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# THE TRANSFORMATION OF THE INSTITUTIONAL SYSTEM OF APPOINTED DEFENCE COUNSELS AND THE RIGHT TO AN EFFECTIVE DEFENCE

**BENCZE, KRISZTINA** *

***Abstract:*** The on-going drafting of bill on criminal procedure contains significant improvements in certain scopes; however in some cases, the bill preserves the existing regulation. The object of my examination is the transform of defense. The previous regulation was concerned many critics. An ombudsman's report, dating from 2012, criticized the foundations of the institution of public defender. The on-going drafting of bill responds to the report, almost point by point, and correct the past mistakes. Presumably the bill coming into force, not only pages, but also in practice, creates the effective protection. It was the fundamental objective of the draft.

***Keywords:*** appointed defence counsels, bill, criminal procedure, effective defence

## 1. Introduction

1st of January, 2018 it is not only the beginning of a new year but also marks a new era in the history of Hungarian law of criminal procedure. According to the preliminary report of the codification committee and the Government, the new code of criminal procedure will come into effect on 01 January, 2018. Although the entry into force goes through more phases, this new period also promises substantial changes in the procedural law.

The whole criminal proceedings were revised by the Codification Committee (hereinafter referred to as Committee), thus the determining authority will conduct the criminal procedure along a totally new conception. The institution of defence counsels has also been affected by the changes. In my opinion, it could not have happened otherwise since basic and conceptual changes also bring along the reform of certain associated legal institutions; on the other hand, it is timely to transform the legal institution of defence counsels, especially the role of the appointed defence counsels.From here on, I will solely review the change of the defence counsel's institution but of course the discussion of other provisions is also inevitable due to the topic's complexity.

## 2. Antecedents

The wind of change has been present as the institution of appointed defence counsels was criticized both by defence counsels and by those accused. So the change was reasonable. Critics were not only tangible "within house", the Hungarian Bar Association but the Commissioner for Fundamental Rights also dealt with many complaints. The torrent of complaints has resulted in the report number AJB-

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3107/2012. In the centre of the comprehensive investigation of the ombudsman was the effectiveness of law of the lawyers and the clients they are advising, the practice of bar associations and the constitutional monitoring of the related regulation.[1] To this end, the Commissioner for Fundamental Rights has reviewed the provisions of the Basic Act, the practice of the Constitutional Court, the law of criminal procedures, the provisions of law on lawyers as well as the legal background on the authorities related to the legal profession's field of activity.[2]

### *2.1. Hungarian basics*

If we want to take a stand on the Draft's provisions concerning defence counsels, we have to shortly review the basics for the right to defence and the legal system as well as the effective regulation. Through these as well as from the awkwardness revealed in the ombudsman's report we will be able to see the direction the Draft should follow in order to make substantial and effective changes in the institution of defence counsels.

From our part, we also intend to review the statutory provisions with regards to the right to counsel, and the operational legislation. However, we - and the discrepancies revealed in the ombudsman report - only wish to do this to an extent necessary to reflect the shortcomings of the current system and to evaluate the proposed provisions, while showing the way ahead. Thus, representing the direction the system must follow in order to facilitate a substantive, efficient change in the institution of the court-appointed lawyer. Please note, that the proposal adopts almost all solutions recommended for the elimination of the discrepancies revealed in the ombudsman report.

The right to counsel is enshrined in the Fundamental Law of Hungary: "Persons subject to criminal proceedings shall have the right to defence at all stages of the proceedings."[3]The best way to explain this constitutional principle is through the jurisprudence of the Constitutional Court. The Constitutional Court has advocated for the effective assistance of legal counsel ever since an early decision they adopted.[4] In the Constitutional Court Decision No. 6/1998 (III. 11.), they laid down that "actual and efficient operation of the right to counsel is an essential prerequisite of a constitutional system of criminal proceedings." The practice of the Constitutional Court clearly shows, that they have never settled for the mere formal provision of the right to counsel; they also required its effective operation and extended this right for the preparation of the defendant and the attorney to exercise their rights. Of course, this matter is regulated in its entirety by the Criminal Proceedings Act; in addition to

1 Alapvető Jogok Biztosának jelentése az AJB-3107/2012-es számú ügyben [The report of the Commissioner for Fundamental Rights in the issue number AJB-3107/2012].

2 Hungarian Basic Law: Act CXI of 2011 on the Commissioner for Fundamental Rights (Ajbt.); Act CLXXXVIII of 2011 on Hungary's 2012 Central Budget; Act XIX of 1998 on the Criminal Procedure (Be.); Act XI of 1998 on Lawyers; Act CLXIII of 2011 on the Public Prosecutor; Act XXXIV of 1994 on the Police; IM Decree No. 7/2002 (III.30.) on the remuneration and costs that can be established to the supporter lawyer and the appointed defense counsel.

3 Fundamental Law, Liberty and Responsibility, Article XXVIII.

4 Constitutional Court Decision No.: 25/1991. (V. 18.).

the definition of persons that may act as a counsel, it provides for the cases where counsel is mandatory, including the appointment process. Therefore, the Court, the Prosecutor, or the Investigating Authority shall appoint an attorney, if (i) the defendant unable to pay for a private attorney requests it; or (ii) legal counsel is mandatory; or (iii) in the interests of the defendant they deem it necessary, and the defendant did not authorize anyone for his defense.

In general, the Attorney Act provides guidance for attorneys' activities. At the same time, we shall note the prominence of the provision mandating attorneys to exercise their profession with due diligence, with conscience and in compliance with the law, as well as to demonstrate a behavior that is expected from a professional lawyer at all times.

Paragraph (2) of section 3 of the Act XI of 1998 on Attorneys at Law, and the Hungarian Bar Association's ethical code no.: 8/1999 (II.22) specifies the following: The attorney shall use all lawful means to defend the interests of his/her client. While handling the case he/she is entrusted with, the attorney shall primarily consider the facts his/her client represented.[5] Where the defendant is restricted in his/her individual liberties, counsel shall coordinate with the defendant as necessary.[6] Counsel shall inform his/her client of the state of affairs, the expected procedural actions, including his/her lawfully available possibilities and obligations.[7]

### *2.2. The international basics*

Hungary ratified one the most important documents of the European Community on 5 November 1992 and enacted it on 7 April 1993, by the Act XXXI of 1993. The Convention for the Protection of Human Rights and Fundamental Freedoms is effective as of 3 September 1993. If the Convention - or any of its several supplementary minutes that have been added to date - is violated, anyone may address the Strasbourg European Court of Human Rights for a remedy. Articles 3, 5, 6, 10 and 13 of the Convention govern criminal proceedings and the legal status of counsels. Let me present a few isolated decisions reflecting on the fact that a mere formal provision of legal counsel won't scale up. Defendants are entitled to an effective assistance of counsel. In several cases, the requirements laid down by the Court are also part of our Proposal.

For example, the case of Artico vs. Italy,[8] where, in the judgment adopted on 13 May 1980, the Court has unanimously established violation of paragraph (3) of Article 6 of the ECHR governing the right to counsel. The applicant was not provided with an effective assistance of legal counsel before the Court of Cassation. The Italian Government's defense, including their opinion that by the mere appointment of a legal counsel they had complied with the ECHR provisions, was rejected by the Court. The Court pointed out that the ECHR provides for an effective assistance of counsel; this cannot be fulfilled once and for all just by the appointment of an attorney. This attorney may die, contract a severe illness, may encounter circumstances that hinder

[5] Ethics Code 3/3.
[6] Ethics Code 8/4.
[7] Ethics Code 8/6.
[8] Artico v Italy, App No 6694/74, A/37, [1980] ECHR 4, (1981)

such activity for a long time, or may just not fulfill his/her obligations in any other way. If notified about such circumstances, authorities shall appoint a replacement attorney, or compel the originally appointed attorney to perform its obligations. In this case, Artico was not provided with an effective legal counsel before the Court of Cassation. The Court has also emphasized, that all errors and/or omissions of the Court-appointed attorney may not be blamed on the State. In this case, the ECHR would have expected the Italian administration to appoint a replacement lawyer or to compel the originally appointed attorney to perform his obligation.

Also, in its unanimous decision adopted on 9 April 1984, the Court has found the lack of an effective assistance of counsel in the case of Goddi vs. Italy.[9] The legal counsel of the detained and absent defendant was not notified of the trial before the Appellant Court of Bologna, thus he could not be present, either. In addition to the absence of the originally appointed attorney, the lack of preparation time provided for the replacement attorney (appointed just a short time before the trial) also contributed to the lack of an effective assistance of legal counsel. The new attorney was not provided with the necessary time and opportunity to study the documents of the case, to prepare a defense, or to contact the defendant.

As I have suggested before, the principles of fair trial, including the adversarial system, become fully operative in a court proceeding. This is where it shall be applied. However, in its judgment in the case of Daud vs. Portugal[10] dated on 21 April 1998, the Court pointed out, that the requirement of an effective assistance of counsel (including the presence, information regarding the case, exercising of entitlements that make the case progress, right to petition, etc.) exists not only during the trial, but also in the pre-trial (investigation) phase. The Court found that Article 6 (1), providing the right for a fair trial, was violated in the context of point 3/c by not providing the defendant with an effective assistance of counsel in the investigation- and trial phase of the criminal proceeding against him. The Court has emphasized that the ECHR doesn't aim for the provision of theoretical or illusional rights. It aims for practical and effective rights, and the mere appointment of a counsel does not ensure the effectiveness of the legal assistance provided for the defendant. The State may not be held accountable for every omission a court-appointed lawyer commits. Because the lawyer's profession shall be exercised independently from the Government, the actions of the counsel shall only regard the business between the defendant and the counsel, regardless of whether the counsel was appointed by the court or paid by the defendant. Pursuant of point 3/c of Article 6 of the ECHR, the national authorities shall only intervene, if they become aware or are made aware of the errors committed by the legal counsel appointed to provide effective legal assistance. In this case, the court findings were based on the fact, that considering the court-appointed lawyer's (un)preparedness and the behavior demonstrated with regards to the case, he was unfit to deliver the effect required by point 3 of Article 6. The Court noted, that the attorney originally appointed by the Court had not performed any kind of action in the interests of the applicant prior to announcing his illness. Therefore, the applicant attempted (and failed) to act in his own defense. As of the second court-appointed counsel, who was notified of his

[9] Goddi v. Italy, App No 8966/80 [1984] ECHR 4 (9 April 1984).
[10] Daud v. Portugal App No 22600/93.

appointment just three days prior to the criminal court's trial, the Court opined that he did not have the necessary time to study the case, to visit the defendant in prison or to prepare the defense. The time between the notification of the appointment of a new attorney and the trial was too short for such a serious and complex case, where investigations were not conducted and the expected penalty was also substantial. The Supreme Court did not remedy the injury. Instead, it rejected the application due to a non-substantiated justification. The Court also explained, that the authority in question - while respecting the principle of independence of the bar association - should have provided opportunity for the applicant to avail the benefits derived from his rights also admitted by said authority. Therefore, the investigating authority, and especially the court(s) conducting the proceedings should have investigated and found the lack of effective legal assistance and the Court-appointed attorney's unfitness for the task. They should've provided a replacement attorney and postponed the trial ex officio.

## 3. Existing problems

There are two basic problems in relation to the appointment of lawyers. One arises on the side of the accused, while the other concerns the working conditions of the determining defence counsel. Though the abovementioned, incomplete regulation seems to be detailed, the quintessence of problems arising on the side of the accused was supplied by the lack of regulation and the insufficient details. The emerging problems can be categorized as follows:

### *3.1. The presence of defence counsel and notification*

As it was already discussed by the Constitutional Court, it is the constitutional right of the accused to prepare for his/her defence in time in an appropriate manner and to have the possibility to deliver his/her opinions on the matter of facts and laws to the same extent as the prosecution. It is obvious that the accused is in great need of the defence counsel's legal expertise in attitudes of legal questions. It is a known fact for lawyers participating in criminal procedures that statements of the accused made during the investigation phase of the procedure are critically important until the end of the proceedings, that is, they will also have a considerable impact on the content of the future verdict.[11] As during the investigation phase the procedural actions related to the accused can be carried out by the authority without the presence of the defence counsel, it is particularly important to ensure the defence counsel's presence in this phase of the procedure in order for the basic law's appropriate effectiveness. It is obviously the interest of the accused concerned to consult an expert before his/her substantial confession influencing the verdict, that is, to prepare with a defence counsel. According to the 2003 research of the Hungarian Helsinki Committee, only 24% of the appointed defence counsels gets into touch with their client up to the first

[11] HERKE, CSONGOR – FENYVESI, CSABA – TREMMEL, FLÓRIÁN: A büntető eljárásjog elmélete [The theory of criminal procedure], 2012, Dialóg Campus Kiadó, Budapest-Pécs, 104.

interrogation.[12] This fact is not only the result of the carelessness of lawyers but of the deadlines, the notification method of the authority, and primarily the current regulation of the appointment.

### *3.2. Remuneration*

Despite the increased fees, the remuneration of the appointed defence counsels falls behind the remuneration of other people involved in the criminal procedure (e.g. expert, interpreter). Not primarily in view of the hourly fee but concerning other incidental expenses such as the settlement of travel expenses, the investigation of documents and the relationship with the detainee. However, these activities represent a big part of the defence counsel's work. Obviously, the non-payment of these 'incidental expenses' does not motivate the appointed defence counsel to conduct the defence at his/her own expense. This clearly gives rise to dissatisfaction on the side of the accused. Particularly striking was the case in the absence of foreign prisoners accused who does not speak the official language of the Hungarian prosecution. The guard and interpreter fees required to contact the accused in detention is no guarantee of the state.[13]

### *3.3. The process of appointment*

One of the most crucial elements of the basic law is the appointment system of defence counsels. The disadvantage of the current system is clearly the fact that the defence counsel is selected for the accused by authorities interested in the success of prosecution – outside the court – during the appointment. This solution leads to the creation of such a dependency link between the investigating authority and the defence counsel which could prevent the effectiveness of the accused party's basic right to defence. This uncertainty is strengthened further by the fact that one part of defence counsels is under the necessity of earning a livelihood, thus it may be possible that the defence counsel will not confront with the authorities aiding his/her living with appointments even if necessary. The current system is unclear; it is the subjective decision of the appointing authority whom they appoint.

## 4. The solutions

In my opinion, the offering solutions, which have already been adopted by the drafts up to now all serve the improvement of the institution of appointed defence counsels. By eliminating the aforesaid problems, effective defence committed by the draft can be implemented. The specimen for an effective defence counsel may be one who is independent of the appointing authority, unbiased, prepares for his/her job in time and is paid appropriately. In my view, the Draft does everything in its power to achieve it.

[12] "Steps towards a transparent system of appointed defense counsels – research report" (HHC, 2012).

[13] FENYVESI, CSABA: *A védőügyvéd, A védő büntetőeljárási szerepéről és jogállásáról* [The defense attorney, the deffence prosecution role and status], 2002, Dialóg Campus Kiadó, Budapest-Pécs, 162-163.

"The accused has the right to an effective defence in all phases of the criminal procedure." But the Draft not only discusses the right to an effective defence in principle but it creates its detailed rules.

The court, the public prosecutor and the investigating authority shall ensure appropriate time and actual possibility for the defence to prepare.

The authority is obliged to appoint a defence counsel even in case of emergency measures involving deprivation and limitation of liberty.

The appointment shall be determined by the court, the public prosecution and the investigating authority so that they have to appoint a defence counsel to the accused offered by a system operated by the Hungarian Bar Association ensuring automatic and random appointment.

A defence counsel shall immediately be appointed when the accused is arrested. Otherwise, the defence counsel shall be notified/summoned at the same time when summoning is sent to the accused. The first interrogation of the arrested shall be postponed by 2 hours if the defence counsel has not appeared at the interrogation.

The draft regularizes the connection of defence counsels alternating each other in time. As opposed to the previous regulation, the situation of defence lawyers are hopefully made easier with mutual cooperation as well as the delivery of documents and evidences.

## 5. Conclusion

The basic aim of finding out the truth in criminal proceedings, on the question of criminal liability for making a decision founded on fundamental rights and procedural guarantees to enforce. It is clear that the effectiveness of a particular criminal proceedings will also be measured, that the above aim at what cost, at what time horizon, and what results can be achieved. The new Criminal Procedure Code made the simplicity, speed and efficiency are important values that have significance attributed to it in determining the detailed rules for each. However, a rule of law in criminal proceedings can not be an end to any price to the question of criminal responsibility for all the decisions and legal institutions subordinated to the basic conceptual level value. It will therefore be sought in the new Criminal Procedure Act that the above principles do not overpower the basic procedural guarantees enforcement of the new procedural points should not result in violation of the basic constitutional principles. During the adoption of the final text, however, the legislature not only marked the premise, but also our country's procedural traditions and international obligations will have to be taken into account.

