

## HUMAN RIGHTS HORIZONTALLY AND REASONABLY

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**Abstract:** *The application of human rights in horizontal direction between non state actors has been debated issue. Allowing breach of human rights by non state actors only because they are not the state does not seem to be sustainable in the future. The article first presents style of application of human rights indirectly in front of European Court of Human Rights and the U.S. Supreme Court and comes to example of direct application model in Switzerland, citing also alternatives how human rights could be treated with reference to recognized authors in the field. Besides some established precedents, new wave cases are present in the legal environment of sports or entertainment sectors to be viewed as the challenge for the continuing discussion in this area of law.*

**Keywords:** *horizontality, non-state actors, human rights, European Convention on Human Rights, U.S. Supreme Court, Switzerland, Swiss Federal Tribunal, sport, doping, entertainment, boycott*

### INTRODUCTION

In various legal documents and pleadings of the parties in their disputes we may observe automatic argumentation by human rights in horizontal relations between private, non-state, parties, including use of European Convention of Human Rights (ECHR). However this argumentation should not be left unnoticed since the horizontality of human rights is not so simple. “State Action!” used to be often mentioned term in student moot court competitions but as A. Reinisch concisely asks “Where are the good old days when everyone knew that human rights violations can only be committed by states against individuals?”<sup>1</sup> Many constitutions are ambiguous or silent whether the rights they guarantee can apply horizontally against non-state entity.<sup>2</sup> This article picked one example of indirect horizontal application of human rights at transnational level - the European Convention of Human Rights (ECHR), second example shows indirect horizontal application of human rights at national level, in the United States<sup>3</sup> and finally, the third example brings direct horizontal application of human rights in Switzerland. These three examples aim to demonstrate that horizontal application of human rights is not automatically available,

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<sup>1</sup> REINISCH, A. *The Changing International Legal Framework for Dealing with Non-State Actors*. In: ALSTON, P. (ed.). *Non-State Actors and Human Rights*. Academy of European Law, European University Institute in Collaboration with the Center for Human Rights and Global Justice. New York University School of Law, Oxford University Press, 2011, p. 37.

<sup>2</sup> OLIVER, D. – FEDTKE, J. (eds.). *Human Rights and the Private Sphere, A Comparative Study*. London and New York: Routledge-Cavendish, Taylor and Francis Group, 2007, p. 9.

<sup>3</sup> Judges of U.S. Supreme Court and European Court of Human Rights refer to each others’ precedents, which contributed to the choice of practice of these courts in this article, see for example CLAPHAM, A. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006, pp. 412–413. Also judges of European and American courts confirmed they are inspired by each others’ decisions and study them, viz. final session at conference Rethinking the Boundaries of Constitutional Law in Athens, 11<sup>th</sup>–15<sup>th</sup> June 2007.

picking some established precedents combined with some progressive cases, for example from sports and entertainment industry, which offer some scandals “that pose constitutional problems”<sup>4</sup> and thus relevant challenging material for future treatment of human rights horizontally.

## 1. INDIRECT INTERPRETATIONS OF HORIZONTALITY OF HUMAN RIGHTS

### 1.1. Example of an international instrument’s level - ECHR

#### 1.1.1. The legal background

It is true that international treaties on human rights, like ECHR, have been concluded among states. Experts on this area, P. van Dijk and F. van Hoof describe that in Strasbourg it is possible to lodge complaints only about violations of the Convention by one of the Contracting parties; a complaint directed against an individual is inadmissible for reason of incompatibility with Convention *ratione personae*.<sup>5</sup> Some case law of the European Court of Human Rights though tempts a test of so called “officious bystander” asking those with their pens at round table at the time when signing the Treaty “did you really mean complaints against individuals would not be possible according to the Convention? What about at least indirectly”?<sup>6</sup> According to P. van Dijk and F. van Hoof again, it is established case-law that the Convention does not merely oblige the authorities of the Contracting States to respect the rights and freedoms embodied in it, but in addition requires them to secure the enjoyment of these rights and freedoms by preventing and remedying any breach thereof, and that, therefore the obligation to secure the effective exercise of Convention rights may involve positive obligations on the part of the State, even involving the adoption of measures in the sphere of the relations between individuals.<sup>7</sup> This in fact may sometimes impose on States a kind of “objective responsibility”.<sup>8</sup> K. Starmer clarified how a State could be held responsible, having a duty: 1) to establish a legal framework providing for the effective protection for Convention rights, 2) to prevent unlawful interferences with the Convention rights 3) to provide information and advice on matters concerning the

