ACCESS TO JUSTICE WITHIN THE CASE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS. THE PUBLIC FUNCTION AND THE CIVIL SERVANT

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ABSTRACT: *The European Court of Human Rights is the supreme interpreter of the Convention. Its case law highlights abundantly both general principles applicable to the relationship between state bodies and individuals and also certain conditions that must be met to comply with the rights provided by the Convention, including the civil servants' rights. In the following, a detailed analysis of the ECHR case law regarding access to justice for civil servants will be presented, but not before reiterating that the work of the bodies of the Council of Europe and the Court has progressively contributed to international protection of human rights.*

KEY WORDS*: Civil servant, European Court of Human Rights, article 6, case-law, international protection.*
JEL CLASSIFICATION: *K23*

1. ACCESS TO JUSTICE FOR CIVIL SERVANTS

The matter of access to justice shall be analyzed through the European Court case law, thus it is imperative to cite Article 6, paragraph 1 of the Convention:
In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. PRELIMINARY REMARKS. THE RELEVANCE OF THE SUBJECT

Article 6 of the Convention guarantees what is known as "the right to a fair trial".[1] In order to outline the reason for approaching the issues with respect to the public function

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and the civil servant within this conventional provision (art.6, para. 1), it must be to specified that in the case law it is estimated that the Convention's system is basically organized into two categories of rights: material or substantial rights and procedural rights. The main difference between the two is that, whilst the first category can be invoked directly in the domestic order of the States Parties and compliance with them is universally insured within their "jurisdiction" (right to life, freedom of conscience, of religion etc.), the rights from the second category (right to a fair trial and to an effective remedy) are reflected in the enhancement of the rights of a person before the courts, not withstanding certain rights and freedoms of a person. The enshrinement of the latter category of "procedural" rights is an expression of a general idea. The achievement of effective protection of human rights is not sufficient solely through substantial rights, which is why it is necessary to include fundamental procedural safeguards that ensure appropriate mechanisms for the enhancement of those substantive rights.[2] In the European Court case law,[3] the question of the applicability of art. 6(1) of the Convention regarding civil litigation is the extent to which art. 6(1) can be applied in litigation arising from disputes over matters concerning either a civil or a public servant. Therefore, it is important to know how disputes arising under the circumstances mentioned above are accompanied by positive law and by the guarantees provided for in art. 6(1) of the Convention.

3. STEPS IN THE EVOLVING CASE LAW

3.1. The first period

Before 1999, when the Court ruled in the Pellegrin case against France,[4] there was an "uncertainty" regarding the applicability of art. 6(1) to litigation between civil servants and their state, regarding their employment.[5]

The theory of pecuniary interest

This "uncertainty" was the result of using the pecuniary criterion for identifying applications, as it was seen through art. 6(1). According to this theory, if the right protected within a proceeding has a pecuniary component, then the provisions of art.6(1) are applicable. On the contrary, if the protected right envisages a public servant's career, namely recruitment, career development and termination of official activities, then the applicability of art. 6(1) is excluded.

The theory of the nature of legal relations

This theory incorporates the criterion of the nature of legal relations[6] in whose contents the rights defended by the claimant within a proceeding were born. This criterion was determined by the Court's finding on the facts common to the laws of the States Parties to the Convention. In the States Parties' systems, there is a fundamental distinction

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[1] It is also known as"*the right to a tribunal*"; this notion was used for the first time in the judgment of the Court in the name of the case from 25 February 1975.
[2] see (Bîrsan, 2005), p.393.
[3] For a presentation of Court's case law regarding the violation of Article 6, see (Popescu, 2006), pp.46-76
[4] The issue is treated as such in the content of the judgment in Pellegrin vs France; see (Berger, 2005), p.291, paragraph 3.
[5] Henber vst France, judgment of the Court from 29 February 1998.
[6] Neigel against France, judgment of the Court from 17 March 1999.

between the rules applicable to civil servants, or, and those exercising a public function, and employees under private law.[7]

