Trabalhos

Themis 2022

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

THEMIS

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CEJ

Desde dezembro de 2025

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CENTRO
DE ESTUDOS
JUDICIÁRIOS

E-BOOK THEMIS 2022

Relativo aos pertinentes trabalhos do 37.º Curso de Formação de Magistrados para os Tribunais Judiciais e do 8.º Curso de Magistrados para os Tribunais Administrativos e Fiscais

Os diversos trabalhos que compõem o presente e-book, e que incidem sobre matérias relativas à jurisdição de Família e Crianças, Processo Civil e Ética e Deontologia, são consequência da participação na competição THEMIS de equipas compostas por auditores de justiça do 37º curso de formação para os Tribunais Judiciais, e de auditores de justiça do 8º curso de formação para os Tribunais Administrativos e Fiscais.

A competição THEMIS está aberta a equipas formadas por três auditores de justiça/formandos para o exercício da magistratura de todos os membros ou observadores da Rede Europeia de Formação Judiciária. A competição visa promover o conhecimento prático do direito da UE e da Convenção Europeia dos Direitos Humanos.

O principal objetivo da competição THEMIS é reunir futuros magistrados de diferentes países europeus, a fim de lhes permitir partilhar valores comuns, trocar novas experiências e debater novas perspetivas em áreas de interesse geral.

A presente publicação reflete o árduo esforço dos auditores de justiça portugueses que em conjunto elaboraram os trabalhos, e dos docentes do CEJ que os orientaram na qualidade de tutores, a quem muito se agradece, e que agora se divulga face à sua pertinência e atualidade à medida que o conceito de cidadania europeia se constrói e aprofunda.

Fica o especial agradecimento aos autores pelo esforço realizado a concorrer para a elaboração do e-book e para que o CEJ continue a cumprir a sua missão de divulgar os conteúdos relacionados com o seu programa de formação.

Valter Batista

Ficha Técnica

Nome:

Trabalhos Themis 2022 – 37.º Curso de Formação de Magistrados para os Tribunais Judiciais e 8.º Curso de Magistrados para os Tribunais Administrativos e Fiscais

Departamento de Relações Internacionais do Centro de Estudos Judiciários

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37.º Curso de Formação de Magistrados e
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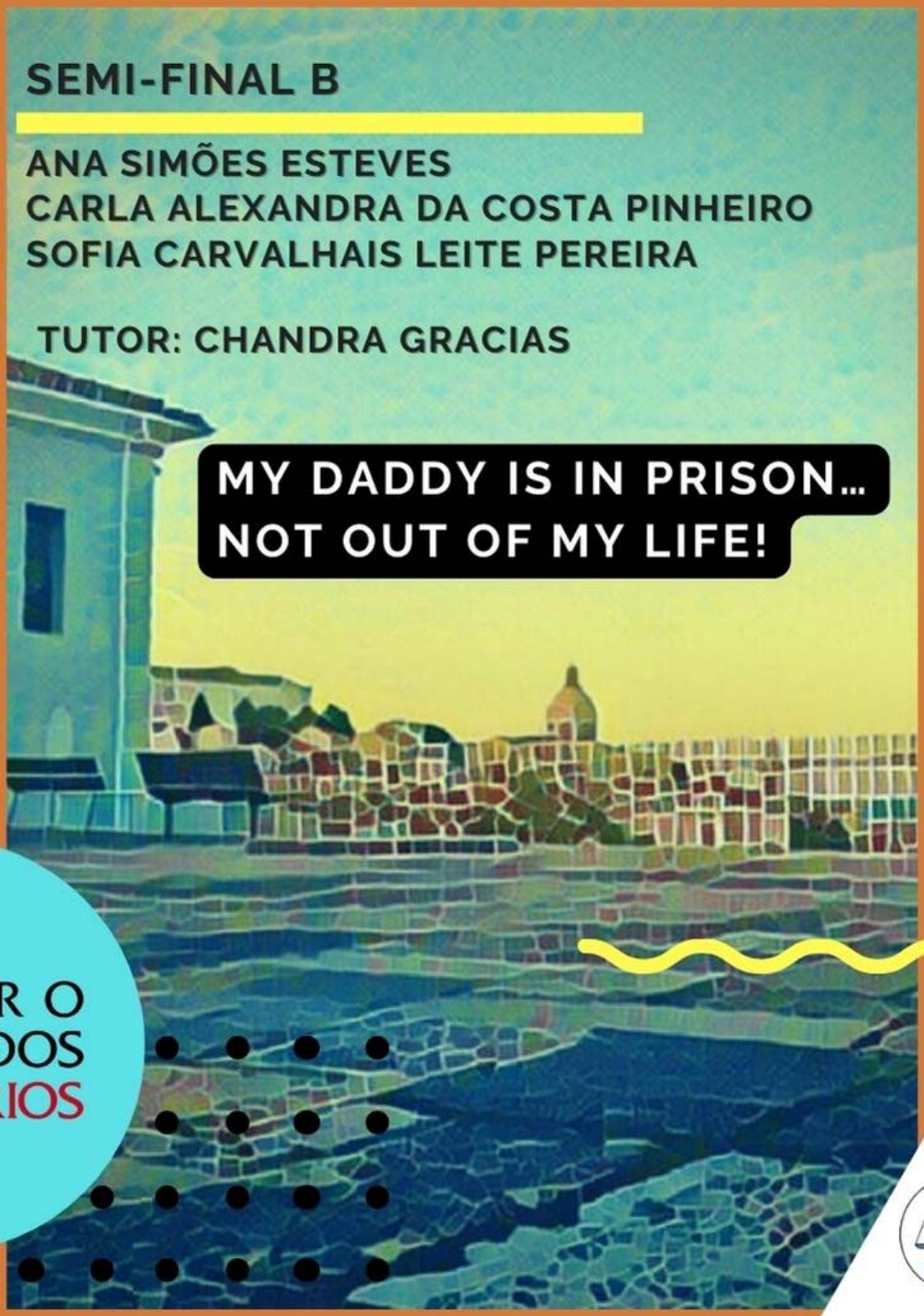

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

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CENTRO
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THEMIS 2022 COMPETITION

AGENDA

SEMI-FINAL B

EU and European Family Law

25-27 May 2022
Vilnius, Lithuania
HOTEL NERINGA
Gediminas Ave. 23,
01103 Vilnius, Lithuania

With financial support from the Justice Programme of the European Union

BACKGROUND

EJTN THEMIS Competition is a competition with a unique format, opened to judicial trainees from across Europe and aiming to exchange views and develop new approaches on topics related to international civil and criminal cooperation, human rights and judicial deontology.

The competition is opened to judicial trainees from all training institutions who are members or observers of EJTN. Teams of three judicial trainees accompanied by one teacher/tutor may enroll in the competition which consists of four semi-finals and a grand-final. The official language of the competition is English.

The jury of the competition is chosen from a pool of experts appointed by EJTN Members, that are well-regarded professionals in the field of the given semi-final/final. As a general rule, experts must not have the same nationality as the competing team they will have to assess.

The jury members assessed the overall quality and the originality, the critical thinking and the anticipation of future solutions, the reference to relevant case law, but also the communication skills and the consistency.

Each semi-final had three stages: a written paper on a topic relevant for the subject of the semi-final, an oral presentation of that paper and a discussion with the jury. The maximum number of teams participating in a semi-final is eleven. The winner and runner up of each semi-final will enter the grand-final, consequently there are eight teams in the grand-final. The prize for the winning team is a one-week study visit, organised and financed by EJTN, in any European judicial institution.