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<sup>4</sup> Term used by Teubner referring to doping among scandals “that pose constitutional problems in the strict sense in relation to violating of human rights by non-state actors”, see. TEUBNER, G. *Constitutional Fragments, Societal Constitutionalism and Globalization*. Oxford: Oxford University Press, 2012, p. 1. See also former European Court of Human Rights judge Jean-Paul Costa’s Legal opinion regarding the draft 3.0 revision of the World Anti-doping Code, available at: <[http://extranet.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-The-Code/Code\\_Review/Code%20Review%202015/Code%20Final%20Draft/WADC-Legal-Opinion-on-Draft-2015-Code-EN\\_2013-06-25.pdf](http://extranet.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code%20Final%20Draft/WADC-Legal-Opinion-on-Draft-2015-Code-EN_2013-06-25.pdf)>

<sup>5</sup> DIJK, P., van, HOOFF, G. J. H., van. et al. *Theory and Practice of the European Convention on Human Rights*. 4<sup>th</sup> edition. Antwerpen-Oxford: Intersentia, 2006, p. 29.

<sup>6</sup> This method of officious bystander was used for example by Advocate General Warner at “neighbouring Court”, Court of Justice of the EU (at that time ECJ) in Luxembourg, in the case Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405, where this court stated that prohibition of discrimination based on nationality does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provisions of services. A. G. Warner asked by the method of officious bystander, whether the free movement provisions on discrimination based on nationality applied to practice excluding foreign players in matches between national teams from different countries.

<sup>7</sup> DIJK, P., van, HOOFF, G. J. H., van. et al. op. cit., supra note 6, p. 836.

<sup>8</sup> Judge V. Zagrebelsky’s dissenting opinion in *Craxi v. Italy* (No. 2), 25337/94, 17. 7. 2003.

Convention rights 4) to respond to breaches of Convention rights and 5) to provide resources to individuals to ensure respect for their rights.<sup>9</sup>

### 1.1.2. The practice

Authors D. Harris, M. O’Boyle and C. Warbrick remind that some articles of the ECHR do offer positive obligations expressly (for example to protect right to life by law, to provide prison conditions that are not inhuman etc.) and other positive obligations were derived by the Court in *Marcks v Belgium* [judgment of June 13<sup>th</sup> 1979], where “this process finds its source”, resp. “the full extent to which the Convention places states under positive obligations to protect individuals against infringements of their rights by other private persons has yet to be fully established, with the Court continuing to add to their number”.<sup>10</sup>

Similarly the Court has pushed new interpretations into modern times, for example on the occasion of exploration of limits of Article 4 of the ECHR in *Rantsev v Cyprus and Russia*: “...However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies.”<sup>11</sup> The Court decided that defendant states are responsible for not avoiding criminal activity concerning trafficking which threatens human dignity and fundamental freedoms because they failed to put adequate measures regulating businesses often used as a cover for human trafficking and at the same time failed to take appropriate measures within the scope of their powers to remove the individual from the situation or risk.<sup>12</sup> In *Van der Musselle*<sup>13</sup> the Court viewed Belgium responsible for the liberal profession - Belgium bar of lawyers concerning the exercise of legal aid to indigent people. In this case Antwerp based pupil advocate complained that he was subject to compulsory labor when compelled by the Belgium bar according to Belgium Judicial Code to provide legal services for free to those who were lacking financial resources for legal representation, arguing if he refused the service, he would be subject of the severe sanctions by the Bar. He blamed Belgium for breach of Article 4 of the ECHR. Similarly, in the case of *X v Netherlands*,<sup>14</sup> football player argued that under transfer rules adopted by Dutch Football Association (KNVB), due to so called transfer fee demanded by his former club, he cannot freely transfer to a new club and is also subject to compulsory labor. The state responsibility for the actions of KNVB was potentially possible in the light of at that time European Commission’s interpretation: “In the Commission’s view it could be argued that the respon-

<sup>9</sup> K. Starmer’s view summarized in SPIELMANN, D. European Convention on Human Rights. In: OLIVER, D. – FEDTKE, J. op. cit., supra note 3, p. 436. According to Clapham it must be proved the state failed to observe the rights, see. CLAPHAM, A. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006, p. 382.

