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HOMO VULNERABILIS, INSTITUTIONS AND MECHANISMS CREATED TO OVERSEE, AT NATIONAL LEVEL, THE ENFORCEMENT OF THE U.N. CONVENTION ON PERSONS WITH DISABILITIES[1]

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Abstract. *Protection of persons with disabilities is instituted in the national law through the establishment of a set of rights to be enforced by means of practical levers in the form of legal instruments pursuant to the European and international regulations. The regulatory framework concentrates a complex set of rules from the special regulation in the matter comprised in Law 448/2006, which develops the constitutional principle enshrined by art. 50 of the Constitution, which was revised in 2003. The study aims to present also some reflections on a number of relevant legal cases handed by the European Court of Human Rights, as well as the aspects of novelty in the content of the regulations issued at national level regarding the monitoring committee established for overseeing the enforcement of the provisions of art.33 from the Convention of United Nations on the rights of persons with disabilities, adopted in New York, December 13th 2006.*

Keywords: *persons with disabilities, UN Convention, ECHR case law, monitoring committee, independent mechanism that oversees the implementation of the convention.*

INTRODUCTION

The matter of the persons with disabilities represents the concern of the states, as well as of the international authorities. The concern is justified by the vulnerability of the persons who are in uniquely difficult situations, persons who

[1] This paper was presented at the Academic Days of Cluj, Cluj-Napoca, 17–31 May 2016, event organized by the Romanian Academy, Cluj-Napoca Branch.

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should be supported by the society as a whole, confirming its humanitarianism through practical means and through the legal and economic instruments.

In this context, what we aspire to depict in the present study are, one the one hand, the international and national regulations that ensure the protection of persons with disabilities, and, on the other hand, the extent to which the protection and promotion of the human rights ensures the full exercise of these rights by the persons with disabilities. In this regard, it is more than welcomed the instrument created at national level in the form of the monitoring committee meant to oversee the enforcement of the UN Convention on the rights of persons with disabilities. Together with the means of operation, which are also accounted in this study, it should bring about a favourable and much needed repositioning of the protection of persons with disabilities in a new frame.

We confess that the set out point for this analysis was the perspective captured by Roth (2011):

> I was one of the Chancellor Avenue playground boys who in the summer of '44 contracted polio and was then confined to a wheelchair for a year before protracted rehabilitation made it possible for me to locomote myself on a crutch and a cane, and with my two legs braced, as I do to this day. Some ten years back, after serving an apprenticeship with an architectural firm in the city, I started a company with a mechanical engineer, who like me, had had polio as a kid. We opened a consulting and contracting firm specializing in architectural modification for wheelchair accessibility, our options ranging from building additional rooms onto existing houses down to installing grab bars, lowering closet rods, and relocating light switches. We design and install ramps and wheelchair lifts, we widen doorways, we make bathroom, bedroom and kitchen modifications – everything to improve life for wheelchair-bound people like my partner. The wheelchair-bound may require household structural changes that can be costly, but we do our best to keep to our estimates and to hold prices down. Along with the quality of our work, this is what largely accounts for our success. The rest was the luck of location and timing, of being the only such outfit in populous northern New Jersey at a moment when serious attention was beginning to be paid to the singular needs of the disabled. (pp. 257–258)

GENERAL ASPECTS CONCERNING THE NATIONAL AND INTERNATIONAL REGULATIONS IN THE MATTER OF THE PROTECTION OF PERSONS WITH DISABILITIES

The category of "persons with disabilities" is defined by the law in the documents of public international law at art. 1, para. 2 of the United Nations Convention on the rights of persons with disabilities, adopted in New York on December 13th 2006[2], as being the persons with long-term physical, mental,

[2] Hereinafter called "UN Convention" the United Nations Convention on the Rights of Persons with Disabilities (available at http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf), published in the Official Gazette no.792 of 26.11.2010, consolidated version of 14.04.2011. A presentation in synthesis of its content is available at http://www.disabilityaction.org/centre-on-human-rights/human-rights-and-disability/united-nations-convention-on-the-rights-of-persons-with-disabilities/

intellectual or sensory impairments that, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

In accordance with the provisions of the Convention, discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability that has the purpose or the effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. The variety of forms of discrimination includes also denial of reasonable accommodation (Mazilu, 2000).

The set of rights enshrined by the UN Convention in favour of the persons with disabilities, rights that have attached the corresponding obligation of the Member States of the Convention to adopt measures that guarantee the exercise of these rights, determine: the equality and non-discrimination of these persons (art. 5), non-discrimination of women, girls and children with disabilities (art. 6 – art. 7), accessibility to the physical environment, to transportation, to information and communications, including information and communications technologies and systems (art. 9), right to life (art. 10), protection and safety in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters (art. 11), right to recognition as persons before the law (art. 12), effective access to justice for persons with disabilities on an equal basis with others (art. 13), right to liberty and security of persons with disabilities on an equal basis with others (art. 14), the right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 15), the right to not be subject to any form of exploitation, violence and abuse (art. 16), protection of the physical and mental integrity of the person on an equal basis with others (art. 17), the right to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others (art. 18), the right to living independently and being included in the community (art. 19), right to personal mobility (art.20), freedom of expression and opinion (art. 21), respect for privacy (art. 22), non-discrimination in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others (art. 23), right to education without discrimination and on the basis of equal opportunity (art. 24), right to access health services, including health-related rehabilitation without discrimination on the basis of disability (art. 25), the right to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life (art. 26), right to work, on an equal basis with others (art. 27), right to an adequate standard of living for themselves and their families (art. 28), political rights and the opportunity to enjoy them on an equal basis with others (art. 29), right to take part on an equal basis with others in cultural life (art. 30).

