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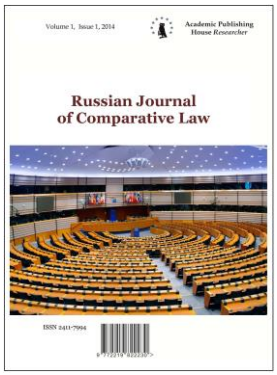

Articles and Statements

UDC 341.1

On the Eurasian Economic Union

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Abstract

The article deals with the questions of creating the Eurasian Economic Union (hereinafter – the EEU, the Union). The author overviews the history of formation of the EEU and studies legal foundations of Eurasian cooperation. The competence of the Union as an international organization is examined in detail. The author reveals the differences between the concepts of coordinated policy, coherent policy, and common policy of the Union. The main attention is devoted to the analysis of the institutions and legal system of the EEU.

Keywords: the Eurasian Economic Community, the Eurasian Economic Union, the Supreme Eurasian Economic Council, the Eurasian Intergovernmental Council, the Eurasian Economic Commission, the Court of the EEU.

1. Introduction

Russia developed deeper relationships with separate states of the former Soviet Union. On 29 March 1996 Russia, Belarus, Kazakhstan, and Kyrgyzstan signed the Treaty on Deepening integration in economic and humanitarian fields [1]. On 26 February 1999 the Agreement on the Customs Union and the Common Economic Area was signed [2]. The individual republics having come from the former Soviet Union became partners outside the CIS, practicing the so-called "enhanced cooperation". On 10 October 2000 Belarus, Kazakhstan, Kyrgyzstan, Russia, and Tajikistan signed the Agreement on the Establishment of the Eurasian Economic Community [3]. A new international organization – the Eurasian Economic Community was set up. In 2006 the Treaty of 2000 had been amended. In October 2007 the leaders of Belarus, Kazakhstan, and Russia signed the Treaty establishing a single customs territory and formation of the Customs Union (hereinafter – the CU) [4]. The relevant international treaties and bodies were created by the CU. Since 1 July 2010 on the territory of Russia and Kazakhstan the Customs Code of the CU 2009 became applicable [5] and since 6 July 2010 this Code operates throughout the whole territory of the CU.

Since 1 January 2012 17 new international treaties came into force which meant the further operationalizing of the Common Economic Area (hereinafter – the CEA). Since February 2012 the

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Eurasian Economic Commission (hereinafter – the EECn) started its work. On 18 November 2011 Belarus, Kazakhstan, and Russia signed a Declaration on Eurasian economic integration [6]. According to this document by year 2015 the creation of a new organization – the Eurasian Economic Union – was planned.

2. Materials and methods

The main sources of this study are the official documents of the EEU as well as the academic articles, and archive materials. The study uses the basic research methods: problem-chronological, historical and situational, systemic methods, and the method of comparative legal studies. The author's arguments are based on problem-chronological approach. The use of historical and situational method allows to reproduce the assessment approach to the problem of legal regulation of the EEU. Method of comparative law defines the difference in views on actual rules of activity of EEU's bodies. Multidisciplinary systematic approach allows using the techniques and knowledge from a variety of disciplines, i.e., international law, civil law, administrative law etc., in order to deal with the present research agenda.

3. Discussion

I. The Eurasian Economic Union: general observations

On 29 May 2014 the Presidents of Belarus, Kazakhstan, and Russia signed the Treaty on the Eurasian Economic Union [7] (hereinafter – the 2014 Treaty, the Treaty). This Treaty 2014 represents a legal basis for the establishment of the Eurasian Economic Union. As an international organization, the Union has the right to cooperate with other states and international integration organizations. It has the right, to conclude treaties on matters within its competence [11]. The procedures for international cooperation of the Union are established by the decision of the Supreme Eurasian Economic Council (hereinafter – the SEEC, the Supreme Council).

The process of concluding treaties with a third party is determined by an international agreement within the Union. The negotiations regarding such draft treaties are implemented on the basis of the SEEC decision after the completion of the relevant domestic procedures within the member states. The expression of consent of the Union to be bound by an international treaty with a third party, as well as the issues of termination, suspension, or withdrawal from such a treaty is also practiced on the basis of the decision by the SEEC after the completion of domestic procedures.

The membership in the Union is open to any state that shares its aims and principles and on the terms agreed between the member states. In order to stand as a candidate for the membership in the Union, the state should send an application to the Chairman of the SEEC. The decision on granting a status of a candidate for membership in the Union to the state is adopted by the Supreme Council. A Working Group consisting of representatives of the candidate state and the member is set up in order to examine if the candidate's national system is compatible with the principles and obligations arising from the law of the Union. The draft program of action for the entry in the Union, and a draft international treaty on accession is also elaborated by the Working Group. An Action Program should be approved by the Supreme Council. The Working Group regularly reports before the High Council on the program of action. The Supreme Council makes decision on signing a treaty on joining of the candidate state to the Union which is subject to ratification (Art. 108 of the Treaty).

On 1 January 2015 the treaty establishing of the Eurasian Economic Union came into force. The next day Armenia joined the EEU [8]. On 29 May 2015, in accordance with the Treaty of Accession to the EEU, Kyrgyzstan become the fifth member of the EEU [9]. Any state may request from the Chairman of the Supreme Council granting the status of an observer state within the Union.

II. Bodies of the Union

The following bodies represent the institutional basis of the Union:

1) the Supreme Eurasian Economic Council (Supreme Council, SEEC);
2) the Eurasian Intergovernmental Council (EIC);
3) the Eurasian Economic Commission (EEC); and
4) the Court of the Eurasian Economic Union (Court).

The Supreme Council composed of the heads of the member states is the supreme decision-making body of the Union. The meetings of the SEEC are held annually. The Council has the right to cancel or modify the decisions taken by the Intergovernmental Council or the Commission. The SEECl makes decisions and orders by the consensus. The Supreme Council shall:

a) determine the strategy, direction, and prospects for the formation and development of the Union and make decisions aimed at achieving the goals of the Union;

b) approve the composition of the College Board and assign responsibilities among the members of the College of the Commission;

c) appoint the of judges of the Union Court based on the submissions by member states;

d) approve the budget of the Union, adopt the Regulation on the budget of the Union, and the report on the budget of the Union;

e) determine the order of admission of new members to the Union and the termination of membership in the Union;

f) decide on granting or revocation of an observer status or a candidate status for accession to the Union;

g) make decisions in the negotiations with a third party on behalf of the Union, including the conclusion of international treaties with the Union, and conferring the right to negotiate, as well as expressing the consent of the Union to be bound by an international treaty with a third party, or termination, suspension, or output of an international treaty.

The Commission is a permanent governing body of the Union. It consists of the Council and the Board. The Commission issues decisions, orders, and recommendations. Decisions, directives, and recommendations of the Board of the Commission should be made by consensus. Decisions, directives, and recommendations of the College of the Commission should be made by a qualified majority or by consensus.

The Eurasian Intergovernmental Council consists of the Heads of Government of the member states. It convenes its meeting at least twice per year. The Intergovernmental Council shall:

a) ensure the implementation and enforcement of the 2014 Treaty and international treaties within the Union, as well as the decisions of the Supreme Council;

b) examine the proposals of the Board on the issues where the Council or the Commission have no consensus;

c) consider the proposals by a member state relating to cancellation or changing the decisions by the Commission, or, if no agreement is reached, introduce such proposals to the Supreme Council;

d) exercise other powers stipulated by the 2014 Treaty and international agreements within the Union. Intergovernmental Council may suspend, cancel, or modify the decisions of the Commission. Intergovernmental Council takes decisions and orders by the consensus.

The Court is a permanent judicial body of the Union. Composition, powers, procedure, functioning, and the formation of the Union Court are determined by the Court Statute (see Annex 2 to the 2014 Treaty).

The Court resolves disputes arising in connection with the implementation of the 2014 Treaty, international treaties within the Union and/or decisions of the bodies of the Union:

1) upon a request of a member state:

on compliance with an international treaty within the Union or its certain provisions with the Treaty;

on observance of the Treaty, international treaties within the Union and/or decisions of the bodies of the Union, as well as certain provisions of these international treaties and/or decisions by another member state;

on compliance with a decision of the Commission or its certain provisions with the Treaty, international treaties within the Union and/or decisions of the bodies of the Union;

on challenging actions (omissions) of the Commission;

2) upon a request of an economic entity:

on compliance with a decision of the Commission or its certain provisions directly affecting the rights and legitimate interests of the economic entity in the sphere of business and other economic activities with the Treaty and/or international treaties within the Union if such a decision

or its certain provisions is in violation of any rights and legitimate interests of the economic entity envisaged by the Treaty and/or international treaties within the Union;

on challenging actions (omissions) of the Commission directly affecting the rights and legitimate interests of the economic entity in the sphere of business and other economic activities, if such actions (omissions) are in violation of any rights and legitimate interests of the economic entity envisaged by the Treaty and/or international treaties within the Union.

For the purpose of this Statute, an economic entity shall refer to a legal person registered under the legislation of a Member State or a third state or a natural person registered as an individual entrepreneur in accordance with the legislation of a Member State or a third state. The Member States may direct to the Court any other disputes, the resolution of which by the Court is expressly provided for by the Treaty, international treaties within the Union, international treaties of the Union with a third party or other international treaties between the Member States.

III. The competence of the EEU

The Union ensures the freedom of movement of goods, services, capital and labor, a coordinated, coherent and common policy in the fields of economy, certain contracts and contracts within the Union [12].

The Member States carry out coordinated or agreed policy within the scope and limits determined under this Treaty and international treaties within the Union. In other spheres of the economy, the Member States seek to implement coordinated or agreed policy in accordance with the basic principles and objectives of the Union.

"Common policy" is implemented by the Member States in certain spheres as specified in the Treaty and envisaging the application of unified legal regulations by the Member States, including on the basis of decisions issued by Bodies of the Union within their powers.

"Coordinated policy" implies the cooperation between the Member States on the basis of common approaches approved within Bodies of the Union and required to achieve the objectives of the Union.

"Agreed policy" is implemented by the Member States in various areas suggesting the harmonisation of legal regulations, including on the basis of decisions of the Bodies of the Union, to the extent required to achieve the objectives of the Union.

The creation of the Union means that:

a) a single internal market for goods and services is operates;

b) the Customs Union of Belarus, Kazakhstan, and Russia operates;

c) the Common Customs Tariff (hereinafter, the CCT) and other common measures regulating trade in goods with third parties are applied. The CCT is a set of the rates of customs duties applicable to goods imported (exported) into the customs territory of the Union from third countries and classified, in accordance with the Single Commodity inventory of foreign economic activities of the Eurasian Economic Union;

g) a unified customs regulations are carried out;

d) free movement of goods between the territories of the member states without customs declaration and state control (transport, sanitary, veterinary and sanitary, phytosanitary quarantine) is ensured.

Paid import duties (a compulsory payment that is levied by the customs authorities of member states in connection with the importing goods into the customs territory of the Union) and other charges should be equivalent enrollments and distributed between the budgets of member states, in accordance with the Annex 5 to the 2014 Treaty. The conditions for the creation and functioning of free (special) economic zones and free warehouses are determined by international treaties within the Union.

The Union shall adopt measures to ensure the functioning of the internal market. Domestic market ensures the free movement of goods, persons, services, and capital. Import and export customs duties or equivalent duties, taxes and fees, non-tariff measures, special protective, antidumping and countervailing measures, are not applied within the framework of the internal market in mutual trade of the state.

In the Union a unified customs regulation is carried out, in accordance with the Customs Code of the Eurasian Economic Union [10], international treaties, acts constituting the right of the Union, and the provisions of the 2014 Treaty.

Foreign policy is implemented by the Union autonomously or jointly with the member states in the areas in which the organs of the Union shall make decisions, mandatory for member states, international agreements with third-party participation in international organizations or independent application of the measures and mechanisms of foreign trade policy. The Union is responsible for the fulfillment of obligations under international treaties concluded between him and realizes its rights under these contracts.

With respect to foreign trade in the Union the MFN is applied in the understanding of the General Agreement on Tariffs and Trade 1994 (GATT 1994) in the cases and conditions where the use of MFN stipulated by international treaties of the Union or the Member States with a third party.

The free trade regime in goods (within the meaning of GATT 1994) can be installed in a trade with a third party, on the basis of an international treaty of the Union with it subject to the provisions of Art. 102 of the Treaty. There are tariff preferences in the Union with respect of goods originating in developing countries and/ or the least developed countries. Tariff preferences, i.e., exemptions from import duties or reduce import duties on goods originating from countries forming together with the Union of a free trade zone, or reductions of import duties on goods originating from developing countries that are users a unified system of tariff preferences Union and (or) the least developed countries - users a unified system of tariff preferences Union.

On the territory of the Union the common rules of determination of the origin of goods imported into the customs territory of the Union shall be applied.

If the possibility of retaliatory measures is provided, in accordance with an international treaty of the Union with a third party and/or the member-states with third parties, the decision to impose such measures in the customs territory of the Union is adopted by the Commission. The Commission also decides on increasing import duties, introducing quantitative restrictions, temporary suspension of preferences or acceptance within the competence of the Commission of other measures affecting the results of foreign trade with the State.

In the area of customs and tariff regulation, the Commission carries out the main powers. It should:

- maintain a single commodity inventory of foreign economic activity and EEU`s Common Customs Tariff;
- set import duties; determine the cases and conditions of tariff preferences; define the procedure of applying tariff preferences;
- determine the conditions and procedures for applying a uniform system of tariff preferences of the Union, including claims of a developing country, i.e., a single user system of tariff preferences of the Union; least developed countries, i.e., users of a unified system of tariff preferences of the Union;
- draft a list of products originating from developing countries or least developed countries in respect of which the importation into the customs territory of the Union of tariff preferences;
- establish tariff quotas when a tariff quota volume distributes between member states, specify the method and procedure of the tariff quota volume distribution among participants of foreign trade activities, and if necessary distribute volumes of tariff quotas between third countries or shall act so that member states would define the method and procedure for allocating tariff quotas among participants of foreign trade activities, and if necessary, allocate tariff quota volume between third countries.