Criticism of both theories

Without the purpose of an exhaustive examination of the above theories, it is, however, required to present a general idea regarding the criticism of both theories, which, in the Court's practice, were sometimes applied in combination. First of all, it should be noted that none of the two theories can explain why the so-called holder of rights born within a legal relation under public law cannot benefit from the provisions of art. 6(1), given that this article is viewed individually and not together with other rights enshrined in the Convention. The idea that the protected right has a non-pecuniary nature cannot fully support the exclusion of the guarantees provided by the Convention in art. 6(1), because the "civil" nature of a right it is not determined by its pecuniary aspect. A civil right may have a non-pecuniary nature. Conversely, pecuniary rights may exist without being civil rights. For example, the right to dignity is a civil right without a pecuniary character. On the other hand, the state's right to levy taxes on taxpayers has a pecuniary nature, but it is a public right, not a civil one. The same principle can be observed regarding the legal nature of the applicable regime in national legal systems, as long as a right born within the employment relation of a civil servant can be strictly civil in nature, such as the right to work, with the specificity that it is exercised by performing tasks in the public sector. Somewhat paradoxically, the legal basis of the exercise of public power can be represented by private legal acts, such as the contracts of counsellors employed by a Cabinet.[8]

3.2. The second period. The Pellegrin case[9]

The determination of admissibility or inadmissibility of an application covering the civil rights of a civil servant in a case like Pellegrin is very complex and much more rigorous than that found in the previous case law of the European Court, which is why we shall briefly present the circumstances of the case.

The Facts

Gilles Pellegrin, the applicant, is a French citizen. In 1989, the applicant was employed in the private sector, working mainly as a management and accountancy consultant. On the basis of the professional experience he had thus acquired, he applied for a job working for the French State under the overseas cooperation programme. The French Ministry of Cooperation and Development recruited him - under a contract signed on 13 March 1989 - as a technical adviser to the Minister of Economy, Planning and Trade of Equatorial Guinea. As head of project, he was to be responsible for drawing up the budget of state investment for 1990, and was to participate in the preparation of the three-year plan and the three-year programme of public investment, in liaison with Guinean civil servants and international organisations. On 9 January 1990, following a

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[7] see (Bîrsan, 2005), p.422.

[8]E.g. according to Article 3 of Ordinance no. 32 of 30 January 1998 on the organization of the central government dignitary's cabinet, with subsequent amendments, the dignitary's cabinet includes personal advisors, whilst under Article 5(2) of the same ordinance, "*the staff of the dignitary's office operates under a fixed-term employment contract, concluded according to law, within the dignitary's term in office*."

[9]Case no. 28541/95, judgment of the Court from 8 December 1999, published electronically at http://sim.law.uu.nl/sim/caselaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/b26120c820e33552c125684d004c5710?OpenDocument.

number of local disagreements, the Guinean authorities placed the applicant at the disposal of the French authorities. This caused the termination of his contract at the expiry of his period of home leave. Mr.Pellegrin lodged an appeal before the Administrative Court of Paris, which was rejected on 23 October 1997. On 16 January 1998, he approached the Court of Appeal, but he had already addressed the Strasbourg organs for alleging a breach of Article 6 due to the excessive length of proceedings, and the infringements of Articles 3 and 13 of the Convention, in 1995.

The theory of functional criteria

The Court had to examine if litigation was admissible under art.6 (1) of the Convention, because the litigation concerned a contract between a civil servant and a state, regulating employment conditions. In rendering its judgment, the Court used a new criterion based on the nature of the function[10] and on the agent's responsibilities. According to this theory, the only proceedings excluded from the applicability of art. 6(1) were the ones concerning public agents whose job was characterized by specific activities in the interest of public administration, viewed as acts of holders of public power, responsible for safeguarding the general interests of the state or other public bodies. In light of the facts, the Court held that the tasks assigned to the claimant gave him important responsibilities in the state's purview in public finance, area par excellence Regalianus. He participated directly in the exercise of public power and he carried out activities that were intended to safeguard the general interests of the state. Therefore, art. 6 (1) would not apply.

