Commentary

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BONE TESTING FOR MIGRANTS' AGE ASSESSMENT: EVALUATION OF THE EUROPEAN PRACTICE PURSUANT TO THE STANDARD OF PROOF SET BY UNION LAW AND THE SUPERVISORY BODIES OF THE COUNCIL OF EUROPE

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ABSTRACT

Drawing on the case law of CJEU and ECHR, I will criticize the European practice of bone testing for migrants. The test is currently employed in order to determine the age of individuals, which is a discriminating factor for the application of a number of rules affecting the fate of the migrant. I will argue that regarding the scientific unreliability of this practice and its danger for the health, bone tests constitute a violation of the right to private life – within Union law and the case law of the supervisory bodies of the council of Europe.

Keywords: Bone testing, migrants, European law, French law

Introduction

Arriving in Europe as a minor or as an adult changes radically the fate of a migrant. Being over or under the legal age of maturity determines the help that will be granted to the migrant upon arrival. Different standards – notably standards of social protection and possibilities to be expelled – will apply to him or her depending on whether he or she reached the day of his or her 18th birthday or not. Being recognised as a minor is hence a major challenge for the migrant and his or her chances to integrate. However, the costs of such challenge are supposed to be borne by the state, which is reluctant to pay expensive help to migrants, especially if there are some doubts about the certainty of their age.

The proof of age must be accurate to the day. Below one's 18th birthday, one is protected; above, one is not protected anymore. For western societies, the birthdate is a must-know that is commonly shared, preciously recorded, and proudly celebrated every year. However, age is an ethnocentric concept that varies from one society to another. Whereas it is obvious in our society that your birthdate – and hence your exact age – is precisely archived somewhere, it is far less obvious in numerous other cultures. Furthermore, the particular situation of displaced people and migrants makes it difficult for them to keep track of such administrative record or to preserve such probative administrative documents in good condition.

Yet exact age is hard to measure if no birthdate is available, and even harder to prove in front of a judge. Nevertheless, this age has to be clearly determined in order to evaluate the protection that will be granted to a migrant. Hence, the states developed the bone test technology in order to assess the age of these persons. This practice has been commonly used in Europe for decades.

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Experts from various fields (radiology, human rights law, children's rights activists, migrants' rights activists) have strongly condemned this practice for a number of reasons I will later try to outline. National government do not appear willing to change their practice even after numerous issues - in particular regarding the reliability of theses tests' results- were raised by scientists.

In this article, I will try to show how this practice is a breach of the European human rights law. By using a procedural perspective in assessing the reliability issues inherent to the practice of bone testing. I will prove that this practice is not in line with the standards of proof required under the Union law. From a more human rights-orientated perspective, I will then try to show how this practice infringes a person's basic human rights, and how bone testing is considered illegal as shown in recent case laws from the CJUE, the ECHR and the European Committee for social rights.

The first section of this article is dedicated to the reliability issues inherent to this practice, and the second section is focused on the compliance of this practice with Union Law's standards of proof requirement. The third section will examine the risk posed by such test to the right to private life according to the CJEU case law. Furthermore, the last two sections will review the recent case laws of the supervisory bodies of the Council of Europe and evaluate the different violations of human rights that arise along with this practice. I will to some limited extent focus on France whose law is further protecting migrants than the European Union one, and which faced two judgements regarding its practice of bone testing.

I. An Undeniable Scientific Problem

The practice of bone tests consists of a radiographical examination of the hand and the wrist of the subject in order to examine if he or she still has "growth cartilage", a cartilage which is meant to disappear through ossification around the maturity of the subject. The images obtained are then compared with the Greulich & Pyle Atlas. This Atlas was constituted between 1930 and 1940 and its original goal was to report growth disorder. It gathered image results from a thousand white North-American subjects with high social status.[1] Recent scientific developments show that ethnic, social level and nutritional differences, including post-traumatic stress disorders have strong influences on children's bone development.[2] Therefore, this Atlas does not accurately assess the migrants' bone development considering most of them are non-white and were subjected to malnutrition and exposed to traumatic events during their odyssey towards Europe. Moreover, these tests tend to be less precise when the subject tested reaches age of maturity. The French Medicine Academy adumbrate figures which do not speak in favour of the trustworthiness of these tests: the margin of error in the evaluation of the age of children between 16 and 18 years old is of one to two years.[3] 88 percent of the minors subjected to these tests in France are between

[1] C. Gaubert, ' Jeunes migrants, pourquoi les tests osseux ne peuvent pas suffire', *Sciences et Avenir* March 26, 2019, Available at : https://www.sciencesetavenir.fr/sante/os-et-muscles/jeunes-migrants-pourquoi-les-tests-osseux-ne-suffisent-pas_132404 (last access 16.05.2019).

