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Editorial

The Centre for European Research and Education is pleased to present the second issue of the Pécs Journal of International and European Law.

Once again, PJIEL looks at topical questions of international and European law from a legal perspective. The second issue is diverse as regards both authors and topics.

In the *Articles* section, Guilherme Lopes Da Cunha and Maeva Szlovik elaborate on the correlation of migration and security and the role of legal regulation from the point of view of human rights and cultural diversity. Veronika Greksza analyses how the European Court of Human Rights interprets and guarantees the right to a healthy environment, and how this relates to the concept of intergenerational equity. The two cases notes of the current issue deal with the relationship between international law and EU law, and national law and EU law, respectively. Ágoston Mohay analyses Opinion 2/13 of the Court of Justice of the European Union regarding the accession of the European Union to the European Convention on Human Rights. Georgina Naszladi looks at a rejection order by the Hungarian Constitutional Court which is relevant regarding the Court's interpretation of the preliminary ruling procedure, touching upon the right to a fair trial as well. As for the section focusing on legal developments in the Western Balkans, Flamur Mrasori assesses compliance with European Union criteria in the light of non-contractual relations. Finally, Gyöngyvér Zsankó reviews the book *The law of the European Union in Hungary: Institutions, processes and the law* by Márton Varju and Ernő Várnay.

We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to become a trustworthy and up-to-date journal of international and European law. The next formal deadline for submission of articles is 15 September 2015, though submissions are welcomed at any time.

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Migration, Security and Law: the Challenge of Human Rights and Cultural Diversity

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Border control is fundamental to the existence of a State. The borders of a territory are of maximum importance to both public administration and national security. However, frequently these two realities are in conflict, when migration is investigated, during times of peace or conflict. It is intended to analyze to what extent the concepts of national security and border clash with the observation of human rights, especially for migrants.

Keywords: security, human rights, migration, national defence, borders

1. Introduction

The State is a political unit, *par excellence*, in the contemporary world. Today, there is an inevitable trend towards the recognition of the human being as the subject of international law,[1] which is against the classic doctrine that only States could exert rights and obligations to act internationally. However, human beings are the lifeblood of the State, and this intellectual opening could locate the human being as a key player in this process: it creates a debate on the need to ensure the security of the State and at the same time to ensure the protection of human rights.

2. State, Border, Security and National Defence

The concept of State holds key elements. The State is a political unit with a population in an organized territory, under a jurisdiction[2]. This synthetic definition has three fundamental aspects: a human element, without which there is no reason to be a State; a geographical feature, the territory where the state projects its authority, the space where a society is organized; and an element of power, sovereignty, something that makes legitimate to set rules, which means exclusivity of jurisdiction of States over their territories[3].

[1] A.A. Cançado Trindade, *Desafios e conquistas do Direito Internacional dos Direitos Humanos no inicio do Século XXI*, In Organization of American States (Ed.), Course in International Law, Inter-American Juridical Committee, Washington 2007, pp 407-490.

[2] A. Slitz, *Nations, States, and Territory*, Berkeley Journal of International Law, Vol. 10, No. 5, 2008, pp 1-39.

[3] Miyoshi Masahiro *Sovereignty and International Law*, in 20th anniversary of the founding of the International Boundaries Research Unit, 1-3 April 2009, Durham, United Kingdom https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi_paper.pdf (20 January 2015).

Thus, considering the elements that involve the construction of the State as legal entity, the importance of the human factor and territorial legitimacy should be stressed out.

Borders –as territory limits of action of a State - are associated with the concept of sovereignty, which is the paradigmatic axis consolidated through Westphalian logic[4]. Representing a key element in the contemporary international system, it sets new rules between peoples, including recognition of reciprocity among States as autonomous entities, the establishment of a regulated International Law and the liberalization of the seas. It also represents the onset of *Raison d´État* and the recognition of sovereignty[5]. In addition, the rise of sovereignty means there is no more space for State recognition through religious arguments. It also means that when the political units begin to accept sovereignty, the notion of border gains more strength to be defended. Moreover, not only the principle of territoriality is established, contributing to the determination of the geographic borders of the sovereign power, but also political autonomy is strengthened, determining the legitimacy of laws that organize the domestic legal-political order.

Therefore, the protection of borders consolidates discussions about the survival of the State. This includes not only the heightened state imposition of domestic authority, but also the State's need to permanently expand influence if it wishes to survive. Consequently, the borders of a State are one of the most sensible areas, mainly when security issues became paradigmatic as after 11th September 2011.

Nevertheless, what kind of security should be analyzed, State or human security? State security has a collective component that includes the intention to protect individuals within a national territory. Human security identifies itself with individual rights in a generic sense[6]. Nonetheless, States must maintain the security of the general population. Many examples illustrate the cardinal importance of this duty *eg.* when terrorist groups and drug dealers try to express political positions through violent extremism. However, to set stereotypes is not always effective, especially when they include cultural and religious elements as a parameter to block borders: there are practices that demonstrate disagreement with international rules on the protection of the human person. In short, borders must be protected and effectively controlled, without migrant criminalization[7].

Traditionally, migration has been treated as a phenomenon associated with technical and geographical criteria. Human mobility is among the oldest historical evidences: for 20 thousand years, mankind migrated from Africa to Asia and then to other parts of the world[8]. However, in the contemporary world, migration operate differently: it became a political, economic and legal matter[9].

In this sense, the borders have multiple facets. Physically, they may be open, regulated, or enclosured by fences. The open ones have easy or facilitated access and the regulated ones are marked by ostensive

[4] The Treaties of Mhe Tre and Osnabrsna 1648, also known as "Westphalia treaties". With these treaties the Thirty Years War ended, which was a major conflict between Catholics and Protestants in the Holy Roman Empire and involved the major powers in Europe. These peace treaties left an important legacy for the formation of the international system.

[5] The policy conceived by Cardinal Richelieu established a watershed in the relations among political units, since it promoted the reinforcement of self-interest and self-determination. It contributed to assure religion and politics as different matters and consolidate indigenous source of political power.

[6] According to: H. Mahmud & M.M. Quaisar & M.A. Sabur, & S. Tamanna, *Human Security or National Security: the Problems and Prospects of the Norm of Human Security*, Journal of Politics and Law, Vol.1, No. 4, December 2008, pp. 67-72; The Human Development Report (1994).

[7] V.O. Batista, O fluxo migratório mundial e o paradigma contemporâneo de segurança migratória, Revista Versus Vol. 3, Rio de Janeiro, July 2009, pp. 68-78.

[8] V.O. Batista, O fluxo migratório mundial e o paradigma contemporâneo de segurança migratória, Revista Versus, Vol. 3, Rio de Janeiro, July 2009, pp. 68-78.

[9] According to the immigration policy of each State the migrants can be fixed temporarily in territories, based on the interests of the national authority.

policing. The barbed wire is usually used to make more difficult to cross the border and it translates the intention to suppress migration. The existence of border-walls goes back to early historical times, when rulers used them to create effective protection and insolation. Thought, they can also be noticed in recent times *inter alia* between Mexico and the United States, and at the Israel – Palestine border. These are one of the most gruesome barriers nowadays[10].

Border control can follow a classic or a modern model. Classic control can be seen as said above, through examples such as open, regulated, fenced or walled borders, militarized or not, with or without checkpoints. Nonetheless, modern methods of control comprise biometric recognition, through the iris mapping, digital fingerprint detection, electronic passports control and facial recognition[11]. Besides, there are cases in which neutral zones were created, also known as Buffer Zones, representing geographical boundaries erected to counter the peripheral populations[12] or restrict access to specific areas[13].

Safety as a timeless and increasingly important issue in the contemporary age has great background. Even before the rise of the modern state, power and wealth were considered essential in the management of political unity. As an example Kautilya illustrated already at 300 BC the seminal importance of armies, fortifications, alliances and political leadership in the book *Arthashastra*. The European *intelligentsia* improved the debate 18 centuries later, when Niccolò Machiavelli, in the book *The Prince*[14], developed interpretations of the major foundations of modern political thought, in which security and the concept of *Raison d'État* are burning issues[15]. Thomas Hobbes, in *The Leviathan*, emphasizes the idea that the state of nature should be always considered so people would not relapse into it[16]. Hence, according to him, defense, surveillance and vigilance are fundamental for the maintenance of one's existence. Moreover, Sir William Petty in the books *A Treatise of Taxes and Contributions* (1662) and *Political Arithmetic Posthum* (1690), regards safety as a priority: it is not only a significant issue *per se* but it is also the main reason for the building up of the economic and military resources of the State.[17] Although gradually

[10] There are other borders controlled by conventional means *e.g.* between India and Bangladesh, India and Pakistan, Spain and Morocco, Botswana and Zimbabwe (in this case for containment of diseases, such as Foot-and-mouth disease).

[11] Portugal and Australia are highlighted in these control means. Portugal used the RAPID system, which no longer requires human intervention, introduced at first time in 2008. Australia developed the SmartGate system, which is also based on electronic passport control and face recognition (Frontex, 2010, p. 6). For more precision : S. Slama, *Politique d'immigration: un laboratoire de la frénésie sécuritaire* in L. Mucchielli (Ed.) La frénésie sécuritaire. Retour à l'ordre et nouveau contrôle social, Éditions La Découverte, Paris 2008. pp. 64-76 ; L. Amoore, *Biometric borders: governing mobilities* in *The war terror*, Political Geography, Vol. 25, No. 3, March 2006, pp. 336-351; Frontex *Biopass II : Automated biometric border crossing system based on electronic passports and facial recognition - RAPID and SmartGate* (EEC) 2010.

[12] R.A. Del Sarto, *Borderlands: The Middle East and North Africa as the EU´s Southern Buffer Zone* in D. Bechev & K. Nicolaidis (Eds.) Mediterranean Frontiers: borders, conflicts and memory in a transnational World, 1edn, Tauris Academic Studies, London 2009, pp. 149-165.

[13] United Nations *Between the fence and a hard place: the humanitarian impact of Israeli-imposed restrictions on access to land and sea in the Gaza Strip* in Special Focus, August 2010, World Food Program. Among other cases, one of the most significant is the Israel constraint which is called green line, and on which Palestinians cannot practice agriculture or fishing, because it says that this will prevent attacks by Palestinian armed groups. However, this policy has had an impact on the life of 180,000 people because of its implementation in 2007, UN, 2010, p. 33.

[14] N. Machiavelli, *O Príncipe*, 33rd edn., Ediouro, Rio de Janeiro 2000.

[15] During the Thirty Years War, France acted in favor of the Protestant and against the Catholic faction, wishing not only to strengthen its own position in Europe, but also to contain the power of Spain and Austria. It aggregated new values into contemporary diplomacy throughout the Cardinal Richelieu administration (Carneiro, 2011, p. 176).

[16] T. Hobbes, *The Leviathan*, Oxford University Press, Oxford 2008.

[17] "*The Publick Charges of a State, are, That of its Defense by Land and Sea, of its Peace at home and abroad, as also of its honorable vindication from the injuries of other States; all which we may call the Charge of the Militia, which commonly is in ordinary as great as any other Branch of the whole ; but extraordinary (that is, in time of War, or fear of War) is much greater*" W. Petty, Aritmetica Politica, Sao Paulo, Abril Cultural, 1662/1983, p. 18.

security became a deep intellectual field, in the late twentieth century researchers complained of insufficient reflection on the matter[18].

In contemporary times, the arguments in connection with security and defense are based on political speeches. States are influenced by national interests do not follow the relevant principles of international law. Despite of the decrease in militarization in the recent past, the adopted practices effectively consider human rights are still unsatisfying.

3. Security and Human Rights in International Migration

The article 13 of the Universal Declaration of Human Rights establishes that "Everyone has the right to freedom of movement and residence within the borders of each state, and everyone has the right to leave any country, including his own, and to return to his country"[19].

Through this article the Universal Declaration of Human Rights articulates the freedom of movement *inter alia* from one State to another[20]. However, the report which can be drawn up today is no cause for celebration: freedom of movement remains very imperfectly[21]. Indeed, certain sources of international law contain limitations to this right. For example the International Covenant on Civil and Political Rights stresses out in its article 12 paragraph (3) that these "rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant"[22].

The absence of a common international definition of the concept of "National Security" leads States to use "all the sources", which sometimes leads to criticism. In fact, this unless common definition has an impact on some human rights, in particular, on the fundamental freedom of movement[23]. We shall see that this is the case in the discussion of the 13th November 2014's French law that aims in particular to forbid some of the French nationals to leave the French national territory so as to prevent the "free movement" of potential terrorists.

As mentioned before, there is no common definition of "National Security" in the field of Migration. States develop their own interpretation of this concept[24]. Indeed, as the notion of law and order, "National Security" turns out at first sight indefinable, because it is peculiar to each State.

[18] B. Buzan, *People, State and fear*, 1edn., Wheatsheaf Books, Sussex, 1983, p.1.

[19] The Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948, Resolution 217 A (III).

[20] However, it is also in the same territory. The context of the time urged for an improved possibility of migration through the reduction of border obstacles and also urged for a strengthening of human rights more broadly.

[21] We can see that the States put the aliens into categories.

[22] The International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by General Assembly, Resolution 2200A (XXI) of 16th December 1966 and entered into force on 23rd March 1976.

[23] We use here fundamental freedom of movement in the global direction of the term but it is important to stress that there exists an asymmetry between the emigration which is recognized as a human right and the immigration which is considered as a question of national sovereignty.

[24] The concept of security is treated here under a wide angle and following the definition given by Salmon J. in *Sécurité de l'État sur son propre territoire contre les dangers internes. La notion se confond ici avec celle de sûreté nationale et ordre public* 2001, p.1025.

As reminded by the former Canadian Minister of Foreign Affairs, Lloyd Axworthy, the first objective of National Security consists of protecting territorial integrity and political sovereignty against outside attacks[25].

The demarcation of this concept thus remains dependent on the discretionary power of States by virtue of the principle of national sovereignty. Here, it is necessary to understand the principle of national sovereignty in the direction defined by Jules Basdevant given during his course at The Hague Academy of International Law[26]. This principle corroborates a classic definition that the State does not contain limitation *rationae personae* or limitation *rationae materiae*. The only limitation is *rationae loci*, which is a territorial limitation.

Nevertheless, the attributes of the sovereignty evoke the principle of the obligation of the State to submit itself to International Law. This compounds the principle of sovereignty as well as imposes limitations of the exercise of the human rights protection[27]. Therefore, a common definition is essential in order to guarantee the human rights protection and free movement.

3.1. The 13th November 2014's French Law: Restricting Freedom of Movement

The concept of "national security" is used to curb the freedom of movement. Indeed, we can notice that more and more States justify a limitation and even a violation of human rights on a preventive base. According to the 13th November 2014's French law "Strengthening measures relative to the fight against terrorism,"[28] citizens could not leave or come back to the national territory when there were reasons for believing that their traveling had a terrorist purpose or that their return would strike a blow at law and order.

This law is clearly open to criticism because it restricts the freedom of movement of the some French citizens, based on an allegation of protection of "national security". This law would be in against of numerous international texts as the article 13 paragraph 2 of the Universal Declaration of Human Rights or the article 2 paragraph 2 of the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the Protocol No.11, that also guarantees specific rights. It demonstrates that criminalization of migrants has been used by States to legitimize a national legislation, with no respect for fundamental rights.

[25] In 1996 Canada, led by Foreign Minister Lloyd Axworthy, the Freedom from Fear approach was adopted as the principle of its foreign policy, Tadjbakhsh 2009, p. 5.

[26] He defines the sovereign power as "The power to decide in a completely free way and without being subjected to any rule, the sovereign power of the State is incompatible with the existence of international law." (personal translation), in Basdevant Jules, *Les règles du droit de la paix*, R.C.A.D.I., t. 58, 1936-IV, p. 578-582 ; Politis N., *Le problème de la limitation de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*, R.C.A.D.I., t. 6, 1925,-I, pp. 12-14.

[27] For more details on sovereign power and international law, you can consult Sarolea Sylvie 2006, pp. 19-30.

[28] Law No. 2014-1353 of November 13th, 2014, *JORF* No. 0263 of November, 14th 2014, p. 19162, which intervenes in a series of concrete measures within the framework of the European Union, elaborated during a working meeting on initiative of France and Belgium, held on July 7th, 2014. We can specify that the first implementing decree of this law was adopted on January, 14th 2015 (Decree No. 2015-26 of January, 14th, 2015, *JORF* No. 0012 of January, 15th, 2015, p. 629), just after the French attacks in Paris. This decree concerns the prohibition on exit of the territory of the French nationals that could intend to participate in terrorist activities abroad.

3.2. National Security and the Freedom of Movement in the European Union

Today, we witness an opening of the borders, although a pernicious effect contributes to strengthening the controls against the flow of people between regions. This has been justified by the necessity to protect national interests. Within the European Union, the EU citizens have the right of free movement. It is gradually more difficult for not EU citizens to cross the European Union's borders, because of the new regulation instruments for border control that are being erected in the European Union[29].

Originally, the free movement of persons aimed to facilitate the migration of workers between member states in the European Union. However, the evolution came true in a larger direction: there is a process of free movement between European Union members, which are not restrict for workers[30].

In fact, the European Union made an effort to create a "space of freedom, security and justice" open for all European Union citizens. The freedom of movement became one of the objectives of the Union[31]. The article 67 paragraph 1 of the Treaty on the Functioning of the European Union (from now on TFEU) establishes the general principles concerning the realization of this "space of freedom, security and justice" because it indicates that the "Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States". The paragraph 1 is completed with the paragraph 2[32] and asserts very clearly the intention to build a common policy on migrations: this is confirmed by the article 21 paragraph 1 of the TFEU which indicates clearly that "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

As reminded by the European Court of Justice in 2008, the right of a citizen to leave his own country can be restricted only when "the personal conduct of that national constitutes a genuine, present and sufficiently serious threat to fundamental interests of society and the measure does not go beyond what is necessary to attain it."[33]

Here, as in the national legislations, these articles remain very indistinct and incomplete[34]. This indistinctness can favor misuses, in particular, towards the freedom of movement of EU citizens. It is important to remember that each State has its own definition of the "national security" and the "public policy" and that there is at the moment no common definition for both these concepts in the European

[29] *E.g.* with the implementation of police forces of control which make almost impossible the crossing of certain borders of the European Union, for example of the difficult crossing of the borders by Gibraltar because of the strengthening of the controls in Morocco. We have to remind that the European Union attributes each year financial supports for these cross-border countries without to be preoccupied by the respect for human rights by these countries. European Union releases a part of its responsibility by this process.

