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**MIGRANT'S RIGHTS AT A SYSTEM OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

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Abstract

How are rights of migrants fulfilled in the so called system of the Convention for the Protection of Human Rights and Fundamental Freedoms? The paper applies the concept of 'transnationalization of human rights' to rights of migrants. In XX century human rights have emerged as a principle to transnationalize rights of particular groups of people: a principle to de-couple protection of individuals from the national jurisdiction to jurisdiction of international institutions. The system of the European Convention has become one of those international institutions.

Outbreak of conflicts in the Middle East, the collapse of the Union of Soviet Socialist Republics, development of European welfare systems — all these have become the factors to determine the increase in the number of incoming migrants to Europe. In addition to that, the system of the European Convention seemed to transnationalize rights of migrants: to provide supplementary protection. Human rights created a strong incentive for migrants to come to Europe.

However, as for rights of migrants, full transnationalization has not been the case. Rights of migrants have mainly remained under national jurisdiction of recipient states in Europe. Three processes in the Convention system have contributed to that: 1) delivering the judgments by the European Court of Human Rights; 2) 'human rights education' within the Council of Europe; 3) academic and information research by the Council of Europe Secretariat.

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1. Introduction

The paper focuses on the fulfilment of rights of migrants in the so-called ‘system of the Convention for the Protection of Human Rights and Fundamental Freedoms’ (the system of the European Convention on Human Rights, the Convention system, the European Convention system).¹ There is no commonly accepted legal concept of a migrant in international law. The definitions of refugees and migrant workers are more developed in international law, however, they still do not cover all migrants. Since the paper focuses on human rights of migrants, the paper applies the working definition of migrants proposed by the Special Rapporteur on the Human Rights of Migrants at the UN Commission on Human Rights in 2000: “1) persons who are outside the territory of the State of which they are nationals or citizens, are not subject to its legal protection and are in the territory of another state; 2) persons who do not enjoy the general legal recognition of rights which is inherent in the granting by the host State of the status of refugee, naturalized person or of similar status; 3) persons who do not enjoy either general legal protection of their fundamental rights by virtue of diplomatic agreements, visas or other agreements” (United Nations Economic and Social Council, 2000: 9).

2. Problem Statement

The ‘system of the European convention’ is grounded on the Convention for the Protection of Human Rights and Fundamental Freedoms. Ten states ratified the Convention on 3 September 1953 and thus established the European Court of Human Rights (ECHR) as a mechanism of the Convention system (Morrison & Berndt, 1981). The system is a complex of institutional and organizational settings between the Council of Europe, international organizations, national governments, non-governmental organizations and commercial enterprises aimed at sustainable implementation of the norms of the Convention in the national legal and social systems (Benvenisti, 2014). The ECHR is responsible for the interpretation of the Convention.

Outbreak of conflicts in the Middle East, the collapse of the Union of Soviet Socialist Republics, development of European welfare systems — all these have become the factors to determine the increase in the number of incoming migrants to Europe. Human rights created a strong incentive for migrants to come to Europe. The public opinion tends to regard the Court in Strasbourg as the principal institution for the respect, protection and fulfilment of human rights. However, the Court remains only a mechanism to interpret the norms of the European convention and the conventions of the Council of Europe — the law of the Council of Europe. This paper shows that the Court in Strasbourg is no longer the principal body to protect rights of migrants, which is not enough for full respect, protection and fulfilment of their rights: the statistical analysis of this paper shows that the number of migrants protected by the Court has significantly dropped in 2011. The ECHR is neither the primary body in the Convention system to fulfil the rights of the migrants: these stay national legal systems of the member states of the Council of Europe

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that protect rights of migrants primarily. Still the Convention system provides ‘human rights education’ and research for those who are working with migrants.

