Trabalhos

Themis 2018

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

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Capa
Vista sobre Alfama e o rio Tejo, a partir do CEJ

O CEJ publica anualmente os trabalhos elaborados pelos/as Auditores/as de Justiça que participam no programa THEMIS organizado pela EJTN (que tem como objectivo principal estimular o conhecimento e o debate entre os futuros magistrados dos diversos Estados-Membros da União Europeia, em áreas temáticas jurídicas de interesse recíproco, promovendo ainda a troca de experiências entre os participantes e o desenvolvimento das competências linguísticas comuns).

Na edição de 2018 foram cinco as equipas de Auditores/as do 33.º Curso de Formação de Magistrados a participar tendo uma delas passado à Final que decorrerá em Paris, em Outubro.

O objectivo de promoção do conhecimento dos diferentes sistemas jurídicos da União Europeia, aumentando exponencialmente o entendimento, a confiança e a cooperação entre juízes e magistrados do Ministério Público dentro dos Estados-Membros, fica também cumprido com a publicação deste e-book.

(HL/ETL)

CENTRO
DE ESTUDOS
JUDICIÁRIOS

Ficha Técnica

Nome:

Trabalhos Themis 2018 - 33.º Curso de Formação de Magistrados

Departamento de Relações Internacionais do Centro de Estudos Judiciários

CENTRO DE ESTUDOS JUDICIÁRIOS

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Coleção:

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Conceção e organização:

Helena Leitão (Procuradora da República, Coordenadora do Departamento de Relações Internacionais)
Edgar Taborda Lopes (Juiz Desembargador, Coordenador do Departamento da Formação do CEJ)

Orientadores das equipas:

Ana Massena (Procuradora da República e Docente do CEJ)
Maria Perquilhas (Juíza de Direito, Docente do CEJ)
Patrícia Costa (Juíza de Direito, Docente do CEJ)
Rui Cardoso (Procurador da República e Docente do CEJ)

Auditores de Justiça:

Ágata Simões (Auditora de Justiça MJ – Grupos E-3)
Ana Brandão (Auditora de Justiça MJ – Grupos G-5)
Catarina Jesus (Auditora de Justiça MJ – Grupos E-3)
Daniel Varão Pinto (Auditor de Justiça MJ – Grupos A-1)
Débora Parente (Auditora de Justiça MJ – Grupos D-3)
Elisabete Ferraz (Auditora de Justiça MJ – Grupos G-5)
Inês Morais (Auditora de Justiça MP – Grupos E-8)
Joana Gouveia (Auditora de Justiça MP – Grupos E-8)
João Miguel (Auditor de Justiça MJ – Grupos E-3)
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Marta Magro (Auditora de Justiça MP – Grupos E-8)
Nuno Morna Oliveira (Auditor de Justiça MP – Grupos A-2)
Pedro Santos (Auditor de Justiça MJ – Grupos G-5)
Sara Domingos (Auditora de Justiça MJ – Grupos E-3)

Revisão final:

Edgar Taborda Lopes – Juiz Desembargador, Coordenador do Departamento da Formação do CEJ
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33.º Curso de Formação de Magistrados

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Apresentação da Equipa

Accompanying Teacher
Maria Perquilhas

CENTRO
DE ESTUDOS
JUDICIÁRIOS

THEMIS 2018 – Equipa Portugal II
Direito da Família e Sucessões
33º Curso

Maria Perquilhas*

Tive o privilégio de acompanhar, enquanto docente orientadora, uma equipa de auditores de Justiça do 33.º Curso Normal de Formação de Magistrados do Centro de Estudos Judiciários (CEJ):

– A equipa Portugal II constituída por Ana Margarida Brandão, Elisabete Ferraz e Pedro Barrambana Santos, Grupo G/5.

Esta equipa concorreu à meia-final B – European Family Law, que teve lugar em Vilnius de 7 a 9 de Maio de 2018.

Previamente à data designada as equipas enviaram o trabalho escrito, com base no qual se desenrolou a apresentação oral, questionário e respetiva argumentação e defesa. Após a apresentação oral, as equipas são sujeitas a um pequeno interrogatório por parte de uma equipa sorteada para o efeito e depois questionada pelo júri.

Concorreram as equipas de França, Grécia, Portugal I, Portugal II, Roménia e Sérvia

A equipa Portugal II apresentou o tema "Fixing the body, Endangering the Soul? Challenges of Intersex Children Under the Fundamental Rights".

O tema é de grande atualidade e reflete bem as exigências de adaptação do intérprete e aplicador do direito nestas áreas do direito da família onde o equilíbrio entre as responsabilidades parentais e o direito à identidade do filho parecem conflituar. A falta de jurisprudência europeia sobre o tema, apenas o Tribunal Constitucional Alemão se pronunciou sobre a temática abordada (embora não na dimensão que o trabalho abarca), os raros e tímidos ordenamentos jurídicos tornaram extremamente desafiante o trabalho realizado e apresentado, exigindo uma enorme criatividade, saber e técnica jurídica.

O tema foi apresentado por escrito nos exatos termos editados neste e-book, tendo sido depois objeto de apresentação oral e discussão nos termos sobreditos.

A equipa Portugal II alcançou o segundo lugar passando à final que se realizará em Paris no Outono p.f.

* Juíza de Direito e Docente do CEJ.

Os trabalhos apresentados a concurso devem apresentar situações que envolvam o direito comunitário, como aliás o nome da semi-final indica, e apresentar caminhos e ou soluções inovadoras, o que implica por parte dos participantes uma grande dedicação e trabalho.

Os nossos auditores, ao contrário de muitos outros concorrentes de outras escolas que se preparam para a competição desde o início do ano de formação, apenas puderam contar com as férias da Páscoa para se prepararem, sendo toda a pesquisa e trabalho realizado fruto de uma dedicação meritória e merecedora de reconhecimento.

Os senhores auditores de justiça da equipa Portugal II constituíram entre si laços de uma verdadeira amizade, tendo o espírito que os unia sido realçado e elogiado pelo júri da competição.

Terminada a competição permanecem os laços criados entre os diversos participantes europeus, que se querem cada vez mais fortes e próximos na construção de uma verdadeira Comunidade Jurídica de práticas uniformes.

Enquanto docente destes três auditores de justiça cumpre-me manifestar o prazer que foi acompanhar o evoluir da pesquisa, do trabalho escrito e da preparação da defesa deste tema por parte desta equipa.

O lugar alcançado prescinde de palavras; ainda assim, cumpre referir que a par de uma pesquisa exaustiva e profunda, fruto da capacidade e autonomia da equipa, o trabalho que foram construindo é de uma elevação técnico-jurídica assinalável.

Já em Vilnius ensaiamos as apresentações e eu, qual júri, lá fiz de advogada do diabo tendo conseguido identificar alguns aspetos que poderiam ser objeto da argúcia do júri.

À semelhança do ano transato, esta semana de partilha criou laços que perdurarão pela vida fora. Termino agradecendo o facto de me terem dado a oportunidade de os ter orientado e acompanhado nesta aventura.

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

1.

1.1. "FIXING" THE BODY, ENDANGERING THE SOUL?

Team Portugal II

Ana Brandão | Elisabete Ferraz | Pedro Santos

Accompanying Teacher

Maria Perquilhas

CENTRO
DE ESTUDOS
JUDICIÁRIOS

EUROPEAN JUDICIAL TRAINING NETWORK
THEMIS COMPETITION
SEMI-FINAL B
BUDAPEST, 2018

International Judicial Cooperation in Civil Matters - European Family Law

"FIXING" THE BODY, ENDANGERING THE SOUL?

CHALLENGES OF INTERSEX CHILDREN UNDER THE FUNDAMENTAL RIGHTS

Team Portugal II
Ana Brandão | Elisabete Ferraz | Pedro Santos

Accompanying Teacher
Maria Perquilhas

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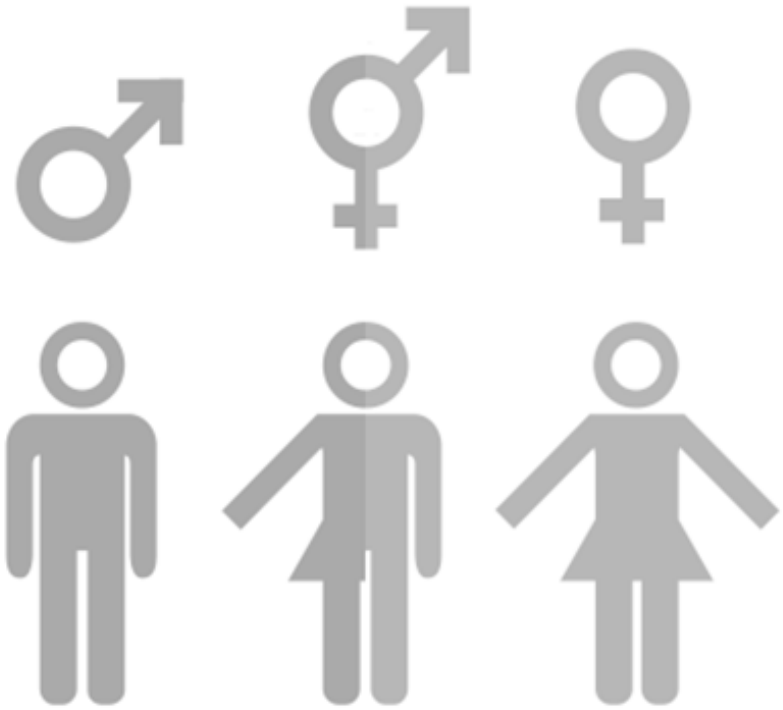

I. INTRODUCTION

"I tell ya, life ain't easy for a boy named Sue."
Shel Silverstein, sung by Johnny Cash, "A boy named Sue", 1969

"*Is it a girl or a boy?*" How often do we hear this question when a newborn comes into this world? Although it may appear harmless to most of us, for some individuals who cannot be clearly classified as male or female at birth, the answer will define not only the way they see themselves but also how they will be socially and legally recognised. In fact, we are used to distinguishing human beings as male or female. Besides, society does not usually recognise a person without reference to their sex or gender[1]. However, this binary classification no longer responds to the diversity that a person's bodily features can assume[2].

According to experts, around 1.7% of the population is born with intersex conditions[3]. Intersex individuals cannot be classified according to the medical norms of male and female bodies regarding their chromosomal, gonadal or anatomical characteristics[4]. In these cases, when parents choose the sex of their newborn child they must be aware that the sex assigned at birth will subsequently become a legal and a social fact and will accompany them throughout the rest of their life.

Because of their invisibility to the majority, due to the fact that they do not fit the parameters of legal and social standards, intersex people suffer a great variety of challenges ranging from mere bureaucracy, to discrimination or medical interventions without informed and conscious consent.

Therefore, the present paper focuses on the impact that some practices, such as issuing birth certificates and medical treatments, can have on the fundamental rights of intersex children.

The best interests of intersex infants are often manipulated to support the lack of social, legal and medical knowledge, research and relevant legislation on the matter. The legal requirement for intersex children to be identified as either male or female leaves them vulnerable to surgical interventions, for cosmetic reasons and without informed consent, which is a real problem, not only because it is irreversible, but also because it may potentially

[1] Sex and gender are distinct, with sex being a biological term and gender being a psychological and cultural term. Sex denotes biological characteristics that a person has with specific reference to genitalia and their reproductive system; gender traditionally denotes having either a male or female proscribed normative role in society.

[2] Anne Fausto-Sterling (*Sexing the Body*, page 78, available at https://libcom.org/files/Fausto-Sterling%20-%20Sexing%20the%20Body.pdf) proposes that, in addition to males and females, we should also accept the categories herms (named after ''true'' hermaphrodites), merms (named after male ''pseudo-hermaphrodites''), and ferms (named after female ''pseudo-hermaphrodites'').

[3] It is estimated that the prevalence of babies born with ambiguous genitalia prompting medical investigation and a diagnosis is 1 in 2000 babies; see L. Liao, D. Wood and S. Creighton, *Parental Choice on Normalising Cosmetic Genital Surgery*, British Medical Journal 351 (2015), available at https://pdfs.semanticscholar.org/57e4/d8d0e78eafd233e58d3169ccd19de1aa2731.pdf and Anne Fausto-Sterling, *Sexing the Body*, pages 51-54, available at https://libcom.org/files/Fausto-Sterling%20-%20Sexing%20the%20Body.pdf.

[4] Medical practice uses the term Disorders of Sex Development (DSD) to cover congenital conditions in which the development of chromosomal, anatomical or gonadal sex is atypical.

be detrimental, both physically (through pain or in relation to sexual function) and physiologically (many intersex people do not identify with the sex they were assigned to), to the child as they develop into a gender identity. Shame and secrecy have allowed the perpetuation of these practices for years, exposing these children to severe human rights breaches and revealing their particular vulnerability and the absence of effective measures to protect them.

Regarding all this, we will approach the subject of intersex children from a fundamental rights perspective, considering the positive legal and medical advances across many European countries and around the world.

For those purposes, the rights of intersex children and their main challenges will be assessed according mostly to two international instruments: the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC). We will also examine the recommendations of some institutions, agencies, activists and NGO's that by means of pioneering and remarkable work are drawing the public's attention to a reality that society can no longer pretend doesn't exist.

II. WHO ARE THE INTERSEX?

As referred before, intersex persons[5] are born with sex characteristics that do not fit typical binary notions of male or female bodies. The variations of sex anatomy, can include[6]:

a) Ambiguous genitalia, such as enlarged clitoris, fused labia (Congenital Adrenal Hyperplasia CAH), absence of vagina (vaginal agenesis, or Mayer-Rokitansky-Küster-Hauser syndrome MRKH), urethral opening not on the tip of the penis, but somewhere below on the underside of the penis (hypospadias), anomalous small penis or micropenis (e.g. Androgen Insensitivity Syndrome AIS), breast development in males (gynaecomastia), and/or

b) Irregular hormone producing organs or atypical hormonal response, for example, a mix of ovarian and testicular tissue in gonads (ovotestes, "True Hermaphroditism"), the adrenal gland of the kidneys (partly) producing testosterone instead of cortisol (Congenital Adrenal Hyperplasia CAH), low response to testosterone (Androgen Insensitivity Syndrome AIS), undescended testes (e.g. in Complete Androgen Insensitivity Syndrome CAIS), little active testosterone producing Leydig cells in testes (Leydig Cell Hypoplasia), undifferentiated streak gonads (Gonadal Dysgenesis GD if both gonads are affected, or Mixed Gonadal Dysgenesis MGD with only one streak

[5] Historically, people with intersex conditions were referred to as "hermaphrodites" but this word has been rejected as embodying many of the misperceptions and mistreatment of intersexed people.

[6] See the NGO Report to the 2nd, 3rd and 4th Periodic Report of Switzerland on the Convention on the Rights of the Child (CRC) regarding the *Intersex Genital Mutilations. Human Rights Violations Of Children. With Variations Of Sex Anatomy*, available at http://intersex.shadowreport.org/public/2014-CRC-Swiss-NGO-Zwischengeschlecht-Intersex-IGM_v2.pdf.

gonad), and/or

c) Atypical genetic make-up, e.g. XXY (Klinefelter Syndrome), X0 (Ullrich Turner Syndrome), different karyotypes in different cells of the same body (mosaicism and chimera).

While many intersex forms are normally detected at birth (or earlier during prenatal testing), others may only be revealed at puberty or later in life (e.g. due to the absence of menstruation or physical development that do not correspond with the assigned sex).

Due to the great diversity among the intersex, it's not correct to cluster them, biologically speaking, into only one category, in parallel to female and male categories. In addition, it's important to acknowledge that being intersex relates to biological sex characteristics and is fully distinct from a person's sexual orientation or gender identity, where the psychological component is more enhanced. Therefore, an intersex person may be straight, gay, lesbian, bisexual or asexual, and may identify as female, male, both or neither[7].

III. INTERSEX CHILDREN AND THE ENJOYMENT OF HUMAN RIGHTS

a) Background and Awareness in European Union

In the European Union, intersex issues have gradually emerged as relevant to fundamental rights protection thanks to the work developed by some European and United Nations institutions[89], agencies[10] and ethics councils[11], activist movements and NGO's[12], which have

[7] The Office of the United Nations High Commissioner for Human Rights (OHCHR) *Free & Equal* campaign refers that "*Intersex people experience the same range of sexual orientations and gender identities as non-intersex people*".

[8] In 2013, the Council of the European Union launched some guidelines to promote and protect the enjoyment of all human rights by lesbian, gay bisexual, transgender and intersex (LGBTI) persons, aiming to provide officials of EU institutions and EU Member States, with guidance to be used in contacts with third countries and with international and civil society organisations, using a case-by-case approach, in order to promote and protect the human rights of LGBTI persons within its external action (see Council of the European Union *Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, Foreign Affairs Council meeting Luxembourg, 24 June 2013, available at https://ec.europa.eu/europeaid/sites/devco/files/137584.pdf). See, also, the European Parliament Resolution on the *EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity*, adopted in 2014, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0009+0+DOC+XML+V0//EN).

[9] The UN High Commissioner for Human Rights and the UN Special Rapporteur on Torture pointed out that intersex people can suffer from discrimination which may lead to seriously ill treatment, especially during childhood (see United Nations (UN), High Commissioner for Human Rights (2011), *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Human Rights Council, Nineteenth session, Report No. A/HRC/19/41, 17 November 2011, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf, and United Nations (UN), Special Rapporteur on Torture (2013), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, Human Rights Council, Twenty-second session, Report No. A/HRC/22/53, 1 February 2013, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.

[10] See FRA Focus Paper 04/2015 entitled *The Fundamental Rights Situation of intersex people*, available at http://fra.europa.eu/en/publication/2015/fundamental-rights-situation-intersex-people.

contributed to a better understanding of the challenges intersex people are faced with, such as discriminatory behaviours and violations to their physical and physiological integrity[13]. Hence, progress has been made in terms of recognising the need to specifically protect them in equal treatment legislation[14].

Human rights are universal and indivisible, therefore applicable to everyone, including intersex children. The Universal Declaration of Human Rights (UDHR) states, in Articles 1 and 2, that "*All human beings are born free and equal in dignity and rights*" and that "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*". Also, the European Convention on Human Rights (ECHR) protects everybody and contains an open-ended list of prohibited grounds of discrimination in Article 14, including the ground of sex and gender[15-16].

The Charter of Fundamental Rights of the European Union (CFREU) protects human dignity in Article 1 and the right to integrity in Article 3, prohibiting any discrimination based on any ground such as sex and genetic features (see Article 21). There's no doubt that children are holders of human rights rather than only objects of protection.

The United Nations Convention on the Rights of the Child (UNCRC) establishes a set of rights that are extremely relevant concerning the protection of intersex children against discriminatory acts and offenses to their integrity. Indeed, Article 3 prescribes that the best interests of the child is a primary consideration regarding all issues that affects children. In Article 7, the UNCRC establishes the right of the child to be registered immediately after birth and to have the right, from birth, to a name and, in Article 8 the right to preserve their identity. Articles 12 and 13 enhance the child's right to form and express their points of view

[11] For example, the Italian Committee on Bioethics, the German Ethics Council and the Swiss National Advisory Commission on Biomedical Ethics published a set of recommendations to safeguard the rights of intersex people.
[12] Such as ILGA-Europe, Organisation Intersex International Europe and Zwischengeschlecht.org / StopIGM.org.
[13] Regarding childhood and as a result of the lack of knowledge of intersex issues, is important to note that intersex children have been treated as a taboo, suffering from bullying and exclusion in schools.
[14] Regardless the national legislative progresses that we will look at, EU Directives related to equal treatment adopt the binary male/female norm.
[15] Unequal treatment of intersex individuals has been frequently addressed in EU policies and advocacy as part of discrimination on the ground of sexual orientation and/or gender identity. Although, such treatment can better be addressed as discrimination on the ground of sex because it is linked to the sex assigned to a person at birth and its direct consequences. Intersex civil society organizations are advocating that a specific ground entitled "sex characteristics" or "intersex status" should be created in order to increase visibility and foster equality for the intersex.
[16] South Africa was the first country in the world to include an express reference to intersex in its equality legislation, through the *Judicial Matters Amendment Act 2005* which altered the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000*. The Australian federal law called *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* introduced an intersex specific ground of discrimination. In Europe, Malta's *Gender Identity, Gender Expression and Sex Characteristics Act (2015)* explicitly provides protection against discrimination on the ground of "sex characteristics". In Spain, the *Basque Country Act 14/2012 on non-discrimination based on gender identity* includes references to "intersex persons". In the United Kingdom, the *Scottish Offences (Aggravation by Prejudice) Act 2009* includes intersex issues in its open wide definition of gender identity.

freely in all matters affecting them and, the right to freedom of expression[17].

Taking these rights into account[18], and in relation to intersex children, non-urgent medical surgeries and the registration of a sex marker on birth certificates may be arbitrary and in breach of their enjoyment of human rights[19].

b) Registration of sex at birth: lack of legal recognition

When a child is born, an official registration of their sex is demanded. For an intersex newborn, this is one of the first moments when their parents are confronted with the well-known binary pattern female/male, and consequently, when their rights are under imminent risk.

Some questions emerge at this point: do parents of intersex children have the obligation to register them as female or male after the birth? Does this obligation violate the full enjoyment of their human rights? Is this legal binary imposition a discriminatory act?

In countries that only have the female-male option, parents are forced to choose the baby's sex, usually pressured by the medical standards and procedures that advise them that the child must fit into one of the existing categories.
The lack of legal recognition, medical support and counselling in these cases originates serious violations to the child's rights to physical and mental integrity and, later in their adolescence, to express their views freely.

As holders of human rights, intersex children are covered not only by the UDHR protection (especially Articles 2 and 6), but also by the protection conferred upon them by Articles 8 and 14 of the ECHR, which guaranties the right to freely develop a personal and a gender identity, without any discrimination based on grounds of sex.

UNCRC, in Articles 2, 3, 7 and 8, establishes the child's right to be registered at birth, imposing on States Parties the obligation to respect and preserve their gender identity, taking into account the best interests of the child, ensuring that no discriminatory practices related to their sex are pursued.

[17] Article 24 of the CFREU establishes the rights of the child, prescribing that "*1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests*".

[18] And other key human rights, such as the right to life (established under Article 3 of the UDHR, Article 2 of the ECHR, Article 2 of the CFREU and Article 6 of the UNCRC), the prohibition of torture and inhuman or degrading treatment (enshrined in Article 5 of the UDHR, Article 3 of the ECHR, Article 4 of the CFREU), the right to respect for private life (prescribed in Article 12 of the UDHR, Article 8 of the ECHR, Article 7 of the CFREU and Article 16 of the UNCRC), the right to health (established under Article 25 of the UDHR, Article 35 of the CFREU and Article 17, 23 and 24 of the UNCRC).

[19] In May 2014, the Commissioner for Human Rights published a paper (entitled *A boy or a girl or a person – intersex people lack recognition in Europe*, available at https://www.coe.int/en/web/commissioner/-/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-euro-1?desktop=true) which exposed the human rights challenges faced by intersex individuals.

Although the majority of EU Member States require that newborns must be promptly registered as male or female, in some European countries birth registration legislation allows other possibilities and flexible measures regarding the assignment of a sex to intersex babies. In effect, we can distinguish different legal approaches across Europe. Thus, in some EU Member States, a delay in the registration of a newborn is allowed when their sex cannot be immediately defined.[20] Other EU Member States permit not only a sex neutral identification to be registered on birth certificates[21], but also the possibility of not including the baby's sex on the birth certificate[22] or the statement that the sex could not be determined[23].

For their innovational approach to this subject, we will look at the birth registration legislation of three specific Member States (the Maltese, Portuguese and German legislation) which we consider better respond to the challenges posed by the social expectations and legal and medical requirements faced by intersex children.
In Malta, according to the *Gender Identity, Gender Expression and Sex Characteristics Act 2015*[24], the entry of a sex marker on the birth certificate can be deferred until the gender identity of the child is determined. Malta has also committed to legally recognise other gender markers in addition to male and female, as well as the absence of such markers on birth certificates.

In Portugal, a proposal presented by the Government regarding the right to self-determination of gender identity and expression of gender and the right to protection of sexual characteristics[25] is under discussion and is expected to be approved in April 2018, in order to reinforce legal recognition of transsexual[26] and intersex people[27-27A]. This proposal defines

[20] Usually this delay intends to allow a medical identification to define the predominant sex, which leads to the legal imposition of choosing a male or female sex. In Belgium, for example, the sex is usually registered during the first week and in a maximum period of three months from the birth of an intersex child; in France, a maximum period of three years is permitted in cases of intersex births. Portugal and Finland do not impose a time limit on the registration of sex when it cannot be clearly defined.
[21] Such as "unknown sex" in the United Kingdom.
[22] In Latvia, for example. In Finland, the lack of sex certification implies that an intersex infant gets an incomplete personal identity code.
[23] It's the case of Netherlands.
[24] The *Gender Identity, Gender Expression and Sex Characteristics Act* requires public services to eliminate any kind of discrimination and harassment on the ground of sex characteristics, promoting equality of opportunities for all. This Act can be accessed at http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1.
[25] This proposal can be consulted at https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=32f5cbdc-4e31-487b-9fd3-41a33bd7297e.
[26] Transsexual people identify with the gender role opposite to the sex assigned to them at birth and seek to live permanently in the preferred gender role. This is often accompanied by strong rejection of their physical primary and secondary sex characteristics and a wish to align their body with their preferred gender. Transsexual people might intend to undergo, be undergoing or have undergone gender reassignment treatment.
[27] This proposal seeks to establish the right to self-determination of gender identity and gender expression, eliminating certain requirements of the legal recognition procedure of gender identity (presentation of a medical report). The initiative also promotes the right to the protection of the primary and secondary sexual characteristics of persons, making any medical intervention that implies changes in the body or sexual characteristics dependent on express and informed consent. Regarding children, except in situations of health risk, medical treatments should only be performed as soon as their gender identity is manifested. In order for this to be possible, is required that the child can produce express and informed consent through their legal representatives, taking into account the principle of progressive autonomy, guaranteeing their right to freely express their opinion and to be taken into account according to their age and maturity and with the principle of the best interests of the child. This proposal establishes the right to maintain sexual characteristics (Article 5), provides that no medical intervention should be

some plans of action concerning medical interventions on transsexual and intersex individuals and intends to clarify several concepts like gender identity, gender expression and sexual characteristics, inspired by the legislation of other countries and communities (like Chile, Malta and The Community of Madrid); at the same time, it promotes transsexual and intersex people's rights and enhances the right of self-determination of gender and children's expression of gender.

In Germany, since the adoption of the *Act to Amend Civil Status Regulations 2013,* it is possible to fill birth certificates without a sex marker and no deadline to include such marker is imposed. Despite the fact that Germany confers a possibility that doesn't exist in the majority of the EU Member States, a case related to this matter was brought to the German Constitutional Court (*Bundesverfassungsgericht*) that obligated the judges to decide if the *Civil Status Act* respected the general right of personality and protection of gender identity of the intersex individuals.

In summary, the case dealt with an individual that, at birth, was assigned and registered by their parents as a female. The complainant was born with an atypical set of chromosomes and was not identified with either the female or the male gender. According to the German law, the complainant could change the register, choosing between the male/female dichotomy or leaving the sex/gender marker field blank. The complainant filed a request with the competent registry office to correct the complainant's birth registration by deleting the previous gender entry "female" and replacing it with "inter/diverse", alternatively only with "diverse". The registry office rejected the request and pointed out that under German civil status law a child needs to be assigned either the female or the male gender in the birth register and emphasised that – if this is impossible – no gender entry is made. The request for correction filed thereupon with the Local Court was rejected; the complaint filed against this decision was unsuccessful.

The complainant appealed to the German Constitutional Court claiming a violation of their general right of personality (which includes the protection of gender identity) under Article 2 (1) in conjunction with article 1(1) of the Basic Law (*Grundgesetz* – GG), discrimination based on gender under Article 3 (3) first sentence GG and, a violation of the principle of equal treatment under Article 3 (1) GG.

Taking the above arguments into account, the German Constitutional Court considered that the general right of personality also protects the gender identity of persons who cannot be assigned as either female nor male gender and, that the current law, not allowing other gender entry besides female or male, interferes with their fundamental rights. The

performed until the person reveals their gender identity (Article 7, no 1) and, sets that any medical intervention performed after the expression of gender identity depends on child's informed consent, expressed through legal representatives and respecting the principles of progressive autonomy and child's best interests (Article 7, no 2).

[27-A] Posteriorly to the present essay, the President of the Portuguese Republic decided to not enact the diploma and returned it to the Portuguese Parliament for reappraisal. In his view, the Parliament should had considered the medical evaluation as an essential part of the procedure, according to the opinion of the Portuguese National Council of Ethics and Life Sciences.

Bundesverfassungsgericht stated not only that gender identity is an important part of an individual identity, which determines, for instance, how people are addressed, what is expected of a person in terms of behavior, upbringing and appearance – besides the importance that is attributed in terms of law – but also that the *Civil Status Act*, only allows two positive entries, which means that people who don't recognize themselves either as female or male do not have the possibility to a positive entry.

In October 10, 2017[28], German's Federal Constitutional Court concluded that the *Civil Status Act* threatened the self-determined development and protection of intersex person's personality and that the previous decisions taken by the Federal Court of Justice, the Celle Higher Regional Court and the Hanover Local Court were unconstitutional by denying a positive entry other than female or male on birth's certifications. The decision mentioned that having as an alternative for the binary pattern "missing data" gives the impression that an alternative gender is ruled out, conveying the idea that the person's gender hasn't been clarified yet. The Court referred, considering the arguments presented by the third parties, that a third option allowing a positive entry in birth register wouldn't affect the status of men and woman under civil status law; that the fact of the introduction of a third positive entry may be associated with bureaucratic and financial costs during a transitional period does not justify denying the option of a further gender entry; and the organizational interests of the State cannot justify the denial of a third standardized and positive entry either. The judges concluded that provisions that only allow two positive entries in birth registers are discriminatory, affirming that this disadvantage isn't justified and that the protection against the discrimination based on gender also includes the protection of gender from people who don´t see themselves as female or male. Therefore, the *Bundesverfassungsgericht* legally recognized a third gender and set a deadline until the end of 2018 for the legislator to regulate the matter by means of law[29].

Here arrived, we can acknowledge that as long as the registration of an immutable, or hard to change, sex marker on the intersex child's birth certificate is required, intersex children will remain vulnerable to discrimination and, their right to develop a personal gender identity will be in crisis due to the binary system instituted. Alternatives to gender markers in legal documents, such as the possibility of including a gender-neutral marker, should be considered by the public authorities in order to assure a full enjoyment of their human rights[30].

