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## **THE PROHIBITION OF INHUMAN OR DEGRADING TREATMENT, AS A BINDING NORM IN EU CRIMINAL LAW**

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### **Abstract**

The protection of human rights in criminal proceedings is still an ongoing challenge for the countries of the EU. The subject of research for the purposes of this study was the case law of the CJEU and the ECtHR, focusing on the prohibition of inhuman or degrading treatment of prosecuted persons in cross-border criminal proceedings. The research was conducted on the basis of decisions concerning the transfer of prosecuted persons under the European arrest warrant process between EU Member States, and extradition proceedings in their relations with third countries. The research findings indicate that ‘judicial dialogue’ between the CJEU and the ECtHR has a positive impact on strengthening the protection of human rights in cross-border criminal proceedings. The recent case law of both CJEU and ECtHR confirms that the prohibition of inhuman or degrading treatment is of an absolute character, constituting a binding norm in EU criminal law. As a result, all EU Member States are obliged to comply with it.

### **Keywords**

EU criminal law, human rights, ‘judicial dialogue’, mutual recognition principle, cross-border criminal proceedings

## INTRODUCTION

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Respect for human rights constitutes one of the main values on which the European Union was founded, as fully reflected in the wording of Article 2 of the TEU. The idea of respecting human rights is deeply rooted in the norms of, both the Universal Declaration of Human Rights<sup>1</sup> and the system of the European Convention on Human Rights (ECHR).<sup>2</sup>

It has been noted that the specific feature of human rights is that the State is first and foremost obliged to respect human rights. It is assumed that such a system of protection allows provision of some security for individuals against any negative actions of the state apparatus, as well as ordering the State to protect their rights and freedoms.<sup>3</sup> Moreover, the peremptory nature of the norms of international human rights law is also emphasized.<sup>4</sup>

When referring to the protection of the fundamental rights of the individual in EU law, it should be remembered that their development took place through the case law of the CJEU. This is the Court which first held that fundamental rights form a part of the general principles of EU law. Furthermore, in order to protect fundamental rights, the national court is bound by the constitutional traditions of the Member States and may not take measures that would be contrary to the fundamental rights established and guaranteed by their constitutions (*Erich Stauder v City of Ulm*, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*).<sup>5</sup>

Based on the case law of the CJEU, one may conclude that, firstly, the EU system of protection of fundamental rights is subject to gradual development. And, secondly, it confirms respect for fundamental rights which are guaranteed by the ECHR, and also those resulting from the constitutional traditions common to the EU Member States. However, the responsibility for ensuring such a compliance is upon the national courts.<sup>6</sup> Further, the catalog of rights adopted in the Charter should be recognized as a landmark in strengthening the respect for the fundamental rights of individuals. Indeed, rights for years covered within various international documents have successfully been combined in one legal document, constituting a set of fundamental rights for ‘citizens of the EU’.

1 Universal Declaration of Human Rights (1948), UNGA Res 217 A(III).

2 Allan Rosas, ‘The European Union and Fundamental Rights: Vanguard or Villain?’ [2017] (7) Adam Mickiewicz Law Review 7.

3 Krzysztof Orzeszyna, Michał Skwarzyński, Robert Tabaszewski, *Prawo międzynarodowe praw człowieka* (C.H. Beck 2020) 13-14.

4 Lidia Brodowski, ‘Zakaz tortur, nieludzkiego lub poniżającego traktowania albo karania w kontekście ekstradycji – zagadnienia wybrane na tle orzecznictwa ETPC’, in Brygida Kuźniak and Milena Ingelevič-Citak (eds) *Ius cogens – soft law. Dwa bieguny prawa międzynarodowego publicznego* (Wydawnictwo Uniwersytetu Jagiellońskiego 2017) 147-159; Orzeszyna, Skwarzyński, Tabaszewski (n 3) 13-18.

5 Case 29/69 *Erich Stauder v City of Ulm*, EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114; Case 4/73 *Nold*, EU:C:1974:51.

