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Do Human Rights Belong Exclusively to Humans? The Concept of the Organisation from a Human Rights Perspective

'a corporation […] has no soul to be damned, and no body to be kicked'
(Edward, First Baron Thurlow)

I Introduction

The idea of an organisation holding human rights appears to be inherently contradictory, an oxymoron.[1] How can it be possible that organisations can invoke rights especially designed for the protection of living human beings? Human rights is the discourse that entails a claim based on the notion of the inherent dignity and the embodied vulnerability of human beings.[2] By contrast, organisations don't have a conscience, don't breathe or eat, can't be enslaved and can't give birth, but they can live forever, can change identity in a day, cut off parts of themselves and turn into new 'persons', and can have simultaneous residences in many different countries.[3] However, to others, the concept of organisations' human rights is relatively unproblematic, as organisations may have rights and obligations as legal subjects.[4] Moreover, some have lobbied for granting organisations the right to freedom of religion, free speech, and other constitutional protections.[5] By invoking the concept of human rights, organisations extend their claims for rights to invoke something approaching a form of legal

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1 Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave MacMillan 2010) 1.

2 Anna Grear, 'Challenging Corporate Humanity Legal Disembodiment, Embodiment and Human Rights' (2007) 7 (3) Human Rights Law Review 511–543, 516.

3 Thom Hartmann, *Unequal Protection How Corporations Became "People" – and How You Can Fight Back* (2nd edn, Berrett-Koehler Publishers 2010) 10.

4 Grear, *Redirecting Human Rights…* (n 1).

5 See *Citizens United v Federal Election Commission* No. 08–205. Decided January 21, 2010 and *Burwell, Secretary of Health and Human Services, et al. v Hobby Lobby Stores Inc.* Decided June 30, 2014.

humanity.[6] This tendency can lead very easily to treating organisations as the moral equivalent of living human beings.[7]

Taking this threat into account, the extension of human rights to organisations as beneficiaries should be investigated closely.[8] Many difficulties need to be solved in order to ensure an adequate level of human rights protection for human beings and organisations as well. To avoid contingency, thinking in a coherent system based on objective considerations is vital in this context. This goal can be achieved by creating a problem map based on two significant aspects. The first lays emphasis on the organisation, and the second focuses on human rights, in accordance with the German constitutional approach. According to Article 19 (3) of the German Constitution, the *Grundgesetz*, fundamental rights also apply to domestic legal persons to the extent that their nature permits.[9] When applying this provision, the German Constitutional Court has regard to both the nature of the rights and to the nature of the legal person.[10]

Space restrictions do not permit us to consider all the aspects of the problem map of organisations as human rights-holders, so in the following sections only its main frames will be underlined to facilitate a better understanding of the context of this paper. When focusing on organisations as the designated first part of the problem map, many questions emerge. For instance, when organisations vindicate human rights protection, are the individuals or the organisations the real right-holders? It is unequivocal that people are human rights holders, even when they join or form an organisation. However, the question is, whether the organisation itself can be a right-holder, and not just the individuals behind it. In this regard, three different approaches can logically be distinguished. The first is that only human beings are human rights beneficiaries, and for this reason organisations are excluded from human rights protection. The second is an instrumental justification, according to which the inclusion of organisations under the protective ambit of human rights serves only as a means of defending the human rights of human beings. There is a third option, whereby the human rights protection of organisations is independent from the individuals' human rights protection. In this case, the organisation is a human rights beneficiary in its own right. The choice between these competing concepts demands the elaboration of human rights justification for the involvement of organisations, which is not the subject of this paper, for this reason this issue will not be examined in more detail. However, attention needs to be drawn to the fact that many courts accept applications claiming human rights abuses from organisations including

6 Grear, 'Challenging Corporate Humanity…' (n 2).

7 Grear, 'Human Rights – Human Bodies? Some Reflections on Corporate Human Rights Distortion, The Legal Subject, Embodiment and Human Rights' (2006) (July) Theory Law Critique 171–199, 189.

8 Grear, 'Challenging Corporate Humanity…' (n 2) 7.

9 In this paper, the words human rights and fundamental rights are interchangeable. Human rights will be used to refer to international context and fundamental rights will be used to the rights guaranteed by national constitutions.