The principles of information exchange within the Union, as well as functioning of an integrated information system are defined in Annex 3 to the 2014 Treaty.

The Union technical regulations have direct effect on the territory of the Union. Order of implementation of the technical regulations of the Union and transitional provisions are determined by the technical rules of the Union and/or an act of the Commission.

Health, animal health, and quarantine phytosanitary measures applied within the Union are based on international and regional standards and guidelines. The agreed policy is implemented via joint implementation of international treaties and acts of the Commission by member states.

States of the Union pursue a coordinated policy aimed: a) to protect the rights of consumers, in accordance with the 2014 Treaty and the legislation in accordance with Annex 13 to the Treaty; b) monetary policy; etc.

The legal framework for trade in services, facilities, activities, and investments in the member states is determined by the Annex 16 to the 2014 Treaty.

To ensure the effectiveness of cooperation, including the exchange of information, the competent authorities of the Member-States conclude agreements.

Administrative cooperation in the framework of the Union includes: a) an operational exchange of information between the competent authorities of the member states and developing the services sector in relation to specific market participants; b) establishment mechanisms for preventing violations by the service and goods providers of legitimate rights and interests of consumers, *bona fide* market actors, as well as public (state) interests.

The competent authorities of member states may ask the competent authorities of other member states information in the framework of the concluded agreements, including:

a) on the identities of entities in those other member states that have supplied services on the territory of the first member state, and, in particular, the confirmation that such a person is established in their territories;

b) the permits issued by the competent authorities, and the types of activity for which permits have been issued;

c) on administrative measures, penal sanctions, or decisions on the recognition of insolvency of persons who have been accepted by the authorities in respect of the person and which directly affect his competence or professional reputation.

The Commission promotes the development and participates in the process of maintaining information systems of the Union on these issues.

Member states within the Union coordinate regulation of financial markets. In order to create the conditions of the shared financial market for the free movement of capital states of the Union shall apply:

a) the exchange of information, including confidential information between the competent authorities of the member states on the management and development of banking, insurance, and activities on the securities market, as well as control and supervision, in accordance with an international agreement within the framework of the Union;

b) agreed actions to discuss problems in the financial markets, and to develop proposals to address them;

c) performing authorized mutual consultation on regulation of banking, insurance, and activities on the securities market.

Goods which are imported from the territory of one member state to the territory of another member state are subject to indirect taxes. States in mutual trade levy taxes, fees and other payments, based on the principle of equal treatment.

Currently, the Union is developing cooperation with the third countries. In 2015, the Agreement on a free trade zone was signed with Vietnam. Similar agreements are elaborated with Egypt, Iran, Mongolia, Thailand, and Serbia.

IV. EEU Law: transitional provisions

The Union's law consists of:

a) the 2014 Treaty;

b) international treaties within the framework of the Union;

c) treaties of the Union with a third party;

d) documents of the Union (including documents of the EEU), the SEEC decisions and orders, document of the Intergovernmental Council of the Eurasian and the Eurasian Economic Commission (EECn), adopted within the framework of their powers. Decisions of the Union's institutions shall be enforceable in member states in a manner, prescribed by national law.

International treaties of the Union with a third party must not contradict the basic objectives, principles, and rules of functioning of the Union. In case of conflict between international agreements in the framework of the Union the 2014 Treaty takes precedence.

Decisions, i.e., the acts by the bodies of the Union containing provisions of regulatory developments, and Orders, i.e., the act by the Union which is of organizational and administrative nature, of the Union should not contravene the 2014 Treaty and international agreements in the framework of the Union. In case of a conflict between the decisions of the Union:

a) the decision of the Supreme Eurasian Economic Council take precedence over the decisions of the Intergovernmental Council of the Eurasian and the Eurasian Economic Commission;

b) the decision of the Intergovernmental Council of the Eurasian take precedence over the decisions of the Eurasian Economic Commission.

As a rule, the 2014 Treaty enters into force since the date when the Depositary receives the last written notification from the member states. The 2014 Treaty includes transitional provisions. International treaties of the member states, concluded in the framework of the Customs Union and the Common Economic Space come into force on the date of entry into force of the Treaty and are included in the Union law as contracts within the Union and shall apply to the extent, not contrary to the 2014 Treaty.

Since its entry into force, the 2014 Treaty provides for:

a) the functions and powers of the SEEC at the level of heads of states and the governments, acting in accordance with the Treaty on the Eurasian Economic Commission of 18 November 2011 and according to the decisions of the Supreme Council and the Intergovernmental Council, acting in accordance with the 2014 Treaty;

b) the functions EEC, established, in accordance with the Treaty on the Eurasian Economic Commission of 18 November 2011 and carrying out its activities, in accordance with the 2014 Treaty;

c) the responsibilities of the members of the Board of the Commission appointed before the entry into force of this Treaty which shall continue serving until the expiration of the term for which they are assigned.

4. Results

As an international organization aimed at regional integration, the Union has own jurisdiction within the limits established by the 2014 Treaty and other agreements concluded within the framework of the Union. The EEU ensures free movement of goods and services, capital, and labor. Member states of the Union implement coordinated, coherent and common policy in the economy.

The 2014 Treaty does not leave opportunities open for the conclusion of international treaties which are not fully consistent with the objectives and principles of this Treaty. Bilateral international treaties between the member states envisaging deeper integration as compared to the provisions of this Treaty or international treaties within the Union or stipulating any additional benefits for their natural and/or juridical persons shall be applied in the relations between the contracting states and may be concluded if they do not affect their rights and obligations and rights and obligations of other member states under this Treaty and international treaties within the Union.

5. Conclusion

Thus, the Eurasian Economic Union operates based on the principles of transparency reflected in the sources of the WTO. All members of the Union have equal rights and opportunities to participate in decision-making. The consolidation of economies obviously envisages closer political cooperation between the member states. The ultimate goal of such co-operation is a full-fledged Eurasian Union.

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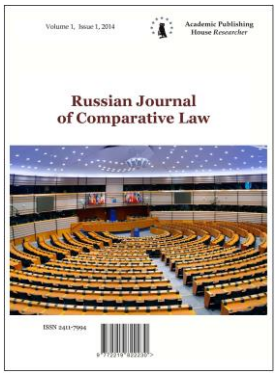

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Ten Years of the Cefta 2006: Legal Aspects

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Abstract

The aim of this work is to determine, from a legal point of view, validity of the CEFTA 2006 ten years after it started, that is, whether this agreement fulfilled its essential goal as well as declared main objectives. The essential goal of the CEFTA 2006 is harmonization of trade regulations of the CEFTA 2006 parties to the international legislation and proper implementation of the regulations. Namely, the parties are in the similar stages of the process of joining the EU market and their cooperation under the agreement should prepare them for participation in the market. The main objectives are improvements of the parties in the fields of liberalization, trade in services, investment, public procurement and intellectual property rights. In the article it was researched whether in the given period any improvement was accomplished in the observed areas of the parties. According to the results obtained, it is concluded that the CEFTA 2006 in general met the expectations during the previous decade. Namely, there were significant results achieved in the observed areas of the parties. However, it is concluded that there is a space for further improvement, especially regarding investment, public procurement and protection of intellectual property rights.

Keywords: The CEFTA, the EU, the Western Balkans, free trade agreement.

1. Introduction

The CEFTA (Central European Free Trade Agreement) was founded by member states of the so-called Visegrad Group (Poland, the Czechoslovakia, and Hungary) on December 21, 1992 in Krakow. Later on, Slovenia (1996), Romania (1997), Bulgaria (1998), Croatia (2002) and the Republic of Macedonia (2006) became members, but then all the member states excluding Macedonia joined the EU and, for that reason, left the agreement. At the same time, from 2001 the Balkan countries have concluded 32 bilateral free trade agreements within the Stability Pact of South East Europe. Therefore, at the summit of Prime Ministers of South East Europe, held on April 6, 2006 in Bucharest, the Declaration on the enlargement of the CEFTA was adopted. It included Albania, Bosnia, and Herzegovina, Moldova, Serbia, Montenegro and United Nations Interim Administration Mission in Kosovo on behalf of Kosovo in accordance with United Nations Security Council Resolution 1244 (hereinafter: Kosovo). The CEFTA amendment (Annex I) named the CEFTA 2006 (hereinafter: CEFTA) was signed on December 19, 2006 at the summit of Prime

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Ministers of South Eastern Europe, in Bucharest, and the new agreement was put into effect on May 1, 2007 1.

The primary goal of the CEFTA is to define general obligations which refer to trade in all goods. The general rule is that quantitative limitations, customs and other export and import costs will be abolished in trade between parties of the region and new constraints will not be introduced. The agreement processes technical obstacles in trade as well as new areas which have not been in touch with bilateral agreements on free trade: trade in services, investments, public procurement, the protection of intellectual property rights as well as arbitrage in case of a dispute. Also, operative rules on the origin of goods have been defined as well as the cooperation of customs administration, competition rules, state aid and the rules of protection.

During the period of the previous ten years (2007-2017), the implementation of the agreement has contributed, along with other factors, to the realization of the essence and general goals of the agreement which is reflected in the improvement of harmonization to international legislation and implementation of the trade regulations of the parties. This improvement can be followed through the corresponding reports on accession to the EU and other reports of relevant international organizations.

2. Methods and Materials

Having in mind characteristics of the subject of our research, we used the text analysis method, the formal-legal method, comparative method and the historical method, while as materials we analyzed the text of the agreement, scientific literature in this area and reports of international organizations. As sources we used the text of the CEFTA 2006, with all additional Annexes and Protocols, as well as other international agreements and strategic documents in the field, relevant scientific literature and the reports of international organizations, primarily of the entities and bodies of the EU (European Commission) and UN (WTO, World Bank, OECD), as well as the regional bodies.

3. Discussion

Legal framework

The Agreement consists of the main text, the Annexes (1-10) and Protocols (I-IV). In the Preamble, the parties defined they wish to contribute to the development of each Party's relation to the European Union and integration into the multilateral trading system. As the objectives of the Agreement are noted: consolidation in a single agreement the existing level of trade liberalization achieved through the network of bilateral free trade agreements; improving conditions further to promote investment; expand trade in goods and services and foster investment by means of fair, clear, stable and predictable rules; elimination of barriers to and distortions of trade and facilitation of the movement of goods in transit and the cross-border movement of goods and services; providing fair conditions of competition affecting foreign trade and investment and gradually open the government procurement markets of the parties; providing appropriate protection of intellectual property rights; providing effective procedures for the implementation and application of the Agreement; and contribution thereby to the harmonious development and expansion of World trade.

The parties agreed to determine „basic duties“, that were duties which actually applied to trade between the Parties on the day preceding the entry into force of this Agreement, and to which the successive reductions set out in this Agreement were to be applied. Also, the parties abolished all quantitative restrictions on imports and exports, customs duties on exports, and customs fees which were contrary to the WTO rules, as well as all measures having equivalent effects on trade between the parties on the date of entry into force of this agreement. For the import customs parties agreed to a standstill, i.e. that no new customs duties on imports, or charges having an equivalent effect, and import duties of a fiscal nature had to be introduced, nor would those already applied been increased, in trade between the parties as of the day preceding the signature of the agreement [1, Art. 2-6].

Considering industrial products the parties agreed to abolish all customs duties on imports, and all other import duties of a fiscal nature in trade on the date of entry into force of this agreement, except the products listed in Annex 2, which had to be abolished till the end of 2008. For agricultural products listed in Annex 3, the parties determined to reduce or abolish the import

customs and all other duties with the possibilities of granting to each other further concessions no later than 1 May 2009. Also, the parties agreed that all issues between the Parties relating to the application of sanitary and phytosanitary measures, as well as technical barriers to trade, had to be governed by the Agreement on the Application of Sanitary and Phytosanitary Measures [2], and the Agreement on Technical Barriers to Trade [3] (with the certain exceptions) [1, Art.7-13].

The Annex 4 (Protocol) laid down the rules of origin of goods, and the methods of administrative co-operation in customs matters, while Annex 5 brought the common rules on mutual administrative assistance in customs issues. It was stipulated that the parties should have to harmonize their application of the Annexes, and to simplify and facilitate customs procedures and to reduce, as far as possible, the formalities imposed on trade. The fiscal discrimination between the products originating in the parties was forbidden, as well as all forms of restrictions on the grant, repayment or acceptance of short and medium-term credits to trade. On the other side, the payments in freely convertible currencies relating to trade in goods between the parties and the transfer of such payments to the territory of the Party enabled to be free from any restrictions [1, Art. 14-16].

The parties agreed to adjust the functioning of any State monopolies of a commercial character or state-trading enterprises in accordance with WTO provisions and to refrain from introducing any new measure which is contrary to such principles. Also, the agreement brought rules on competition concerning undertakings, state aid, and contingent protection rules (anti-dumping measures, general safeguards, conditions and procedures for taking measures, the balance of payments difficulties) in accordance with the adequate WTO provisions [1, Art. 19-25].

On services, the agreement stipulates that trade in services is defined in accordance with the relevant provisions of the General Agreement on Trade in Services, of the WTO, i.e. that the parties will gradually develop and broaden their co-operation with the aim of achieving a progressive liberalization and mutual opening of their services markets, in the context of European integration, taking into account the rules of the GATS [1, Art. 26-29]. Also, the agreement regulates investments in a way that each party has to ensure fair and equitable treatment and full protection and security to investments of the investors of the other parties, in accordance with its domestic laws and regulations by investors of the other parties, and the treatment can't be no less favourable than that granted by each party to the investments made by its own investors [1, Art. 30-33]. Besides, the parties agreed that the provisions of this agreement apply to all laws, regulations, procedures or practices regarding any procurement by central or sub-central government entities or other relevant entities 1, Art. 34-36. On intellectual property rights the provisions stipulate that industrial property rights, copyright and related rights, topographies of integrated circuits, as well as protection against such unfair competition should be in accordance with the Paris Convention for the Protection of Industrial Property and the Agreement on Trade-Related Aspects of Intellectual Property Rights [1, Art. 37-39].