[2] G. Noll, 'Junk science ? Four arguments against the radiological age assessment of unaccompanied Minors seeking asylum'. *International Journal of Refugee Law*, 2016-28 pp. 234-250, §4 (pp. 239-244).

[3] National Medicine Academy, *Sur la fiabilité des examens médicaux visant à déterminer l'âge à des fins judiciaires et la possibilité d'amélioration en la matière pour les mineurs isolés étrangers*, 2007, Available at: http://www.academie-medecine.fr/07-01-sur-la-fiabilite-des-examens-medicaux-visant-a-determiner-lage-a-des-fins-judiciaires-et-la-possiblite-damelioration-en-la-matiere-pour-les-mineurs-etrangers-isoles/ (last accessed 16.05.2019).

16 and 18 years of age,[4] and their age can only be evaluate within a one or two years margin of error, randomly placing them above or below the age of 18.

Hence, the data used to determine the age of migrants are inaccurate and the features of this method present some numerous scientific flaws. Another bias appears in the relationship between forensic experts and judges the difficulties linked to the assessment by legal professional of scientific medical data further weaken the already unreliable results of such tests.
In a monograph on the relationship between law and medicine[5], Lena Wahlberg underlines the epistemological and ontological differences arising between forensic and legal sciences. This leads to what is called a "type III error", in other words, it provides the right answer to the wrong question. The differences of how lawyers and scientists conceptualize the world make these kinds of errors possible, and the lack of training of legal practitioners in scientific issues makes it hard for them to recognize such error in practice. As Gregor Noll recalls[6], the scientific experts in such cases want to give a useful answer to the decision maker and try to "translate" their answer into legal terms by using a neutral and scientific vocabulary. The use of this vocabulary makes it harder for the judges to call into question what seems to be a scientific obviousness Radiologists are also not always aware of the debate surrounding bone testing and their reliability. Medical experts are also sometimes unaware of the interdisciplinary biases that may have influenced their results.
On the side of the judges, the controversy surrounding the reliability of bone testing has most likely not reach their ears, as it is a forensic and not a legal debate. Even if it would have, the training of a lawyer does not include the understanding of such forensic issues, and the judge is then most likely not going to be aware of the extent of the consequences of this debate on the reliability of the proof presented to him.[7]Most lawyers have faith in the forensic expertise, and it seems hard for a lawyer to call into question a scientific technical issue they are not made aware of.

Hence, the scientific controversy surrounding this practice is in itself undeniable, and it must be accepted that these tests have little if any forensic reliability. The problems raising from this forensic debate is even more worrisome as the decision makers are in general not able to identify and cope with these forensic issues. Therefore, they have difficulties in adapting their decisions according to the doubts surrounding this practice.

Now that the problems of this practice have been established, it can be compared to the standard set by Union law in that matter.

II. The *Pfizer*'s standard for Expert's Report Related Proof

In 2002, the European Court of First Instance (CFI) formulated standards on the matter of experts' reports in the judgement *Pfizer,*[8] standards that can be extended to the field of asylum[9], and that include forensic reports. An expert report must fulfil the requirements of excellence,

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[4] C. Gaubert, supra note 2
[5] L. Wahlberg, *Legal Questions and Scientific Answers: Ontological Differences and Epistemic Gaps in the Assessment of Causal Relations*, Lund University 2010.
[6] G. Noll, supra note, 3
[7] C. Kaupa, *Dealing with non-legal knowledge in legal discourse*, 14 octobre 2016, Available at: https://medium.com/legal-methodology/4-dealing-with-non-legal-knowledge-in-legal-discourse-and-different-approaches-in-legal-d2436271e18, (accessed on 16 May 2019).
[8] CJEU, Pfilzer Animal Health V. Council (T-13/99) of September 11, 2002.
[9] M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford:Hart Publishing 2014, §8.5.1.

independence and transparency in order to ensure 'the scientific objectivity of the measures adopted' in order to base the decision on relatable information and avoid arbitrariness.[10]
Asylum system is harmonized within the European Union. Bone tests are regulated by article 25(5) of the Procedure Directive.[11] Hence, national provisions of EU member states surrounding the practice of bone testing all derive from this article. It circumscribes the practice of bone testing. Its second paragraph provides that the medical examination to determine the age of the migrant "shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result". Despite this safeguard, the practice that results from this provision is far from being reliable, as shown in the first section.