10 Peter Oliver, 'Companies and their fundamental rights: A comparative Perspective' (2015) 64 (June) International Law Quarterly, 661–696, 692.

the European Court of Human Rights, the Hungarian and the aforementioned German Constitutional Court as well.[11] In conclusion, pursuant to these organs, organisations are included in human rights protection. Based on this practice, this paper does not bring this status into question, it accepts organisations as human rights beneficiaries.[12]

The second part of the problem map focuses on human rights and the question of which rights can be invoked by organisations and for what reason. When examining whether a certain human right can be possessed by an organisation or not, first the major difference between a human being and an organisation needs to be clarified from a fundamental rights approach. This aspect appears in many case law as the very nature of the human rights.[13] Based on this aspect, the organisations' fundamental rights can be roughly divided into three groups.[14] The first group contains the rights which are wholly inapplicable to organisations, for instance prohibition of torture, inhuman or degrading punishment.[15] Other rights are always and without discussion regarded as applicable to organisations, such as protection of property.[16] The third group of human rights is in the middle, meaning that the applicability of these rights is open to debate, for instance the protection of home or the freedom of expression in a commercial context.[17] In addition, a third facet of the problem map should be mentioned, namely the extent of being a human rights holder as an organisation. In a broad sense, this is included in the second question concerning human rights, although considering its significance, it shall be mentioned specifically.[18]

These are the main directions which shall be interrogated as a whole in order to decide whether an organisation can be a human rights-holder in a specific case or not. Nevertheless, in the following, this paper focuses on the concept of the organisation from a human rights

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11 See at the Article 34 European Convention on Human Rights, the Article I Section (4) of the Hungarian Constitution and the Article 19 (3) of the *Grundgesetz*. Pursuant to Article 34 of European Convention on Human Rights, the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.

12 This paper accepts organisations as human rights beneficiaries and tries to shed light on the fact that there is a need for an original concept of the organisation from a human rights perspective, as will be discussed later in more detail.

13 The European Court of Human Rights', the Hungarian and the German Constitutional Court's case law have examined the nature of the given fundamental right to decide whether it can be invoked by a corporate entity or not.

14 See the study by Marius Emberland, *The Human Rights of Companies* (Oxford University Press 2006, Oxford).

15 Winfried H.A.M. van den Muijsenbergh, Sam Rezai, 'Corporations and the European Convention on Human Rights' (2012) 25 Pac. McGeorge Global Bus. & Dev. L.J. 43–68, 50. See also *Verein Kontakt-Information-Therapie (KIT) v Austria,* Appl. No. 11921/86, See also the study by Emberland (n 14).

16 Article 1 of Protocol 1 to the European Convention on Human Rights says every natural or legal person is entitled to the peaceful enjoyment of his possessions.

17 See the study by Marius Emberland (n 14).

18 This part might contain the aspects, which determine the extent of the human rights protection of organisations. For instance, what is the role of the purposes and objectives of the organisation in question? Can a profit-oriented organisation claim the freedom of religion or can a private military organisation rely on human rights standards, or do these purposes preclude these organisations from the protective ambit of human rights?

perspective. In this regard, the future purpose is to determine an own positive definition of an organisation for the Hungarian fundamental rights practice, with the help of the Hungarian, the German and the European human rights perspective. However, this essay now takes just the first step to do so by naming three aspects which determine a negative definition of this term. To achieve this first objective, the European Court of Human Rights' case law and the Hungarian views will assist. The Hungarian perspective is fundamental for this essay, because it is not possible to provide an adequate concept for organisation from a human rights perspective without a profound understanding of the Hungarian views and practice concerning organisations' fundamental rights. The European Court of Human Rights' case law is relevant in this context for numerous reasons. Due to the fact that corporate entities were always intrinsically favoured by the framers of the European Convention on Human Rights, the European Court of Human Rights does not limit human rights standards to natural persons.[19] For this reason, the European Court of Human Rights' case law has thorough views in relation to organisations' human rights.[20] Besides all these reasons, it is also very important that the European Convention system is widely thought to be the most juridically mature supranational human rights regime and there is a widespread perception that the European Court of Human Rights is the most developed and successful international human rights forum.[21] Taking these perceptions into account, the practice of Strasbourg cannot be avoided when analysing the concept of the organisation from a human rights perspective.

In the following, the three elements of the negative definition of the organisation from a human rights approach will be presented through the results of these two practices. The main statements of the relevant cases of Strasbourg and Hungary will demonstrate the existence and the necessity of these three elements.

II Why Organisations?

Before identifying the three aspects of the negative definition, a preliminary issue needs to be elaborated, namely why the potential human rights-holder is called an organisation and what this term intends to cover. It seems to be obvious that entities established by individuals refer to artificial persons, as opposed to natural persons, and comprise all bodies which are not natural persons. However, artificial persons may have a wider scope of non-human beings than organisations, because nowadays this term may encompass artificial intelligence, rivers, whole ecosystems or animals as well.[22] These non-human beings can be seen also as artificial persons