[30] The free traffic of European citizens allows integrating a bigger number of persons and the granting of a bigger number of rights.

[31] This free circulation evolved step by step. Firstly, the Schengen agreement spurred a process of cooperation which allowed creating the European Union as a space of freedom without internal borders. Then, the Amsterdam Treaty allowed a "space of freedom, security and justice", complemented by the Lisbon Treaty, which made it one of the main objectives of the European Union. More recently the elaboration of the Stockholm Program occurred, which provides a new roadmap to these subjects. Today the Schengen area covers 26 States of the European Union, four non-member States of the European Union (Iceland, Liechtenstein, Norway, Swiss) and three de facto European micro-states (Monaco, San Marino, and Vatican).

[32] This paragraph specifies that the Union "shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals".

[33] Case C-33/07, Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v. Gheorghe Jipa 2008.

[34] These limitations are referred to in Arts. 45§ (3) and 52§(1) of the Treaty on the functioning of the European Union and this limitation is resumed by the right by-product with the Directive No. 2004 / 38 in its Art 27.

Union law. So the EU law opted for a supervision of these concepts in their scope and in their effects. This supervision allows protecting in particular the freedom of movement.

Nevertheless, it is important to observe that, in spite of an increasing will of the European Union to strengthen migrant rights, the European Union "shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States"[35]. However, despite this frame, man could think that over the European Union territory looms the presence of some sort of "transparent borders".

In the clearing of the outside borders, the European Union delegates more and more administrative functions to certain agencies in the field of control of borders and in the application of the legislation of international protection.[36] Nevertheless, it is important to remember that the European Union as well as its Member States undertook through numerous sources of international law to respect and to protect human rights. These commitments pushed the European Union to set up effective mechanisms of control in order to ensure the respect for fundamental rights in the various activities of its agencies. Indeed, in time these agencies began to become emancipated and more and more criticisms are made towards the functioning and the activity of these agencies. For example, the agency FRONTEX[37] "suffered" numerous criticisms on its operating modes, notably concerning the absence of differentiation in its methods of assessment or even the interventions outside the territory of the European Union.

The European Union decided to react with the adoption of Regulation 1168/2011/EU.[38] In addition to this regulation, a consultative forum and an officer of the fundamental rights were set up to control the FRONTEX agency. Even more recently, the European Union created a European system of surveillance of the borders (EUROSUR). The aim of EUROSUR is the progressive implementation of a "system of the systems" to improve the knowledge of the situation and increase the States' capacities of reaction to fight "against irregular immigration and against cross-border crime"[39].

But even here, it is necessary to pay attention that perverse effects do not hinder the good functioning and that this system of cross-border control does not strengthen a European security policy to the detriment of the respect and of the conservation of human rights.

4. Conclusion

To protect and strengthen the rights of migrants, it is essential to elaborate at the international level a common bundle of indications allowing a clear and precise definition of "National Security" within the international Community which would avoid numerous abnormalities realized by States.

[35] Art. 5§(2) of Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, 2007, OJ C326.

[36] *E.g.* FRONTEX, EUROJUST, EUROPOL or even more recently EUROSUR.

[37] The FRONTEX agency (European Agency for the management of the outside borders) was organized with the Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Frontiers. You can consult FRONTEX on: http://frontex.europa.eu/assets/About_Frontex/frontex_regulation_en.pdf. Frontex official website: http://frontex.europa.eu/.

[38] This regulation modifies the 2007/2004/EC Frontex regulation.

[39] Regulation EU No. 1052/2013 of 22th October 2013 establishing the European Border Surveillance System (EUROSUR) 2013, OJ L 295/11.

Thus, the conservation and the intensification of the rights of migrants for the borders also have to pass through a better frame of analysis for the agencies of surveillance and control on the borders. The intensification of rights also has to be undergirded by States and regional institutions when these exist and are concerned. And finally, we could not imagine – as Antoine Pécoud and Paul De Guchteneire [40] propose – the creation of a world without borders, where border controls would be abolished and where people could move freely worldwide because at the national level, the States don't be ready for that and at the international level, the instruments of protection of the free circulation and more widely rights of the migrants are still too scattered.

[40] Pécoud A., De Guchteneire P., *Migrations sans frontières, essais sur la libre circulation des personnes*, Paris, Unesco 2009, p. 383.

Questions of a Comprehensive Protection of the Right to a Healthy Environment in Strasbourg

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Intergenerational equity expresses the responsibility of every generation to give over the Earth to future generations in a condition not worse than in which it was received from previous generations. It forms the basis of the well-known term 'sustainable development' which plays a major role in international environmental protection policy. Intergenerational equity is connected with the right to a healthy environment too, as this right intends to protect not only the present generation but future generation as well. Yet how does the European Court of Human Rights take into account the interests of future generations?

Keywords: human right to a healthy environment, intergenerational equity, intragenerational equity, sustainable development, environmental protection, human rights protection, ECtHR case law

1. Introduction

The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter Convention or ECHR) is the most significant cornerstone of human rights protection in Europe. Despite the ongoing debate on the interdependent and indivisible relationship between human rights and the environment, the right to a healthy environment is not included explicitly among the human rights protected by the Convention. However, based on the living instrument character of the Convention, the European Court of Human Rights (hereinafter Strasbourg Court or ECtHR) derived this right from other provisions of the Convention. Is this kind of indirect regulation of the right to a healthy environment sufficient in a Convention which represents the basis of the European human rights protection? The first step towards answering this question is to examine the right to a healthy environment through all its aspects. The present paper argues that one significant aspect of the right to a healthy environment is intergenerational equity. Intergenerational equity does not only form the basis of the term sustainable development, but it is also strongly related with the right to a healthy environment, as this right intends to protect the present generation and the future generation as well. Yet how does the Strasbourg Court assure the right to a healthy environment? Does it consider – if possible at all – the interests of the future generation regarding the right to a healthy environment?

[1] This article is part of the author's doctoral research. Any comments, advice, questions or criticism about this article are most appreciated (e-mail: greksza.veronika@ajk.pte.hu).

Grateful thanks for the help and the support of Johannes Lukas Hermann.

2. Main Terms

In order to understand the connections between the interests of the future generation and the right to a healthy environment, a short clarification of the main terms such as environment, sustainable development, inter- and intragenerational equity and the right to a healthy environment is helpful.

2.1 Environment

There is no widely accepted definition of the term environment in international law. However, its content was determined *inter alia* by the Council of Europe. According to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, signed 1993 in Lugano, "environment" includes natural resources such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape.[2] As stated by the International Court of Justice "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."[3] Therefore, not only the present generation but also the unborn – *i.e.* future – generation is related to the environment. Environmental pollution affects our present living space and could endanger that of the future generation as well. Hence, future generation is interested in nowadays environmental protection. Yet what is the connection between environmental protection and sustainable development and how is the future generation concerned thereby? The answers to these questions may be found by taking a closer look at relevant UN declarations.

At the 1972 United Nations Conference on the Human Environment, which was held in Stockholm and symbolizes the beginning of international environmental law, the so-called Stockholm Declaration was adopted. The second paragraph of this legally non-binding declaration states that "protection and improvement of the human environment affect the well-being of peoples and economic development throughout the world."[4] The 11th Principle of the declaration articulates that "the environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all."[5] The connection between environment and development was more strongly articulated in the 4th Principle of the Rio Declaration, which was adopted in 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro. It states that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[6]

In line with the above, the conclusion could be the following: Protection of the environment and development are interdependent and indivisible – one cannot be effectively achieved without the other. However, this is only true if the development is sustainable.

[2] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment Art. 2 (10).

[3] Legality of the Threat or Use of Nuclear Weapons, Advisory opinion of 8 July 1996, ICJ Reports pp.19, paragraph 29.

[4] Paragraph 2, Declaration of the United Nations Conference on the Human Environment.

[5] Principle 11, Declaration of the United Nations Conference on the Human Environment.

[6] Principle 4, Rio Declaration on Environment and Development.

2.2 Sustainable Development

The concept of sustainable development was developed by the international community in 1987 as an answer to increasingly prominent environmental issues. Sustainable development has no clear definition despite the fact that it dominates international environmental policy since the end of the 1980s.[7] Two sources of international law form the basis of the debate on sustainable development: On the one hand, the Report of the World Commission on Environment and Development from 1987 (commonly known as Our Common Future Report or as Brundtland Report) and on the other hand, the 1992 Rio Declaration on Environment and Development. The Brundtland Report states that "sustainable development is a development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[8] As stated by Ludwig Krämer, the Brundtland-formula is hardly helpful as it defines a term – development with a special quality (sustainability) – with the term itself.[9] So far, the content of sustainable development is not sufficiently specified and due to its inconsistent use the term has been significantly diluted. What is clear is that the concept of sustainable development is based on complementary and equal pillars of economic, social and environmental aspects as it was first conceived in the 2002 Johannesburg Declaration on Sustainable Development.[10] However, there is a lack of consistency between the three components of sustainability, since the economic interests often override environmental considerations in the political decision making. The concept of sustainable development as it appears in the Rio Declaration is a typically anthropocentric term, because human beings are at the centre of concerns for sustainable development.[11] As sustainable development is indivisible from intergenerational equity,[12] not only the present human beings but the past and the future generation as well are in the focus of this concept.[13]

2.3 Intergenerational and Intragenerational Equity

Intergenerational equity is a much discussed topic of environmental law. It expresses the responsibility of the prevailing present generation to give over the Earth to the following – future – generation in the same condition as it was received from the past generation.[14] In legal terms, the present generation is entitled to environmental rights ensured by the past generation and has an environmental obligation to provide the future generation with the same rights. Also described as "fairness to future generations", intergenerational equity means in other words that the human species holds the environment in common with all members of our species: past, present and the future generations.[15] Thus, "as members of the

[7] Alexandre Kiss & Dinah Shelton, *Guide to International Environmental Law*, Martinus Nijhoff Publishers, Boston 2007, p. 97.

[8] Chapter 2 paragraph 1, Report of the World Commission on Environment and Development: Our Common Future.

[9] Ludwig Krämer, on the 25th April at the conference "*Model Institutions for a Sustainable Future*" in Budapest in 2014.

[10] Paragraph 5, Johannesburg Declaration on Sustainable Development.

[11] Principle 1, Rio Declaration on Environment and Development.

[12] See chapter no. 2.1.

[13] Principle 1, Rio Declaration on Environment and Development.

[14] Experts like Edit Brown Weiss use the terms "past generations", "present generations" and "future generations" in plural. In the present paper these terms are used in singular as there is always only one prevailing present generation who has rights and duties regarding the past generation and the future generation.

[15] Weiss, *Our Rights and Obligations to Future Generations for the Environment* in Steve Vanderheiden (Ed.) Environmental Rights UK 2012, pp. 384-386.

present generation, we hold the earth in trust for future generations. At the same time we are beneficiaries entitled to use and benefit from it."[16]

If the Brundtland definition of sustainable development[17] is compared with the one of intergenerational equity, it becomes clear that a development can only be sustainable if intergenerational equity is provided. Thus, intergenerational equity is part of sustainable development; more precisely, it is the foundation for sustainable development.

The term intergenerational equity should not be confused with *intragenerational equity* which exists between people of the same generation as there are obligations and rights between the members of that generation. However, "meeting the needs of the present generation without compromising the ability of future generations to meet their own needs"[18] is only possible if the equity between the members of the present generation works: People living today cannot be expected to fulfil intergenerational equity if they are not able to meet their own basic needs.[19] Thus, intergenerational equity cannot be achieved without intragenerational equity.[20]

In summary, it can be stated that the present generation as a collective has environmental rights and obligations based on intergenerational equity. At the same time, the members of the present generation as individuals or collective entities have environmental rights and obligations based on intragenerational equity. Subsequently, it is examined what kind of environmental rights and obligations are concerned by inter- and intragenerational equity.

2.4 The Right to a Healthy Environment

2.4.1 Overview

The right to a healthy environment has two dimensions: a collective and an individual one. On the one hand, the present generation as a *collective* is provided with the right to an environment with a conserved quality by the past generation. On the one hand, the members of the present generation as *individuals* are entitled to an environment with a certain quality (substantive part of the right) and to access to information, to participate in decision making, and to access to justice in environmental matters (three procedural rights).

2.4.2 The Collective Right

Obliged by inter- and intragenerational equity, the present generation shall conserve the diversity of the natural and cultural resource base, maintain the quality of the environment and provide the future generation with equitable access to this legacy.[21] It has a positive obligation to preserve the quality of the environment and a negative obligation not to destroy or pollute the environment for the following

[16] Weiss 2012, p. 385.

[17] See chapter no. 2.2.

[18] Chapter 2 paragraph 1, Report of the World Commission on Environment and Development: Our Common Future.

[19] To define the „basic needs of a present generation" is decisive as well.

[20] *E.g.* paragraph 8 Budapest Memorandum, which was signed by the participants of the Conference of Model Institutions for a Sustainable Future held in Budapest, 24 - 26 April 2014. Signed *inter alia* by Judge C.G. Weeramantry, Dinah Shelton, Edith Brown Weiss and Ludwig Krämer.

[21] Weiss 2012, pp. 388-389.

generation. At the same time the present generation has the right to an environment with a conserved quality, provided by the past generation (substantive part of the right to a healthy environment). Subjects of this environmental right are the generations, more precisely the collective entities of a given generation *e.g.* peoples or group of individuals. Therefore the right has a collective character. Since this right focusses on human beings, the questions arise if it is a human right and whether a collective environmental right can be a human right at all?

In order to answer this question a closer look at the relationship between human rights and the quality of environment is needed. This link is widely accepted. The protection of human rights is based on the respect for human life, and the quality of human life rests upon maintaining a liveable planet. Both environmental protection and human rights protection aim to ensure better life conditions. Environmental pollution could endanger or infringe human rights such as the right to life. Thus, maintaining a high quality of environment is inseparable from human rights protection. The essence of this viewpoint was articulated by Christopher Gregory Weeramantry, judge and former vice president of the International Court of Justice. In his often quoted separate opinion in the judgment concerning the Gabčíkovo-Nagymaros project[22] he wrote that the protection of the environment as the right to development is a „vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights [...].”[23]

As a consequence, the existence of a safe and healthy environment constitutes a precondition of several human rights (*inter alia* the fundamental rights to life, to health, to private life and family and to property).[24] Thus, an enforceable collective right to a healthy environment would contribute not only to a better environmental protection but also to a higher level of protection and to a more efficient enforcement of human rights. Furthermore, it is not unusual for the human rights concept to have a collective or a group as the subject of a right, especially in the given case: The right to a healthy environment just as the right to development or the right to peace are widely accepted as third-generational human rights, which are also called ‘solidarity rights’.[25] These rights are usually associated not only with individuals but with a group of people or collective entities.[26] On these grounds, the collective right to a healthy environment in my opinion constitutes a human right.[27]

[22] Hungary suspended the completion of the 1977 Budapest Treaty on the Gabčíkovo-Nagymaros barrage system alleging that it entailed grave risks to the environment and the water supply in 1989. Slovakia denied these allegations and insisted that Hungary carry out its treaty obligations. Slovakia put into operation an alternative project only on Slovak territory, whose operation had huge effects on Hungary's access to the water of the Danube. Hungary and Slovakia notified jointly to the International Court of Justice regarding the implementation and the termination of the mentioned treaty in 1993. The International Court of Justice found that both Hungary and Slovakia had breached their legal obligations. See the Judgement of the ICJ at http://www.icj-cij.org/docket/files/92/7375.pdf (10. March 2015).

[23] Part A (b) “*Environmental Protection as a Principle of International Law*” in Separate opinion of Christopher Gregory Weeramantry in *Case Concerning the Gabcíkovo-Nagymaros Project* (Hungary/Slovakia).

[24] See in more details Donald K. Anton & Dinah L. Shelton, *Environmental Protection and Human Rights*, Cambridge University Press, 2011.

[25] According to Karel Vasak, who used this term first in 1977, the human rights could be divided into three groups: civil and political rights as first generational human rights; economic, social and cultural rights as second generational human rights; and solidarity or third-generational human rights.

[26] *E.g.* Karel Vasak, United Nations Educational, Scientific and Cultural Organisation Courier, 1977; Stephen Turner, *A substantive environmental right: an examination of legal obligations of decision makers towards the environment*, Kluwer Law International, The Netherlands 2009, p. 16.

[27] This collective right can also have a procedural side. To entitle collectives with procedural environmental rights is not new in the international law. The Aarhus Convention for example sets out the right to access to “environmental information” of non-governmental organizations.

2.4.3 The Individual Right

The 1st Principle of the Stockholm Declaration states that „man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations." This definition highlights that the right to a healthy environment intends to protect not only the present but the future generation as well. However, not all environmental issues concern the interests of the future generation and raise intergenerational questions.[28] Furthermore, not only collectives of a generation, but also individuals are entitled to environmental rights as environmental issues can affect individual human rights as well.

A look at various forms of international regulation of the right to a healthy environment shows that individuals as subjects of this human right are entitled to an environment with a certain quality. In addition to this substantive aspect, the right to a healthy environment includes three procedural rights: access to information, access to justice and participation in decision making in environmental matters.[29] The three procedural aspects of the right to a healthy environment were explicitly formulated *inter alia* in the 10th Principle of the Rio Declaration.[30] They were expanded in the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (commonly known as Aarhus Convention), which entered into force in 2001. This convention is the most far-reaching international treaty with minimum standards for the procedural aspects of the right to a healthy environment. It is a milestone regarding the regulation not only because of the expansion of the three procedural rights but also because of its enforceable character.[31]

3. Right to a Healthy Environment in the ECHR

The European Convention on Human Rights is one of the most influential international treaties established under the aegis of the Council of Europe. It entered into force in 1953 and became the most significant cornerstone of the human rights protection in Europe. The human rights ensured in the Convention are guaranteed by the Strasbourg-based European Court of Human Rights: private persons are entitled to start a procedure against a signatory state of the Convention before this court regarding human rights infringements. The importance of the Convention is also shown by the fact that only those states can become members of the Council of Europe which have ratified the Convention and accepted the right for individual application and the jurisdiction of the Strasbourg Court.

[28] *E.g.* noise pollution does not infringe the rights of the future generation to a healthy environment.