European integration

The CEFTA parties are in the similar phase of economic development and have the mutual goal to become members of the European Union. In order to accomplish this, regional cooperation is directed towards the areas which have the goal of promoting better economic relations between the member countries except in the trade area and other areas such as investment, services, public procurement, intellectual property, etc [4, p. XII].

The EU integration as a target of socio-economic integration of the countries in region SEE is not only reflected in CEFTA but also in the document SEE 2020: "The SEE 2020 Strategy outlined in this document reflects the determination of all the governments in South East Europe to embrace the bold policy approaches required to attain the levels of socioeconomic growth necessary to improve the prosperity of all its citizens and to facilitate eventual integration with the European Union (EU)" [5, p. 4].

In Albania domestic consensus on the fundamentals of a market economy was broadly maintained in 2007 [6, p. 19]. In the meantime, Albania significantly improved in completing obligations within the European integrations. Therefore, in the report of the EU in 2015 it was stated that Albania is moderately prepared for the development of the functional market economy [7, p. 4, 33].

At the beginning of the observed period (2007), Bosnia and Herzegovina in general, had a lack of coherence and consensus on economic policies, which prevented the acceleration of reforms

at State, Entity and other government levels [8, p. 19]. However, according to the report of the EU in 2015, a certain improvement in the economy was made [9, p. 4, 40].

In a report of the EU in 2007, it is stated that FYR Macedonia generally accomplished an improvement in the implementation of the SAA and regarding the majority of its obligations [10, p. 5]. Additionally, the report of the EU from 2015 stated: "Regarding the economic criteria, FYR of Macedonia is on a solid level of preparation in the development of functional market economy" [11, p. 25].

According the EU report in 2007, in Montenegro in general, macroeconomic stability has been maintained. However, there were reported some remained risks to macroeconomic stability in the medium term, such as the large external deficit and the surge in consumer loans [12, p. 22]. On the other hand, according to report 2015, Montenegro was evaluated as moderately prepared country in developing a functioning market economy. Some progress was made in addressing some economic challenges, in particular on fiscal consolidation and the business environment [13, p. 23].

At the beginning of the particular period (2007-2016), Serbia was about to sign the SAA, that is, at the time still did not become a candidate country. Therefore, at the end of 2007, the European Commission declared that "a stable and prosperous Serbia fully integrated into the family of European nations is important for the stability of the region. In this regard, it encouraged Serbia to meet the necessary conditions to allow its SAA rapidly to be signed" [14, p. 4, 5]. According to the last report of the EU about Serbia (2015) regarding its European integrations, it is stated that the European Council approved the status of Serbia as a candidate country in 2012. The SAA between Serbia and the EU came into force in September 2013, the negotiations on association started in January 2014 and analytical review of legal achievements of the EU (the screening process) was completed in March 2015. Furthermore, it is stated that Serbia is committed to its strategic goal of accessing the EU and continues to carry out the obligations from SAA in a time record [15, p. 4].

The EU 2007 report evaluated that overall, the economy and economic policies in Kosovo* were affected by the uncertainty over the future status of Kosovo. Within this context, the policies in place were broadly sound and market-oriented. However, economic policy coordination remained weak [16, p. 24]. In 2015 it was reported that Kosovo is at an early stage in developing a functioning market economy, and that some progress was made, particularly on facilitating business creation, improving the legal system and on financial sector stability, but the persistent trade deficit reflects a weak production base and lack of international competitiveness [17, p. 30].

Liberalization

The CEFTA parties achieved the complete liberalization of trade in goods (industrial and agricultural) in February and March 2015 by signing the Additional Protocol 4 CEFTA regarding the last remaining quotas on wine between the Republic of Macedonia and the Republic of Moldova. Besides removing custom tariffs, in order to achieve much better trade, the Western Balkan countries developed the Systematic Electronic Exchange of Data (SEED) which is already established in the countries with technical and financial aid from IPA European commission [18, p. 6].

To further enhance intra-CEFTA trade, progress needs to be made in the reduction and elimination of Non-Tariff Barriers (NTBs). Therefore a negotiating framework for the elimination of NTBs has been established between the parties, but, given the technical nature of NTBs, their elimination on a multilateral basis has been relatively slow. Another complexity in reducing NTBs lies in the fact that the CEFTA parties are simultaneously pursuing regional trade integration and integration with the EU and are therefore in the process of adopting the relevant EU acquis. While the most of the parties are moving toward alignment with the EU norms in terms of procedures and regulations, the unsynchronized and multi-speed adoption of the EU *acquis* is generating additional barriers to trade among the parties. Therefore, it is essential that the parties take a coordinated approach to tackling NTBs [19, p. 15].

Also, the parties have improved their negotiations on the Protocol 5 which will help simplify border procedures in all phases, increase the electronic exchange of information, and it will also provide mutual recognition of economic affairs. Within the support of the Protocol 5 negotiations, the parties also considered the improvement of information flow through providing mutual standards which refer to data and efficient and effective technique solutions for data exchange [18, p. 7].

Trade in services

Negotiations on trade services of the Parties officially began in July 2014, primarily, to secure gradual liberalization and mutual service market opening by eliminating barriers. Four series of

negotiations were held in 2015 when relevant improvement regarding the offers and requests for market opening in ten services subsectors was achieved (business and professional services, tourism, environmental, cultural, communication and construction, and distribution, educational and health services). Also, the draft text of the Additional Protocol on Trade in Services and Annex 1 on Temporary Entry and Stay of Natural Persons for Business Purposes were finished. It is expected that negotiations will have been completed by the end of 2016 while the Additional Protocol on Trade in Services is expected to be implemented from 2017 [18, p. 7].

The CEFTA Subcommittee on Trade in Services and its working groups have undertaken various activities to improve the quality of trade in services statistics across the CEFTA region and harmonize them with those of the European Union. Also, they initiated discussions on the mutual recognition of professional qualifications. Both issues have been very important to the capacity of the Parties to implement the Additional Protocol on Trade in Services [18, p. 7].

The first meeting of the Working Group on Trade in Services Statistics was held in October 2015 when the main tasks of the Working Group were agreed: reviewing the quality and coverage of available trade in services statistics; identifying priorities for further development of statistics for commonly agreed areas; meeting the needs of users with regard to analysis of trade in services and investment; and setting up an operational reporting system of statistical data and a sustainable dissemination platform to be managed by the CEFTA Secretariat; working on improvement of the availability and quality of FDI data with a view to develop a first regional report on investment expected to be published in 2017 [18, p. 7, 8].

The present expansion of trade in services in the CEFTA economy is the result of investment increase and the development of their services sectors as well as their opening to foreign competition. Regarding the WTO and EU association, the parties obliged themselves to reforms for the improvement of market openness with the aim of facilitating foreign proprietorship and eliminating policies which discriminate foreign companies. However, various barriers in institutional and legal frameworks still restrain the expansion of the trade in services. Regarding the general barriers, the movement of workforce/professionals is a providing services regime with the largest limitation level in the region since getting a work permit for foreign citizens, even for temporary jobs, is a long, complicated and expensive process. The accreditation of diplomas and certificates is another important obstacle in the way of foreign citizens who provide services. Further, in the construction sector there are limitations for over-border, providing services and recognition of foreign licenses. In passenger and especially rail traffic there is a high regulation degree, market protection and the presence of state monopolies which all together limit the possibility of trade in services. However, the largest limitations are imposed on trade in legal services where trade is practically limited to the local population. Namely, foreign citizens can only provide legal consulting services. On the other hand, IT services are less regulated and trade in this sector depends, to a large extent, on other elements such as technological achievements (to exist demand in these services) and protection of intellectual property. Therefore, if the parties decide to promote trade and the integration of their service sectors, the next step would be a detailed review of domestic legislation in analyzed sectors. Afterward, excessive and economically unnecessary regulations will need to be eliminated [20, p. 80, 81].

Investment

In the given period the CEFTA parties have taken over a series of commitments for the establishment of a free and an open investment regime which facilitates free investment flow in the whole region. A lot of activities conducted in accordance with other CEFTA priorities such as trade, help and transparency will improve the investment climate in the region. The zone of single cumulation has the potential to improve its approach in the region and in the market of its leading trade partners, which is the EU, EFTA, and others, and to improve the integration into a global economy. Therefore, the countries requested UNCTAD to take over the overview of the Investment policy which can give a detailed analysis of investment policies in the South East European region and give a suggestion for the improvement of investment policies and reforms on the individual level of the economy and also through the synergy mechanisms of the regional cooperation [18, p. 8, 9].

Additionally, in 2015 the CEFTA Joint Working Group on Investment Policy and Promotion was created with two primary goals: the coordination of investment policies which provides greater security for investors and investments; and coordination for the promotion of activities for investments with the aim of facilitating free investment flow in the region. In regards to the

investment policy coordination, the Joint Working Group has a goal to coordinate investment policies, develop guidelines of an adequate practice for FDI motivating plans and programs, achieve non-discrimination in domestic treatment of investors, increase the transparency of investment incentives, provide the same protection level for all investors and their investments, etc. The JWG has three primary goals to accomplish regarding the coordination activities for the promotion of investments: the development of a product for the promotion of investments and the establishment of mechanisms/instruments for mutual promotion; further strengthening of cooperation between IPAs on every level; and the establishment of investment concept for increasing the involvement of regional priority sectors in regional chains and global supply networks [21].

In the Republic of Serbia, several crucial and serious challenges have been determined. They present a threat to the economic development of the parties and they can be solved with the increase of direct foreign investments. These are high unemployment rate, relevant foreign trade deficit, relevant structural and competitive problems which the industry deals with. On the other hand, there are listed factors which can cause the increase in direct foreign investments. It is, primarily, a program of law reform in order to accomplish the standards of the European Union not only in the economic sphere but also in other social spheres. Also, new knowledge and technologies, based on inventive and innovative development, applied in production and the process of creating new products and services can increase the total competitiveness of Serbian economy in global frameworks. Encouraging direct foreign investments requires at the same time activities and partnership of all characters: the Central Government, local authority, and foreign companies [22].

In the EU report 2007 on Albania, it was stated that Albania signed the Stabilization and Association Agreement with the EU, however, the revision of the legislative framework for the complete liberalization of capital movement was still in progress given the fact that Albanian economy was generally based on cash payment at the time [6, p. 28]. However, in Albania in 2015 a certain improvement has been accomplished regarding the capital movement, mostly in the fight against money laundering [7, p. 33].

Bosnia and Herzegovina according to the EU progress report 2007 continued to apply relatively liberal rules on capital flows, yet, certain limitations remained 8.Although, the SAA between Bosnia and Herzegovina and the EU was put into force on June 1, 2015, regarding the capital movement, Bosnia and Herzegovina continues to apply relatively liberal rules on capital flows, but the legal framework has not coordinated the legislation of the EU [9, p. 40].

During 2007 in Macedonia, the improvement was not noted in the area of capital movement and payment, or that "the preparations in the area of free movement of capital are still lagging behind" 10, p. 28. At the end of the seen period (2015), the EU reported that "limited progress took place on capital movements and payments" [11, p. 35].

In Montenegro in 2007 it was evaluated that overall, preparations for implementing the SAA in the area of free movement of capital were on track, but preparations on the fight against money-laundering were at a very early stage [12, p. 27]. In 2015 the progress on free flow of capital was reported, namely, it was evaluated that Montenegro is moderately prepared in this area, because some progress was made on payment systems [13, p. 32].

In Serbia in 2007 the evaluation of the EU stated that it was necessary to further improvement for the absolute liberalization of investment in accordance with the SAA [14, p. 34]. Therefore, in 2015 the report evaluated that the improvement achieved by adopting the Law on Payment Services, and during the following year Serbia should conduct further liberalization on short-term capital movement and strengthen the Agency for preventing money laundering [15, p. 33].

In Kosovo* in 2007 in the field of free movement of capital, overall, very little progress could be reported in this area [16, p. 31]. In 2015 some progress was made, namely, it was stated that, capital movements remain largely free, with no restrictions on foreign ownership or investment in the financial sector, and the central bank's capacity to supervise the sector remains sufficient [17, p. 40].

Public procurement and intellectual property rights

At the beginning of the period Albania took steps towards the approval of the new law on public procurement with the aim of harmonizing its legislation with the legislation of the EU. Additionally, further capacity strengthening of the copyright office was still necessary since piracy and forging were widespread [6, p. 31]. However, in 2015 Albania has reached a certain level of

preparation in public procurement, particularly through the adoption of the amendment of the Law on Public Procurement. Also, Albania also reached a certain improvement regarding the intellectual property, but still has not completed its obligations under article 73 of the Stabilization and Association Agreement [7, p. 36].

Bosnia and Herzegovina according to the EU progress report 2007 improved in the area of public procurement, but there was a strong need for capacity improvement of consumers to efficiently run the procurement procedure as well as strengthening administrative capacities on all procurement levels. Moreover, a small improvement was accomplished regarding the intellectual property [8, p. 36]. In the report from 2015 it is stated that solid improvement was accomplished, especially through putting into force the new law on public procurement, however, the country is still in an early phase of harmonization with the *acquis*. Additionally, it is stated that Bosnia and Herzegovina is moderately prepared in the area of intellectual property rights since a certain progress has been accomplished in this area, but additional efforts, especially on improving implementation and coordination [9, p. 44].

In Macedonia in the area of public procurement was not noted a progress in 2007. Additionally, it was stated that the preparations in the area of copyright and other related rights were in a backlog [10, p. 30]. Some improvement was achieved in the area of public procurement, especially through the mandatory usage of electronic procurements, but recent amendments to the Law on public procurement reduced the level of harmonization with the legal achievements of the EU. Furthermore, it was established that the area of copyright and related rights was correlated with the rules of the EU for legal protection. This is related, for example, to computer programs, broadcasting, brands, biotechnological inventions and pharmaceutical products [11, p. 38].