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[3] Constitutional Court Decision No.: 25/1991. (V. 18.).
**[4]** Ethics Code of Hungarian Bar Association.
[5] Artico v Italy, App No 6694/74, A/37, [1980] ECHR 4, (1981).
[6] Goddi v. Italy, App No 8966/80 [1984] ECHR 4 (9 April 1984).
[7] Daud v. Portugal App No 22600/93.).

# EXTENT OF THE VOTING RIGHTS OF LEGAL PERSONS GOVERNED BY PRIVATE LAW, IN PARTICULAR OF COOPERATIVES

**NAGY, ERIKA***

*Abstract:* The rules relating to organizational stucture and operation of legal persons governed by private law can be found among general rules pertaining to all legal persons and specific norms for various types of legal persons in the Book Three of Act V of 2013 on the Civil Code. The voting rights have an impact on the operation and management of the forms of association. One of the aims of this presentation is to draw up the similarities and distinctions between the different kinds of legal persons, in particular cooperatives. In the case of cooperatives the principle of „one member-one vote" is a key pillar of the basic cooperative principle „democratic member control". This presentation is also undertaken to show, how this cooperative principle appears in legislation, concerning the legal norms on the European Cooperative Society (SCE) and some national legislation in the EU, too.

*Keywords:* Civil Code, cooperatives, legal persons governed by private law, voting rights.

## 1. Introduction

Legal persons may be established and operated in a form defined by the Civil Code.[1] The Civil Code determines the types of legal persons governed by private law. These are: associations, business associations (including general partnership, limited partnership, private limited-liability company or limited company), cooperative societies, groupings and foundations.

These forms of legal persons governed by private law are very different from each other. Because of their legal person character we can find several similarities in them. Their common nature is, that all legal persons have legal capacity; they are entitled to have rights and obligations.[2] They are independant in civil relations and operate as legal identities separated from its members. A legal person shall have its own name and seat, shall have assets separate from its members and founders, and shall have a management and representative body.[3]

Members and founders exercise their decision-making powers in a body consisting of persons exercising founder's.[4] At the meetings of decision-making bodies the members or founders shall decide the matters at issue by voting.[5] The exclusive competence of the decision-making body is – among others– to create rules in

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[1] Article 3:1 (4) on the Civil Code.

[2] Article 3:1 (1) on the Civil Code.

[3] Article 3:1 (5) on the Civil Code.

[4] Article 3:16 (1) on the Civil Code

[5] Article 3:19 (1) on the Civil Code

connection with establishing and operating of the organisational structure, including the rules related voting rights.

Obviously, the voting right, the practise and extent of it are one of the most important part of the rights belong to membership.[6] That is why it matters, how the voting right is laid down in the rules pertaining to the legal persons.

## 2. The Non-binding approach of the Civil code

The Third Book of the current Civil Code carried out the legislation concerning the legal persons in that way, that it sets out standard general provisions for all types of legal persons with specific rules for various types of legal persons at the same time.[7]

In the Third Book, the Civil Code has changed the binding aspect of the former legislation to the non-binding approach. The norms have to be applied on the grounds of principle lex specialis derogat legi generalis. The provisions formulate the principle of freedom of establisment of a legal person and content of the instrument of constitution. By the Civil Code the members of a legal person themselves decide on the legal person's organizational structure and operational arrangements. As regards relations between members and founders, and between them and the legal person, and as regards the organizational structure and operational arrangements of the legal person, in the instrument of constitution the members and founders may derogate from the provisions of the third Book on the Civil Code relating to legal persons, except as set out in the law.[8]

On the basis of this provision we can say, that the regulating of voting right belongs to the issue of the private autonomy by the members, as it pertains to the relationship between the members, but it concerns also the legal person's organizational structure and operational arrangements.[9]

The further question, if the members may agree to derogate from the provisions relating to voting rights, their agreement infringes any interest to be saved or not. This is the obstacle of the freedom of content of the instrument of constitution.

Members and founders of a legal person may not derogate from the provisions of this Act:

[6] Here apart from single-member companies.

[7] It means not only a two-tier system of rules (general and specific norms), but a three-tier system of rules exists for business associations (general rules relating to legal persons, general rules relating to business associations and specific rules relating general partnerships, private limited-liability companies or limited company) for example. In addition, a four-tier system of rules needs to be applied to limited partnerships. (Article 3:155 on the Civil Code: The provisions on general partnerships shall also apply to limited partnerships subject to the exceptions set out under this Title.) The rules shall be interpreted at four levels, too. (Article 3:368 (3) on the Civil Code: The common provisions relating to business associations shall apply to groupings subject to the exceptions set out in this Part.)

[8] Article 3:4 (1)-(2) on the Civil Code.

[9] It is very difficult to guess whether rules relating to the legal person's organizational structure and operational arrangements concern external relationship or not. In many cases they concern, but in these cases they may not fall within paragraph (2).

- if it is precluded by law; or
- where any derogation clearly violates the interests of the legal person's creditors, employees and minority members, or it is likely to prevent the exercise of effective supervision over legal persons.[10]

We can take a position in this issue in view of the specific provisions. To study the rules relating to the legal persons is we can state that the members of a legal person may derogate in the instrument of constitution from the provisions on the Civil Code concerning the voting rights.[11] (It shall be noted, that in the case of cooperatives the derogation from the rule one member one vote is doubted, there is no single voice in this issue. I will go back to this question later.)

## 3. Voting rights in general

Common rules for all types of the legal persons that how many votes a member has do not exist. There is neither a such provision, that each member shall have at least one

[10] Article 3:4 (3) on the Civil Code.

[11] On the problems of interpreting Article 3:4: AUER, ÁDÁM: Gondolatok a Ptk. III. könyvének diszpozitív szabályozásáról [Ideas on the non-binding legislation of the third book on the Civil Code], in *Opuscula Civilia,* 2016/3. szám, 2-11., http://akk.uni-nke.hu/uploads/media_items/2016_-evi-3_-szam_opuscula-civilia.original.pdf, [2017.03.20.], BODZÁSI, BALÁZS: Főbb változások az új Ptk.-nak a jogi személyekre, valamint a gazdasági társaságokra irányadó közös szabályaiban [Main changes under the common rules on the Civil Code governing the legal persons and the business associations], in *Cégbirnök*, 2013/8. szám, 3-7., http://www.hvgorac.hu/sites/portal/files/ch_2013_8_bodzasi.pdf, [2017.03.20.], BODZÁSI, BALÁZS: Az új Ptk. esetleges módosításairól [On any changes of the new Civil Code], in *Magyar Jog,* 2016/4. szám, 65-72., CSEHI, ZOLTÁN: A jogi személyek szabályozása az új magyar Polgári Törvénykönyv tervezeteiben – egy kísérlet eddigi története [The legislation of the legal persons in the Bills of new Civil Code- the previous story of an attempt], in *Polgári Jogi Kodifikáció*, 2008/5-6. szám, 4-13., http://ptk2013.hu/polgari-jogi-kodifikacio/csehi-zoltan-a-jogi-szemelyek-szabalyozasa-az-uj-magyar-polgari-torvenykonyv-tervezeteiben-egy-kiserlet-eddigi-tortenete-pjk-20085-6-4-13-o/127, [2017.03.20.], GADÓ, GÁBOR: Kógens-e a diszpozitív? [Is the non-binding binding?], in *Cégbirnök*, 2013/9. szám, 3-5., http://ptk2013.hu/szakcikkek/gado-gabor-kogens-e-a-diszpozitiv-ch-20139-3-5-o/2561, [2017.03.20.], JÓJÁRT, ESZTER: Diszpozitivitás a régi és az új Polgári Törvénykönyvben [Dispositivity on the old and the new Civil Code], in *Magyar Jog,* 2014/2. szám, 673-685., http://ptk2013.hu/szakcikkek/jojart-eszter-diszpozitivitas-a-regi-es-az-uj-polgari-torvenykonyvben-mj-201412-674-685-o/4613, [2017.03.20.], KISFALUDI, ANDRÁS: A jogi személyek szabályozása az új Polgári Törvénykönyvben [The legislation of the legal persons on the new Civil Code], in *Jogtudományi Közlöny*, 2013/7-8. szám, 333-342., SÁRKÖZY, TAMÁS: Még egyszer a Ptk. jogi személy könyve állítólagos diszpozitivitásáról [Again on the alleged dispositvity of the book of legal persons on the Civil Code], in *Gazdaság és Jog,* 2015/11. szám, 8-14., http://ptk2013.hu/szakcikkek/sarkozy-tamas-meg-egyszer-a-ptk-jogi-szemely-konyve-allitolagos-diszpozitivitasarol-gj-201511-8-14-o/5668, [2017.03.20.], SÁRKÖZY, TAMÁS: A Ptk. jogi személy könyve esetleges felülvizsgálatáról [On the alleged review on the book of relating to legal persons of the Civil Code], in *Gazdaság és Jog,* 2016/7-8. szám, 3-10., http://ptk2013.hu/wp-content/uploads/2016/08/GJ2016julaug3_10o.pdf, [2017.03.20.].

vote. Even so indeed we can state this. From the opposite side, no member may be deprived from his voting right – for guaranteed aims – and the opportunity to participate in the decision-making process of the legal person.[12] But a member may not exercise his voting right in each case. It does not mean, that this member does not have a voting right, only that, he may not vote in specific matters. We can find general and specific provisions relating to this issue. Among the general rules it is laid down, that the member may be precluded from voting, by a conflict of interest.[13] It is to be noted, that it is possible to derogate from this rule. It can be found among the specific rules, that if a member of a cooperative or of a limited company does not provide his capital contribution prescribed in the statutes is not allowed to exercise their voting rights. It can not be derogated from this provisions.[14]

We can distinguish two types of regulation relating to the various types of legal persons. Tipically, the nature of an association may be people-centred or investment capital-centred.[15] It determines the share of the voting rights between the members. There are certain associations which have mixed nature. In these associations one nature is dominant over the other. We consider associations, general partnership, limited partnership, cooperative societies and groupings as people-centred formations. These formations allocate equal voting rights to members, independently of their economic position pursuant to the provisions relating to these associations. In investment capital centred associations – by the main rule - voting rights are allocated in proportion to the invested capital. Clearly investment capital-centred formations are limited companies, but private limited-liability companies and foundations are included also here.

## 4. Voting rights relating to each of legal persons

For this approach we can find further norms relating to the voting rights among the specific rules on the Civil Code. Each norm consists of derogation from the main rule, strengthening the regulatory model on derogation provided for by the Act. Such norms

[12] An opposite provision in the instrument of constitution otherwise may conflict with Article 3:4 (3) b. on the Civil Code.

[13] Article 3:19. on the Civil Code.

[14] Article 3:337 (2) on the Civil Code. Article 3:333 (3) on the Civil Code provides: Any provision of the statutes which provides more lenient sanctions then what is prescribed in this Act upon members for failure to provide the capital contribution shall be null and void. In combination with two provisions, it results, according to Article 3:4 (3)a derogating from this rule is inconceivable. The rule relating to limited companies we concern as a binding rule, because of the voting rights attached to shares. (Article 3:260 on the Civil Code).

[15] An association is concerned as a capital-centred association, if its members are not important, but the financial contribution provided by the members is significant. The people-centred nature is exactly the opposite, where the members in general perform personal involment in the association, or they contribute to achieving the objectives of the association. The rights of the members are same, independently on the invested capital. One of these rights is the voting right, when the same extent of the vote highlights the primacy of the individual and not the capital.

exist among the rules in connection with limited companies, associations, foundations and groupings.

In the case of limited companies the main rule is a binding legislative provision: voting rights attached to shares are determined by the nominal value of such shares. The exception to this is the one type of shares, so called shares conferring prior voting right. Holders of shares conferring prior voting right may exercise multiple voting rights to the extent defined in the articles of association. In respect of private limited company multiple voting rights are unlimited, in respect of public limited companies the voting rights attached to one share may not exceed the voting rights corresponding to the nominal value of the share by a factor of ten; any provision of the articles of association to the contrary shall be null and void. Besides, certain resolutions of the general meeting may be adopted solely upon the simple majority vote of the holders of shares present conferring prior voting right with veto rights, or if there is only one share conferring prior voting right in issue, such resolutions may be adopted if supported by the holder of this share.[16]

Associations' members shall have equal rights and obligations, except the membership of special legal status.[17] These members of special legal status may have multiple voting rights, in theory without restriction. So the statutes may derogate from the provisions on the Civil Code.

The foundations have special nature, because besides the managing body of the foundation, the board of trustees, optional so called founders' meeting can operate optional.[18] The founders' meeting is a form of a body, where several founders may exercise the founder's rights collectively. In matters not regulated by the charter document the provisions on the general meeting of associations shall apply to the founders' meeting.[19] This means, that the founders have equal voting rights, but they may derogate from these provisions without limitation in the charter document.

The groupings have twofold: the legislation in connection with the main goal of groupings, that is issues of coordination and interest represantion and the legislation in connection with the optional joint economic activities (economic auxiliary activities).[20] In the former field the people-centred nature, in the latter the investment capital-centred nature is significant. In connection with issues of coordination and interest representation all members shall have one vote. Independantly, whether the members provided financial contribution or not, and if they did, how much. The memorandum of association may, however, grant multiple voting rights to certain members, with the restriction that no single member may acquire more than fifty per cent of the votes.[21] So, no single member can decide in any issues. Within the scope of economic auxiliary activities, as well as in some cases of prominent competence of the supreme body (such

[16] Article 3:232 (1)-(2) and 3:260 (1) on the Civil Code.
[17] Article 3:65 (2) on the Civil Code.
[18] Article 3:397 (1) on the Civil Code.
[19] Article 3:395 (1) on the Civil Code.
[20] The common rules on the business associations shall be applied to the groupings, too. This means, the extent of the voting right would be in proportion of invested capital without specific legal norm. [Article 3:368. (3)].
[21] Article 3:372 (2).

as decision on dissolution or initiating the exclusion of a member etc.), voting rights shall be established in proportion to the capital contributions provided, or failing this, equivalent votes shall be granted.[22]

No provisions other than the main rule exist in the case of general partnerships, limited partnerships, private limited-liability companies and cooperative societies. In general partnerships, limited partnerships, in the process of adopting decisions, each member shall have an equal vote. In practice, the voting rights are granted in proportion to the invested capital by the instrument of constitution. Any clause of the memorandum of association to deprive a member of his voting right shall be null and void.[23] In the supreme body of a private limited-liability company the voting rights are allocated in proportion to the invested capital provided by the member.[24]

## 5. Voting rights relating to cooperative associations

There is a particular situation in cooperative societies. No provisions other than the main rule exist in connection with the voting rights. This is: at the general meeting each member shall have one vote irrespective of their capital contribution.[25] There is no consensus in the legal literature and legal practice till now, whether this rule is binding or not.[26]

We stated earlier that the members of a legal person may derogate in the instrument of constitution from the provisions on the Civil Code concerning the voting rights. In contrast, there is a basic cooperative principle „democratic member control", which implies the principle of „one member-one vote" also.It is not the element of the definition of a cooperative, but it is a marked, significant nature of cooperatives. If it was a part of the term, this provision would be definitely binding. If this norm is binding, this is the only one of the associations, where the Act doesn't allow a derogation from the one member one vote rule. Unless in special laws, such as for example Act on Housing Cooperatives. If an investor takes a higher risk with a bigger financial contribution, he should but can not participate more vigorously in the decision making process. This rule does not improve the competitiveness of cooperatives. But at the same time, if the regulation is not binding, there is no restriction of the derogation

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[22] Article 3:372 (3).
[23] Article 3:143 (1) and 3:155.
[24] Article 3:110. (2) (general rules relating to business associations).
[25] Article 3:337 (1) on the Civil Code.
[26] DZSULA, MARIANN: Miért kógens a diszpozitív? IV. [Why binding a non-binding? IV.], in *Céghírnök*, 2014/6. szám, 11., http://ptk2013.hu/dzsula-mariann-miert-kogens-a-diszpozitiv-iv-ch-20146-10-14-o, [2017.03.20.], RÉTI, MÁRIA: A magyar szövetkezeti jog hatályos szabályairól a Polgári Törvénykönyv rendelkezéseire figyelemmel [On the current norms of the Hungarian cooperative legislation taking into account the provisions on the Civil Code], in *Szövetkezés,* 2015/1. szám, 54-58., NAGY, ERIKA: A magyar és a finn szövetkezeti szabályozás aktuális kérdései [Topical issues of the Hungarian and Finnish cooperative legislation], in *Jogi Tanulmányok 2016, Jogtudományi Előadások az ELTE ÁJK Doktori Iskoláinak Konferenciáján 2016. június 10.*, 2016, Budapest, ELTE ÁJK Állam- és Jogtudományi Doktori Iskola, 51-62., http://www.ajk.elte.hu/file/jogitanulmanyok2016.pdf, 2017.03.20.

provided by the Act. It may happen, the voting rights between the members are established only in proportion to the invested capital. This is contrary to the cooperative principle democratic member control, including the principle one member one vote, as well as it is not in accordance with the essence of the cooperatives.