6 Rosas (n 2).

Importantly, under Article 6 of the TEU, the Charter acquired the same legal force as the Treaties (Article 6 (1) (1) of the TEU). It should also be stressed that the fundamental rights, guaranteed by the provisions of the ECHR, and those which are resulting from the constitutional traditions common to the Member States, became general principles of the Union's law (Article 6 (3) of the TEU). The analysis of the *acquis communautaire* / EU in the field of judicial cooperation in criminal matters allows for the conclusion that the protection of human rights is a priority here, which is closely related to the contemporary tendency to humanise criminal law. At this point, it is necessary to focus attention on the special importance of 'judicial dialogue' between the CJEU and national courts, as well as between the CJEU and the ECtHR, which consequently affects the unification of judicial practice in the EU Member States.<sup>7</sup>

In principle, cooperation between the national criminal justice systems of the EU Member States presumes a high degree of mutual trust, when it comes to the issue of respect for human rights. However, as the case law of the CJEU illustrates, mutual trust between States cannot remain unconditional. There are allowed to limit it 'in exceptional circumstances', deeply rooted in the protection of fundamental rights. In addition, a special controlling role is played by the ECtHR. Factually, in the event of a possible breach of the binding human rights standards, States are liable under the ECHR system. Such a controlling approach is confirmed in the recently issued judgement in *Bilovaru and Moldovan v France*.<sup>8</sup> The limits applied to the principles of mutual recognition and mutual trust in judicial practice may therefore result from the obligation to comply with the norms of international human rights law. Returning to the main point, one may say that EU criminal law from the perspective of cross-border criminal proceedings (and domestic criminal proceedings) should ensure the most effective protection of human rights.<sup>9</sup>

## 1. THE RIGHT TO DIGNITY, AS A FOUNDATION FOR HUMAN RIGHTS

In the context of EU criminal law and criminal justice, the right to respect for human dignity (Article 1 of the Charter) is of particular importance. The right to dignity is commonly recognized, as a foundation for other fundamental rights.<sup>10</sup>

7 Orzeszyna, Skwarzyński, Tabaszewski (n 3) 122-129; Rosas (n 2) 11-15.

8 *Gregorian Bilovaru and Codrut Moldovan Apps nos 40324/16 and 12623/17* (ECtHR, 25 March 2021).

9 Joanna Beata Banach-Gutierrez, 'Przekazywanie ściganych europejskim nakazem aresztowania: ewolucja zasad wzajemnego zaufania i uznawania w sprawach karnych' in Piotr Góralski (ed), *Prawo karne na rozdwoju: współczesne tendencje i kierunki zmian* (Instytut Wydawniczy EuroPrawo 2021) 445-473.

10 Joanna Beata Banach-Gutierrez, Christopher Harding, 'Fundamental Rights in European Criminal Justice: an Axiological Perspective' (2012) 20 *European Journal of Crime, Criminal Law and Criminal Justice* 239.

As has been aptly argued, dignity *per se* results from the fact that man exists as an individual being. As a legal value, it is at the same time a certain kind of foundation, the basis of human rights, and the goal, the culmination of the legal structure of these rights. Dignity empowers an individual in the axiological system of human rights, granting him tools in the form of rights and freedoms.<sup>11</sup>

Under Polish law, the Preamble of the Constitution of the Republic of Poland provides an obligation for ‘respect to the inherent dignity of the person’. Further, in the light of Article 30 of the Constitution ‘The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities’.<sup>12</sup> The literature emphasises that dignity is a general clause, which means that the entire Constitution should be read in the light of the call that is expressed in the text of its Preamble, ordering all those who apply the provisions of the Constitution of the Republic of Poland to care for inherent human dignity.<sup>13</sup>

## 2. TOWARDS THE PROHIBITION OF INHUMAN OR DEGRADING TREATMENT

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The question of prohibition of inhuman or degrading treatment is inextricably linked with respect for the dignity of the human being. It was introduced into EU law on the basis of Article 4 of the Charter. Its provisions reflect fully international human rights law, including Article 3 of the ECHR.<sup>14</sup> In addition, reference should be made to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>15</sup> and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>16</sup> Also, Article 40 of the Constitution of the Republic of Poland contains such a prohibition.

Hence, the prohibition of inhuman or degrading treatment should be taken seriously by all of national authorities.<sup>17</sup> The Preamble to Council Framework Decision

11 Orzeszyna, Skwarzyński, Tabaszewski (n 3) 20.

12 The Constitution of the Republic of Poland (1997), Dz.U. (1997), No 78, item 483 with subsequent amendments.

13 Orzeszyna, Skwarzyński, Tabaszewski (n 3) 25.

14 Ibid, 331-343.

15 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UNTS 85

16 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), ETS 126.