<sup>10</sup> HARRIS, D., O’BOYLE, M., WARBRICK, C. *Law of the European Convention on Human Rights*. 2<sup>nd</sup> edition. Oxford University Press, 2009, p. 19.

<sup>11</sup> *Rantsev v Cyprus and Russia*, complaint no. 25965/04, 7. 1. 2010, Para 277.

<sup>12</sup> *Ibid.*, Paras 284 and 286.

<sup>13</sup> *Van Der Musselle v Belgium*, 6 E.H.R.R., 163, 23. 11. 1983.

<sup>14</sup> *X v Netherlands* (resp. *Mühren v Netherlands*), complaint no. 9322/81.

*sibility of the Netherlands Government is engaged to the extent that it is its duty to ensure that the rules, adopted, it is true, by a private association, do not run contrary to the provisions of the Convention, in particular where the Netherlands courts have jurisdiction to examine their application.”* Both, Belgium pupil advocate and football player, lost on the facts of the case and I will return to circumstances of these cases in section 3.2 of this article below.

## 1.2. Example of national jurisdiction – United States.

### 1.2.1. Legal background

United States was the first country to adopt a Bill of rights in 1791 but constitutional rights are engaged only when there is governmental and state action.<sup>15</sup> Justifications of this approach are based on restriction of state influence and also the courts, with origins in *Civil Rights Cases*.<sup>16</sup> Nowak and Rotunda summarize, that while few commentators doubt that the Bill of Rights and the fourteenth amendment apply only to those acts which are somehow connected to governmental or “state” action, there are no generally accepted formulae for determining when a sufficient amount of government action is present in practice, thus justifying subjecting the practice to constitutional restraints. Similarly like in the case of ECHR practice above, in the U.S. state may be connected to the asserted deprivation of someone’s guaranteed right by its tolerance of the challenged practice as well as by its positive acts.<sup>17</sup>

### 1.2.2 The practice

The precise determinations for state responsibility are not defined but some tests though emerged from the case law, when state action is present. For example Public function test, which means if private persons are engaged in the exercise of governmental functions their activities are subject to similar constitutional restrictions.<sup>18</sup> The Public function theory is somewhat limited, in that it is traditionally confined to essential governmental services that have no counterparts in the public sector.<sup>19</sup> Rotunda and Nowak refer among others for example to *San Francisco Arts* case, where despite United States Olympic Committee (USOC) was chartered by the United States government, having exclusive right to use the word Olympic, there was no state action when San Francisco Arts (SFA) invoked First amendment rights to use the word Olympic, which was denied to the SFA by the USOC, having exclusivity to use the word Olympic.<sup>20</sup> Nowak and Rotunda refer to the same

<sup>15</sup> OLIVER, D. – FEDTKE, J. op. cit., supra note 3, p. 9.

<sup>16</sup> 109 US 3 (1883). Excellent legal discussion on the purpose and existence of state action’s substance was provided by CHEMERINSKY, E. More is not Less: A Rejoinder to Professor Marshall. *Northwestern University Law Review*. 1985, Vol. 80, No. 3, p. 571 and MARSHALL, W. Diluting Constitutional Rights: Rethinking “Rethinking State Action”. *Northwestern University Law Review*. 1985, Vol. 80, No. 3, p. 558.

<sup>17</sup> NOWAK, J., ROTUNDA, R. *Constitutional Law*. 4<sup>th</sup> edition. Minn: West Publishing Co., St. Paul, 1991, p. 484. See *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602 (1989), where the state “did more than adopt a passive position towards underlying private conduct.”

<sup>18</sup> *Ibid.*, p. 457.

<sup>19</sup> WONG, G. *Essentials of Sports Law*. 4<sup>th</sup> edition. Santa Barbara: Praeger, 2010, p. 216.