The Civil Code has implemented the whole text of the repealed Act on Cooperatives relating to the voting rights, with that difference, the former provisions were binding in the repealed Act, unless otherwise stipulated by the law.[27]

To compare, the Statute for a European Cooperative Society (SCE) sets out in recital and among the binding specific provisions, that each member of an SCE shall have one vote, regardless of the number of shares he holds.[28] The Statute allows derogation from this provision, but it determines the maximum number of the votes a member may hold. The extent of weighted voting is in proportion to the member's participation in the cooperative activity.[29] In financial or insurance SCEs and those SCEs which the majority of members are cooperatives in the statues may take into account the members' participation in the capital of the SCE for determining the number of votes.[30] Just the statutes may allocate voting rights in proportion of invested capital to non-user (investor) members.[31] The statutes of the SCE may provide for the participation of employees' representatives in the general meetings, provided that the employees' representatives do not together control more than 15 % of total voting rights.[32]

The German cooperative legislation has choosen a similar legal solution. The Cooperative Act allows multiple voting rights, too. Multiple voting rights (maximum 3) may be granted to those members, who promote particularly the activity of the cooperative. The legislation is different in those cooperatives, where at least the three-fourth of the membership are enterpreneurs or the majority of the membership is a

[27] Act on Cooperatives, that is Act X of 2006 [Article 23 (1)-(2)].

[28] Particular principles concerning cooperative associations include notably the principle of the primacy of the individual which is reflected in the specific rules on membership, resignation and expulsion, where the 'one man, one vote' rule is laid down. {Recital (7) (8) and Article 59 (1) on the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (Statute), celex:32003R1435, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R1435, [2017.03.20.]}

[29] The control should be vested equally in members, although weighted voting may be allowed, in order to reflect each member's contribution to the SCE. [Recital (10) on Statute for SCE] If the law of the Member State in which the SCE has its registered office so permits, the statutes may provide for a member to have a number of votes determined by his/her participation in the cooperative activity other than by way of capital contribution. This attribution shall not exceed five votes per member or 30 % of total voting rights, whichever is the lower. [Article 59 (2) on the Statute].

[30] In financial or insurance SCEs the attribution shall not exceed five votes per member or 20 % of total voting rights, whichever is the lower. [Article 59 (2) on the Statute].

[31] Nevertheless, non-user (investor) members may not together have voting rights amounting to more than 25 % of total voting rights. [Article 59 (3) on the Statute].

[32] Article 59 (4) on the Statute.

registered cooperative. These registered cooperatives' members may have more number of votes and it is determined by the capital contribution.[33]

The Finnish Act on Cooperatives says explicitly, that the members may derogate from the norm one member one vote in the bylaws.[34] This Act also stipulates the maximum number of votes a member may hold. So, no single member may acquire more than twenty times the number of votes of another member. Unless in those cooperatives, where the majority of the members is cooperative or other legal person, as well as at least one legal person governed by public law.[35] In the so called stock market cooperatives the bylaws may stipulate freely the extent of the voting rights.[36]

## 6. Conclusions

The Hungarian Civil Code restricts the extent of the voting rights exercising by a single member exclusively in the public limited companies and in the field of cooperation and interest representation of groupings. The question arises: Do the member have freedom of establishment the voting rights indeed without restrictions? May there be any obstacles to be a single member in a position to take decisions? We know that nobody may be deprived from his voting right. Would be the principles of Civil Code the obstacle to the regulating of the voting right by the members? It is sure, that the other explicit guarantee provisions are the restriction on the extent of the voting righst. For example, which powers must be shared amongst the organs, which are the exclusive powers of the supreme body, what kind of matters what kind of decisions must be taken by a qualified majority. Generally at least a two-thirds majority or unanimiously, or who may not exercise his voting right because of his personal interest etc. It can be established, that the provisions relating to the organizational structure and operational management as a whole ensure the members to exercise properly their voting rights.

The Hungarian legislator does not establish provisions for the rule one member one vote in the case of cooperatives as an exception. The tendency of the European cooperative legislation is if an Act allows derogation from the main rule, it determines at the same time the maximum number of votes a member may hold and the types of cooperatives where there is no resctriction on the derogation from the main rule. The Civil Code definitely provides in some associations, that the instrument of constitution may grant multiple voting rights to certain members, in the proportion to the invested capital or by another approach. The different importance of the members can justify these derogations. The different importance appears more frequently in the different amount of the financial contribution provided by the members, but it may be a specific professional knowledge of a member or any other aspects which may bring benefits to

[33] RÉTI: *op.cit.* 59.

[34] Each member has one vote, unless otherwise provided in the bylaws. [Article 13 (1) on the 14.6.2013/421 Osuuskuntalaki (Act on Co-operatives)], http://finlex.fi/fi/laki/ajantasa/2013/20130421?search%5Btype%5D=pika&search%5Bpika%5D=osuuskuntalaki#O1, [2017.03.20].

[35] Article 13 (2) on the 14.6.2013/421 Osuuskuntalaki (Act on Co-operatives).

[36] Article 13 (3) on the 14.6.2013/421 Osuuskuntalaki (Act on Co-operatives).

the society. It is in accordance with the European cooperative legislation. It refers to the fact too, that the derogation from the main provision is not prohibitied by the Civil Code, neither in cases, where we can find only the main rule.

In summary, the legislator relies on the members the regulation regarding the share of voting rights between the members. The legal norm has an alternate role with regard to the regulation of sharing voting rights. If the members do not tell anything in this issue in the instrument of constitution or they do not derogate from the norms provided by the Act, the legal norms shall be applied even if the norm is not binding. This type of regulating approach means obviously, that it is very difficult to distinguish the various types of associations in view of the legislation of voting right. Because any type of associations may state almost any rule in its instrument of constitution. It may be concluded, that the intention of the legislator was the same in the case of cooperatives, too. That is, the legislator intended to regulate the voting rights in that way, that the members may derogate from them. But he failed to take into account the particular characteristics of the cooperatives, more precisily, that the principle one member one vote is an important, significant element of cooperative societies. Against this background it may be recommended to consider the cooperative legislation regarding the extent of the voting rights. Exceptionally, (a limited number of) plural voting rights may be granted through the bylaws. The base of the plural voting rights may be the volume of transactions with the cooperative or other criteria. However, plural voting rights may not be granted only on the basis of the amount of financial contributions by a member in primary cooperatives.

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# THE LEGALITY OF THE PRISTINA - BELGRADE POLITICAL DIALOGUE: THE QUEER CASE OF THE HISTORIC AGREEMENT

**PUSTINA, LORIK***

*Abstract:* In order to fulfil the preconditions set by the European Union vis-à-vis Western Balkans, countries of the latter must meet numerous criteria to show that they are ready to adhere in the EU. One of those conditions as stipulated in the Stabilization and Association Agreement is the regional cooperation, which entails the good neighbouring relations between candidate and/or potential candidate countries. In order to help both Kosovo and Serbia fulfil partially these criterions, EU has decided to step in and facilitate a high level political dialogue between the two countries. However this is being done by the EU in ambiguous terms, and uncovering a risk of constitutional crisis in Kosovo.

The dialogue is meant to provide a fast track mechanism for reconciliation and good neighbouring relations, however this needs to be done at the cost on finding a creative approach and often violating provisions of the Constitution of one side, Kosovo, since it doesn't recognize it as a state but rather as a territorial entity still in line with the Resolution 1244 of the UNSC (1999).

The paper provides an analytical approach of the agreements signed and binding legal documents, such as the Constitution of the Republic of Kosovo (2008), in order to point out key elements of constitutional infringement. Further, the paper argues briefly the imposing provisions of the agreement by the EU in the Europeanization context, concluding that the Europeanization process cannot be fitted universally without carefully analysing the legal as well as the cultural and historical context.

*Keywords:* dialogue, state-building, Europeanization, kosovo, serbia, EU, constitution.

## 1. Introduction

After years of struggle and opposite views on the legal status of Kosovo, both Kosovo and Serbia, have decided that the best way to move forward is to engage in a mutual dialogue about issues pertaining the citizens of respective countries.

The dialogue on technical talks, to be later transformed into high political dialogue between the representatives of both Governments started in 2011 under the sponsorship and mediation of the European Union, in order to achieve normalization of relations between the two countries – both committed to the EU integration path.

These talks, facilitated by the EU - who has used their stimulating tools to incentivize both parties in implementing the reached conclusions, albeit some more than the other for which it shall be subsequently discussed throughout the paper, has reached its highlight in April 2013, when the two Prime Ministers, Hashim Thaci of Kosovo and Ivica Dacic of Serbia signed the document on normalization of relations between the two countries.

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The 15 points agreement on normalization of the relations signed between Kosovo and Serbia on April 2013, for the normalization of their relations to be more in detail elaborated and analyzed in the Kosovo domestic legal infrastructure, also known as the Historic Agreement of Brussels (further "the HA"), foresees the creation of the Association of Kosovo Serb municipalities, agreements on Energy and Telecom as well as the Judiciary i.e. Rule of Law.

Taking the dialogue mediation responsibility very seriously, the EU uses Henry Kissinger's famous "constructional ambiguity"[1] especially when dealing with Kosovo, as a result of its, as it is known, "status neutrality" as a consequence of the five member states that don't recognize Kosovo as an independent state, in a – what Visoka and Doyle argue – a neo-functional peace approach for resolving disputes through deconstructing highly political issues into technical meanings in order to achieve mutually acceptable agreements.[2]

However, this approach has proven to leave space for ambiguous interpretation and lack of transparence by both Governments, since their positions sitting at the table are diametrically opposed, i.e. Serbia still sees Kosovo as its integral part, and does everything in its power to block the signing of any document where Kosovo's statehood is being referred to, while on the other hand, Kosovo authorities proclaim that every agreement signed is a de-facto recognition of its statehood not only by the EU but by Serbia as well. The interpretation maneuverability leased by the EU to both parties, has proven to polarize not only the difficult relations between the Government of Kosovo and that of Serbia, but also the political scene in Kosovo, where the Kosovo Serb political parties represented both in the Government and in the Parliament do act as instructed by Belgrade that hinders the normal political life flow in the country.

The dialogue between Pristina and Belgrade as it started bears in itself several inconsistencies and fallacies. Several key facts were not taken into consideration when two sides signed off to the European Union facilitated dialogue, and the first being primarily – Kosovo has not been, and still is not treated as an independent state in the dialogue. The EU cannot sign off to such actions, because of its five non-recognizing member states[3] while Serbia remains in its position treating Kosovo as a part of its territory as they stipulate it even in their Constitution preamp. Thus the negotiations take place in a neutral terrain, with no state symbols, and no official insignia, nonetheless, being treated unequally. Serbia as a state, a candidate country for the EU, and Kosovo[4] as a territorial entity.

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[1] MICHAL, SHUR-OFRY – OFER, TUR-SINAI: Constructive Ambiguity: IP Licenses as a Case Study, in *University of Michigan Journal of Law Reform,* Vol 48. Issue 2. (2015) 391-435. http://repository.law.umich.edu/mjlr/vol48/iss2/3.

[2] VISOKA, GEZIM – DOYLE, JOHN: Neo-Functional Peace: The European Union Way of Resolving Conflicts, in *JCMS,* Vol. 54. N. 4. (2016) 862–877.

[3] Five member states of the European Union still don't recognize Kosovo's declaration of Independence: Spain, Greece, Slovakia, Romania and Cyprus.

[4] In 2012, Kosovo and Serbia technical negotiators struck a deal for Kosovo's unhindered regional representation. According to the agreement reached on February 2012, Kosovo will be represented with a footnote accompanied with the text This label [ie "Kosovo"] does not

Imposed better saying than mediated, some of the agreements, such as the creation of the Association of Serb Municipalities which represents the fundament of the HA, did bring an enormous division gap within the political scene of Kosovo, manifested by blocking the work of the Parliament by the opposition parties using protests on the streets and tear gas within the Parliament chamber.

Ultimately, the President of Kosovo, Madam Atifete Jahjaga, did halt the process by sending the agreement to an interpretation by the Constitutional Court, which ruled that some of the provisions in this agreement are inconsistent with the Constitution of Kosovo, thus should be redacted.[5] This action was seen unfavorable by the Serbian Government as well as the Kosovo Serbs, who boycotted their participation in the Parliament.

The agreements, if seen from a state functioning perspective have had an impact. Kosovo authorities have nominally extended their reach in the anarchic and lawless northern part of Kosovo, dominated by the minority Serb population who have been constantly disobedient to the Government, regardless the fact that its full integration still remains a wishful thinking as Belgrade refuses to instruct either the political representatives or the citizens into cooperation with the authorities in Pristina.

This article begins by bringing the most important milestones of the dialogue process, the way how it started and its proceedings, concentrating on the approach used by the EU in this dialogue, as well as the postulate upon which it was set. It will also briefly analyze the agreements reached, focusing further on those contested for the creation of the Association of the Serb municipalities and the allocation of the Kosovo country code by the ITU. The article in its central part shall theoretically as well as empirically argue that in these cases, the Europeanization top to bottom approach as argued by Radaelli is a slippery slope where the constitutional order of Kosovo has been undermined, allowing another State (Serbia) to possess nominal control over a part of Kosovo's territory. Moreover, the constructive ambiguity approach used by the EU in the negotiations, especially with the case of allocating a country code to Kosovo by the ITU, where according to the action plan of implementation Serbia had to give its consent, while Austria did apply for the code, so Kosovo is just a user and not a full owner of it, is seen as an direct interference of one sovereign state in the internal affairs of the other.

Borzel argues fairly that limited statehood is the main cause of ineffective implementation of EU-induced reform[6] when talking about the Western Balkan countries, part of which is Kosovo as well – however it fails to mention the fact that some of the imposed prerogatives from EU, do add to the limit of the statehood in Kosovo as we have seen in the case of the Parliament blocking because of the ASM – deemed by all, including the Constitutional Court of Kosovo as unfit with the

prejudge the status of Kosovo and is in accordance with Resolution 1244 and the opinion of the ICJ on Kosovo's declaration of independence.

[5] Verdict number KO130/15 of the Constitutional Court of Kosovo. http://www.gjk-ks.org/repository/docs/gjk_ko_130_15_shq.pdf.

[6] BORZEL, TANJA A.: *When Europeanization hits limited statehood: The Western Balkans as a test case for the transformative power of Europe*, 2011, KFG Working Paper series. No. 30. Kolleg – Forschergruppe, Freie Universitat Berlin.

Constitution, So, in one hand, if the EU imposes reform for compliance with its request, the question remains, why it insists in implementing agreements that are of a clear breach of the Constitutionality?

## 2. From UN to EU – the dialogue endeavors of Kosovo and Serbia

There was a great impatience of the majority Albanian population in Kosovo 5 years after the UN administration first installed itself in the country. The bar of resentment towards the indolence of the United Nation Mission in Kosovo (UNMIK) for resolving the question of the final status was raised high, and the violence outbreak of March 2004 did prove that the status-quo maintained by the UN was not viable anymore. Despite the diametrically opposite positions of Serbia and Kosovo at the highest level dialogue table in Vienna, in what is referred to as the "meeting of the elephants", Serbia offering substantial autonomy to Kosovo within the auspice of Serbia still claiming Kosovo as part of its territory, and Kosovo agreeing to nothing less than independence, negotiations did proceed facilitated by the UN, EU and US, in a spark of hope for achieving a mutually agreed solution. But the prospect for such a conclusion was far of reach.