Venue location: Hotel Neringa, Gediminas Ave. 23, 01103 Vilnius, Lithuania

AGENDA

Wednesday, 25 May 2022		
09:30	**Opening Ceremony of the THEMIS 2022 Semi-Final B**	**Natalija Kaminskiene,** director of National Courts of Administration **Markus BRUCKNER,** EJTN Secretary General **Rasmus Van Heddeghem**, junior project manager EJTN
09:45	**Lecture – Lithuanian Judicial System**	**Antanas Jatkevičius**, deputy director of National Courts of Administration
10:15	**Coffee Break & Group Photo**	
10:45	**Presentation of Rules & Jury introduction**	**Rasmus Van Heddeghem**, junior project manager EJTN Jury members: **Ilse Couwenberg (BE)** **Borianna Musseva (BG)** **Inesa Fausch (LT)**
11:15	**Presentation and discussion – Team PORTUGAL II**	**CORREIA, Sérgio Miguel** **XAVIER CUNTIM, Bárbara Maria** **COSTA RIBEIRO, Ana Rita** *Tutor:* GRACIAS, Chandra
12:30	**Coffee Break**	
12:45	**Presentation and discussion – Team CZECHIA**	**ŠEBA, Jan** **KAPOUNOVÁ, Jana** **BLAHOVÁ, Luisa**

		Tutor: STRAKA, Josef
14:00	**Lunch**	
15:00	**Presentation and discussion – Team GERMANY**	**LEHMANN HANEL, Zuzana** **MENKEN, Shaline-Michelle** **LEHNER, Clara Maria** *Tutor:* LEHNER, Clara Maria
16:15	**End of day 1** Jury deliberation	
17:30	**GUIDED TOUR OF VILNIUS**	

Thursday, 26 May 2022		
09:00	**Presentation and discussion – Team PORTUGAL I**	**COSTA PINHEIRO, Carla Alexandra** **SIMÕES ESTEVES, Ana** **LEITE PEREIRA, Sofia** *Tutor:* GRACIAS, Chandra
10:15	**Coffee break**	
10:45	**Presentation and discussion – Team FRANCE**	**THOMAS, Etienne** **ENSLEN, Mathilde** **DURANDELLE, Claire** *Tutor:* LAJUS-THIZON, Emmanuelle
12:00	**Presentation and discussion – Team SERBIA**	**ZDRAVKOVIC, Zarko** **ANDJELIC, Stefan** **MIRCETIC, Milena** *Tutor:* DELIBASIC, Zorana
13:15	**Lunch**	
14:15	**End of day 2** Jury deliberation	
20:00	**OFFICIAL THEMIS DINNER**	

Friday, 27 May 2022		
09:30	**Awards Ceremony**	**<u>Jury members:</u>** **Ilse Couwenberg (BE)** **Borianna Musseva (BG)** **Inesa Fausch (LT)** **Natalija Kaminskiene,** director of National Courts of Administration
10:30	**Closing ceremony**	**Rasmus Van Heddeghem**, junior project manager EJTN

11:30	**End of the Semi-Final B**
12:30	Departure of participants

JURY MEMBERS

Ilse COUWENBERG (BE)
Judge at the Supreme Court of Belgium

Inese FAUSCH (LT)
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CENTRO
DE ESTUDOS
JUDICIÁRIOS

My daddy is in prison…

Not out of my life!

Design by Sofia Costa

Team Portugal I

Ana Simões Esteves

Carla Alexandra da Costa Pinheiro

Sofia Carvalhais Leite Pereira

Tutor

Chandra Gracias

Abstract

The present paper aims to shed light on the problems faced by children whose fathers are incarcerated.

Firstly, as with all other individuals, children are considered as persons with rights. Therefore, States must respect and consider the child in decision-making processes that may affect them, directly or indirectly, particularly when they see that a parent is in prison.

With this study, we explore the multiple problems these children face during childhood, as a result of their fathers' prison sentences, e.g., analyzing the legal provisions in the European Union, as well as the jurisprudence of the European Court of Human Rights.

This paper concludes by giving solutions to the problems identified throughout, so that these children can feel seen and heard.

Keywords: children; imprisoned parents; problems faced; visits; visitation rights; contact.

Index

Abbreviations and acronyms

Appl. – Application

CRC – Convention on the Rights of the Child

CFREU – Charter of Fundamental Rights of the European Union

ECHR – European Convention on Human Rights

EU – European Union

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

No. – Number

UDHR – Universal Declaration of Human Rights

Introduction

A child with a parent that is in prison is, often, a forgotten child. Forgotten by the State itself, as well as by family, who generally tend to focus on the problems an imprisoned family member brings to the dynamics of the household.

However, neither must forget that a child that sees their parent imprisoned, in the case of this paper, the father[1], is a child that sees their life turned upside down.

This child often suffers from health, social and welfare disadvantages, that manifest in different ways, whether externalized (e.g., attention or aggression problems) or internalized by the child. The fact is that the imprisonment of a parent affects children in various ways, depending on the environment, the family life, as well as the support given to them.

The truth is that a child with imprisoned parents normally is not aware of their rights, is not considered in the decision-making process, and is not considered when visitations take place.

Therefore, in the following pages, we explain the problems these children face, as well as the European legal instruments and the jurisprudence in question, so that we can build solutions that not only make a difference in these children's lives, but that are also simple for States to put into place.

Methodologically, this paper focus on the relationship between the father who's been imprisoned and his child.

1. The multiplicity of problems faced by a child of imprisoned parents

As is well known, a child, according to international law, is considered to be any person younger than eighteen years of age. Due to their specific needs children have up and until that age where their personality is being developed, they have natural limitations in exercising their legal rights. Those needs create special rights for children that must be established and respected for both States and societies, including their parents and broader family. In addition to the natural circumstances, they face growing up, the number of children who are also dealing with one particular issue: parent

[1] Considering the specific problems that may occur in a child with incarcerated mother (as the children might live in the prison along their mother), this paper will not approach child-mother relation, but only child-father one and its problems and solutions regarding a father's imprisonment.

incarceration, is increasing in Europe. Within this study we will only refer to the problems faced by children who have an incarcerated father.

Having a father in prison can alter the child psychological (e.g., family discord, substance abuse and mental health problems) and material stability (e.g., poverty) and consequentially the child's self-esteem and knowledge and behavior when interacting with others. Those differences depend on how well structured the family life is, as well as the child's life before the fathers' incarceration and the strength of the child-father bond as well as the support given to the child and family during father's incarceration. In fact, the more problems and discriminatory factors (such as age, gender, and even lack of support) children have to deal with, the more difficulties they will have after the fathers' incarceration. After imprisonment, the difference between that family lifestyle and the patron family life of that country usually increases, as they face health, social and welfare disadvantages. This situation affects boys and girls equally; however, boys tend to externalize it through their behavior as girls tend to internalize it. When asked, children of prisoners expressed a major need for advice and support as well as the need for their feelings, behavior and choices to be understood. They also referenced the need for information, greater respect, for express support and to understand the penal justice system. For that reason, society and the judicial system have a major role to play, as the prisoner's family, and particularly his child, tend to be socially excluded, stigmatized and suffer from victimization.

With the father's incarceration, children tend to have disruptive care, both emotionally and financially. Many different situations may occur: children might be cared for by the other parent, by different a family member over that time, or be taken into care by an institution; they might also have to take care of younger siblings. Either way, parent imprisonment causes greater stress for children than separation or death of a parents.

At the same time, parent imprisonment may cause financial difficulties as it creates or potentiates poverty. The incarceration reduces the income of the family and as a consequence, its quality-of-life standards, including house, health and development adding an additional cost with visiting the incarcerated father. This all contributes to a higher risk of debt for the family. And even worse, as financial problems tend to extended the father's release, he will have difficulties getting a new job.

Another consequence of the fathers' imprisonment is a lack of contact between child and father. A court convicts the father of a crime and sentences him to

imprisonment, but it also "sentences" a child to living without the continuous presence of their father on a daily basis. The child is not heard by the judge – they are the "*invisible victims*" or "*hidden victims*" of the penal system. This creates feelings of abandonment by the justice system despite needing greater protection from the State and society. As the sentence is executed, the child's separation from the father causes a disruption in the child-father relationship, which can only be remedied by contact and visits with the incarcerated father. If the contact is dramatically reduced or nonexistent, the child will start to see the father not as a care figure but as a stranger, which has tremendous consequences on their relationship and on the father's possibility to have custody in a post-release scenario. But this circumstance can also affect other relationships of the child, namely with siblings, and others in the future, especially if they do not have extensive family member support while the parent is in prison.

Parental incarceration tends to develop in the child long-term feelings of sadness, depression, anger, aggression, fear, uncertainty, anxiety, guilt and compromising relationships with others (causing antisocial problems). It also may lead to sleeping problems, eating problems, post-traumatic stress disorder, school progression problems (low grades and aggressive behavior) or, on another level, hostility, drugs or alcohol abuse, running away and delinquent activities.

These children suffer from stigma, discrimination and oppression from society, particularly in schools among teachers and peers, creating disadvantages in their education. By fearing rejection, these children usually do not talk about the incarceration with friends and do not tell others about it.

Another problem is caused by hiding the truth about a father's incarceration or lying to children. In fact, in the majority of known cases, father's incarceration is hidden from the child. However, the result is that children feel reassured when they know where their father is and why he is in prison. By telling the truth, in an honest and simple way, we are allowing children to understand what they are facing and to receive the necessary and required help. With those factors, children are able to come to terms with it more easily.

Another specific issue they face is the difficulty with visiting an incarcerated father, including lack of transportation and long-distance travel, financial problems, the restrictions imposed by visitation regimes and phone regulations and the non-child-friendly environment. That environment can intimidate the child, causing stress and anxiety, reducing the child's will of to return for another visit.