19 Grear, *Redirecting Human Rights…* (n 1) 25.

20 See Emberland (n 14).

21 Grear, *Redirecting Human Rights…* (n 1) 24.

22 Robert van den Hoven van Genderen, 'Do We Need New Legal Personhood in the Age of Robots and AI?' in *Robotics, AI and the future of Law* (Springer Nature Singapore 2018). See also <https://www.theguardian.com/global-development-professionals-network/2017/apr/21/rivers-legal-human-rights-ganges-whanganui>

that may claim legal or even constitutional protection.[23] For this reason, artificial persons cannot be appropriate for this writing. The phrase of legal person cannot be an adequate concept either, especially if thinking about entities that have no legal personality under national law or private law but still can be bearer of rights and obligations in a limited way, such as civil companies in Hungarian private law.[24] On the basis of these aspects, the term of organisation seems to be suitable in this context. In particular, as this paper tries to cover those entities that are formed by human beings and act for the benefit of human beings in a broad interpretation, this does not definitely imply the recognition of legal personality by the state. Nevertheless, these entities shall be independent entities, the existence of which shall be independent of their members.[25] If otherwise, certain human rights would be held by the several individuals who make up the organisation and the right would be 'their' right and not 'its' right.[26] The notion of the organisation is also supported by the fact that the European Convention on Human Rights encompasses the term of non-governmental organisations as human right holders.

Regarding the category of the organisations entitled to apply for human rights protection, the scope is broad; there are non-profit associations, labour unions, political parties, foundations, churches, monasteries, and all sorts of economic enterprises, such as limited liability companies, limited partnerships and building societies.[27] This indicates that these entities can be large or small to different degrees, they can have very different purposes and different levels of legal personality. Among these organisations, there are legal entities recognised as bearers of rights and duties in a limited way but lacking the legal status of a legal person, and there are legal entities having legal personality.[28] There are partnerships based on the personal involvement of their members too, like cooperative societies, or legal entities such as the unification of funds, foundations, or entities with financial interests, such as limited liability companies.[29]

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accessed 3 November 2019; <https://www.climatechangenews.com/2017/04/03/indian-court-awards-legal-rights-person-nature/> accessed 3 November 2019.

23 Lawrence B. Solum, 'Legal Personhood for Artificial Intelligences' (1992) 70 N.C. L. Rev. 1231–1287.

24 This topic will be discussed in more detail in the following. See more information about civil companies in Section 5/A of the Act CLXXV of 2011 on the Freedom of Association, on Public-Benefit Status, and on the Activities of and Support for Civil Society Organizations.

25 Grear, 'Challenging Corporate Humanity…' (n 2) 7.

26 Peter Jones, 'Human Rights, Group Rights, Peoples Rights' (1999) 21 (1) Human Rights Quarterly 86; Grear, 'Challenging Corporate Humanity…' (n 2) 8.

27 Tom Zwart, *The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee* (Martinus Nijhoff Publishers 1994, Dordrecht) 47.

28 For instance, civil companies in Hungarian law or oHG, KG, GbR in German law.

29 See at the Section 3:325 (1), Section 3:88, Section 3:378 and Section 3:88 of the Hungarian Act V of 2013 on the Civil Code, See also at Samuli Skurnik, 'The Role of Cooperative Entrepreneurship and Firms in Organising Economic Activities – Past, Present and Future' <https://pdfs.semanticscholar.org/91dc/b354eab58ad8d7bb6fa8973e8ba404977808.pdf> accessed 27 January 2020. See also Jerker Nilsson, Organisational principles for co-operative firms (2001) 17 (3) Scand. J. Mgmt. 341.

To determine the concept of an organisation from a human rights perspective, the common features of these organisations shall be examined and identified in a general context, with a special focus on the human rights approach. By reviewing the common features of these organisations, the elements of the negative definition appear.

III Three Elements of the Negative Definition

1 No Legal Personality Under National Law

To identify what makes an artificial person become an organisation, first it needs to be examined from when an organisation can exist. Based on the beginning of the organisations' existence, it can be stated that the concept of organisation from a human rights perspective has a wider scope than being a legal personality under national law, as it was mentioned before. Under national law, legal personality is often conferred on a body, which has reached a certain level of organisation, while other entities, although they may be bearers of rights and duties in a more limited way, are not recognised by the state as legal persons. Considering this, the concept of the organisation from a human rights perspective is not equivalent to legal persons under national law. Although most of the organisations bringing applications before constitutional or human rights courts are legal persons, having a legal personality is not a prerequisite.[30] This conclusion can be found in the European Court of Human Rights' case law in three different ways, which will be presented with the relevant cases in the following.

a) The dissolution of organisation

The first element concerns the dissolution of an organisation, for which the suitable example is the case of *Freedom and Democracy Party (ÖZDEP) v Turkey*. In this case, the Turkish authorities applied to the Constitutional Court to have the party dissolved.[31] Shortly afterwards, the founding members of ÖZDEP decided to dissolve the party voluntarily. Nevertheless, the proceedings before the Commission and the Court were continued with ÖZDEP as applicant.[32] The European Court of Human Rights found that the members of ÖZDEP had resolved to dissolve their party in the hope of avoiding certain effects of the dissolution by the Constitutional Court, in their case a ban on holding similar office in any other political body.[33] Thus, the decision of ÖZDEP's leaders had not been taken freely.[34] Moreover, the Turkish law on the regulation of political parties provided that if a decision to dissolve a political party had been taken by the competent body of the party after an application for its dissolution had

30 Zwart (n 27) 46.

31 *Freedom and Democracy Party (ÖZDEP) v Turkey,* no. 23885/94, § 9, 8 December 1999.