After years of negotiations, and with an ideal solution acceptable to both parties nowhere in sight, in 2007, the UN special envoy Marti Ahtisaari presented the Ahtisaari Package or also known as the Comprehensive Status Proposal for Kosovo (CSP),[7] which foresaw a limited time supervised independence for Kosovo, with some strong provisions for the Serb minority protection.

On the day of 17 February 2008, the Parliament of Kosovo without the Serb minority members present, declared the independence and the final secession from the remainders of Yugoslavia – which was followed by the recognition of more than 50 states, including the US and the vast majority of the EU member states – however without the support of the UN Security Council – which created a parallel legal universe with the Resolution 1244 (1999) in place and added to the ambiguity in the subsequent operations launched by the EU the European Union Special Representative (EUSR) and the EU Rule of Law Mission (EULEX).

Unhappy about the declaration of independence, Serbia turned to the International Court of Justice to seek for the opinion on the, what they call it, "unilateral declaration of independence" of Kosovo. The International Court of Justice (ICJ) in its opinion[8] did rule in very clear terms that the declaration of independence did not violate international law nor the Resolution 1244 of the UNSC, however did not confirm whether Kosovo is a de-facto and de-jure a state.

From the ICJ the debate shifted to the UN again, where Serbia demanded that the issue of Kosovo is to be returned to the Security Council – however, learning from the

[7] UN presents key plan for Kosovo: BBC News 26 January 2007. http://news.bbc.co.uk/2/hi/europe/6300999.stm.

[8] Accordance with International law of the unilateral declaration of independence in respect of Kosovo. Advisory opinion of 22 July 2010. http://www.icj-cij.org/docket/files/141/15987.pdf.

mistakes in the past, the UN referred the issue to the EU, as they said "this is an European matter" – and at the same time adopting a resolution[9] which called for technical dialogue between Kosovo an Serbia with the mediation of the European Union. This mandate was a straightforward and truthful way of explaining what we were doing and why. "Cooperation … to improve the lives of ordinary people" reflects what people sometimes call "the European method" – seeking peace through practical cooperation rather than through grand rhetoric about the brotherhood of mankind – though sometimes we cannot resist that temptation too. This is the method invented with the Coal and Steel Community. The last objective, "bringing Serbia and Kosovo closer to the EU" is essentially about enlargement: the Thessaloniki promise which the EU will one day make good.[10]

Nevertheless, the postulate upon which the dialogue has started has been wrong. The EU was aware that because of the opposition because of several crucial points. EU, because of the 5 non recognizing members,[11] cannot make a fully-fledged promise on the integration path for Kosovo despite its will. Nonetheless, again in a vague and transcendent language it established some sort of contractual relationship, especially with the signing of the Agreement for Stabilization and Association.

Serbia who sits at the opposing side of the table does consider Kosovo still part of its territory, contesting its statehood, thus undermining the equal dialogue position.

Last, but not least, apart from myriad of problems faced by the boycott of the Serbian political representatives in the Government and the Parliament, Kosovo authorities do not control the entirety of its territory. The northern part inhabited by the Kosovo Serbs, show disregard to the Kosovo legal order, resentment towards any kind of EU presence and existing in a lawless and anarchic environment, abide by the rules of Belgrade only.

It is very important to mention the factuality of the ethnic division line and how did that occur. The division of the country was manned immediately after the war in 1999, when a protest of Mitrovica – the divided city – inhabitants from the Albanian majority escalated in strive to take over the occupied territory of the northern part. This did trigger a NATO/KFOR intervention which in order to prevent the escalation of the conflict set up a security parameter around Mitrovica north, effectively making it a safe haven for Kosovo Serbs from all around Kosovo. In addition, this was also done in order to retain the multiethnic character of the country but it led to a clustering effect in which the north of the river Iber emerged as a Kosovo Serb space while the south as a Kosovo Albanian space.[12]

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[9] UN General Assembly Resolution 298/64 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/298.

[10] COOPER, ROBERT: *The Philosophy of the Belgrade-Pristina Dialogue*, Posted on 16.07.2015. in Belgrade - Pristina, EWB Op-eds, https://europeanwesternbalkans.com/2015/07/16/sir-robert-cooper-the-philosophy-of-the-belgrade-pristina-dialogue/.

[11] Spain, Greece, Cyprus, Slovakia and Romania have refused to recognize the statehood of Kosovo till the day the paper was presented.

[12] GUSIC, IVAN: Contested democrac(ies): disentangling understandings of democratic governance in Mitrovica, in STRÖMBOM, LISA – BJÖRKDAHL, ANNIKA (eds.): *Divided Cities: Governing Diversity*, 2015, Nordic Academic Press, 215-234.

Nonetheless, Kosovo made a strategic choice backed by its international friends to rely on Belgrade to deliver the local Serbs to the Kosovo legal order; this worked and ended years of unrest, but it also produced a new Serb political elite that is somewhat inexperienced and tightly bound to Belgrade. The elected Serbs will have to carve out a role for themselves, an identity that goes beyond faithful servants of Serbia and focuses on the people that elected them.[13]

## 3. Agreements reached so far and their state of implementation

Taking into consideration the nature of the relations between Kosovo and Serbia, despite the yielded paradigm that the negotiations were focused on technical issues, and not political – this for the matter of the fact that political talks would entail the tough questions of recognition, the North and the political relations between Kosovo and Serbia – the dialogue has been political from the day it has started. Sir Robert Cooper who has facilitated these technical talks confirms it. The Dialogue fell into two parts: the first, at official level, was about practical issues. Sometimes it was referred to as "the technical dialogue" by people who wanted to emphasize that the issues were not political. This is nonsense. All issues have both political and technical aspects.[14]

The negotiations which started in March 2011, did actually concentrate on purely technical issues that have largely hindered the citizens of both states in their everyday life – which again was declaratively the primary concern of the EU officials. Negotiations started on the topics of return of cadasters and the civil registry; free trade (membership in CEFTA, custom stamps); electricity and telecommunication; issues related to freedom of movement (ID and travel documents, car insurance. driver's license and license plates, air traffic); mutual recognition of diplomas; missing persons; cultural heritage; crossing points and integrated border/boundary management; regional cooperation.[15]

The negotiations continued after the elections in Serbia, and in 2013 the following agreements were reached in the, what is being referred to as, the Historical Agreement (HA), i.e. the creation of the Association/Community of Serb majority municipalities; integration of police and security structures; integration of judiciary; holding elections in northern municipalities in accordance with Kosovo laws and energy and telecommunication.[16]

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[13] PRELEC, MARKO – RASHITI, NAIM: *Balkan Policy Research Group Report. Serb Integration in Kosovo after the Brussels Agreement*, 2015, http://balkansgroup.org/wp-content/uploads/2015/03/Serb-Integration-Kosovo-19-March-2015.pdf.

[14] COOPER: *op. cit.*

[15] OROSZ, ANNA: *Implementation of the Belgrade-Prishtina dialogue: results, controversies and prospects*, 2016, Institute for Foreign Affairs and Trade, 13-32. http://kki.gov.hu/download/a/b5/71000/kki_v4_kosovo_beliv_crop.pdf.

[16] Law Nr. 04/L-199 for the ratification of the first international agreement of the principles that regulate the normalization of the relations between the Republic of Kosovo and the Republic of Serbia

Year 2014, was characterized as a lost year for the dialogue because of the Kosovo general elections taking place, and the 6 months of a stalemate because of internal political clashes.

In the meeting between the two Prime Ministers, Mustafa and Vucic in August 2015, both parties agreed on the last document about the action plan on the implementation of the provision from the HA. The delegations initialed the general principles/main elements of the Association/Community of Serb majority municipalities in Kosovo, the Telekom Action Plan, the Action Plan on energy issues and the Bridge in Mitrovica.[17] The last point was imposed on the political dialogue table by the local Kosovo Serbs, keeping barricades on the main bridge that divides the city between the Albanian inhabited South and the Serb majority inhabited North part.

For the purpose of this paper, I will focus only on two them, which is the Telekom agreement and its implementation as well as the creation of the ASM. In tackling also the problem of the EU's soft approach, especially towards Serbia, a portion of the following chapter will be dedicated to the organizing elections of Serbia within the territory of Kosovo.

As per the state of implementation, currently the +383 country code has been allocated to the Republic of Kosovo for use, as the decision has been published in the International Telecommunications Union (ITU) on December 15, 2016[18] only after Serbia on December 3, 2016 has sent a letter of consent where it has requested for the ITU to allocate a in international code for the geographical area of the Autonomous Province of Kosovo and Metohija[19] which has represented the first strike on the undermining of the Kosovo's statehood with an official document by a UN agency. The lack of transparency in the process has fueled different interpretations to the agreement. Serbia officials insist that with this agreement they have preserved their telecommunications property in Kosovo and have only allocated a geographical area code, the Government of Kosovo has claimed that this is one of the most important steps towards the consolidation of the statehood. Moreover, the opposition political parties in both states have also diametrically diverse opinion. In Serbia, the nationalists parties do claim that with these acts "Serbia is giving away Kosovo and recognizing its existence as a state", while in Kosovo they claim that the Government has brought Serbia back in Kosovo by agreeing to have a geographical code for Kosovo.

http://www.kuvendikosoves.org/common/docs/ligjet/Ligji%20per%20ratifikimin%20e%20marreveshjes%20se%20pare%20per%20normalizimin%20e%20marredhenjeve%20Kosove%20Serbi.pdf.

[17] Summary of the Brussels Agreement package. Internal document sent to the Government of Kosovo, by the Minister for Dialogue in the Government of Kosovo, Mrs. Edita Tahiri. 27 August 2015.

[18] ITU-t telecommunication standardization sector of ITU complement to recommendation ITU-T E.164 (11/2010). Annex to ITU Operational Bulletin No. 1114 – 15.XII.2016. https://www.itu.int/dms_pub/itu-t/opb/sp/T-SP-E.164D-2016-PDF-E.pdf.

[19] ITU Secretary General letter to Rasim Ljajic, Minister for Trade, Tourism and Telecommunications in the Government of Serbia. Geneva, 7 December 2016.

One of the most troublesome issues to have been discussed in Brussels, and for which still a functioning modality has not been found, is undoubtedly the creation of the Association of Serb Municipalities.

The dialogue, as said earlier, it was presumed that it shall entail difficult political questions – such as the extension of the Kosovo Government authority in the Northern part, something which was lacking since 1999 i.e. since the declaration of Independence. The north has been troubled and out of wither international reach or Governmental authority since 2008. Illegally operating parallel structures, barricades and illegal security bodies have been operating with the funding from Belgrade for years, and those are seen as the only credible organizations fully to be trusted by the local Serbs. However, the dialogue between Kosovo and Serbia did conclude that these structures must be dismantled and Kosovo authorities should take the control over that part.[20]

Nonetheless, this Agreement was anticipated with grave opposition by the other political parties represented in the Parliament, those forming the political opposition block, with protests and tear gas in and out of the Parliament chamber.

In order to ease the internal political tensions lacking the potential to bring the parties together for a mutually accepted solution, the President of Kosovo, Atifete Jahjaga sent the Agreement to be evaluated for its Constitutionality to the Constitution court, while the opposition parties still claiming that the creation of this entity in Kosovo, is a de-facto division of the country amongst ethnic lines, just as it is in Bosnia and Herzegovina.[21]

The Agreements have truly been vague in their wording and interpretation, creating an additional impetus for misinterpretation or sparking conflicts between the two countries that are present at the dialogue table. As it will be subsequently discussed, the Visoka and Doyle implied neo-functional peace approach of the EU, has had in terms of integration a positive impact of the Europeanization process, however it has seriously undermined the functionality of Kosovo – and this just because of the fact that Kosovo is not being treated as a state neither by EU nor by Serbia.

## 4. The ASM an NGO or executive body? Its Legal and Constitutional impact within the Europeanization prism

The Association of Serb Municipalities is still unclear what will represent. Just another non-governmental body aimed at quasi institutional cooperation between some legal entities i.e. municipalities, or a fully-fledged executive association with rights overarching to the autonomy of one ethnic group in Kosovo.

[20] *Summary of the benefits from the package of the Agreements concluded in Brussels.* Report by the Ministry for Dialogue in the Government of Kosovo to the Government of Kosovo and the Parliament. 27 August 2015. http://www.kryeministri-ks.net/repository/docs/Perfitimet_shteterore_te_Kosoves_nga_Pakoja_e_marrveshjeve_ne_Bruksel__270815.pdf.

[21] ECONOMIDES, SPYROS – KER-LINDSAY, JAMES – PAPADIMITRIOU, DIMITRIS. Kosovo: Four Futures, in *Survival,* Vol. 52. no. 5., (October–November 2010.) 99–116.

Being that the EU has backed up, facilitated and yielded the implementation of the provision of this agreement strongly always using the incentives method for both Serbia and Kosovo on their integration path, it is important to analyze it contested provisions through the eye of the Europeanization theory in parallel to the constitutional and legal accords in Kosovo.

### *4.1. The Constitutional Court verdict*

The Agreement on the creation of the ASM brought political violence and turmoil in Kosovo. Its implementation do require the 2/3 majority vote in the Parliament, something which the current ruling coalition partners do not have – while the Agreement on the ASM, together with other arrangements such as the Demarcation with Montenegro were seen as substantially damaging to Kosovo, the former implying that it will give more enhanced responsibilities to the Serbian minority in Kosovo in a mono ethnic boundary line drawn amongst the municipalities where the Kosovo Serbs do represent the majority of the population, thus divide the country even more.

In the course of the action in order to block the Constitutional changes, the Vetevendojse! (Self-determination!) political party – the biggest opposition one, joined by the other opposition block parties used tear gas and pepper spray to impede the work of the Parliament. Moreover, street protests were organized on almost daily basis, some of them resulting in violent clashes between the protesters and the Kosovo Police with an aftermath of lot of injured from both sides and hundreds of thousands of euros damage to the movable and immovable government property.

To resolve the crisis, President of Kosovo, Mrs. Atifete Jahjaga turned to the Constitutional Court with the request of interpretation whether the agreement of 25 August 2015 on the principles of the ASM[22] reached between the two prime-ministers in Brussels, is in compliance with the Constitution of Kosovo (October 2015).[23]

In addition, the President requested that the Court establishes a provisional measure, meaning that "every action and effect produced by the Principles of the Association to be suspended, thus it is requested that the Court imposes a temporary / provisional measure on the matter raised, until a final verdict is reached".[24]

In its reasoning, Amicus Curiae of the Constitutional Court of Kosovo, on the case of the Constitutionality of the ASM, has stipulated that even though the European Charter of Local Governance foresees the municipal cooperation, nowhere can be

[22] Association/Community of Serb majority municipalities in Kosovo – General Principles/ main elements. Agreed and signed on 25 August 2015, in Brussels by the Prime Ministers of Kosovo and Serbia, mediated by the EU.

[23] Request for assessment of the compatibility of the principles that the document titled "Association / Community of the municipalities with a majority Serbs in Kosovo – The guiding principles/the main elements" with the Constitution, in the Articles 3 (equality before the Law), par. 1 in Chapter II (the fundamental rights and freedoms) and Chapter II (Rights of the communities and its members) of the Constitution of the Republic of Kosovo. 30 October 2015. Office of the President of Kosovo, Legal Affairs.

[24] Constitutional Court of Kosovo. Verdict – reference number AGJ877/15 on the case number K0130/15. 23 December 2015.

found what the point 4 of the General Principles says that the ASN will "exercise full overview", a terminology that is vague and inexistent in the legal practice. Further, the Agreement (2013) unlike the General Principles (2015) does not define the Association/Community as a legal entity of a specific character, it doesn't foresee its establishment with a Government decree and it doesn't specify the budget, the administration and the competences as stipulated in the General Principles.[25] The Agreement (2013) foresees that the ASM shall be in line with the European Charter on the Local Self-Governance and the structures of the ASM will be on the same basis as the Association of Kosovo Municipalities.

In addition, the General Principles use the phrase "municipalities with majority of Serb population", in the title and the text as well. This is in contradiction to the article 3, par. 1 and article 124, par. 4 of the Constitution of Kosovo, as well as the Article 10, par. 1 of the European Charter on the Local Self-Governance.

In its verdict, albeit in a very vague language using legally ambiguous terms such as "not entirely compatible" or "not fully fulfilling the constitutional standards", has ruled that the judicial act and the Statute have to be in compliance with the Articles 12, 21.4, 44 and 124.4 of the Constitution,[26] thus suspending the further processing of the Agreement and untying the political knot in the country.