All those problems that children of prisoners have to cope with must urgently be reduced by State politics and laws, including those referenced below.

2. The European response

2.1. The European legal provisions

The legal analysis of this topic needs to start by looking at the CRC, because, although it is not a European legal provision, it sets out the general principles that secure children's rights, which is applicable in the states that ratified it[2].

The states that ratified the CRC are obliged to take action, whether in legislative or administrative actions or in other areas, to make sure that children's rights recognized by the CRC are ensured. The rights and principles established by the CRC are also directly relevant to the topic in question: the children of imprisoned parents.

To begin with, the base principle set by the CRC is the protection of the best interests of the child, as established by Article 3(1).[3] The best interests of the child puts the child as the subject of its own rights and as an individual. Therefore, the best interests of the child must be evaluated individually, e.g., it must consider that specific child, their family and social circumstances.

When dealing with a child with imprisoned parents, that child best interests must be considered independently from the parent themselves, in order to make sure that every single decision made that affects the child only takes into consideration the needs of the child, specially, when it comes to their visitation rights, the frequency, the time and duration, the conditions in which the visitation takes place, etc.

Secondly, as per Article 12(1)[4], the child of imprisoned parents has the right to express his or her view and to be heard on all subjects that directly and indirectly affect them. The child should be informed of this right as soon as their parent is detained, in a language that the child understands.

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[2] The CRC was ratified by 194 countries. The only states that have not ratified the CRC are Somalia, United States of America and South Sudan, which means that every European states as ratified, so it is applicable in every European state. Information available at https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child .

[3] Article 3(1) of the CRC reads: *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration*.

[4] Article 12(1) of the CRC reads: *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

The child must be able to express his or her view on the matters that affects their lives, as well as be heard, in a form independent from the detained or imprisoned parents, as the child is his or her own person and must be granted their rights as is. The child needs to be able to exercise these rights, as far as visitation is concerned, when, for instance, there is a need to reduce the number of visitations to the parent, in order to, before any decision is made, realize how that specific decision affects the child personally.

Thus, the child's right to express his or her views, as well as the right to be heard, indicates that the child is the center of the decision-making process[5], and the respect of the child shall be secured by the State itself.

When talking about a child of imprisoned parents, we need to secure the non-discrimination principle, as mentioned in Article 2 of the CRC.

This principle implies that the State has to ensure that a child of imprison parents is not discriminated against when exercising their own rights because of the actions of their parents. This means that no child should suffer any consequences as a result of their parents' actions, just because the parent is imprisoned.

After the overview of the CRC, we need to analyze the International and European legal instruments that protect family life, that set the tone in the protection of a child of imprisoned parents. These legal instruments are: Articles 10 and 23 of the UDHR; Articles 6 and 8 of the ECHR; Article 23 of the ICCPR; Article 10 of the ICESCR; Article 9 of the CRC; Article 24.3 of the EUCFR.

These legal instruments highlight four areas with importance to a child of imprisoned parents: respect for family life, the arrest of the parent, information about the whereabouts of the imprisoned parent, and the frequent and regular contact between the child and the parent.

Family life and the necessary respect is regulated in both Article 16 of the UDHR and Article 23 of the ICCPR, where it states that a family must be protected by the State, as well as that the State cannot interfere in a person's private and family life. Therefore, in these legal instruments, States are bound by a positive obligation to protect family life, and a negative obligation not to interfere in a person's family life,

[5] Article 24(1) of the CFREU reads: *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.*

unless necessary by law and/or necessary for the protection of certain interest or rights of other individuals.

In relation to the topic of this paper, although separation between a child and a parent cannot be ruled upon, as a rule, the fact is that the detention of a parent is a situation where separation does occur. However, that separation between a child and his or her parent and the interference in their family life cannot mean that the child is stripped from the parent figure.

Thus, the State has to ensure that the child and his or her parent maintain contact, either with regular and frequent visitation or with regular information about the whereabouts of the child and of the parent (so both can keep in contact with each other), and, also, so both can communicate regularly.

In the realm of the right to regular and frequent contact between a child and his or her imprisoned parent, the problem that arises is with visitation. When a parent is arrested or imprisoned, a child must be informed about the right to keep in contact with the parent. This right is articulated in Article 9(3) of the CRC[6], as well as Article 24(3) of the EUCFR[7].

Under the ECHR, this rights of a child of imprisoned parents are articulated in both Article 6 ('Right to a fair trial') and Article 8 ('Right to respect for private and family life').

In Article 6(1) of the ECHR[8], States shall ensure that a child is heard, when deciding on any aspect of his or her life, which includes a situation where the parent is imprisoned. Therefore, when a court sentences a parent to a prison term, it must always consider how that affects the child, as well as determine ways how that impact can be minimized. For that to be determined, the Judge has the obligation to hear the child in the decision-making process, in order to ensure compliance with his or her best interest.

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[6] Article 9(3) of the CRC reads: *States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests*.

[7] Article 24.3 of the CFREU reads: *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.*

[8] Article 6(1) of the ECHR reads: *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

The hearing of a child, however, has to be done with respect to the age and maturity of the child, because, if not respected, there is also a violation of the right to be heard.

The Article 8 of the ECHR emphasizes that a child, as the subject of rights and an individual that should be considered as one, needs to see his or her family life respected and protected, which includes the need to be ensured regular and frequent visitation of the imprisoned parent, as long as the child wishes to do so and their best interests are respected, as well as the right of the child to keep in contact with the parent.

It is the State that must ensure that the child is informed of this right, as well as it being the State's obligation to ensure that the child has every condition in place to keep in contact.

States, as well as the European Court of Human Rights, cannot forget that the center of these rights is not the imprisoned parent, but the child him or herself. The child is the person that the State needs, and is obligated, to protect, non-discriminate against, and consider when deciding on each aspect of a child's life, even if the parent is imprisoned, because a child cannot carry the sins of his or her parent.

2.2. The jurisprudence of the European Court of Human Rights

On Several occasions, the European Court of Human Rights has been called to evaluate on the violation of article 8 of the Human Rights Convention. However, most of the time, these decisions focus on visiting rights, such as the restrictions on visits to prisoners on remand, their frequency and the conditions under which they take place. Even when it comes to the restrictions on visiting rights between a prisoner and his wife and child, several times, these limitations on visits are justified with the risk of collusion.

The court has addressed the duration of the restrictions on visitations and the impact that could have on family life. In the case of *Moiseyev v Russia*[9], visitation restrictions were imposed for the entire duration of the detention, which in this case, was three and a half years. Another example of restrictions is the case of *Khoroshenko v Russia*[10], where the prisoner at the time of his arrest had a three-year-old son, and had been sentenced to life imprisonment, not being allowed to have any contact with his

[9] See Conclusion on Article 8 of the ECHR, in the Case of *Moiseyev v Russia*, available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-1884%22]}

[10] See paragraph 20 in the Case of *Khoroshenko v Russia*, available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-156006%22]}

family for the first five years of his imprisonment from 1994 to 1999, and after that and until 2009, he could only have a visit every six months, which led him to lose contact with his son. In both cases, the Court agreed that the measures taken constituted an interference with the applicant's "private life" and "family life". But what about the child's life?

The common denominator between all the decisions from the European Court is that the child's right to visit his parent in prison is never mentioned. The court mentions whether or not there has been a violation of the convention, reiterates the prisoner's right to visitation and family life, but never, under any circumstances analyses the rights of the child. It seems that the child ends up being punished for the parent's mistake, first by being stripped of that parent on a daily basis in their home, and afterwards when their rights to maintain a relationship with that parent aren't secured.

In the *Khoroshenko* case, the child was deprived of a paternal figure for years, having no connection whatsoever with his father, and there wasn't any comment in the European's Court decision about the implication of this on the child's development.
Why was it never questioned in any of the decisions mentioned above, how the duration of the restrictions on visitation could affect the child, instead of focusing on the parents right to be with his child? In the case of *Alexandru Enache v Romania*[11], why was there no appreciation for the benefits the child would have in staying with that parent, since it was only a few months old, and was the only parent present in his life, instead of focusing the discussion on the father's right to have his sentence delayed just like women in the same circumstances had? How is it possible, that with so many decisions the views of the child were never taken into account, nor was the respect for the best interests of the child even mentioned?