In Montenegro, in 2007 some legislative progress could be reported, because the PPL was based on the relevant EC directives in the areas of public authorities, utilities and remedies [12, p. 29]. In 2015 it was stated that in public procurement, Montenegro is moderately prepared on public procurement, because good progress was achieved with the adoption of amendments to the public procurement law at the end of 2014. However, more work is needed to prevent corruption occurring during the procurement cycle. Also, alignment with the *acquis* on concessions is at an early stage. Therefore, it is concluded that more work is needed to strengthen implementation and enforcement capacity at all levels [13, p. 32].

According to EU 2007 report, Serbia did not have a consistent, efficient and completely independent system of public procurement with efficient procedures for contract award, therefore, additional efforts were necessary for harmonizing legislation, implementation strategy of public procurement and capacity strengthening for the conducting of operations from the SAA. Additionally, it was estimated that in the area of intellectual property was necessary to make additional efforts in order to accomplish the harmonization between the domestic legislation and the required achievements, as well as its usage, especially for the purpose of eliminating piracy and forging [14, p. 37]. In the area of public procurement which is especially susceptible to corruption, Serbia is, according to the 2015 report, moderately prepared, and as the result bigger efforts are necessary, even though a solid improvement was accomplished during the previous year by adopting changes and additions of the Law on Public Procurement [15, p. 35]. Also, the evaluation is that Serbia has achieved a solid level of preparation regarding the harmonization of intellectual property with the legislation of the EU while in the next year it should: additionally harmonize the Law on Author's Rights, topography of semiconductor products, patents and protective signs with legal achievements of the EU, including the Directive on IPR [15, p. 35].

In Kosovo*, according to the 2007 report, it was stated that overall, some progress could be reported in the field of public procurement. Preparations for alignment with the European standards in this field were starting [16, p. 33]. The EU reported in 2015 that Kosovo* is at an early stage in this area. Effective implementation remains a major challenge and procurement is particularly vulnerable to corruption. Some progress was achieved, especially in enforcement of a centralized public procurement system. However, considerable efforts are still needed to use public procurement efficiently [17, p. 41, 42]. Also, in 2007 Kosovo* has some level of preparation in the area of intellectual property rights. Some further progress was made in this area [17, p. 43].

3. Results

Bearing in mind the geographical, historical and infrastructural advantages comparing to the other parties of this agreement, Serbia has managed to build more favourable conditions, both in terms of the legal framework and the capacities suitable for trade in the region and beyond, as well as for investment. Also, the Republic of Serbia has successfully adopted international standards in the fields of public procurement and protection of intellectual property rights, but in these fields further progress is expected soon.

4. Conclusion

According to the text of the CEFTA and the conducted analysis of its impacts on the economies of the CEFTA parties, we can conclude that the agreement in the previous ten years, in general, fulfilled the expectations, that is, it partially met not only the general, essential objective, that is European integration of the parties, but also the declared main goals, i.e. improvement in the fields of liberalization, investment, public procurement, as well as intellectual property rights. Namely, based on the reports of the European Commission for each of the parties, it can be stated that they made significant improvement in the European integration process. Furthermore, the increase in the very important services sector, as well as in financial direct investments, is evident. Also, all the parties made some progress in the fields of investment, public procurement and protection of intellectual property rights, but in these areas there is a lot of space for further improvement.

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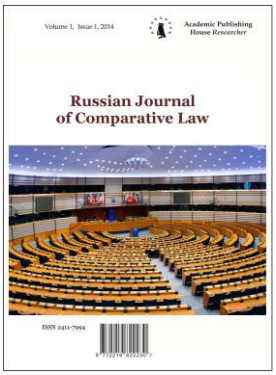

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The Rights of the Child in Intercultural Marriage in the Context of Finnish-Russian Marriages

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Abstract

This article examines separate legal aspects of observing the best interest of the child in the context if intercultural marriage. The author considers these issues on the example of Finnish-Russian marriages. This overview attempts to find answers regarding legal guidelines of settling disputes between the parents in intercultural marriage in the best interest of the child. The author takes into consideration situations of settling custody disputes between the parents also in cases of divorce. For these purposes the author analyses in detail the 2 November 1998 decision by the Supreme Court of the Russian Federation on the case No. 4-G98-16 that had not enforced the decision of the Finnish court regarding the custody of a child coming from the Finnish-Russian marriage which had been dissolved. This case is analyzed against the background of the Hague Convention on the Civil Aspects of International Child Abduction.

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Keywords: intercultural marriage, rights of the child, best interest of the child, custody of the child, the Hague Convention on the Civil Aspects of International Child Abduction.

1. Introduction

Shared border between the states accelerates migration processes, like in the case of Finland and Russia. Intercultural marriages, i.e., marriages between men and women who had grown up in different socio-cultural environments are among the consequences of such migration. As remarked by K. Goncalves, individual accounts of intercultural marriage "often invoke conflicting feelings about the way one is, acts, thinks or behaves with certain interlocutors and within different social contexts" [1; 12]. From the perspective of the rights of the child such marriages put at stakes the interests of choosing the language, religion, and upbringing style of the child, as well as ensuring stable family environment and the best interest of the child in case of divorce. Cultural differences and variations in legal regulation of child welfare systems in Finland and Russia are decisive factors potent to cause disputes regarding child protection in the context of Russian-Finnish marriages. The issues of child protection have already become inherent to agenda of official meetings between Finnish and Russian public authorities. Elaboration of working mechanisms enabling to observe

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the rights and interests of children born in intercultural marriages is a topical problem entailing the most important legal relationships concerning child protection and child welfare.

2. Methods and Materials

From a perspective of international human rights law we aim to overview legal mechanisms allowing to implement the best interest of the child both, in intercultural marriage and in cases when such a marriage is dissolved. This overview is based largely on the method of legal dogmatics when we analyze how legal norms regarding the rights of the child are implemented in the context of Russian-Finnish intercultural marriages. Such discourses entail comparative studies between Finnish and Russian law. Moreover, our studies also extend to international-national interaction when assessing how international law standards of children's rights are implemented nationally.

We base our discussion on publicly available materials, i.e., academic publications, international treaties and their interpretation by treaty bodies, case-law of international human rights bodies, as well as national statutory law coupled with its application by national courts.

Intercultural Marriages and their Effect on the Rights of the Child

L. Lainiala and M. Säävälä completed a study entitled "Intercultural marriages and consideration of divorce in Finland: Do value differences matter?" for the Population Research Institute in Helsinki based *inter alia* on the 2012 intercultural marriage survey [2]. That survey revealed that the foreign-born spouses in Finland "originated in nearly 140 different countries" where "Russia was the most common single group of origin"[2]. This study as well as other studies on intercultural marriages found that such marriages end with divorce more often in comparison with marriages where both spouses came out of the same socio-cultural background [1; 2; 3; 4].

The effects of intercultural family environment on the rights of the child are manifold. To start with, the parents need to decide on the language spoken inside the family. This issue remains a discretion of parents as the practice of international human rights organs does not provide interpretations on how to solve this issue in the best interest of the child. Dealing with language rights of minors, the European Court of Human Rights gives guidelines only with respect of education. For instance, in Belgian Linguistic Case the Court stated that the right to education means the right to be educated in the national language and does not extend to ensuring the parent's linguistic preferences [13]. From the position of social sciences, bilingualism is a good yet not the only choice for a child living in intercultural family environment. In particular, social scientists argue for the benefits of the so-called "one-parent-one-language" approach. This approach was conceived by a French linguist, Maurice Grammont in his 1902 book entitled "*Observations sur le langage des enfants*/Observations on Children's Language" [1; 5] who claimed that "by strictly separating the two languages from the beginning the child would subsequently learn both languages easily without too much confusion or mixing of languages" [1; 5].

When each parent in intercultural marriage communicates with the child in own language the child not only avoids confusing languages but takes "an example of adult language use" and has "the opportunity to form a natural emotional relationship with the child through their language" [1; 5].

Intercultural marriage also requires from the parents more efforts to ensure stable family environment for the child. This follows *inter alia* from the provisions Article 18 of the UN Convention on the Rights of the Child stipulating that: *"States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern"* [6].

If parents in intercultural marriage allow their disputes to disrupt implementing their parental duties exerting negative impact on children's wellbeing, schooling and general development it can be a ground for child welfare intervention. Child welfare services take consideration of the best interest of the child, reflecting the provisions of the UN Convention on the Rights of the Child, par. 1 of Article 3 of which provides that: "*[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*" [6].

The laws in Finland are rather strict concerning the circumstances in which children are brought up. In particular, in accordance with the Finnish Child Welfare Act, the authorities responsible for social services must monitor and promote the wellbeing of children, eliminate and

prevent the emergence of disadvantageous factors concerning the circumstances in which they are brought up [7, Section 7].

Facing the Divorce

In absence of agreement between the parents in cases of divorce and when the child's residence is in Finland the authorities of Finland determine who of the parents should be the primary care-taker. Par. 1 of Article 9 of the UN Convention on the Rights of the Child provides that: *"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child"* [6].

Observing the best interest of the child is a primary consideration of the authorities in determining this issue of primary custody of the child. Yet in some cases when family life is no more possible a parent who does not have the official status of s primary caretaker can attempt to take the child out of his or her familiar environment and even bring it abroad. Case-law of the Russian courts includes the case when a citizen of Finland had to appeal to the court in order to confirm the validity of a decision by the Court of Vaasa (Finland) on the basis of which he became a primary caretaker of the child whose mother is a citizen of Russia.

On 2 November 1998 the Supreme Court of the RF decided the case No. 4-G98-16 on the appeal of Mr. Yu., a citizen of the Republic of Finland who asked to recognize and enforce on the territory of the Russian Federation the decisions of the Court of Vaasa regarding the custody of a minor entrusted to him as a father [8]. Although after dissolution of marriage between the parents the Court of Vaasa entrusted the custody solely to the father, the child's mother took away the child from Finland to Russia. Yu. considered that event to be in violation of *inter alia* Article 11 of the UN Convention of the Child stipulating that: "[s]tates Parties shall take measures to combat the illicit transfer and non-return of children abroad." Yu. submitted an application to the Court of Moscow Oblast where he asked to recognize and enforce the decision in question. The Court of Moscow Oblast rejected the application of Yu. Appealing against that judgment, Yu. Reached the Supreme Court of the Russian Federation, invoking, in particular and argument that in consideration of this case the Court of Moscow Oblast did not apply Article 11 of the UN Convention on the Rights of the Child.

The Supreme Court failed to find grounds for nullifying the judgment of the Court of Moscow Oblast in question and rejected the claims of Yu. to recognize and enforce the decision of the court of Vaasa. And that was despite clear provisions of para. 1 of the Decree of the Presidium of the Supreme Soviet of the USSR of 21 June 1988 "On the recognition and enforcement of decisions of foreign courts and arbitration courts in the USSR," stating that: *"decisions of foreign courts are recognized and enforced in the Soviet Union, if it is provided by international treaties of the USSR. Those decisions of foreign courts which are not subject to special enforcement procedure are recognized in the Soviet Union, in accordance with the legislation of the Soviet Union or international treaties concluded by the Soviet Union. For the purposes of this Decree decisions of foreign courts imply decisions in civil cases and those parts of sentences in criminal cases which regard compensation for damages caused by crime, in accordance with international agreements of the Soviet Union, as well as acts of other bodies of foreign states"* [8].

The treaty between the Soviet Union and the Republic of Finland on legal protection and aid in civil, family, and criminal law [9] was concluded in 1978. This treaty became valid for Russia as the Russian Federation as a successor of the Soviet Union and carries out international legal obligation of the Soviet Union. True, the Supreme Court of the Russian Federation acknowledged the existence of the said treaty. It claimed that the 1978 Treaty between the USSR and the Republic of Finland "On Legal Protection and legal assistance in civil, family and criminal cases" "contains and exhaustive inventor of family matters where the decisions passed by the courts of the Contracting Parties are recognized on the territory of the other Party (Art. 21 and 23). Yet, the Court continued that "the disputes relating to determination of residence of the child (including the custody of the parents) are not enlisted by this Treaty". The Court, hence, concluded that the provisions of the said agreement between Finland and the USSR "could not be interpreted broadly," and any changes in the said inventory should be made via official procedures. Under the said circumstances, the Supreme Court upheld the decision of the Court of Moscow Oblast and rejected the claims of Yu.

3. Results

The main differences between Russian and Finnish child welfare systems culminate in the issue of early intervention by child welfare services. Finnish system based on the Act on Child Welfare No. 417/2007 rests on the principle of early intervention of social services that provide support for families in cases when children's rights and interests might not be fully observed. Although social services offer help to families with children in the mode of e.g., family counselling, cleaning services etc., not seldom Russian parents consider such actions as arbitrary intervention in their family life, which only aggravates possible conflicts.

4. Conclusion

This decision No. 4-G98-16 by the Supreme Court of the Russian Federation clearly favors the mother, a citizen of Russia, as a more potent custodian. It illustrates the differences in cultural norms in Finland and in Russia, reflected in the legislation. Although Art. 38 of the 1993 Russian Constitution declares that parents enjoy equal parental rights, the same article 38 puts "*motherhood* and childhood" under special state protection. This reflects the understanding that can surface in the Russian society, according to which the child should remain with mother after the divorce, although not in every case. Whereas the Constitution of Finland is gender neutral and targeted at the equality of gender rights.

Yet based on the provisions of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction [10] and assuming that the child was under 16 years of age (which is the limit set forth by Article 4 of this Convention) and the custody right were actually exercised, such removal of a child is wrongful because it is in breach of rights of custody attributed to a Yu. under the law of Finland in which the child was habitually resident immediately before the removal. True, this judgment by the Supreme Court of the Russian Federation is in violation of the Hague Convention. However, at the time of making this decision Russia has not yet joined this treaty unlike Finland that joined it in 1994 [12]. Russia joined the Hague Convention in 2011, and since then failures to implement the decisions of the courts of other contracting parties regarding custody of children amount to child abduction and cause legal responsibility. Since 2011 similar cases should be considered differently in order to implement the Hague convention which is targeted at returning the child to his or her legal guardian.

