection and preservation of the Oceans. 3) Optimal use of the living and non-living resources of the oceans, and 4) Respect for freedoms in oceans. These principles are the main pillars by which the maritime policy of the Maritime Administration is founded. An additional essential international instrument with regard to the Maritime Administration's ocean policy, is the United Nations Convention on Conditions for Registration of Ships 1986, which highlights that, "a State shall have a competent and adequate national Maritime Administration which shall implement applicable rules and standards concerning, the safety of ships and persons on board, and the prevention of pollution of the marine environment".⁷

The relevant international instruments of IMO for the improvement of maritime safety and pollution prevention are a significant contributor for the Maritime Administration's national policy toward ocean issues. The most substantial instruments are as follows: 1) The International Convention for the Safety of Life at Sea (SOLAS) 1974, as a significant instrument to ensure the safety at sea with regard to the seaworthiness of ships. 2) The International Convention for the Prevention of Pollution from Ships (MARPOL) 73/78, aiming the complete elimination of intentional pollution of marine environment, and preserving and protecting the ocean environment. 3) The International Convention on Standard of Training, Certification and Watch Keeping for Seafarers (STCW) 1978, with the purpose to promote safety at sea and protection of the marine environment by establishing international standards for the manning of ships, labour conditions and, training and certification of seafarers. 4) The International Convention on Load Lines (LL) 1966. 5) The International Convention on Oil Pollution, Preparedness and Co-operation (OPRC) 1990. 6) The Intervention Convention 1969 and 7) Collision Regulation (COLREG) 1972.

Within the legal framework of Maritime Administration, the United Nations Environment Program Conventions are also essential legal sources. The most significant legal instruments are: 1) Agenda 21, which is a comprehensive plan of action for the protection, rational use and development of ocean space and their living resources. 2) Convention on International Trade in Endangered Species (CITES), aiming to ensure that international trade of wild animals and species does not threaten their survival. 3) Convention on Migratory Species (MSC), in which all the migratory species threatened with extinction are listed. It is on the purpose of these legal instruments, that the Governments and their respective Maritime Administration should take all measures to implement and enforce the rules and regulations of all the above international conventions.

⁷ United Nations, (1986). *United Nations Convention on Conditions for Registration of Ships*; Article 7, Geneva, 7 February 1986. Retrieved August 30, 2007 from: <http://www.admiraltylawguide.com/conven/registration1986.html>

5 Conclusions

In conclusion, analysing the concept of Maritime Administration, its approach toward ocean policy issues and its legal framework, is perhaps an efficient method in defining the role of Maritime Administration in the ocean policy issues. In this respect, the principal role of the Maritime Administration is the implementation of appropriate maritime strategies for ensuring the quality of shipping industry and seafarers, maritime environment protection, maritime safety and security, along with an effective economic management of maritime resources. Therefore, the purpose of Maritime Administration is to provide the government with a mechanism in order to perform satisfactory and effectively those tasks pertaining to National and International Maritime Legislation.

Moreover, the consultation and contribution in the national maritime policy-making process to protect the national maritime interests, the implementation and enforcement of the national and international maritime laws with regard to the optimization of the ocean resources and environmental protection, the adoption and execution of the ICOM and IMM systems for a sustainable use and development of the ocean space and resources, and finally to provide cross-sector coordination among interested institution in maritime affairs are the main tasks of Maritime Administration toward ocean policy issues. In order to perform all the above responsibilities, Maritime Administration is based on National Maritime Laws and International Maritime Conventions, as the main instruments in setting principles, rules and regulation regarding the ocean resource management, safety at sea, and protection of marine environment. In light of these considerations, the role of Maritime Administration toward maritime affairs and particularly in the ocean policy issues is crucial, irreplaceable and very important.

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Andrei Sidorenko

*Theory of State and Law Department, Perm State
National Research University, Russian Federation*

The Role of International Justice in the Process of Global Harmonization of Enforcement Standards

Abstract

Over the past sixty years the number of international, regional and internationalized courts grown exponentially because of the global nature of relationships in most fields of human activity. The practice of such courts is based on the achievements of modern jurisprudence, which was formed in different regions of the world with local cultural and historical features. Hence, each new treaty about supranational jurisdiction of a court in the beginning is painfully perceived by some states, because law enforcement activity of that new court often involves "legal transformation" of its participants in different degrees. However, in the future, by a joint effort law enforcement process in that court brings unified principles and concepts of law which leads to systematization and unification of justice standards, shapes unified system of views on law. For example in international jurisprudence was elaborated approach to the rule of law principle and its components: legal certainty, legal efficiency and balance of interests (proportionality). In the countries such as Russia, Romania, Turkey, Italy and some others modern legal science and practice on this issue are formed by European Court of Human Rights decisions. In several African countries common approach to the rule of law principle has been set by practice of hybrid courts and tribunals, which were represented by domestic judges and judges from Western states. International justice is structured in a system that is growing up and becomes more complicated. In the general form the system of international courts can be represented as follows: 1) internationalized courts and hybrid tribunals; 2) regional courts; 3) regional and international courts and tribunals ad hoc; 4) permanent international courts and tribunals. Concept "court" in purposes of the research includes all mechanisms of solving international disputes with judicial or quasi-judicial functions (such as permanent and ad hoc arbitration tribunals or special commissions established under international treaties, etc.). In the paper has been made an attempt to analyze the modern system of international and national with "elements of internationalism", in order to predict the ways of further development of that system. It also describes the impact of individual international and regional courts on the modern global legal space as well as on the legal system of the Russian Federation.

Keywords: *globalization, legal transformation, system of international courts*

1 Introduction

The increasing number of international courts leads to the formation of a complex system, which has no signs of vertical integration. This system is interesting mainly because it forms a certain range of views on the international law and order and the practice of interpretation of international norms in their jurisdiction. In this regard particularly important to understand the reasons of huge authority of some international courts and ineffectiveness others in the process of judicial practice.

The basis of a systematic view to any phenomenon is the presence of several components of the system which are interconnected. Prior to the formation of the Permanent Court of International Justice international courts were formed on ad hoc basis and didn't had systematic nature (for example, the proceedings against Peter von Hagenbach, held in Breisach am Rhein in 1474 had a value for the history of international criminal justice, but as ad hoc court was not part of a system). However, since its establishment, despite the small functioning capacity of this court it can be called a world-recognized authoritative body of justice, which decisions are significant and can be adopted by other international courts.

2 Fragmentation of international judicial bodies

The problem of the proliferation of international courts and tribunals has been designated in the report to the fifty-eighth session of the International Law Commission of 13 April 2006 on the fragmentation of international law. Modern conditions of international life generate needs of specialization and fragmentation of international justice, which negatively affects to credibility of general international law. So in the report was indicated that the process of fragmentation raises questions correlating the general and special norms of law. In addition, the growth of international organizations in the field of human rights, environmental protection, and other integration associations leads to localization of international law, separation of law enforcement practices across regions. This is an objective process because of the lack of uniformity development in continents, as well as the discrepancy in views on the law of the Western (European), Asian and African regions. If the first ones base their way of being on the principles of anthropocentrism and human rights priority, others has a tendency to collectivism. Another important issue is the regionalization of the world. Along with the European Union were formed organizations such as Mercosur (Southern Common Market), the African Union, the Economic Community of Central African States (ECCAS), BRICS - a group of five major emerging national economies: Brazil, Russia, India, China, South Africa, Shanghai cooperation Organization (SCO), the Arab Maghreb Union, the Association of Southeast Asian Nations (ASEAN), the North American Free Trade Agreement (NAFTA). This system of international organizations can achieve success in its development and organize their own specific approach to the interpretation of international law.

In addition, the quantitative growth of international courts also contributes complication and development of collective international legal relations, intensification and actualization of new spheres of human life. Instantaneous exchange of information, scientific and technological progress in different areas changes nature of legal relationships. As once the response to the challenge of global environmental problems was the creation of the International Environmental Court, so in the future it might appear

an international court or other mechanism associated with the fight against cybercrime or settlement of disputes in the field of bioengineering.

3 Informal hierarchy of international courts

Systematic approach to international justice has several features that are inherent to international law itself. The international legal order is legally-coordinated but not legally-subordinated, it is impossible to ascertain a hierarchy of sources of international law and to establish formally certain penalties for violations of international norms. Furthermore international law by its nature is uncertain and it provides an opportunity for States to solve problems using diplomacy through political methods. The appearance of international judicial law enforcement practice eliminates uncertainty and generates a rule of conduct for the future. Sustainable practices may give birth to *opinio juris*. Consequently the court's decision for its considerable recognition should have unshakeable authority, continuity in the interpretation of international law and rationale of position. Every judgment approves only because of compromise of equal in status contracting entities, which in the name of a higher purpose of maintaining of international order are ready to provide the opportunity for authoritative judges make a decision based on their internal understanding of the essence and spirit of the law.

In this regard it should be noted that any court which acting on the basis of an international treaty for its authority should also have all or most of the rights given to it by the treaty. The reverse situation is generated by the possibility of ratifying the Convention and any other agreement with reservations or interpretative declarations, which can be used to detriment of the court's jurisdiction. For example the Rome Statute of the International Criminal Court doesn't provide the right to amnesty, which is why some countries tried to influence the provision of the Statute about amnesties for their interests. These attempts can be traced in interpretative declarations made by individual states upon ratification of the ICC Statute. These acts are not reservations prohibited by Article 120 of the Rome Statute. It is, rather, an expression of the consent of the State to participate in an international treaty. In this regard interpretative declarations to Rome Statute of Colombia and Uruguay are of particular interest because they comparable with reservations.

As stated in interpretative declaration of Colombia to the ICC Statute: "None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia ". This formulation is particularly troubling, especially because in 2002 (the year of entry into force of the ICC Statute) in Colombia continued mass torture, killings and enforced disappearances. So according to the U.S. State Department for the first half of 2007 in Colombia were registered 74 cases of torture, which is 46 % more than in the first half of 2006.

Even more opposite to the Rome Statute interpretative declaration Uruguay: "As a State party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic ". In response number of countries (Finland, Netherlands, Germany and Sweden) announced this statement clause (7 and 8 July 2003). Then, in the period from July 28, 2003 - August 29, 2003 they

were joined by Ireland, United Kingdom, Denmark and Norway. Since Uruguay ratified the Rome Statute on June 28, 2002, and in accordance with Art. 20 of the Vienna Convention on the Law of Treaties, reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later. Later Uruguay in review on the application of these states indicated that it is taking steps to align national legislation with Part 9 of the Rome Statute. From the position of Uruguay this meant proper fulfillment of the obligations under the treaty. Nevertheless, despite that interpretative declaration, question about Uruguay's participation in ICC hasn't been raised.

As pointed out by Russian professor Aslan Abashidze feature of obligations which contain Rome Statute according to the doctrine of international law and the International Court of Justice is that they are obligations *erga omnes*. By their very nature, these commitments are concern for all countries. Given the importance of its norms all states might have legal interest in their protection. Agreeing with this point of view it should be noted that attempts by individual countries in any way to circumvent the provisions of the Rome Statute or other comparable treaties under any circumstances should not be feasible and such interpretative declaration mustn't have legal force. However often reservations initiate dialogue between states and helps to the process of international unification.

Hence international courts are guided not only by international law (norms, practices, principles) but also by convenient understanding of international law in the framework of a specific interstate union, universal or regional. Moreover, international courts usually are not officially bounded by their precedents. Nevertheless the authority of international courts based on unconditional confidence in judges and fidelity of their interpretations of law in particular cases. In accordance with Art 2 of the International Court of Justice Statute judges in this court are persons with high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law. That authority of judges in conjunction with the weighty justification for their position in each case forms court's precedents. Deviation from such precedents may call into question the competence of the court's decision and make it impracticable.

It should also be noted that in the science of international law the question of what can be attributed to international courts is problematic. Of course there are no doubts about status of constantly-acting courts and tribunals as the International Criminal Court. However, it is very important to expand this circle of "courts" due to the fact that many of them actually form the world order due to the stability of their position.

For example, quasi-judicial mechanisms and arbitration bodies of UN and the WTO. So the Dispute Settlement Body of the WTO follows its legal practice which often observes and analyses by parties of the dispute, especially when case goes to appeal. For example the U.S.A - definitive safeguard measures on imports of certain steel products case, where parties have repeatedly stated the need to follow the practice of the WTO Appellate Body in the interpretation of the provisions of the Safeguards Agreement.

Moreover there is important question of inclusion into the system of international courts of hybrid or "internationalized" courts which have been created for the prosecution of war crimes in post-conflict societies in the period 2000-2007 and were mostly successful.

These types of courts in science is called differently: "hybrid (criminal) courts/tribunals", "hybrid courts/tribunals", "internationalized (criminal) courts/ tribunals", "semi-internationalized criminal courts/tribunals", "hybrid international/national institutions" . These today are Special Panels for Serious Crimes - Timor Leste (2000), Regulation 64 panels in the courts of Kosovo (2000), The Special Court for Sierra Leone (2002) War Crimes Chamber in Bosnia-Herzegovina (2005); Extraordinary Chambers in the Courts of Cambodia (2006), the Special Tribunal for Lebanon (2007). Composition, structure and legal proceedings in hybrid courts are different and depend on whether an institution internationalized domestic court or an independent judicial body of hybrid type. However in all of them composition of judges and prosecutors appointed by the UN Secretary Counsel. Penalties are determined in accordance with national and international practice of imprisonment.

Not all researchers of hybrid tribunals indicate them as internationalized courts. So Professor Ciara Damgaard believes that the Special Court for Sierra Leone uses international acts to remove immunities. Same courts in Cambodia, East Timor, Kosovo and Bosnia-Herzegovina can't be regarded to international courts primarily because they are included in the state's judicial system. Court for Lebanon also can't be called international regardless the fact that it doesn't included in state's national system of justice because it does not apply international law and its jurisdiction is not international . In addition it should be noted that such courts have a problem with recognition of their independence due to the order of their funding. For instance the Appeal Chamber of the Special Court for Sierra Leone in case "Prosecutor v. Sam Hinga Norman" the defense claimed the absence of the necessary independence of the court to hear the case in view of the possibility for three donor states to manipulate justice by providing economical pressure to the court (the threat of one of the States to stop funding and call into question the existence of the court) . However, despite these shortcomings the activity of these hybrid tribunals has unifying importance for States that comes under their jurisdiction because those courts are applying universal approaches to law and forming unified law enforcement practice in accordance with international standards of justice. Furthermore, participating in that courts such highly respected specialists as Antonio Cassese gives additional weight to their judgments and places them in history of international legal science.

Thus it can be concluded that the system of international courts at the present stage of development is based on the following grounds: the temporary nature of work (permanent and ad hoc); subject jurisdiction (general, as the International Court of Justice, and special, as the International Tribunal for the Law of the Sea); territorial jurisdiction (universal and regional); composition of the judges (international and internationalized). All of these international courts involved in the process of global exchange of law enforcement practice. Based on the provisions of Article 38 of the Statute of the International Court of Justice, in its activities as a judge may be guided by judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Hence the higher authority of the court and more extensive array of enforcement practice, the more chance that it will be used as precedents. For example, the Inter-American Court of Human Rights in its judgments refers to the practice of the European Court of Human Rights showing importance of its conclusions on specific types of cases.

4 Russian way of participation in international justice

It is obvious that ECHR is the most successful court of human rights and it formed a huge array of precedential decisions and recognized doctrine of international law. Position of ECHR about the meaning of the general principles of law, such as *res judicata*, rule of law and others, are very important in international and national (mostly constitutional) levels. Russian Federation began its participation in the Council of Europe since 1998, and after a painful adaptation period has implemented most of the provisions of the European Convention of Human Rights and additional Protocols with approaches to law enforcement of ECHR. In accordance with the Russian Federal Law of 30.03.1998 N 54-FZ "On ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols" the Russian Federation recognizes *ipso facto* and without special agreement jurisdiction of the European Court in the interpretation and application of the Convention and its Protocols to it in cases of alleged violations of the provisions of the Russian Federation treaty acts. Consequently the legal position of this court in judgments against Russia is obligatory and the positions indicated in the decisions of the ECHR in relation to other member countries of the Council of Europe are advisory. On the other hand the chairman of the Russian Constitutional Court Valery Zorkin reasonably noted that in event of applying ECHR's rulings beyond the frame of specific case and extending its power to all similar situations Russia amplifies jurisdiction of ECHR to supranational legislative level where it not belongs to a system of checks and balances which is unacceptable. He also noted that today ECHR often gives interpretation of norms of the European Convention in a way that its authors even could not assume which in science calls "evolutionary interpretation" and this fact is often a matter of controversy and contradictions.

According to statistics on December 31, 2013 99 900 complaints are pending before the ECHR, and more than half of them filed against four countries: Russia, Ukraine, Italy and Serbia. During 2013 year the European Court issued against Russia 129 decisions and 119 of them contains information on the presence at least of one violation, which again brings Russia to leaders of violators of the Convention.

Legal opinions of ECHR repeatedly corrected Russian laws. For example are very important judgments which describe necessity of provision of legal certainty which specifically noted by Constitutional Court Russia in its judgments. Legal certainty is a wide principle in opinion of ECHR that is not directly specified in the text of the European Convention. ECHR has repeatedly noted that legal certainty "is a component of the rule of law principle" which contains in Article 3 of the Statute of the Council of Europe and in the preamble to the European Convention. Legal certainty is also a component of the right to a fair trial and the right to liberty and personal inviolability (interprets that way mainly in cases of illegal detention). Nevertheless even with respect to such widely described practice of usage of legal certainty principle in the Russian national courts many old problems still didn't solved.

For instance repeatedly dismantled by European Court aspect of legal certainty - quality requirements to the law and protection against judicial tyranny, in cases of time of legal detention is continuing violating. Since May 23, 2013 the Judgment of the ECHR in the case of *K. v. Russian Federation*, which was initiated by a complaint filed November 9, 2011, after an established practice in relation to Russia in similar cases. Subject of the complaint was indefinite detention and a lack of consistency between public authorities on

the question of using applicable legislation. Decisions are taken with the same wording by the European Court against Russia in 2005 and 2007, as well as against Lithuania and Poland in 2000. Another category of cases - about irrefutability of judgments is still under consideration by the ECHR. Famous case "Ryabykh v. Russia" of 2003 is often cited by the ECHR in its judgments, but nevertheless in September 19, 2013 decision came again, with the same wording and the same subject of the dispute, which has been considered in detail in the decision of the Constitutional Court of 21.01.2010 N 1-P – pension payments.

Russian researchers noted that Russian judges are not using in practice the European Convention and the ECHR positions containing the interpretation of the Convention, because they doesn't familiar with both. Many judges "are simply afraid to look stupid and rely solely on the wording of the national legislation". Illustrative in that case the statement of the chairman of Ordzhonikidze District Court in Yekaterinburg L. Rudenko about the case "Rakevich v. Russia" In particular, the judge stated that she does not support ECHR in this matter and completely on the side of the Russian courts.

Describing integration of Russia in other international judicial bodies it should be noted that the views of the Russian politicians and lawyers often in the side of inadmissibility of limitations of national sovereignty. That's why the ratification of the Statute of the International Criminal Court is still not been resolved in Russia; it is in contradictions with Russian Constitution. Another example can be shown in case of "Arctic Sunrise" where Russian side declared that upon the ratification of Convention on the Law of the Sea Russian Federation made a statement that in doesn't accept procedures provided on in section 2 of Part XV of the Convention, entailing binding decisions with the respect to disputes [...] concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction".

Another problem for Russian international judicial development is weakness of Eurasian Economic Community Court and Economic Court of the Commonwealth of Independent States, which are analogues of the most successful integrated entity – the EU, that does not have the international weight and their solutions are not numerous. Consequently Russia has a long way to international integration and inclusion into the global legal practice. The position of the Russian authorities regarding the issue of limitation of state sovereignty for a long time will be protectionist.

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**Geraldo Taraj¹,
Gjergji Ceka²**

¹*Department of Law, Beder University, Albania*

²*Faculty of Law, Tirana University, Albania*

The Mistaken Analogy

Abstract

Emanating from actual political developments in Eastern Europe, the Crimea annexation by Russia shows us again and again that “border changing” cause is still a hot issue in Europe. Except irritating a major part of public opinion throughout the civilized world, this act constitutes a breach of several important general and particular norms of International Law.

Notwithstanding the fact of being criticized by the most important voices of the political west, Putin insist in the legitimacy of this activity, supporting his question in formulas like “defending the rights of ethnic Russians” who are being violated by “Ukrainian fascists”; the right of self-determination of the people of Crimea and calling the case of Kosova.

But, can the case of Kosova serve as a precedent to justify the annexation of Crimea? Is this analogy supported in factual evidences and legal provisions?

This article tend to challenge such inappropriate *Milosevicean* claims such dangerous for the International civilized order. The line between Crimea and Kosova is very deep and large, taking into account historical background, ethnic diversities and legal status of both republics.

Keywords: *Crimea, Kosova, U.N. Charter, Memorandum of Budapest, humanitarian intervention, aggression.*

1 Introduction

On 28 February of this year, unidentified Russian military troops invaded Ukrainian Autonomous Republic of Crimea. This happened immediately after the lingering pro European riots in Kiev entailed the pro Russian president of Ukraine, Yanukovich to resign. The president of Russian Federation, Vladimir Putin, craftily used this turbulent situation to excuse such activity, that pure aggression, as committed to "protect the right of native Russians" in the peninsula. The Western leaders and the major part of public opinion condemned this act as an "nineteenth century fashion" one and completely in violation with both universal and specific norms of international law, such as the provisions of United Nations Charter, OSCE charter, the Memorandum of Budapest and other friendship agreements between Russia and Ukraine.

Gatherings of Security Council were held in March, attempting to reach a resolve to this crisis but no success. Several means of leverage were planned to be used by United States and European Union members such as expulsion of Russia from "G8", economical sanctions from individual to more general ones, escalating to economic isolation of Russia.

Furthermore, a decision was made by the republican parliament of Crimea to call a referendum to decide on the fate of this area. The people of Crimea would choose between staying a part of Ukrainian with a greater autonomy, or seceding from it to participate Russian Federation. Enclosed by a military hurdle, with the boycott of Tatars and Ukrainians, without a sole external monitoring, "at the barrel of the gun", the referendum was held in 16 March. Ninety-six per cent of the participants voted "pro" for the secession. Formalities of signing and ratifying a joining-Russia agreement followed this episode. Even this activity of Russian Government was condemned by Western politicians who didn't recognize the results and even the referendum itself, lawyers and by a level headed part of public opinion.

Such voices argued that the intervention of Russian and pro Russian forces in Crimea was obviously an aggression act in violation of UN Charter and other international provisions; The referendum was not legitimate because it violates the Constitution of Ukraine; The secession also is not legal because it violates the principle of territorial integrity (*Uti Possidetis*) and also the merge of Crimea into the Russian Federation is an unacceptable act of annexation.

Vladimir Putin and other Russian officials replied to such voices that Russia was doing the same thing that United States and NATO did in 1999 in Kosova. They intervened for humanitarian reasons, because the rights of native Russians were being violated. Russia interfered to protect those rights. According to them, the people of Crimea have the right to secede from Ukraine as the people of Kosova separated from Serbia. Thus, the secession of Crimea is lawful resembling the case of Kosova.

But how ponderous, how rational are the above mentioned claims? Can we draw a parallel between Kosova and Crimea? Can we say that it existed a violation of human rights in Crimea compared with that violation happened in Kosova? Can we say the possibility of cohabitation between Russians and Ukrainians is comparable with the possibility of the cohabitation between Serbians and Albanians in Kosova?

2. Situation in Crimea (Ukraine)

The latest events in Autonomous Republic of Crimea (*de jure* part of Ukraine), constitute probably the most serious West-East crisis, generating reminiscences of the Cold War. Geographically, Crimea is a peninsula stretching out from the south of Ukraine between the Black Sea and the Sea of Azov and separated from Russia to the east by the narrow Kerch Strait. Crimea has a population approximately of about 2.3 million citizens, made by 58% Russians, 24% Ukrainians, 12% Tatars and 6% other ethnicity.

2.1 The Crisis Development

The crisis genesis in Ukraine begins with the withdrawal from signing the EU Association Agreement from Ukrainian Government (under Yanukovich's Presidency) in November 2013, an act which generated violent protests in Kiev against the Yanukovich's regime, considered as a pro-Moscow President. These protests were finalized about 3 months later, in February, after Ukrainian Parliament brought down from power President Yanukovich. Immediately on 28 February, the President of Russian Federation (Vladimir Putin) sent military forces in Ukraine occupying the Crimean peninsula after pro-Russian gunmen had seize control of key buildings in Crimea. In these circumstances Crimean Parliament, being under effective control of Moscow, on 6 March 2014 voted to join Russia. On 16 March, Crimea voters choose to secede in disputed referendum, held in doubtfully circumstances, without permission of Kiev and being monitored only by Russian army and pro-Russian gunmen of Crimea. A day later, Crimean Parliament declares independence and formally applies to join Russia, which accepted it by a Parliament's Act. This way was concluded a theatrical annexation of Crimea, being effectively absorbed by Russian Federation.

2.2 Historical Profile of Crimea

Since 1783 until 1954, Crimea was part of Russia annexing it from Turkish Ottoman Empire. In 1954, Crimean peninsula was transferred to Ukraine under the then Soviet leader Nikita Khrushchev, for technical administrative reasons. After the collapse of Soviet Union, Ukraine like other Soviet Union Countries gained independence and Crimea remained part of Ukraine territory. At this point it is important to underline three important developments or moments crucial to normalizing/regulating the Russia-Ukraine relationship and thus maintaining peace and security in the region:

2.2.1 The Alma-Ata Declaration

On December 1991, Post-Soviet countries gathered to establish the Commonwealth of Independent States (CIS) and declare their independences, by signing the Alma-Ata Declaration, an act finalizing the dissolution of the Soviet Union. Part of this agreement or declaration, were also Russia and Ukraine. The Preamble of this declaration notably provided that, the independent states pledged to:

Develop their relations on the basis of mutual recognition and respect for state sovereignty and sovereign equality... non-interference in the internal affairs, the rejection of the use of force, the threat of force and economic and any other methods of pressure... to recognize and

respect each other's territorial integrity and the inviolability of the existing borders...¹

2.2.2 *The Budapest Memorandum (1994)*

Probably, one of the most significant events determining the Post-Soviet relationship between Russia and Ukraine is the signing of The Budapest Memorandum of 1994.² This Memo was issued by United States of America, Russian Federation and United Kingdom with the purpose to welcome the accession Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons as a nonnuclear-weapon State, and was finalized with the signing of all States listed above including Ukraine. Under this Memo Ukraine was obliged to eliminate the entire nuclear arsenal, which effectively would be surrendered to Russia. Whilst, the pledge of Russia, US and UK was in reaffirming their commitment and obligation to:

i. respect the Independence and Sovereignty and the existing borders of Ukraine, in accordance with the principles of the CSCE (Commission on Security and Cooperation in Europe) Final Act.

ii. refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations.

iii. refrain from economic coercion designed to subordinate to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind, in accordance with the principles of the CSCE Final Act.

iv. seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used.

v. not to use nuclear weapons against any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a state in association or alliance with a nuclear weapon state.

2.2.3 *The Black Sea Fleet Agreement*

During the 90', Russia and Ukraine many times were a step close to an armed conflict and Sevastopol (the capital of Crimea) was in centre of these skirmishes. In this city was stationed the Black Sea Fleet which among others was the main claim of Russia. In 1997 an agreement was reached from the two countries on these terms: "Ukraine agreed to have its navy in joint operational-strategic exercises with the Russian Black Sea Fleet. Russia in the other hand reaffirmed its commitment to respect the existing borders of Ukraine and

¹ The Alma-Ata Declaration, Preamble, December, 1991.

² Memorandum on Security Assurances (Budapest Memorandum), Dec. 5, 1994, (EIR, February 21, 2014).

Yeltsin's (at the time President of Russian Federation) government simply yet ignored another appeal from Duma (Russian Parliament) to demand Special Territorial Status for Sevastopol."³

2.3 Post-Soviet Crimea

After Ukrainian independence, political figures from the local Russian community sought to assert sovereignty and strengthen ties with Russia through a series of moves declared unconstitutional by the Ukrainian government. The 1996 Ukrainian constitution stipulated that Crimea would have autonomous republic status, but insisted that Crimean legislation must be in keeping with that of Ukraine.

Crimea has its own parliament and government with powers over agriculture, public infrastructure and tourism.⁴

2.3.1 Minority Rights in Ukraine and Crimea

Ukrainian legislation historically has had an positive attitude toward minority rights. "*Ukrainian National Republic, proclaimed in 1917, guaranteed robust language rights for 'national minorities' and even degrees of 'national-personal' autonomy for all such groups, particularly Russian, Jewish and Polish minorities.*"⁵

Such a proclamation offered unrestrained political standards for those days' circumstances. Except the break-up during the Soviet period, this kind treatment of minorities went on till today.

Thus, "in 1992, one year after Ukraine declared its independence from the Soviet Union, the Verkhovna Rada (Parliament) passed a Law on National Minorities which largely reaffirmed the positive approach to minority issues from pre-Soviet times, combining general cultural and religious rights with language and education rights, and some unspecified degree of cultural autonomy."⁶

Such an approach was reaffirmed on the 1996 Constitution, as amended in 2004. It:

channels this precedent into a new ambitious legal and policy framework. For one, it recognises the state's process of civic state-building linked to the self-determination of the 'Ukrainian nation', understood as the whole people comprising of all ethnicities. At the same time, it provides protection for both the Ukrainian nation as a whole and the ethnocultural identity of all 'national minorities' and 'indigenous peoples' of Ukraine, and reaffirms language and education rights for Russian and other minority languages. Moreover, Chapter X provides for an 'Autonomous

³ FELGENHAUER, Tyler. "*Ukraine, Russia and Black Sea Fleet Accords*" (1999). WWS Case Study, 2/99.

⁴ BBC News Europe, "*Crimea Profile*", 22 March 2014.

⁵ PENTASSUGLIA, Gaetano. "*Viewpoint: Russia and inflated minority card in Ukraine*" (March 11, 2014). University of Liverpool website (University News).

⁶ *Ibid.*

Republic of Crimea', where ethnic Russians account for approximately 60% of the population, as a politic unit to which a range of powers is devolved from Kiev, and which is thus an integral part of the state.

Also, it is important to emphasize that there are no reports of International Organizations of Human Rights observing that Russian ethnicity members are suffering from grave and eminent violations of fundamental Human Rights and Liberties. There is no such a situation in Russian population. Sure, this is not a suggestion that in Ukraine there are no violations of Human Rights, but these violations have not passed into the "red zone", they are within the "edges of normality" of Human Rights problems in the region and there are no indications that this violations may be "discriminative" in regard of Russian minority. If there are Human Rights violations in Ukraine, this happens to be on the behalf of the entire Ukrainian society, it does not concern the Russian ethnicity in particular. This fact is also confirmed by the statement of UN Secretary-General for Human Rights, in the 7144th Meeting⁷ of UN Security Council (March 19, 2014), noting that Human Rights violations against Russian minority in Ukraine were neither widespread nor systematic.

2.3.2 Crimean Self-Determination

The above mentioned facts show us that the "people" of Crimea are entitled with all the autonomy they need in order to fulfill under international law their right of self-determination through internal self-determination: "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."⁸ Internal self-determination is a concept deriving from the interpretation made of important international documents such as: U.N. Charter⁹, U.N.'s International Covenant on Civil and Political Rights¹⁰ and its International Covenant on Economic, Social and Cultural Rights¹¹, U.N. General Assembly's Declaration on Friendly Relations¹², Vienna Declaration and Program of Action¹³, U.N. General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations¹⁴ and by the Final Act of the Conference on Security and Co-operation in Europe¹⁵ too. Referring to their provisions, the right of self-determination is fulfilled by the "peoples" through two ways or forms: (1) the internal self-determination; and (2) the external self-determination. Amid the two of those prevails the internal self-determination, resulting as "the rule" ("the basic norm"-Kelsen would have said) from the established practice, governing "the right of self-determination dimension" as a part of international legal order. This is also a standard generally accepted by the International Community. On the other hand, the external self-determination comes out as a necessity, the sole opportunity, only in exceptional

⁷ SC/11328, "UNITED NATIONS HUMAN RIGHTS MONITORING MISSION DEPLOYED TO CRIMEA AMID CRISIS BETWEEN RUSSIAN FEDERATION, UKRAINE, SECURITY COUNCIL TOLD", March 19, 2014.

⁸ 1998 CanLII 793 (SCC), "REFERENCE RE-SECCECION OF QUEBEC", File No: 25506.

⁹ Charter of the United Nations, Can. T.S. 1945 No. 7.

¹⁰ U.N. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171.

¹¹ U.N. International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3.

¹² GA Res. 2625 (XXV), 24 October 1970.

¹³ A/CONF.157/24, 25 June 1993.

¹⁴ GA Res. 50/6, 9 November 1995.

¹⁵ 14 I.L.M. 1292 (1975), "Helsinki Final Act".

circumstances, when “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state” (internal self-determination) is an impossible task due to concrete circumstances, such as for example: “severe, widespread and systematic violations of fundamental Human Rights and Liberties”. Thus, it is to be said that the people of Crimea have already exercised and enjoyed their right to self-determinate through an alignment of political privileges, which result necessary to effectively pursue their fundamental needs as an ethnic entity within the framework of Ukrainian state.

3. Kosova v. Crimea, a Mistaken Analogy?

3.1 The Roots of Conflict(s)

The relations between Albanians of Kosova and Serbs threads back to the 6th century’s Slavic Invasion in the Balkans. According to Russian-born Serbian historian, the byzantologist Georg Ostrogorsky ‘Unlike other temporary onrushes that occurred those times in this part of Byzantine Empire, the Slavic ones were the most tracer in the ethnic and political composition of the peninsula’.¹⁶

The phrase “*diversification in the ethnic compositions of Balkans*” means permanent occupation of significant areas of vital territories by the arrival tribes. This permanent capture triggered also permanent hatred between native peoples and arrival tribes near the bordering areas, especially between Albanians and Slavs. This stretching conflict was reflected in the folkloric epos in both ethnic groups. Is to be underlined that Albanians and Serbs are two different ethnic groups with different language in contrary with Russians and Ukrainians who belong to similar ethnic groups (Eastern Slavic) and speak similar languages, any of which is a kind of Eastern Slavic languages.

After a long lethargy, such disputes Kosovar Albanians and Serbs was reawakened tremendously in 1913 after secession of Albanian territories from Ottoman Empire where Great Powers left outside Albanian boundaries massive areas which were divided by neighboring states. Kosova also was one of such areas which became a part of Serbian state. Such transfer left room for an unnatural conflict-prone cohabitation between Serbs and Albanians; a bloody, unequal occupation reigned upon Albanians in Kosova for approximately one century.

A totally different manner was applied in transferring Crimea to Ukraine. In 2 February 1954 Crimea became part of Ukraine by a decree of the Presidium of the Supreme Soviet of the Soviet Union. This transfer was realized legally by the domestic government in compliance with the Constitution of USSR and that of Soviet Ukraine¹⁷, for drainage purposes, in contrary with the transfer of Kosova to Serbia which was a decision of foreign powers, a bargaining result of Balkanic War’s aftermath.

After World War II, through the Constitutional Law of 1968 and the Constitution of 1974, Kosova became a Serbian Autonomous Republic within the Yugoslav Federation. Thus,

¹⁶ OSTROGORSKY, Georg, “*Geschichte des byzantinischen Staates*”(1963). Transl. into Albanian by XHUFI, Pellumb. “*Historia e Perandorisë Bizatine*”(1997). Shtëpia Botuese “Dituria”. Pp. 253.

¹⁷ SIEGELBAUM, Lewis. “1954; The Gift of Crimea”. SovietHistory.org. March 3, 2014

the Tito's regime offered Albanians in Kosova a partial self-determination, taken in consideration the political and historical framework in Yugoslavia.

Reawakened nationalist approaches of Milosevic leadership, triggered legal and political measures that restricted Kosova's right as a national entity, a social structure that fulfilled the conditions of being entitled for the right of self-determination. In pretext of inhibiting "violations to the rights of Serb population in Kosova", in 1989 Serbian military troops encompassed the Parliament of Republic of Kosova and forced the members to change the Constitution against the autonomy.

The abrogation of the autonomy of Kosova provoked chain secession of Slovenia, Croatia and Bosnia from the Yugoslav State. The cost of doing so, however, was to unleash the brutal Balkans conflict of the early 1990's, brought to a close only with the 1995 Dayton Accords. After Dayton, Kosovar Albanians continued to seek greater rights.¹⁸

Meanwhile, Crimea enjoyed a broad autonomy within the Ukrainian state since the Constitution of 1917 which became even more favourable for Crimean people till nowadays. This Autonomy is the most crucial criteria of self-determination principle. Recalling the 1998's ruling of Canadian Supreme Court (Secession of Québec)¹⁹ and general doctrine of international law (Antonio Cassese), when a people have an effective access protection in the context of the existing state, when it is not subject to discrimination and systematic violation of Human Rights, it exercises already the right of self determination in the internal sense. In order to strike a fair balance between two principles, territorial integrity (*uti possidetis*) in one hand, and the right of self-determination in the other hand, once the purpose is achieved by internal self determination, there is no room for external self determination (secession). So Crimea exercised already its right of self-determination by actual autonomy; any further step is an disproportional violation of territorial integrity of Ukraine. Is to recall also, that Kosovar Albanians did not sought independence when Kosova was an Autonomous Republic, because they, somehow exercised a kind of self-determination.

3.2 Grave and Systematic Repression over Albanians in Kosova at the period 1989-1999

On the other side, grave and systematic violations of Albanian population's rights after the Serbian occupation of autonomy, compelled the formation of Kosova Liberation Army, an organization aimed to protect Albanians right for independence.

The emerge of KLA aggravated Serbian repression which, sometimes impossible to face and destroy guerrillas attack of the former, began to avenge toward the civil unarmed Albanian population. Yugoslav Army used excessive and random force, "which resulted in property damage, the displacement of population and death of civilians"²⁰.

Such kind of foreseen, systematic practices aren't strange for Serbian policy against Albanians, recalling that:

¹⁸ MURPHY, Sean D., Book Review of: Marc Weller, "*Contested Statehood: Kosovo's Struggle for Independence*", Oxford University Press, 2009.(pp 321)

¹⁹ 1998 CanLII 793 (SCC), "*REFERENCE RE-SECCECION OF QUEBEC*", File No: 25506.

²⁰ International Tribunal for the Former Yugoslavia.

the first official Serb plan to change the ethnic character of Kosova by reducing the number of Albanians was drafted during the late 1920s and early 1930s by the Serbian Academy of Sciences, involving the transportation of Albanians to Turkey. About 100,000 left before the programme was interrupted by the outbreak of World War II. It then resumed in 1953. In the 1980s a draft Memorandum of the Serbian Academy of Sciences and Arts called for redressing the ethnic balance in Kosovo in favour of the Serbs and Montenegrins. In 1991, the breakup of Yugoslavia coincided exactly with the collapse of the one-party state in Albania and the subsequent opening up of the country. Many Serbs then believed that the Kosova Albanians should be encouraged to go and live in Albania. By 1995, however, it had become clear that no Kosova Albanians showed any desire to go and live in Albania, and worse still, the Kosova Albanians were planning to begin a guerrilla campaign inside Kosova itself²¹.

According to this report of Britannic Parliament, which reveals even the reasons behind such extreme hatred and desire for extinction of Albanians,

In 1996, as the KLA began its campaign, the Belgrade Academy of Sciences published a detailed report, which described the state of Yugoslavia in the year 2015 if the Kosovar Albanians remained inside Serbia/Yugoslavia. The report stated that due to the Albanians' high birthrate, the Albanian population was far younger and more fit for military service, so that 25 per cent of Serbia's conscripts were of Albanian origin.

The value of this report lays in disclosing the roots of such unilateral hatred from where flows the whole malevolent, criminal activity against Albanians. It shows that Serbian xenophobia against Albanians emanated as an continuous irrational fear from their natural vitality. Such inferior self-estimation of the intellectual and political elite of Serbia boosted anti-Albanian sentiment amongst the Serbian population, and brought the idea that the sole way of dealing with the Kosova Albanian 'problem' was to displace large number of Albanians²².

The upper mentioned background of conflict is essential for producing an useful analysis on the impossibility of cohabitating inside a common framework of statehood of both peoples.

In its resolution 49/204 (of 23 December 1994) — the first of a series on the “Situation of Human Rights in Kosova”, the General Assembly of UN acknowledged the “continuing deterioration” of the human rights situation in Kosova, with “various discriminatory measures taken in the legislative, administrative and judicial areas, acts of

²¹ Parliament of the United Kindom Select Committee on Foreign Affairs Fourth Report, available at: <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaaff/28/2802.htm>.

²² *Idem*.

violence and arbitrary arrests perpetrated against ethnic Albanians in Kosova”, including:

“(a) police brutality against ethnic Albanians, the killing of ethnic Albanians resulting from such violence, arbitrary searches, seizures and arrests, forced evictions, torture and ill-treatment of detainees and discrimination in the administration of justice;

(b) discriminatory and arbitrary dismissals of ethnic Albanian civil servants, notably from the ranks of the police and the judiciary, mass dismissals of ethnic Albanians, confiscation and expropriation of their properties, discrimination against Albanian pupils and teachers, the closing of Albanian language secondary schools and university, as well as the closing of all Albanian cultural and scientific institutions;

(c) the harassment and persecution of political parties and associations of ethnic Albanians and their leaders and activities, maltreating and imprisoning them;

(d) the intimidation and imprisonment of ethnic Albanian journalists and the systematic harassment and disruption of the news media in the Albanian language;²³

Thus, the repression reached its climax on 1999, where Serbia realised it was the time to unleash its decades-long plan to ethnically cleanse Kosova. An updated cleansing plan, named “Horseshoe”, published in October 1998 began to be applied in the beginning of 1999. Latter, a decision of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia found those elements of war-crimes committed against Kosovar Albanians:

The manner in which the [FRY and Serbian forces] dealt with the KLA was often heavy-handed and involved indiscriminate violence and damage to civilian persons and property, further exacerbating rather than ameliorating the situation in Kosova. The consistent eye-witness accounts of the systematic terrorization of Kosova Albanian civilians by the forces of the FRY and Serbia, their removal from their homes, and the looting and deliberate destruction of their property, satisfies the Chamber that there was a campaign of violence directed against the Kosova Albanian civilian population, during which there were incidents of killing, sexual assault, and the intentional destruction of mosques. It was the deliberate actions of these forces during this campaign that caused the departure of at least 700,000 Kosovo Albanians from Kosova in the short period of time between the end of March and beginning of June 1990²⁴.

²³ “*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*”, I.C.J. Reports 2010, *Paralel Opinion of the Judge Cançago Trindade*.

²⁴ *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebrojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T)*, Judgment, 26 February 2009, vol. 2, para. 1178 (available on the ICTY website: (<http://www.icty.org/case/milutinovic/4#tjug>)).

Vice Versa, at the time when Russian troops intervened in Crimea, just a sole gun wasn't fired against any Russian citizen of Crimea. As spoken above, there doesn't exist any evidence for any violation of the human rights or ethnic discrimination against Russians. The contrast in the scope of human rights is tremendous.

3.3 (NATO's) Humanitarian Intervention *Vis a Vis* Russian Intervention

Thus, such atrocities illustrated above overpassed any limit of toleration, caused an ultimatum of NATO to Serbian government and 72 hours latter, a bombing campaign over strategic areas and military objectives. Those humanitarian intervention taken due to grave violations of humanitarian international law, remained inside the rational limits, was proportionate to the purpose aimed (prevention of humanitarian law offence).

Remaining in the reasons of humanitarian intervention, seems necessary to point out that general international law, recognizes such external activity that violates territorial integrity of the state/s against whom it is conducted, only in exceptional cases. If a state or a military alignment decide to commit an humanitarian intervention inside the territory of another state, some preconditions of proportionality and distinction must be fulfilled.

At first, there must be strong evidences that human rights are being gravely and widely violated. According to the doctrine of humanitarian intervention, humanitarian intervention should be strictly aimed to solve the crisis;

Secondly, other means for stabilizing the humanitarian crisis are exhausted at the point that the external intervention is the less restrictive mean to prevent further humanitarian law breaches;

Thirdly, as humanitarian intervention inevitably contains violations to the territorial integrity of another state, it should be applied only if necessary and the means adopted should be the less restrictive ones.

Fourthly, the principle of distinction requires that like the combat parts, the military interventionist troops must be clearly distinguished and identified regarding to what state or combating part he/she belongs to²⁵.

Fifthly, deriving from the first point, an intervening power or alignment must act only to stop the humanitarian emergency. It cannot annex a territory with the pretext of HI.

Is striking that, while NATO-s intervention in Kosova accomplishes all the upper-mentioned principles, except accidental occurrences, the Russian intervention in Crimea lacks of those conditions.

Taking into account such criteria, in the case of Kosova the intervention of NATO was triggered by the humanitarian disaster that was happening there. This humanitarian disaster was accompanied with the unwillingness of Serbia to resolve the situation and the exhaustion of all the possible means, including Rambouillet and other attempts.

²⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. International Committee of the Red Cross.

Such humanitarian “catastrophe” has not occurred in Ukraine, nor has systematic human rights’ violations happened there, except, maybe in the Putin’s head. Vladimir Putin and other secessionists claim that, as pro-Western fascists seized government illegally, Russian population there were exposed continuously under potential risk of being violated in their rights. Such veil-pretences are both illogical and obviously unsupported in facts. Even if those allegations were true, no attempt was made to address the case by peaceful means, that nowadays are innumerable.

The intervention in Crimea fails to satisfy even the principle of distinction, for Russian troops that intervened in Crimea were not identifiable while NATO soldiers in Kosova fulfilled this requirement.

The Russian intervention didn’t focus to the prevention of further violations of human rights (which lacked the substance), but merely was an occupation and latter an annexation of Crimea.

Furthermore, unlike the Russian “humanitarian intervention” in Crimea, there wasn't territorial occupation of Kosova by NATO but only an aerial attack upon strategic buildings.

Taking into account those above mentioned arguments, is difficult to draw a parity line between the humanitarian intervention of NATO in Kosova and the conquering intervention of Russia in Crimea. This intervention deeply fails to comply with the legal test.

3.4 International Administration of Kosova

After the cease of bombing campaign, Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999. In this resolution, the Security Council, “determined to resolve the grave humanitarian situation” which it had identified and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide “an interim administration for Kosovo ... which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions”²⁶. The powers and responsibilities thus laid out in Security Council resolution 1244 (1999) were set out in more detail in UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government (Constitutional Framework), which defined the responsibilities relating to the administration of Kosova between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosova²⁷.

These upper mentioned means set up by Resolution 1244, Constitutional Framework and UNMIK Regulation, were aimed to regulate constitutional order in Kosova in an intermediate period until a resolve of the question of Kosova status. Moreover, those

²⁶ *Security Council Resolution 1244 (1999)*, (Para. 10).

²⁷ “*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*”, *I.C.J. Reports 2010*, p. 403., Third Chapter; Factual Background.

norms implicitly "abrogated" the juridical power of Serbian Constitution over the territory of Kosova as they imposed new constitutional regulations of the political and civil order there (*Lex posteriori derogat priori*). Unlikely, the Ukrainian Constitution and the Constitution of Autonomous Republic of Crimea never ceased to have power in upon this territory.

Afterwards many efforts for negotiation, mandated from UN Security Council, were made for the final resolution of Kosova status but no consent was made. "Between 20 February and 8 September 2006, several rounds of negotiations were held, at which delegations of Serbia and Kosova addressed, in particular, the decentralization of Kosova's governmental and administrative functions, cultural heritage and religious sites, economic issues, and community rights"²⁸. According to the Reports of the Secretary-General, "the parties remain[ed] far apart on most issues"²⁹

On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that:

after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosova's future status"³⁰. . . . The time has come to resolve Kosova's status. Upon careful consideration of Kosova's recent history, the realities of Kosova today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosova is independence, to be supervised for an initial period by the international community³¹.

The Secretary-General fully supported both the recommendation made by the Special Envoy but the Security Council didn't adopted it because of the Russian refusal. Long process of attempts for consensus, the refusal of recommendation by Russia, proved the impossibility of another way to solution except the unilateral declaration of independence.

3.5 The Independence of Kosova Vis a Vis the Annexation of Crimea

The representatives of the people of Kosova declared Kosova as an independent state... recognizing the fact that Kosova is an isolated example emerged from severe disintegration of Yugoslavia ... it cannot serve as a precedent for other separatist movement."

²⁸ Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations docs. S/2006/361, S/2006/707 and S/2006/906.

²⁹ Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707; S/2006/906.

³⁰ "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion", I.C.J. Reports 2010, p. 403., Third Chapter; Factual Background.

³¹ Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo's future status, United Nations doc. S/2007/ 168, 26 March 2007.

An advisory opinion has been requested in resolution 63/3 adopted by the General Assembly of the United Nations on 8 October 2008. On 22 July 2010, the International Court of Justice ruled upon this request.

Responding to the question if the unilateral declaration of independence violates international law, the Court answered "no" to three sub questions. According to the Court, *"general international law contains no general prohibition on declarations of independence"*³².

On the question if declaration violated resolution 1244 it held *"that at least once the negotiating process had been exhausted, Security Council resolution 1244 (1999) was no longer an obstacle to a declaration of independence"*. The Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution. Thus The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, *the declaration of independence did not violate Security Council resolution 1244 (1999)*. The Court held that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court found that the declaration of independence did not violate the Constitutional Framework.³³

In this advisory opinion, more than scrutinizing the right of Albanians for independence in light of historical background and international norms, ICJ dealt with merely technical arguments. It affirms the principle set out in *SS Lotus case*, which established the principle that, under international law, that which is not forbidden is permitted. This resulted to have been a mistake. By not examining any principles according to which the legal claims to secession might be assessed, the ICJ has implicitly allowed states like Russia to support illegal acts of secession that suit their particular political interests, all the while aping the language of respecting international law³⁴.

The annexation of Crimea proved this statement as true. Russia tends to legitimise the Crimean secession and joining Russian Federation with the precedent of Kosova. But Kosova has nothing in common with Crimea under the legal point of view. Unlike the majority's opinion in above mentioned case, we want to recall that the right to secede or

³² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403.*, Fourth Chapter IV "THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW".

³³ *Idem*, 53.

³⁴ LINDEN-RETEK, Paul and BREWER, Evan. "Why Crimea is not Kosovo, and why it matters". (18 March 2014). Published on openDemocracy. (Available at <http://www.opendemocracy.net>). Pp5.

the right of a people for external self determination emanates from its extreme impossibility to cohabitate with another different ethnic group inside common national borders. The scale of self determination belonging to a people depends on how their needs are fulfilled and human rights are respected on a given time and space.

This *stricto sensu* interpretation of the universal principle of self determination as written in Art. 1 of UN Charter³⁵ seems existentially necessary for the purpose of maintaining global peace through respecting territorial integrity of states, another principle of UN charter sanctioned in UN Charter³⁶. Thus, a fair balance must be struck between both principles in order to assess whether a people have the right for independence or their needs can be accomplished by pursuing other forms of internal self independence. Insofar as the political solution can be found within a federal or unitary structure, secession might not be necessary. If it cannot, secession might be unavoidable³⁷. As it seems, international law tends to deal with people's needs with saving existing borders and exceptionally, where this is impossible the solution will be a change at existing borders. Thus, general principle seems to be this: "We existing states all have our own domestic problems and disaffected groups or regions, so we must stick together behind sovereignty and territorial integrity"³⁸.

Taking into account all the comparative elements mentioned in this paper we may conclude that independence of Kosova cannot serve as a precedent for Crimea secession and its merge with Russian Federation.

In Kosova, Albanian population suffered a long time denial of its basic rights and this situation aggravated unceasingly while Russian population in Crimea has never been exposed by such conditions and they exercised their rights without need for further autonomy or for independence. Thus the right of internal self determination was not possible to be exercised by Kosovars and the last instance was external self determination. Kosova's ability to exercise 'internal self-determination' within Serbia was severely limited to the point of being unimaginable³⁹.

While in Kosova, the diversion between ethnic groups was tremendous, the ethnic hatred made the cohabitation impossible, in Crimea such problems are not present. The brutal

³⁵ The Purposes of the United Nations are: ... "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" Article 1 Para 2 of UN Charter, San Francisco 1945.

³⁶ According to Article 2 Para.4 of this Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

³⁷ LINDEN-RETEK, Paul and BREWER, Eyan. "Why Crimea is not Kosovo, and why it matters". (18 March 2014). Published on openDemocracy. (Available at <http://www.opendemocracy.net>). Pp5.

³⁸ GOLDSTEIN, Joshua S. PEVEHOUSE Jon C. "International Relations", Tenth ed. 2013-2014 Update.

³⁹ LINDEN-RETEK, Paul and BREWER, Eyan. "Why Crimea is not Kosovo, and why it matters". (18 March 2014). Published on openDemocracy. (Available at <http://www.opendemocracy.net>). Pp. 6.

repression — and international crimes accompanying it — to which the Kosovar population was subjected in 1998-1999 could but prevent it from contemplating a future within the Serbian State, so deep the psychological wounds go (and still do) and so well entrenched in minds was (and still is) the memory of the atrocities committed. There are crimes which cannot fade from the individual and collective memory⁴⁰.

The independence of Kosova was product of numerous attempts to address the case to pacific solutions which all failed while no attempt for alternative solution was made in Crimea.

Kosova did not seek independence under a post-Yugoslav or Serbian constitution, indeed not under any national Constitution at all. UN Security Council Resolution 1244 constituted the binding legal order and *de facto* replaced the Serbian one. The resolution 1244 refused to decide on final status of Kosova, leaving the matter for future Security Council decisions, and did not impede or prevent a declaration of independence. Indeed, Kosovo's Declaration of Independence was meant as a public affirmation of what had by then become a political fact, with Kosova being recognized by the majority of Western states⁴¹. The secession of Crimea violated Ukrainian Constitution which governs Crimea despite political turbulences. According to that Constitution, Crimea is integral constituent part of Ukraine.

As Kosova became an independent state, it did not merge with Albania. In contrary, Crimea declared independence in order to be a part of Russia. This act nullifies legitimacy of the independence itself even if such independence would be legitime.

The independence of Kosova was recognized by the majority of most powerful states while the independence of Crimea was recognized only by Russia who later annexed Crimea.

We will conclude this article recalling an important principle: *ex injuria jus non oritur*. According to this well established general principle of international law, a wrongful act cannot become a source of advantages, for the wrongdoer. The secession of Crimea tends to create a dangerous precedent in the international law; it gives a sense of legitimacy to secessionist movements around the world, as itself consists on a wrongdoing. If an wrongful act brings beneficial outfits to its author, this will attract other international actors as is happening to other eastern areas of Ukraine. Awakenings of other illegitimate separatist movements around the world, would seriously harm the global peace.

At his Separate Opinion in the Kosova Advisory Opinion , Judge Cancado Trindade wrote:

States exist for human beings and not vice-versa. States transformed into machines of oppression and destruction ceased to be States in the eyes of their victimized population. Thrown into lawlessness, their victims sought refuge and survival elsewhere, in the *jus gentium*, in

⁴⁰ “*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*”, I.C.J. Reports 2010, Written Comment of France.

⁴¹ *Idem*.

the law of nations, and, in our times, in the Law of the United Nations⁴².

Obviously, unlike Serbia did to Kosovar Albanians, Ukraine was not “*transformed into machine of oppression and destruction*” to Crimean citizens and consequently cannot be punished, cannot be violated in its territorial integrity, because it has not committed a sole wrongful act to Russian citizens. “*Where there is no human rights violation, there is no room for externally self determination*”.

⁴² “*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*”, I.C.J. Reports 2010, *Paralel Opinion of the Judge Cançago Trindade*.

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**Bardhok Bashota¹,
Fisnik Ismaili²**

¹ Lecturer of International Relations, Iliria College, Pristine

² Lecturer of International Business, Iliria College, Pristine

Roli i UNMIK-ut në menaxhimin e sektorit ekonomik si një komponentë shtetndërtuese në Kosovë: 1999-2008

Abstract

Në shekullin e 21-të, çështja e shtet-ndërtimit në rrethanat post-konfliktuale, si dhe përpjekjet ndërkombëtare për të parandaluar dhe për të menaxhuar pasojat e dështimit të shtetit, janë bërë pyetje të mëdha në agjendën e politikës ndërkombëtare. Aktualisht konsiderohet se vlerat liberale perëndimore të përfshira në agjendat e shtet-ndërtimit ndërkombëtar, sidomos në kuadër të tezës së paqes liberale, janë bërë gjithnjë e më të përhapura dhe më të zakonshme. Modelet e shtetndërtimit sipas kësaj teze përfshijnë demokracinë liberale, një ekonomi të tregut, politikën ekonomike të përcaktuara nga teoria e rritjes neoklasike, pjesëmarrjen e komunitetit në zhvillim, dhe një rol të fortë për shoqërinë civile dhe sektorin privat.

Tanimë, është vlerësuar që procesi tranzitor nga lufta në paqe dhe ai i shtet-ndërtimit kanë dimensione të theksuara ekonomike. Dimensionin e ofrimit të shërbimeve shtetërore varet nga ekzistenca e aseteve produktive në mënyrë që të gjenerojnë të hyra të nevojshme për të mbështetur funksionalizimin e institucioneve, përfshirë financimin për sigurinë, gjyqësorin, institucionet e zgjedhura, dhe monopolin e dhunës. Dimensionin transformues i shteteve kërkon zhvillimin e institucioneve që ndihmojnë për të prodhuar një ekonomi të qëndrueshme si dhe në zgjerimin dhe ndryshimet strukturore. Këto përfshijnë institucionet për të menaxhuar dhe zbatuar ri konfigurimin e të drejtave pronësore gjatë proceseve të zgjatura shoqërore të transformimit. Edhe në kontekstin e Kosovës, tranzicioni drejt një ekonomie të tregut të lirë ka qenë një element thelbësor i aktivitetit shtet-ndërtues të UNMIK-ut.