Another example of the systematic indifference to the child's rights from the European Court is the case of *Horych v Poland*[12]. In this case, the prisoner had only one visit from his two young daughters because the Kraków Remand Centre didn't have conditions for visits by children or minor persons, as they had to go through the dangerous detainees' ward, past the prison cells to reach the visiting area, which presented a traumatic experience for the girls. Even after getting to the visiting area, they were separated by bars and a window, making it impossible for a normal

[11] Case of *Alexandry Enache v Romania*, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-177223%22]}
[12] See paragraphs 31-41 in the Case of *Horych v Poland*, available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-110440%22]}

interaction and was very stressful for the children. This prisoner was considered dangerous because of the drug smuggling charges against him and the possibility of tampering with witnesses or colluding with associates, which led to a restriction on his visits. However, we can't apply this principle to his minor daughters. They didn't represent a risk of getting messages to his associates or being a means to tamper with any witnesses, which was also the interpretation of the European Court. In this particular case, and only because the conditions the visitations of his minor daughters were stated by the prisoner in his complaint, did the European Court pronounced on the matter, stating that '*However, positive obligations of the State under Article 8, in particular an obligation to enable and assist a detainee in maintaining contact with his close family, includes a duty to secure the appropriate, as stress-free for visitors as possible, conditions for receiving visits from his children, regard being had to the practical consequences of imprisonment'*[13], and that the fact was that this wasn't done - it didn't strike a fair balance between the requirements for a 'dangerous detainee' and the prisoner's right to respect for his family life. Although we salute The European Court for analyzing the conditions of the visits by the children, we believe the Court should have made reference to the violation of the children's right to be with their father, instead of analyzing the issue exclusively from the applicant's perspective.

Can we really hope to change the practices in European countries on this subject, when the European Court doesn't even address the subject?

A child can't suffer greater consequences for the crimes of a parent, and therefore it is imperative that, when discussing the visitation rights of an imprisoned parent, or the conditions under which these visits should be held, we also take into account the best interests of the child and the child's own right to family life. That is the only way we can hope to alter the current practices.

3. The required solutions needed: the recommendations to the EU

As seen above, the needs of a child of imprisoned parents must be at the center of the decision-making process. Therefore, we must find solutions that focus on the child's best interests when it comes to their visitation rights.

[13] See paragraph 131.

The first thing that might change is the relevance that children of prisoners have in the penal system. The Tribunal does not consider the right of the child to contact his father while he is in prison, nor the child's importance for his father's rehabilitation. Considering these factors – and the consequences imprisonment can have on a child's development – judges must, limit incarceration penalties only to the most serious crimes, and sentence alternatives whenever possible and proportional. Acting in this way, judges avoid harming innocent parties, like children, as well as forcing a family separation. Only when the application of these measures does not ensure that the sentence functions, can the judge use imprisonment. In this case, the judge might define the contact and/or visits between child and father according to the gravity of the crime and their proximity and affection before the sentenced, keeping in mind that the child must grow with a present father as long as this corresponds to the child's best interests, even if this father is in prison. To do so, the criminal judge can hear the child[14] after the sentence and, preferentially, after the *res judicata*. Other solution is the criminal judge officiously transfers the decision of child-father's contacts and visiting to the family judge or to the penalty's enforcement court judge. The hearing, besides being a child right – as this solution affects her/him, allows the judge to know if the child wants to visit her/his father, wants to maintain the contact between them (if existent before) and to take that into account as well as the child age in the regulation visits if it is for her/him best interests.

On the one hand, the determination of the time and frequency of the visits or, if those are not possible or do not correspond to child's best interests, the regularity of the contact between the two, allows the child to understand, from the start, what he or she can count on. That single fact has an undeniable impact in assuring that the child-father relationship will continue despite his imprisonment. In addition, the system proves that the child matters, and that her/his rights will be guaranteed by the judiciary system.

On the other hand, despite the penal sentence being fixed, visits and contact should be provisory, and subject to alteration, based on future circumstances that may occur. Denying those alterations could have a negative effect on the child's development.

A second solution we propose is specialized assistance and support to the child – and, if possible, the whole family of the prisoner. In fact, children with imprisoned

[14] See article 12(2) of the CRC.

fathers note a lack of information regarding the penal system and their rights. That fact makes it more difficult for them to understand the opportunities in their life and to adapt thereto. Dealing with a fathers' incarceration requires special techniques and support in order to fully understand the situation and how to act properly to maintain stability and care when a major role figure in not present in the way he used to be. This specialized support must be determined by the judge in the sentence or be required by the child itself if older than sixteen years of age or by child's representatives, including his imprisoned father. The main functions of this support are: (i) to inform children of their rights regarding their fathers incarcerations; (ii) to help children to deal with these types of situations; and (iii) to support children's families to face the prison sentence of the relative, adapting their live to the new circumstance. One way to do this, is to publish child directed videos and films informing them of their rights. Ideally that information must be spread across society, in order to inform people of all ages to the problem s faced by these children. At this point, the disadvantage faced by these children and their families will be considerably reduced.

Another solution we feel is necessary is to make sure there is a child-friendly environment in prisons, where the child can be received for the visitation.

First of all, upon a child's entrance in the prison facilities, the security procedures, e.g., searching, need to be adequate to the child's age and maturity, making sure that it is a stress-free process.

In order to ensure that the process is as stress free as possible, prison officers need to be able, before initiating the security procedures, explain to the child why the security measures need to happen, as well as what that security process really is, in a language that the child comprehends.

For that to happen, officers need to have special training on how to speak properly to a child, or the prison needs to have a specialized professional to properly explain the security procedures to the child.

Regarding these two subjects, is our recommendation for States to provide prison facilities with child appropriate videos explaining the visitation process, with a view of the facilities, so that the child can prepare mentally and emotionally.

Also, the space where the visitation take place needs to have books, posters, drawings and other visuals that can help the child to feel more at 'home', instead of feeling like being in a prison setting.

The space needs to be a space where a child can freely play with the parent and interact in a way as similar as possible to that which the child would have if the parent was at home and be big enough for the child to ease the tension and distress that usually accompanies these visitations, preferably with an outside visiting area, where a child can run, play sports with the parent and not feel confined.

These solutions would help maintain the bond between the child and the parent that existed prior to the imprisonment, which is essential to healthy development.

The regulation of visitation time is also imperative. In several situations, short term visits enable the frequency of the visits. Children have strict schedules regarding school and other activities and States cannot expect a change in their routines because of a parent being imprisonment.

Therefore, it is our advice that the time schedule for visitation not be limited to a specific hour in the day, but a period of time, e.g., a morning or an afternoon whenever a child wishes, independent of the day of the week.

Although in person visitations are important and should be the rule, when not possible, online visitations are the solution. We recognize the difficulty that online visits pose on both parties, the child and the parent, however, it is an important tool to preserve the bond between a child and a parent in the periods when in person visitations do not occur.

Thus, in order for online visits to resemble an in-person visitation, some guidelines should be observed.

Before the online visitation happens, the first step is to prepare the child for the video call. In the preparation, both the adults that are responsible for the child, as well as the child's imprison parent, need to discuss the time of day that is the best for the visitation to take place. The time in which must take place should be determined based on the schedule of the child him or herself, and not in the best interests of the adults.

When preparing for these visits, the adult should explain to the child how the program for the online visit works. When technical difficulties arise, the adult present should explain to the child what happened, e.g., when the call is dropped, the child needs to understand that it wasn't because of the imprisoned parent.

Then, because in the videocalls the child only sees and hears the parent on the other side without the benefit of smell and touch, the adult that is with the child should repeat any questions the imprisoned parents asks, so that the child remains focused, as well as point out anything that could interest the child.

Also, so that the child can maintain interest in the visitation and concentrate, the child needs to feel engaged by the imprisoned parent. That is possible, depending on the child's age, by reading storybooks, singing a song together, asking how their day went, how school is going, what university or major they are interested in etc.

Although an online visitant does not have the same contact as an in person one, the conversation must flow easily, the child should be able to feel like the parent is involved in their feelings, day-to-day life and their interests.

One of the periods when these visits could occur would be at meal time, e.g., when the child is lunching or having dinner, allowing the imprisoned parent to share the meal with the child.

Another example how online visitation could work, is at the child's bedtime, with a video call where the parent could read a bedtime story or talk about how the child's day went, for a period of at least 30 minutes.

Through these online visitations, the relationship between the child and the parent could continue to develop as 'normally' as possible, and could mitigate the negative effects of the imprisonment of the parent on the child, e.g., the feeling of separation that comes with having an imprisoned parent.

Finally, since the child's problems after the father incarceration are due to miss information relating to her/his rights and to discrimination and stigma by the whole society and particularly by the ones child contact daily, we think that should be made court films and cartoons as institutional propaganda to sensitize the child and the society to those children feelings and rights in order to disclose this subject and they feel integrated again as they should have been since the first day of their father's incarceration because they do no wrong. That propaganda must be adapted to children of different ages and it should be made different ones according to child ages allowing them to understand that imprisonment is not a death sentence and their father will be in freedom some day in the future with them as long as they want to be with him.