[29] *E.g.* Art. 11 European Social Charter (1961); Principle 1 Stockholm Declaration (1972); Principle 23 World Charter for Nature (1981); Art. 24 African Charter on Human and Peoples` Rights (1981); I (1) Report of the World Commission on Environment and Development: Our Common Future (1987); Art.11 (1) Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988); Hague Declaration on the Environment (1989); I Art. 1-2 European Charter on Environment and Health (1989); Reports on Human Rights and Environment of Fatma Zohra Ksentini (1991-1994); UN Resolution A/RES/45/94 (1990); Principle 10 Rio Declaration (1992); Draft Declaration of Principles on Human Rights and the Environment (1994); Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (1998); UN Secretary-General report on Relationship Between Human Rights and the Environment (2005); Art. 29 United Nations Declaration on the Rights of Indigenous Peoples (2007).

[30] "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[31] An eight membered „Compliance Committee" checks the compliance of the Aarhus Convention, whose members are elected individually and represent no country or organisation.

At the time when the Convention was created, the states have not yet faced significant environmental problems which would have made the regulation of such a fundamental right necessary in the framework of the Convention. Therefore, the right to a healthy environment is not included explicitly among the human rights protected by the Convention. The idea to amend the Convention regarding the right to a healthy environment only arose in 1999.

Even though the ECHR does not provide an explicit right to a healthy environment, the Court dealt with many cases on "social" issues such as the environment. Obviously, the human rights declared in the Convention serve as a framework for the ECtHR case law. The Strasbourg Court, however, interprets the text of the Convention in the light of present-day circumstances. The interpretation of the Convention as a "living instrument" guarantees the effective and not illusory protection of human rights and fundamental freedoms.[32] Thanks to this dynamic reading of the Convention, the right to a healthy environment just like other social rights was derived from the Conventions provisions.[33] As judge Pinto de Albuquerque stressed, social rights as any other human rights have a minimum core which can and should be determined and enforced by the courts.[34] What is the minimum core of the right to a healthy environment? Is intergenerational equity a part of it?

As discussed earlier[35] the individual subjects of the right to a healthy environment are entitled to an environment with a certain quality and to three procedural rights: access to information, access to justice and participation in decision making in environmental matters. According the established jurisprudence of the ECtHR the individual right to a healthy environment was directly derived *inter alia* from the right to life (article 2 ECHR)[36] and the right to respect for private and family life (article 8 ECHR).[37] *E.g.* in the

[32] The living instrument character of the Convention was first expressed by the Court in 1978 in the case *Tyrer v. United Kingdom*: "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field." Paragraph 31, *Tyrer v. The United Kingdom* (App. no. 5856/72) ECtHR (1978).

[33] *E.g. Fredin v. Sweden* (App. no. 18928/91) ECtHR (1994); *López Ostra v. Spain* (App. no. 16798/90) ECtHR (1994); *Balmer-Schafroth and Others v. Switzerland* (App. no. 22110/93) ECtHR (1997); *Guerrya and others v. Italy* (App. no. 14967/89) ECtHR (1998); *L.C.B. v. United Kingdom* (App. no. 23413/94) ECtHR (1998); *Hertel v. Switzerland* (App. no. 25181/94) ECtHR (1998); *Chassagnou and others v. France* (App. nos. 25088/94, 28331/95 and 28443/95) ECtHR (1999); *McGinley and Egan v. United Kingdom* (App. nos. 21825/93 and 23414/94) ECtHR (2000); *Athanassoglou and others v. Switzerland* (App. no. 27644/95) ECtHR (2000); *Chapman v. United Kingdom* (App. no. 27238/95) ECtHR (2001); *Hatton and Others v. The United Kingdom* (App. no. 36022/97) ECtHR (2003); *Öneryildiz v. Turkey* (App. no. 48939/99) ECtHR (2004); *Fadeyeva v. Russia* (App. no. 55723/00) ECtHR (2005); *Taşkin and Others v. Turkey* (App. no. 46117/99) ECtHR (2005); *Steel and Morris v. The United Kingdom* (App. no. 68416/01) ECtHR (2005); *Budayeva and Others v. Russia* (App. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) ECtHR (2008); *Verein gegen Tierfabriken v. Switzerland* (App. no. 32772/02) ECtHR (2009); *Tatar v. Romania* (App. no. 67021/01) ECtHR (2009); *Deés v. Hungary* (App. no. 2345/06) ECtHR (2010); *Grimkovskaya v. Ukraine* (App. no. 38182/03) ECtHR (2011); *Flamenbaum and others v. France* (App. nos. 3675/04 and 23264/04) ECtHR (2012); *Herrmann v. Germany* (App. no. 9300/07) ECtHR (2012).

[34] Separate opinions of judge Pinto de Albuquerque concerning cases *Konstantin Markin v. Russia* (App. no. 30078/06) ECtHR (2012); *Mouvement Reelien Suisse v. Switzerland* (App. no. 16354/06) ECtHR (2012); *Fáber v. Hungary* (App. no. 40721/08) ECtHR (2012); *Ahmet Yildrim v. Turkey* (App. no. 3111/10) ECtHR (2013); *Tarantino and others v. Italy* (App. nos. 25851/09, 29284/09 and 64090/09) ECtHR (2013); *Lagutin and others v. Russia* (App. nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09) ECtHR (2014).

[35] See chapter no. 2.4.3.

[36] Infringement of Art. 2 *e.g. Öneryildiz v. Turkey* (App. no. 48939/99) ECtHR (2004); *Budayeva and Others v. Russia* (App. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) ECtHR (2008).

[37] Infringement of Art. 8 *e.g. López Ostra v. Spain* (App. no. 16798/90) ECtHR (1994); *Guerra and others v. Italy* (App. no.14967/89) ECtHR (1998); *Taşkin and Others v. Turkey* (App. no. 46117/99) ECtHR (2005); *Moreno Gómez v. Spain* (App. no. 4143/02) ECtHR (2004); *Fadeyeva v. Russia* (App. no. 55723/00) ECtHR (2005); *Roche v. United Kingdom* (App. no. 32555/96) ECtHR (2005); *Öckan and others v. Turkey* (App. no. 46771/99) ECtHR (2006); *Ledyayeva and others v. Russia* (App. nos. 53157/99, 53247/99, 53695/00 and 56850/00) ECtHR (2006); *Giacomelli v. Italy* (App. no. 59909/00) ECtHR (2006); *Lemke v. Turkey* (App. no. 17381/02) ECtHR (2007); *Tatar v. Romania* (App. no. 67021/01) ECtHR (2009); *Branduse v. Romania* (App. no. 6586/03) ECtHR (2009); *Bacila v. Romani* (App. no.19234/04) ECtHR (2010); *Deés v. Hungary* (App. no.

well-known López Ostra case[38], which concerned noise pollution and a waste-treatment plant, the Court expressed for the first time that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without seriously endangering their health. In the case of Guerra and Others[39] the Court observed that the direct effect of toxic emissions on the right to respect for private and family life means that article 8 is applicable.

Dealing with environmental issues, the Strasbourg Court also stated in its case law a violation of the prohibition of torture (article 3 ECHR)[40], the right to a fair trial (article 6 [1])[41], the freedom of expression (article 10)[42], the freedom of assembly and association (article 11)[43], the right to an effective remedy (article 13)[44] and the protection of property (article 1 of the Protocol No.1).[45] Generally speaking, these human rights might be concerned, if the right to a healthy environment is infringed.[46] On the other hand, the prohibition of discrimination (article 14) generally protects social rights as well, because it covers not only the enjoyment of the rights explicitly foreseen in the Convention but also those rights that fall within the implicit ambit of the Convention.[47] However, the Court has not yet stated discrimination according to the article 14 ECHR, when dealing with environmental matters.

The Convention does not contain the right to a healthy environment explicitly. Additionally, its protection has procedural obstacles as well. According to article 34 of the ECHR any person, non-governmental organisation or group of individuals can lodge an application with the Court claiming to be the victim of a violation done by one of the signatory states of the rights set forth in the Convention or the Protocols. However, to be a victim is not enough. According to the admissibility criteria set forth in the article 35 of the ECHR, the applicant has to suffer a significant disadvantage.[48] The condition of direct and personal

2345/06) ECtHR (2010); *Dubetska and others v. Ukraine* (App. no. 30499/03) ECtHR (2011); *Grimkovskaya v. Ukraine* (App. no. 38182/03) ECtHR (2011).

[38] *López Ostra v. Spain* (App. no. 16798/90) ECtHR (1994).

[39] *Guerra and others v. Italy* (App. no. 14967/89) ECtHR (1998) paragraph 57.

[40] Infringement of Art. 3 *e.g. Brânduşe v. Romania* (App. no. 6586/03) ECtHR (2009).

[41] Infringement of Art. 6 (1) *e.g. Fredin v. Sweden* (App. no. 12033/86) ECtHR (1991); *Matos e Silva Lda. and others v. Portugal* (App. no. 15777/89) ECtHR (1996); *Burdov v. Russia* (App. no. 33509/04) ECtHR (2009); *Dactylidi v. Greece* (App. no. 52903/99) ECtHR (2003); *Kyrtatos v. Greece* (App. no. 41666/98) ECtHR (2003); *Taşkin and Others v. Turkey* (App. no. 46117/99) ECtHR (2005); *Steel and Morris v. The United Kingdom* (App. no. 68416/01) ECtHR (2005); *Okyay and Others v. Turkey* (App. no. 36220/97) ECtHR (2005); *Öckan and others v. Turkey* (App. no. 46771/99) ECtHR (2006); *Lemke v. Turkey* (App. no. 17381/02) ECtHR (2007); *Hamer v. Belgium* (App. no. 21861/03) ECtHR (2007); *Borysiewicz v. Poland* (App. no. 71146/01) ECtHR (2008); *Leon and Agnieszka Kania v. Poland* (App. no. 12605/03) ECtHR (2009); *Deés v. Hungary* (App. no. 2345/06) ECtHR (2010).

[42] Infringement of Art. 10 *e.g. Piermont v. France* (App. nos. 15773/89 and 15774/89) ECtHR (1995); *Hertel v. Switzerland* (App. no. 25181/94) ECtHR (1998); *Thoma v. Luxembourg* (App. no. 38432/97) ECtHR (2001); *Vides Aizsardzibas Klubs v. Latvia* (App. no. 57829/00) ECtHR (2003); *Verein gegen Tierfabriken v. Switzerland* (App. no. 32772/02) ECtHR (2009).

[43] Infringement of Art. 11 *e.g. Chassagnou and others v. France* (App. nos. 25088/94, 28331/95 and 28443/95) ECtHR (1999).

[44] Infringement of Art. 13 *e.g. Dactylidi v. Greece* (App. no. 52903/99) ECtHR (2003); *Hatton and Others v. The United Kingdom* (App. no. 36022/97) ECtHR (2003).

[45] Infringement of Art. 1 Protocol No. 1 *e.g. Matos e Silva Lda. and others v. Portugal* (App. no. 15777/89) ECtHR (1996); *Chassagnou and others v. France* (App. nos. 25088/94, 28331/95 and 28443/95) ECtHR (1999); *Burdov v. Russia* (App. no. 33509/04) ECtHR (2009); *Öneryildiz v. Turkey* (App. no. 48939/99) ECtHR (2004); *N.A. and others v. Turkey* (App. no. 37451/97) ECtHR (2005); *Z.A.N.T.E.-Marathonisi A.E. v. Greece* (App. no. 14216/03) ECtHR (2009); *Turgut v. Tukey* (App. no. 1411/03); *Satir v. Turkey* (App. no. 36192/03) ECtHR (2010).

[46] The list of articles is not taxative. *E.g.* the violation of the right to liberty and security (ECHR Art. 5) has been examined as well in the case *Mangouras v. Spain* (App. no. 12050/04) ECtHR (2010). The Court found no infringement.

[47] Separate opinion of judge Pinto de Albuquerque regarding the case of *Konstantin Markin v. Russia* (App. no. 30078/06) ECtHR (2012).

[48] Art. 35 (3) b) ECHR "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: […] (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the

concern and the lack of a preventive approach (need of significant disadvantage) can lead to the conclusion that the collective right to a healthy environment of the present generation is not ensured in the Convention. The requirement of a significant disadvantage seems to be too strict for establishing an effective protection of the right to a healthy environment. In addition, the need of direct and personal concern excludes a crucial group from the potential applicants: non-governmental organisations which are not directly and personal concerned.

Establishing an *actio popularis* in cases where collectives of the present generation are concerned might look utopian. The Court expressed several times that there is no possibility for an *actio popularis* in the framework of the Convention.[49] The Court explicitly noted that, the Convention does not "envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because [it] consider,[…] that it may contravene the Convention."[50]

Even the Aarhus Convention, which regulates the pillars of the procedural rights of the right to a healthy environment in details, rejected to introduce an *actio popularis* in connection with environmental issues. However, it strengthened the status of environmental non-governmental organisations (NGOs)[51] which is an example to follow. NGOs play a decisive role in environmental protection as they express collective interests and speak on behalf of many with specific skills often not available to individuals. To strengthen the *locus standi* of NGOs before the Strasbourg Court would be an intermediate solution between the maximalist approach of the *actio popularis* and the minimalist approach according to which only those who are directly concerned have the right to individual actions.

As stated before the collective right to a healthy environment is based on the concept of intergenerational equity. However, the interests of the future generation do not play a decisive point in the ECtHR`s case law neither. The concept of intergenerational equity has appeared only once so far in 2012 in the case Herrmann *v.* Germany.[52] In his separate opinion, judge Pinto de Albuquerque mentioned intergenerational equity as guarantee for the sustainable enjoyment of nature by future generations.[53]

As a conclusion it can de stated that only the individual aspect of the human right to a healthy environment gained ground in the protection system of the ECHR. But would it at all be possible to establish the collective right to a healthy environment under the aegis of the ECHR? The following chapter aims to propose ideas for the debate on the aforementioned question.

4. Possible Solutions

How could the collective right to a healthy environment be established under the aegis of the ECHR? On the one hand, this could be achieved by applying the living instrument character of the Convention as it was done with the individual right to a healthy environment. On the other hand, the European human

Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

[49] *E.g. L'Erablière A.S.B.L. v. Belgium* (App. no. 49230/07) ECtHR (2009).

[50] Case of *Burden v. United Kingdom* (App. No. 13378/05) ECtHR (2008) paragraph 33.

[51] Attila Pánovics, *Environmental Rights and the Enforcement of the Right to Water* in Marcel Szabó & Veronika Greksza (Eds.), Right to Water and the Protection of Fundamental Rights in Hungary, Studia Europaea , Budapest 2013, pp. 163-165.

[52] Case of *Herrmann v. Germany* (App. no. 9300/07) ECtHR (2012).

[53] Paragraph 10 of the separate opinion of judge Pinto de Albuquerque regarding the case of *Herrmann v. Germany* (App. no. 9300/07) ECtHR (2012).

rights system could be amended by an additional protocol as it was done *inter alia* with the protection of property.

With the help of the living instrument approach, the Strasbourg Court could derive the collective dimension of the right to a healthy environment from the provisions of the Convention as well. Reaching this goal, significant precedents dealing with environmental matters should be overruled: *e.g.* the Strasbourg Court expressed several times that an environmental NGO, as any other victim, could only be an applicant if the NGO itself suffered a significant disadvantage, although NGOs, being involved in matters of public interest, have the role of public watchdogs.[54] In order to be able to lodge a petition under the Article 34 of the ECHR, "a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation."[55] As discussed before strengthening the *locus standi* of the environmental NGO-s would be among the first steps on the way to a collective right to a healthy environment. According to the ECtHR, a precedent can only be overruled:[56]

- in case of emerging consensus, either in the domestic legal systems of Council of Europe Member States or under specialised international instruments,
- in favour of upholding a different legal standard,
- when there is new scientific knowledge impacting on the issue at stake, or
- when further development is needed because of uncertainty or in order to enlarge the ambit of protection ensured by the Convention.

The first possibility could be excluded as the international community seems to be unwilling to accept explicit written obligations regarding the right to a healthy environment. The Rio+20 Conference on Sustainable Development is an example of that tendency. A final document entitled "The Future We Want" was adopted there, but it achieved no breakthrough and lacks any innovative approach. Contrary to the high expectations, only well-known aims and principles were repeated in this soft law document.[57]

The possibility to set aside a precedent when it needs further development in order to enlarge the ambit of protection (the fourth possibility) is undoubtedly in play. Because of the interdependent relationship between environment, sustainable development, intergenerational equity and the right to a healthy environment,[58] the human right to a healthy environment plays a major role in environmental protection. The further development of this right is in global need, as the continued degradation and erosion of the environment would cause irreversible changes that could endanger the living standards.[59]

However, it is not easy to overrule a precedent. The Court expressed several times that it should not depart from its previous case law "without cogent reasons if the circumstances of the new case are not

[54] *E.g. Animal Defenders International v. the United Kingdom* (App. no. 48876/08) ECtHR (2013); *Vides Aizsardzības Klubs v. Latvia* (App. no. 57829/00) ECtHR (2004); *Társaság a Szabadságjogokért v. Hungary* (App. no. 37374/05) ECtHR (2009); *Youth Initiative for Human Rights v. Serbia* (App. no. 48135/06) ECtHR (2013); *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* (App. no. 39534/07) ECtHR (2013).

[55] Case of *Burden v. United Kingdom* (App. No. 13378/05) ECtHR (2008) paragraph 33.

[56] Paragraph 7 of the separate opinion of judge Pinto de Albuquerque regarding the case of Herrmann *v.* Germany (App. no. 9300/07) ECtHR (2012).

[57] The final document of the Rio+20 Conference on Sustainable Development is available at http://sustainabledevelopment.un.org/rio20.html (10 January 2015).

[58] See chapter no. 2.

[59] OECD *Environmental Outlook to 2050: The Consequences of Inaction.* See at www.oecd.org/env/indicators-modelling-outlooks/49846090.pdf (10 March 2015).

materially distinct from the previous case because of legal certainty, foreseeability and equality before the law."[60] However, can we still talk about a precedent if the circumstances are materially distinct?