Në lidhje me rolin që ka pasur UNMIK-u në rindërtimin dhe zhvillimin ekonomik në Kosovë, si komponentë standard shtet-ndërtuese, pyetjet më të rëndësishme që mund të shtroheshin do të ishin: Cila ishte strategjia e bashkësisë ndërkombëtare për rehabilitimin dhe zhvillimin e ekonomisë kosovare dhe me çfarë sfidash ka qenë ndeshur?, dhe cilët janë treguesit real të suksesit apo dështimit të këtyre përpjekjeve për arritjen e këtyre objektivave?

Keywords: *shtet-ndërtim, shoqëri post-konfliktuale, tranzicion, ekonomi e tregut, zhvillim ekonomik.*

1 Hyrje

Në fakt, në debatin bashkëkohorë për shtetndërtimin, si një faktorë për një paqe të qëndrueshme, konsiderohet se kombinimi i vlerave demokratike dhe atyre ekonomike konform idealeve liberale, mund të shërbej si një ilaç efikas në zhdukjen e faktorëve konfliktual. Andaj, në pjesën dërmuese të administratave ndërkombëtare, agjendat e tyre kanë qenë të dominuara me synimet për rimëkëmbjen dhe zhvillimin e sektorit ekonomik si një parakusht për një paqe të qëndrueshme. Kjo çështje ka qenë edhe më e theksuar në agjendat e qarta shtetndërtuese të këtyre administratave, pasi që ato kanë vlerësuar se rindërtimi dhe zhvillimi ekonomik paraqesin njërin nga komponentët esencial në shtetndërtimin ndërkombëtar.

2 Strategjia e UNMIK-ut në rindërtimin dhe zhvillimin ekonomik të Kosovës

Elementët vendimtarë të strategjisë ndërkombëtare për rehabilitimin e ekonomisë kosovare mund të përmbliken si vijon:

Ndihma emergjente dhe rindërtimi; Krijimi i një kornize institucionale dhe ligjore; Komercializimi dhe privatizimi i ndërmarrjeve shoqërore dhe nxitja e sektorit privat, etj.¹ Për realizimin e këtyre detyrave, Shtylla IV e UNMIK-ut ka themeluar institucionet e mëposhtme në administratën ekonomike dhe financiare:

Autoriteti Bankar dhe i Pagesave i Kosovës (BPK), “banka qendrore” e Kosovës, përgjegjëse për dhënien e licencave për institucionet financiare dhe për zhvillimin e një sistemi bankar për ekonominë e tregut; Departamenti i Rindërtimit, përgjegjës për mbikëqyrje dhe bashkërendim të veprimeve të UE-së në Shtyllën IV; Autoriteti Qendror Fiskal (AQF), që përfshin thesarin, zyrën e buxhetit, administratën tatimore dhe shërbimin doganor; Departamenti i Shërbimeve Publike, përgjegjës për krijimin e shërbimeve serioze në një ekonomi tregu të plotësuar me një kornizë funksionale rregullash. Kjo përfshin krijimin e ofruesve funksionalë dhe të besueshëm të Shërbimeve Publike; Departamenti i Tregtisë dhe Industrisë (DTI), me detyrë realizimin e komercializimit të ndërmarrjeve shtetërore dhe shoqërore, nxitjen e zhvillimit të sektorit privat, investimeve të brendshme e tregtisë me jashtë.²

Lidhur me themelimin e këtyre dhe institucioneve tjera, Stahn kishte shkruar qarta larg në vlerësimin e tij, saqë ai deklaroi se UNMIK-u me këtë hap i krijoi themelet e shtetit të Kosovës.³

Rindërtimi si zhvillim. Në përgjithësi është vlerësuar se sfida më urgjente me të cilat ndeshen administratat ndërkombëtare në administrimin e territoreve të dala nga lufta, ka të bëjë me përpjekjet për rimëkëmbjen e infrastrukturës së rrënuar ekonomike në përgjithësi. Këso situatash paraqesin një sfidë serioze për këto administrata, sepse ato nuk mund të ndërmarrin asnjë hap për të vendosur konturat e organizimit të jetës sociale në përgjithësi, mbi një bazë ekonomike të rrënuar.

¹ ICG, *Kosova: Një strategji për zhvillimin ekonomik*, Raporti 123 për Ballkanin, Prishtinë/Bruksel, 19 dhjetor, 2001, f. 12.

² Po aty, f. 12.

³ Stahn, *The Law and Practice of International Territorial Administration*, 2008, p. 320.

Në vitin 1999, fokusi kryesor i bashkësisë ndërkombëtare dhe programeve të saj ishte i orientuar në rindërtimin sesa në zhvillimin ekonomik⁴. Rreth 70% e fondeve të rindërtimit vinin nga vendet anëtare të UE-së, që kryesisht vepronin përmes Komisionit Evropian. Si përgjegjëse për menaxhimin e programeve kryesore të ndihmës të UE-së në Kosovë ishte Agjencia Evropiane për Rindërtim (AER), e cila pavarësisht që ishte agjenci financuese e UE-së, megjithatë ishte e shkëputur nga Shtylla IV. Gjatë periudhës 2000-2001, AER ishte përgjegjëse për 547 milion €⁵. Me këtë shumë të madhe, AER pati përparësi rindërtimin e infrastrukturës së shpërfillur të Kosovës, duke u përqendruar tek energjia, strehimi, transporti dhe furnizimi me ujë si dhe tek projektet ndihmëse në bujqësi, zhvillimin e ndërmarrjeve, shëndetësi, dhe qeverisjen lokale/shoqërinë civile⁶. Në fakt, projekti ndërkombëtar i shtetndërtimit në Kosovë në aspektin e investimeve për kokë banori, ishte njëri nga projektet më gjithëpërfshirëse i parë ndonjëherë⁷.

Një specifike që duhet theksuar lidhur me mbështetjet për rindërtim, ka të bëjë me atë se donacionet kryesore të organizatave të ndryshme ishin të pajisura dhe të specializuara vetëm për ndihmë emergjente dhe jo për zhvillim. Kjo bëri që ndihma e emergjencës të kthehej në ndihmë për rindërtim dhe zhvillim vetëm në vitin 2000⁸. Prandaj, edhe pse gjatë kësaj kohe ishin vënë në dispozicion burime të konsiderueshme ndërkombëtare për Kosovën, prapë se prapë, zhvillimi ekonomik (përtej rindërtimit të infrastrukturës fizike dhe kornizave makroekonomike), u bë një politikë e UNMIK-ut vetëm më vonë. Për shembull, raporti i qershorit i vitit 2003 nga ana e Sekretarit të Përgjithshëm Annan për UNMIK-un, nuk i referohej zhvillimit ekonomik si një strategji afatgjate deri në paragrafin 42, pastaj përmbante shtatë paragrafë relativisht të përgjithshëm të fokusuar kryesisht rreth financave publike dhe privatizimit⁹. Pas kësaj, mbështetja e fuqishme përmes ndihmës ndërkombëtare gjatë pesë viteve të para të ndërhyrjes së jashtme në Kosovë, ndryshoi në mënyrë cilësore, nga një ndihmë emergjente humanitare në ndihmë afatgjatë për rindërtim dhe zhvillim. Kjo barrë fillo ti bartej UE-së, ku pas Samitit të Selanikut të vitit 2003 dhe përmes mekanizmave të "Paktit të Stabilitetit për Evropën Juglindore" dhe "Marrëveshjes për Stabilizim dhe Asocim", përkushtimi i UE-së për të rritur ndihmën ekonomike dhe bashkëpunimin në të gjithë rajonin e Ballkanit intensifikoi dhe transferoi përgjegjësinë më të madhe për ndihmë ekonomike nga agjentët e OKB-së në programet e UE-së¹⁰.

Infrastruktura ligjore dhe institucionale. Kur jemi te analizimi i çështjeve rreth zhvillimit ekonomik, pa dyshim, faktorët më të rëndësishëm për ngritjen e këtij sektori në Kosovën e pas luftës konsideroheshin investimet e jashtme dhe donacionet e organizatave ndërkombëtare. Mirëpo, ka qenë evident fakti që çdo drejtim i investitorëve dhe

⁴ Richmond & Franks, *Co-opting the Liberal Peace: Untying the Gordian Knot in Kosovo*, 2007, p. 16.

⁵ ICG, *Kosova: Një strategji për zhvillimin ekonomik*, Raporti 123 për Ballkanin, Prishtinë/Bruksel, 19 dhjetor, 2001, f. 13.

⁶ Po aty, f.114.

⁷ Augestad Knudsen, *Privatization in Kosovo*, 2010, p. 10.

⁸ ICG, Raporti 123 për Ballkanin, Prishtinë/Bruksel, 19 dhjetor, 2001, f. 13.

⁹ Henry H. Perritt, *Final Status for Kosovo and Economic Sustainability*, Chicago-Kent College of Law, March 2004, pp. 268-269.

¹⁰ Narten, *Assessing Kosovo's Postwar Democratization Between External Imposition and Local Self-Government*, p.146.

donacioneve të jashtme në Kosovë ka qenë përcjellur me një pasiguri të dyfishtë: atë që lidhej me mungesën e sovranitetit të Kosovës dhe paqartësinë tjetër, atë të mos precizimit të politikave për zgjidhjen e statusit final të saj. Këto dy paqartësi, detyrimisht reflektonin një pasiguri tek këta investitor.

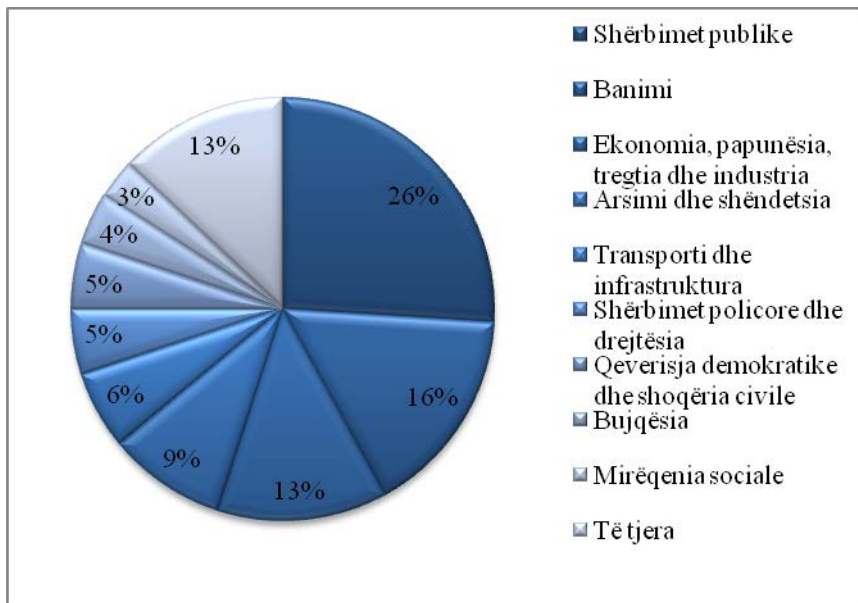
Meqenëse çështja e një juridiksioni afatgjatë nuk ishte zgjidhur, lindi nevoja për masa që do të garantonin pasurinë dhe të drejtat e investuesve. Nëse disa çështje të pronësisë dhe juridiksionit nuk mund të zgjidheshin, duhet të gjendej një rrugë kreative për krijimin e një mjedisi ligjor të përkohshëm. P.sh. Banka Botërore e kishte gjetur një zgjidhje për problemin që Kosova nuk është një shtet sovran. Meqenëse UNMIK-u ishte krijuar në bazë të një mandati të OKB-së, për Bankën Botërore, megjithatë, ka qenë i mundshëm dërgimi i ndihmave dhe ushtrimi i një sërë veprimtarive tjera¹¹. Me kalimin e kohës, UNMIK-u filloj ta zgjidhte këtë problem përmes miratimit të një numri të konsiderueshëm të rregulloreve, të cilat e përmirësuan infrastrukturën ligjore dhe institucionale për një zhvillim eventual ekonomik.

Sa i përket infrastrukturë institucionale ekzistuese të asaj kohe, donatorët ishin përqendruar gjithnjë e më tepër në ngritjen e kapaciteteve të këtyre institucioneve. Ndihma teknike vlerësohet rreth 742 milion € ose 29% të zotimeve të donatorëve nga qershori 1999 deri në fund të vitit 2003 (ose 525 milion € ose 25 % të donacioneve për të njëjtën periudhë). Megjithatë, deri në vitin 2004, ndihma teknike llogaritej rreth 71 % e të gjitha zotimeve të donatorëve (ose 46 % të donacioneve të përgjithshme në vitin 2004). Ky ndryshim pasqyron transferin e vazhdueshëm të përgjegjësisë nga UNMIK-u drejt IPVQ-ve dhe theksin e vënë në Standardet për Kosovën, në forcimin e institucioneve vendore, përmirësimin e kapacitetit të politikave ekonomike të institucioneve të Kosovës, si dhe forcimin e zhvillimit të programit për investime publike dhe menaxhim të buxhetit.¹² Një pasqyrë e përqindjes së investimeve të jashtme në sektorët përkatës të ekonomisë kosovare është paraqitur në figurën 11.

Figura 1. Shpenzimet e donatorëve në sektorë të ndryshëm në periudhën e rindërtimit:
1999-2004

¹¹ ICG, Raporti 123 për Ballkanin, Prishtinë/Bruksel, 19 dhjetor, 2001, f. 16-17.

¹² Banka Botërore, *Asociacioni Ndërkombëtar për Zhvillim, Shkresa e përkohshme për Kosovën për periudhën VF06-VF07*, Raporti Nr. 35262-XK, 30 Mars 2006, f. 15.



(Burimi: Banka Botërore, *Asociacioni Ndërkombëtar për Zhvillim, Shkresa e përkohshme për Kosovën për periudhën VF06-VF07*, Raporti Nr. 35262-XX, 30 Mars, 2006, f.16.)

Në saje të veprimtarisë rindërtuese të UNMIK-ut dhe veçanërisht në këtë drejtim, mund të nxirret një përfundim se ky mision, në përgjithësi, ka bërë që infrastruktura institucionale në Kosovë të jetë mjaft e zhvilluar dhe efikase, sidomos duke pasur parasysh faktin se çdo gjë kishte filluar nga zeroja. Mirëpo, problemet më të theksuara kishin të bëjë me infrastrukturën ligjore. Si pengesa më sfiduese në këtë drejtim ka qenë ajo që lidhej me mos definimin e statusit final. Për më tepër, problemet që vinin nga paqartësia e statusit final të Kosovës, më së tepërmi janë reflektuar gjatë procesit të privatizimit.

Privatizimi dhe komercializimi. Privatizimi, si një çështje "fundamentalisht politike", është bërë një *strategji ekonomike* e projekteve për shtetndërtimin ndërkombëtar, duke e avancuar atë në të gjithë botën si një pjesë vetë-evidente e tezës së paqes liberale¹³. Po ashtu, privatizimi konsiderohet që e kryeson listën e reformave ekonomike më neo-liberale¹⁴. Mbi këtë bazë është konsideruar që përfshirja e bashkësisë ndërkombëtare përmes UNMIK-ut në procesin e privatizimit në Kosovë, ka qenë një shembull i qartë i shtetndërtimin ndërkombëtar¹⁵, dhe se njëra nga synimet kryesore të saj ka qenë ngritja dhe funksionalizimi i një ekonomie mbi parimet neo-liberale.

Ndër hapat e parë që u ndërmorën në lidhje me privatizimin dhe komercializimin në Kosovë nga Departamenti i Tregtisë dhe Industrisë (DTI), si bartës i kësaj përgjegjësi, ishte regjistrimi dhe fillimi privatizimit të ndërmarrjeve shoqërore (NSH). Në fillim të

¹³ Knudsen, *Privatization in Kosovo*, 2010, p. 10.

¹⁴ Henry H. Perritt, *Final Status for Kosovo and Economic Sustainability*, Chicago-Kent College of Law, March 2004, p. 287.

¹⁵ Knudsen, p.9.

misionit të UNMIK-ut, kishte rreth 350 NSH-të me mbi 60.000 të punësuar¹⁶ që duheshin privatizuar. Ky proces përbënte një sfidë shumë serioze, sepse përveç që duhej të kalohej një tranzicion i vështirë i reformimit të sektorit ekonomik, nga një ekonomi e planifikuar në një ekonomi të tregut, sfida bëhej edhe më komplekse për shkak se nuk dihej saktë se kush mund të kishte pronësi të vërtetë mbi këto ndërmarrje: IPVQ-të, UNMIK-u, apo RFJ-ja. Kjo erdhi si rezultat i paqartësisë së statusit të ardhshëm të Kosovës dhe referimit që i bëhej nga ana e Rezolutës 1244 integritetit dhe sovranitetit territorial të RFJ-së mbi Kosovë. Ky problem ngriti një pyetje të rëndësishme ligjore në lidhje me atë se kush kishte autorizim për të privatizuar këto ndërmarrje.

Duke i referuar Rezolutës 1244, RFJ kërcënonte investitorët potencialë me padi nëse UNMIK-u do të vazhdonte më tutje me shitjen e NSH-ve. Për këto arsye, përpjekjet ndërkombëtare për të privatizuar NSH-të u ndërprejnë. Kjo situatë politike, me probleme të tilla ligjore bëri që investitorët e huaj të mos ishin të gatshëm të rrezikojnë paratë e tyre në një territor të pllakosur nga pasiguria¹⁷.

Megjithatë, përkundër këtyre sfidave, avokatët ndërkombëtarë nga vendet perëndimore promovuar një numër të qasjeve të ndryshme për të privatizuar NSH-të e Kosovës. Për shembull, Shtylla IV e UNMIK-ut e themeloi Agjencinë Kosovare të Mirëbesimit (AKM) më 13 qershor 2002. AKM-ja kishte një personel dhe juridiksion të plotë të ndarë nga UNMIK-u, dhe atë me qëllim që të zbuste rrezikun e përgjegjësisë së OKB-së. AKM-ja kishte të drejtën për të administruar NSH-të dhe privatizimin e tyre e bëri përmes dy metodave: “spin-off-it” dhe “likuidimit”¹⁸. Madje, pasi privatizimi ishte opsioni i parapëlqyer i DTI-s, në mënyrë që të kapërcehen pengesat ligjore që pengojnë privatizimin e menjëhershëm, DTI-ja ka propozuar “komercializimin” si një fazë e përkohshme e ringjalljes së NSH-ve. Kjo qasje nënkupton mundësimin e kontratave menaxheriale me kompanitë që aktualisht veprojnë në sektorët përkatës. Kjo lejon përdorimin e asetëve për një kohë të përcaktuar duke mos paragjykuar pronësinë përfundimtare¹⁹.

Duke u bazuar në faktin që UNMIK-u kishte bërë përpjekje për zhvillimin e ekonomisë kosovare konform parimeve neo-liberale, kjo do të thotë se ai kishte ndjekur një strategji sipas parimeve të tezës së paqes liberale. Kjo strategji i ka shtyrë kritikët e kësaj teze t’i adresojnë një numër sfidash me të cilat bashkësia ndërkombëtare ka qenë ndeshur dhe të cilat, sipas tyre, nuk janë evituar në shkallë të kënaqshme.

Siç shprehej Richmond, ishte e qartë se zhvillimi ekonomik në Kosovë ishte kapur në një situatë paradoksale: asnjë zhvillim pa status, dhe asnjë status pa zhvillim²⁰. Sipas Richmond, zhvillimi ekonomik në Kosovë ka qenë larg përputhjes me parimet e tezës së paqes liberale. Për shembull, duke u përpjekur arritjen e një transformimi të përsheptuar nga një ekonomi socialiste postkomuniste në një version hiper-kapitalist formal të bazuar

¹⁶ ICG, Raporti 123 për Ballkanin, Prishtinë/Bruksel, 19 dhjetor 2001, f. 19.

¹⁷ Coehlo, 2008, p. 363.

¹⁸ Bernhard Knoll, *From Benchmarking to Final Status? Kosovo and The Problem of an International Administration's Open-Ended Mandate*, The European Journal of International Law Vol. 16 no.4, EJIL, 2005, p. 652.

¹⁹ ICG, raporti 123, f.20.

²⁰ Richmond & Franks, *Co-opting the Liberal Peace: Untying the Gordian Knot in Kosovo*, 2007, p. 16.

në ekonominë e tregut, është rritur në fakt shkalla e papunësisë dhe e varfërisë, si dhe ka pasur një rënie në standardin e jetesës²¹.

Pavarësisht kësaj, është e nevojshme që përpjekjet për zhvillimin ekonomik të Kosovës të bëhen nën dritën e një analize të treguesve makroekonomik, përmes të cilëve, mund të masim edhe shkallën e performances së kësaj veprimtarie, duke nxjerrur në pah sukseset dhe dështimet e këtij misioni në sajë të këtij aktiviteti.

3 Treguesit makroekonomik të zhvillimit

Matja e performancës së zhvillimit dhe qëndrueshmërisë ekonomike në Kosovë është shumë me rendësi. Rezultatet e nxjerrura, ofrojnë mundësi për konstatim real të shkallës së performances së UNMIK-ut dhe IPVQ-ve në lidhje me përpjekjet e tyre për ngritjen dhe zhvillimin e sektorit ekonomik në Kosovën e pas luftës. Ndër treguesit më të rëndësishëm makroekonomik të matshëm gjatë administrimit të saj nga UNMIK-u, janë: niveli i GDP-së, politikat monetare, si dhe gjendja e importit dhe eksportit (bilanci tregtar).

Niveli i GDP-së: Sipas Bankës Botërore, në nëntor 2000, prodhimi i përgjithshëm vendor (GDP) në Kosovë ishte 3 miliardë marka gjermane DM, (1.4 miliardë US\$), apo rreth 1,400 DM për capita (për banorë). Kjo përbënte një rritje mjaft të lartë, krahasuar me 840 DM për capita, në nëntor 1999²². Me kalimin e kohës, GDP-ja në Kosovë gjatë periudhës 2004-2008 ka qenë ngritur prej 2,912.5 milion € në 3,851.4. GDP për banorë është rritur prej 1,427 € në vitin 2004 në 1,789 € në vitin 2008²³.

Në planin financiar: Edhe pse në Kosovë funksiononte Autoriteti Bankar, megjithatë, ky institucion nuk ishte përgjegjës për politikën monetare, pasi që Kosova përdorte njësinë monetare të një vendi tjetër (Gjermanisë). Përndryshe, ajo kryente shumicën e funksioneve të një banke qendrore të tipit perëndimor. Përgjegjësia e saj kryesore ishte licencimi i bankave dhe institucioneve financiare. Po kështu, ajo ofronte shërbime bankare dhe të pagesave për entet publike, si dhe mundësimin e pagesave kombëtare dhe shërbimeve të tjera të pagesave për bankat e Kosovës²⁴. Pas njësisë monetare të markës, bashkësia ndërkombëtare, *de facto*, miratoi me shpejtësi euron si monedhën vendase, duke e vendosur Kosovën në territorin e “Eurozonës”, madje edhe përpara shumë shteteve anëtare të UE-së²⁵.

Gjendja e Importit dhe eksportit: Regjimi tregtar në Kosovë gjatë administrimit të saj nga UNMIK-u, ishte plotësisht i liberalizuar pa kufizime për import dhe export, por edhe pa nxitje dhe stimulime të eksportit²⁶. Kosova ka importuar pothuajse të gjitha mallrat e konsumit dhe lëndëve të para në periudhën pas luftës pasi që nuk kishte rifilluar prodhimi në atë periudhë. Shumica e importeve ishin të nevojshme fillimisht në përpjekjet për

²¹ Po aty, p. 17.

²² ICG, raporti 123, f.2.

²³ Enti i Statistikave të Kosovës, Gross Domestic Product in Kosovo 2004 – 2009, Series 3: Economic Statistics, Pristina, November 2010.

²⁴ Po aty, f. 17.

²⁵ Coelho, 2008, pp. 358-359.

²⁶ Riinvest, *Investimet e Jashtme Direkte në Kosovë, Politika Ekonomike*, Raport hulumtues, 19 Shtator, 2002, faqe 24.

rindërtimet e mëdha të financuara kryesisht nga dërgesat prej diasporës dhe ndihmave të huaja. Megjithatë, me zgjerimin e aktivitetit ekonomik në Kosovë, shumica e makinerisë dhe lëndës së parë ishin të importuara. Këto investime kanë stimuluar prodhimin vendor dhe ngadalë e kushtëzuan fillimin e zëvendësimit të importit. Megjithatë pasi që ekonomia u rrit, po ashtu edhe importi u rrit në mënyrë të qëndrueshme. Importi u rrit në mënyrë të vazhdueshme prej 2005-2008 nga 1.16 miliard € 1.93 billion € ose 66,6%²⁷.

Në anën tjetër, eksportet e Kosovës pothuajse nuk ekzistonin menjëherë pas luftës në vitin 1999. Sidoqoftë, ato përfundimisht u nxitën pas aktivizimit të kapaciteteve të prodhimit në Kosovë, kryesisht pas procesit të privatizimit të disa prej fabrikave kryesore të tilla si Feronikeli. Por, gjatë gjithë kohës, eksportet ishin ende në nivel shumë të ulët (si pjesë e GDP-së ishin më pak se 6%), megjithatë, midis 2005 dhe 2008 ato u rritën nga 56 milion € në 199 milion €, një rritje prej 253%²⁸. Por në çoftë se analizojmë periudhën 2005-2009, vërejmë se eksportet e mallrave të saj mbulohehin vetëm me 10,3% të importit të saj të mallrave në 2008²⁹. Kjo ka bërë që bilanci tregtar në Kosovën gjatë administrimit të UNMIK-ut të jetë kryesisht negativ. Një gjendje e importeve dhe eksporteve e paraqitur grafikisht është dhënë në figurën 2.

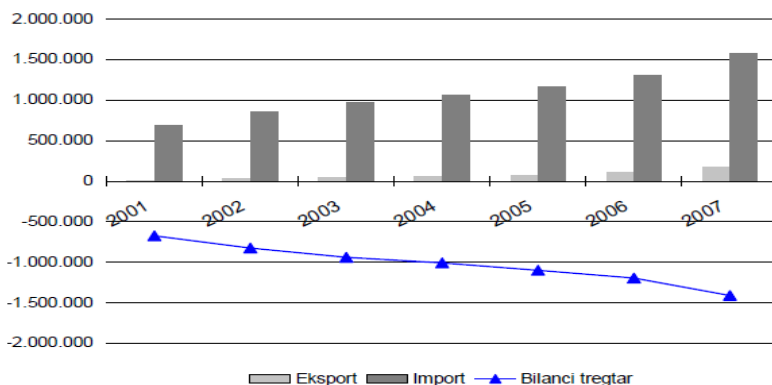


Figura 2. Qarkullimi në tregtinë e jashtme sipas viteve në vlerë.
(Burimi: Enti i Statistikës së Kosovës, Statistikat e tregtisë së jashtme, Seria 3, 2007, f.9)

4 Konkluzion

Nga shtjellimet e më sipërme lidhur me përpjekjet për ndërtimin e komponentëve shtetndërtues në Kosovë, mund të nxirren disa përfundime specifike. Së pari, komplet qasja e UNMIK-ut e aplikuar në realizimin e këtij procesi ka qenë unike në krahasim me praktikat tjera të shtetndërtimit ndërkombëtar. Meqenëse shtetndërtimi në rastin e Kosovës u realizua në kuadër të një sërë rrethanash shumë specifike, bëri që Kosova të jetë një praktikë unike në këtë drejtim. Kjo natyrë unike ka bërë që të ndiqen edhe

²⁷ The World Bank, *Kosovo Quarterly Economic Briefing 2009, (1)*, Kosovo Exports and Imports, 2005-2009.

²⁸ The World Bank, *KQEB*, 2009.

²⁹ Po aty.

strategji më specifike shtetndërtuese, duke aplikuar edhe qasje të tilla që kanë shkuar gjithnjë e më tepër larg çdo praktike standarde shtetndërtuese.

Lidhur me politikat e UNMIK-ut për zhvillimin ekonomik të Kosovës, mund të konstatohet se ato kanë qenë më tepër të një natyre “infuzioniste”. Këto politika kanë qenë të orientuara më tepër drejt rindërtimit sesa drejt krijimit të një baze për një zhvillim ekonomik të qëndrueshëm. Andaj, bazuar në këto politika të UNMIK-ut, mund të vlerësojmë se i vetmi komponent zhvillimor i ekonomisë kosovare ka qenë rindërtimi, pra “rindërtimi si zhvillim”.

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Alba Gerdeci
Universiteti Epoka, Shqipëri

Përgjegjësia për të mbrojtur: sovraniteti dhe të drejtat e njeriut

Abstrakt

Rastet e përsëritura të shkeljeve të rënda dhe sistematike të të drejtave të njeriut kanë gjeneruar vazhdimisht debat mbi teorinë dhe praktikën e ndërhyrjes humanitare. Përballë paafatësisë së OKB-së, për të parandaluar ose për ti dhënë fund tragjediave të tilla humanitare si në Ruanda, Burundi, Bosnje, Kosovë, Darfur, Siri e gjetkë, komuniteti ndërkombëtarë ka filluar të mbrojë dhe zbatojë një të drejtë për të ndërhyrë me qëllim ndalimin e shkeljeve masive të të drejtave të njeriut, ndërkohë që parimi i respektimit të sovranitetit vazhdon të mbetet një parim themelor i së drejtës ndërkombëtare. Pikërisht kjo përplasje mes dy normave atë të respektimit të të drejtave të njeriut dhe sovranitetit qëndron në themel të problematikës së ndërhyrjes humanitare.

Në këtë kuadër, qëllimi i studimit në fjalë është të analizojë lindjen dhe zbatimin e doktrinës së “përgjegjësisë për të mbrojtur” si dhe kontributin e kësaj të fundit në debatin që rrethon ndërhyrjen humanitare. Studimi nxjerr në pah vlerat ideologjike dhe normative të kësaj norme, në funksion të zgjidhjes së dilemës mes të drejtave të njeriut dhe sovranitetit.

Keywords: *Ndërhyrja humanitare, përgjegjësia për të mbrojtur, sovraniteti, të drejtat e njeriut*

1. HYRJE

Në rast se ndërhyrja humanitare, përbën një shkelje të papranueshme të sovranitetit, atëherë si duhet ti përgjigjemi Ruandës, Srebrenicës – shkeljeve masive dhe sistematike të të drejtave të njeriut të cilat ofendojnë çdo parim të njerëzimit tonë të përbashkët?

Annan¹

Kjo thënie tejet e cituar e Annan, nxjerr në pah dilemën qëndrore të ndërhyrjes humanitare, tensionin mes dy normave konkurruese të së drejtës ndërkombëtare: sovranitetit dhe të drejtat e njeriut. Në njërën anë, parimi i respektimit të sovranitetit urdhëron mos ndërhyrjen në çështjet e brendshme, të cilat konsiderohen nën juridiksionin ekskluziv shtetëror dhe në anën tjetër, qëndron shqetësimi i komunitetit ndërkombëtarë, i cili nuk mund të qëndrojë duarkryq përballë shkeljeve masive dhe sistematike të të drejtave të njeriut nga shteti.

Tema e ndërhyrjes humanitare në përgjithësi dhe sidomos e ndërhyrjes me forca ushtarake për qëllime humanitare është një ndër tema më të diskutuara në fushën e marrëdhënieve ndërkombëtare, sidomos në kuadrin e luftës kundër terrorizmit dhe invazionit të Irak-ut në vitin 2003. Në qëndër të debatit kanë qënë dimesionet morale, ligjore dhe politike të ndërhyrjes humanitare.

Pavarësisht nga ky diskutimi i gjerë, arritja e një konsensusi mbi parimet e ndërhyrjes humanitare dukej i pamundur. Në vitin 1999, Sekretari i Përgjithshëm i OKB-së në mbledhjen e 54 të Asamblesë së Përgjithshme, sfidoi vendet të parandalojnë “një tjetër Ruanda” dhe të arrijnë sa më shpejt një konsensus mbi ndërhyrjen humanitare. Si rezultat në vitin 2000, qeveria kanadeze themeloi Komisionin Ndërkombëtarë mbi Ndërhyrjen dhe Sovranitetin Shtetëror (KNNSSH), si një komision i pavarur, i cili në vitin 2001, publikoi Raportin “Përgjegjësia për Mbrojtur” (PPM).² Zhvillimi normative më i rëndësishëm i konceptit të “Përgjegjësisë për të Mbrojtur” ndodhi në miratimin që kryetarët e shteteve dhe qeveritë i dhanë në vitin 2005, në nenin 138 dhe 139 të “Dokumentit mbi Përfundimet e Samitit Botëror”.³ Këshilli i Sigurimit që atëherë i është referuar PPM disa herë, në dy rezoluta mbi mbrojtjen e civilëve në konfliktet e armatosura dhe më pas në Rezolutën 1706, të vitit 2006,⁴ mbi Darfur, e cila është rezoluta e parë që lidh PPM me një konflikt konkret.

¹ Kofi Annan, “We the Peoples: The Role of the UN in the 21st Century,” United Nations Department of Public Information (2000), p. 48.

² International Commission on Intervention and State Sovereignty, “The Responsibility to Protect” 2001 <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

³ United Nations, General Assembly, 2005 World Summit Outcome, 31, par. 138, 139, (15 September 2005) <http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005%281%29.pdf>

⁴ United Nations Security Council - Resolution 1706 (2006) <http://responsibilitytoprotect.org/files/Resolution%201706%20Darfur%20July%202006.pdf>

Koncepti i PPM është konsideruar nga shumë autorë si zhvillimi më i rëndësishëm në kuadër të konceptit të sovranitetit që nga Traktati i Vestfalisë në vitin 1648⁵ si dhe zhvillimi normativ më dramatik i së tashmes.⁶

Sipas PMM, sovraniteti shtetëror nënkupton përgjegjësi, në këtë kuadër, shteti ka përgjegjësinë për të mbrojtur popullsinë e tij nga shkeljet masive të të drejtave të njeriut. Në rast se shteti nuk mundet ose neglizhon atëherë kjo përgjegjësi i takon komunitetit ndërkombëtarë.

Në këtë kuadër, studimi trajton sovranitetin si një parim ligjor i cili daton përpara regjimit të drejtave të njeriut dhe së dyti problematikat mbi të drejtat e njeriut, të cilat sjellin një nevojë për riinterpretim të sovranitetit. Me tej, analizohet lindja dhe zbatimi i doktrinës së “përgjegjësisë për të mbrojtur” si dhe kontributi i saj në debatin që rrethon ndërhyrjen humanitare. Studimi nxjerr në pah vlerat ideologjike dhe normative të kësaj norme, në funksion të zgjidhjes së dilemës mes të drejtave të njeriut dhe sovranitetit.

2. SOVRANITETI

Koncepti i sovranitetit qëndron në themel të sistemit ndërkombëtar, si “norma bazë” mbi të cilën shoqëria e shteteve funksionon, si guri i themelit të Kartës së Kombeve të Bashkuara dhe “kushtetutës globale”.⁷ Sipas këtyre pikëpamjeve, e drejta ndërkombëtare, organizatat ndërkombëtare dhe institucionet e tjera të shoqërisë ndërkombëtare pajtohen me qëndrimin se rendi ndërkombëtarë mund të sigurohet, vetëm në rast se shtetet respektojnë sovranitetin e njëri-tjetrit.⁸ Por këto pikëpamje tashmë përballen me argumente të tjera të cilat konsiderojnë si parim kardinal mbrojtjen e të drejtave të njeriut, duke e shëndërruar sovranitetin në një koncept jo më absolut.

Koncepti i sovranitetit është kritikuar jo pak herë. Në pjesën më të madhe kritikata lidhen me aspektin absolute ose jo të tij, nëse përbën vetëm një autoritet legjitim apo kërkon dhe pushtet për të ushtruar këtë autoritet dhe rolin që kanë normat ekzistuese mbi sovranitetin në zgjidhjen e çështjeve problematike aktuale. Diskutimet fokusohen edhe mbi raportin e rëndësisë mes dy aspekteve kryesore të sovranitetit, atij të brendshëm dhe të jashtëm. Përballë vështirësisë për të gjetur një përkufizim të vetëm të sovranitetit, studiuesit janë fokusuar në mënyrën sesi funksionon dhe si mund të ndryshojnë nën efektin e rrethanave të reja, sesa në thelbin e tij. Ndaj në përgjithësi ata bien dakort se që kur sovraniteti hyri në shkencat politike, ai nuk ka pasur një përkufizim të pranuar ndërkombëtarisht.

2.1 Qasja ligjore ndaj sovranitetit

⁵ Anne-Marie Slaughter from Princeton University – Accessed April, 2014
http://en.wikipedia.org/wiki/Responsibility_to_protect#cite_note-17

⁶ Thakur, R. and Weiss, T. G. (2009) “R2P: From Idea to Norm—and Action?” *Global Responsibility to Protect*, vol. 1 pg.22

⁷ Ayoob, M. (2002) “Humanitarian Intervention and State Sovereignty,” *The International Journal of Human Rights*, vol. 6, no. 1 Retrieved from
<http://kirstenfisher.com/wp-content/uploads/2013/12/Ayoob-Humanitarian-Intervention-and-State-Sovereignty.pdf>

⁸ Ibid. fq 81

Ekzistojnë qasje të ndryshme ndaj sovranitetit si “sovraniteti si autoritet”, “sovranitet i ndarë” dhe “sovranitet si përgjegjësi”. Stephen Krasner ka identifikuar të paktën katër kuptime të ndryshme të sovranitetit: sovraniteti Vestfalian, përkufizuar si përjashtimi i përfshirjes së aktorëve të huaj në çështjet e brendëshme, sovraniteti shtetëror, përkufizuar si organizimi i pushtetit public në shtet dhe niveli i kontrollit i ushtruar nga këto autoritete; sovraniteti ligjor ndërkombëtar i cili nënkupton njohjen reciproke të shteteve njohjen reciproke të shteteve dhe sovraniteti i ndërlidhjes, i cili i referohet aftësisë së autoriteteve publike të kontrollojnë lëvizjet përtej kufijëve.⁹

Sovraniteti konceptohet si një kombinim i dy elementëve: të jashtëm dhe të brendshëm, kontroll i brendshëm dhe autonomi e jashtme, të cilat bashkohen në një terminologji të vetme “sovraniteti si autoritet”. Ky përkufizim vë në dukje aftësinë e sovranitetit shtetëror për të ndaluar ndërhyrjet e jashtme.¹⁰ Në sistemin “Vestfalian”, si cili mori jetë në shekullin e XVII, sovraniteti nënkupton “identitetin ligjor të shtetit në të drejtën ndërkombëtare”.¹¹ Pra, shteti është mbajtësi i vetëm i sovranitetit dhe ushtron autoritet mbi popullin dhe territorin. Juristët argumentojnë se shteti ka sovranitet kur mund të veprojë në mënyrë të pavarur ose pa kontrollin e shteteve të tjera.¹² Parimi i barazisë sovraane parashikohet në nenin 2.1 të Kartës së Kombeve të Bashkuara dhe norma e mos-ndërhyrjes në nenin 2.4 dhe 2.7 të saj. Sipas Kartës, e cila konsiderohet si burimi ligjor më i rëndësishëm në lidhje me përdorimin e forcës, një shtet sovran ushtron juridiksion ekskluziv dhe të plotë mbi kufijtë e tij territorial, ndërkohë që shtetet e tjera kanë detyrimin e mos-ndërhyrjes në çështjet e brendëshme. Pas Luftës së Dytë Botërore, anëtarësia në OKB u konsiderua si simbol i sovranitetit të pavarur shtetëror dhe vulosje e pranimit nga komuniteti ndërkombëtar. Siç parashikohet në Kartë, kjo organizatë synon ruatjen e paqes dhe sigurisë ndërkombëtare mbi bazën e mbrojtjes së integritetit territorial, pavarësisë politike dhe sovranitetit shtetëror të anëtarëve.

Sovraniteti shpesh lidhet me normën e mos-ndërhyrjes. Kjo konsiderohet si baza e mirëfunksionimit të komunitetit ndërkombëtarë. Siç vërehet në Kartën e OKB-së, shtetet me vullnet të lirë, marrin përsipër të mos përdorin forcë kundër një shteti tjetër, ashtu siç kanë rënë dakort për detyrime të tjera ndërkombëtare, si zgjidhja paqësore e mosmarrëveshjeve, respektimi i të drejtave të njeriut dhe i së drejtës së vetëvendosjes. Megjithatë, siç jemi në dijeni, problem kryesor i së drejtës ndërkombëtare është pikërisht siguri i zbatimit të angazhimeve ndërkombëtare. Në fakt norma e mos ndërhyrjes nuk ka qënë kurrë absolute në të shkuarën. Shtetet kanë ndërhyrë në çështjet e shteteve të tjera, për shkaqe nga më të ndryshmet si interesa strategjik, siguri kombëtare dhe qëllime humanitare. Parimi i mosndërhyrjes është dobësuar së fundmi edhe si rezultat i riinterpretimit të sovranitetit.

2.2 Evolucion i interpretimit të parimit të sovranitetit

⁹ Zellman, A. (2008) Review of Krasner, S. D. (1999) *Sovereignty: Organized Hypocrisy*, Princeton: Princeton University Press Accessed April 2014 <http://arielzellman.wordpress.com/2008/02/10/review-sovereignty-by-stephen-krasner>

¹⁰ Ibid. supra note 7. Fq 82

¹¹ International Commission on Intervention and State Sovereignty, “*The Responsibility to Protect*” 2001 fq.12

¹² Slomanson, R. (2007) *Fundamental Perspectives on International Law*, 5th edn, fq 234

Përkufizimi i sovranitetit ka evoluar në sajë të sfidave të reja, si zgjerimi i kërcënimeve kundër paqes dhe sigurisë kombëtare, rënies së autoritetit shtetëror, rëndësia e sovranitetit popullor dhe kërkesat e reja të vetëvendosjes.¹³ Në të njëjtën kohë, ndërhyrjet pas vitit 1990, risollën vëmendjen në konceptimin e sovranitetit nga “sovraniteti si pushtet” në “sovranitet si përgjegjësi”.

Francis Deng ishte i pari cili në vitin 1993, artikulojë qasjen e “sovranitetit si përgjegjësi”, iqajse e cila sfidonte parimin e mos - ndërhyrjes.¹⁴ Gjithësesi, ishte raporti KNNSSH në 2001, i cili vendosi në qendër këtë parim, në kuadër të “përgjegjësisë për të mbrojtur”. Sipas Henry Shue, shtetet sovraane krahas të drejtave kanë edhe detyrime. Këto detyrime kushtëzojnë sjelljen e tij, pra ata kanë një “sovranitet të kushtëzuar” me respektimin e të drejtave të njeriut të popullsisë së tyre.¹⁵

Shumë studiues tashmë bien dakort, se sovraniteti nuk është absolute dhe mbrojtja e sovranitetit nuk mund bëhet duke pretenduar se shteti mund të bëjë çtë dojë me popullin e tij.¹⁶ Megjithatë, studiues të tjerë si Henry Kissinger, këmbëngulin se shtetet vendosin vetë mbi mënyrën e duhur për të organizuar sistemin e tyre politik, që do të thotë se kushtet e brendshme nuk duhet të lidhen me rendin ndërkombëtar. Të tjerë argumentojnë se rinterpretimi i sovranitetit si i kushtëzuar çel rrugën për ndërhyrje, gjatë të cilave shtete perëndimore nën petkun e komunitetit ndërkombëtar ndjekin në fakt interesa perëndimore.¹⁷ Pavarësisht këtyre debateve, në përgjithësi ekziston një qëndrim i përbashkët se kuptimi i sovranitetit ka ndryshuar nën dritën e transformimit të marrëdhënieve në komunitetin ndërkombëtar dhe institucionet ndërkombëtare.

Tashmë, koncepti i sovranitetit të kushtëzuar nuk përbën vetëm një debat në ambientet akademike por edhe një praktikë. Veçanërisht pas hyrjes në fuqi të “Përgjegjësisë për të mbrojtur” nga Asambleja e Përgjithshme e OKB-së në 2005.

3. TË DREJTAT E NJERIUT

3.1 Regjimi i drejtave të njeriut

Dokumente të rëndësishë historike si Magna Charta (1215), Deklarata Franceze e të Drejtave të Njeriut (1789) dhe Karta e të Drejtave në Kushtetutën e Shteteve të Bashkuara (1791) përshkruajnë të drejtat e njeriut sit ë pandashme dhe të pamohueshme. Në të njëjtën kohë, teoria e së drejtës natyrore parashikon që të qëniet njërëzore gjatë gjithë

¹³ Weiss, T. G. and Hubert, D. (2001) “*The Responsibility to Protect: Research, Bibliography, Background*,” Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty: fq. 6-12
<http://web.idrc.ca/openbooks/963-1/>

¹⁴ Deng, F. M. (1993) *Protecting the Dispossessed: A Challenge for the International Community*, Washington

¹⁵ Shue, H. (2004) “Limiting Sovereignty,” in J. Welsh (ed.) *Humanitarian Intervention and International Relations*, Oxford: Oxford University Press. Pg. 50

¹⁶ Ibid. supra note.11, pg.8

¹⁷ Ayoob, M. (2002) “Humanitarian Intervention and State Sovereignty,” *The International Journal of Human Rights*, vol. 6, no. 1 Retrieved from
<http://kirstenjfisher.com/wp-content/uploads/2013/12/Ayoob-Humanitarian-Intervention-and-State-Sovereignty.pdf>

kohës kanë disa prerogativa kryesore të cilat lidhen me dinjitetin njerëzor dhe pronësinë.¹⁸ Në gjysëm e dytë të shekullit të XX, lindi ideja e nevojës së një interpretimi të ri të sovranitetit me qëllim sigurimin e respektimit të të drejtave të njeriut. Të drejtat e njeriut përfshijnë mbrojtjen e individëve dhe grupeve nga shkeljet e të drejtave të njohura ndërkombëtarisht nga qeveritë.

Dy dokumentet ligjore bazë të regjimit të të drejtave të njeriut janë Karta e Kombeve të Bashkuara (1945) dhe Deklarata Universale e të Drejtave të Njeriut (1948). Me kalimin e kohës, një sër traktatesh me natyrë të detyrueshme plotësuan me tej regjimin. Me rëndësi të veçantë janë Konventa Ndërkombëtare mbi të Drejtat Civile dhe Politike dhe Konventa Ndërkombëtare mbi të Drejtat Ekonomike, Sociale dhe Kulturore (1966). Të tjera traktate përfshijnë: Konventën mbi Eliminimin e të Gjitha Formave të Diskriminimit Racor (1965) e cila u pasua nga Konventa mbi Eliminimin e të Gjitha Formave të Diskriminimit ndaj Femrave (1979), Konventa kundër Torturës, Trajtimit Çnjerëzor dhe Degradues (1984) dhe Konventa mbi të Drejtat e Fëmijëve (1989).

Karta e Kombeve të Bashkuara i referohet shtatë herë të drejtave të njeriut, së bashku me betimin që anëtarët “zotohen të veprojnë në mënyrë individuale apo kolektive me Organizatën; me qëllim arritjen e synimeve në lidhje me të drejtat e njeriut të parashikuara në nenin 56 të Kartës. Karta kërkon “respektim universal..... të të drejtave dhe lirive themelore të njeriut” në nenin 55 pika c, por nuk specifikon përmbajtjen e të drejtave. Në këtë kuadër, ajo përbën një skelet për drejtat e njeriut.

Deklarata Universale e të Drejtave të Njeriut është përpjekja më e rëndësishme për universalizimin e të drejtave të njeriut. Kjo deklaratë u miratua në vitin 1948 si një instrument jo i detyrueshëm, me qëllim interpretimin e detyrimeve në traktate të ndryshme. Edhe pse deklaratat nuk kanë karakter të detyrueshëm, ato shërbejnë si bazë për sjelljen e shteteve. Vlera e një dokumenti të tillë qëndron në njohjen dhe pranimin nga numër i madh shtetesh. Deklarata është e rëndësishme pasi është i pari dokument i OKB-së i cili parashikon të drejtën e individëve për mbrojtje nga komuniteti ndërkombëtar, në rast mungese të mbrojtjes nga shteti i tyre. Siç u përmend më sipër në vitin 1966 u miratuan dy Konventa, të cilat ishin traktate ndërkombëtare shumëpalëshe me fuqi detyruese. Së bashku, ato kodifikojnë të drejtat dhe liritë themelore të njeriut dhe detyrojnë shtete të vendosin mekanizma efektiv për të shqyrtuar shkeljet në këtë kuadër. Përveç sistemit të OKB-së, ekzistojnë edhe mekanizma rajonal, ndër të cilët sistemi evropian konsiderohet si më i suksesshmi, me Konventën Europiane të të Drejtave të Njeriut dhe mekanizmin e saj të zbatimit Gjykatën Europiane të të Drejtave të Njeriut.

Sidoqoftë, ekzistenca e instrumentave ndërkombëtarë mbi të drejtat e njeriut nuk mjafton për të garantuar mbrojtjen e tyre. Një problem i madh i së drejtës ndërkombëtare është mungesa e mekanizmave të zbatimit. Sjellja konkrete e disa shteteve ndaj qytetarëve të tyre përbën një dëshmi në këtë kuadër.

3.2 Universaliteti i të drejtave të njeriut

Ashtu siç ka evoluar parimi i sovranitetit ka evoluar edhe regjimi i të drejtave të njeriut. Pranimi i përgjegjësisë penale individuale për shkelje të të drejtave të njeriut dhe miratimi

¹⁸ Tuck, R. (1979) *Natural Rights Theories, their Origin and Development*, Cambridge: Cambridge University Press.

i Statutit të Gjykatës Ndërkombëtare Penale janë një zhvillim i rëndësishëm i viteve 90. Siguria njerëzore përbën gjithashtu një zhvillim të së drejtës ndërkombëtare në kuadër të humanizimit të saj.¹⁹ Megjithatë një debat i gjerë ekziston mbi raportin e të drejtave të njeriut dhe relativizmin kulturor. Sipas kritikëve universaliteti i të drejtave të njeriut i parashikuar në dokumentat e ndryshme të sipërpërmendura pasqyron vlerat perëndimore, të cilat vendet liberale ia kanë imponuar vendeve Aziatike, Islamike ose Afrikane me qëllim ndërhyrjen në punët e tyre të brendshme. Thelbi i këtij debati janë të drejta të tilla si liria e besimit fetar, familjes, kulturës, të drejtat e grave. Por universaliteti i të drejtave të njeriut nuk nënkupton që atë çfarë bëhet në rajone të ndryshme, ai nënkupton mbrojtjen që të gjithë qëniet njerëzore në botë gëzojnë, pa dallim feje, race, gjinie, ngjyre.²⁰ Universaliteti nuk nënkupton eliminimim e diversitetit kulturor por të drejta të patjetërsueshme, që kanë në thelb dinjitetin njerëzor dhe që përbëjnë standard minimale të vendosura nga e drejta ndërkombëtare.²¹

3.3 Standard e ndërhyrjes humanitare

Përdorimi i forcës është moralisht i lejueshëm, kur standardet minimale të shkeljeve të të drejtave të njeriut tejkalohen. Në përgjithësi këto kufij vendosen shume lart, duke lejuar ndërhyrjet vetëm për ti dhënë fund shkeljeve masive, të rënda dhe sistematike të të drejtave të njeriut si psh. në rastin e genocidit në Ruandë dhe spastrimit etnik në Bosnje dhe Kosovë. Literatura pranon përdorimin e forcës në rastet e genocidit, spastrimit etnik, krizw e qullimshme ushqimore ose shpërnguljes masive. Dokumenti Përfundimtar 2005 parashikon aplikimin e “Përgjegjësisë për të mbrojtur” në katër lloje krimesh: genocid, krime lufte, krime kundër njerëzimit dhe spastrim etnik.²²

4. EKUILIBRI MIDIS SOVRANITETIT DHE TË DREJTAVE TË NJERIUT

Debati i cili rrethon dy parimet ligjore atë të sovranitetit dhe të të drejtave të njeriut, e bën ndërhyrjen ushtarake me qëllim mbrojtjen e të drejtave të njeriut një sfidë sa herë shkelje të të drejtave të njeriut ndodhin. Ky tension mes dy normave është gjithmonë i pranishëm në debatin që rrethon ndërhyrjen humanitare. Ky tension është gjithashtu në qëndër të kritikave të atyre të cilët janë në favor të mos-ndërhyrjes. Pra në këtë kuadër është e rëndësishme që të gjendet një ekuilibër funksional midis dy parimeve.

Siç u theksua më sipër debati mbi sovranitetin ka në fokus një sër çështjesh si të qëniet absolut ose jo apo nëse nënkupton një autoritet legjitim apo gjithashtu pushtetin për të ushtruar këtë autoritet. Për më tepër, nuk gjendet një gjuhë e përbashkët përsa i përket

¹⁹ Meron, T. (2006) *The Humanization of International Law*, Boston: Martinus Nijhoff Publishers.

²⁰ Higgins, R. (1999) “The Continuing Universality of the Universal Declaration,” in P. Baehr, C. Flinterman and M. Senders (eds) *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*, Amsterdam: Royal Netherlands Academy of Arts and Science: 17–26.

²¹ Badescu, G. (2010). “Humanitarian Intervention and the Responsibility to Protect - Security and human rights” pg 48

²² General Assembly, “2005 World Summit Outcome Document: Resolution,” A/RES/60/1, 24 October.

<http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>

raportit të rëndësisë mes aspektit të jashtëm dhe të brendshëm. Sovraniteti shpesh lidhet me parimin e mos-ndërhyrjes. Ndonëse ky i fundit konsiderohet si një normë bazë e në marrëdhëniet ndërkombëtare, jemi dëshmitar që shtete për arsye të ndryshme ndërhyjnë në çështjet e brendshme të njëri-tjetrit.

Pra, literatura e shqyrtuar, dëshmon se interpretimi tradicional i sovranitetit nuk mjafton më. Nga ana tjetër ashtu siç ka evoluar parimi i sovranitetit edhe rregjimi i të drejtave të njeriut ka evoluar. Përqëndrimi në të drejtat individuale njerëzore është një fenomen i shekullit të njëzet. Në fakt të drejtat e njeriut kanë penetruar në çdo fushë të politik-bërjes si dhe tashmë është njohur përgjegjësia penale ndërkombëtare për shkelje të rënda të të drejtave të njeriut. Megjithatë, universalizimi i drejtave të njeriut përballet me sfidën e relativizmit kulturor, i cili ngadalëson gjetjen e balancës së duhur mes sovranitetit dhe të drejtave të njeriut.

Të qenit anëtar i komunitetit ndërkombëtar, nënkupton që shteti ka detyrimin të respektojë të drejtat e njeriut. Kur ai dështon, atëherë komuniteti ndërkombëtar ka të përgjegjësinë për të vepruar në mbrojtje të të drejtave e të pafajshmëve, dhe kjo nënkupton edhe ndërhyrjen ushtarake për qëllime humanitare.

Siç pasqyrohet në Raportin mbi KNNSSH ekziston një konsensus i gjerë se përgjegjësia për të mbrojtur është një përgjegjësi themelore dhe bazë që sovraniteti imponon dhe në rast se shteti nuk mundet ose nuk ka vullnet, atëherë ndërhyrja me anë të forcës për qëllime humanitare mund të jetë e nevojshme.²³ Pra në përgjithësi Komisioni konkludoi se ekziston një përgjegjësi e dyfishtë: e jashtëme, për të respektuar sovranitetin e shteteve të tjera dhe e brendshme për të respektuar të drejtat e njeriut. Mbrojtja e sovranitetit edhe në rastin e mbrojtësve fanatik të tij, nuk nënkupton që shteti mund të bëjë çtë dojë me popullin e tij.²⁴ Sipas Raportit, përgjegjësia për të mbrojtur gjen bazë ligjore në Konventën mbi Genocidin, Konventat e Gjenezës, traktatet mbi të drejtat e njeriut, Statutin e Gjykatës Penale Ndërkombëtare, në praktikën e shteteve dhe në vetë praktikën e Këshillit të Sigurimit (2001:50). Pra ekziston një erozion i parimit absolut të sovranitetit shtetëror në realitetin e sotëm, si rezultat i të cilët të drejtat e njeriut nuk përbejnë më një çështje të juridiksionit eksklusiv shtetëror.²⁵

Por përsëri reagimi ndaj shkeljeve masive të të drejtave të njeriut çel gjithmonë një debat të gjerë, për shkak të gjuhës eksplicite të Kartës së Kombeve të Bashkuara mbi parimin e respektimit të sovranitetit. Vetë OKB-ja e ka të vështirë të pajtojë parimin bazë atë të respektimit të sovranitetit me mandatin e saj parësor atë të ruajtjes së paqes dhe sigurisë kombëtare “të ruajë brezat e ardhshëm nga murtajat e luftës” si dhe të misionit të saj të promovimit të lirisë dhe mirëqënies së njerëzve në shtetet. Për këtë arsye lind nevoja që analizohet PMP siç parashikohet në Raport si dhe kontribut i saj në debatin mbi ndërhyrjen humanitare.

²³ Ibid. supra note.11, pg.69 paragraph 8.2

²⁴ Ibid. supra note.11, pg.50 paragraph 6.17

²⁵ Shiko: Weiss, T. G. and Hubert, D. (2001) “*The Responsibility to Protect: Research, Bibliography, Background*,” Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty: fq. 6-12

<http://web.idrc.ca/openbooks/963-1/>

5. PËRGJEGJËSIA PËR TË MBROJTUR

Raporti i KNNSSH është ndërtuar me qëllim pajtimin e tensionit, në parim, mes sovranitetit dhe ndërhyrjes humanitare. Komisioni ishte i balancuar, pavarur dhe gjithëpërfshirës dhe raporti ishte rezultat i konsultimeve të shumta në të gjithë kontinentet.