It is considered that this change in the case law - marked by the judgment referred to above - is due to the detection of unequal treatment between the States Parties in relation to persons belonging to state services that perform equivalent functions, even if their performance is based on different legal relations with the state. Unequal treatment concerns state agents that perform the same tasks, but became holders of public function differently.[11] Consequently, the new orientation of the Court's practice was to ensure equal treatment for state agencies occupying similar or equivalent positions in the States Parties, regardless of the system within which they operate - either civil servants under public law or employed on a contractual basis under private law.

3.3. The third period. The Vilho Eskelinen case[12]

Brief History

The case was introduced by Vilho Eskelinen and others against Finland. The applicants are Finnish nationals living in Sonkakoski or Sonkajärvi (Finland). Under a collective agreement of 1986, they were entitled to a special allowance for working in a remote area. When that allowance was withdrawn in 1988, they were given individual wage supplements to make up the difference. On 1 November 1990, they were moved on duty to another police station even further away from their homes. This decision had the effect on changing the location of their jobs, commuting 50 km daily, spending money

[10]see (Chirită, 2007), p.244.

[11] The Court has found that in certain Contracting States, the servants contracted by the state are under a public law regime, even though they often exercise equivalent or similar functions. Judgment from 8 December 1999 in the Pellegrin case, para.63; (Corneliu Bîrsan, 2010), p.424

[12] Cause no. 63235/00, judgment of the Court of 19 April 2007, published electronically at http://sim.law.uu.nl/sim/caselaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/b26120c820e33552c125684d004c5710?OpenDocument.

and time on travelling and also the fact that the applicants lost their individual wage supplements. They maintained, however, that the Kuopio Provincial Police Command promised them compensation.

The applicants claimed compensation from the Ministry of Finance via administrative channels, but the ministry rejected the request without explanations. Therefore, the request followed its course before the Regional Administrative Council, but the Council rejected the request in 1997. The same year, the applicants appealed the Council's decision before the Regional Administrative Court, but the Court dismissed the appeal a year later. In 1998, the applicants appealed, but in 2000, the Supreme Administrative Court upheld the lower court's decision.[13]

In 2000, the eight have filed a complaint claiming that they were not heard in the procedures concerning their salaries and that their duration was excessive. In 2005, the application was declared admissible. The Court considered that there had been a delay in conducting the proceedings before the Board of Management, without this being justified. In conclusion, there has been a violation of Article 6 § 1 of the Convention.

International law and relevant practice

The second paragraph of art. 47[14] from the Charter of Fundamental Rights of the European Union corresponds to art.6(1) from the European Convention on Human Rights. In European law, the right to a fair hearing is not related only to disputes concerning civil rights and obligations. This is one of the consequences of the fact that the Union is a community based on the rule of law, as the Court held in *Case no. 294/83 - Les Verts against The European Parliament, judgment of 23 April 1986 (1988) ECR 1339*. As a result, Article 47, in the context of European law, is neither restricted by civil rights and obligations, nor by the field of criminal law under Article 6 of the Convention. In this regard, Article 47 codifies the right, as defined by ECJ case-law.

Findings in law

a) The existence of a right or of a legitimate interest

The Court considers that it is indisputable that a promise was made by the Regional Police Command, for the purposes of granting compensation to the petitioners. The case files indicate that further individual awards were granted, sometimes in situations that were not very different from that of the applicants. Even if the national courts have rejected the administrative claims after examining the merits of the dispute and identifying the existence of a "right", the applicants were at least entitled to argue that they had a legitimate interest in their applications.