In our humble opinion, we believe these solutions are best to ensure the child's best interests, and their own right to family, so we urge the European States to make changes to their criminal justice departments in order to accommodate these solutions, never forgetting that the child must always be the center of the decision-making process.

Conclusion

A child that sees a father going to prison, although forgotten by the criminal justice system, is a subject of their own rights which must be protected, seen and heard by all. While their father is incarcerated, other problems tend to be aggravated and another's appear whose gravity depends on how well-structured the family life was, the support given to the child and family, and the strength of the affective child-father bond after the father's incarceration. These 'hidden victims' have to cope with forced separation, disruptive care, financial difficulties, lack of contact between child and father, isolation, discrimination and oppression specially by their peers, as well as inner problems like sadness, depression, anger, aggression, fear, uncertainty, anxiety, guilt - leading to more severe problems in the long-term.

When it comes to legal provisions, a child's rights, which include the right to see their family life protected and visitation rights, when separated, are present in various international instruments. The core principle when it comes to the rights of a child, as a subject of rights in the decision-making process, is the best interests of the child at the center. These must therefore be considered independently of the parents themselves. The best interests is also manifested in their right to be informed and heard, when decisions are being made. Although the separation between a child and their father is inevitable, this child cannot, by any means, be stripped of their right to keep in contact. Therefore, States need to find solutions in order for that not to happen, and not forget that the child cannot suffer the consequences of their fathers' actions.

Through the analyses of several decisions from the European Court of Human Rights, we can see just how often children's rights are neglected when it comes to maintaining a relationship with an imprisoned parent.

We hope that with this paper, we are able to shed the light on the importance of prioritizing the child's best interest, ensuring their own visitation rights with their parents.

(i) First of all, the Judge should consider if imprisonment is absolutely necessary.

(ii) If so, the Judge must define the contacts and/or visits between child and father with refence to the gravity of the crime and their proximity and affection of the child and father prior to the sentenced, as well as the child's best interest, child will and age.

(iii) Visitations, if not possible in person, must be through online services and, if in person, must occur in a child-friendly environment.

(iv) At all times, the children must be informed of their rights and, if necessary, the State should provide specialized assistance, in order for them to face and overcome these circumstances.

(v) Finally, there should be made court films and cartoons as institutional propaganda, which will allow the child to know her/him rights and to feel that she/he is not the only one dealing with father's incarceration and also sensitize the whole society as a way to stop discrimination and stigma to those children and their families.

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Trabalhos

Themis 2022

SEMI-FINAL B

ANA RITA COSTA RIBEIRO
BÁRBARA MARIA XAVIER CUNTIM
SÉRGIO MIGUEL CORREIA

TUTOR: CHANDRA GRACIAS

MOTHERS, NEWBORNS AND CORONAVIRUS BARRIERS – AN ANALYSIS OF RESTRICTIVE MEASURES IMPLEMENTED IN THE EU IN LIGHT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

THEMIS

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DE ESTUDOS
JUDICIÁRIOS

THEMIS 2022 COMPETITION

AGENDA

SEMI-FINAL B

EU and European Family Law

25-27 May 2022
Vilnius, Lithuania
HOTEL NERINGA
Gediminas Ave. 23,
01103 Vilnius, Lithuania

With financial support from the Justice Programme of the European Union

BACKGROUND

EJTN THEMIS Competition is a competition with a unique format, opened to judicial trainees from across Europe and aiming to exchange views and develop new approaches on topics related to international civil and criminal cooperation, human rights and judicial deontology.

The competition is opened to judicial trainees from all training institutions who are members or observers of EJTN. Teams of three judicial trainees accompanied by one teacher/tutor may enroll in the competition which consists of four semi-finals and a grand-final. The official language of the competition is English.

The jury of the competition is chosen from a pool of experts appointed by EJTN Members, that are well-regarded professionals in the field of the given semi-final/final. As a general rule, experts must not have the same nationality as the competing team they will have to assess.

The jury members assessed the overall quality and the originality, the critical thinking and the anticipation of future solutions, the reference to relevant case law, but also the communication skills and the consistency.

Each semi-final had three stages: a written paper on a topic relevant for the subject of the semi-final, an oral presentation of that paper and a discussion with the jury. The maximum number of teams participating in a semi-final is eleven. The winner and runner up of each semi-final will enter the grand-final, consequently there are eight teams in the grand-final. The prize for the winning team is a one-week study visit, organised and financed by EJTN, in any European judicial institution.

Venue location: Hotel Neringa, Gediminas Ave. 23, 01103 Vilnius, Lithuania

AGENDA

Wednesday, 25 May 2022		
09:30	**Opening Ceremony of the THEMIS 2022 Semi-Final B**	**Natalija Kaminskiene,** director of National Courts of Administration **Markus BRUCKNER,** EJTN Secretary General **Rasmus Van Heddeghem**, junior project manager EJTN
09:45	**Lecture – Lithuanian Judicial System**	**Antanas Jatkevičius**, deputy director of National Courts of Administration
10:15	**Coffee Break & Group Photo**	
10:45	**Presentation of Rules & Jury introduction**	**Rasmus Van Heddeghem**, junior project manager EJTN Jury members: **Ilse Couwenberg (BE)** **Borianna Musseva (BG)** **Inesa Fausch (LT)**
11:15	**Presentation and discussion – Team PORTUGAL II**	**CORREIA, Sérgio Miguel** **XAVIER CUNTIM, Bárbara Maria** **COSTA RIBEIRO, Ana Rita** *Tutor:* GRACIAS, Chandra
12:30	**Coffee Break**	
12:45	**Presentation and discussion – Team CZECHIA**	**ŠEBA, Jan** **KAPOUNOVÁ, Jana** **BLAHOVÁ, Luisa**

		Tutor: STRAKA, Josef
14:00	**Lunch**	
15:00	**Presentation and discussion – Team GERMANY**	**LEHMANN HANEL, Zuzana** **MENKEN, Shaline-Michelle** **LEHNER, Clara Maria** *Tutor:* LEHNER, Clara Maria
16:15	**End of day 1** Jury deliberation	
17:30	**GUIDED TOUR OF VILNIUS**	

Thursday, 26 May 2022		
09:00	**Presentation and discussion – Team PORTUGAL I**	**COSTA PINHEIRO, Carla Alexandra** **SIMÕES ESTEVES, Ana** **LEITE PEREIRA, Sofia** *Tutor:* GRACIAS, Chandra
10:15	**Coffee break**	
10:45	**Presentation and discussion – Team FRANCE**	**THOMAS, Etienne** **ENSLEN, Mathilde** **DURANDELLE, Claire** *Tutor:* LAJUS-THIZON, Emmanuelle
12:00	**Presentation and discussion – Team SERBIA**	**ZDRAVKOVIC, Zarko** **ANDJELIC, Stefan** **MIRCETIC, Milena** *Tutor:* DELIBASIC, Zorana
13:15	**Lunch**	
14:15	**End of day 2** Jury deliberation	
20:00	**OFFICIAL THEMIS DINNER**	

Friday, 27 May 2022		
09:30	**Awards Ceremony**	**<u>Jury members:</u>** **Ilse Couwenberg (BE)** **Borianna Musseva (BG)** **Inesa Fausch (LT)** **Natalija Kaminskiene,** director of National Courts of Administration
10:30	**Closing ceremony**	**Rasmus Van Heddeghem**, junior project manager EJTN

11:30	**End of the Semi-Final B**
12:30	Departure of participants

JURY MEMBERS

Ilse COUWENBERG (BE)
Judge at the Supreme Court of Belgium

Inese FAUSCH (LT)
Legal Adviser,
Central and Eastern European Jurisdictions
Swiss Institute for Comparative Law