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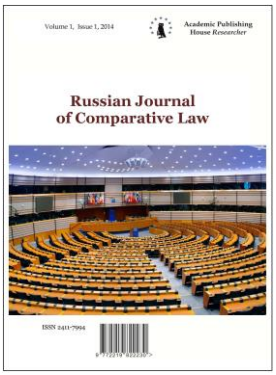

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The United Nations Human Rights Council and the Right to Peace

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Abstract

The present article studies and criticizes the "right to peace" as an individual's fundamental right, as claimed by the resolution of 24 June 2016 of the UN Human Rights Council. The criticism concerns problems of content and method of the aforesaid Resolution (to be approved or not by the UN General Assembly), and this also with regard to the so-called "soft law" especially with regard to the difficulty of identifying the subject holder of the so called "right to peace" and even more the difficulty of enforceability in judgment of such a supposed "right to peace". This, both with regard to the identification of the competent judicial instance and the identification of the subject responsible for the breach of law, as well as the assessment of the specific facts at which the "right" in question can be considered as violated. It is no coincidence that it is included in the category of "soft law" which, having no binding force, cannot certainly be understood as a legal category.

Keywords: United Nations Human Rights Council, "*Right to Peace*", "soft law", "peace education", fundamental rights, actionability, individual.

1. Introduction

It is since ancient times that the issue of peace has been the subject of speculation by philosophers and men of letters and it is unnecessary to operate references in this regards. This for their not containable amplitude as well as for the extraneousness of such speculations with respect to the object of this study which, moreover, has to be contained in a well limited number of pages.

Just to give a point of reference confirming the assumption, it would be enough to think about Emmanuel Kant and his philosophical speculations on the theme of peace.

The problem of peace among men within the limits of the state organization, as well as the issue of peace in the context of inter-state relations in the entire international community, has always been addressed, obviously, in a strictly political context. The most expressive example consists of the primordial purpose for which it is addressed, or should be addressed, the United Nations: "the maintenance of international peace and security." A very different question is whether this objective has been achieved or not. Certainly, after seventy years of UN activities there is good reason to doubt that this objective has been achieved and that, in many cases, there was the intention of achieving it.

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However, it is not an opinion but a statement of fact that in those seventy years, there were situations of serious and widespread armed conflict far greater than the ones occurred in the two hundred years preceding the creation of the UN.

That such a failure was caused by the very questionable decision to provide, within the UN Security Council, five states with permanent seats - and each one of them capable of preventing the adoption of its resolutions with their vote against [1, p. 665] - is a different problem from what constitutes the object of this short study.

It cannot be denied that the jurists, and especially internationalist jurists, have dealt with the problem of peace, that is how to ensure the maintenance of peace or, from a different standpoint, how to forestall and prevent armed conflicts between States.

Even in this respect the scientific production of Hans Kelsen, that for his fame does not require specific bibliographical references, is significant and emblematic. And finally, the scientific production of Ugo Villani which is indicated, given its amplitude, only in its most significant expressions [2, p. 225; 3, p. 19; 4, p. 57; 5, p. 428; 6, p. 8; 7, p. 3; 8, p. 11; 9, p. 252; 10, p. 53; 11, p. 69; 12, p. 141; 13, p. 163] for the purposes of the present study.

However, internationalist jurists who have dealt with the problem of peace and how to prevent the war – as well as how to restrict the legitimacy of using military force (legitimacy sometimes allowable) - did so by offering organizing schemes of international relations between the states considered most fit for the purpose. This by identifying, in the changed historical and political context of international relations, either the general principles of international law and the extension, on the interpretative level, of their receptive reach, or through the identification of rules that, while not attributable to the category the general principles of law, can be intended as binding or prevailing over rules of equal rank.

2. Materials and methods

This paper is based upon UN documents: United Nations Human Rights Council, Resolution June 24, 2016; Universal Declaration of Human Rights of December 10, 1948: Newsletter *Pace e diritti umani* Doc. A/HRC/20/31; Doc. A/HRC/RES/14/3 (Resolution 14/3 of June 23, 2010).

The article examines the so-called "right to peace" with regard to the relevant international instruments and in the framework of the general theory of international law.

3. Discussion

Today we are faced with a new and relatively recent fact: the alleged assertion of a right to peace intended as a fundamental right of the individual and not as a mandatory rule of conduct for States to ensure the maintenance of international peace and security.

Thus, we would be in presence of a new fundamental right of the individual in addition to the numerous others of which is claimed the existence, the recognition and the alleged obligation to guarantee that, since the Universal Declaration of Human Rights of December 10, 1948 [14], it has expanded enormously the ranks of the pretended fundamental rights. And this is – incidentally – to the detriment of even the slightest guarantee of their effective and concrete claim against the state authority that should ensure their recognition and application.

The so-called right to peace formally expressed by the Human Rights Council of the United Nations and which will be discussed below, requires a preliminary observation: this new and purported fundamental right is understood in some sort of logical and methodological contradiction to the armed conflict between states. The operating end enforcing implication of this new claimed fundamental right is that armed conflict would always be illegitimate with respect to general international law.

This will be discussed below, but it is now appropriate to make an observation as elementary as it is not felt by the authors of the claimed fundamental right and by the members of the United Nations Human Rights Council.

It means to say that peace on the one hand cannot be understood reductively as a situation of no war, but vice versa it must be understood as a situation indicative of even minimum acceptably living conditions of every individual.

In this perspective it is clear that it is not only the armed conflict that compromises effective peace in the sense indicated above -and that, therefore, gives a shareable content to the same peace- but there are other, more harmful causes that compromise peace: the economic

overwhelming, the exploitation of other peoples' natural resources, the political abuse of power, the imposition of economic models only meaningful of the interests of international finance, the currency speculation, the unemployment, the underdevelopment and so on.

Not to trivialize, but what's the difference on the moral, political and, as now claimed, legal level, between the children who die of hunger and the children who die because of war events?

As already pointed out, the alleged recognition of the right to peace is meant as a fundamental right of the individual by the UN Human Rights Council *Resolution*, adopted June 24, 2016 with thirty-four votes in favour, nine against and four abstentions [14], (*Resolution* that will be brought to the General Assembly for its final approval) results in a general, vague and implicit claim that any international armed conflict is unlawful.

With this *Resolution*, therefore, it would like to affirm also the illegitimacy of the use of military force to self-defence requirements [15, p. 392], as well as the illegitimacy of any military intervention in defence of others and primordial fundamental rights of the person (when this actually happens, not when, as almost always happens, the military intervention takes the defence of those primordial fundamental rights as a pretext, but is actually aimed to the pursuit of other illegal purposes and thus presents itself as the "armed wing" of the overbearing political will of certain States to the detriment of others, celebrating in this way the indiscriminate use of force that is justified by nobles and false needs and cloaked in a false formal legitimacy; and this often precisely by means of certain resolutions of the UN Security Council: think of the aggression on Serbia, Iraq, Libya, Syria, etc., or the case of Ukraine [16, p. 53; 17, p. 451; 18, p. 18; 19, p. 3]) that contradictorily and curiously the resolution of June 24, 2016 through "the right to enjoy the peace" would guarantee "so that all human rights are promoted and protected and the development is fully realized".

The *Resolution* at issue not only claims, to its inevitable implications (where the *right to peace* was actually meant as a right that can be operated in any way), to abolish at a stroke the substantial body of law of *jus in bello*, but would also like to disown to the States the *jus ad bellum*, even in cases of non-contestable requirements of self-defence.

Moreover, the *Resolution* does not take into account not only the history, but above all phenomenal reality that cannot be cancelled or cannot be impeded in its repetition by utopian efforts, while laudable on the moral level, of those who participate in the approval of the *Resolution* in question.

It must be said that in the extent of the awareness of the reality and of the consciousness of what is feasible, important attempts have been done in the sense of the limitation of the *jus ad bellum* and even more in the sense of the limitation of the *jus in bello*. Think of the definitional efforts and the efforts of content related to the ban and to the enforceability of the war of aggression; or think of the significant body of regulations of the well-known Geneva Conventions relating to the war in its development, in its manners and in the discipline of the subjects who take part to it, to the guarantee of the civil population, the treatment of prisoners, etc.

The *Resolution* at issue in its assumptions and in its manifest utopian purposes, as we said, would assume an international community no longer formed by States but by individuals and, although out of every anarchist vision, an international community governed by a sort of (nonexistent) world government, and from which it is rejected any possibility of recourse to force.

In the observation of the non-contestable reality emerges not only the utopian character of the *Resolution*, but rather the impossibility to achieve the objectives that are, with it, nobly pursued.

Nor it seems possible a reutilization of the said *Resolution* in the context of law arguing that it would integrate a sort of *soft law* for the sole and primary reason that the *soft law* is not law, and it should be more correctly interpreted as a recommendation or a moral or political solicitation; this confirms the absence of its legality: the *jus* is will that makes itself command in its normative form, expressive of a mandatory command that requires, demands and guarantees execution even in coercive forms and in its punitive previsions.

We are well aware of exposing absolutely elementary reflections but in the presence of these allegedly juridical elaborations (the *right to peace*) we are in the need of repeating and remembering them.

Below the affirmation of the principle in article 1 of the *Resolution*, which states "the right to enjoy peace", the following article 2 seems to indicate the ways of achieving peace and places upon

Member States obligations already imposed on them in derivation from the international general principles or consisting of a different way of being of their internal systems expressive of a certain social body, finalized at the maintenance of peace from the perspective of the *Resolution*: equality and non-discrimination, justice and rule of law and the guarantee of freedom "from fear and from want".

Apart from the apparent interference in state affairs (what was once called the *domestic jurisdiction*), the question is: what equality? According to what parameters and compared to what criteria? What justice? Freedom from fear of what? Freedom from which need? In this regard, apart from the already highlighted aspects and utopian content, the authors of the *Resolution* still seem to realize that true peace is founded on social justice within the State and in the relations between states. But, then, they must change, with regard to this second aspect, the economic, commercial and financial linkages among the states.

The *Resolution* does not say it but it would appear to be meant the prohibition of any – not only economic and commercial- policy of oppression and exploitation by some States to the detriment of others.

The article 3 states that the States, the United Nations and specialized agencies, particularly the UNESCO "should take appropriate sustainable measures to implement the present Declaration". It is not specified what kind of measures. It isn't neither written what kind of "support and assist" should give the "International, regional, national and local organizations" and even "civil society"!

The article 4 of the Resolution underlines the role of the "education" to "the spirit of tolerance, dialogue, cooperation and solidarity" and to this end, a reference is made to a "University for Peace" that should contribute to the "dissemination of knowledge": what that means in practice is objectively hard to imagine.

The final article 5 takes on a role in a sense of the *safeguard clause* providing that nothing in the *Resolution* shall be construed "as being contrary to the purposes and principles of the United Nations" but it is to be understood in line with the Charter of the United Nations, the Universal Declaration of Human Rights and "the relevant international and regional instruments ratified by States" (of course, those relating to the rights and fundamental freedoms of the individual).

4. Results

The goal of peace, guaranteed by its alleged *legal cover* through the *Resolution* at issue, and thus understood as the *right* of every individual and of the peoples (but there is no reference to them in the *Resolution*) would actually deprive the State sovereignty of all its content and all its political autonomy, placing this new *right* in the context of the recognition and guarantee of rights and fundamental freedoms of the individual insured at the international level.

Therefore, as initially mentioned, the State would be deprived not only of his actual ability to autonomous government of the community allocated in its territory to the limits imposed by the *Resolution* at issue for the pursuit of the alleged *right to peace* (the content of which is not, however, defined), but is deprived of any autonomous policy-making capacity in terms of choice of use of military force as regards the defence of its interests. Interests that are indispensable and consubstantial to the way of being of the State: its territorial integrity, its sovereignty (particularly monetary), its political independence, its right to enjoy exclusively from their own natural resources, etc.

It is for this reason that at the beginning it has been necessarily underlined the relapse that such declaration shall determine to the legitimate use of military force.

Regarding the *Resolution* in question it has been observed that "just for the Western countries it would have been the opportunity to assert forcefully that peace is an individual and collective right involving specific obligations for States *beginning with the disarmament and the economic global governance in respect of economic and social rights* in the light of the principle of interdependence and indivisibility of all human rights" [20]: it is so confirmed the assumption that the right to peace is founded on disarmament, namely the prohibition of armed conflict in all its forms and justifications. The reference to the *global economy governance* confirms, then, what we have pointed out about the utopian, and as such useless, approach, of the June 24, 2016 *Resolution*, with the resulting depletion of any content of state sovereignty. The rest is just the usual panegyric of human rights that, as such, far from promoting them, trivializes them.

Given that, between the States that have approved the *Resolution*, numerous were those that, in the field of fundamental rights and freedoms of the individual, should just keep quiet, there is also to say that the text of the *Resolution* did not incorporate the previously prepared and proposed by the Consultative Committee where, in addition to a *right to peace* and not right to *enjoy peace*, referring not only to individuals but also to the peoples, *individually or jointly* States (?) are indicated as the *main counterpart of the right to peace* [21]. Therefore, a right and as such should be *operated* in respect of States which violate it: before which judicial instance, how and when, is not provided by the *Resolution* either in its draft nor in its text as finally approved.

It was also noted that the holders of the *right* "in the traditional form of the *jus ad pacem* therefore remain the States" [20] and not the individuals.

Then, being the individuals mere beneficiaries of peace and not the holders of the alleged *right*, each State may have a claim to its *right to peace* against any other State. And if a State becomes defaulting, the State alleging the violation of his *right* what does it do? It suffers the violation? It reacts with the use of military force failing, even it, the obligation? He cites the defaulting State in legal proceedings? And, in what jurisdiction?

It is clear in this regard that we are facing a fanta-legal elaboration that would be based essentially on the illegitimacy for every State to exercise its sovereign powers relating to the *jus ad bellum*, with the addition of a superfluous reference to the provisions of the UN Charter about the prohibition of the use of force and the obligation to peacefully resolve international disputes. Then, as if reality did not say anything and as if from 1945 to date nothing had happened in the opposite direction; or as if the UN had actually guaranteed during its seventy-one years of peace and international security.