The Constitutional Court verdict was not well perceived by the Serbian side in the dialogue. They have insisted that the ASM should be formed as soon as possible as agreed in Brussels, since it allows for the Government of Serbia to legally have in control the municipalities of mono-ethnic composition, including the northern part of the country. However, at this point, on the basis of the verdict, the European Union's reaction has been mild, thus allowing to insist that the dialogue should continue on other matters – allowing the three sides to contemplate in finding alternate resolution or wait for the bad bloods among the political parties in Kosovo to cool off and ultimately to adopt the ASM General Principles of 2015 in its current form.

### *4.2. The Europeanization, the EU and the agreement*

The European Union entails the fundamental principles of respect of human rights, democracy and rule of law as a basic pillar of its functioning – and with that, they represent the bare minimum that the aspiring member countries need to fulfil to even begin thinking about entering into contractual negotiations with the EU.

Schimmelfenning *et.al,* stipulates the principle of "political conditionality" that the EU imposes on the member states using the accession incentive as not always productive, since the cost of adoption of EU imposed rules for the domestic government is high, politically and economically.[27]

[25] Constitutional Court of Kosovo. Verdict – reference number AGJ877/15 on the case number K0130/15. 23 December 2015. Pg. 9.

[26] Ibid. Pg. 14.

[27] SCHIMMELFENNING, FRANK – ENGERT, STEFAN – KNOBEL, HEIKO: The impact of EU political conditionality, in SCHIMMELFENNING, FRANK – SEDELMEIER, ULRICH (eds): *The Europeanization of Central and Eastern Europe*, 2005, Cornel University Press. 29-50.

Borzel and Risse further argue that in order to achieve the process of Europeanization there must be a, some degree of misfit between the European level processes and domestic ones which ultimately leads to adaptational processes that have a cost – social and political one.[28] In the case of the Constitutional changes regarding the creation of the ASM, it is clear that the EU imposed actions are not necessarily mandated to the integration path, but rather an internal Constitutional order. Furthermore, as Kosovo has both legislatively and practically fulfilled as well as exceeded the criterion of respecting the fundamental rights and freedoms for minorities, it can be concluded that the EU is not taking into consideration the historical context of the creation of a mono-ethnic layered institution within the Constitutional order of Kosovo, which contrary to what the aspirations of the EU are – it might get Kosovo further back from its integration path, rather than moving it forward.

The dialogue and the Agreement in this form, poses a threat of creating a parallel constitutionally forbidden category of territorial autonomy, which as it is said above, will endanger the multiethnic composition of the country, its fragile relations with the Belgrade authorities and detriment its EU integration path.

In this context it is argued that whereas territorial autonomy is appropriate to the long-established states and consolidated democracies of the West, it is far less workable in a CEE context marked by historic disputes over territorial borders, continued geopolitical insecurities and recent or still ongoing processes of democratisation. These inherited communist and pre-communist legacies mean that governments in the region have been reluctant to endorse far-reaching territorial autonomy for national minorities, seeing this as a barrier to successful state-building and state consolidation or even as a potential threat to state integrity.[29]

## 5. Conclusion

Kosovo's international legitimacy was contested since it declared its independence. It did not have the support of the UN Security Council facing an opposition from Russia and China. Thus, its consolidation and recognition as a state has moved and still goes in a slow pace. Surroi argues that even today, since the Declaration of Independence there have been three layers of contestation, territorial – Serbia claiming that Kosovo still belongs within its borders, the European identity – the non-recognizing members of the EU resulting in a hybrid relation between the two, and the third, however the least important for this paper, is the global/ideological tug-of-war in which some countries

[28] BORZEL, TANJA A. – RISSE, THOMAS: Conceptualizing the Domestic Impact of Europe, in RADAELLI, CLAUDIO M. – FEATHERSTONE, KEVIN (eds): *The politics of Europeanization*, 2003. Oxford University Press, 57-83.

[29] SMITH, DAVID J.: *Minority Territorial and Non-Territorial Autonomy in Europe: Theoretical Perspectives and Practical Challenges,* http://bgazrt.hu/_dbfiles/htmltext_files/7/0000000177/David%20J.%20Smith.pdf.

see Kosovo as a product of either US or Western unilateralism and without a UN membership.[30]

But the question remains, what did the dialogue brought up until today since 2011? Did it help Kosovo on its path towards consolidated statehood or its integration path, or was just an excuse to sit on the same table with Serbia so that the latter will ultimately be rewarded with membership. Sir Robert Cooper, one of the first mediators in the talks between the two sides concludes: The Dialogue was never just about Serbia. It was also about Kosovo learning to act like a mature state. That means giving the welfare of the people more importance than the symbols of the state. If Kosovo wants to persuade the world that their independence was justified they should make their treatment of the Kosovo Serbs a model of how different ethnic communities can live together. One day that might even impress Serbia.[31]

However, in Kosovo the reality is different from what the EU perceives. The myriad provisions of protection of the minorities, including an effective veto powers in the Parliament, the Serbian minority can paralyze the decision making in the central level on any issue that is of a vital interest or subject of a constitutional amendment.

The ASM will have full oversight on the economic development, education, health, urban and rural development, as well as security wise where the list of the names for the police commanders in the respective municipalities will be end by the ASM. It shall have a political elected representation with a president, vice-president, Assembly and a Council. These are all elements of a political territorial autonomy – a third layer of power in Kosovo, which is between the central government and the municipalities. The European Union has imposed the process of "Europeanization" to the Kosovo legal infrastructure since the negotiations for the final status commenced. To an extent, it has brought Kosovo to the limits of normal functionality, while maintaining its status neutrality. On the other hand it has rewarded Serbia with its candidacy status and opened the negotiations for accession, at the same time minimizing the nationalist role of the euro-skeptic parties in Serbia, those of which the high representative for Foreign Policy and Security, Frederica Mogherini did feel on her own skin when addressing the Serbian parliament in March 2017, where the representatives of Vojislav Seselj radicals were booing and chanting "Serbia! Russia! We don't need the Union!" referring to the EU.[32] Kosovo in this context has just recently only signed the Stabilization and Association Agreement with the EU, the very first step towards normal contractual relations with the Union.

With this in mind, the approach of the EU vis-à-vis the dialogue should change, and a clear integration perspective to Kosovo should be given, anchoring both countries in the membership path in parallel thus imposing a change of dynamics in the "normalization of relations dialogue between Pristina and Belgrade".

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[30] SURROI, VETON. The unfinished state(s) in the Balkans and the EU: the next wave, in RUPNIK, JACQUES (ed.): *The Western Balkans and the EU: 'The hour of Europe'*, June 2011, Chaillot papers – EUISS.

[31] COOPER: *op. cit.*

[32] EU's Mogherini booed in Serbian parliament ahead of Balkan summit. Reuters report 3 March, 2017. http://www.reuters.com/article/us-eu-balkans-serbia-idUSKBN16A2A0.

Both International Relations and International Law scholars are witnessing a competing trend in international life, signaled by the rise of a group of phenomena most often explained in terms of "globalization," "transnationalism" or the "new medievalism." These include the emergence and increasing importance of sub-state and non-state actors, increasing international economic and political interdependence, the perceived transformation or disintegration of state sovereignty, the ascendancy of difficult "global" issues that require coordinated responses, and the continuing financial and administrative crises of the United Nations Organization. In this increasingly complicated environment, students of international order are embracing international "governance" as an alternative to international "government," the traditional liberal internationalist ideal of formal international institutions displacing domestic sovereigns in specific issue-areas.[33]

In Kosovo this was proven. The constitutional court ruling on the ASM, presented with a very vague and ambiguous language, didn't merely solve the question of the (un)Constitutionality of the agreement, but it was an definite impetus for the satisfaction of the EU officials to ensure that the dialogue will continue smoothly – and the legal acts will just prove to be of a secondary nature and possibly subject of amendment. Is this what Europeanization should actually look like?

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# EUROPEAN COURT OF HUMAN RIGHTS CASE LAW ON PROTECTION OF PERSONAL DATA: REASSESSMENT OF REPUBLIC OF TURKEY CASES IN LIGHT OF TURKEY'S DATA PROTECTION LAW

**VÁRKONYI GÜLTEKİN, GIZEM***

*Abstract:* Protection of Personal Data is one of the newest right developed within the Right to Privacy. This fundamental right has been perceieved mostly as a European value giving as a reason that it has been continuesly develop-ing under the European legal framework. Turkey also follows European heritage of human rights as one of the member of the Council of Europe and European Union candidate country. Recognition of personal data pro-tection as a single fundamental right was a late action of Turkey. For this reason, some of the data potection cases could not solved in Turkey's jurisdiction, but were referred to the European Court of Human Right. If there was well-grounded data protection law before, the cases could be solved quicker and more in favor of Plaintiffs.

*Keywords:* European Court of Human Rights, data protection, human rights, Turkey.

## 1. Introductıon

Republic of Turkey is one of the largest and most populated country in Europe. Its special geopolitic position gives many advantages to the country. Many neighbors around the country from the European continent gives opportunities to Turkey to follow global legal developments in the field of human rights protection. European Union is an important organization as a matter of fact that it makes globally leading developments in certain areas especially protection of human rights. Although, Turkey's European Union accession turned to be a sort of "soap opera" by more than 30 years now, it is impossible to refuse the efforts of Turkey on the road to the EU accession. Many legal developments boosted the country to adopt better human rights protection legislation. One of these efforts is surely is on the data protection field. Turkey is one of the oldest member of Council of Europe. Although she is one of the first signatory[1] of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108),[2] she waited so many years to ratify it. Only very recently, in 2016, Turkey could enact a law on Protection of Personal Data. For years, Turkish courts were interpreting the personal data protection cases in frame of separate laws such as Turkish Code Civil, Turkish Criminal Code and sector focused regulations. In Europe, however, protection of personal data was defined as a fundamental right that should be protected in the single legislation. In this paper, we will re-interpret the ECHR Case Law in light of the new Turkish Data Protection Law. Moreover, new law brought many developments but still there is a need for further improvements.

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[1] The Convention was opened for signatories in 1981 and Turkey signed it at that time.

[2] Full text version of the Convention is accessible at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680078b37.

### *1.1. Development of Right to Protect Personal Data*

Protection of personal data is one of the newest third generation rights and increasingly receiving attention in the legal concept. This right firstly developed under the right to privacy before 90's, when the mass technologic developments had not been started yet. Since then, such developments change people's daily life as well as confront them with new threats.

The technologic developments change people's life style as well as their private life. One touch is enough to share any personal information with billions of people nearly with speed of light. Either willingly, mistakenly or out of knowledge, information related to our personal life "fly somewhere on the virtual space" where whomever can access it. For this reason first of all, the perception and then the understanding of privacy has changed. Privacy basically referred to the physical privacy such as border of someone's home or some space that can be definable with physical borders. Vast amount of virtual services and transactions eliminated this tangible border, sometimes by people's their own will sometimes by forcing them to use such virtual services. Hence, not just services such as internet banking, health information systems or online shops, but communication facilities and social media attractions also receive many users. Using such services require sometimes people's financial information, sometimes age indication or sometimes addresses, phone numbers, nationalities, in short, information belong to people. Millions of data somehow transmitted to the virtual space where people do not exactly know what happens to them and do not have control over it. The virtuality has changed the privacy in a way that it got new dimensions which is intangible and other than physical privacy such as information privacy or spiritual (decisional privacy).[3] It brought a new type of privacy, information privacy, which generally refers to personal data protection. However, there are claims[4] that even information privacy is not enough to involve the personal data protection issues. For these reasons, even newer right, right to protect personal data has shaped in different philosophical and legal basement. Still, there is a connection existed between privacy and personal data protection. Data protection right developed with privacy and been separate right but never has lost its connection. This connection was described best in one of the research[5] as follows: "Data protection is both broader and more specific than the right to privacy. It is broader because data protection also protects other fundamental rights such as the freedom of expression, the freedom of religion and conscience, the free flow of information, the principle of non-discrimination, next to individual liberty and self-determination. But data protection is also more specific than privacy since it simply and only applies when personal data are processed". It is

[3] SAVOIU, ALINA – BASARABESCU, C. CATALIN: The Right to Privacy, in *Annals of the Constantin Brancusi University of Targu Jiu Juridical Sciences Series,* 2013, 1, 90.

[4] WRIGHT, DAVID – RAAB, CHARLES: Privacy principles, risks and harms, in *International Review of Law, Computers & Technology,* 2014, 3, 28, 278.

[5] GUTWIRTH, SERGE – POULLET, YVES – HERT, PAUL DE: *Data Protection in a Profiled World,* 2010, Springer, Dordrecht-New York http://search.ebscohost.com/login.aspx?direct=true&db=edshlc&AN=edshlc.012582268-5&lang=tr&site=eds-live&authtype=ip,uid.

clear that neither data protection nor privacy is not an equivalence of each other. From the legal point of view also differentiation between the two rights were needed and occurred by many national and international legal documents.

Data protection as a fundamental right was adopted by many European countries as well as Council of Europe (CoE) members. Some of the members already had basement of such right in their domestic legislation while some of them had to modify it in order to comply with the Convention. Most of the members ratified the Convention in the early 2000. However, Turkey waited 36 years for the ratification and currently it holds the latest ratified country among the members of the CoE.

In this work, we assume that if there was Personal Data Protection Law in Turkey from the day that the Convention 108 was signed, and then if it was ratified quickly, there would not be any cases related to this topic in the European Court of Human Rights' (ECtHR) agenda. Although there were not much cases already, because of the country's bad reputation in the ECtHR as a second most defendant country, it could be possible to decrease some amount of the case load there. Also, it would be better for the plaintiffs to get quicker result, and solve the case in the national remedies. We choose one of the case which is directly related to personal data protection, apart from the privacy for the first sight. The case is important and worth to examine to show how Personal Data Protection Law in Turkey will affect the country's fundamental rights efforts in a positive way.

### *1.2. Protection of Personal Data in the International Context*

Right to protect personal data had been interpreted under the privacy protection national sphere as well as international one. First personal data protection placed under the privacy rules in the global approach. The most known and the first most comprehensive human rights document, the United Nations Universal Declaration of Human Rights (UDHR) signed and declared in 1948, can be accepted also as the first legal document that ensures right to privacy. Article 12 of the UDHR indicates that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Although the UN take the first step towards protection of human rights, right now it is the European continent where the human rights researches and legislation has been predominantly and continuously developing. It is clear in the international documents also; CoE European Convention on Human Rights (ECHR) is one of the comprehensive international human rights legal document that is very effective in Europe as well as countries from other continents that are willing to join. Article 8 of the ECHR stresses out the "Right to respect for private and family life."[6]

[6] The article stresses out that "Everyone has the right to respect for his private and family life, his home and his correspondence" and "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

There is no doubt that ECHR brought many basic norms in order to protect political and civil rights but the Convention adopted almost any single human rights in frame of its protection. Hence, as we will mention below, the first and only international legal document protecting personal data has been developed within the ECHR. We think that ECHR affected domestic will and development on protection of personal data and privacy in Europe. When we review the legal developments about personal data protection, one can easily realize that the right to protect personal data is actually a European value. Until the Convention 108 was enacted, there were many development occurred in the European countries. For example, the first domestic legal regulations were done for data protection in 1970 Länd of Hessen, Germany. The reason why behind this need was the idea of creating a central federal database for storing the data and realization of the risk of protection of the database. Later on in 1977, the legal improvements affected the federal level and federal level legislation was adopted. Sweden was the second country where data protection legislation was adopted and then other European countries except from Ireland, UK and Italy developed its domestic legislation either at the constitutional level or constitutional studies2. United States is the only non-European country where personal data protection legislation has developed earlier than 1980.

Automatic systems surely easiness the world of manual works but in a world where the value of data protection was realized, it would not pushed out of concept. Organization for Economic Cooperation and Development (OECD) has realized the danger on transferring "vast quantities of within seconds across national frontiers, and indeed across continents, has made it necessary to consider privacy protection in relation to personal data" and where there is no unique approach to the issue from the countries, it will cause breaches on people's basic rights. For this reason, OECD released its Guidelines on the Protection of Privacy and Transborder Flows of Personal Data in 1980, as the first document that deals with transmission of personal data abroad. Later on the UN would follow the OECD with its the Guidelines for the Regulation of Computerized Personal Data Files in 1990 which was updated in 2013 last. The Asia-Pacific Economic Cooperation, similarly to the OECD, adopted APEC Privacy Framework in 2004 in order to handle regional data transfers without causing breaches on people's fundamental rights. The document focuses on the data protection in the field of economy foresees the rules for "electronic commerce to expand business opportunities, reduce costs, increase efficiency, improve the quality of life, and facilitate the greater participation of small business in global commerce". APEC information privacy principles are presented as "Preventing Harm, Notice, Collection, Limitations, Usages, Choice, Integrity of Personal Information, Security Safeguards, Access and Correction, Accountability" which are in the framework with the Directive 95. The last part of the document presents separate approach to Domestic and International Implementations. These documents are not binding "how to..." documents where the basic principles for data protection is drawn, not deeper.