32 Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press 2005, New York) 248.

33 *Freedom and Democracy Party (ÖZDEP)* (n 31) § 26.

34 Ibid.

been lodged by the authorities, this should not prevent the proceedings before the Constitutional Court from continuing, or depriving any dissolution order of its legal effects.[35] As domestic law provided that a voluntarily dissolved political party remained in existence for the purposes of dissolution by the Constitutional Court, the Government could not contend before the European Court of Human Rights that ÖZDEP was no longer in existence when the dissolution order was made, and for this reason the government's preliminary objection was dismissed.[36] Taking these aspects of the case into account, the European Court of Human Rights found a violation of Article 11 of the Convention and the judgement was issued in the name of the party even after its dissolution.[37] Based on the statements of this case, the dissolution of an organisation does not hinder it from being a human rights beneficiary. In addition, this case indicates that if the domestic law treats an organisation as a still existing entity after its dissolution then it can be a bearer of rights and duties in a very limited way, then its human rights protection is necessary.

b) Unregistered organisation

The second situation is when an organisation has not been registered yet and still can bring an application claiming its human rights violation before the European Court of Human Rights, resulting in being a human right holder without legal personality under national law.[38] This happened in the case of *Stankov and United Macedonian Organisation Ilinden v Bulgaria,* in which the question arose whether an organisation that had been refused registration could be accepted as an applicant before the Commission.[39] The Bulgarian Government argued that where a non-governmental organisation lacks legal standing under domestic law and where it is not open to the Commission to examine the conformity with the Convention of the decision that led to such legal situation, then the non-governmental organisation has no standing to submit a petition.[40] The Commission recalled that in its case-law in cases concerning non-governmental organisations which had been refused registration or had been dissolved and the complaints concerned *inter alia* the very fact of the dissolution or of the refusal of registration, the Commission had not questioned the applicants' *locus standi* as non-governmental organisations within the meaning of the Convention.[41] The Commission stated that any other solution would lead to a substantial degree of restriction of the rights of non-governmental organisations to petition under the European Convention

35 Lindblom (n 32) 248.

36 *Freedom and Democracy Party (ÖZDEP)* (n 31) § 26. It should be noted here that the Turkish government did not raise the objection that ÖZDEP was no longer a party to the proceedings because it did not exist legally, but only that it could not be considered a victim because of the decision to dissolve the organisation voluntarily.

37 Lindblom (n 32) 248.

38 Because in accordance with a lot of legal systems organisations obtain their legal personality under national law by the virtue of their court registration.

39 *Stankov and United Macedonian Organisation Ilinden v Bulgaria,* no. 29221/95 and 29225/95, Admissibility Decision, 29 June 1998.

40 Lindblom (n 32) 248.

41 *Stankov* (n 39).

on Human Rights.[42] Furthermore, the Commission also noted that the refusal of registration of an association did not amount to interference with the association's right to freedom of assembly if the association was able to perform its activities without registration however, if the authorities sought to suppress the activities of such an association following the refusal of registration, there must be a possibility for it to submit a complaint under Article 11 of the Convention.[43] These statements prove that an organisation without registration can also invoke protection against arbitrariness by the state, which jeopardises the free existence and functioning of an organisation.

This also supports that being an organisation, from a human rights perspective, does not necessarily entail legal personality under national law. Any other conclusion would lead to the exclusion of unregistered organisations from human rights protection and would leave organisations unprotected against governmental arbitrariness during its registration process. This issue also appeared in the case of *APEH Üldözötteinek Szövetsége and Others v Hungary,* in which an unregistered organisation alleged, in particular, that the registration procedure had been unfair, in breach of Article 6 of the Convention.[44] The European Court of Human Rights found the application admissible, and stated that there had been a violation of Article 6 (1), as the principle of equality of arms had not been respected in the registration procedure.[45] This was the conclusion, in spite of the fact that, according to Hungarian law, associations obtain their legal existence only by virtue of their court registration.[46] This case again underlined the need for human rights protection of unregistered organisations and strengthened the view that organisations from a human rights perspective need to be differentiated from organisations according to national law.

c) De facto organisation without legal personality under national law

Beside these two cases, a third situation can also be identified. This is when organisations as bearers of rights and duties in a limited way under national law are still human rights holders. This instance appears in the *Zumtobel v Austria* case, in which one of the applicants was a limited partnership, which did not have legal personality under Austrian law, yet the application was admissible.[47] This case strengthens the conclusion that the concept of the organisation from a human rights perspective is independent from the concept of legal personality under national law, since entities having legal personality under national law have a narrower scope than organisations being potential human rights holders, due to the fact that there are entities which may be bearers of rights and duties in a limited way, but not recognised as legal persons under national law. These entities are called *de facto* organisations