<sup>20</sup> NOWAK, J., ROTUNDA, R. op. cit., supra note 18, p. 461.

case when they describe Symbiotic relationships test, meaning that state action relate to number or type of contacts between government and the challenged practices or the alleged wrongdoer.<sup>21</sup> On this occasion the Supreme Court decided that the fifth amendment also did not apply, because federal government was not involved in the USOC's decisions concerning the use of the word Olympic and its symbols. The state or federal government must have substantial influence over the association's activities, and state and association's actions are supported or sanctioned by the government.<sup>22</sup> In the U.S. only the 13<sup>th</sup> amendment applies horizontally to abolish slavery.

## 2. EXAMPLE OF DIRECT APPLICATION OF HUMAN RIGHTS HORIZONTALLY

Switzerland is a country, where we may find example of so called direct application model of human rights, where human rights can be applied horizontally.<sup>23</sup> Selection of Switzerland in this article was also made because seats of many associations regulating international sport are based there. International sport sector is highly regulated and set up on pyramid structure.<sup>24</sup> Doping scandals raised “new constitutional question”.<sup>25</sup> The Court of arbitration for sport (CAS), which is the highest appeal tribunal concerning final decisions of sports associations, including doping sanctions according to World Anti-doping Code (WADA Code)<sup>26</sup>, has its seat in Switzerland as well. According to Cassini sports tribunals like CAS “display many more similarities with public international law regimes than with private ones. This is a further confirmation of the theory that the more complex private regimes become, the more they will come to resemble public law regimes”.<sup>27</sup> CAS award was confronted with horizontal application of human rights as defined in art. 10 and 27 of Swiss Constitution by football player Francelino Matuzalem da Silva. He was disputing disciplinary sanction of FIFA<sup>28</sup> in front of Swiss Federal Tribunal (SFT). SFT held that as a fundamental legal value, the personality of the human being requires the pro-

<sup>21</sup> NOWAK, J., ROTUNDA, R. op. cit., supra note 18, at p. 470 also describing, that this includes direct aid, governmental encouragement or ordering specific activities or delegation of public functions. Other test described by the authors includes “whether there is a sufficient nexus between the wrongdoer and the government by assessing the degree to which the government has commanded, encouraged or otherwise directed the complained of activity”, p. 464 (State Commandment or Encouragement of Private Activities test). Also according to these authors, in the U.S. the lack of predictability stems from the Court's repeated insistence that state action depends in each case on “sifting the facts and weighing the circumstances”.

<sup>22</sup> WONG, G. op. cit., supra note 20, p. 216.

<sup>23</sup> BARAK, A. Constitutional Human Rights and Private Law. In: CLAPHAM, A. *Human Rights and Non-State Actors*. Cheltenham: Edward Elgar Publishing Limited, 2013, p. 257, stating that “the language of the constitutions of several cantons explicitly mandates application of this model; in the remaining cantons and on the federal level, direct application has been adopted by means of interpretation”.

<sup>24</sup> See. WEATHERILL, S. Is the Pyramid Compatible with EC Law? In: WEATHERILL, S. *European Sports Law: Collected Papers*. Hague: T. M. C. Asser Press, 2007, pp. 259–271.

<sup>25</sup> TEUBNER, G. op. cit., supra note 5, p. 1.

<sup>26</sup> This code was created by World Anti-doping Agency whose legal environment I already described for this Journal in TLQ 1/2013 in the article titled On the Specifics of Doping Regulation in Sport therefore I will not cover it in detail here.

<sup>27</sup> CASSINI, L. The Making of a Lex Sportiva by the Court of Arbitration for Sport. *International Sports Law Journal*. 2011, No. 3–4, p. 28. Jean-Paul Costa uses the term that sports federations have “certain public authority prerogatives” (viz. opinion of J. P. Costa cited supra note 5, p. 5).