As the doctrine[3] acknowledges, the UN Convention outlines the legal framework using the collocation "persons with disabilities" instead of "persons with handicap", thus setting out the righteous way to relate to them in accordance with the principle of equal treatment to all persons, without violating their inherent dignity by reflecting certain impairments with which the person was born or which were acquired during the course of life.

The concerns borne for persons with disabilities have resulted in the output, by the World Health Organization established in Geneva, in 2001, of an International Classification of Functioning, Disabilities and Health[4], which has moved away from being just a "consequences of disease" classification, definition stipulated in the 1980 version, to become a "components of health" classification, which identifies the constituents of health, whereas "consequences" focuses on the impacts of diseases or other health conditions that may follow as a result.

The medical model and the social model of disability comprised in the classification are differentiated by the fact that the first one "views disability as a problem of the person, directly caused by disease, trauma or other health condition, which requires medical care provided in the form of individual treatment by professionals", while the latter "sees the issue mainly as a socially created problem, and basically as a matter of the full integration of individuals into society. Disability is not an attribute of an individual, but rather a complex collection of conditions, many of which are created by the social environment"[5].

The UN Convention provides a change in the approach of persons with disabilities, who "are no longer viewed as objects of charity, that need medical treatment, but they are considered "subjects" who have rights and are capable of claiming them and make well-informed decisions regarding their life based on their free consent"[6].

The fundament of the change of paradigm noticed ut supra is the approach of persons with disabilities not from the point of view of the medical model of disability, but from the point of view of the social model of disability, or a fusion of the two models, aspect developed by the doctrine (Mocanu, 2013).

Moreover, the adoption of the UN Convention was preceded by international acts, such as declarations, adopted by the General Assembly of the United Nations Organization (The declaration on the rights of mentally retarded persons, adopted in 1971 and the Declaration on the right of persons with disabilities, 1975[7]).

[3] See Apan (2015, pp. 246–250), and also, in this regard, see the Opinion of the European Economic and Social Committee on 'The Implementation and monitoring of the UN Convention on the Rights of Persons with Disabilities by the EU institutions and the role of the EESC of 12.12.2012, published in Official Journal C44 of 15.02.2013 (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2013.044.01.0028.01.ENG&toc=OJ:C:2013:044:TOC)

[4] Its full title is: International Classification of Functioning, Disabilities and Health (http://apps.who.int/iris/bitstream/10665/43737/1/9789241547321_eng.pdf?ua=1).

[5] International Classification of Functioning, Disabilities and Health, p.20.

[6] A change mentioned in Opinion of the European Economic and Social Committee, pt. 2.9.

[7] Indicated and developed in Mocanu (2013, p. 5).

In the European Union Law[8], the protection of persons with disabilities is reflected in legal instruments that are harmonized with the provisions of the UN Convention, and it is enshrined through the EC Treaty – former art. 13, now transposed into art. 10 of the Treaty on the European Union. The European legal framework is supplemented with documents of relatively recent date, such as: the European Disability Strategy 2010–2020: a renewed commitment to a barrier-free Europe[9], for disabled persons, the European Parliament Resolution of 20 May 2015 on the List of Issues adopted by the United Nations Committee on the Rights of Persons with Disabilities in relation to the initial report[10] of the European Union, Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, of 2.12.2015[11].

From the set of rights, recognised at international level for the benefit of these persons, is detached, for the persons with disabilities, the principle of accessibility to the physical environment in the social, economic, professional, educational, cultural, sport context, or, in other words, the proclamation of their access under normal conditions thereto, in all the areas of the socio-economic and cultural life, and its guarantee through adequate judicial instruments (of international law, regional/European, as well as of national law in the signatory states or the states that ratified or adhered to the Convention).

Together with the principle of equality of rights for all persons, also expressed as equality of opportunities, accessibility, as a principle, completes and renders efficient in practice the right of persons with disabilities to be present on all segments of the social manifestations, in the same conditions as all other persons, expressing the guarantee that the rights recognised and enshrined through international, regional and state law can be exercised at any time.

In the meaning of art. 3 of the UN Convention, the general principles that represent the fundament of the regulation content of the international act, and which are meant to guide the signatory states in their actions according to the objective of the Convention, include also: the principle of respect for inherent dignity, individual autonomy, including the liberty to make one's own choices and the independence of persons, principle of non-discrimination, principle of full and effective participation and inclusion in society, principle of respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, principle of equality of opportunity, principle of accessibility, principle

[8] Hereinafter called "UE".

[9] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0636:FIN:RO:PDF

[10] Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0208+0+DOC+XML+V0//EN

[11] Available at http://opac.oireachtas.ie/AWData/Library3/JUQDocLaid220116_161811.pdf

of equality between men and women, principle of respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

In the domestic law, the legal framework for setting-up the protection of persons with disabilities, through rights and associated guarantees, includes regulations that originate from different judicial sources. First of all, it is worth mentioning that Romania ratified the UN Convention of 2006 on the rights of persons with disabilities, through Law 221 of 2010[12], entered into force on 2 March 2011, as resulting from art. 9 of the Ministry of Foreign Affairs Order no. 33 of 2011, on the entry into force of certain international treaties[13].

Since the provisions of art. 33 of the Convention institute for the member states the obligation to designate, in accordance with their organizational system, one or several points of contact within the government for aspects related to the implementation of the Convention, including a mechanism of coordination, as well as one or several independent mechanisms for the promotion, protection and monitoring of the implementation of the Convention, Romania proceeded to the adoption of certain internal regulations for the transposition of the undertaken obligations, in view of which we invoke: Law no. 8 of 2016 on the implementation of the safety mechanisms stipulated in the Convention regarding the rights of persons with disabilities[14],amended and supplemented through Government Emergency Ordinance no. 40 of 2016 on the establishment of measures for the central public administration and amending and supplementing certain legal provisions[15].