[28] The Federal Constitutional Court's decision can be consulted at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html.

[29] By a decision of 14 March 2018, delivered on 19 March 2018, the Austrian Constitutional Court opened proceedings for the repeal of state registration of sex (E 2918/2016). An intersex person, being neither male nor female, had asked the civil status office to correct the entry in the birth register from male to "inter", "other", "X" or a similar designation, or to delete the sex-entry as a whole. After the civil status office had refused and the Administrative Court confirmed, the Constitutional Court now preliminarily has found in favour of the intersex person. The decision is available at https://www.vfgh.gv.at /downloads/VfGH_Pruefungsbeschluss_E_2918-2016_unbest_Geschlecht_ano.pdf.

[30] However, it should not be overlooked that the registration of a child without a sex selection may in some jurisdictions lead to practical problems: consider, for example, the choice of a child's name. In some systems, such as the Portuguese one, there are no general neutral names available, which leads to the imposition that the chosen name does not create any doubt concerning the child's sex.

c) Medical interventions on intersex children: the Gordion Knot

It is common practice to submit intersex children to surgical and other medical procedures for the purpose of trying to make their appearance conform to binary sex stereotypes which may not be necessary to guarantee their healthy development.[31] Until the 90's, the prevailing medical opinion was that ambiguous sex could and should be fixed, and in fact, genital surgeries on intersex babies became routine in spite of the fact they were rarely medically necessary. Nowadays, an emerging shift in the medical perspective is perceptible among a number of practitioners, with a consensual common ground regarding the medical management of intersex children[32]. Thus, the legal challenges that these practices imply remain the same.

These medical procedures, performed at an early age, are often irreversible and can cause permanent infertility, incontinence, pain, loss of sexual sensation and depression[33]. Normally performed without full, free and informed consent, these practices may violate the child's rights to physical integrity, to be free from torture and ill-treatment, and to live free from harmful practices[34]. On this particular subject, Intersex Rights Organisations aims to end normalising surgeries and other cosmetic medical treatment, which they decry as "intersex genital mutilation" (IGM). Equally relevant on this topic are the Yogyakarta Principles, a set of principles elaborated by a group of experts in human rights law. Although they are not binding on States, they are considered as an interpretative parameter by the Council of Europe as human rights standards[35-36]. In this particular, and since 2006 this group regards as a basic state obligation to *"take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration"* as well *"establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse"* (Principle

[31] The predominant theory used to understand the relationship between sex and gender until the end of the 20th century was Professor John Money's nurture theory. Money concluded that gonads, hormones and chromosomes did not automatically determine a child's gender role, and that "mix-sex children" could be assigned to the "proper gender" early in their childhood and be nurtured within that gender role provided the appropriate behavioural interventions ensued.

[32] The Lawson Wilkins Paediatric Endocrine Society (USA) and the European Society for Paediatric Endocrinology have published the so-called "*Consensus Statement on the management of intersex disorders*", also known as "*the Chicago Consensus*". See I. A. Hughes, C. Houk, S. F. Ahmed, P. A. Lee, *Consensus statement on management of intersex disorders*, LWPES/ESPE Consensus Group, Arch Dis Child 2006, 1–10, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2082839/.

[33] In fact, the psychological distress caused by the negative outcomes of surgery can result in self-harming and suicidal behaviour.

[34] UN Special Rapporteur on torture (2013) draws attention to the fact that intersex children are often submitted to irreversible sex assignment, involuntary sterilisation and genital-normalising surgery, performed without their informed consent or without the consent of their parents.

[35] The Yogyakarta Principles, *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, 2007, available at http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

[36] About the Yogyakarta Principles, see Piero Tozzi, *Six Problems with the 'Yogyakarta Principles'* (April 2, 2007). International Organizations Research Group Briefing Paper No. 1, available at SSRN: https://ssrn.com/abstract=1551652.

18, b) and c)).

As regards to the legal framework with respect to genital-normalizing surgery in intersex children, the focus of the ECHR is Article 3 (the prohibition of torture), Article 8 (respect for private and family life) and Article 14 (the prohibition of discrimination). At the same time, there are numerous Articles of the UNCRC that are potentially breached in infant genital-normalizing surgery, including Article 2 (freedom from discrimination), Article 3 (the best interests of the child being paramount), Article 12 (respect for the views of the child), Article 16 (the child's right to privacy), Article 24 (the child's right to health and health services) and Article 37 (protection from torture or other cruel, inhumane or degrading treatment)[37-38]. The participation of children in decisions that affect their body and their ability to self-determination is essential. The UNCRC promotes parental decision-making under Articles 3 and 18, in that the best interests of the child are paramount, which would allow for parental consent to cover therapeutic interventions that would benefit the child's health. However, in the case of non-therapeutic interventions, the UNCRC aims to protect the child from harm and promotes a supportive approach to autonomous decision-making. On the other hand, Article 24 (3) of the UNCRC affirms that States Parties shall take all effective and appropriate measures to abolish traditional practices that are prejudicial to health. Health care providers should strive to postpone non-emergency invasive and irreversible interventions until the child is sufficiently mature to provide an informed consent. Genital-normalizing surgery is considered as harmful when the child does not make the decision and States should take legislative measures promoting advocacy to prevent harmful practices against intersex children in breach of the child's human rights. States Parties should guarantee that no child is subjected to unnecessary medical or surgical treatment, protecting bodily integrity, autonomy and self-determination to children concerned, and provide families with intersex children with adequate counselling and support.

Central to this position is that Article 8 of the ECHR requires safeguarding measures to protect a person's physical integrity, which is not currently provided in the context of medical and parental decision-making in infant genital-normalizing surgery.

As referred above, in 2015 Malta adopted the *Gender Identity, Gender Expression and Sex Characteristics Act*, which was the first law to prohibit surgery and treatment on the sex characteristics of minors without an informed consent, stating, in Article 14, that *"it shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent"*.

[37] See M. Bauer and D. Truffer, *NGO Report to the 2nd, 3rd and 4th Periodic Report of Switzerland on the Convention on the Rights of the Child* (CRC) (Zwischengeschlecht, 2014), available at www.intersex.shadowreport.org.

[38] Also, some Articles of the CFREU are important in this matter, such as Article 3 (the right to integrity of the person), Article 7 (the respect for private and family life), Article 21 (the prohibition of discrimination) and Article 24 (the rights of the child, including the right of children to express their views freely and to have their views taken into consideration on matters which concern them in accordance with their age and maturity).

At this point we are obliged to critically appraise the way in which the subject has been dealt with, especially in relation with the medical approach and in confrontation with the essential core of human dignity.

As asked by Melanie Newbould[39], why is early genital surgery considered in the child's best interests?

Obviously, we are not addressing situations where there is a life-threatening risk that imposes the intervention to safeguard a child's right to life (Article 6 of the UNCRC) which is peacefully recognized as prevailing.

Taking into account the foregoing legal framework, it is clear that when a situation of this kind arises, the rights of the child are put in tension, in particular the right to preserve the child's identity (Article 8 of the UNCRC), the right of the child to intervene in decisions of particular importance in relation to their life, when there is sufficient capability for it (Article 12 of the UNCRC), as well as the child's right to physical integrity and sexual identity, protected under Article 8 of the ECHR. Crossing the referred framework, it is the child's best interest principle, granted in Article 3 of the UNCRC.

All medical interventions on newborns, due to their natural incapability of expressing an opinion and of deciding, are performed without their personal consent. It is settled in European legal systems within the States that, since children who are faced with medical interventions do not have natural competency to make their own decisions, the legal representatives have the faculty/obligation to decide and express, with their best interests in mind, their desire to perform the surgery[40].

In theory, the legal representatives of the child are those who are entitled to determine what the child's will is and, if provided consent is given to the intervention in a fully informed manner[41], there would be no problem in this particular.

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[39] Melanie Newbould, *When Parents Choose Gender: Intersex, Children, and the Law* - Med Law Rev (2016) 24 (4): 474, available at https://doi.org/10.1093/medlaw/fww014.

[40] Regarding to the legal recognition of autonomy to consent (civil capacity), the national frameworks have particular importance in determining where the minority status ends and the person assumes full capability. Apart from some national peculiarities, in most European countries the age of legal majority begins at 18. However, there are some acts where the age criterion is removed and it is given to the child the ability to decide if it is found that regardless of age, the child has the natural capability to perceive and decide their will, in an enlightened way. In this regard, there are well known orientations intended to investigate the capability such as the "*Gillick competence*" or the *mature minor doctrine*. Those orientations have been introduced as normative parameters that tend to reduce the amplitude of the effects of legal majority by establishing open clauses that allow the decision maker to verify casuistically the child's natural capacity and not to be subject to a formal clause. See Robert Wheeler, *Gillick or Fraser? A plea for consistency over competence in children*, BMJ 2006, 332, available at https://doi.org/10.1136/bmj.332.7545.807 and Melinda T. Derish, *Mature Minors Should Have the Right to Refuse Life-Sustaining Medical Treatment*, 28 JLMedEthics 109 (2000), available at https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3178&context=facpubs.

[41] We must not forget the particular position of parents, who are often not fully informed about the consequences of their decision and, in particular, may not even have freely formed their will in so far as they are simultaneously influenced by social pressure and the desire to have a child that is part of the norm.

At this point, we must ask ourselves: it is legitimate, in light of the child's abovementioned fundamental rights and on the assumption that the child is unable to express their will, to exclusively give the legal representatives the power to take decisions on the performance of a highly-intrusive and likely definitive surgical intervention? It is not within the core of child's personality the decision on the eventual ablation of part or totally of their genitals? Doesn't that choice to intervene limit the child's development? Do the States have the obligation, under international instruments, to protect intersexual children from early surgical interventions, assuring that their right to choose sex and gender (or not to choose at all) remains within their reach, when their natural capability arrives?

In an attempt to answer these questions, some guidelines can be taken into account. When a clinical manifestation of intersexuality does not provoke a situation that seriously undermines life or development that demands an urgent intervention, it is our belief, due to the current international framework that was surveyed, that is duty of the States to promote an effective system of protection of minors by opposing intervention based on the sole decision of the legal representatives, with the purpose of, with it, effectively ensuring children's rights provided in Articles 3, 8 and 14 of the ECHR and 12, 16, 24 and 37 of the UNCRC.

It is imperative, in our opinion, to ensure that any decision on urgent, necessary and irreversible surgery or other intervention has to be taken by a multidisciplinary group that truly ensures, as far as possible, the child's best interest and intervenes only if absolutely necessary for the child's growth and until the child is able to decide. In this context, when an intervention is necessary, and in the light of existing studies, there is no real guarantee that the parents, as legal representatives, are in a position to correctly form their resolution given their personal and emotional connection. For this reason, the establishment of the compulsory intervention of a professional medical group with special qualifications in this area can be an important step in preventing unreasonable surgeries. Simultaneously, we consider essential that there should be a procedure in place for the formation of qualified, persistent informed consent, together with the express elimination of the possibility for the parents to make such choice by themselves. Such a procedure should also ensure that no decision is taken without full demonstration of the impossibility to wait for the development of the child until their have sufficient capacity to decide, bearing in mind the actual danger that may result from such delay, especially regarding social and educational factors[42].

Lastly, with regard to the non-urgent medical surgeries and treatments, the child's role in the decision-making process is fundamental, as the child is the one who can legitimately take that decision. Thus, due to the rights and interests in conflict, we believe that only the child is in the position to decide who their want to be, ultimately, to define who they are. To guarantee the complete formation of the child´s will, a procedure must be adopted that ensures the

[42] In this regard, it is interesting to note the decision adopted by the Constitutional Court of Colombia in 1999. Confronted with the tension of the various vectors, the Court concluded, at the same time, that prohibiting surgeries would imply human experimentalism which is not conform to the dignity of the human person, and that its performance should follow a protocol which would effectively ensure the best interests of the child and the protection of their fundamental rights. See Julie A. Greenberg, *Legal Aspects of Gender Assignment*, The Endocrinologist, Vol. 13, No. 3, 279, 2003, available at https://ssrn.com/abstract=459810.

professional supervision of the child, determines the child's actual maturity, the ability to formulate their decision with full awareness of the consequences for their health, body and development, as well as in order to ascertain, in light of what has been established, the safeguarding of their actual superior interest. To this extent, if we place ourselves in the core of personality, the decision, once verified its presuppositions, must be adopted exclusively by the child.

The child's ability to decide, regardless of their age and under the best existing knowledge at the time of the decision, should be measured casuistically, allowing a period of reflection that secures, as far as possible, that the decision that the child adopts is the one that suits them best. Solely through the full respect of the child's will is possible to preserve their right to self-determination.

d) Empowerment of Intersex Children Human Rights

As we have been saying, there is a junction between legal requirements, medical pressure and social expectations following the birth of an intersex baby. Hence, legal and medical professionals should be better aware of the challenges faced by intersex children to ensure the full respect of their human rights.

In view of the foregoing, the lack of legal and social recognition associated with non-necessary medical interventions, threatens, not only their right to freely develop their personality, but also their right to an equal treatment, without any discrimination based on their sexual characteristics and, to preserve their physical and mental integrity – ultimately, their human dignity[43].

We cannot forget that Article 8 of the ECHR protects individuals against arbitrary interference by the public authorities in their private life[44]. In addition to this negative obligation, public authorities also have the duty to undertake positive measures to assure the respect of this right. In fact, Article 8 entails a positive obligation on the part of the State to protect the physical integrity of people within their jurisdiction. Though Article 8 does not contain an express reference to the right to self-determination, the notion of personal autonomy is an important principle subjacent to the interpretation of its guarantees. In this sequence, the European Court of Human Rights has pointed out that elements such as gender identification

[43] Principle 31 of the Yogyakarta Principles states that *"Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them*". Principle 32 refers that "*Everyone has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person*".

[44] Moreover, Article 16 of the UNCRC stressed that children shall not be subjected to arbitrary or unlawful interference with their privacy.

and name fall within the protection of Article 8.[45] The European Court holds that gender identity and self-determination belong to one of the most intimate aspects of private life and that registration of a person's sex in the State's birth register (and the display of sex in certificates and identity documents) thus has identity building effects. In 2013, the Parliamentary Assembly of the Council of Europe (PACE) called on its Member States to "*ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than a vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and provide families with intersex children with adequate counselling and support*".[46]

The rights consecrated in the UNCRC can be read to mean that all non-medically necessary normalisation or gender related treatment leading to irreversible alterations to the body must be expressly consented by the child in line with their best interests and their ability to form and express their views regarding their body and identity. As well, the registration of an unchangeable sex marker on the intersex child's birth certificate without regard to their gender identity may be wanton and in breach of the child's right to personal identity and to express their personality.

Thereby, States must recognize that there is an implicit obligation to protect intersex children from genital-normalization surgery and that one mechanism by which to do so is to allow a child to be registered without assigning a sex. Allowing a child to be registered without an assigned sex could encourage the child to identify their sex and gender congruence and better enable any decisions on genital surgery to be lawfully considered. Thus, respecting and reinforcing their right to freely develop their personality, attending to their points of view and best interests, through a supported-decision-making approach to support the welfare of the child, which, at its core, places the child as the primary decision maker.[47]

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[45] See *Van Kück v. Germany*, Application No. 35968/97, judgment of 12 June 2003, available at https://www.unionedirittiumani.it/wp-content/uploads/2012/07/CASE-OF-VAN-KUCK-v.-GERMANY.pdf.

[46] See PACE's Resolution 1952 (2013) *Children's right to physical integrity*, available at http://assembly.coe.int/nw/xml/xref/_xref-xml2html-en.asp?fileid=20174&lang=en.

[47] Yogyakarta Principles 31 recommends that States should "*A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality; B. Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person; C. While sex or gender continues to be registered: i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity; ii. Make available a multiplicity of gender marker options; iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender; iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender*". Principle 32 stresses that States shall "*A. Guarantee and protect the rights of everyone, including all children, to bodily and mental integrity, autonomy and self-determination; B. Ensure that legislation protects everyone, including all children, from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics; C. Take measures to address stigma, discrimination and stereotypes based on sex and gender, and combat the use of such stereotypes, as well as marriage prospects and other social, religious and cultural rationales, to justify modifications to sex characteristics, including of children; D. Bearing in mind the child's right to life, non-discrimination, the best interests of the child, and respect for the child's views, ensure that children are fully consulted and informed regarding any modifications to their sex characteristics necessary to avoid or remedy proven, serious physical harm, and ensure that any such modifications are consented to by the child*

IV. CONCLUSIONS

Although public awareness of this reality is increasing, intersex children remain subject to violations to their human rights as long as birth and other registries do not ensure a proper record of their sex identity, and as long as they are medically treated as children with health disorders. Hence, we advocate that states' public policies must facilitate the recognition of intersex individuals before the law through the adoption of a new provision or marker on birth certificates and other legal documents, or, at least by providing the possibility of not choosing a specified male or female sex/gender marker, thereby respecting their right to self-determination. Also, we defend that EU and national equal treatment and non-discrimination legislation should include a specific ground based on sex characteristics providing them with greater visibility.

In relation to medical treatments, in our opinion States have the obligation to intervene in order to prevent all unnecessary, non-emergency, invasive and irreversible surgery or treatment on intersex babies, postponing an eventual decision on this matter, until the child is able to meaningfully express their will in a supported-decision-making process and to give their informed consent, once verified their ability to clearly understand the consequences that their decision can entail. Only this way, can States guarantee full enjoyment of intersex children's right to their bodily integrity, autonomy and self-determination, and their right to pursue happiness.

concerned in a manner consistent with the child's evolving capacity; E. Ensure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity; F. Provide adequate, independent counselling and support to victims of violations, their families and communities, to enable victims to exercise and affirm rights to bodily and mental integrity, autonomy and self-determination; G. Prohibit the use of anal and genital examinations in legal and administrative proceedings and criminal prosecutions unless required by law, as relevant, reasonable, and necessary for a legitimate purpose".

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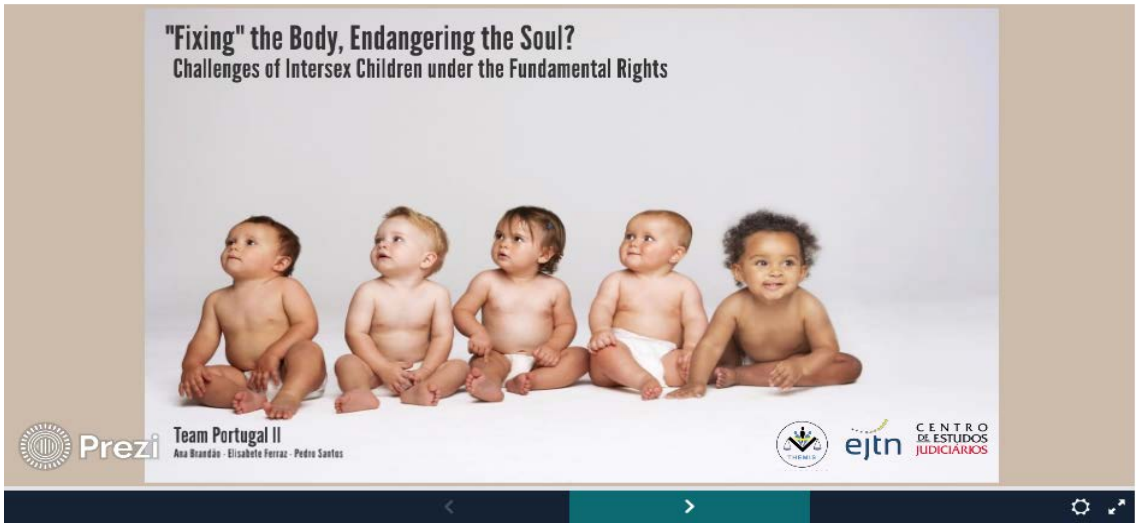

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CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

2.
Apresentação da Equipa

Accompanying Teacher

Ana Massena

CENTRO
DE ESTUDOS
JUDICIÁRIOS

THEMIS 2018 – Equipa Portugal I
European Family Law
33º Curso

Ana Massena*

As senhoras auditoras do 33º Curso Normal de Formação de Magistrados do Centro de Estudos Judiciários, **Inês Lopes da Silva Santos Morais**, **Joana Filipa Nunes Gouveia** e **Marta Cristina Mendes Ferreira Magro**, concorreram à meia-final B – European Family Law, realizada em Vilnius – Lituânia, Semi-final B de 7 a 10 de Maio 2018.

Naquela semi-final participaram equipas provenientes das escolas de formação de magistrados da França, Grécia, Roménia e Sérvia, e duas de Portugal: Portugal I, constituída pelas auditoras acima identificadas, e Portugal II.

Enquanto docente orientadora, foi para mim um privilégio ter acompanhado a equipa Portugal I.

Esta fase da competição é constituída pela elaboração prévia de um trabalho escrito, depois apresentado oralmente por todos os elementos da equipa, a que se segue a resposta a questões colocadas por uma equipa adversária, anteriormente sorteada para o efeito, e finalmente a resposta às questões do júri.

A equipa Portugal I apresentou o trabalho subordinado ao tema: "*EMOTIONAL PARENTHOOD AND ITS POSSIBLE LEGAL CONSEQUENCES*", tendo como ponto de partida a redação atual do artigo 1904º-A do Código Civil.

Enquanto docente que acompanhou o trabalho da equipa e que esteve presente durante a competição, posso afirmar que as auditoras se empenharam na respetiva realização e apresentação.

Durante a preparação do trabalho ocorreram diversas reuniões entre nós, contando com a presença de todos os elementos da equipa Portugal I, que se dedicou de forma profícua à concretização, com êxito, das diversas etapas da análise e tratamento do tema escolhido, incluindo a recolha e o estudo da jurisprudência do Tribunal Europeu dos Direitos Humanos, bem como a análise de outros sistemas jurídicos da União Europeia, em termos de direito comparado.

O modo como a equipa Portugal I organizou o acervo de elementos que lhe permitiram aprofundar a temática e a própria forma de execução do trabalho para a sua apresentação na competição contou com o empenho e a participação de todos os elementos.

* Procuradora da República, Docente do CEJ e Coordenadora da Jurisdição da Família e a das Crianças.

Sublinho que esta tarefa a que se propuseram implicou para as auditoras, necessariamente, um acréscimo assinalável no seu trabalho formativo pois decorreu, em simultâneo, com as sessões do curso e a sua prévia preparação, o que é de louvar.

Ainda que a equipa Portugal I não tenha obtido classificação que lhe permitisse o respetivo apuramento para a competição final, a realizar no próximo mês de Outubro, em Paris, considero que a sua apresentação foi de mérito e o trabalho escrito tem relevantíssimo interesse para o estudo do tema.

A inserção do trabalho da equipa Portugal I neste e-book constituirá, na minha opinião, o reconhecimento desse mérito.

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

2.

2.1. EMOTIONAL PARENTHOOD AND ITS POSSIBLE LEGAL CONSEQUENCES?

Team Portugal I

Inês Morais | Joana Gouveia | Marta Magro

Accompanying Teacher

Ana Massena

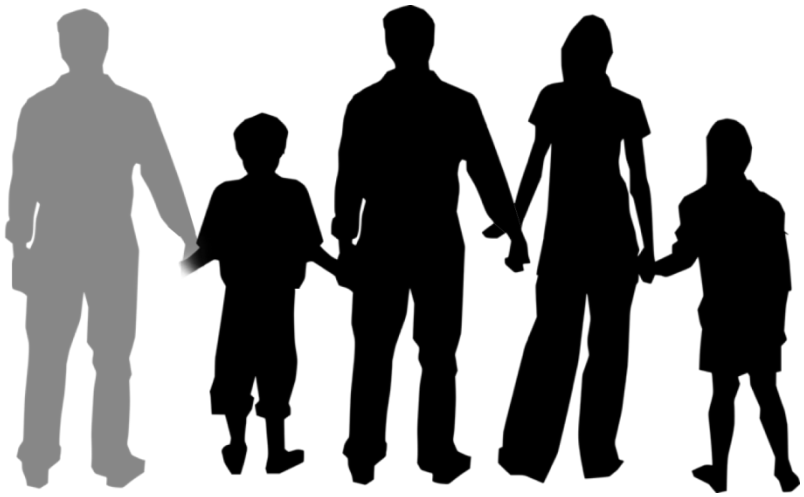
CENTRO
DE ESTUDOS
JUDICIÁRIOS

THEMIS 2018

Vilnius Semi Final B – European Family Law

EMOTIONAL PARENTHOOD

AND ITS POSSIBLE LEGAL CONSEQUENCES



Team Portugal I

Inês Morais | Joana Gouveia | Marta Magro

Accompanying Teacher

Ana Massena

CENTRO DE ESTUDOS JUDICIÁRIOS

Index

"*It is not flesh and blood, but heart which makes us fathers and sons*"
Friedrich Schiller

1 – Introduction

Currently, filiation and socio-affective parenthood are the important topics in Family Law. If, on the one hand, a biological filiation remains the most relevant criteria of a family bond, on the other hand it cannot be denied that this is now competing with the socio-affective criteria, as a principle for family bond.

The social developments observed in European and western societies, from the end of the 60's of the 20th century, with the appearance of de facto unions and, consequently, of socio-affective parenthood required a recognition by European Court of Human Rights, henceforth «ECtHR» and later on normative recognition of the socio-affective bonds, consummating the child's best interests[1]. Family law standards will, thus, adapt to this social reality that is in constant transformation: the family.

In Europe, ECtHR, has been progressively taking out the monopoly of the biological criteria in the qualification of relations as a constituent of "family life" and, increasingly recognizing the importance of affection in interpersonal relations or social effectiveness of the family role in the qualification of family relations.

In accordance with the positive obligation of recognizing non-marital families, several European legal regimes came to recognize the role of the parent in a *de facto* union, thus legally protecting a socio-affective reality.

Although in Portugal, the biological paradigm still has a big role when it comes to the establishment of a filiation, Article 1904-A of the Portuguese Civil Code, thus forth «CC», provides for situations in which socio-affective parenthood is legally recognized. It considers the affective bonds established between a child and an adult, with whom its only parent has a relationship, forming amongst themselves a family relation – following Article 8 of the European Convention of Human Rights, thus forth «ECHR».

2 – New family realities

2.1 – Approach to the new family realities

The families of the past were closed and impenetrable to others. Family behaviors were 'institutionalized' under a set of established norms, this was the role model of a 'nuclear family' – based on marriage and consisting of a father, a mother and a child. The break with this scenario began at the end of the 60's of the 20th century, with the 'democratization' of the

[1] Article 3 of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on the 20 November 1989.

family. This, in turn, generated other family realities, such as: "de facto family unions", "single-parent families", and "recombined families", all of them presenting as a common trait the predominance of affective bonds.

Family became a structure for personal accomplishment for each of its members. It has disappeared, slowly and progressively, the unchanged and perpetual character of the above-mentioned family unit and nowadays, interpersonal relationships which are freely chosen and developed by its members prevails. The legislator has the obligation to keep up and adapt to these new realities, refraining from imposing any static view on the concept of family. The modern family has released itself from marital and blood bonds and is concerning itself more with emotional and affective relations, seeing as it is the will of the members of these same family structures, which define the new concept of family.

As concerns the exercise of parenthood, in the sense of replacing the purely biological criteria for a criteria of love, based on the desire of caring and voluntary assumption of such duty. That criteria can no longer discipline the entirety of contemporary society and the aspirations of its individuals. That is why, currently, the exercise of parenthood goes beyond the biological aspect and invades the social and psychological aspects.

Affections have come to be more valued in the establishment of relationships that unite adults and children. Truthfully, socio-affective parenting gains significance because it is based on the affections and love that brings together the members of a family unit and not because it is pre-established by the biological connection or by the legal parenting presumption[2] - it occurs from an affectionate interaction, making it therefore a parental bond.

2.2 – Recognitions of the *de facto* families

Keeping up with the socio-cultural transformations of the family structures in Europe, the ECtHR has developed an evolutional interpretation of Article 8 of the ECHR and the right to respect for private and family life, mentioning that the Convention is a living instrument which must be interpreted and applied in light of the new social realities in Europe. The Court has allowed the coexistence of the traditional definition of family, based on marriage, and the broader definition, which is founded in factual family bonds that unite a natural family.

The notion of family must be based on the existence of substantial affective and effective bonds between the people that are presented as a family. The ECtHR has already considered that family life demands and assumes a life effectively 'lived', sustaining that the simple fact of the existence of a biological relationship between a child and parent is not enough to assume the existence of a family life between them, not unless it is effectively 'lived' between them[3], pointing to the Court for the effective criteria of interpersonal bonds.

[2] According to the article 1826 of the Portuguese Civil Code, it is assumed that the child born or conceived in matrimony has as a father the spouse of the mother.

[3] Complaint no.16 944/90, M. *versus* The Netherlands, 8 February 1993 – the situation in which a person donates its sperm exclusively to allow a woman to conceive through artificial insemination does not allow, in itself, the donator the right to the respect for his family life with the child.

Concerning the bonds which involve a child and its biological parent, the Court begins by stating that the lack of common life between the parents, at the moment of the child's birth, does not impede family life[4], because the mere filiation bond amongst the child and its biological parent constitutes the *ipso facto* family life. Recognizing the evolution of family relations, the ECtHR came to consider, in another case, that the biological bond is not sufficient to create a family, requiring the existence of a family, resulting from a *de facto* union, to be shown by other factors[5].

The ECtHR recognizes that between parents and their children there is always a family relation, through birth. However, it also recognizes the fundamental circumstances that can determine the inexistence of any relation, such as the lack of any real or personal bond between the child and the parent, besides the biological aspect. Therefore, what truly matters in the existence of life and family bonds is the effectiveness of the aspects that unite the people. For this reason, Article 8 of the ECHR protects the bonds that unite members of recombined families[6], such as the ones between a child and its stepmother/stepfather.

In the case Soderback vs. Sweden (28th October 1998), the ECHR made prevail the effective and affective family bonds between a child and its adoptive father, over the filiation bonds between a child and its biological father. The adoptive father had taken care of the child since she was eight months old having always acted has its father and being recognized as such. The ECtHR protected the family life in existence, in detriment of the relation of filiation between the child and the biological father, that is to say, the court ruled for the affective relation over the biological relation, since what had decreed the adoption was limited on solidifying and formalizing the *de facto* family bonds which united the child, mother and adoptive father.

It is natural that the child develops, with the spouse or the person with whom its only parent is in a *de facto* union, a relationship as profound or even more profound than the one it could have established with its biological parent. Hence, in the name of the child's best interest, the Court has given a clear prevalence to strong socio-affective parenthood, instead of biological parenthood.

The case law of the ECtHR recognizes the existence of family life in *de jure* families *and* in *de facto* families, proven by effectiveness criteria of interpersonal relations or by the appearance of a family. The absence of a biological bond does not prevent the existence of a family life and, on the contrary, the existence of a family bond might not suffice to identify family life.