<sup>28</sup> *Fédération Internationale de Football Association (FIFA)*.

tection of the legal order. In Switzerland protection of the personality of human being is a fundamental legal value which is protected constitutionally in Art. 10 (2) of the Swiss Federal Constitution (BV) and this unfolding of personality is also covered by Art. 27 (2) BV, resp. “*The free unfolding of personality is not protected merely against infringement by the state but also by private persons (see Art. 27 (f) ZGB which substantiates personal freedom in private law in Switzerland) ... The limits to legal commitments due to the protection of privacy do not apply only to contractual agreements but also to the statutes and decisions of legal persons.*” The SFT continued also in the light of Swiss Civil Code: “*The threat of an unlimited occupational ban based on Art. 64 (4) of the FIFA Disciplinary Code constitutes an obvious and grave encroachment in the Appellant’s privacy rights and disregards the fundamental limits of legal commitments as embodied in Art. 27 (2) ZGB [Swiss Civil Code]*”<sup>29</sup> Financial sanction as a result of disciplinary proceedings by FIFA towards the player was very high. According to facts the player broke his contract with his former football club, his employer, ignoring FIFA rules on contractual stability in football and therefore was sanctioned by a ban from all professional activities in connection with football until a claim in excess of € 11 million with interest at 5% from the middle of 2007 (i. e. € 550’000 yearly) is paid. Ban in sports is very sensitive topic. For example sanctions provided for by the WADA Code “have sufficiently significant, if not to say grave, professional and/or financial consequences affecting the athletes, and other related persons.”<sup>30</sup> Some authors bring the issue whether the *Matuzalem* ruling might threaten Anti-doping or match-fixing regulations, which secure proper functioning and integrity of sport, but at the same time conclude, that if these fundamental sporting principles are in danger, life-long bans should be still possible in severe cases.<sup>31</sup> *Matuzalem* case demonstrates well the issue of horizontality of human rights.<sup>32</sup>

### 3. WHAT ARE RE-SOLUTIONS?

#### 3.1. Retreat - going back to roots, lower in legal hierarchy

Above solution of horizontal application of human rights in Switzerland demonstrated clear cut solution of the problem of the horizontality of human rights, there seems to be no controversy. The view that the application of human rights horizontally is not auto-

<sup>29</sup> <http://www.swissarbitrationdecisions.com/sites/default/files/27%20mars%202012%204A%20558%202011.pdf>. Judgment of March 27<sup>th</sup>, 2012, *Francelino da Silva Matuzalem v. Fédération Internationale de Football Association (FIFA)*, 4A 558/2011.

<sup>30</sup> Jean-Paul Costa’s Legal opinion regarding the draft 3.0 revision of the World Anti-doping Code, p. 3.

<sup>31</sup> LEVY, R. Swiss Federal Tribunal overrules CAS award in a landmark decision: *FIFA vs. Matuzalem*. *International Sports Law Journal*. 2012, No. 3–4, p. 38. For comparison see decision handed down in 1979, referred in *Bosman* case by Advocate General Lenz on the basis of German law by the Landesarbeitsgericht (Higher Labour Court) Berlin: *The Landesarbeitsgericht adopted the position that the transfer rules restricted the free choice of place of employment and therefore infringed Article 12 of the Grundgesetz (Basic Law)*. In the *Landesarbeitsgerichts’s* opinion it was not permissible even for private agreements to conflict with that provision, with the result that any acceptance of those rules by the player was irrelevant. On Germany’s position see *Drittwirkung*. In: OLIVER, D. – FEDTKE, J. op. cit., supra note 3, p. 125. Similarly on the right of employment of sportsmen at Court of Labour of Antwerp (Hasselt district) 6<sup>th</sup> May 2014, Chamber 2, Algemeen rolnummer 2009/AH/199.

<sup>32</sup> It can be expected that unlimited bans in sports shall be confronted in CAS, for example CAS 2013/A/3249 but in this case unfortunately CAS denied jurisdiction.