In practice, through Law no. 8 of 2016, subsequently amended and supplemented, it is set up the Council for monitoring, an administrative autonomous authority with legal personality, under the control of the parliament, which exercises the prerogatives stipulated in art. 4 of the law[16], and, to be in compliance with the provisions of art. 33 of the Convention, it is designated the National Authority for Persons with Disabilities, with the capacity of a coordination mechanism regarding the implementation of the Convention[17]. For the implementtation of the same obligation undertaken according to art. 33 of the UN Convention, there shall be set-up a contact point for the implementation of the Convention within each of the ministries indicated by art. 16, para. 1: Ministry of Education and Research, Ministry of Justice, Ministry of Health, Ministry of Communication and Information Society and the Ministry of European Funds[18].

[12] Published in the Oficial Gazette of Romania, Part I, no. 792/26.11.2010.

[13] Published in the Oficial Gazette of Romania, Part I, no. 265/14.04.2011.

[14] Published in the Oficial Gazette of Romania, Part I, no. 48/21.01.2016, hereinafter called "Law 8/2016".

[15] Published in the Oficial Gazette of Romania, Part I, no. 490/30.06.2016, rectified on 08.08.2016.

[16] Law 8/2016, title II, art. 3–14.

[17] Law 8/2016, title III, art. 15.

[18] Law 8/2016, itle IV, art. 16 lists their prerogatives.

The domestic legal framework was customized beginning with 2006 through the special law in the matter, namely Law no. 448 of 2006 on the protection and promotion of the rights of persons with disabilities,[19] republished in 2008,[20] subsequently amended and supplemented, which regulates the "rights and obligations of persons with disabilities, granted with the aim of their social integration and inclusion", stating that this judicial regime is also addressed to children and adults with disabilities, Romanian citizens, foreign citizens or stateless persons, during the period when, according to the law, they have residency in Romania.

Art. 3 of the law lists the principles that must be observed for the protection and promotion of the rights of persons with disabilities, and the following chapters elaborate the regulation of the rights granted to these persons in the fields[21] of: health and recovery/rehabilitation (art. 10–11)[22], education, (art. 15–19), dwelling (art. 20), culture, sport and tourism (art. 21), transportation (art. 21, art. 23–24), legal assistance (art. 25), taxation (art. 26, art. 28), credit (art. 27), social services (art. 31, art. 35–45, art. 51, and the following), social performance (art. 57–art. 58), accessibility (art. 61–62), orientation, professional formation, occupation and labour employment (art. 72, art. 75–77)[23].

The legal framework had its landmark in the principial rule stated by art.50 or Constitution of Romania, revised in 2003, according to which: "The persons with disabilities enjoy special protection. The State shall provide the accomplishment of a national policy of equal opportunities, disability prevention and treatment, so that disabled persons can effectively participate in community life, while observing the rights and duties of their parents or legal guardians."[24] .

PROTECTION AND PROMOTION OF THE INDIVIDUAL'S FUNDAMENTAL RIGHTS AND FREEDOMS IN VIEW OF ASSURING THEIR FULL EXERCISE, UNDER EQUAL CONDITIONS, BY THE PERSONS WITH DISABILITIES

Through a prima facie analysis of the rights provided by the UN Convention, it can be ascertained that it comprises in a exhaustive manner the individual's

[19] Published in the Official Gazette of Romania, Part I, no. 1006/18.12.2006.

[20] Republished in the Official Gazette of Romania, Part I, no. 1/3.01.2008.

[21] The rights of persons with disabilities at national level in 2013 are mentioned in Înțelegerea dizabilității - ghid de bune practici, available at http://ro.ettad.eu/understanding-disability/models-of-disability.

[22] The rights of pacients with disabilities are to be seen in Turcu (2010, p. 129–132).

[23] For a detailed presentation see Apan (2015, p. 252–255). See also Accesibilizarea spațiului public pentru persoanele cu dizabilități - obligații şi provocări pentru instituțiile publice, issued by the Institute for Public Policies (IPP) in partnership with the National Council for Fight against Discrimination (CNCD), in 2013, available at http://e-accesibilitate.ro/assets/pdf/Studiu_ accesibilitate_ persoane_cu_dizabilitati_2013.pdf

[24] The constitutional regulations in the matter of social security can be seen in Roş (2011, p. 59–67).

fundamental rights and freedoms, which originate from the European Convention on Human Rights, amended through Protocols no. 11 and 14, accompanied by the additional Protocol and by Protocols no. 4, 6, 7, 12, and 13.[25]

The aim of the UN Convention is, in accordance with art. 1, to promote, protect and assure the full exercise of all the fundamental rights and freedoms of the individual, by all the persons with disabilities and to promote respect for their inherent dignity. Ipso facto, the UN Convention comprises rights that we notice to have a more applied content and to be explained more in detail, in comparison to those provided in the European Convention on Human Rights, in order to address as appropriate as possible to the complex and, at the same time, particular situations in which the persons with disabilities are found.

Also, an analysis of the categories of human rights revealed by the doctrine (Bîrsan, 2005, p. 30–31; Mazilu, 2000, p. 85–117 and Vida, 1999, p. 18–21) identifies the following classes of rights, which are bound together in a solid and permanent way: civil and political rights, also called "first generation" rights; economic, social and cultural rights, also called "second generation" rights; the human rights of third generation known also as "solidarity rights", category which includes, inter alia, the right to peace, the right to development, the right to a healthy environment.

Consequently, not only that the rights of persons with disabilities stipulated in the content of the UN Convention emerge from the European Convention on Human Rights, but subsidiarily they can be transposed on the classification delivered by the doctrine indicated ut supra, for the rights contained in the European Convention on Human Rights, but with certain proper particularities.