Table 1.: Development of personal data protection timeline

| National | | International | |
|---|---|---|---|
| 1970 | Hessen | 1948 | United Nations |
| 1970-1974 | United States | 1950 | Council of Europe |
| 1973 | Sweden | 1980 | OECD |

| | | | |
|---|---|---|---|
| 1976 | Portugal | 1981 | Council of Europe Convention 108 |
| 1977 | Germany | 1995 | European Union Directive 95 |
| 2016 | Turkey | 2004 | Asia-Pasific Economic Cooperation |

Source: KÜZECI, ELIF: *Personal Data Protection*, 2010, Unpublished doctoral thesis, Ankara, Ankara University Institution of Social Sciences, Ankara, 117-119.

Another international legal document that is very important for data protection legislation is the Directive 95 of the European Union. The importance of the Directive is, it is multidimensional. First of all, it aims to take over difficult interpretation of direct data breach issues based only on privacy. The Directive also brings stronger protection than the other legislations, because it introduces many rights that can be counted new in this field. Right to obtain the source of the information, modification, remedies, rules for transferring the personal data abroad even though the transferee country does not have an adequate level of protection can be present with some examples.[7] In 2000 Charter of Fundamental Rights adopted right to protect personal data as a human right. Since then, the EU institutions also follow the same rules of personal data protection as the Directive reflects.

We should point out that although the Directive was released later than the Convention, the Convention was affected from this newer approach to the data protection and later it was modified mostly based on the Directive. It should not be wrong to say the Directive is globally influential document in this field. However, the EU authorities even did not think that the Directive meets with the developments and the needs of EU citizens furthermore. In order to adopt single approach and elimination differences between the EU members, the EU introduced European Data Protection Regulation in 2016, and it will be enforced in May 2018. The new Regulation brings stricter rules that will be directly applicable in the Member States, even more it will be bind cross-border sense and it introduces new rights such as "right to be forgotten". There is no doubt that legal developments are trying to catch the daily developments and for now EU seems more adopted to the change.

Based on the ECHR of CoE, privacy started not to meet with the needs of European people. For this reason, stressing the personal data protection separately as a single right at the international level has adopted in Europe lead by CoE. By this way, the restricted interpretation caused by only privacy right targeted to be eliminated. Also, lack of being standard legal basement for everyone in Europe could be ensured. Convention 108 opened for signatory in 1981.

## 2. Basıcs of the conventıon 108

Convention 108 is the first international legal document protects individuals' data. It is accepted as the basement of the Directive 95 and a model for many countries' national personal data protection legislation. Currently, all the 47 members of the CoE ratified the Convention, 5 non-CoE member countries signed (Cabo Verde, Mauritius,

[7] KÜZECI: *op. cit.* 176.

Morocco, Senegal, Tunisia, Uruguay) and 3 of them (Mauritius, Senegal, Uruguay) ratified the Convention.[8] For this reason, it worths to review the Convention 108 deeply.

It is important to see what does personal data mean according to the Convention. Personal data is "any information relating to an identified or identifiable individual" who is actually defined as the data subject. Whomever, either in the public or the private sector, collects, stores and processes the data subject's information is called as data controller. Scope of the Convention was limited with the automated personal data files and processes but some of the countries, such as Serbia, adopted national legislation that covers the non-automated files containing personal data either. This Convention is the basic and it brings the minimum standards for protection of personal data so the countries should be free to adopt more or better solutions in their jurisdiction. For this reason, the Convention explicitly indicates that the countries should give a notice if they extend or limited the scope of it. This would definitely help improving the Convention as well as to see the different implementations so that the CoE may recommend to the countries to ensure standard level of protection.

The basic principles for data protection in the Convention are as following:

*Duties of the Data Controllers;* to adopt the rules of the Convention at the national level, and make it as soon as possible.

*Quality of data*; should be determined while processing whether it is fair and lawful, in frame of its purpose, accurate and updated, and is stored for no longer than is needed.

*Special (sensitive) data;* is a data that should not be processed automatically if there is no separate protection rules at the national level. These data is the data related to racial origin, political opinions or religious or other beliefs, health or sexual life and most importantly for our case, criminal convictions of the data subjects.

*Data security;* any kind of security measure against illegal accession of the personal data.

*Additional safeguards for the data subject;* is a right to know whether the data is stored, where it is store and who is the controller, ask for erasure or rectification if it is illegally stored, and have a remedy if it is stored illegally.

*Exceptions and restrictions;* are based on the fact that there can be issues to restrict such protection. These issues can be related to state and public security, state's monetary interests, suppression of crime, and protection of others' rights and freedoms besides the data subject.

*Sanctions and remedies;* should be adopted in the domestic law against violations.

*Trans-border data flows:* Before the Additional Protocol on the Convention 108 was accepted in 1999 which we will mention below,, it was very open ended for interpretation to transfer the personal data outside of the jurisdiction, without in knowledge whether tansferee country would protect the data same way as the

[8] The Chart of the signatory countries and the ratifications can be found here: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p_auth=QraCFokWs

transferer. Within the amendment, it was modified in favor of the persons as well as the countries to not to put them in a confusion and missing protection.

*Cooperation between parties;* is important to share information and practices either with the CoE or parties of the Convention.

*Consultative Committee;* which consists of representative from contractor parties and open for non-contractors' representative. The Committee's duties are to make proposals to improve the Convention, propose amendment and give its opinion as well as advices. It is an independent body to watch over the application of the Convention.

The Convention 108 was adopted by many member states of the CoE in the 90's but when the internet based activities developed and integrated into people's daily life, there appeared another problems. There are several technologically leading companies in different countries. Electronic world is not very much independent from the hardware, which means that such services actually served from certain points where the hardware is located. When a person takes an activity on the web, it leaves nearly a fingerprint alike sign on such hardwares. In addition, many services run better with the data from the user of the service; the data is stored and processed on the hardware where might be at the jurisdiction of abroad. While such cases appear and were looking like to appear more, CoE amended the Convention 108 in 2001 with the Additional Protocol which regulates the rules of data transmission abroad to the countries that is not a party of the Convention 108. The Protocol brought the obligation for the transferee country to ensure "adequate level" or safeguards to protect personal data at their domestic law. Level of adequacy which placed in nearly any national or international personal data protection documents, has criticized many times by the scholars. This is because firstly, not every country perceive privacy in a same way. It was the case of transmission of the air plane ticket Personal Name Records from European Union to the United States. When the US obliged the air carriers to share wide range of such information with the US law enforcement authorities, regardless of where they come from, it was the EU that delivered its privacy concerns. Actually, such "adequacy" concept was performed in this issue. Still, there are debates about the adequacy understanding. Because there is a need to agree clearly on whether prior approval to the data transmission is enough or transmission with no ex ante control should be adopted.[9] Apart from this discussion, Additional Protocol brought an obligation to the contractor countries to establish a national supervision mechanism to be watch-dog of the data controllers whether they are compatible with the Convention.

The Court had received numerous cases regarding to the right privacy. Indeed, there are many cases related received directly or indirectly related to personal data protection. According to the ECtHR Factsheet published in November 2016, the Court groups the cases related to personal data according to the titles of the rights as they are in the Convention. According to that, the main rights of the people as well as the violation areas are grouped as "Collection, storage and use, disclosure, accession,

[9] KIERKEGAARD, SYLVIA – WATERS, NIGEL – GREENLEAF, GRAHAM – BYGRAVE LEE A. – LLOYD, IAN – SAXBY, STEVE: 30 years on-The review of the Council of Europe Data Protection Convention 108, in *Computer Law&Security Review* (2011), 27, 231, doi:10.1016/j.clsr.2011.03.007.

erasure or destruction of personal data". After this grouping, the type of data must be important for the Court as a first step for the judgement. Health related data, employees' data, DNA data, data gained from surveillance technologies such as CCTVs or telephones, social insurance data and many more types of data have been subject of the Court's judgement. The cases lodged by the individuals against one or more member states, and found eligible to be judged generally resulted as fine or just satisfaction. The cases that did not violated the ECHR or the Convention generally interpreted as "legitimately aimed and necessary for the national security, public safety and the rights of the victims, and of preventing crime". As the Member States of the CoE can ask for preliminary ruling from the judges of the ECtHR, many cases were interpreted under the principle of proportionality or margin of appreciation. Surely, there are cases that the judges made the ruling in favor of the Member State to not to breach the Conventions.

However, in the 21st century the technology has gain an unstoppable speed. Mobile usage as well as social media boomed. Developments required once again changes on the Convention. In order to make the Convention better, more effective and more clear for everyone, so called globalization[10] or modernization of the Convention had finalized in 2013, but not enforced yet. The modernization includes major developments such as obligation of the parties, data protection standards, additional obligations, data export restrictions and new roles for the CoE Consultative Committee. We will not discuss the planned developments in frame of this article, however, it is important to stress out that data protection legislation is a dynamic process in Europe where global leading developments occur in the field.

## 3. Protectıon of personal data ın the turkısh jurısdıctıon

Turkey was lack of a single personal data protection law until 2016. The Law was enacted upon the constitutional amendment referendum held in 2010, that brought many legal developments in human rights protection, as expressing the personal data protection as a single right. During the preparation and after the enactment, it immediately interpreted as harmonization of the 108 Convention and 95 Direction. Although the 95 Direction will be replaced as a Regulation next year, this seems very important step for the country to follow updated and European developments in this field.

Prior to the Law, there were many sector based regulations for protection of personal data. These sectors were mainly the ones that the technologic developments that affected very quickly. E-communication, e-banking, e-commerce and anything contains "e" was regulated with a personal data protection. However, different implementations and lack of a Law guidance and power was creating a disadvantageous situation for the country. Staying out of these global developments created obstacles for the country, for example, Turkey could not collaborate with the EU agencies such as

[10] GREENLEAF, GRAHAM: 'Modernising' data protection Convention 108: A safe basis for a global privacy treaty?, in *Computer Law&Security Review* (2013), 29, 431, http://dx.doi.org/10.1016/j.clsr.2013.05.015.

Europol for intelligence exchange. This missing point was always expressed in the EU-Turkey Progress reports from the year that Turkey was announced as a candidate country, since 1999[11] until the adoption of Personal Data Protection Law, 2016. This created political pressure on the country which may be assumed as a boosting effect for the country's legal development in this field. Although sectoral data protection steps taken, sectoral regulations swelled up the legislation with no comprehensive interpretation possibility. Turkey took a huge step with enactment of Personal Data Protection Law.

The Law consists of 7 Chapters and 33 Articles. Basic principles in the law are found very similar to the EU Directive by most of the Turkish scholars.[12] The definition of personal data is as comprehensive as the other international legislation and expressed as "any information belongs to natural person(s) who is identified or identifiable". In compliance with the other examples, Turkish Personal Data Protection Law also differ the sensitive or special categories of personal data, data related to ethnicity, political opinion, religion, appearance (clothes), health, and sexual life. As a general rule, both data types cannot be processed without an explicit consent of the data subject. The explicit consent is defined as "freely given consent based on pre-given information on a specific subject". This may certainly cause wrong implementation of the Law, because it does not stress the form of the consent whether it is written or oral declaration or just putting a sign on the check-box on the virtual world could be enough.

The processing activity should be restricted with the purpose and scope of the processing. In the Law, processing principles are base on the data subject's consent which means that there can be processing activity without a consent of the data subjects. Out of consent cases are generally referring to the fact that the activity only can be done in a legitimate basis such as, if the data is already made public by the data subject, it is necessary for the public safety and security, or if processing is necessary to fulfill a legal obligation of the data controller. While the data controllers are bind with the processing rules, they also must ensure transparency, accession and erasure rules. They also must not transfer the personal data neither inside the country nor outside of the country, without a legitimate basement.

The Law clarifies the basic principles of data processing, the circumstances, and exceptions for data processing, responsibilities of the data controllers, legal remedies, and sanctions. Establishment, competences, working principles, personnel and the budget of the Personal Data Protection Authority and the Board for Data Protection thoroughly explained. The Board would be established 6 months later the Law was enacted, which was in April 2016. Unfortunately, there is no formal information

[11] All the reports are available at: https://ec.europa.eu/neighbourhood-enlargement/countries/package_en.

[12] KORKMAZ, IBRAHIM: An Assessment of The Law on Protection of Personal Data, in *Turkish Bar Association Journal* (2016) 124, 81–152., BAĞCI, GÖKHAN UĞUR: *14 Soruda Kişisel Verilerin Korunması Kanunu. E-ticaret ve internet hukuku,* http://www.eticarethukuku.com/14-soruda-kisisel-verilerin-korunmasi-kanunu#more-176 [2016-11-10], TOKSOY, FEVZI – BALKI, BAHADIR – YILDIZ, SERA ERZENE: *Data Protection in Turkey: overview. Practical Law Multi-Jurisdictional Guide,* http://us.practicallaw.com/7-520-1896?q=turkey [2016-11-11].

verifying the establishment of the Institution while we publish this work. Some of the news websites quoted from each other that the Head of the Institution and the members were elected in the Parliament, but the Institution is still not ready. Current political issues in Turkey such as terrorist attacks, 15th of July military coup attempt and adopting state of emergency after it, and constitutional amendment which will result with switching the parliamentary system to the presidential system might be effective for this slow development, we guess.

The data controllers' responsibilities and duties according to the Law are closely related to the legal collection, storage and processing activities. For this reason, data controller should inform the data subjects during the collection. Informing activities should at least consist of the purpose, transfer, method and legal basement of the collection, and the rights of the data subjects finally. In frame of their rights, the data subjects have a right to learn whether their data is being processed, if yes, ask for information about the process, ask for the purpose of the process and whether the processing complying with this purpose, ask for rectification, erasure or destroying if the processing is not complying with the purpose, and ask for the data controller to inform if the data is transmitted to third parties. As it is already seen in the Law, all the rights and rules are closely related to the processing activity. During the processing, besides legal basement, there are principles for the data controllers to follow. These principles are:

- The data should be accurate and kept updated if necessary,
- Should be processed for certain, explicit and legitimate purposes,
- Processing should be limited, related and restrained with its scope,
- Should be stored in a limited time within its scope.

The rest and the most of the Law is about the needed supervisory body, so we can dismiss this part due to its irrelevance with our case. In frame of the basic rules and principles, now we can review the present case.

## 4. Cemalettın canlı vs. Republıc of turkey case[13]

Although Turkey's personal data protection framework had been developed slower than European practices, there were not much cases carried to the ECHR. We do not interpret it negatively, instead, the reason behind could be the national mechanisms were found enough for protection of such right. As we already indicated before, lack of data protection law was found an obstacle for international collaboration in the certain fields but there were no cases stayed unsolved in Turkish jurisdiction related to personal data protection. Still, the Personal Data Protection Law was necessary for Turkey and adopting such law ensures better protection for the fundamental rights.

[13] Judgment of the European Court of Justice of 6 October 2009. Cemalettin Canli vs. Belgium. Case C-6/09 available at: http://hudoc.echr.coe.int/eng?i=001-89623.

### *4.1. Merits of the Case*

The Plaintiff, Cemalettin Canli is a known sociologist with number of publications. In 1990, he was prosecuted to be involved with an illegal organization known as left-communist group of people named "Revolutionary Youth" and "Revolutionary Path". It should be noted here that in Turkey, sadly, some of the organizations used these kind of "fancy" titles to cover themselves because they generally do not purely target to stress out what do they think democratically, but serve to some other purposes, like terrorist activities. Unfortunately, these kind of groups generally contain also "bad guys" besides the innocent believers. As we can see in this case also, not all the members of such organizations are treated as bad guys; hence Mr.Canli was neither arrested, nor punished after the interrogation. He was released right after his investigation. Later on, in August 2003, while he was going to a demonstration organized by the Confederation of Public Workers' Unions in Ankara, which is totally legal organization, he was arrested by the police after a brawl between policeman and a group of demonstrators including him. While 26 policemen injured, Mr.Canli claimed that he was beaten by the police. At the same day, the police prepared a report which describes this issue. The report had an addition information related to the Plaintiff's background that he was previously convicted. The report clearly contained that "he had a previous record for terrorist related activity". The report was presented to the Prosecutor's office in Ankara. The Prosecutor decided according to the Demonstrations Act of Turkey, accusing Mr.Canli and others from the group for damaging state property and resisting arrest by using force. Upon this decision, the case devolved to the Ankara Criminal Court of First Instance. There, a police presented a new report to the court called "Records of Guilt", which includes his fingerprints, address and birth information, also his past involvements in 1990 in accordance with Police Regulations on Fingerprinting. He was in a position that he was found guilty in the past and it should be known by the Prosecutor.