matic was shown in the case of European Court of Human rights and U.S. Supreme court. Most constitutions are still silent about protection of human rights between private actors so “it has been left to the courts to respond to claims that protection does indeed extend to private sphere.<sup>33</sup> According to Barak, formulations of “Every citizen has the right...” make it linguistically possible for horizontal application of human rights but do not mandate it, it is upon the courts again,<sup>34</sup> thus he offers an alternative resolution. In his opinion the true meaning of indirect application of protection of human rights against non-state actors can be made by “Strengthened and Augmented Indirect Application” of these rights, which is a recognition of human rights that must permeate via private law channels: “Private law is the framework that translates constitutional human rights into a “give and take” way of life between private individuals. Private law contains a complicated and extensive system of balances and arrangements intended to make collective life possible and enabling each of the participating individuals to enjoy basic human rights”.<sup>35</sup> He refers to legal environment of human rights where prime should be focused on to principles of good faith, public policy or reasonableness.<sup>36</sup> There shall be evaluating of strengths of the interests of parties in dispute.<sup>37</sup> Also according to G. Teubner state responsibility for the acts of private actors “puts the cart before the horse”, private actors should be also responsible for breach of fundamental rights, not only states.<sup>38</sup> E. Chemerinsky’s interpretation is also the solution. According to him “Inexcusable violations of fundamental values should not be tolerated just because the violator is a major corporation rather than the government”, thus he believes that since courts constantly choose between competing values where no easy or determinate answers exist anyway, they can make judicial balance between private parties’ rights: “Moreover, a choice between competing values is made whether or not there is state action doctrine...one person’s liberty will be vindicated and the other’s person’s violated....”<sup>39</sup>

<sup>33</sup> BARAK, A. op. cit., supra note 24, pp. 256–7.

<sup>34</sup> See for example Czech Highest Court applying fair trial provision established in Czech Charter of Fundamental Rights and Freedoms concerning disciplinary proceedings against club in Czech Football Association, where the Court stated that right to fair trial at level of civic organization of Czech FA is per analogiam supported by constitutional procedural guarantees as governed by art. 36 (1) of the Charter. [http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/\\$\\$WebSearch1?SearchView&Query=%5Bheslo%5D%3DSport&SearchMax=1000&Start=1&Count=15&pohled=1](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/$$WebSearch1?SearchView&Query=%5Bheslo%5D%3DSport&SearchMax=1000&Start=1&Count=15&pohled=1). 28 Cdo 4852/2009.

<sup>35</sup> BARAK, A. op. cit., supra note 24, p. 271. In other words author ads on p. 273, that where the right is recognized (in public law), the remedy must also be recognized (in private law): *ubi ius, ibi remedium*. He distinguishes the direct application model in the sense that direct application model ignores private law and derives the rights from constitutional law directly but the strengthened indirect application model is using as a source only private law which provides relief “because private law is essentially an expression of the constitutional human rights of private individuals”.

<sup>36</sup> BARAK, A. op. cit., supra note 24, pp. 274–275. In the *Matuzalem* case cited above the SFT also emphasized that the principle anchored at Art. 27 (2) ZGB belongs to the important generally recognized order of values, which according to dominant opinion in Switzerland should be the basis of any legal order.

<sup>37</sup> This is happening anyway in models described in this article: concerning ECHR in SPIELMANN, op. cit., supra note 3, pp. 440–447: “Balancing competing rights and public interests in the private sphere”. Concerning situation in the U.S. in NOWAK, J., ROTUNDA, R., op. cit., supra note 18 at pp. 483–486: “A Possible Balancing Approach to State Action Issues”. In the *Matuzalem* case SFT stated that “The abstract goal of enforcing compliance by football players with their duties to their employees is clearly of less weight as the occupational ban against the Appellant, unlimited in time and worldwide for any activities in connection with football”.

<sup>38</sup> TEUBNER, G. op.cit., supra note 5, p. 12.

<sup>39</sup> CHEMERINSKY, E. op. cit., supra note 16, p. 573.

### 3.2. Common sense

It is indeed true that sometimes reasonable person test could be the standard as well. For example, in *Van Der Mussele* concerning compulsory labor the European Court looked to various factors, resp. whether there is “the menace of a penalty”, if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of the profession, that the service could not be treated as having been voluntarily accepted beforehand (this could apply, for example, in the case of a service unconnected with the profession in question).<sup>40</sup> These are considerations which exclude pupil advocate or football player in *X v Netherlands* case from the position that they would be subject to compulsory labor.<sup>41</sup> Despite the European Court’s attempts “applying the living instrument/evolutive approach to update the Convention’s protections to reflect contemporary needs” some situations like above are not appropriate for human rights review.<sup>42</sup> This is approach of sort of reasonable person test, common sense. According to Jean Paul Costa, in pending case *Mutu v. Switzerland* (application N°40575/10), the complaint lodged by the applicant football player based on Article 4 was not communicated, which is a strong indication from the Court as to the remote probability of the applicability of Article 4 of ECHR.<sup>43</sup>