42 Ibid.
43 *Stankov* (n 39).
44 *APEH Üldözötteinek Szövetsége and Others v Hungary* Application no. 32367/96 5 October 2000.
45 *APEH Üldözötteinek Szövetsége* (n 44).
46 Lindblom (n 32) 174.
47 *Zumtobel v Austria* no. 12235/86, 30 June 1992.

in this paper, because they can actually function and perform their activities without legal personality under national law.

Another appropriate example for *de facto* organisations as human rights beneficiaries is the *Canea Catholic Church v Greece* case, in which the application was treated by the Commission and the European Court of Human Rights as filed by the church as such, in spite of the fact that the Greek government denied that the church had legal personality.[48] The church claimed the refusal of the Canea Court of First Instance and the Court of Cassation to recognise the church as a legal person with capacity to bring or defend legal proceedings violated, *inter alia*, Article 6 and 9 of the European Convention on Human Rights.[49] The European Court of Human Rights noted that the Court of Cassation's ruling, that the church had no capacity to take legal proceedings, had imposed a real restriction on it, preventing it from having any dispute relating to its property rights determined by the courts.[50] Therefore the European Court of Human Rights concluded that such a limitation impaired the very substance of the church's right to a court and constituted the breach of Article 6 of the Convention.[51]

Based on the conclusions of these cases, it can be stated that the conception of an organisation from a human rights perspective has a wider scope than an organisation having legal personality under national law. Questioning the *locus standi* of a non-governmental organisation as an applicant when it has not been registered yet or has been dissolved or is just a *de facto* organisation – meaning the organisation has no legal personality under national law – would result a substantial restriction on being a human rights beneficiary as an organisation. In conclusion, organisations as human rights holders need real existence and function, but do not necessarily need legal personality under national law. Any other conclusion would result that the state bearing primary responsibility for the respect and protection of human rights would determine in which cases it is obliged to do so and in which it is not. This option would leave dissolved, unregistered and *de facto* organisations unprotected, and it would generate an arbitrary practice which would undermine and jeopardise the human rights protection of human beings and organisations by abolishing the very essence of human rights, protection against unrestricted governmental arbitrariness.[52]

48 *Canea Catholic Church v Greece,* no. 25528/94, 16 December 1997.

49 *Canea* (n 48) § 32.

50 Lindblom (n 32) 249.

51 *Canea* (n 48) § 42.

52 For the purpose of human rights see Sári János, Somody Bernadette, *Alapjogok Alkotmánytan II.* (Osiris Kiadó 2008, Budapest) 33; van den Muijsenbergh, Rezai (n 15) 56.

2 Different Term from the Organisation Recognised Under Private Law

The second aspect of the negative definition of the organisation from a fundamental rights approach comes from the need for a distinction between the private and the public law definition of legal entity.[53] With regard to legal capacity, the Hungarian Constitutional Court emphasised that the transposition of a concept into another branch of law could be done only with a special focus on the characteristics of the certain field.[54] This statement shed light on the fact that the substantial difference between private and public law must be taken into account. Whereas private law concerns the property and personal relationships of human beings based on horizontal relationships, constitutional law applies to the rights guaranteeing the freedom and dignity of individuals against the state based on vertical relationships.[55] It follows that fundamental rights within public law have their own peculiarities. Without considering them, the term 'organisation' could be seen exactly as an organisation having legal personality under private law, which does not necessarily cover all organisations having rights and obligations. For example, until 2013, limited and general partnerships had no legal personality under private law in Hungary.[56] Moreover, nowadays there are civil companies, editorships and other bodies, which have no legal personality under private law, but still can have rights or duties in some way and, for this reason, they may in certain cases request constitutional protection against governmental arbitrariness.[57] If the term 'organisation' from a human rights approach would be the same as the organisation under private law, these organisations could not be fundamental right-holders, although there is no reason for this restriction in the field of fundamental rights.[58] Despite the need for this distinction, the Hungarian Constitutional Court's interpretation does not point in this direction; on the contrary, one of the Constitutional Court's decisions stated that the Constitution ensures the protection of fundamental rights specifically to entities having legal personality.[59] This statement may indicate that the Hungarian Constitutional Court does not differentiate between a legal entity under private law and a legal entity from a fundamental rights perspective. However, this would be necessary because there can be such entities that have no legal personality under private law, but are still victims of fundamental rights breaches.[60] This indicates that the scope

53 This perception is connected with the first element of the negative definition of the organisation from a human rights perspective, named no legal personality under national law.