13Supreme Administrative Court has explained this decision saying that "*commitment (promise), took by the command of the police in the district of the Regional Administrative Council for the purposes of financing the monetary compensation intended to reduce the negative effects of this kind of police reorganization, has no legal relevance and, consequently, no hearing of the petitioners on the circumstances of the conclusion of that commitment has any legal relevance.*"

[14] *Everyone whose rights and freedoms guaranteed by the law of the Union are violated, has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

b) The civil nature of the right[15]

It may be noted in this context, that the present case concerns an application by civil servants, who claimed certain sums of money under the pretence of additional damages.

c) Applying the Pellegrin pattern to the circumstances of the Vilho case[16]

The decision in the Pellegrin case offered a concept fit for application to a precisely case. From this case onwards, it must to be determined whether the applicant was in certain categories of jobs, if he indeed had exercised activities that could be characterized as within the scope of the exercise of public power, or that the applicant's position in the hierarchy of the State was so important or complex that it can be said that we are in the presence of general participation in the exercise of State power.

d) Applying the functional criterion in subsequent cases to the Pellegrin case

In Kepka against Poland,[17] the Court held that although the applicant was unfit for active duty as a fire-fighter, he worked throughout his career in the national fire service as a teacher, and his work involved conducting research and access to information that had a specific nature, such as those included in national defence, an area in which the State exercises sovereign power and involving, as a whole, at least indirectly, the applicant's participation in activities designed to safeguard the general interests of the State. Therefore, Article 6 was inapplicable.

In Kanayov against Russia, the claimant was an active officer in the Russian navy; therefore he "*exercises part of the sovereign power of the State.*" The Court held that Art. 6(1) will not apply even if the dispute concerned the failure to enforce a judgment favourable to the applicant, concerning some travel expenses related to the dispute.

In Veresova against Slovakia,[18] art. 6(1) has been declared inapplicable regarding a jurist working for the police. The Court ruled on the basis of the nature of the duties and the responsibilities of the police force as a whole, apparently without taking into consideration his individual role within the organization.

On the other hand, in Martinie against France,[19] the Court held art. 6(1) to be applicable by taking into account the position of the applicant and not the nature of the dispute. The applicant was a civil servant working as an accountant at a school without participating in any way in the exercise of public power. The Court took into account mainly the fact that the dispute concerned the obligation to repay certain unauthorized payments, reaching the conclusion that the applicant's obligations are "civil" under Article 6(1), due to the fact that they have predominantly private law features.

In the case of Yuriy Nikolayevich Ivanov against Ukraine,[20] the Court considered that there was a violation of Art. 6(1). The applicant, a former member of the armed forces, a

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[15]The assessment is necessary as the Government argued that Article 6 is inapplicable to disputes between state agencies and their employees concerning the conditions of employment.

[16] Palma, 2007.

[17]Case no. 49180/99, judgment of the Court from 4 May 2004, published electronically at http://echr.ketse.com/doc/49180.99-en-20040504/.

[18]Case no. 70497/01, judgment of the Court from 1 February 2005, published electronically at http://echr.ketse.com/doc/70497.01-en-20050201/.

[19]Case no. 58675/00, judgment of the Court from 12 April 2006, published electronically at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-73196#{"itemid":["001-73196"]}.

[20]Case no. 40450/04, judgment of the Court from 15 Octomber 2009, published electronically at http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2896803-3182815#{"itemid":["003-2896803-3182815"]}.

civil servant, was entitled to lump-sum retirement payment and compensation for wearing a uniform, but these payments have not been made at retirement. The Court reiterates that a person who has obtained a final judgment against the state should not be forced into a position to initiate separate enforcement proceedings, and such situation would engage the responsibility of the state for the judgment. Consequently, the applicant was the victim of a violation of art. 6(1).

In Colceru against Romania,[21] there was a violation of art. 6(1) as a result of an unfair dismissal. The applicant, was a civil servant at the start of the domestic proceedings, a jurist of the National Agency for Communications and Informatics, which was disbanded and replaced by the Ministry of Communications and Information Technology.

4. CONCLUSIONS AFTER EXAMINING THE CASE LAW

In light of the above, the Court concludes that, as applied in practice, the functional criterion did not lead to a simplification of the analysis of Article 6 in the proceedings in which a public official is a party, neither did it lead to the intended higher certainty in this area. The Pellegrin precedent shall be understood as being different by reference to the previous case law of the Court, and as a first step in the removal of the inapplicability of Article 6 to civil servants, thus paving the way for a partial applicability.

