…

Once the right to remain silent attaches, any communication between an accused and an agent of the state (including a suborned informer) is subject to the right and may proceed only if the accused waives the right;" (R. v. Hebert [1990] 2 S.C.R. 151: Scope of right to silence, the court of Appeal for the Yukon territory, Canada).

According to this approach, when a suspect person expresses his will to remain silent, any communication between him and the police investigator is subject to this right and can exist only when the suspect waives his right.

At case P"H (Jerusalem) 5034/02 the state of Israel V Yarden Morag and others (published in www.nevo.co.il) it was held:

"Suspect being warned before giving his version or answers the investigators questions has a purpose which is the constitutional right granted to the suspect to be silent, facing a man of authority investigating him and that he does not have to fear him or be afraid of him and also he does not have to rely on his promises".

The police in this case breached their legal, ethical and moral duties which deprived Mrs. Dvir from due process of law.

Mrs. Dvir's case was a claim for damages for the police misconduct. The court ruled in her favor and granted her damages.

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ACCESS TO JUSTICE IN THE AREAS OUTSIDE THE CONTROL OF NATIONAL GOVERNMENT ON THE EXAMPLE OF EASTERN UKRAINE

Human rights protection represents the top priority for the international community along with maintaining international peace and security and conflict resolution [1]. The instruments of international law are aimed to directly or indirectly increase the protection of human rights. However, the implementation of international instruments and international co-operation remains the biggest challenge and precludes the UN from becoming an effective tool “harmonizing the actions of nations in the attainment of common ends” [1] .Art. 1 of the UN Charter points out the importance of respect of the principle of self-determination. However the interpretation of the principle raises a whole range of issues which remain among the hardest and most sensitive to resolve.

The Luhansk and Donetsk Peoples Republics (LPR and DPR) represent the territorial scope of the study. It is relevant to start the analysis of human rights protection on the territories outside the control of national authorities by specifying the legal status of these territories. It is addressed on the basis of international law,

however the internal context of the development of LPR and DPR and the reaction of Ukrainian state are included in the analysis.

The access to justice and legal instruments of human rights protection on the territories outside the control of national government constitute a research problem of this article. To address the issue in a more specified manner it is necessary to formulate the hypothesis: a) the principle of self-determination shall not be applied as a basis for LPR and DPR; b) the access to justice on the territories outside the control of national authorities remains unresolved in the national legislation to protect human rights.

The notion of self-determination is among the most controversial topics in the international law. What is certain by now is that it should be carefully addressed on the case by case basis involving all possible legal instruments to provide the protection of territorial integrity and human rights. For the purposes of this article it is important to define the notion itself as well as the subjects who can appeal to it. As it was aptly remarked by Professor S. Ratner 'self-determination' is "the process in international law usually attributed with the mythical status of creating states, has moved from a political concept to something akin to a legal tenet of uncertain contours" [16, p. 3].

The most challenging part is to define what law – international or national is the one to determine this question or how to create an effective cooperation between both of them. Even though the principle of self –determination evolved in post-colonialism era there are a lot of examples of conflicts in non-colonial countries in post-soviet area like Transnistria, Nagorno Krarabakh, South Ossetia and Abkhazia. Professors A. Cassese and M. Koskenniemi underline two main aspects concerning self-determination: territoriality and "colonialist nature of boundary-drawing, raising questions about its legitimacy—with significant implications for the human rights agenda" [9]. The second aspect that remains unresolved concerns subjects to self-determination while 'all peoples' have the right to self-determination' the question is "who the people are?" [17, 1052]. Castellino defines three groups of people who claim to self-determination and seek to create their own state. The criteria is not defined, however the groups are: "(a) Peoples, also referred to as 'nations' or 'submerged nations'; (b) Indigenous peoples, also referred to as First Nations or 'Indians', and usually considered to subsume 'Tribal Peoples'; (c) Minorities, also referred to as 'ethnic, linguistic, or religious minorities' or, more problematically in Europe, as 'national minorities'"[10, p. 155].