Këmbëngulja e përgjegjesisë për të mbrojtur mbi përdorimn e ndërhyrjes humanitare “si masë përjashtimore dhe të jashtëzakonshme” është karakteristika kryesore e Raportit. Pra ai është ndërtuar për të adresuar kundërshtimet si në rastin e relativizmit kulturor dhe mundësinë e abuzimit me justifikimin e ndërhyrjes humanitare. Raporti PMP parashikon përdorimin e forcës për të mbrojtur të drejtat e njeriut si masë ekstreme e justifikuar vetëm në raste të jashtëzakonshme. Përgjegjësia për të mbrojtur thekson se të drejtat e parashikuara në të drejtën humanitare dhe në të drejtat e njeriut janë universale, por në të njëjtën kohë parashikon specifikisht dy kriteret e ndërhyrjes:

- A. humbja masive e jetës, faktike ose e parashikuar, me qëllim genocide ose jo...si rezultat i veprimeve me dashje të shtetit ose neglizhencës ose paafësisë për të vepruar ose në situatën e dështimit të shtetit;
- B. spastrim etnik masiv, faktik ose i parashikuar, nëpërmjet vrasjeve, shpërnguljes së pavullnetshme, terrorit ose përdhunimit.²⁶

Nëpërmjet një përcaktimi të tillë të saktë të rasteve të ndërhyrjes, Komisioni pengon çdo lloj ndërhyrje humanitare e cila mund të maskohet si e tillë, për qëllime abusive në mbrojtje të interesave shtetërore. Gjithashtu përdorimi i forcës me qëllim ndryshimn e kufijëve, përmbysjen e rregjimit ose mbështetjen e kërkesës së një grupi në kuadër të vetvendosjen nuk mund të konsiderohet një justifikim legjitim i ndërhyrjes humanitare.²⁷

5.1 Pavarësia e shteteve

Qasja e PMP ndaj sovranitetit, sigurisht që përbën një sfidë për konceptin tradicional të sovranitetit, por nuk e zhvlerëson atë. Në fakt, ajo përforcon rëndësinë e sovranitetit, duke hedhur dritë edhe mbi ndryshimet që ka pasur ky parim në arenën ndërkombëtare në të drejtën zakonore. Debati mbi sovranitetin ka evoluar mjaft, duke filluar nga koncepti imperial mbi sovranitetin tek ai i sovraniteti popullor.

Sipas Raportit, mosndërhyrja është norma, shkelja e së cilës duhet të justifikohet...dhe përjashtimet në parimin e mos ndërhyrjes duhet të kufizohet.²⁸ Pra raporti ravijëzon një transformim të kulturës së mos dënimit gjatë ushtrimit të sovranitetin në kulturën e përgjegjshmërisë dhe përgjegjesisë së shteteve në raport me detyrimin e tyre për të mbrojtur. Ky transformim përbën një riformulim dhe jo braktisje të sovranitetit dhe parimit të mos ndërhyrjes. Propozimet e Komisionit respektojnë atë që është e rëndësishme në sovranitet, mos ndërhyrjen, si bazë e shoqërisë ndërkombëtare për tu mbrojtur nga ndërhyrja e jashtëme. Raporti thekson se prerogative kryesore për të mbrojtur i takon shtetit.²⁹ Vetëm në rast se shtetet dështojnë në parandalimin ose dhënien

²⁶ Ibid. supra note.11, pg.xii

²⁷ Ibid. supra note.11, pg.35

²⁸ Ibid. supra note.11, pg.31

²⁹ Ibid. supra note.11, pg. xi, 17, 69

fund të këtyre shkeljeve masive të të drejtave të njeriut brenda territorit të tyre, përgjegjësia bie mbi komunitetin ndërkombëtar.³⁰

5.2 Barazia e shteteve

Përveç theksit tek pavarësia shtetërore, përgjegjësia për të mbrojtur rregullon edhe barazinë e shteteve. Disa nga kritikët e PMP sugjerojnë se “sovrانيتeti si përgjegjësi” ndikon negativisht në barazinë sovranë. Kritika kryesore portretizon sovranitetin si mbrojtjen e vetme që shtetet e dobëta kanë ndaj atyre me të forta dhe sugjeron që minimi i sovranitetit shtetëror do të rezultojë në çrregullim të rendit botërorë.³¹

Kjo kritikë është e saktë pasi nënvijëzon që shtetet lidhin marrëdhënie mbi bazë barazie në të drejtën ndërkombëtare dhe se barazia është themelore për të drejtën ndërkombëtare, por sipas Raportit ripërkufizimi i sovranitetit nuk do të thotë mohim të barazisë sovranë.³² Parimi i barazisë sovranë është transformuar si rezultat i sfidave të njëpasnjëshme në marrëdhëniet ndërkombëtare, si psh. shtete sovranë të cilët bashkëpunojnë në kuadrin e institucioneve ndërkombëtare. Njëkohësisht, shtetet të cilat kryejnë shkelje masive të të drejtave të njeriut, humbasin disa nga të drejtat e tyre sovranë, por jo statusin e tyre si shtete sovranë.

Një kritikë tjetër mbi praktikën e ndërhyrjes humanitare lidhet me fuqinë e “shteteve të cilat konsiderohen më të barabarta se të tjerat”. Psh. vështirë se një ndërhyrje humanitare mund të autorizohet ndaj pesë anëtarëve të përhershëm të Këshillit të Sigurimit. Pra, kjo i hap rrugë standardeve të dyfishta. Kjo theksohet dhe pranohet edhe në Raport.³³

5.3 Zbatimi i regjimit të të drejtave të njeriut

Raporti i jep rëndësi të veçantë shteteve, pasi çështja më problematike është zbatimi i të drejtave të njeriut, ku edhe OKB-ja ka aftësi të kufizuar. I njëjti përqëndrim tek shtetet reflektohet në Rezolutën e Asamblesë së Përgjithshme në vitin 2005, si dhe në Rezolutat e Këshillit të Sigurimit në 2006 dhe 2009. Pra si përfundim shtetet janë aktorët e vetëm të cilët sigurojnë respektimin e së drejtës ndërkombëtare dhe zbatimin e regjimit të të drejtave të njeriut. Pra e drejta ndërkombëtare nuk mund të vihet në zbatim pa vullnetin e shteteve. Siç dëshmojnë shkeljet e rënda të të drejtave të njeriut në vende të ndryshme të botës, zbatimi i regjimit në praktikë është i vështirë dhe mekanizmat ekzistues janë të pamjaftueshëm. Në përgjithësi palët bien dakort se e drejta ndërkombëtare është efektive vetëm në rast se ajo parashikon shprehimisht mekanizma për zbatimin e saj. Psh. Gjykata Ndërkombëtare e Drejtësisë ose institucione *ad hoc*. Deri më sot, regjimi ndërkombëtar i të drejtave të njeriut nuk ka formuar mekanizma me juridiksion të detyrueshëm. Arsyeja – sovraniteti shtetëror. Në shumicën e rasteve shtetet nuk pranojnë mbikëqyrje ndërkombëtare, dhe ndër to nuk janë vetëm shtetet me të dhëna negative për zbatimin e të drejtave të njeriut. Zbatimi i të drejtave të njeriut nga komuniteti ndërkombëtarë varet nga vullneti i shteteve sovranë por dhe strategjitë e tyre të politikës së jashtme.

³⁰ Ibid. supra note.11, pg 69

³¹ Ibid. supra note.17

³² Ibid. supra note. pg 7 -1.32

³³ Ibid. supra note. pg 37

6. KONKLUZIONE

Raporti i KNNSSH i vitit 2001 përbën një argument bindës se të drejtat e njeriut dhe sovraniteti mund të gjejnë një ekuilibër funksional. Riinterpretimi i sovranitetit si përgjegjësi është një ndër vlerat kryesore të raportit. Ky qëndrim është pasqyruar qartë edhe në Dokumentin Final të Samitit Botëror mbajtur në vitin 2005 si dhe Raportin e Sekretarit të Përgjithshëm “Zbatimi i Përgjegjësisë për të Mbrojtur” ku argumentohet se “Përgjegjësia për të mbrojtur është aleat i sovranitetit, jo armik”.³⁴

Gjithashtu, pjesa më e madhe e anëtarëve të OKB-së pranuan parimin e sovranitetit si përgjegjësi në gjatë debatit mbi përgjegjësinë për të mbrojtur në Asamblenë e Përgjithshme në korrik të 2009. Gjithashtu shtetet ranë dakort se konfliktet e brendëshme mund të përbëjnë kërcënim për paqen dhe sigurinë kombëtare. Në të njëjtën kohë, në Raport, në paragrafin 139 të Dokumentit Final të Samitit Botëror dhe në Raportin e vitit 2009 të Sekretarit të Përgjithshëm, vihet re pajtim mbi katër llojet e veprave penale mbi të cilat legjitimohet aplikimi i R2P: genocide, spastrim etnik, krime lufte dhe krime kundër njerëzimit.

Qasja ndaj sovranitetit si përgjegjësi, dhe jo thjesht si kontroll, ka qenë gjithmonë në qëndër të evolucionit normativ të PPM, pare si përgjegjësi e shtetit ndaj qytetarëve të tij dhe ndaj komunitetit ndërkombëtarë. Vlera e Raportit qëndron ndër të tjera në lidhjen që krijon mes sovranitetit dhe të drejtave të njeriut, parime të cilat duhet të shihen si të ndërthurura dhe të balancuara dhe jo konkurruese. Theksi që Raporti vendos vazhdimisht tek qëndrueshmëria e sovranitetit dhe identifikimi i problematikave në lidhje me të, është një përpjekje e suksesshme për të arritur respektimin universal të të drejtave të njeriut. Vendosja e ekuilibrit mes tyre dhe trajtimi i kujdesshëm i të problematikave në lidhje me të është një arritje e madhe, ndryshe miratimi i PMP nga vendet në zhvillim dhe nga vendet anëtarë të përhershëm të Këshillit të Sigurimit si Kina dhe Rusia të cilët i qëndrojnë besnik parimit tradicional të të drejtave të njeriut do të ishte i pamundur.

³⁴ United Nations (2009) “Implementing the Responsibility to Protect,” Report of the UN Secretary-General, Ban Ki-moon, A/63/677 pg. 7

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Nagip Arifi

*Dr.sc. Juridiko Penal, Universiteti
Ndërkombëtar i Novi Pazarit, Bujanoc*

Dhuna në familje në Luginë të Preshevës

Abstract

Dhuna në familje është një problem që prekë të gjitha shtresat dhe grupet e shoqërisë, pa dallim race, etnie, niveli ekonomik, zone gjeografike, besimi fetar, moshe, etj. Si e tillë dhuna në familje është problem në mbarë botën, me të cilën po përballlet çdo shoqëri dhe çdo vend. Duke qenë se dhuna në familje është një çështje tepër e ndjeshme në vende dhe rajone të ndryshme, për adresimin e saj duhen programe dhe strategji. Në të shumtën e rasteve dhuna në familje si dukuri është shumë vështirë për ta hulumtuar pasi që konsiderohet si çështje private në mes familjarëve, dhe është një nga format e krimeve më pak të raportuara dhe zakonisht konsiderohet si një çështje private, e si rrjedhojë nuk dihen me saktësi përmasat dhe frekuenca e fenomenit.

Në kohën tonë familja e ka humbur qetsinë, e ka humbur dinjitetin, ndodhë që në të gjitha familjet, pavarësisht arsimit, fesë, gjendjes ekonomike, etnisë, ose identitetit kulturor, fenomeni dhunë vjen në shprehje. Familja është e kërcënuar jo vetëm nga faktorë natyrorë: vdekja, sëmundjet, katastrofat e ndryshme natyrore, etj., por është e kërcënuar edhe nga sjelljet devijante, konfliktet gjithfarëshe, dhuna, alkoholizmi, përdorimi abuziv i drogës, braktisja, sëmundjet seksualisht të trasmetueshme, etj. Pra familja është një strukturë që përmbledh një mori marrëdhëniesh dhe rolesh dhe si e tillë është e ndjeshme nga dhuna që ushtrohet brenda saj.

Dhuna në familje është një sjellje e udhëhequr nga nevoja për të pasur kontroll. Mund të fillojë nga kërcënimet, telefonatat bezdisëse dhe ndjekjet (si ndjekje e viktimës kur shkon e kthehet nga puna, dhe kërcënimi), e deri tek marrëdhëniet seksuale të padëshiruara, goditjet, gërvishjet, mbylljen në shtëpi, goditje me objekte të forta, kërcënim me thikë ose me armë tjetër, refuzim për ta ndihmuar gruan kur është shtatzënë ose e sëmure, tentativë për vrasje deri në formën më të rëndë, madje edhe deri në vdekje. Shumë dhunues nuk janë të dhunshëm në marrëdhënie të tjera, si për shembull në punë ose me miqtë. Në mënyrë të përsëritur ata e mohojnë dhunën në familje dhe ashpërsinë e kësaj dhune. Kur ballafaqohen me sjelljen e tyre abuzive, ata kanë tendencën të fajësojnë partneren e tyre se i ka provokuar, ose refuzojnë të pranojnë përgjegjësinë.

Keywords: *Dhuna, familja, format e dhunës në familje, grupet e marginalizuara.*

Hyrje

Dhuna në familje është një dukuri globale dhe sot ajo tërheq vëmendjen në të gjitha nivelet, nga ai lokal, kombëtar, dhe në nivel ndërkombëtar. Ajo nuk njihet kufijtë gjeografik, nuk është e kufizuar në moshë, nuk është një preferencë e veçantë e një kulture, etnie, feje, orientimit politik, seksual, dhe është e pranishme në të gjitha llojet e marrëdhënieve familjare dhe në çdo mjedis shoqëror.

Viktimat e dhunës në familje mund të jenë të gjitha struktrat shoqërore pavarësisht nga gjinia, moshja, përkatësia etnike, arsimi, megjithatë fakti dhe përgjegjësia është vetëm në autorët, ushtruesit e dhunës në familje, të cilët në shumicën e rasteve nga shoqëria trajtohen si qytetar të ndershëm dhe shumë të respektuar.

Dhuna në familje është një nga format më të përhapur të shkeljes së të drejtave të njeriut në Europë dhe në botë dhe duhet të parandalohet në çdo vend të Europës dhe botës. Vendet e Ballkanit Perëndimor, veçanërisht vendet e ish -Jugosllavisë, të përballura me nivele të larta të dhunës, krimit dhe pasigurisë së përgjithshme, ka bërë që edhe dhuna në familje të jetë më prezente. Faktorë të tjerë që lidhen me gjendjen e pasluftës dhe tranzicionit, siç janë pasiguria ekonomike dhe personale, papunësia, varfëria, krimi dhe intoleranca kanë kontribuar në një rritje të dhunës në familje. Duke qenë se pjesë e kësaj tërësie gjeografike është edhe Lugina e Presheves, andaj edhe ky regjion vuajti e po vuan edhe më tej pasojat e tranzicionit, përfshirë këtu edhe shkaqet identike që sjellin edhe deri te ushtrimi i dhunës në familje.

Dhuna në familje më herët është konsideruar si e pranueshme, e dëshirueshme, sjellje normale në "disiplinmin"e anëtarëve të padisiplinuar të familjes, sidomos grave dhe fëmijëve.

Mjedise shoqëror të tilla si yni, me një trashëgimi të fortë patriarkale dhe forma të ndryshme të politikave dhe praktikave diskriminuese, dhuna në familje për fat të keq është e vështirë për të studiuar si një problem me të cilën po përballen shoqëria.

Dhuna në familje

Dhuna në familje është e pranishme në të gjitha periudhat historike, shtresat sociale dhe në të gjitha shoqëritë moderne. Dhuna në familje nuk është konsideruar si një problem për një kohë të gjatë, shumica nuk e kanë ditur se ekziston. Arsyeja për këtë është se të gjitha ngjarjet, rastet që ndodhnin brenda një familje trajtoheshin si çështje private, andaj për pasojë dhuna në familje nuk është konsideruar e rrezikshme për shoqërinë.

Duke qenë se familja është komuniteti kryesor social, dhe një nga të drejtat themelore të njeriut është që asnjë person nuk mund të jetë viktimë e dhunës, atëherë dhuna në familje duhet të jetë një problem kryesor i shoqërive demokratike, duke përfshirë edhe shoqëritë tona.

Procesi i zhvillimit (ushtrimit) të dhunës është kompleks, ai zgjatet me vite dhe nuk ndodh papritmas. Shanset që një person i cili ishte viktimë e dhunës në familje, është abuzuesi tre herë më shumë se sa një personi i cili është rritur në një mjedis normal.

Në literaturën kriminologjike dominon pikëpamja ku ushtruesi i dhuns për të arritur një qëllim të caktuar e përdorur dhunën ose kërcënimin për të sulmuar viktimën¹. Kjo është thjesht, përdorimi i forcës ose kërcënimit me qëllim të ushtrimit të dhunës².

Të dhënat nga studime aktuale tregojnë se dhuna në familje është forma më e zakonshme e dhunës në të gjithë rajonin dhe viktimat kryesore janë gra të moshës rreth 30 vjeç, e martuar apo divorcuar, nënë e dy fëmijëve, arsimin e mesëm ose punëtorë. Është vlerësuar se një në katër gra që ishin në marrëdhëniet intime përjetuan dhunë fizike apo seksualenga partneri i tyre.³

Dhuna në familje deri pak vite më parë në trevat tona por edhe në Luginë të Preshevës është konsideruar si tabu temë dhe rrallë herë është diskutuar në publik, por edhe sot e kësaj dite në disa vende rurale mbetet një temë tabu. Në media është vërejtur vetëm në kronikat e zeza. Kjo tabu temë, ishte një sekret i mbajtur mirë - dhe shpesh e padukshme për të afërmit. Por të gjithë e dinin se ishte një çështje private, personale e një familje.

Në qendrën për punë sociale, organet e policisë, institucionet mjekësore dhe në gjykata nga dhunuesit shpesh mund të dëgjohet, "se ai duhet të ketë qenë i provokuar", ose "besohej se disa shuplaka nuk janë të tepërta që të dinet se kush është shef në shtëpi".

Dhuna në familje zakonisht ndodhë në një shtëpi familjare, kryesisht në prani të fëmijëve, siç tregohet nga rezultatet e anketës së parë mbi zbatimin e masave për mbrojtjen nga dhuna në familje, e cila është botuar nga Qendra e Grave Autonome. Në 97.4 % për qind të rasteve, vendi i ngjarjeve të dhunshme ishte i njëjtë me vendin e banimit, dhe fëmijët e mitur janë të pranishëm në kryerjen e dhunës në 63.4 % për qind të rasteve, po sipas të dhënave të kësaj Qendre.

Në sajë të përpjekjeve të grave viteve të fundit, qeveritë e rajonit kanë bërë përpërim në zhvillimin e legjislacionit në lidhje me çështjen e dhunës në familje, futjen e masave ligjore dhe sanksionin e saj ligjor. Në shumicën e vendeve, dhuna në familje është një vepër penale. Pothuajse të gjitha vendet kanë adoptuar ligje specifike kundër dhunës në familje dhe shkelje të ligjeve të cilat ofrojnë masa mbrojtëse për viktimat, me urdhër të gjykatës ushtruesit të dhunës mund që t'i merret edhe arma e zjarrit.⁴

Llojet dhe format e dhunës në familje

Format më të shpeshta të llojeve të dhunës në familje sipas analizës së studimit të kryer në Luginë të Preshevës:

1. dhuna në mes partnerëve,
2. dhuna ndaj fëmijëve dhe
3. dhuna ndaj personave të moshuar dhe personave me aftësi të kufizuara

¹ Dj. Ignjatović, Kriminologija, Dosije, Beograd, 2008, fq 145

² F. E. Hagan Introduction to Criminologi: Theories, Methods, and Criminal Behavior, Nelson Hall Chicago 1990, fq. 212,

³ Nikolić-Ristanović, Vesna i Dukmanović Mirjana, Medjunarodni standardi o nasilju u porodici i njihova primena na zapadnom Balkanu, Beograd: Prometej, 2006, fq. 21-24.

⁴ SEESAC, South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons, fq 1.

1 *Dhuna në mes Partnerëve*

Nëse kemi parasysh statistikën në lidhje me dhunën në familje apo dhunën në mes partnerëve në të gjithë anët e botës, vërehet një ndarje e qartë në mes ushtuesit të dhunës dhe viktimës në baza të gjinisë dhe pozitës. Nuk mund të mohohet se dhuna në përgjithësi ushtrohet nga mashkujt, ndërsa gratë janë objekte të privilegjuar të agresionit të mashkullit⁵.

Dhuna në mes partnerëve, është përdorimi i sulmit fizik dhe seksual i burrit ndaj gruas, pa marrë parasysh nëse ajo është raportuar ose zbuluar, dhe është ndjekur penalisht, ose gjykuar me një vendim të plotëfuqishëm të gjykatës⁶.

Statistikat tregojnë se në Serbi, dhe në rrethin e Pcinjës, 97 % - 98 % e rasteve të dhunës në familje ushtrohet ndaj grave.

2. *Dhuna ndaj grave*

Të drejtat e grave janë pjesë e pandashme e të drejtave universale të njeriut, në përputhje me dokumentet ndërkombëtare. Republika e Serbisë është anëtare e Kombeve të Bashkuara (OKB-së), Këshillit të Evropës dhe organizatave të tjera ndërkombëtare dhe nënshkruese e një numëri të konventave ndërkombëtare mbi të drejtat e grave dhe për barazinë gjinore.

Sipas dokumenteve ndërkombëtare, dhuna ndaj grave nënkupton çdo akt dhune e cila rezulton apo ka të ngjarë të rezultojë në vuajtje fizike, seksuale ose psikologjike të grave, duke përfshirë kërcënime për akte të tilla, detyrimin apo privimin arbitrar të lirisë, qoftë në jetën publike apo private .(Platforma e Pekinit për Veprim , fq.113) " Dhuna ndaj grave është një manifestim i shpërndarjes historikisht të pabarabartë të pushtetit mes burrave dhe grave, që ka çuar në dominimin dhe diskriminimin ndaj grave nga burrat."

Shenjat të cilat tregojnë abuzimi fizik përfshijnë:

- lëndime në fytyrë,
- lëndime në gjoks, bark dhe pjesët e trupit të mbuluar me veshje,
- përdredhjet, të çara ose eshtra të thyera,
- lëndimet me thikë ose objekte të tjera të forta,
- shenja të dukshme në qafë (nga të rënat me shuplaka, me tel, rryp, peshqir etj.)
- dhëmbë të thyer,
- shkulja e veshit,
- lëndime në zonën gjenitale ,

Shenja të tjera që mund të tregojnë abuzimin:

- ankthi, nervozizmi, ndjenja e dobësisë, ndjenja e frikës, turp dhe fajit,
- vetë - neglizhimi dhe humbja e vetë-respektit ,
- përdorim i alkoolit dhe i drogës,
- çorientim, humbje, agresioni ndaj vetes dhe të tjerëve, vështirësi seksuale,

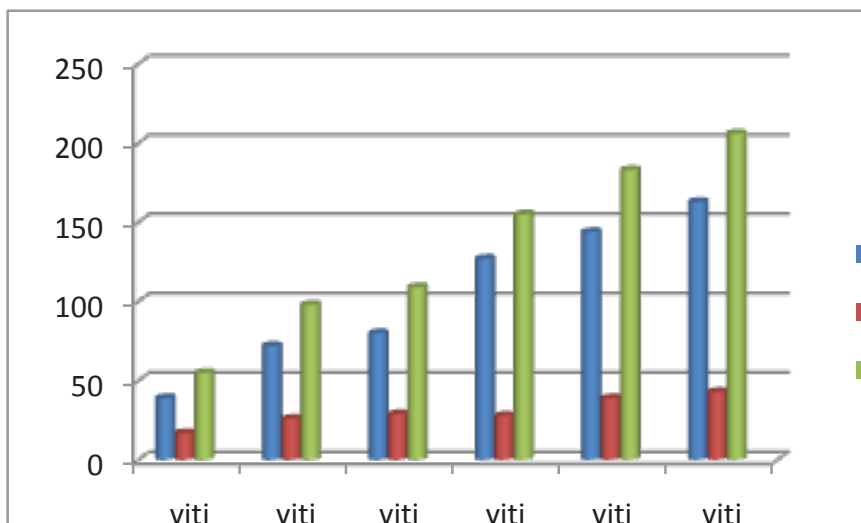
⁵ R. Kovačević, B. Kecman, "Ličnost i naselnički kriminalitet", Revija za kriminologiju i krivično pravo, nr. 3, 2007, fq 151-168.

⁶ S. Konstantinovi – Vilić, V. Nikolić – Ristanović, vep..cit, fq.133.

- çrregullime të stresit post-traumatik⁷.

Sipas Organizatës Botërore të Shëndetësisë, studime të ndryshme tregojnë se mesatarisht në mes të 10 dhe 50% e grave kanë përjetuar një formë të dhunës fizike nga partneri i tyre, mesatarisht 12 dhe 25% të grave kanë qenë të detyruar të bëjnë marrëdhënie seksuale me dhunë dmth pa vullnetin e tyre, edhe ate nga ish- partneri apo partneri aktual, dhe se përhapja e prostitucionit të detyruar dhe trafikimit me gra nga viti në vit po rritet⁸.

Në Serbi, kurrë nuk e dihet për rreth 78 % të rasteve të abuzimeve që burrat i ushtrojnë ndaj grave, dhe periudha mesatare e raportimit të dhunës që ushtrohet ndaj gruas është dymbëdhjetë (12) vjet, ndërsa në Luginë të Preshevës, sipas hulumtimit tonë, raportimi bëhet vetëm pas 15-20 vjetësh. Sipas hulumtimit tonë, por edhe duke u bazuar në të dhënat nga Instituti i Mirëqenies Sociale çdo vit ka pasur një rritje të dhunës, veçmas rritje ka shënuar dhuna ndaj grave, gjë që shihet qart në diagramin e më poshtëm.



Kjo tregon se viktimat më të shpeshta të dhunës në familje janë gratë, në më shumë se 70 % të rasteve të ushtrimit të dhunës. Duke marrë pjesë në anketën tonë, përfaqësuesit e qendrave për punën sociale në Luginë të Preshevës u përgjegjën për punën me viktimat e dhunës. Ata thanë se 60 % e grave që morën pjesë në qendrën për punë sociale zakonisht thonë: Burri im nuk më rrah dhe nuk përdor dhunë ndaj mua, por ndodh që ndonjëher të me jep ndonjë flakaresh në mënyrë të rastësishme. Dhe kjo për ato nuk paraqet dhunë. Viktimat shpesh mendojnë se ajo duhet të jetë kështu, për shembull, se burri ka të drejtë që herë pas here të rrah gruan, duke e konsideruar këtë si pjesë e pandashme të jetës bashkëshortore . Viktimat kanë frikë të thonë të vërtetën, ndoshta për faktin se, sipas kodit

⁷ Organizat botërore e shëndetsis, 2002

⁸ Raporti botëror për dhunën dhe shëndetin Organizat botërore e shëndetsis, Zhenev, 2002.

të trashëguar nga tradita, publikimi i dhunës së ushtruar nga burri do të ishte zbulim i një turpi, sekreti familjar, gjë e cila është evidente veçmas në mjediset rurale..

Rasti 1 (S.P) e tërë jetën më rrihte burri, së pari përdorte ndonjë flakaresh dhe më vonë kthehej në grushta, dru dhe gjithçka që do t'i qëllonte në duar. Kur ai vjen nën ndikimin e alkoolit, ai më dëbonë nga shtëpia, dhe unë shpesh ndodhë të flinja jashtë, dhe askush nuk e dinte për këtë. Kam vuajtur për shkak të fëmijëve, por edhe për shkak të një edukimi patriarkal, e që sipas asaj edukate duhet të dëgjohet mashkulli dhe t'i bindesh urdhërave të tijë. Historia është një 55 vjeçareje, e cila ende vuan pasojat e një martesë të tillë.

3. Dhuna ndaj fëmijëve

Dhuna ndaj fëmijëve mund të konsiderohet si manifestimi më e rëndë i dhunës në familje, duke pasur parasysh karakteristikat e viktimave, ekzistenca e një marrëdhënie të besimit, lidhje emocionale, detyrat e kujdesit dhe edukimit nga ata të cilëve fëmijët iu besohen.

Në vendet e zhvilluara prindërit vrasin më shumë fëmijë sesa tuberkulozi, fruthi dhe diabeti së bashku. Dhe se ky është përfundim i frikshëm nga që fëmijët nuk duhet të jenë aq shumë të mbrojtur nga asgjë tjetër se sa nga prindërit e tyre⁹.

Sa i përket dhunës midis të rinjëve dhe kundër të rinjëve në Republikën e Serbisë nuk ka ndonjë studim të plotë, ngase, ngase aktualisht janë paraqitur edhe forma të reja ndaj tyre. Abuzimi i fëmijëve konsiderohet një shkelje e qëllimshme, pa asnjë shpjegim. Abuzim ose përdorimi i dhunës ndaj fëmijëve thuaja se është bërë në mënyrë të barabartë nga ana e prindërëve, përkatsisht nënës dhe babait. Zakonisht ushtrimi i dhunës është kryer së bashku, por nëse njëri prind ka përdorur dhunë, qoftë fizike apo psikike, ndaj fëmijës, prindi tjetër e di atë dhe nuk bën asgjë për ta parandaluar abuzimin, dhe ai/ajo në mënyrë të tërthortë bëhet edhe pjesëmarrës në ushtrimin e dhunës.

Prindërit zakonisht janë ushtrues të dhunës ndaj fëmijëve për shkak të varfërisë, stresit, varëshmëris nga alkooli apo droga.

Dhuna mbi fëmijët është një fenomen global. Ajo shfaqet si në vendet tashmë të zhvilluara dhe, në një përmasë më të madhe, edhe në vendet në zhvillim. Është kjo arsyeja që organizata të tilla ndërkombëtare si UNICEF, WHO, ILO, etj., kanë shfaqur një interesim në rritje për të adresuar këtë fenomen. Të dhënat të referuara në dokumentet e këtyre organizatave tregojnë për përmasën dhe llojet e ndryshme të dhunës që ushtrohet mbi fëmijët. Në gjithë botën gjatë viti 2002 janë vrarë gati 53.000.¹⁰ Ndërmjet 20 dhe 65 % të moshave shkollorë janë deklaruar se kanë qenë të dhunuar fizikisht ose verbalisht në 30 ditët e fundit¹¹.

⁹ Podatak Unije za zaštitu detinjstva, prema N. Banjanin – Djuričić, Vep. Cit, fq .11-12.

¹⁰ Globalne procene posledica pozdravlje zbog nasilja nad decom. Podržavajući rad za Studiju Ujedinjenih nacija o nasilju nad decom (Ženeva, Svetska zdravstvena organizacija, 2006).

¹¹ Organizat Botërore e shëndetësis (www. who.int/school_youth_health/gshs) pëe periudhën kohore 2003 deri 2005.

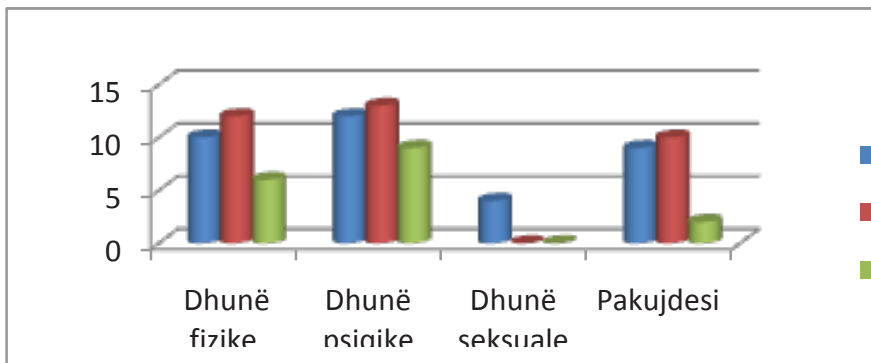
Organizata Botërore e Shëndetsisë vlerëson se në vitin 2002, 150 milion vajza dhe 73 milion djemë, nën moshën 18 vjeçë, kanë përjetuar mardhënje seksuale të detyrueshme ose forma të ndryshme të dhunës seksuale, duke përfshirë edhe kontaktin fizik¹².

Studimet në Mbretërinë e Bashkuar dhe në Shtetet e Bashkuara kanë zbuluar se 90% e të gjithë fëmijëve ndëshkohen fizikisht gjatë fëmijërisë.¹³

Në vitin 2004, rreth 218 milion fëmijë kanë qenë të angazhuar të punojnë, dhe nga ky numër 126 milion kanë punuar në punë të rrezikshme.¹⁴

Sipas hulumtimit tonë, si shkaqe të dhunës ndaj fëmijëve në Luginën e Preshevës zakonisht ndodhin rastet e mëposhtme :

- njëri apo dy prindërit, kanë qenë viktimë të dhunës, si fëmijë
- njëri apo dy prindërit kanë pasur një fëmijëri të vështirë,
- njëri apo dy prindërit janë të varur nga alkooli ose droga,
- lidhjet e tanishme midis prindërve janë të dhunshme,
- shtatzënia e padëshiruar, fëmija nuk është i mirëpritur,
- nuk ka lidhje të duhur dhe intimiteti në mes të prindërve,
- të dy prindërit kanë zotësi të kufizuara prindërore,
- të dy prindërit janë nën moshën 25 vjeç, të papjekur dhe të izoluar nga shoqëria,
- të ardhurat dhe strehimi nuk ofrojnë kushte të volitshme,
- prindërit nuk kanë mbështetje sociale e tj..



Raporti statistikor i Entit Republikan për statistika për periudhën kohore 2007- 2012¹⁵

Raporti statistikor entit Republikan për statistika për periudhën kohore 2007- 2012¹⁶

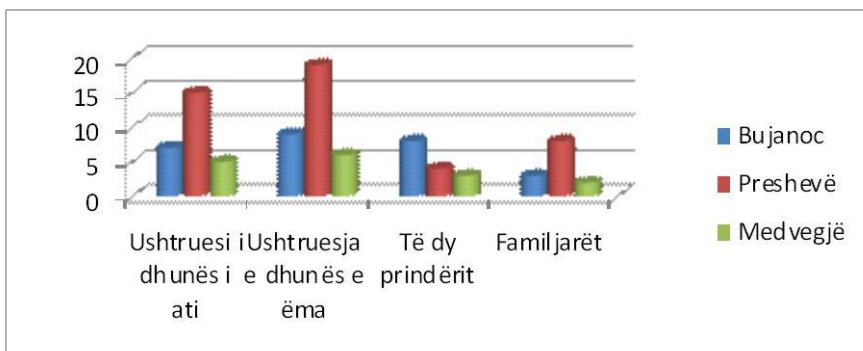
¹² Globalne procene posledica pozdravlje zbog nasilja nad decom.

¹³ Children and Violence, Innocenti Digest No 2, UNICEF, fq. 6

¹⁴ The end of Child Labour- Within Reach: global report, Geneva, International Labour Office, 2006.

¹⁵ www.zavodsz.gov.rs

¹⁶ www.zavodsz.gov.rs



Me rëndësi të veçantë në procesin e krijimit të një sistemi për parandalimin dhe mbrojtjen nga dhuna në familje, veçmas ndaj fëmijëve është themelimi i Këshillit për të Drejtat e Fëmijëve dhe Këshillit për Barazi Gjinore në Republikën e Serbisë. Këshilli për të Drejtat e Fëmijëve, me mbështetjen e UNICEF-it, ka zhvilluar një Plan Kombëtar të Veprimit për Fëmijët, i cili është miratuar nga ana e Qeverisë në vitin 2004. Me këtë u theksua mbrojtja e fëmijëve nga dhuna si një nga detyrat me përparësi deri në vitin 2015.

4. Dhuna ndaj personave të moshuar

Ky lloj i dhunës nuk është hetuar ende në masën që meriton. Fenomeni i dhunës ndaj të moshuarve është vërejtur në vitet e 70-ta të shekullit njëzetë.

Në fillim shekullit XXI është paraqitur një formë e re e dhunës në familje kundër të moshuarëve¹⁷. Kjo lloj dhune i ka goditur grat e vjetra që kanë një barrë të madhe në familjet e tyre, e cila me kalimin e viteve u bë shumë e rëndë për to. Një grua e cila ka një barrë të tillë edhe pse nuk ka treguar një lodhje ekstreme, dhe fëmijët e saj nuk e vërejnë, mbingarkesat e këtyre individëve të çon në shfaqjen e sëmundjeve në nivel psikosomatike dhe fizike. Manifestimet e tilla shprehen përmes presionit të lartë të gjakut, çrregullime metabolike dhe diabetit, problemeve në funksionimin e zemrës dhe frymëmarrjes, marramendje dhe çrregullime, lodhje kronike, dobësim etj. Në nivel emocional, ekziston një mosdiponim i përgjithshëm, siklet, mungesa e dëshirës, mungesa e motivimit, ndjenja e fajit për shkak të gjendjes së dobët të tij/saj, dhe në raste më të rënda, vie deri te mendimi i vetëvrasjes si e vetmja mënyrë për të dalë nga kjo krizë¹⁸.

Forma universale të dhunës ndaj të moshuarëve janë :

- dhuna fizike përfshinë goditje, shtyrje, goditje me shuplakë, izolimi, dhënia e shumë medikamenteve apo dhënia e medikamenteve të gabuara,
- abuzimi psikologjik përfshinë bërtitje, sharje, fajësim, poshtërime, njollosje, etiketime, kritika të vazhdueshme, deri te injorimi i tyre i skajshëm,

¹⁷ Encarni Linan. Síndrome de la abuela esclava. Psicología on-line (3) (<http://www.psicologia-online.com/monografias/4/abuela-esclava.shtml>).

¹⁸ M. Vlajković, „Zlostavljanje ostarelih u porodici“, Socijalna misija, nr. 3-4, 2004, fq.169-180.

➤ dhuna ekonomike përfshin përdorimin ose shfrytëzimin e paautorizuar të pronës, të të hollave, pensionit, ose pasurive të tjera dhe ushtrim dhune me qëllim ndikimit në lënien e testamentit.

➤ mosrespektimi, privimi nga ushqimi, ngrohja, veshmbathja, komoditet etj.

Në Republikën e Serbisë dhe në rethin e Pçinjës por edhe në Luginë të Preshevës, të dhënat mbi dhunën ndaj të moshuarëve mungojnë dukshëm.

Sipas hulumtimi të Shoqatës së viktimologëve të Serbis del se:

- 5-10 % e të moshuarëve në Serbi i janë ekspozuar dhunës,
- në nivel botëror kjo përqindje sipas të dhënave zyrtare është 4 %, por besohet se përqindja e vërtetë është më e lartë,
- shumica e viktimave janë gra më të vjetra se 75 vjet, me aftësi të kufizuara mendore dhe fizike,
- autorët më të shpesht të dhunës, në më shumë se 50%, janë gjithashtu gra - vajza dhe gratë e djemëve ose kunatat,
- forma më e zakonshme e dhunës ndaj të moshuarëve është dhuna psikologjike - 50 %, ndërsa dhuna fizike në 19 % të rasteve¹⁹.

Sipas hulumtimit tonë në rethin e Pçinjës ku përfshihet edhe Luginë e Preshevës 3-7 % e të moshuarëve janë ekspozuar dhunës, dhe forma më e zakonshme e dhunës ndaj të moshuarëve është dhuna psikologjike me 60%, fizike 20 %, ekonomike është në mes 15-20% , ndërsa më së paku vie në shprehje dhuna seksuale.

Sipas të dhënave të Entit të Statistikave të Serbisë në vitin 2002 në Serbi numri i popullsisë ishte 7.498.001 ku 3.645.930 meshkuj dhe 3.852.071 femra. Ndërsa në vitin 2009. në Serbi numri i popullsisë ishte 7.320.807 banorë, që do të thotë se për shtatë vjet popullsia ka rënë me 177.194 , gjegjësisht më shumë se 25.000 në vit , dhe moshja mesatare ishte 41.24 vjeç. Këto të dhëna janë shqetësuese për të gjithë.²⁰

Pyetsori

Intervistimi është bërë me; 7 përfaqësuese të policisë, 3 të prokurorisë, 3 të gjykatave, 5 avokatë dhe me 7 punonjësit e qendrave për punë sociale, gjatë periudhës janar-maj 2012, me ç'rast janë parashtruar pyetjet e mëposhtme:

I. Çfarë do të thotë dhuna në familje ?

Të gjithë të anketuarit e kanë përkufizuar dhunën në familje si dhunë fizike, psikologjike, apo ngacmimit të një anëtarit ndaj anëtarit tjetër të familjes .

Të anketuarit nga Departamenti i Policisë së Vranjës, i cili mbulon shtatë komuna, kryesisht janë përgjigjur se dhuna në familje përfshinë përdorimin e forcës fizike, psikologjike, kanosjes dhe detyrimin emocional, izolimin, etj.

¹⁹ V. Nikolić-Ristanović i M. Dokmanović – Medjunarodni standardi o nasilju u porodici i njihova primena na Zapadnom Balkanu, 2006.godine.

²⁰ Republika Srbija, Republički zavod za statistiku, Statistički godišnjak Srbije 2005, 2006,2007,2008,2009,2010.

Përfaqësuesit e gjykatës dhe prokurorisë në përgjithësi kanë dhënë të njëjtën përgjigje. Dhe më tepër i rrefeohehin Kodit Penal, duke u përpjekur për të kujtuar karakterin e një veprë penale. Ata deklaruan se termi dhuna në familje përfshin forcën fizike, psikologjike, seksuale, fyerjet e ndryshme dhe të shpeshta, etiketimet, njollosjet, detyrime bindëse negative duke provokuar dhunë pa asnjë arsye.

Përfaqësuesit e qendrave për punë sociale përgjigjen se dhuna në familje është çdo formë e sjelljes verbale ose jo verbale që ka efektin e rrezikimit të shëndetit, zhvillimit dhe dinjitetit e njeriut, e shprehur si dhunë psikologjike, fizike, ekonomike, seksuale dhe emocionale.

Përgjigja më e plotë është dhënë nga avokatët, dhe një prej tyre e dha këtë përgjigje : " Dhuna në familje është çdo formë e dhunës fizike, seksuale, psikologjike dhe ekonomike e kryer nga një anëtar i familjes ndaj një anëtari tjetër të po të njëjtës familje, sjelljes së pacipët me qëllim të caktuar, dhe kjo vepër penale kryhet me paramendim dhe me përgjegjësi të plotë penala por mund të kryhet edhe nga persona që janë të papërgjegjshëm penalisht.

II. Ushturuesit e dhunës më së shpeshti janë?

(Ju mund të zgjedhni më shumë se një përgjigje)

- | | |
|--|---------------|
| 1. Anëtarët e familjes së gjinisë mashkullore, | 8. Prindërit, |
| 2. Anëtarët e familjes të gjinisë femrore , | 9. Nënata, |
| 3. Burrat, | 10. Vajzat, |
| 4. Gratë, | 11. Nusët, |
| 5. Etërit, | 12. Gjyshja, |
| 6. Djemt, | 13. Gjyshi. |
| 7. Fëmijët | |

Shumica e të anketuarve ose të 22 anktuar kanë deklaruar se burrat janë ushturuesit më të shpeshtë të dhunës në familje, meqenëse është i ditur fakti se tradicionalisht burri është " kreu i familjes" dhe dëshiron që ta ketë pushtetin absolut mbi gjithë antarët e tjerë të familjes e sidomos ndaj gruas. 21 të anketuarë kanë deklaruar se meshkujt e familjes janë ushturues të dhunës, dhe kjo përgjigje u vendos kryesisht nga përfaqësues të policisë, prokurorisë dhe gjykatave, 12 të anketuar, kryesisht përfaqësues të Qendrës për punë sociale dhe prokurorisë, u përgjigjën se fëmijët janë ushturues dhune në familje, 8 të anketuar menduan se ushturues të dhunës në familje janë etërit, 6 të anketuar mendojnë se gratë janë ato që ushtrojnë dhunë, dhe vetëm 1 nga të anketuarit u deklaruan se ushturues dhune janë vajzat. Një i anketuar, polic me profesion, është deklaruar se ushturues të dhunës në familje janë të gjitha kategoritë e personave të radhitur në pyetësor.

III. Më së shpesht viktimat janë ?

(Ju mund të zgjedhni më shumë se një përgjigje)

- | | |
|--|---------------|
| 1. Anëtarët e familjes të gjinisë mashkullore, | 8. Prindërit, |
| 2. Anëtarët e familjes të gjinis femrore, | 9. Nënata, |
| 3. Burrat, | 10. Bijat, |
| 4. Femrat, | 11. Nusët, |
| 5. Etërit, | 12. Gjyshja, |
| 6. Djemt, | 13. Gjyshi. |
| 7. Fëmijët, | |

Shumica e të anketuarve janë deklaruar se gratë janë viktime më të shpeshta të dhunës në familje. Nga 27 të anketuar, 21 prej tyre deklaruan se gruaja është viktimë e dhunës në familje, 19 të anketuar deklaruan se antarët e gjinisë femrore janë viktime të dhunës në familjes, numër i njëjtë i të anketuarëve mendon se fëmijët janë viktime të dhunës në familje. Përgjigje identike kanë dhënë edhe të anketuarit nga qendrat për punës sociale dhe policia. 17 të anketuar kanë deklaruar se fëmijët janë viktime më të shpeshta të dhunës në familje, 12 të anketuar kanë deklaruar se viktime janë prindërit, 6 kanë deklaruar nënat, ndërkaq 2 të anketuar kanë deklaruar që viktime janë nuset dhe vajzat .

IV. Shkaqet e dhunës në familje janë?

(Ju mund të zgjedhni më shumë se një përgjigje)

- | | |
|-------------------------------|--|
| 1. Kriza ekonomike, | 6. Alkool, |
| 2. Rritja e papunësisë, | 7. Çrregullim mendor të ushtruesit të dhunës, |
| 3. Varfëria, | 8. Dëshirat e burrit që të dominojnë dhe të kontrolloj familjen, |
| 4. Strehimi i papërshtatshëm, | 9. Dëshira e gruas për të dominuar dhe kontrolluar familjen, |
| 5. Edukata patriarkale, | 10. Droga. 11. Mungesa e mekanizmave të qartë dhe efektive për të mbrojtur viktimat. |

Të anketuarit përmendin një numër faktorësh që ndikojnë në dhunën në familje, të tilla si alkoolizmi, kriza ekonomike, varfëria, rrethanat e vështira financiare. Por, numri më i madh i të anketuarve , 26 sish, ka thënë se alkooli ishte shkaku i dhunës në familje, si ndaj grave, fëmijëve e po ashtu edhe ndaj personave të moshuar dhe atyreve me aftësi të kufizuara. Vetëm një avokat nuk është deklaruar për alkoolin si shkaktar i dhunës në familje.

Duhet të theksohet se shumë studime kanë treguar se alkooli nuk është një shkak i mjaftueshëm për dhunën në familje, dhe e njëjta vlen edhe për çrregullimet mendore të ushtruesit të dhunës, dhe ky në fakt është një paragjykim. 18 të anketuar janë deklaruar se kriza ekonomike është shkaktari i dhunës në familje, 15 e të anketuarëve deklaruan apo mendojnë se varfëria është shkak i dhunës në familje. Megjithatë nuk mund të mohohet fakti se dhuna në familje, veçanërisht ndaj grave, ndodhë në të gjitha vendet, pavarësisht nga niveli i tyre i zhvillimit ekonomik. Kjo është ajo që ndodhë edhe në vendet që kanë arritur një nivel të lartë të zhvillimit në të gjitha fushat e zhvillimit, sikur atë ekonomik, kulturor, politik etj.

Trembëdhjet sish janë deklaruar se shkak i dhunës në familje janë çrregullimet mendore të ushtruesit të dhunës. Një përfaqësues i policisë tha se të gjitha rastet që ne kemi cekur janë shkaqet e mundshme të dhunës në familje . Ndërkaq dëshira e meshkujve që të kenë dominim dhe kontroll në familje është deklaruar si shkak i dhunës në familje nga 5 të anketuar. 3 të anketuar si shkak të dhunës në familje kanë deklaruar strehimin e papërshtatshëm.

V. Marrëdhënia e ushtruesit të dhunës ndaj dhunës ?

(Ju mund të zgjedhni më shumë se një përgjigje)

1. Ushtruesi i dhunës e justifikon sjelljen e vet
2. Ushtruesi i dhunës nuk ndjen shqetësim ndaj sjellje së dhunshme, për shkak se ajo është parë si normale nga ai.

3. Ushtuesi i dhunës dënon sjelljen e vetë (në rastet kur dhuna ushtrohet nën ndikimin e alkoolit) ,
4. Nuk ka rregulla .

Marrëdhënia e ushtuesit të dhunës me dhunën, Numri më i madh i të anketuarve, 17 prej tyre kanë deklaruar se ushtuesi i dhunës nuk ka asnjë shqetësim ndaj sjelljes së dhunshme, për shkak se ajo është parë si normale nga ushtuesi. 14 e të anketuarve janë deklaruar se ushtuesit e dhunës e justifikojnë sjelljen e tyre, ndërkaq shumica e të anketuarve nga policia dhe 5 nga qendrat për punë sociale, janë përgjigjur se ushtuesi i dhunës dënon sjelljen e vet, kur dhuna ushtrohet nën ndikimin e alkoolit.

Anketimi i bërë me tre ushtues dhune tregon se ata në përgjithësi kanë deklaruar se gratë e tyre janë të pabindura, nuk i përmbushin obligimet e tyre, gratë nuk gatuajn mirë, ato nuk dëgjojnë, nuk i kryejnë punët e shtëpisë në mënyrën e duhur, dhe se burrat kanë të drejtë për të rrahur gratë që nuk binden. Sipas tyre, burri duhet të jetë ai i cili dominon dhe duhet t'i kontrolloj gratë, sepse gratë nuk e meritojnë besimin andaj ato duhet të binden dhe të bëjnë atë që iu thotë burri.

VI. Marrëdhënia e viktimës ndaj dhunës

(Ju mund të zgjedhni më shumë se një përgjigje)

1. Të gjitha gratë besojnë se dhunuesi nuk dënon sjelljen e tyre,
2. Të gjitha gratë nuk mendoj kështu,
3. Viktimat shpesh përpiqen për të justifikuar ushtuesin e dhunës para njerëzve, sepse ajo jeton me të,
4. Viktim parimisht e dënon, mirëpo për shkak të kompleksitetit të marrëdhënieve, viktimë në fund justifikon dhunuesin,
5. Viktima e dënon dhunuesin pa kurrfar rezerve,
6. Rëndom e dënojnë, por disi përmbahen për të mos thënë të vërtetën, megjithatë në vetvete e dënojnë dhunuesin,
7. Me kalimin e kohës pajtohet me fatin,
8. E dënojnë, ankohen, kërkojnë ndihmë, por me aq modesti, në heshtje, pa ndonjë vullnet që këtë ta çojnë deri në fund.

Në pyetjen e mardhënies së viktimës ndaj dhunës, 21 e të anketuarëve deklaruan se gratë zakonisht dënojnë sjelljet e dhunuesit por disi tërhiqen, nuk dëshirojnë ta thonë të vërtetën e plotë, ndërkaq kështu u deklaruan edhe shumica e prokurorëve dhe gjyqtarëve të anketuar. 17 e të anketuarëve janë deklaruar se viktimat e dënojnë dhunën, ankohen, kërkojnë ndihmë, por në mënyrë modeste, në heshtje, dhe nuk kanë vullnet për të çuar gjërat deri në fund. Këtë përgjigje e kanë dhënë shumica e të anketuarëve nga qendrat për punë sociale dhe 5 të anketuar nga policia. 7 të anketuar janë deklaruar se të gjitha gratë besojnë se dhunuesit nuk i dënojnë sjelljet e tyre. Përgjigjen se “viktimat shpesh tentojnë ta arsyetojnë ushtuesin e dhunës para njerëzve për shkak se jeton me të” e kanë deklaruar më së shumti përfaqësues të qendrave për punë sociale dhe 2 përfaqësues të policisë.

VII. Arsyet e vazhdimet të jetës së viktimës në bashkësi me ushtuesin e dhunës

(Ju mund të zgjedhni më shumë se një përgjigje)

1. Mungesa e parave,
2. Fëmijët dhe tradita patriarkale,
3. Mungesa e mbështetjes nga familja,
4. Mungesa e mbështetjes së shoqërisë.

Në këtë pyetje, 25 e të anketuarëve janë deklaruar se fëmijët dhe tradita patriarkale janë arsytet më të shpeshta për ta vazhduar jetën në bashkësi me ushtruesin e dhunës, 18 e të anketuarëve janë deklaruar se është mungesa e parave, 10 janë deklaruar se arsye është mungesa e mbështetjes nga familja, ndërkaq 9 e të anketuarëve janë deklaruar se mungesa e mbështetjes nga shoqëria është arsyeja që viktima të pranoj për ta vazhduar jetën në bashkësi me ushtruesin e dhunës.

Përfundim

Për mbrojtjen sa më efektive nga format e ndryshme të dhunës në familje, në Luginë të Preshevës është i nevojshëm një kompleks ndërhyrjesh në fusha të ndryshme. Disa prej këtyre ndërhyrjeve kanë efekte parandaluese, disa të tjera fokusohen te trajtimi i viktimave të dhunës:

- Të bëhen fushata në shkallë të gjerë dhe sistematike për ndërgjegjësimin e popullatës në përgjithësi, ndryshimi i qasjes ndaj këtij fenomeni nga ana e mjekëve, psikologëve, psikiatrive dhe pedagogëve, për të pasur një pasqyrë më gjithëpërfshirëse mbi pasojat e dhunës, mbi efektet shkatërruese të dhunës psikologjike, mbi të drejtat e viktimave për paprekshmëri fizike dhe psikike, etj.

- Të bëhen trajnime dhe programe të tjera (vizitat në shtëpi) me prindërit për njohjen e tyre me metodat alternative të edukimit të fëmijëve;

- Të bëhen trajnime të punonjësve të edukimit, shëndetësisë dhe të përkujdesjes shoqërore për diagnostifikimin e hershëm dhe raportimin e rasteve të dhunës në familje;

- Të botohen fletushka lidhur me edukimin e fëmijëve, të cilat sfidojnë përdorimin e dhunës dhe ofrojnë teknika jo të dhunshme për arritjen e objektivave të edukimit të fëmijëve;

- Të kthehet besimi i popullatës lokale në institucionet shtetërore për ta lajmruar dhunën, për t'i hulumtuar dhe identifikuar ushtruesit e dhunës, si dhe përfshirja e ekspertëve lokal nëpër këto institucione me qëllim të ngritjes së besimit të ndërsjellt;

- Që në nivel qendror të ngritet një strukturë e veçantë qeveritare (së bashku me strukturat regjionale dhe lokale) e cila do të merrej para së gjithash me trajtimin e dhunës ndaj fëmijëve dhe grave;

- Të rishqyrtohet numri i lëndëve mësimore, duke përjashtuar nga Planprogrami mësimor ngarkesat e panevojshme të tij, që personeli edukativo-arsimor dhe nxënësit të lirohen nga stresi që e shkakton përmbajtja e deritanishme e tij dhe të merren masa për trajnim lidhur me manaxhimin e stresit.

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Ligjet dhe Konventat

Konventa e Këshillit të Evropës mbi Mbrojtjen e Fëmijëve kundrejt Shfrytëzimit Seksual dhe Abuzimit Seksual, CETS,

Konventa mbi të drejtat e Fëmijës, e miratuar nga Asambleja e përgjithëshme e organizatës së Kombeve të Bashkuara,

Web faqe

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MA. Ilma Bici

*Departamenti i Drejtësisë, Universiteti
'Hëna e plotë' (Bedër). Shqipëri*

Të drejtat e të miturve në procesin penal: Mbrojta e tyre në arenën ndërkombëtare

Abstrakt

Qëllimi i këtij punimi është evidentimi i të drejtave të fëmijëve në procesin gjyqësor penal, si dhe mënyra e trajtimit të tyre në legjislacionin e brendshëm dhe atë ndërkombëtar. Kjo për arsye se me gjithë masat dhe garancitë që janë marrë në këtë drejtim, përsëri në praktikë kanë dalë probleme të cilat kanë nevojë për një rregullim më të hollësishëm.

Sot është një fakt i pakontestueshëm se krimi është një problem themelor i shoqërisë moderne si dhe forma më e rëndë e cënimit të cilësisë së jetës së tij. Duke pasur parasysh që fusha e drejtësisë për të mitur është tepër e gjërë, tema synon të trajtojë një aspekt të veçantë të saj që lidhet me masat shtrënguese ndaj të miturve, por pa anashkaluar edhe elementë të tjerë me rëndësi në fushën e drejtësisë për të mitur.

Punimi do të jete i ndarë në katër kapituj, në kapitullin e parë do të trajtohet pak histori deri sot në evolucionin e trajtimit juridiko-penal të të miturit.

Në kapitullin e dytë do të trajtohet rregullat dhe mënyra e mbrojtjes së të miturve nga organizmat ndërkombëtare, si: Konventa "Për të Drejtat e fëmijës", miratuar nga OKB, Direktivat e Kombeve të Bashkuara për parandalimin e kriminalitetit të të miturve, (Direktivat e Riadit), si dhe disa dokumente të tjera të rëndësishme të Këshillit të Europës.