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CENTRO
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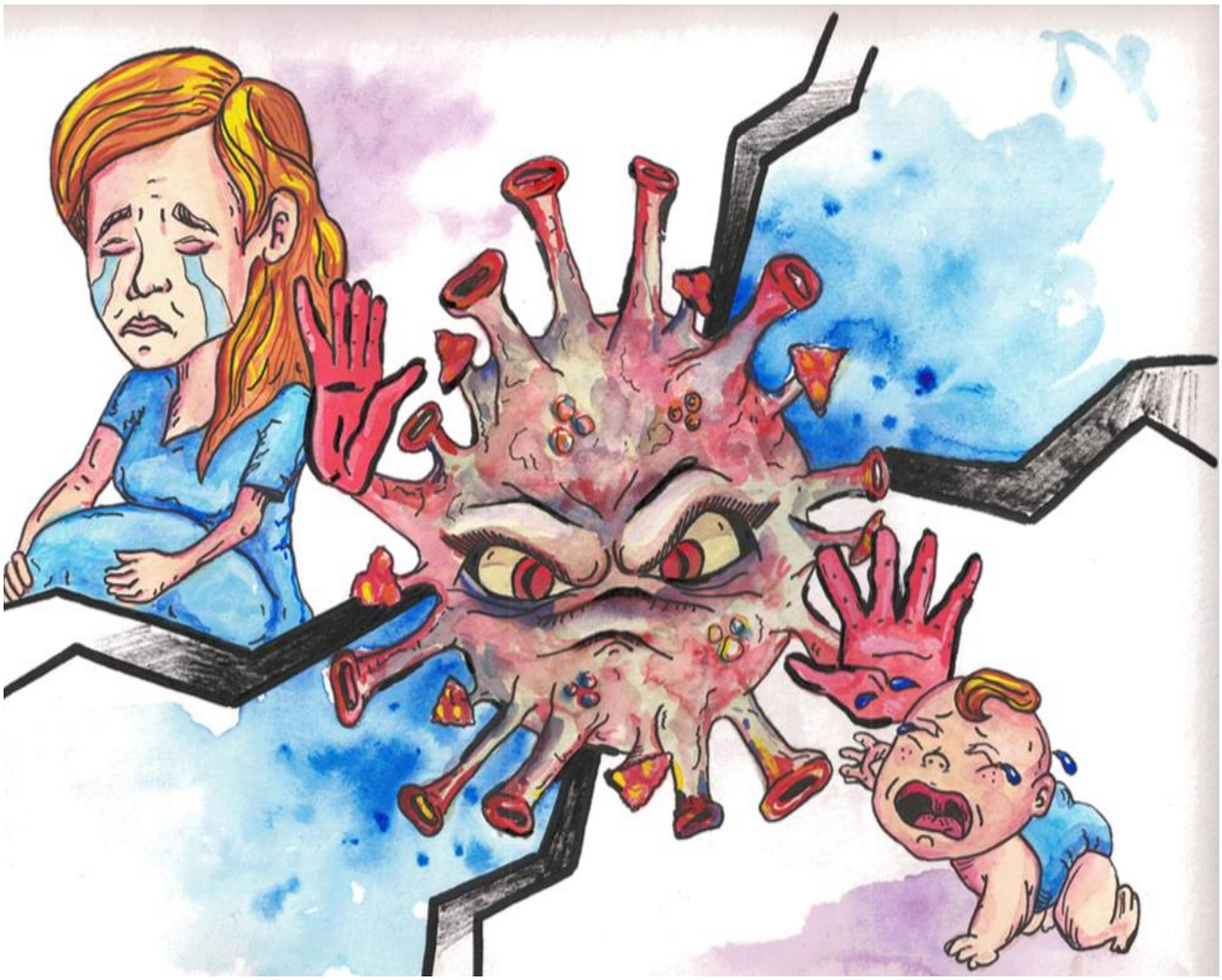
Mothers, newborns and Coronavirus barriers

An analysis of restrictive measures implemented in the EU in light of the European Convention on Human Rights



Credits: Rita Pedro

Semi-Final B: EU and European Family Law

Ana Rita Costa Ribeiro - Bárbara Maria Xavier Cuntim - Sérgio Miguel Correia

Team: Portugal II

April 2022

Abstract

In December 2019, a new severe illness caused by coronavirus 2 (SARS-CoV-2) emerged in Wuhan, China, creating a global pandemic of unprecedented magnitude.

The situation has evolved rapidly throughout the world and particularly in the European Union. The unexpected risks and threats that the Member States faced and the need to ensure the continued exercise of the most basic and elementary functions of the state are essentially the reasons why some Member States made provision in their constitutions for a state of emergency.

Regarding the restrictive measures implemented, we focused our analysis on the measures which impacted mothers and newborns, also focusing on the peri-partum period, the period between the last month of pregnancy and the first 5 months of the baby's life. The consequences of these measures on the future psychosocial development of families and how they may be modified and alleviated during the course of the pandemic are still unknown.

Faced with the centrality of the rights affected, it is up to the scientific community to reflect on the preservation of the essential core of freedoms. In particular, those applying the Convention are called upon to work together to preserve the rights set out in it.

Keywords: COVID-19; right to respect for family life; freedom of movement; inseparability between mothers and children; restrictive measures; proportionality.

1. Part I

A. Problem statement

In December 2019, a new severe illness caused by coronavirus 2 (severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)) emerged in Wuhan, China, creating a global pandemic of unprecedented magnitude.

On 11 March 2020, the World Health Organization (WHO) qualified the public health emergency caused by Covid-19 disease as an international pandemic constituting a public calamity.

The situation has evolved rapidly throughout the world and particularly in the European Union.

Focusing the issue on the European reality, and in view of the above, measures were, and continue to be, adopted that severely restrict rights and freedoms with regard to rights of movement and economic freedoms, in an attempt by the different Member States to prevent the transmission of the virus.

In March 2020, there were increasing numbers of new infections in all Member States. The knowledge and experience of some recommended, at that time, the adoption of identical measures by others as a way to contain the spread of the disease in the EU.

The different ways in which the virus could be transmitted were still being investigated by the scientific community, as they were unknown. Person-to-person transmission through respiratory droplets that are produced when an infected person coughs, sneezes, speaks, sings or exercises were already confirmed, although more details were not yet known.

It was also known that the disease was usually transmitted from close contact (about 1.5m away for 15 minutes or more) with a contagious person and that the virus could spread over longer distances or stay in the air for longer under certain circumstances.

It was also known that it was possible for a person to contract the virus by touching surfaces that had been in contact with the virus and then touching their own mouth, nose or eyes.

It was also known that the virus is transmitted by a person with symptoms of the infection, but also before they even manifest clinical symptoms (pre-symptomatic) and even by infected people who do not manifest symptoms (asymptomatic).

COVID-19 seemed to have the greatest impact on elderly and people with significant comorbidities. The SARS-CoV-2 infection in children appeared to be less common and less severe compared with adults. Few cases of newborns with COVID-19 were reported in the reporting period, and little was known regarding route of infection, clinical presentation, management and outcome.

Vertical transmission of SARS-CoV-2 appeared to be rare, consistent with other coronavirus infections. There were few children reported with possible vertical transmission.

Answers were lacking to an endless number of pressing questions, including the significance of vertical and horizontal transmissions to newborns, route and timing of horizontal transmission, the role of breastfeeding, prediction of the severity of childhood illness, and the effectiveness of preventive measures

to protect infants and health workers, as well as the potential side effects of such measures, particularly on maternal-fetal attachment initiated during pregnancy and requiring intensification during the first days of the newborn's life.

The WHO put forward hygiene, respiratory etiquette and food safety practices as preventive and protective measures to reduce exposure and transmission of the disease.

It was in this context - that of the emergence of a new coronavirus causing a new disease that spread rapidly, was very deadly and was completely unknown to the scientific community - that the various Member States implemented measures restricting fundamental rights, such as restrictions on freedom of movement, as a means of containing the spread of the disease.

The unexpected risks and threats that the Member States faced and the need to ensure the continued exercise of the most basic and elementary functions of the state are essentially the reasons why some Member States made provision in their constitutions for a state of emergency[1].

Only a minority of Member States do not have constitutional provision for a state of emergency, although they do provide for alternative mechanisms to this exceptional state as a means of reacting in the event of their parliaments being unable to function, by allowing the exceptional transfer of legislative powers to the monarch, for example, to the executive (Belgium and Denmark) or even to the Federal President (Austria).

Of the 24 member states that provide for the state of exception in their constitutions, only 17 anticipate its possible application in a pandemic situation[2].

Of the 17 Member States equipped with this emergency 'constitutional armoury' that could be used in a pandemic, such as that caused by the SARS-Cov-2 virus, only 10 chose to use it during the first peak of the pandemic in Europe: Bulgaria, Czech Republic, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia and Spain. The remaining 7 Member States - Croatia, Germany, Lithuania, Malta, the Netherlands, Poland and Slovenia - which could in principle have used the state of emergency on pandemic grounds, chose not to do so[3]. However, it can be noted that in almost half of the Member States that declared a constitutional state of emergency, this was not the only measure, and a legal emergency regime was

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1 European Parliamentary Research Service, *States of Emergency in response to the coronavirus crisis - Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic*, December 2020, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf.

2 Please see table 2 of the document cited in the previous footnote – *Member States with emergency state clauses in their constitutions*, pages 19 and 20, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf.