In the case of bone testing, the *Pfizer* standard has not been met. Contrary to what is sought for, the safeguard surrounding this practice under the Union law does not allow for a reliable result. Article 25(5) PD does not help in reaching the excellence, independence and transparency requirements of an expert's report as provided under the Union law in order for it to be accepted by a judge. The practice of bone testing, therefore, does not comply with the standard of proof set by the Court of Justice. Members of the European Union should therefore think twice before using the results of such tests in asylum procedures. Besides its weak scientific and probative value, this practice can also constitutes a violation of human rights.

III. A Test Constituting an Interference with the Right to Private Life According to the CJEU

Article 25(5) requires the consent of the subject (or of his or her representative) before being able to carry out the medical examination determining the age of the asylum seeker. To avoid this consent to be emptied of all meaning, the Union law further provides that a refusal to undergo the examination cannot be the sole basis for a rejection of an asylum seeker's application.
Nonetheless, a refusal is often synonymous with rejection of the status of an unaccompanied minor and of the advantages that comes with it. It was for instance the case of Adama S., whose case has been in France the source of a "priority preliminary ruling on constitutionality" in 2019, that we will examine later on in this paper.[12] Does the requirement of consent remains true when a person's refusal leads to the rejection of his/her application? The CJEU answered this question in a judgement *F* on January 2018.[13] This case was about psychological tests carried out on asylum seekers to determine their sexual orientation. The Court states that even if the tests at stake were

> "formally conditional upon the consent of the person concerned, it must be considered that that consent is not necessarily given freely, being de facto imposed under the pressure of the circumstances in which applicants for international protection find themselves".

The Court concludes that such tests constitute an interference with the right to private life of the person concerned. In order for the examination to be justified, it must not exceed the limits of what is appropriate and necessary in attaining the objectives pursued by the legislation.[14] The Court adds that

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[10] CJEU, Pfilzer Animal Health V. Council (T-13/99) of September 11, 2002, para 172.
[11] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), L180/60).
[12] Conseil Constitutionnel, Décision n° 2018-768 QPC March 21, 2019. The French constitutional court did not mention this issue in its ruling.
[13] CJUE, F v. Bevándorlási és Állampolgársági Hivatal (C-473/16) 25.01.2018, § 53.
[14] *Ibid.*, §56.

> "the suitability of an expert's report such as that at issue in the main proceedings may be accepted only if it is based on sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community".[15]

Considering the lack of scientific reliability of the practice in question, there is reason to believe that these tests would fail a proportionality test in front of the CJEU.

The first sections reviewed the lack of compliance of article 25(5) PD with the Union law. The following sections will examine the compliance of this practice with the jurisprudence of the ECHR and the ECSR as supervisory bodies of the Council of Europe. A recent request has been issued by Italian lawyers to assess the compliance of the Italian practice of bone testing with article 8 of the ECHR.[16] Drawing on the ECHR case law, I will argue in the next section that this practice constitute a violation of the right to private life.

III. The ECHR's Case Law on Medical Examination Without Consent Endorsing the Possibility of Human Right's Violation

According to the ECHR, signs of past persecution creates a presumption that persecution would happen again upon return. People able to show signs of past persecution are hence protected from being expelled. The medical evidences used to show the signs of past persecution has been the subject of abundant case law of the ECHR, which ruled on numerous occasions on the standard of proof required for these evidences.[17] The standards of proof required vary depending on the importance of the rights being protected. The right not to be subjected to inhuman or degrading treatment (article 3 ECHR) is an absolute right. Its infringement cannot be justified. In the case of bone testing, the right to private life (article 8) is endangered as medical examinations are being carried out without the real consent of its subject, thus constituting an interference with article 8.[18] A justified infringement of article 8 does not constitute a violation of the right to private life. As it is of a lesser importance, the exigency of the standards of proof applicable in the case of bone testing is less than in the case of evidence of former ill treatment.