Another solution for a complete protection of the human right to a healthy environment (with the collective and the individual rights) could be an additional protocol to the Convention as it was done in the case of the right to property.[61] This idea is not new, however has not been successful yet. Since 1999, various non-governmental organisations and the Parliamentary Assembly of the Council of Europe have constantly, but unsuccessfully put pressure on the Committee of Ministers, in order to persuade it to amend the Convention with the right to a healthy environment by a protocol. The Committee of Ministers stated that several member states have already enshrined the protection of the environment as a human right and/or as a state objective in their constitutions and that the programmatic provision on environmental protection has also been included in the Charter of Fundamental Rights of the European Union.[62] Even though the Charter contains one of the longest catalogues of human rights, it does not contain the right to a healthy environment. Article 37 of the Charter states the following: „A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."[63] This provision only declares the high level of protection and improvement of the quality of the environment and sustainable development as general principles.[64] It provides the individual with no actual enforceable right guaranteeing that a high level of environmental protection and an improvement of the quality of the environment are considered in the framework of the policies of the Union, and even less with an actual right to a healthy environment. Therefore, article 37 does not contain a fundamental right but is rather an aim of the European Union.[65]

The Committee of Ministers articulated also several times that it recognises the importance of a healthy environment and considers that it is relevant for the protection of human rights. However, the Committee proclaims that „although the European Convention on Human Rights does not expressly recognise a right to the protection of the environment, the convention system already indirectly contributes to the protection of the environment through existing convention rights and their interpretation in the evolving case law of the ECtHR." [66] On both occasions, the Committee of Ministers did not consider it advisable to draw up an additional protocol to the convention in the environmental domain. And here the debate was only about the individual right.

A third solution would be the establishment of a new European human rights convention containing a catalogue of third-generational human rights such as the right to a healthy environment with its individual and collective dimensions. Since Europe has the most effective human rights regime[67] and effectively

[60] *E.g*. Paragraph 32 of the case *Cossey v. the United Kingdom* (App. no. 10843/84) ECtHR (1990).

[61] Art. 1. (Protection of Property) Protocol no. 1. of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[62] Doc. 10041 (24 January 2004) Reply from the Committee of Ministers part 3.

[63] Art. 37 of the Charter of Fundamental Rights of the European Union.

[64] András Osztovits (Ed.), Gabriella Gerzsenyi, *Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata* [Commentary on the Treaty on European Union and the Treaty on the Functioning of the European Union] Complex 2011, pp. 2508 - 2511.

[65] Jürgen Schwarze (Hrsg.) EU- Kommentar 3. Auflage Nomos Verlagsgesellschaft, Baden-Baden 2012, p. 2708.

[66] Joint reply adopted by the Committee of Ministers on 16th June 2010 at the 1088th meeting of the Ministers' Deputies on "*Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment*" https://wcd.coe.int/ViewDoc.jsp?id=1638385&Site=CM (10 March 2015).

[67] Andreas Follesdal & Brigit Peters & Geir Ulfstein (Eds.), *Constituting Europe. The European Court of Human Rights in a National European and Global Context*, Cambridge University Press, 2013.

protects first and second generational human rights, the idea of a new human rights catalogue on this regional level does not seem to be so unrealistic.

In my point of view, the time has come for the international community to take the next step in the regulation of the right to a healthy environment in a binding way. For all three ways proposed previously, the first milestone would be to reconcile the interests of the states. Unfortunately, the time when the political decision makers will reach this landmark is not yet foreseeable, thus the proposed solutions might seem utopian.

Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case note

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On 18 December 2014, the Court of Justice of the European Union (CJEU) has delivered its Opinion pursuant to Article 218 (11) TFEU on the EU's accession to European Convention on Human Rights (ECHR) at the request of the European Commission. Sitting in full court, the CJEU found that the draft revised agreement on the accession of the European Union to the ECHR is incompatible with EU law. This paper gives a concise overview of the judgment, and provides some critical remarks.

Keywords: Opinion 2/13, European Convention on Human Rights, Court of Justice of the European Union, European Court of Human Rights, Fundamental Rights, Human Rights

1. Facts and background

According to Article 6 (2) TEU as amended by the Treaty of Lisbon, the Union shall accede to the European Convention on Human Rights.[1] The question of the European Community (EC) acceding to the ECHR was brought up also some time ago, but the Court of Justice has found in its opinion 2/94 that the EC did not possess the necessary competence to accede.[2] The Treaty of Lisbon has introduced an express legal basis for the EU to accede to the ECHR – the actual accession needs to be regulated in a special international agreement. The Council of Europe Member States also had to modify the ECHR in order to enable the EU to accede; this was done via Protocol No. 14 to the Convention.[3]

Primary EU law essentially lays down two legal requirements regarding the accession:

- the accession shall not affect the Union's competences as defined in the Treaties [Article 6 (2) TEU];
- the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or Article 344 TFEU[4] (Protocol No 8 attached to the EU Treaty).

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (1950). ETS No. 005.

[2] Opinion 2/94 of the Court of Justice. [ECR 1996 I-01759]

[3] Available at http://conventions.coe.int/treaty/en/treaties/html/194.htm. See also the related Madrid Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force (http://conventions.coe.int/treaty/en/treaties/html/194-1.htm)

[4] According to Article 344 TFEU, the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

Additionally, in the Declaration on Article 6 (2) of the Treaty on European Union, the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that accession must be arranged in such a way as to preserve the specific features of EU law.

The Draft revised agreement on the accession of the European Union, regulating the institutional and legal aspects of accession, was finalised in 2013.[5] It was the European Commission that requested the opinion of the Court of Justice. The significance of the issue is underlined by the fact that the European Parliament, the Council, the Commission and twenty-four Member States submitted observations in the procedure. The Commissions initial request for an opinion already contained its view that the Draft Agreement is compatible with primary EU law; the Austrian, Belgian, Bulgarian, Czech, Cypriot, Danish, Dutch, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Polish, Portuguese, Romanian, Slovak, Spanish, Swedish and United Kingdom governments, and the Parliament and the Council essentially all agreed, even if their reasoning did differ to some extent.[6]

2. The View of the Advocate - General

Following a long and detailed analysis on the basis of the legal criteria contained in Article 6 (2) TEU and Protocol No. 8 and in the light of Declaration No. 2, Advocate-General Kokott has reached the conclusion that the draft agreement contained nothing that could fundamentally call into question the compatibility of the proposed accession of the EU to the ECHR – Kokott was of the opinion that the draft agreement merely required 'some relatively minor modifications or additions, which should not be too difficult to secure.' Kokott proposed that the Court of Justice declare that the draft agreement is compatible with the Treaties, provided that certain modifications, additions and clarifications are made. Particularly, she pointed out the following necessary changes:

- Having regard to the possibility that they may request to participate in proceedings as co-respondents pursuant to Article 3 (5) of the draft agreement, the European Union and its Member States are systematically and without exception informed of all applications pending before the European Court of Human Rights (ECtHR), in so far and as soon as these have been served on the relevant respondent.
- Requests by the EU and its Member States to become co-respondents shall not be subjected to any form of plausibility assessment by the Strasbourg court.
- The prior involvement of the CJEU must extend to all legal issues relating to the interpretation, in conformity with the ECHR, of EU primary law and EU secondary law.
- The conduct of a prior involvement procedure pursuant may only be dispensed with when it is obvious that the CJEU has already dealt with the specific legal issue raised by the application pending before the ECtHR.
- The principle of joint responsibility of respondent and co-respondent does not affect any reservations made by contracting parties within the meaning of Article 57 ECHR.

[5] Draft accession agreement of the European Union to the European Convention on Human Rights

http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf (10 March 2015).

[6] Opinion 2/13, Paras. 108-109.

. Finally, the ECtHR may not otherwise, under any circumstances, derogate from the principle of the joint responsibility of respondent and co-respondent for violations of the ECHR found by the ECtHR.[7]

3. The Judgment of the Court

The judgment of the Court, however, reached a different conclusion.

First, the Court determined that the case was admissible: the Court noted that the subject-matter of the request was an agreement envisaged within the meaning of Article 218 (11) TFEU, and that the Commission has submitted to the Court of Justice the draft accession instruments on which the negotiators have already reached agreement in principle: those instruments together constitute a sufficiently comprehensive and precise framework for the arrangements in accordance with which the envisaged accession should take place, and thus enable the Court to assess the compatibility of those drafts with the Treaties.[8] Some Member States have raised the issue whether the admissibility of the case is affected by the fact that the internal rules on the EU's involvement in the ECHR have not yet been adopted. The Court was of the standpoint that even if they were already adopted, the internal rules could not be subject to review by the Court pursuant to Article 218 (11) TFEU – they were deemed irrelevant to the case as the competence of the Court in this regard is strictly limited to the review of the envisaged international agreement in question.[9]

As to the substance of the case, the Court of Justice started out by providing, as preliminary considerations, some general remarks on the nature and characteristics of EU law and the EU: it has pointed out that the EU is precluded by its very nature from being considered a state. The Court reiterated in this regard that the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals.[10] The essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are engage in a 'process of creating an ever closer union among the peoples of Europe'. The Member States all recognize certain common values, upon which the EU itself is founded (as listed in Article 2).[11] The Court also stressed that the autonomy of EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of the fundamental rights (which are the heart of the Union's legal structure) is ensured within the framework of the structure and objectives of the EU.[12]

The Court then went on to review, in the light, in particular, of Article 6 (2) and Protocol No. 8, whether the legal arrangements proposed in respect of the EU's accession to the ECHR were in conformity with

[7] View of Advocate General Kokott. Opinion procedure 2/13, paras. 278-280.

[8] Para. 148.

[9] Paras. 149-151.

[10] Paras. 156-157.

[11] Paras. 167-168.

[12] Para. 170.

the requirements laid down and, more generally, with the EU's 'basic constitutional charter', the Treaties.[13]

3.1. The special characteristics and the autonomy of EU law

3.1.1. Article 53 of the Charter

The Court noted that, should the EU accede to the ECHR, it would, like any other Contracting Party, be subject to external control to ensure the observance of the rights and freedoms enshrined in the ECHR, subjecting the EU and its institutions to the control mechanisms provided for by the ECHR and to the decisions and the judgments of the ECtHR. Conversely, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR. The Court of Justice pointed out that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the ECHR, and by the Member States' constitutions. The Court of Justice has interpreted this provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law.[14] On the other, Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR. According to the Court of Justice, that provision should be coordinated with Article 53 of the Charter, as interpreted by its own case law, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised. The agreement, however, contained no such provision.

3.1.2. Mutual trust

The principle of mutual trust between the Member States is of crucial in EU law: it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. According to the Court of Justice, the approach of the draft agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, disregards the intrinsic nature of the EU and fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law. The ECHR would require the Member States of the EU in their relations with each other to check whether another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between

[13] Para. 163. The Court first referred to the EEC-Treaty as the basic constitutional charter in the Les Verts judgment. [Case 294/83 *Les Verts v. Parliament*]

[14] Melloni para. 60.

those Member States. Thus the accession is liable to ‘upset the underlying balance’ of the EU and undermine the autonomy of EU law, and the draft agreement does not contain any provision to avert such developments.

3.1.3. Advisory opinions and preliminary rulings

Protocol No. 16 to the ECHR establishes and advisory opinion mechanism: it permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or its protocol. On the other hand, EU law requires the same national courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU regarding EU law. Even though the draft agreement does not foresee the EU acceding to Protocol No. 16, according to the Court of Justice the mechanism established by the protocol could affect the autonomy and effectiveness of the preliminary ruling procedure (notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR): it cannot be ruled out that a request for an advisory opinion under Protocol No. 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure might be circumvented. The draft agreement does not address this issue.

Summarizing the abovementioned points, the Court of Justice held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy.

3.2. Article 344

The Court has stressed that Court in line with is jurisprudence, an international agreement cannot affect the allocation of powers fixed by the Treaties or the autonomy of the EU legal system and the respective powers of the Court, a principle enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

In the Court’s view, the fact that Article 5 of the draft agreement provides that proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is *not* sufficient to preserve the exclusive jurisdiction of the Court of Justice: Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU in conjunction with EU law. Accordingly, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and goes against the very nature of EU law.

3.3. The co-respondent mechanism

The Court also found the co-respondent mechanism to be problematic, as in its current form, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision (binding both on the Member States and on the EU) as regards the admissibility of requests to apply the mechanism.

Furthermore, if the ECtHR establishes a violation in respect of which a Contracting Party is a co-respondent to the proceedings, the respondent and the co-respondent are to be jointly responsible for that violation. According to the Court, this provision does not preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State has made a reservation. This would affect the situation of Member States in relation to the ECHR – a situation which is contrary to what Article 2 Protocol No. 8 requires in this regard.

Thirdly, the Court found that the fact that Article 3 (7) of the draft agreement allows for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established is also unacceptable. In such exceptional cases the ECtHR may decide, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation. According to the Court, the ECtHR cannot be empowered to rule on the allocation of responsibility between the EU and its Member States as such a decision would yet again mean the assessment of the rules of EU law governing the division of powers between the EU, risking an adverse effect to the distribution of powers in the EU system.

3.4. The procedure for the prior involvement of the Court of Justice

The Court, while noting the importance of such a procedure, held that in its current form, the procedure [Article 3 (6) of the draft agreement] does not ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed. This should be guaranteed so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated. The Court also held it to be problematic that the abovementioned procedure only allows for the Court to rule on the validity of secondary EU law, and not on its interpretation. The Court stressed: if the Court were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.[15]

3.5. Judicial review in CFSP matters

The final point brought up by the Court concerned the question of judicial review regarding Common Foreign and Security Policy (CFSP) matters. The Court of Justice has very limited competence in CFSP matter, as it may only monitor compliance with Article 40 TEU, and review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU. This means that certain acts

[15] Paras. 236-248.

adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice. The draft agreement, however, would empower the ECtHR to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, whereas the Court lacks such jurisdiction, entrusting judicial review to a non-EU institution. Yet according to the Court of Justice's case law, jurisdiction to carry out a judicial review of acts, actions or omissions of the EU cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.

Having regard to all of the above, the Court of Justice concluded that the agreement on the accession of the EU to the ECHR is not compatible with Article 6 (2) TEU or with Protocol No. 8.

4. Remarks

The accession of the European Union to the European Convention on Human Rights would mean that, for the first time, the EU would be subject to external control as regards the protection of fundamental rights. Following some diverging and alternating steps on the road to possible accession by the EC/EU, the Treaty of Lisbon finally included an *expressis verbis* legal basis for EU accession to the ECHR. What's more, it made it an obligation.[16] The EU finally came close to fulfilling this obligation when the draft agreement was finalised in 2013. The current Opinion of the Court of Justice, however, means that accession will be considerably delayed.

4.1. The consequences of Opinion 2/13

Opinions given by the Court of Justice under Article 218 (11) TFEU are binding in nature, thus in case the opinion of the Court is negative, the envisaged agreement may not enter into force unless it is amended or the Treaties themselves are revised. To say that either of these options is difficult is probably an understatement.

During a possible renegotiation of the draft agreement would, the EU would have to insist that all objections raised by the Court of Justice are addressed. This 'checklist' of demands for almost a dozen amendments would, from the point of view of the EU, not be negotiable, and considering the fact that the previous version also took over three years to negotiate, amendments aimed at giving priority to EU law and the Court of Justice over certain elements of the Convention would probably not be well received by non-EU members of the Council of Europe.[17]

Amendments to EU primary law are, as (relatively) recent integration history has shown, also not necessarily easy and ratification of modifying treaties may be delayed or even rejected (it should be enough to refer here to the failed Constitutional Treaty and the not exactly smooth ratification of the Lisbon Treaty).

[16] TEU Art. 6 (2) "The Union *shall* [emphasis added] accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[17] Peers, Steve: *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection* in EU Law Analysis, http://eulawanalysis.blogspot.hu/2014/12/the-cjeu-and-eus-accession-to-echr.html (18 December 2014)

4.2. Critical remarks

The Opinion of the Court of Justice was much awaited, and when it finally arrived, it mostly caused disappointed reaction from academics. The procedure before the Court of Justice presented an interesting situation: the Commission (who initiated the procedure), the Parliament, the Council, and twenty-four Member States were all of the opinion that the draft agreement was compatible with EU primary law, and were all essentially aiming to 'convince' the Court of Justice of their point of view. The Advocate-General's View, while noting certain issues, was in favour of conditional approval (reflecting a 'pro-accession spirit'), the Court of Justice's Opinion reflects a different, to some extent formalistic view – some call its attitude 'uncooperative'.[18] The rejection also came as a somewhat of a surprise, because in the Court of Justice itself was involved, to an unprecedented extent, in the process of drafting the agreement, and the drafters committed to take into account the Joint Communication of the Presidents of the Luxembourg and Strasbourg courts.[19]

I agree with Steve Peers as regards his assessment that most of the Court of Justice's conditions for accession are of a procedural nature, and are meant essentially to accomplish one thing: preserving the competence of the CJEU as the adjudicator of EU law as an autonomous legal order. The Court's vigilance in protecting its own jurisdiction is hardly surprising in light of such judgments as MOX Plant or Kadi. The previous one has shown that the Court of Justice requires that any EU law matter between Member States be brought before it and that engaging a different international tribunal with such a case means no less than an infringement of Member State obligations under EU law.[20] In the latter case, the Court of Justice has taken a dualistic approach to the relationship between international law and EU law, and held emphasized *inter alia* that obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Treaties. It may be seen as somewhat ironic that in the Kadi case, the Court of Justice was otherwise emphasizing the essential nature of fundamental rights protection.[21]

Among its other misgivings, the CJEU has emphasized the possibly problematic interplay between the Protocol No. 16 advisory opinion procedure by the ECtHR, and the CJEU's preliminary ruling procedure. It is worth noting in this regard that Protocol No. 16 is not even in force yet, and that the Protocol No. 16 advisory opinion is different in nature, as it will be limited to the highest national court, it is never obligatory and the opinion itself is not binding.[22]

The CJEU's insistence that it is unacceptable under EU law for the Member States to lay down higher protection standards than the Charter (as stated by it previously in the much debated Melloni judgment)[23] lead to the statement that Article 53 of the ECHR (which allows for higher protection by the contracting states) and Article 53 of the Charter to be incompatible. Whereas it is a legitimate aim to prevent the

[18] *The EU's Accession to the ECHR – A 'NO' from the ECJ. Editorial Comments* in Common Market Law Review Vol. 52 (2015), p. 1.

[19] Odermatt, Jed: *A giant step backwards? Opinion 2/13 on the EU'S accession to the European Convention on Human Rights* in Leuven Centre for Global Governance Studies, Working Paper No. 150, 2015, p. 8.

[20] C-459/03 *Commission v. Ireland* [2006] ECR I-04635.

[21] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council* [2008] ECR I-0635.

[22] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2013) http://conventions.coe.int/Treaty/EN/Treaties/Html/214.htm (10 March 2015).