3 This is the case, for example, in Spain, where Organic Law 4/1981 regulates the state of alarm, emergency and siege, with an indication of the type of measures that the executive can adopt and the rights that can be restricted during these arrangements. In Hungary, the main rules on the state of extreme danger are set out in the Constitution, while implementing rules of such states are contained in two cardinal acts (Disaster Management Act and the Coronavirus Containment Act), i.e. legislative acts with an improved method of adoption, because they were adopted by a two-thirds majority in the National Assembly. In Poland, the state of natural disaster provided for in Article 232 of the Polish Constitution is detailed in its legal aspects in the Act of 18 April 2002, which defines the requirements, powers and measures. In Romania, the state of emergency is governed by Organic Law 453/2004 of 1 November 2004 (which requires a majority vote of the members of both houses of parliament to approve), which approved Emergency Ordinance (EGO) 1/1999 of 21 January 1999. During the first wave of the pandemic, the Romanian Government modified EGO 1/1999 through EGO 34/2020 of 26 March. The Constitutional Court found this emergency ordinance unconstitutional, considering that the government had exceeded its powers by assuming additional legislative powers.

activated. This was the case in Bulgaria, Hungary, Portugal, Romania and Slovakia. The combination of these two regimes did not occur simultaneously, but in most cases, one preceded or followed the other in a staggered way.

Finally, states of emergency of a constitutional nature are most often not autonomous, but are complemented by detailed legislation, either constitutional or ordinary, to regulate the transfer of powers, the duration, safeguarding and limiting the state of emergency in detail.

B. Measures to be considered in the investigation

Regarding the restrictive measures implemented, we focused our analysis on the measures which impacted mothers and newborns, also focusing on the peri-partum period, the period between the last month of pregnancy and the first 5 months of the baby's life. The measures analysed are of a different nature: contact of the baby with the mother with suspected or confirmed COVID-19 and breastfeeding[4].

The WHO recommended skin-to-skin contact, provided the mother complied with hygiene rules[5,6].

Despite the benefits of contact, its absence minimized the risk of horizontal mother-child contagion and allowed a more correct analysis of the possibility of vertical transmission if mother and child turned out to be positive; it was not known whether vertical transmission existed or if the type of transmission influenced the clinical evolution of the newborn. Contagion after birth does exist and cases of infection of the newborn have been reported, generally with a favourable evolution. The same applies to accommodation after birth, where temporary mother-child separation may minimise the potential risk of postnatal mother-child horizontal infection, despite the possible consequences on mother-child bonding and breastfeeding success[7].

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4 It should be noted that, in addition to the measures listed above, measures were also implemented restricting visits and family members' stay in the hospital during and after childbirth.

5 The benefit of skin-to-skin contact has been demonstrated, namely the establishment of a strong mother-child bond, increased likelihood of successful breastfeeding, stabilization of glucose levels and maintenance of the baby's body temperature.

6 Public health and medical organizations released guidance regarding breastfeeding for mothers with confirmed SARS-CoV-2 infection that weighed infection risk with the known and documented benefits of breastfeeding and early bonding. The WHO and UNICEF recommended continued breastfeeding, rooming in, skin to skin contact, and kangaroo care utilizing infection control practices. Specifically, the '*WHO recommends that mothers with suspected or confirmed COVID-19 should be encouraged to initiate or continue to breastfeed. Mothers should be counselled that the benefits of breastfeeding substantially outweigh the potential risks for transmission.'* In contrast, the Centers for Disease Control and Prevention, while encouraging the continuation of breastfeeding in general, stated, '*temporary separation of the newborn from a mother with confirmed or suspected COVID-19 should be strongly considered to reduce the risk of transmission to the neonate*' [Bastug A, Hanifehnezhad A, Tayman C, Ozkul A, Ozbay O, Kazancioglu S, Bodur H. Virolactia in *An asymptomatic Mother with COVID-19, Breastfeeding Med.*, 2020, 15(8):488–491, available at https://doi.org/10.1089/bfm.2020.0161].

7 About breastfeeding and infant contact, Bethany Kotlar, Emily Gerson, Sophia Petrillo, Ana Langer and Henning Tiemeier, *The impact of the Covid-19 pandemic on maternal and perinatal health: a scoping review*, 2021, available at https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01070-6.

The possibility of transmission of novel coronavirus through breast milk is unclear. The published evidence on the presence of SARS-CoV-2 in breastmilk consisted of case reports and case series of postpartum women who tested positive for the coronavirus during pregnancy. Of milk samples collected from 37 women, the majority tested negative for SARS-CoV-2 [Huntley BJ, Huntley ES, Di Mascio D, Chen T, Berghella V, Chauhan SP. Rates of maternal and perinatal mortality and vertical transmission in pregnancies complicated by severe acute respiratory syndrome coronavirus 2 (SARS-Co-V-2) infection: a systematic review. Obstetr Gynecol. 2020; 136(2):303–312; Dong L, Tian J, He S, Zhu C, Wang J, Liu C, Yang J. Possible vertical transmission of SARS-CoV-2 from an infected mother to her newborn, JAMA, 2020; 323(18): 1846–1848. https://doi.org/10.1001/jama.2020.4621, Oxford-Horrey C, Savage M, Prabhu M, Abramovitz S, Griffin K, LaFond E, Riley L, Easter SR. Putting it all together: clinical considerations in the care of critically ill obstetric patients with COVID-19. Am J Perinatol. 2020;37(10):1044–1051. https://doi.org/10.1055/s-0040-1713121; Lei D, Wang C, Li C, Fang C, Yang W, Chen B, Wei M, Xu X, Yang H, Wang S, Fan C. Clinical characteristics of COVID-19 in pregnancy: analysis of nine cases. Chin J Perinatal Med. 2020 Mar 16;23(3):225–31.,

Neonatal Intensive Care Units (henceforth NICUs) have implemented visiting policies restricting the presence of parents and extended family with the aim of protecting hospitalized newborn's and health professionals.

The consequences of these measures on the future psychosocial development of families and how they may be modified and alleviated during the course of the pandemic are still unknown.

The scientific evolution imposes a constant updating of the models of clinical approach, continuously adapted to the epidemiological evolution and the Public Health measures implemented and, therefore, we circumscribe our analysis to the measures implemented in March 2020, taking for granted that, today, the reality differs from the one we present.

We list below some of the measures implemented in different Member States[8], in March 2020, starting with Portugal.

In Portugal, if in the presence of a pregnant woman with suspected or confirmed COVID-19, the whole health team linked to the delivery block should be informed. After delivery, the puerperal woman was to remain in an individualized space until a decision was made according to the test result. Contact isolation measures were implemented until the mother's result was known, taking into account the recommendations on skin-to-skin contact.

Breastfeeding or breastfeeding through the offer of extracted milk could be considered, according to the mother's wishes and after clarification and information by the clinical team.

Joint accommodation of the newborn and the mother in an individual room could be considered, with a assurance that the mother would comply with infection control measures (mask and hand and breast hygiene). In this situation, the cot should be placed at least 2 metres away from the mother's bed. The hospitalization of the newborn in a dedicated room or nursery could also be considered, preferably in an incubator, and respecting measures to control infection by contact and droplets.

In Belgium and Germany, under the same circumstances, the newborn was allowed to stay with the mother, as was breastfeeding. Strict hygiene precautions were taken and a distance of at least 1.5 metres was maintained between the cradle and the mother. If the mother was moderately ill, the child was hospitalized in the NICU.

Wang S, Guo L, Chen L, Liu W, Cao Y, Zhang J, Feng L. A case report of neonatal 2019 coronavirus disease in China. Clin Infect Dis. 2020;71(15):853–857. https://doi.org/10.1093/cid/ciaa225], with the exceptions of Zhu et al. and Wu et al. who found one positive sample among 5 samples from 5 women [Zhu C, Liu W, Su H, Li S, Shereen MA, Lv Z, Niu Z, Li D, Liu F, Luo Z, Xia Y. nBreastfeeding risk from detectable severe acute respiratory syndrome coronavirus 2 in Breastmilk. J Infect. 2020. https://doi.org/10.1016/j.jinf.2020.06.001], and among 3 samples from 3 women, respectively [Wu Y, Liu C, Dong L, Zhang C, Chen Y, Liu J, Zhang C, et al. Coronavirus Disease 2019 among pregnant Chinese women: case series data on the safety of vaginal birth and breastfeeding. BJOG. 2020;127(9):1109–1115. https://doi.org/10.1111/1471-0528.16276]. These preliminary findings suggested that transmission of SARS-CoV-2 through breast milk was unlikely.