It may be recalled that a medical examination carried out without consent is a breach of a negative obligation of the state: an obligation to refrain from engaging in actions contrary to the rights protected by the Convention. Positive obligation, on the other hand, requires the state to provide in order to comply with its international obligation. The justification of the breach of such a negative obligation is more demanding than if it were a justification for the breach of a positive obligation.

Keeping in mind that article 8 protects a right that can be interfered with, so that its infringement does not necessarily constitutes a violation of the Convention, but also that the practice of medical examination without consent constitutes a breach of a negative obligation, which is more hardly justifiable, I will try to assess if this practice would constitute a violation of article 8 ECHR. It

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[15] *Ibid.*, §58.
[16] ECHR, Request n°5795/17, Ousainou Darboe and Moussa Camara v. Italy, introduced on January 18th 2017 and transmitted on February 14th 2017 by Mr. Marco Ferrero and Mrs. Elisa Chiaretto.
[17] M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford: Hart Publishing 2014, §8.5.1.
[18] ECHR, European Commission of Human Rights, Peters v. Pays-Bas, Judgement on the merits, Request n° 21132/93 6.04.1994, §3.

would not be the case if the infringement would be justified, hence if the infringement is foreseen by the law, if it pursues a legitimate aim and if it is necessary in a democratic society.[19]
The legal requirement here would be fulfilled by a national transposition of the article 25(5) of the Procedure Directive. Article 25(5) seems to meet the requirements of clarity and accessibility needed for the legality requirement.

The legitimate aim pursued here is the control of migration. Dembour underlines that when the legitimate aim pursued is the control of migration, the protection of individuals operated by the ECHR tends to be less strong.[20] Keeping this in mind, it should be noted that the Court enlightened that in cases of medical examination carried out without consent, the legitimate aim was particularly relevant.[21] In the case of bone testing, only a temporary control of migration is at stake, as it concerns the control of minor migrants. Being a minor is a characteristic which is by essence limited in time. The protection of minors does not indefinitely oblige the state. It stops when the person protected becomes eighteen years old.

Finally, the interference must be necessary in a democratic society, must answer a compelling social need, and must be proportionate to the aim pursued. The proportionality test carried out by the ECHR is a control *in concreto*, which means that it is the actual and practical result of a national provision that are examined and not just the formal guarantees the provision encompasses.[22] The ECHR must be interpreted in the light of the international law, particularly the convention for the rights of the child,[23] which is also mentioned in article 25 PD. This article also grants a presumption of minority to the children who have not yet been proven to have reached the age of majority. They must therefore be considered as children in the balancing of the public and private interests. Radiographical examination constitute a physical duress, as radiation emanating from it are harmful to health[24]. Moreover, the consequences of these arbitrary tests are heavy for the persons concerned: chance to be expelled of the territory and the end of the social help granted to minors. Finally, the ECHR already highlighted the significance of the probative reliability of a medical examination carried out without consent to justify such an examination.[25] The case was then about a paternity testing, and the probative force of this test helped establish that such test carried out without explicit consent would not constitute a violation of the right to private life. Despite the probative force of the tests, the fact that the respondent was a child, and that this test was carried out for this child's interest carried weight in the decision as well. In our case, the child is the applicant, and the reliability of the bone tests is more than obscure. It is the best interest of the child not to be subjected to these tests which are rendered arbitrary by unreliable results.

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[19] ECHR, Guide on article 8 of the ECHR, available at : https://www.echr.coe.int/Documents/Guide_Art_8_FRA.pdf (last accessed 30.05.2019).
[20] See for instance M.B. Dembour *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford University Press 2015, chapter 4, pp. 96-129.
[21] ECHR, Mifsud v. Malte, request n° 62257/15 29.01.2019, § 71.
[22] ECHR, Mifsud v. Malta, request n° 62257/15 29.01.2019, § 67.
[23] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.
[24] Union law contains a directive "laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation" (council directive 2013/59/EURATOM of 5 December 2013, L13/1) and which requests a strict justification for the carrying of such "medico-legal" exposure, see recital 32 of the directive.
[25] ECHR, Mifsud v. Malta, request n° 62257/15 29.01.2019, § 59.