[23] Case C-399/11 Melloni [2013] (Not yet reported.)

circumvention of the limit set by Article 53 of the Charter, the CJEU is in effect arguing against a higher level of fundamental rights protection.[24]

It is also questionable whether the CJEU's insistence that CFSP measures cannot be subject to review by the ECtHR is fully defendable. Operations in the framework of the CFSP may entail fundamental rights violations by Member States in extraterritorial situations; and as the case law of the ECtHR has shown, the ECHR can, under circumstances, have extraterritorial effect based on the interpretation of the concept of 'jurisdiction' (Art. 1 ECHR) by the Strasbourg court.[25] The international responsibility of international organizations for fundamental rights infringements is also an issue that may have relevance in this regard.[26] It seems that the CJEU is currently of the opinion that if it does not have jurisdiction over EU CFSP measures, then the ECtHR cannot either.[27] Some question whether the accession of the EU is necessary at all, also (but not exclusively) in light of the Opinion[28], yet the accession would undoubtedly mean external judicial control of EU law for the very first time (as all EU fundamental rights norms including the Charter are, from the point of view of the EU, 'internal'); what's more, if the EU is to honour the obligation enshrined in Article 6 (3) TEU, then it cannot but accede to the ECHR. The TEU could, of course, also be modified (even though it really doesn't seem probable at this time). Leonard Besselink has proposed an innovative solution possibility that would be based on adding a 'notwithstanding protocol' to the Treaties[29], although this would mean a quite hostile response to the Opinion of the Court of Justice.[30] I agree with Daniel Halberstam that, for all its problematic elements, Opinion 2/13 indeed contains real concerns about important constitutional principles, yet these concerns are sometimes somewhat misguided, and the responses required by the CJEU seem to show signs of mild overreaction.[31]

At the 2014 FIDE conference, the president of the European Court of Justice, Vassilios Skouris began his remarks by a determined statement: "The Court of Justice is not a human rights court; it is the Supreme Court of the European Union."[32] If nothing else, Opinion 2/13 definitely gave weight to that statement. Its contribution to an enhanced protection of fundamental rights in the EU, however, remains questionable.

[24] Lock, Tobias: *Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR* on Verfassungsblog http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu (18 December 2014)

[25] The Court's case law regarding this issue is complex and not without questions, but the acceptance of extraterritorial jurisdiction under certain requirements is an unquestionable element, having regard cases such as, *inter alia*, *Loizidou v. Turkey* (App. no. 15318/89) ECtHR (1996), *Al-Skeini and Others v. The United Kingdom* (App. no. 55721/07) ECtHR (2011), and *Hassan v. United Kingdom* (App. no. 29750/09) ECtHR (2014).

[26] In the case law of the ECtHR, see among others *Behrami and Behrami v. France* and *Saramati v. France*, *Germany and Norway* (Application nos. 71412/01 and 78166/01) EctHR Grand Chamber (2007).

[27] Peers, Ibid. Peers also states that the CJEU's point of view demonstrated in this opinion means that bringing a CFSP dispute before the International Court of Justice would also be deemed by it to be a breach of EU law obligations.

[28] See in this regard for example Láncos Petra Lea: *A Bíróság 2/13. számú véleménye az Unió EJEE-hez való csatlakozásáról* in Pázmány Law Working Papers 2015/1, p. 8. (Available at: http://plwp.jak.ppke.hu/hu/)

[29] Besselink, Leonard F. M.: *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13* on Verfassungsblog, http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213 (23 December 2014)

[30] See also Odermatt, Jed 2015, p. 15.

[31] Halberstam, Daniel: *'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward* in Public Law and Legal Theory Research Paper Series, No. 439, February 2015, p. 38.

[32] Quoted by Besselink (Ibid.).

The Hungarian Constitutional Court's Judgment Concerning the Preliminary Ruling Procedure – Comments on a Rejection Order

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The Hungarian Constitutional Court rejected the admission of a constitutional complaint which held that the violation of the right to fair procedure and right to a fair trial is infringed in case courts refuse their obligation to initiate a preliminary ruling procedure. In the case at hand, the examined questions are constitutional law issues of fundamental importance, and the Hungarian Constitutional Court had the possibility to declare that the Fundamental Law of Hungary does not allow the arbitrary application of law, and that the CJEU may be considered the forum of fair trial.

Keywords: preliminary ruling procedure, right to fair procedure, right to a fair trial, arbitrary application of law

1. Preamble

On 19 May 2014, the Hungarian Constitutional Court (HCC) rejected the admission of a constitutional complaint which held that the violation of the right to fair procedure and right to a fair trial[2] is infringed in case courts refuse their obligation to initiate a preliminary ruling procedure.[3]

The complainant initiated the annulment of a decision of the Curia of Hungary by reference to Article 27 of Act CLI of 2011 on the Constitutional Court (hereinafter: Act on the HCC), because according to his view, the Curia of Hungary denied his claim for the initiation of the preliminary ruling procedure of the Court of Justice of the European Union arbitrarily. He claimed that the denial should be justified professionally, objectively, and in detail. The applicant emphasized that during the review procedure, the Curia of Hungary did not fulfill its obligation of initiation established by Article 267 of the Treaty on the Functioning of the European Union unlawfully, so it did not proceed fairly, and deprived him of a fair trial.[4]

[1] The research was made in the frame of „Procedural constitutionality, with special regard to the protection of fundamental rights' procedures" No. K 109319 project supported by the Hungarian Scientific Research Fund.

[2] Art. XXVIII of Fundamental Law of Hungary.

[3] For similar previous decisions of the HCC see Decision of the Constitutional Court 3147/2013. (VII. 16.) and 3110/2014. (IV. 17.).

[4] Decision of the Constitutional Court 3165/2014. (V. 23.), Reasoning [5].

In his reasoning the complainant referred to the criteria regarding the initiation of the a preliminary ruling determined by the CJEU in the *CILFIT*[5] and *Köbler*[6] *cases*, and how they were not fulfilled. He stated that the Curia refused its duty based solely on Hungarian law (the rules of the review procedure regulated in the Hungarian Code of Civil Procedure): the refusal was not justified by European law, or by the jurisprudence of the CJEU, thus the non-compliance with the obligation of initiation was arbitrary. According to the practice of the European Court of Human Rights (ECtHR) non-compliance with this obligation is not in accordance with the requirement of fair procedure, if the member state court explains its refusal exclusively by its own internal law, neglecting European Union law. The refusal is not arbitrary if it occurs with detailed and professional justification in accordance with European law, and the CJEU's practice. According to the complainant in the case at hand the Curia arbitrarily disregarded the competence of the CJEU established by Article 267 of the Treaty on the Functioning of the European Union, and at the same time deprived him of his right to a fair trial (before the CJEU), which would have had competence to interpret the relevant law in his case. Consequently, the Curia infringed his rights by ignoring the right to a fair trial in the civil procedure.[7]

2. The HCC's reasoning

The HCC rejected the constitutional complaint based on Article 29 of the Act on the HCC, because according to its judgment the complaint did not contain conflict with the Fundamental Law, and the case did not raise constitutional law issues of fundamental importance. As the starting point of its reasoning the HCC referred to its previous practice,[8] and recalled that according to Article 24 (1) of the Fundamental Law of Hungary, the Constitutional Court shall be the principal organ for the protection of the Fundamental Law. According to Article 24 (2) d), the Constitutional Court shall review the conformity with the Fundamental Law of any judicial decision from the point of view of constitutionality; its jurisdiction is limited to examine and eliminate conflicts with the Fundamental Law in case they significantly affected the judicial decision. Therefore it has no competence to review the whole judicial procedure, so it must not examine the direction of the judicial decision or the judicial discretion and evaluation of evidences.[9] During the constitutional review of judicial decisions, the Constitutional Court does not adjudge specific legal questions belonging to the courts' competence or questions the aim of is the interpretation of a certain legal act.[10]

In this case the HCC agreed with the court of first instance's reasoning in the rejected order, in which the complainant initiated the preliminary ruling procedure. According to this reasoning, the complainant's questions did not concern the interpretation of the Treaties or the review of validity or the interpretation of the EU intuitions' legal acts, but the review of the decision of a national court, thus they do not fall within the competence of the CJEU.[11]

[5] Case 283/81, Srl CILFIT and *Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415.

[6] Case 224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.

[7] Fort the anonymized complaint see: http://public.mkab.hu/dev/dontesek.nsf/0/9f5779f56d0e13fcc1257cb600589364/$FILE/IV_507_0_2014_inditvany_anonim.pdf.

[8] Decision of the Constitutional Court 3028/2014. (II. 17.)

[9] Decision of the Constitutional Court 3231/2012. (IX. 28.), Reasoning [4].

[10] Decision of the Constitutional Court 3003/2012. (VI. 21.), Reasoning [4], Decision of the Constitutional Court 3028/2014. (II. 17.), Reasoning [12].

[11] Decision of the Constitutional Court 3165/2014. (V. 23.), Reasoning [14].

In its argument the HCC summarized its previous and relevant practice in connection with the right to fair procedure.[12] In the course of this, it emphasized that according to its interpretation the essential element of the right to fair procedure is the compliance with procedural rules of fundamental importance. At the same time further parts of the judicial procedure, especially the decision in certain cases by the application of legal rules and the practice of courts' discretional rights are not constitutional issues. According to the HCC in this case the competent judge by the national law has the right to decide whether there is needed to initiate the preliminary ruling procedure or not by the interpretation of the applicable legal rules and the consideration of factual questions. Thus, according to the reasoning the HCC has no competence to examine this case under Article 29 of the Act on the HCC.[13]

3. Critical remarks

The Constitutional Court – in order to fulfill its obligation declared by law – conducts at first necessarily a formal, and then a material examination regarding a constitutional complaint: it checks whether the complaint fully corresponds to the formal and material conditions prescribed in the Act on the HCC.[14] In this system of conditions, two alternative criteria of admissibility regulated by the Article 29 of the Act on the HCC deserve high regard, because by the declaration of these not utterly unambiguous criteria, the legislator accepted the filtration of complaints (or their selection?) as legitimate.[15] The interpretational traditions of the criterion *"constitutional law issues of fundamental importance"* derive from German example.[16] The Federal Constitutional Court of Germany rejects most of the constitutional complaints by referring to this criterion, which means that the Constitutional Court interprets the criterion *"constitutional law issues of fundamental importance"* freely, and it is also used for the rejection of the majority of constitutional complaints.[17] In order to avoid a possible arbitrary practice aiming at reducing the high number of cases, the criterion of *"constitutional law issues of fundamental importance"* would have to inspire the Constitutional Court to protect rights objectively. Thus the aim of the procedure is not only to enforce the concerned person's rights, but also to clarify constitutional issues. Those problems can be considered as *"constitutional law issues of fundamental importance"* which cannot be solved either by the Fundamental Law of Hungary or the previous practice of the HCC,[18] and regarding which the

[12] Decision of the Constitutional Court 3165/2014. (V. 23.), Reasoning [15].

[13] Decision of the Constitutional Court 3110/2014. (IV. 17.), Reasoning [24].

[14] Art. 52 Para (1) of the Act on the HCC. According to the Article 56 Para (2): „[T]he panel shall examine in its discretionary power the content-related requirements of the admissibility of a constitutional complaint – in particular the concernment pursuant to Sections 26 to 27, the exhaustion of legal remedies and the conditions specified in Sections 29 to 31."

[15] Georgina Naszladi: *Válogatás vagy szűrés? Az „alapvető alkotmányjogi jelentőségű kérdés" az alkotmányjogi panaszeljárásban* in Törő Csaba & Cservák Csaba & Rixer Ádám & Fábián Ferenc & Miskolczi Bodnár Péter & Deres Petronella & Trencsényiné Domokos Andrea (eds.): IX. Jogász Doktoranduszok Országos Szakmai Találkozója 2013, Károli Gáspár Református Egyetem, Budapest, 2014, pp. 53-60.

[16] The German legal basis: Bundesverfassungsgerichtsgesetz (the Act of the Federal Constitutioanl Court of Germany) Article 93a Para (2) item a). About the German experiances' evaluation see: Kelemen Katalin: *Van még pálya. A magyar Alkotmánybíróság hatásköreiben bekövetkező változásokról.* Fundamentum 2011, Vol. 4, pp 91.

[17] Donald Kommers: *The Constitutional Jurisprudence of the Federal Republic of Germany*. Duke University Press, Durham, 1997, pp. 19-20.

[18] In the Decision of the Constitutional Court 22/2012. (V. 11.), Reasoning [40] was declared, that: "[T]he Constitutional Court can apply in the new cases the arguments connected to the questions of constitutional law judged upon in the past and contained in its decisions adopted before the Fundamental Law was put into force, provided that it is possible on the basis of the concrete provisions – having the same or similar content as that of the previous Constitution – and of the rules of interpretation of the Fundamental Law. "

jurisprudence is divided or where the problem goes far beyond a personal issue.[19] Prescribing the criterion of *"conflict with the Fundamental Law, which significantly affected the judicial decision"* – which would reduce the possibility of subjective interpretation – the HCC's examintation aims to answer whether the HCC can provide remedy for the violation of the concerned person's fundamental rights by changing the legal status of the decision made by the general court.[20]

In the case at hand, regarding the previous case law of the HCC, it is important to emphasize that the HCC has not yet ruled on whether the CJEU is to be considered an independent and impartial court established by law under Article XXVIII of the Fundamental Law of Hungary. Furthermore, it has not decided whether it would be contrary to the affected person's right to a fair procedure if the judicial forum – despite its obligation laid down by Article 267(3) TFEU – would fail to initiate a preliminary ruling procedure. The clarification of these questions is a fundamentally important constitutional law issue, because these problems may potentially occur in numerous other cases.

In connection with the other criterion (conflict with the Fundamental Law, which significantly affected the judicial decision) it can be stated that without substantive examination, only in the course of the admissibility procedure it cannot be excluded that unlawful non-initiation of the preliminary ruling procedure would not influence the legally binding judicial decision. The Curia of Hungary would have been obligated to request a preliminary ruling from the CJEU, because the subject of its procedure connected to the interpretation of EU law,[21] and the CJEU would have had competence to decide about it.

By its – unsuitable – interpretation, the HCC considered that the initiation of the preliminary ruling procedure was the petition. Although the complainant stated that the court had applied the national and EU law with incorrect content and he had therefore incurred damages, he did not base his petition on this, and he also did not request the review of how the court had applied the law, nor the review of the entire judicial procedure. It was only the conclusion of his constitutional criticism that if the Curia of Hungary had fulfilled its obligation to initiate a preliminary ruling procedure, there probably would have been a different decision in his case. According to the complaint, the violation of fundamental rights was attributed to the court, since it did not fulfill its legal obligation and the rejection was not justified by professional reasons. Thus the judicial procedure cannot be considered as fair, and the complainant was deprived from his right to a fair trial. Hence I am of the view that if the HCC had examined the procedure of the Curia of Hungary from the point of view of constitutionality related to the right to fair procedure, the constitutional complaint procedure would have provided remedy for the violation of the fundamental right.

It has to be remarked that the HCC agreed with the court of first instance's decision, even though the Curia of Hungary and the court of appeal – as detailed by the petition[22] – did not accept the arguments of the court of first instance regarding the preliminary ruling procedure. This is important, because while the court of first instance held that the CJEU did not have competence in this case, the court of appeal and the Curia of Hungary disagreed. This means that according to the latter courts, the Curia would have been

[19] These aspects are just examples. About the material clarification of the constitutional law issues of fundamental importance see especially Kadlót Erzsébet: *Az indítványok szűréséről*. Alkotmánybírósági Szemle 2012, Vol. 1, pp. 96-104.

[20] Vissy Beatrix: *Az individuális alapjogvédelem kilátásai az alkotmánybíráskodásban. Merre mutat az alkotmányjogi panasz iránytűje?* Magyar Közigazgatás 2012, Vol. 2, pp. 31.

[21] The subject of the procedure was a suit for compensation against the Curia of Hungary based on the EU law.

[22] http://public.mkab.hu/dev/dontesek.nsf/0/9f5779f56d0e13fcc1257cb600589364/$FILE/IV_507_0_2014_inditvany_anonim.pdf (24 March 2015).

responsible to initiate the preliminary ruling procedure, and thus it should have explained in detail why it did not do so.

Examining the constitutional review of the violation of the right to a fair trial and the right to fair procedure, this problematic decision of the HCC cannot be evaluated separately from the procedure leading up to it. The right to fair procedure and the right to a fair trial guarantee not only that the decision made at the end of the procedure is formally fair and is promulgated by the judge designated by law, but also that in the procedure leading up to the decision the right to fair procedure and the right to a fair trial were ensured all along for the concerned person. Consequently, the unconstitutionality of the decision at hand can and should be examined in the context of the procedure of the Curia of Hungary, because the requirement of the right to fair procedure is a quality which can only be adjudged by considering the entire procedure and its circumstances.[23] Thus, if the Curia of Hungary had ignored the preliminary ruling procedure arbitrarily, it would have violated the complainant's right to fair procedure guaranteed by Article XXVIII Para. (1) of the Fundamental Law of Hungary.

In order to decide about the arbitrary nature of the rejection of admissibility, the ECtHR's jurisprudence should be invoked, because according to the HCC, the level of the protection of fundamental rights provided by the HCC cannot be less effective than the level of international protection which is binding upon Hungary.[24] The ECtHR dealt with the question whether the non-initiation of the preliminary ruling procedure based on Article 267 TFEU violates the concerned persons' right to a fair procedure (declared by Article 6 of the ECHR) several times. On the one hand, according to the ECtHR's clear and constant practice the concerned persons do not have absolute rights to have their petition submitted to the CJEU by the competent national court. On the other hand, the right to fair procedure can be violated – under certain circumstances – if the national judicial forum of the highest level refuses the initiation of the preliminary ruling procedure, especially if this denial is arbitrary.[25]

In the course of the examination of arbitrariness, the ECtHR also refers to the CJEU's decision in the *CILFIT case*,[26] and it follows its content during the examination of whether the right to fair procedure has been violated, and evaluates whether the non-initiation of the otherwise obligatory preliminary ruling procedure taking into account the *ratio decidendi* of the *CILFIT case*. For example, according to the ECtHR there is no arbitrariness if the national court explains in detail why the initiation of the preliminary ruling procedure was refused by referring to the CJEU's relevant practice in connection with the case at hand.[27] Furthermore, it is not arbitrary if the European laws invoked by the concerned person were not relevant or did not raise any question of interpretation.[28]

Consequently, according to the ECtHR's interpretation, the concerned person's right to a fair trial will be violated due to the non-initiation of the preliminary ruling procedure if this occurs contrary to the rules determined in the *CILFIT case*. The omission of the preliminary ruling procedure is arbitrary if the

[23] The Decision of the Constitutional Court 36/2013. (XII. 5.), Reasoning [32].