### 3.3. Last resorts - boycotts or self-regulation

Some authors refer to alternative ways how to compel non-state actors to act in accordance with human rights.<sup>44</sup> One of them is a boycott. For example in the U.S. legal environment described above the Cop Killer controversy is an interesting example. The musical band Body Count (led by rap artist Ice-T) released in 1992 the album with the same title, *The Body Count*. It included the song *Cop killer*. According to Combined Law Officers of Texas (CLEAT) song promoted the hate material and supported violence against the police. CLEAT encouraged to boycott the album and focused its effort against the label, Time Warner Company. Since neither CLEAT nor Time Warner is a government agency, either one could suppress “Cop Killer” without violating the First Amendment.<sup>45</sup> CLEAT

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<sup>40</sup> Despite European Court of Human Rights held that consent of the pupil lawyer with rules of Belgium Bar in advance correctly reflects one aspect of the situation and did not attach decisive weight to it (“the applicant’s prior consent, without more, does not therefore warrant the conclusion that the obligations incumbent on him in regard to legal aid did not constitute compulsory labor”).

<sup>41</sup> Cases *Van Der Mussele* and *X v Netherlands* are uncomparable for example with unlawful acts against Czechoslovakian ice-hockey national team, world champions ending in mines and labor camps when the European Convention was in the process of its birth, which I briefly covered for this journal in TLQ 4/2013, pp. 330–332.

<sup>42</sup> For some reason applicants try this argumentations in various professions, for example see also *Štefan Bucha v Slovakia*, complaint no. 43259/07, 20.9. 2011, *X v FR.G.*, complaint no. 4653/70 Yearbook XVII (1974) 148. Different opinion had Advocate-General Lenz in the case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman* [1995] ECR I-4921 in front of European Court of Justice, now Court of Justice of the EU: *Moreover, the European Human Rights Commission’s reasoning that an infringement of rights could be excluded because the person concerned had by choosing that occupation accepted any restrictions which might be bound up therewith seems to me to be altogether questionable.*

<sup>43</sup> Opinion of J. P. Costa cited supra note 5, pp. 16–17.

<sup>44</sup> REINISH, A. op. cit., supra note 2, p. 69.

<sup>45</sup> STEINER, G. STEINER, J. *Business and Society, A Managerial Perspective, Text and Cases*. 7<sup>th</sup> edition. New York: McGraw-Hill Inc., p. 101.

“tried to avoid the free speech issue and stated that it did not begrudge Ice-T the right to express his views. But it had the right to openly object to them. And police officers had the right to withhold their consumer dollars from the company that distributed them.”<sup>46</sup> CLEAT threatened nation-wide boycott of Time Warner which defended production of the album.<sup>47</sup> Ice-T finally agreed to take Cop Killer from the original album and re-release was made without the song. Subsequently self-regulation was apparent also in the light of above. Music industry, resp. Recording Industry Association of America (RIAA) placed on some albums warnings on explicit lyrics and similarly The Motion Picture Association of America (MPAA) made with National Association of Theater Owners (NATO) a rating system for the movies which might restrict their appearance in the cinemas which provoked a following question: “would you rather have this done by an industry or governmental body?”<sup>48</sup> Similarly in sports, World Anti-doping Agency decided to put explicitly into Art. 8 of new version of the WADA Code (in force since 2015) the protection of fair trial referring to the European Convention of Human Rights concerning decisions on doping. CAS also voluntarily applies the European Convention of Human Rights in its case law horizontally.<sup>49</sup>

### 3.4. For the future

It is interesting when former judge of European Court Jean-Paul Costa was writing his opinion on WADA Code, he made an elaborate evaluation instead of writing one sentence that WADA is not a state, therefore it does not have to worry about scrutiny of ECHR. Reasonable assumption could be made that Jean-Paul Costa predicted WADA Code shall be confronted often in Switzerland (CAS/SFT), in a country with a possibility of direct application of human rights like in *Matuzalem* case or that some state involvement could be derived from the document based on states' participation in fight against doping, through UNESCO for example,<sup>50</sup> or self regulation by WADA (Art. 8 of new WADA Code in force since 2015) or he was simply optimistic forecasting full application of human rights horizontally in the future. Indeed in European legal environment in the light of Preamble to European Convention of Human Rights drafters of the Convention “gave evidence of great value they attached to general respect for the fundamental rights

<sup>46</sup> Ibid, p. 101.