The respect for family life requires not only negative obligations (of non-interference) from the States, but also positive obligations, that are translated into obligations of adopting measures

[4] Ruling Berrehab *versus* The Netherlands, 21 June 1988 – the birth of the child occurred after the parents divorce had been decreed, having ceased the cohabitation and not having the father the child in his care. This does not prevent the existence of a constitutive bond of family life between the child and the father.
[5] Ruling Lebbink *versus* The Netherlands, 1 June 2004 – The Court ruled that a mere biological relatedness, without any other factual or law elements that would indicate the existence of an up-close relationship was not sufficient to guarantee the protection of article 8.
[6] The concept of "*recombined families*" translates the familial realities composed by a couple *de jure* or *de facto* with a child or children, in which at least one of the is the adoptive or natural child of one of the members of the couple.

that assure the effective practice of the rights established in Article 8, in accordance with the principle of efficacy. The first time the Court clearly recognized the existence of a positive obligation of the State of assuring the safeguarding of family life was in the ruling of Marckx *vs.* Belgium on the 13 July 1979, the State having the obligation to act in a way that allows familial bonds to develop naturally[7].

It is within the context of positive obligations that one can integrate the Law no. 137/2015, of 7 September, which came to alter the CC looking to reinforce the children's protection regarding the exercise of parental responsibilities.

According to the Portuguese legal regime, as a rule, immediately after birth all children must have an established filiation and, when this does not occur, it is the State that promotes the competent action to correct such omission (v.g. officious actions of investigation of motherhood and parenthood). Nonetheless, there are some situations in which is not possible to determine who the father/mother of the child is, in such cases this information is omitted in its birth register and continuing its maternal or paternal filiation as unknown.

On the other hand, Portuguese law predicts exceptions to the establishment of filiation. More specifically, when there is the use of medically assisted procreation, if the woman seeking the MAP treatments is not in a conjugal relationship, from the moment of birth there will only be the maternal filiation. The State declines, in this particular case, the development of any proceedings to establish the omitted filiation[8].

The Portuguese judicial system also predicts the establishment of filiation only in relation to one of the parents, in the case of individual adoption (see 1979 CC). For that effect, the previously existent filiations are extinguished by the adoption (see Article 1986 CC), when the child is adopted only by one person. Thus, the adoptive filiation will only be determined in relation to that.

Having identified the situation which contemplates, in the Portuguese legal system, the determination of the filiation of a child only related to one of the parents, there is the need to ascertain that the social reality exceeds the legal reality. As such, even though the child does not have a legally recognized parent, it may come to have – and most times does have – a *de facto* parent.

Following a family "recomposition", the only parent of the child, may come to be a family consisting of a *de jure* or de facto couple, in which the child/ren is/are related to one of the members of the couple. In such situations, the other assumes the role of the *de facto* parent, and an affective and social relation emerges that is similar to the one that would be established between the child and its biological parent.

[7] According to Belgian law, there was no legal bind between a single mother and a child resulting just from birth, as to see the filiation accepted, the mother had to recognize her child. Therefore, the Court came to consider that the Belgian State had the obligation to create a judicial mechanism that would allow the integration of the child in its family from the moment of birth and because of this, without the need for recognition.
[8] See article 20 (3) of the Law 32/2006, 26 July.

Determining that the best interests of the child require it and considering the affective bonds between a child and its *de facto* parent, the Law allows him to exercise, together with the biological parent, the parental responsibilities related to the child.

Considering the effectiveness of interpersonal bonds or the social appearance of a family, the ECtHR has been qualifying the existent relationship between a child, who is the son or daughter of one of the members of the couple and the other member of the couple, as forming a "family life" that deserves to be protected under Article 8 of the European Convention of Human Rights. Following such evolution, the Portuguese legislator recognized that in certain situations, the best interest of the child may dictate the prevalence of "socio-affective" parenthood over biological parenting.

3 – Presentation of the institute predicted on the article 1904-A of the Portuguese Civil Code

3.1 – The Institute of extension of the parental responsibility

> "***Article 1904.º-A***
> ***Combined exercise of the parental responsibility by the only parent of the child and by its spouse or de facto companion***
>
> *1 – When the filiation is established only regarding one of the parents, the parental responsibility may also be attributed, by judicial decision to the spouse or the de facto companion, exercising them, in this case, together with the parent.*
>
> *2 – The combined exercise of the parental responsibility, under the previous paragraph, depend upon the request of the parent and its spouse or de facto companion.*
>
> *3 – The Court must, whenever possible, listen to the minor.*
>
> *4 – The exercise of parental responsibility, under this article, begin and is extinguished before adulthood or emancipation only by judicial decision, established in Articles 1913 to 1920-A.*
>
> *5 – In case of divorce, separation of people or assets, declaration or marriage annulments, de facto separation or cohabitation cessation between the parental co-responsible Articles 1905 and 1906, with the necessary adaptations, are applied".*

In light of the evolution of family composition that has been taking place, the Portuguese judicial system, through Law no. 137/2015 of 7 September, enshrined in Article 1904-A of the CC - the combined exercise of parental responsibility by the only parent of the child and by its spouse or *de facto* companion.

Such a legislative alteration aims to protect and value the new and deep bonds of affection established between a child and the spouse or *de facto* companion of the parent, intending to conciliate the law with the new family realities.

The combined effort of parental responsibility intends to preserve and protect the affective bonds between the child and the spouse or companion of its parent, appearing as a *plus* to the traditional family structure.

For the exercise of parental responsibility to be attributed to both, it is necessary that certain requisites be determined, more specifically, that the filiation of the minor only be carried out by one of the parents and, simultaneously, that the request be expressed to the Court by the parent and its spouse or *de facto* companion.

Only after a judicial decision can parental responsibility be carried out by both. After such a decision, in the eyes of the law, the affective bond is equivalent to the biological bond. Hence, resulting the co-entitlement of the rights and duties related to the exercise of parental responsibility, which can only be taken back in cases of inhibition, according to Article 1904 (4) of the CC.

The content of parental responsibility translates into a set of powers and duties that assure the moral and material well-being of the child, meaning the daily care, personal relation, education, support, legal representation and the administration of the child's assets. Considering the impact that such a bond based on affection has in the life of a child when the situation applies it is imperative that the decision of the concrete case taken by the Court be conducted with maximum demand. Therefore, a ruling must be made regarding the level of affection in the relationship that has developed between the child and the third non-parent and, also a prudent assessment of real capacities of the person, as the future co-holder of the parental responsibility of the child. Furthermore, it must be considered the capacity of the third to respect and promote the conservation of the relationship of the child with its biological family, in the sense that the conservation of that relation will safeguard its best interests.

This new legal regime is commonly known as parental co-responsibility, in the sense that the spouse or the *de facto* companion of the parent takes over the exercise of the parental responsibility of the child, sharing such rights and duties with the biological parent. In this way, more than fitting the third in the concept of "stepmother" or "stepfather" it is necessary to view this spouse or de facto companion of the child's parent as an "affective parent" [9].

The parenting co-responsibility comprehends the joined exercise of parental responsibility and it is only in that aspect of the child's life that it has judicial reflexes.

In that way it can be understood that in cases of divorce and separation of people or assets, declarations of annulment or marriage annulments, de facto separations or the ceasing of

[9] PEREIRA, Rui Alves, in "*Extension of the "stepmother" and "stepfather" Parental Responsibilities*", Magazine Locus Delicti, p. 4

cohabitation of the parents entitled as responsible, emerges the regulation of the parental responsibility with the expressed remission for the current regime and in the same situations, for the biological parents, as presented in Article 1904-A, (5) of the Civil Code. However, *in casu*, the fixation of a regime obligates both biological and affective parent. The affective parent continues to exert the parental responsibility over the child, even after divorce, separation or the ceasing of cohabitation, as is the case where there are two biological parents. That is to say, the regime will provide for the interactions between the child and person with whom it no-longer lives, the child's maintenance and the way to provide it.

The regime aims to defend the relations of affection established between the child and the affective parent. The daily interaction, the affections and family moments with that person leads to the creation of a quality relationship of affection, already founded in the exercise of parental responsibility.

It would be against the child's best interest to break the affective bonds built and maintained with this person upon a divorce or separation with its parent, for as one knows, children build their memories and dreams, daily, on the people with whom they maintain a proximate and affective relationship, transferring to them their social references.

The content of the new article 1904-A of the CC, leads us to the concept of socio-affective parenthood/motherhood, putting into perspective situations that are based on affective bonds between the child and a third person with whom it does not share any biological relation, but that as far as the exercising of parenthood is concerned it acts like such relation existed, behaving like the "Father" or "Mother" of the child.

The regime provided for in Article 1904-A (3) of the CC the establish the need to hear the child. Such requirement finds pure harmony in the ordained principle in the Portuguese legal order of children's rights to participation and to be heard regarding matters that concern them[10]. The principle of participation and hearing of the child has come to be vividly modeled and morphed, reaching a larger expression with the acknowledgment of the child's right to be heard in judicial proceedings that concern them as an achievement of their best interest[11].

3.2 – Critical appreciation of the Portuguese legal regime

The regime established in Article 1904-A of the CC presents undeniable advantages. Notwithstanding we have some concerns that limit the effective applicability of that regime.

A first observation intimately relates to the prerequisites of the regime itself, because if the law demands that the extension of parental responsibilities occurs only when a unique filiation

[10] Under the articles 4, (c) and 5 (4), (a), and 5 (7), (a) of the General Regime of the Civil Tutelary Process, approved by the Law no. 141/2015, of 8 September, with the alterations introduced by the Law no. 24/2017, of 24 May.

[11] In fact, the child's right to be heard presents as the Principle 3:6 of European Family Law regarding Parental Responsibilities, predicting several diplomas of international nature, from which the article 12 of the Convention on the Rights of the Child and the articles 3 and 6 of the European Convention on the Exercise of Children's Rights stand out.

bond is established, such a prerequisite may compromise and reduce its practical applicability. Indeed, one of the most common and new family realities are named "recombined families", that is to say, children with an established filiation with two parents, who after a divorce or separation, have a parent who finds a new partner(s) with whom to share his or her life with and this new partner takes on an influential and affective role in the children's life. Also, in this case, one is faced with an affective parent with whom the child builds and shares a bond of affection. One question is: is the affective union unworthy of this same protection?

One has reason to believe the regime established by Article 1904-A should not have limited its application to cases when the filiation is already in place, regarding one of the parents. It should also take into account the situations where the filiation is established with both parents. Such limitation takes the majority of new family realities, more specifically recombined families, not to be covered by such regime.

In fact, recombined families have been gaining ground in relation to other types of family realities and, in these cases, the child and the affective parent build and established affective bonds that deserve protection, since they assume a predominant role in the child's life. It is not the fact that the filiation is established with one or both parents that influences the affective relationship between a child and the affective parent.

This delimitation can contribute for a lack or near inexistent application of the combined exercise of parental responsibility.

However, it is worthy to note that the Portuguese legislator showed already in Article 1903 (1) (a) of the CC the importance that the spouse or de facto companion of the parent assumes in the child's life, predicting that in case of impediment of both biological parents, the exercise of parental responsibilities be attributed, primarily, to the affective parent.

There is also the question of a late filiation of the child, due to omission in the register. Practically, this puts into question the coexistence of biological and affective parents. Pondering that the extension of parental responsibility is decreed and later on the biological father legally recognizes the child[12]. To this end, the principle of biological truth is put in place, since any child has the right to the establishment of its biological filiation, also harmonizing and cautioning the right to know its genetic roots and the right to personal historicity – rights constitutionally guaranteed under Article 26 of the Portuguese Constitution.

Such rights assume an ethical-judicial value that is manifested by any individual's right to know his "whole", so as to form and build his "self", based on a sense of belonging and inclusion. However, relevant questions arise: should the established bond between child and affective parent be restricted? Under the assumption that such solution would be contrary to the defense of the superior interest of the child, how can one legally articulate the combined exercise of parental responsibility, which has been judicially decreed, with the exercise of parental responsibility by the biological parent who legally recognizes his/her child? Should the

[12] According with article 1854 of the CC, the father can recognize his child before or after his or hers birth and even after the death of the child.

exercise of such parental responsibility and, specially, the discussion of matters of particular importance to the minor be shared and debated by "three"?

In the face of the described situation, one believes the exercise of parental responsibility must be exerted by both the biological parents and the affective parent. Only in this way can the superior interest of the child be safeguarded. However, we can distinguish two situations: the biological parent only legally recognizes the child without proposing the regulation of parental responsibility[13] or, on the other hand, after the legal recognition of the child, the biological parent takes action over the regulation of the parental responsibility.

In both situations, the judicial decision of regulation of parental responsibility must safeguard the maintenance of parental "co-responsibility" by the affective parent. Once this is assumed as a pillar of stability and security in the emotional and social development of the child, it cannot be neglected by the appearance of the other biological parent. Truthfully, it does not make sense that a person who, over a period of time, has assumed functions of "father", suddenly ceases to do so[14].

Though, how can such exercise be adjusted "to three" when the legal regime established in the articles 1877 and subsequent of the CC is foreseen for the combined exercise of parental responsibility only by two people? One understands the current regime of parental responsibility must be reinterpreted to face these new realities. Thus, when it comes to the child's current life acts, the parental responsibility must be exerted by the parent with whom the child resides, under what is set forth in Article 1906, (3) of the CC, where the parent must not go against the most relevant educational orientations. In turn, related to matters of particular importance there will be the need for an agreement amongst parents, biological and affective, and when such does not happen they will have to go to court, resembling what is already provided for in Article 44 of the General Regime of Civil Tutelary Process.

In case of separation or divorce of the biological parent and the affective parent, under the terms of Article 1904-A, (5) of the CC, the parental responsibility will be regulated as in the divorce or separation of the two biological parents. It may even happen that child can come to live with the affective parent if that in its superior interest. It is also important to note that the affective parent will also be obliged to pay child maintenance under Article 1878 (1) of the CC, which must be interpreted in an actualistic way (see Article 9 of the CC).

Apart from that, one question arises and it concerns the possible implications that may come from the child's opposition to the combined exercise of parental responsibility. How does one proceed when there is opposition in this regard?

[13] In this case, the Public Prosecutor must propose a regulatory action of parental responsibility in representation of the child for the defense of his or hers superior interest. According to articles 3 (1) (a) and 5 (1) (c) of the Status of Public Prosecutions, the Public Prosecutor is obliged to defend of the interests of minors. By contrast, the extension of parental responsibility predicted on article 1904-A of the CC must be jointly required by the biological and affective parent, having the Public Prosecutor legitimacy for such action.

[14] It is relevant to point out that under the article 1904-A (4) of the CC, the exercise by the affective parent of parental responsibility can only be extinct in case of adulthood or by judicial decision, after verified the conditions for limitation or inhibition (articles 1913 to 1920-A of CC)

The opposition of the child to the combined exercise of parental responsibility must always be analyzed according to his or her age and maturity, but above all, to the superior interest of the child. Notwithstanding, the judicial authorities having to consider the opinion and reasons invoked by the child, the truth is that *in casu* and caring for its superior interest a compromise may be reached in order to adjust the combined exercise of parental responsibility.

4 – Analyses of judicial regimes with similar solutions

Currently many of the existing families all over the world are now rebuilt families (blended or recombined), that is to say, families that result from the union of elements that were previously separated. Certainly such family realities were previously marginalized, but the truth is that an increase in occurrences led to a paradigm shift. There were social movements and political debates all over the world that argued for the acceptance of these new forms of family life, and they have come to be gradually accepted.

In the European Union, different legal orders have slowly been regulating the new reality of the de facto families, although not evenly or with equal coverage.

Actually, some legal orders have come to accept affective parenting, giving the not only rights, but also duties in relation to the child. Others, on the other hand, refuse such allocation, reserving the parental responsibility and its exercise to the parents, biological or adoptive. One can divide the legal systems of the Member States into two groups: one recognizing some rights (even if, as said, with different scopes) to the affective family and the other where such this is denied. In the first group one should include countries like Germany, Denmark, France, England, Wales, Ireland and The Netherlands. In the second group: Italy, Belgium and Spain (without any liability to the legislation of the independent Spanish communities of Catalonia and Aragon). However, the European legal orders that recognize these rights to others besides the parents (biological or adoptive), don't do it in the same terms as the Portuguese. In fact, they do not demand, as a requirement for this extension, for the filiation to be established only concerning one of the parents.

Notwithstanding, stigmas (are less common) related to these new (and more frequent) family realities, it is important to keep in mind that there is necessary to safeguard its internal functioning, mainly the relations between the spouse or companion of the parent and the son/daughter to protect the child's interest in having a legally recognized family. As Maria Teresa Duplá Marín clarifies "*it is fundamental to find a balance between the responsibilities of the biological parents and the stepfathers present in the new rebuilt family, but also find a reciprocation in the parent/son and stepfathers/stepsons relations*"[15][16].

[15] "*La autoridad familiar del padrastro o madrastra en la legislación aragonesa: del Apéndice Foral de 1925 al artículo 72 de la Ley 13/2006 de Derecho de la Persona*", in Revista Critica de Derecho Inmobiliario, N.º 717, 2010, p. 66.

[16] Just like it happens in Portugal, the European legal systems, by the international tools they follow, hearing the child is mandatory and essential to making a decision, namely in situations of extension of the parental responsibilities. In the European Union space it is beneficial and desired a standardization of proceedings. It is in the Legislative Power of the Member States the way that this right can (and must) be exerted in courts and other

In this sense, in England and Wales the Children's Act of 1989 predicts the possibility of extension of parental responsibility to others, namely stepfathers and stepmothers.

In agreement with the aforementioned diploma and together with the Civil Partnerships Act 2004, when the parent of the child is married or in a de facto union with another person who is not the biological parent of the child, this third person can start exercising the parental responsibility of the child. Those legal orders can happen in four ways:

> ***i)*** Through the celebration of an agreement with the parent with whom he or she is married (or resides in a de facto union) and that exercises parental responsibility, determining that such exercise is combined;
>
> ***ii)*** Through the celebration of an agreement with both parents that the parental responsibility are exerted in consonance by both parents of the child – in this case the responsibility would fall on the three subscribers of the agreement;
>
> ***iii)*** Through a parental responsibility order made by the court on an application by the stepparent (one which will be based on an analysis of the child's superior interest);
>
> ***iv)*** Through a family arrangements order, either for residence or contact (in this situation it is not necessary that the relationship of the biological parent with the affective parent be judicially recognized).

When the exercise of parental responsibility is decided this way, it can only be terminated by judicial decision through the requirement of the person that exerts the parental responsibility over the child or by the child's own request.

Even if the parent's spouse does not have parental responsibility, he or she is obliged, in case of danger, to practice all acts necessary to remove the danger and to inform the parent that exercises the parental responsibility.

The French legal system does not assign to stepfathers and mothers a legal status. However, through the 4 March 2002 diploma (Loi sur l'autorité parentale) it established the "role" to the person, that although not being a parent, lives daily with the child of the spouse, through the possibility of *"délégation-partage volontaire de l'autorité parentale".*

This regime, though not very commonly used, has come to be especially popular among same sex couples. However, it is important to explain that this delegation consists only on the shared exercise of parental responsibility, which will be exerted by three people, never risking the parents' right (biological or adoptive) to the exercise of parental responsibility.

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entities with competence in matters of family and minors. That is the reason why there are still plenty and significant differences in the way this right is safeguarded in the different European legal orders.

This delegation of parental responsibility can be established in two different levels: totally or partially. The partial delegation is the one that better suits rebuilt families, because it is left to the grantor the establishment of its effects and boundaries and they must be in accordance as to the type of duties and rights that will be conceded to the third person in question. This type of delegation will, through rules, focus on the day-to-day acts of the child's life, namely picking the child up or leaving the child at school, signing her up in for sports activities or accompanying him or her to medical appointments. In turn, the total delegation compares the third non-parent to the biological parent. All rights concerning to the child will be in his or hers care, with the exception of the right to authorize adoption, which continues to be only attributed to biological parents. A key requisite for the acceptance of any type of delegation to the parental responsibility is for this third person to have a real and positive role in the child's life.

The procedure that allows for the extension of parental responsibility depends on a judicial decision which must be preceded not only by the hearing of the parents, but also the affective parent and in accordance with the European legal instruments to which France is bound by, also the hearing of the child[17]. A legal opinion must be given by the Public Prosecutor.

The German Law regulated for the first time, in 2001, the role of the stepfather and stepmother (§1687 b BGB), giving the spouse of the parent (of the same or of different sex) parental responsibility to the child. In fact apart from the agreement with the parent, these decisions are only admitted concerning to day to day life acts. This means that these decisions concern to the child's daily life and not to other matters of high relevance, like religious education, surgical procedures, etc.

In practice, for this parental responsibility to be meaningful, even though limited, it is crucial that they are exercised exclusively by the spouse of the third person. It is also relevant that the child has already established a close relationship with this third party. The court must always primarily attend to the superior interest of the child[18].
It is also worth noting and without any prejudice to the extension of parental responsibility (which can be suspended or even extinct if the superior interest of the child so imposes), the spouse of the child's parent is obliged, in case of danger, to practice all acts necessary to remove that danger and to inform afterwards the parent that exercises the parental responsibility.

[17] The French legal system predicts that the child has the right to be hear in the family context, as well as in any administrative or judicial proceeding (whether having asked or officiously) that concerns her and where a decision can be taken that affects her, either in regards to family, socially or personally, with having a fixed a minimum age for the exercise of this right (see article 338, (1) of the Code de Procédure Civile). This hearing is usually directed by the judicial magistrate, in court and normally in its office. The child may be accompanied by a lawyer or a person of its trust. This presence can denied by the court if it is perceived to be harmful.it is also worth noting that without prejudice for the favor of the hearing in court, the French legal order does not put aside the possibility of the child being heard by a specialist.

[18] The German Law establishes as mandatory the hearing of the child since 14 years of age (article 159 of Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, from 17 of December). However, the same rule predicts the possibility of hearing younger children, when their will appears to be relevant in the Court's ruling. In both situations, the Court may dismiss the hearing when the reasons so demand.

It is worth mentioning that unlike what happens in other legal orders (namely the Portuguese and Dutch), German law predicts that the exercise of parental responsibility be terminated in cases of divorce or separation. However the Court will have to analyze whether a contact order with this third person is justified.

In Denmark, parental responsibility can only be exercised by two people at time, therefore its extension can only be admitted by an agreement with the parent who has sole parental authority. This agreement needs to be approved and the court will grant it, if it is not considered to be inconsistent with the Childs' best interest. It is important to mention that the extension of parental responsibility is only admitted to married partner of the biological parent, and has marriage, in Denmark, is only admitted between to people of different sex, the biological and affective parent must be from opposite sexes.

In case of separation or divorce the parental responsibility will have to be ruled has in a case of divorce of the biological parents, however it is also possible to demand for the joint parental authority to be terminated.

In Ireland, the concept of guardianship means the rights and duties of parents in respect the upbringing of their children. These rights and duties are normally granted to the biological parents, however nowadays in certain circumstances they can also be attributed to a step parent, a civil partner or a person who has cohabitated with a parent for at least three years if they have co-parented the child for more than two years or even to a person who has provided for the child's day-to-day care for a continuous period of more than a year, if that same child had no parent or guardian.

In turn, the Dutch legal order predicts the possibility of extending parental responsibility with a larger scope than other Member States. Title 14 of the Dutch Civil Code starts by distinguishing parental responsibility – which can be exercised by both parents, by one of them or by one of the parent coupled with a third (by a maximum of two people) – of custody in itself, one that can be conducted by one or two people that are not the parents.

Therefore, a third person (the new parent's spouse or a person with whom the parent finds itself in a *de facto* union, but also another family member, for example, an uncle or aunt) to whom does not fall, as a rule, the exercise of parental responsibility of a child, may still be entrusted such duties (and rights) when requested, together with the parent that exercises the parental responsibility (this request can only be accepted by the court if the parental responsibility are being carried out by one person, having the aforementioned imposition of these responsibilities being carried out by a maximum of two people).

Essential to the acceptance of the extension of parental responsibility is also that the third applicant has developed a close and personal relationship with the child[19]. If legal family ties exist it is also necessary for that third person to have been executing the responsibilities,

[19] To ascertain the existence of a close relationship, the court may take a hold on the child's hearing (mandatory in light of the international tools that Holland follows). The Dutch legal order, to this regard, predicts that the hearing of the child is mandatory since 12 years of age and that it must take place in the office of the judicial magistrate, which is to be accompanied by a court clerk.

together with the parent that legally detains this right, by a minimum period of a year and revealing, in that sense, the maintenance of relation beneficial to the interests of the child.

The court cannot disregard the interests and rights of the parents that have not been exercising parental responsibility up to the moment of the request (without prejudice of the request not being accepted) as the same may, in the future, ask for it to be conceded with the parental responsibility of its child.

The Dutch legal system also predicts that in case of divorce or separations, the exercise of parental responsibility may be attributed to an ex-spouse or ex-partner of the parent if the child's interest so imposes. It is also the case by the death of the parent that holds the parental responsibility, the spouse or partner is automatically named the guardian of the child.

5 – Conclusion

Due to social developments in family realities, socio-affective parenthood will come to assume an increasingly significant role. The ECtHR recognized the importance of affections and of the effectiveness of family relations were recognized, having been acknowledged that the mere biological bond might not be sufficient to identify "family life", there being the necessity of sometimes maintaining the affective bond. It is exactly in that direction that the European legal systems, have adapted, building judicial institutes that regulate these new family realities, even if with different scopes.

This is exactly the conclusion we can take from the analysis previously done to the different European legal systems, that predict different ways of recognizing the rights of affective parents, as well as rights, in relation to the children's whose lives they are a part of and with whom they have established personal relations that are gratifying and beneficial to the children. It is also worth noting, that the Portuguese legal system has, nowadays, the most restrictive regime when it comes to the recognition of such family realities, noticeable by the extension of the exercise of parental responsibilities only being verifiable in situations in which the filiation is established with only one of the parents.

Lastly, in this paper we have tried to present the judicial recognition, the importance and role of the affective parent, which will always be based on the respect for the superior interest of the child, as it is the basic principle of Family Law.

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COLEÇÃO THEMIS

3.
Apresentação da Equipa

Accompanying Teacher

Patrícia Costa

CENTRO
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THEMIS 2018
Technology and new means of communication in European Civil Procedure
33º Curso

Patrícia Helena Leal Cordeiro da Costa*

O texto que se segue é da co-autoria dos Auditores de Justiça do 33.º Curso normal de formação de Magistrados do Centro de Estudos Judiciários (CEJ), **Daniel Varão Pinto, José Marques Ribeiro e Nuno Morna Oliveira**, tendo sido elaborado no âmbito do concurso Themis e apresentado na respectiva meia-final C (Processo Civil Europeu) que teve lugar em Tessalónica, Grécia, entre 4 e 7 de Junho de 2018.

Foram designados como formadores responsáveis pela participação da delegação portuguesa a Dra. Estrela Chaby Rosa e a signatária, ambas docentes do CEJ, tendo-me cabido a honra de acompanhar a equipa à semi-final supra referida.

Destaca-se ainda a prestimosa colaboração prestada pelo Ponto de Contacto da Rede Civil e Comercial, Dra. Paula Pott, a quem se aproveita para apresentar o nosso sentido agradecimento.

Os trabalhos em competição nesta semi-final foram elaborados por formandos das magistraturas, oriundos de diversos países da União Europeia (UE) para além de Portugal: Polónia, República Checa, Itália, Áustria, França, Grécia, Alemanha, Roménia e Hungria.

O texto, denominado "TECHNOLOGY AND NEW MEANS OF COMMUNICATION IN EUROPEAN CIVIL PROCEDURE – REGULATIONS (EC) 1393/2007 AND (EC) 1206/2001", reveste-se de grande interesse e qualidade, não se limitando a descrever o "estado da arte" e antes propondo soluções inovadoras para problemas concretos, aproveitando para o efeito não só a já longa e relevante experiência portuguesa neste domínio (com destaque para a ferramenta Citius na tramitação electrónica de processos judiciais e para o uso generalizado e bem sucedido da videoconferência para tomada de depoimentos orais em tempo real), mas também fazendo apelo a experiências de outros sistemas, análise que se revela de particular importância no momento actual, em que decorre o processo de revisão dos referidos Regulamentos, e sendo certo ainda que a jurisprudência relevante do Tribunal de Justiça da União Europeia não é abundante, o que coloca desafios particulares a quem se dedica a esta matéria.

A apresentação oral do trabalho pelos Srs. Auditores foi muito sólida, revelando segurança na mesma, desenvoltura e dinamismo, e preocupação em criar *rapport* com a assistência, o que foi conseguido. Responderam ainda com segurança às questões que lhe foram colocadas, revelando que os seus conhecimentos não se limitaram ao texto escrito, antes demonstrando

* Juíza de Direito e Docente do CEJ.

estudo do Direito Europeu em matéria civil, nomeadamente ao nível do *case law* já estabelecido.

A avaliação final do júri foi bastante positiva, tendo sido marcante o elogio dado à nossa equipa de Auditores não só quanto à qualidade e inovação do trabalho apresentado, mas também relativamente à postura com que se apresentaram, tendo, aliás, o presidente do júri destacado que revelaram qualidades essenciais para serem bons magistrados, avaliação que renovou depois individualmente aos Srs. Auditores.

Este concurso como objectivos, entre outros, o desenvolvimento do Direito Europeu e de laços de respeito e mútua confiança entre os (futuros) magistrados do espaço europeu, finalidades que cremos terem sido amplamente alcançadas no caso concreto e em particular pelos Auditores cujo trabalho agora se apresenta.

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

3.

3.1. TECHNOLOGY AND NEW MEANS OF COMMUNICATION IN EUROPEAN CIVIL PROCEDURE

Team Portugal

Daniel Varão Pinto | José Marques Ribeiro | Nuno Morna Oliveiras

Accompanying Teacher

Patrícia Costa

CENTRO
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TECHNOLOGY AND NEW MEANS OF COMMUNICATION IN EUROPEAN CIVIL PROCEDURE – REGULATIONS (EC) 1393/2007 AND (EC) 1206/ 2001

T H E M I S – 2018
THESSA LONIKI SEMI-FINAL C
EUROPEAN CIVIL PROCEDURE

Team Portugal

Daniel Varão Pinto | José Marques Ribeiro | Nuno Morna Oliveira

Accompanying Teacher

Patrícia Costa

LISBON 2018

TECHNOLOGY AND NEW MEANS OF COMMUNICATION IN EUROPEAN CIVIL PROCEDURE – REGULATIONS (EC) N. º 1393/2007 AND (EC) N.º 1206/2001

"It fills us with joy to be able to contribute a little so that Europe may become a unique state, thus getting farther and farther from our children's horizon the miserable spectre of war"
– José Fernando de Salazar Casanova[1]

I. The evolution of judiciary cooperation regarding civil and commercial matters in the European Union

From as early as the XVIII century, the necessity of international cooperation regarding matters of justice has been felt within European confines. Letters of request are probably the oldest recorded means of communication across borders, allowing national courts to ratify rulings outside of their area of jurisdiction, including in foreign countries[2].