54 Decision 36/2000. (X. 27.) of the Hungarian Constitutional Court.

55 Somody Bernadette, Szabó Máté Dániel, Vissy Beatrix, Dojcsák Dalma, *Alapjogi Tanok* (HVG-ORAC 2018, Budapest) 160.

56 Act IV of 2006 on business organisations 2. § (2).

57 See Section 5/A of Act CLXXV of 2011 on the Freedom of Association, on Public-Benefit Status, and on the Activities of and Support for Civil Society Organizations. See also the case of Equal Treatment Authority EBH/HJF/243/2019 for the claim of an editorship.

58 There are oHG, KG and GbR in German law as well, which have no legal personality, but still can be human rights beneficiaries.

59 Decision 25/2012. (V. 28.) of the Hungarian Constitutional Court.

60 This is supported by the European Court of Human Rights' views as well, which sheds light on why being a legal person under national law is not a prerequisite.

of an organisation as a fundamental rights-holder is wider than an organisation having legal personality under private law.

Moreover, this distinction is needed not only because the scope of the organisation can be wider than its private law counterpart, but also because this term may consist of fewer entities than legal persons under private law. Hence, by virtue of the human rights approach within public law, governmental organs cannot be right-holders, based on the main function of human rights that is protecting individual's autonomy, and freedom against governmental power.[61] Taking into account the main function of fundamental rights, the case law of the Hungarian Constitutional Court excludes governmental organs from fundamental right-holders. According to one decision of the Constitutional Court, an organ entitled to exercise public authority is obliged to secure and protect fundamental rights, therefore any breach of its fundamental rights is not possible.[62] In another case, in which the Hungarian tax authority claimed the protection of its fundamental rights, the Constitutional Court strengthened the aforementioned case law by concluding that the organ entitled to exercise public authority is obliged to secure and protect fundamental rights, therefore the breach of its fundamental rights is not possible.[63] As opposed to this case law, the concept of being a right-holder under private law does not preclude governmental organs from being right holders, because in private law the aforementioned requirement does not exist.[64] In conclusion, borrowing the private law definition of legal entity for the benefit of fundamental rights discourse is not possible without considering the peculiarities of the fundamental rights discussion, as the scope of fundamental rights-holders from a fundamental rights perspective can be wider and narrower than legal persons under private law.

3 Excluding Governmental Organs from the Concept

By recognising the exclusion of governmental organs from the protective ambit of fundamental rights, the third aspect of the negative definition is identified. This statement is supported by the European Court of Human Rights' case law as well, which specifies the term 'governmental organs'.

The Commission made it clear during its first session that non-governmental organisations are private organisations, as opposed to public entities.[65] According to the European Court of Human Rights' case law for the qualification as a governmental organisation, the organ at

61 Sári, Somody (n 52).

62 Decision 23/2009. (III. 6.) of the Hungarian Constitutional Court.

63 Decision 3317/2012. (XI. 12.) of the Hungarian Constitutional Court, which was after entry into force of the new Constitution *(Alaptörvény)*.

64 According to Section 3:405 (1) of the Hungarian Civil Code, the State shall participate in civil relations as a legal person.

65 Peter van Dijk and Fried van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998, Hague) 46.

issue needs not only to be a public entity, but also has to have the power to exercise public authority. Taking this consideration into account in the Holy Monasteries case, the European Court of Human Rights noted that monasteries are non-governmental organisations within the meaning of the European Convention of Human Rights, because they do not exercise governmental powers.[66] It stated that, from the classification as public law entities, it could only be inferred that the legislature wished to afford them legal protection against third parties.[67] The monasteries came under the spiritual supervision of the local archbishop, not under the supervision of the State, of which they were completely independent.[68] The European Court of Human Rights concluded that the applicant monasteries were therefore to be regarded as non-governmental organisations.[69] The statements of this decision indicate that the category of governmental organisation includes legal entities which participate in the exercise of governmental powers or act under the control of the state.[70] In addition, in the case of 16 Austrian Communes and some of their *Councillors v Austria,* the Commission stated that local government organisations such as communes, which exercise public functions on behalf of the State, are clearly governmental organisations and for this reason they cannot bring an application.[71] So the European case law not only classifies the central institutions of a state as governmental organisations, but also decentralised local institutions, such as communes and municipalities, or administrative bodies in which municipalities participate in order to fulfil their public functions. This opinion was strengthened by the case of *Danderyds Kommun v Sweden,* in which the European Court of Human Rights reiterated that it is not only the central organs of the state that are clearly governmental organisations, as opposed to non-governmental organisations, but also decentralised authorities that exercise public functions, and added that this is the case notwithstanding the extent of the decentralised authorities' autonomy against the central organs.[72] The European Court of Human Rights underlined that this is the case even if the municipality claims that, in the particular case, it is acting as a private organ.[73] A conflict between a central state organ and a municipality is rather a conflict of jurisdiction which is not for Strasbourg to solve.[74] Hence, for the

66 *Holy Monasteries v Greece,* no. 13092/87 and 13984/88, § 49, 9 December 1994. See also *Finska församlingen i Stockholm and Hautaniemi v Sweden,* Admissibility decision, 11 April 1996.