Regarding the extension of the protection of the individual's fundamental rights and freedoms, ensured by the European Convention on Human Rights, the doctrine from Bîrsan (2005 p. 150–151) acknowledges prima facie that "the provisions of the Convention and also the provisions of the additional protocols cannot be extended to rights that are not stipulated therein" and that "through praetorian and dynamic interpretation of the Convention, the Court came to recognize and protect certain rights by means of extending the interpretation of the provision to those expressly regulated (...) and this extension has its limitations; it cannot operate on rights that are not related to the rights regulated by the Convention and/or by its additional protocols, being distinct from those, such as certain social rights".

The perspective of the European Court of Human Rights on guaranteeing the individual's fundamental rights and freedoms in view of ensuring the full and equal exercise of these rights by the persons with disabilities is highlighted precisely through its case law. We realize, as we are about to develop in the following pages, that this is the way in which the rights provided by the European Convention on

[25] Available at http://www.echr.coe.int/Documents/Convention_RON.pdf, hereinafter called the European Convention on Human Rights.

Human Rights are integrated as a whole, as we can consider their framework to be integrating certain rights of the persons with disabilities.

Or, as indicated it supra, the rights of the persons with disabilities originate from and can be transposed on the individual's fundamental rights provided in the European Convention on Human Rights. From this perspective of analysis, we shall determine that the case law of the European Court of Human Right added value to the rights of the persons with disabilities, regulated by the UN Convention.

The Court's case law in the matter is comprised in syntesis in the document published by the Court on 15 September 2015 – „Les personnes handicapées et la Convention européenne des droits de l'homme"[26] . In this non exhaustive themed file, there are exposed a great number of judgements on the rights of these categories of persons, grouped accordingly to the right guaranteed by the European Convention on Human Rights and by the protocols, based on which the applications in the matter were submitted and/or approved[27].

Hence, after analyzing a judgement in a case on the rights of persons with disabilities[28], the court assessed that a right to an emergency allowance as well as to an allowance specific to the persons with disability, to the extent to which this right is provided by the national legislation in force, represents a property right in the meaning of art.1 of Protocol no.1.

[26] Available at http://www.echr.coe.int/Documents/FS_Disabled_FRA.pdf

[27] The rights enshrined in the case law are the following: "right to life – art. 2 (Nencheva and others *vs*.. Bulgaria; Jasinskis *vs*. Latvia; V.C. *vs*. Romania); prohibition of torture, inhuman or degrading treatment or punishment. – art.3, dwelling conditions of the social establishment of psychiatric institution; verbal and/or physical harassment; risk of being subject to cruel treatments in the event of removal, expulsion or extradition; Sterilisation for birth control purposes (Price vs. U.K.; Vincent *vs*. France; Z.H. *vs*. Hungary; Arutyunyan *vs*. Russia; Zarzycki *vs*. Poland; Grimailovs *vs*. Latvia; Semikhvostov *vs*. Russia; Asalya *vs*. Turkey; Helhal *vs*. France, Stanev *vs*. Bulgaria; Dordevic *vs*. Croatia; Hukic *vs*. Sweden; S.H.H. *vs*. U.K.; Aswat *vs*. U.K.; R.R. *vs*. Poland); right to liberty and security –art 5 (D.D. *vs*. Lithuania; Gauer and others *vs*. France; H.L. *vs*. U.K.; Stanev *vs*. Bulgaria); right to a fair trial – art. 6 (Mocie *vs*. France; Farcas *vs*. Romania); right to respect for private and family life.–art. 8 (Botta *vs*. Italy; Zehnalova and Zehnal *vs*. Czech Republic; Spyra and Kranczkowski *vs*. Poland; Chtoukatourov *vs*. Russia; Ivinovic *vs*. Croatia; Kutzner *vs*. Germany; Saviny *vs*. Ukrain; A.K. and L *vs*. Croatia; Pretty *vs*. U.K.; Lashin *vs*. Russia; X and Y *vs*. The Netherlands; Glor *vs*. Switzerland); absence of representation of the minor with disabilities before courts of justice. access to beach; access to public institutions; professionals errors of medical personnel; impossibility to run prenatal genetic testing; deprivation of legal capacity; withdrawal of parental authority; placing children to foster care and the right to visit of the parents with disabilities; assisted suicide and personal autonomy; medical treatment and absence of consent; sexual abuse on a person with mental disability; right to marry – art.12; prohibition of discrimination – art.14; protection of property rights – art. 1 of Protocol no. 1; right to education –art. 2 of Protocol no. 1, right to vote – art. 3 of Protocol no. 1"

[28] See Bîrsan (2005, p. 150–151) and the case law referred therein, case Gaygusuz vs. Austria of 16 September 1996, available in extenso on http://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/AVRIL_2013/CEDH_gaygusuz.pdf, and case Koua Poirez, c. France, available in extenso on http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A61991CJ0206

As it is plainly visible, the right to non-discrimination has a particular individuality within the regulatory framework on the rights of persons with disabilities and it is discovered illo tempore in the directives and regulations of the European Union, and also in art. 14 of the European Convention on Human Rights. Within this Convention, it was stated that the right to non-discrimination "does not have an independent existence because it cannot be invoked, but, regarding the rights and freedoms regulated by the Convention, the Convention prohibits any discrimination concerning these rights and freedoms" (Bîrsan, 2005, p. 891–892).

Considering the above, the doctrine (Handbook on European non-discrimination law, 2011, p. 108) was the one that drew the conclusion that "Although it is not expressly listed as criteria protected by European Convention of Human Rights, the disability was included by European Court of Human Rights in the interpretation of "other" criteria under art.14". The revealed perspectives gave rise in the doctrine to the legitimate question of whether these "represent and extension of the court's case law towards recognizing certain social rights that are tightly connected to the ones regulated by the Convention and by the additional protocols" (Bîrsan, 2005, p. 151).