In our case the argumentation of LPR or DPR falls to neither of the categories as there is no historical or ethnical definition of "people of Donetsk" or "people of :Luhansk" neither "people of Crimea" (except indigenous Crimean Tatars) it is not possible to apply the principle of self-determination in this territorial context [11].

According to the resolution of Parliamentary Assembly of Council of Europe 2133 (2016) the self-proclaimed entities – Luhansk Peoples Republic (LPR) and Donetsk Peoples Republic (DPR) are not legitimate neither according to international or national law. It is stated in the Resolution that these entities are created, supported and effectively controlled by Russian Federation. Moreover, the illegitimate status applies to all the bodies of the DPR and LPR including de-facto established courts [6].

In Ukrainian legislation it is stated that cities, towns and villages of Luhansk and Donetsk oblast shall be recognized as occupied territories [4]. Moreover, art. 5 of the Law "On special order of local governments in certain regions of Donetsk

and Luhansk oblasts" introduced a special procedure for the appointment of heads of the prosecution and courts, which involves local governments in addressing these issues [5]. It should be noted that the transitional provisions of the constitution of LPR refer to the Ukrainian legislation that should be applied in parts that don't contradict the provisions of LPR constitution [14]. It is of course clear that any legal document issued by LPR self-proclaimed government doesn't have legal force.

However, it is challenging to assess how the outcome of current legislation influences the access to justice in above mentioned regions meaning the question of human rights protection in the local courts. The judiciary of the quasi state of LPR lacks judges having approximately 3 judges per local court that pledged to the LPR. Only criminal cases are being heard by military courts and general courts. Civil, administrative and commercial cases are not being heard that violates art. 6 of Convention on human rights and fundamental freedoms (hereinafter - "the ECHR") [11].

The question that remains unresolved is what the legal mechanism to protect human rights is and what the access to justice includes. ECHR provides special rights to a fair trial and the right to an effective legal remedy According to the Office for Democratic Institutions and Human Rights, these concepts are considered integral components of the broader concept of "access to justice", which, in turn, provides for the right of access to efficient, timely and fair services by the courts and prosecutors [2].

The concept of "access to justice" may include a wide range of recognized rights. "Access to Justice" means the obligation of the State to ensure the right of everyone to have access to effective and fair services in justice and judgment rendered in a timely manner. These rights are enshrined as fundamental principles in the Constitution of Ukraine and its international obligations, including international treaties. These treaties include the ECHR and the International Covenant on Civil and Political Rights (hereinafter - "ICCPR"). In addition, the right of access to justice, including guarantees of procedural rights, commitment to the rule of law and the right to effective remedies are an integral part of OSCE commitments in the human dimension, confirmed by OSCE member-countries, including Ukraine [7].

According to art. 13 of the ECHR states are obliged to provide an effective remedy for violations of rights and freedoms recognized in the ECHR. States at their discretion to decide how they will carry out this commitment, but effective remedies must be available to ensure the possibility of damages and provide for reasonable prospects of success of the case. In the art. 6 ECHR right to a fair trial includes the guarantee to procedural rights, namely the right of access to the court, the right to enforcement of judgments and are entitled to finality of judgments [2].

According to the OSCE report on the access to justice people who live on the territories under the control of DPR and LPR usually do not use or do not have access to the legal aid. In addition, legal aid providers can not provide services in areas outside the control of government. Among other significant issues there are: limited resources, difficulty to enforce decisions, lack of clear guidelines for the restoration of the case materials and the failure to develop appropriate action plans in emergencies [7].

In the previously mentioned cases of Nagorno Karabakh, Transnistria as well as in the case of Northern Cyprus the experience of responsibility for crimes on these territories was underlined in the Resolution of PACE dedicated to the legal

remedies to human rights violations on the Ukrainian territories outside the control of Ukrainian authorities. It is stated that "residents of a region in one State Party that is de facto under the control of another State Party may lodge an application both against the State to whom the territory in which he or she resides belongs de jure and the State which exercises de facto control. The Court found the northern part of Cyprus to be de facto controlled by Turkey, Transnistria by Russia, and the Nagorno-Karabakh region by Armenia" [6].