Kapitulli i tretë do të përmbajë masat shtrënguese që zbatohen ndaj të miturve në një proces penal si në Republikën e Shqipërisë ashtu edhe në arenën ndërkombëtare (vezhëm krahasimor) dhe së fundi në kapitullin e katërt do të bëhet një trajtim në lidhje me "Modelin e Ri të Drejtësisë penale për të miturit"

Fjalët kyçe: *Masat e sigurimit ndaj të miturit; Drejtësia restauruese; Drejtësia retributive; Direktivat e Riadit*

I. Një vështrim historik ne trajtimin e evolucionit juridiko-penal të të miturit

E drejta romake trajton si të mitur apo “impuberes” të gjithë personat që nuk kishin arritur shkallën e pubertetit. Për femrat ekzistonte mendimi se në moshën dymbëdhjetë vjeçare arrin pubertetin, ndërsa për meshkujt nuk ekzistojnë kufinj moshorë¹. Për herë të parë moshë e miturisë është përcaktuar në kodifikimin e Justinianit², e cila ishte 12 deri në 14 vjeç.

Në këtë periudhë i mituri nuk gëzonte asnjë të drejtë. Ai ndodhej nën pushtetin atëror, “pater potestas”, i cili kishte të drejtën e jetës dhe të vdekjes së fëmijës së tij. Ai mund ta shiste, ta ekspozonte, ta braktiste etj.

Dallimi midis të miturve dhe të rriturve si autorë të veprës penale e ka origjinën që nga Roma e lashtë ku bëhej mjaft qarte diferencimi i llojit të sanksionet përkatësisht për një të mitur dhe ndryshe për një të rritur.

Në të drejtën penale kontinentale reforma e parë në drejtim të diferencimit të së drejtës penale për të mitur nga ajo për të rritur drejt modelit të posaçëm të masave edukuese të frymëzuara nga ideja për edukim dhe përmirsim është kryer në Hollandë në vitin 1901, ku kufiri i miturisë është përcaktuar moshë 18 vjeç. Në Angli janë krijuar gjyqe për të mitur me ligjin për fëmijët të vitit 1908. Në Gjermani ligji i parë për të mitur është i vitit 1923, nën ndikimin e legjislaturës amerikane. Në vitin 1953 krijohen gjykatat e para për të mitur.

Aktualisht sot e drejta për të mitur është nën ndikimin e fortë të standarteve ndërkombëtare. Vendosija e tyre në të drejtën penale për të mitur ka për qëllim të afroje dhe të eliminojë dallimet apo kolizionin midis legjislacionit ekzistues të një vendi dhe atij ndërkombëtar³.

Për të kuptuar më qartë ‘të miturin’ si pjesë e një krimi në fillim duhet të kemi të qartë konceptin Kriminalitetit. Kriminaliteti⁴ shihet në këndvështrime të ndryshme. Kështu duke u nisur nga volumi i kriminalitetit ai mund të kuptohet si tërësia e krimeve të kryera në një kohë dhe vënd të caktuar.

Nisur nga struktura e kriminalitetit mund të trajtohen aspekte cilësore të tij, si llojet e krimit. Ndërsa dinamika e kriminalitetit nënkupton ndryshimin e tij në periudha të ndryshme kohore. Për sa i përket konceptit të miturisë Konventa Për të Drejtat e Fëmijës në nenin Nr.1 të saj jep përkufizimin e termit “fëmijë”, sipas të cilit është fëmijë çdo qenie njerëzore nën moshën 18 vjeç.

¹ Arta Mandro ‘E drejta romake’, shtëpia botuese ‘Afërdita’ Tiranë 1998 f.100

² Vllado Kambovski, E Drejta Penale, pjesa e përgjithshme, Sh.B “Furkan ISM”, - Shkup, 2006, fq 1085.

³ “Masat shtrënguese ndaj të miturit”- Anisa Qilimi, Qershor Tiranë 2007, Shkolla e magjistraturës.

⁴ Vasilika Hysi, Hyrje në kriminologji dhe penologji , Shtypshkronja “Ilar”, Tirane 2002, fq 68.

Kodi penal në nenin Nr.12 përcakton se mosha e përgjegjësisë penale për të miturit është 14 vjeç për krime dhe 16 vjeç për kundërvajtje penale. I mituri, i cili do të mbajë përgjegjësi penale për një vepër të kryer prej tij do të konsiderohet personi i cili është 14 deri në 18 vjeç. Të mitur janë edhe të gjithë personat e tjerë nën moshën 14 vjeç, por për efekt të moshës së tyre nuk do të mbajnë përgjegjësi penale⁵.

Në fillimin e shekullit të XX-të pati një levizje të gjërë në drejtim të marrjes së masave të posaçme ndaj të miturit, në ato raste kur ai ishte paraqitur si autor i veprës penale. Duke menduar se për shkak të moshës nuk e kupton rëndësinë e veprës dhe si rrjedhim është më pak i përgjegjshëm, të miturit i caktohej një sanksion thjesht duke ulur dënimin. Gjithsesi zhvillimet e mëvonshme treguan se me anë të këtyre masave nuk është arritur rezultati i duhur. Zhvillimet bashkohore orientohen në hartimin e masave të posaçme që duhet të merren ndaj të miturve duke parashikuar në raste të caktuara edhe një procedurë të posaçme ndaj tyre.

II. MBROJTA NDËRKOMBËTARE E TË MITURIT

Aktualisht sot e drejta për të mitur është nën ndikimin e fortë të standarteve ndërkombëtare. Vendosija e tyre në të drejtën penale për të mitur ka për qëllim të afroje dhe të eliminojë dallimet apo kolizionin midis legjislacionit ekzistues të një vendi dhe atij ndërkombëtar. Zhvillimi bashkohor i së drejtës penale për të mitur është i dyzuar midis dy kontradiktave themelore. Nga njëra anë modeli i drejtësisë së trashëguar sipas së cilës delinkuentët e mitur shihen si një kategori e posaçme në numer të vogël të cilët do të mbajnë përgjegjësi në momentin që do të konsumojnë një vepër penale dhe nga ana tjetër modeli i ri i drejtësisë penale për të mitur, i cili udhëhiqet nga ideja për edukim e përmirsim dhe dënimin e tij me një sanksion alternativ. Modeli i ri i drejtësisë penale për të mitur përgjithësisht orientohet në dallimin që ekziston midis një autori të mitur dhe një autori të rritur të një veprë penale. Sipas tij në sistemin e trashëguar dënimet jepen ndaj një personi të vetëdijshëm dhe të përgjegjshëm, ndërkohë që i mituri e kryen veprën në një fazë të zhvillimit të personalitetit të tij në të cilën nuk mund të kuptojë tërësisht shkaqet dhe pasojat e sjelljeve të tij për sa kohë është në zhvillim⁶.

- Konventa “Për të Drejtat e Fëmijës”

Është një konventë e një rëndësie të veçantë sa i përket cilësimit të të miturit dhe mbrojtjes që i kushtohet atij si subjekt i veçantë i së drejtës. Në nenin 1 të saj jepet përkufizimi i termit “fëmijë”, sipas të cilit është fëmijë çdo qenie njerëzore nën moshën 18 vjeç, përveç rasteve kur ligji i brendshëm vendos një kufi më të ulët. Në nenin 3/1 thuhet se në të gjitha vendimet që kanë të bëjnë me fëmijën, të marra nga institucione publike, private apo të përkrahjes shoqërore, gjykatat apo autoritetet administrative, interesi më i lartë i fëmijës duhet të jetë në konsideratë mbizotëruese.

Në nenin 40 të Konventës përcaktohen në mënyrë të detajuar garancitë procedurale që duhet të respektohen ndaj një fëmije të dyshuar ose autor të një veprë penale. Me interes

⁵ Vllado Kambovski, E Drejta Penale, pjesa e përgjithshme, Sh.B “Furkan ISM”, -

Shkup, 2006, 1084.

⁶ “Masat shtrënguese ndaj të miturit”- Anisa Qilimi, Qershor Tiranë 2007, Shkolla e magistraturës.

në fushën që po trajtojmë është detyrimi që përcakton konventa për shqyrtimin pa vonesë të çështjes së tij nga një autoritet ose organ gjyqësor ,respektimi plotësisht i jetës private në të gjitha fazat e procedimit, si dhe detyrimi i shteteve pale që sa herë është e nevojshme dhe e detyrueshme, keta femije të trajtohen pa ju drejtuar procedurës gjyqësore⁷.

- “Rregullat e Havanës”

Heqja e lirisë së një të mituri duhet të jetë një masë e fundit, për një kohë sa më të shkurtër dhe duhet të kufizohet vetëm në raste të jashtëzakonshme. Heqje e lirisë do të thotë çdo lloj ndalimi ose burgimi, apo vendosja e një personi në një institucion publik ose privat, nga i cili ky person nuk lejohet të largohet me dëshirën e tij⁸.

Qëndrimi i të miturit në paraburgim ndaj të miturve duhet të jetë sa më i kufizuar. Të miturve u duhet garantuar përfitimi aktivitetëve dhe programeve kuptimplote, që do të shërbenin për të nxitur dhe ruajtur shëndetin dhe vetërespektin e tyre, për të nxitur ndjenjën e tyre të përgjegjësisë dhe për të inkurajuar ato qëndrime dhe aftësi që do t'i ndihmonin ata në zhvillimin e potencialit të tyre si anëtarë të shoqërisë.

I mituri mund të dërgohet në një institucion paraburgimi vetëm si rezultat i një vendimi gjyqësor, ose vendimi tjetër administrativ për paraburgim. Mbrojtja e të drejtave individuale të të miturve përsa i përket sidomos ligjshmërisë së zbatimit të masave të ndalimit sigurohet nga autoriteti kompetent, ndërsa objektivat e integritetit shoqëror duhet të sigurohen nga kontrollet sistematike sipas standarteve ndërkombëtare, ligjeve dhe rregulloreve vendase, nga një organ i autorizuar për të vizituar të miturit dhe që nuk i përket mjediseve të paraburgimit⁹.

Sa më shpejt që të jetë e mundur pas momentit të pranimi në një institucion paraburgimi, çdo i mitur duhet të intervistohet dhe duhet të përgatitet një raport psikologjik dhe social duke identifikuar cdo faktor që ka lidhje me llojin dhe nivelin specifik të kujdesit dhe programit që kërkohet nga i mituri. Ky raport se bashku me raportin e përgatitur nga mjeku që ka ekzaminuar të miturin në momentin e pranimi duhet t'i dërgohen drejtuesit të institucionit për të përcaktuar vendin më të përshtatshëm për të miturin brenda institucionit të paraburgimit. Personeli i trajnuar duhet të përgatisë me shkrim një plan trajtimi të të miturit duke specifikuar objektivat e trajtimit, afatin kohor dhe mjetet dhe mjetet me të cilat duhet të arrihen¹⁰.

Një analizë e hollësishme e këtyre rregullave tregon se ka shume për të bërë jo vetëm për sa i përket të miturve të cilët janë të izoluar në një institucion paraburgimi, në kuadër të caktimit të një mase shtrënguese, por edhe në tërësi në fushën e drejtësisë për të mitur.

- “Direktivat e Riadit”.

Në ndryshim nga Rregullat e Havanës, të cilët shprehen për heqjen e lirisë së të miturit si masë e fundit dhe përgjithësisht për kushtet në paraburgim, Direktivat e Riadit e vënë

⁷ “Konventa për të Drejtat e Fëmijes”- OKB, 20.11.1989.

⁸ “Rregullat e Kombeve të Bashkuara për mbrojtjen e të miturve të cilëve ju ëshë hequr liria” - 14 Dhjetor 1990.

⁹ “Rregullat e Kombeve të Bashkuara për mbrojtjen e të miturve të cilëve ju ëshë hequr liria” - 14 Dhjetor 1990.

¹⁰ Po aty.

theksin tek parandalimi i kriminalitetit me kontributin e të gjithëve, nëpërmjet hartimit të strategjive jo vetëm kombëtare, por edhe rajonale apo ndërkombëtare¹¹.

Në tërësinë e tyre Direktivat e Riadit, së bashku me Rregullat e Havanës si dhe konvente të tjera të shumta ndërkombëtare, përbëjnë një korpus serioz dispozitash të cilat duhet të merren në vëzhgim dhe studim për hartimin e një kuadri ligjor sa më të përshtatshëm në fushën e drejtësisë për të mitur në përgjithësi dhe në atë të caktimit të masave shtrënguese ndaj të miturit në vecanti.

Pjesa më e madhe e praktikës gjyqësore e zhvilluar nga Gjykata Evropiane e të Drejtave të Njeriut në lidhje me dhunën ndaj fëmijëve është përqëndruar në çështjen e ndëshkimit trupor, por ka rëndësi të drejtpërdrejtë për të gjithë situatat e dhunës ndaj fëmijëve. Një seri vendimesh të Gjykatës, që datojnë që prej vitit 1978, kanë sfiduar ndëshkimet trupore të fëmijëve në paraburgime.

Prandaj Konventa i detyron shtetet anëtare që të sigurojnë mbrojtjen e cdo personi kundër dhunës dhe torturës, nëpërmjet masave legislative, administrative dhe gjyqësore. Duke iu referuar sistemit juridik shqiptar, si baza ligjore, ashtu edhe struktura institucionale janë të pamjaftueshme dhe larg standarteve të kërkuara për të garantuar një trajtim në përputhje me kërkesat të legjislacionit ndërkombëtar, prandaj nevojitet një rishikim i sistemit ligjor për të sjellë një përmirësim si të sanksioneve, kompetencave të organeve po ashtu edhe të procedurave.

III. Të drejtat e të miturve në republikën e shqipërisë

Të analizosh sistemin e drejtësisë penale për të miturit në Shqipëri është një detyrë shumë komplekse. Kjo sepse në këtë janë të përfshira dhe të përkrahura çështje që kanë të bëjnë me ligjin dhe standardet e tij, me institucionet përgjegjëse, strukturat, nivelin e kompetencës dhe të përgjegjshmërisë së tyre, burimet njerëzore kualifikimin dhe (pa)-mjaftueshmërinë e tyre, politikën dhe mënyrën e adresimit të tyre dhe pa dyshim edhe mënyrën e zbatimit të ligjeve si edhe qëndrimeve subjektive ndaj politikave të caktuara, etj.

Që të bësh një analizë objektive të administrimit të sistemit të drejtësisë për të mitur kërkohet që të merresh me shumë komponentë që kanë të bëjnë jo vetëm me të lexuarit e ligjit, por edhe të një sere vendimesh në bazë dhe për zbatim të tij, studimit të raporteve dhe rezultateve të monitorimit të hallkave të sistemit, sugjerimeve e raporteve të partnerëve ndërkombëtare, dokumenteve politike të qeverisë, nivelit të koordinimit të sistemit, elasticitetit dhe fleksibilitetit të strukturave, termave financiarë, etj. Kërkohet që të gjitha analizat dhe deduksionet të përgjigjen pyetjes: sa është mbajtur parasysh interesi më i lartë i fëmijës? A është i mirë apo i keq administruar sistemi i drejtësisë për të mitur? Sa është qasja me standardet ndërkombëtare¹²?

Legjislacioni ynë ka parashikuar një sërë dispozitash për të miturin, por në praktike hasen probleme në interpretimin dhe zbatimin e tyre, pasi kjo kategori subjekti ka nevojë për një trajtim të vecantë nga një ligj i vecantë ose në pamundësi të këtij ligji, krijimi i një kapitulli të vecantë në Kodin e Procedurës Penale, vetëm për të miturit. Mënyra me të

¹¹ “Direktiva e Kombeve të Bashkuara për parandalimin e kriminalitetit të të miturve”- OKB, 1990.

¹² “Drejtësia për të miturit në shqipëri”- Manual, UNICEF

cilën fëmijët, të cilët janë viktimë të kushteve në të cilat ata jetojnë dhe fëmijët të cilët kanë shkelur ligjin trajtohen, ndëshkohen dhe rehabilitohen, është në thelb një reflektim i kulturës së shoqërisë dhe sistemit të saj të vlerave. Të miturit zënë një përqindje të konsiderueshme të popullsisë në botë dhe ndërkohë ballafaqohen me ndikimin e pasojat e zhvillimeve politike, ekonomike, sociale, të globalizimit, efektet e krizave ekonomike dhe financiare. Mirëqenia e fëmijëve cenohet nga varfëria, sëmundjet, neglizhënva dhe format e rënda të kriminalitetit. Sot vihet re një rritje e të miturve të përfshirë në krim dhe nga kjo lind nevoja e ndërtimit të një sistemi drejtësie penale për të mitur, I udhëhëqur nga “interesi më I lartë I fëmijës”, por gjithashtu rëndësi ka edhe hartimi, zbatimi I një strategjie për parandalimin e kriminalitetit të të miturve/ndaj të miturve. Aktualisht, prirja kryesore e drejtësisë për të miturit në shumë prej vendeve evropiane është duke tentuar drejt një sistemi më shtrëngues, por jo domosdoshmërisht më efektiv. Në thelb është pikërisht ky aspekt që shqetëson shumicën e atyre që janë duke punuar në këtë fushë¹³.

Kodi Penal i RSH permban nje sere dispozitash nepermjet te cilave i behet nje mbrojtje e vecante te drejtave dhe interesave te te miturve. Ekzistojne nje sere aktesh nderkombetate per mbrojtjen e te drejtave te femijeve. Deklerata e te drejtave te femijeve e adoptuar nga Asmbleja e Pergjitheshme e Kombeve te Bashkuara ne vitin 1959, e cila deklaroi mbrojtjen e femijes ndaj te gjitha formave te pakujdesise, egersise, shfrytezimit. Kodi Penal i RSH permban nje sere dispozitash nepermjet te cilave i behet nje mbrojtje e vecante te drejtave dhe interesave te te miturve. Kjo mbrojtje paraqitet si nga aspekti procedural edhe ai material. K.Penal i RSH ne nenin 49/2¹⁴ i njej te drejten personit nen 18 vjec per te pasur mbrojtjes detyrimisht. Kur i pandehuri eshte i mitur atij i sigurohet ndihme juridike dhe psikologjike ne cdo gjendje dhe shkalle te procedimit, si dhe prania e prindit ose personit te afert te kerkuar nga i mituri. Organi procedues mund te kryejë veprime me te miturit pa praninë e personave te mesiperm vetem kur keto veprime jane ne interes te te miturit (neni 35) KPrP.

Neni 116, 117 i K.Penal parashikon veprat penale te shtytjes, ndermjetesimit, ose ushtrimit te prostitucionit me persona te mitur, si dhe pornografia ne ambientet e te miturve, ku i mituri shfrytezohej nga persona me te rritur ne aktivitete kriminale. Keto vepra paraqesin nje rrezikshmeri te madhe per vete faktin se keta persona nuk e kane ndergjegjen e plote per veprimet qe kryejne. Por ajo qe eshte me e rëndësishme, jane pasojat e shumta qe lene tek femijet shtytja ose terheqja e tyre ne krim qe varen nga moshja, psikologjia e femijes etj. KP i ben nje mbrojtje te vecante lirise seksuale te te miturit. Ligji penal mbron te miturit qe nuk kane arritur moshen 14 vjec ose nuk kane arritur pjekurine seksuale, pavaresisht se vepra mund te jete kryer pa dhune, (n 100) K.Penal. K.Penal mbron lirine seksuale edhe te te miturit nga 14 deri ne 18 vjec ne nenin 101 te tij, ne qofte se ndaj ketyre te miturve kryhen ose tentohet te kryhen maredhenie seksuale me dhune. Gjithashtu K.Penal parshikon edhe vepra penale te turpshme luxury ndaj te miturve. Rëndësia e kesaj dispozite eshte e madhe ne kushtet kur femijet po behen gjithnje e me shume objekt i abuzimeve seksuale nga te rriturit. Gjithashtu edhe per parandalimin e efekteve te droges dhe lendeve narkotike e substancave psikotrope K.Penal ka parashikuar N 285/2 ku nxitja per perdorim droge dhe substancave psikotrope ka nje sanksion te rende. Persa i perket vete rolit te femijeve si subjekte te veprave penale, legjislacioni penal eshte nisur nga parimi i mbrojtjes se interesave te te miturve,

¹³ “Sistemi i drejtësisë për të miturit në Shqipëri dhe Standartet Evropiane”- Msc. Redone Ndreko, FD.U.T

¹⁴ KPr.P

respektimi i personalitetit të tij, vecorite e moshes etj. KP ne trajtimin e delinkuenteve te mitur ka mbajtur parasysh rekomandimet e dhena ne aktet nderkombetare dhe Rregulloren e Pekinit.

Mosha per pergjegjesi penale ne KP ne ndryshim nga KP i meparshem per kundravajtjet penale qe ishte 14 vjec tashme eshte bere 16 vjec. Ky hap ka te beje me rendesine e paket dhe rrezikshmerine e paket shoqerore qe karakterizohen kundravajtjet penale. Instituti i denimit ka shume rendesi persa i perket te denuarve te mitur. Ky rregull eshte ne perputhje me Rregulloren e Pekinit ku ndalohej zbatimi i denimit kapital per vepra penale te kryera nga te mitur. KP ne nenin 51 parashikon se te miturit qe ne kohen e kryerjes se kriminit nuk kane mbushur moshen 18 vjec¹⁵, denimi me burgim nuk mund te jete me shume se gjysma e denimit qe parashikon ligji penal per vepren penale te kryer¹⁵.

Neni 52 I Kodit Penal parashikon perjashtimin e te miturit nga denimi dhe dergimin e tij ne nje institucion edukimi. Te drejten e perjashtimit te te miturit e ka gjykata dhe kete e ben kur vepra penale nuk ka rrezikshmeri te larte, kur fajtori ka pasur nje sjellje te mire para kryerjes se vepres. Pra gjykata vendos per perjashtimin e te miturit nga denimi dhe dergimin e tij ne nje institucion edukimi¹⁶. Do te thoja qe panvaresisht nga mjetet, instrumenete e shumta qe vendi ynë ka vënë si garanci per respektimin dhe mbrojtjen e të drejtave të të miturve në procesin penal, sërisht mendoj që ka disa probleme ligjore dhe praktike lidhur me dënimet ndaj të miturve:

- Konstatohet se KP vetëm për caktimin e masës së dënimit me burgim ka një ndryshim midis të miturve dhe të rriturve dhe nuk ka një dispozitë që të bëjë diferenca edhe për llojet e tjera të dënimeve dhe as për dënimet kryesore lidhur me kundravajtjet. - Nga mënyra se si qëndron neni 51 i KP duket sikur është ulur vetëm kufiri maksimal i dënimit të dhënë për një vepër penale dhe asnjë lehtësi tjetër në lidhje me masën e dënimit ndaj një të mituri. Kjo gjë bën që shpesh herë masat e dënimit për të miturit të jenë pothuajse njëjloj me ato që jepen për të rriturit. Parashikimi i uljes së masës së dënimit për të miturit nën minimum kur ekziston një numër i caktuar rrethanash lehtësuese mund të ishte me vend.

- Sipas nenit 49 gjykata mund të marrë në konsideratë edhe rrethana të tjera për sa kohë i quan të tilla që justifikojnë lehtësimin e dënimit pavarësisht nga rrethanat lehtësuese që përmenden në nenin 48 të KP, por edhe këtu nuk renditet një e tillë si mosha.¹⁷

- Për disa vepra penale që parashikojnë vetëm dënim me burgim, psh: Vjedhja (neni 134i KP), Mbajtja e lëndëve narkotike – neni 283 KP, është e nevojshme që të përcaktohen vlerat minimale për të cilat duhet të procedohet i pandehuri i mitur. Mospërcaktimi i këtyre vlerave bën që të dënohen me burgim të mitur për vjedhje në vlera fare të vogla apo vjedhje të mbetura në tentative ku mund të mos ketë fare dëm material, ose të mitur përdorues të lëndëve narkotike për mbajtjen e sasive të vogla të lëndëve narkotike që ndoshta mund t'i kenë edhe vetëm për përdorim vetjak.

Rrjedhimisht mendoj se çështjet e sipërpërmenura kane nevojë për një rregullim pasi shpesh herë mudn të bëhen shkas për nje keqësim apo nënshtrim të një mase shtrënguese jo në propocion të saktë me vepën që është kryer.

¹⁵ KP në RSh

¹⁶ “Dënimi penal tek të miturit”- Msc.Viola Prifti FD.UT

¹⁷ Po aty.

¹⁸ Drejtësia për të miturit në shqipëri”- Manual, UNICEF

- **Kuptimi i Drejtësisë Restauruese**

Drejtësia restauruese është një nocion i ri në literaturën tonë juridike, pak i njohur dhe i patrajtuar më parë. Drejtësia restauruese mund të përkufizohet si një procedurë që merret me pasojat e konfliktit, ku përfshihen viktimat, kundërvajtësit dhe persona të tjerë, interesat e të cilëve janë prekur dhe ka për qëllim restaurimin e marrëdhënieve dhe dëmit të shkaktuar nga vepra penale.

Drejtësia restauruese rrit mundësinë për një pjesëmarrje personale më aktive të viktimës si palë e prekur. Ajo krijon mundësi që viktimat të jetë një zë më i fortë në trajtimin e pasojave të viktimizimit në komunikimin me të akuzuarin, të marrë ndjesë prej tij dhe dëmshpërblim. Nëpërmjet politikave konsesuale synohet jo vetëm pajtimi midis viktimës dhe të akuzuarit, por edhe marrja përsipër e përgjegjësi nga ana e këtij të fundit duke i ofruar mundësi praktike për të bërë ndryshime, të cilat mund të ndihmojnë për riintegrimin dhe rehabilitimin e tij. Ajo synon gjetjen e një alternative sa më të bute dhe të pranueshme për palët në konflikt, duke ofruar rezultate më konstruktive dhe më pak shtypëse se ato të drejtësisë ndëshkuese.

Duke menduar se forma më e mirë e shpjegimit të një nocioni është ajo krahasimore me një koncept tjetër, dallimi midis të drejtës retributive dhe asaj restorative, do të shërbente akoma më tepër zbulimit të përmbajtjes së kuptimit të drejtësisë restauruese¹⁸.

Dallimi midis të drejtës retributive dhe asaj restauruese ka të bëjë pikësepari me raportet e krijuara midis subjekteve të ndryshëm. E drejta retributive shtrihet në një raport të dyanshëm midis shtetit dhe autorit të veprës penale ku dënimi i këtij të fundit është një formë shpagimi ndaj shtetit për veprën e kryer. Ndërsa e drejta restauruese shtrihet në një raport të trefishtë midis autorit të veprës, viktimës dhe shtetit ku shteti është vetëm ndërmjetësues në procesin e barazimit mes autorit dhe viktimës.

E drejta retributive apo e thënë ndryshe Drejtësia Ndëshkuese ka në qendër të saj “shkeljen e ligjit”. Nëse konkludohet që ligji është shkelur kalohet në një moment të dytë¹⁹: A është personi i akuzuar fajtor për shkeljen e ligjit? Nëse po, ky person duhet ndëshkuar! Ndërsa në të drejtën restauruese, ajo çka paraqet interes parësor është marrëdhënia e cënuar, pajtimi i palëve, nevojat e viktimës, restaurimi i situatës së mëparshme me veprime konkrete, restaurimi i dëmit, si dhe marrja e përgjegjësi reciprokisht nga palët.

Nga analiza e kuadrit ligjor të realizuar gjatë këtij punimi arrijmë në këto konkluzione:

Nuk ka një ligj të plotë integral që të trajtojë çështjet e drejtësisë për të mituri. Dispozitat lidhur me të miturit janë të shpërndara në ligje e kode. Ndërkohë ka shumë ligje që ndërsa trajtojnë çështje të drejtësisë penale nuk bëjnë asnjë trajtim të diferencuar për të miturit duke i barazuar në këtë mënyrë me të rriturit. Në analizën e legjislacionit, kjo ishte e evidente në një masë të konsiderueshme.

¹⁹ Masat shtrënguese ndaj të miturit”- Anisa Qilimi, Qershor Tiranë 2007, Shkolla e magistraturës.

Në disa raste ndodh që standardi ligjor nuk shoqërohet me akte nënligjore në bazë dhe për zbatim të tij, ose ndërsa standardi është de jure, ai nuk gjendet de facto. Rasti i gjykimit të, çështjeve për të mitur nga gjykata ose seksione për të mitur dhe rasti i aplikimit të masave edukuese në kushtet e mungesës së institucioneve. Shembuj të tillë ndonëse nuk janë të shumtë e bëjnë sistemin vetëm “në letër” dhe nuk garantojnë të drejtat e të miturve në procesin penal.

Ka ende vend për harmonizim të legjislacionit me standardet ndërkombëtare lidhur me drejtësinë për të miturit. Ratifikimi i një numri të madh konventash nuk e ezauron plotësisht problemin sepse ende zbatueshmëria e konventave nuk është në të njëjtin stad me ligjin për efekt të njohurive të limituara lidhur me to.

Dispozitat në fuqi i japin sistemit të drejtësisë më shumë pamjen e një sistemi ndëshkues se sa të një sistemi rehabilitues dhe edukues për të miturit. Kjo është në kundërshtim me standardet ndërkombëtare të detyrueshme për vendin tonë.

Përgjithësisht legjislacioni ka pësuar ndryshime të vazhdueshme. Edhe në KPP dhe KP si edhe në ligjin për organizimin e pushtetit gjyqësor, janë bërë një sërë ndryshimesh të herëpashershme. Ndonjëherë duket sikur dispozitat vijnë në kundërshtim me njëra tjetrën ose janë të paqarta. Një rishikim i plotë i tyre në harmoni me njëra tjetrën është i domosdoshëm.

Në përfundim mund të themi që problemet lidhur me të miturin nuk janë thjesht të karakterit juridik, por edhe të karakterit social. Prandaj në trajtimin e tyre kërkohet jo vetëm pjesëmarrja e aktorëve institucional, por edhe atyre shoqërore si familja, shoqëria, komuniteti. Zhvillimi i drejtësisë për të mitur nuk mund të kufizohet thjesht në përfshirjen e nocioneve të reja, por edhe në zbatimin e tyre në praktikë, çdo ndryshim nuk duhet thjesht të mbetet në fazën e rekomandimeve, por të shoqërohet me energji shtytëse pozitive për të ecur përpara

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**Ermira Llacja¹,
Esmeranda Basho²**

¹*Master Shkencor Penal (Drejtesi), Universiteti i Tiranës, Shqiperi*

²*Master Shkencor Penal (Drejtesi), Universiteti i Tiranës, Shqiperi*

Standartet ndërkombëtare për mbrojtjen e fëmijëve. Sa njihen dhe zbatohen realisht në vendin tonë

Abstrakti

Fëmijët si një “kategori vunerabël” kanë nevojë për një mbrojtje të veçantë nga ana e shtetit. Mbrojtja e të miturve është një çështje e ndjeshme, por dhe mjaft komplekse. Vendi ynë ka nënshkruar konventa dhe është bërë pjesë e instrumentave ndërkombëtare në fushën e mbrojtjes së fëmijëve. Standartet ndërkombëtare për mbrojtjen e të miturve përbëjnë një udhërfyes, i cili i drejton shtetet në rrugën e duhur për të realizuar një mbrojtje efektive të fëmijëve. Në kuadër të aspiratës tonë për tu bërë pjesë e Bashkimit Europian, njohja dhe zbatimi i standarteve ndërkombëtare përbën një detyrë sfiduese për shtetin shqiptar. A ka arritur shteti ynë ta përmbush këtë detyrë komplekse?

Dhënia e një përgjigjeje për këtë pyetje përbën dhe qëllimin e këtij punimi. Punimi synon të nxjerrë në pah problemet në kuadrin ligjor dhe atë praktik, për mbrojtjen e fëmijëve. Së pari në këtë punim do të trajtojmë kontekstin ligjor ndërkombëtar, karakterin detyrues dhe rekomandues të normave të së drejtës ndërkombëtare, si dhe instrumentet ndërkombëtare për mbrojtjen e fëmijëve. Së dyti do bëjmë një paralelizëm të kontekstit ligjor ndërkombëtar me atë të brendshëm, për të parë se sa janë pasqyruar standartet ndërkombëtare në legjislacionin e brendshëm, duke evidentuar përparësitë dhe mangësitë e këtij të fundit. Së treti do të ndalemi në problematikën që ndeshet në kuadrin praktik për mbrojtjen e fëmijëve në vendin tonë. Dhe së fundmi pas gjithë analizës do jepen përfundimet dhe disa rekomandime për realizim e një mbrojtjeje më efektive të fëmijëve.

Fjalet kyce: Fëmijë, Standarte, Mbrojtje, Drejtësi, Ri-integrim.

1 Hyrje

Rritja e vëmendjes të familjes dhe shoqërisë ndaj fëmijëve duhet të përbëjë objektivin kryesor, në kuadër të mbrojtjes së të drejtave të fëmijëve. Mbrojtja e të drejtave të fëmijëve përbën një detyrim kushtetues, ligjor por edhe moral, si dhe një detyrim të shtetit tonë në kuadër të integritetit në familjen europiane. Në çdo shoqëri ekzistojnë tregues të ndryshëm që flasin për shkallën e zhvillimit dhe të demokratizimit të saj. Ndër këta tregues, mjaft të rëndësishëm janë treguesit e nivelit të kujdesit, që shoqëria tregon ndaj grupeve më të dobëta të saja, ku përfshihen dhe të miturit, të cilët nuk kanë mundësi të mbrojnë vet të drejtat e tyre.

Koncepti i termit ‘fëmijë’ jepet në Konventën “ Për të Drejtat e Fëmijës”, neni 1: *“me fëmijë kuptohet çdo qenie njerëzore nën moshën 18 vjeç, me përjashtimin e rasteve kur moshë madhore arrihet me përpara ,në përputhje me legjislacionin të cilit ai i nënshtrohet.*

Rregullat e Kombeve të Bashkuara ‘Për mbrojtjen e të rinjve të cilëve u është hequr liria’, në rregullin 11, jep pothuajse të njëjtin përkufizim: *‘I mitur është çdo person nën 18 vjeç’*. Me këtë term shpesh është nënkuptuar moshë e fëmijërisë por pa e përcaktuar se sa është kjo moshë. Me termin ‘fëmijë’, kuptojmë personin që s’ka arritur moshën e pjekurisë, i cili s’ka përgjegjësi për veprimet e veta. Kriteret për të përcaktuar kur një person do të quhet fëmijë janë të ndryshme. Ndër to mund të përmendim : moshën, zhvillimin trupor, zhvillimin mendor, dhe atë emocional. Koncepti fëmijë identifikohet në më të shumtën e rasteve me konceptin ‘i mitur’, gjë e cila shpesh është e gabuar. Në legjislacionin tonë nuk ka një përkufizim të saktë të termit ‘fëmijë’. Për të siguruar një mbrojtje efektive të të drejtave të fëmijëve duhet në rradhë të parë të kemi një përkufizim të saktë.

Shkalla e demokracisë së një vendi shikohet në rradhë të parë nga mbrojtja e të drejtave të njeriut dhe sigurisht mbrojtja e të drejtave të fëmijëve përbën një nga shtyllat bazë të demokracisë. Pas viteve ’90 legjislacioni shqiptar ka pësuar reformime të herëpashershme, por ende ka vend për përmirësime të tjera. Por sigurisht pjesën më problematike e përbën zbatimi në praktikë i legjislacionit.

Ajo që duhet të mbizotërojë që në procesin e hartimit të legjislacionit, deri në zbatimin e tij në praktikë nga institucionet përkatëse, është parimi i interesit më të lartë të fëmijës. Po sa mbahet parasysh interesi më i lartë i fëmijës? A njihen standartet ndërkombëtare për mbrojtjen e të miturve në vendin tonë dhe sa zbatohen realisht? A janë fëmijët të mbrojtur në Shqipëri? Cilat janë sfidat me të cilat përballet vendi ynë në kuadrin e mbrojtjes së të drejtave të fëmijëve? Këtyre dhe të tjera pyetjeje do t’ju japim përgjigje në këtë punim.

2 Standartet Ndërkombëtare lidhur me trajtimin ndaj të miturve

2.1 Standartet e Përgjithsme Ndërkombëtare.

Parimet ndërkombëtare kanë për qëllim të vendosin standarde minimale për mbrojtjen e të miturve, në përputhje me të drejtat dhe liritë themelore të njeriut dhe me qëllim që të neutralizojë efektet e dëmshme të të gjitha llojeve të ndalimit dhe për të inkurajuar integritimin në shoqëri. Rregullat e gjithëpranuara duhen zbatuar në mënyrë të paanshme, pa asnjë lloj diskriminimi për shkak të racës, ngjyrës, seksit, moshës, gjuhës, besimit fetar, kombësisë, bindjes politike apo rasteve të tjera, besimeve apo praktikave kulturore,

pronës, statusit të lindjes apo atij familjar, origjinës etnike apo shoqërore dhe aftësisë së kufizuar. Detyra primare e shteteve është respektimi i këtyre parimeve minimum dhe më tej avancimi për një mbrojtje dhe trajtim përtej këtyre standarteve. Duhet thënë që organizmat ndërkombëtare përpjekjet e tyre për mbrojtjen e të miturve e kanë bërë. Hartimi i një sërë aktesh si: konventa, rekomandime, rezoluta, direktiva, udhëzime, rregullat standart, janë një dëshmitar jo vetëm i vullnetit të mirë por edhe përpjekjeve reale dhe konkrete për të vënë në zbatim tërësinë e standarteve ndërkombëtare. Në mënyrë që këto akte të respektohen e zbatohen nga vetë shtetet ato janë veshur me “mantel” detyrues ose rekomandues në varësi të llojit të aktit¹. Gjithashtu edhe KDF (Konventa për të Drejtat e Fëmijëve) përmban norma ligjore, zbatimin e të cilave mbikqyret nga Komiteti mbi të drejtat e Fëmijëve. Megjithatë edhe disa prej rekomandimeve apo direktivave kanë një karakter esencial të cilat indirect bëhen të detyrueshme për respektim nga shtetet.

Në aspektin ligjor ndërkombëtar, drejtësia për të mitur bazohet në disa akte të rëndësishme, si: Konventa për të Drejtat e Fëmijës, Rregullat e Pekinit, Rregullat e Havanës, Rregullat e Riadit, etj. Këto rregulla mund të konsiderohen si udhërrëfyes për një proces të rëndësishëm të ndarë në 3 faza:

- *Së pari*, politika sociale për të parandaluar dhe mbrojtur të rinjtë nga përfshirja e tyre në krim (Rregullat e Riadit);
- *Së dyti*, ngritja e një sistemi drejtësie për të miturit që vijnë në konflikt me ligjin, sistem i cili duhet të zhvillohet në mënyrë progresive (Rregullat e Pekinit);
- *Së treti*, mbrojtja dhe garantimi i të drejtave themelore si dhe marrja e masave për riintegrimin social të të rinjve, dikur të privuar nga liria (Rregullat e OKB për Mbrojtjen e të Miturve të privuar nga liria).

2.2 Instrumentat Ndërkombëtare

2.2.1 Instrumentat e Kombeve të Bashkuara

Sigurimi i një zbatimi të plotë të standarteve të përcaktuara nga aktet normative është prioriteti i organizmave kompetente. Aktet e nxjerra nga Organizata e Kombeve të Bashkuara në përgjithësi parashikojnë mbrojtjen e të miturve në sistemin e drejtësisë, duke i kushtuar një rëndësi të vecantë trajtimit të të miturve në sistemin penitenciar. Një nga prioritetet e këtyre instrumentave është evidentimi dhe zbatimi i alternativave të dënimit duke bërë të mundur eliminimin sa më shumë të dënimit me burgim, duke e parë atë si mundësinë e fundit të privimit të lirisë. Riintegrimi i të miturve në shoqëri është pasuesi ideal i politikave rehabilituese. Kur të miturit mbahen në paraburgim, thelbësore është që ato të vecohen nga të rriturit, tu sigurohen mjetet e duhura që të ruajnë kontaktet me familjet e tyre në mënyrë që rikthimi në komunitet të mos përbëjë pengesë për vazhdimësinë e jetës në vazhdim.

Instrumentat e Kombeve të Bashkuara janë:

-Konventa e OKB për të Drejtat e Fëmijës (1989), ratifikuar më 27.2.1992 dhe protokollin shtesë i saj lidhur me prostitucionin dhe pornografinë ndaj të miturve; Deklarata

¹ Drejtësia për të mitur në Shqipëri ,botim I CRCA,udhëhequr nga Prof.Dr.Arta Mandro.

Universale e të Drejtave të Njeriut e vitit 1948; Deklarata mbi të Drejtat e Fëmijëve Rregullat Standart Minimum të Kombeve të Bashkuara për Administrimin e Drejtësisë për të Mitur (Rregullat e Pekinit) 1985; Rregullat e Kombeve të Bashkuara për Mbrojtjen e të Rinjëve që iu është hequr liria (Rregullat e Havanë 1990; Udhëzimet e Kombeve të Bashkuara për Prandalimin e Kriminalitetit të të rinjëve (Udhëzimet e Riadit) Rregullat Standart Minimum lidhur me masat Mosarrestimit (Rregullat e Tokios); Pakti Ndërkombëtar lidhur me të drejta Civile dhe Politike vitit 1966 Konventa kundër Torturës dhe Trajtimit apo Ndëshkimit Cnjerëzor, Mizo dhe Dehradues.

Konventa mbi të Drejtat e Fëmijës (KDF), e detyrueshme për Shtetet Palë të saj, përcakton të drejtat e të gjithë fëmijëve, duke përfshirë edhe fëmijët në cilësinë e viktimës, dëshmitarit dhe autorit të veprës penale². Ajo plotësohet me instrumente të tjera ligjore detyruese, si dhe të detajuara më tej nga rregulla dhe udhëzime shtesë që kanë të bëjnë me drejtësinë për të miturit³.

Ekziston një kufizim i rëndësishëm në Evropë me atë që shtetet evropiane mund të bëjnë në drejtim të legjislacionit të përgjithshëm penal apo me futjen e pakufizuar të novacioneve në legjislacionin penal të të miturve. Veprimi i tyre është i kufizuar me të vërtetë nga rekomandimet ndërkombëtare, rregullat dhe konventat. Legjislacioni më i rëndësishëm për të cilin të gjitha ligjet evropiane janë testuar është Konventa Evropiane për të Drejtat e Njeriut dhe Liritë Themelore (KEDNJ)⁴, e cila është miratuar në 1950 nga Këshilli i Evropës¹. Konventa zbatohet nga Gjykata Evropiane në Strasburg dhe ka influencë të konsiderueshme në legjislacionin kombëtar të vendeve anëtare që e kanë miratuar Konventën.

2.2.2 Instrumentat e Këshillit të Evropës

Edhe standartet ndërkombëtare të parashikuara nga Këshilli i Evropës jënë një lloj konfirmimi i parimeve të përcaktuara nga aktet e OKB. Është bërë një përforsim i tyre duke i vënë dhe më shumë theksin te parimet më të rëndësishme, te mbrojtja e të drejtave të njeriut dhe të miturve në vecanti. Disa nga instrumentat më të rëndësishëm janë:

- Konventa Ndërkombëtare e të Drejtave të Njeriut si dhe protokollat shtesë të saj 1,2,4,5,6,7,11
- Karta Sociale Evropiane e Rishikuar
- Konventa Evropiane e Ushtrimit të Drejtave të Fëmijëve
- Konventa Evropiane për Prandalimin e Torturës, Dënimeve dhe Trajtimeve Cnjerëzore apo Degraduese dhe protokollat nr.1 dhe 2.
- Konventa Evropiane mbi të Drejtat Sociale.
- Konventa Evropiane për Mbikqyerjen e Persona të Dënuar apo të Liruar me Kusht⁵.

Rekomandime të Tjera të Këshillit të Europës

² *Manuali i Punonjësit të Shërbimit të Proves*, mundësuar nga Prezenca e OSBE-së në Shqipëri, PEGI, Tiranë, 2009.

³ Sipas nenit 1 të KDF, fëmijë është “çdo njeri nën 18 vjeç, përveç rasteve kur sipas ligjit të aplikueshëm për fëmijën, moshë për t’u konsideruar i rritur parashikohet më herët.

⁴ Shqipëria e ka ratifikuar KEDNJ në vitin 1995

⁵ Ratifikuar me ligjin 7284 sdt 26.12.2000

Këto rekomandime janë bazuar në parimet e Rregullave Europiane të Burgjeve me qëllim që t'u shërbejnë qeverive të shteteve anëtare në praktikën dhe legjislacionin e tyre të brendshëm, që t'i zbatojnë në mënyrë progresive dhe me bazë sa më të gjerë.

Rekomandimi Nr. R (92) 16 i Komitetit të Ministrave të Shteteve Anëtare në lidhje me Rregullat Europiane mbi Sanksionet dhe Masat Komunitare

Termi “sanksione dhe masa komunitare” i referohet atyre masave dhe sanksioneve që mbajnë të dënuarin në komunitet, por me disa kufizime të lirisë së tij nëpërmjet vendosjes së kushteve dhe/ose detyrimeve, dhe të cilat zbatohen nga organet e përcaktuara me ligj për këtë qëllim. Termi përfshin çdo sanksion të vënë nga një gjykatë apo gjyqtar, dhe çdo masë të marrë para apo në vend të një vendimi mbi një sanksion, si dhe mënyrat për të zbatuar një dënim me burgim jashtë ambienteve të burgut⁶.

Rekomandimi CM/Rec(2008) 11 i Komitetit të Ministrave të shteteve anëtare mbi Rregullat Europiane për të dënuarit e mitur që i nënshtrohen sanksioneve ose masave⁷

Ky rekomandim ka për qëllim të rrisë unitetin midis shteteve anëtarëve të tij, veçanërisht duke harmonizuar ligjet mbi çështjet me interes të përbashkët, duke konsideruar faktin që nevojitet një bashkëveprim në nivel evropian për të mbrojtur më mirë të drejtat dhe mirëqenien e të miturve që hyjnë në konflikt me ligjin, si dhe për të zhvilluar një system drejtësie në interes të të miturve në shtetet anëtare.

2.2.3 Instrumentat e Bashkimit Evropian

Bashkimi European sin je structure e unifikuar politico ekonomike, ka një kuadër të tijin legjislativ për mbrojtjen e të miturve në vecanti. Ky kuadër konsiderohet si parashikimi dhe mbrojtja më e mire konsoliduar juridikisht fëmijëve. Procesi i integritetit në të cilin Shqipëria kërkon të bëhet pjesë, kërkon pëmbushjen e një sërë detyrimeve ligjore nga kjo e fundit. Harmonizimi dhe përafrimi i legjislacionit me standartet e BE, është një detyrë immediate për ligjvënësën Shqipar. Kjo veprimtari do të përbejë fokusin e punës së grupeve të krijuara në Ministrinë e Drejtësisë si edhe e veprimtarisë së Komisionit për Reformën ligjore⁸. Disa nga rekomandimet e Komisionit European në lidhje me trajtimin e të miturve janë: Pornografia Fëmimore; Masat kundër turizmit seksual; Trafikimin e qenieve njerëzore dhe shfrytëzimin seksual të fëmijëve; ndihmën ndaj fëmijëve të zhdukur ose të shfrytëzuar seksualisht; Vendim kuadër i KE lidhur me luftën kundër shfrytëzimit seksual të fëmijëve dhe pornografisë fëmijërore⁹.

⁶ Edhe pse ky përkufizim nuk përfshin sanksionet monetare, çdo aktivitet mbikëqyrës apo kontrollues i ndërmarrë për të siguruar zbatimin e tyre, përfshihet në qëllimin e rregullave

⁷ Edhe pse ky përkufizim nuk përfshin sanksionet monetare, çdo aktivitet mbikëqyrës apo kontrollues i ndërmarrë për të siguruar zbatimin e tyre, përfshihet në qëllimin e rregullave

⁸ Plani Kombëtar për përafrimin e legjislacionit me atë të BE, dhe zbatimit të MSA, Republika e Shqipërisë, Këshilli i Ministrave, Tiranë 2005. Urdhëri i Kryeministrit Nr. 90 datë 16.04.2004 lidhur me detyrat dhe funksionet e KRL si dhe rdhëri Nr. 143 datë 23.06.2006 lidhur me përbërjen e KRL.

⁹ Drejtësia për të mitur në Shqipëri, botim I CRCA, udhëhequr nga Prof.Dr.Arta Mandro. ISBN:978-99956-18-09-4

2.4 Disa prej Parimeve të Drejtësisë për të Miturit

Përkufizimi i drejtësisë për të miturit

Qëllimi i drejtësisë për të mitur është të sigurojë se fëmijëti janë shërbyer në mënyrën më të mirë të mundshme dhe mbrohen nga sistemet e drejtësisë¹⁰. Ajo në mënyrë specifike synon të sigurojë zbatimin e plotë të normave dhe standarteve ndërkombëtare për të gjithë fëmijët, të cilët vijnë në kontakt me sistemin e drejtësisë si viktimë, dëshmitarë dhe të dyshuar për një vepër penale, apo për arsye të tjera, ku ndërhyrja gjyqësore është e nevojshme, për shembull lidhur me kujdesin e tyre, privimin e lirisë ose për mbrojtjen e tyre. Cilado që të jetë arsyeja për fëmijët, që janë në kontakt me sistemet e drejtësisë, ato zakonisht janë trajtuar nga profesionistë dhe institucione të njëjta. Ky qëllim gjithashtu përfshin sigurimin e aksesit të fëmijëve në drejtësi për të kërkuar dhe për të marrë kompensim në çështje penale dhe civile¹¹.

Në vijim të parimeve të të drejtave të fëmijës, bazuar në normat dhe standartet ndërkombëtare ligjore, duhet të udhëheqë të gjitha ndërhyrjet e drejtësisë për fëmijët, nga zhvillimi i politikave në punën e drejtpërdrejtë me fëmijët:

1. Çdo fëmijë ka të drejtë që t'i jepet konsideratë primare interesave të tij apo të saj më të mirë. Në të gjitha veprimet lidhur me fëmijët, të ndërmarra nga gjykatat, autoritetet administrative apo autoritete të tjera, duke përfshirë edhe ato joshitetore, interesat më të mirë të fëmijës duhet të jenë parësore. Ky parim do të aplikohet edhe gjatë marrjes së vendimeve në lidhje me një fëmijë në mënyrë individuale apo për fëmijët si një grup. Ky parim duhet të udhëheqë të gjithë procesin (gjyqësor, administrativ apo çdo process tjetër), por edhe të kihet në konsideratë primare në përcaktimin në vend të parë nëse fëmija duhet të marrë pjesë në proces apo jo.

2. Çdo fëmijë ka të drejtë të trajtohet në mënyrë të drejtë dhe të barabartë, pa asnjë lloj diskriminimi. Vëmendje e veçantë duhet t'i kushtohet grupeve më vulnerabël të fëmijëve, duke përfshirë - por pa u kufizuar tek - fëmijët e lidhur me grupet e armatosura, fëmijët pa kujdes prindëror, fëmijët me aftësi të kufizuara, fëmijët që i përkasin grupeve të minoriteteve, fëmijët e emigrantëve, fëmijët e lindur si rezultat i -përdhunim gjatë periudhës së luftës dhe fëmijët e prekur nga HIV/AIDS.

3. Çdo fëmijë ka të drejtë të shprehë pikëpamjet e tij ose të saj lirisht dhe ka të drejtë për t'u dëgjuar. Fëmijët kanë të njëjtë të drejtë të veçantë për t'u dëgjuar në çdo procedurë gjyqësore dhe administrative, qoftë drejtpërdrejt ose nëpërmjet një përfaqësuesi apo një organi të përshtatshëm, në përputhje me rregullat procedurale të së drejtës kombëtare. Kjo nënkupton për shembull që fëmija merr informata të mjaftueshme në lidhje me procesin, në lidhje me opsionet dhe pasojat e mundshme të këtyre opsioneve.

4. Parandalimi i konfliktit me ligjin si një element thelbësor i çdo politike të drejtësisë për të miturit. Në kuadër të politikave të drejtësisë për të miturit, theksi duhet të vihet në

¹⁰ UN'Common Approach to Justice for Children', Mars 2008

¹¹ Raporti i Sekretarit të Përgjithshëm mbi "Shteti i së drejtës dhe drejtësia ndërkombëtare në shoqëritë në periudha konflikti dhe pas tyre", Gusht 2004, e përcakton drejtësinë si "një ideal të përgjegjshmërisë dhe barazisë/drejtësisë në mbrojtjen dhe rivendosjen e të drejtave si dhe në parandalimin e ndëshkimit e veprimeve të gabuara"

strategjitë e parandalimit për të lehtësuar shoqërizimin e suksesshëm dhe integrimin e të gjithë fëmijëve, në veçanti përmes familjes, komunitetit, grupeve të kolegëve, shkollës, trajnimeve profesionale dhe punësimit.

5. Privimi nga liria i fëmijëve duhet të përdoret vetëm si një masë e fundit dhe për periudhën më të shkurtër të përshtatshme kohore. Prandaj duhet të miratohen dispozita për drejtësinë restauruese, skemat alternative dhe alternativa për privimin nga liria. Për të njëjtën arsye, programimi i nevojave të drejtësisë për fëmijë për të ndërtuar sisteme të drejtësisë informale dhe tradicionale për aq kohë sa ata respektojnë standartet dhe parimet themelore të të drejtave të njeriut, të tilla si barazia gjinore.

Sa i njohim dhe sa i zbatojmë standartet ndërkombëtare në proceset me të miturit? Shqipëria bën pjesë në ato shtete të cilat i nëshkruajnë dhe i ratifikojnë instrumentat ndërkombëtarë pa ndonjë vështrësi. Ky qëndrim tregon dhe vullnetin e mirë për të përafuar legjislacionin kombëtar me standartet ndërkombëtare. Por ky masivitet i ratifikimit të marveshjeve ndërkombëtare kërkon edhe një mirëzbatim të tyre në praktikë dhe si detyrë primare del mirëinformimi i personave kompetentë. Aplikimi i tyre i pakët në praktikë nga institucionet përkatëse është një tregues i qartë që këto instrumenta ndërkombëtarë edhe pje pjesë e legjislacionit të brendshëm nuk njihen aq sa duhet. Një nga arsyet e mosaplikimit të tyre është fakti që në Fletoren zyrtare është vetëm ligji i cili ka miratuar konventën por nuk gjendet përmbajtja e Konventës. Këtu bëhet fjalë për ato koventa të ratifikuara para viti 1998 ku botimi i tyre nuk ishte detyrim kushtetues¹². Gjithashtu duke qenë se ratifikojmë shumë instrumenta ndërkombëtarë, një pjesë e tyre ngelen të papërkthyer për shumë kohë, ose një pjesë e tyre nuk kanë një përkthim profesional në termat e duhur juridik. Informatizimi i këtij shërbimi do të sillte një lloj lehtësime të perceptueshmërisë nga ana e publikut por jo vetëm. Është e domosdoshme që në faqen e QPZ këto konventa apo marveshje të kenë hapësirën e tyre ku të publikohen të përkthyer në mënyrë që të jenë lehtësisht të aksesueshme¹³.

Konventa Evropiane e të Drejtave të Njeriut është në një nivel detyrimi zbatueshmërie ashtu si dhe Kushtetuta, cka do të thotë se ajo duhet të njihet dhe të aplikohet ashtu si ligji ynë themelor. Praktika juridike shqiptare tregon që nuk kemi të njëjtën zbatueshmëri për këto dy akte, kjo vjen dhe nga fakti e mosnjohjes ashtu si duhet i KEDNJ. Megjithatë me kalimin e viteve situata është përmisuar për vetë faktin e thjeshtë që qytetarët shqiptarë kanë çuar në Gjykatën e Strasburgut shtetin Shqiptar. Kjo ka qenë një lloj indicje që gjyqtarët, prokurorët apo avokatët të përditësohen edhe me jurisprudencën e Strasburgut¹⁴. Është për tu vlerësuar fakti që në faqen e internetit të Gjykatës Kushtetuese janë të publikuara në gjuhën shqipe vendimet e Gjykatës së Strasburgut me palë shtetin shqiptarë¹⁵. Këto instrumenta ndërkombëtarë nuk duhet vetëm të njohen por edhe të zbatohen në varësi të rasteve. Mënyrat e aplikimit mund të jenë nëpërmjet zbatimit të drejtpërdrejtë të së drejtës ndërkombëtare¹⁶. Interpretimi i së drejtës ndërkombëtare në varësi të rrethanave konkrete është një lloj tjetër i përdorimit të

¹² Botimi Drejtësia për të mitur në Shqipëri, udhëhequr nga As.Prof.Dok Arta Mandro. ISBN 978 99956-18-09-4, fq 20.

¹³ www.qpz.gov.al

¹⁴ Jurisprudenca e Gjykatës së Strasburgut . Ledi Bianku. Tiranë 2005.

¹⁵ Shih faqen zyrtare të internetit të Gjykatës Kushtetuese. eeë.gjykatakushtetuese.gov.al.

¹⁶ Neni 122/2 I Kushtetutës së R.SH.

standarteve ndërkombëtare. Referimi të jurisprudenca e Strasburgut do të ndihmonte shumë praktikën gjyqësore shqiptare në zgjidhjen e drejtë të konflikteve¹⁷.

2.5 Praktika Gjyqësore e Gjykatës Evropiane të të Drejtave të Njeriut në lidhje me të drejtat e fëmijës

Konventa Evropiane për të Drejtat e Njeriut dhe Liritë Themelore kryesisht garanton të drejtat civile dhe politike. Edhe pse ajo bën disa referenca të drejtpërdrejta tek fëmijët, disa nga nenet e saj janë përdorur në mënyrë efektive nga Gjykata për të mbrojtur dhe promovuar të drejtat e fëmijës në Evropë. Praktika gjyqësore e Gjykatës Evropiane të të Drejtave të Njeriut (GJEDNJ) e vë theksin si në kërkesën për të mbrojtur interesat e fëmijës ashtu dhe në rolin e familjeve për kujdesin e fëmijëve. Konventa gjithashtu detyron Shtetet Anëtare të parandalojnë dhunën ndaj fëmijëve. Kështu, në bazë të neneve 3 dhe 8 të Konventës¹⁸, Shteteve Anëtare u kërkohet që në radhë të parë të marrin masa parandaluese për mbrojtjen e integritetit fizik dhe seksual të fëmijës; së dyti, autoritetet kompetente në nivel kombëtar pritet që në mënyrë efektive të hetojnë çfarëdo pretendimi të keqtrajtimit në sferën e familjes ose brenda institucioneve të kujdestarisë dhe së fundi të ndjekë penalisht dhe të ndëshkojë abuzuesit.