It was also noted that "The fact that in this majority there are countries whose governments do not stand for the respect of human rights, democracy and the rule of law, highlights the lack of political intelligence and the bad conscience of those governments that profess loyalty to universal values and at the same time excel in producing and exporting weapons and unleash wars and armed interventions outside of international legality" [20].

Which is to say that if those countries governed with "bad conscience" had also them approved and undersigned the *Resolution* at issue, the would have ceased to produce and export weapons and unleash wars: here the ingenuity overcomes the intelligence.

How it is possible to say that although the *Resolution* is expression of *soft law*, that is of *lightweight mandatory*, it would contain, in substance, "the principles of *jus cogens*, highly mandatory" [20], is a statement impossible to decipher for its inherent contradictions and it is impossible to give to it a logical meaning.

5. Conclusion

Conclusively, it is unthinkable to promote the development of the international legal order, a more precise *organization* of its general legislation, and thus develop a renewed general theory of international law, regardless of the phenomenal reality, as well as the retrospective and historical perspective; or, worse, proposing sentences that, while politically and morally assessable as new general principles of international law which, as such, should be methodologically traced as the source of their legitimacy and their effectiveness in the collective legal consciousness of States that certainly is not the one manifested in the context of the Human Rights Council of the United Nations or in the framework of the UN General Assembly, where the positions of each State and the correlative voting expressions are too often dependent on political and economic circumstances and on power relations.

The general principle that, as mentioned earlier, would be represented by rules of *jus cogens*, should be identified in its existence and effectiveness and in the context of historical and political circumstances, in the concrete behaviour of States in their international relations in accordance with their common *feeling* of relating to a non-derogable obligation.

The general principles and/or the *jus cogens* rules cannot be the way of *feel* the spirits willing but utopian, and even less they can be the expressions of political intentionality. If it was so, it would compromise the fundamental relationship that justifies the existence and legitimacy of any legal rule: it is not through a legal rule that one a political outcome can be achieved, even in the noblest sense of the expression, but the opposite is true, namely that the legal rule comes from the

phenomenal reality and the way of being of political relations that constitutes the collective legal consciousness abovementioned.

The reasoning that is implicitly contested and unknowingly operates on the basis of an assumption, of an alleged essentially and inherently authoritarian that, beyond the role of a misunderstood *irenics*, is not aware of consolidating through the proposal of a general disarmament and a corresponding general prohibition of armed conflict, the balance of power of certain political and economic hegemonic States against weak States.

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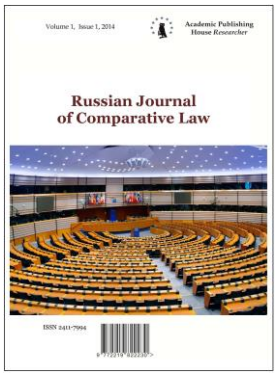

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The Human Embryo in the Case-Law of the European Court of Human Rights

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Abstract

This paper presents an analysis of the case-law of the European Court of Human Rights regarding the status of a human embryo. At the beginning, the author makes an overview of the legal documents on the subject-matter produced by intergovernmental organisations on both universal and regional levels. The overview covers also a national legislation of Australia, China, Japan, United States and most of the European states. Further the paper elaborates on the decisions and judgments of the European Court adopted for the last fifty five years. The summary of this case-law is provided in a chronological order from the oldest to the newest one. Finally, the author comments on the practice of the European Court of Human Rights with regard to the issue of the human embryo legal position. The case-law in question certifies that human embryo cannot be considered "a thing", but at the same time it is still not "a person" for the purposes of the Article 2 of the Convention.

Keywords: European Court of Human Rights, European Convention on Human Rights, Court, Convention, human embryo, abortion, embryo research.

> *«If the term „everyone" in Art. 2 ECHR included embryos, research with human embryos, including the mixing of a human embryo with an animal embryo, which ends with the destruction of the embryo would be prohibited»* [1].
>
> Marion Weschka

1. Introduction

Recently the Grand Chamber of the European Court of Human Rights (hereinafter also the Court) issued a judgment in the case of *Parrillo v. Italy* [2], which concerns the issue of human embryo research. This is not the first judgment of this Court, where it has dealt with a sensitive question of a legal status of a human embryo. The issue of the protection of life of an unborn child was a subject to a large discussion, *inter alia*, in a majority of cases concerning abortion. The topic also relates to certain aspects of the right to private life.

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The aim of this paper is to answer the question, what is an attitude of the European Court to the position of a human embryo. Is it a property of parents, that should be protected under Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereinafter also the 'Convention') or is it a person, whose life deserves protection under Article 2 of the Convention?

The current study consists of three main parts. At the beginning, the author will focus on the approaches taken by different international organisations and states towards regulation of the research on human embryos. The overview of such approaches will give us a possibility to understand whether there exists a consensus toward the subject-matter and how the issue is regulated all over the world. The European Court of Human Rights does not act in a vacuum; it thoroughly follows legal tendencies not only in the Council of Europe (hereinafter also the 'CoE') Member States, but also in other countries and intergovernmental organisations. Then the paper will concentrate on the outline of the up to date Court's case-law relating to a human embryo position. The judgments and the decisions will be provided in a chronological order in view of the fact that the Convention is a living instrument, which reflects changes in society. Finally, the author will provide a reader with her reflections on the problem of whether the protection of human rights of a person begins with the day of birth or already from the moment of conception.

2. Materials and methods

The main sources for writing this article became the case-law of the European Court of Human Rights, monographs on the subject-matter, journal publications and Internet archives. The study used the basic scientific methods such as the historical method, analysis, synthesis and the method of comparative law. The use of historical method allowed to describe the practice of the Court regarding the human embryo status in a chronological order. Analysis and synthesis always complement one another. Every synthesis is built upon the results of a preceding analysis, and every analysis requires a subsequent synthesis to verify the results. The author applied these two methods throughout the paper. The method of comparative law served as a tool for defining the difference in views on the subject from the sides of the states and intergovernmental organisations.

3. Discussion

1. Regulation of human embryo research in the world

The topic of the status embryo is closely connected with the question of human embryo research. As we will see further, the positions of the main subjects of international law (states and intergovernmental organisations) in this regards are quite polar. If one considers an embryo to be already a human, there can be no any research opportunities with this regard. When one contemplates that it is not a human being yet, then the research using human embryos may become possible. Each rule, nonetheless, has its exceptions. There exist states, which prohibit research on embryos, but allow for abortions (for example, Italy). Similarly, there are countries, where abortions are strictly prohibited and at the same time some medical experiments on humans are permitted (This is the case of Poland).

The prohibition on human embryo research on national level varies considerably from the state to the state [3; 4; 5; 6]. Moreover, the policies in this respect are not stable and change in time [7; 8]. Politics and approaches taken by significant international intergovernmental organisations strongly influence the position of states [9]. At the international level, many such organisations have undertaken efforts to regulate human embryo research. Nevertheless, only a few of them have been successful and only to a limited extent.

The United Nations, its bodies and related to it organisations have issued a number of declarations relating to the subject-matter. None of them is, however, of binding nature. Being the source of soft-law they are difficult to enforce. An excellent example is the **Universal Declaration on the Human Genome and Human Rights**, which in its preamble specifies that "research on the human genome … should fully respect human dignity, freedom and human rights" [10]. This declaration does not prohibit human embryo research directly, but calls only for the respect of human dignity.

The **International Declaration on Human Genetic Data** [11] of 2003 in its Article 5 specifies that human genetic data and human proteomic data may be collected, processed and stored. Though the purposes of the uses of this data are restricted and include a few reasons, namely, diagnosis and health care, scientific research, forensic medicine and legal proceedings.

Apart from this, the data may be utilised for any other purpose consistent with the Universal Declaration on the Human Genome and Human Rights and the international law of human rights.

More specifically, the **Declaration on Human Cloning** [12] introduces a ban on cloning of human beings. This document is also of a soft-law nature. Observers reiterate that this declaration is "a weak, non-binding political statement" [13]. Similar status has also the UNESCO **Universal Declaration on Bioethics and Human Rights** [14] adopted the same year. Additional information on the subject also draws from universal professional standards of the World Medical Association (WMA) [15] and the International Society for Stem Cell Research [16].

On the European continent, the two strongest regional organisations dealing with the subject of human embryo and human rights are *the Council of Europe and the European Union*. Regarding the first of them, the Parliamentary Assembly of the Council of Europe in 1986 adopted the **Recommendation 1046 (1986)** [17], which forbids any creation of human embryos for the purposes of research. It 1989 it confirmed this approach by adopting the **Recommendation 1100 (1989)** [18].

On 4 April 1997, the CoE had adopted the first legally binding international text, which partially regulates the area of human embryo research, namely the **Convention on Human Rights and Biomedicine** ("Oviedo Convention") [19]. In accordance with Article 2 of this treaty the interests of the human being shall prevail over the interest of science. Article 18 of the Convention specifies that creation of human embryos for research purposes is prohibited. In the states where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo. The meaning of the phrase "adequate protection" is not provided. The Oviedo Convention entered into force in December 1999. It was ratified by 29 out of 47 CoE member states [20]. Most of them have membership in the EU. Germany, the United Kingdom and Russia are not the parties to this international treaty. For the Czech Republic the treaty entered into force already in 2001 [20].

In 2007, the **Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research** gained entry into force. This document is quite vague and envisions that research shall not involve risks and burdens to the human being disproportionate to its potential benefits. It is unclear who is responsible for evaluation of such proportionality. Currently, only 10 CoE member states have ratified this document [21]. The Czech Republic is not among them.

One of the newest texts on the subject is the **Resolution 1934 (2013)** of the CoE Parliamentary Assembly on ethics in science [22], which in para. 3 welcomes the UNESCO initiative to establish the World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) with the view of engaging in ongoing ethical reflection and exploring the possibilities of drafting and periodically reviewing a set of fundamental ethical principles based on the Universal Declaration of Human Rights.

The European Union also has a comparably wide range of documents dealing with the research on human embryo. In accordance with Article 3 of the **Charter of Fundamental Rights of the European Union** [23] the reproductive cloning of human beings is prohibited. The European Group on Ethics and Science in New Technologies (EGE) at the European Commission adopted a number of opinions [24, 25] on the matter. In particular, it specifies that stem cell research aims to alleviate severe human suffering, however, it should comply with ethical and legal requirements [25]. Accordingly, the EU declines to finance human embryo research leading to the destruction of human embryos [26].

In the other continents, e.g. in Africa and America, the regional intergovernmental organisations also were established with the goal to protect human rights and to promote human dignity. Each of the human right treaties produced by the bodies of the African Union and the Organisation of American States contain provisions on protection of human life. As to the matter of regulation of the human embryo research, the **African Union** does not have any specific legal document for it [27]. The author was not able to find any particular treaty regulation on a legal status of human embryo also within the frames of the **Organisation of American States**. Some aspects of the topic may be found in the case-law of the **Inter-American Court of Human Rights**. In its judgment in the case of *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica* [28], the Inter-American Court has conducted an analysis of the existing in the world instruments regulating the legal status of embryo. In concluded that the human embryo, prior to implantation,

is not covered by the terms of Article 4 of the American Convention on Human Rights (the right to life) [28]. It added that the risk of embryonic loss is present both in IVF and in natural pregnancy.

Let us take a brief look at the diversity of approaches taken by the various state legislative bodies in adjusting human embryo research. In **Australia**, Research Involving Human Embryos Act 2002 has been amended many times [29]. The last changes brought the law of 2014 [30] setting forth criminal responsibility for a number of offences, e.g. use of excess ART embryo and activities involving use of human eggs. The Australian National Health and Medical Research Council allow research on embryos only on condition of licences.

In **China** there are no binding laws prohibiting any type of research on human embryos. The Ministry of Science and Technology and the Ministry of Health of China in 2003 adopted the Ethical Guiding Principles on Human Embryonic Stem Cell Research [31]. Principle 4 states: "Any research aiming at human reproductive cloning shall be prohibited." Nonetheless, this document lacks enforcement mechanisms.

Similar is the situation in **Japan**. The Japanese legislative body has not issued any laws regulating human embryo research to date, although the ministries produced a number of soft-law documents [32]. One of them is Guidelines on clinical research using human stem cells [33]. This document is in general permissive with respect to many types of research including human embryonic cells.

Laws of the **United States** do not prohibit research on human embryos directly. Nonetheless, since 1996 a ban on the use of US Department of Health and Human Services funds for research on the creation of human embryos and research that involved the injury or destruction of human embryos has existed in practice [34]. Every fiscal year the US Congress has passed bills, which totally banned all federal government funding of human embryo research. This ban was partially reversed in 2001 when the National Institutes of Health announced it would fund selective research on human pluripotent stem cells [35]. Today, in view of the progress of science in the world, there is a strong debate in the US as to the need of such research support.

In **Europe**, despite membership of the states in significant intergovernmental organisations such as the European Union (EU) and the Council of Europe (CoE), there is also no consensus with regard to research on human embryo. Summary on regulation of stem cell research in some EU countries may be found on the web of EuroStemCell [36]. In addition, Research division of the European Court of Human Rights for the purposes of rendering judgment in the above mentioned case of *Parrillo v. Italy* conducted a comparative analysis of the legislation of the *CoE Member States* concerning prohibition or permission of research involving human embryo. These comparative law materials show that the legislation of Belgium, Sweden and the United Kingdom allow scientific research on human embryos and the creation of embryos for that purpose (*Parrillo case,* cited above, § 69). In some other countries, such as the Czech Republic, France, Greece, Hungary, the Netherlands, the creation of embryos for scientific research is banned; nevertheless, research using surplus embryos is generally allowed under certain conditions (*Parrillo case,* cited above, § 70). The law of Andorra, Latvia, Croatia and Malta expressly prohibits any research on embryonic stem cells. Meanwhile in Austria, the statutory ban concerns only "totipotent" embryonic cells (*Parrillo case,* cited above, § 74). In many countries, human embryo research is not regulated, but practice shows that such research is conducted. This is the case of Russia, for instance (*Parrillo case,* cited above, § 76).