<sup>47</sup> For example Time Warner's position was presented by its representative Gerald M. Levin in the Wall Street Journal, article titled “Why We Won't Withdraw ‘Cop Killer’”, published on June 6<sup>th</sup>, 1992 at p. A20. Also George Bush, Bill Clinton or Dan Quayle expressed their views on the occasion of this affair.

<sup>48</sup> WEILER, P., MYERS, G. *Entertainment, Media, and the Law. Text Cases and Problems*. 4<sup>th</sup> edition. St. Paul: West – A Thomson Reuters business, 2011, p. 138.

<sup>49</sup> CAS 2009/A/1920 *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski vs. UEFA*, CAS 2011/A/2425 *Ahongalu Fusimalohi vs. FIFA* and some other public law principles like *ne bis in idem* in CAS 2011/O/2422 *USOC vs. IOC*.

<sup>50</sup> Which does have sense in the light of literature see STRAUBEL, M.: The International Convention Against Doping in Sport: is it the Missing Link to USADA Being a State Actor and WADC Coverage of U. S. Pro Athletes? *Marquette Sports Law Review*. 2008, Vol. 19, No. 1, which refers to SHIPLEY, A.: Wider Front in Doping Battle: Law Enforcement Takes the Lead in Sports Probes, *Washington Post*, 2. 3. 2007, citing sports official when he was “Amazed” when he could use state like tools to investigate doping when U. S. Senate assisted United States Anti-Doping Agency's efforts in BALCO scandal. See also MC CAFFREY, P.: Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should be Treated as State Action, 22 WASH. U. J. L. & POL'Y, 2006.

and freedoms”.<sup>51</sup> Above I presented examples concerning the horizontality of human rights but sometimes, maybe, “While we ought to learn from the past, sometimes the best lesson is that the past cannot guide us”<sup>52</sup> and standard should step by step direct us towards direct horizontality of human rights, resp. “that society should consciously decide whose freedom to protect”<sup>53</sup>.

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<sup>51</sup> VAN DIJK, P., VAN HOOFF, G. J. H. et al. op. cit., supra note 6, p. 31. HERREMANS, T., DeJONG, P.: In Belgium, it is generally admitted that the wording of Article 8 of the Convention is sufficiently precise and complete so as to be directly applicable and that this provision has ‘horizontal effect’, which means that its protection can be claimed in a relation between two Citizen (in BLACKSHAW, I. – SIEKMANN, R., Sports Image Rights in Europe (eds.), Hague: T.M.C. Asser Press, 2005, p. 6). In SPIELMANN, D. in OLIVER, D. – FEDTKE, J. op. cit., supra note 3, also at p. 433 describes “Three means of applying the Convention in the relations between private parties”, that is the obligation to interpret private law instruments in a manner compatible with the Convention (besides the doctrine of positive obligations and balancing competing rights and public interests in the private sphere). At the time of submission of this article there were still pending cases of *Claudia Pechstein v. Switzerland*, complaint no. 67474/10 and *Adrian Mutu v. Switzerland* complaint no. 40575/10, both sportsmen suing Switzerland for responsibility of not securing their rights guaranteed by ECHR.

<sup>52</sup> GORDLEY, J. The Abuse of Rights in the Civil Law Tradition. In: DE LA FERIA, R. – VOGENAUER, S. (eds.). *Prohibition of Abuse of Law. A New General Principle of EU Law?* Oxford and Portland, Oregon: Hart Publishing, 2011, p. 33.

<sup>53</sup> CHEMERINSKY, E. op. cit., supra note 16, p. 576.