The concept of "institutional systems of promotion and protection of human rights" at regional and European level reveal the landmarks of this protection at EU level (Popescu, 2000, p. 64). Analysing the topic of human rights, one finds outlined the concerns for human protection at EU level in each of the treaties and agreements of the European construction, and, regarding the judicial review, the doctrine (Renucci, 2009, p. 26) states that: "This system is dual because, on the one hand there is the European Court of Human Rights whose reason is to protect the fundamental rights, while on the other hand there is the Court of Justice of European Communities, which is increasingly interested in this matter, therefore this concern is not exclusive."

The doctrine (Craig & de Burca, 2009, p. 481–516) reveals, at the same time, the status of the human rights stipulated by the European Convention on Human Rights and their reflection in the case law of the European Court of Justice, concluding that "the Court has constantly treated the European Convention on Human Rights as representing the special source of inspiration for the principles of EU law."

Therefore, the principles behind human rights as provided in the European Convention on Human Rights are enshrined also in the EU acts, through the adoption and implementation of the EU Charter of Fundamental Rights[29]. In the preamble of the EU Chart, it is reaffirmed the respect for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common

[29] Hereinafter called UE Charter, published in the Official Journal of 26.10.2012, C 326/391, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT. For the commented content of the Charter see Craig and Burca (2009, p. 517–524).

to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union[30] and of the European Court of Human Rights.

The fundamental rights stipulated in the EU Charter are structured in 6 titles and are the following:

- dignity: human dignity; right to life; right to integrity of the person; prohibition of torture and inhuman or degrading treatment or punishment; prohibition of slavery and forced labour;
- freedoms: right to liberty and security; respect for private and family life; protection of personal data; right to marry and right to found a family; freedom of thought, conscience and religion; freedom of expression and information; freedom of assembly and of association; freedom of the arts and sciences; right to education; freedom to choose an occupation and right to engage in work; freedom to conduct a business; right to property; right to asylum; protection in the event of removal, expulsion or extradition;
- equality: equality before the law; non-discrimination; cultural, religious and linguistic diversity; equality between women and men; the rights of the child; the rights of the elderly; integration of persons with disabilities;
- solidarity: workers' right to information and consultation within the undertaking; right of collective bargaining and action; right of access to placement services; protection in the event of unjustified dismissal; fair and just working conditions; prohibition of child labour and protection of young people at work; family and professional life; social security and social assistance; health care; access to services of general economic interest; environmental protection; consumer protection;
- citizen's rights: right to vote and to stand as a candidate at elections to the European parliament; right to vote and to stand as a candidate at municipal elections; right to good administration; right of access to documents; European ombudsman; right to petition; freedom of movement and of residence; diplomatic and consular protection;
- justice: right to an effective remedy and to a fair trial; presumption of innocence and right of defence; principles of legality and proportionality of criminal offences and penalties; right not to be tried or punished twice in criminal proceedings for the same criminal offence;

The fundamental rights provided in the EU Charter include in the title III the section "Equality" art.26 with the subtitle "Integration of persons with disability". As well, through the judgements of the ECHR, there are reconfirmed the aspects

[30] Hereinafter called ECHR.

related to the rights of the persons with disabilities. Exempli gratia, in the case C-312/11 delivered on 4 July 2013[31], the Commission *vs*. Italy[32], after examining the various measures adopted by Italy in view of the professional integration of persons with disabilities, ECHR decided that the Italian legislation does not impose on all employers to take efficient and practical measures, in accordance with the needs of each particular case, in favour of all persons with disabilities, to address the various aspects of employment and allow these persons to have access to a job, to carry out activity related to the job, to advance and have access to training.

RELEVANT CASE LAW – THE JUDGEMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS OF 17 JULY 2014 – THE CENTRE OF LEGAL RESOURCES ON BEHALF OF V.C. *VS.* ROMANIA (APPLICATION NO. 47848/08)[33]

In the landscape of fundamental human rights provided with utmost accuracy and aesthetics of the legal language, both in he European Convention on Human Rights and in the EU Charter, as well as capitalised in the case law of the ECHR and of the ECJ, our concern goes to the level at which these rights are assured at national level.

For an objective analysis regarding the rights of persons with disabilities, we turned to the judgement of the Court of 17 July 2014, which we consider to be highly relevant for the theme proposed for analysis.

A non-governmental organisation in Romania – The Centre for Legal Resources[34], acting on behalf of Mr. Valentin Câmpeanu, addressed the Court on 2 October 2008, claiming that V.C. was the victim of violation of art. 2, art. 3, art. 5, art. 8, art. 13 and art. 14 of the European Convention on Human Rights[35].

[31] Available in excerpt on http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d58c7ef9b3917940d59c2bcf5616b2f92f.e34KaxiLc3eQc40LaxqMbN4ObhuOe0?text=&docid=157587&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=641644

[32] Available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-312/11

[33] Available at https://fiatiustitia.upm.ro/wp-content/uploads/2014/08/Desc%C4%83rca%C8%9Bi-Cauza-Valentin-C%C3%A2mpeanu-c.-Rom%C3%A2niei-Traducere-%C3%AEn-limba-rom%C3%A2n%C4%83.pdf

[34] Hereinafter called „CLR". As stated on the official website, CLR is a non-governmental organization, established in 1998 by the Open Society Foundation, which actively advocates for the establishment and operation of a legal and institutional framework that safeguards the observance of human rights and equal opportunities, free access to fair justice and which contributes to the capitalization of its legal expertise for the general public interest. The CLR conducts investigations, takes over cases of abuses against the rights of institutionalized people with mental disabilities and go through all the necessary trial steps for securing these rights; CLR supported the draft of the Law for implementation of mechanisms provided by the Convention on the rights of persons with disabilities (see http://www.crj.ro/)

[35] See points 1–3 of the judgement. The Convention generated in the national law the provisions comprised in art. 58–81 of Book I and art. 441–450 of Book II of the new Civil Code that enshrines the respect for the dignity of humans, as revealed in the doctrine – Turcu (2011, in Introduction. para. 1 şi 2).