17 Biuletyn Informacji Publicznej Rzecznika Praw Obywatelskich, ‘Artykuł 40 Konstytucji RP – zakaz tortur, niehumanego i poniżającego traktowania w działaniach Rzecznika Praw Obywatelskich’ <<https://bip.brpo.gov.pl/sites/default/files/%2Fart%2040.pdf>> accessed 20 July 2021; Ewa Dawidziuk, *Traktowanie osób pozbawionych wolności we współczesnej Polsce na tle standardów międzynarodowych* (Wolters Kluwer 2013).

2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States directly refers to the observance of human rights (Recitals 12 and 13 of the Preamble).<sup>18</sup> In the light of today's international norms on the protection of human rights, prohibition of inhuman or degrading treatment should be considered, in terms *jus cogens* norms. In effect, it provides an absolute ground for refusing to execute a European arrest warrant (EAW),<sup>19</sup> as well as refusal of extradition to third countries.<sup>20</sup>

### 3. THE IMPORTANCE OF THE 'JUDICIAL DIALOGUE' BETWEEN THE CJEU AND THE ECtHR FOR STRENGTHENING THE PROTECTION OF HUMAN RIGHTS IN EU CRIMINAL LAW

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#### 3.1. Surrender of the prosecuted persons under the European Arrest Warrant process between EU countries

Analysing the case-law of the CJEU on the protection of human rights in cross-border criminal proceedings, one should pay attention, first of all, to three crucial judgments which refer to conditions of imprisonment, namely *Aranyosi and Căldăraru*,<sup>21</sup> *ML*<sup>22</sup> and *Dorobantu*.<sup>23</sup>

In the joined cases *Aranyosi and Căldăraru*, the CJEU especially recalled that the EAW mechanism operates on the basis of the principles of mutual recognition and mutual trust among the EU Member States. However, at the same time the Court in its judgement also made reference to 'exceptional circumstances'.

Hence, the Union principle of mutual recognition is not absolute, as exceptions are allowed, with references to 'exceptional circumstances' laid down in Article 4 of the Charter. In practice, it means that Article 4 of the Charter is binding on the EU Member States. In other words, when applying EU law the national courts are obliged to respect the provisions of the

18 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States [2002] OJ L 190/1.

19 Cf Article 607p para 1 (5) of the Polish Code of Criminal Procedure (1997) [Kodeks postępowania karnego], Dz.U. (1997), No 89, item 555 with subsequent amendments, which provides for an obligatory refusal to execute the EAW, if this could lead to violation of the freedoms and human rights. Witold Klaus, Justyna Włodarczyk-Madejska, Dominik Wzorek 'In the Pursuit of Justice: (Ab)Use of the European Arrest Warrant in the Polish Criminal Justice System' (2021) 10 Central and Eastern European Migration Review, 95 <<https://doi.org/10.17467/ceemr.2021.02>>.

20 Brodowski (n 4).

21 Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, EU:C:2016:198. Adriano Martufi, Daila Gigengack, 'Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings' (2020) 11 New Journal of European Criminal Law 282 <<https://doi.org/10.1177%2F2032284420946105>>.

22 Case C-220/18 PPU *ML*, EU:C:2018:589.

23 Case C-128/18 *Dumitru-Tudor Dorobantu*, EU:C:2019:857.

Charter. Also, the CJEU indicates that the absolute nature of the norms respecting human rights is confirmed in the provisions of the ECHR. It is argued that specifically, Articles 1 and 4 of the Charter and Article 3 of the ECHR, enshrine one of the fundamental values of the EU and its Member States, that means respect for the dignity of the human being and inextricably linked with it the prohibition of inhuman or degrading treatment (paras 82-87).<sup>24</sup>

Referring to the conditions of deprivation of liberty in the State issuing the EAW and the criteria that should be adopted in order to assess compliance with Article 4 of the Charter, it was the CJEU that issued two successive rulings of key importance for the national criminal justice system. These are respectively the judgments in the cases *ML* and *Dorobantu*. In accordance with the CJEU ruling in the *ML* case, although the issuing State provides for legal measures that enable the verification of the lawfulness of the conditions of deprivation of liberty (detention conditions) in the light of fundamental rights, the judicial authorities that execute this order are obliged to individually assess the situation of each person concerned (paras 75-76). At the same time, the CJEU, referring to the case law of the ECtHR, noted among other elements, that to constitute a violation of Article 3 of the ECHR, ill-treatment must reach a minimum level of severity which depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases the sex, age and state of health of the victim (para 91).<sup>25</sup>

In turn, when ruling in the *Dorobantu* case, the CJEU noted that:

*Framework Decision 2002/584 explicitly states the grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European arrest warrant, as well as the guarantees to be given by the issuing Member State in particular cases (Article 5) (para 48).*

Nonetheless, the CJEU also pointed out that ‘in exceptional circumstances’ and on the basis of specific information, it is possible to place other limitations on the principles of mutual recognition and mutual trust between Member States, bearing in mind Article 4 of the Charter and Article 3 of the ECHR (paras 48-50).<sup>26</sup>

### **3.2. Surrender of citizens of the European Union and Member States of the European Free Trade Association (EFTA) in extradition proceedings**

Regarding the surrender of European Union citizens to third countries in extradition proceedings, one should take into account the case law of the CJEU, in such cases as:

<sup>24</sup> Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, EU:C:2016:198.

<sup>25</sup> Case C-220/18 PPU *ML*, EU:C:2018:589.

<sup>26</sup> Case C-128/18 *Dumitru-Tudor Dorobantu*, EU:C:2019:857.

*Petrubhin*,<sup>27</sup> *Pisciotti*,<sup>28</sup> *Raugevicius*,<sup>29</sup> *Ruska Federacija*<sup>30</sup> oraz *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*.<sup>31</sup>

When ruling in the cases of *Petrubhin* (para 60) and *Raugevicius* (para 49), the CJEU argues that in the event that a third country sends a request to a Member State for the extradition of a national of another Member State, the former must consider whether the extradition would infringe the fundamental rights guaranteed by the Charter, in particular Article 19. To recall Article 19 (2) of the Charter reads that 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

Furthermore, in *Pisciotti*, the CJEU referring to the national court questions held *inter alia* that:

*in a case, such as that in the main proceedings, in which a Union citizen who has been the subject of a request for extradition to the United States under the EU-USA Agreement has been arrested in a Member State other than the Member State of which he is a national, for the purposes of potentially acceding to that request, Articles 18 and 21 TFEU must be interpreted as not precluding the requested Member State from drawing a distinction, on the basis of a rule of constitutional law, between its nationals and the nationals of other Member States and from granting that extradition whilst not permitting extradition of its own nationals, provided that the requested Member State has already put the competent authorities of the Member State of which the citizen is a national in a position to seek the surrender of that citizen pursuant to a European arrest warrant and the latter Member State has not taken any action in that regard (para 56).*<sup>32</sup>

The CJEU's position was next confirmed in the case of *Ruska Federacija*, recalling that given the lack of an international agreement between the EU and a third country in the field of extradition, Member States should retain the competence to establish provisions on extradition. However, Member States are obliged to exercise this competence in compliance with EU law (para 48). Accordingly, if the concerned national (in this case, an Icelandic national) claims a serious risk of experiencing inhumane or degrading treatment in the event of extradition, the requested Member State should, prior to possible extradition, verify that their surrender will not infringe the rights set

27 Case C-182/15 *Aleksei Petrubhin v Latvijas Republikas Ģenerālprokuratūra*, EU:C:2016:630.

28 Case C-191/16 *Romano Pisciotti v Bundesrepublik Deutschland*, EU:C:2018:222.

29 Case C-247/17 *Denis Raugevicius*, EU:C:2018:898.

30 Case C-897/19 PPU *Ruska Federacija v I.N.*, EU:C:2020:262.

31 Case C-398/19 *Generalstaatsanwaltschaft Berlin*, EU:C:2020:1032.

32 Case C-191/16 *Romano Pisciotti v Bundesrepublik Deutschland*, EU:C:2018:222.

out in Article 19 (2) of the Charter (para 64). As the CJEU points out, if the requested State considers that Article 19 (2) of the Charter does not preclude the execution of the extradition request, there is still the necessity to examine whether the discussed restriction is proportionate to the objective of preventing the risk of impunity for the prosecuted person (para 69).<sup>33</sup>

In turn, in *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*, the CJEU referred to the admissibility of surrendering BY, a Ukrainian and Romanian citizen, to Ukrainian authorities for the purpose of conducting criminal proceedings against him. In this case, the CJEU found that, if the Member State of the prosecuted person has been duly informed, the requested Member State may continue the extradition procedure and, where appropriate, extradite this person in the event of a failure to issue an EAW within a reasonable time by the Member State of which he or she is a national, taking into account all of the circumstances of the case (para 53). At the same time, the requested Member State should indicate to the Member State of which the prosecuted person is a national, a reasonable time limit after which, if there is no EAW issued by that State, the person will be extradited. When setting such a time limit, the Member State is obligated to reconsider all the circumstances of the case, in particular the duration of possible pre-trial detention and the complexity of the case (para 55).<sup>34</sup>