As a multi-actored system, the Convention system is wider than the ECHR: it allows the ECHR outcomes to be transmitted into the national legislation and public opinion. Currently, the core of the system of the European convention includes the Council of Europe principal political and executive body: the Committee of Ministers — and 47 member states of the Council of Europe. As for rights of migrants, the Convention system includes: 1) the Convention itself; 2) the European Convention on establishment; 3) the European convention of migrant workers; 4) the Convention on the participation of foreigners in public life at local level; 5) the European Social Charter; 6) the Convention on the recognition of qualifications concerning higher education in the European region; 7) the European Convention on Nationality. The ECHR as a mechanism for the interpretation of Convention synthesizes the law of the Council of Europe and decides if the national legal systems correspond to the law of the Council of Europe. The Committee of Ministers of the Council of Europe is responsible for the control of the functioning of the Convention system. Therefore, to draw a line, the Convention system functions as a regime with distinct rules for respect, protection and fulfilment of human rights (Bates, 2011). The system faces certain challenges, notably, the civil and political rights are enforced thoroughly, while social rights are not enforced in the same manner. This challenge shrinks the space for the protecting rights of migrants as they are in need for social protection primarily.

3. Research Questions

The research question of the paper is the following: how are rights of migrants fulfilled in the system of the Convention for the Protection of Human Rights and Fundamental Freedoms?

4. Purpose of the Study

The purpose of the study is to explore how rights of migrants are fulfilled within the variety of instruments and mechanisms of the system of the European Convention. The paper applies sociological approach towards the studies of human rights and international organizations, hence goes beyond the widely spread analysis of the case-law of the European Court of Human Rights. The paper concentrates on fulfilment rather than on protection of human rights in the Convention system.

5. Research Methods

The paper applies the concept of ‘transnationalization of human rights’ to rights of migrants. In XX century human rights have emerged as a principle to transnationalize rights of particular groups of people: a principle to de-couple protection of individuals from the national jurisdiction to jurisdiction of international institutions. The system of the European Convention has become one of those international institutions.

The Convention system has much changed since 1953, which was determined by three factors: 1) establishment of European regional intergovernmental organizations after WWII; 2) inclination of a number of states and communities to create an international court on human rights with sanctioning

powers; 3) initiation of so called ‘new democracies in transition’ and dissolution of the Union of Soviet Socialist Republics. In the field of rights of migrants, the system incorporated the developments of the international law, notably, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Convention system is regarded as ‘a living mechanism’: it permanently incorporates the developments of national legal systems, however, not to the fullest extent in case of social rights and rights of migrants.

The transnationalization of the rights of migrants determines the Convention system. The translationalization of human rights is the process of de-coupling the human rights agenda ‘from the sphere of a nation-state ... to the transnational sphere’, as stated by A. Fischer-Lescano and K. Möller (Fischer-Lescano, Möller, 2016: 1). This definition contains *circulus in definiendo*, and an attentive reader might ask the authors to provide the definition of ‘transnational sphere’. The authors propose to understand transnationalization as a process of communication within the system in the Luhmannian sense of the world society as a social system: as the economy transcends the national borders, so do legal and political systems, therefore, human rights become transnationalized. Therefore, respect, protection and fulfilment of human rights can not be identified within particular national border, it has become unclear who is advocating for obligations in human rights: individuals, states, companies (Lohmann, 2016).

The more rights of the migrants are fulfilled, the more they are transnationalized. The transnationalization of human rights occurs on two levels: thematic level (right to) and group level (right of) (Kaasch, 2016). The ‘right of’ approach has been vastly studied under the term of ‘a vulnerable group’ (Weissbrodt & Rumsey, 2011). While the issue of migrants’ inclusion/exclusion in Europe is under high public scrutiny, fulfilment of the rights of migrants do not receive the respective level of attention in the academic literature. The academic literature focuses quite often on protection of vulnerable sub-groups of migrants such as refugees, asylum seekers, irregular migrants, environmental migrants and internally displaced persons, children, the elder people, the disabled migrants etc. (Ippolito, Sánchez, 2015: 2). How are the rights of migrants fulfilled in the system of the European Convention?