It wasn't until the XIX century, with the rapidly expanding industrial and technological revolution, that the first international instruments were celebrated in pursuit of a faster, more efficient interstate cooperation – an evolution that continues throughout the XX century, and to this day, with the rise of globalization and the potential elimination of borders and the expansion of Humanity across the globe, in an ever-crescent miscegenation of cultures, peoples and values. And, in the background, the need for economic security and the lingering presence of international commerce.

Thus the need for security, either from the perspective of the market and from the perspective of the citizen, regarding the facilitation of judiciary actions and procedures across international borders – inspiring the elaboration of several bilateral agreements including the (still in practice) Hague Convention of 1970.

The objective of simplifying the formalities regarding recognition and execution of judicial decisions across the Member-States of the Union was already a concern in article 220 of the Treaty of Rome, which instituted the European Economic Community in 1957, leading to the celebration of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in 1968. Undisputedly of capital importance, this instrument predicted, in its article 26, the mutual recognition of judgments among contracting stages, without the need of any special procedure, and instituted the prohibition of reviewing the substance of the matter decided in the foreign ruling[3]. The Lugano Convention of 1988 then reinforced these rules among members of the European Economic Community and also members of the European Free Trade Agreement.

[1] Portuguese Judge in the Supreme Court of Justice. The quote was written in Portuguese in an article published by *Revista da Ordem dos Advogados,* Ano 62 – Vol. III – December 2002 and freely translated by the subscribers.
[2] LAURENT LÉVY, "L'Entraide Judiciaire Internationale en Matière Civile", *in Colloque L'Entraide Judiciaire Internationale en Matière Pénale, Civile, Administrative et Fiscale*, Genève, 6-7 February 1985, p. 55.
[3] JOÃO AVEIRO PEREIRA, "Cooperação Judiciária em Matéria Civil e Comercial", *in Direito e Justiça,* vol. XV, Tomo 2, 2002, p. 117.

With the Treaty of Maastrich, in 1992, judicial cooperation in civil matters was determined as an area of common interest to the EU Member-States (third pillar), but the most important step forward followed, with the signing of the Treaty of Amsterdam, and the conceiving of the area of freedom, security and justice.

This treaty established specific provisions on judicial cooperation in civil matters, which were, thereby, transferred to the first pillar and fell within the scope of immediate legislative competence of European Union. Improving and simplifying the systems for cross-border service of judicial and extra-judicial documents, cooperation, taking of evidence and the recognition and enforcements of decisions on civil matters was, therefore, considered essential for the proper functioning of the internal market.

The Treaty of the Functioning of the European Union (as instituted by the Treaty of Lisbon in 2007) brought further expansion of the judicial cooperation in civil matters and, nowadays, clearly states as a primary objective of the Union *"the judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases"*[4], electing as main areas of action (while aiming for the mutual recognition and enforcement between Member-States of judgments and of decisions in extrajudicial cases), the cross-border service of judicial and extrajudicial documents, the compatibility of the rules applicable in the Member-States concerning conflict of laws and of jurisdiction, cooperation in the taking of evidence, effective access to justice, the elimination of obstacles to the proper functioning of civil proceedings (if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States), the development of alternative methods of dispute settlement, and support for the training of the judiciary and judicial staff.[5]

As pursuant to these objectives, the Regulation was the legal instrument considered adequate to the purpose of harmonization of Member-States legislations, given the cross-borders characteristics of the premise and the clear goal of facilitating the free circulation of goods, people and ideas which is the *ex libris* of the EU – due to its binding force and direct applicability in all Member-States[6] - and in the wake of these clear goals, the number of regulations keeps growing. From Regulation 1346/2000 on Insolvency Proceedings, Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Regulation 44/2001 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and, last but not least and the main object of this present paper, Regulations **1393/2007 o**n the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and **1206/2001** on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Judicial cooperation in civil matters is, hereupon, the given name for a quickly expanding and developing European civil procedure. Even tough there is not a uniform European Civil Procedure

[4] Article 81, par. 1 of the TFEU.
[5] Article 81, par. 2 of the TFEU.
[6] Article 288, § 2 of the TFUE.

Act, the notion of European civil procedure covers areas regarding typical cross-border issues and topics which are often considered as a procedural part of international private law.

Consequently, as citizens of the world and, for what matters, citizens of Europe, no one can be in denial as to the increasingly faster development and growth of new technological tools – and European legislation and jurisprudence cannot, by any means, get behind the age of the Internet.

Communication from one point of the globe to the other in instant speed is now a given data. From the humble origins of the e-mail, to the possibility of connecting in a video-call from the United States to Australia through a device about the size of a human hand, the transmission and travel speed of information is now at all-time high.

And from the new horizons opened by these new means of technology arises the concept of "**electronic justice**", or simply "E-justice", which can be defined as the use of technology, information and communication to improve access of citizens to justice and effective judicial action[7].

The development of E-justice has been widely recognized by the European authorities as a key element in the modernization of judicial systems. Proof of this is the creation of online data bases such as *curia.europa.eu* and the implementation of a judicial atlas in criminal and civil cases enabling practitioners to determine the appropriate judicial authorities in different parts of the EU; and, of course, the building of a judicial network portal in civil and commercial matters, in 2003, by the Commission – *e-justice.europa.eu.*

E-justice brings undeniable advantages to the values of efficiency, transparency, celerity, and even to timely delivery of justice. Thus, these values favour and benefit the administration of justice, which, in turn, fulfils the aim brought about by the article 47 of the Charter of the Fundamental Rights of the European Union and the article 6 of the European Convention on Human Rights – *the rights to due process, fair trial and effective remedy*[8].

As such, in this paper, we will be analysing two of the most relevant legal instruments in the field of European civil judicial cooperation already mentioned above: Regulations 1393/2007 on the service in the Member-States of judicial and extrajudicial documents in civil or commercial matters and 1206/2001 on cooperation between the courts of the Member-States in the taking of evidence in civil or commercial matters, in order to appreciate not only their specific previsions regarding the use of electronic tools but also its effective use in the judiciary practice. Furthermore, we will also address the most problematic aspects of the Regulations, on this matter, mainly, their use by the judicial operators on a daily basis.

[7] In his Political Guidelines, President Juncker has defined the need for a better judicial cooperation among one of the 10 priorities of the Commission: "*as citizens increasingly study, work, do business, get married and have children across the Union, judicial cooperation among EU Member States must be improved step by step... so that citizens and companies can more easily exercise their rights across the Union*".

[8] The European Parliament has adopted an own-initiative report on common minimum standards of civil procedure in the EU. In its resolution of 4 July 2017, the European Parliament includes recommendations to the European Commission and expresses the need of minimum procedural standards and a wider use of modern communication technology both relating to service of documents and taking of evidence.

II. Service in the Member-States of judicial or extrajudicial documents – Regulation 1393-2007 of the European Parliament and of the Council

1. Overview

Cross-border service of judicial documents has long been one of the main fields of mutual judicial assistance in civil and commercial matters.

Different methods were agreed upon, beyond the traditional method of using diplomatic or consular channels, namely those resulting from bilateral and multilateral treaties, such as the Hague Convention of 1954 on Civil Procedure, followed by the Hague Convention of 1965 in the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

In the frame of the European Union, this matter has been one of the keystones of judicial cooperation in civil and commercial matters, defined in the Treaty of Amsterdam.

Indeed, through the settlement of the judicial cooperation in civil matters among the direct legislative competences of the Union, necessary for the functioning of a an internal market, the European legislator adopted Regulation 1348/2000, later replaced with Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007. Aware of the importance of such matters, the legislator targeted, in creating the precepts within these Regulations, the improving of the transmission of proceedings between the courts of the Member-States, to make them fluid, quick and simple.

The adoption of this Regulation operated a clear paradigm shift on what is now the main concern about cross-border service of documents. If, until then, such concern was somewhat keen on the protection of national sovereignties, the main focus today is the protection of individual procedural guarantees for the parties in the procedure.

Indeed, the service of process gradually shifted from being looked upon as an exercise of powers of a sovereign state on another one's territory, to being considered as an act of providing assistance and cooperation, reaching for the objective of guaranteeing adversarial procedure and effective exercise of the right of defence.

Taking the example of the parts on a judicial demand, from the defendant's point of view, the main concern will obviously be the guarantees of a due process, such as regarding the language and translation requirements on documents and the right to be heard and to contradiction. On the other hand, from the claimant's point of view, his concern will regard speed, reliability and low cost transmission in order to effectively access justice.

In fact, Regulation 1393/2007 provides for different ways of transmitting and serving documents, without any rule of precedence or priority between them[9], even tough we can state the positive effects on efficiency and celerity of the direct way of service.

Indeed, the first way is through designated transmitting and receiving agencies. This is a direct mean connection, that is to say, without intermediary, by means of a channel that has, on the one hand, the one that asks for the practice of the act and the need for intervention and, on the other hand, another who implements it, as results, with the necessary clarity, of articles 4 to 11 and 16 of the Regulation.

On the other hand, the Regulation also provides for a direct way of service, through competent judicial officials of the member state addressed, as long as it is permitted under the law of the requested Member-State, such as stated on the article 15 of the Regulation. At last, the Regulation also provides for the possibility of transmission by consular and diplomatic channels (v. article 12 and 13), and through mail, per registered letter worth acknowledgment of receipt or equivalent (v. article 14)

Regarding to methods of service, the Regulation provides for important requirements concerning language. Namely, it is required for the document to be served to be translated in a language that the addressee understands or the official language of the Member State addressed – otherwise the addressee may justifiably refuse to accept the document, an entitlement which must be advertised by the serving agency.

Hence, at the level of principles, the rules stated by the Regulation correspond to an effective exercise of the right to be heard in a proceeding, and, therefore, granting procedural guarantees, such as those relating to cost barriers and effective access to court, besides those relating to the duration of proceedings.

2. New possibilities: an integrated European system of service

After this brief explanation of the European system of service as maintained by Regulation 1393/2007, it is now imperative to regard the practice within the Union, as well as between Member-States, and the scenario provided by the Regulation itself.

First of all, it is mandatory to observe and conclude that the Regulation does not contain specific provisions regarding the electronic service of documents.

On a second note, we can ascertain as per the information obtained from the E-Justice portal, that it is starting to be accepted that the court can serve documents to the parties through

[9] As stated by the European Court of Justice in, for example, judgements of 2 March 2017, *Andrew Marcus Henderson*, C-354/15, paragraph 71; 9 February 2006, *Plumex*, C-473/04 paragraphs 20 – 22; 19 December 2012, *Alder*, C-325/11 paragraphs 31 and 32.

electronic means across some of the Member-States,[10] although, in many cases, this is only possible if the party has agreed or specifically asks for such a method and indicates to the court an electronic address in which they can receive the document via e-mail.[11] Other Member-States, however, have gone a step further and created online systems through which parties can be served, at least when the proceedings have already started.

We can refer to a few examples: first of all, we have the *Citius* system in **Portugal**, which allows for legal representatives to be served documents, to notify the other legal representatives, to consult all proceedings in which they represent a party, as well as to submit documents to the court. Electronic submission via the *Citius* portal is nowadays the rule in civil proceedings, recently being also extended to criminal proceedings, while submission of documents to court and service to the parties by postal service or in person is becoming the exception. **Austria**, which began to digitally file procedural documents as early as the 1990's, created the *Elektronischer Rechtsverkehr* system, which is mandatory to a number of entities, including lawyers and notaries – also, since 2014, it now allows citizens to receive correspondence from the authorities through a secure e-mail account.[12]

With this in mind, it is important to share information on the Estonian e-Residency system, which in our investigation we concluded that could be an example towards the building of a legal and infrastructural framework for an integrated hub of judicial communication, service and consultation across Member-States.

The e-Residency system allows anyone who has a connection to the Estonian state to manage their business from anywhere in the world, from receiving and authenticating documents, to start a company and manage it. The feature which we would mostly like to bring to attention is the possibility of obtaining a Personal Identification Code (PIC), which consists of a unique 11-digit code that remains the same for the entire lifetime of the resident, which can be attributed to anyone working or living in Estonia.[13]

This is not entirely a novelty, as one could argue that almost every country in the world attributes an identification number to its citizens or residents. However, in light of the present paper, we would like to point out that any citizen with a PIC has an e-mail address attributed to them, which is in turn used by all the national authorities to serve documents and transmit information upon their citizens; and this is relevant, because, given the existence of an Estonian PIC, the Estonian Code of Civil Procedure allows the court to electronically serve the document upon the PIC's titular, even if they do not have a legal representative.[14] The court sends an e-mail to the code's

[10] Exceptions include **Malta**, **Ireland**, **Northern Ireland**, **Gibraltar**, **Luxembourg**, **The Netherlands** and **Cyprus**, States in which electronic service is not allowed, either by strict legal prohibition or absence of regulation. Greek legislation allows for the electronic service of documents, although the specific aspects are yet to be regulated by a presidential decree; **Belgium** is also still building the body of regulation and the technical process to create a system of electronic service.
[11] It is the case with **Slovakia**, **Finland** (regarding only documents that must be served by the Public Prosecutor), **Romania**, **Gibraltar** (only if both parties have a legal representative), **France** (within the conditions allowed by article 748 of the Code de Procédure Civile), the **Czech Republic** and **Bulgaria**.
[12] https://www.digital.austria.gv.at/legal-framework-in-austria and https://www.bmdw.gv.at/Digitalisierung/ElektronischeZustellung/Seiten/default.aspx).
[13] *https://www.workinestonia.com/coming-to-estonia/personal-id-code/*
[14] Article 311.1, line 5 of the Estonian Code of Civil Procedure.

titular associated address, with a link that allows the citizen to access the courts' information system and view all the documents relevant to the procedures, as well as to confirm reception of the document.[15]

Now, bearing in mind this small exemplification of the Member-State's solutions, we will continue by stating that it is necessary to distinguish two situations within the Regulation, since this instrument *"applies to documents to be served which can be very different in nature, depending on whether they are judicial or extrajudicial documents and, if the former, on whether it is a document instituting the proceedings, a judicial decision, an enforcement measure or any other document."*[16] This means that the Regulation is relevant when the document is served in a running procedure, as well as to initiate one. And the difficulties begin here, as there is a substantial difference between these phases of a civil proceedings.

In fact, despite this rather laudable effort from some of the Member-States, it is worrying to verify that there's been a certain resistance to apply the same principles to the service of documents across borders. An initiative by the Directorate-General for Justice and Consumers[17] produced a report which identifies several shortcomings regarding the proper application of Regulation 1393/2007, stating that *"there is evidence that despite their ambition to promote the use of modern technologies, Member States' designated authorities do not accept electronic means of communications for interactions between themselves and that electronic service methods are not used and neither electronic evidence is transmitted or accepted under the Regulation."*

As stated before, the Regulation does not specifically address electronic service. It is also true that the Regulation operates under two conflicting interests: while the ever-present economic interests of the Union require fast methods of service, the fundamental rights of the citizen to a proper defence and due process of law require safe and certain means to serve a document, particularly when the proceedings have not been initiated yet and the party may not even have a legal representative. This represents a permanent tension between *speed* and *security; "speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed. Security in transmission requires that the document to be transmitted be accompanied by a standard form, to be completed in the official language or one of the official languages of the place where service is to be effected, or in another language accepted by the Member State in question."*[18]

This need to assure security in the transmission or service of documents has resulted in the system which we described above, with the primary means of service being the transmission through transmitting and receiving agencies and the proper use of the Regulation's forms.
It must be pointed out that, regarding the proper service of documents, the requesting State, through its transmitting agency, can ask for the service to be processed in a specific manner, in

[15] See the article of the Estonian CCP mentioned in the note above, and the information obtained in the E-Justice Portal.
[16] Judgement of the European Court of Justice from 8 May 2008*, Ingenieurbüro Michael Weiss und Partner GbR*, C-14/07, paragraph 41.
[17] Available in the E-Justice portal in *https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5988152_en.*
[18] Consideration 7 of Regulation 1393/2007.

an alternative (rather than an exception) to the principle *lex fori regit proccessum*, which states that the service should be made according to the law of the receiving State.[19] In this light, the receiving State can refuse to comply, if that method is incompatible with its internal law: however, one could argue that, like the similar system proposed by article 10.3 of Regulation 1206/2001, such refusal should be founded on manifest incompatibility of the internal law with the requested means, and not merely on the absence of regulation regarding a given communication method; and also, technical difficulties to comply with a given request should also be insurmountable, in a way that it is completely impossible for the requested State to comply with the request.[20]

If this interpretation might be possible in Regulation 1206/2001, the problem with the service of documents regards mainly the proof of reception, the compression of the sovereignty of the requested Member State and the disharmony between all the internal legal and technological systems. It is hard to conceive a full harmonization between all the Member States civil procedures in a way that would allow the service of documents electronically throughout the European Union territory.

Even if the main way of service, build upon this triangular (or rather, quadrangular) system does not completely remove the Regulation's demand for speed, considering that article 4.1 stipulates that this contact between the agencies and the recipient should be done *"directly and as soon as possible"*, it is understandable and natural that electronic means of communication are not being used between agencies, considering either that security in transmission could be impressively harmed by such methods, but also, in light of the different approaches made by the Member States in their internal law regarding the use of electronic tools of service.[21]

The problem is obviously a lot more pressing regarding the service of documents which initiate the instance; but even regarding the documents being served *during* the proceedings, one cannot ignore the fact that the Regulation is still silent regarding electronic service; an argument could be advanced in the sense that, based on the method of *analogia legis,* article 14, regarding direct service by postal service, could be interpreted in the sense of allowing for e-mail communication, at least when a proceeding is already running its course.[22] We do consider that this last option might mean a huge effort of interpretation, which the Regulation might not have allowed.

In conclusion, even in the aforementioned Portuguese, Estonian and Austrian cases, one most point that their systems only function either between operators or in a voluntary basis, and it is

[19] See article 7.1 of Regulation 1393/2007.
[20] ALFONSO YBARA BORES, *El Sistema de Notificaciones en la Unión Europea en el Marco del Reglamento 1393/2007 y su Applicación Jurisprudencial*, in Cuadernos de Derecho Transnacional (Octubre 2013), Vol. 5, Nº 2, p. 493 (including note 46).
[21] Articles 6.1 and 6.2 can also be used as thorough examples when they mention *"the swiftest possible means of transmission"*.
[22] Given also that, unlike its predecessor (Regulation 44/2001), Regulation 1393/2007 does not allow Member-States to impose any conditions on the means of service via postal service. The report we mentioned above by the Directorate-General for Justice and Consumers gives notice of a cost between €5 to €20 to serve documents via postal service from one State to the other; electronic communication does not usually carry any costs, which would, in *ultima ratio*, benefit both the communitary institutions and its citizens.

not easy or, for that matter, even legally admissible to impose on citizens the adhesion to this kind of system.

In order for such system to be implemented it would be advisable to start with larger corporations, which have the means, time and resources to control the reception of service. A problem, which, we believe, would, however, still linger, concerns the proof of receipt, as well as the technical inadequacies and civil procedure diversity among Member States.

3. eIDAS and the future of electronic service

As such, despite technological advances and the work put in by some Member States in order to dematerialize judicial proceedings and make way for electronic service, the conclusion to withdraw is that it doesn't appear possible, merely under the legal framework of the Regulation, for receiving States to comply with a request which demands the use of a given means of transmission, including electronic service, even taking into consideration also that Regulation 1393/2007 specifically states that the refusal options should be kept to a minimum, to ensure its efficiency (see Consideration 10). To such oppose either the incompatibility of internal law and technical difficulties, as explained.

However, it is defendable, at least *de iure constituto,* to propose and think about new possibilities, given at least by a few instruments already developed by the European institution: in particular, the e-Delivery project, which in turn has its roots on the eIDAS system.

E-Delivery is a node for electronic communications, which allows for electronic transmission of documents across the Union space; with this objective, any given Member-State can merge any current IT system with the e-Delivery nodes, to enable secure and reliable transmission of documents and data.[23] As an integrant part of the aforementioned eIDAS system, it shares the common goals of Regulation 910/2014 of the European Parliament and Council, which regulates electronic identification and trust services for electronic transactions in the internal market.

Born from an invitation from the European Council to the Commission, in the Council's conclusions of 27 May 2011, eIDAS and the aforementioned Regulation operate under the central idea of forbidding the refusal of legal effects of electronic documents solely on the base of that electronic character. Articles 43 and 46 of the Regulation do pay tribute to this objective, by expressly stating that electronic documents cannot be refused legal effect as admissible evidence, and that there is a presumption of the integrity of the data, the sending of that data by the identified sender, its receipt by the identified addressee and the accuracy of the date and time of sending and receipt indicated by the qualified electronic registered delivery service.[24]

While integrated in a larger scheme, as part of the Commission's Connecting Europe Facility (CEF), which means to facilitate European citizens access to electronic services in all of the Union

[23] *https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/What+is+eDelivery+-+Overview.*
[24] *https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/What+is+eDelivery+-+EU+legislation*. Also to note is that this Regulation has been in full appliance since the 1st of July 2016, according to its article 52.

space, the specific reference made in Regulation 910/2014 regarding judicial procedures demonstrates the European institutions desire in bringing electronic communication and electronic justice to a relevant stage in citizen's lives. Not only electronic communication and service might contribute to speed in the service of documents, it also can contribute to the diminishing of administrative costs of time and money associated with the intervention of central transmitting and receiving agencies.

The possibility of joining the tools provided by the eIDAS and e-Delivery systems, with a legal framework built upon Regulations 1393/2007 and 910/2014, might be a first step towards a more efficient electronic justice system.[25]

It would be important, to review and develop the legal instruments already at hand, since, as the subscribers of this paper can tell, the eIDAS Regulation and system is not being currently implemented or even used; and there is still a long way to go towards a perfect interconnected system. But we hope that, with this small exposure of the possibilities and the work of several of the Member-States, we may have advanced a possible solution to the problem. If serving documents via electronic means is already a given in some Member-States, the Union cannot fall behind its members, and as we've shown has been steadily working towards the structuring of a strong, efficient European justice, based on the new information and technological advances.

III. The taking of evidence in civil matters in the European Union – Council Regulation 1206/2001

1. Overview

The EU Regulation 1206/2001, of 28 May 2001, is the tool used to enable a court from a Member-State, accountable for its appreciation, to take evidence in a simple, effective and swift manner in another Member-State, through direct contact with judicial authorities of the latter, and is applicable to any taking of evidence procedure instituted in the civil law or anticipated evidence.

The Regulation aim is to avoid countries confines within the European Union to represent an obstacle in solving cases that demand cross-border evidence collecting, therefore creating a homogenous procedural system, which allows a court from a Member-State to have access to the evidence, without regarding to where it has to be taken, ensuring the effectiveness of four principles: *simplicity, clarity, judicial security* and *quickness*.

The Regulation was preceded by the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and gave expression and effectiveness to articles

[25] Since the eIDAS system and Regulation were mostly created to certify electronic signatures, it would be extremely useful considering also its use for notarial effects, mainly within Regulation 650/2012 regarding enforcement of authentic instruments in matters of succession; the certification of the document's origin would accelerate and rectify proceedings in a field where tardiness is often the rule.

61 c) and 65 of the Amsterdam Treaty, which determined and assumed the need to simplify and improve judicial cooperation in cross-border collecting of evidence.

The main innovation introduced by Regulation 1206/2001 is to allow a court from a Member-State, by itself directly, having for such been authorized, to take evidence in another Member State territory, regarding any taking of evidence procedure admitted in the civil law.

The Regulation states, therefore, two different ways of operating the taking of evidence in another Member State's territory. A Court may either ask another Member State court or authorities to collect the evidence, or it can take it directly in that other Member State's territory, in terms as follow.

2. Direct and indirect taking of evidence

The taking of evidence by the requested court, under the provisions set out by Articles 10 to 16 of the Regulation, relies on a direct communication and transmission between both requesting and requested courts, using standard forms attached to the Regulation, and gives expression to the principle of *active cooperation*, which supresses the intervention of third party entity.

This means that the requested court will take the evidence by itself, as it would normally proceed if it were the jurisdictional responsible authority on a non cross-border case.

Indeed, using the designated forms, the requesting Member-State court requests the performance by the authorities of the requested Member-State. The form on which the request is made must clearly indicate information such as regarding the requesting court's denomination, the names and addresses of the parties to the proceedings and their representatives, if any, the nature and subject matter of the case and a brief statement of the facts, apart from a description of the taking of evidence to be performed and the purpose the request serves, besides the documents or other objects to be inspected.

Once the request has been received, the competent court shall acknowledge the receipt in 7 days, and the Regulation states that the request shall be fulfilled in 90 days from the date of receipt, according to the legislation of the requested Court.

However, the requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State, using form A in the Annex. The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference.

The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties[26].

Once the procedure is completed, the requested court shall send the requesting court the documents establishing its execution[27].

The taking of evidence by the requesting court relies, on the other hand, on a request by the national court to the **central body** of a given Member State, under Article 17 of the Regulation, on somewhat we can name and perceive as the principle of *passive cooperation*.

Once the green light is given and the collecting of evidence is granted, the Member-State's requesting court is allowed to perform any actions in order to take the evidence directly, on its own, without the interference of a court, according to its own legislation.

A significant aspect we must point out regards article 17.2, which specifically states that the direct taking of evidence may only take place and can only be performed on a voluntary basis, this meaning that the target person must voluntarily collaborate in the procedures, since the Regulation, on what concerns to this way of collecting evidence, forbids the use of coercive measures. Furthermore, in the cases of direct taking of evidence aiming for the inquiring of a designated person, the requesting court shall inform such person that the performance shall take place on a voluntary basis. The requesting court itself is responsible for organising the hearing and for notifying the witness of date, the time and place of the hearing as well as of the fact that the giving of evidence is voluntary.

Summarizing, the most relevant differences between both ways of taking evidence are, therefore (besides, obviously, the court responsible for the taking of evidence), the possibility of the use of coercive measures (only on active cooperation), the applicable law (requested state's law on active cooperation) and the participation or not of an entity of contact, since article 17, differently from article 10, foresees the need to address to a central body/competent authority.

3. Videoconference: direct or indirect taking of evidence?

Both in active cooperation, under the article 10.4, or in passive cooperation, in accordance with article 17.4, paragraph 4, the use of communication technologies is widely encouraged, especially videoconference and teleconference. This has been considered to meet the standards of Article 6 of the European Convention of Human Rights. Reducing delay, improving economy, efficiency and effectiveness and the more general objective of promoting confidence in the justice system through the use of new technologies are laudable aims and are unlikely to generate much dissention.[28]

[26] According to Article 10.4, paragraph 4, if there is no access to the technical means referred to above in the requesting or in the requested court, such means may be made available by the courts by mutual agreement.
[27] Article 16.
[28] B. Loveday, in M. Fabri *et al.* (eds.), *The Challenge of Change for Judicial Systems*, 2000 p. 23

Most Member-States, in fact, already allow for the taking of evidence through videoconferencing, as we can confirm by a simple consultation of the *E-Justice* portal.[29]

Courts have, however, been often characterised by a very low level of technological competence. Adding up to this fact, it is also worth noting that the technology needed for the use of videoconferencing is not available in every court of most Member States, and where videoconferencing is available, the different systems might not be compatible with the ones used in the other Member States' courts.

We should remind that the Regulation does not limit the use of information technologies to videoconferencing, since it states that the use of communication technology allowed and encouraged, with both articles 10.4 e 17.4, paragraph 4, pointing out teleconference and videoconference only as examples.

At this point one should question if it wouldn't be advisable to use tools like *Videolink* and consumer applications such as Skype, to perform the taking of evidence, since these solutions guarantee stability and compatibility to a larger degree than the classic videoconference systems, which rely on different hardware and software.

Despite the fact that the use of communication technologies is incentivized and encouraged by the Regulation, it omits whether the taking of evidence through them should take place directly under Article 17 or should otherwise, be the requested Member States' authorities to carry it out.

Both articles 10.4 and 17.4 of the Regulation indicate the use of communication technologies. The arrangement of a cross-border hearing using communication technologies requires for certain formal measures to be taken. We can imagine the Regulation providing for two possibilities regarding the use of communication technologies in cross-border taking of evidence, based on the systems we mentioned above.

Under articles 10 to 12, the requesting court may request the requested court in another Member-State to enable it or the parties to be present or participate by means of video or audio communication technologies in the taking of evidence by the requested court. Such a request may only be refused if it is incompatible with the law of the Member-State of the requested court or by reason of major practical difficulties.[30] Article 13 then provides for coercive measures for the execution of the request. However, under Article 14 the witness may claim the right to refuse to give evidence in accordance with the law of the Member-State of the requesting or the requested court. We should note that in this procedure the intervention of the requesting court is somewhat limited. Even if article 12 allows for the intervention of the requesting court, *it does not clearly specify the level of participation attributed to it*.

Under Article 17, the requesting court itself takes evidence directly in another Member-State with the consent of the central body or competent authority of this Member-State. Under Article

[29] https://e-justice.europa.eu/content_taking_evidence_by_videoconferencing-405-en.do?clang=en
[30] On this matter, see page 9 above.

17.4, the central body or competent authority is obliged to encourage communication technologies for this purpose. Article 17.2 specifies that direct taking of evidence may only take place if it can be performed on a voluntary basis.

However, using the info stated by the already quoted "*Modernisation of judicial cooperation in civil and commercial matters: Service of documents",* the European Commission states that, regarding to the Regulation on taking of evidence, *"available data suggest that the method of direct taking of evidence is used rarely" and that this is partly explained by "objective obstacles, such as the inaccessibility of videoconferencing equipment, but partly also by the structure of the procedure established by the Regulation, which is considered to be formalistic and cumbersome".*

The provisions of the Regulation regarding the direct taking of evidence give express voice to sovereignty concerns: hence the need for the intervention of a central body in the framework of the direct taking of evidence.

But one could question the current need and, more than that, the current coherence of this solution, based on the intervention of a central body authority, rather than on a simply court-to-court liaison.

The central body's figure is increasingly less present in EU legislation, so we can argue about either the symbolic meaning of the remaining role of a central authority on what regards the collecting of evidence, but also about the need of its lasting presence and prerogatives. On the perhaps unnecessary role of the central authority in this matter, Carlos Marinho also considers that the use of video and audio communication technologies should not be looked upon with sovereignty concerns, once it does not imply for a physical and effective incursion on another Member-State territory[31].