The issue in fact and the circumstances of the case

Valentin Câmpeanu was a man of Roma ethnicity, born on 15 September 1985. His father is unknown, and his mother, Florica Câmpeanu, deceased during the events described below, abandoned him at birth, to grow up in an orphanage. In 1990, he was diagnosed as HIV-positive and was then diagnosed with "profound mental retardation" and was categorized accordingly as belonging to the "severe" disability group. He also suffered from various conditions associated with his HIV virus infection, such as pneumonia, tuberculosis and severe hepatitis, and, in March 1992, he was transferred to the Craiova Centre for Disabled Children and, at a later moment, to the Craiova no. 7 Placement Centre.

A series of medical examinations were carried out on him after 2003, and he was transferred between medical institutions. On 30 September 2003, the Dolj County Child Protection Panel ("the Panel") ordered that Mr. Câmpeanu should no longer be cared for by the State. The decision was justified on the grounds that Mr. Câmpeanu had recently turned eighteen and was not enrolled in any form of education at the time, and decided to transfer him to the Poiana Mare Neuropsychiatric Hospital ("PMH"). The Dolj County Council Disabled Adults Medical Examination Panel reassessed his health, finding that his HIV infection corresponded to the "average" disability group. PMH informed the Panel that it could not admit Mr.Câmpeanu, who had been diagnosed with HIV and mental disability, as the hospital lacked the facilities necessary to treat individuals with such a diagnosis[36].

In January 2004, the Panel and the County Department for the Protection of the Rights of the Child ("the Child Protection Department") decided to place Valentin Câmpeanu in the Cetate-Dolj Medical and Social Care Centre ("the CMSC"); at this time he was in an advanced state of "psychiatric and physical degradation". A medical examination carried out upon Mr Câmpeanu's admission to the CMSC concluded that he suffered from "severe intellectual disability, infection and malnutrition". At that time, he was 168 centimetres tall and weighed 45 kilograms. Aspects related to the treatment with antiretroviral followed up to that point were not mentioned in the report issued upon his admission into the facility[37].

During the evening of 6 February 2004, Mr. Câmpeanu became agitated, and it was mentioned in the report that the patient "became violent, assaulted other patients, broke a window and tore up a mattress and his clothes and sheets". He was given treatment to calm him down[38].

On 9 February 2004, Mr. Câmpeanu was taken to the PMH for examination, diagnosis and treatment, where his condition was described as "not a psychiatric emergency", and that "he was not agitated", being diagnosed with "medium intellectual disability" and prescribed sedative medicines. No information regarding

[36] See pt. I, A, 1, 7, 8, 9 and 11of the judgment.
[37] See pt. I, A, 3, 13 and 14 of the judgment.
[38] See pt. I, A, 3 and 15 of the judgment.

Mr. Câmpeanu's medical history could be obtained upon his admission to the hospital, as he "would not cooperate"[39].

On 9 February 2004, Mr. Câmpeanu was returned to the CMSC on the same day, by which time his health had worsened considerably, and even though his treatment with ARVs was resumed, his condition did not improve. The CMSC decided that, in order to treat Mr. Câmpeanu's condition, he should better be transferred to a facility which was more suitable for the treatment of his health problems, and it was considered that this should be PMH[40].

On 13 February 2004, Mr. Câmpeanu was transferred from the CMSC to the PMH, in Psychiatric Department V, and, on 15 February 2004, Mr. Câmpeanu was transferred to Psychiatric Department VI, given the fact that he was HIV-positive, department which had only two general, non-specialist doctors and no psychiatrists on its staff.

On 19 February 2004, Mr. Câmpeanu stopped eating and refused to take his medication. He was therefore prescribed an intravenous treatment that included glucose and vitamins.

On 20 February 2004, a team of monitors from the CLR visited the PMH and noticed Mr. Câmpeanu's condition: alone, in an unheated room, which contained only a bed without any bedding, dressed only in a pyjama top. At the time he could not eat by himself or use the toilet without assistance, the only nutrition provided to him was glucose, through a drip.

Valentin Câmpeanu died on the evening of 20 February 2004. According to his death certificate, issued on 23 February 2004, the immediate cause of death was cardiorespiratory insufficiency. The certificate also noted that the HIV infection was the "original morbid condition" and designated "intellectual disability" as "another important morbid condition". No autopsy was carried out on the body.

Criminal complaints lodged by the CLR within the internal procedure

On 15 June 2004, the CLR lodged two criminal complaints, one with the prosecutor's office attached to the Craiova District Court and the other with the prosecutor's office attached to the Dolj County Court, in relation to the circumstances leading up to and surrounding Mr. Câmpeanu's death, alleging that there had been committed offences related to the care and death of Mr. Câmpeanu.

The Calafat District Court, to which was declined the jurisdiction for settling the complaint submitted by CLR, initially lodged with the prosecutor's office attached to the Dolj County Court, issued a fresh judgment not to prosecute, and Dolj County Court allowed the appeal, quashed the judgment delivered by the Calafat District Court and dismissed the CLR's complaint concerning the decision of 30 March 2007 not to prosecute. The court mainly relied on the conclusions of the forensic report and the autopsy report[41].

[39] See pt. I, A, 3 and 16 of the judgment.
[40] See pt. I, A, 1 and 10 of the judgment.
[41] See pt. I, B, 1, 26 and 27 of the judgement.