Mund të identifikohen tri llojet e detyrimeve të shtetit në rastet e kujdesit për fëmijët¹⁹:

1. Detyrimet për të mos ndërhyrë në ushtrimin e të drejtave të mbrojtura nga Konventa, përkatësisht jetës familjare apo për të mos keqtrajtuar një fëmijë.
2. Detyrimet pozitive për të miratuar legjislacionin që parandalon individët e tjerë për të ndërhyrë në të drejtat e mbrojtur nga Konventa;
3. Detyrimet procedurale lidhur me procesin e vendimmarrjes.

2.6 Garancitë procedurale lidhur me largimin nga mjedisi familjar sipas nenit 8 të KEDNJ-së

Gjykata konsideron se kënaqësia reciproke nga prindi dhe fëmija e ndenjes dhe shoqërisë me njeri-tjetrin përbën një element thelbësor të jetës familjare dhe se masat e brendshme që pengojnë një kënaqësi të tillë përbëjnë një ndërhyrje në të drejtën e mbrojtur nga Neni 8 i KEDNJ-së. Një ndërhyrje tek kjo e drejtë përbën një shkelje të kësaj dispozite, nëse nuk është “në përputhje me ligjin”, që ndjek një qëllim të ligjshëm sipas paragrafit 2 të nenit 8 dhe mund të konsiderohet si “e nevojshme në një shoqëri demokratike”. Fakti që një fëmijë mund të vendoset në një mjedis më të dobishëm për rritjen e tij apo të saj nuk justifikon në vetvete një masë të detyrueshme për largimin nga kujdesi i prindërve biologjikë.

Në *çështjen Johnston të 1986*, Gjykata pohoi se “respektimi i jetës familjare nënkupton ekzistencën në ligj të masave mbrojtëse që bëjnë të mundshme, që nga momenti i lindjes, integrimin e fëmijës në familjen e tij.” Gjykata Evropiane e të Drejtave të Njeriut u lejon shteteve një diferencë të rëndësishme të vlerësimit kur vendos për domosdoshmërinë për të hequr një fëmijë nga familja e tij, bazuar në idenë se autoritetet vendase mund të

¹⁷ Kristaq Traja, Natyra Juridike e vendimeve të Gjykatës së Lartë. “Jeta Juridike” revistë juridike shkencore e shkollës së Magjistraturës, Nr. 1 Tiranë 2005.

¹⁸ Nenet kryesore relevante për kujdesin ndaj fëmijëve janë nenet 3, 5 dhe 8 të KEDNJ.

¹⁹ Konkluzione të dala nga Konferenca Ndërkombëtare mbi të Drejtat e Fëmijës, Rumani, Shkurt 2006.

vendosin të vlerësojnë më mirë balancën²⁰ midis interesit të fëmijës dhe të të drejtave familjare të prindërve të tij. Megjithatë, Gjykata kërkon ekzistencën e procedurave gjyqësore në të cilat interesat e prindërve janë të mbrojtura në mënyrë të drejtë.

Megjithatë, rasti *Noëcka vs Suedi* (vendimi i 13/03/1989) i mëvonëshëm illustroi se edhe kur keqtrajtimi apo abuzimi nuk është i përcaktuar juridikisht në gjykatat e vendit, prova se keqtrajtimi ka ndodhur ende mund të konsiderohet i justifikueshëm për ndërhyrje në jetën familjare.

Neni 8 përmban gjithashtu një detyrim pozitiv për Shtetet për bashkimin e prindërve me fëmijët e tyre, duke e parë zhvendosjen si një masë të përkohshme. Në gjykimin e çështjes *Johansen vs Norvegjisë* (1996/07/08), Gjykata pohoi se masa të tilla si ato që kanë për qëllim të privojnë në mënyrë permanente një prind të kontaktojë ose të ketë kujdestarinë duhet të aplikohet vetëm në rrethana të jashtëzakonshme dhe mund të justifikohet vetëm kur nuk kishte asnjë alternativë tjetër masë që të lejonte mbrojtjen e interesave të fëmijës.

Largimi nga ambienti familjar është parë si një masë e shkallës së fundit, gjë që mund të përdoret nga shtetet vetëm kur alternativa të tjera, më pak kufizuese për të drejtat e familjes nuk janë të mundshme²¹. Gjykata gjithashtu i kushton shumë rëndësi mbajtjes së kontakt midis prindërve dhe fëmijëve, gjatë vendosjes së fëmijës në përkujdesje²².

Neni 5/1, pika d) përcakton se “privimi i lirisë së një të mituri nëpërmjet një urdhri të ligjshëm me qëllim mbikëqyrjen edukative” apo “privimi i tij i lirisë me qëllimin për ta sjellë atë para autoritetit ligjor kompetent”.

Gjykata gjithashtu vlerësoi se burgimi i të miturve “në kushtet e izolimit virtual dhe pa ndihmën e personelit me trajnim arsimor” nuk mund të konsiderohet si mbështetje e ndonjë qëllim edukativ. Në një çështje tjetër të mëvonshme, në vendimin e *D.G. vs Irlandës* e 16/05/2002, Gjykata deklaroi se mbikëqyrja arsimore/edukative nuk mund të barazohet me nocionet e mësimin në klasë dhe përfshin disa aspekte të ushtruara nga një autoritet lokal të së drejtës prindërore në të mirë dhe për mbrojtjen e të miturit . Megjithatë, në këtë rast të veçantë, Gjykata gjeti shkelje të nenit 5 § 1 d), ku një i ri u mbajt për një muaj në një institucion penal ku çdo veprimtari arsimore dhe rekreative ishte tërësisht opsionale dhe vullnetare.

Terren i dytë për paraburgimin lidhet me situatat ku një i mitur i akuzuar për një krim është vendosur, për shembull, nën vëzhgim psikiatrik, që do të çojë në një raport që rekomandon një vendim në lidhje me përshtatshmërinë e tij për të qëndruar në paraburgim. Ai mbulon gjithashtu privimin e lirisë së një të mituri gjatë procedimit gjyqësor në lidhje me vendosjen e tij në shërbimin e kujdesit për fëmijët.

²⁰ Shih, *inter alia*, vendimin për çështjen *K.A. vs. Finlandës*, të dt. 14/01/2003.

²¹ Në çështjen *P.C. dhe S. vs. UK* (vendimi i dt. 16/07/2002), Gjykata konkludoi se, edhe pse një urdhrë mbrojtje emergjentë ishte vërtet i nevojshëm për një fëmijë të sapolindur nëna e të cilit vuan nga sindromi Munchausen, implementimi i këtij urdhëri: transferimi i fëmijës nga spitali tek shërbimi i kujdesit social, përveçse është një formë drastike e mbikqyrjes së nënës dhe fëmijës brenda në spital, përbnte shkelje të nenit 8.

²² Shih *Couillard vs. Francës*, 1 korrik 2004.

3. Kuadri Ligjor Shqiptarë në Paralelizëm me Standartet Ndërkombëtare

Mbrojtja e të drejtave të fëmijëve përbën një nga drejtimit kryesore të politikave juridiko-sociale në Republikën e Shqipërisë. Në themel të këtyre politikave janë parimet themelore të Kushtetutës, Konventave të OKB si dhe instrumentatave të tjera ndërkombëtare të ratifikuara nga shteti shqiptar, të cilat theksojnë se fëmijët për shkak të vecorive të moshës, mungesës së pjekurisë fizike dhe intelektuale, kanë nevojë për një mbrojtje dhe vëmendje të vecantë nga familja dhe institucionet shtetërore²³. Një vëmendje e vecantë në këtë kuadër është treguar ndaj fëmijëve në konflikt me ligjin duke përmisuar në mënyrë të vazhdueshme sistemin e drejtësisë për të mitur në përputhje me standartet ndërkombëtare. Legjislacioni shqiptar në kuadër të trajtimit dhe mbrojtjes ndaj të miturit, ka si karakteristikë të tij shpërndarjen në akte të ndryshme ligjore e nënligjore. Një nga mungesat më të rëndësishme në legjislacionin shqiptar është hartimi i një Kodi gjithëpërfshirës lidhur me drejtësinë për të miturit. Nuk ka një sistem ligjor të unifikuar për të mitur²⁴. Ka ligje brenda të cilave të miturit trajtohen në mënyrë të vecantë por fragmentare. Ka akte të tjera ku dispozitat mbi të miturit nuk bëjnë asnjë dallim nga trajtimi i të rriturve. Sipas rendit hierarkik normat që veprojnë në territorin e Republikës së Shqipërisë janë:

1. Kushtetuta;
2. Marveshjet ndërkombëtare
3. Ligjet;
4. Aktet Normative të Këshillit të Ministrave.

3.1 Kushtetuta e Republikës së Shqipërisë dhe Standartet e drejtësisë për të mitur.

Kushtetuta është ligji themelor mbi të cilin bazohen të gjitha aktet e tjera ligjore e nënligjor si dhe politikat qeverisëse. Të drejtat dhe liritë themelore të individit janë baza e cdo shteti²⁵. Të drejtat e të miturve mund ti grupojmë në tre kategori kryesore: E drejta për arsim; E drejta e mbijetesës dhe kujdesit shëndetsor si dhe e drejta për mbrojtje ligjore. Në Kushtetutë përcaktohet se cdo person të cilit I hiqet liria ka të drejtën e trajtimit njerëzor dhe respektimit të dinjitetit. Në bazë të legjislacionit shqiptar të pandehurit të mitur i sigurohet ndihmë juridike dhe psikologjike në cdo gjëndje dhe shkallë gjykimi me pranë e prindit ose personave të tjerë të kërkuar nga i mituri dhe të pranuar nga autoriteti që procedon. Gjatë fazës së Gjykimit sipas moshës së të miturit gjykata mban parasysh kërkesën për të mos ndërprerë procesin edukativ. Nuk ka Përkufizim në Kushtetutë lidhur me kategoritë të mitur, të rinj dhe fëmijë. Vetëm në nenin 27/ç përmendet termi I mitur nën kontekstin “Liria e personit nuk mund të kufizohet, përveçse në rastet e mëposhtme: ...ç. për mbikqyrjen e të miturit për qëllime edukimi ose për shoqërimin e tij në organin kompetent.” Fëmijë “ përmendet në nent 54,59/ç. Ndërsa të rinj në nenin 54/1.

Kushtetuta e R.Sh në Kreun II të Pjesës II paraqet në mënyrë të përmbledhur parimet kryesore të drejtësisë penale dhe garancitë procedurale të të pandehurit të cilat nënkuptojnë shtrirjen e tyre edhe për të miturit në procesin penal. Ndër më të rëndësishmet përmendim:

²³ Neni 54 dhe neni 59 I Kushtetutës parashikon mbrojtje të vecantë nga shteti për fëmijët.

²⁴ Botimi Drejtësia për të mitur në Shqipëri, udhëhequr nga As.Prof.Dok Arta Mandro. ISBN 978 99956-18-09-4.

²⁵ Neni 3 I Kushtetutës së Republikës së Shqipërisë.

- E drejta për një proces të rregullt ligjor: Si një e drejtë kushtetuese dhe mbi të gjitha si shtylla kryesore përmban në vetvete edhe një tërësi të drejtash procedurale. E drejta për gjykim të drejtë public brenda afateve procedurale dhe prej një gjykate të pavarur, të paanshme të caktuar me ligj²⁶.
- Të drejtat dhe garancitë procedurale penale kushtetuese, janë tërësia e të gjitha të drejtave të cilat gjejnë zbatim në momentin e arrestimit ose të kufizimit të lirisë²⁷. Prezumi i pafajsisë; Kushdo quhet i pafajshëm përderisa nuk i është provuar fajësia me vendim gjyqësor të formës prerë.
- Moskufizimi i lirisë dhe mos cënimi i saj: Askujt nuk mund ti hiqet dhe ose kufizohet liria përveçse në rastet dhe sipas procedurave të parashikuara nga ligji. Në rastin e të miturve kufizimi i lirisë lidhet me mbikqyerjen e tij për qëllime edukimi ose për shoqërimin e tij në organin kompetent.

Standartet ndërkombëtare janë pjesë e sistemit të brendshëm ligjor dhe ato kanë një vend shumë të rëndësishëm të përcaktuar nga vetë Kushtetuta²⁸.

3.2 Reformat Ligjore-Kodi Penal

Pjesa më e madhe e legjisllacionit shqiptar është zëvendësuar që prej rënies së komunizmit në 1992, Kodi i ri Penal²⁹. Përsa i përket moshës në të cilën të miturit mund të ndiqet penalisht, pra “mosha për përgjegjësi penale”, nuk ka standarde ndërkombëtare që të përcaktojnë një moshë të veçantë që duhet të njihet për këtë qëllim, dhe standartet kombëtare ndryshojnë në masë të madhe mes tyre³⁰. Komisioni për të Drejtat e Fëmijëve ka miratuar kohët e fundit një Koment të Përgjithshëm mbi “*Të drejtat e fëmijëve në drejtësinë për të miturit*”, që e adreson këtë çështje por që nuk siguron një standard të qartë dhe jo të dykuptimtë. Legjisllacioni shqiptar, i cili nuk lejon që fëmijët nën moshën 14 vjeç të ndiqen penalisht për një vepër penale, i plotëson kriteret e vendosura nga ky Komitet.

Legjisllacioni shqiptar në fuqi, nuk parashikon marrjen e ndonjë masë kur një krim është kryer nga një fëmijë nën moshën 14 vjeç, as kur fëmijët e moshës 14 ose 15 vjeç kryejnë kundërvajtje. Ligji, siç u shprehëm më sipër, përcakton vetëm vendosjen e “masave edukative”³¹, të cilat janë definuar si vendosje në një institucion të një tipi të caktuar, që nuk ekziston më.

²⁶ Neni 42 I Kushtetutës së Republikës së Shqipërisë.

²⁷ Nenet 28,31,32,33,34 të I Kushtetutës së Republikës së Shqipërisë.

²⁸ RSH zbaton të drejtën ndërkombëtare të detyrueshme për të, neni 5 I Kushtetutës së RSH.

²⁹ Shih nenin 46 të Kodit Penal të RSH.

³⁰ *Assessment of Juvenile Justice Reform Achievements in Albania*, UNICEF Regional Office for Central and Eastern Europe/ Commonwealth of Independent States, Gjenevë, July 2009.

³¹ 63. Shih ligjet: Ligjin nr.10023, dt.27.11.2008, “Për disa shtesa dhe ndryshime në ligjin nr.7895, dt. 27.01.1995 “Kodi Penal i Republikës së Shqipërisë”, i ndryshuar ndryshime në ligjin nr.8331, dt. 21.04.1998 “Për ekzemitimin e vendimeve penale”, i ndryshuar”.

Natyrisht, përgjigja e përshtatshme ndaj veprimeve kriminale të kryera nga këta fëmijë nuk mund të jetë vendosja në një ambient banimi/qëndrimi, siç ishin p.sh. shkollat e riedukimit që u mbyllën pas viteve 1990. Nevojat e shumta mund të përmbushen nga ndërmjetësimi ose programet jo-rezidenciale. Megjithatë, nevojitet një përgjigje e nevojshme në mënyrë të qartë, në këtë drejtim. Përgjigjet dhe kriteret e duhura për zgjedhjen e përgjigjeve më të përshtatshme në raste të veçanta duhet të përcaktohen me ligj³².

Në mënyrë të përcaktuar Kodi Penal e trajton të miturin si i dëmtuar/viktimë dhe si subject /autor të veprës penale. Nenet 50,79,83,100,101,108,109/2,117,124,125,127,128,129 janë dispozitat të cilat parashikojnë llojet e veprave penale që kanë si të dëmtuar/viktimë. Ndër veprat penale që kanë një ndjeshmëri më të lartë në ambientin social janë: vrasje me dashje e të miturit, marrëdhënie seksuale ose homoseksuale me dhunë me të mitur të moshës 14-18 vjeç, vepra të turpashme, trafikimi i fëmijëve etj. Përsa i përket të miturit si autor i veprave penale duhet të kemi parasysh moshën që është përcaktuar për përgjegjësi penale, në varësi nëse është krim apo kundërvajtje. Lloji i dënimit i cili do të përcaktohet; masa edukuese si dhe dënimet alternative. Në qoftë se do të krahasonim grupin e dispozitave që trajtojnë të miturin si viktimë me ato që trajtojnë si autor, do të themi që grupi i parë është më i plotë dhe më i përditësuar me instrumentat ndërkombëtare. Ndërsa përsa i përket masave edukuese, dënimeve alternative janë të cunguara dhe nuk janë të parashikuara në legjislacion në mënyrë gjithëpërfshirëse.

3.3 Reforma Ligjore-Kodi i Procedurës Penale

Kodi i Procedurës Penale parashikon garancitë procedorialetë të pandehurit të mitur gjatë procesit penal. Ndër garancitë me ndjeshmëri më të lartë është ; gjykimi i të miturve prej senksioneve përkatëse të të miturve; të drejtën e mbrojtjes, të ndihmës juridike dhe psikologjike;raporti i drejtë i personalitetit të të miturit me masat penale;çaktimi i dënimit me burgim si masë e fundit penitenciare.

Neni 263 i Kodit të Procedurës Penale në lidhje me kohëzgjatjen e burgimit nuk përmban asnjë dispozitë/paragraf të veçantë lidhur me të akuzuarit e mitur. Neni 230 i Kodit të Procedurës Penale vendos kriteret specifike që kufizojnë të privimin e lirisë për grata shtatzëna dhe me fëmijë në gji (të sapolindur), të moshuarit dhe personat e vendosur në programet për abuzimin me substancat narkotike, të cilët janë akuzuar për krime, por nuk ka dispozita të ngjashme që të zbatohen për të mitur të akuzuar për krime.

Edhe pse prokurori ka diskrecionin të urdhërojë mbikqyrjen në shtëpi, nuk ka as prezumim ndaj burgimit dhe as ndonjë dispozitë që përcakton kriteret specifike për privimin e lirisë ndaj të akuzuarve të mitur³³.

³² Rregulloret e burgut që lejojnë përdorimin e 'izolimit' ose mbylljes së vetmuar në izolim si sanksion disiplinor për të dënuarit e mitur dhe të rritur janë të papajtueshme me Rregullën 67 të Rregullave të Kombeve të Bashkuara për Mbrojtjen e të Miturve të Privuar nga Liria, e cila e përshkruan këtë praktikë, e zbatuar për të miturit, si një formë e "trajtimit johuman dhe poshtërues.

³³ Shih ligjet: Ligjin nr.10023, dt.27.11.2008, "Për disa shtesa dhe ndryshime në ligjin nr.7895, dt. 27.01.1995 "Kodi Penal i Republikës së Shqipërisë", i ndryshuar", Ligjin nr.10024, dt.27.11.2008, "Për disa shtesa dhe ndryshime në ligjin nr.8331, dt. 21.04.1998

Sipas nenit 339/1 të Kodit të Procedurës Penale, gjykimet duhet të zhvillohen në mënyrë publike. Këtu përfshihet edhe gjykimi i personave nën moshën 18 vjeç. Në nëntor dhe dhjetor 2008³⁴, u miratuan disa ligje që lidhen me shërbimin e provës, ndihmën ligjore dhe dënimet alternative. Një nga ligjet zgjeron mundësinë për dhënien e dënimeve me gjysmë-liri dhe vënien në provë. Një ligj tjetër krijon shërbimin e provës dhe përcakton funksionet e tij. Ligji i tretë krijon një program të asistencës ligjore publike. Edhe pse këto ligje të reja nuk përqëndrohen posaçërisht mbi të miturit, ato përmbajnë disa dispozita për të miturit, pasi ata do të përfitojnë prej tyre.

Disa reforma të rëndësishme administrative kanë pasur një ndikim të dobishëm në trajtimin e subjekteve të mitur. Një prej tyre ishte transferimi i përgjegjësisë për të gjitha institucionet e paraburgimit dhe burgjet nga Ministria e Brendshme në varësi të Ministrisë së Drejtësisë. Për burgjet transferimi u krye në 1993 dhe 1994, dhe ai për ambientet e paraburgimit u bë në periudhën mes 2005 dhe 2007.

Një tjetër ndikim i dobishëm pozitiv ishte krijimi, në gjykata i seksioneve të veçantë dedikuar ekskluzivisht për rastet e të miturve. Krijimi i seksione të tilla të veçanta doli i nevojshëm nga Kodi i Procedurës Penale i 1995. Një Dekret i presidentit autorizoi themelimin e tyre në gjashtë gjykata të rretheve gjyqësore në vitin 2007. Edhe pse shumë e shohin këtë si një masë të përkohshme dhe një hap drejt krijimit të gjykatave të specializuara, ka një konsensus të gjerë të faktit se emërimi i gjyqtarëve të cilët specializohen në raste të këtij lloji, ka përmirësuar cilësinë e drejtësisë.

3.4 Akte të tjera ligjore e nënligjore.

Në legjislationin shqiptar ka dhe një tërësi aktesh të tjera ligjore e nënligjore që bëjnë mbrojtjen dhe trajtimin e të miturve, duke qenë se nuk kemi një system të unifikuar të legjislationit për të miturit. Ligji” Për Mbrojtjen e të Drejtave të Fëmijëve” nr.10347 dt.04.11.2010 përcakton të drejtat e fëmijëve në koherencë me konventën e OKB për të drejtat e fëmijëve. Ligji vendos themelin për ngritjen e mekanizmave të përshtatshëm institucionalë që do të garantojnë dhe sigurojnë mbrojtjen e fëmijëve.

VKM NR 263, datë 12.04.2012 “*Për përcaktimin e rregullave të hollësishme, për bashkëpunimin midis mekanizmave institucionalë dhe organizatave jofitimprurëse, për realizimin e politikave vendore për mbrojtjen e të drejtave të fëmijëve*”.

Ligji 10347 datë 4.11.2010 përcakton rregullat e bashkëpunimit të mekanizmave institucionale në nivel qendror dhe vendor me organizatat jofitimprurëse për realizimin me efektivitet të politikave për mbrojtjen e të drejtave të fëmijës. VKM përcakton mënyrën e bashkëpunimit duke vënë theksin në fusha konkrete si :Hartimi dhe zbatimi i ligjeve, strategji kombëtare dhe rajonale që kanë në fokus të drejtat e fëmijëve; ngritjen dhe fuqizimin e NJMF, NJDF, strukturave të ngarkuara me çështje sociale në nivel komune, bashkie, qarku; në mbrojtjen, referimin dhe analizën e rasteve të fëmijëve në rrezik;

“Për ekzemitimin e vendimeve penale”, i ndryshuar”” Ligji Nr.10 039, dt. 22.12.2008 “*Për ndihmën juridike*”.

³⁴ *Assessment of Juvenile Justice Reform Achievements in Albania*, UNICEF Regional Office for Central and Eastern Europe/ Commonwealth of Independent States, Gjeneva, July 2009.

VKM NR 264, datë 12.04.2012 “Për procedurat e kryerjes së kontrollit dhe vendosjes së sanksionit nga Agjencia Shtetërore për Mbrojtjen e të Drejtave të Fëmijëve”

VKM është mbështetur në nenin 37 pika 4 të Ligjit nr.10347, datë 4.11.2010 “Për mbrojtjen e të drejtave të fëmijës” sipas të cilit shkeljet e të drejtave të fëmijëve, që përbëjnë kundravajtje administrative do të ndëshkohen me gjobë, duke përjashtuar rastet kur kjo shkelje përbën vepër penale apo është subjekt i ndëshkimit nga ligje të tjerë.

VKM NR 265, datë 12.04.2012 “Për krijimin dhe funksionimin e mekanizmit të bashkërendimit të punës ndërmjet autoriteteve shtetërore përgjegjëse për referimin e rasteve të fëmijëve në rrezik, si dhe mënyrën e procedimit të tij”. VKM përcakton mekanizmin për të trajtuar rastet e fëmijëve në rrezik dhe mënyrën se si procedohet për këto raste. Përcaktohen qartë strukturat që janë pjesë e mekanizmit si dhe detyrat konkrete për gjithsecilën prej tyre.

4. Kuadri Praktik

4.1 Fëmijët dhe sistemi i drejtësisë

Sistemi i drejtësisë është një nga hallkat kryesore, në të cilën garantimi dhe mbrojtja e të drejtave të fëmijëve është e një rëndësie primare. Është e rëndësishme mbrojtja e tyre në çfarëdo pozite që të jenë, si të mitur në konflikt me ligjin, të mitur-viktima, të mitur-dëshmitarë etj.

Legjislacioni ynë i ka kushtuar më shumë rëndësi parashikimit të rregullave për mbrojtjen e të miturve në konflikt me ligjin dhe kjo për vetë faktin se në këtë rast ata janë më të ekspozuar ndaj mundësisë së shkeljes së të drejtave të tyre. E drejta e mbrojtjes përbën të drejtën themelore të të miturit në konflikt me ligjin. Kur i pandehuri është nën moshën 18 vjeç, ndihma nga një mbrojtës është e detyrueshme³⁵. Në rast se skanë mjetet e nevojshme ekonomike ndihma ligjore ofrohet falas. Mirëpo jo gjithmonë asistenca ligjore është në nivelin e duhur dhe si rrjedhim nuk siguron mbrojtjen e nevojshme. Këtu hyn në lojë profesionalizmi i avokatëve të caktuar nga shteti dhe kontrolli që ushtrohet mbi ta. Të miturit gjykojnë nga seksionet e veçanta të krijuara pranë Gjykatave të Rretheve Gjyqësore me dekret të Presidentit. Problem mbetet specializimi i gjyqtarëve të cilët gjykojnë çështjet e të miturve. Është e nevojshme të trajnohen dhe të njihen me të gjithë legjislacionin e brendshëm dhe me standartet ndërkombëtare për të drejtat e fëmijëve.

Problematic mbetet sistemi i paraburgimit dhe ekzekutimit të vendimeve penale. Mungojnë burgjet e veçanta për të miturit. Ata e vuajnë dënimin në seksione të veçanta të burgjeve për të rriturit. Gjithashtu në vendin tonë mungojnë institucionet e riedukimit. Është e nevojshme ngritja e këtyre institucioneve në mënyrë që të miturit në konflikt me ligjin të mos vuajnë dënimin në institucionet e ekzekutimit të vendimeve penale, por të edukohen në këto institucione.

Policia si një institucion i administratës shtetërore ka për detyrë të mbrojë rendin dhe sigurinë publike. Policisë i ndalohet që në njoftimet publike të çënojë dinjitetin e personit,

³⁵ Neni 49 paragrafi i dytë, Kodi i Procedurës Penale.

sidomos të fëmijës³⁶. Mirëpo në ligjin për policinë e shtetit nuk kemi të parashikuar një rregullim të veçantë për mbeotjen e të fëmijëve. Kur mungon vet parashikimi ligjor është më e vështirë që të realizohet konkretisht.

4.2 Mbrojtja sociale

Në kuadër të realizimit të mbrojtjes sociale është miratuar ligji nr. 9355, datë 10.03.2005 “Për ndihmën dhe shërbimet shoqërore”, i cili është ndryshuar me ligjin nr. 10 399 datë 17.03.2011 “Për disa shtesa dhe ndryshime të ligjit 9355/2005”. Ndryshimet konsistojnë në:

- Zgjerimin e grupeve përfituese si viktimat e dhunës në familje dhe jetimët;
- Funksionimin e shërbimit të kujdestarisë në familje si shërbim alternativ për fëmijët;
- Administrimin më të mirë të programit të ndihmës ekonomike.

Ndryshimet përfshinë dhe një pagesë shtesë për fëmijët e familjeve në skemën e ndihmës ekonomike të cilët ndjekin arsimin e detyrueshëm. Ky ndryshim përbën një inkurajim për familjet që të dërgojnë fëmijët në shkollë, pasi fenomeni i braktisjes së shkollës është mjaft i përhapur dhe një nga arsyt kryesore është aspekti ekonomik. Regjistrimi i fëmijëve rom në kopshte dhe shkolla është një nga problematikat më të mëdha në sistemin arsimor. Përqindja më e madhe e fëmijëve rom nuk ndjekin arsimin e detyrueshëm. Ndjekja e arsimit të detyrueshëm përbën një nga objektivat e Planit të veprimit për fëmijë 2013-2015, të “Programit kombëtar për braktisjen zero” dhe të planit të Veprimit Për Dekadën Rome. E drejta e fëmijëve për të qenë të mbrojtur nga shfrytëzimi dhe përdorimi për punë garantohet nga Kushtetuta e Shqipërisë. Punësimi i fëmijëve ndalohej për sa kohë fëmijët ndjekin arsimin e detyrueshëm.

Me gjithë penalizimet ligjore, fenomeni i punësimit të fëmijëve në Shqipëri është mjaft i përhapur. Ndër format më të rënda të shfrytëzimit të fëmijëve, evidentohet lypja, duke u detyruar prej prindërve për shkak të varfërisë ekstreme në të cilën jeton familja. Fëmijët e rrugës, janë të ekspozuar për më tepër ndaj të gjitha formave të dhunës gjatë kohës që ata qëndrojnë në rrugë. Këta fëmijë, nuk e frekuentojnë shkollën duke mos pasur kështu as mundësi për të ardhmen e tyre³⁷.

4.3 Plani i veprimit për fëmijë 2012-2015³⁸

Në periudhën 2011-2012 është miratuar Plani i Veprimit për fëmijë 2012-2015³⁹. Miratimi i këtij plani veprimi ka qenë një përgjigje ndaj rekomandimeve të BE-së, për realizimin e të drejtave të fëmijëve. Në miratimin e tij kanë marr pjesë institucionet e nivelit qendror dhe atij vendor, si dhe të shoqërisë civile. Plani i veprimit ka për qëllim të

³⁶ Ligji nr. 8553, datë 25.11.1999 “Për Policinë e Shtetit”.

³⁷ Për më tepër shiko Raporti Vjetor i Monitorimit të Zbatimit të Ligjit “Për Mbrojtjen e të Drejtave të Fëmijëve”.

³⁸ Politikat e Përfshirjes Sociale për Fëmijët dhe Financimi i tyre në Shqipëri botim i Qendrës Shqiptare për Studime Ekonomike, mbështetur nga UNICEF.

³⁹ VKM Nr. 182 datë 13.03.2012

nxisë hartimin e politikave të harmonizuara për mbrojtjen e fëmijëve. Plani i Veprimit ka fokusuar objektivat në disa nga të drejtat e fëmijëve si:

1. E drejta e fëmijëve për mbrojtje nga dhuna;
2. E drejta e fëmijëve për mbrojtje sociale;
3. Edrejta e fëmijëve për kujdes shëndetësor;
4. E drejta e fëmijëve për zhvillim dhe arsim;
5. E drejta e fëmijëve për mbrojtje ligjore.

Plani i veprimit i ngarkon njësitë e qeverisjes vendore me detyrën e intensifikimit të përpjekjeve për ngritjen e shërbimeve të reja , reformimin e sistemit të shërbimeve sociale,në përputhje me nevojat e fëmijëve, për të realizuar mbrojtjen e tyre nga keqtrajtimet, dhuna dhe puna e detyruar.

4.4 Mekanizmat institucional për mbrojtjen e të drejtave të fëmijëve

4.4.1 Agjencia Shtetërore per Mbrojtjen e të Drejtave të Fëmijëve

Është një institucion ekzekutiv, që bashkërendon punën për mbrojtjen e të drejtave të fëmijëve. Kjo Agjenci ka për detyrë të monitorojë zbatimin e ligjit nr. 10347 datë 04.11.2010 “Për mbrojtjen e të Drejtave të Fëmijës”, të propozojë udhëzime për mbrojtjen e të drejtave të fëmijëve, të mbështesë institucionet e tjera dhe organizatat jofitimprurëse, për përgatitjen e raporteve dhe statistikave për zbatimin e të drejtave të fëmijëve.

4.4.2 Këshilli Kombëtar për Mbrojtjen e të Drejtave të Fëmijëve

Është një organ këshillimor pranë Këshillit të Ministrave, i cili kordinon politikat që duhen ndjekur për fëmijët. Ai monitoron zbatimin e strategjive kombëtare. Këshili ka në përbërje anëtar të pushtetit qendror atij vendor dhe shoqërisë civile.

4.4.3 Ministri që bashkërendor punën për çështjet e mbrojtjes së të drejtave të fëmijës

Ky organ ka për detyrë :

- Bashkërendimin e punës me autoritetet shtetërore përgjegjëse;
- Hartimin e politikave dhe programeve shtetërore për mbrojtjen e të miturve;
- Propozimin e ndryshimeve ligjore;
- Orientimin e donatorëve vendas dhe ndërkombëtar për zbatimin e të drejtave të fëmijëve.

4.4.4 Njësitë për të Drejtat e Fëmijëve

Këto njësi ndahen në Njësi për të Drejtat e Fëmijëve në nivel qendror dhe Njësi për të Drejtat e Fëmijëve në nivel bashkie ose komune. Këto njësi kanë për detyrë:

- monitorimin e mbrojtjes së të drejtave të fëmijëve;
- referimin e rasteve të shkeljeve të të drejtave të fëmijëve;
- shkëmbimin e informacionit për mbrojtjen e të drejtave të fëmijëve;
- organizimin e takimeve informuese;
- raportimin periodik në Agjencinë Shtetërore për Mbrojtjen e të Drejtave të Fëmijëve.

4.4.5 Qendra për Mbrojtjen e të Drejtave të Fëmijëve në Shqipëri

Objektivat e kësaj qendre janë:

- informimi për të gjithë mbi të drejtat e fëmijëve dhe instrumentat kombëtarë dhe ndërkombëtar lidhur me këto të drejta;
- trajnimi i anëtarëve të parlamentit, gjykatësve, mësuesve, punonjësve të policisë etj.;
- edukimi i të drejtave të fëmijëve nëpër shkolla;
- mbrojtja e të drejtave të fëmijëve në Shqipëri;
- zhvillimi i të drejtave të fëmijëve.

Qendra për Mbrojtjen e të Drejtave të Fëmijëve synon përmirësimin e respektimit të të drejtave të fëmijëve, duke kërkuar zbatimin e ligjeve kombëtare si dhe implementimin e standarteve ndërkombëtare. Strategjia e saj e veprimit përfshin dy drejtime: afatshkurtër dhe atë afatgjatë. Strategjia afatshkurtër përfshin:

- asistenca për institucionet qeveritare për zbatimin e ligjeve që mbrojnë të drejtat e fëmijëve;
- implementimi i standarteve ndërkombëtare për mbrojtjen e të drejtave të fëmijëve;
- informimi mbi situatën e të drejtave të fëmijëve në vendin tonë;

Në strategjinë afatgjatë përfshihen:

- rritja e volumit të të drejtave të fëmijëve;
- mbrojtja e të drejtave të fëmijëve nëpërmjet një asistence juridike të kualifikuar;
- rritja e kontributit të komunitetit në mbrojtjen e të drejtave të fëmijëve;
- edukimi i të drejtave të fëmijëve nëpër shkolla.

5. Përfundime dhe Rekomandime

5.1 Përfundime

- Në Shqipëri nuk ka ende një system gjithëpërfshirës të mbrojtjes së fëmijëve;
- Nuk ka një legjislacion të unifikuar në lidhje me drejtësinë për të mitur. Dispozitat janë të shpërndara në akte të ndryshme normative duke bërë të vështirë edhe referimin të këto.
- Në legjislacion në disa raste nuk bëhet dallimi i trajtimit të të rriturve me të miturit. Në qoftë se ne nuk e kemi të parashikuar shprehimisht këtë diferencim në aktet normative nuk mund të presim që ky trajtim i diferencuar të bëhet në praktikë.
- Duke qenë se Shqipëria ka ratifikuar një sërë aktesh ndërkombëtare dhe i ka bërë pjesë të legjislacionit të saj të brendshëm, disa nga këto instrumenta nuk kanë një zbatim de fakto. Kjo vjen e dhe si rezultat i masivizimit të miratimit të këtyre instrumentave dhe moszbatimit praktik të tyre. Gjithashtu ka dhe shumë akte normative për llogari të të cilave nuk kanë dalë aktet nënligjore. Edhe ky është një vakum normativ në legjislacion.

- Vlen për tu theksuar edhe fakti se standartet ndërkombëtare kanë nevojë për një aplikueshmëri në praktikë. Kjo do të thotë se këto instrumenta duhet të njihen më shumë nga organet kompetente dhe personeli i tyre në mënyrë që të kenë një zbatueshmëri më të lartë.
- Imediate për legjislacionin për të miturit është projektimi i një sistemi rehabilitues dhe edukues dhe jo një system ndëshkues si ai që kemi tani. Kjo vjen në kundërshtim të hapur me standartet ndërkombëtare dhe me parimet e përgjithshme të saj.
- Me ndryshimet e herëpashershme të bëra në legjislacionin vendas ka një lloj konfuziteti i cili sjell kundërshtime të hapura midis vetë dispozitave. Duke qenë se një pjesë e ligjeve janë të përkthyer, ka një lloj paqartësie në dispozitat përkatëse, duke i bërë jo shumë të kuptueshme nga zbatuesit e ligjit. Nga kjo lind dhe moszbatimi si duhet i tyre në praktikë.
- Ndonëse vendi ynë ka bërë hapa përpara në fushën e mbrojtjes së fëmijëve, ende nuk mund të themi se kjo detyrë është realizuar plotësisht;
- Mungojnë studimet zyrtare për shkallën e mbrojtjes së të drejtave të fëmijëve;
- Fëmijët janë të ekspozuar ndaj dhunës dhe detyrimit për të punuar;
- Një përqindje e lartë e fëmijëve në Shqipëri nuk ndjekin arsimin e detyrueshëm, por detyrohen të punojnë në kushte të vështira dhe të dëmshme për shëndetin e tyre;
- Mbrojtja e fëmijëve në konflikt me ligjin nuk realizohet si duhet praktikisht;
- Mungojnë rregullimet e posaçme ligjore për mbrojtjen e fëmijëve;
- Organizatat jofitimprurëse nuk mbështeten aq sa duhet nga institucionet shtetërore;
- Mungonë infrastruktura e nevojshme për mbrojtjen e të miturve dhe respektimin e të drejtave të tyre;

5.2 Rekomandime

- Është i nevojshëm ndryshimi i Kodit Penal, Kodit të Familjes dhe Kodit të Punës, për për rregulluar në kapituj të veçantë mbrojtjen e fëmijëve;
- Nevojitet hartimi i strategjive për parandalimin e dhunës ndaj fëmijëve;
- Duhet të ketë një koherencë më të madhe ndërmjet legjislacionit të brendshëm dhe atij ndërkombëtar;
- Të zgjerohen masat alternative të dënimit dhe të specializohen në kuadrin e të miturve.
- Të parashikohet qortimi, këshillimi, gjoba, punë publike si dënime alternative të cilat të zbatohen ndaj të miturve, dhe dënimi me burgim të shihet si masë e fundit për tu zbatuar.
- Për shumë vepra që nuk kanë një rrezikshmëri të lartë shoqërore të mos parashikohet dënimi me burgim por ai me gjobë, kjo normalisht dhe në varësi të llojit veprës penale.
- Të parashikohet shprehimisht që mungesa e asistencës psikologjike gjatë procedurave përkatëse do të shkaktojë pavlefshmëri absolute të akteve dhe veprimeve procedurale.
- Hartimi i akteve ligjore duhet bëhet nga një grup specialistësh të fushave të ndryshme dhe të konsultuar gjërësisht.
- Akordimi i një buxheti të veçantë për realizimin e programeve dhe ngritjen e strukturave të specializuara për mbrojtjen e fëmijëve;

- Organizimi i fushatave sensibilizuese për rritjen e përfshirjes së komunitetit në çështjet e mbrojtjes së fëmijëve;
- Trajnimi i herëpashershëm i punonjësve social, gjyqtarëve, policisë etj;
- Ndërmarrja e programeve për uljen e analfabetizmit;
- Skema për sigurimet shoqërore duhet të përmirësohet në mënyrë që të mbështeten më mire familjet dhe fëmijët në nevojë;
- Nevojiten kërkime të mëtejshme në mënyrë që të kuptohet korniza institucionale e mbledhjes së të dhënave dhe përpunimi i rasteve abusive;
- Mbrojtja dhe siguri i të drejtave të fëmijëve duhet të përbëjë një përparësi të punës së pushtetit qendror e vendor;

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**Arbesa Kurti¹,
Elida Elezi²**

¹ Msc ne të Drejten Penal, Univeristeti i Tiranës

²Msc në të Drejtën Penale, Universiteti i Tiranës

Funksioni subsidiar(komplimentar) i Gjykatës Ndërkombëtare Penale në Republikën e Shqipërisë

Abstrakt

Një nga parimet themelore që shtetet kanë ruajtur dhe ruajnë me forcë është sovraniteti. Shpeshherë shteteve iu është dashur të heqin dorë nga një pjesë e sovranitetit për hir të paqes dhe sigurisë ndërkombëtare, të respektimit dhe garantimit të të drejtave të njeriut, apo të përbushjes së detyrimeve ndërkombëtare. Pasojat e rënda në njerëz dhe në ekonominë e vendeve që solli Lufta e II Botërore, i vuri shtetet përpara detyrimit që të fillonin bashkëpunimin në kuadër të mbrojtjes dhe garantimit të të drejtave të njeriut, parandalimin dhe luftimin e kriminalitetit, bashkëpunimin në fushën e drejtësisë etj. Gjatë luftës u kryen shumë krime serioze, si krime të luftës, krime kundër njerëzimit, genocide, agresione, autorët e të cilave mund të ngeleshin të pandëshkuar për shkak të ndikimit që kishin në shtetet e tyre.

Përpara shtetve lindte detyrimi për të vënë përpara përgjegjësisë penale autorët e këtyre krimeve, të cilët në të shumtën e rasteve ishin udhëheqës të shteteve apo persona që ushtronin detyra të larta shtetërore. Për këtë arsye u ngritën disa gjykata *ad hoc*, të cilat do të gjykonin të gjithë personat që ushtronin detyra të larta shtetërore, të akuzuar për kryerjen e krimeve gjatë luftës. Krahas ngritjes së gjykatave *ad hoc*, para shteteve lindte nevoja dhe detyrimi për ngritjen e një gjykate të përhershme, e cila do të gjykonte autorët që kryenin krime lufte, krime kundër njerëzimit, genocide etj. Projekti për ngritjen e një gjykate ndërkombëtare të përhershme ka kaluar nëpër shumë debate dhe shumë diskutime, pasi shteteve do ti duhej të hiqnin dorë nga një pjesë e sovranitetit duke ia kaluar atë kësaj gjykate.

Në këtë punim do të analizohet funksioni komplementar i veprimit të Gjykatës Ndërkombëtare Penale duke e ndërthurur me raste nga praktika, si dhe do të analizohet pozicioni dhe marrëdhëniet e Gjykatës Ndërkombëtare Penale me gjykatat kombëtare në Republikën e Shqipërisë, raporti i Statutit të Romës me të drejtën e brendshme. A shkel sovranitetin e Republikës së Shqipërisë kjo gjykate dhe a është në përputhje me Kushtetutën Statuti i Romës?

Shumë nga shtetet ishin skeptik për ngritjen e një gjykate ndërkombëtare të përhershme, dhe konkretisht në lidhje me kufijtë e veprimit të Gjykatës Ndërkombëtare Penale, deri ku do ta shtrinte juridiksionin ajo, cilat do ishin raportet midis Statutit të Romës dhe të drejtës së brendshme të shteteve, gjykatës ndërkombëtare penale dhe gjykatave të brendshme?

Fjalët kyçe : *sovranitet, funksioni komplementar, krime serioze, Statuti i Romës*

I. Hyrje

Gjykata Ndërkombëtare Penale u krijua, pas shumë diskutimesh që u zhvilluan midis shteteve. Diskutimet kishin të bënin me rolin e Këshillit të Sigurimit deri tek detajet në lidhje me procedurën ligjore, çështjet ligjore parë në këndvështrimin e sistemeve ligjore, të drejtat procedurale që do të garantohehin, kufijtë e shtrirjes së veprimtarisë së gjykatës. Një nga problemet kryesore që i bënte shtetet skeptik në rënien dakort për krijimin e një Gjykate Ndërkombëtare Penale, ishte çështja e sovranitetit dhe kufizimi i tij. Shumë shtete, pavarësisht se ishin ideatorët dhe hartuesit e Statutit të Romës, refuzuan ta nënshkruanin dhe ratifikonin atë.

Shteti Shqiptar e ka nënshkruar dhe ratifikuar Statutin e Romës, duke pranuar juridiksionin e Gjykatës Ndërkombëtare Penale. Juristët Shqiptar kanë diskutuar në lidhje me pozicionin e kësaj gjykate në Republikën e Shqipërisë dhe raportet e saj me gjykatat kombëtare.

Në këtë punim do të analizohet domosdoshmëria e krijimit të Gjykatës Ndërkombëtare Penale, pozicioni komplementar që zë kjo gjykatë në raport me gjykatat e brendshme, kushtetutshmëria e Statutit të Romës dhe raporti me të drejtën e brendshme.

II. Gjykata Ndërkombëtare Penale, domosdoshmëri apo shmangie përgjegjësie?

Luftrat Botërore sollën pasoja të mëdha materiale dhe në njerëz. Autorët e këtyre Luftërave për shkak të influencës së tyre brenda shtetit nuk viheshin përpara përgjegjësisë penale. Kjo u vërtetua pas Luftës së Parë Botërore, ku përpjekjet për të vënë përpara përgjegjësisë penale dhe për të ndëshkuar autorët nga gjykatat e brendshme dështuan¹. Për garantimin e paqes dhe sigurisë ndërkombëtare, shtetet krahas hapave të tjerë duhet të merrnin masa për ndëshkimin e autorëve që çënonin sigurinë dhe paqen ndërkombëtare.

Pyetja që ngrihej lidhej me juridiksionin e gjykatës që do ti gjykonte, do ishte gjykata e brendshme apo duhej ngritja e një Gjykate ndërkombëtare? Nga njëra anë gjykatat e brendshme janë konsideruar mjeti më efektiv për gjykimin e krimeve ndërkombëtare, arsye këto politike dhe praktike pasi siguroheshin në këtë mënyrë lehtësira më të mëdha në marrjen e provave apo zhvillimin e hetimeve. Nga ana tjetër kjo të lë hapësira dyshimi lidhur me paanshmërinë e shtetit në procesin që zhvillohet ndaj autorit, mbizotërimi i konsideratave politike shpeshherë do të ishte i pashmangshëm. Përveç kësaj përgjegjësi individuale për krime ndërkombëtare mund të sjellë edhe përgjegjësi shtetërore, veçanërisht kur autorët e këtyre krimeve kanë vepruar në cilësinë e organeve të shtetit.²

Për këtë arsye në Konventën e Gjeneves e Vitit 1948³, për herë të parë dhe në mënyrë të plotë, u parashikua ngritja e një gjykate penale ndërkombëtare që do kishte juridiksion për gjykimin e veprave penale të kryera gjatë Luftës së Dytë Botërore. Duhet të theksojmë që në këto momente qëllimi ishte ngritja e gjykatave *ad hoc*, të cilat do të funksiononin deri sa të vinin përpara përgjegjësisë autorët dhe funksioni i tyre ishte i përkohshëm. Në

¹ Shih Xhafo.J, *E drejta penale ndërkombëtare*, Tiranë 2009, fq 188

² Marrë nga cikli i leksioneve, Fakulteti i Drejtësisë, Viti III.

³ Shih nenin 6 të Konventës së Gjeneves e vitit 1948

kuadër të këtij qëllimi, u krijua Karta e Nuremburgut, në të cilën parashikohej krijimi i Gjykatës së Nuremburgut, e cila do kishte funksion të përkohshëm *ad hoc* dhe do të gjykonte krimet e kryera nga autorët gjerman. Parimet e parashikuara në Kartën e Nuremburgut, si dhe ato që lindën nga jurisprudenca e saj u përpunuan dhe janë parashikuara në Asamblenë e Përgjithshme gjatë diskutimit për Statutin e Romës⁴. Krahës krijimit të Gjykatës së Nuremburgut, u ngrit edhe Gjykata e Tokios, e cila do kishte funksion *ad hoc* dhe do të gjykonte krimet që ishin kryer nga kriminelët japonez.

Pas Luftës së Ftohtë, në shumë vende që kishin sisteme komuniste, ndryshimi i këtij sistemi në shumë raste u shoqërua me lufta civile. Gjatë zhvillimit të luftimeve civile, u kryen edhe një sërë krimesh, si krime të luftës, krime kundër njerzimit, genocide etj. Për të ndëshkuar autorët e këtyre krimeve u ngritën një sërë Gjykatash Ndërkombëtare *ad hoc*, të cilat do të gjykonin autorët e këtyre krimeve dhe do të ushtronin juridiksion vetëm mbi territorin ku ishin zhvilluar këto krime. Disa nga këta gjykata janë, Gjykata Penale Ndërkombëtare e Hagës dhe Gjykata e Ruandës. Për gjykimin e krimeve të luftës, krimeve kundër njerzimit, genocidit të kryera në vende të ndryshme janë ngritur edhe gjykata me elemente ndërkombëtar ose gjykata që kanë pasur asistencë ndërkombëtare si: Gjykata e Kamboxhias, Gjykata e Sierra Leones, Gjykata e Lartë e Irakut etj. Specifikë e ngritjes së gjykatave ishte se ato ngriheshin në bazë të një rezolute të Këshillit të Sigurimit.

Të gjitha këto hapa të ndërmarra nga shtetet ishin pararendëse të krijimit të Gjykatës Ndërkombëtare Penale të Përhershme. Në fakt propozimi i parë për krijimin e një gjykate ndërkombëtare është bërë nga themeluesi i Kryqit të Kuq, Gustav Mayer, i cili ngriti pretendimin se gjykatat e brendshme nuk do të ishin të afta të gjykonin krimet në të cilat ishin përfshirë shtetasit e tyre.

Hartimi i draftit të statutit, me anë të të cilit do të ngrihej një gjykatë ndërkombëtare iu caktua Komisionit Ndërkombëtar të Ligjeve, i cili në vitin 1994 doli me një draft i cili bazohej në jurisprudencën ndërkombëtare të Gjykatës së Nuremburgut dhe Tokios, të projekt statuteve të viteve 1951 dhe 1953, në statutet e Gjykatës së Hagës dhe Ruandës.⁵

Drafti iu paraqit Asamblesë së Përgjithshme, e cila caktoi në 1996 një Komision *ad hoc* për të analizuar draftin, pikpamjet e ndryshme dhe pretendimet e tyre në lidhje me draftin.

Një pikë e diskutueshme ishte raporti i Gjykatës Ndërkombëtare Penale dhe gjykatave të brendshme. Pavarisht se kjo pikë u përfshi në diskutimet përfundimtare, asnjë nga grupet e ngritura nuk e përfshi në axhendën e diskutimeve⁶. Një nga shtetet që e mbështeste shumë fortë parimin e komplementaritetit ishin Shtetet e Bashkuara të Amerikës⁷.

Një tjetër diskutim ishte nëse GjNP-ja do ishte me një instancë apo, do të kishim një gjykatë me dy shkallë. Nga ana e Komisionit Ndërkombëtar të Ligjeve u sugjerua që

⁴ Shih Rezolutën nr. 95(1) të datës, 11.12.1946

⁵ Shih Solera O, "Complementary Jurisdiction and international criminal justice", IRRIC 2002, Vol. 84, No 845, fq.146, www.icrc.org/eng/assets/files/other/145-172-solera.pdf, vizituar dt.12.03.2014

⁶ Po aty, fq.147

⁷ Shih Scheffer D, "The United States and the international criminal court", The American journal of Interan Laë, vol.93, nr.1, 1999, fq 3

GJNP të ishte me dy instanca, tribunali i gjykatës dhe dhoma e apelit, e cila do të shqyrtonte ankimet mbi vendimin e tribunalit⁸.

Statuti i Romës u hartua dhe u hap për nënshkrim në Konferencën Diplomatike të Romës në vitin 1998, me anë të të cilit u ngrit Gjykata Ndërkombëtare Penale me karakter të përhershëm dhe do të hynte në fuqi vetëm pasi të nënshkruhej nga 60 shtete. Statuti i Romës hyri në fuqi më 1 korrik të vitit 2002.

Nga dinamika e ngjarjeve dhe diskutimeve të shumta, konstatohet që mbrojtjes së paqes dhe sigurisë ndërkombëtare i duhet ngritja e një Gjykate të Përhershme, e cila do ishte e pavarur dhe do vihej në veprim, vetëm në rastet kur gjykatat e brendshme nuk do ishin në “gjendje” të gjykonin personat përgjegjës. Mënyra si është hartuar Statuti, duke parashikuar parimin e komplimentaritetit, tregon një balancim midis interesit ndërkombëtar dhe sovranitetit të shteteve⁹.

III. Raporti midis Gjykatës Ndërkombëtare Penale dhe gjykatave të brendshme

Gjykata Ndërkombëtare Penale është themeluar përmes një traktati ndërkombëtar (Statuti i Romës), i cili ka hyrë në fuqi më 1 korrik 2002. Një nga parimet që udhëheq funksionimin e Gjykatës Ndërkombëtare Penale është parimi i komplimentaritetit. Që në preambulën e Statutit parashikohet se ‘...Gjykata Ndërkombëtare Penale e themeluar sipas këtij Statuti do të plotësojë juridiksionet penale kombëtare’¹⁰

Në nenin 1 të Statutit të Romës gjithashtu parashikohet se:

Gjykata Ndërkombëtare Penale që do të themelohet do të jetë një institucion i përhershëm dhe do të ketë fuqinë për të ushtruar juridiksionin e vet mbi personat për krimet më të rënda të shqetësimit ndërkombëtar, siç referohet në këtë Statut, dhe do të plotësojë juridiksionet penale kombëtare. Juridiksioni dhe funksionimi i Gjykatës do të rregullohet nga dispozitat e këtij Statuti.¹¹

Një nga pikat për të cilën shtetet hezitonin të binin dakort ishte deri ku do të shtrinte kufijtë Gjykata Ndërkombëtare. A do shëndrrohej ajo në një rrezik të vazhdueshëm të çënimit të sovranitetit?

Për këtë arsye që në preambulën e Statutit dhe në dispozitat në vazhdim, u parashikua se Gjykata Ndërkombëtare Penale do të lindte e drejta për të gjykuar, vetëm kur shtetet do të dështonin në realizimin e vendosjes përpara drejtësisë të autorëve të krimeve serioze, si krime të luftës, krime kundër njerëzimit, genocid. Në këtë mënyrë ideja themelore e komplimentaritetit është ruajtja e sovranitetit të shteteve sipas të cilit:

⁸ Shih Cassese, A., Gaeta, P., R.W.D Jones, “*The Rome Statute of the International Criminal Court*”, Vol.II, Oxford, 2002, fq 1536

⁹ Shih Benzing, M., “The Complementary regime of the international Criminal Court, International Criminal Justice between State Sovereignty and the fight against impunity”, Max Planck Yearbook of United National Laë, vol.7, 2003, fq.7

¹⁰ Shih paragrafin 10 të Preambulës së Statutit të Romës

¹¹ Shih nenin i të Statutit të Romës

çdo shtet ka për detyrë të ushtrojë juridiksionin penal edhe për krime ndërkombëtare, të forcojë juridiksionin kombëtar ndaj krimeve të ndaluara në Statut dhe të perfeksionojë sistemin ligjor kombëtar, në kuadër të nevojave të hetimit dhe procedimit të personave që kanë kryer krime ndërkombëtare të listuara në statut¹².

Sipas Statutit, rregulli i përgjithshëm është gjykimi i këtyre veprave penale nga gjykatat e brendshme dhe në mungesë të vullnetit të këtyre të fundit, vepron GJNP.

Në nenin 17 (1) të Statutit parashikohen rastet kur GJNP-ja nuk mund të pranojë një çështje:

- a) *çështja është duke u hetuar apo ndjekur penalisht nga një shtet i cili ka juridiksion mbi të,*
- b) *çështja është hetuar nga një Shtet që ka juridiksion për atë dhe shtetit ka vendosur të mos ndjekë penalisht personin në fjalë (në këto dy raste ,gjykata ka të drejtë përjashtojë mundësinë që shteti është i gatshëm ose i paaftë me të vërtetë për të kryer hetimin a ndjekjen para se ajo të pranojë çështjen),*
- c) *personi në fjalë tashmë është gjykuar për sjelljen që është objekt i ankesës*
(parimi i ne bis in idem)
- d) *rasti nuk është i një rëndësie të mjaftueshme për të justifikuar veprime të mëtejshme nga Gjykata*¹³.

Kriteret e pamundësisë janë parashikuar në mënyrë të qartë në nenin 17 (3):

Për të përcaktuar paaftësinë në një rast të veçantë , Gjykata do të shqyrtojë nëse, për shkak të një kolapsi të plotë apo të konsiderueshem, apo pamundësisë se sistemit kombëtar gjyqësor, shteti nuk mund të marrë të akuzuarit, provat e nevojshme, dëshmi apo nuk mund të realizojë në këtë gjendje procesin.

Cilësimi i paaftësisë nuk lidhet vetëm me situatën e konflikteve të armatosura kombëtare ose fatkeqësive natyrore të cilat shkaktojnë pamundësi të konsiderueshme në sistemin brendshëm gjyqësor, p.sh. kaos dhe luftë në territorin e ish-Jugosllavisë dhe të Ruandës gjatë viteve 1990, por edhe në atë në të cilën sistemet gjyqësore kombëtare tërësisht ose në thelb janë në një kolaps total, në këtë mënyrë nuk janë në gjendje për të kryer një proces apo gjykim penal. Paaftësia në rastin e fundit mund t'i referohet mungesës së drejtës materiale, apo legjislacionit ekzistues, i cili nuk plotëson standardet e të drejtave ndërkombëtare të njeriut.