[24] the Decision of the Constitutional Court 36/2013. (XII. 5.), Reasoning [26].

[25] See for example *Divasga v. Spain* (App. no. 20631/92) EctHR (1993), *Wynen and Centre Hospitalier Interrégional Edith-Cavell v. Belgium* (App. no. 32576/96) EctHR (2002), *Dotta v. Italy* (App. no. 38399/97) EctHR (1999). These cases are examples close to the revealed problem, and would be considered in the course of adjudgement of the constitutional complaint.

[26] *Ullens de Schooten and Rezabek v. Belgium* (App. no. 3989/07) ECtHR (2001).

[27] *Divasga v. Spain* (App no. 20631/92) EctHR (1993).

[28] *Dotta v. Italy* (App. no. 38399/97) EctHR (1999).

competent forum does not explain its reasons professionally, objectively and in detail, hence if the forum ignores turning to the CJEU discretionally.

In the case at hand, the Curia of Hungary would have had the possibility to legally omit the initiation of the preliminary ruling procedure only if the conditions laid down by the CJEU in the *CILFIT case* had been met, i.e. if the competent court would have had ascertained that the issue was not relevant for the case, or if the provision of EU law in question had already been interpreted by the CJEU, or if the correct application of EU law was evident beyond any reasonable doubt. Nevertheless, the Curia of Hungary did not make reference to any of these arguments when it refused to initiate the preliminary ruling procedure.

Regardless, the HCC's reasoning was limited only to emphasizing that the competent court has the discretional right to decide whether it initiates preliminary ruling, and the decision about it is not a constitutional law issue. It is, however, true that the violation of an individual procedural rule does not always result in an unfair procedure, and as it was stated in the HCC's decision 3352/2012. (XI. 12.), the right to fair procedure does not always imply the right to a correct and fair decision due to the fact that factual and legal mistakes of judges are inherent to the current judicial system. At the same time, the violation of the right to fair procedure can be established if – as it happened in this case – the court practices its obligatory rights arbitrarily. Thus it is not the subject of the HCC's procedure to determine whether the decision about the preliminary ruling procedure was correct or not, rather to examine whether the decision was fair and not arbitrary. To rule on this is not only a possibility but an obligation for the HCC.

4. The significance of the HCC's decision

The analyzed constitutional complaint is based on the right to fair procedure and the right to a fair trial declared in Article XXVIII Para (1) of the Fundamental Law of Hungary. The professional consideration of the constitutional complaint requires the HCC to evaluate whether the fulfilment of the preliminary ruling procedure's initiation may be refused *in abstracto* constitutionally, and on the basis of this whether the negligence of the preliminary ruling procedure is *in concreto* arbitrary, and subsequently unconstitutional, in the light of the ECtHR's jurisprudence, Article 267 of the TFEU Union, and the *CILFIT* conditions.

Accepting that for the present case solely the Hungarian law should be applied, the HCC – beside the applicable European law – ought to have invoke, in case of doubt, the practice of the Federal Constitutional Court of Germany, as the HCC's practice and criteria regarding the question at hand have not been developed yet. The HCC has – from the beginning – considered the case law of the Federal Constitutional Court as an example when passing decisions.[29] According to the Federal Constitutional Court of Germany, if a national Constitutional Court, which would be obligated by the TFEU to initiate a preliminary ruling procedure, fails to do so (and the conditions under which it would be released from its

[29] About the Federal Constitutional Court of Garmany's practice whether it is possible to initiate constititional complaint based on the right to fair trial because of the violation of the obligation of preliminary ruling procedure's initiation see Osztovits András: *Az előzetes döntéshozatali eljárás legfontosabb elméleti és gyakorlati kérdései*. KJK-Kerszöv, Budapest, 2005, pp. 176-179.

obligation are not met), it commits such infringement which is suitable to violate the concerned person's right to fair procedure and right to a fair trial.[30]

In the case at hand, the examined questions are constitutional law issues of fundamental importance, and the HCC had the possibility to declare that the Fundamental Law of Hungary does not allow the arbitrary application of law, and that the CJEU may be considered the forum of fair trial. In addition, the HCC could have made it clear that in case a competent court against whose decisions there is no judicial remedy under national law fails to initiate the preliminary ruling procedure despite its obligation unde Article 267(3) of the TFEU, it deprives the concerned person from the right to a fair trial, which violates the right to fair procedure.

Furthermore, it is obvious that the revealed questions reach beyond an individual issue, as in January 2013 the president of the Curia of Hungary – under Article 29 of Act CLXI of 2011 on the Organisation and Administration of the Courts – set up a working group to analyze national jurisprudence regarding the subject of 'The application of EU Law: the experiences of the initiation of the preliminary ruling procedure'. The report made by the group expressly pointed out that the unlawful omission of the preliminary ruling procedure has occurred several times in the Hungarian judicial system.[31] This professional finding makes it also necessary for the HCC to review the preliminary ruling procedure's role in Hungarian procedural law in order to clarify the constitutional criteria – in accordance with the Decision of the Constitutional Court 3/2013. (II. 14.) – which should be considered in the legal practice in the future.

[30] See especially the following decisions of the Federal Constitutional Court of Germany: 1 BvR 230/09.,1 BvR 1036/99, 2 BvR 947/11 etc.

[31] http://www.lb.hu/sites/default/files/joggyak/az_europai_unio_joganak_alkalmazasa.pdf (24 March 2015)

Free Movement of Capital in Kosovo – Compliance with EU Criteria in the Light of Non-Contractual Relations

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Since the free movement of capital as one of the fundamental freedoms of the Internal Market of the EU is an important sphere of the financial integration process of Kosovo in the EU, its implementation in Kosovo will be presented in the light of Kosovo's non-contractual relationship with the EU. In this regard, the implementation of European standards in terms of ensuring this freedom by Kosovo will be treated through a brief background, an analysis of the EU Progress Reports related to Kosovo (from 2005 to 2013), through a presentation of peculiarities and similarities of Kosovo's financial system as compared to other countries, and through a presentation of the current legal position of Kosovo in terms of overall financial integration.

Keywords: free movement of capital, financial integration, financial system of Kosovo, non-contractual relation

1. Introduction

The historical aspect of financial integration in the European Union (EU), presents two important developing trends regarding this field: the first one is the establishment of the continuous cooperation of the EU member states with the purpose of expanding the basic freedoms of the internal market; and the second being the continuous effort of the aspiring EU integrated countries to harmonize their respective legislation with that of the EU. In this context free movement of capital in Kosovo belongs in the second trend, although an additional factor which is non-contractual relations needs to be considered as well.

In this paper, the definition and the judicial effect of the free movement of capital in the EU framework will be treated initially, then Kosovo's advance in the legal harmonization process in non-contractual relation conditions with the EU, the understanding of Kosovo's specific non-contractual relationship with the EU, the challenges, similarities, differences, advantages and disadvantages of Kosovo's financial system regarding the free movement of capital, and finally the Kosovo's current legal position in the financial integration field in general.

Based on the fact that there is a lack of specific research in this field, the research methodology can be considered 'imposed', since the reference material for this paper constitutes EU primary legislation (the treaties), European Court of Justice (ECJ) judgments, primary and secondary legislation of the country, and the Progress Reports of the European Commission for Kosovo. Apart from these, second hand sources have been taken into account as well, which in one form or another are related to the free movement of capital field (texts and works published in journals).

2. Definition and Judicial Effect of the Free Movement of Capital

From the perspective of European Union Law (EU Law), free movement of capital is to a large extent established by provisions in primary legislation and by the bylaws of the EU.[1] In particular, when considering the content of primary legislation, we start from the formulation that is defined by the Treaty on the Functioning of the European Union[2] (TFEU), where the content of free movement of capital has not undergone major changes in character from previous iterations. However, its content has been expanded with secondary legislation.[3] In addition to that, ECJ has played and plays quite an important role in the regulation of the issues in this area, especially because of the fact that the decisions of this Court are considered as legal sources of EU law.[4] It is important to note that the ECJ through a judgment in the *case Skatteverket v. A*, of 18 December 2007,[5] has determined that the principle of free movement of capital shall have a direct effect.[6] Since the treaties provide for the free movement of capital in general terms, secondary legislation plays a major role in the specification of the provisions of the treaties, thus becoming necessary legal acts.[7] In addition to the Treaties and secondary legislation, a large role is played by the ECJ judgments in the application of the right of free movement of capital, because this eliminates all national restrictions regarding this right.[8]

Legal basis for the free movement of capital is determined by what is called the primary legislation and it was envisaged under the Treaty on the European Economic Community, which represented a move towards economic integration.[9] Moreover, the free movement of capital, with roughly similar and generalized content is currently foreseen under the Lisbon Treaty.

Given the historical aspect, the free movement of capital through the founding treaties and its regulation was treated as an interim or transitional process which over time, would adapt and expand in line with European integration. Thus the concept of free movement of capital that was established with the Treaties was further specified with secondary legislation, namely EU directives and regulations, as they were drafted to enable implementation the respective articles of the EU treaties.

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[1] In this case, primary legislation would be treaties such as founding treaties containing provisions on free movement of capital, and the Treaty of Lisbon, whereas secondary acts are regulations and EU directives dealing with treaties provisions on the free movement of capital.

[2] Treaty on the Functioning of the European Union, Art. 63 para. 1 and 2, (signed in Lisbon on 13 December 2007, and entered into force on 1 December 2009), OJ C 326/47.

[3] This group of EU secondary legislation consists of acts that are ranked as follows: Regulations, Directives, and Decisions.

[4] The EU Court of Justice as one of principal institutions responsible for the interpretation of the EU Law exercises its activity in the area of free movement of capital through decisions which are considered as sources of EU Law. An important example of this is the judgment in Case C-95/12, *Commission v. Germany*, http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-10/cp130138en.pdf (20 March 2014).

[5]Case C-101/05 *Skatteverket v. A*, judgment of 18 December 2007, http://ec.europa.eu/dgs/legal_service/arrets/05c101_en.pdf (21 March 2014).

[6] Direct effect means that member countries need not introduce legal acts dedicated to this area, but shall directly enforce EU Law provisions.

[7] The first group of this secondary legal acts includes: Directive 88/361/EEC, especially Ann. I; Council Regulation (EC) No. 332/2002; Council Regulation (EEC) No. 397/1975/EEC; Council Regulation (EEC) No. 682/1981; Council Regulation (EEC) No. 1969/1988; Regulation (EC) No. 1889/2005.

[8] Tim Connor,*"Market Access" or Bust? Positioning the Principle within the Jurisprudence of Goods, Persons, Services, and Capital*, Vol. 13, No. 06, 2012, pp. 679-756,

http://www.germanlawjournal.com/index.php?pageID=11&artID=1437 (5 February 2015).

[9] Paul Craig & Grainne De Burca, *EU Law, Text, Cases and Materials*, 4th ed., Oxford University Press, Oxford 2008, p. 6.

In terms of formulation, the definition of free movement of capital through the treaties and its materialization via secondary legislation has not undergone any significant changes from the earlier ones; however the transformation lies in the expansion of the content of this freedom.

In addition to the facts mentioned above, it is very important to note that the Accession Agreements have significant impact in terms of regulating the area of free movement of capital. As such, they effected the free movement of capital with their provisions on the constraints, respectively the exemptions from the application of some areas of EU Law in the newly acceded countries, thus causing serious difficulties in the functioning of the EU internal market. It should also be noted that in the cases where the free movement of capital regarding third countries presents difficulties in the operation of the Economic Monetary Union, the European Council, by a proposal from the European Commission, and in consultation with the European Central Bank, may take protective measures against those third countries for a maximum duration of 6 months.[10]

Free movement of capital, as one of the fundamental freedoms of the EU internal market, as defined in general terms under the Treaty on the Functioning of the European Union, implies the ban or removal of all restrictions on the free movement of capital, and all restrictions over payments between EU Member States, and between EU Member States and third countries.[11] The EU internal market as an agreement between the member states was created for the elimination of restrictions for the purpose of enabling free movement of services, people, goods and capital, including competition.[12]

Based on the above and taking into account the hierarchy of legal acts under the EU framework, it can be concluded that the predictability of the free movement of capital presents a general and direct obligation, both for the Member States and third countries aspiring to be part of the EU.[13]

3. Non-Contractual Relations: Kosovo's Case

The Stabilization Association Process (SAP) as a political framework for the Western Balkans[14] through the European integration process of the countries of this region aims to stabilize regional cooperation and establish a European prospect. This process began in the year 1999 and was addressed specifically to the Western Balkans. It will be considered concluded with the accession of these countries in the EU. The relationship between the EU and these countries, until the legal definition phase between the bilateral agreements with the EU, in a theoretical aspect is considered to be non-contractual. In this context we can say that the non-contractual character of these relations between the EU and the Western Balkan countries is considered as such until the Stabilization and Association Agreement (SAA) is signed. These agreements are signed on a specific stage of development, between the EU and an aspiring EU country thus noting the end of the non-contractual relations. The content of these agreements includes the

[10] Op. cit. (note 2).

[11] Ibid., Art. 63, p. 71.

[12] Elspeth Barry & Mathew J. Homewood & Barbara Bogusz, *EU Law: Text, Cases, and Materials*, Oxford University Press, Oxford 2013, p. 339.

[13] General and direct obligation of provisions dedicated to free movement of capital are a result not only of prescription of this freedom under the Treaties but also the judgment of the EU Court of Justice in the *Case C-101/05 Skatteverket v A.*

[14]This group consists of: Kosovo, Albania, Montenegro, Serbia, FYRO Macedonia and Bosnia and Herzegovina.

commitment of the aspiring countries to fulfill the formal criteria necessary for accession,[15] but in a stricter and time frame defined format.

In Kosovo's context, the non-contractual relations lasted longer than in other countries, because of the specifics that characterized Kosovo in this process, whether they were political, economic or legal. Since the non-contractual relations are neither a legal category even from Kosovo's perspective nor that of the EU; they are treated in this paper in a more theoretical manner, and is done for the following reasons:

- to show the EU's commitment to including Kosovo in the SAP since its launch (albeit in very specific circumstances)
- to show Kosovo's commitment to tackling the challenges of EU integration process,
- to show that the progress of Kosovo in this process is in non-mandatory circumstances, and
- to show the readiness of the EU and Kosovo to sign the SAA, by transforming these relations into taking a contractual character.

Apart from this, the treatment of non-contractual relationship in this case serves, not only a strict separation between the contractual relationship, but also as a way to show the obligations that are given by the EU in the preceding stages up to the SAA and after it as well. Consequently, the obligations that the EU undertakes by signing the SAA, indirectly oblige Kosovo to fulfill the challenges that arise from the integration process, even though the relations are of a non-contractual nature. Whereas the obligations that the EU and Kosovo undertake after singing the SAA are mutual and as such unavoidable to fulfill, and their evaluation of fulfillment is more rigorous.

Based on what was said above, while alluding to the theoretical aspect based on the factual circumstances, the non-contractual character of the relationship between Kosovo and the EU is much more evident when compared with other countries that are part of the SAP. This situation exists for two reasons:

- first, because of the longer time Kosovo has passed before agreeing to the SAA compared to other countries, and
- second, because of the specifics[16] that Kosovo has had in this process.

Finally, the consideration of the non-contractual relations and their transfer into contractual relations serves as a valuable indicator for the progress that Kosovo has shown in the European integration process on one side and the recognition of this progress by the EU.

4. Kosovo's Characteristics Related to Free Movement of Capital

Given the basic meaning of the free movement of capital (as defined by the Treaty on the Functioning of the European Union)[17] and its components,[18] it can be easily established that the financial system of the

[15] Accession Criteria (Copenhagen criteria): http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhague_en.htm (4 April 2014).

[16] Specifically, because of the undefined status until 2008 (being under the UN interim administration) and the lack of recognition of Kosovo's independence by 5 EU member states.

[17] Treaty on the Functioning of the European Union, Part III, Title IV, Chapter 4: Capital and Payments –Art. 63 (e.g. Art. 56 TEC), OJ C 326/47.

[18] As a component of free movement of capital is the nomenclature prescribed in Ann. 1 of EU Directive 88/361/EEC.

Republic of Kosovo[19] has some unique characteristics which differentiate it from the other countries in the region,[20] but they are not very significant. As a new financial system that was established from scratch, it includes similarities and differences in comparison to others, and at the same time highlights some advantages and disadvantages compared to others as well. Some of the specificities which need to be emphasized regarding the financial system of Kosovo are: a) the establishment of the system from scratch 15 years ago (because of the war/conflict between Kosovo and Serbia that concluded in 1999 and left Kosovo to rebuild its financial system); b) the functioning of this system on basic-traditional financial services; c) a system which encompasses all licensed financial institutions which are regulated and supervised by a single authority;[21] d) the changes to the primary and secondary legal framework during this period, i.e. since establishment in 1999 to date; e) the structure of capital which is dominated by foreign capital; f) the payment system and a credit registry[22] which is managed and maintained by the Central Bank of the Republic of Kosovo (CBK); and g) the small financial system with limited international exposure.

Besides these specifics, the financial system of the Republic of Kosovo also has similarities with other financial systems, compared to the others in the region, which can be summarized in terms of general features concerning: a) the level of development, which means that the challenges that Kosovo's financial system faces are roughly the same, with some exceptions (the efficient functioning of the system, the expanding span of financial services, capacity development, etc.); b) harmonization of financial legislation with EU respective acts presents one of the important similarities of Kosovo's financial system with those of other countries in the region for two reasons: the first, after these countries are faced with the process of incorporating EU legislation into their own national legislation, and the second after EU legislation undergoes changes, especially after the financial crisis of 2008, challenges these countries with harmonization of same financial legislation at the same time, and c) the role of supervisory and regulatory authorities related to free movement of capital also presents a similarity since the regulatory authorities of the financial system of these countries are responsible for fulfilling the challenges of a regulatory and supervisory character regarding the free movement of capital that arise from the EU integration process.

Specifics and similarities of the financial system of Kosovo mentioned above, if compared with those of member countries of the EU, do not necessarily imply that they can be treated as distinct or similar, as can be done in addressing specifics or similarities with those of the region. Therefore, similarities of the financial system of the Republic of Kosovo with those of any EU member country may be difficult to find or are not present at all, especially in terms of development and legislation, whereas similarities can be found in a comparison of the financial system of Kosovo with the countries in the region.