The forensic and the autopsy reports

On 14 September 2004, at the request of the prosecutor's office, a forensic report was issued by the Craiova Institute of Forensic Medicine, which states that Valentin Câmpeanu was recommended medical treatment HIV and his psychiatric condition, the treatment being correct and appropriate as to the dosage, in connection with the patient's clinical and immunological condition.

On 22 October 2004, Valentin Câmpeanu's body was exhumed and an autopsy carried out. The forensic report recorded that the death was not violent and it was due to cardiorespiratory insufficiency caused by pneumonia, a complication suffered during the progression of the HIV infection that was diagnosed on his admission into hospital[42].

Relevant internal law and practice

The judgement of ECHR makes reference to the guardianship system: guardianship of minors, the procedure of incapacitation, the guardianship of persons with disabilities, legislation regarding the promotion and protection of the rights of persons with disabilities. These are the internal regulations considered to be relevant in this case and they stipulate that persons with disabilities are protected against negligence and abuse based on their location, including by means of legal assistance or being placed under guardianship and temporary guardianship; if the person with disabilities does not have any parents or any other person who might agree to act as his or her guardian, a court may appoint as guardian the local public authority or private-law entity that provides care for the concerned person[43].

Relevant elements from international law

The UN Convention provides the following rights for persons with disabilities: quality and non-discrimination (art. 5); the right to life (art. 10); equal recognition before the law (recognition of legal capacity on an equal basis with others, legal assistance, exercise of legal capacity consisting in appropriate and effective safeguards to prevent abuse – art. 12); access to justice (art. 13); rights that were developed also at point 2 of the present article[44].

Violation of art. 2, art. 3 and art. 13 of the European Convention on Human Rights

The CLR stated that the death of Mr. Câmpeanu was caused by the cumulated effects of actions or omissions, imputable to certain state institutions, which were contrary to their legal obligation to provide him with care and treatment. It is also considered that the authorities had failed to put in place an effective mechanism to safeguard the rights of people with disabilities placed in long-stay institutions, including by initiating investigations into suspicious deaths.

Furthermore, the serious flaws in Mr. Câmpeanu's care and treatment, the living conditions at the hospital, and the general attitude of the authorities and

[42] See pt. I, B, 2 and 30 of the judgement.
[43] See pt. I, C, 51 and E, 63 of the judgement.
[44] See pt. III, A, 1, 6, 4 of the judgement.

individuals involved in his care and treatment, amounted to inhuman and degrading treatment. Under Article 3 corroborated with art. 2 and art. 3 of the Convention, the CLR submitted that no effective remedy existed in the Romanian domestic legal system in respect of suspicious deaths and/or ill-treatment in psychiatric hospitals[45].

The relevant provisions of the European Convention on Human Rights are the following:

- art. 2 "Everyone's right to life shall be protected by law. [...]"
- art. 3 "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"
- art. 13 "Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[46]

Aspects related to the admissibility of the application before CEDO

On 7 June 2011, the application was communicated to the Government and it was decided to rule on the admissibility and merits of the application at the same time, in accordance with art. 29, para. 1 of the Convention. The government considered, on the one hand, that CLR could not hold the capacity of victim, and, on the other hand, CLR did not demonstrate that it was legitimately representing the victim, who deceased meanwhile. The Court stated, again, the fact that the Convention must be interpreted as guaranteeing rights that are practical and effective as opposed to theoretical and illusory.

Considering the exceptional circumstances of this case and the severity of the charges upheld, the Court assessed that CLR – the petitioning entity – could lodge petitions on behalf of Mr. Campeanu and represent him in Court, even if CLR had not been lawfully summoned to act on behalf of the victim, even if he deceased before the application was lodged under the conditions of the European Convention on Human Rights. The Court concluded that drawing a different conclusion would attract the impossibility for these serious accusations of breach of the European Convention on Human Rights to be examined at international level, risking that the defendant state is exonerated of the liability incurred to it according to the Convention; hence the Court decided to admit the application on the violation of rights provided in the Convention[47].

Violation of Article 13 in conjunction with Article 2 of the Convention

The Court assessed that Mr. Campeanu was transferred from one entity to another without a diagnosis and without proper monitoring, with contempt for his real health condition and for his basic medical needs. It was also determined by the Court the negligence of the authorities in this case, which failed to assure the

[45] See pt. I, 79 of the judgement.
[46] Rights developed in Micu (1998, p. 34–39).
[47] See pt. I, A, 80–86 and 104–106 and 112 of the judgement.

correct treatment with ARV to the patient. The only treatment provided to Mr. Câmpeanu included sedatives and vitamins, and no meaningful medical investigation was conducted.

The Court considers that the respondent State has failed to provide an appropriate mechanism able to afford redress to people with mental disabilities claiming to be victims under Article 2 of the Convention.

The Court finds a violation of Article 13 in conjunction with Article 2 of the Convention, on account of the State's failure to secure and implement an appropriate legal framework that would have enabled Mr. Câmpeanu's allegations relating to breaches of his right to life to have been examined by an independent authority.

The Court unanimously declares that there was a violation of Article 2 of the Convention, and that that there has been a violation of Article 13 in conjunction with Article 2 of the Convention[48].

The Court recommends that the respondent State envisage the necessary general measures to ensure that mentally disabled persons in a situation comparable to that of Mr. Câmpeanu are afforded independent representation, enabling them to have Convention complaints relating to their health and treatment examined before a court or other independent body[49].

We hereby witness that for the institutions in which are hospitalised persons with disabilities, under loop being especially the psychiatric establishments, it is instituted the monitoring of the enforcement of UN Convention on rights of persons with disabilities. The hope that situations such as the ones revealed by the ECHR judgment of 17 July 2016 will not reoccur is thus legitimate.