The outline of this study on the regulation of human embryo research and the legal status of an embryo in the international organisations and the states shows that the approaches introduced by them are rather diverse. The subjects of international law may now consonantly answer to the question of whether the life of a person should be protected from the moment of conception and the destruction of an embryo is impermissible under all circumstances. Given the title and the main objective of the paper, we continue with an examination of the practice of the European Court of Human Rights.

2. Overview of the Court's case-law regarding a status of human embryo

The Court had elaborated on the legal status of human embryo in a number of its cases. Not all of them concerned directly the embryo's right to life. Furthermore, the Court has never recognised the embryo as a direct victim of a breach of the Convention. Most of the cases at issue related to the right of parents to have or not to have children. It was recognised that though

expressly not specified in the Convention, this right is within the scope of Article 8 of the Convention [37].

Compatibility of abortion with the right to life (Article 2) was subject to the Court examination almost from the very beginning [38]. However, in sixties and seventies there were no judgments, but only the decisions to the topic as the complaints in this regards were raised *in abstracto* [39]. For example, in the case of *Brüggemann and Scheuten v. Germany* [40] the European Commission of Human Rights, given the context of the application, did not find it necessary to decide, whether the unborn child is to be considered as 'life' in the sense of Article 2 of the Convention.

In eighties, the issue of abortion and life of an unborn child was raised before the Court by the applicants in the context of the right to effective remedy. This case concerned the group of people campaigning against abortion [41]. When solving the case, the Court, nevertheless, did not decide neither on Article 2, nor on Article 8 of the Convention.

The judgment of the Court in the well-known case of *Open Door and Dublin Well Woman v. Ireland* [42] relating to the right to impart information on abortion was given in 1992. The applicants alleged that the national courts' injunction, restraining them from assisting pregnant women to travel abroad to obtain abortions, infringed their rights under Article 10 of the Convention. The Irish government contested these claims should be interpreted against the background of, *inter alia*, Article 2 of the Convention. In this regard, the Court observed that "at the outset that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2…" [42] and refused to deal with these claims.

The notion "human embryo" has appeared in the practice of the Court in 1994 in the case of *Phyllis BOWMAN and the Society for the Protection of Unborn Children (SPUC) v. the United Kingdom* [43]. The applicants in this case did not, however, complain of a violation of their parental rights. The case concerned the issue of freedom of expression. Mrs Bowman distributed leaflets stating "We are not telling you how to vote but it's essential for you to check Candidates' voting intentions on abortion and on *the use of the human embryo as a guinea-pig*." The leaflet contained information on the three candidates from the major political parties and outlined their publicly stated views on the subject-matter. On the basis of this, Mrs Bowman was charged for promoting or procuring the election. Before the Court the applicants allege inability to express freely their opinion on the issue as contrary to Article 10 of the Convention. The part of the application submitted in respect of the Society for the Protection of Unborn Children (SPUC) was declared inadmissible *ratione personae* in view of the fact that it was never a subject to domestic proceedings and could not claim to be a victim of a violation of the Convention.

The complaints of Mrs Bowman under Article 10 of the Convention were admissible and the Court has dealt with them in a judgment given a few years later [44]. It has found a violation of this provision of the Convention noting that states have certain margin of appreciation in striking balance between rights to free elections and freedom of expression. Nevertheless, the law in question operated as total barrier to applicant's publishing information with a view to influence voters in favour of anti-abortion candidate and therefore the restriction was disproportionate. In this judgment, the Court did not express any opinion as to possible legal status of an embryo focusing purely on the freedom of expression without analysing the truthfulness and legality of the content of leaflets.

In 2004 the Grand Chamber of the Court gave a judgment in the case of *Vo. v. France* [45], the milestone case with regard to the possible protection of life of an unborn child. Deciding it, the Court was given an opportunity to hold whether the provisions of Article 2 of the Convention extend also to human embryos. The applicant in the instant case submitted that there had been a breach of the right to life on the ground that the conduct of a doctor responsible for the death of her child *in utero* was not classified as homicide.

The Court conducted a detailed analysis with regard to the issue of the beginning of life within the meaning of the Convention and whether the unborn child has such a right. It noted that "Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define "everyone" ("toute personne") whose "life" is protected by the Convention" (*Vo case*, cited above, § 75). Further the Court specified that "*…the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention* and that if the unborn do

have a "right" to "life", it is implicitly limited by the mother's rights and interests" (*Vo case*, cited above, § 80). It observed that the issue of when the right to life begins comes within the margin of appreciation of the CoE member states. As regards to France, the unborn child lacks a clear legal status in its law. Nonetheless, it does not mean that a human embryo is deprived of all protection. According to the Court, the applicant had a possibility to lodge an action for damages against the French authorities on account of doctor's alleged negligence. In view of this, it was concluded that "…even assuming that Article 2 was applicable in the instant case…, there has been no violation of Article 2 of the Convention" (*Vo case*, cited above, § 95).

The judgment was accompanied with a number of separate opinions. Judges Rozakis, Caflisch, Fischbach, Lorenzen and Thomassen submitted that given the fact that the protection of an unborn child is far narrower in scope that the one given to a child after birth, Article 2 of the Convention is inapplicable in this case [46]. In its dissenting opinion Judge Ress wrote: "Since *I consider that Article 2 applies to human beings even before they are born*, an interpretation which seems to me to be consistent with the approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the foetus against the negligent acts of third parties, I find that there has been a violation of Article 2 of the Convention" [47]. Judges Mularoni and Strážnická when further observing that "Article 2 must be interpreted in an evolutive manner so that the great dangers currently facing human life can be confronted. This is made necessary by the potential that exists for genetic manipulation and *the risk that scientific results will be used for a purpose that undermines the dignity and identity of the human being*" [48]. Therefore, in their opinion, the Court should have found an infringement of the Convention.

In the case of *Znamenskaya v. Russia* [49] the Court decided on the status of a stillbirth. In the thirty-fifth week of the applicant's pregnancy, the embryo asphyxiated in her womb. The birth certificate issued by the authorities contained a name of Mr Z., the applicant's husband, indicated as a father of the stillbirth. The applicant contested before domestic courts this registration entry asking for amendment in the birth register that would specify the name of biological father of unborn child, Mr G. The existence of a relationship between the applicant and G. was undisputed and his paternity was not contested. The courts, however, refused to examine the case as a civil action on the ground that the child had not acquired civil rights.

The Court observed that bearing in mind that the applicant must have developed a strong bond with the embryo, an inability to conduct changes in the birth certificate undoubtedly affected her private life guaranteed by Article 8. In its opinion, the situation where a legal presumption is allowed to prevail over biological and social reality is not compatible with the state's obligations under the Convention. Accordingly, there has been a violation of Article 8. In their dissenting opinion, Judges Rozakis, Botoucharova and Hajiyev noted that they are not ready to accept that the applicant's private life encompasses a right to ask for recognition of the paternity of the stillborn child, as part of the states' positive obligations. As to them, this is the child, who could have had, if born alive, a legitimate expectation of being recognised by a biological father as part of his/her family and private life [50].

In 2007 the Court has dealt again with the question of when the life begins in the case of *Evans v. the United Kingdom* [51]. The applicant, Ms Natallie Evans and her partner, Mr J., attended a clinic for reproduction treatment, which resulted in creation of six embryos. A few weeks later she underwent an operation to remove her ovaries. The doctors ask her to wait a few years before the implantation of the embryos. In one year the relationship with a partner terminated and he withdraw the consent for the continued storage and implantation of fertilised eggs.

The applicant introduced before the Court a number of complaints. One of them related to Article 2 of the Convention, in view of the fact that according to the applicant the provisions of English law requiring the embryos to be destroyed once J. withdrew his consent to their continued storage violated the embryos' right to life. The Grand Chamber of the Court referring to the already mentioned case *Vo. v. France* [45], concluded that *the embryos created by the applicant and J. do not have a right to life within the meaning of Article 2 of the Convention*. Therefore, there had been no breach of that provision.

The case of *A, B and C v. Ireland* [51] concerned the restrictions on obtaining an abortion in Ireland. The case is interesting for us from the point of view of the rights of mother to terminate the life of un unborn child. Here the Court stressed that although there is no European consensus on the scientific and legal definition of the beginning of life, there exist a clear consensus on the

minimum standards for abortion services necessary to preserve a woman's health and well-being. Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi in their joint partly dissenting opinion noted that "…the Court was not called upon in this case to answer the difficult question of "when life begins". This was not the issue before the Court, and undoubtedly the Court is not well equipped to deal effectively with it. The issue before the Court was whether, regardless of when life begins – before birth or not – the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: *… the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus"* [52].

The similar thoughts also were expressed in the Court's judgment of 2011 concerning Poland. The case of *R.R. v. Poland* [53] related to a lack of access to prenatal tests resulting in inability to have an abortion on grounds of foetal abnormality. Ms R.R. considered that she had been subjected to inhuman and degrading treatment as a result of the doctors' intentional failure to provide necessary medical treatment in the form of timely prenatal examinations that would have allowed her to take a decision as to whether to continue or terminate her pregnancy. After examination of all the circumstances of the case the Court held that the rights of the applicant under Article 3 and 8 of the Convention were infringed. It again stressed that although there is no European consensus in respect of the period of time when the life begins, most of the CoE states have in their legislation *resolved the conflicting rights of the foetus and the mother in favour of greater access to abortion* (*R.R. case,* cited above, § 186).

The same year the Court has dealt also with the issue of prohibition under national law on the use of ova and sperm from donors for the purposes of *in vintro* fertilisation in the case of *S.H. and Others v. Austria* [54]. The question of whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity was one of the raised by the Court. It was observed that Austrian law does not prohibit going abroad to seek treatment of infertility and that in the event of a successful treatment it contains clear rules that respect the wishes of the parents. Therefore, the Court came to conclusion that there had been no violation of the rights of the applicants under Articles 8 and 14 of the Convention. It, however, did not decide on whether or not the prohibition of gamete donation itself is justified under the Convention. It is of interest to look at the separate opinions to this judgement as regards to the judges' attitude to a position of a human embryo.

Judge de Gaetano expressed an idea that *prohibition of the freezing and destruction of human embryos* "like the prohibitions against racism, unjust discrimination and the marginalisation of the ill and the disabled – *is not a denial of fundamental human rights but a positive acknowledgment and advancement of the same*" [55]. According to him, neither Article 8, nor Article 12 of the Convention can be construed as granting a right to conceive a child at any cost. The "desire" for a child cannot become an absolute goal which overrides the dignity of human life [55]. Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria dissented from the majority decision. They referred to Articles 12 and 15 of the International Covenant on Economic, Social and Cultural Rights [56] which recognise the right of everyone to enjoy the benefits of scientific progress and the right to enjoy the highest standard of physical and mental health [57]. In their opinion there had been a breach of Article 8 of the Convention.

With regard to the previously discussed case, it is of interest to describe the Court's approach to medically assisted procreation using a donor in respect of the same-sex couples. In the case of *Gas and Dubois v. France* [58], the Court observed that the provisions of the French law that anonymous donor insemination is only confined to infertile heterosexual couples cannot be seen as a violation of the Convention in the applicants' case as far as they could not claim to be a victim of it (*Gas and Dubois,* cited above, § 63). The case in question concerned refusal of simple adoption order in favour of homosexual partner of biological mother.

Ban on screening human embryos prior to *in vitro* fertilisation was subject to assessment in the case of *Costa and Pavan v. Italy* [59]. The applicants allege before the Court that being healthy carriers of cystic fibrosis they had no access to preimplantation genetic diagnosis for the purposes of selecting an embryo unaffected by the disease. They complained that the required technique was available to the other categories of persons and relied on Articles 8 and 14 of the Convention. It was observed that the Italian legislation lacks consistency in this area. There exists a possibility of an

abortion on medical grounds if the fœtus turns out to be affected by the disease, but no such a right in advance to prevent probable negative consequences. In view of this, the Court concluded that such a situation is contrary to the Convention.

The case of *Knecht v. Romania* [60] concerned uncooperative conduct of local authorities in returning of seized frozen embryos that the applicant deposited with a private clinic. The applicant's complaint under Article 8 of the Convention specified a breach of her right to a private and family life in so far as she was prevented from becoming a parent by means of an IVF procedure. She submitted that Romania failed to allow her to transfer her embryos into a specialised clinic of her choice. The Court observed that one year after the application was lodged with it, Romanian court expressly acknowledged that the applicant had suffered a breach of her rights under Article 8 and offered her the required redress, namely the embryos had been transferred into a specialised clinic. In view of this, the conclusion was that the Convention was not violated.

On 24 June 2014, the Court gave two judgments in cases relating to a specific aspect of the status of an embryo, *Mennesson and Others v. France* [61] and *Labassee v. France* [62]. The cases concerned recognition in France of parent-child relationships in respect of artificial insemination, which took place abroad. The applicants after a number of unsuccessful attempts to conceive a child using *in vitro* fertilisation (IVF) with their own gametes, decided to go to the United States, where they underwent IVF using own gametes and eggs from a donor. The US doctors implanted the fertilised embryos in the uterus of another woman. Given that in the USA the process in question is legal, the applicants entered into the gestational surrogacy agreements. The surrogate mothers gave birth to two twins (in the first case) and a girl (in the second case).

The couple of Mr and Mrs Mennesson entered into surrogacy agreement in California and as a result, the Supreme Court of California by its judgment recognised that they should be recorded in the birth certificate as the father and mother of the twins. The French authorities, however, refused to recognise these records in birth certificate as far as according to national legislation any reproductive or gestational surrogacy agreement was null and void.

Mr and Mrs Labassee did not challenge the refusal to register the birth of their daughter Juliette, but sought to have the legal relationship recognised on the basis of *de facto* enjoyment of status (in French - "possession d'état"). In France they were able to obtain an "acte de notoriété", a document issued by a judge attesting to the status of a child, which certifies the existence of a de facto parent-child relationship. However, the public prosecutor refused to enter this record into the register. Therefore, the couple was forced to take the matter to court.