[19] Kosovo, since 1999, until 2008 when it declared its independence was under UN Interim Administration based on the UN Security Council Resolution 1244. The Republic of Kosovo currently is recognized by over 100 UN member countries, 23 of which are EU member states. Apart from that, the International Court of Justice has confirmed Kosovo's unilateral declaration of independence by the Advisory Opinion of 22 July 2010 that it is not in opposition to International Law. For the purposes of this paper, the term Kosovo will be used for the period preceding 2008, while the term Republic of Kosovo will be used when referring to the period after the declaration of independence (i.e. after 17 February 2008).

[20] Albania, Serbia, Montenegro, Former Yugoslav Republic of Macedonia (Candidate countries) and Bosnia and Herzegovina (Potential candidate countries together with Kosovo).

[21] All financial institutions in the Republic of Kosovo are licensed/registered, regulated and supervised by the Central Bank of Kosovo.

[22] The purpose of the Credit Registry is collection and dissemination of positive and negative information on physical and legal persons, for the purpose of improving the evaluation process for client creditors and enforcing the supervisory function of the Central Bank.

5. Advantages and Disadvantages Compared to the Region and the EU

Based on specifics and similarities of the financial system of the Republic of Kosovo in comparison to the countries in the region and the EU countries, several advantages and disadvantages may be identified:

- As a system built from scratch, during the drafting of legislation in this area standards and international best practices were used, adapting them to the needs of establishing the system and then in the development of this system, without being influenced by the earlier system (tradition)[23] and the non-existence of publicly owned financial institutions (such as Bosnia and Herzegovina, Albania, Serbia, Montenegro, etc.);
- As a system which is regulated and overseen by a single authority, it implies a lower cost to the country, by avoiding the establishment of separate supervisory authorities for different sectors of the system (banking, insurance, pensions, etc.) something that differentiates the Republic of Kosovo from Albania, Bosnia and Herzegovina, Montenegro, Macedonia which have established separate supervisory authorities for their separate financial system sectors;
- As a small system in terms of volume of products and institutions, and with minimum international exposure, it highlights two principal facets: a) on one hand, it has been proved as positive phenomenon especially during times of crisis and financial turbulence, such as the recent international financial crisis, b) on the other hand, lack of international exposure reflects the level of development of the system.
- As a system dominated by foreign capital, it demonstrates continuous stability and sustainability;[24]
- With a unique system of payments and a unique credit registry, the country's financial system represents a quality of economies respectively small financial systems, under ongoing development;
- As a system faced with frequent changes and transformations of primary legislation and secondary legislation respectively, it reflects in itself the development character of the system over the years since its establishment, and at the same time presents difficulties both from the regulatory aspect for the CBK, and also difficulties with which constituent institutions of the system were faced.

6. Challenges and Progress in Complying with EU Criteria

In order to give a clear picture of the financial system of the Republic of Kosovo in relation to the free movement of capital, we need to adopt a generalized analytical overview of the EU Progress Reports for Kosovo,[25] with focus on the economic criteria part, and especially the free movement of capital.

[23] This fact is mentioned since in several cases (countries), "legal tradition" is claimed as one factor slowing down the process of harmonizing the legislation. This as a result that certain legislation creates a certain related system, where legislative changes imply changes in a respective system, where the latter is manifested as a resistance factor against the harmonization of legislation.

[24] Banka Qendrore e Republikës së Kosovës, *Raporti i Stabilitetit Financiar*, Nr. 06, dhjetor 2014, pp. 26, 29, 75, 77, 81; http://www.bqk-kos.org/repository/docs/2015/BQK%202014_FSR%206_shqip.pdf (5 February 2015).

[25] Progress Reports for Kosovo are assessment reports prepared by the European Commission which measure the annual progress achieved in Kosovo. Progress assessment is done against fulfillment of Copenhagen criteria, as formal criteria for membership in the European Union. This assessment document for Kosovo is published since 2005.

Below are some of the most important challenges that have accompanied the financial system of Kosovo, as identified by the EU Progress Reports for Kosovo throughout the years, from the early years up to 2013):

- In 2005, Kosovo Progress Report highlights that Kosovo currently has no specific legislation covering the area of free movement of capital, and that free movement of capital in and out of Kosovo is completely unregulated.[26]
- Progress Report for 2006 highlights that the free movement of financial capital into and out of Kosovo remains unregulated, and that the use of Serbian dinar as a currency more than Euros in making payments in Serbian enclaves in northern Kosovo, represents a serious obstacle to the free movement of capital and hinders the BPK[27] role in these areas[28].
- 2007 Progress Report for Kosovo highlights that overall there is very little progress that can be reported in this area[29].
- Progress Report for 2008 highlights that in general progress has been made in the area of free movement of capital, being partially harmonized with European standards, also there has been some progress in building the necessary administrative capacities, however substantial actions need to be taken with respect to legislation and capacity building for implementation, and that no meaningful progress has been made in the payments system[30].
- 2009 Progress Report for Kosovo concluded that limited progress had been made in terms of free movement of capital, but Kosovo currently did not differ in the treatment of foreign financial actors in relation to domestic ones. In general, the regime for the free movement of capital was very liberal; however, EU compliant financial legislation needed to be drafted.[31]
- In 2010, Progress Report noted that the system of free movement of capital is very liberal, but it is necessary to continue with the gradual harmonization with requirements of Basel II[32] standards, and harmonization of legislation with the EU framework with respect to the area of movement of capital[33].
- In terms of free movement of capital, 2011 Progress Report noted that the system for free movement of capital is quite liberal; however, reforms are needed in order to implement the Basel standards and draft legislation also consistent with EU standards; it also notes that the capacity of the CBK to supervise the financial system is adequate[34].

[26] European Commission, *Kosovo (under UNSCR 1244/99) 2005 Progress Report [COM 2005]*, (Part 3, 3.1. Internal Market; 3.1.3 Free movement of Capital), p. 40.

[27] BPK-Banking and Payment Authority of Kosovo, means the supervisory and regulatory authority of the financial system in Kosovo at that time, respectively the predecessor institution of the Central Bank of Republic of Kosovo.

[28] *Kosovo (under UNSCR 1244/99) 2006 Progress Report [SEC 2006]*, (Part 4 European Standards, 4.1.3 Free movement of Capital), p. 25

[29] *Kosovo (under UNSCR 1244/99) 2007 Progress Report [SEC 2007]*, (Part 4 European Standards, 4.1. Internal Market, 4.1.3 Free movement of Capital), p. 31.

[30] *Kosovo (under UNSCR 1244/99) 2008 Progress Report [SEC 2008]*, (Part 3 European Standards, 3.1. Internal Market, 3.1.3 Free movement of Capital), p. 40.

[31] *Kosovo (under UNSCR 1244/99) 2009 Progress Report [SEC 2009]*, (Part 4 European Standards, 4.1. Internal Market, 4.1.3 Free movement of Capital), pp. 28-29.

[32] Basel II means a framework of international standards for efficient bank supervision, as developed by the Basel Committee on banking supervision of the Bank on International Settlement (BIS).

[33] *Kosovo 2010 Progress Report [SEC 2010]*, (Part 3 European Standards, 3.1. Internal Market, 3.1.3 Free movement of Capital), p. 30.

[34] *Kosovo 2011 Progress Report [SEC 2011]*, (Part 4 European Standards, 4.1. Internal Market, 4.1.3 Free movement of Capital), pp. 34-35.

- In 2012, it was recorded that Kosovo has a financial system dominated by a liberal regime on the free movement of capital, including foreign direct investment, whereas efforts to obtain access to the SWIFT[35] system have not yielded results; it has an embryonic system of capital market and to fulfill its requirements arising from the SAA (i.e. for the future) it needs to harmonize its legislation with EU standards as regards free movement of capital and payments system.[36]
- 2013 Progress Report for Kosovo notes the following: that Kosovo uses the Euro as its official currency, however the CBK has limited instruments of monetary policy, albeit important steps have been taken to preserve the financial stability but there is ample space for improvements, secondary legislation should be reviewed, and faster progress has to be made towards risk-based approach.[37]

Based on these progress reports of the European Commission, it has been noted that until 2005 when the first progress report was published for Kosovo, there was no progress. That does not mean that this area was completely unregulated, as mentioned in the progress report for 2005.

An analytical overview of the progress reports on Kosovo from 2005 to 2013 suggests that in the beginning challenges highlighted in these reports resembled more to findings of an assessment or audit report than challenges per se. Since initially it became evident that there was a lack of both the legislation and administrative capacities dedicated to free movement of capital. Over time, the relevant legislation for the financial system of the country was gradually introduced, and in that legislation a specific part is devoted to the free movement of capital. This is evidenced by the findings of Progress Reports starting from 2008 onwards, when challenges related directly to the free movement of capital were being identified, and at the same time measuring of the progress in addressing those challenges was initiated.

Based on the Progress Reports, we found that many of them are phrased generally and not specifically, therefore leading to room for interpretation regarding whether or not Kosovo's challenges were met.

An important aspect that needs to be noted is the instances in the progress reports that identified challenges which have been directly linked to supranational political aspects. Typical examples include the efforts to join the Green Card System and SWIFT, where these processes require being a member of United Nations, however it should be mentioned that these instances were not very significant.

From the above, it can be concluded as follows:

- The financial system of Kosovo has addressed the issue of free movement of capital from the beginning, but the institutional and legislative aspects were introduced from 2005,[38] because as mentioned earlier, this system was built from scratch;
- Since 2005, the progress in this area, both in terms of institutional capacity building and legislative capacity building is a subject of assessment by the Progress Reports of the European Commission for Kosovo;

[35] Society for Worldwide Interbank Financial Telecommunication (SWIFT), to which the Central Bank of Republic of Kosovo has obtained access in December of 2013.

[36] *Communication from the Commission to the European Parliament and the Council on a Feasibility Study for Stabilization and Association Agreement between European Union and Kosovo [SEC 2012]*, (part 3 Ability to assume the obligation from an SSA, 3.4 Movement of workers, establishment of services and capital), p. 24.

[37] *Kosovo 2013 Progress Report on Kosovo [SWD 2013]*, part 3 Economic Criteria, pp. 21-26, and part 4 European Standards, 4.1 Internal Market, pp. 27-30.

[38] The first Progress Report for Kosovo was published in 2005, which marks the key moment when free movement of capital is addressed institutionally and is regulated with legal acts, expressively or indirectly.

- In the first years of operation of the country's financial system, the priority was given to basic legislation in order to set the foundations, namely the framework for building a stable and sustainable system, to be followed later by secondary legislation in order to make it a more dynamic and efficient system;
- After the installation of the legal infrastructure and administrative capacity building related to the country's financial system, there is a further need for the advancement and development of this system both in terms of legal coverage, as well as the expansion of services and financial products to the country;
- The above-mentioned need resulted in a dynamic process of transformation and enrichment of legislation, and its harmonization with EU standards, especially after the Declaration of Independence on 17 February 2008;
- The process of developing this system and the development of legal infrastructure was followed by dynamic efforts to harmonize the legislation and a more focused assessment by the EU for the purpose of meeting the challenges arising in connection with the free movement of capital and payment system.
- Currently, the financial system of the Republic of Kosovo lies in a stage of development where it has completed its legal infrastructure to a large extent, although for certain areas there are ongoing efforts for the review, drafting, and amendments to both primary and secondary legislation, always harmonized with the EU legislation.
- Currently, no provision in the applicable domestic legislation related to the financial system provides any hindrance or restriction regarding the free movement of capital and payments.[39]
- Finally, it is worth mentioning that last year,[40] the Republic of Kosovo initiated the process of negotiations for the SAA with the EU, where titles IV, V, VIII, and IX of the draft of this Agreement are dedicated to free movement of capital and payments. In January 2014, negotiations were concluded on the above-mentioned chapters between Kosovo[41] and the EU, and the SAA was initialed in Summer 2014[42].

All the foregoing conclusions represent a statewide activity, which viewed from the standpoint of relations between Kosovo and the EU, represents the harmonization of Kosovo with the terms and conditions of the EU under the spirit of non-contractual relations as the SAA between Kosovo and the EU has not yet been signed. It is this Agreement which will determine the contractual relations between Kosovo and the EU[43]. In addition, it means that Kosovo's approach to integration processes indicates the

[39] Following are the legal acts that directly or indirectly regulate matters related to the area of free movement of capital: Constitution of the Republic of Kosovo, which promotes the market economy as a value (section 7) and determines that the free market economy and competitiveness shall be a foundation for the economic regulation in Kosovo (section 10), Legislation on banks, insurance, pensions, financial institutions and non-banking financial institutions, including regulations and instructions issued by the Central Bank of the Republic of Kosovo.

[40] In December 2013.

[41] This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

[42] Source: Kosovo Ministry of European Integration, http://www.mei-ks.net/?page=2,5,1011, (2 February 2015).

[43] This reality could be considered because of “political” circumstances since at the time when European prospect for the Western Balkans was opened in 1999, and later on confirmed in the Thessaloniki Summit in 2003 and until 2008, Kosovo was still under interim international administration under the Organization of the United Nations. UNMIK. This has enabled Kosovo to gain access to the Stabilization and Association Process through a specific EU mechanism known as STM, in force until 2010. As of 2010, the STM is advanced to the Stabilization and Association Process Dialogue, also as a specific mechanism of the EU for Kosovo, as e result of some other different political circumstances such as the non-recognition of Kosovo by the five EU member countries (Greece, Spain, Cyprus, Slovakia, and Romania). Both these mechanisms represent a dialogue framework between Kosovo and the EU in order to meet the challenges in the European integration process, however, this is

seriousness and the only alternative, therefore even in the non-contractual relations with the EU, a similar approach is adopted as in other countries of the Western Balkans (Albania, Bosnia and Herzegovina, Macedonia, Kosovo, Serbia). With a special focus, such progress achieved in the area of financial integration is evidenced by the presence of foreign financial actors in the financial system of the country, as well as the level of foreign capital, mainly from EU countries.[44]

7. Current Judicial/Real Position of Kosovo in Area of Overall Financial Integration

Based on the facts and circumstances presented so far, in this section we will attempt to present a comprehensive overview, with the purpose of presenting the current legal status of Kosovo in relation to the overall process of financial integration.

Considering the fact that the EU membership prospect of Kosovo began immediately after the war in Kosovo, namely in 2003, when such a possibility has generally become available for all countries in the region known as the Western Balkans, the Kosovo case is marked by a distinctive set of features compared to others. Those distinctive features of Kosovo in this process were of a political character, as described below:

- Starting with the Interim International Administration of Kosovo for approximately 9 years, where the EU's solutions for the inclusion of Kosovo in the process of European integration were characterized by the installation of mechanisms specific to Kosovo, such as the Stabilization and Association Process Tracking Mechanism (STM), followed by the Stabilization and Association Process Dialogue (SAPD).[45]
- Declaration of Independence has changed Kosovo's approach to this process. However, in legal terms with respect to the relationship with the EU, not much progress has been made. This is because of the five EU Member Countries[46] that have not yet recognized Kosovo. As a result, until 2010, *i.e.* even after the declaration of independence, the representation of the country in the integration processes was made possible through the STM, a body that is separate and established since the time when Kosovo was under interim international administration.
- SAPD marks a very important moment in the process of European integration for Kosovo, as this mechanism represents an advanced transformation of the prior mechanism (STM) of the EU for Kosovo. Therefore, the SAPD comes as a result of meeting the challenges by Kosovo in the

not a contractual relationship in the legal aspect. In 2012, the Feasibility Study on the SAA between Kosovo and the EU was conducted, which was positive, thus resulting in the initiation of negotiations in December 2013 between Kosovo and the EU on SAA. Currently, negotiations on the SAA are concluded and the Agreement was initialed in Sumer 2014. Source: Kosovo Ministry of European Integration http://www.mei-ks.net/?page=2,5,1011, (5 February 2015).

[44] Source: Periodic and annual reports of the Central Bank of Kosovo, especially from 2008 to 2014, available at www.bqk-kos.org.

[45] These specific mechanisms for Kosovo represent a dialogue framework between the latter and EU. The Stabilization and Association Process Tracking Mechanism was established to enable Kosovo access to the Stabilization and Association Process as a framework for dialogue for the Western Balkans, since until 2008 Kosovo was still under UN interim administration. Even following the declaration of independence of Kosovo (17 February 2008), the same mechanism (STM) was in force until 2010, and at that time it was replaced by the more advanced follow on mechanism, the Stabilization and Association Process Dialogue (SAPD). Source: Kosovo Ministry of European Integration, http://www.mei-ks.net/?page=2,78, (5 February 2015).

[46] As of April 2014, EU member countries that have not recognized the Republic of Kosovo are: Greece, Spain, Cyprus, Slovakia and Romania.

process of European integration. However, in no way it can be concluded that this specific mechanism specially established for Kosovo was not a reflection of the acknowledgment and recognition of the reality created in Kosovo after the declaration of independence, or may be otherwise defined as a typical "political response" of the EU in relation to Kosovo.[47] In one form or another, it was formally confirmed that the STM should be transformed into a SAPD since Kosovo has made the necessary progress in the European integration process, and it was now necessary to move to a more advanced stage of relations between Kosovo and the EU, albeit still not on a contractual basis. Viewed from the standpoint of the content of these mechanisms, the transition from STM to SAPD has to do more with legitimizing the recognition of Kosovo's progress by the EU rather than a substantial change in terms of its functioning and content. Further it implies a significant reaction of the EU, which certainly provides a stronger legal position to the whole process of integration, and paves the way for further advancement of our country towards EU. Regardless of the advancement of the Republic of Kosovo in the process, such relationship did not take a contractual character even under the new mechanism, respectively the SAPD.

- The negotiation of the SAA marks the most important phase for the Republic of Kosovo in the process of European integration, since entering into such an arrangement with the EU is legally based on the provisions of the Lisbon Treaty.[48] This is because the country enters into a more dynamic and detailed phase in the realization of its aspiration to join the EU. The initiation of this process is based on the progress made by Kosovo in the process and is made possible under the umbrella of a "tacit consensus" of all EU member countries in light of the fact that Kosovo is not recognized by five of twenty-eight member countries of the EU.