### 3.3 ECtHR judgment in *Bivolaru and Moldovan v France*

The judgment in the case of *Bivolaru and Moldovan v France*<sup>35</sup> is the third judgment of the ECtHR after the judgments in *Pirozzi v Belgium*<sup>36</sup> and *Romeo Castaño v Belgium*<sup>37</sup> 'controlling' the operation of the EAW mechanism between EU Member States. It has been said that in *Bivolaru and Moldovan v France*, the ECtHR delivered a landmark judgment in relation to the execution of EAWs between EU Member States, as well as the presumption of equivalent protection of human rights.<sup>38</sup>

Despite the merger of two cases concerning Romanian nationals, *G. Bilovaru* and *C. Moldovan*, the ECtHR ruled differently in relation to each of the applicants. The ECtHR found that the execution of the EAW resulted in a violation of Article 3 of the

33 Case C-897/19 PPU *Ruska Federacija v I.N.*, EU:C:2020:262.

34 Case C-398/19 *Generalstaatsanwaltschaft Berlin*, EU:C:2020:1032.

35 *Gregorian Bilovaru and Codrut Moldovan v France* Apps nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).

36 *Pirozzi v Belgium* App no 21055/11 (ECtHR, 17 April 2018). The ECtHR found no violation of Articles 5 (1) (right to liberty and security) and 6 (1) (right to a fair trial) of the ECHR.

37 *Romeo Castaño v Belgium* App no 8351/17 (ECtHR, 9 July 2019). The ECtHR found a violation of Article 2 of the ECHR (right to life).

38 William Julié and Juliette Fauvarque, 'Bilovaru and Moldovan v. France: a new challenge for mutual trust in the European Union?', 22 June 2021 <<https://strasbourgobservers.com/2021/06/22/bivolaru-and-moldovan-v-france-a-new-challenge-for-mutual-trust-in-the-european-union/>> accessed 3 December 2021.



ECHR in the case of *Moldovan* and no such violation in the *Bilovaru* case. Both applicants argued that the execution of the EAW by French judicial authorities constituted a violation of Article 3 of the ECHR. In the *Moldovan* case, the ECtHR found that the information provided was sufficient to confirm that the conditions of detention posed a real risk of inhuman and degrading treatment. Moreover, the French judicial authorities should not have relied on the assurances of the Romanian authorities regarding the improvement of these conditions. The analysis of the materials in the *Bilovaru* case led the ECtHR to a different conclusion. Firstly, it underlined that asylum rights were granted by the Swedish authorities to the complainant prior to Romania's accession to the EU. In the opinion of the ECtHR, in circumstances where there are doubts as to the admissibility of the execution of an EAW, the French judicial authority should have asked the CJEU for a preliminary ruling. Secondly, it was noted that the information provided by the applicant regarding the conditions of his detention, as well as the risk of persecution on the grounds of his religious beliefs, was insufficient to establish a violation of Article 3 of the ECHR.<sup>39</sup>

## CONCLUSIONS

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In conclusion, one may admit that the visible 'judicial dialogue' between the CJEU and national courts, as well as between the CJEU and ECtHR, is a very important factor in strengthening respect for human rights. Without any doubt, the existing 'judicial dialogue' is crucial for establishing the European area of freedom, security and justice, in which human rights protection takes a central place. Such a 'judicial dialogue' allows for the operation of minimum common standards in the national criminal justice systems of all EU Member States, in accordance with the international norms.

The prohibition of inhuman or degrading treatment is a premise for limitations of the principles of mutual recognition and mutual trust in transnational judicial cooperation by the EU Member States. It should be applied by competent national authorities, both in domestic criminal proceedings and cross-border proceedings. In practice, this means that the prohibition of inhuman or degrading treatment should be observed at all stages of criminal proceedings, applying also to those persons who are detained at a Police Station, and during the course of interrogation.

To conclude, in light of EU criminal law, one may state that the prohibition of inhuman or degrading treatment is truly a binding norm upon all EU Member States. The approach undertaken by the Union's policy seems to be relevant with the contemporary humanisation of criminal law, which is based on international protection of human rights.

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<sup>39</sup> Ibid; *Gregorian Bilovaru and Codrut Moldovan v France* Apps nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).

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