Mr. Canli became a Plaintiff starting from this point, from January 2004. He first lodged a complaint to the Public Prosecutor showing that he was acquitted from this case and this case should not be presented again here by the police. He pointed out that the above-mentioned Regulation should contain the rule of exclusion of such information from the police records. By this way, the policeman who prepared the report against him breached the Regulation according to him. While the case is running, one of the press released a news including the following information: one of the captured is a member of an illegal organization, Revolutionary Youth. Upon that, he claimed that this report damage the presumption of innocence because he is a known person and his reputation damaged with the news.

In February 2004, the Public Prosecutor refused his claims giving as a reason that the police "just" informed the court about the past of him. The Plaintiff claimed that the Public Prosecutor made his/her decision based on a missing information because he or she did not even mention about the Regulation, which the plaintiff referred to be reviewed in his application. The applications were refused giving as a reason that the policeman only informed the prosecutors. He extended his application as claiming that some of his rights in the European Convention of Human Rights were violated starting from fair hearing to respect to family life. His this application was also refused and on December 2005, he was acquitted from the case.

Aftermath, the case was closed in Turkey not in favor of the Plaintiff's claims. However, once his fame and family was damaged, he kept seeking his rights in the ECtHR. He lodged his complaint to the Court, claiming that there is a violation of the Article 8, entitle "Right to respect for private and family life". The ECtHR judges analyzed the application step by step. The basement of the judgement was the Article 8 of the ECHR, but Convention 108 was interpreted widely because of the merits of the case fit exactly to the Convention. Whenever the ECtHR receives a case, it always starts from evaluating it according to admissibility criteria of the Court. The ECtHR admissibility criteria is very clear and simple.

Firstly, the Government of Republic of Turkey draw the attention of the Court on the application must be counted as inadmissible because the Plaintiff were not exhausted the domestic remedies. The judges agreed on the fact that the Plaintiff's efforts were not taken serious and would not have been taken neither even if he kept trying. The Government claimed that keeping the records has a legitimate basis; but the Government did accept that it should have been amended with the right information. The Government also argued that the Plaintiff should have seek his right against the newspaper. However, the newspaper company did not make anything lawful; the news was released as it was received by the Prosecutor. The Plaintiff did not have chance to ask for correction of his data because he did not know that his records are kept wrong and also he already complained about it to the court.

The ECtHR judges agreed that the information that the Prosecutor gained from the policeman under the title of "Records of Guilt" report mentioned about him as he is still a member of an illegal organization which breaches protection of his reputation. Passing such inaccurate information to Public Prosecutor against him also breach his right to privacy. It was not a necessity for public security nor the public to know this record; so here the judges decided that this information was related to his private life. The most important part of the judgement is the fact that the Police Regulations on Fingerprinting orders to the law enforcement agencies to keep all information up to date by attaching all related information about the individuals. So, Turkey was fined with 5.000Euro for pecuniary damage plus 1.500Euro for costs and expenses of the Plaintiff.

### *4.2. Result*

If Turkish Personal Data Law was enacted prior to this case, the interpretations as well as the fine would be different. Article 4 of the Law is drawing the general principles for data processing rules, which oblige the data controller (related Police Department, in our case) to keep personal data (Mr.Canli's records) updated and accurate. Article 5 of the Law shows the rule for data processing; the personal data cannot be processed without an explicit consent of the data subject (Mr.Canli). Because the Plaintiff was under the investigation procedure and this procedure regulated with another law which makes the data controller not to require the consent of the data controller, he would not get much advantage of this article. However, it is the Plaintiff's right to know what records are kept about him especially at the law enforcement agencies archives. The Plaintiff did not even know that his records are kept and it is kept inaccurately. Article 6 of the Law prevents persons from processing their sensitive data without their consent, which is in this case, his political opinions and philosophical beliefs and more importantly, his criminal records. The news released about him was showing him as criminal as well as it was possible to guess his political opinions from the organizations' names that he was member of. The policemen caused actually more damage to his private life than the ECHR interpreted.

As the Section 5 of the Law orders, both the policemen and the police department would be punished. Because the Plaintiff was not informed that his records are being kept, the police department would be punished from 5.000 to 100.000Turkish Lira (TL) (approx. 1.000Euro to 25.000Euro). Because the data was acquired and released by the newspaper, there could be another punishment for the department. This data is not a public data and it should have kept secure by the department, so there could be fine from 15.000TL to 1.000.000TL (approx. 4.000Euro to 250.000Euro). The most importantly, apart from the fine, there would be disciplinary proceedings against the policeman who shared these information with the Prosecutors. If this Law was enacted, there would be significant timeframe to keep such information. If the policeman kept these data more than it is necessary, there could be other punishments according to Turkish Criminal Code. Finally, if this Law and the Board was active prior to the case, may be the Plaintiff could apply to the Board. The Board probably would decide in favor of the Plaintiff, so there would not be any harm for the both Parties. So, if the Law was enacted before;

- There would not be need for going until the ECtHR and loose time,
- There would be more compensation gained by the Plaintiff,
- There would not even be need for such complicated procedures, because the Plaintiff could access to the Board and the Board would decide in favor of the Plaintiff.

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# ADAPTATION OF RIGHTS IN REM ACCORDING TO THE EU REGULATION ON MATRIMONIAL PROPERTY REGIMES

**ZAVADILOVÁ, LUCIE***

*Abstract*: In June 2016 the Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes has been adopted. According to its Preamble, the Regulation should not affect the limited number of rights in rem (the numerus clausus principle) known in the national law of the particular Member State. Nevertheless, the spouses should be allowed to enjoy in another Member State the rights which have been created or transferred to them as a result of the matrimonial property regime. Therefore, Article 29 of the Regulation provides for the adaptation of an unknown property right to the closest equivalent right under the law of that other Member State. The aim of this contribution is to describe the concept of adaptation and analyse how adaptation of rights in rem can be used in the context of matrimonial property regimes.

*Keywords*: Adaptation, Adaptation of Rights in Rem, Matrimonial Property Regimes, Matrimonial Property Regulation, Succession Regulation.

## 1. Introduction

The increasing mobility of persons in contemporary globalized world inevitably leads to a significant increase in the number of marriages with cross-border element.[1] This covers not only mixed and migrant marriages, but also situations when the spouses acquire property abroad.[2] On June 24, 2016, almost ten years after the presentation of the Green Paper by the European Commission, the Council of the European Union passed a Regulation implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes[3] ("Matrimonial Property Regulation"). Its aim is *"to provide married couples with legal certainty as to their property and offer them a degree of*

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[1] *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes,* Brussels: European Commission, COM(2016) 106 final, 4.

[2] DIAGO DIAGO, MARIA DEL PILAR: The Matrimonial Property Regime in Private International Law, in ŠARKEVIĆ, PETAR – PAUL, VOLKEN (eds.): *Yearbook of Private International Law*. Volume II – 2000, 2000, Kluwer Law International, Hague, 180.

[3] Council Regulation (EU) 2016/1103 (24th June 2016) implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

*predictability"*.[4] To achieve this goal, the adopted regulation covers all rules concerning the matrimonial property regimes in a single instrument.[5]

Lately, discussion about the adoption of so called Rome 0 Regulation has also been launched.[6] Questions concerning the general part of private international law are traditionally of great importance in this legal area. Nevertheless, the European legislator has chosen a way of a step-by-step codification of the several special areas concerning the conflict-of-law rules in which institutes of the general part are regulated.[7] The Matrimonial Property Regulation deals with several of them as well. Those are – adaptation of rights *in rem* (Article 29), overriding mandatory rules (Article 30), public policy clause (Article 31), and renvoi (Article 32). The Matrimonial Property Regulation is not applicable yet,[8] but this contribution seeks to address at least one of the possible challenges which might occur in practice.

In this paper, the author would like to focus on a very specific issue – the instrument of adaptation. The aim of this contribution is to describe the concept of adaptation and analyse how adaptation of rights *in rem* can be used according to the Matrimonial Property Regulation. To fulfil this goal the author will also deal with the Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[9] ("Succession Regulation"), which also contains provision on adaptation and constitutes a source of inspiration, in more details.

[4] Recital 15 of the Preamble to the Matrimonial Property Regulation.

[5] *Ibid.*

[6] More to this initiative see LEIBLE, STEFAN – MICHAEL, MÜLLER: The Idea of a "Rome 0 Regulation", in ŠARKEVIĆ, PETAR – PAUL, VOLKEN (eds.): *Yearbook of Private International Law*. Volume XIV – 2012/2013, 2013, Sellier, European Law Publishers, Munich, 137-152; WAGNER, ROLF: Do We Need Rome 0 Regulation?, in *Netherlands International Law Review*, Vol. 61, Issue 2. (2014), 225-242.

[7] KÖHLER, ANDREAS: General Private International Law Institutes in the EU Succession Regulation – Some Remarks, in *Anali Pravnog Fakulteta Univerziteta u Zenici*, Issue 18. (2016), 169-171.

[8] The Matrimonial Property Regulation will be used for the determination of the applicable law to spouses who marry or choose the law applicable to their property regime after 29 January 2019. See Articles 69(3), 70(2) of the Matrimonial Property Regulation.

[9] Regulation (EU) No 650/2012 of the European Parliament and of the Council (4th July 2012) on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. The regulation is applicable to the succession of persons who die on 17 August 2015 or later. See Article 83 of the Succession Regulation.

## 2. Adaptation

### *2.1. General outline*

Adaptation (also adjustment) – as a conflict-of-law instrument[10] – is recognized in most continental legal systems but is hardly known in the common law countries.[11] *"The problem of adaptation has its source in the analytical approach of private international law, according to which an appropriate law has to be determined for every raised legal question."*[12] In practice, it is not unusual that the cross-border situation has to be decided in compliance with two or more legal systems (so called *dépeçage*), which are applied simultaneously or subsequently.[13] Since the relevant legal systems are not synchronized with each other, their combined application may lead to inconsistency.[14] It may even produce result which none of the involved legal systems would presume, if they decide the whole case on their own.[15]

*Dannemann* calls this situation "accidental discrimination".[16] It means that a case which is linked to several legal systems is treated differently than a comparable case which is connected only with one of those systems; provided the different treatment is not justified.[17] *Dannemann* even considers "adjustment of applicable rules" to be one of three methods available for determining the rules which influence the outcome of the case having cross-border implication. *"Adjustment occurs when courts modify or ignore applicable rules in order to avoid accidental discrimination."*[18]

Besides, adaptation may be used in situations when a right *in rem* is invoked in the state which is not familiar with the property right in question. This may especially occur

[10] It is interesting to mention that *Dannemann* comes up with innovative idea that the adaptation is a method. More to this concept see below.

[11] DANNEMANN, GERHARD: Accidental Discrimination in the Conflict of Laws: Applying, Considering, and Adjusting Rules from Different Jurisdictions, in ŠARKEVIĆ, PETAR – PAUL, VOLKEN (eds.): *Yearbook of Private International Law*, Volume X – 2008, 2009, Sellier, European Law Publishers, Munich, 124.

[12] KÖHLER: *op. cit.* 179.

[13] ROZEHNALOVÁ, NADĚŽDA: Adaptace a jiné obdobné procesy [Adaptation and similar processes], in ROZEHNALOVÁ, NADĚŽDA: *Instituty českého mezinárodního práva soukromého* [Institutes of the Czech Private International Law], 2016, Wolters Kluwer, Praha, 152.

[14] *Bodgan* uses *"the metaphor of the construction of a car using spare parts that are faultless as such but need to be adjusted to each other because they are of different models"*. See BOGDAN, MICHAEL: Private International Law as Component of the Law of the Forum. General Course on Private International Law, in *Recueil des Cours, Collected Courses of the Hague Academy of International Law – 2010*, Vol. 348, 2011, Martinus Nijhoff Publishers, Leiden/Boston, 232, footnote 641.

[15] KÖHLER: *op. cit.* 179.

[16] DANNEMANN: *op. cit.* 114.

[17] *Ibid.*120, 128.

[18] *Dannemann* differentiates between three methods – application of substantive rules selected by conflict-of-law rules, the consideration of non-applicable rules, and adjustment of the applicable rules. This is, however, outside the scope of this paper. For more details see DANNEMANN: *op. cit.* 113-114.

in the course of succession proceedings or matrimonial property regime proceeding.[19] In all these cases,[20] the inconsistent result may be adjusted by the relevant conflict-of-law instrument – adaptation.[21]

In practice, adaptation can be carried out in two different ways. Since adaptation on the level of private international law and adaptation on the level of substantive law are traditionally being distinguished.[22] According to the first approach *"the inconsistency could be eliminated by a teleological modification of conflict-of-law rules insofar as they mandate only one law to govern the whole respective legal relationship as a result. This could be achieved by revising the scope of the concerning rules or by developing a completely new conflict-of-law rule. In both cases, the dépeçage as a source of inconsistency would be directly eliminated."*[23] The second approach which deals with inconsistent results "*is exclusively located on the level of substantive law without affecting the codified conflict-of-law rules. In this case, the applicable substantive law has to be modified or completely ignored and replaced by new substantive rules, which have to be developed modo legislatoris."*[24]

Similarly, *Dannemann* distinguishes so called conflicts solution (i. e. choosing a different law) and a substantive law solution, which means modification, ignoring or creation of a new substantive rule.[25] According to some authors, the substantive law solution should take precedence over the conflicts solution,[26] because it allows more differentiated modifications and constitutes smaller intervention in the legal structure.[27]

Adaptation should be admitted as *ultima ratio* to prevent accidental discrimination, especially to prevent infringement of the principle of equal treatment, right to liberty and property. In each case, adaptation should be understood restrictively, as an instrument by which the courts and other authorities intentionally ignore or modify applicable rules. This means that exceptional reason must be found in order to justify such an act. It is therefore necessary to distinguish adaptation from legal application and interpretation. In practice, adaptation constitutes a device *"by which courts 'correct' the legislator"*.[28] It is up to the discretion of the judges to reach a reasonable solution in each specific case.[29]

[19] ROZEHNALOVÁ: *op. cit.* 152.
[20] For more examples see BOGDAN: *op. cit.* 232-234.
[21] KÖHLER: *op. cit.* 179.
[22] For example KÖHLER: *op. cit.* 184; KUČERA, ZDENĚK – MONIKA, PAUKNEROVÁ: Adaptace (přizpůsobení) [Adaptation (adjustment)], in KUČERA, ZDENĚK; PAUKNEROVÁ, MONIKA; RŮŽIČKA, KVĚTOSLAV ET AL.: *Mezinárodní právo soukromé* [Private International Law], 2015, Aleš Čeněk, Plzeň, 180.
[23] KÖHLER: *op. cit.* 180.
[24] *Ibid.* 180.
[25] DANNEMANN: *op. cit.* 132.
[26] For example KUČERA – PAUKNEROVÁ: *op. cit.* 180; KÖHLER: *op. cit.* 185.
[27] KÖHLER: *op. cit.* 185.
[28] DANNEMANN: *op. cit.* 124.
[29] ROZEHNALOVÁ: *op. cit.* 154.

We can summarize that adaptation is a flexible instrument which can be used in various situations[30] and may manifest itself in numerous forms. Nevertheless, in this paper author would like to focus on adaptation of rights *in rem* which is especially relevant in matrimonial property regime proceedings. Since the rights *in rem* does not necessarily have be governed by the *lex rei sitae*. On the contrary, the law applicable to matrimonial property regimes often applies. The same holds true for the area of succession law, which will also be analysed in more details.[31]

### *2.2. Succession Regulation*

The concept of adaptation of rights *in rem* has for the first time been explicitly introduced in the EU law by the Succession Regulation. It is interesting to note that the Commission's proposal did not contain any adaptation rule.[32] Nevertheless, in its comments on this proposal the Max Planck Institute for Comparative and International Private Law suggested that the instrument of adaptation of rights *in rem* should also be addressed by the regulation.[33]

The Succession Regulation now provides three different adaptation rules (Articles 31 – 33). It should, however, be noted that also other forms of adaptation cases can arise in the context of succession which are not covered by these provisions. For example, if the spouse's right of succession – governed by foreign succession law – has to be combined with a claim concerning the distribution of matrimonial property governed by the matrimonial property law.[34] The reference to adaptation in these situations is not precluded by Article 31 of the Succession Regulation.[35] This implies that other forms of adaptation are also permissible.