6. Findings

The rights of migrants are fulfilled within the following procedures in the Convention system.

1. Delivering the judgments by the ECHR on individual and collective applications from migrants. Here, migrants are applicants and participate in the procedures before the Court in Strasbourg.

2. ‘Human rights education’ for national human rights institutions, NGOs, lawyers and human rights defenders in the field of the rights of migrants under the auspices of the Council of Europe.

The Convention system involves the educational and training events to implement the norms of the Convention into the national social systems. As an example, the Joint European Union — Council of Europe programme on setting up an active network of independent non-judicial human rights structures. During such seminars the Convention system forms the images of typical migrants under the protection, i. e. 1) refugees and asylum seekers; 2) those who have been trafficked or brought in illegally by people smugglers; 3) vulnerable groups, such as minors, particularly unaccompanied minors (Council of Europe, European Union, 2008: 12). The Convention system also includes distance learning and short training

programmes such as the programme ‘Human Rights Education for Legal Professionals’, which focuses on civil servants and the consultants to the national governmental in the field of rights of migrants.

3. Organization of academic and information research by the Council of Europe Secretariat (Registry of the ECHR).

The Convention system sustains the academic and information research in the field of rights of migrants. A significant share of budget for such programmes come from the EU European Neighborhood Instrument budget, i. e. through the EU-led Fundamental Rights Agency (European Union Fundamental Rights Agency, 2014). Such research joints up the case-law of the Court of Justice of the European Union and the ECHR, provides policy recommendations for the bodies of the EU and the Council of Europe, plus, for their member states. The other notable example of this type of the functioning of the convention system is regular selective information flow, the other joint EU — Council of Europe programme focused on the national human rights structures (Council of Europe, 2017). Every series of information flow includes a monthly selection of the most notable cases of the ECHR from the perspective of the registry servants of the EU bodies or the Council of Europe Secretariat. On the basis of that information, the Council of Europe publishes guides for practitioners (Ktistakis, 2016).

The final dimension of the Convention system is the research and analytical work of the ECHR itself. The main part of research is conducted by the “Jurisconsult in charge of Grand Chamber Registry, Research and Case-Law information”. It includes four divisions: Grand Chamber Registry, Research and Library Division, Case-law Information and Publications Division, Just Satisfaction Division (Council of Europe, Organisation Chart..., 2017). The ECHR servants work as the Council of Europe Secretariat. The outcome of this research and analytical work is impressive: the Bureau of the Court selects approximately 30 most important cases annually and publishes them with Wolf Legal Publishers. The Court database of cases has around 4 million visitors per year, while the Court’s website recorded a total of approx. 6 million visitors in 2016. The cases are translated into twelve target languages with the help of the Human Rights Trust Fund (Council of Europe, the ECHR Annual Report, 2016: 170-171). The Court organized 500 visitor groups and 54 training sessions with the total of 17 872 visitors in 2016 (Council of Europe, the ECHR Annual Report, 2016: 175). The work of the Registry of the ECHR is organized by approx. 680 registry servants (270 lawyers and 410 administrative staff). Table 1 shows the distribution of the ECHR Registry staff dependent on the state of origin. The numbers above the average values are stressed by bold type.

Table 01. States of origin of the ECHR Registry staff and number of judgments

State	Number of servants	% of total	Number of pending cases by 1 January 2016	% of total	Number of applications followed by a judgment in 2015	% of total
Average	15*		1714**		60***	
Ukraine	42	6.51%	14530	19.72%	81	3.32%
Russian Federation	62	9.61%	10677	14.49%	160	6.56%
Turkey	40	6.20%	8648	11.74%	158	6.48%
Romania	38	5.89%	5030	6.83%	260	10.66%
United	44	6,82%	617	0.84%	1028	42.15%