THE MONITORING COMMITTEE FOR THE ENFORCEMENT OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES; CURRENT STATE AND PERSPECTIVES

Grounded on the ECHR Judgment of 17 July 2014, the decision to set up at national level the monitoring committee for the enforcement of the UN Convention on the rights of persons with disabilities constitutes an imperative that can no longer be ignored[50].

The presumptive question in the approach of the topic on the monitoring committee is: will the monitoring of the implementation of the Convention through the newly set up national committee bring that expected and much needed push forward in respecting the rights of persons with disabilities?

[48] See pt. 2. A, (i), 152, 153, 160 and 161 of the judgment.

[49] See pt. 2. A, (i), 160 and 161 of the judgment.

[50] In this regard, see also The Special Report on the Protection of Persons with Disabilities, by the Ombudsman, 2013, available on http://www.avp.ro/rapoarte-speciale/raport_special_handicap_mai2013.pdf

The change of paradigm and the introduction of the thesis of monitoring are motivated by the relevance granted to overseeing the way in which the UN Convention is implemented, the way in which the property/non-property rights of the persons with disabilities are (not) fully, effectively and persistently respected over long term, at national level.

The task of monitoring is given to the monitoring committee, as an autonomous administrative authority with legal personality, set up since 2016 at national level, under the control of the parliament, the activity of the committee being complemented by that of the independent experts. The monitoring committee will be led by a president and a vice-president, appointed by the Senate, with the approval of the Commission for Human Rights, Religion and Minorities. What we observe is the *origin of the proposal for the positions of president and vice-president.* This proposal is advanced by the non-governmental organisations that carry out activity related to persons with disabilities. The president holds the power of chief authorising officer and leads the activity of the committee, the expenses of the committee being financed entirely by the state budget.

The categories of institutions that are to be monitored are public or private residential establishments, meant for persons with disabilities, such as hospitals, psychiatric establishments, for which the monitoring activity covers exclusively the persons with disabilities.

The prerogatives of the monitoring committee are diverse, including: to check the legal character of the presence of persons with disabilities in the monitored institutions; to regularly examine the full exercise of the rights of persons with disabilities within the monitored institutions; to receive and analyze the notification of death of persons with disabilities communicated by the monitored institutions; to verify whether, in case of the death of persons with disabilities, the institutions notify the judicial bodies to run autopsy, as provided by the law; to refer to the competent authority to sanction or suspend, withdraw and/or invalidate the accreditations of the institutions that are being monitored, in case of violation of rights of persons with disabilities; to immediately notify the judicial competent bodies whenever there is indication that the violation of rights of persons with disabilities has a criminal nature; to have an active legal capacity in defending the rights and legitimate interests of persons with disabilities[51].

The monitoring activity is carried out through monitoring visits and through any means of information regarding the respect of the rights of the persons with disabilities by these institutions. The monitoring visits shall basically take place *without previous notice, based on an annual schedule of visits, established by the president of the Monitoring Committee, or non-scheduled*, at the order of the president. The visits shall not depend on any previous authorisation or notification from the party whose activity is to be monitored or verified, this being in

[51] See pt. 4, lit. a–k, of Law 8/2016.

accordance with the practice of relevant international monitoring institutions for human rights ("Report of the Commissioner for human rights", 2014).

The visits shall be scheduled primarily for institutions where there were registered cases of severe violation of the rights of persons with disabilities, or to observe the evolution of the situation determined during previous visits (follow-up visits)[52].

The monitoring visits should be carried out by teams made of 3 members, one of which must be a specialised inspector of the committee, and 2 independent experts, acting as external associates[53]. The objective is to set up a group of at least 20 independent experts in the field of the rights of persons with disabilities. The findings of the visits shall be comprised in *visit reports* that will be communicated to the institutions that had been visited and to public authorities to which they are subordinated or coordinated by, and the monitored authorities shall draw a *reasoned reply* to the report.

The monitoring and representing activity is not the exclusive prerogative of the committee, as the committee is the one that facilitates access, whether announced of unannounced, of the representatives of non-governmental organizations that carry out activity concerning the rights of persons with disabilities, in the monitored institutions. Non-governmental organizations that carry out activity related to the rights of persons with disabilities also hold active legal capacity in defending the rights and legitimate interests of persons with disabilities.

Although regulated since 2016, the activity of the monitoring committee registered a tough start, hampered by a number of organizational aspects, which prove once again the shortcomings of the national administrative system ("Comunicat de presă - Guvern", 2016, August 11).

CONCLUSIONS

If the regulations on the rights of persons with disabilities are a tradition at international level, quite the opposite can be said at national level, where the case law analysed in chapter 4 reveals the absence of concern of the institutions of the state towards an effective manifestation and preservation of these rights, especially in the case of persons with mental disabilities.

For this reasons, it would be useful to remember Patapievici's (2001, p. 411) statement "the universal declaration of human rights made history not because it referred to "humans" or because it granted them "rights", but because it expressed loud and definitively that the rights of humans are inscripted in his nature (they do not depend on the political regime from where they randomly are found) and are universal (the fact of being political is, for the individual, recessive to the fact of being human – tout court)" .

[52] See art. 10 of Law 8/2016.
[53] See art. 14 of Law 8/2016.

With this background, we consider that the monitoring committee is designed to have its own active role, but, at the same time, it is also thought as an organizational support and as coordinating body for the monitoring activities that will be carried out also by means of services externalised to independent experts in the field of persons with mental disabilities, as well as through initiatives of the non-governmental organizations that carry out activity on the rights of persons with disabilities.

According to our perspective, it is the conjunction of these components that should generate the efficiency of the monitoring of the national implementation of UN Convention. But the means of implementation and the effective involvement of the monitoring committee in the regulatory domain pertaining to its jurisdiction are aspects that will soon be reflected in practice, and which we will continue to study.

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