The paper will now present the current legal position of Kosovo in light of financial integration, where one of the key factors is the primary and secondary legislation for the financial sector, the above mentioned EU mechanisms for Kosovo and the process of negotiating the SAA, and the draft SAA itself. The process of European integration can also be divided into integral parts, principally for study or evaluation purposes. Related to this, the process of financial integration shall be assessed in light of Kosovo's path in this process and the assessment will come as a result of a separation of financial integration part from the European integration as a whole. Financial integration is primarily a market-driven process,[49] which means that its establishment is impossible to realize in one country or one single country in isolation, simultaneously its development enables the development of other financial actors of other countries that are an indirect indicator of the degree of financial integration. For the importance of financial integration in particular for the national legal harmonization that is linked to the internal market of the EU, Ralph H. Folsom considers it critical for the advancement of the EU integration.[50] Financial integration should also be distinguished from economic integration which, according to Encyclopedia Britannica is defined as: "The process in which two or more states define a specific geographic area in

[47] It is considered a typical political reaction since the new reality created in Kosovo following the declaration of independence necessitated actions of such character by the EU for the following reasons: acknowledgment of Kosovo's progress in the integration process and acknowledgement of the new reality in Kosovo. These two main reasons are followed by interesting purposes by the EU by creating a political balance for member countries not recognizing Kosovo and creating the necessary conditions for the much needed consensus for contractual relations between EU and Kosovo.

[48] Treaty on the Functioning of the European Union, Art. 217, OJ C 326/47.

[49] Klaus Liebscher, Josef Christl, Peter Mooslechner & Doris Ritzberger-Grünwald, eds., *Financial Development, Integration and Stability: Evidence from Central and South-Eastern Europe*, Edward Elgar Publishing: Cheltenham U.K. 2006, p. 48.

[50] Ralph H. Folsom, *Principles of the European Union Law*, 2nd ed., St. Paul, MN: Thomson/West 2009, p. 67.

order to limit trade barriers to protect certain economic purposes."[51] Looking at the process of European integration for Kosovo since the beginning, without repeating the circumstances of political character, we can draw some conclusions which are relevant for the current position of Kosovo in view of financial integration. These findings are:

- The process of financial integration of the country is initiated by the opening of the European prospect for Kosovo in 2003, but its formalization in fact is done by the publication of first Progress Report for Kosovo in 2005.[52] Through this report, which as we said earlier assesses progress in Kosovo on the basis of meeting the criteria for EU accession known as Copenhagen criteria,[53] where among others a part of this report assesses the progress towards financial integration;
- Progress of the Republic of Kosovo in the process is assessed based on incorporation of European standards into national legislation and on the basis of the overall development of the country's financial system. As a result of meeting the challenges in the process of financial integration, it is interesting to note the findings of Progress Report for Kosovo for 2005, quote "Currently there is no provision dedicated to free movement of capital, and free movement of capital in and outside Kosovo is completely unregulated", whereas subsequent progress reports in general terms note, quote "progress has been made but there is still room for improvement." What does this comparison imply? Nothing more or less than a very meaningful overview which demonstrates the willingness of Kosovo despite non-contractual relations with the EU, to take all the necessary steps to harmonize legislation and meet the financial challenges as identified in evaluation reports of the EU.
- Starting from a general principle that economic processes precede legal ones, we can say that the advancement and progress of Kosovo in economic integration and in particular financial integration have indirectly facilitated progress in other areas that are subject to achievement and evaluation based on meeting the Copenhagen criteria. This means that progress in meeting the challenges of the financial sphere in particular has contributed to improving the current legal position of the Republic of Kosovo in the integration processes in general.
- Harmonization of financial legislation of the Republic of Kosovo with that of the EU did not develop spontaneously and unilaterally but only on the willingness and actions of Kosovo. This is best illustrated by the installation of a special mechanism only for Kosovo (STM and SAPD) and evaluation reports of the EU for Kosovo, through which the harmonization of legislation is measured and supported.
- Feasibility Study for the Stabilization and Association Agreement between Kosovo and the EU,[54] directly led to the change in the legal position of the Republic of Kosovo in the integration

[51] Encyclopedia Britannica, *Economic Integration*,

http://www.britannica.com/EBchecked/topic/178433/economic-integration, (5 March 2015).

[52] European Commission, *Kosovo (under UNSCR 1244/99) 2005 Progress Report [COM 2005]*, http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1423_final_progress_report_ks_en.pdf, (3 March 2014).

[53] The Copenhagen criteria are formal criteria for EU accession, as determined by the European Council in Copenhagen in 1993. These criteria include the economic, political and legal criteria.

[54] *Communication from the Commission to the European Parliament and the Council on a Feasibility Study for Stabilization and Association Agreement between European Union and Kosovo [SEC 2012]*.

This study assesses whether Kosovo is ready to negotiate and subsequently can implement a Stabilization and Association Agreement and identifies priority issues to be addressed before negotiations can start and priority areas that Kosovo would need to address to be able to meet its obligations under a Stabilization and Association Agreement.

processes in general, and in financial integration in particular. This is because the Republic of Kosovo has now entered into a new phase of relations with the EU resembling relations that the EU has with other countries as part of the SAP. Therefore, it has entered a stage when the attribute of being in "special relations" due to political circumstances, is gradually transformed into "contractual relations" between Kosovo[55] and the EU, which will eventually happen with entry into force of the SAA.

Given the above findings, it is very important to note that Kosovo is currently a member of major international financial institutions / organizations such as International Monetary Fund, the World Bank Group (WB), and the European Bank for Reconstruction and Development (EBRD). This form of international financial integration implies an important part of the undeniable progress in financial integration of the Republic of Kosovo in the EU.

Another interesting argument that demonstrates the commitment of the Republic of Kosovo to financial integration is the publication of monetary statistics in the publication of International Financial Statistics of the IMF (IFS)[56] just weeks after joining the IMF.

The overall conclusion of the current legal position of the Republic of Kosovo in the field of financial integration may be summarized as follows: the Republic of Kosovo as a full member of the IMF, the WB and EBRD, may be considered integrated into the international financial system. In addition to that, as a country with clear a European Union prospect, it is now in one of the most important development stages to date, in setting and meeting the challenges of the (regional) financial integration in the EU, which is of a different size and format[57] from international financial integration. Financial legislation of the Republic of Kosovo as stated in other parts of this paper is extremely advanced and is being harmonized with international principles and standards, and EU directives. This legislation does not contain restrictive or discriminatory provisions in the treatment of foreign capital against domestic capital. Financial institutions in the country have reached such a level of development that enables them to cope without any difficulties with any legislative changes as a result of the incorporation of EU directives and international standards. Finally, the CBK as a supervisory and regulatory authority has achieved the necessary capabilities that enable it to introduce secondary legislation to harmonize and promote, supervise and regulate the financial system efficiently and to meet all the challenges arising from the international financial integration and the EU accession.

8. Conclusion

In the preceding parts some conclusions have been summarized that are very specific for each of them. Evaluating the free movement of capital from an EU perspective and that of Kosovo is impossible

[55] This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

[56] International Financial Statistics (IFS) is and annual IMF publication on countries' financial statistics for IMF member countries. Source: Central Bank of Kosovo, available at www.bqk-kos.org.

[57] It has been stated previously that the European financial integration is of a different size and format from that of international integration, in order to explain two circumstances. Firstly, to explain an element which at first glance resembles a disruption in the traditional logical sequence of regional and international integration, which in Kosovo's case is in the opposite order. Second, European financial integration is a system built by EU member countries which does not affect or oppose the principles of international financial integration, as a system which sets conditions and criteria to be fulfilled by countries aspiring membership in the system, and which is not built in terms of subordination or domination in relation to international financial order.

without referring to its legal treatment. The specifics of Kosovo's case in the implementation of the free movement of capital process, in particular the circumstances of the non-contractual relations, highlights the characteristics, advantages and disadvantages, the challenges and the harmonization process with the EU criteria as well as the actual legal position of Kosovo in the financial integration field and the EU in general.

In this context we come to some very concise and material conclusions closely related to the object of analysis in this paper. The conclusions are:

The financial system of Kosovo is new in terms of its operation (after it separated as a result of the disintegration of the previous system and it had to be rebuilt from zero), which faced many basic challenges with an organizational and functional character.

Is not affected by the so called "legal tradition" since its development had a detachment (1990-1999), which led to the construction of a completely new system.

The financial system of the country was not faced with existing publically owned financial institutions that present significant challenges in Albania, Serbia, Bosnia and Herzegovina, etc.

Development of a financial system followed many quick changes to legislation that was a result of two circumstances, that of the transformation after the independence of Kosovo, and that of the EU legal harmonization.

Although national legislation in the first years of operation did not contain specific provisions regarding the free movement of capital, it also did not contain provisions that restricted it. A more important argument for this is the fact of the domination of foreign capital (mainly from EU member states) in the system.

As an advantage of the financial system of Kosovo, we can count the existence of a single regulatory, licensing and supervisory authority of the whole financial system, the existence of a unique payment system (characterized by small economies) and the presence of foreign capital, something that establishes sustainability of a system in an adequate manner supported by a legal infrastructure.

The flaws as well as challenges are considered to be the limited exposure to the global system (during the times of crisis this may have seemed to be an advantage, but in current circumstances it is an indicator of the level of development), the frequent changes to legislation that had implications on financial system actors, the expansion of the financial products and services range.

The harmonization of the financial legislation in general and the one that is linked with the free movement of capital specifically, is presented as a main challenge, thus the dynamic in this direction is from Kosovo's side needs to be intensified since financial legislation undergoes frequent changes even within the EU.

The characteristics of Kosovo's financial system in implementing free movement of capital is an illustration of the will on the part of Kosovo even in the circumstances of non-contractual relations to make progress in harmonization of the relevant legislation with that of the EU;

Financial legislation in Kosovo does not contain any provision that limits the free movement of capital and no provision that presents preferential treatment to national capital with regard to foreign capital.

The involvement of Kosovo in the SAP, the establishment of EU mechanisms specially for Kosovo (STM and SAPD) and its progress in the process of European integration as well as new circumstances after the

declaration of independence distinctly improved its legal position regarding financial integration in the EU and in general (membership in the IMF, WB, EBRD, access to SWIFT, etc.).

Kosovo in the legal aspect as well as its factual aspect now enters a new phase of the relationship with the EU, one where non-contractual relations will be transformed into contractual ones after the entry in to force of the SAA (currently initialed).

Review

Márton Varju – Ernő Várnay (Eds.): The law of the European Union in Hungary: Institutions, processes and the law[1]

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With its eastern expansion the European Union required the newly joined, post-communist Member States to enhance their democratization. Although Hungary complied well and rapidly with the formal criteria of accession, further effective and quick implementation regarding the rule of law and good practises in public administration was also demanded by the Union, which is in progress ever since then.[2] The institutional transformations, as consequences of the implementation, required not only the adjustment of the legal regime, but the adjustment of the attitude of civil servants and law makers as well. Obviously, this aim could be reached over a relatively long period of time. The reviewed book aims to analyse this process: "This book examines the impact of European Union law on the state and law in Hungary. [...] It looks at the institutional responses in government to the direct adaptational pressures following from various areas of EU law and governance, in particular, the mechanisms and practises adopted for the harmonization of national law with EU law, including the external acquis, the application and enforcement of EI law in Hungary and the protection of by the Hungarian government of rights and Hungarian interests before EU courts."[3]

One would think the 10 years which have passed since 2004 would have been enough time for domestic legal literature to fully process the changes of governmental structures, and of substantive and procedural law and other impacts arising from EU accession. Even though several books, studies, publications, monographs and textbooks exist, these are mainly sectoral in scope. Comprehensive literature on the advantages and difficulties of harmonization and governance, jurisdiction, and law-making from pre-accession up until today is not easily found, and even less so in foreign languages. The book by editors Márton Varju[4] and Ernő Várnay[5] succeeds in filling the gap in this field of science.

Flóra Fazekas (University of Debrecen) is the author of a chapter concerning the role of Hungarian Constitutional Court. She gives an overview of the constitutional context and effects of EU membership and of the constitutional disputes which have arisen since 2004 in this regard. The practice of the Polish and Czech constitutional courts is compared with the Hungarian practice starting with the pre-accession period. The chapter sets out a transparent and understandable structure. Although some aspects of

[1] Márton Varju Ernő Várnay (Eds.): The law of the European Union in Hungary: Institutions, processes and the law, HVG-ORAC Publishing Ltd., 2014.
[2] Ibid. p. 21.
[3] Ibid. p. 21.
[4] Senior Research Fellow at the Hungaran Academy of Sciences and Senior Lectruer at the Faculty of Law of the University of Debrecen.
[5] Professor of European Union Law and Head of the Department of European and International Law at the Faculty of Law of the University of Debrecen.

fundamental rights protection at EU level are discussed here on a case by case basis, and later in Chapter Six, the issue is unfortunately not dealt with elsewhere in the book. The interpretation and effect of EU accession to European Convention on Human Rights[6] could perhaps also have been made part of the analysis (as far as it is relevant for Hungary).

The following chapters by Angéla Juhász-Tóth,[7] Réka Somssich[8] and Ernő Várnay strengthen the comprehensive nature of the book by fitting their chapters perfectly into the methodology described. Angéla Juhász-Tóth raises an important question: did the Hungarian Parliament waste the opportunities that it had had regarding the implementation of EU law? She aims to give a comprehensive overview of the legal background of the operation of the Parliament and the practices regarding EU affairs, and assesses the EU related activities of Hungary.[9] This goal of the chapter is indeed realized; and it is, in my view, one of the most interesting sections of the book. Réka Somssich and Ernő Várnay focus on other aspects of the transposition of EU law in chapters regarding the methods and procedures of approximation and the role of the Hungarian government and governance. Réka Somssich introduces the context and the historical background of pre- and post-accession coordination procedures and the alignments needed to fulfil the criteria of the European Union from a novel point of view. Ernő Várnay evaluates harmonization on a different level as he describes the results of and the rationales behind cases concerning Hungary before the European Court of Justice.

The following two chapters deal with the judicial effects of the accession. One of the main challenges of the harmonization of EU law was the adoption of measures regarding judicial cooperation between EU Member States; but also being subject to the supremacy of EU law and the power of authentic interpretation by the Court of Justice made national courts face new types of challenges, also regarding the interpretation of judicial independence. Márton Varjú underlines the main objectives and realized measures in the field of judicial cooperation well. András Osztovits[10] and Katalin Gombos[11] analyses the trends and quality of preliminary ruling procedures from Hungarian national courts. The use of statistics made the chapter even more unique.

The last chapters concern three different fields of EU policies. The study by Tihamér Tóth[12] discusses the probably most important field of integration, the provisions regarding the functioning of the internal market. The reception and application of competition law of the European Union still poses challenges for the Member States' administrations monitoring authorities. The chapter incorporates also the case law of the Hungarian Competition Authority, although without a precise general definition of the national legal background (which might have been useful to include). Mónika Papp[13] gives account of Hungarian developments regarding a similarly important field of European Union law: the rules on state aid. Compared with other publications concerning this topic, the chapter provides novel insight into the issue

[6] Convention for the Protection of Human Rights and Fundamental Freedoms.
[7] Lawyer-linguist at the Euroepan Court of Justice, and former Civil Servant at the Committee of European Affairs of the Hungarian Parliament.
[8] Lecturer in Law at the Faculty of Law of the Eötvös Lóránd University (ELTE), Department of International Private Law and European Economic Law, and former Head of the European Union Law Department at the Ministry of Justice.
[9] Angéla Juhász-Tóth: *European Union law and the Hungarian Parliament: wasted opportunities?* Ibid. p. 79.
[10] Judge at the Curia, and Senior Lecturer at the Faculty of Law of the Károli Gáspár University of the Reformed Church in Hungary, Head of the Department of European and International Law, and Senior Research Fellow at the Hungarian Academy of Sciences, Institute of Legal Studies.
[11] Judge at the Szeged Regional Appeal Court and Senior Lecturer at the Faculty of Law of the University of Szeged, Department of International and European Law.
[12] Senior Lecturer at the Faculty of Law of the Pázmány Péter Catholic University, and of Counsel, White&Case, Budapest.
[13] Lecturer in Law at the Faculty of Law of the Eötvös Lóránd University, Department of International Private Law and European Economic Law, and Research Fellow at the Hungarian Academy of Sciences.

by summarizing more than 250 individual decisions of the Commission concerning Hungary in this field. Chapter Ten from Ildikó Bartha[14] discusses Hungary's international agreements affected by EU membership and also examines the treaty-making practice from pre-accession times to the Treaty of Lisbon.

One of the main advantages of the book is that it examines not only the realized EU-related provisions, but pre-accession procedures. It also focuses on levels of professional background behind the transformation, and the effects of trainings organized for judicial and administrative staff. Furthermore, it tries to identify and elaborate upon the constitutional problems that arose in the accession period. Instead of dealing only with European Union law in general, it focuses on related domestic measures. It employs a sectoral approach, but with broader analyses, thus the book provides a complex overview of the condition of the Hungarian legal system before and after accession. It is indeed unique to summarize subjects like reception of competition law measures, international agreements of the Hungarian State and the role of national courts in preliminary ruling procedures together in one comprehensive book. It would not be wise for anyone to say that the domestic law (or the law of any Member State, for that matter) is perfectly harmonized with EU law, and the reviewed book emphasizes this statement correctly. Different actors at different stages of implementation are advised to consider the findings of the book, as these may prove useful in speeding up the fine-tuning of the Hungarian legal system in light of the EU acquis. The authors are all practicing legal professionals as well, increasing the practical relevance and reliability of the reviewed book.

Even scientific works and textbooks sometimes cannot avoid showing political preferences, but that is not the case here. The political neutrality of the writers can be assessed positively. It is crucial to remain neutral in criticising and evaluating the governmental regimes, instead of only just stating the facts. Such an approach can highlight and detail the problems and deficiencies experienced during the legislative 'reception procedures' in an impartial way.

De lege ferenda elements are not too common in the book, thus it can be described more as statements on and evaluation of past and present. At first glance, it is thus perhaps less relevant for legal and administrative practice, however, lessons learned from the past may serve as a roadmap of good implementation for the future – or on the contrary, as a list of practices to be avoided. The editors expressly state in Chapter One that the examination of deeper, less visible impacts of the Europeanization of the domestic legal order are not part of the book: the aim of the reviewed book is defined as exploring the motivations and interests of the Hungarian institutional system regarding EU membership.[15]

All chapters are written in compliance with the methodology described in Chapter One, and with great professionalism. The authors also cite foreign literature, which ensures a thorough analysis with some comparative aspects. Foreign language works of Hungarian authors are sometimes said to neglect the proper legal terminology, but not in the case of this book, which uses a fluent and professional style. It can be stated that the book fully achieves its aim. It was published in 2014, and gives up to date, factual, and experience-based information. The book provides extensive information about the full spectrum of the EU-oriented accession and harmonization procedure in Hungary, and the lessons learned from this process may serve as useful guidelines going forward – for Hungary and for other states (pre- or post-accession) as well.

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[15] Ibid. p. 25.