5. THE NEW VIEW ON APPLICABILITY OF ARTICLE 6

The Court is aware of the interest of the state to control access to a court when it comes to certain staff. However, it is essential for the States Parties, especially for their national legislatures, to accurately identify those areas of public service involving the exercise of discretionary powers inherent to the sovereignty of the state, in which the interests of individuals are secondary. The Court exercises its role as supervisor, as a consequence of the principle of subsidiary. If a national system denies access to a court, the Court will verify if the dispute really justifies the exception to the guarantees of Article 6, and if not, Article 6 shall be applicable.[22]

6. THE RELEVANT CASE LAW REGARDING ROMANIA

6.1. The Facts

The applicant, Dan Strungariu,[23] is a 48-year-old Romanian national who lives in Timisoara (Romania). An engineer by profession, specialising in privatisation, the applicant was dismissed from his post at the Agency for Privatisations and Administration of State Shareholdings[24] in April 2001. He challenged that decision in the Romanian courts. In a judgment of 31 October 2001, the Timiş County Court quashed that decision and ordered his reinstatement and coverage of his unpaid salary. That judgment was

[21]Case no. 4321/03, judgment of the Court from 28 July 2009, published electronically at http://echr.ketse.com/doc/4321.03-en-20090728/.

[22]In order to exclude an applicant from the protection provided byArticle 6, two conditions must be met. Firstly, the state must explicitly provide for certain subjects that are not entitled to a court in its domestic law. Secondly, this exclusion must by justified by objective reasons, which are in the interest of the State.

[23]Case no. 23878/02, the judgment of the Court from 29 September 2005, published electronically at http://sim.law.uu.nl/sim/caselaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/75fe1add53f9763bc1257088003121f2?OpenDocument

[24]A public institution directly subordinated to the Government.

upheld by a final judgment of the Timişoara Court of Appeals. In January 2003, the applicant was reinstated in a post similar to the one he had held before his dismissal. The Agency also paid the final instalment of his unpaid salary, having made an initial payment in May 2002. However, in 2004, the applicant was again dismissed.
The applicant filed a claim at the European Court, claiming that he was denied the right to effective judicial protection because of the delay in the execution of the judgment that ruled in favour of his reinstatement and payment of his wages; and because of the impossibility of execution of that judgment.

6.2. Findings in law

The Court did not take into account the position that the applicant had with the public authority nor the nature of the duties or responsibilities incumbent on him.
By interpreting the law, the Court considered that there had not been a violation of Article 6(1) of the Convention in respect of performance of the obligation to pay wages owed to the applicant, but that there had been a violation of proceedings in relation to the performance of the obligation to reinstate the applicant in his previous post.

6.3. Concurring opinion of Judge Caflish, who was joined by Judge Bîrsan

The considerations of the opinion outlined that the Government has waived its claim of inadmissibility *ratione materiae*, based on the applicability of art.6(1), because the applicant occupied a position in a public authority. Moreover, it was clear that the Government did not rely on such an exception because the claimant "*does not exercise functions of public authority, as shown in the job description*."
Examining further a possible regime applicable to the objection, the Court conducted a retrospective case-summary on the applicability of art.6(1) of the Convention, from civil point of view. It was found that, the pecuniary criterion for the admissibility of a case was decisive, and if it concerned the conditions for career advancement, the claim was inadmissible. Further, it has been shown that, based on the considerations of the Pellegrin judgment, litigation regarding public officials, whose employment disputes are characterized by specific activities of administration that forges them into holders of public power, entrusted with the general interests of the State, is excluded from the scope of art.6(1).