Kingdom						
Poland	36	5.58%	2445	3.32%	31	1.27%
Italy	20	3.10%	8292	11.25%	25	1.03%
Hungary	8	1.24%	5113	6.94%	88	3.61%
France	139	21.55%	1050	1.43%	32	1.31%
Bulgaria	16	2.48%	835	1.13%	37	1.52%
Germany	19	2.95%	576	0.78%	12	0.49%
Serbia	14	2.17%	1497	2.03%	121	4.96%
Greece	9	1.40%	896	1.22%	94	3.85%
Total	645****	100%	73680	100%	2439	100%

* Average in number of servants is counted for 43 states without Liechtenstein, San-Marino, Monaco, Andorra, as these states did not have their servants. **Average in pending cases is counted without Liechtenstein, San-Marino, Monaco, Andorra, as they had small number of pending cases (Liechtenstein — 7, San-Marino — 6, Monaco — 5, Andorra — 4).***Average in application followed by a judgment is counted for 41 states without Netherlands, Denmark, Ireland, San-Marino, Monaco, Andorra, as in 2015 there were no applications against these states followed by a judgment. **** The sources for the table are the factsheets on states prepared by the ECHR Registry on 24.03.2016. In those materials the overall number of servants is 679, while if we sum the number of servants from every state, the overall number is 645. The data also varies from one language version to the other: from the total of servants 640 to 708. The table is compiled by the authors of the paper. URL: <http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets> (retrieved 19.11.2017)

7. Conclusion

Therefore, the Council of Europe Secretariat’s research and analytical work plays an important role in the process of the fulfilment of the rights of migrants in the Convention system. It is notable that the Council of Europe Secretariat presented by the ECHR Registry distinguishes several sub-groups of the migrants who are in need for the protection such as migrants in detention, young migrants, migrants with a risk of collective deportation or expulsion, asylum seekers suffered from the collisions in the EU human rights system (so-called ‘Dublin cases’), migrants applying to the Court interim measures under the Rule 39 of the Rules of the Court (Council of Europe, Migrants in Detention, 2017)

In the beginning of its establishment the Convention system was designed to defend ‘... human personality against all tyrannies...’ (Johnson, 1964: 5). However, the current developments in the rights of migrants before the ECHR show the ‘Strasbourg reversal’: the ECHR treats migrants primarily as aliens and then after that as human beings (Dembour. 2015: 184). As put by the ECHR senior officials, the migratory flows to Europe present a challenge, though ‘not ... significant in quantitative terms’ (Council of Europe, Speech..., 2016). At the same time, civil society recognizes the current developments in rights of migrants as much challenging: as counted by the NGO “No Fortress Europe”, 12 347 individuals died or disappeared trying to enter EU from the South Mediterranean coasts in the decade 1998-2008 (Council of Europe, European Union, 2008: 14). The NGO ‘United for Intercultural Action’ provides the number of 33 305 deaths or disappearances of migrants in the period 1993-2017 (United Against Racism, 2017)

The rights of migrants are transnationalized in the Convention system. However, they are not transnationalized in an equal manner with the rights of the other groups: refugees, children, women, disabled, etc. As an example, 791 applications for interim measure were submitted to the Court in 2015:

161 applications were accepted by the Court, 630 were refused protection (20.3% accepted). In 2010 the Court decided on 3680 applications for the interim measures, where 1440 were accepted (39% accepted). In 2011 the Court accepted 350 out of 2750 application for interim measures (12.7%). In 2011 the procedures for submitting applications before the Court were changed, which influenced the decrease in number of protected migrants. Therefore, the ECHR provides less protection for the migrants than for the general groups of applicants (Dembour, 2015: 435). Rights of migrants remain the burden of national legal systems and stay mainly under national jurisdiction. The Convention system still focuses on the fulfilment of the rights of migrants through the other dimensions, notably, through ‘human rights education’ and organization of academic and information research. The system continues to use the ‘vulnerability’ approach and differentiates between the sub-groups of migrants, which shrinks space for fulfilling rights of migrants.

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