Juridiksioni i Gjykatës lidhet në mënyrë të drejtpërdrejtë me termin ‘jo efektshmëri’, i cili është ndryshuar me termin ‘paaftësi’ dhe përfshin në mënyrë të përmblodhur¹⁴:

¹² Scheffer.D, “The United States and the international criminal court”, The American journal of Interan Law, vol.93, nr.1, 1999

¹³ Shih nenin 17 të Statutit të Romës

¹⁴ Shih Benzing.M, “The Complementary regime of the international Criminal Court, International Criminal Justice between State Sovereignty and the fight against impunity”, Max Planck Yearbook of United National Law, vol.7, 2003, fq.7

- Mungesën e vullnetit të mirë;
- Shkeljen e të drejtave procedurale;
- Me anshmërinë e gjykatës gjatë gjykimit të çështjes.

Statuti i Romës u kërkon të gjitha shteteve palë, duke përfshirë dhe shtetet jo-nënshkruese, të garantojnë dhe të respektojnë standardet e të drejtave të njeriut dhe parimet e parashikuara në Statut, duke përfshirë prezumimin e pafajësisë, fuqinë jo-prapavepruese “ratione personae”, ne bis in idem, e drejta për tu dëgjuar publikisht, të drejtën e të akuzuarit për të zgjedhur avokat dhe të marrë ndihmë ligjore pa pagesë, e drejtat për tu informuar, për ti bërë pyetje dëshmitarit, e drejta për të heshtur, e mosinkriminimit etj. Ky detyrim duhet të zbatohet, pasi përveç rasteve të pafajësisë së gjykatave të brendshme, parimi i komplimentaritetit të GJNP zbatohet edhe në rastet kur gjykatat e brendshme shkelin të drejtat procedurale të të pandehurit¹⁵.

Një nga rolet më të rëndësishme të parimit të komplimentaritetit është të inkurajojë Shtetin Palë për zbatimin e dispozitave të Statutit si dhe forcimin e juridiksionit kombëtar mbi këto krime të rënda të parashikuara në Statut. Për sa kohë që sistemi juridik i një shteti mund të hetojë dhe të ushtrojë ndjekjen penale të krimeve serioze të parashikuara në Statut në mënyrë efikase, sovraniteti i shtetit do të mbetet i paprekur, i lirë nga çdo ndërhyrje e GJNP-së. Por në rast se një shtet nuk është i gatshëm apo është i paaftë për të hetuar apo ndjekur penalisht një rast, Gjykata do të thirret nëpërmjet parimit të komplementaritetit të pranoj çdo rast në fjalë dhe të ushtrojë juridiksion mbi të. Praktika ka treguar se GJNP-ja tregohet e kujdesshme në pranimin e rasteve për gjykim, ajo shqyrton kriteret e pranueshmërisë rast pas rasti në mënyrë të hollësishme, pasi sicc është shprehur sistemi i GJNP është konceptuar si një mekanizëm dytësor, plotësues, plotësues për vendosjen në vend të drejtësisë dhe të të drejtave të viktimave¹⁶.

Tashmë duket e njohur për të gjithë se Statuti i Romës është një kodifikim i ligjit ekzistues zakonor ndërkombëtar . Krimet e genocidit, krimet kundër njerëzimit dhe krimet e luftës kanë tronditur ndërgjegjen e njerëzimit dhe kanë prekur interesat e bashkësisë ndërkombëtare në tërësi . Prandaj, ndalimi i këtyre krimeve është bërë pjesë e “*congens jus*” dhe çdo shtet ka një detyrim “*erga omnes*” për ti ndëshkuar ato. Nga pikëpamja e teorisë natyraliste të së drejtës ndërkombëtare, një shtet ka gjithashtu detyrimin për të vepruar në përputhje me të drejtën ndërkombëtare zakonore .

Parakusht që një shtet të ushtrojë juridiksionin e tij penal kombëtar është që të njohin se krimet e paraqitura në Statutin e Romës janë krime të dënueshme sipas legjislacionit të tij kombëtar. Nëse një Shtet refuzon të miratojë ligjin kombëtar dhe nuk arrin të ndëshkojë shkelësit e supozuar , parimi i komplimentaritetit do të jetë i zbatueshme në shtetin në fjalë .

Për të përmbushur kërkesat e parimit të komplementaritetit, një shtet është i obliguar që të ndryshojë si ligjin e vet kombëtar material dhe atë procedural.

Shqipëria e ka ratifikuar Statutin e Romës në 2002. Për sa më sipër, Shqipëria i ka pjesë të legjislacionit penal veprat penale të parashikuara në Statut, që përpara se ta miratonte dhe

¹⁵ Po aty

¹⁶ Shih, Bederman.J.D, *International Decisions*, Situation in the Republic of Kenya, No. ICC-01/09-02/11-274 vol.106, 2012, fq.124

ta ratifikonte atë. Përveç faktit që krimet e luftës, krimet kundër njerëzimit, genocide janë të parashikuara në ligjin penal, për këto vepra nuk vepron një nga institutet që është parashkrimi¹⁷, këto vepra nuk i nënshtrohen afateve të parashkrimit. Gjykata Ndërkombëtare Penale do të ketë juridiksion në Republikën e Shqipërisë, në të gjitha ato raste kur është kryer një nga krimet e parashikuara në Statut, të cilat janë të parashikuara edhe në ligjin penal të brendshëm, për të cilat gjykatat e brendshme do jenë të paafta për të vënë përpara përgjegjësisë autorët e këtyre veprave.

IV. Kushtetueshmëria e Statutit të Romës dhe raporti me të drejtën e brendshme

Statuti i Gjykatës Ndërkombëtare Penale është bërë objekt i shqyrtimit nga Gjykata jonë Kushtetuese lidhur me kushtetueshmërinë e tij. Në vendimin e saj Gjykata Kushtetuese ka konstatuar se parimet themelore për mbrojtjen e të drejtave dhe lirive themelore të njeriut, të sanksionuara dhe të garantuara edhe nga Kushtetuta e Republikës së Shqipërisë, si: prezumimi i pafajësisë; ai i “nullum crimen sine lege” (nuk ka krim pa ligj); “nullum poena sine lege” (nuk ka dënim pa ligj); i ndalimit të fuqisë prapavepruese; i të drejtës së mbrojtjes me një avokat; i pavarësisë së gjyqtarëve; i paraqitjes para gjykatës para arrestimit apo e drejta e apelit të vendimit, janë të garantuara edhe nga Statuti.

Përveç kësaj gjykata kushtetuese merr në konsideratë edhe një dispozitë tjetër kushtetuese, duke filluar që me preambulën e saj. Në preambulën e saj, Kushtetuta e Republikës së Shqipërisë, pranon si vlerat më të larta të njerëzimit drejtësinë, paqen harmoninë dhe bashkëpunimin ndërmjet kombeve. Në nenin 2 të saj sanksionon:

Për ruajtjen e paqes dhe të interesave kombëtarë Republika e Shqipërisë mund të marrë pjesë në një sistem sigurimi kolektiv, në bazë të një ligji të miratuar me shumicën e të gjithë anëtarëve të Kuvendit.

Për më tepër, në Kushtetutën e Republikës së Shqipërisë, në rendin e brendshëm juridik, pranohen edhe marrëveshjet ndërkombëtare të ratifikuara, të cilat kanë epërsi ndaj ligjeve të vendit (neni 122 i Kushtetutës).

Kjo dispozitë pasohet në funksion të delegimit të kompetencave shtetërore si formë e delegimit të të drejtave të sovranitetit me nenin 123, i cili në paragrafin e parë sanksionon ‘Republika e Shqipërisë, në bazë të marrëveshjeve ndërkombëtare u delegon organizatave ndërkombëtare kompetenca shtetërore për çështje të caktuara’.

Mundësia për të kontraktuar angazhime kushtetuese ndërkombëtare në një fushë të tillë të rëndësishme si ajo e drejtësisë penale, përbën një atribut të ushtrimit të sovranitetit të shtetit. Nga vetë përmbajtja e Statutit, del qartë se këtu nuk bëhet fjalë për një organizëm kombëtar e as për një gjykatë të jashtëzakonshme. GjNP-ja nga natyra e saj është një institucion gjyqësor legal dhe ndërkombëtar, i krijuar me vullnet të lirë të shteteve sovrane palë në Statut, dispozitat e të cilit bazohen mbi parimin e respektimit të të drejtave dhe lirive të njeriut.

¹⁷ Shih nenin të Kodi Penal të Republikës së Shqipërisë i vitit 1995

Nga sa u parashtrua, Gjykata Kushtetuese e Shqipërisë, nuk e sheh si tejkalim të këtyre kufijve transferimin e disa kompetencave të pushtetit gjyqësor në një fushë të caktuar me interes ndërkombëtar siç është ajo e përndjekjes së autorëve të krimeve të genocidit, krimeve kundër njerëzimit, krimet e luftës e agresionit.

Duke u nisur nga kwo argumente Gjykata Kushtetuese e ka kosideruar Statutin tw pajtueshem me kushtetutwn pwrsa i pwrket ushtrtrimit tw sovranitetit¹⁸.

Parimi i komplimentaritetit gjatë fazës së ekzekutimit të vendimeve të Gjykatës Ndërkombëtare

Vendimet e GjNP janë të detyrueshme për tu zbatuar nga shtetet pale dhe personi që është dënuar nga kjo gjykatë duhet të vuajë dënimin. Duke qenë se nuk janë ngritur institucione të posaçme për vuajtjen e dënimit të përcaktuar nga GjNP, dënimi vuhet në një nga shtetet që ka treguar gadishmëri për mbajtjen e personit dhe ky shtet përcaktohet nga tribunali i GjNP bazuar në listën e shteteve. Statuti ka parashikuar se personi do ta vuajë dënimin në një nga shtetet duke marrë parasysh¹⁹:

- a) Parimin që Shtetet Palë duhet të ndajnë përgjegjësinë e zbatimit të dënimeve me burgim, në pajtim me parimet e ndarjes së barabartë, ashtu siç është mundësuar në Rregullat e Procedurës dhe Provave;
- b) Zbatimin e standarteve ndërkombëtare të traktateve të pranuar gjerësisht mbi trajnimin e të burgosurve;
- c) Pikpamjet e personit të dënuar;
- d) Nacionalitetin e personit të dënuar
- e) Faktorë të tjerë që kanë të bëjnë me rrethanat e krimit, me personin e dënuar, ose me zbatimin efektiv të dënimit, ashtu siç është e nevojshme për caktimin e shtetit zbatues.

Pasi GjNP vendos shtetin që do të ekzekutojë dënimin, do jetë ligji i brendshëm i këtij shteti që do të zbatohet gjatë vuajtjes së dënimit.

Kushtet e burgimit rregullohen nga ligji i Shtetit të Zbatues dhe janë në pajtim me standardet ndërkombëtare të traktateve të pranura gjerësisht mbi trajnimin e të burgosurve; në asnjë rast kushtet e tilla janë më shumë ose më pak të favorshme se sa ato të ofruara për të burgosurit e dënuar për veprat e njëjta në Shtetin zbatues²⁰.

Konstatojmë një ndërthurje juridiksionesh ku juridiksioni fillestar i takon shtetit për të gjykuar personin, në mungesë të vullnetit të këtij të fundit, ky juridiksion i kalon GjNP e cila procedon dhe gjykon në bazë të Statutit të Romës. Pasi GjNP merr një vendim, ekzekutimi i tij do bëhet në bazë të legjislacionit të brendshëm të një shteti.

Pavarsisht se kemi një ndërthurje midis të drejtës së brendshme të shteteve dhe Statutit të Romës, në fazën e ekzekutimit të dënimeve Gjykata Ndërkombëtare Penale ka ruajtur një

¹⁸ Vendimi i Gjykatës Kushtetuese, nr.186, datë 23.09.2002

¹⁹ Shih nenin 103 të Statutit të Romës

²⁰ Shih nenin 106 paragrafi 2 i Statutit të Romës

pozicion mbikqyrës. Kjo do të thotë që pavarësisht se në ekzekutimin e dënimeve do zbatohet legjislacioni i brendshëm, ky nuk mund të jetë në kundërshtim me të drejtën ndërkombëtare dhe çdo kërkesë e të dënuarit do gjykohet nga GjNP.

Zbatimi i dënimit me burgim i nënshtrohet mbikëqyrjes së Gjykatës dhe është në përputhje me standartet ndërkombëtare të traktateve të pranuarra gjërësisht mbi trajnimin e të burgosurve.²¹

Megjithëse vuajtja dënimit do të ekzekutohet sipas legjislacionit të brendshëm të shteteve, në statut parashikohet se shteteve nuk u lejohet që të favorizojnë personin që vuan dënimin. Ndryshe nga të burgosurit e tjerë, të dënuarve nga GjNP nuk kanë të drejtë të kërkojnë zbatimin e dënimeve alternative, i vetmi rast që lejohet një dënim alternative është lirimi me kusht. Edhe në këtë rast kompetente për të gjykuar lirimin me kusht nuk do jetë gjykata e shtetit, ku personi vuan dënimin, por Gjykata Ndërkombëtare Penale. ‘Vetë gjykata ka të drejtë të vendosë për çdo zvogëlim të dënimit dhe vendos për çështjen pasi të ketë dëgjuar personin’.²²

Parashikimi i statutit është në përputhje me të drejtën tonë të brendshme në lidhje me ligjin e aplikueshëm në rastin e vuajtjes së dënimit të dhënë nga GjNP. Në dispozitat procedurale parashikohet se vendimet e huaja i nënshtrohen njohjes dhe pasi njihen ekzekutohen sipas ligjit shqiptar²³.

Një pyetje që ngrihet në këtë rast është a do ti nënshtrohet njohjes vendimi i GjNP, apo do jetë drejtpërdrejtë i zbatueshëm? Në statut nuk gjejmë një parashikim konkret në lidhje me këtë pikë, por nga një interpretim të zgjeruar dhe duke iu referuar parashikimeve në Statut konkludojmë që në rastin kur shteti do shprehë dëshirën për të pranuar vuajtjen e dënimit të personit të dënuar nga GjNP duhet ti bashkangjisë kësaj kërkesë dhe kushtet e pranimit, si dhe duhet të konfirmojë përcaktimin e bërë nga GjNP, pasi kjo e fundit e cakton atë si shtet ekzekutues.

...Në kohën e shfaqjes së dëshirës së tij për të pranuar personat e dënuar, Shteti mund të bashkangjisë kushtet e pranimit të saj, ashtu siç është rënsë dakord me Gjykatën dhe në pajtim me këtë pjesë. Shteti i emëruar në rastin e veçantë duhet të konfirmojë nëse e pranon përcaktimin e bërë nga Gjykata.

Shteti ekzekutues ka të drejtën të paraqesë kushte vetëm në fazën e parë, më pas vendimi është i zbatueshëm drejtpërdrejtë dhe nuk do ti nënshtrohet parashikimeve ligjore. Ky rregullim i parashikuar në Statut, vjen edhe nga fakti që Statuti është ratifikuar nga shteti dhe bën pjesë në të drejtën e brendshme. Pavarësisht se Kodi ynë i Procedurës Penale nuk e parashikon si rast të veçantë ekzekutimin e vendimeve të GjNP, mendojmë që duhet të bëhet një ndërrhyrje në këtë pikë, pasi rregullimi aktual i KPP e kushtëzon ekzekutimin e vendimit penal të huaj me njohjen nga ana e gjykatave të brendshme.

Një tjetër element është zbatimi i institutit të “*amnistisë*” dhe “*faljes*”. Në Statut nuk është parashikuar asnjë rregullim për këto dy institute. Në lidhje me amnistinë, ky institut nuk

²¹ Shih nenin 106 paragrafi 1 i Statutit të Romës

²² Shih paragrafin 2 të nenint 110 të Statutit të Romës

²³ Shih nenet 512-518 të Kodit të Procedurës Penale të Republikës së Shqipërisë

gjen terren për tu zbatuar pasi, veprat penale për të cilat GJNP gjykon dhe dënon, nuk mund të amnistohen. Pavarisht se shteti mund të ndërmarrë një vendim për të amnistuar këto vepra, kjo do binte në kundërshtim me vetë Statutin, i cili është ratifikuar dhe i përmban në trupin e tij këto vepra penale. Krahas kësaj nëse krahasojmë zbatimin e institutit të amnistisë për vendimet penale të huaja, jurisprudenca jonë është unifikuar në këtë drejtim²⁴:

Kolegjet çmojnë se ligji për amnistinë nuk i shtrin efektet e tij ndaj kërkuesit si gjatë kohës që ndodhej në territorin e shtetit grek, ashtu edhe kur ai është transferuar në ekzekutim të vendimit të atij autoritetit për vazhdimin e ekzekutimit të dënimit të huaj në Shqipëri.

Pavarisht se Statuti nuk është shprehur, këto dy institute nuk mund të zbatohen pasi rrezikshmëria e veprave penale është shumë e madhe dhe nëse do kishte një kërkesë të të dënuarit, ato do të gjykohehin nga vetë Gjykata Ndërkombëtare Penale në bazë të parashikimeve në Statut²⁵: ‘Vetë Gjykata ka të drejtë të vendosë për çdo kërkesë, për ankesë dhe rishikim. Shteti zbatues nuk pengon bërjen e asnjë kërkesë të tillë nga personi i dënuar’.

Nga formulimi i mësipërm, është vetë Gjykata që shqyrton kërkesat. Shteti zbatues nuk ka asnjë tagër mbi zvoglimin e dënimit, përjashtimin nga vuajtja e dënimit etj. Me këto parashikime duket sikur personi i dënuar nga GjNP diskriminohet dhe nuk trajtohet në mënyrë të barabartë me të burgosurit e tjerë që vuajnë dënimin në këtë shtet. Gjithashtu në ligjin tonë penal nuk gjejmë asnjë përjashtim për moszbatimin e dy institutive mbi veprat penale dhe mbi personat e dënuar nga GJNP. Mendojmë që kjo pjesë duhet të rishikohet dhe të bëhen rregullime të brendshme në lidhje me zbatimin e këtyre institutive.

VI. Konkluzione

Gjykata Ndërkombëtare Penale lindi si një domosdoshmëri, për të vendosur përpara përgjegjësisë penale autorët e krimeve që trondisnin dhe çënonin paqen dhe sigurinë ndërkombëtare. Por juridiksioni i kësaj gjykate do ketë funksion komplementar në raport me gjykatat e brendshme. Në rastet kur gjykatat e brendshme do ishin të “paafita” për të gjykuar krimet kundër njerëzimit, krimet e luftës, genocid, kjo kompetencë do ti kalojë GJNP. Shqipëria e ka ratifikuar Statutin e Romës, akti që ka themeluar Gjykatën Ndërkombëtare Penale, në vitin 2002 duke e bërë Statutin e Romës pjesë të së drejtës së brendshme dhe si rrjedhojë detyrimin për të zbatuar juridiksionin e GJNP në rastet e parashikuara në Statut. Statuti i Romës ka kaluar edhe testin e Kushtetutshmërisë, pra Statuti i Romës është në përputhje me Kushtetutën.

Ndonese ka pasur shumë debate doktrinare, Shqipëria nuk ka pasur raste konkrete për të vënë në diskutim raportin midis GJNP dhe gjykatave të brendshme. Pavarisht kësaj Shqipëria i ka përmbushur detyrimet që rrjedhin nga Statuti, si inkriminimi i krimeve ne legjislacionin e brendshëm. Mendojmë që për të evituar konfliktet midis normave, duhet të bëhen ndryshime në ligjin penal dhe atë procedural, përse i përket njohjes së vendimit të GJNP, ekzekutimit të këtij vendimi, zbatimi ose jo i institutive të “amnistisë” dhe “faljes”.

²⁴ Shih Vendimin e Gjykatës së Lartë, nr.154, datë 15.04.2000

²⁵ Shih paragrafi i dytë i nenit 105 i Statutit të Romës

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Vendimi nr.154, datë 15.04.2000 i Kolegjeve të Bashkuara të Gjykatës së Lartë

**Erald Shushari¹,
Arsiola Dyrmishi²,
Rinald Frashëri³**

¹ Master në të Drejtën Administrative

² Kandidat për Doktor Shkencash

³ Fakulteti i Drejtësisë

Krimi kompjuterik dhe legjislacioni penal

Abstrakt

Eshtë përmbledhur nën termin “Axhenda e Evropës Dixhitale” dhe përbën një nga 7 iniciativat e Strategjisë “Evropa 2020”. Përputhet me trendin aktual të shoqërisë së informacionit, ç’ka duket se po ndryshon edhe qasjen mbi kriminalitetin. Nëse deri sot, organet ligjzbatuese investoheshin kryesisht në krimet konvencionale aktualiteti obligon drejt një vëmendje të shtuar drejt krimit kompjuterik. Hapësira kibernetike po kthehet në terren të përshtatshëm për kryerjen e veprave penale të rënda si akte terroriste, spiunazh, mashtrime të rënda apo vepra penale që kanë si objekt të dhënat personale dhe të drejtën e privatësisë. Ky studim në pjesën e parë do të trajtojë fenomenin e krimit kibernetik duke përfshirë cila është tendenca e figurave të veprave penale dhe cili është kuadri ligjor ndërkombëtar dhe i brendshëm për luftimin e krimit kompjuterik. Studimi do të shkojë drejtë qëllimit për t’i dhënë përgjigje pyetjeve hulumtuese si: Cila është qasja e legjislacionit penal shqiptar mbi krimin kompjuterik? Cilat janë marrëveshjet ndërkombëtare dhe si janë implementuar ato në legjislacionin e brendshëm? A jemi në kushtet kur nevojiten ndryshime ligjore si për krimin kompjuterik, ashtu edhe për komunikimet elektronike? Si mund të superohen vështirësitë e zbatimit të legjislacionit penal kundër krimit kompjuterik dhe cili është qëndrimi juridik mbi provat dixhitale? Sa të specializuara janë organet e zbulimit, hetimit për të luftuar dixhitalizimin e krimit? Studimi nuk do të ofrojë përgjigje ezauruese por do të përdorë metodat cilësore dhe sasiore si dhe literaturën shqiptare e të huaj për të konkluduar dhe sjellë rekomandime mbi këtë trend aktual e futurist të kriminalitetit.

Fjalë kyçe: krim kompjuterik, prova dixhitale, hapësirë kibernetike, legjislacion penal

Hyrje

Në vitet e fundit, shoqëritë në të gjithë botën për shkak të përdorimit masiv si dhe “varësisë” ndaj sistemeve kompjuterike po konsiderohen shoqëri informacioni. Teknologjia e informacionit dhe ndikimi i saj është i dukshëm thuajse në çdo aspekt të jetës njerëzore. Revolucioni kompjuterik po ekspozon shoqërinë ndaj kërcënimeve të reja kriminale, aspak konvencionale, të tilla si krimi kibernetik¹. Rrjetet kompjuterike të ditëve të sotme ofrojnë mundësi të reja dhe moderne për shkeljen e ligjit duke krijuar potenciale që shtyjnë subjektet në kryerjen e formave të ndryshme të kriminalitetit tradicional në mënyrë jo tradicionale.

Rrjetet kompjuterike përfshijnë rrezikun e sulmeve të vazhdueshme, si: ndërhyrjet ilegale të telekomunikacionit, terrorizmin elektronik, pornografinë dhe përmbajtje të tjera fyese, vjedhja me anë të tele-marketit, vjedhja e identitetit, pastrimi i parave etj. Shqipëria tashmë po përfaqëson një terren të përshtatshëm për krimin kompjuterik. Ai po gjen përhapje graduale dhe po kthehet në një kërcënim serioz dhe real. Vjedhjet nëpërmjet internetit dhe veçanërisht vjedhja e llogarive bankare apo kartave të kreditit përbëjnë figurat e veprave penale më të përhapura. Natyrshëm lind pyetja: a jemi gati për luftën ndaj këtij lloji kriminaliteti, përballë së cilës edhe shoqëritë më të emancipuara si ato përëndimoret ndihen të kërcënuara ?!

1.1 Kuptimit i “krimit kibernetik”

Sistemet kompjuterike janë bërë të aksesueshme për një numër të madh përdoruesish. Duke mos dashur të diskutojmë teknologjinë e informacionit në terma negativ dhe të vetdijshëm për hovin e zhvillimit me të cilin shpesh relacionohen këto teknologji, ndoshta krimi kompjuterik përbën rrezikun më të madh që i vjen njerëzimit nga hapësira kibernetike. Keq-përdorimi i saj nga elementë kriminalë njihet me emrin krim kibernetik (cybercrime). Krimi kibernetik duhet distancuar nga një nocion i përgjithshëm i asaj që quhet krim informatik². Ky i fundit lidhet me një aktivitet kriminal që ka si objekt apo si mënyrë të kryerjes së krimit, kompjuterin. Krimi kibernetik, pra, është në këtë prizëm një nënkategori e krimit informatik dhe ka të bëjë me veprimtarinë kriminale të zhvilluar në rrjet (network). Ai mund të shihet në dy këndvështrime :

a) në një kuptim të ngushtë, me krim kompjuterik do të kuptohet çdo sjellje e kryer nëpërmjet veprimeve elektronike të cilat drejtohen ndaj sigurisë së sistemeve kompjuterike dhe të dhënave të përpunuara prej tyre ;

b) në një kuptim më të gjerë, me krim kompjuterik do të kuptohet çdo sjellje e paligjshme e kryer nga mënyra apo nëpërmjet një kompjuteri apo një sistemi kompjuterik³.

¹ Canaj, E. (2013) Lufta e “specializuar” ndaj krimit modern-Krimi kompjuterik. Botuar në Gazetën Panorama.

² Bruqi, F. (2010). Krimi kibernetik, sfidë për shoqërinë e sotme. Marrë nga faqja “<http://www.voal-online.ch/index.php?mod=article&cat=ARTKULTUR%C3%8B&article=8172>”. Datë 15/03/2014.

³ Computer crime-http://en.wikipedia.org/wiki/Computer_crime. Marrë më datë 16/03/2014

Për sa i përket përkufizimit se çfarë kuptojmë me krim kibernetik duhet thënë që në literaturë nuk ka një përkufizim universalisht të pranuar. Përgjithësisht krimi kibernetik përkufizohet si veprimi në kundërshtim me ligjin penal që realizohet duke përdorur një kompjuter ose një rrjet interneti. Nga ky përkufizim kuptojmë se dallimi i krimeve kibernetike nga veprat e tjera penale qëndron në anën objektive të këtyre veprave. Kështu element dallues i krimeve kibernetike është fakti që për realizimin e tyre përdorohet një kompjuter ose një rrjet interneti. Nga ana subjektive krimet kibernetike kanë zakonisht qëllime përfitimi ekonomik ose shkaktimin e një dëmtimi mbi pasurinë e një personi, dëmtim ky që i shkaktohet më anë të futjes të paautorizuar, modifikimit ose fshirjes së të dhënave informatike, ose veprimtaria e kufizimit të aksesit në këto të dhëna me anë të pengimit në çdo mënyrë të funksionimit të një sistemi informatik .

Në literaturë njihet edhe një koncept tjetër, **krimi në rrjet**. Krimi në rrjet përcaktohet si krimi që kryhet duke përdorur internetin. Krimet në rrjet paraqesin rrezikshmëri të theksuar. Ato përfshijnë hacking, shkeljet e së drejtës së autorit, pornografia e fëmijeve etj. Kriminë rrjet më i përhapur është shkelja e privatësisë dhe përhapja e informacioneve që në bazë të ligjit janë sekrete ose konfidenciale.

Siç e shohim koncepti i krimit kompjuterit është shumë i gjerë. Krimet kompjuterike përfshijnë potencialisht një sërë aktivitete të paligjshme. Ato mund të ndahen në dy kategori të mëdha :

- Krime që godasin një kompjuter ose një rrjet të caktuar direkt.

Shembuj të këtyre krimeve janë: Viruset kompjuterike, sulmet për ta bërë kompjuterin të papërdorshëm (Denial-of-service attacks), instalimi i Malwareve (Kodet malicious)⁴

- Krime që synojnë një kompjuter ose një rrjet të caktuar për të kryer një veprë penale tjetër.

Zakonisht këto janë vepra penale më rrezikshmëri më të larta. Shembuj të kësaj kategorie janë:

- Përhapja e informacioneve të rreme për të dëmtuar një kompani, një individ apo një grup individësh të caktuar. (Cyberstalking)
- Mashtrimi dhe vjedhja e identitetit.
- Dërgimi i linkeve me anë të email ose mesazheve në rrjetet sociale që synojnë vjedhjen e informacioneve personale si, fjalëkalimet etj. (Phishing scams)
- Vjedhja e informacioneve që kanë lidhje me një gjendje lufte, me taktikat ushtarake, gjendjen ushtrore, mobilizimin e saj etj. (Information warfare)⁵

1.2 Vështirësitë e zbatimit legjislativ penal për krimet kibernetike

Krimi kibernetik zhvillohet në kushte anonimiteti dhe kjo e vështirëson shumë punën investigative të organeve kompetente dhe zbatimin e legjislativ penal. Vendi ku jeton subjekti që kryen veprën penale dhe vendi ku mund të kryhet vepra penale shpesh janë vënde krejtësisht të ndryshme nga njëri-tjetri dhe kjo e bën akoma më të vështirë

⁴ Computer crime-http://en.wikipedia.org/wiki/Computer_crime. Marrë më datë 16/03/2014

⁵ Po aty

investigimin, duke pasur parasysh ligjet e ndryshme që mund të kenë shtetet dhe qasjen ndaj këtij lloj krimi.

Pavarësisht se shumë shtete kanë krijuar seksione të posaçme në organet e tyre të rendit me qëllim rritjen e luftës ndaj këtij lloj kriminaliteti përsëri legjislacioni penal për këto vepra penale paraqet vështirësi përse i përket zbatimit. Vështirësitë me të cilat ndeshet zbatimi i legjislacionit penal për këto vepra penale janë:

I. çështja e juridiksionit.

Në këndvështrimin ligjor, Interneti është i konceptuar dhe funksionon në një mënyrë të tillë, që për të nocioni i kufijve nuk ekziston. Në fushën juridike një krim në radhë të parë sanksionohet nga një ligj. Ky ligj i përket një shteti të caktuar dhe zbatohet nga një gjykatë kompetente e një shteti të caktuar. Nocioni i shtetit është i lidhur ngushtë me nocionin e territorit, pra me kufijtë shtetërorë. Kjo ndikon shumë në fazën e përndjekjes së krimit. Imagjinojmë një pirat informatik që kryen aktin e tij kriminal supozojmë në Kinë, duke sulmuar një bankë në Zvicër dhe duke derdhur shumë në vjedhur elektronikisht në Itali. Cili institucion gjyqësor dhe cili ligj është kompetent në këtë rast? Kina, vendi nga i cili autori kreu krimin; Zvicra, vendi ku ndodhet viktimja; apo Italia, vendi ku u realizua rezultati? Tre vende kaq të ndryshme përse i përket vendndodhjes, kulturës juridike dhe perceptimit të nocionit të krimit a do të mundën të bien dakord për përndjekjen dhe gjykimin e këtij akti?!

II. Anonimiteti e veprës penale.

Përpara se të diskutojmë çështjen e juridiksionit, është e nevojshme të zbulojmë ku është kryer vepra penale edhe kush e ka kryer atë. Kjo nuk është aspak e lehtë sepse ka shumë mënyra sesi personi që kryen veprën penale të fsheh identitetin e tij. Duhet të kuptojmë që krimet kibernetike kryhen nga njerëz me njohuri shumë të avancuara teknike dhe ata do bëjnë çdo gjë që të humbasin gjurmët e tyre.

Disa studime kanë treguar se njerëzit kanë më shumë të ngjarë të angazhohen në sjellje të paligjshme në internet për shkak të perceptimit të anonimitetit. Shpesh njerëzit që kryejnë këto krime kanë edhe një vetëbesim të madh që organet e rendit nuk do të mund t'i identifikojnë⁶.

Këtu vlen të theksohet se anonimiteti që ofron interneti, bën që krimi i organizuar po fillon dalëngadalë të interesohet dhe të marrë në dorë frenat e këtij fenomeni. Praktika tregon që krimi i organizuar ka kuptuar tashmë rëndësinë dhe përfitimin nga fenomeni i krimit kibernetik.

III. Natyra e provave

Një tjetër gjë që e bën krimin kibernetikë më të vështirë për të hetuar dhe ndjekur penalisht në krahasim me shumicën e krimeve të tjera, është natyra e provave. Problemi me provat dixhitale është se janë shumë të brishta dhe mund të dëmtohen lehtësisht.

⁶ Lovet, G. (2009) Fighting cybercrime: technical, juridical and Ethical challenges. Fortinet, France .pg 68

IV. Njohuritë e kufizuara të prokuroreve edhe gjykatësve në këtë fushë

Ndërsa në shumë vende, organet e zbatimit të ligjit kanë arritur t'i fuqizojnë kapacitetet e tyre për të hetuar krimet kibernetike dhe për të siguruar provat elektronike, kjo duket se ka ndodhur në një shkallë më të ulët për gjyqtarët dhe prokurorët, të cilët megjithatë luajnë një rol kyç në proceset ligjore penale. Gjyqtarët dhe prokurorët hasin vështirësi në përballjen me realitetet e reja të botës kibernetike⁷.

V. Raportimet e pakta të këtyre krimeve.

Pjesa më e madhe e krimeve kompjuterike nuk raportohen tek organet e rendit. Në vitin 2008 në SHBA, Instituti për Sigurinë Kibernetike nga një studim që kishte kryer raportoi se vetëm 27% e krimeve kibernetike ishin raportuar tek organet ligjzbatuese. Ndërsa mendohet se vetëm 15 % e vjedhjeve në internet raportohen. Kjo vjen për shkak se për të mos rënë në sy, shumata e përvetësuar nga keto vjedhje, janë në më të shumtën e rasteve, shumata të vogla parash⁸.

1.3 Legjislacioni ndërkombëtar dhe krimi kibernetik

Karakterit specifik i krimit kompjuterik dhe rrezikshmëria e lartë shoqërore kërkon edhe bazën e duhur ligjore. Është e qartë që një luftë efektive kundër krimit kibernetik kërkon një bashkëpunim ndërkombëtar të gjerë, të shpejtë dhe efektiv në çështjet penale. Për këtë arsye, përveç akteve kombëtare që ka adoptuar çdo shtet, janë miratuar edhe një seri aktesh ligjore ndërkombëtare. Këto instrumente ndërkombëtare mund të ndahen në pesë kategori :

1. Akte të miratuara nga Këshilli i Evropës ose nga Bashkimi Evropian. Ndër aktet e miratuara nga Këshilli i Evropës ose nga Bashkimi Evropian vlen të përmendet : “Konventa për krimin në fushën e kibernetikës” miratuar nga Këshilli i Evropës në vitin 2001. Në vitin 2003 kësaj Konvente i janë shtuar edhe protokollet të tjera shtesë. Konventa e Këshillit të Evropës “Për mbrojtjen e fëmijëve kundër shfrytëzimit dhe abuzimit seksual” miratuar në vitin 2007. Legjislacioni i BE-së duke përfshirë Direktivën e-Commerce (2000/31/EC), “Për luftën kundër mashtrimit dhe falsifikimit në blerjet që nuk kryen me para në dore”. Direktivën (2001/413/JHA), “Për të dhënat personale”. Direktiva 2002/58/EC e ndryshuar, “Për sulmet kundër Sistemeve të Informacionit” etj⁹.

2. Akte të miratuara nga Komonuelthi i Shteteve të Pavarura (Commonwealth of Independent States). Marrëveshja e bashkëpunimit në luftën kundër veprave penale lidhur me teknologjinë e informacionit miratuar në vitin 2001.

3. Akte të miratuara nga Unioni Afrikan. Konventa e Unionit Afrikan “Për krijimi i një kornize ligjore të favorshme për Sigurinë Kibernetike në Afrikë”. Miratuar në vitin 2012. Direktiva për luftën kundër krimit kibernetik e Komunitetit Ekonomik të Vendeve Afrikane Perëndimore (KESHPA). Miratuar në vitin 2009.

4. Akte të miratuara nga Liga e Shteteve Arabe. Konventa kundër veprave penale në fushën e teknologjisë së informacionit e Ligës së Shteteve Arabe, miratuar në vitin

⁷ Këshilli i Evropës (2009). Trajnim për krimin kibernetik për gjyqtarë dhe prokurorë: një concept-Rrjeti i Lisbonës. Fq 4

⁸ Gercke, M. (2012) Understanding cybercrime: Phenomena, challenges and legal response. Pg 82

⁹ United Nations Office on Drugs and Crime. (2013). Comprehensive Study on Cybercrime. Vienna. pg 183

2010. Ligji model kundër veprave penale në fushën e teknologjisë e informacionit”. Miratuar nga Liga e Shteteve Arabe ,në vitin 2014.

5. Akte të miratuara nga Kombet e Bashkuara. Protokoll i shtesë i Konventës së Kombeve të Bashkuara “Për mbrojtjen e fëmijëve nga prostitucioni edhe nga pornografia”. Ky protokoll është miratuar në vitin 2000.

Përveç këtyre akteve ndërkombëtare që përmendëm mësipërm ekzistojnë edhe shumë akte të tjera që rregullojnë pikërisht krimet kibernetike.Disa akte janë detyruese dhe kanë fuqi ligjore dhe disa të tjera jo por këto akte kanë synime të njëjta.Synimet e këtyre akteve janë:

I.Plotësimi dhe azhurnimi i kuadrit ligjor të brendshëm të shteteve dhe rregullimin juridiko-penal, në mënyrë të veçantë për inkriminimin e disa veprimeve të keqpërdorimit të kompjuterit si krime/vepra kriminale.

II.Nxitjen e një politike të përbashkët penale, që ka për qëllim mbrojtjen e shoqërisë nga krimi kibernetikë dhe nxitjen e një bashkëpunimi ndërkombëtar;

III.Të frenojnë veprimet e drejtuara kundër konfidencialitetit,integritetit dhe disponueshmërisë të sistemeve kompjuterike, rrjeteve dhe të dhënave kompjuterike.

IV.Të lehtësojnë zbulimin, hetimin dhe ndjekjen penale të këtyre veprave penale në të dyja nivelet kombëtare dhe ndërkombëtare, dhe duke siguruar marrëveshjet për bashkëpunim ndërkombëtar të shpejte dhe të besueshëm;

V.të mbrojnë interesat legjitime në përdorimin dhe zhvillimin e teknologjive të informacionit¹⁰;

Aktet ndërkombëtare që kanë objekt luftën kundër krimit kompjuterik sa vijnë edhe shtohen ,kjo për shkak se ka ndërgjegjësimit ndërkombëtare se karakteri specifik i krimit kibernetik dhe rrezikshmëria e lartë shoqërore e tij ka nevojë për një legjislacion më të harmonizuar.Është tashmë e qartë për të gjithë se ligjet e ndryshme që mund të kenë shtetet dhe qasjen ndaj këtij lloji krimi e bën akoma më të vështirë investigimin e tij.Nga ana tjetër duhet të kuptojmë se harmonizimi dhe ndryshimet e duhura ligjore janë vetëm një element,por ligji vetëm nuk mjafton!

Një arsye tjetër pse shtetet kanë rritur bashkëpunimin kundër krimit kibernetik është edhe fakti se rreziqet mund të jenë të njëjta.Të gjitha vendet kanë të përbashkët përdorimin e TCP/IP si protokolle të komunikimit dhe të gjitha këto vende veprojnë nëpërmjet të njëjtave sisteme operative siç janë windows, UNIX, Linux, etj, dhe aplikime të programeve si Firefox, Skype, Microsoft Office dhe shumë programe të tjera. Duke analizuar në mënyrë logjike, vihet re se në vendet me zhvillim teknologjik të njëjtë, problemet që dalin si pasojë e kësaj teknologjie informacioni janë të ngjashme¹¹.

2 Legjislacioni penal shqiptar dhe krimi kompjuterik

Legjislacioni penal i cili trajton krimin kompjuterik pëson ndryshime të herë pas herëshme me qëllim që t'i përgjigjet si duhet këtij krimi jo konvencional dhe shpesh transnacional. Pra,është e rëndësishme që çdo sistem ligjor të marrë masa për të garantuar që ligji penal dhe procedural penal të jetë i përshtatshëm për t'iu përgjigjur sfidave që krijon hapësira

¹⁰ Po aty

¹¹ Beka,R(2013). Roli i teknologjive të reja të informacionit në ndihmesë të Sigurisë kombëtare.Teme diplome- Universiteti “Aleksander Moisiu” .Durrës. Fq 6

kibernetike dhe krimi kompjuterik¹². Gjatë punimit do të studiohen figurat e veprave penale të parashikuara në legjislacionin penal shqiptar të cilat bëjnë pjesë në krimin kompjuterik të cilat pavarësisht ndryshimeve në elementët e veprës penale kryhen në hapësirën kibernetike apo nëpërmjet hapësirës kibernetike. Janë disa figurat e veprave penale të krimit kompjuterik por pak kush është terësisht i vetdijshëm se çfarë rrezikshmërie paraqesin krimet kompjuterike. Rasti i virusit kompjuterik “love bug” është një rast ilustrativ i cili paraqet disa karakteristika të krimit kompjuterik.

Virusi “love bug” daton në Maj të vitit 2000 kur ky virus u përhap me shpejtësi përqark botës. Virus i kompjuterik infektoi të paktën 270.000 kompjutera në orët e para. Gjithashtu mbylli kompjuterat e kompanive të mëdha si Ford Motor si dhe sistemin e Shtëpisë së Lordëve (Ang House of Lords) Ekspertët vërtetuan se virusi ishte krijuar në Filipine. Legjislacioni penal në Filipine i asaj kohe nuk parashikonte krimet kompjuterike çka i vendosi ekspertët në një situatë të vështirë për atë kohë sa ishin në vakum ligjor. U propozua që situata të zgjidhej duke aplikuar dispozita të ligjeve të tjerë për atë sa nuk kishte një ligj specifik. U vlerësua se dëmi ishte rreth 10 bilionë dollarë por ligji filipinas nuk e parashikonte një vepër të tillë penale. Subjektet aktivë të veprës penale nuk u dënuan, por situata detyroi shtetin filipinas të miratonte ligjin për krimin kompjuterik. Situata, në të cilën shtetet nuk kanë legjislacion penal të përshtatshëm për të luftuar krimin kompjuterik është ende aktuale për mbi 100 shtete¹³ dhe shumë prej shteteve që kanë miratuar legjislacionin penal për krimin kompjuterik ende nuk kanë bërë ndryshimet e duhura¹⁴.

Në cilin grup shtetesh bën pjesë Shqipëria, a ka legjislacion penal kundër krimit kompjuterik, sa i azhurnuar është ai dhe cila është përhapja e përdorimit të internetit? Sipas ish ministrit të Teknologjisë dhe Informacionit pothuajse 60% e popullsisë shqiptare përdor internetin¹⁵. Shifra e përdoruesve referon në mundësinë për t'u ekspozuar para sjelljeve kriminale në hapësirën kibernetike. Në fakt rasti i parë i krimit kompjuterik në Shqipëri u evidentua në vitin 2008, rast i cili i vendosi organet ligjzbatuese në vështirësi pasi kjo formë e kriminalitetit ishte e re dhe e panjohur por edhe sepse nuk ekzistonte kuadri ligjor¹⁶. Viti 2008 shënon përveç rastit të parë të regjistruar edhe vitin i cili relacionohet me ndryshimet ligjore dhe institucionale si përgjigje ndaj fenomenit të krimit

¹² Cybercrime Investigation and Prosecution: the Role of Penal and Procedural Law, Susan W Brenner: University of Dayton School of Law

¹³ See e.g., U.S. Wants More Cybercrime Laws, Wired News (July 26, 2000), <http://www.wired.com/news/politics/0,1283,37809,00.html>:

¹⁴ McConnell International, Cyber Crime and Punishment ("The Cyber Crime Laws of Nations"), <http://www.mcconnellinternational.com/services/cybercrime.htm>. For a list of the 52 countries, see McConnell International, Cyber Crime and Punishment note 4, <http://www.mcconnellinternational.com/services/cybercrime.htm>.

¹⁵ The speech of Minister of Innovation and ICT Mr. Genc Pollo: "The Seminar for the Freedom of Media and Voice in the framework of the European integration of Albania", <http://www.mitik.gov.al/english/index.php/fjalimet-e-ministrit/299-the-speech-of-minister-of-innovation-and-ict-mr-genc-pollo-the-seminar-for-the-freedom-of-media-and-voice-in-the-framework-of-the-european-integration-of-albania>, 16 Jan 2013

¹⁶ Hergis Jica: Cyber Security and National Security Awareness Initiatives in Albania: A Synergy Approach, botuar në Mediterranean Journal of Social Science, ISSN 2039-9340.

kompjuterik.Si përgjigje institucionale u krijuan disa institucione administrative¹⁷ si dhe vlen për t'u përmendur Ligji Nr. 10 023, datë 27.11.2008 "Për disa shtesa dhe ndryshime në ligjin nr. 7895, datë 27.1.1995"Kodi penal i Republikës së Shqipërisë" me të cilin lidhen ndryshimet në dispozitat e Kodit Penal dhe shtimit të dispozitave të reja të cilat sanksionuan për herë të parë figurat e veprave penale të krimit kompjuterik.Nëse ligji Nr.10 023 parashikoi pothuajse në mënyrë të plotë figurat penale,ndryshimi nisi me Ligjin Nr.9859 datë 21.1.2008 sipas të cilit në nenin 117 të Kodit Penal u shtua paragrafi i cili sanksiononte se përbënte vepër penale përdorimi i të miturit për prodhimin e materialeve pornografike, si dhe shpërndarja ose publikimi i tyre në internet apo në forma të tjera.Dispozita paraqet një rëndësi të veçantë pasi shënon sanksionimin e parë të figurave të krimit kompjuterik por edhe sepse tregon vëmendjen e legjislatorit ndaj mbrojtjes së të drejtave të fëmijëve,si kategori që gëzon mbrojtje të veçantë nga legjislacioni.

Sipas statistikave 6% e përdoruesve të internetit në Shqipëri janë midis moshës 13-15 vjeç. Të rinjtë shpenzojnë 3-4 orë lundrim online¹⁸ duke e aksesuar lirisht internetin në shkollë,shtëpi apo qendra interneti.Ajo që është më shqetësuese është fakti se pavarësisht ndryshimeve ligjore në Kodin Penal të ndodhura në Maj të 2013¹⁹,ndryshime të cilat e bëjnë legjislacionin e brendshëm në përputhje me Protokollin Opsional të CRC ,si dhe pavarësisht se nga Republika e Shqipërisë është ratifikuar Konventa kundër Krimit Kompjuterik e Këshillit të Evropës (2002),legjislacioni ende nuk është në përputhje të plotë me Konventën e Lanzanotes.Në kuadër të legjislacionit dhe të përmbajtjes së sigurtë në internet problematika konsiston në mungesën e një ligji që i detyron me ligj Siguruesit e Shërbimit të Internetit (ISP) të kontribuojnë në parandalimin e publikimit të materialeve pornografike për fëmijë ose t'i bllokojë këto përmbajtje automatikisht.Për atë që mund t'i referohemi edhe si "ligj organik" kundër krimit kompjuterik,Ligji Nr.10 023 duhet thënë që në 12 nenet e këtij ligji nuk është shtuar dispozitë e re në Kodin Penal por nenet ekzistuese janë plotësuar apo shtuar me paragraf të rinj duke bërë kështu të mundur që të sanksionohet ligjërisht kryerja e veprave penale nëpërmjet hapësirës kibernetike.Figurat e veprave penale që parashikohen në Kodin tonë Penal mund të kategorizohen:

- 1-Vepër penale kundër personit
- 2-Vepër penale kundër pasurisë
- 3-Vepër penale kundër moralit
- 4-Vepër penale kundër administrimit të drejtësisë
- 4- Vepër penale kundër Shtetit

¹⁷ Ministria e Teknologjisë dhe Informacionit (MITIK),e-governement,AKEP,AKSHI,AKCE si dhe seksioni kundër krimit kompjuterik pranë Drejtorive Rajonale të Policisë

¹⁸ Cela A., Fshazi T., Mazniku A., Kamberi G., Smaja J., *Youth in albania 2011, study*, Friedrich-Ebert-Stiftung,

22 May 2012,<http://www.fes-tirana.org/pages/en/publications/publications-2012.php?lang=EN>

¹⁹ Ligji nr. 144/2013 "Për disa shtesa në ligjin nr. 7895,datë 27.01.1995 "Kodi Penal i Republikës së Shqipërisë", të ndryshuar;

http://www.parlament.al/web/Sesioni_i_tete_15184_1.php

Pavarësisht parashikimeve, relativisht të plota për kohën kur u miratuan dhe për traditën e munguar për këtë krim në pjesën e posaçme të Kodit Penal të Republikës së Shqipërisë krimi kompjuterik nuk përbën një seksion të veçantë. Disa figura të veprave penale që lidhen me krimin kompjuterik janë inkuorporuar brenda dispozitave të tjera të Kodit Penal. Ligji Nr.10023 datë 27.11.2008 nëpërmjet sanksionimit në nenin 1 shtoi pikën “j” në nenin 7 të Kodit Penal sipas të cilit ligji penal shqiptar është i zbatueshëm edhe për shtetasin e huaj që jashtë territorit të Republikës së Shqipërisë kryen në dëm të interesave të shtetit apo të shtetasit shqiptar vepra penale në fushën e teknologjisë së informacionit. Ky paragraf i shtuar në vitin 2008 paraqet rëndësi sepse, së pari referon në rrezikshmërinë që kanë këto vepra penale duke qënë të krahasueshme me krimet kundër njerëzimit, kundër pavarësisë dhe rendit kushtetues, vepra me qëllime terroriste etj.

Shtimi i këtij paragrafi është po ashtu i rëndësishëm pasi referon në termin e përdorur nga legjislatiioni penal shqiptar për këto vepra penale pasi ky legjislatiioni i referohet atyre me termin *“vepra penale në fushën e teknologjisë së informacionit”*. Duket se legjislatiioni penal shqiptar është në unison me përcaktimin që i ka bërë Departamenti Amerikan i Drejtësisë (ang The United States Department of Justice) i cili e përcakton krimin kompjuterik si *“Cdo shkelje e normave penale që përfshin njohuri në teknologjinë e informacionit përgjatë kryerjes, hetimit apo ndjekjes së veprës penale”*²⁰

Në po këtë linjë të “konformimit” të rrezikshmërisë së krimet kompjuterik legjislatiioni penal shqiptar ka shtuar me nenin 11 të Ligjit Nr.10 023 ,paragrafin a të nenit 74 i cili sanksionon “Krimet kundër njerëzimit “. Neni 74/a sanksionon *“Ofrimi në publik ose shpërndarja e qëllimshme e publikut nëpërmjet sistemeve kompjuterike, e materialeve, që mohojnë, minimizojnë, në mënyrë të ndjeshme, miratojnë ose justifikojnë akte, që përbëjnë gjenocid ose kundër njerëzimit, dënohet me burgim tre deri në gjashtë vjet.”* Nëse do të studiojmë këtë paragraf evidentohen disa elementë .Së pari dispozita referon në vepra penale që kryhen nëpërmjet sistemit kompjuterik. Nga ana objektive kjo figurë e veprës penale kryhet nëpërmjet ofrimit në publik, shpërndarjes së qëllimshme të publikut të materialeve. Nga ana subjektive ofrimi në publik ose shpërndarja ka për qëllim të mohojë, minimizojë në mënyrë të ndjeshme ose të miratojë, justifikojë akte që përbëjnë gjenocid ose kundër njerëzimit. Vepra penale kryhet me dashje direkte. Marzhet e dënimit për këtë vepër penale janë nga 3 deri në 6 vjet. Duhet mbajtur parasysh këtu se nëpërmjet sistemit kompjuterik komunikimi me publikun është më i shpejtë, më masiv dhe krijon ndjeshmëri te publiku. Rrjetet sociale janë shndërruar tashmë në platforma moderne ,efektive, të shpejta, masive komunikimi duke u konsideruar si një model bashkëkohor komunikimi, tendencën e të cilit po ndjekin edhe komunikimet zyrtare.

Neni 11 i ligjit Nr.10 023 ka shtuar gjithashtu paragrafin a të nenit 84 të Kodit Penal duke sanksionuar kanosjen me motive racizimi dhe ksenofobie nëpërmjet sistemit kompjuterik. E sanksionuar si *“Kanosja serioze për vrasje ose plagosje të rëndë, që i bëhet një personi, nëpërmjet sistemeve kompjuterike, për shkak përkatësie etnike, kombësie, race apo feje, dënohet me gjobë ose me burgim deri në tre vjet.”* Nga ana objektive vepra penale kryhet nëpërmjet kanosjes serioze për vrasje apo plagosje të rëndë. Për t’u cilësuar juridikisht si një figurë e tillë veprave penale duhet që kanosja të jetë serioze për plagosje të rëndë apo vrasje dhe të jetë e motivuar nga përkatësia etnike, kombësia, raca apo feja por ajo që e

²⁰ Nat’l inst. Of justice, U.S. Dep’t of Just., computer crime: criminal just. Resource manual 2 (1989).

bën këtë figurë të veprës penale krim kompjuterik është pikërisht kryerja nëpërmjet sistemeve kompjuterike.

Figura e veprës penale “mashtrimi” me ligjin nr10 023 u plotësua me paragrafin b sipas të cilit:

Futja, ndryshimi, fshirja ose heqja e të dhënave kompjuterike apo ndërhyrja në funksionimin e një sistemi kompjuterik, me qëllim për t'i siguruar vetes apo të tretëve, me mashtrim, një përfitim ekonomik të padrejtë apo për t'i shkaktuar një të treti pakësimin e pasurisë, dënohen me burgim nga gjashtë muaj deri në gjashtë vjet dhe me gjobë nga 60 000 (gjashtëdhjetë mijë) lekë deri në 600 000 (gjashtëqind mijë) lekë. Po kjo vepër, kur kryhet në bashkëpunim, në dëm të disa personave, më shumë se një herë ose kur ka sjellë pasoja të rënda materiale, dënohet me burgim nga pesë deri në pesëmbëdhjetë vjet dhe me gjobë nga 500 000 (pesëqind mijë) lekë deri në 5 000 000 (pesë milionë) lekë.

Gjithashtu janë parashikuar disa figura të veprave penale të kryera nëpërmjet sistemit kompjuterik, të tilla si falsifikimi kompjuterik²¹, hyrja e paautorizuar kompjuterike²², përgjimi i paligjshëm i të dhënave kompjuterike²³, si dhe ndërhyrja në të dhënat kompjuterike²⁴, ndërhyrja në sistemet kompjuterike²⁵ dhe keqpërdorimi i pajisjeve.²⁶

²¹ Parashikuar në nenin 186/a i Kodit Penal të Republikës së Shqipërisë. “Futja, ndryshimi, fshirja apo heqja e të dhënave kompjuterike, pa të drejtë, për krijimin e të dhënave të rreme, me qëllim paraqitjen dhe përdorimin e tyre si autentike, pavarësisht nëse të dhënat e krijuara janë drejtpërdrejt të lexueshme apo të kuptueshme, dënohen me burgim nga gjashtë muaj deri në gjashtë vjet. Kur kjo vepër kryhet nga personi, që ka për detyrë ruajtjen dhe administrimin e të dhënave kompjuterike, në bashkëpunim, më shumë se një herë ose ka sjellë pasoja të rënda për interesin publik, dënohet me burgim tre deri në dhjetë vjet.”

²² Parashikuar në nenin 192/b i Kodit Penal të Republikës së Shqipërisë. Hyrja e paautorizuar apo në tejkalim të autorizimit për të hyrë në një sistem kompjuterik a në një pjesë të tij, nëpërmjet cenimit të masave të sigurimit, dënohet me gjobë ose me burgim deri në tre vjet. Kur kjo vepër kryhet në sistemet kompjuterike ushtarake, të sigurisë kombëtare, të rendit publik, të mbrojtjes civile, të shëndetësisë apo në çdo sistem tjetër kompjuterik, me rëndësi publike, dënohet me burgim nga tre deri në dhjetë vjet.”

²³ Parashikuar në nenin 293/a i Kodit Penal të Republikës së Shqipërisë. “Përgjimi i paligjshëm me mjete teknike i transmetimeve jopublike, i të dhënave kompjuterike nga/ose brenda një sistemi kompjuterik, përfshirë emetimet elektromagnetike nga një sistem kompjuterik, që mbart të dhëna të tilla kompjuterike, dënohet me burgim nga tre deri në shtatë vjet. Kur kjo vepër kryhet nga/ose brenda sistemeve kompjuterike ushtarake, të sigurisë kombëtare, të rendit publik, të mbrojtjes civile apo në çdo sistem tjetër kompjuterik, me rëndësi publike, dënohet me burgim nga shtatë deri në pesëmbëdhjetë vjet.

²⁴ Parashikuar në nenin 293/b i Kodit Penal të Republikës së Shqipërisë. “Dëmtimi, shtrembërimi, ndryshimi, fshirja apo suprimimi i paautorizuar i të dhënave kompjuterike dënohen me burgim nga gjashtë muaj deri në tre vjet. Kur kjo vepër kryhet në të dhënat kompjuterike ushtarake, të sigurisë kombëtare, të rendit publik, të mbrojtjes civile, të

Janë një sërë dispozitash të cilat përveç faktit që vlejné të studiohen në mënyrë të detajuar paraqesin disa karakteristika të përbashkëta:

- Janë figura të veprave penale që kryhen nëpërmjet sistemit kompjuterik
- Në studim të termave,legjislacioni penal shqiptar përdor termat “të dhëna kompjuterike,sisteme teknike e kompjuterike” ,në ndryshim nga parashikimi fillestar si vepra penale në fushën e teknologjisë së informacionit
- Figurat e veprave penale si objekt mbrojtjen e të dhënave kompjuterike
- Të dhënat kompjuterike mund të fshihen,ndryshohen,dëmtohen nëpërmjet mashtrimit,falsifikimit,ndërhyrja në të dhënat kompjuterike ,hyrja e paautorizuar kompjuterike,përgjimi i paligjshëm i të dhënave kompjuterike
- Legjislacioni penal ka vendosur nën mbrojtjen e tij juridike jo vetëm të dhënat kompjuterike por edhe pajisjet apo sistemet kompjuterike
- Legjislacioni penal shqiptar është treguar i kujdesshëm të parashikojë edhe rrethanat e veçanta të kryerjes së veprave penale
- Shumë dispozita të Kodit Penal në marzhet e dënimit parashikon edhe gjoba (sanksion ekonomik) për shkak se shumë nga veprat penale të krimit kompjuterik kryhen për përfitim ekonomik për vete apo për persona të tretë.