Likewise, we believe that the prohibition of coercive measures will most likely obstruct to better results in the direct taking of evidence procedures regarding the use of video and audio communication technologies.

We must not forget the concerns with favouring and fomenting the area of freedom, security and justice and also to the developing of an effective and simplified system, thus developing cooperation on a *common judiciary space,* where judicial decisions circulate and legal situations acquired under one legal system are acknowledged within the EU across borders without unnecessary obstacles.[32]

In fact, the primary objective that presides and underlies the Regulation is the ideal of the creation of an area of freedom, security and justice, such as implied in article 65 of the Treaty of European Community – today article 81 of the Treaty of Lisbon. The swift and agile ways of taking evidence in the context of cross-border evidence cooperation must be the legislator resolution.

[31] CARLOS MELO MARINHO, *Textos de Cooperação Judiciária Europeia em Matéria Civil e Comercial,* Coimbra Editora, 2008, pp. 29-31.
[32] As stated by YBARRA BORES, Alfonso, op. cit., pp. 248-265

The solutions regarding video and audio communication technologies, with, in our appraisement, the appointed contradictions, disturb the full success of international judicial cooperation, most needed for the proper functioning of the internal market. This will only be achieved on a basis of total mutual trust between the Member-States' courts and authorities, mutual trust that is somewhat mitigated because of the passive cooperation or direct taking of evidence still being dependant on a central body's figure intervention and also because of the denial about the use of coercive measures.

At this point, we should also note that we don't see reasons to affirm that there is a true and pure way of direct taking of evidence in what concerns the use of communication technologies within article 17 of the Regulation. The central body's intervention and the lack of coercive measures to impose the participation of witnesses compromise the effectiveness of this procedure. With Alfonso Ybarra Bores[33], we also believe that "(…) *La figura del órgano central, esencial en los instrumentos internacionales clásicos en materia de asistencia judicial internacional bajo la denominación de autoridades centrales —y en particular en los que se han ocupado de la obtención de pruebas en el extranjero—, no desaparece en el Reglamento 1206/2001, si bien en éste su papel ha quedado relegado a un segundo plano, aunque no carente de importância."*

We believe that video and audio communication technologies should preferably be used – whether it's under the indirect or direct taking of evidence – in the framework of direct contact between the courts of the Member States involved. [34]

We should also remind that, according to the E-Justice portal,[35] "*videoconferencing is an efficient tool that has the potential to facilitate and speed up cross-border proceedings and to reduce the costs involved*, and in our opinion the intervention of a central body lacks coherence with the aims of judicial cooperation. We believe that the role of the central body could be revised by the legislator in the future or even be eliminated.

As a final note, to ensure of the importance of videoconferencing, the E-Justice platform lists a series of future plans, which could include[36]:

- Links to EU legislation and legislation of the Member States regulating the use of videoconferencing;

[33] Op. cit., p. 255.
[34] Also, one can never forget the jurisprudence laid down by the ECJ judgment of 21 February 2013, *Pro-Rail,* case C-332/11, in the sense that an act of investigation by an expert from a Member-State can take place in another Member-State's territory, outside of the Regulation's provisions; meaning that the Regulation stipulates a set of organized rules that are not necessarily imperative, and does not prevent Member-States to obtain evidence under different understandings. As such, it is our conclusion that this line of thinking can be applied to any means of extracting and taking evidence, and not exclusively regarding expert analysis. So, videoconferencing and other video/audio communication methods, could be used in cross-border cases outside of the Regulation rules – even though communication with the central body might prove, at least, a security measure.
[35] *Videoconferencing as a part of european e-justice the essentials of videoconferencing in cross-border court proceedings*, European Communities, 2009.
[36] https://e-justice.europa.eu/content_general_policy_description-70-en.do

- Consolidated information on all courts with videoconferencing facilities in the Member States;

- Tools for the practical arrangement of videoconferences (electronic forms, possibly a booking system in the long-term);

- Links to national instructions or manuals, where available;

- A section on examples of videoconferencing in cross-border proceedings and a collection of best practices;

- Information on training and online training modules;

- A link to the interconnected interpreters' databases.

IV. Final thoughts

With this paper we meant to draw attention to the fact that it is not only the protection of national sovereignty that is the major concern in regards to cross border legal assistance. On the contrary, the EU legislator's concern is, besides the goal on establishing a genuine single market and judicial area, to protect the individual interests of people who participate in cross-border litigation and this has to be taken into consideration and reflected on the provisions set by the Regulation, or in its interpretation.

We believe that both Regulation 1393/2007 and 1206/2001 hardly live up to their full potential in terms of reaching the EU legislator's goals, such as making judicial proceedings simpler, more efficient and with an impulse and impact on the protection of fundamental rights of the parties involved, in particular access to justice and the rights of the defense. There is still much to be done. But with the proper investment from the judiciary, it is only a matter of time until we see the use of information technologies to their maximum capabilities to the benefit of cross-border litigation and the freedom, security and justice space.

The world is changed, and the European institutions are revealing the will and desire to implement technological advance in the functioning of the Union; the judiciary procedure is one of the fields which would benefit the most from these changes, with all the advantages mentioned above which might be brought upon the due process and the lives of citizens and companies, and lastly, the European economy, function and objectives of gathering and union.
The possibilities are endless, and ours is just a small contribution; within the confines of this paper, we do hope we have given the reader a small rendering of the current panorama, and the possible advances we might build, as a united Europe.

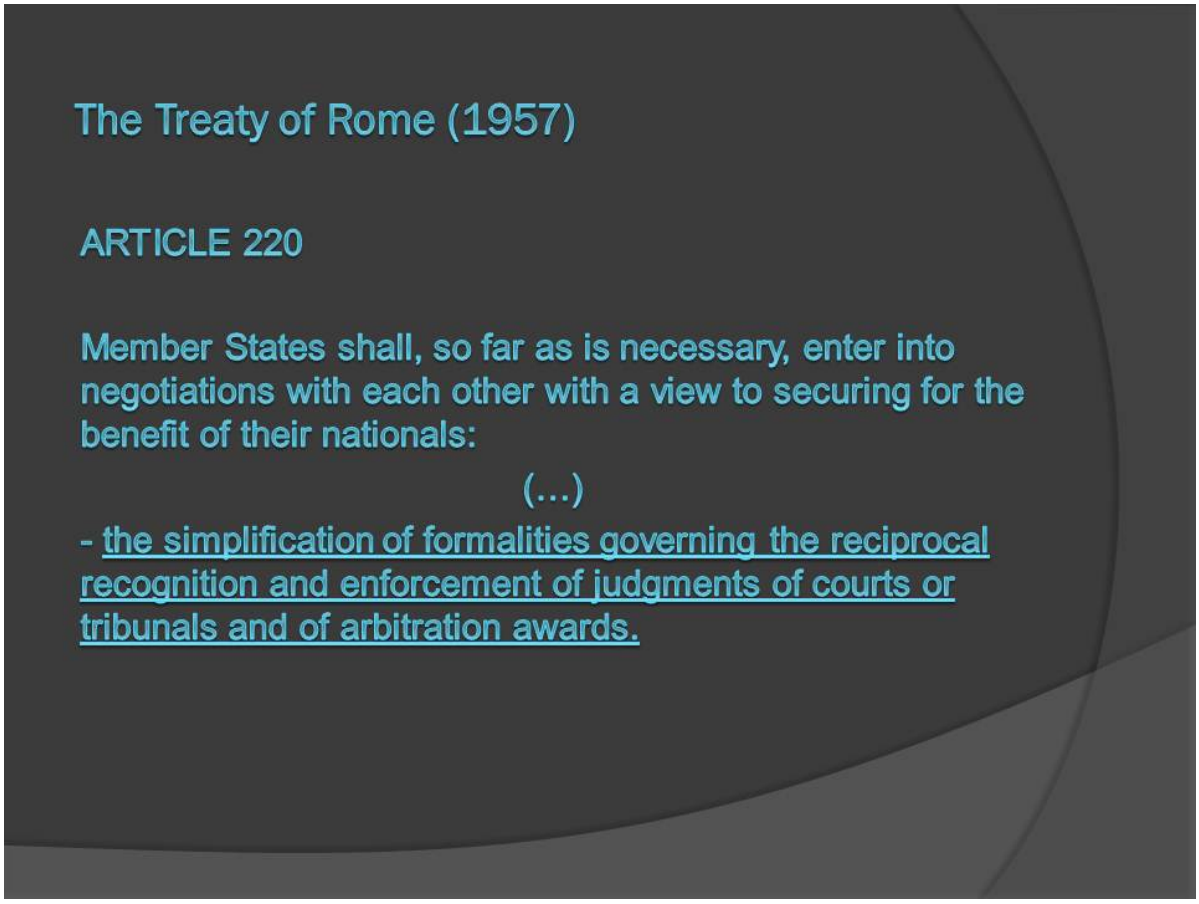
TECHNOLOGY AND NEW MEANS OF COMMUNICATION IN EUROPEAN CIVIL PROCEDURE – REGULATIONS (EC) 1393/2007 AND (EC) 1206/2001

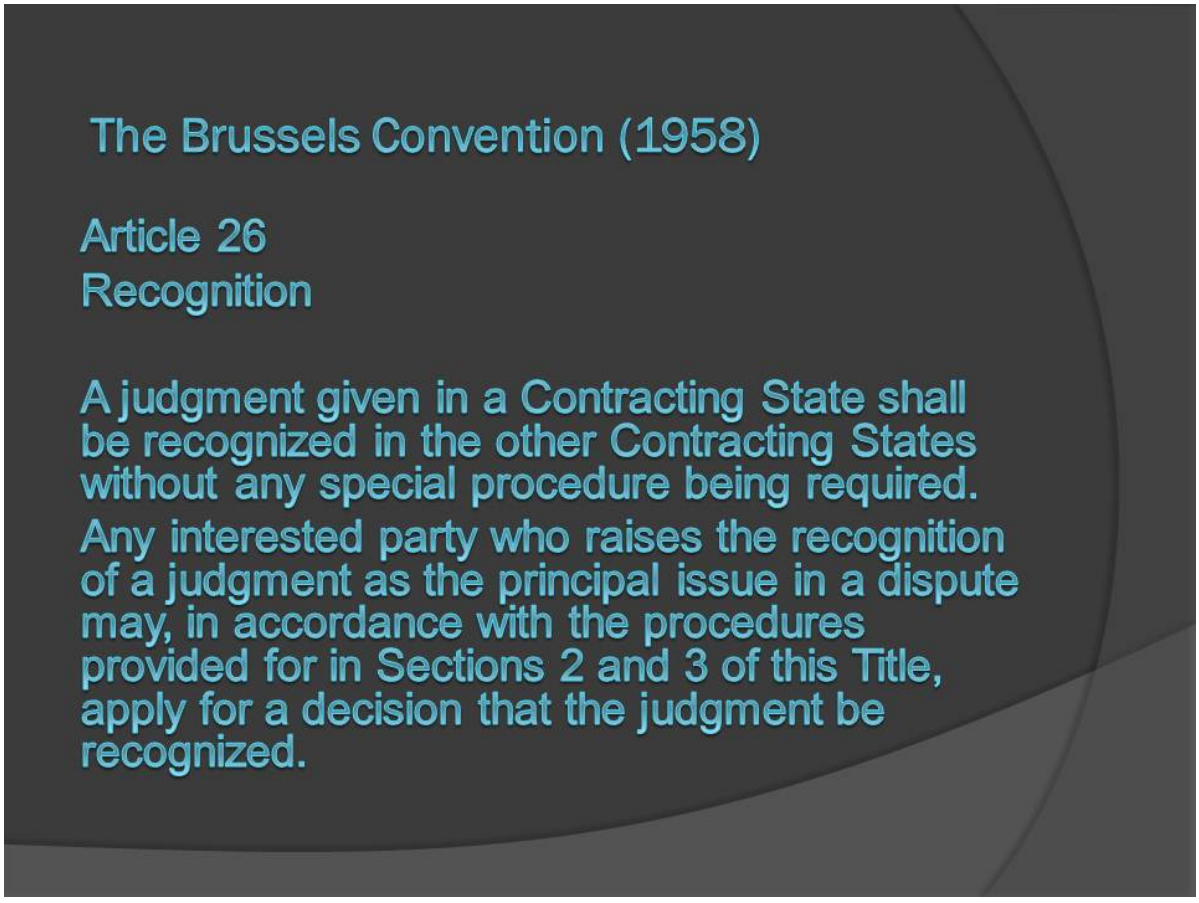
THEMIS – 2018
THESSALONIKI SEMI-FINAL C
EUROPEAN CIVIL PROCEDURE

TEAM PORTUGAL

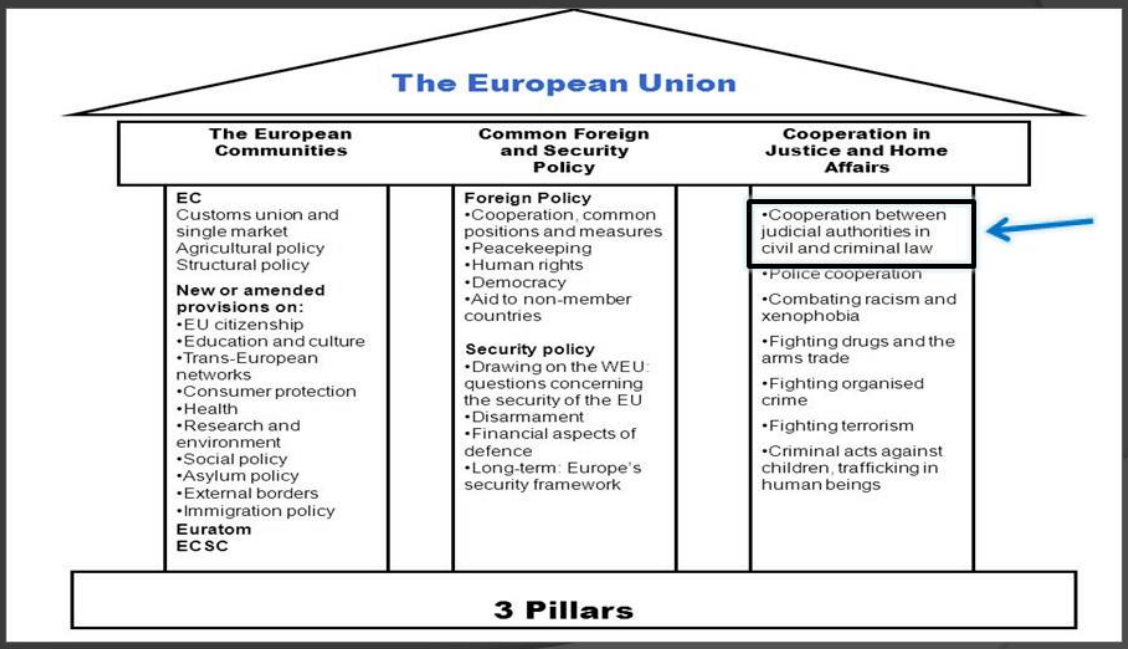
THE EVOLUTION OF JUDICIARY COOPERATION REGARDING CIVIL AND COMMERCIAL MATTERS

- The Treaty of Rome (1957)
- The Brussels Convention (1958)
- The Hague "Evidence" Convention (1970)
- The Lugano Convention (1988)
- The Treaty of Maastrich (1992)
- The Treaty of Amsterdam (1997)
- The Treaty of Lisbon (2007)


The Treaty of Rome (1957)
ARTICLE 220
Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:
(…)
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.


The Brussels Convention (1958)
Article 26
Recognition
A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.
Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Title, apply for a decision that the judgment be recognized.

The Treaty of Maastrich (1992)



The Treaty of Amsterdam

- The conceiving of the area of freedom, security and justice;
- Specific provisions on judicial cooperation on civil matters - REGULATIONS (EC) 1393/2007 AND (EC) 1206/2001

THE LISBON TREATY

Article 81

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(d) cooperation in the taking of evidence;

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

CVRIA

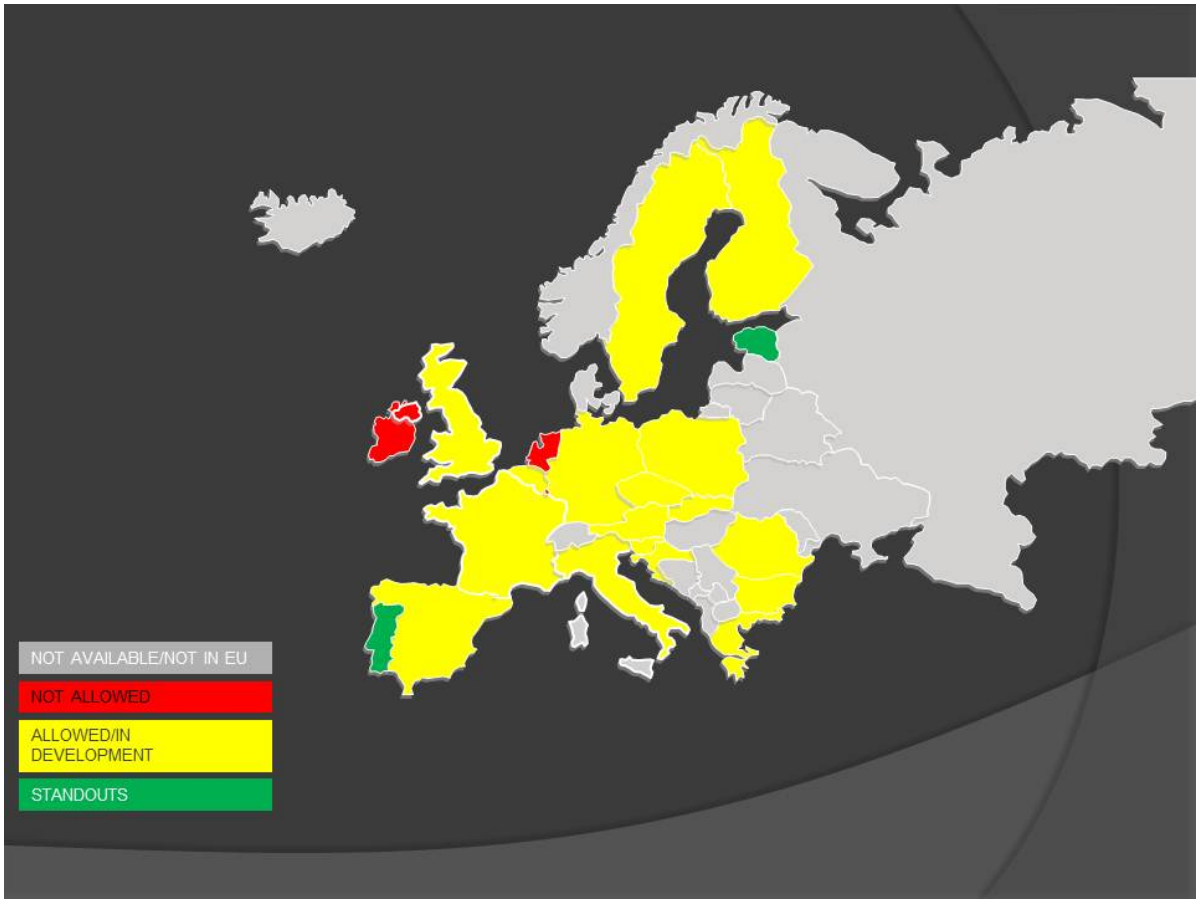
e-JUSTICE EUROPEAN

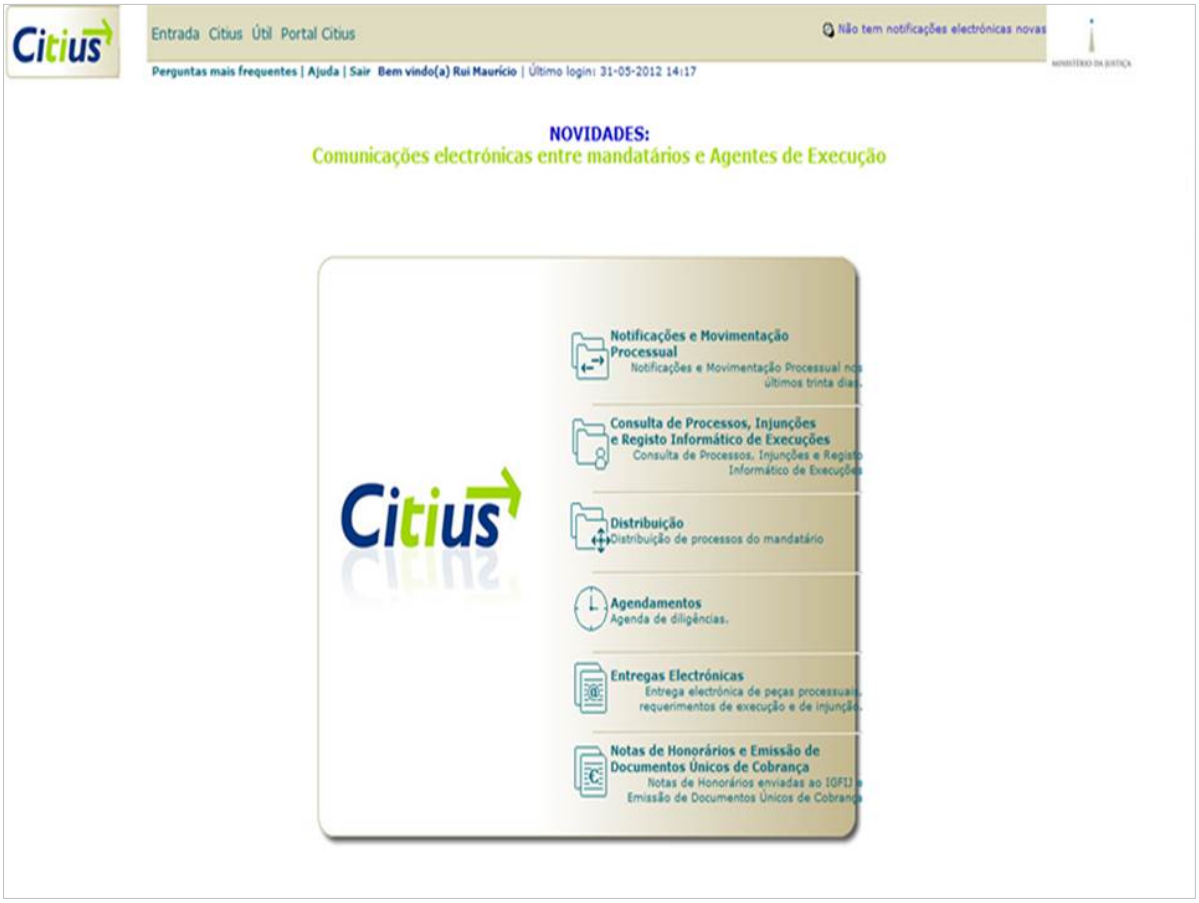
Article 47 of the Charter of the fundamental rights of the European Union

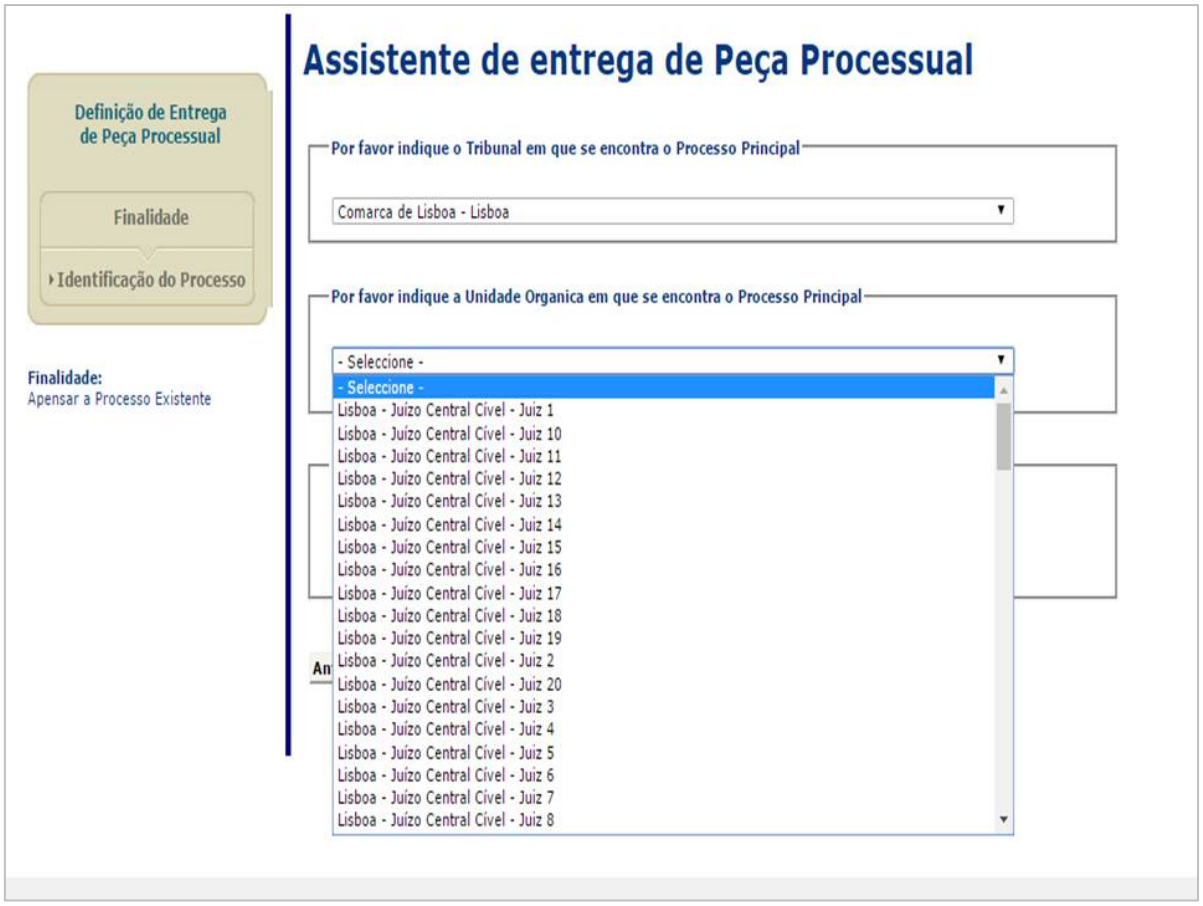
Article 6 of the European Convention on Human Rights

The rights to due process, fair trial and effective remedy


Regulation (EC) 1393/2007
Cross-border service of judicial or extrajudicial documents in EU Member-States


NOT AVAILABLE/NOT IN EU
NOT ALLOWED
ALLOWED/IN DEVELOPMENT
STANDOUTS


Citius
Entrada Citius Útil Portal Citius
Não tem notificações electrónicas novas
Perguntas mais frequentes | Ajuda | Sair Bem vindo(a) Rui Maurício | Último login: 31-05-2012 14:17
NOVIDADES:
Comunicações electrónicas entre mandatários e Agentes de Execução
Citius
Notificações e Movimentação Processual
Consulta de Processos, Injunções e Registo Informático de Execuções
Distribuição
Distribuição de processos do mandatário
Agendamentos
Agenda de diligências.
Entregas Electrónicas
Notas de Honorários e Emissão de Documentos Únicos de Cobrança



§ 311[1]. Electronic service of procedural documents

(1) A court may serve procedural documents electronically through the designated information system by transmitting a notice on making the document available in the system:

1) to the e-mail address and phone number notified to the court;

2) to the e-mail address and phone number registered in the information system of a register maintained in Estonia concerning sole proprietors or legal persons;

3) to the e-mail address and phone number of the addressee and his or her legal representative entered in the population register;

4) to the e-mail address and phone number of the addressee and his or her legal representative in the database of another state register where the court can check information independently by making an electronic query;

5) upon the existence of Estonian personal identification code, to the e-mail address personal-identification-code@eesti.ee

(2) The court may also send a notice on making the document available to the phone number or e-mail address found in the public computer network, on the presumed user account page of a virtual social network or on a page of another virtual communication environment which the addressee may be presumed to use according to the information made available in the public computer network or where, upon sending, such information may be presumed to reach the addressee. If possible, the court makes the notice available on the presumed user account page of a virtual social network or on a page of another virtual communication environment in such a manner that the notice cannot be seen by any other persons than the addressee.

(3) A procedural document is deemed to be served when the recipient opens it in the information system or confirms the receipt thereof in the information system without opening the document and also if the same is done by another person, whom the recipient has granted access to see the documents in the information system. The information system registers the service of the document automatically.

(…)

NOT USED BETWEEN MEMBER-STATES

OBSTACLES?

- LACK OF REGULATION
- NO UNIFORM CIVIL PROCEDURES
- TECHNICAL DIFFICULTIES
- RIGHTS OF DEFENCE
  - SPEED VS SECURITY
  - PROOF OF RECEPTION

Article 10.3 of Regulation 1206/2001: The requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State, using form A in the Annex. The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State or by reason of major practical difficulties. If the requested court does not comply with the requirement for one of these reasons it shall inform the requesting court using form E in the Annex.

ANALOGIA LEGIS?

Article 14
Service by postal services

Each Member State shall be free to effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent.