In both cases the Court concluded that Article 8 of the Convention was not violated in respect of the parents. It in particular noted that there is no consensus in Europe both on the lawfulness of surrogacy arrangements and on the legal recognition of the relationship between intended parents and children lawfully conceived abroad as a result of such arrangements. This lack of consensus reflects the fact that recourse to surrogacy raised difficult ethical issues. Consequently, the CoE member states have a wide margin of appreciation in making surrogacy-related decisions. The Court also specified that the applicants had been able to settle in France shortly after the birth of the children and live there together. There was nothing to suggest that they were at risk of being separated by the authorities because of their situation in the eyes of French law. Given the practical implications for the applicants' family life and the respondent state's margin of appreciation, the Court held that the French authorities acted in compliance with the Convention.

As regards to the applicants' children, which were born in the US on the basis of the surrogacy agreements, the Court observed that although Article 8 of the Convention does not guarantee a right to obtain a particular nationality, the fact remains that nationality is a component of individual identity and the existing uncertainty may have negative consequences. The fact that the applicants' children were not identified under French law as their own children has implications in terms of the inheritance rights. In view of the importance to be attached to the child's best interests, the Court concluded that there had been a breach of the applicant children's right to respect for their private life under Article 8 of the Convention.

A few days later the Court issued a decision in a case with a similar background, namely *D. and Others v. Belgium* [63]. It concerned the interests of a child who had been born in Ukraine from a surrogate pregnancy, which was signed by the applicants, two Belgian nationals. The Belgian authorities went even further when refused to authorise the arrival of the child on its

national territory. The Court, however, did not find an infringement of the Convention in this case in view of the further developments in the case. When the application was already in the Court, the state authorities at the end granted of a laissez-passer for the child and the family settled in Belgium. It was observed that the Convention could not oblige the CoE member states to authorise entry to their territory of children born to a surrogate mother without the national authorities having a prior opportunity to conduct certain relevant legal checks. Given that, the applicants could reasonably have foreseen that the procedure to have the family relationship recognised and to take the child to Belgium would necessarily take a certain time. In addition, the time taken to obtain the laissez-passer had, at least in part, been attributable to the applicants themselves as they had not submitted sufficient evidence to demonstrate their biological ties to the child. Thus, in refusing to authorise the child's entry to the national territory, the Belgian state had acted within the limits of the margin of appreciation enjoyed by it.

In 2015 the chamber of the Court gave a judgment in the case of *Paradiso and Campanelli v. Italy* [64], where it held that Article 8 of the Convention was violated in view of the fact that the Italian authorities placed in social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract. The applicants in the case are two Italian nationals, Ms Donatina Paradiso and Mr Giovanni Campanelli and, according to the birth certificate issued in Russia, their son, Teodoro Campanelli. The first two applicants went to a Moscow-based clinic, which specialised in assisted-reproduction techniques and entered into an agreement with a Russian company. After successful in vitro fertilisation – supposedly carried out using the second applicant's sperm – two embryos "belonging to them" were implanted in the womb of a surrogate mother. A baby was born in February 2011 and in accordance with Russian law, the applicants were registered as the baby's parents. When returned to Italy and asked to register the birth certificate, they were placed under investigation for "misrepresentation of civil status" and violation of the adoption legislation. At the court's request, a DNA test was carried out, which showed that there was no genetic link between the second applicant and the child. On the basis of this, a domestic court decided to remove the child from the applicants. The child was placed in a children's home in a locality that was unknown to the applicants and they were forbidden from having contact with the child. Moreover, the child was adopted by the other family and had received a new identity in April 2013. It meant that he had had no official existence for more than two years.

Before the Court the applicants complained of the refusal to recognise the legal parent-child relationship established abroad alleging a breach of a number of provisions of the Convention. The Court noted that the prohibition in Italy on using surrogacy arrangements could not take precedence over the best interests of the child, in spite of the absence of any biological relationship. Reiterating that the removal of a child from the family setting was an extreme measure that could be justified only in the event of immediate danger to that child, the Court concluded that, in the present case, the conditions justifying a removal had not been met.

The Court took into account also explanations given by a lawyer of the Russian company, responsible for the process of realisation of the surrogacy agreement. It was submitted that the Russian law permits to circumvent the requirement to have a genetic link with one of the future parents for the purposes of issuing a birth certificate by purchasing the embryos, which thus became "one's own" embryos. Nonetheless, given that the child has developed emotional ties with the foster family with whom he was placed at the beginning of 2013, the Court reiterated that the finding of a violation in the case cannot be understood as obliging the Italy to return the child to the applicants.

On 1 June 2015, the case of *Paradiso and Campanelli v. Italy* was referred to the Grand Chamber of the Court at the request of the Italian government. On 9 December 2015, the Court held a Grand Chamber hearing in the case. In December of 2016, the final judgment of the Court was not given yet.

The last and the newest to the moment judgment to be discussed in the current section is the one in the case of *Parrillo v. Italy* [2]. The case raised a question of possibility to use embryos for the purposes of scientific research. The applicant in this case, Ms Adelina Parrillo, complained before the Court under Article 8 of the Convention and Article 1 of protocol No. 1 to the Convention about inability to donate her embryos to scientific institution. The Court ruled that the Convention was not breached. Given the legal prohibition in Italy of conducting the embryonic cell research,

the Court agreed that Italy did not overstep its margin of appreciation. It is of interest to have a look on the Court's argumentation regarding the second complained of provision. The Court decided not to provide any explanation as to the moment when human life begins, but strongly reiterated that "*human embryos cannot be reduced to "possessions" within the meaning of that provision* [Article 1 of protocol No. 1]" (*Parrillo case,* cited above, § 215).

In the current section the author described in a chronological order, how the Court in its practice assessed the status of human embryos. In the next part of this article there will be given an analysis of this case-law with the corresponding reflections.

3. Reflections on the status of a human embryo under the Convention

The provided overview of the Court's case-law has shown that the issue of the legal status of a human embryo was the subject of the Court's examination for a period of over fifty-five years. For this period, the Court has never ruled specifically on the rights of an embryo. If the embryo was developed into a child, the Court later could give a judgment in respect of the child. When a life of an embryo was terminated at the stage from the conception and before the birth, the Court in its judgments has dealt only with the rights of parents. Even when the question of the status of embryo was raised by the parties, the Court never recognised an embryo as a victim in the proceedings before it. It is well known that a victim status is one of the key criteria for an admissibility of an application. Without having this status "persons" may not obtain any fulfilment of their rights.

For the purposes of the present study, one of the most important cases is the *Vo v. France,* when the Court clearly stated the unborn child (embryo) may not be regarded a "person" directly protected by Article 2 of the Convention. From this we can derive that the human embryo does not have a right to life under this international treaty. Of course, not all of the judges of the Court agree with such an interpretation of the Convention. Some of them already in 2004 considered that Article 2 applies to human beings even before their birth [47]. For the other judges of the Court the rights of the mother, her well-being and health are more valuable than the ones of the foetus [50]. Of course, there exist a huge variety of specific circumstances, which influence decision making practice of the Court. These are different situations, when a mother wants to give birth to a child and when she does not possess such a wish. The attitude of a society as to the right of an unborn child to see the day light is not unified. In our opinion, there is no one answer to this question. Both mother and a child deserve protection under the Convention, but what to do in the time when their interests are contravene.

In its judgment in the case of *Evans v. the United Kingdom* of 2007 the Court held that the embryos created by the applicant and her partner do not have a right to life within the meaning of Article 2 of the Convention. In 2015 the issue was again raised by the parties in the case of *Parrillo v. Italy*. Here the Court, nonetheless, concluded that it is not necessary to examine the sensitive and controversial question of when human life begins under Article 2 of the Convention, as it is not an issue in the instant case. In its concurring opinion, Judge Pinto de Albuquerque noted: "In this context, it is crucially important to note that the Grand Chamber did not cite paragraph 56 from *Evans v. the United Kingdom* (cited above) in which the Court had stated that "the embryos created by the applicant and J. [did] not have a right to life within the meaning of Article 2 of the Convention", nor the Chamber judgment of 7 March 2006 in that case, § 46, nor even the classic statement of principle in *Vo v. France* ([GC], no. 53924/00, § 82, ECHR 2004). This omission is noteworthy. Not only does it reflect the Grand Chamber's uneasiness with the Evans anti-life principle, but furthermore it consolidates the opposite principle set out in paragraph 59 of *Costa and Pavan* that the embryo is an "other", a subject with a legal status that could and should be weighed against the legal status of the progenitors…" This opinion in the most recent case of the Court, on one hand, shows, that there could be changes in the legal position of an embryo in the future case-law of the Court. On the other hand, the fact that the Court refused to rule on the subject may at the same time signify that it is not ready to recognise the embryo's right to life.

It is possible to say that the discussion as to the status of an embryo became more vivid after 2000, which can be explained by expansion of the IVF technologies and their mass utilisation. In a number of cases the Court admitted the rights of children, which were born in a result of a gestational surrogacy agreement, when the doctors implanted the fertilised embryos in the uterus of another woman. In some states of the world, such as Russia, Ukraine and the United States, persons who enter in a surrogacy contract may be recorded into the birth certificates of such children as their parents. The Court confirmed that in view of the best interests of a child, it is

important to recognise the rights of the children at issue to inherit and to obtain a residence permit in the country of origin of their "parents". Moreover, even when the child does not have a biological link with such parents, when the embryos were only purchased by them, the Court may find a breach of Article 8 of the Convention given the fact that the child was removed from "parents" and put into social-care services.

With regards to termination of existence of the embryos by means of destruction, the Court takes an opposite approach. In the case of *S.H. and Others v. Austria*, Judge de Gaetano expressed an opinion that prohibition of the freezing and destruction of human embryos, like the prohibitions against racism, serves as an acknowledgment of the human rights [55]. Similarly, in the *Parrillo case*, the Court came to conclusion that the applicant has no right to forward her embryos to the scientific institution for the purposes of research, where they would be destroyed.

Answering the question, whether the embryos could be considered a parents' property in the sense of Article 1 of Protocol No. 1 to the Convention, the Court gave a negative response. In the already mentioned judgment in the case of *Parrillo v. Italy* it noted that human embryos cannot be reduced to "possessions" within the meaning of that provision. If the human embryos are not a thing, which can be possessed by somebody, but not yet a person for the meaning of the Convention, what they are? The examination conducted above unfortunately cannot provide a reader with an answer to this question.

The other interesting aspect of a status of an unborn individual is whether the situation would be different, if we would speak not directly about an embryo, but about the other state of development of human being. The Court in its case-law clearly distinguishes, for example, between a foetus and an embryo: "…fœtus, which is clearly far further developed than an embryo…" [65] Moreover, in the *Costa and Pavan case* the Court stressed that the concept of "child" cannot be put in the same category as that of "embryo". This could mean that the principle of the best interest of a child is not applicable to the cases concerning human embryos. As to the question of whether it could be applied to the foetus the Court remains silent.

When deciding on a subject-matter, the Court often takes into account provisions of international documents, such as Oviedo Convention (see e.g. *S.H. case*, cited above, § 42; *Evans case*, cited above, § 50; *Parrillo case*, cited above, § 54). It also assesses practice of the other international human rights courts, such as the Inter-American Court of Human Rights (see, *Parrillo case*, cited above, § 68). The Court also reflects opinions of the national courts, not only within the Council of Europe, but also overseas. For instance, in the *Evans case* the Court referred to the judgment the Supreme Court of Tennessee in the case of *Davis v. Davis* (842 S.W.2d 588, 597; Tenn. 1992).

It is of importance to notice that the Court often carefully assess the existence or non-existence of common ground between the laws of the Convention contracting states in the cases concerning human embryos. On the one hand, where there is no consensus within the CoE member states, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the states will normally be restricted (see e.g. *S.H. case*, cited above, § 94). It means that the Court always have to weight, whether it will give preference to the fact that of existence of sensitive ethical issues or to the individual's identity. Both focuses are closely connected and very often it is hard to distinguish between them. Therefore, some authors criticise the Court for inconsistence in its decision making. In our opinion, all the cases relating to human embryos raise serious moral questions, but it does not mean that the margin of appreciation of the states have always to be wide. If an embryo is not a person under the Convention, then there would not be any individual existence at stake. Given the fact that in some cases the Court supported the states' legislation on prohibition of embryo destruction, the thesis does not seem to be undisputable.

3. Results

Both the case-law of the Court and the analysed norms of the international organisations and the states demonstrate that the status of a human embryo in the world is very distinct: from permission, through no regulation to prohibitive measures. Furthermore, it varies from type to type of the research on human embryos. Additionally, certain practices that are strictly prohibited

in general may be authorised through licensing and special permissions. It would, therefore, require additional study on the rules and conditions of such authorisation.

The Court in its case-law distinguishes between an embryo and a foetus, but do not specify the difference in their protection under Article 2 of the Convention. Moreover, the term "embryo" is defined differently in national law, which raises a number of other questions. Furthermore, there exist a number of synonymous titles, e. g. "embryo", "foetus", "germ", "fetus", "pre-embryo", "proembryo", which are understood similarly or differently depending on the context. In the course of translation of these terms from the various foreign languages, the meanings of the words may be interchanged as well. This again would lead to dissimilar understanding of the issue. It has to be stressed that the practice of the Court does not give an answer to the question, whether a human being on different stages of development before birth has a dissimilar level of protection.

4. Conclusion

The Court in its practice up to date refuses to answer the question, when the human life begins, but it clearly stated that the embryo is not a person in the sense of Article 2 of the Convention. It is unclear, whether it could be seen as a "person" for the purposes of the other provisions of the Convention. Up to date, there is no case-law, whether the Court has recognised an embryo as a direct victim.

What is absolutely true is that an embryo is not a possession within the meaning of Article 1 of Protocol No. 1 to the Convention. This signifies, that "parents" may not freely utilise their embryos. Therefore, in some countries, it is the state who decides on a destiny of unborn beings who are not supposed to become children. Nonetheless, in Russia, for example, a person may become an owner of embryos and even a biological parent on the basis of the purchase agreement. It shows that the legal status in the CoE member states is not unified and the Court will still have a number of issues to rule on in its future practice.

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