Nevertheless, as has already been mentioned, author would only like to focus on the adaptation of rights *in rem* according to Article 31 of the Succession Regulation.[36]

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[30] JÚDOVÁ, ELENA: Nová úprava adaptácie v Zákone č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom [New Regulation of Adaptation in Act No. 97/1963 Coll., on Private International Law and Rules of International Procedure], in ROZEHNALOVÁ, NADĚŽDA – DRLIČKOVÁ, KLÁRA – VALDHANS, JIŘÍ (eds.): *Days of Law 2015*, 2016, Masarykova Univerzita, Brno, 110-111.

[31] JÚDOVÁ: *op. cit.* 113.

[32] *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession*. Brussels: European Commission, COM(2009) 154 final.

[33] For more details see *Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession.* Max Planck Institute for Comparative and International Private Law, March 2010, 90-91, 94-95.

[34] KÖHLER: *op. cit.* 170, 184. For specific example with possible solution see BOGDAN: *op. cit.* 232-233.

[35] Recital 17 of the Preamble to the Succession Regulation. See WELLER, MATTHIAS: Article 1: Scope, in CALVO CARAVAGA, ALFONSO L. – DAVÍ, ANGELO – MANSEL, HEINZ-PETER (eds.): *The EU Succession Regulation: A Commentary*, 2016, Cambridge University Press, Cambridge, 108.

[36] *„Where a* ***person invokes a right in rem*** *to which he is* ***entitled under the law applicable to the succession*** *and the law of the Member State in which the right is invoked* ***does not know the***

This is connected with the fact that the details of the property rights recognized among the EU Member States vary. Situation is especially problematic if the right *in rem* that should be recognized is not known in the state in which the right is invoked.[37] For example, the Dutch right of usufruct differs from the French right of *l'usufruit*. According to Dutch law the holder of the right of usufruct is allowed to consume the assets under usufruct without a duty to replace. In comparison, under French law the holder of *l'usufruit* is obliged to restore the assets with similar quantity and quality at the end of the duration of the relationship.[38]

It should be emphasised that the Succession Regulation differentiates between the transfer of rights and obligations by succession (which is governed by the succession law), and the nature of rights *in rem*. The nature of property rights is based on the principle of *numerus clausus* and is excluded from the material scope of the Succession Regulation. The same holds true for any recording in a register of rights in immovable or movable property.[39] In fact, the borderline is delimited between the law of succession and the law of property.[40] It follows that the *lex successionis* determines the rights (including the rights *in rem*) granted to each heir or legatee, but it is for the *lex situs* of the assets (i. e. property status) to determine the rights *in rem* for them.[41] If the boundary is not clear, the Court of Justice of the European Union will need to decide.[42]

In many cases, there are no difficulties when the succession law coincides with the law of the Member State where the rights *in rem* are relied upon. However, problem may arise if there is distinction between the succession law and the law of the state where the right is exercised. For example, estate includes assets in other Member State than the state in which the deceased had his habitual residence.[43]

To handle these kind of situations, Article 31 of the Succession Regulation provides for the adaptation rule on the level of substantive law. The provision covers situations when the *lex successionis* itself generates a right *in rem* concerning the

***right in rem*** *in question, that* **right shall**, *if necessary and to the extent possible,* **be adapted to the closest equivalent right in rem** *under the law of that State,* **taking into account the aims and the interests** *pursued by the specific right in rem and the* **effects** *attached to it."* (emphasis added).

[37] BOST, JENNIFER: Nothing Certain About Death and Taxes (and Inheritance): European Union Regulation of Cross-Border Successions, in *Emory International Law Review*, Vol. 27, Issue 2. (2013), 1164-1165.

[38] *Ibid.* 1164-1165. For more examples see LAGARDE, PAUL: Article 31: Adaptation of rights in rem, in BERGQUIST, ULF – DAMASCELLI, DOMENICO – FRIMSTON, RICHARD et al. (eds.): *EU Regulation on Succession and Wills: Commentary*, 2015, Sellier. European Law Publishers, Köln, 167.

[39] Recitals 15, 18, 19 of the Preamble; Article 1(2)(k, l); Article 23(2)(e) of the Succession Regulation. See LAUKEMANN, BJÖRN: The European Certificate of Succession: Portrait of a New Instrument in European Private International Law, in HESS, BURKHARD – BERGSTRÖM, MARIA – STORSKRUBB, EVA (eds.): *EU Civil Justice: Current Issues and Future Outlook*, 2016, Bloomsbury Publishing, Oxford, 161-182.

[40] SOLOMON, DENNIS: The Boundaries of the Law Applicable to Succession, in *Anali Pravnog Fakulteta Univerziteta u Zenici*, Issue 18. (2016), 217.

[41] LAGARDE: *op. cit.* 166.

[42] FRIMSTON: *op. cit.* 49.

[43] WAUTELET, PATRICK: *Art. 31 Succession Regulation (650/2012) – a first look at a mysterious provision* (2013).

inheritance, which is unknown to the *lex rei sitae*[44] – especially domestic register law or insolvency law.[45] If this is the case, a judge is allowed to adapt a foreign right *in rem* to the closest equivalent property right of that other Member State. Provided this is necessary for the preservation of the limited number of rights *in rem* (the *numerus clausus* principle) in the national law of the particular state.[46] Since Article 31 of the Succession Regulation does not distinguish between movable and immovable assets, the adaptation of rights *in rem* to the *lex situs* must be made for both movable and immovable property,[47] including intellectual property.[48]

Nevertheless, it should be emphasised that the Member State is also allowed to refuse (i. e. not recognize) the foreign property right. Since the Succession Regulation makes the adaptation of the right *in rem* only necessary in limited circumstances.[49] The judge is supposed to take into account *"the aims and interests pursued by the specific right in rem and the effects attached to it"*.[50] In this context, *Bost* objects that the ability of refusal might not lead to the simplification and predictability, i. e. the goals pursued by the Succession Regulation.[51]

It is also necessary to mention that the judge is entitled to refuse to apply certain provision of a foreign law *"if such application is manifestly incompatible with the public policy (ordre public) of the forum"*.[52] However, *Laukemann* states that the *numerus clausus* principle should not be understood as a reason extending the public policy exception.[53] In other words, the public policy exception is the instrument distinct from adaptation, because they serve different purposes.[54] Moreover, the public policy exception has much higher threshold.[55] Those instruments are therefore not interchangeable.

According to *Rozehnalová*, adaptation may generally occur either during the course of proceeding itself or at the stage of recognition and enforcement of foreign judgment. Article 31 of the Succession Regulation provides for the adaptation of rights *in rem* in the course of succession proceeding. Moreover, this provision seems to be applicable only upon the initiative of an entitled person (the beneficiary). It means that Article 31 of the Succession Regulation is not applicable *ex offo*.[56]

[44] KÖHLER: *op. cit.* 180.
[45] LAUKEMANN: *op. cit.* 161-182.
[46] Recitals 15, 16 of the Preamble; Article 31 of the Succession Regulation. See KÖHLER: *op. cit.* 180.
[47] LAGARDE: *op. cit.* 167.
[48] WELLER: *op. cit.* 107.
[49] BOST: *op. cit.* 1165.
[50] Recitals 15, 16 of the Preamble; Article 31 of the Succession Regulation.
[51] BOST: *op. cit.* 1165.
[52] Recital 58 of the Preamble; Article 35 of the Succession Regulation.
[53] LAUKEMANN: *op. cit.* 161-182.
[54] ROZEHNALOVÁ: *op. cit.* 160, 162.
[55] WAUTELET: *op. cit.*
[56] Recitals 15, 16 of the Preamble; Article 31 of the Succession Regulation. See ROZEHNALOVÁ: *op. cit.* 152, 163.

*Solomon* remarks that the method of adaptation *"is subject to a very sophisticated, highly technical debate that threatens to transcend the needs of practical jurisprudence"*.[57] In this context, Article 31 of the Succession Regulation *"strikes a balance by giving useful (albeit: quite general) guidelines for a practical approach to the problem without getting lost in theoretical battles"*.[58] We found his conclusion convincing.

### *2.3. Matrimonial Property Regulation*

The original proposal for a regulation on matrimonial property regimes presented by European Commission in 2011 did not contain any adaptation rule.[59] Nevertheless, inspired by the Article 31 of the Succession Regulation, the instrument of adaptation has been incorporated in the revised proposal for a regulation on matrimonial property regimes presented in 2016, i. e. the proposal which has afterwards been adopted by way of enhanced cooperation.[60] *Weller* states that adaptation has become *"a normatively recognized tool of European choice-of-law methodology"*.[61]

The Matrimonial Property Regulation regulates the concept of adaptation of rights *in rem* in its Article 29.[62] This provision is inserted in the chapter III – Applicable law. Therefore, the adaptation of rights *in rem* can be performed in the course of matrimonial property regime proceeding.[63] It is the adaptation on the level of substantive law, so the applicable substantive rules can be modified.[64]

Before we analyze the instrument of adaptation of property rights in more details, several remarks should be made. Since the Matrimonial Property Regulation is based on the principle of unity, the law applicable to a matrimonial property regime shall apply to all assets (movable and immovable), regardless of where the assets are located.[65] It

[57] SOLOMON: *op. cit.* 217.
[58] *Ibid.* 217.
[59] *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.* Brussels: European Commission, COM(2011) 126 final.
[60] *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.* Brussels: European Commission, COM(2016) 106 final. Unfortunately, the explanatory memorandum does not provide further details about this provision.
[61] WELLER: *op. cit.* 108.
[62] *„Where a* ***person invokes a right in rem*** *to which he is* ***entitled under the law applicable to the matrimonial property regime*** *and the law of the Member State in which the right is invoked* ***does not know the right in rem*** *in question, that* ***right shall****, if necessary and to the extent possible,* ***be adapted to the closest equivalent right*** *under the law of that State,* ***taking into account the aims and the interests*** *pursued by the specific right in rem and the* ***effects*** *attached to it."* (emphasis added).
[63] Since there is barely any literature dealing with Article 29 of the Matrimonial Property Regulation, author will use sources concerning Article 31 of the Succession Regulation similarly. Those provisions are almost identical.
[64] Similarly KÖHLER: *op. cit.* 180.
[65] Recital 43 of the Preamble; Article 21 of the Matrimonial Property Regulation. More to the unity principle see *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and*

should also be noted that matters such as the nature of rights *in rem* and the requirements for the recording in a register of a right in property are explicitly excluded from the substantive scope of this regulation. Nevertheless, the creation or the transfer resulting from the matrimonial property regime of a property right as provided for in the law applicable to the matrimonial property regime should be permitted. Provided the *numerus clausus* of property rights known in the national law of particular Member States is not affected. It means that a Member State should not be required to recognise a right *in rem* relating to property located in its territory, if the property right in question is unknown to its legal system.[66] On the other hand, the spouses should be allowed to enjoy in another Member State the rights which have been created or transferred to them as a result of the matrimonial property regime. For these reasons, the Matrimonial Property Regulation contains a provision which admits the adaptation of rights *in rem*.[67]

Article 29 of the Matrimonial Property Regulation is applicable upon the fulfilment of three conditions. Firstly, initiative of an entitled person invoking a right *in rem*, is necessary.[68] Secondly, the right invoked must be a right *in rem* according to the relevant matrimonial property law. Last but not least, the right *in rem* in question cannot exist in the Member State where it is invoked,[69] which means that there are significant differences between the property rights.[70] If these conditions are met, a judge shall find the closest equivalent right *in rem* to the foreign property right invoked. Under a literal interpretation, the judge should choose among the property rights known to his legal system, i. e. from a limited list of rights *in rem* (*numerus clausus*). In case there is not an equivalent right, a literal interpretation would deprive a claimant of his protection. Because of this, the Matrimonial Property Regulation provides useful guidelines in order to ensure the claimant an adequate protection of the right invoked, since it also admits other forms of adaptation. It means that the court acquires a wide discretion to identify the closest equivalent right *in rem*.[71]

The judge is entitled to adapt an unknown property right to both movable and immovable assets – provided this is necessary and to the extent possible – to the closest (functionally) equivalent right under the law of that other Member State. Nevertheless, the Member State is also allowed to refuse foreign property right. In each case, the aims and the interests pursued by the particular right *in rem* and the effects attached to it should be taken into account.[72]

*enforcement of decisions in matters of matrimonial property regimes*. Brussels: European Commission, COM(2016) 106 final, 9.

[66] Recitals 19, 24, 27, 28 of the Preamble; Article 1(2)(g, h) of the Matrimonial Property Regulation.

[67] Recital 25 of the Preamble to the Matrimonial Property Regulation.

[68] Similarly ROZEHNALOVÁ: *op. cit.* 163.

[69] Similarly CALZOLAIO, ERMANNO – LAURA, VAGNI: Article 31: Adaptation of Rights in rem, in CALVO CARAVAGA, ALFONSO L. – DAVÍ, ANGELO – MANSEL, HEINZ-PETER (eds.): *The EU Succession Regulation: A Commentary*, 2016, Cambridge University Press, Cambridge, 445.

[70] Similarly WAUTELET: *op. cit.*

[71] Recital 26 of the Preamble to the Matrimonial Property Regulation. See CALZOLAIO – VAGNI: *op. cit.* 448.

[72] Recital 26 of the Preamble; Article 29 of the Matrimonial Property Regulation.

In summary, the instrument of adaptation provides an answer to a variety of problems. On the other hand, Article 29 of the Matrimonial Property Regulation is not a device permitting general and complete application of *lex rei sitae* to all rights *in rem*. Instead, it offers a limited possibility to deviate – in limited number of circumstances – from ordinary application of the law applicable to matrimonial property regime. The adaptation constitutes an exception from otherwise applicable matrimonial property law.[73] However, it does not provide for straightforward answers. Instead, it is the task of judges to find appropriate solution upon the precise facts of the case. We can conclude, that Article 29 of the Matrimonial Property Regulation ensures a high degree of flexibility, but it leads to a divergence among the Member States at the same time.[74]

## 3. Conclusion

In private international law it is often a case that court is obliged to apply foreign law on particular cross-border situation. The aim of this contribution was to describe and analyse the concept of adaptation of rights *in rem* according to the Matrimonial Property Regulation. However, attention has also been paid to the Succession Regulation.

We can conclude that adaptation is a conflict-of-law instrument which allows a judge to adjust inconsistent results caused by simultaneous or subsequent application of several legal systems on the cross-border case. Adaptation is a flexible instrument and can be used for *ad hoc* solution in a variety of situations. Moreover, technically well-performed adaptation may contribute to the better understanding and treatment of foreign law. Since it will not be necessary to refuse to apply a provision of the foreign law with regard to the public policy exception or to deny the recognition of a foreign judgment due to its conflict with *ordre public*.

Adaptation of rights *in rem* which is especially relevant in succession proceedings and matrimonial property regime proceedings is newly regulated in the EU law. Since the general choice-of-law rule for determining the law applicable to a matrimonial property regime (or succession) covers all kinds of assets (i. e. movable and immovable), adaptation will in practice be of great importance.

The division between the *lex rei sitae* and the law applicable to a matrimonial property regime is not always easy. Because of the principle of *numerus clausus* of rights *in rem*, the Member States are not obliged to recognize foreign property right to assets located in their territory. Instead, they are (only) required to provide for the adaptation of an unknown right *in rem* to the nearest equivalent property right under the law of that Member State in order to allow the spouses to enjoy the rights *in rem* created or transferred to them under the law applicable to their matrimonial property, irrespective of where the property is located and whether the jurisdiction there knows such a right or not.[75] The same holds true with regard to the succession.

Even it is quite difficult to deal with these general institutes of private international law, author considers Article 29 of the Matrimonial Property Regulation (as well as

[73] Similarly WAUTELET: *op. cit.*
[74] CALZOLAIO – VAGNI: *op. cit.* 451.
[75] Similarly WELLER: *op. cit.* 106-107.

Article 31 of the Succession Regulation) as useful guideline for a practical approach. In author's opinion, express regulation can draw judges' attention to this instrument and help them reach a reasonable and fair solution in each particular case.

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