What about *documents which initiate the instance?*

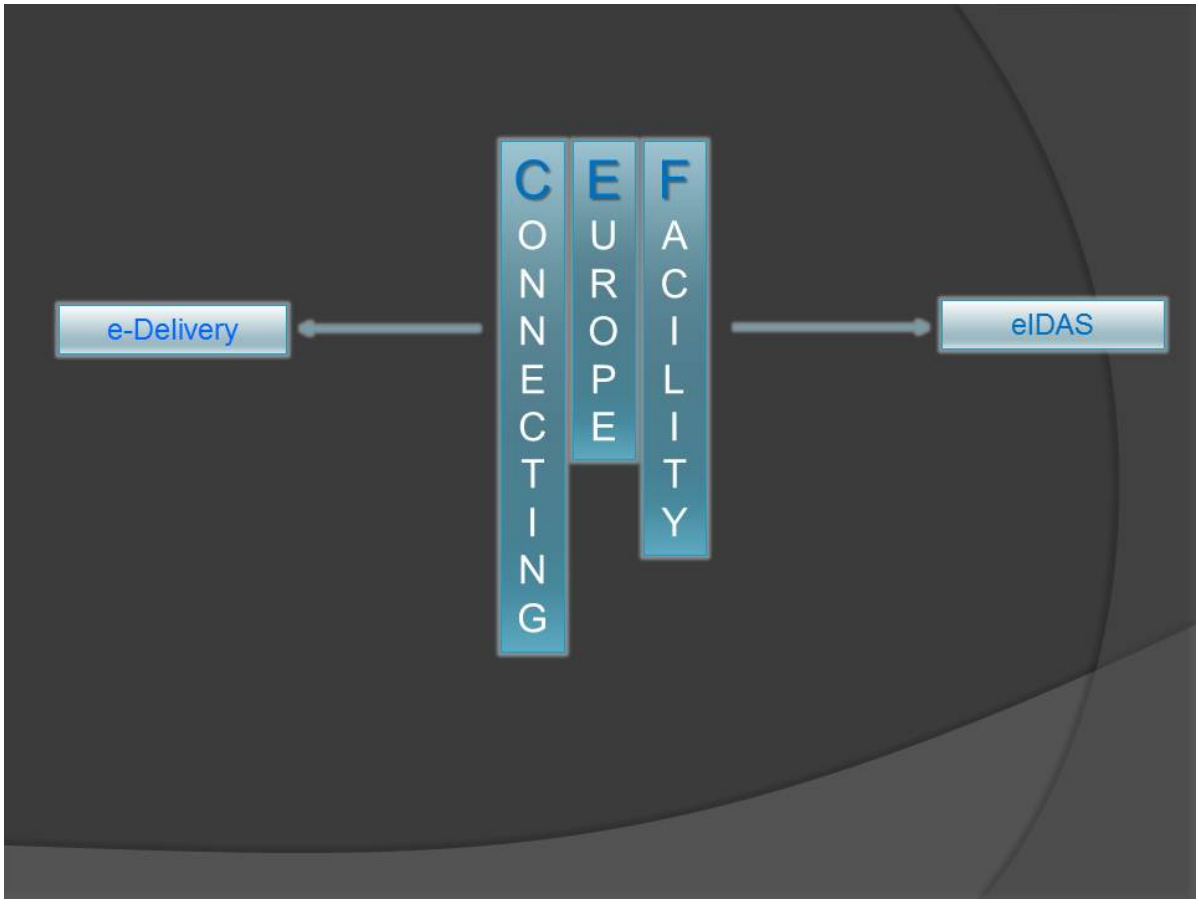
Improving the E-Justice Portal

Further harmonization of States' civil procedure systems

Ground rules for technical aspects

CREATION OF A FULL INTEGRATED EUROPEAN SYSTEM

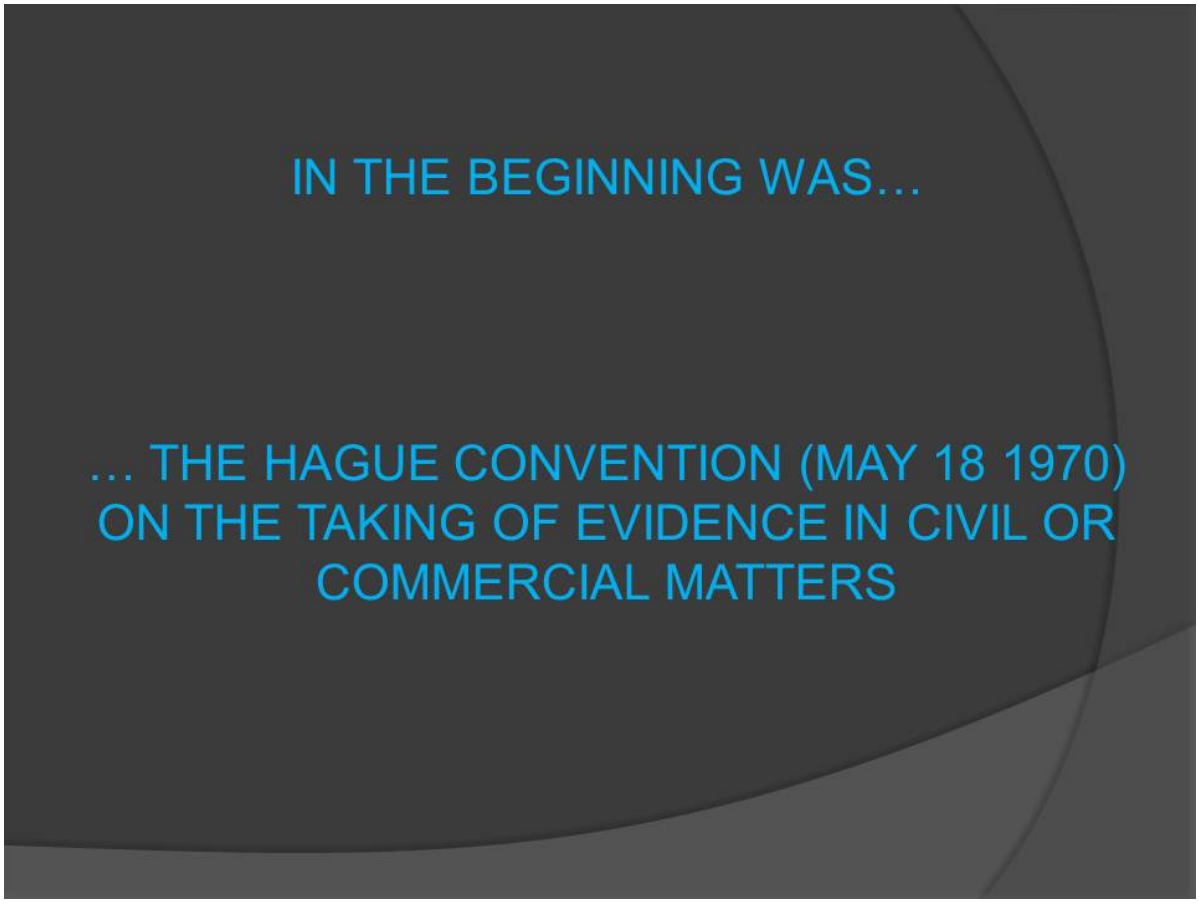
Gradual coercibility, starting with larger companies

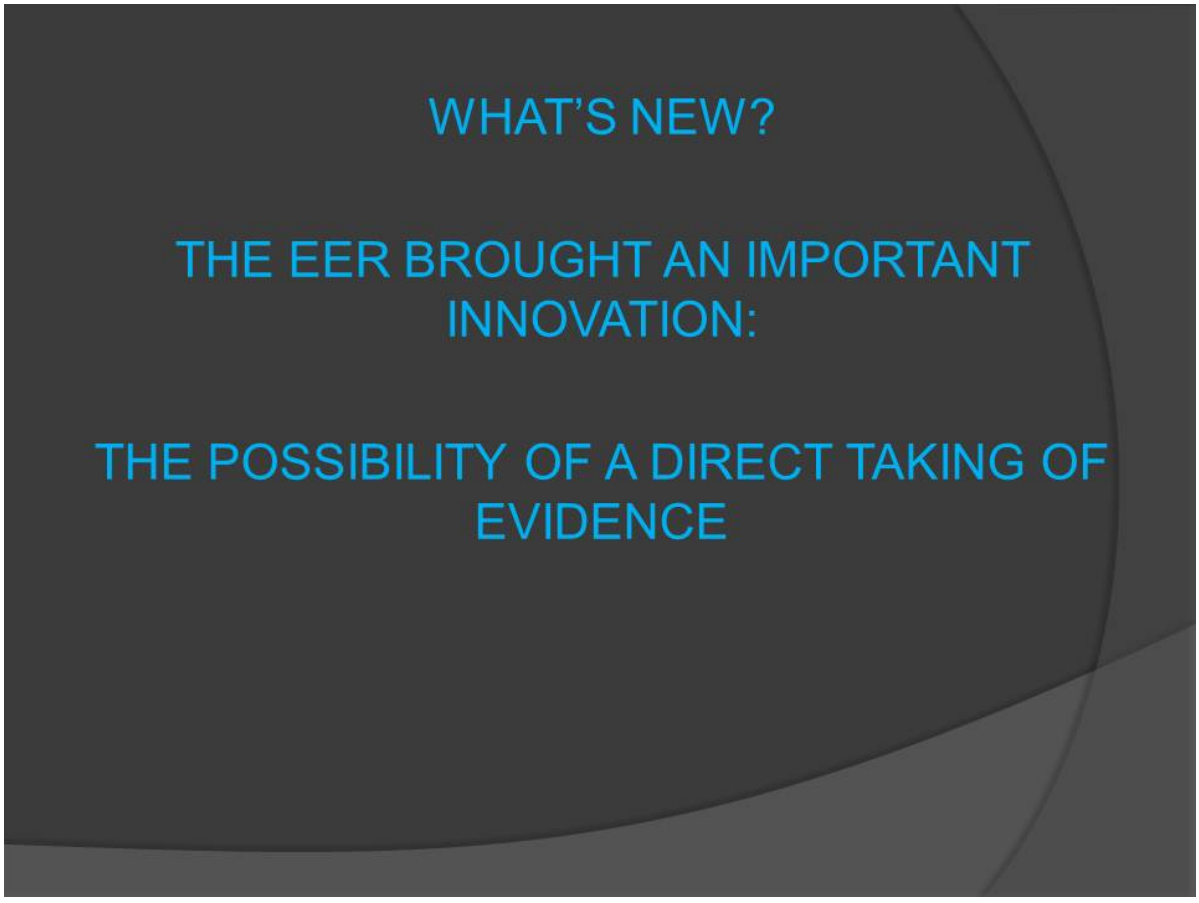


EU REGULATION 1206/2001 (MAY 28, 2001), OR: EUROPEAN EVIDENCE REGULATION (EER)

PRIMARY OBJECTIVE

To eliminate obstacles in cross-border litigation whenever evidence collection is needed


IN THE BEGINNING WAS…
… THE HAGUE CONVENTION (MAY 18 1970) ON THE TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS


WHAT'S NEW?
THE EER BROUGHT AN IMPORTANT INNOVATION:
THE POSSIBILITY OF A DIRECT TAKING OF EVIDENCE

INDIRECT TAKING OF EVIDENCE – HOW IS IT PERFORMED?

Direct communication between both requesting and requested courts

Standard forms attached to the Regulation

Principle of *active cooperation* (supresses the intervention of a third party entity)

INDIRECT TAKING OF EVIDENCE

The requested court will take the evidence by itself, as it would normally proceed if it were the jurisdictional responsible authority on a non cross-border case.

INDIRECT TAKING OF EVIDENCE

The requesting court may call for the taking of evidence to be executed in accordance with a special procedure provided for by the law of its Member State, using form A in the Annex.

The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence (e.g. videoconference and teleconference)

The requested court shall comply with such a requirement unless this is incompatible with its law or represents major practical difficulties.

DIRECT TAKING OF EVIDENCE – HOW IS IT PERFORMED?

The taking of evidence by the requesting court relies on a request by the national court to the ***central body*** of a Member State, under Article 17 of the Regulation – passive cooperation

Once the green light is given and the collecting of evidence is granted, the Member-State's requesting court is allowed to perform any actions in order to take the evidence directly, on its own, without the interference of a court, and according to its own legislation.

Always on a voluntary basis
No coercive measures

3. VIDEOCONFERENCE
DIRECT OR INDIRECT TAKING OF EVIDENCE?

- The use of videoconferencing is widely encouraged in the EER
- Most Member States already allow the use of videoconference in the taking of evidence

LOW LEVEL OF TECHNOLOGICAL COMPETENCE IN THE COURTS

INCOMPATIBILITY BETWEEN TECHNOLOGY/ COMMUNICATION SOFTWARES

NOT AVAILABLE AT ALL

VIDEOCONFERENCE – DIRECT OR INDIRECT TAKING OF EVIDENCE? THE EER IS SILENT

EUROPEAN COMMISSION

"available data suggests that the method of direct taking of evidence is used rarely" and that this is partly explained by "objective obstacles, such as the inaccessibility of videoconferencing equipment, but partly also by the structure of the procedure established by the Regulation, which is considered to be formalistic and cumbersome".

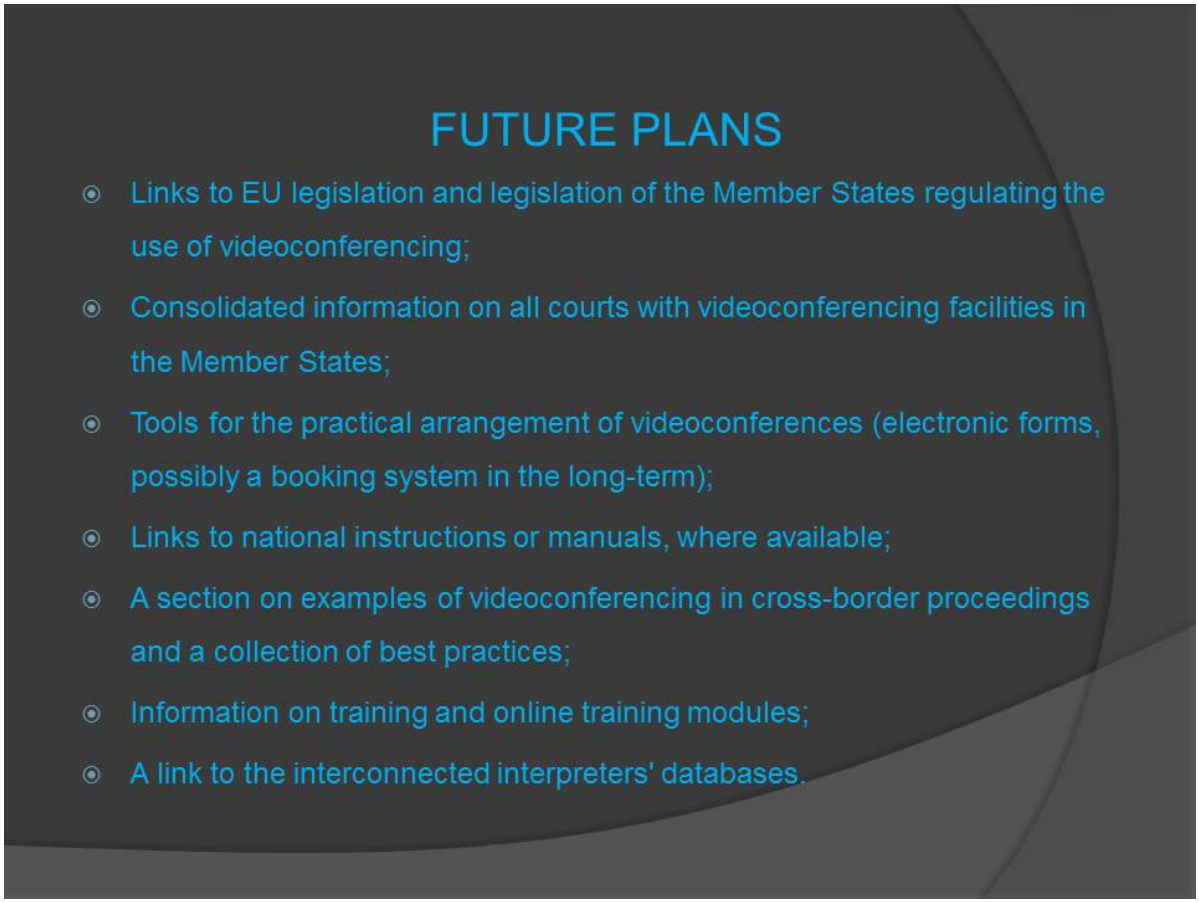
THE FUNDAMENTAL REASON BEHIND THIS

The provisions of the Regulation regarding the direct taking of evidence give voice to sovereignty concerns: hence the need for the intervention of a central body.

IS THERE A PURE WAY OF DIRECT TAKING OF EVIDENCE AFTER ALL?

ARE THE FORMAL PROVISIONS REPRESENTING A TRUE OBSTACLE TO THE USE OF VIDEOCONFERENCE?

DIRECT CONTACT BETWEEN COURTS REGARDLESS OF THE METHOD


FUTURE PLANS
Links to EU legislation and legislation of the Member States regulating the use of videoconferencing;
Consolidated information on all courts with videoconferencing facilities in the Member States;
Tools for the practical arrangement of videoconferences (electronic forms, possibly a booking system in the long-term);
Links to national instructions or manuals, where available;
A section on examples of videoconferencing in cross-border proceedings and a collection of best practices;
Information on training and online training modules;
A link to the interconnected interpreters' databases.

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

4.
Apresentação da Equipa

Accompanying Teacher

Rui Cardoso

CENTRO
DE ESTUDOS
JUDICIÁRIOS

THEMIS 2018 – Equipas Portugal I e II
Judicial Ethics and Professional Conduct
33º Curso

Rui Cardoso*

Este ano, a semi-final D do Themis, sob o tema "Judicial Ethics and Professional Conduct", realizou-se em Budapeste – Hungria, entre 3 e 6 de Julho de 2018.

Portugal participou no concurso com duas equipas, ambas integralmente compostas por auditores de justiça da magistratura judicial do 33.º Curso de Formação para os Tribunais Judiciais, tendo eu tido a honra de por elas ser escolhido para tutor.

Uma – designada pela organização da EJTN como Portugal I – era composta por Ágata Simões, Catarina Jesus e Débora Parente; outra – designada pela organização da EJTN como Portugal II – era composta por João Miguel, José Ramos e Sara Domingos.

A equipa I apresentou um trabalho escrito com o título "REBUILDING THE BRIDGE BETWEEN THE JUDICIAL SYSTEM AND THE COMMUNITY", onde aborda a necessidade de o sistema de justiça, respeitando os limites existentes, nomeadamente impostos pelo segredo de justiça, comunicar mais e melhor com a comunidade. Através dos *media*, reconhecendo a sua relevância e o poder que tem, mas também pelos seus próprios meios, que deve criar. Acentua ainda a necessidade de ter uma política de comunicação estruturada, com uma importante vertente preventiva, e não meramente reactiva. O sistema judicial exerce um poder do Estado em nome da comunidade, pelo que tem obrigação de transparência e de informar a comunidade da forma como exerce esse poder. Deve, portanto, esforçar-se para melhorar a comunicação da justiça, reconstruindo a ponte entre o sistema judiciário e a comunidade, que também permitirá o aumento de confiança nesse sistema e fortalecer a sua legitimidade. Esse é um dever ético dos magistrados.

O trabalho escrito da equipa II teve como título "THE INDEPENDENCE OF THE JUDICIARY IN THE DEMOCRATIC BALANCE OF THE 21ST CENTURY". Nele aborda os desafios actuais à independência dos tribunais e do juiz. Este, no início do século XXI, é obrigado a assumir o papel de último reduto do Estado Democrático de Direito, aproveitando o conteúdo da liberdade conferida pela prerrogativa institucional da independência. Este dever ético está consagrado no Tratado da União Europeia e nas Constituições nacionais, que impõem o exercício do poder judicial com independência. Assim, é legítimo ao juiz desaplicar as normas que têm o potencial de questionar o conteúdo essencial da função jurisdicional, que pode até ser considerado um desvio do poder legislativo. Estas premissas implicam a necessidade de afirmar um dever ético do juiz de resistência para salvaguardar o conteúdo útil da independência. A proclamação da independência, protegida por instrumentos jurídicos

* Rui Cardoso – Procurador da República e Docente do CEJ.

sofisticados, não terá qualquer proveito se o guardião principal – o juiz – não a cultivar como uma atitude pessoal.

Ambos os trabalhos são de grande interesse e elevada qualidade. São inovadores, apesar de bem assentes nos normativos da União Europeia e do Conselho da Europa, bem como na jurisprudência do Tribunal de Justiça da União Europeia e na do Tribunal Europeu dos Direitos Humanos.

Na apresentação feita em Budapeste, ambas as equipas foram muito além da mera síntese dos seus textos, não só na forma, como no conteúdo, como adiante se poderá ver.

A escolha dos temas, o desenvolvimento e redacção dos textos escritos, a concepção das apresentações e os seus conteúdos, são trabalho exclusivo das duas equipas, que neles puseram todo o seu empenho, saber e (a já evidente) paixão pela realização da Justiça.

O mérito é inteiramente seu.

Não obstante, como seu docente do Centro de Estudos Judiciários e aqui seu tutor, tenho indisfarçável orgulho nos textos que escreveram e nas apresentações que fizeram em Budapeste. Mais: tenho total confiança no seu futuro desempenho de qualidade como juízes de direito. Juízes de Portugal, da União Europeia e do Conselho da Europa.

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

4.

4.1. REBUILDING THE BRIDGE BETWEEN THE JUDICIAL SYSTEM AND THE COMMUNITY

Team Portugal I

Ágata Simões | Catarina Jesus | Débora Parente

Accompanying Teacher

Rui Cardoso

CENTRO
DE ESTUDOS
JUDICIÁRIOS

EUROPEAN JUDICIAL TRAINING NETWORK
THEMIS COMPETITION
SEMI-FINAL D
BUDAPEST, 2018

REBUILDING THE BRIDGE BETWEEN THE JUDICIAL SYSTEM AND THE COMMUNITY

Team Portugal I
Ágata Simões | Catarina Jesus | Débora Parente

Accompanying Teacher
Rui Cardoso

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INTRODUCTION

1. The judicial system can no longer escape from the spotlight in which it has been for years. It is time for it to reclaim its power and that involves taking on an active role in the task of informing the community of its decisions and the proceedings involved in reaching them. In truth this task is inherent to the State power exercised by the judicial system, since it is done on behalf of the community and the administration of justice corresponds to a key value, resulting in the need to inform the community in a way that is understandable to them. That is to say that if the judicial systems operates on behalf of the community then it is under the obligation to be transparent and to inform what, why and how something has been done.

The visibility of the judicial system arose mostly due to the advent of economic criminality, a phenomenon covered by the media – a sector in development - and which interested and shocked people. With the continuance of the media's expansion, the emergence of new cases of economic crimes and the slow pace of the response of the judicial system to such cases, the coverage of judicial matters grew. Its focus broadened and other types of cases started to be reported: first other types of criminal cases and then family law cases.

Simultaneously, the judicial system either kept silent or responded by using incomprehensible vocabulary with lay people. The void created by that allowed the media's coverage of judicial cases to be the only information that the community had. As a result, the image that the community had (and still has) of the judicial system ensues exclusively from the media's reports of it.

The contrast between the obligation that arises for the judicial system to communicate justice and the silence that characterizes it makes it vital to adopt a new stance and to design strategies through which the judicial system reclaims its role of informing the community about the administration of justice. This does not mean that the judicial system should not cooperate with other agents that inform the community, such as the media, or even overshadow them, it simply means it should act in accordance with its duty to inform the people whose right is being exercised.

Additionally, it can be said that communicating justice in a manner that is understandable is a way of restoring people's trust in the administration of justice and of legitimizing the judicial system. Because the image that people have of justice is mostly based solely on the media's inaccurate reports of its administration that focus primarily on its weaknesses without explaining their context and the strategies that the judicial system has adopted to deal with them, and because that system has chosen to remain silent (which is felt as an admission of guilt), the diagnosis of a crisis of justice has become a *fait accompli*.

Let it be clear that the intent has to be the improvement of the communication of justice so that the community is in possession of the information necessary to evaluate the power exercised on their name. However, we believe that the more transparent and closer to people justice becomes, the more people will trust it, even if it has weaknesses – the point is that

those weaknesses have to be explained and there has to be information regarding what is being done to overcome them.

2. The phenomenon which has been described is transversal, we think, to the majority of European countries, and this is why we believe this paper and the topic are appropriate for a contest such as Themis. Be that as it may, the starting point of this paper is the assertion that the judicial system has an obligation to be transparent and to guarantee that people on whose behalf it exercises the judicial power know and understand the decisions and the process used to reach them. This is basic and the fact that it is basic makes it fundamental to future judges and prosecutors, no matter what their context.

The choice of this subject was a natural one. In fact, the communication of justice is a subject that interests us in all of its dimensions. However, two different circles can be identified when considering the communication of justice, depending on the addressees of said communication: an inner circle, if what is meant are the parties (civil cases) or the defendant (criminal proceedings), their lawyers, the witnesses and anyone else who, for some reason, has contact with a case and an outer circle which is constituted by everyone else. The choice fell on this last circle, because it is not so contingent on the legislation of each country and therefore is easier to be debated in a broader way.

3. This paper is divided into three sections. The first one is devoted to the understanding of this phenomenon. The second focuses on the legal framework of the subject. The last section will contain the measures through which the judicial system adopts a new attitude and reclaims its role of informing the community about the administration of justice that it carries out on its behalf.

FIRST SECTION
AN OVERVIEW OF THE SUBJECT

«Democracy», «press freedom», «duty to inform», «right to information», «freedom of expression», «privacy rights», «right of personal portrayal», «right to a fair trial»: here are some of the guidelines that were taken into account in this paper.

If there was a time when freedom of speech and the right to inform and be informed was not allowed[1], nowadays it is the total opposite.

In the last two centuries the media has had a vital role in society, so much so that it is called the Fourth Power[2]. Indeed, even though the media's impact in society has often been claimed to be a novelty of the last decades, the truth is it has had that impact for over two centuries.

[1] And we do not forget that in some countries, unfortunately, that still occurs.
[2] The origin of this term is unknown, however some attribute it to Edmund Burke whereas others attribute it to Henry Brougham, Thomas Macaulay or William Hazlitt.

Karl Popper, for instance, advocated that television had to be controlled given the unlimited political power it has.

It is impossible to talk about controlling the media without immediately referring to press freedom and the attempts to restrict such freedom, precipitated by situations in which it collided with political power or with individual rights.

In fact, if the media has had a vital role in society for the last two centuries and a relationship with the State powers characterized by tension, what changed in the last few decades – and this is what interests us – is that the focus of media broadened and it started to include judicial decisions and proceedings on a regular basis.

Judicial cases, especially criminal ones and those involving famous personalities and politicians, have always interested the community and thus the media[3]. However, the emergence of cases of economic criminality coupled with the slowness of the judicial system in responding to these cases fostered the growth of the media's interest in the functioning of justice. In other words, what began as an interest in criminal cases evolved into an interest in the functioning of the administration of justice, due to its apparent inability to deal with them.

The interest in the judicial system increased exponentially and the more the media reported judicial decisions without legal knowledge (and so without understanding these decisions) and influenced by its profit-making spirit, the worse the image of justice became. This culminated in the announcement of a crisis of justice.

Speaking of crisis, a crisis of values has also been announced in contemporary societies. This combined with the so-called crises of justice has resulted in a broken image of the judicial system and the belief that justice is not administered. The deference to justice agents has also been affected.

Against this backdrop, justice adopted a passive attitude, not responding to the media's misreports of judicial decisions and proceedings, and built a wall of technical language incomprehensible to most people, including the media. From a legal point of view, the judicial system justified this position with the duty of reserve of judges. Later on, this system started to react, although sporadically and slowly[4].

In contrast to this, the media's reports are immediate and the language used is simple and accessible. Additionally, news is written in a way that appeals to people's emotions, more easily earning their uncritical acceptance. There is a gap between the community's emotional

[3] Just an example of how criminal cases for their obvious public relevance have always been of media's interest: in England, July, 19th, 1872, the arrest of Mary Ann Cotton made the headline of The Northern Star.

[4] This slow response is related to the response to media's misreports of judicial decisions and not the response to the case itself. It is often said that the time of justice and the time of media is different, because the first demands weighting and reflection whereas the latter is imbued in a spirit of immediacy of the moment. These two cannot, it is believed, be synchronized.

(due to the nature of the matter and the way it is portrayed) judgment and the Court's objective trial.

With globalization and with the development of technologies, while justice was not able to follow this modernization, the media took advantage of all their resources in order to communicate more and to a larger audience.

It is interesting to see that in the beginning of civilization all trials were public, and when we say public we mean that people were tried in the middle of some square of some town and the community used to gather around to see those trials with no intermediary.

With the passage of time, courts left the streets and went into buildings and instead of maintaining their openness regarding to the public, with no intermediary, they became more and more distant from the community to such an extent that the media took their place to become their unofficial interlocutor, with all the risks that are associated and are well-known.

It is time for justice to connect with the community again, with no middleman.

SECOND SECTION
LEGAL FRAMEWORK

1. The first section, although brief, identified the media as the body which has taken on the role of informing the community about the administration of justice. It also provided a better understanding of the stance the judicial system has taken as regards this task. With this information as a backdrop and bearing in mind that the focus of this article is the presentation of measures to improve the communication of justice, the following section will provide a brief legal framework of the activity carried out by media and the guidelines within which the judicial system must act when administering justice that reflect in the communication of justice.

1.1. To begin with, when we talk about justice and media there are three rights protected by The European Convention on Human Rights that may be in conflict: the right to a fair trial (Article 6), the right to respect for private and family life (Article 8) and the right to freedom of expression (Article 10).

Those rights are also protected by other international instruments such as The International Covenant on Civil and Political Rights (Article 19 - concerning the freedom of expression), The Charter of Fundamental Rights of The European Union (Article 7 about the respect for private and family life; Article 11 with respect to freedom of expression and information; Article 47 regarding the right to an effective remedy and to a fair trial; Article 48 respecting presumption of innocence and right of defense) and The Universal Declaration of Human Rights (Article 10 with reference to the right to a fair trial; Article 11 concerning the presumption of innocence and right of defense; Article 12 about the right to respect for private and family life; Article 19 with respect to freedom of expression and information).

It is uncontestable that the media is essential to society: their task is to inform the community about matters with public relevance, granted that that the community has the right to be informed[5].

Indeed, The European Court of Human Rights (ECtHR) has already delivered many judgments on the freedom of expression as regards the freedom of the press to inform the public in which it prevailed over any other interest, especially in those cases where there is undeniably a public concern.

An example is the judgment of the case Pinto Coelho v. Portugal (no. 2) - 48718/11, of 22/03/2016[6]. In this case, the Lisbon Court of Appeal convicted the journalist for broadcasting recordings of a court hearing with no permission. The ECtHR viewed the issue differently and considered that despite the significant reasons behind the journalist's conviction, they were not weighty enough to motivate an interference in the journalist's right of freedom of expression and information[7].

Regarding the judiciary, the role of the media is also very important. It has to be kept in mind that Courts administer justice in the name of the people[8], so Courts have the obligation of reporting to those exact same people. And a way for people to supervise, even if indirectly, the administration of justice is through the media, that covers those cases of public concern.

However, in some cases, the right to inform and to be informed may be restricted.

According to the Article 10, number 1, second part of The European Convention on Human Rights and to Articles 14 and 19 of The International Covenant on Civil and Political Rights, the publicity of trials may be excluded in circumstances where 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»*[9].

[5] As The European Court of Human Rights has already stated in the judgment regarding to the case of The Sunday Times V. The United Kingdom (Application no. 6538/74) of 26 April 1979, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57584%22]}: «*Article 10 (art. 10) guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed.*»

[6] Available in French at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161523%22]}

[7] For other judgments regarding this subject, see, for eg. the case Campos Dâmaso v. Portugal, Application no. 17107/05, of 24/04/2008; Laranjeira Marques da Silva v. Portugal", application no. n. º 16983/06,of 19/01/2010, Pinto Coelho v. Portugal (no. 1), application no. 28439/08 of 28/06/2011, Du Roy and Malaurie v. France, application no. 34000/96, of 03/10/2000 all available at: http://hudoc.echr.coe.int.