67 Ibid.

68 *Holy Monasteries* (n 66).

69 Ibid. See also *Finska församlingen i Stockholm and Hautaniemi v Sweden,* Admissibility Decision, 11 April 1996.

70 A typical example for the last one is running a public service under governmental control. See *Practical Guide on Admissibility Criteria* 13, <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 18 November 2019.

71 16 Austrian Communes and some of their *Councillors v Austria,* Admissibility decision, 31 May 1974; *Ayuntamiento de X. v Spain,* Admissibility decision, 7 January 1991; *Ayuntamiento de Mula v Spain,* Admissibility decision, 1 February 2001. See also in van Dijk and van Hoof (n 65) 46; Lindblom (n 32) 250.

72 *Danderyds Kommun v Sweden,* no. 52559/99, Admissibility Decision, 7 June 2001.

73 Ibid.

74 Ibid.

qualification as governmental organisation, it is decisive that the organisation at issue has in general the power to exercise public authority, although it is not necessary that it does so in the specific case.[75] This results that both central and decentralised organs of the state are governmental, and for this reason they cannot be human rights holders. However, it cannot be decisive whether they are public entities or not, because the only thing to be inferred from their being classified as a public law entity is that the legislature wished to afford them legal protection against third parties. Therefore, governmental organisations that normally exercise public functions and activities related either to the exercise of public power or to state-controlled activities in the field of public services are precluded from exercising human rights.[76] On the other hand, a private association is not deprived of its non-governmental status if it pursues aims that are also pursued by the state or fulfils functions that have been recognised by state organs as being of public interest.[77]

This case law indicates that, in order to determine whether a legal entity falls within the category of governmental organisation, its legal status, the nature of the activity it carries out and the context in which it is carried out shall be taken into consideration.[78] This results that the decision, whether an organisation is a human rights holder or not, entails a profound examination of the certain organisation's characteristics, with a special focus on its power to exercise public authority.

The Hungarian fundamental rights discussion also has many aspects to examine in relation to governmental organs' human rights.[79] However, as opposed to the European Court of Human Rights' views, nowadays municipalities and other organisations with public authority in Hungary may invoke fundamental rights if the organisation in the specific case does not exercise public authority and acts as a private organ instead.[80] For instance, as compared to the previous case law of the Hungarian Constitutional Court, which excluded municipalities from the protective ambit of fundamental rights, in Decision 3178/2014. (VI. 18.) the Hungarian Constitutional Court did not investigate the municipality's entitlement to fundamental rights protection, the complaint was rejected on other grounds, which is equivalent to accepting municipalities as human rights beneficiaries. Furthermore, in another case, due to the municipality acting as a private organ in the certain situation, the Hungarian Constitutional Court considered irrelevant that the applicant exercises public authority in general and stated that the municipality can be a fundamental rights holder.[81] In addition, another decision of the Hungarian Constitutional Court accepted an application claiming the

75 No. 13252/87.
76 Zwart (n 27) 46.
77 Ibid.
78 *Practical Guide* (n 70).
79 Decision 23/2009. (III. 6.); Decision 3149/2016. (VII. 22.); Decision, 3091/2016. (V. 12.) and Decision 23/2018. (XII. 28.) of the Hungarian Constitutional Court.
80 Decision 3149/2016. (VII. 22.) and Decision 3091/2016. (V. 12.) of the Hungarian Constitutional Court.
81 Decision 3149/2016. (VII. 22.) of the Hungarian Constitutional Court.

protection of the right to a fair trial by a public authority and stated the violation of its right guaranteed by Article XXVIII (1) of the Hungarian Constitution.[82]

This case law raises the question whether having public authority is part of the negative definition of an organisation from a fundamental rights perspective or an obstacle for being a fundamental rights holder in the specific case. In the first case, an organisation having public authority cannot be a fundamental right-holder anyway, because it would be conceptually impossible.[83] In the second case, this would depend on the circumstances. If the organisation having public authority would act as a private organ, then it may invoke the protection of fundamental rights. This direction appears in the Hungarian constitutional discourse, taking into account the new case law of the Hungarian Constitutional Court and the new provision of the Act on the Constitutional Court, according to which an entity exercising public authority might be a beneficiary of a right guaranteed by the Constitution.[84]

In conclusion, having public authority may be criteria of the negative definition of an organisation from a human rights perspective, but there is also an opportunity for 'just' being an obstacle in certain cases. However, it is certain that exercising public authority in the given case is part of a negative definition of an organisation from a human rights approach.[85]