In the reasoning of the opinion, the Pellegrin precedent is illustrated along with the ruling in Frydlender against France (Case no. 30979/96 from27 June 2000).[25] Whereas in the first case, art.6(1) is declared inapplicable, the Court ruled otherwise in the second case, although the approach (the functional criterion) is the same.
Furthermore, the situations of the respective applicants, Pellegrin and Frydlender, could be synthetically characterized by the criterion of the exercise of public power and the criterion of the nature of liability that involves such an exercise. Pellegrin was participating in the preparation of a part of the State budget, concerns which are essentially within the public sector. The specifics of these activities create a presumption of a high level of responsibility and rank. Conversely, even if he was an employee of the Ministry of Economic Affairs of France, Frydlender was tasked with the promotion of

[25]The applicant was contracted by the Department of Economic Development of the Ministry of Economic Affairs in 1972. He was transferred toAthens in order to work as a technical advisor, and later in New York. In 1986, the Ministry informed him of its decision not to renew the contract, on the basis of,*inter alia*, the lack of initiative of the applicant.

French products, an activity generally open to any individual and with nothing specific to the exercise of public power.
In relation to the circumstances in Strungariu, the Judges appreciated that his place of employment and the nature of his duties and responsibilities would have successfully allowed the Romanian Government to raise an objection of inadmissibility under Article 6(1) of the Convention, citing the applicant's participation in the exercise of public power.

7. SOME CONCLUDING CONSIDERATIONS ON THE CASE LAW OF THE COURT

The key issue concerning the applicability of art. 6(1) is to answer the question whether it is acceptable to apply the Convention in such way that it would produce two opposite effects.
As far as we are concerned, we believe that one interpretation must be excluded in favour of uniform and consistent application. Furthermore, the evolution and development of the case law of the Court demonstrates its tendency to extend the applicability of art. 6(1) of the Convention to disputes concerning civil and public servants. However, the current orientation of the case law, although of adequate quality, does not fully meet the requirements of art. 6(1) of the Convention, because it starts from the wrong premise: that the applicability or inapplicability of art.6(1) is dependent on the presence of public functions and the exercise of public power.

The real premise from which it should start is the civil nature of the right protected by a proceeding. The civil nature of a right is not dependent on whether one is or is not in public service.

Regarding the existence of certain qualities related to the exercise of public power, inherent to the work place of a potential petitioner or implied by the concrete work the applicant performs, they should not lead to the inapplicability of art. 6(1); they express only the idea that in domestic law, the legal relation has public law reflexes, but this does not rule out the fact that the specific legal relation enshrines a civil right. It just means that such a civil right must be exercised in the special conditions outlined by public law.
The main question that remains to be determined is what is meant by the civil nature of a right, or otherwise, how can the category of civil rights be determined?

The Court did not give an abstract definition of the concept of "*civil rights and obligations*", but it has ruled in cases by taking into account the particularities prevailing in them: public or private law. Whilst doing so, the Court held that there is an attempt to avail oneself of a civil right when it was found that private law peculiarities prevail.
As regarding Romania, article 21 from the Constitution provides access to justice for every person - Romanian citizens, foreign citizens or stateless persons - without making any difference whether they are civil servants or exercise a part of public power. *Ratione materiae*, access to justice is provided to defend any right or lawful interest, regardless if it is provided by the Constitution or other laws. We must also point out the idea that justice not only means the settlement of civil cases, but also administrative, commercial, criminal, employment, tax and other cases, which is why it is found that in terms of subject matter, Article 21 is broader than Article 6 of the European Convention.[26]

[26](Drăganu, 2003), p.22

Finally, we must note that the development of European law has an impact on the field of European human rights, given that European judicial guarantees operate on a broader set of rights than the narrower spectrum of rights protected in civil or criminal matters. As affirmed by the European Court, ECJ case-law influences the case law of the Strasbourg Court. Thus, we highlight the mention made by the European Court of Justice in its jurisprudence concerning the Vilho case: if the restrictive approach to the applicability of Article 6 of the Convention to applicants who fulfil a public function or claim rights relating to a public function would lead to the usurpation of European law, the codification of the latter body of jurisprudence that guarantees an effective remedy and a fair trial must accompany a much broader category of rights than that traditionally known as "civil rights".

The tendency of the Court to approach the provisions of Article 6 extensively is evident. This shows that it is trying to broaden the scope of the international guarantees providing comfort for the legal person even in those cases where the legal issues are accepted as falling within the margin traditionally exclusive to state regulation and enforcement.

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