I argued here that the assessment on the merits of the conventionality of bone testing tend to show that it constitutes an interference in the right to private life and cannot be justified. The interest of the state here is of temporary nature, while children's interests is to avoid duress and arbitrary decisions based on unreliable tests. Drawing on this conclusion, I believe that states should refrain from using bone testing in assessing the age of migrants in order to comply with their European obligation to protect human rights.

V. A Practice Already Condemned by the ECSR

In 2018, the ECSR condemned France for its practice of bone testing.[26] The practice of bone testing in France is regulated by Article 388 of the French civil code which offers larger safeguards than article 25(5) PD. According to French law, these tests can only be carried out if a judge requested them, the results of the examination must encompass a mention of the margin of error, and the examination cannot be used as the sole evidence to determine the age of the person. Despite this broader formal protection, the French abusive practice of bone testing has been condemned by the ECSR, as it violate article 17§1 of the European social charter. The committee underlines the serious consequences of such practice for minors, and how bone testing is ill-suited and ineffective.[27] Different forms of abuse by the authorities were documented by the CNCDH[28] and the French ombudsman[29]: person repeatedly tested until their test-results show their maturity and the use of bone tests even though some material evidences (such as birth certificates) were presented. The French High Council for public health and the French National Medicine Academy both showed the scientific aberration of such tests in determining a person's age.[30]

Despite the strong condemnation on the French's bone testing practice, the French constitutional court ruled one year later that the same Article 388 of the French civil code sufficiently protects constitutional rights.[31] The French judges decided to ignore France's bone testing malpractice and to focus solely on the formal procedural safeguards provided for by the French civil code, hence, going against the decision of the ECSR.

I regret that the French constitutional court did not take into account the international criticisms directed against the French practice. The French court did not compel the French lawmakers to comply with its international obligations with regard to human rights protection. A different outcome would have been a powerful signal of the authority of the ECSR, and would probably have had consequences towards all the other European states who are bound by the European social charter yet still using bone testing

Conclusion

I argued here that the common practice of bone testing in Europe constitutes a violation of the right to private life under both the Union law and the law of the Council of Europe. Such practice,

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[26] CESD, Comité Européen d'Action Spécialisée pour l'Enfant et la Famille dans leur Milieu de Vie (EUROCEF) v. France, request n°114/2015, decision on the merits 24 .01.2018, § 113.

[27] *Idem.*

[28] The *Commission Nationale consultative des Droits de l'Homme* (CNCDH) is a French quasi non-governmental organisation promoting and protecting human rights, both as a councelor for the government and the parliament, and also as a whistleblower alongside the citizens.

[29] *Ibid.*, §111 and §107.

[30] *Ibid.*, §110.

[31] Conseil Constitutionnel, Décision n° 2018-768 QPC March 21, 2019.

although heavily condemned by medicine and asylum law professionals, remains engrained in of the European protection standards for both asylum seekers and child migrants. The European commission has considered in its last recast project of the procedure directive[32] to strictly use the tests as the last resort.

In my opinion, it would be wiser to adapt the reception of migrants to their real needs rather than to a contrived criterion such as age. The "chronological" age is incredibly less significant than the ability of a person to face the outside world, and much less important than the support a person needs to reach independency. Granting social help based on a social examination rather than based on an arbitrary test highlights the actual needs of the person irrespective of his/her age or maturity level. From my perspective, aligning help according to the actual needs of a person rather than based on a person's age is the way to achieve real integration. Adopting this approach would allow the European states to be in line with the tenets of human rights law

Moreover, only a small amount of the world's population comes from countries where birth registration is common. In African countries, less than 10% of all the births are registered, and even in Europe, the percentages of birth registration vary a lot from one country to another.[33] This results in some nationalities being almost systematically subjected to such tests. Thus, creating discrimination on the basis of nationality, as would Noll argue.

Irrespective of the discriminatory nature of such an unreliable practice, putting children's health at risk in order to determine if they fall into categories which are irrelevant in their societies of origin appears ludicrous. Bone testing does not reach the objective of granting social protection to the most vulnerable – children –, nor is it in compliance with the European obligation of the states to uphold the human rights law. Such a dangerous and arbitrary practice should be withdrawn, and I strongly advocate for assessment methods that would not endanger the health of the children, and that would allow a thorough assessment of the person's need and not only of a person's age.

[32] Proposal for a regulation of the European parliament and of the council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2016/0467 final - 2016/0224 (COD).
[33] G. Noll, supra note, 3