2.1 Krimi kompjuterik dhe legjislacioni procedural penal

Ndryshimet në Kodin Penal të Republikës së Shqipërisë të ndodhura me ligjin nr.10023 i cili identifikohet me ligjin i cili solli parashikimet ligjore përsa i përket krimit kompjuterik u shoqëruan natyrshëm me ndryshimet në Kodin e Procedurës Penale,ndryshime të cilat morën karakter ligjor nëpërmjet ligjit nr.10054 datë 29.12.2008.Nëpërmjet një ligji relativisht të shkurtër ,me 5 (pesë) nene u sanksionuan ndryshime të rëndësishme në procedurën penale.

Neni 1 i Ligjit Nr. 10 054 sanksionoi se në nenin 59/1²⁷ të Kodit të Procedurës Penale të shtohet edhe neni 119/b²⁸ .Nëpërmjet këtij ndryshimi në K.Pr.Penale sipas të cilit

shëndetësisë apo në çdo të dhënë tjetër kompjuterike, me rëndësi publike, dënohet me burgim nga tre deri në dhjetë vjet.”

²⁵ Parashikuar në nenin 293/c i Kodit Penal të Republikës së Shqipërisë. “Krijimi i pengesave serioze dhe të paautorizuara për të cenuar funksionimin e një sistemi kompjuterik, nëpërmjet futjes, dëmtimit, shtrembërimit, ndryshimit, fshirjes apo suprimimit të të dhënave, dënohet me burgim nga tre deri në shtatë vjet. Kur kjo veprë kryhet në sistemet kompjuterike ushtarake, të sigurisë kombëtare, të rendit publik, të mbrojtjes civile, të shëndetësisë apo në çdo sistem tjetër kompjuterik, me rëndësi publike, dënohet me burgim nga pesë deri në pesëmbëdhjetë vjet.”

²⁶ Parashikuar në nenin 293/c i Kodit Penal të Republikës së Shqipërisë. “Prodhimi, mbajtja, shitja, dhënia në përdorim, shpërndarja apo çdo veprim tjetër, për vënien në dispozicion të një pajisjeje, ku përfshihen edhe një program kompjuterik, një fjalëkalim kompjuterik, një kod hyrjeje apo një e dhënë e tillë e ngjashme, të cilat janë krijuar ose përshtatur për hyrjen në një sistem kompjuterik ose në një pjesë të tij, me qëllim kryerjen e veprave penale, të parashikuara në nenet 192/b, 293/a, 293/b e 293/c të këtij Kodi, dënohen me burgim nga gjashtë muaj deri në pesë vjet.”

²⁷ Neni 59 i K.Pr.Penale “I dëmtuari akuzues”

personi i cili është dëmtuar nga veprat penale midis të cilit edhe për veprën penale “Fyerja me motive racizmi ose ksenofobie nëpërmjet sistemit kompjuterik “ ka të drejtë të paraqesë kërkesë në gjykatë dhe të marrë pjesë në gjykim si palë për të vërtetuar akuzën dhe për të kërkuar shpërblimin e dëmit. Rëndësia e dispozitës qëndron në dy momente: Së pari i njëjti drejtën personit të dëmtuar për të qënë palë dhe për të vërtetuar akuzën dhe së dyti se ligji procedural penal i njëjti drejtën personit të dëmtuar, tashmë palë e procesit penal të kërkojë shpërblimin e dëmit.

Kodi i Procedurës Penale nëpërmjet shtimit të paragrafit a në nenin 191 “Detyrimit për paraqitjen e të dhënave kompjuterike”²⁸ i ka dhënë një “status” të veçantë këtyre të dhënave duke njohur rolin e tyre në procesin gjyqësor kur kërkohen nga gjyqtari dhe i dëmtuari akuzues. Detyrimi për paraqitjen e të dhënave është një detyrim që shtrihet si për mbajtësin ashtu edhe për kontrolluesin, duke shkuar edhe më tej edhe për dhënësin e shërbimit (operatorin që ofron shërbimin). Të dhënat kompjuterike, apo evidencat dixhitale për faktin se janë të brishta apo të ekspozuara ndaj dëmtimeve apo shkatërtimeve është parashikuar mundësia që prokurori me akt të motivuar të vendos detyrimin për paraqitjen e të dhënave kompjuterike, duke e detyruar gjykatën të vlerësojë kërkesën e prokurorit brenda 48 orëve. Sërish, për efekt të ruajtjes dhe administrimit të të dhënave kompjuterike në nenin 3 të ligjit nr.10 054 datë 29.12.2008 është shtuar në nenin 208 të Kodit të Procedurës Penale paragrafi a sipas të cilit:

Në rastin e procedimeve për veprat penale në fushën e teknologjisë së informacionit, gjykata, me kërkesë të prokurorit, vendos sekuestrimin e të dhënave dhe të sistemeve kompjuterike. Në këtë vendim, gjykata përcakton të drejtën për të hyrë, kërkuar dhe marrë të dhënat kompjuterike në sistemin kompjuterik, si dhe ndalimin për kryerjen e veprimeve të mëtejshme apo sigurimin e të dhënave ose të sistemit kompjuterik.

Në zbatim të Vendimit të Gjykatës prokurori ose oficeri i policisë gjyqësore, i deleguar nga prokurori merr masa :

- a) për të ndaluar kryerjen e veprimeve të mëtejshme ose për të siguruar sistemin kompjuterik, vetëm të një pjesë të tij ose të një mjeti tjetër memorizimi të dhënash;
- b) për të nxjerrë dhe marrë kopje të të dhënave kompjuterike;
- c) për të penguar hyrjen në të dhënat kompjuterike, ose për t'i hequr këto të dhëna nga sistemet kompjuterike me të drejtë hyrjeje;
- ç) për të siguruar paprekshmërinë e të dhënave përkatëse, të memorizuara.

²⁸ Neni 119/b i Kodit Penal “ Fyerja me motive racizmi ose ksenofobie nëpërmjet sistemit kompjuterik”

²⁹ 1. Gjykata, në rastin e procedimeve për vepra penale në fushën e teknologjisë së informacionit, me kërkesë të prokurorit ose të të dëmtuarit akuzues, urdhëron mbajtësin ose kontrolluesin të dorëzojnë të dhënat kompjuterike të memorizuara në një sistem kompjuterik apo në një mjet tjetër memorizimi. 2. Gjykata, në këto procedime, urdhëron edhe dhënësin e shërbimit për dorëzimin e çdo informacioni për abonentët e pajtuar, për shërbimet e ofruara nga dhënësi. 3. Kur ka arsye të bazuara për të menduar se nga vonesa mund t'u vijë një dëm i rëndë hetimeve, prokurori vendos, me akt të motivuar, detyrimin për paraqitjen e të dhënave kompjuterike, të përcaktuara në pikat 1 e 2 të këtij neni dhe njofton menjëherë gjykatën. Gjykata vlerëson vendimin e prokurorit brenda 48 orëve nga njoftimi.

Kodi i Procedurës Penale të Republikës së Shqipërisë i referohet me të dhëna kompjuterike, duke mos përdorur termin ndërkombëtar “të dhëna dixhitale” por përtej termave dhe përdorimit të tyre investimi duhet të shkojë në profesionalizmin e zyrtarëve shqiptarë për të administruar këto prova. Vlen të theksohet se ky ligj kryesisht, përveç dispozitës kur parashikon mundësinë e të dëmtuarit për të qënë palë e procesit, për ta vërtetuar akuzën dhe për të kërkuar dëmshpërblim, në nenet vijuese synon të rregullojë nëpërmjet parashikimeve ligjore, në term përmbljedhës, ruajtjen dhe administrimin e të dhënave kompjuterike”.

Disa karakteristika të dispozitave të Kodit të Procedurës Penale:

- Nga pikëpamja formale dispozitat e K.Pr.Penale në përgjigje të krimit kompjuterik janë 4 dispozita parashikuese
- Vetëm një dispozitë e K.Pr.Penale rregullon “statusin” e të dëmtuarit duke e bërë atë palë të procesit si dhe duke i njohur të drejtën e dëmshpërblimit
- Dispozitat e K.Pr.Penale sanksionojnë ruajtjen dhe administrimin e të dhënave kompjuterike
- Të dhënat kompjuterike sigurohen dhe administrohen nëpërmjet detyrimit për paraqitje, sekuestrimit të të dhënave, ruajtja e përsheptuar dhe mirëmbajtja e të dhënave kompjuterike, ruajtja e përsheptuar dhe zbulimi i pjesshëm i të dhënave kompjuterike
- Ka një qëndrim disi neglizhent ndaj siguruesit të shërbimit të internetit (ISP) duke mos sanksionuar me ligj detyrimet e tij

Rekomandime

Teksa tentohet të jepen rekomandime për krimin kompjuterik duhet të theksohet se rekomandimet në planin teorik, qoftë edhe të shoqëruara me ndryshime ligjore do të ishin të pamjaftueshme, madje edhe jo të nevojshme. Kuadri ligjor aktual siç e trajtuam më lartë duket të jetë modern, i plotë dhe në përputhje me standardet ndërkombëtare, prioritet merr në këtë drejtim implementimi i tyre dhe mbrojtja nëpërmjet mjeteve efektive teknologjike, të cilat mund të reduktojnë aktivitetin kriminal kompjuterik. Mendojmë se për një implementim sa më të mirë të legjislacionit tonë penal në këtë fushë ndër të tjera duhen marrë këto masa:

- 1) Duhet investuar shumë për trajnimin dhe aftësimin e oficerëve apo personave të cilët merren me zbulimin e këtyre krimeve, pasi këto krime kryhen nga persona me aftësi të spikatura dhe që ecin me ritme shumë më të shpejta.
- 2) Nevojitet nxitja e të gjithë subjekteve në rast të keqpërdorimit kompjuterik për të lajmëruar organet kompetente. Shumë i rëndësishëm është raportimi në organet kompetente, i cili duhet bërë në çdo rast.
- 3) Kërkohej trajnimi i gjyqtarëve dhe prokurorëve rreth provave elektronike dhe krimet kompjuterike. Duhet që njohuritë që lidhen me krimin kibernetik dhe provat elektronike të përfshihen në njohuritë e përgjithshme që merren nga gjyqtarët dhe prokurorët. Minimalisht kërkohej trajnim bazë në çështje që lidhen me krimin kibernetikë dhe provat elektronike. Është e qartë se një numër më i madh çështjesh penale, por edhe çështjesh civile e administrative që dalin në gjyq janë të lidhura në një mënyrë a në një tjetër me teknologjinë e informacionit dhe komunikimit, dhe se pjesa më e madhe e gjyqtarëve dhe prokurorëve të çështjeve penale në mos do të

përballen direkt me krimin kibernetik, do t'u duhet të përballen me çështje që lidhen me provat elektronike.

- 4) Duhet t'u jepet prioritet politikave të caktuara, të cilat ndihmojnë në mënyrë të ndjeshme në parandalimin dhe në luftën ndaj këtij lloj krimi. Në një të ardhme të afërt, këto politika do të mund të rrisin efektivitetin e reformave ligjore të ndërmarra dhe të minimizojnë ndjeshëm rrezikun e krimeve kibernetike në Shqipëri. Është e domosdoshme hartimi i një politike kombëtare për mbrojtjen nga krimi kibernetik si dhe rritjen e sigurisë në shoqërinë e informacionit.
- 5) Duhet përmirësuar ende legjislacioni penal në këtë fushe. Përmirësimi i legjislacionit përsa i përket ligjit substancial penal, ligjit procedural penal, parashikimit të dënimeve që i përshtaten rrezikshmërisë së veprave penale si dhe dëmshpërblimit të subjekteve pasivë të veprave penale si dhe hartimi i dispozitave penale në mënyrë të tillë që t'i përshtatet "neutralitetit të teknologjisë" çka nënkupton t'i përshtatet dhe përgjigjet ndryshime eventuale të teknologjisë. Legjislacioni duhet të përshtatet akoma më shumë me *acquis communautaire*.
- 6) Ligjet dhe terminologjia e tyre duhet të jetë e qartë dhe e kuptueshme për subjektet aktivë të veprave penale, viktimat si dhe zyrtarët ligjzbatues.

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PhD. Arjan Lame

*Departamenti Drejtësisë , Universiteti
“Hëna e Plotë” (Bedër), Shqipëri*

Globalizimi dhe bashkëpunimi ndërkombëtar në kuadrin e fenomenit të krimit kompjuterik

Abstrakt

Si rrjedhojë e mbarimit të “Luftës së Ftohtë” dhe rënies jo vetëm të kufijve fizike por edhe të atyre ekonomik dhe financiar, globalizimi arriti të prodhojë efekte qoftë pozitive ashtu dhe negative. Organizatat ndërkombëtare dhe legjislacionet kombëtare u gjendën të papërgatitura në përballimin e fenomeneve si cybercrime, pastrimi i parave dhe organizatat kriminale transnacionale të cilat arritën të shfrytëzojnë mundësitë e reja që ofrojnë globalizimi. Është me rëndësi shkencore analizimi i këtyre fenomeneve në më shumë se një dimension për të kuptuar sesi vënde si Shqipëria të izoluarat arritën të bëheshin të “preferuara” për krimin në përgjithësi duke shfrytëzuar boshllëqet qoftë juridike ashtu dhe institucionale. Instrumentët juridikë si traktatet dhe konventat ndërkombëtare, dispozitat që prodhojnë kohezion në komunitetin ndërkombëtar nëpërmjet nënshkrimit të tyre nga shtetet si dhe që krijojnë agjenci apo struktura, është përgjigja e komunitetit ndërkombëtar në luftën kundër këtyre fenomeneve. Capacity building është përgjigja në terma bashkëpunimi ndërkombëtar në dimensionin e krijimit të grupeve të punës dhe të strukturave me karakter multi-task, qëllimi i të cilave ka të bëjë me sigurinë, privatësinë, dhe besimin në zhvillimin e mëtejshëm të teknologjisë së komunikimit dhe informacionit si dhe përfitimit sa më shumë të sinergjive që ofron globalizimi. Si këto fenomene reflektohen edhe në Shqipëri është mënyra e analizës në më shumë se një dimension e parë jo vetëm nga pozicioni i brendshëm por edhe nga ai ndërkombëtar dhe në vecanti ai i Këshillit të Europës në luftën kundër krimit në përgjithësi dhe atij kompjuterik në vecanti si dhe rrugët për fuqizimin e aktorëve dhe institucioneve në luftën kundër këtyre fenomeneve.

Keywords: *Globalizim, cybercrime, organizata kriminale transnacionale, pastrimi i parave, organizatë ndërkombëtare, konventa.*

Mbarimi i Luftës së Dytë Botërore: “rënia” e kufijve

Rënia e Murit të Berlinit si eveniment në simbolikën e saj arriti të prodhojë një seri fenomenesh të tjera që aty për aty me syrin e zhveshur nuk mund të perceptoheshin. Kërkojmë të ri-evokojmë disa aspekte dhe elementë thelbësorë të kësaj ngjarjeje të cilët do të na ndihmojnë në diskutimin e kësaj teme.

Elementët kryesorë ishin aktorë politik evropian, aktorë euro-atlantik dhe qyteti i Berlinit i ndarë në dy kampe të ndryshme ideologjike nëpërmjet një kufiri dhe që përfaqësonte dy shtete gjermane të ndryshme: RFGj dhe RDGj. Nëse shkalla e hapjes së kufirit përpara rënies ishte në terma “hapur/mbyllur”, aktorët politikë që kontribuan në këtë proces ishin Helmut Kohl, Donald Regan, Michail Gorbacev dhe Vaclav Havel.

Deri këtu kemi evokuar qytete, qytet-shtete dhe aktorë politik ndërkombëtar. Koncepti i qytetit në sociologjinë e organizimit të hapsirës përshkruhet si një *relais* marrëdhëniesh apo një *network* shërbimesh të ndryshme dhe komplementare¹. Në momentin që një vijë ndarëse fizike merr pamje si në rastin konkret – ndërtimi i murit të Berlinit - atëherë kemi të bëjmë me manifestimin më të ngurtë të konceptit të kufirit. Dhe për më tepër, brenda një qyteti ku marrëdhëniet janë të tipit ndërthurës, ky fenomen përfaqëson rastin tipik të “Luftës së Ftohtë” brenda disa qyteteve të rëndësishme të Evropës.

Të përpiqemi të ndërtojmë më mirë kontekstin në fjalë në terma analitik. Kemi qytete dhe network marrëdhëniesh komplementare. Kufij shtetëror që përfaqësonin dy ideologji të ndryshme me një shkallë poroziteti shumë të ulët. Aktorët politik të përmendur më lart janë ekspresion i këtij konteksti që justifikon maksimën se janë rrethanat që përcaktojnë *leader*-at. Së bashku këta aktorë gjejnë një “rezultat” në veprimtarinë e tyre politike. Gorbacev nëpërmjet konceptit të *glasnost* apo të *perestrojk*-ës kërkon një hapje kundrejt “mureve” të ndërtuar në mënyrë artificiale brenda “qyteteve”² dhe reformë në lidhje me sistemin e demokracive popullore lindore. Havel i Çekosllovakisë ri-kërkon kurorëzimin e “pranverës së Pragës të ‘68”. Nga ana tjetër Kohl kërkon të ri-bashkojë qytetin e Berlinit dhe në këtë mënyrë ti hapi rrugën bashkimit të dy gjermanive. Ndërsa Regan nëpërmjet supermacisë së “*Star Wars*” arrin të uli në tavolinë Gorbacev dhe të firmosin fundin e “luftës së ftohtë”.

Ajo që në plan të parë dukej e pamundur u arrit të “zmontohej” pikërisht nga aty ku kishte filluar: me ndryshimin e kuptimit fizik dhe analitik të kufirit në shumë dimensione. Parisi, Londra dhe Roma qoftë si qytete ashtu dhe si qendra të vendim-marrjes politike vëzhgonin nga afër ndryshimet gjeopolitike në zemër të Europës edhe pse me humor jo shumë të mirë pasi ishin munduar të kushtëzonin Gjermaninë në mes të Europës disa herë gjatë historisë së saj.

Modalitete të ekspresionit të kufijve

Kufiri konfigurohet në terma analitik dhe hapsinor. Në terma analitik sepse bën të mundur dallimin në cilësi dhe sjellje të grupe, të strukturave, të organizatave dhe të sistemeve të

¹ A. Gasparini, *La Sociologia degli spazi: Luoghi, città, società*, Carocci editore, 2000, Roma,

² Kremlin do të thotë jo vetëm kështjellë por edhe kufinj brenda kufijve përveç evokimit të institucionit të Qeverisë Ruse.

tipit “sektorial”, “funksional” apo “jo territorial” që janë pjesë e sistemit dhe që mund të dallohen në kufij “konkret” si grupet e interesit, sipërmarrjet tregtare, partitë politike, familjet por edhe subsistemi ekonomik, kulturor, organik dhe psikologjik³. Në kuptimin hapsinor pasi rrethon fenomenin e komponentëve të sistemit njerëzor territorial “për nivel” si p.sh. ai i sistemit familjar, kombëtar dhe ndërkombëtar dhe që e ndan por nuk e ç’rrenjos nga ambienti fizik. Është me interes të hedhim dritë në konceptin e kufirit të sistemeve abstrakte pasi ai fizik tashme është bërë i prekshëm.

Hulumtimet më domethënëse të konceptit të kufirit të sistemeve abstrakte janë bërë nga K. Deutsch, D. Easton, G. Almond, përfaqësues të përfaqësues sistemeve të shkencës politike⁴. Aspekti cilësor i këtij koncepti qëndron në ndryshimin e kufirit matematiko-statistik si një vlerë kritike e “kthimit jo prapa”. Për shkencat shoqërore rëndësia e këtij koncepti është e evidente në rastin e kalimit nga bashkësi në organizatë ose e quajtur ndryshe “shkallë sistematike”. Një shembull konkret është ai i falimentimit të shoqërisë Parmalat në Itali ku përveç falimentimit të sipërmarrjeve të grupit të tij falimentuan edhe bankat që kishin financuar shoqërinë. Kjo e vërteton që realiteti njerëzor është i strukturuar në sisteme dhe nën-sisteme dhe që përfaqësojnë struktura apo super-struktura.

Fenomene të “reja” të epokës së globalizimit

Në këtë ekskursus dhe analizë cekëm nga afër nëpërmjet konceptit të kufirit zhvillimet më klamoroze të viteve ’90-të në zemër të Europës së “vjetër”. Elementi më kardinal që do të përcaktonte zhvillimet e mëtejshme pasi u bë një “penetrim” në kufirin më perëndimor të ish Bashkimit Sovietik ishte sistemi socio-ekonomik jo eficient ku punëtorët paguheshin pak dhe prodhimi shumë i dobët. Nga momenti që autoriteti i jashtëm në terma kufijsh u kris i gjithë sistemi i kontrollit u vu në “diskutim”. Efekti domino shpesh të gjithë “perden e hekurt” nga Finlanda deri në Shqipëri. Njëkohësisht evenimente si krijimi i tregut të lirë evropian, marrëveshja e tregtisë së lirë e vendeve të Amerikës së Veriut, ardhja e internetit dhe hapja e tregtisë së lirë ndaj Kinës dhe Hong-Kong-ut në ’97, kontribuan në “gradë” apo “shkallë” të ndryshme në lindjen apo zhvillimin dhe “eksportimin” e disa fenomeneve në kuadrin e krimit të organizuar dhe ndërkombëtarizimit të tyre. Përpara se të vazhdojmë të hulumtojmë mbi fenomenin e krimit të organizuar është e nevojshme diskutimi i një tjetër koncepti si p.sh. ai i aktorit.

Koncepti i aktori

Fill mbas ndryshimit të perspektivës ndërkombëtare *feedback*-u më domethënës përfshiu dimensionin e konceptit të aktorit në përgjithësi. Paradigma teorike të marrëdhënieve ndërkombëtare dhe analistë të “*real politik*” u vunë në provë. Studiues të marrëdhënieve ndërkombëtare ishin dëshmitarë të njohjes dhe pranimit të aktorëve të “rinj” si pjesëmarrës substancial në *network*-un e afërave botërore.

Për këta studies “një aktorë domethënës është një individ apo organizatë që kontrollon burime materiale dhe financiare dhe merr pjesë në marrëdhënie politike me aktorë të tjerë nëpërmjet kufijve të shtetit. Dhe ky aktor nuk është e thënë të jetë domosdoshmërisht një

³ Dizionario di Sociologia “Concetto di Confine” fq. 315, Edizioni Pauline, Roma, 1955.

⁴ Po aty fq. 316.

shtet⁵. Këtë përkufizim të aktorit do t'a marrin hua nga këta studiues pasi dy cilësi apo attribute të tij janë domethënëse: individ-organizatë nga njëra anë dhe nga tjetra burime materiale-financiare.

Në këtë kontekst pas krisjes së autoritetit të ish Bashkimit Sovietik duhet shtuar komponentja e autonomisë së veprimit e individit apo e organizatës. Pa dashur të rievokojmë ngjarjet e shkuara, rasti i rënies së regjimit autoritar në Shqipëri dhe hapja/rënia e kufijve janë rasti konkret më domethënës në lidhje me çfarë po diskutojmë. Ka edhe një element tjetër për mendimin tim shumë domethënës që ka të bëjë me qytetin si sistemi më përfaqësues i *network*-ut që aktiviteti njerëzor ka arritur të realizojë dhe që duhet të shpenzojmë disa fjalë dhe që ka lidhje me temën tonë.

Koncepti i qytetit në dimensionin sistematik

Hapësira dhe organizimi i tij por edhe elementët specifik të tij janë të mbushur me simbolikë dhe me një zgjedhim të simboleve⁶. Qyteti përfaqëson një shoqëri të artikuluar, përballje me të tjerët dhe realizim të individit në një organizatë më të lartë se vetë ai dhe krijimin e një bote artificiale. Simboli tjetër është për t'u lexuar në eksperiencën e marrëdhënieve inter-personale që do të thotë sistemi i komunikimit që një bashkësi jeton. Më tej, një simbol tjetër është ai i historisë së bashkësisë, së grupit dhe individit në ndërtimin e fakteve kulturore të interpretuara dhe të jetuara emocionalisht.

Qyteti shikohet edhe si një vend i shenjtë si pasojë e ndodhjes së tij përgjatë “aksit të botës”⁷. Kjo do të thotë që qyteti shpirtëzohet dhe bëhet një simbol dhe një rast i mirë për individin për të realizuar cilësitë e veta individuale dhe që janë ato që kanë vlerë për ndërtimin dhe mbajtjen e rendit në përgjithësi.

Arsyeja përse është i rëndësishëm qyteti në temën që po diskutojmë është se përveç të qenurit imazh i grupit dhe i komunitetit është një pikë e konvergjencës së interesave publike dhe private. Ndërsa shumë i rëndësishëm është tranzitimi përgjatë tij i *flukseve* të mallrave, të personave, të ideve dhe i kulturave. Në këtë kontekst i jemi afruar temës tonë dhe nëpërmjet “rrugës” së përdorur kemi prekur elementë që aty për aty janë të pa perceptueshëm si përsëmbull kufijtë analitik dhe ndërthurja e tyre e cila prodhon brenda qytetit përkatësi, bashkësi, aktivitete ekonomiko-shoqërore, administrative dhe elementë të sigurisë.

Një herë e një kohë ishin muret e kështjellave që kryenin funksionin mbrojtës dhe portat e hyrejes kryenin funksionin e filtrimit të personave dhe mallrave që hynin brenda territoreve të tyre. Ndërsa në ditët e sotme elementi i sigurisë jo vetëm rrugor por edhe karshi formave të aktivitetit njerëzor ka marrë në vetvete dimensione të reja. Kjo si pasojë e rënies së kufijve të dukshëm dhe si rezultat i “shumëzimit” të mënyrave e të “rrugëve” të reja në tregti ku teknologjitë e reja kanë dhënë një kontribut parësor.

Fakti që qytetet janë gjithashtu edhe kontenitorë të fenomeneve të jashtë ligjshme dhe kriminale e tregojnë edhe legjendat urbane dhe metropolitane. Nuk është një rastësi që

⁵ R. V. Keohane, J. S. Nye. *Transnational relations and World Politics*, fq. xxiv, 1970, Cambridge, Harvard University Press.

⁶ A. Gasparini, vepër e cituar, fq. 209.

⁷ R. Berthelot, *La pensee de l'Asie et l'astrobiologie*, Payot, 1949, Paris

qyteti është një “laborator” sikundër e thamë edhe më lart në “realizimin” e aspiratave të individit apo të grupit shoqëror mbi bazën e karakteristikave të *network*-ut dhe të mundësive të lidhjeve që mund të aktivizojë në dimensione të ndryshme të jetës shoqëro-ekonomike dhe administrativo-politike përfshi këtu edhe pozicionin gjeografik dhe të infrastrukturës rrugore.

Krimi dhe organizatat kriminale

Të diskutosh mbi krimin fillimisht do të thotë të kryesh një klasifikim të fenomeneve që janë të ndaluara si dhe të emërosh aktet që përbëjnë një vepër penale. Elementi thelbësor nga pikëpamja politologjike e fenomenit është aspekti legal apo ilegal i ngjarjes, i sjelljes, i vendimit, i autoritetit, i sipërmarrjes, etj. Do të shtoja që dimensionin ekonomik i fenomenit është moventi karakterizues që nga kohët e largëta të piraterisë dhe të banditizmit deri në ditët e sotme.

Janë pikërisht *format* dhe *mënyrat* që kanë “evoluar” në relacion me kontekstin shoqëror dhe zhvillimin e formave agreguese të aktivitetit njerëzor sikur qytetet dhe së fundmi teknologjitë si dhe shiftimi i kufijve nga të “ngurtë” në analitikë. Në këtë panoramë të tipit “*matrix*” në terma rrjeti, kalimi nga një pozicion në një pozicion tjetër merr karakteristika mutante spekulimi.

Këtu ka gjenezën pikënisja e “*transformimit*” apo e “*tranzicionit*” jo vetëm e individëve por edhe e organizatave. Dhe një nga rrugët e transformimit është edhe ajo e migracionit dhe vëndi ynë është një rast ku çfarë kemi hulumtuar deri tani mund edhe të shërbejë si një “laborator” testimi.

Kufiri i shtetit Shqiptar ka qenë një kufi i “fortë” dhe i pa depërtueshëm. Dhe kjo mbi bazën e një autoriteti të padiskutueshëm qoftë në dimensionin e lëvizjeve si të brendshme nga njeri qytet të tjetri ashtu edhe jashtë kufijve të shtetit. Aspekti i lëvizjes dhe i kontaktit qoftë të brendshëm ashtu dhe të jashtëm ishte i filtruar.

Dimesioni i “transformimit” në hierarkinë shoqëro-ekonomike ishte i “rregulluar” sipas sistemit dhe sjelljet e “huaja” të klasifikuara nga regjimi i atëhershëm ishin të klasifikuara dhe të emëruara në kodin penal. Një herësh që u rrëzua autoriteti i regjimit u rrëzuan kufijtë jo vetëm fizik por edhe ata analitik pasi vetë sistemi kufijtë e mëparshëm analitik i kishte abroguar apo bërë nul në emër të ndërtimit të “njeriut socialist”. Rënia e tyre në të gjitha dimensionet arriti të krijojë një lëvizje nga zonat rurale në qytetet dhe nga qytetet në vendet e tjera pritëse të migrimit.

Elementë dhe fenomene të panjohur më parë për një shoqëri të mbyllur por edhe jo në gjendje të mirë ekonomike, në kontakt me fenomene të shoqërive të tjera në qytetet përëndimore, i “hapën” rrugën tranzicionit shqiptar drejt demokracisë duke përdorur edhe “rrugën” e emigracionit. Mënyrat dhe rrugët janë modalitetet që përbëjnë shpirtin e një shoqërie apo dinamikën shoqërore të saj dhe ndërtimin e grupeve të interesit duke pasur për sfond drejtësinë dhe ligjin.

Nga ngjarjet e këtyre dy dekadave të fundit treguesit e konflikteve shoqërore në dimensionin horizontal dhe atyre vertikal midis shoqërisë dhe institucioneve të shtetit kanë pasur si karakter pikërisht ndër të tjera edhe kalimet klandestine të kufirit nga njëri shtet në tjetrin dhe problemet që janë evidentuar kanë qenë në lidhje me vërtetësinë e identitetit në pasaportat e lëshuara nga institucionet përkatëse nga ana e shtetit shqiptar

por është evidentuar edhe një problem tjetër si ai i “blerjes” në dhënien e vizave nga ambasadat e shteteve ku ekzistonte regjimi i vizave.

Në momentin që sistemi nuk arrinte të furnizonte me pasaporta dhe me viza kërkesat “lindi” fenomeni skafist. Mekanizmi është si vijon: në momentin që sistemi ka një “gradë” apo “shkallë” të caktuar hapeje, pranimit dhe filtrimit, duhet të funksionojë edhe sistemi i parandalimit të formave që anashkalojnë filtrimet⁸ duke filluar qysh nga neutralizimi i mundësisë së korrupsionit aktiv dhe pasiv deri te parashikimi si vepra apo aktivitete kriminale në kodin penal i atyre fenomeneve si delinkuente apo kriminale. Në rastin e Shqipërisë sistemi vuri në dukje deficiet të dukshme në të gjitha dimensionet e tij dhe vonesa në marrjen e masave si kundërpërgjigje karshi këtyre fenomeneve.

Një shembull është fakti që vetëm në fund të vitit 2000 Shqipëria nënshkroi Protokollin e OKB-së në lidhje me parandalimin dhe dënimin e trafikut të qenieve njerëzore në kuadrin e Konventës së OKB-së në kuadrin e Luftës kundër Krimit të Organizuar Transnacional dhe në 2008 Konventën e Këshillit të Europës mbi Luftën kundër Trafikut të Qënieve Njerëzore. Trafikimi i qënieve njerëzore dhe prostitucioni treguan se ishin mënyrat më të shpejta për t’u pasuruar dhe morën karakterin e një sipërmarrjeje ekonomike përfshi këtu edhe elementin klanor rural të migruar në qytete si në Shqipëri ashtu dhe jashtë saj. Shtuar edhe avvenimente të tjera si rënia e piramidave financiare në ‘97 dhe kriza humanitare në Kosovë në ‘99, organizimi i shteti Shqiptar u vu para vështirësive objektive dhe menaxhimi i tyre nxori akoma më në pah dobësitë e sistemit.

Në terma individit dhe grupit fenomeni i krimit në përgjithësi në periudhën ‘97-98’ pati intensitet shumë të lartë si pasojë e ndërthurjes nga njëra anë e rënies së piramidave financiare dhe nga ana tjetër e ndryshimit të pushtetit politik të asaj kohe. Nuk është një rastësi që edhe organizma të shtetit morën tipare të formave autoritare kriminale si refleks të sistemit të mëparshëm të diktaturës. Krimi i organizuar si fenomen u bë i njohur për zyrtarë të shtetit dhe politikanë.

Në një studim të kryer nga Banka Botërore në vitin 1998 dhe të kërkuar nga Qeveria Shqiptare në lidhje me korrupsionin në Shqipëri me qëllim ndërtimin e një strategjie kombëtare për të luftuar korrupsionin, ky studim tregojë se korrupsioni ishte bërë problemi më i madh dhe se kishte mundësuar infiltrimin e grupeve kriminale në ekonominë shqiptare dhe përhapjen e aktiviteteve të krimit të organizuar⁹. Ka edhe një koincidençë në kohë: që nga viti 1998 deri në ditët e sotme në debatin politik midis dy forcave politike më të mëdha në fushatë zgjedhesh dhe rotacion politik akuzojnë njëra-tjetrën për lidhje me krimin e organizuar.

Interesi publik dhe politik në lidhje me fenomenin nxiti aktivitetin akademik kërkues. Ismet Elezi prezanton krimin e organizuar në leksionet e tij në Universitetin e Tiranës si një formë e organizuar profesionale e krimit ku banda të ndryshme bashkëpunojnë

⁸ Firewall. IT-ja ka arritur të ndërtojë këtë sistem mbrojtjeje në sistemet kompjuterike dhe këtu shikojmë një ngjashmëri në lidhje me sigurinë e sistemit në terma çertifikate sigurie për IT-inë në formën e driver-ave të furnizuara nga prodhuesi i paisjeve hardware.

⁹ V.Hysi, *Organized Crime in Albania: The ugly Side of Capitalism and Democracy*, në *Organised Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond*, pp. 540-60. Edited by Cyrille Fijnaut & Letizia Paoli, publikuar nga Springer, 2004, Hollande.

sistematikisht në kryerjen e veprimtarive kriminale. Studiues të tjerë si Edison Heba, Shefki Bejko dhe Zamir Poda kryejnë veprimtari kërkimore në lidhje me format e përhapjes së krimit të organizuar, aspektet ekonomike dhe financiare si dhe struktura e tyre. Elementi i pamjaftueshëm në veprimtarinë e tyre ka qenë sasia e të dhënave cilësore dhe sasore¹⁰.

Është ky elementi që ka bërë të vështirë edhe përkufizimin e krimit apo të krimit të organizuar. Me ratifikimin e Konventës së OKB-së në kuadër të luftës kundër krimit të organizuar transnacional në gusht të vitit 2002, përkufizimi zyrtar i grupit të krimit të organizuar i parashikuar në nenin 2 të këtij traktati është përfshirë në Kodin Penal të Republikës së Shqipërisë në nenin 28 me ndryshimet përkatëse.

Bashkëpunimi dhe traktatet ndërkombëtare

Ratifikimi i Konventës së OKB-së në kuadrin e luftës kundër krimit të organizuar transnacional reflekton vullnetin politik të qeverisë për të përqafuar dhe mbështetur vlerat si dhe për të arritur objektivat e marra përsipër si pasojë e nënshkrimit dhe ratifikimit. Nga një këndvështrim i tillë dalin në pah një sërë cilësish të këtij burimi të së drejtës ndërkombëtare. Shikohet qartë se Konventa rreflekton një politikë nga njëra anë dhe nga ana tjetër negociimi dhe ratifikimi reflektojnë pushtetin, organizimin dhe aspiratat e qeverisë që nënshkruan dhe të legjislaturës që i ratifikon. Një proces i tillë influencon politikën e brendshme veçanërisht në ato vende ku politika është e paqëndrueshme.

Traktatet dhe konventat përcaktojnë objektiva të qartë politikave publike si dhe u japin legjitimitet këtyre të fundit. Shpenzimi i kapitalit politik në nënshkrimin dhe ratifikimin e traktateve apo konventave në shumicën e rasteve përcakton një “regjim traktati apo konvente” që reflekton vlera të cilat janë në linjë me ato të qeverive që i nënshkruajnë dhe ratifikojnë por që mbeten si një “ekran” publicitar dhe në praktikë mbeten larg në arritjen e këtyre rezultateve.

Ky fakt hedh dritë mbi arsyen kryesore të nënshkrimit dhe ratifikimit të këtyre instrumentave e cila është një mungesë qëndrueshmërie angazhimi në arritjen e këtyre vlerave apo objektivave.

Mos përfshirja në “regjime traktatesh apo konventash” do të përkthehej në një “presion” nga vendet fqinje për një përfshirje. Rasti i krijimit të Zyrës së Interforcës Italiane në Shqipëri është një shembull i cili tregon se në momentin kur organe të caktuara të shtetit nuk janë në gjëndje të sigurojnë disa standarte në luftën kundër krimit dhe atij të organizuar në veçanti, shteti fqinjë mori përsipër të bëjë një detyrë të tillë në territorin Shqiptar me pretendimin se nga Shqipëria vinin flukset e migracionit klandestin dhe të trafikëve të tjera të paligjshme dhe kjo kishte një kosto politike¹¹.

Aspekti pozitiv i këtyre formave të bashkëpunimit nëpërmjet ndërtimit të “traktateve bashkëpunuese” është ndërtimi i grupeve të punës apo i agjensive të specializuara dhe që përkthehet në *capacity-building* dhe që ndryshon në mënyrë cilësore politikën e një

¹⁰ Po aty.

¹¹ Ky “konstatim” bëhet jo vetëm nga këndvështrimi akademik por edhe nga eksperiencia personale si specialist në Ministrinë e Rendit Publik, Departamenti i Marrëdhënieve dypalëshe dhe Integritetit, 2003, Tiranë.

qeverie si dhe axhendën e saj në lidhje me përcaktimin si dhe arritjen e disa standarteve. Por nga ana tjetër përbën mbështetje politike të brendshme elitave politike si dhe faktor mobilizimi politik¹².

Duke sintetizuar, traktatet dhe konventat influencojnë politikën por nuk prodhojnë transformime rrënjësore. Në aspektin institucional fuqizojnë dhe ndërveprojnë jo vetëm me politikën e brendshme por edhe me institucionet dhe nuk i zëvendësojnë këto të fundit. Një karakteristikë tjetër është se e drejta ndërkombëtare në terma traktatesh apo konventash intereson më shumë në ato vende ku grupet e interesuara (të interesit) kanë interesin dhe instrumentat¹³ për të kërkuar arritjen e atyre objektivave apo standarteve dhe që reflektohen pikërisht në këto instrumenta të së drejtës ndërkombëtare.

Interneti dhe cybercrime

Zhvillimi i jashtëzakonshëm i teknologjisë së informacionit dhe i internetit sidhe përdorimi i rrjetit informatik kanë bërë të mundur avancimin e shoqërisë një hap më përpara por nga ana tjetër ka nxjerrë në pah disa fenomene negative. Jam i mendimit që është me interes përdorimi i një përqsajeje e tipit “network” si ajo në rastin e qytetit ku kufijtë analitik në ofrimin e shërbimeve të ndryshme transformohen në një dimension si rrjeti kompjuterik dhe konkretisht në terma hardware dhe software. Pa hyrë në terminologji informatike, disa aspekte të jetës së përditëshme shiftohen në rrjetin kompjuterik duke përdorur pikërisht pajisje informatike dhe sisteme programesh kompjuterike. Mundësia e kontakteve e krijuar në këtë mënyrë është shumë herë më e madhe se ajo në jetën e përditëshme. Është pikërisht kjo mundësi që dha shtysë lindjes së *e-commerce*, *social networking web*, etj.

Aspekti më delikat dhe që është më vulnerabël i *Information Comunciation Tecnology* është ai i “dobësisë” të kufirit në terma analitik midis identitetit të përdoruesit, shkeljes së normës ligjore dhe të pajisjes së përdorur. Ky konstatim vjen mbi bazën e fenomenit të virusit I Love You i cili përvec dëmtimit informatik të të dhënave evidentojë edhe një mungesë legjislacioni në lidhje me klasifikimin e veprimtarisë si shkelje ligjore por edhe të identitetit të përdoruesit.

Kemi këtu një analogji me kufijtë analitik brenda qytetit por edhe me kufijtë të zonës Schengen në lidhje me tregtinë e lirë të mallrave dhe lëvizjen e lirë të njerëzve: nga njëra anë qarkullimi dhe lëvizja për mallrat me fletë shoqërimi në lidhje me identitetin e prodhuesit, transportuesin dhe destinacionin dhe nga ana tjetër duke pasur një dokument identifikimi personal me të dhëna biometrike përgjatë lëvizjes dhe kalimit nga një shtet në një shtet tjetër. Nëse kalimi i kufijve në botën reale strukturohet si më lart ai i botës virtuale ka një strukturë të ngjashme ku elementi i “çertifikatës” apo i “licencës” qoftë i programit të përdorimit apo të sigurisë është më vulnerabël në momentin ku rrjeti është infrastruktura fizike dhe ofruesi i shërbimit sidhe magazinuesi i të dhënave është *provider*-i¹⁴.

¹² A. Lame, Elita politike shqiptare dhe e ardhmja e shqipërisë: “Tryezë e rrumbullakët me politikanë shqiptarë”, në Rruga shqiptare e modernizimit, I.S.I.G, Editor A. Gasparini, 2001, Gorizia, Itali.

¹³ Në kuptimin e teknologjisë në të gjitha dimensionet dhe të know-how.

¹⁴ Ngjashmëria qëndron në autoritetin e lëshuesit të pasaportës dhe të përputhshmërisë me poseduesin në rastin e lëvizjes së individëve ndërsa në rastin e vërtetësisë informatike

“Flukset” që kalojnë në rrjet janë më tej edhe një çështje tjetër shumë delicate që ka të bëjë me privatësinë e individit, të informacionit dhe të sigurisë në veçanti të shteteve. Evenimente si akti terrorist në New York të 11 shtatorit 2001 dhe fenomeni Snowden janë fenomene që evidentojnë vulnerabilitetin e sistemit të rrjetit informatik dhe një sfidë shoqërisë moderne në terma të cybercrime.

Konventa e Këshillit të Europës mbi Cybercrime në fuqi nga 1 korriku 2004 është përgjigja në terma instrumentash të së drejtës ndërkombëtare në lidhje me këtë sfidë. Nëpërmjet cilësive të këtyre instrumentave që kemi diskutuar më lart, kjo Konventë është një guidë për çdo shtet në zhvillimin e një legjislacioni kombëtar dhe të kuptueshëm mbi cybercrime dhe një kuadër bashkëpunimi midis shteteve që e nënshkruajnë. Gjithashtu, Këshilli i Europës beson se konventa është një rrugë ideale për qeveritë për të parashikuar dhe parandaluar problemet dhe për t’i zgjidhur ato, duke punuar së bashku për të krijuar siguri për qytetarët e Europës dhe më gjerë. Shqipëria ka ratifikuar projekt-konventën në vitin 2002 dhe është palë në këtë instrument juridik të së drejtës ndërkombëtare i cili është në fuqi nga viti 2004. Prokuroria po punon në ngritjen e një grupi pune mbi hetimin dhe luftimin e krimit kompjuterik.

Konkluzione

Zhvillimet politike që ndodhën në qendër të Europës dhe që patën fillimisht për objekt konflikti kufijtë e “fortë” e të dy sistemeve në dimensionin qoftë ideologjik ashtu dhe në atë të prodhimit nxorën në pah “dobësinë” dhe nevojën për të strukturuar në më shumë se një dimension kufijtë analitikë të sistemeve të ndryshme në momentin e rënies së kufijve të “dukshëm”. Fenomene të cilat nuk ishin dukuri për shoqëri të ndryshme u përfshinë apo u prekën si pasojë jo vetëm e “hapjes” karshi zhvillimeve globale por edhe si pasojë e panjohurisë dhe të jokatkapacitetit për t’i mënjeluar por edhe për ti luftuar ato.

Nevoja për një harmonizim të sistemeve juridike është elementi i parë për të parandaluar dhe luftuar boshllëqet (bugs) që sistemet e ndryshme në Europë patën pas mbarimit të “Luftës së Ftohtë” jo vetëm në dimensionin juridik por edhe në dimensione të tjera dhe që vërtetohet nga zhvillimet në gjirin e familjes Europiane.

Europa e qyteteve të mëdha dhe e qyteteve të dijes mbi bazën e eksperiencës dhe kapaciteteve që e karakterizojnë luan një rol shumë të rëndësishëm si aktor në influencimin e zhvillimeve globale dhe rajonale. Sinergjitë që globalizimi ofron kanë nevojë për një “superstrukturë” e cila të “filtrojë” dhe “kanalizojë” zhvillimet shoqëroro-ekonomike nga njëra anë dhe nga ana tjetër politika të cilat të kenë në qendër të fokusit të tyre individin, kulturën, etikën dhe profesionalizmin si vlera të cilat nuk kanë nevojë për kufinj të “fortë” për të ekzistuar por kanë nevojë për ndërgjegjësim dhe pjesëmarrje aktive në zhvillimet e përditëshme globale. Kjo është sfida më e madhe që shoqëria globale po përjeton dhe instrumentat dhe teknologjia në dispozicion të bashkësisë ndërkombëtare është e disponueshme. Statistikat e njerëzimit kanë treguar se vetëm nëpërmjet përjetimit të kataklizmave shoqëror, ekonomik dhe politik ndërkombëtar komuniteti ka arritur të ndërgjegjësohet dhe të marrë në dorë fatin dhe të ardhmen e tij.

qëndron në certifikatat e sigurisë (SSL) së serverave ku qëndrojnë të magazinuar të dhënat.

Ph.D. Candidate. Nertil Bërdufi¹,

Av. Parid Plaku²

¹Law Department, "Hëna e Plotë" (Bedër) University, Albania

²Law School, University of Tirana, Albania

Cybercrime, a National Security Issue

Abstract

As we have entered a new era of computer-based lifestyle, lawmakers have made essential and considerable changes in the law to make it as compatible as possible with crimes committed by hackers (trespassers that engage in criminal activity through computers and the internet). This crime is one of the newest and most developed, which consistently lead to the evolution of law in several jurisdictions. The growth of technology and online communication has not only generated a dramatic increase with respect to criminal activity, but it resulted in what appears to be different sorts of criminal engagement.

The increasing incidence of criminal activity and the potential emergence of new types of crimes pose great challenges for legal systems and law enforcement. This article argues that law enforcement officials cannot effectively pursue cyber criminals if they do not have the legal tools necessary to do so. Furthermore, this paper will conduct some comparable and critical analysis of the US and UK jurisdictions with respect to Albania to address whether existing laws are sufficient to fight cybercrime and if there are areas for revision.

Keywords: *Cybercrime, hackers, law, jurisdiction.*

Introduction

What is Cybercrime? History of the definitions as a distinctive technology is developed in such a way that computer and cybercrimes can have their own definitions.(Laura Ani, 2011) It is argued that since cybercrime can include all categories of crime, a proper definition should state the particulars, the knowledge or the use of computer technologies. OECD recommendations in 1986 included a working definition as a study basis: computer-related crimes are considered an illegal behavior, unethical or unauthorized with respect to automatic processing and data transmission.(Susan W Brenner, 2001)

Council of Europe recommendations in 1987 adopted a functional approach and computer-related crimes are described simply as listed and defined deeds in the proposed guidelines or recommendations for national legislators.

In the recommendations of the Council of Europe in 1995 on the Criminal Procedure Law, the term "offenses related to Information Technology" (IT offenses or IT crimes) is used.(Laura Ani, 2011) In this recommendation, the IT crimes are described as: involving an offense from an investigation which the investigating authorities should obtain information possessed or transmitted in computer systems, or electronic data processing systems.

In a communication of the Commission of the European Union in 2001 a single definition was introduced. In this communication, "computer-related crimes are treated in a broad sense as any crime that in some way or another involve the use of information technology. (Laura Ani, 2011) Council of Europe Convention on Cybercrime in 2001 defines cybercrime in Articles 2-10 of Criminal Substantive Law in four different categories: (1) offenses against the confidentiality, integrity and availability of computer data and systems, (2) computer-related offenses, (3) content-related acts; (4) offenses in connection with violations of copyright and related rights.(Laura Ani, 2011)

This is a list of minimum consensus not excluding the expansion in domestic law. Content-related offenses such as breach of copyright, racism, xenophobia, and child pornography, cannot be understood normally as cybercrimes by many observers. Violations of copyright are based on agreements and civil contract and traditionally do not constitute criminal offenses in many countries.(Susan W Brenner, 2001)

Violations of copyright will often apply civil remedies because of numeral complicated issues. Child pornography has always been a criminal offense. Cybercrimes are crimes that have gone beyond conventionalism and now have threatened the national security of all countries, even in technologically developed countries like the USA. Terrorists are using 512-bit encryption that is impossible to decrypt.

Osama bin Laden's attacks of 9/11 can be cited as a pure example, the LTTE attack on the American Military system of deployment during the war in Iraq. Different types of cybercrimes are emerging in the world today, hacking, bombing, diddling, viruses, spoofing and salami attacks are all capable of security breaches in information systems of vital installations.(Susan W Brenner, 2001)

One of the most important goals of the legislation is to prevent criminal offenses, a potential perpetrator in cyberspace should be given a clear warning that certain criminal

acts cannot be tolerated, and when offenses occur, the perpetrators must be punished for the crime committed explicitly and efficiently to remove it or others from such crimes. (Susan W Brenner, 2001) These basic principles are also valid for cybercrime. These remedies include an arsenal of cybercrime acts well established for use in the prosecution of cyber criminals and procedural rules governing the collection of facts and evidence in the investigation. Cybercrime is often transnational in character; offenders can take advantage of loopholes in existing legislation to avoid apprehension and / or prosecution. It is therefore important that any legal system should take action to ensure that its criminal law and procedure is sufficient to meet the challenges presented by cybercrime.(Susan W Brenner, 2001)

The phenomenon of cybercrime

Cybercrime is one of the biggest legal challenges, so from 2000-2010 the Internet has expanded at an average rate of 444.8% globally and currently about 1.96 billion people are "Online"¹. In his masterpiece "Concept of Law", Hart declared that "human beings are vulnerable so rule of law is necessary to protect them."

By applying this in cyberspace, we can say that computers are vulnerable so rule of law is necessary to protect and keep them safe against cybercrime.(Laura Ani, 2011) Cybercrime is a criminal activity involving information technology infrastructure, illegal access, illegal interception (by technical means of non-public transmission of computer data, from or within a computer system), data interference (harmful unauthorized deletion, deterioration, alteration or suppression of computer data), interference (interfering with functioning systems of a computer system inputs, transmitting, damaging, deleting, etc.), forgery (ID theft) and electronic fraud.(Laura Ani, 2011)

There is no difference between conventional crime and cybercrime. Yet in a deeper analysis there is an obvious differentiation between conventional crime and the Internet, which is of a considerable extent.(Susan W Brenner, 2001) This is true for the middle class involvement in cybercrime cases. The difference is that cybercrime should be an involvement at any stage of the virtual layer. Business, economic and white collars crimes have rapidly been transformed and computers have been used to spread these types of crimes in activities and environments in which they are located.

It is proved that cybercrime today is one of the biggest legal boundaries which has stimulated a different form of crime, creating a source for new methods of crime, such as identity theft, fraud, theft, bribery, sabotage, espionage, conspiracy, robbery, distribution of pornography, violation of privacy, and other offenses such as attempted murder, kidnapping and killing a soul.(Laura Ani, 2011) Almost all crimes that can be committed by a person now can be performed by use of computers. (Susan W Brenner, 2001)

It is proved that cybercrime today is one of the biggest legal boundaries which has stimulated a different form of crime, creating a source for new avenues of crime, such as identity theft, fraud, theft, bribery, sabotage, espionage, conspiracies, robbery, distribution of pornography, violation of privacy, and outrage as attempted murder, kidnapping and killing a man. Almost all crimes that can be committed by a person now can be performed by use of computers. The reasons of computer weaknesses can be categorized as follows:

¹ World Internet Usage and Population Statistics,

<<http://www.internetworldstats.com/stats.htm>> accessed 28 March 2014.

1. The capacity to store data in a relatively small space

Computer has a unique characteristic of storing data in a very small space. This ensures an easy removal or derivation of information through physical or virtual media.(Laura Ani, 2011)

2. An easy access

The problem encountered in maintaining a computer system from unauthorized access is that any possibility of violation made is not because of human error, but because of the complex technology. Smuggling the logical bomb, keys that can steal access codes, advanced voice recorders; retinal images etc., which are biometric systems and get through firewalls that can be used to take and pass security systems.(Laura Ani, 2011)

3. Complexity

Computers work within operating systems of millions of codes. The human mind is fallible and it is possible that there could be a mistake at any stage. Cyber criminals take advantage of these mistakes and penetrate into the computer system.(Laura Ani, 2011)

4. Negligence

Negligence is associated with human behavior. It is therefore very likely that, by protecting the computer system could be the negligence, which enables a cyber-criminal to gain access and control over the computer system. (Laura Ani, 2011)

5. Loss of evidence

Loss of evidence is very common and obvious issues like all records are routinely destroyed. Collection of additional data outside the territorial extent paralyzes this system of crime investigation.²

The classification above may be referred to as basic factors and / or problems that cause cybercrime, but to get a clear picture of the extent of the problem is necessary to take a pragmatic look at these factors.

Some time ago in May 2000, a computer virus known as the "love bug" emerged and spread rapidly around the globe.(Laura Ani, 2011) According to a report, the virus has infected at least 270,000 computers in the first hours after its release. This forced the closure of computers in large corporations such as Ford Motor Company and Dow Chemical Company, and the computer system in the House of Lords.(Laura Ani, 2011) The virus has destroyed files blocking e-mail traffic to more than twenty countries, and some have estimated that the virus caused 10 billion dollars in damages.

Security experts have discovered that the virus originated from the Philippines, investigators from the Philippines and the United States were set to track down the person who distributed the virus.(Laura Ani, 2011) Their efforts were troubled by the lack of computer crime laws in the Philippines: investigators had found deficiencies trying to get warrants, local prosecutors had to look the statutes and laws of their country more thoroughly in order to find relevant articles to get a warrant.

² The Unites States Department of Justice www.justice.gov/criminal/cybercrime
accessed 28 March 2014

Even when the suspect Onel de Guzman was arrested, there have been deficiencies in the law because there were no laws to convict him for what he had done. The Philippines had no legal norm defining crime for breaking in a computer system to spread a virus or other harmful programs, or to use a computer in an attempt to commit theft.(Laura Ani, 2011) These charges were eventually dropped after the Department of Justice concluded that “there are no laws that apply to what he did in connection with computer and that investigators have enough evidence to support a conviction for theft.”³

This incident urged Filipinos to adopt state law cybercrime and measures imprisonment for those who hack into computer systems and / or distribute viruses or other harmful programs, although the new law cannot be applied retroactively to the individual suspected of spreading the virus "love bug", so that such crime was not convicted.⁴

“Love bug” virus clearly identified some of the problems of this type of law enforcement activity, i.e.(Laura Ani, 2011):

1. The absence of international agreements in which cybercrime deteriorates the problems of lack / inadequacy of domestic criminal law and often conflicting requirements of local criminal laws;
2. Lack of specific criminal laws for cybercrime and / or inadequacy of criminal laws that are designed to deal with criminal behavior occurring in the real world / or physical and not through the virtual world of cyberspace;
3. The difficulty of verifying which nation (s) has / have jurisdiction to prosecute a cybercriminal, and once that determination is made, verification of jurisdiction over that person should be made;
4. The difficulty of determining how many offenses are committed, against whom and damage resulting from these works.⁵

Cybercrime is a problem that cannot be addressed only at the national level, as "love bug" illustrates. We are witnessing the development of remote parallel offenders and violators who may be located physically in one place and can easily cause irreparable damage in other countries, therefore international cooperation is necessary to deal with cybercrime as transnational crime.(Laura Ani, 2011) When it comes to dealing with cybercrime, no country is an island, but nations must cooperate instead to deal with the issue of ensuring that cybercrime cannot exploit the gaps and shortcomings in procedural laws to avoid capture and prosecution.

Countries also have an imperative to review their criminal laws to ensure that their citizens are well protected from cybercrimes after domestic prosecutors have been known to fail due to lack of applicable law. In the case of United States vs. Baker⁶ U.S. federal appeals court upheld the dismissal of charges against a defendant who posted his

³ Onel de Guzman's thesis was a computer that was designed to steal passwords; the thesis was rejected because it was designed to commit theft).