[8] The idea now presented is inspired by Article 202 of The Constitution of the Portuguese Republic, where it is established that the Courts administer justice in the name of the people. Even though the subject of this paper is being addressed from a European point of view, we believe the reference to this idea is appropriate since it translates an understanding of the administration of justice that is common, we think, to all European countries.

[9] Article 10, no. 1, second part of The European Convention on Human Rights.

Unfortunately, the media does not always respect judicial secrecy and more than once they have given incorrect information to the public about a case.

Wrongful information contributes to an incorrect shaping of the public's opinion about a case and about the functioning of the judicial system. Most of the times, such wrong information is due to a lack of legal education not only of the journalist but also of the common citizen.

Such cases where the media misreports matters as well as other cases regarding matters with public relevance, create the context in which the conception and implementation of measures to improve the communication of justice have to take place. This brief note helps to bridge what is being said and the third section of this paper and even though the intention is not to anticipate the measures that will be further suggested it is important to mention one other point that has to be taken into account when considering such measures.

1.2. Indeed, despite the fact that the United Nations Basic Principles on the Independence of the Judiciary (1985)[10] states in point 8, under the principle of freedom of expression and association, that *«(…) members of the judiciary are like other citizens entitled to freedom of expression (…)»* according to the Value 2 of The Bangalore Principles of Judicial Conduct[11] [12], of 2002, respecting impartiality, a judge cannot *«make any comment in public or otherwise that might affect the fair trial of any person or issue.».*

With reference to this subject, the Consultative Council of European Judges (CCJE)[13] has issued an Opinion (no. 3 of 19/11/2002)[14] in which it is said that: *«The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgments for the public. Besides, for the countries where the judges are involved in criminal investigations, it is advisable for them to reconcile the necessary restraint relating to the cases they are dealing with, with the right to information. Only under such conditions can judges freely fulfil their role, without fear of media pressure».*

As a matter of fact, it has already been decided by the ECtHR in the case of WORM v. AUSTRIA (83/1996/702/894), of 29/08/1979[15], that journalists do not have the role of deciding who is

[10] Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx
[11] Available at: https://www.un.org/ruleoflaw/blog/document/the-bangalore-principles-of-judicial-conduct/
[12] The Bangalore Principles of Judicial Conduct is a code of judicial conduct, which was created by a Judicial Group on Strengthening Judicial Integrity associated with the United Nations, composed by judges. This project arose after the conclusion that communities all over the world were losing its trust in judicial systems associated to the fact that these systems were often seen as impartial and corrupt. Therefore, that Group created a code that contains values that should be followed by the judiciary all over the world in order to regain people's trust in justice.
[13] The CCJE is a consultative body of the Council of Europe, composed by judges, regarding the independence, impartiality and competences of the judiciary.
[14] Available at: https://rm.coe.int/16807475bb
[15] Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58087%22]}

guilty or not and therefore do not have to right to publish statements that are likely to harm the chances of a person receiving a fair trial, whether that was the purpose or not.

In this case, the ECtHR considered that the conviction of the Austrian journalist (for having exercised prohibited influence on criminal proceedings through publishing an article in which a pending trial against a former Minister of Finance was reported) was not a breach of Article 10 of the European Convention of Human Rights[16].

The Committee of Ministers of the Council of Europe has already spoken about the subject matter here, in 2003. It issued the Recommendation (2003) 13[17] respecting the provision of information through the media in relation to criminal proceedings. In that Recommendation, the Committee stated that the public has the right to be informed through the media about the activities of judicial authorities. However, when informing, the media needs to considerer the following principles: (i) the respect for the principle of the presumption of innocence, (ii) the principle of the accuracy of information[18] and (iii) the principle of regular information during criminal proceedings with reference to those cases where there is a public interest[19].

In 2005, the CCJE issued another Opinion regarding this subject (Opinion n. º 7 of 25/11/2005) [20]on which it is peremptory that *«Judges express themselves above all through their decisions and should not explain them in the press or more generally make public statements in the press on cases of which they are in charge. (…)».* In this Opinion, the CCJE believes that if, on matters concerning justice, a court or a judge is «attacked» by the press, the judge should abstain himself from any public reaction[21]. Still, the CCJE defends that when those type of attacks happen, there must be a proper response.

THIRD SECTION
MEASURES FOR THE IMPROVEMENT OF THE COMMUNICATION OF JUSTICE

1. Scope and protagonists

Taking into account the framework for action provided by the previous section, the focus of this section is on the measures that we believe might improve and foster the communication

[16] This judgment stresses that the job of the judiciary is to judge according to the facts of the case and the law, independently of public pressures.
[17] Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805df617
[18] And for that judicial authorities should provide verified information to the media.
[19] In these cases, the judicial authorities should provide information to the media about essential acts, as long as it respects the secrecy of investigations
[20] Available at: https://rm.coe.int/1680747698
[21] On the ECHR judgment on the case Perna v. Italy, application no. 48898/99, 25 July 2001, The Court considered that the conviction of a journalist by the Italian courts - regarding its accusation of a public prosecutor in a newspaper about some alleged strategy of gaining control of the public prosecutors' offices in a number of cities and the use of the criminal turned-informer to prosecute a former Italian minister –was not in breach of Article 10 of the Convention. Indeed the Court considered that those accusations without any proof configured an excess of the borders that were protected by the freedom of expression.

of justice. However, before presenting these measures there are a few considerations to be made concerning, firstly, their scope and, secondly, the players involved.

1.1. As for the scope of the measures suggested, it is of the utmost importance to bear in mind that the intention behind them is above all to enable the community to have information regarding the administration of justice and to enable them to evaluate whether or not the State power (which is being exercised on their behalf) is being correctly carried out.

It cannot be denied that the subject now being addressed emerged from the realization that the majority of people not only have a bad impression of justice and do not understand it, but even believe that the there is a crisis of justice, which has created in us the desire to reverse it – this explains our concern with this topic as (hopefully) future judges, who seek to have the community feel that the role played, exercising a right of theirs, is being duly carried out. Having said that, we understand that the priority has to be to provide the community with reliable, objective and understandable information, regardless of the assessment people might make based on such data.

Still, ensuring people's trust in the judicial system is in itself important. However that trust has to be based on accurate information and that is not achievable if the judicial system remains hostage to the information provided by bodies that are not prepared to understand legal language and that are not necessarily invested in providing accurate information.

Equally important is to adopt measures through which the community experiences the hardships of administering justice. It is one thing to grant information regarding a specific case, its decision and proceedings. It is another altogether to be put, for instance, in a judge's or lawyer's position and feel all the hardships that come with administering justice and that cannot be fully comprehended unless you experience them, granted that such experience will never fully mimic a judge's or lawyer's functions.

It might be considered that contemplating measures directed at the intention explained in the last paragraph is to digress from the scope of this paper, which is the communication of justice. We disagree. Enabling people to have closer and more personal knowledge of the administration of justice ultimately results in them being more capable of not only understanding the information provided but also of having a more critical view of that information. This might be especially useful when we think about the tendency of most people to accept, uncritically, the information reported by the media.
Still in relation to the scope of the measures further suggested, they were conceived to improve the communication of justice in the short term as well as in the medium and long term.

As is expectable, the measures designed to allow people to have contact with the administration of justice and/or to experience what it means to be a judge or a lawyer are measures whose effect is gradual. In contrast, the measures that translate into the judicial system adopting an active role in informing people have, due to their being directed to more people at the same, a more immediate effect.

1.2. On the topic of the key players of the measures, the first point to be mentioned is one that is often overlooked when addressing the subject of this paper: the fact that the judicial system is composed of a multitude of actors and that all of those actors, no matter if they administer justice or simply aid in fulfilling such State power, are crucial for improvements in communicating justice.

Even though when considering the judicial system, the tendency might be to think about judges (and, thus, to consider that the improvement of the communication of justice is solely a duty of theirs, as those who embody the administration of justice), the truth is that such administration, as it is at present, presupposes the intervention of several agents: judges, prosecutors and lawyers. This being the case, it is not possible to disregard the importance of these agents that must be mobilized in order to create a common framework for action.

Lastly, the measures indicated below are intended, primarily, to ensure that the judicial system, with all the agents that have just been identified, take on an active role in informing the community about the administration of justice, thus making it transparent, which, in turn, has the potential to make people trust such administration and deem it as a legitimate power.

For one thing, this involves taking on a position close and accessible to the rest of people and to inform them of judicial decisions and proceedings, with no intermediary. It involves informing the community about the administration of justice in general as well.

In addition, the judicial system must recognize the importance of the media and its power. Only then will it be able to take advantage of such power and use it to better inform the community. We are not deluded by this strategy, insofar as we are aware that it does not eradicate judicial decisions being incorrectly reported through the media. Nevertheless it is our belief that collaborating with the media is the best way of guaranteeing that the community is better informed.

2. Measures regarding the interaction between the judicial system and the media

Under this subtitle, we will address various measures that concern the interaction between the judicial system and the media.

Creating a figure to whom competence for informing the community of judicial decisions is assigned (respecting the inadmissibility of a judge commenting its own cases) is the basis of the measures suggested below, granted that the mere creation of this figure is, in itself, an endeavor to improve the interaction between media and the judicial system.

The creation of a spokesperson for local Courts would allow the judicial system to anticipate the media's coverage of judicial cases. Indeed through the creation of this figure, the judicial system could not just react in the event of a news outlet's incorrect report of a judicial case, but also anticipate and be the first to inform the community about relevant matters. This preventive action would have two consequences: on the one hand, it would counterbalance

the disparity between the time of the media and the time of justice, that normally results in people only remembering the first thing they read, see or hear about a certain matter (this is why responding after a week or two is, in practice, almost the same as doing nothing); on the other hand, it would provide reliable, yet understandable, information, based on which the media could play its role.

The spokesperson might be a judge with managerial powers or a communications advisor with a legal background. Truthfully, we believe the most important thing when implementing this is choosing someone capable of conveying information in a way that is both accurate and understandable, as well as someone who has legal knowledge so that he is able to draw the line between what can and what cannot be said (this is related to those cases which are under investigation confidentiality).

This does not mean that judges do not collaborate with that figure: not only are they in a better position to identify cases that are bound to interest the media and the community as well as the important aspects of such cases, but also to more rapidly draft press releases or statements concerning them – granted that speedy action as regards this particular aspect of informing people is crucial -, simply they cannot be the ones who read or inform the community, neither can they comment on them afterwards.

In respect to the release of statements concerning judicial cases (or even other types of relevant information about the administration of justice), it ought to be done by this spokesperson and those statements should primarily be read, instead of simply having a written statement released (having someone read a certain statement humanizes it).

Given the competences of this spokesperson, this figure should invest in improving the judiciary's relationship with the media. If this person is the face of justice in a certain area and is the one who contacts the media, that same media should feel it is acknowledged by him – recall what was said about being imperative to recognize the media and its importance.

Additionally, this spokesperson has to take into account the fact that most judicial cases are only relevant locally and so the release of statements about these cases only makes sense in local newspapers. This does not mean that that information is not made available to everyone – it will be argued that Courts should use social media and those platforms should contain the same information provided in press releases.
What has been said is related to providing information about specific cases. However the judicial system should acknowledge many forms of the media's coverage , one of them being the participation in televised debates concerning cases or other topics related to the administration of justice that are relevant outside local communities or the administration of justice.

As long as the participation in these debates complies with the ethical duties of judges, prosecutors and lawyers, there is no reason to not take part in them. Given the national impact that these debates have, their importance and the opportunity they pose cannot be ignored. By this we do not advocate the participation in every single debate about justice.

However, completely ignoring them is neither advisable nor acceptable given that the judicial system exercises a State power on behalf of the community (that is the people who watch these debates).

Considering that the theme of those debates are most likely judicial cases or aspects of the administration of justice with national impact and relevance, the judicial system should be represented by central figures or entities, namely associations of judges, prosecutors or lawyers.

Aside from the aforementioned intervention, and keeping in mind that justice does not have its own platform for communication with the general public, we feel that the conclusion of protocols with the media sector, especially the written press, in order to include a legal insert in the publications of the most referenced newspapers would be key, not only to respond to misrepresentations and unfounded criticism, but also to convey information and provide the necessary clarifications on contents considered relevant to ordinary citizens, always making an effort to simplify and decode legal language, if necessary with the assistance of image and communication experts.

3. Websites

The use of websites by the Courts is common, especially by the Courts of Appeal, the Supreme Courts, the ECtHR and the European Union Court of Justice. Their use may also be useful for the Courts of First Instance.

These websites must include, first and foremost: the decisions rendered or summaries of them; statements concerning a specific proceeding on a newsworthy case or even the live broadcasting of press releases; contacts; and information about the Court and its functioning. Other types of contents can be included, in order to make the functioning of Courts and the administration of justice more transparent and understandable, for example a detailed description of the competences of that Court, a brief and accessible explanation of how someone may bring an action before the Court, an indication of the cases in which a lawyer is required and an indication of where to require legal aid.

Providing forms (for instance, a form to require payment of the compensation witnesses are entitled to for the expenses they have due to the proceedings) and disclosing statistics about the administration of justice in general is another possibility.

On these websites, videos could also be made available to allow those who see them to experience what it means to be a judge. In this regard, it is important to refer to the website *You be the judge*[22], that features videos through which the person is placed in the position of a judge and has to make a decision. Websites or videos like these allow people to understand,

[22] The website is www.ybtj.justice.gov.uk.

albeit in greatly scaled-down, some of the problems that judges encounter daily, humanizing them.

Lastly, these websites could also include videos in which central figures or entities, namely associations of judges and/or prosecutors explain how certain topics or types of cases (for example, specific types of criminal cases such as drug trafficking, or, on a civil domain, general contractual terms and conditions) pose difficulties and how they are being addressed.

The layout of these websites should make them truly accessible for the community and the language should be understandable (without losing accuracy).

4. The Use of Social Media

Given that the aim is for the judicial system to take an active role in informing the community, without any intermediation, the use of social media is one of the most appropriate measures to achieve this purpose.

In reality, the use of social media has progressively increased among sovereign bodies, such as Parliaments, Governments and Presidents of the Republic. Through the creation of Facebook pages or Twitter accounts, for instance, these bodies disclose information that concerns the State powers exercised by them, in a way that is understandable to the community.

The same cannot be said about the judicial system, however. First we must distinguish the use of these platforms by Courts as sovereign bodies, the use by entities that represent judges, prosecutors and lawyers, and the use by judges, prosecutors and lawyers as private citizens. What matters for the purposes of this paper, is the use of social media by Courts and by the representative entities of the agents of the judicial system.

Facebook pages and Twitter accounts, for instance, are an ideal platform for the disclosure of information pertinent to the community, which can be used by all Courts, that is by First Instance Courts, Courts of Appeal or the Supreme Courts.

As for the content of the information provided through these platforms, it can be diversified: small summaries of the decisions rendered; statements concerning a specific proceeding on a newsworthy case or even the live broadcasting of press releases; the publication of informational videos on the functioning of the Court or, for instance, explaining the layout of a courtroom, or what to be expected when someone is summoned to testify; the publication of cultural events concerning the judicial systems; the publication of conference schedules; etc..

Needless to say, these platforms enable Courts not only to inform the community about specific cases but also to act more broadly, informing the community about the administration of justice as a whole, even through the disclosure of statistics. It cannot be ignored that the community is mainly interested in specific and newsworthy cases, but we believe that these platforms should, nonetheless, be harnessed to provide as much information as possible. In

addition, this combined with the other measures indicated in this paper can have a substantial effect in making the administration of justice transparent and showing its proactiveness which, in turn, may increase the level of trust in it.

The use of these platforms by Courts of Appeal or the Supreme Courts probably seems more obvious, however even First Instance Courts can do it (in fact, the use of social media by them has an enormous potential for improving the communication of justice at a local level). It is not possible to make a rule concerning this topic and so all that can be said is that such use should depend on the dimension of the Court in case (the territorial extension over which it has competence and the material range of those same competences).

In relation to the person who ought run the Facebook page or the Twitter account, it depends very much on the judicial organization of each country, yet it seems clear that this task should be assigned to a single person with managerial powers – recall the figure of a spokesperson referred to above -, without prejudice of each judge, dealing with a newsworthy case, informing that person of the existence of such a case and the need to post some information about it, for example, a summary of the decision rendered in it.

The use of social media by the entities that represent judges, prosecutors and lawyers is also important, although not as vital. These entities should primarily focus on providing an overview of the functioning of Courts and the administration of justice.

5. Programs with the community

As was said earlier in this section, the scope of the measures is also to bring the agents of the judicial system and the community closer, allowing people who otherwise would have no contact with that system to experience what it is to be a judge, a prosecutor or a lawyer. This serves three purposes: firstly, it enables people to feel, first hand, the hardships of administering justice or, at least, aiding that administration, which, in itself, creates a different perception of the judicial system; secondly, since it translates into contact with judicial agents it humanizes them and that also creates a different perception of the judicial system; lastly, it slowly brings about a clearer understanding of information regarding judicial cases or, more broadly, the judicial system (that is especially relevant when considering the need to equip people with basic legal knowledge so that they are more prepared to read reports of judicial cases).

The main target of the programs that could be designed to achieve those goals is schools. Schools are the ideal place to host mock trials[23] and informal talks about the administration of justice and the judiciary and other legal professions. These activities could also take place in courtrooms, if local schools do not have adequate facilities to host them.

[23] In Portugal, for instance, there is already a program that organizes mock trials in schools. It is called «*Justiça para Todos*» which means «*Justice for Everyone*».

The obstacle that might be used to question the feasibility of those programs is related to the busy schedules of judges, prosecutors and lawyers, worsened by the fact that they would have to coordinate their timetables.

If the programs now being suggested are planned and various teams (composed of one judge, one prosecutor and one lawyer) are organized, participating in them would occupy two or three days in each year. We are not indifferent to the full schedules of those agents, however weighing in their timetables and the need to effectively communicate justice (which the programs now being covered indirectly help), we consider that two or three days are perfectly achievable.

These programs could be organized by Courts, schools, Bar Associations and representative entities of judges, prosecutors and lawyers.

6. Language in public hearings

Taking into account that hearings are public, judges should be particularly careful with the use of technical language. The need to use accessible and comprehensible language is, first and foremost, related with the guarantee of the rights of the parties. Still, it is undeniable that, at least in smaller towns where people are more accustomed to watching hearings, the use of comprehensive language aids the communication of justice that is being administered.

CONCLUSION

In contemporary societies, the media has conquered a place as the Fourth power, beside the legislative, executive and judiciary power. The relationship between these powers is, like any other power relationship, characterized by constant tension, and the tension between the media and the judicial system was the starting point for this paper.

The media has a vital role in democratic societies: to inform the community about matters regarding public concern, granted that the administration of justice is one of those matters. Although this is crucial it also poses a problem, worsened by the growing interest of the media in judicial matters: the clear and simple language used by the media, which signifies it is understandable by everyone, coupled with the uncritical acceptance of the media's news as absolute truths and the passive attitude of the judicial system and its technical language has resulted in a bad and inaccurate image of that system.

In order to find a balance between these two powers and to improve the communication of justice by the judicial system, there have been many initiatives (not just in Europe but all over the world) regarding this subject: Conventions designed to guarantee the rights protected by those powers, recommendations and codes of conduct about how those rights can be conciliated. In more extreme cases, the ECtHR has also proved important, solving the conflict between the many rights at stake.

An important limit in this respect is judge's duty of confidentiality, which means that they cannot comment on their cases or any other case directly.

Bearing all of this in mind, in this paper we have argued that the judicial system has to recognize the media's relevance and take advantage of the power it has. However, it is equally important to take an active role in informing the community and adopting a preventive, rather than a merely reactive attitude towards the media's misreporting of the administration of justice.

The measures suggested are an expression of these principles.

We are not deluded by the effect of these measures and we do not think they will miraculously and completely solve the issues described. However, considering that the judicial system exercises a State power on behalf of the community, it is under the obligation of transparency and to inform the community of the administration of justice. Therefore, it has to endeavors to improve the communication of justice, rebuilding the bridge between the judicial system and the community which will also allow the increase of trust in that system and fortify its legitimacy.

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CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

4.

4.2. THE INDEPENDENCE OF THE JUDICIARY IN THE DEMOCRATIC BALANCE OF THE 21ST CENTURY

Team Portugal II

João Miguel | José Ramos | Sara Domingos

Accompanying Teacher

Rui Cardoso

CENTRO
DE ESTUDOS
JUDICIÁRIOS

JUDICIAL ETHICS AND PROFESSIONAL CONDUCT THEMIS COMPETITION
SEMI-FINAL D
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Accompanying Teacher
Rui Cardoso

Introduction

As VERGÍLIO FERREIRA, a famous Portuguese author, once wrote, "[the exercise of *freedom*] *has to be in the name of what is indisputable to us, that is, of that in relation to which one is not free. Freedom only has meaning against something that opposes to us. But what we do not always think is that it only makes sense to be* against, *if we are* in the name of"[1].

Present times provide us with endless *trials* regarding the *boundaries* of freedom to adjudicate (and, in general, to exercise the judicial power), comprised in the *independence of the judiciary*: particularly, the challenges imposed by the social changes of the 21st century, productivity obligations and illegitimate interventions by the legislative and executive powers.

In this context, in order for judicial *independence* to overcome the status of mere abstract proclamation of *devoir-être,* it is of utmost importance to affirm the need to entrust courts with the preservation of both fundamental rights and the core of judicial independence, which is "*the key to upholding the rule of law in a free and democratic society*"[2], as values *in the name of* which independence is exerted.

I. The concept of independence

From a semantic point of view, the concept of independence comprises a positive aspect of discretion and a negative aspect related with the state of not being under control or influence from others. In the judicial sense, discretion/autonomy is ultimately limited by the *rule of law.*

However, the concept of judicial independence is highly indeterminate. In order to define it, one should begin with an overview of legal provisions on the matter. In regard to international conventions, Article 10 of the Universal Declaration of Human Rights provides that "*everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal* (…)"*;* Article 14(1) of the International Covenant on Civil and Political Rights (1966) states that "(…)*everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*"; the EU Charter of Fundamental Rights, under Article 47(2), determines that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*"; according to Article 6 (1) of European Convention on Human Rights "*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 (…)*".

From the normative elements enunciated, it immediately follows that the concept of independence appears usually associated with the provision of the *fair trial*, that it, as a fundamental *right of the citizens.* [3] [4] However, judicial independence involves more than what is read at first glance in these

[1] VERGÍLIO FERREIRA (1992), p. 34.
[2] AN POWER (2012), p. 1.
[3] Cfr. LABORINHO LÚCIO (2000), p. 34.

legal texts. Worthy of account is what is provided for in the *Bangalore Principles of Judicial Conduct*[5], which define independence, primarily, as a value: "*judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects*"; thus, the value is distinguished from the *ought* (*devoir-être*).

I.1. The value – corollary of the rule of law

Judicial independence, more than a mere *individual* right, is rendered as a true corollary of the democratic *rule of law,* as courts are sovereign bodies with power to administer justice in the name of the people and it falls to them to defend the rights and legal interests of the citizens, restrain breaches of the law and to resolve conflicts of private or public interests.

"*Independence is - must be - the essential status of a true court and a true judge, for it is only on the basis of it and through it that the intention to truth and justice that is structurally inherent in the activity of the courts - of each court - is susceptible to be achieved. Only with regard to it there is a guarantee that the judicial decision can be valid as an emanation of the law and not simply as a decision-making act of the State*".[6]

In this sense, judicial independence is a guarantee of the equality of citizens[7] and *individual* freedom towards political power[8]. This reasoning provides for an increased importance of the independence of the judiciary, not only at State level, but also at the level of the European Union.

Unequivocally, the independence of the judiciary is a *conditio sine qua non* of the maintenance of the democratic rule of law and, therefore, one of the pillars of the European Union (Article 2 TEU).

Going deeper, taking into account the fact that the national courts are the first line of interpretation and application of European Union law (Articles 4 (3) and 19 (1) TEU), in addition to the obligation upon the Member States concerning judicial cooperation and the establishment of a common area of freedom, security and justice, based on reciprocal trust, one quickly realizes that ensuring the existence of effective judicial independence within each of the Member States is, after all, part of the *guarantees* of the European Union and "*inherent in the task of adjudication*"[9].

Recently, the CJEU reflected this view in its judgment of 27-02-2018, Case C-64/16. Citing the judgment in question, "*the very existence of effective judicial review to ensure compliance with Union law is inherent in the rule of law* (…).

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[4] Cfr. Judgments of the ECtHR *Baka v. Hungary* (2016)*, Procola v. Luxembourg* (1995), *McGonnell v. UK* (2000), *Findlay v. UK* (1997), §52.
[5] Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.
[6] JORGE MIRANDA/RUI MEDEIROS (2007), p. 37.
[7] ORLANDO AFONSO (2017), p. 45.
[8] JOSÉ PASCUA (2007), p. 60.
[9] Cfr. judgment of 27-02-2018, Case C-64/16, of the CJEU, §42.

It follows that any Member State must ensure that bodies which, as a 'court or tribunal' within the meaning of Union law, form part of its system of remedies in areas covered by Union law satisfy the requirements of judicial protection effective".

Furthermore, "*the independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence*".

The view taken by the CJEU on judicial independence may also lead to future infringement proceedings brought by the Commission against Member States for breaching the principle of the independence of the judiciary, either on its own initiative, or even, and this would be an innovative solution, by another Member State.

I.2. The *ought* – independence in action

Ought means direction towards *something* - the value being that *something* and ought being the *modus essendi* of the value[10]. In that sense, the value of independence is pursued through ethical norms as well as through institutional guarantees, defending judges, the judicial system and, as mentioned before, democratic rule of law.

Separation of powers,[11] freedom of hierarchical constraint or subordination[12] and exclusive submission to law[13] are usually seen as the prime elements of independence. Indeed, judges should be "*able to act without any restriction, improper influence, pressure, threat or fear of interference, direct or indirect, from any authority, including authorities internal to the judiciary*"[14] in order to deliver binding judgments impervious to modification by a non-judicial authority, which is also an element of the independence of the judiciary, as held by the ECtHR in *Van de Hurk v. the Netherlands.*[15]

Also, immunity and non-liability resulting from decisions, prohibition to initiate proceedings *ex officio*, reasonable remuneration[16], stability of tenure, irremovability by the executive[17], a sole body of judges, the principle of natural justice (or establishment of a tribunal by law) [18] and selection of new judges under objective criteria account for the adequate exercise of the function entrusted to the judiciary.

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[10] JOHANNES HESSEN (1974), pp. 86, 87.
[11] Cfr. ECtHR judgment, *Campbell and Fell v. the United Kingdom* (28 June 1984).
[12] Cfr. judgment of 27-02-2018, Case C-64/16, of the CJEU, §42; ORLANDO AFONSO (2017), p. 45.
[13] JUAN AROCA (1990), p. 120; the author refers that the judicial branch should ultimately only be subject to the Constitution, accepting ordinary law in the terms of a constitutional delegation.
[14] ANN POWER (2012), p. 3.
[15] Cfr. ECtHR judgment *Van de Hurk v. the Netherlands*, (19 April 1994).
[16] Cfr. judgment of 27-02-2018, Case C-64/16, of the CJEU, §17; SHIMON SHETREET (2013), pp. 156, 164
[17] Cfr. ECtHR judgment *Henryk Urban and Ryszard Urban v. Poland* (30 November, 2010).
[18] Marcuccio v Commission (Case C-528/08 P)

One of the vital institutional preconditions for independence lies on the provisions regarding appointment, discipline and removal of judges and, specifically, the independence of the entity in charge of that activity[19] [20]. Indeed, this point is of the utmost importance, constituting a benchmark of democracy. In this respect, AROCA provides a bold statement: "*in this context, it seems obvious that the guardian of independence of others must be itself independent*. *If it were not so, we would be before the Absurd*"[21].

Furthermore, the public prosecution office must also enjoy a considerable degree of independence from the executive power[22] – given that it is responsible for channeling charges into the courts, otherwise rendering judiciary's independence, in certain cases, useless.

From an ethical perspective, there are rules usually imposed on judges: the inability to perform other professional activities, the obligation to refrain from political connections, to not give opinions on ongoing cases, the prohibition of accepting gifts or favours[23], among other norms. It is a duty of the judiciary to behave in a certain manner, undoubtedly in their personal life, but especially whilst rendering decisions.

The *Bangalore Principles* point out, in Article 1.1., that "*a judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason*".

It should also be noted that independence in action must be guided by the goals it aims to achieve. "O*ne of the most appropriate ways to define the ethical model of a judge,* (…) *is to return to the general principles. And the general nuclear principle is none other than that which consists in observing the duties of the judge from the point of view of the aims of the judicial function. According these aims, if what is asked of the judge is that he applies the law in a fair and lawful manner, this aim of legal justice must be present in all his acts, throughout his life, because the best way to be just in the application of the law is striving to obtain an ideal of justice in all his works*".[24]

[19] "*These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge*", cfr. preamble of the *Bangalore Principles of judicial conduct.*

[20] Regarding the independence of the self-government body that appoints, promotes, removes, transfers and regulates judges, two views appear to be acceptable: the "strict" version, demanding total separation from other branches in order to inhibit interferences and contamination; the "harmonic" version, admitting members from outside the judiciary, to prevent an isolated, reckless body with no connection to society and other institutions, cfr. CONSIGLIO SUPERIORE DELLA MAGISTRATURA (2001), p. 121-122.

[21] JUAN AROCA (1990), p. 125.

[22] CARLO GUARNIERI (1981), p. 229.

[23] Cfr. *Bangalore Principles of Judicial Conduct,* 4.14.

[24] LORENZO DEL RÍO FERNÁNDEZ (2009), p. 117.

II. The 21st century as a new challenge for the judiciary

"*The role of courts in society is not static; it is in a continuous process of change and transition*"[25]

European society is becoming more diverse and intricate, with law having to face challenges such as multiculturalism, specialized crime, the explosion of mass litigation and new forms of trade.

Moreover, due to the growth of inequalities and feeling of injustice, Europeans seem to be losing their confidence in institutions, on which "*depends the very survival of States and societies, and more specifically the satisfactory functioning of the systems of political democracy*".[26] ROUSSEAU, in *The Social Contract*, affirmed that the damage of collective references and the breach of social bonds may lead to law following private interest, which is negative for the collectivity.[27] In that same sense, the danger for the community, that senses the forfeiture of sovereignty, derives from the fact that "*States and politicians* de facto *'answer to the markets', that is, to powers which are anonymous, global and distant, but at the same time local and pervasive*"[28].