Moreover, the Resolution clearly states that "under international law, the Russian Federation, which exercises de facto control over these territories, is responsible for the protection of the population living there" [6]. Therefore, when it comes to the protection of human rights and responsibility of the state under ECHR Russia should be seen as responsible for their provision and implementation of ECHR decisions concerning the citizens of LPR and DPR territories.

As it is provided in the Report on legal remedies to establish responsibility of Russia for the violations of human rights on the conflicted territories it is necessary to prove that armed groups "were in fact controlled by Russia, but also that they were in control of the "locus delicti" where the alleged violation took place at the time when it took place" [6].

To conclude it is essential to answer the question how is it possible to ensure human rights in the territory outside the control of national government? According to the general procedure of applying to ECHR the applicant has to provide "copies of documents and decisions showing that the applicant has complied with the exhaustion of domestic remedies requirement and the time-limit contained in Article 35 § 1 of the Convention" [3]. In our case we deal with illegal courts of DPR and LPR and limited access to the national courts, who can issue the decision in favour of the applicant which will not be implemented on the occupied territories. To resolve this vicious circle ECHR in its recent decision case of Mozer v. the Republic of Moldova and Russia addresses two issues raised in this article: 1) Russia is responsible for the violation of human rights of the citizen of Moldova "by virtue of its continued military, economic and political support for the "MRT", which could not otherwise survive, Russia's responsibility under the Convention is engaged as regards the violation of the applicant's rights" [8]; 2) the alternative mechanism to provide the protection of human rights on the territories outside the control of local government is to recognize that "the courts of unrecognized entities, including decisions taken by their criminal courts, may be considered "lawful" for the purposes of the Convention provided that they fulfill certain conditions" [8].

However, the Court underlines the statement that using this instrument "does not in any way imply any recognition of that entity's ambitions for independence" [8]. Meanwhile, Ukrainian legislation struggles to resolve this issue on the domestic level. The president of Ukraine issued a decree on approval of "A national strategy on human rights" where the strategic aim to renew access of citizens to justice, to provide the investigation of crimes committed in their respective towns of Donetsk and Luhansk regions"[5].

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PHILOSOPHY OF BORIS KISTIAKOVSKI. LESSON OF THE IDEA OF STATE OF LAW FOR CONTEMPORARY AND FUTURE GENERATION

Boris Kistiakovsky was the Ukrainian philosopher of law whose considerations about the idea of the state of law can have immortal value. Kistiakovsky is the member of the legal school called Russian liberals. The idea of these group assumed changing of the tsarist system without using false revolutionary methods. However the difference between Kistakovsky and many of liberals was connected with his support for idea of the free develop of the Ukrainian nation. Kistiakovski wasn't indirectly in favour of Ukrainian independence. He support idea of multinational empire. However he saw the necessary element of such state in the rights of national freedom to all nations of empire. Ukrainian nation should gain all tools of free national development in the new model of state[1]. In my article I would like consider the Kistakovski's philosophy of law. In my opinion this philosophy doesn't lost actuality in the contemporary Middle-Eastern Europe.

The school of Russian liberalism promoted idea of the building state of law in Russian empire. Liberal was against tsarist despotism. However they were also in the sharp conflict with revolutionist. State of law should included unquestioned human rights. But from the other hand the idea of human rights shouldn't be sacrifice for realization of the idea of the abstracted will of nation or or the will of people. The idea of the state of law should be base on the respect for dignity of individuals. Liberal was in conflict both with tsarism and revolutionist. The revolutionist accused them of support regime. These group was also divided. Some between them was in favour of natural law as Pavel Novogredcev or in favour of religious rebirth as Volodimir Soloviov. To this group is included also Leon Petrazycki with his theory of psychological school in law[2]. But all of them support evolution of Russian empire to the model of the state of law.

Kistiakovski was fascinated by the school of neokantianism. Another than his counterparts from the camp of liberals he had his own time of the marksist's fascinations. But by all time he try connected the idea of social human rights with strongly respect for constitutionalism[3]. Even in the time when he was member of marksist camp he was inspired only by they philosophy of economics[4].He praised

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3 S. Heumann, op.cit, p.13-48.
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