⁴ Although the United States and the Philippines have an extradition treaty, Philippine law requires that laws exist in both countries recognizing a given offence.

⁵ Scores of nations, especially in the developing world, lack laws governing cyberspace crimes and are woefully short on computer- savvy investigators and the technology required to go after sophisticated hackers.

⁶ Fed. App. 0036P Sixth Circuit Court of Appeals [1997] see : www.laws.lp.findlaw.com accessed 29 March 2014

descriptions of rape, torture and murder of women online, because the provisions of the federal criminal statute do not include his actions. If a country considers its criminal laws and it shows a gap which does not deal with cybercrime effectively, steps must be taken to change deficiencies by adopting new laws and amending existing laws in cybercrime. (Laura Ani, 2011) It is important to note at this point that countries that ignored this gray area of the law will be less capable of competing in the new economy, hence the reason cybercrime breaches national borders and nations risk of having their electronic messages blocked from the network.

Insufficiency of legislation and resources

Criminal sanctions against trespass, breaking and entering could not be called an act of hacking into a computer network that illegally acquired data. (Laura Ani, 2011) From sophisticated airline reservations systems, military early warning mechanisms in ATMs and digital supermarkets, IT revolution has brought a large group of collaborators and amenities that have influenced modern communication, travel, security and trade.

However the massive profits made by the information age are not perfect. By linking human activity to spread electronic resources and infrastructure is not an important weakness, but an ever-present danger of abuse, insidious manipulation and sabotage of computers and computer networks. This distinct, unique phenomenon is a new class of anti-social activity that cannot be addressed through the implementation of existing laws. Most countries do not have legislation in place to deal with internet / computer related crimes. (Fawzia Cassim, 2009)

The essence of this article provides a critical overview of the countries that have adopted specific laws on cybercrime offenses and whether such laws are adequate enough to target "high-profile" cybercrime such as the spread of the virus, hacking, fraud and theft. (Laura Ani, 2011) Even for countries that do not have specific legislation about the Internet, traditional criminal laws are sufficient to deal with the problems presented by computer-generated crime. A comparative summary of the two jurisdictions, the United Kingdom and the United States of America will provide a broad analysis on the phenomenon of cybercrime and how it is dealt with adequately in each of these jurisdictions. (Fawzia Cassim, 2009)

The United Kingdom

In the UK, the English courts concluded that their existing laws do not accommodate or reflect changes brought upon by computer technology. (Fawzia Cassim, 2009) In *RV Gold*⁷ the defendant was acquitted, because there was no law to prevent illegal access to a computer and it led to the adoption of Computer Misuse Act (CMA) 1990. However, this Act was quickly found to be ineffective in addressing cybercrime, so Computer Misuse Act was changed and came into force in England and Wales on 1 October 2008.⁸ Changes in the CMA were included in the Police Law and Justice⁹ by Serious Crimes Act¹⁰.

⁷ *R v Gold & Schifreen* [1988] 1 AC 1063

⁸ EWCA [2004] Crim 631. It should be noted that s.4 and 5 of the CMA also provide that the UK has jurisdiction to try the offender if the offence is significantly linked to the UK.

⁹ *R v Gold & Schifreen* [1988] 1 AC 1063

¹⁰ Ibid.

In order to avoid confusion, the government decided to apply these changes all at once, through a legislative order (delayed). Although the Police and Justice Act deals primarily with police reform, it also contains amendments of the Computer Misuse Act. There was widespread agreement that the existing computer laws of the United Kingdom are outdated, because each change has drawn criticism in a bigger or smaller extent. The changes cover three main provisions.(Fawzia Cassim, 2009) Firstly the maximum penalty for unauthorized access to a computer system (less serious of the three deeds included in the original act) was increased from six months to two years in prison, making enough serious violations that an extradition request can be completed.¹¹

Secondly, denial of service attacks (DOS) pertaining before to the legal gray area are now clearly criminal with a maximum sentence of up to 10 years in prison.(Fawzia Cassim, 2009) Thirdly, amended Act makes it an offense to distribute hacking tools for criminal purposes. Home Office has also recently announced a proposal to make it harder for sex offenders to meet children online. In the UK, the English courts' jurisdiction is considered among others in *R vs. Smith (Wallace) No. 4*, the Court of Appeal had to consider the following facts: the defendant's physical presence in England, the fact that substantial criminal activities took place in England, and whether or not it was necessary that the "last act" is committed within its jurisdiction.(Fawzia Cassim, 2009)

The court found that the issue on whether the English Courts have jurisdiction or not depends on where the last act took place and if it is determined that a significant part of the offense is within the jurisdiction of the United Kingdom, the English courts have jurisdiction to try the offense.(Fawzia Cassim, 2009) Access in England and Wales that allows prosecution in cases where an element of the offense occurred within the jurisdiction of the courts has little judicial support. This was relevant in cases of fraud, but cannot be considered for cases of inciting racial hatred, as part of the Public Order Act 1986. Great Britain has made commendable efforts in trying to prevent cyber criminals, amendments show a tougher stance of the UK in combating cybercrime. Also new proposals aimed at child sex offenses were introduced by the Home Office and the advent of the National Crime Unit Hi-Tech¹². This brings the police, the private sector and academia together to combat cybercrime that ultimately ensures the participation of all key actors in the fight against cybercrime.

The United States

National Information Infrastructure Protection Act of 1996 (hereinafter, the NIIPA or "1996 Act") protects individuals against various crimes involving "protected computers". Two U.S. Secret Service and the FBI have jurisdiction over offenses committed under NIIPA, the latter by the U.S. Patriot Act. Communications Electronic Privacy Act of 1986 (hereinafter ECPAT) is also aimed at non-traditional crimes such as hacking.(Fawzia Cassim, 2009) It prohibits any access gaining, altering or preventing unauthorized electronic storage. Key works include federal cyber harassment, identity theft, internet scams making intentional false representations to the Internet, identity theft, use password sniffer, execution and creation

¹¹ Police and Justice Act 2006, Section 35(3) (a)-(c)

¹² It undertakes national proactive investigations of serious and organized crime using IT. It also provides consultation to local forces and other agencies; lease with government on policy issues and provides 24-hour point of contact.

of "worms", compilation of viruses as "Trojan horses", websites and web-false or "web-spoofing". (Fawzia Cassim, 2009)

Many states have passed legislation aimed at procedural issues involved in prosecuting cybercrime. Some have added sections that enhance definition cybercrime statutes specific and / or general criminal statutes. Others have adopted statutes which defined the offense levels and penalties for cybercrime, create startup period for prosecution of cybercrime and address potential protection cybercrime charges. It may be difficult to apply jurisdictional predicates such as performing all or part of a crime within a state or "causing harm" to someone in a state. In U.S. jurisdiction and applicable law is determined in court by case analysis rather than applying written codified strict rules.

U.S. approach has traditionally considered notions of "reason" and "fairness" underlying both plaintiffs and defendants.(Fawzia Cassim, 2009) The U.S. has an abundance of case laws that has addressed the issue of jurisdiction in different areas of Internet regulation. As a general rule, a defendant may be sued in the U.S. in the state where he resides, but where the defendant is not a resident of the state in where the suit is brought upon, a court may hear the case only if the court should exercise personal competence on the defendant. (Fawzia Cassim, 2009) However, in civil law jurisdictions, as a general rule, a defendant may be sued in the state where he resides based on issues and taking into account the residence and domicile rules usually provided in the Civil Code. Further jurisdictional problems arise for state prosecutors, because criminal law jurisdictional rules require the prosecutor to prove that the defendant intended to cause harm within his state. U.S. state courts have not yet seen many challenges in the state assertions of jurisdiction in cases charging cybercrime.(Fawzia Cassim, 2009)

Review of practice "non-cyber" statutes indicates that, even though the state law will currently support Internet aggressive response regarding illegal activities that have an impact on a particular state, even when the author is not physically located within the forum state. For example, in Michigan, the implementation of criminal and civil against online distributors of alcohol, drug prescription, GHB producing boxes "GHB manufacture kits", as well as child pornography and sexual predators has begun. Online sales of regulated items such as alcohol, drugs and tobacco represent a typical area in which state action can arise offense. The case of U.S. vs. Gorshov raises controversy over the jurisdiction of a country to enforce its law regarding cybercrime cases.(Susan W Brenner, 2001) The fact was that several Russian citizens were identified as hackers who had broken into the computer systems of American businesses. They were blocked by FBI agents and were arrested later.¹³ The information was taken from the Russian computers by FBI agents without a warrant. The District Court found that there was no violation of the Fourth Amendment, which does not include extra-territorial research of non-US citizens, nor has violated Russian law. However, Russian authorities accused FBI agents and requested their presence for trial in Russia, but the U.S. government did not comply. Bold attempts are being made in the U.S. to respond to rising cybercrime, such as Project Safe Childhood to combat the exploitation of children on the Internet, and the use of specialized prosecutors to combat cybercrimes in the U.S. Attorney Offices nationwide. (Laura Ani, 2011) Other initiatives have also been launched by U.S. Electronics Task Forces and FBI crime which brings law enforcement officers, along with members of the private sector and academia in a cooperative effort against cybercrime. The Justice Department also continues to rely on _____

¹³ The question arose whether the actions of the FBI agents were justified or not as an exercise of enforcement of jurisdiction. United States v. Gorshkov [2001] WL 1024026.

dedicated attorneys in the Criminal Divisions, Computer Crime and Intellectual Property Sections. (Fawzia Cassim, 2009)

In August 2008, the U.S. Senate approved a bill on cybercrime to modernize the country's computer crime laws and to provide prosecutors with more leeway in prosecuting cyber criminals. Current federal cybercrime laws require prosecutors to show that illegal activity caused at least \$5,000 in damages before they can begin operations for unauthorized access to a computer.

The new legislation contains the following changes: (a) installing spyware or keystroke-monitoring programs in ten or more computers is considered a felony, regardless of the amount of damage, (b) new legislation also allows victims of theft identity to seek restitution for time loss and money spent restoring their credit and (c) the law would allow federal courts to prosecute cyber criminals whose computers attack in the state where they live. A new provision covers Internet extortion to address shortcomings in the existing law.

These new provisions will be added to a bill known as the Defense Act 2008 of former vice president. The new government under President Barack Obama is currently reviewing the regulations and cybercrime.(Fawzia Cassim, 2009) Furthermore, the U.S. introduced a new bill, which if passed would economically penalize foreign countries that choose or fail to put a stop to criminal activity originating from Cyber within their borders.

This Cybercrime Reporting would make the White House responsible for determining exactly which countries have to tackle the problem of cybercrime and have a "pattern of cybercrime against the U.S. government, private entities or people." If they fail to act after assessing the situation they are in looking for help of the U.S. and new resources - OPIC or Exlm financing, new multilateral financing, new TDA assistance, preferential trade programs, or new foreign aid, as long as such factors do not limit projects to combat cybercrime. The above discussion shows that the United States is taking the lead in addressing cybercrime. Collaborative initiative involving the police, the private sector and academia is an encouraging effort to involve all role players in the fight against cybercrime. The advent of the new law also illustrates that the U.S. is taking the lead in updating outdated laws computer to keep abreast with the advancement of computer technology. Ratification of the Council of Europe Convention on Cybercrime by the United States has received much needed support in the global fight against cybercrime. (Fawzia Cassim, 2009)

Recommendations

Provisions should be adopted for cyber space, with as much clarity as possible and specifications, and not rely on vague interpretation of the existing laws. When laws are passed cybercrime perpetrators will be punished for their actions, not by clear and expansive interpretations of existing provisions, or other provisions for covering purposes only for occasional and peripheral actions.(Susan W Brenner, 2001) A brief assessment of draft bills in Albania will highlight inequalities already highlighted in the legislation. The first law titled "Computer Security and Critical Information Infrastructure Protection Law" in 2005 has raised debates among academics and interested parties.

We have witnessed how to determine what is a critical infrastructure or a system. First, we must determine what type of data held we have and the potential impact of any change or security breach before we consider it critical. Result of the law means that a complete critical assessment of a risk in a wide range of issues such as the business community, terrorism and unauthorized access will be evaluated to establish levels of impact against the confidentiality, integrity and availability of information. Second, these so called "critical infrastructure" will only apply when it is passed as a law and means no computer crime legislation would apply to other neighborhoods, i.e. home users. It has been suggested that the law should cover all neighborhoods and not be limited in its application, which will lead to the bill not reaching the desired effect.(Fawzia Cassim, 2009) Further definition of critical infrastructure should be defined in the interpretation to avoid distraction.

A critical analysis of the second bill is entitled "Safe Cyber". The proposed bill aims to make it possible to use electronic evidence as primary evidence in court. He states that "Notwithstanding anything contained in any law or act in Nigeria, information in any computer that is printed on paper, stored, recorded or copied in any media, will be considered the main evidence under this law." It further acknowledges that Albania question the fact when it comes to understanding and implementing crime and privacy violation.

The law treats unsolicited commercial emails (UCE) and spamming, which has long been a problem of Albania's reputation for a long period. Recently it arrested two suspects for allegedly committing fraud through a website where they tried to deceive a businessman of \$40,000. The suspects had successfully detected the victims' emails, communicating with their foreign suppliers and finally reaching an agreement.

Conclusions

Balkan countries have been criticized for not dealing properly with cybercrime enforcement as their agencies are adequately equipped in terms of intelligence personnel and infrastructure, since the private sector is also lagging behind in curbing cybercrime. Balkan countries are preoccupied with urging matters to be a part of poverty, fuel crisis, political instability, ethnic instability and traditional crimes such as rape, murder and theft, concluding the result that the fight against cybercrime is lagging behind. It is accepted that international legal mutual aid and technical assistance should be provided in the Balkan countries and individual corporate entities should effectively combat cybercrime in the Balkans. Balkans needs to build partnerships to fight crime and corruption on the Internet. However, it is commendable that other Balkan countries are making efforts to address cybercrime.

Most law enforcement personnel are not equipped with the necessary technological knowledge, while most cyber criminals are experts in computer technology. In combating these crimes there is no need for educating and developing human resources, which is one of the most reliable strategies. In addition to this, universities, schools of higher education and academic institutions should set up special courses designed to allow the next generation of judges and lawyers to become skilled in what is a difficult area, but very profitable.

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**Nevila Kullojka¹,
Valbona Ndrepepaj²,
Denis Spahija³**

¹Fakulteti i Drejtësisë, Universiteti i Tiranës, Tiranë, Shqipëri,

²Fakulteti i Drejtësisë, Universiteti i Tiranës, Tiranë, Shqipëri,

³Asistent prane Universitetit "Haxhi Zeka", Pejë, Kosovë

Mbrojtja Ndërkombëtare e të Drejtave të Personave Juridikë

Abstrakt

Sot, Përgjegjësia Penale ndaj Personave Juridikë, është po aq e rëndësishme sa edhe Përgjegjësia Penale ndaj Personave Fizikë. Kalimi nga *Societas delinquere non potest*, në, *Societas puniri potest e debet*, ishte një hap mëse i nevojshëm dhe njëkohësisht i domosdoshëm për një shoqëri të pastër nga krimi.

Por, marrja e cilësisë së 'subjektit' sjell automatikisht si pasojë detyrimin që ndaj personave juridikë të zbatohen edhe garancitë që ofron e Drejta. Aplikimi i përgjegjësisë penale ndaj personave juridikë e shndërron këtë të fundit në një subjekt që jo vetëm duhet t'i nënshtrohet së drejtës, por gjithashtu e Drejta duhet t'i ofrojë mbrojtje dhe garanci.

Çështja e mbrojtjes së të drejtave është një çështje mjaft delikate dhe sensitive. Zbatimi dhe respektimi i tyre është kryefjala e çdo procesi, dhe *inter alia* ato përbëjnë një aspekt thelbësor edhe në insitutin e përgjegjësisë penale ndaj personave juridikë.

Ky artikull synon të na paraqesë një qasje të re të konceptit të mbrojtjes së të drejtave, jo më në kuptimin klasik, si një ekskluzivitet vetëm i personave fizikë. *Tempora mutantur*, dhe personat juridikë zënë gjithmonë e më shumë një vend të rëndësishëm tani edhe në jetën ligjore, prandaj, ne, e konsiderojmë të nevojshme trajtimin e çështjes së mbrojtjes së të drejtave jo vetëm në spektrin e personave fizikë, por edhe ndaj personave juridikë. Përgjatë këtij trajtimi do të analizojmë në mënyrë të detajuar pyetjen se: A pasqyron procesi penal ndaj personave juridikë të njëjtën mbrojtje dhe garanci të të drejtave siç ofron edhe procesi ndaj personave fizikë, në kuadër të arritjes së detyrimit për një proces të rregullt ligjor.

Sigurisht që ky artikull synon të na parashtrijë në një këndvështrim analitik, nëpërmjet përdorimit edhe të metodës krahasimore, të të drejtave dhe garancive që gëzon personi juridik, në mënyrë që procesi ndaj tij të reflektojë standarte. Gjithashtu do të ndalemi në mënyrë të veçantë edhe në analizimin e dënimit me vdekje ndaj personave juridikë,

trajtuar paralelisht me dënimin me vdekje ndaj personave fizikë. Natyrisht që ky artikull është bazuar gjatë analizës së tij në një këndvështrim ndërkombëtar, pra nuk jemi ndalur thjesht në kufijtë kombëtarë, por i kemi mëshuar fort garancive ndërkombëtare që ekzistojnë. Trajtimi i aspekteve teorikë *vis a vis* jurisprudencës së Gjykatës Europiane për të Drejtat e Njeriut na shërben për të patur një trajtim të gjithanshëm të kësaj çështjeje.

Procesi penal ndaj personave juridikë duhet të reflektojë standarte dhe duhet të jetë promovues i respektimit dhe mbrojtjes së të drejtave. Përgjegjësia Penale e Personave Juridikë është shndërruar në një kusht *sine qua non* për një politikë penale efikase dhe gjithashtu udhëheqësi i saj, prandaj është e nevojshme t'i kushtojmë rëndësinë e duhur.

Fjalë kyçe: *të drejtat e personave juridikë, garanci ndërkombëtare, proces i rregullt ligjor, denimi me vdekje,*

1 Hyrje

Kjo nuk është më një qeverisje e njerëzve, nga njerëzit, dhe për njerëzit. Është një qeverisje e personave juridikë, nga personat juridikë, dhe për personat juridikë.¹ Sic e kemi cekur edhe *supra* personat juridikë² janë shndërruar në aktorë të rëndësishëm të jetës sociale, dhe si rrjedhojë ato domosdoshmërisht që shndërrohen edhe në aktorë të rëndësishëm edhe të ligjit penal. Ky artikull synon të na japë një pamje të plotë të të drejtave që gëzojnë personat juridikë në kuadër të aplikimit të ligjit penal ndaj tyre, dhe të fitimit të cilësisë së subjektit ndaj të cilit ky ligj vepron. Por jo vetëm kaq, gjithashtu një pjesë thelbësore e këtij punimi është fakti se a mund të sigurohet në procesin penal ndaj personit juridik respektimi dhe zbatimi i të drejtave të themelore, sa arrihet kjo realisht, cilat janë garancitë që na reflekton ky proces dhe a janë ato të mjaftueshme për të na reflektuar standarte? Hulumtimi i legjislacionit vendas *vis a vis* atij ndërkombëtar dhe jurisprudencës së Gjykatës Europiane për të Drejtat e Njeriut, do të na ndihmojë për t'i dhënë përgjigje këtyre pyetjeve përgjatë artikullit, duke na dhënë kështu një trajtim të gjithanshëm të këtij insituti dhe duke nxjerrë në pah rolin që ai luan në promovimin dhe respektimin e të drejtave dhe lirive themelore. Gjithashtu do të ndalemi në analizimin në mënyrë të veçantë edhe të dënimit me mbarim të personit juridik, për të përcaktuar domosdoshmërinë e ekzistencës së tij.

2 Të drejtat e personave juridikë

Procesi gjyqësor si rregull nuk duhet të ketë dallime ndërmjet personave fizike dhe atyre juridikë përsa i përket mbrojtjes së të drejtave të tyre.³ Respektimi të drejtave gjatë procedimit penal nuk është i lidhur me statusin e personit që është subjekt i saj, prandaj dhe nuk duhet bërë dallimi nëse për aplikimin e të drejtave kemi të bëjmë me person fizik apo person juridik⁴.

Theksojmë paraprakisht se këto të drejta nuk janë të lidhura vetëm me shkallët e para të gjyqësorit, por ato duhet të respektohen në të gjitha instancat e tij. Gjykata Europiane për të Drejtat e Njeriut, ka theksuar se nëse lejohen procedura apelimi, si personat fizikë dhe

¹ Rutheford B. Hayes, 1876

² Mendimi shkencor juridik e përcakton personin juridik si një subjekt të veçantë, mbajtës të drejtash dhe detyrimesh, organizëm kolektiv që e drejta e ka njohur si subjekt të saj, duke i dhënë zotësinë për të pasur të drejta dhe detyrime juridike, zotësi kjo e veçantë nga zotësia juridike e personave që e përbëjnë atë, dhe në të njëjtën kohë zotësinë për të vepruar. Për më shumë rreth kuptimit dhe personalitetit juridik të personit juridik referohu në “E drejta civile, pjesa e përgjithshme”, Ardian Nuni, Tiranë 2009, faqe 136-242. Shiko gjithashtu dhe ‘Equity and the law of trusts’, Philip H. Pettit, London 1979, faqe 16,

³ Ne, nenin 16 Kushtetuta jonë shprehet se: Të drejtat dhe liritë themelore, si dhe detyrimet të parashikuara në Kushtetutë, vlejnë dhe për personat juridikë, për aq sa përputhen me qëllimet e përgjithshme të këtyre personave dhe me thelbin e këtyre të drejtave, lirive dhe detyrimeve,

⁴ Kështu nëse do të merrnim rastin e Gjykatës Europiane për të Drejtat e Njeriut, kjo gjykatë nuk e lidh çështjen me faktin se kemi të bëjmë me persona fizikë apo juridikë, por me shkellen e kryer, pra nuk përbën dallim subjekti, shiko Fortum Oil dhe Gas Oy kundër Finlandës, ku kjo gjykatë theksoi se artikulli 6 i Konventës aplikohet si për personat fizikë dhe për ato juridikë njësoj,

personat juridikë gëzojnë të njëjtat të drejta për një proces të rregullt ligjor, siç i gëzonin në shkallën e parë.⁵

Le t'i marrim me radhë këto të drejta, pasi në këtë mënyrë do të kemi një pamje më të qartë të tyre. E drejta për një gjykatë të paanshme dhe të pavarur,⁶ sigurisht që është një e drejtë që ofrohet gjatë procesit, pasi në të kundërt do të kishim të bënim me shkelje serioze jo vetëm të të drejtave themelore të personit juridik, por gjithashtu dhe me por gjithashtu dhe me mosfunksionim të sistemit të drejtësisë. Një gjykatë e pavarur dhe e paanshme është premisë për një sistem drejtësie efikas, dhe si pasojë dhe personat juridikë kanë të drejtë për një sistem të tillë drejtësie⁷. Kjo e drejtë, është një e drejtë e sanksionuar në urimet e rregullojnë pro esin penal, dhe duke ënë se këto dokumenta rëndojnë me përm ajtjen e t re dhe m i personat juridikë, atëherë deduktojmë e kjo e drejtë është një e drejtë e jo vetëm shtrihet dhe ndaj personave juridikë, por sigurisht që përbën një detyrim për zbatim kurdoherë. 77KK K

E drejta për akses në gjykatë, është një nga të drejtat kryesore, dhe si e tillë ajo duhet të reflektohet në procesin ndaj personave juridikë dhe sigurisht që kjo e drejtë ju njihet këtyre subjekteve.⁸ Gjykata Europiane për të Drejtat e Njeriut shprehet se e drejta për akses në gjykatë nuk është një e drejtë absolute, pra ajo mund t'i nënshtrohet kufizimeve, por, këto kufizime nuk mund të jenë të tilla sa të prekin thelbin e saj. Gjithashtu këto kufizime duhet të ndjekin një qëllim legjitim, të kalojnë testin e proporcionalitetit.⁹

E drejta për një vendim brenda afateve të arsyeshme dhe detyrimi i arsyetimit të vendimit,¹⁰ janë gjithashtu të drejta në kuadër të procesit të rregullt ligjor, të cilat karakterizojnë procesin kur është i përfshirë personi juridik¹¹. Pra koha që kalon nga ngritja e akuzës ndaj personit juridik, dhe marrjes së një vendimi ndaj tij, duhet të përmbushë kriterin e afateve të arsyeshme, dhe natyrisht që ky vendim duhet të jetë i

⁵ Shiko për më gjërë vendimin Paykar Yev Haghtanak LTV kundër Armenisë, 21638/03, 20 dhjetor 2007, Gjykata Europiane e të Drejtave të Njeriut,

⁶ Shiko nenin 6 të Konventës Europiane për të Drejtat e Njeriut, nenin 3 të Kodit të Procedurës Penale të Republikës së Shqipërisë,

⁷ Në çështjen Kyprianou kundër Qipros, datë 15 dhjetor 2005, Gjykata Europiane për të Drejtat e Njeriut, ka theksuar se "është shumë e rëndësishme në një shoqëri demokratike që gjykata të ngjallë besim tek publiku dhe tek i akuzuari",

⁸ Shiko nenin 6 dhe 13 të Konventës Europiane për të Drejtat e Njeriut, nenin 43 të Kushtetutës së Republikës së Shqipërisë,

⁹ Kështu gjykata, është shprehur në çështjen Paykar Yev Haghtanak LTV kundër Armenisë, se pagimi i tarifave për akses në gjykatë, nuk përbën një shkelje *per se* të artikullit 6 të konventës. Megjithatë masa e kësaj tarife, e kombinuar me rrethanat e çështjes, ku përfshihet *inter alia* aftësia e aplikantit për t'i paguar ato dhe shkalla në të cilën këto kufizime janë vendosur, janë faktorë të cilët përcaktojnë nëse subjekti gëzon apo jo efektivisht të drejtën për akses në gjykatë. Shiko dhe Strag Datatjanster AB kundër Suedisë, 50664/99, 21 qershor 2005,

¹⁰ Shih *supra* nenin 6,

¹¹ Në çështjen Garyfallou AEBE kundër Greqisë, 18996/91, 24 shtator 1997, gjykata arriti në përfundimin se afati i arsyeshëm kohor ishte shkelur, pasi ky afat ishte i barabartë me mbi 11 vjet. Afati i arsyeshëm kohor sipas saj varet nga rrethanat e çështjes, kompleksiteti i çështjes, sjellja e aplikuesve dhe sjellja e autoriteteve përkatëse, shiko dhe Marpa Zeeland B.V dhe Metal Welding B.V kundër Hollandës, 46300/99, 9 nëntor 2004,

arsyetuar. Kjo e drejtë shërben për ta mbrojtur subjektin nga vonesa të panevojshme, të cilat mund të ndikojnë dhe të kompromentojnë efektivitetin dhe besueshmërinë e sistemit të drejtësisë, dhe gjithashtu shërben për të shmangur rastet kur subjekti i akuzuar qëndron për një periudhë të gjatë kohore në një situatë të pasigurtë në lidhje me gjendjen e tij. Detyrimi për arsyetimin e vendimit është i lidhur ngushtë dhe me të drejtën e personit juridik për akses në gjykatë, pasi në bazë të tij, personi juridik do t'i drejtohet efektivisht instancave më të larta gjyqësore, dhe do të realizojë praktikisht të drejtën për akses në gjykatë.¹²

E drejta për mos tu diskriminuar është një e drejtë tjetër nga e cila përfiton dhe personi juridik.¹³ dhe përbën një garanci më tepër për një gjykatë të drejtë.¹⁴ E drejta për tu informuar, në një gjuhë të cilët subjektet e kuptojnë në detaje, për natyrën dhe shkakun e akuzës përkundrejt tyre, është një aspekt më shumë që garanton procesin e rregullt ligjor ndaj personave juridikë. Gjithashtu në të njëjtën linjë qëndron dhe e drejta për të patur një përkthyes në rastin kur në gjykatë flitet një gjuhë të cilën subjekti nuk e kupton.¹⁵

Në të njëjtën kohë e drejta e mbrojtjes, është një e drejtë që jo vetëm nuk i mohohet personave juridikë, por është e reflektuar kurdoherë në procesin penal.¹⁶ Sigurisht që nuk mundemi gjithmonë të prezumojmë se personi juridik ka të ardhura të mjaftueshme për të siguruar një mbrojtës, prandaj është e domosdoshme që dhe e drejta për mbrojtje falas duhet t'i sigurohet personave juridikë. Me të është e lidhur dhe e drejta për të patur kohë të mjaftueshme dhe lehtësitë e nevojshme për përgatitjen e mbrojtjes.

E drejta e mosvetinkriminimit, është një e drejtë tjetër e cila meriton vëmendje gjatë procesit penal.¹⁷ Kjo e drejtë mbron paraprakisht të pandehurin nga detyrimi për të dhënë deklaratat jashtë vullnetit të tij, pra përfshin pikësëpari të drejtën për të heshtur. Askush nuk mund të detyrohet të japë të dhëna, të flasë, të deklarojë fakte kundër vullnetit të tij. Kjo e drejtë sigurisht që përfshin dhe personat juridikë, dhe si pasojë dhe këto subjekte e kanë të drejtën për të heshtur.¹⁸ Kjo është një e drejtë e cila duhet të respektohet jo vetëm në shkallët e para të gjyqësorit, por gjithashtu duhet të respektohet dhe gjatë instancave më të larta. Sigurisht që personi juridik nuk mund të flasë vetë, nuk mund të dorëzojë vetë dokumente, ai mund t'i bëjë këto veprime nëpërmjet përfaqësuesit të tij, pra nëpërmjet personave fizikë, dhe si rrjedhojë autoritetet duhet të respektojnë

¹² *Supra*,

¹³ Shiko nenin 14 të Konventës Europiane për të Drejtat e Njeriut dhe nenin 18 të Kushtetutës së Republikës së Shqipërisë,

¹⁴ Shiko për më gjërë Religionsgemeinschaft der Zeugen Jehovas kundër Austrisë, 40825/98, 31 korrik 2008,

¹⁵ I referohemi nenit 6/3 të Konventës Europiane për të Drejtat e Njeriut, nenit 31 të Kushtetutës,

¹⁶ Shih shënimin *supra*, neni 6 paragrafi i tretë/b të Konventës Europiane për të Drejtat e Njeriut, nenin 31 të Kushtetutës, dhe nenin 6 të Kodit të Procedurës Penale,

¹⁷ Shiko nenin 6 dhe nenin 32 të Kushtetutës,

¹⁸ Gjykata është shprehur se detyrimi për të dorëzuar dokumente të cilët mund të inkriminojnë personin juridik përbën një shkelje të procesit të rregullt ligjor, pra të së drejtës për tu mos vetinkriminuar, shiko Funke kundër Francës, 10828/84, 23 shkurt 1993, paragrafi 44, Saunders kundër Britanisë së Madhe, 19187/91, paragrafi 70-76, 29 nëntor 1996, ku gjykata thekson se kjo e drejtë zbatohet në të gjitha procedimet penale, pavarësisht llojit të veprës penale dhe pavarësisht kompleksitetit të çështjes,

fillimisht të drejtën e personave juridikë për të heshtur, dhe në një hap të dytë duhet të respektojnë të drejtën e përfaqësuesve dhe punëmarrësve të tyre për të heshtur përsa i përket çështjes në fjalë. Në të njëjtën kohë autoritetet nuk mund të detyrojnë këta të fundit për të mos përfutur nga kjo e drejtë.

Parimi i prezumimit të pafajësisë, aplikohet gjithashtu dhe ndaj personave juridikë.¹⁹ Ky parim i lidhur dhe me parimin *in dubio pro reo*, sigurisht që nuk mund të mungojë gjatë procesit penal pavarësisht subjektit që është i pandehur, pasi përbëjnë parime jetike për procesin, dhe nuk lidhen me veçantitë e subjektit, por duhet të bashkëshoqërojnë dhe të karakterizojnë çdo proces.²⁰

Një e drejtë tjetër nga e cila përfiton dhe personi juridik është dhe e drejta për kompensim kundrejt një vendimi të padrejtë dhe kundrejt shkeljes së të drejtave themelore.²¹ Sigurisht që nëse personi juridik është subjekt i një vendimi të padrejtë, dhe ka zbatuar detyrime që në bazë të ligjit nuk kishte detyrimin për t'i zbatuar, atëherë natyrisht që duke përfutur dhe nga e drejta për akses në gjykatë personi juridik duhet të përfitojë kompensimin e duhur.

Ne bis in idem është natyrisht një nga pasojat kryesore të një procesi penal, dhe natyrisht që nuk është i lidhur vetëm me personat fizikë, por njëkohësisht është i aplikueshëm dhe ndaj personave juridikë.²²

Koncepti i jetës private, e drejta e korrespondencës, sigurisht që shtrihen dhe ndaj personit juridik,²³ prandaj dhe autoritetet janë të detyruara t'i respektojnë këto detyrime.²⁴

¹⁹ Neni 6/2 i Konventës Europiane për të Drejtat e Njeriut,

²⁰ Shiko vendimin Aannemersbedrijf Gebroeders Van Leewen B.V. kundër Hollandës, 32602/96, 25 janar 2000, në të cilin Gjykata Europiane e të Drejtave të Njeriut është shprehur se parimi i prezumimit të pafajësisë do të aplikohet tek personat juridikë njësoj si tek personat fizikë,

²¹ Neni 41 i Konventës Europiane për të Drejtat e Njeriut, neni 44 të Kushtetutës, neni 9 të Kodit të Procedurës Penale,

²² Neni 34 i Kushtetutës, neni 7 i Kodit të Procedurës Penale,

²³ Shiko nenin 8 të Konventës Europiane për të Drejtat e Njeriut, dhe nenin 36, 37 të Kushtetutës,

²⁴ Shiko për më gjërë rreth këtyre koncepteve Funke kundër Francës, 10828/84, 25 shkurt 1993, ku gjykata është shprehur se kufizimet në lidhje me këtë të drejtë duhet të ndjekin një qëllim të ligjshëm, të jenë të domosdoshme në një shoqëri demokratike, në mënyrë që këto kufizime të jenë efektive dhe njëkohësisht jo abuzuese, shiko gjithashtu, Association for European Integration and Human Rights & Ekimdzhiiev kundër Bullgarisë, 62540/00, 28 qershor 2007, dhe njëkohësisht Niemietz kundër Gjermanisë, 13710/88, 16 nëntor 1992, ku gjykata na e shpjegon këtë koncept dhe shtrirjen e tij, si dhe çështjen Colas Est dhe të tjerë kundër Francës, 16 prill 2002, 37971/97, ku përsëri gjykata theksoi se ka ardhur koha që artikulli 8 të interpretohet në mënyrë të tillë që në rrethanë të caktuara të përfshijë dhe zyrat qëndrore të një shoqërie tregtare, degëve të saj ose vendeve të tjera të zhvillimit të aktivitetit, gjithashtu duhet të theksojmë se në këtë rast Gjykata Europiane e Drejtësisë nuk ka përfshirë në konceptin “vendbanim” dhe mjediset e ushtrimit të aktivitetit tregtar. Shiko dhe çështjen Buck kundër Gjermanisë, 41604/98, 28 prill 2005, ndërsa në çështjen, Wieser & Bicos Beteiligungen GmbH kundër Austrisë,

Nullum crimen, nulla poena sine lege,²⁵ aplikohet pa limite dhe ndaj personave juridikë.²⁶ Ai është një ndër parimet që udhëheq procesin penal, dhe si rrjedhojë dhe premisë për ekzistencën e tij, prandaj është e një rëndësie të veçantë që personat juridikë të kenë akses në këtë parim.²⁷

E drejta e pronësisë, është gjithashtu një e drejtë e lidhur ngushtësisht me procesin penal, pasi ajo mbron personat juridikë nga ndërhyrjet që mund të kryejë shteti në të drejtën e tyre të pronësisë nëpërmjet ligjit material dhe procedural penal, duke përjashtuar rastet kur ndërhyrja është ligjore, e nevojshme, proporcionale dhe ka një qëllim legjitim. Kjo e drejtë gjithashtu shërben për të ndaluar konfiskimin apo vendosjen e sanksioneve tepër të mëdha dhe jo proporcionale në bazë të ligjit penal, duke kërkuar në këtë mënyrë vendosjen e rregullave specifike në lidhje me këtë problem.²⁸

E drejta e shprehjes është një e drejtë e cila duhet parë në dy aspekte,²⁹ së pari ligji penal nuk mund të kriminalizojë të drejtën e personave juridikë për tu shprehur, dhe së dyti e drejta për tu shprehur i mbron ato nga detyrimi për të bashkëpunuar me autoritetet.³⁰

74336/01, 16 tetor 2007, gjykata është shprehur se nuk ka se pse të bejë dallime ndërmjet personave fizikë dhe personave juridikë për konceptin e korrespondencës,

²⁵ Shiko nenin 7 të Konventës Europiane për të Drejtat e Njeriut, nenin 29 të Kushtetutës, dhe nenet 2, 3 të Kodit Penal të Republikës së Shqipërisë,

²⁶ Ai nënkupton që vepra penale dhe sanksionet të jenë të parashikuara shprehimisht në ligj, ligji duhet të jetë i aksesueshëm dhe i parashikueshëm,

²⁷ Parimi i ligjshmërisë është një ndër parimet më të rëndësishme. Gjykata në çështjen Radio France dhe të tjerë kundër Francës, 53984/00, 30 mars 2004, është shprehur se veprat penale duhet të jenë qartësisht të përcaktuara dhe të parashikueshme në ligj, paragrafi 17-20. Normat duhet të jenë të përkufizuara saktë, në mënyrë që personat të mund të rregullojnë sjelljen e tyre, individët duhet të jenë në gjendje, madje dhe me këshillimin e duhur të parashikojnë deri në një farë mase pasojat e sjelljes së tyre. Këto pasoja nuk është e nevojshme që të parashikohen me siguri të plotë, por ligji duhet të ruajë stabilitet. Rrjedhimisht, shumë ligje përmbajnë terma të cilat lënë hapësirë për interpretim. Por qëllimi i parashikueshmërisë sipas gjykatës varet dhe nga konteksti i çështjes, fusha që ligji mbulon, numri dhe statusi i personave të cilët ligji i drejtohet. Ligji mundet përsëri të përmbushë detyrimin për parashikueshmërinë pavarësisht faktit se duhet të marrim këshillim ligjor, kjo veçanërisht në rastet kur kemi të bëjmë me persona të cilët kryejnë aktivitete profesionale, të cilët janë mësuar dhe pritet të marrin ndihmë ligjore në ndërmarrjen e veprimeve të caktuara, shiko për më shumë dhe Forminster Enterprises Limited kundër Republikës Çeke, 38238/04, 9 tetor 2008,

²⁸ Shiko çështjen, AGOSI kundër Britanisë së Madhe, 9118/80, 24 tetor 1986, ku gjykata është shprehur se duhet të ekzistojë një lidhje ndërmjet sjelljes kundër ligjit të zotëruesit të pronës dhe pronës së zotëruar, që në rast të shpalljes së pafajësisë atij t'i rikthehet pronësia, si dhe çështjen Forminster Enterprises Limited kundër Republikës Çeke, 38238/04, 9 tetor 2008, ku gjykata thekson se këto kufizime duhet të jenë ligjore dhe proporcionale,

²⁹ Shiko nenin 10 të të Konventës Europiane për të Drejtat e Njeriut,

³⁰ Kështu ato nuk janë të detyruar të dorëzojnë shënime, dokumente, fotografi, filmime, sigurisht me përjashtime të përcaktuara. Shiko për më gjërë çështjen Saňomá Uitgevers B.V. kundër Hollandës, 38224/03, 31 mars 2009, dhe Nordisk Film & TV A/S kundër

Të trajtosh gamën e gjërë të të drejtave në sistemin e drejtësisë penale nuk është e thjeshtë, dhe sigurisht numërimi i të gjithë të drejtave në një artikull do të ishte e vështirë, por, ne, me anë të kësaj qasjeje synojmë të cekim dhe të theksojmë faktin se procesi që përfshin dhe personin juridik është një proces i cili është garant i të drejtave dhe parimeve themelore. Ai, sigurisht është reflektues i dokumenteve të cilat parashikojnë këto të drejta dhe parime, dhe gjatë gjithë procesit vendos në qendër të tij respektimin e tyre. Sigurisht që dhe ky proces reflekton probleme, pasi ai nuk është i përsosur, pasi kjo varet dhe nga mënyra sesi në praktikë personat dhe strukturat përgjegjëse i reflektojnë këto standarte, dhe për shkak të pranisë së këtyre problemeve ekzistojnë dhe shkallët e drejtësisë, por sigurisht që mund të themi se në kuadër të respektimit të të drejtave të njeriut, procesi që ka subjekt dhe personin juridik është promovues i reflektimit dhe respektimit të këtyre të drejtave.³¹

3 E drejta për jetë dhe personi juridik

3.1 Hyrje

Gjithashtu në këtë artikull duam të trajtojmë një nga të drejtat kryesore, e drejta e jetës, e përkthyer për personat juridikë e drejta për të vazhduar aktivitetin e tyre.³² Ky është një dënim që është i parashikuar nga shumë vende dhe përbën një nga dënimet kryesore ndaj personave juridikë.³³ Sigurisht që e kuptojmë që nuk është e njëjta gjë të flasësh për dënimin e personit juridik dhe dënimin e personit fizik, respektivisht me mbarimin dhe vdekjen, por në kuadër të debatit juridik mendojmë se meriton vemendje dhe ky koncept, pasi si rregull kemi të bëjmë me subjekte të së drejtës të cilat meritojnë të trajtohen njësoj përsa i përket mbrojtjes së të drejtave.

3.1 Dënimi me vdekje ndaj personit juridik

Natyrisht që apikimi i të drejtave të njeriut dhe për personin juridik do të ketë specifikat e veta, por a duhet që kjo ndarje të arrijë deri në stadin që për një subjekt të mos pranohet dënimi me vdekje, ndërsa për një subjekt tjetër ky dënim të aplikohet? Në kuadër të parimit të barazisë dhe në kuadër të parimit të mosdiskriminimit një gjë e tillë është e papranueshme, pasi këto subjekte meritojnë trajtim të njëjlojtë nga ligji penal. Por praktikisht një ndarje e tillë bëhet, dhe sigurisht që një ndarje e tillë është mëse e justifikuar në kuadër të situatës kriminale që rëndon ndaj personave juridikë, dhe sigurisht që në kuadër të shkëlqeve që ato kanë kryer ky dënim është proporcional, prandaj, ne,

Danimarkës, 40485/02 , 8 tetor 2005, si dhe *mutatis mutandis* Markt intern Verlag GmbH & Beermann kundër Gjermanisë, 10572/83, 20 nëntor 1989,

³¹ Shiko në lidhje me respektimin e të drejtave të personit juridik në procesin penal edhe P. Van Kempen, Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR, faqe 13-24, <http://www.ejcl.org/143/abs143-20.html>.

³² Kjo është një e drejtë e parashikuar nga neni 1 i Konventës Europiane për të Drejtat e Njeriut, dhe neni 21 i Kushtetutës së Republikës së Shqipërisë,

³³ Në rekomandimin 88(18), Këshilli i Europës e liston si një nga dënimet e mundshme ndaj personave juridikë detyrimin për mbylljen e tij, neni 7 i këtij rekomandimi. Ligji ynë gjithashtu e parashikon si dënim kryesor mbarimin e personit juridik, në nenin 9. Belgjika, Republika Çeke, Franca etj e parashikojnë gjithashtu këtë dënim,

duam dhe të nxjerrim në pah rëndësinë e këtij dënimi si dhe faktin se a përputhet ai me respektimin e të drejtave.³⁴

Nëse do ta konvertonim, sanksionin kryesor që jepet ndaj personave juridikë, mbarimi i tij, me sanksionet ndaj personave fizikë, ai do të përbente dënimin me vdekje. Automatikisht na lind pyetja: *nëse dënimi me vdekje për personat fizikë është i papranueshëm për sistemet e sotme të Drejtësisë*,³⁵ atëherë pse për personat juridikë duhet të lejohet një dënim i tillë?

Sigurisht që në mbrojtje të kësaj kauze në ndihmë na vijnë argumentat që janë dhënë kundër dënimit me vdekje ndaj personave fizikë. Jurisprudenca e ka cilësuar si të papranueshëm dënimin me vdekje të personave fizikë, pasi ky dënim prek thelbin e të drejtës për jetë. Kështu ky është një dënim i cili nuk lidhet me kufizimin e kësaj të drejte por me eliminim përfundimisht të subjektit nga shoqëria.³⁶ Përderisa ky lloj dënimi prek thelbin e së drejtës kur bëhet interpretimi i dënimit me vdekje për personat fizikë, automatikisht që e njëjta llogjikë duhet të ndiqet dhe kur bëhet interpretimi i dënimit me mbarim të personit juridik. Pra, dhe në rastin e personave juridikë, dënimi me mbarim automatikisht do të interpretohej sikur cek thelbin e kësaj të drejte, pasi ai eliminon përfundimisht këto subjekte. Por, në të njëjtën kohë duhet të jemi të ndërgjegjshëm se ndaj personave juridikë nuk mund të aplikohet dënimi me burgim, dhe si rrjedhojë dënimi me mbylljen e tij mbetet një nga dënimet kryesore që mund të aplikohet dhe që mund të ketë efektin e plotë në kuadër të parandalimit të përgjithshëm. Njëkohësisht duhet të theksojmë se aplikimi i tij bëhet vetëm në ato situata të cilat e justifikojnë plotësisht zbatimin e tij.³⁷

Gjithashtu një nga armët më të forta që përdoret kundër dënimit me vdekje është fakti se nëpërmjet aplikimit të tij bëhet e pamundur përmbushja e qëllimit të dënimit, që është edukimi i autorit të veprës penale³⁸. Sigurisht që duhet të cilësojmë se ky dënim nuk përbën rregullin e përgjithshëm, ai jepet vetëm në raste të përcaktuara qartësisht nga ligji,³⁹ pra kur personi juridik është themeluar thjesht si një organizëm që do të shërbente për kryerjen e veprave penale dhe me anë të tij do të bëhej e mundur realizimi i aktiviteteve kriminale, atëherë do të ishte mëse e llogjikshme aplikimi i *dënimit me vdekje* për keta persona juridikë. Kështu duke qënë se personi juridik përbëhet nga persona fizikë, qëllimi i edukimit nëpërmjet dënimit, do të shtrihej tek personat fizikë që e kanë ndërtuar atë. Prandaj me anë të tij do të arrihej jo vetëm edukimi i personave fizikë,

³⁴ Në lidhje me kriteret e kufizimeve të të drejtave shiko nenin 17 të Kushtetutës,

³⁵ Sigurisht që nuk i referohemi të gjithë sistemeve, pasi jemi të vetëdijshëm për aplikimin e dënimit me vdekje nga një sërë vendesh,

³⁶ Shiko për më tepër Aurela Anastasi, E drejta kushtetuese e krahasuar, Tiranë 2009, shtëpia botuese "Dajti 2000", faqe 121-136,

³⁷ Shiko nenin 12 të *lex specialis*,

³⁸ Sigurisht që dhe ndëshkimi i autorit të veprës penale përbën qëllimin e dënimit, por gjithmonë e më shumë rëndësi po i kushtohet funksionit riedukues të tij, në kuadër të integritetit të autorit dhe parandalimit të recidivizmit,

³⁹ Neni 12 i ligjit tonë, *supra*,

parandalimi i posaçëm, por edhe parandalimi i përgjithshëm,⁴⁰ pasi ky dënim do të shërbente si katalizator në tkurrjen e nismave kriminale nga ana e personave juridikë.

Sigurisht që dhe ndaj personave fizikë, në vendet që aplikohet dënimi me vdekje, ai aplikohet në rrethana të caktuara dhe për vepra penale të limituara, por në këto raste bëhet e pamundur realizimi i qëllimit të edukimit, pasi realisht nuk do të kishim më një subjekt të cilin do të synonymim ta rehabilitonim. Ndërsa tek personat juridikë siç e theksuam *supra* pavarësisht se personi juridik nuk do të ekzistonte më, natyrisht që dënimi do t'i shtrinte efektet e tij ndaj personave fizikë, duke realizuar kështu qëllimin e tij.

3.2 Proporcionaliteti dhe garancia e thelbit

Për të qënë më të qartë rreth këtij dënimi, është e nevojshme që ta nënshtrojmë atë kundrejt testit të proporcionalitetit, për të kuptuar nëse ai e kalon këtë test.⁴¹ Kështu, fillimisht duhet të përcaktojmë nëse kemi të bëjmë me shkelje të të drejtave. Siç e kemi theksuar dhe *supra*, në këtë rast kemi të bëjmë me shkelje të së drejtës për jetë, pasi personi juridik privohet nga e drejta për të vazhduar aktivitetin e tij. Por këtu, ne, duhet të bëjmë një dallim, pasi kur ky dënim aplikohet tek personat fizikë, atëherë ai do të konsiderohet se ka prekur thelbin e së drejtës, ndërsa kur ky dënim do të aplikohet ndaj personave juridikë, pavarësisht se në kuadër të parimit të barazisë dhe mosdiskriminimit duhet të arrijmë në përfundimin se ai prek thelbin e së drejtës për jetë, në kuadër të arsytimit që kemi bërë *supra* konkludojmë se një gjë e tillë nuk mund të pranohet *a priori* dhe për personat juridikë. Në vijim të mbrojtjes së tezës që në rastin e personave juridikë pavarësisht se *prima facie* duket sikur kemi të bëjmë me thelbin e së drejtës, theksojmë përsëri që kemi të bëjmë me aplikim të tij në raste të caktuara qartësisht dhe plotësisht nga ligji, pra kemi të bëjmë me raste kur personi juridik e di shumë mirë që pasojat e veprimeve të tij do të jenë pikërisht ato që do të definojnë dhe shuarjen e tij në të ardhmen. Kështu do të ishte *non sens* që nëse një person juridik është krijuar me qëllim kryerjen e veprës penale, ne, të lejonim vazhdimësinë e tij përpos këtij fakti, thjesht nga detyrimi për të respektuar të drejtën e tij për jetë dhe për të mos cekur thelbin e saj. Pra pavarësisht se kemi të bëjmë me privim të kësaj të drejte, dhe pavarësisht se *prima facie* kemi të bëjmë me cekje të thelbit të kësaj të drejte, justifikimi për ekzistencën e këtij dënimi i tejkalon këto pengesa *infra*.

Ky dënim mbetet mënyra e vetme për të arritur objektivat e vendosura nga legjislatori, pasi vetëm në këtë mënyrë realizohet shmangia e kryerjes së veprave penale nga i njëjti person juridik, edukimi i personave fizikë dhe parandalimi i përgjithshëm. Aplikimi i dënimeve të tjera në këto raste specifike do ta bënte të pamundur realizimin e objektivave të tillë, pasi këto dënime nuk janë parashikuar specifikisht për këto raste. Kështu aplikimi vetëm i dënimit me gjobë në këto raste, sigurisht që do të kishte impakt, por ai nuk do të përbënte premisë që më pas ky person juridik i themeluar për kryerjen e veprave penale nuk do ta vazhdonte një karrierë të tillë.

⁴⁰ Për më shumë rreth koncepteve të parandalimit dhe funksioneve të dënimit lexo Ismet Elezi, Skënder Kaçupi, Maksim R. Haxhia, Komentari i Kodit Penal të Republikës së Shqipërisë, Tiranë 2009, shtëpia botuese West Print, faqe 199-200,

⁴¹ Shiko rreth elementëve të këtij testi, Aurela Anastasi, E drejta kushtetuese e krahësuar, Tiranë 2009, shtëpia botuese "Dajti 2000", faqe 121-127, dhe ndër të tjera dhe çështjen Colas Est dhe të tjerë kundër Francës, 16 prill 2002, 37971/97,

Duhet theksojmë se ky dënim është i përcaktuar kurdoherë në ligj, pra është ligji penal ai i cili e ka të përcaktuar dhe të qartësuar zbatimin e tij. Në të njëjtën kohë sqarojmë se sigurisht që ky dënim do të jepet kur ekziston një lidhje e arsyeshme me veprën penale, pra kur plotësohen kushtet e përcaktuara në ligj, dhe si pasojë vetëm në këtë mënyrë mund të arrihet objektivi i synuar nga legjislatori.

Qëllimi i këtij dënimi është ai i cili e përforcon më së shumti nevojën për një dënim të tillë. Ky qëllim konsiston në përmbushjen, arritjen e parandalimit të posacëm dhe të përgjithshëm, në krijimin e terrenit të përshtatshëm ligjor për të pasur një luftë efikase dhe efçente kundër krimit *supra*.

Ky dënim është i domosdoshëm në një shoqëri demokratike, pasi ai i shërben parandalimit të krimit dhe si i tillë i përgjigjet një qëllimi të ligjshëm, duke përfshirë në këtë mënyrë dhe interesin publik brenda tij. Pra nëse do të vendosnim përballë të drejtën për vazhdimësi të personit juridik nga njëra anë, dhe nga ana tjetër interesin publik, i cili konsiston në nevojën për një shoqëri të sigurtë, të pastër nga krimi, mund të konfirmojmë që interesi publik jo vetëm që është real dhe i legjitimuar, por në këtë rast edhe prevalon. Pra nevoja për ndërhyrje është e domosdoshme në kuadër të interesit publik. Gjithashtu nevoja për një dënim të tillë justifikohet nga situata kriminale që ka përfshirë personat juridikë. Kryerja e veprave penale gjithmonë e në rritje, serioziteti dhe rrezikshmëria shoqërore e këtyre veprave penale e bën të domosdoshme dhe një politikë penale të ashpër ndaj këtyre subjekteve.

Kjo analizë na shërben për të kuptuar që aplikimi i këtij dënimi është mëse i domosdoshëm dhe i përligjur. Privimi i të drejtës për vazhdimësi i personit juridik, automatikisht është i lidhur me privimin e të drejtave civile të personave fizikë. Është kjo pasojë, e cila mendojmë së përbën ndryshimin. Prandaj ekzistenca e dënimit me vdekje të personit juridik, pavarësisht se në kuadër të debatit juridik mund të përafrohet me dënimin me vdekje të personave fizikë, praktikisht analiza e mësipërme na tregon se argumentat e përdorura për mosaplikimin e dënimit me vdekje tek personat fizikë, shërbejnë si argumenta për aplikimin e këtij dënimi kundrejt personave juridikë. Kapërcimi i testit të proporcionalitetit e përforcon më tepër këtë zgjidhje. Nëse do ta analizonim *a contrario*, mungesa e një dënimi të tillë do të reflektonte idenë e lejimit të ndërtimit të personave juridikë me qëllim kryerjen e veprave penale, dhe si rrjedhojë dhe kryerjen e veprave penale, prandaj është e nevojshme që drejtësia jo vetëm të jepet, por edhe të ndihet nga qytetarët.

Sigurisht që personin juridik, në kuadër të të drejtave të njeriut duhet ta trajtojmë si të barabartë me personin fizik,⁴² por duhet të theksojmë se gjithmonë duhet të mbajmë parasysh dhe diferencat që ekzistojnë ndërmjet tyre.⁴³

⁴² Rithekojmë dhe një herë se gjithmonë në plan të parë është zbatimi i garancive materiale dhe proceduriale ndaj personit juridik, *supra*,

⁴³ Kështu për shembull dhe Kushtetuta jonë është shprehur se të drejtat dhe liritë themelore zbatohen dhe ndaj personit juridik, për aq sa përputhen me qëllimet e përgjithshme të këtyre personave, pra kuptojmë se dhe vetë Kushtetuta është më fleksible përsa i përket të drejtave të personit juridik,

4 Konkluzione

Njohja e personave juridikë si përfitues të sistemit që pasqyron mbrojtjen ndërkombëtare të të drejtave, përpos faktit se është thelbësore për të garantuar standarte jo te dyfishta në një proces, ka një rëndësi esenciale për zhvillimin e vetë së drejtës dhe rritjen e besimit tek Drejtësia.

Analiza e trajtuar në këtë artikull na tregon se procesi penal ku personi juridik është subjekt, është një proces i cili reflekton standartet e nevojshme për mbrojtjen e të drejtave. Ky proces pasqyron garancitë e parashikuara në dokumentet ndërkombëtare dhe si rrjedhojë personi juridik është përfitues dhe gëzues i të drejtave të mbrojtura prej tyre në kuadër të një procesi të rregullt ligjor. Nëpërmjet pasqyrimin të jurisprudences së Gjykatës Europiane për të Drejtat e Njeriut, ne, mund të konkludojmë, se pavarësisht faktit se kemi të bëjmë me një insitut të ri në shumë vende, procesi penal në të cilin personi juridik është subjekt, është një proces i cili respekton dhe nuk ben dallime për shkak të subjektit. Gjithashtu mund të themi se aplikimi i dënimit me vdekje ndaj këtyre subjekteve është një diferencim që bëhet në kuadër të karakteristikave të posacme që paraqet ky subjekt, ndaj nuk mund ta barazojmë me personin fizik në thelb për cdo aspekt, e si rrjedhojë jemi të detyruar të aplikojmë edhe përjashtime mëse të përligjura.

Marrja si shembull i përvojave të respektimit dhe mbrojtjes së të drejtave në kuadër të personave fizikë, na jep mundësinë që ta përsosim më tej sistemin e mbrojtjes së të drejtave të personave juridikë, duke u afruar më shumë drejt perfeksionimit, dhe ndërtuar në këtë mënyrë një sistem drejtësie i cili reflekton barazi, mbrojtje dhe Drejtësi.

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HËNA E PLOTË BEDËR
UNIVERSITY

Address Rr. "Jordan Misja",
Tirana- Albania
Telefon: +355 4 24 19 200
Fax: +355 4 24 19 333
Web: www.beder.edu.al