Furthermore, governments and parliaments enact new regulations, often technical and specific, create diverse institutional responses and prescribe vectors of action for courts in addition to traditional judgment while struggling to deal with the current hyper-complex[29] system of society.

Thus, in 21st century democracies, judicial *redress* is sought to solve issues where administrative and political institutions have either failed or refrained to deal with (avoiding its electoral downside), witnessing the growth of judicial intervention, resolving "*disputes that are economic or political in nature*"[30] and shielding the expansive tendency of the content of fundamental rights[31].

Further engagement of the judicial system in contemporary democracy must safeguard human dignity, equality and non-discrimination of minorities, new fundamental rights such as informational self-determination[32] and the confidence in democratic rule of law.

The judge must therefore come to terms with these transformations and manage to preserve a neutral position in society, while capturing the mentality and values of the era he lives in, and maintaining independence while taking decisions that delve in new issues or that may be considered against the popular will.

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[25] SHIMON SHETREET (1988), p. 467.
[26] GIAMPIERO BORDINO (2014), p. 1.
[27] JEAN-JACQUES ROUSSEAU (2010), p. 103.
[28] GIAMPIERO BORDINO (2014), p. 1.
[29] "*Hyper-complexity is a system that is poorly hierarchized, multipolar, more dominated by strategic and heuristic skills, more dependent on intercommunication, more subjected to disorder, to noise, to error*", cfr. EDGAR MORIN (1973), p. 115.
[30] SHIMON SHETREET (2013), p. 19.
[31] GUARNIERI/PEDERZOLI (1996), p. 150.
[32] CATARINA BOTELHO (2018), p. 122.

II.1. The *Stranger* and the *Enemy*

The refugee crisis, the - unavoidable[33] - arrival of people of the developing world and the growth of minorities[34] (including gender and sexual minorities) are becoming targets of the public eye, producing new layers of social diversity and creating difficulties for integration; these groups become the *Stranger*[35], the unfamiliar element of the community, comprising "*alien styles of life*"[36].

On the other hand, terrorism fears, aggravated by the recent attacks in the heart of Europe, have not only led to increased communitarian security accompanied by the tightening of fundamental freedoms, but to the complicated issues of the Criminal Law of the *Enemy* (*Feindstrafrecht*) and the clash between the protection of public interest and human rights.[37]

Despite the fact unfamiliarity or terror will lead to *rejection* based upon fear by the majority (resulting in less tolerant political choices or in the risk of judges being overtaken by their own emotions), the courts must embody the balance that democratic rule of law requires and ensure the respect for human rights, with UN Human Rights Council reiterating the importance of the independence of the judiciary towards this matter.[38]

It must be asserted that, at times, the courts will lay a counter-majoritarian[39] decision and that decision will remain democratic[40], because if the holder of a right "*has no way to enforce it, the right resembles the concept as it exists in an authoritarian regime*".[41]

BURT NEUBORNE defends that majorities can be as unfair as authoritarian elites towards weak and unpopular groups or subjects, devaluing minorities. "*Even at its best, political democracy risks overvaluing the needs of the 'ins' and undervaluing the interest of the 'outs', especially when the outs are despised or feared*"[42], rendering the legal treatment of minorities "*one of the principal tests of how far respect for human rights and the rule of law is observed*".[43]
Currently, the task laid upon the judge gains crucial importance amidst globalization and, particularly, in an European Union of 28 different countries; integration and the single *market* broaden the group of addressees of a legal framework[44] that makes national courts true guardians of fundamental rights of a diversified population.

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[33] NADIA URBINATI (2017), *passim.*
[34] Cf. ECtHR judgment *D.H. and Others v. Czech Republic* (2007).
[35] ZYGMUNT BAUMAN (1991), *passim.*
[36] ZYGMUNT BAUMAN (1998), p. 11.
[37] Opinion no. 8 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on "the role of judges in the protection of the rule of law and human rights in the context of terrorism".
[38] Cfr. Report of the Special Rapporteur on the independence of judges and lawyers (2017).
[39] GUARNIERI/PEDERZOLI (1996), p. 150.
[40] Cfr. JOSÉ PASCUA (2007), p. 46; ORLANDO AFONSO (2004), p. 61, "only the truth of the judicial formulations and the freedom of the citizens constitute the source of legitimacy of the jurisdiction. Truth and freedom (from personal freedom to freedom of thought, from rights of defense to political freedoms) have to be guaranteed by a power that is not tied to the interests of the majority".
[41] BURT NEUBORNE (1988), p. 190.
[42] BURT NEUBORNE (1988), p. 190.
[43] PETER ASHMAN (1993), p. 3.
[44] For example, the European Arrest Warrant or the European Investigation Order.

Besides, in this cooperation context, a new duty to acquire foreign language skills might be envisioned in order to eliminate obstacles and intermediaries that may obstruct the immediacy favoured in the *decision* of the case. In this sense, the judge must exert independence while becoming accountable before a larger audience and subject to pressure from foreign authorities, guaranteeing, on one side, mutual recognition and steady assistance, and, on the other, individual freedoms and procedural rights of nationals and foreigners.

Therefore, the European judiciary must be aware of *difference* and be the first to learn how to cope with the *Stranger* and to deal with the *Enemy* in order to secure the individual rights and freedoms in a globalized background.

II.2. Judges *on trial* - confidence *in* independence

Mass *media* is one of the most recognized characteristics of our time, penetrating all aspects of contemporary life[45]. It is set on real time, by countless operators, providing an accelerated, yet inconsistent, stream of information.[46]

Although it has become one of the main instruments for external scrutiny of judicial proceedings[47], traditional and social media tend to hold one-sided views, fragmented references and biased constructions of those references[48], more often perceived as an entertainment product channeled to please the shallow curiosity of audiences rather than a platform providing content relevant to legitimate public interest.

SHIMON SHETREET and SOPHIE TURENNE hold that public scrutiny is perhaps the most important of the checks on the judiciary, and should therefore be welcomed, as judicial activity is of public interest at all times, and, ultimately, *public property*. SHETREET and TURENNE consider that, notwithstanding the increasing powerlessness of law to prevent comments or press *leaks* concerning proceedings under judicial *secrecy*,[49] limits to scrutiny should be provided for, given the threat to judicial independence caused by *immoderate* media or governmental censure.[50]

In fact, the opposition to attacks against the independence of the judiciary will be stronger if there is a fierce public debate and a free press.[51] In that sense, the judiciary must not give up its role as regards the media, given that judges are also part of the democratic dialogue[52] and have the responsibility to share their constitutional viewpoint with citizens. The trust of the public in the judiciary and, particularly, in its independence, constitutes a safeguard of that same independence.

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[45] MARK DEUZE (2011), p. 137.
[46] JEAN BAUDRILLARD (1991), p. 103-4.
[47] The right to a fair trial enshrined in Article 6 of the ECHR includes *media coverage* – cfr. CHRISTOPH GRABENWARTER (2014), p. 145.
[48] HENRIQUES GASPAR (2010), p. 168-9.
[49] A. T. H. SMITH (2000), p. 127.
[50] SHIMON SHETREET (2013), p. 382.
[51] SALVATORE SENESE (2008), p. 30.
[52] NORMAN REDLICH (1988), p. 156.

Albeit exposure by judges and prosecutors while expressing their opinions might compromise their independent outlook (by revealing their standing on certain matters taken to their judgment or otherwise leading to a generalization of that viewpoint to the whole body at the eyes of the community), the courts must find an adequate way to broadcast the execution of the judicial power.

The independence of the judiciary requires the courts to communicate on their own terms and to be cautious before adopting the media's methods, pace and framework. Nevertheless, the courts are bound to the duty of informing and updating the public opinion which is, as KARL POPPER stressed in 1987, extremely powerful, and "*constitutes a de-responsabilised power that can be adapted, staged and strategically planned*".[53] Accordingly, the judicial system plays a role in protecting free speech in society, as democracy depends not only on the right to vote but on the diffusion of information and opinion to the citizens.

The broadcasting of judiciary's message does not mean a distortion of institutions, but, at most, the start of a "*constitutional mutation*" claimed by the new *information* society[54], by means of a new democratic form of control and accountability, enhanced by digital sources providing permanently accessible information.

In fact, this accountability means that the courts must play their role not only independently, but while creating an *appearance* of independence. As the Strasbourg Court stresses, in accordance with the concept of independence enshrined in Article 6 (1) ECHR, it must not be ignored that citizens are entitled to be kept from objectively justified doubts on independence[55]. "*In the exercise of their judicial functions, judges shall* (…) *avoid any situation that may affect confidence in their independence*"[56].

Therefore, the courts have the obligation to shape public opinion, within the boundaries of truth, so as to enhance their legitimacy among a *polymorphic* audience subject to media distortion and defend themselves against attempts to undermine their independence, in order for the latter to be taken as a chief priority by citizens.

II.3 Writing the truth with independence

In the present day, the judge is more than just a law technician: he is a social therapist, a minister of equity[57], a conciliator, a solution finder, a pacifier. However, in an age where boundaries of knowledge stretch and access to information is widespread, the judge has become *la bouche de la verité*.

[53] KARL POPPER (1992), p. 144-45.
[54] VICTOR SOUZA (2016), p. 76.
[55] Cfr. ECtHR judgments *Campbell and Fell v. the United Kingdom* (28 June 1984), *Langborger v. Sweden* (22 June 1989), *Procola v. Luxembourg* (28 September 1995) and *McGonnell v. the United Kingdom* (8 February 2000).
[56] Cfr. *Resolution on Judicial Ethics*, ECtHR, 2008.
[57] HENRIQUES GASPAR (2010), p. 23.

Currently, the judiciary operates in an age of alternative facts and fake news that are planted in public opinion – the "*disillusionment with institutional structures has led to a point in which people don't believe in facts anymore*"[58]. Furthermore, there is a growing challenge concerning the trust in the correspondence of conveyed knowledge and reality.[59]

The courts, in dealing with the cases brought before them with independence, providing rigorous treatment of facts within fair proceedings, have the ability to take on a new position in society as creators of *negative entropy*[60], becoming a safe reference for citizens. If immune to the interests that support media, the judicial proceedings enable the gathering of information through independent investigation beyond open sources available to the regular citizen; the adversarial or *inter partes* procedures allow all the parties to be heard; and thoroughness in evidentiary analysis provide superior reliability than the constant urge of information exposure[61].

Evidently, courts are not able to answer every question or address every subject that the community would consider itself entitled to be informed of, neither will they provide conclusions at the pace that the media does; conversely, in an era of loss of references and breach of reliance, independence from political or economic influences renders courts a trustworthy institution for one of contemporary society's scarcities: truth.

III. Procedural independence: a concrete case *upstream* the decision

III.1. Productivity as a quality standard

As stated above, the judiciary is confronted today with requirements that go beyond the exercise of its traditional role and that may *limit* its content. It is necessary that "*the independence of the judiciary is not only related to the act of adjudicating, because it implies its presence upstream and downstream of the decision, and requires the creation of organizational models of the judicial system that allow the affirmation, exercise and exposure of independence, not only of each judge in particular, but of the judiciary itself as a whole*" [62]
In the same sense, the constitutionalisation of fundamental rights does not end at the material level. It also takes on an unequivocal organizational, procedural dimension – e.g., the right to access to justice, the right to effective judicial protection, cfr. Article 6(1) ECHR.

Consider, for example, the requirements provided for in the law regarding the increase in productivity within the judiciary. The judicial system is being treated as a public service which must meet quantitative levels within necessarily scarce resources, summoning a demand and supply approach to justice[63] which renders judges employees of the state.

[58] Cfr. NOAM CHOMSKY (2018).
[59] Correspondence theory of truth, cfr. IMMANUEL KANT (2008), p. 197.
[60] ERWIN SCHRÖDINGER (1944), p. 24.
[61] ANTOINE GARAPON, (2001), p. 280.
[62] ORLANDO AFONSO (2004), p. 78.
[63] SHIMON SHETREET (2013), p. 10.

This criterion allows the definition of results *a priori* and an evaluation *a posteriori*, establishing a comparative relation between the proposed objective and the objective achieved. This type of evaluation is only possible if there is a standardization of the activity assessed, which occurs in the field of industrial production process (evaluation of the production process of various goods with the same exact characteristics and nature).

The pursuit of efficiency in the administration of justice only apparently seems to be compatible (and even desirable) with the independence of the judiciary. Indeed, the view of subjecting the judiciary to *production* rate is, at least, flawed[64].

Typically, the determination of the level of efficiency is associated with a quantitative criterion, based on speed. The faster the process leading to the final result, the more efficient the activity will be.

However, efficiency measured on the basis of promptness, which results in a quantification of the judicial activity (number of decisions, progress of the proceedings, etc.) is neither possible nor compatible with the independence requirements of the judicial power.

In fact, the jurisdictional activity is characterized precisely by the solution of concrete disputes, assuming distinct *shapes and forms* from each other. The individuality of the dispute to be tried requires different methods in the exercise of the judicial power (case study, analyzing case law and doctrine, collaboration with entities outside the court, international judicial cooperation).

The aforementioned reasons demonstrate that the blind quantification of objectives and evaluation of the activity of the judiciary (based on speed and not on the content of *justice*) has no logical nor teleological support, since it can only find a place in the economy, being left out of the performance of a function associated with sovereignty.

In comparison to the other sovereign powers, the definition of quantitative objectives for the legislative and executive powers (e.g. setting the objective of approving 200 enactments during a session) would hardly be considered as acceptable. By the same reason, this perception should apply in regards to the judicial system since the "*quality of justice should not be understood as a synonym for mere productivity of the judicial system*"[65].

In particular, as regards these efficiency requirements, it should be noted that "*reorganizing the judiciary is not putting it on a quantitatively high (but costly) production line of dubious quality: it is not to make it work within the time-limits dictated by a globalized economy but rather to restore it to the effectiveness of the reasonable time*".[66]

Therefore, efficiency will have to be assessed according to the concrete outlines of the activity carried out by each judge and not by an illusory standardization, otherwise imposing a judicial

[64] ORLANDO AFONSO (2017), p. 106.
[65] Opinion no. 6 (2004) of the Consultative Council of European Judges (CCJE) on fair trial with a reasonable time.
[66] ORLANDO AFONSO (2004), pp. 196.

culture of speed, resulting in thoughtless decisions (or lacking reflection) and stagnation of legal thinking.

III.2. Prevalence of *justice*: fair decision in reasonable time

The conscience and will of the judge[67] shall lead them, inherently, to pursue justice in a thoughtful way and according to the best interpretation of the law, rejecting an instantaneous and *low cost* justice, made at the expense of a mature study, adapted to the case.
In fact, since it deeply conflicts with the concept of independence, the judiciary must reject the application of quantitative criteria that belong to the economy and management fields, because it seems incompatible with its idiosyncrasy and design. As seen under Article 6(1) ECHR, the delay of the proceedings, must be assessed according to the specific circumstances of the case[68].

On the other hand, the use of language related to the business world contributes to the deterioration and adulteration of the image of Justice, associating it with the world of the ephemeral and of the slavery of profit, far from its public purpose, better translated by "*suum cuique tribuere*" (ULPIANUS).

The timings of Justice will never be the timings of the economy, since Justice is not translatable into numbers, but only through the concepts of *right* and *wrong*, while perceiving the peculiarities of the case.

What was set out above must not, however, dispel the search for efficiency and speed in the judicial sphere, but rather to base that assessment on criteria suitable to the jurisdictional activity.
In respect to this drive for efficiency, "*a balance must be struck between the value of efficiency in the administration of justice and the value of procedural fairness, a balance necessary to sustain the public confidence in the courts*".[69]
It should also be noted that, in order to approach those timings, the judiciary shall be equipped with material means suitable to achieve its purpose[70]; the judiciary shall not be subject to pressures disguised in numbers or graphics without correspondence with the *content* of justice of a proceeding or decision.

In a similar approach, the Magna Carta of Judges[71] (Fundamental Principles) prescribes that "*following consultation with the judiciary, the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system*".

[67] CARLO GUARNIERI (1981), p. 104, mentions that acting according to one's own conscience is a product of independence.
[68] CHRISTOPH GRABENWARTER (2014), p. 141-2.
[69] SHIMON SHETREET (2013), p. 95.
[70] As prescribed in Recommendation no. R (94) 12 of the committee of ministers to member states on the independence, efficiency and role of judges.
[71] CCEJ, 2010.

IV. Overcoming Montesquieu: creativity as an ethical imperative

"*Mais les juges de la nation ne sont, comme nous avons dit,*
que la bouche qui prononce les paroles de la loi"
MONTESQUIEU, *De L'esprit des Loix*[72]

Interpretation and application of the law is not a univocal question, as MONTESQUIEU intended. GUASTINI points out that "*jurists and judges actually disagree about the meanings of most statutory and constitutional sentences. In other words, most legal provisions are in fact interpreted, at least diachronically, in different ways.* (…) *Therefore most legal provisions are liable to different and competing interpretations.* (…) *Nevertheless, no truth-criterion is available for meaning-ascribing sentences – at least, nobody was able to identify and defend a convincing criterion.* (…) *As a consequence, any interpretive decision – i.e., any act of interpretation accomplished by subjects, such as judges, who apply the law – supposes a choice between competing possibilities. This amounts to saying that interpretation is not an act of knowledge but rather an 'act of will', which always implies discretion*".[73]

At this point, the purely literal application of the law appears as possible, but not as a necessarily adequate solution. Although it is true that interpretation and application must be distinguished from the *creation* of law (in accordance with the principle of separation of powers) – meaning the creation of new *statutes*–, it must also be noted that a legal sentence admits a varied number of interpretations[74], assigning the judge a certain interpretative discretion within the framework of possible interpretations.

In this particular point, there is no method to establish, *a priori*, a hierarchy between the various semantic contents that can be extracted from a statute (and the *literal* meaning does not necessarily prevail on other options)[75]. "*In a sense, interpretation is the very source of legal rules, since 'it is only words that the legislature utters', and legal texts 'do not interpret themselves'. I mean that law-giving authorities issue not meanings (rules), but just sentences, whose normative meaning contents – i.e., the expressed rules – are to be detected by means of interpretation. This is not to say that legal sentences have no meaning at all before interpretation.* (…)"[76]

To the ambiguity of language in law is added the possibility of conflicts between rules and the fact that there are cases that do not fit under any existing valid norm.[77] [78]

Indeed, if it is true that *courts are independent and are subject to the law*, it does not follow that judges apply all statutes uncritically. "*From the very principle of the separation of powers derives only, in what concerns this matter, that the constitutional holders of the legislative power have a monopoly over the approval of legislative acts; it does not follow that they have a monopolistic role*

[72] Cf. MONTESQUIEU (1817), p. 136.
[73] RICCARDO GUASTINI (2005), p. 139.
[74] MARTIN LOUGHLIN (2000), p. 91.
[75] HANS KELSEN (2008), p. 381.
[76] RICCARDO GUASTINI (2005), p. 141.
[77] ALEXY (2001), p. 17.
[78] Reminding that law is mostly a *semi*-finished work, cfr. HENRIQUES GASPAR (2007), p. 23.

on the creation of the law. In a word: if it is true that the independence of the courts (…) *is affirmed in principle through obedience to the law, the truth is that respect for the dignity of the human being and for the requirements of the rule of law allow courts to act beyond the law or even against the law*".[79]

It might be questioned if what was mentioned undermines the ideal of the rule of law, in the form of *legal certainty*. As noted, the margin of uncertainty and ambiguity is in the very nature of the Law[80], imposing reasons for the decision. In this context, it seems that the court is required to justify the legal conclusions it reaches, but is not unconditionally bound to the will of the legislature or the whims of political institutions, becoming the formalist "*operator of a giant syllogism machine*"[81]. That is, the antithesis is merely apparent.[82]

Considering that the legal system contains uncertainty and contradiction and the judge is bound by the law, it seems that an effort is required of the judge to examine the possible meanings of the law in coherence with the essential principles of the system. In this respect, and with particular reference to safeguarding the fundamental principles of the democratic rule of law in crisis, it is particularly important to adopt a teleological perspective, based on the aims of the system. In fact, the legislator's political rationality does not always coincide with the *reasoning* of the jurisdiction[83] and an efficient system of judicial review is totally incompatible with an *antilibertarian, absolute, dictatorial regime*, as is amply proven by historical experience[84].

This perspective, in the light of what has been referred in the previous sections, is essential to safeguarding the ultimate values of the system. Furthermore, since, in accordance with the rule of law, higher norms limit *discretion* on the exercise of powers, "*courts tend to appear as a cornerstone of the rule of law: norms' hierarchy does not become effective if it is not judicially sanctioned and fundamental rights are not ensured if there are no independent judges to guarantee their protection*"[85] . Judicial review[86], whether of the constitutionality of statutes and other normative acts, or of the legality of administrative acts, becomes an essential characteristic of the rule of law.

The margin of discretion in determining the rule of the case or the prevailing norm, associated with the allocation of reasons for deciding is, thus, also a manifestation of judicial independence and not an obstacle to the separation of powers. It is within this margin of interpretative discretion, associated with the *duty to* give reasons for the decision, that the judge is required to apply the normative content that, *in casu*, is best suited to the equitable solution of the case. The existence of

[79] Rui Medeiros/Jorge Miranda (2007), pp. 39-40.
[80] Martin Loughlin (2000), p. 92.
[81] Vitalius Tumonis (2012), p. 137.
[82] Neil Maccormick (2005), p. 254.
[83] Stressing the differences between *legal reasoning* and *political reasoning*, cfr. Christoph Mollers (2012), p. 7.
[84] Mauro Cappelletti (1988), p. 85.
[85] Orlando Afonso (2004), p. 19.
[86] As Mauro Cappelletti (1988), p. 90, states that "*(i) judicial review of legislation is necessary if one wants to have a serious chance of making a constitution effective as an enforceable law superior to, and binding upon, the political branches. And yet, (ii) the review power, to be effective, can be entrusted only to judges, i.e., to persons and bodies (relatively) unaccountable to the political power*".

this margin of discretion must be assumed and considered as an *instrument* aiming at the best decision, and above all to ensure an equitable solution of the case. "*The judge is not an absolute power, but a power responsible to provide for justice in conflictual relations*"[87].
"*Judges, at the present time, tend to present themselves as true political actors*" as judicial decisions are also part of the process of determining *individual rights.* "*The conflict that exists today in contemporary societies, the type of controversial legal relationships arising from scientific and technological development, postulate the existence of a judiciary capable of delivering effective responses in an increasingly unanswered political context*"[88]. In fact, the judiciary must not give *dead answers to living questions*[89].

In this context, *discretion* conferred by law still seems to be an ideal way to make the law more flexible, allowing for a fair decision in the specific case. For this reason, an active search for the *best* law possible, which is more suited to the case, is required – that is, the judge is required to create law, which is more in line with the values independence aims to ensure: dignity of the human person, fundamental rights and democratic rule of law. In this sense, the contemporary profile of the judge is the "*guardian judge*"[90].

Jurisprudential creativity is a largely acknowledged phenomenon[91] and a constitutive element of contemporary democratic societies, not only linked to cultural mutations such as "*the anti-formalist revolt*" - or in other words the criticism towards a positivist theory of law interpretation – but also a deep transformation of the relation between the state and society.[92] The judicial creativity at stake doesn't mean a misappropriation of power[93], since, as BENJAMIN CARDOZO mentions, "*the Law that results from that operation is discovered, not created*".[94] [95]

If submission to law is a central element of independence, it is an ethical duty, given the context of frailties listed above, to apply the *best possible law*, in conscience and with an active approach. In this sense, creativity must be assumed as a *virtue of the good judge.*

V. Conclusion: a *duty of resistance*

The 21st century judge is compelled to adopt a role as the last stronghold of democratic rule of law, seizing the content of *freedom* conferred by the institutional prerogative of *independence* – as part of his "genetic code"[96].

[87] MIGUEL YÁÑEZ (2009), p. 221.
[88] ORLANDO AFONSO (2004), p. 82.
[89] ORLANDO AFONSO (2004), p. 186.
[90] GUARNIERI/PEDERZOLI (1996), p. 71.
[91] On this matter, cfr. HART (2007), p. 335.
[92] GUARNIERI/PEDERZOLI (1996), p. 148.
[93] CATARINA BOTELHO (2018), p. 121.
[94] BENJAMIN CARDOZO (2004), p. 84.
[95] Also, CATARINA BOTELHO (2018), p. 121, claims that *judicial activism* is a round and plastic concept devoid of methodological criticism to the adjudicative role, depending, most of the times, on the agreement our disagreement towards the decision.
[96] HENRIQUES GASPAR (2018), p. 5.

To be effective, *independence* must be total, and affirmed as an *absolute* value. The limitation, however partial, of independence implies the denial of the freedom it conveys.

Therefore, interventions in the fundamental principle of *independence of the judiciary*, must not limit its content[97], given that "*there is a 'static, absolute and insurmountable barrier to aggressive intervention by the legislator*(…)'"[98] that the courts shall ultimately take as their own responsibility.

This *ethical* duty is enshrined in the TEU and national constitutions[99] which impose the exercise of the judicial power with independence. Thus, it is legitimate to disapply norms which have the potential to call into question the essential content of the jurisdictional function, that may even be considered as a misuse of legislative power.[100]

The aforementioned premises entail the need to affirm an ethical duty of *resistance* to safeguard the useful content of independence. In fact, as CALAMANDREI mentions, there is no other function "*which, more than that of a judge, requires from whom exercises it, that he has a strong sense of dignity; a sense that imposes a search in one's conscience, more than in the opinions of others, of the justification of the function*"[101].

The proclamation of independence, sheltered by sophisticated legal instruments, will be of no avail if its main guardian does not nurture it as a *personal attitude*,[102] standing on trial before the inner court of judgment – his conscience.[103]

[97] The intangibility of the essential content is a conceptual instrument of protection of the respective right in the face of the legislator – cf. JORGE MIRANDA/RUI MEDEIROS (2010), p. 397.
[98] JORGE MIRANDA/RUI MEDEIROS (2010), p. 396.
[99] In this sense, the fundamental principles regarding judicial Independence are enunciated in the constitution. Cfr. Opinion no. 1 (2001) of the of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges.
[100] Cfr. HART (2007), p. 81, stating that legislative acts infringing the core of fundamental rights are *ultra vires* acts.
[101] PIERO CALAMANDREI (2009), p. 143.
[102] GARCIA MARQUES (2006), p. 34.
[103] IMMANUEL KANT (2005), p. 328.

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The Story of Eva (diplomas legislativos criados)

Law no. 345/2018, of 3rd March, on the entry, permanence and removal of third country nationals

Considering recent terrorist attacks in Newland and the resulting growing need to preserve internal security and public order, the Parliament adopts the following statute:

Article 1

Law no. 23/2007, of 4th July, concerning entry, stay, exit and removal of third country nationals from national territory, which transposes Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, is repealed.

Article 2

Entry or permanence of all third country nationals in national territory is prohibited.

Article 3

Any violation of the previous article constitutes a crime, punishable with the penalty of expulsion.

Article 4

Any proceedings concerning the matters referred to in articles 2 and 3 are urgent and are under supervision of the Minister of Justice.

*

Law no. 45/2013, of 13 September, on the Judicial System Organization

(…)

Article 95 (Procedural objectives)

1. The judge is bound by the obligation to complete each case assigned to him within a maximum period of three months.

2. In urgent proceedings, the three month period referred to in the previous number is reduced to one month.

3. Any violation of the previous numbers constitutes a breach of the duty of diligence, punishable in accordance with the Judiciary Law.

4. The Ministry of Justice shall monitor compliance with numbers 1 and 2.

Video

https://www.youtube.com/watch?v=6UT5dpi2igE&index=2&list=PLSjxFtWMXHbOmh0cleOdI6-teph-XAzVn&t=0s

An Ethical Duty (sentença final)

Decision

(…)

Regarding the accusation of terrorism and murder, the evidence collected and examined leads to an impossibility to state, beyond reasonable doubt, that the defendant is criminally liable. In fact, the two witnesses that claim the defendant committed the crime he was charged with didn't offer the court guarantees of stable memory of the event. Furthermore, the negative results of fingerprints and DNA analysis and the five witnesses that deny the presence of the defendant as the driver of the vehicle used for the crime lead to the conclusion that Mr. Fahad must be acquitted of all charges.

(…)

According to article 2 of Law no. 345/2018, «*entry or permanence of all third country nationals in national territory is prohibited*», and constitutes a crime punishable with the penalty of expulsion – cfr. no. 3. The Court considers, however, that the aforementioned statute violates fundamental rights provided for in European Law in a disproportionate way.

Pursuant to article 12(1) of the Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (the «**Directive**»), transposed by the statute repealed by Law no. 345/2018, of 3rd March, on the removal of third country nationals, «*Member States may take a decision to expel a long-term resident* ***solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security***».

The fact that the national law applicable to the case repealed the statute transposing the directive does not imply the *irrelevance* of the EU Law. The Directive has direct effect, as it does not provide for any *discretion* regarding the exclusion of the public order criterion. In fact, it is:

(i) Sufficiently clear and precisely stated,

(ii) Unconditional and not dependent on any other legal provision and confers a specific right (the right not to be subject to expulsion on conditions not provided for in the norm) upon which de defendant may base his claim.

Therefore, the Directive has direct effect and is applicable to the case. Considering that the national law disregards the aforementioned criterion, providing for a penalty of expulsion in *any case* of entry or permanence of third country nationals, in a disproportionate way, the court must disapply the referred rule. Article 12 of the Directive is, thus, applicable.

As stated in the judgment delivered in case C-636/16 «*according to the case-law of the Court, the principal purpose of Directive 2003/109 is the integration of third-country nationals who are settled on a long-term basis in the Member States* (…)

To that end, as stated in recital 16 of Directive 2003/109, the EU legislature takes the view that long-term residents should enjoy reinforced protection against expulsion.
Accordingly, under Article 12(1) of Directive 2003/109, Member States may take a decision to expel a long-term resident ***solely where he or she constitutes an actual and sufficiently serious threat to public policy or public security*****».**

Considering the fact that it has not be proven that the defendant, as a long-term resident, constitutes «*an actual and sufficiently serious threat to public policy or public security*», the rationale of «*integration of third-country nationals who are settled on a long-term* basis» is still applicable to the case, granting the defendant permission to stay in national territory; therefore, the accusation has no grounds on this matter.

The Court hereby rules that the defendant is not criminally liable and shall not be subject to the penalty of expulsion.

Newland, July 5th 2018
Eva Morales

Video

https://www.youtube.com/watch?v=7L7j_ImtHIs&list=PLSjxFtWMXHbOmh0cleOdI6-teph-XAzVn&index=2

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Largo do Limoeiro

1149-048 Lisboa

cej@mail.cej.mj.pt