IV Conclusion

The negative organisation definition from a human rights perspective has three main elements, which underline the necessity of an autonomous, positive concept of the organisation based on fundamental rights characteristics. The first element is independence from the legal personality under national law, as legal personality is often conferred on a body that has reached a certain level of organisation, while other entities, although they may be bearers of rights and duties in a more limited way, are not recognised by the state as legal persons. Considering this, three different ways can prove the existence and the necessity of this element. The first is when an organisation has not been registered yet by the state, which in most cases means that the organisation has no legal personality under national law.[86] The second is when an organisation has been dissolved, which results that the organisation has no

[82] Decision 23/2018. (XII. 28.) of the Hungarian Constitutional Court. According to Article XXVIII (1), in the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[83] This is the case according to the European Court of Human Rights.

[84] Section 27 (3) of Act CLI of 2011 on the Constitutional Court, according to which, with regard to a petitioner exercising public authority, it is necessary to examine whether it is entitled to the right guaranteed by the Constitution.

[85] In spite of that, according to Decision 3/2018. (XII. 28.) of the Hungarian Constitutional Court, an entity exercising public authority in the specific case can be a beneficiary of the right to a fair trial guaranteed by the Hungarian Constitution.

[86] *Stankov* (n 39), *APEH Üldözötteinek Szövetsége* (n 44).

longer legal personality under national law.[87] The third situation is when an organisation exists and functions without legal personality under national law, this entity is called *de facto* organisation in this paper.[88] These cases prove that organisations may claim human rights protection before, after and even without their legal personality being guaranteed by the state. Any other solution would result that the state, which is obliged to ensure and protect human rights, would define in which cases this obligation exists and this option may lead to an arbitrary practice. This would undermine and jeopardise the human rights protection of human beings and organisations as well, by abolishing the very essence of the human rights discussion: the protection against unrestricted governmental arbitrariness.[89]

The second aspect of the negative definition of the organisation from a fundamental rights approach is coming from the need for a distinction between the private and public law concepts of the legal entity, since the transposition of a concept into another branch of law can only be done with a special focus on the characteristics of the certain field.[90] It should be noted that there is a substantial difference between private and public law, because private law concerns the horizontal relationships of human beings, and fundamental rights include rights guaranteeing the freedom and dignity of individuals against the state based on vertical relationships. This characteristic of public law should be considered, and it follows from this that the scope of organisations under private law can be narrower than its human rights counterpart.[91] However, at the same time, legal persons under private law can cover more entities than organisations from a fundamental rights perspective, because private law does not preclude governmental organs from being right-holders.[92] Nevertheless, by virtue of the fundamental rights approach within public law, governmental organs cannot be right-holders, based on the main function of human rights, namely protecting individuals' autonomy and freedom against governmental power.[93]

This conclusion leads us to the third aspect of the negative definition of the organisation from a human rights approach, namely the exclusion of governmental organs from the protection of human rights. Based on the views of the European Court of Human Rights' and the Hungarian practice, the category of governmental organisation includes legal entities that exercise governmental powers and act under governmental control. Hence, to be excluded from the protective ambit of human rights as a governmental organisation it is decisive that the organisation at issue has the power to exercise public authority. This results that it is not only the central organs of the state that are clearly governmental organisations, as opposed

87 *Freedom and Democracy Party (ÖZDEP)* (n 31).

88 *Zumtobel* (n 47); *Canea* (n 48).

89 Sári, Somody (n 52); van den Muijsenbergh, Rezai (n 15) 56.

90 Decision 36/2000. (X. 27.) of the Hungarian Constitutional Court.

91 See civil companies in Hungary, the *Zumtobel* case of the European Court of Human Rights and oHG, KG, and GbR forms in German law as well, which have no legal personality, but still can be human rights beneficiaries.

92 According to Section 3:405 (1) of the Hungarian Civil Code, the State shall participate in civil relations as a legal person.

93 Sári, Somody (n 52).

to non-governmental organisations, but also decentralised authorities that exercise public functions, notwithstanding the extent of their autonomy against the central organs.[94] In relation to this question, the European Court of Human Rights and the Hungarian Constitutional Court take a different view, as nowadays municipalities and other organisations with public authority in Hungary may invoke fundamental rights if the entity in the certain case does not exercise public authority and acts as a private organ.[95] Despite this difference, it can be concluded that exercising public authority is part of the negative definition of the organisation from a human rights perspective, taking into account the European case law and the very essence of the fundamental rights discussion, namely the protection of human dignity and autonomy against governmental authority.

In conclusion, the negative definition of the organisation from a human rights perspective is independent from legal persons under national law or private law, and excludes governmental organs exercising public authority.

94 *Danderyds Kommun* (n 72).

95 Decision 3149/2016. (VII. 22.), 3091/2016. (V. 12.) of the Hungarian Constitutional Court.