8 Anna Lavizzari, Claus Klingenberg, Jochen Profit, John A. F. Zupancic, Alex S. Davis, Fabio Mosca, Eleanor J. Molloy, Charles C. Roehr and The International Neonatal Covid-19 Consortium, *International comparison of guidelines for managing neonates at the early phase of the SARS-CoV-2 pandemic*, 2020, clinical research article available at https://www.nature.com/articles/s41390-020-0976-5.

Following first contact after delivery between a mother with suspected or confirmed COVID-19 and her newborn, the infant was kept in isolation until the test result was known. The infant would remain in isolation for 14 days if negative. Both, mother and infant, were tested.

In both Member States, breastfeeding was promoted even in the case of mother-infant separation.

In Spain and Italy, under the same circumstances, the baby was allowed to stay with the mother, and breastfeeding was permitted. Strict hygiene precautions were also followed. Following contact between mother and baby immediately after birth, the use of a mask was required until the baby tested negative. The baby was kept in a closed incubator and isolation room (negative pressure room, if available). Everyone, as in Belgium and Germany, was tested, both mother and baby.

In both Member States breastfeeding was promoted even in the event of separation, although in Italy, before the decision on breastfeeding was taken, medication given to the mother was considered.

In the Netherlands, the measures in place at the time were broadly similar. Without prejudice, following the first contact of a mother with suspected or confirmed COVID-19 with her infant after delivery, the infant was considered positive for SARS-Cov-2 until tested negative. In all other cases, only babies showing symptoms were tested.

Breastfeeding was also promoted in the case of separation.

In Norway and Sweden, the measures implemented were similar to those listed.

In Poland, in circumstances similar to those described, the newborn was isolated from the mother during hospitalization and breast milk was provided from a distance. Following contact between mother and baby shortly after delivery, masking was required until the baby tested negative. The baby was kept in a closed incubator and isolation room (negative pressure room if available). Everyone, as in Belgium and Germany, was tested, both mother and baby.

Regarding breastfeeding, and in case the mother tested positive for SARS-Cov-2, breastfeeding was promoted but the administration of infant formula was also considered possible for organizational reasons.

In France[9], SARS-CoV-2 positive newborns were isolated and clinically monitored for 14 days, but this did not necessarily require admission to the NICU.

C. Central research questions

Are the distancing measures imposed in the course of the states of emergency declared in the different member states, in March 2020, compatible with the right to freedom of movement provided for in Article 2 of Protocol 4 to the ECHR and the conditions for its limitation provided for in para. 2 of the same article?

[9] Janice Hopkins Tanne, *Covid-19: Doctors in France report case of baby infected in utero*, July 2020, available at https://www.bmj.com/content/370/bmj.m2851.

What impact did the restriction on this right to freedom of movement have on the established relationship (or lack thereof) between the mother and the newborn child in the first days following the birth?

Did those removal measures involve, or did they not involve, albeit reflexively, a violation of the right to respect for private and family life provided for in Article 8 of the ECHR?

Were, at that time, the restrictive measures we are proposing to examine proportionate to the gravity of the threat they were intended to combat?

Given the current relevance of the subject, the aim of this work is to contribute to the scarce existing literature and the lack of consensus found therein.

It is also intended to think to the future, and taking into account the cyclical occurrence of pandemic phenomena, propose possible measures to be taken in the event of another threat of the same or greater magnitude.

2. Part II

D. Freedom of movement

Provided for in Article 2 of Protocol No. 4, freedom of movement consists of three different rights: freedom to move, freedom to choose the country of residence and freedom to abandon any State[10]. It does not appear in isolation, but it is also provided for in many other documents, such as the Universal Declaration of Human Rights (Article 13), the International Covenant on Civil and Political Rights (Article 12), the Charter of Fundamental Rights of the European Union (Article 45), and others[11].

Of particular interest to our analysis, Paragraph 1 of Article 2 states, «Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence». Reading the paragraph, it is possible to identify the freedom of movement and freedom to choose one's country of residence.

Addressed to *everyone*, the rights stated on Article 2 apply to children as well, as clarified by the Court in the Case of *Diamante and Pelliccioni v. San Marino*, where it states that «it notes that the rights guaranteed by this provision apply to any person, and not solely to adults» (para. 204)[12].

To benefit from freedom of movement, one must be «lawfully within the territory of a State». Controlled by domestic law criteria, this requirement does not exclude aliens or stateless people who are only in transit or for a limited period[13].

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10 ECtHR, *Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights – Freedom of movement*, First edition - 31 December 2021, at p. 6 para. 1.

11 The Protocol No.4 and, of course, its Article 2, can only be invoked before the States which ratified the Protocol. Therefore, it can not be invoked in relation to Greece, Switzerland, Turkey or the United Kingdom.

12 *Diamante and Pelliccioni* v. San Marino, 2011. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

13 For further developments, see the Explanatory Report to Protocol No.4, para. 8 and ECtHR, *Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights – Freedom of movement*, First edition - 31 December 2021, p. 10 para. 32.

Guaranteed by Article 5(1), the right to liberty differs from freedom of movement on the intensity of the level of the offense[14]. More oriented towards situations such as detentions or convictions, Article 5(1) aims to focus on more serious offenses. If the case falls within the scope of the right to liberty, the Court will not consider freedom of movement[15].

To distinguish between the two rights, the Court will take into account criteria such as the duration of the deprivation, its effects, and the lack of consent to isolation, the last consisting of a subjective element[16]. The Court will also consider an objective factor[17], such as the restricted area where the person is confined, the freedom to leave, the level of supervision or control.

In view of the specific situation of the COVID-19 pandemic, the Court sided with the decision that the order of confinement by the States, specifically by the Romanian Government in the *Terhes v. Romania* decision, should not be seen as a deprivation of liberty. The applicant claimed house arrest, and the Court held that «The level of restrictions on the applicant's freedom of movement had not been such that the general lockdown ordered by the authorities could be deemed to constitute a deprivation of liberty»[18].

The Court considered that: *i)* since the applicant could leave his home for reasons determined in domestic legislation; *ii)* since he could decide when to do so; *iii)* since the measures implemented to compel citizens to remain at home had been general; *iv)* and considering he was not subjected to special and individual surveillance; *v)* nor was he obliged to remain in a determined and cramped space; or *vi)* deprived of social contact, this was not a deprivation of liberty. Considering the various criteria, and with the understanding that it was not a case that falls under the Article 5 of the Convention, the Court pointed out that the situation should be read as a limitation to the freedom of movement.

In the same vein, in case of *De Tommaso v. Italy*, the Court clarified that it is important to pay attention to the circumstances contributing to the adoption of restrictions. That said, the Court added that «Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good»[19].

Accordingly, adding to the case-law, the Court stated that «The Court does not consider that such commonly occurring restrictions on movement, so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, can properly be described as "deprivations of liberty" within the meaning of Article 5 para. 1»[20].

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14 ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 14 para. 55.

15 ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 14 para. 57-58.

16 ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 14 para. 59.

17 ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 14 para. 60.

18 *Decision Terhes v. Romania*, 2021.

19 *De Tommaso v. Italy*, paragraph 81, 2017. In conformity, check *Nada v. Switzerland*, 2012.

20 *Austin and Others v. The United Kingdom*, paragraph 59, 2012.

Therefore, considering the abovementioned case-law, taking into account criteria such as the duration, effects, possibility of access to social contact, area where the person is confined, the possibility of leaving the area, level of personalized supervision, and also the circumstances which determined the adoption of such measures, the most probable decision would be to analyse these cases under the appreciation of the freedom of movement, as resulting from Article 2(1).

E. Right to family life

Article 8 embodies four interests, identified as private life, family life, home and correspondence[21]. In what concerns us, it is particularly relevant to consider the right to family life, reflected in paragraph 1 of Article 8.

The Court recognizes the primary purpose of Article 8 as a mechanism to protect individuals from arbitrary intrusions by the State[22], in its traditional negative understanding.

When it comes to the definition of family life and what we should consider to be a family, the Court has been building this notion. Nuclear to the definition of family life is the right to live together. By living together, the members of the family are able to socialize or provide company and cooperate or look after each other, as primary and traditional aspects of family life[23]. Whenever we consider that there is a family, considering that the right to family life requires the prior existence of a family – and the *Court* has already clarified that a family can consist of a single mother and her child,[24] - we then must apply the protection proclaimed by paragraph 1 of Article 8. Therefore, the States may only interfere with the indicated right when the intrusion reflects the concerns stated in paragraph 2.

It follows from the case of *Marckx v. Belgium*, that the States assume not only negative obligations, as stated, but also positive obligations. Accordingly, since the need for protecting the right to family life results from Article 8(1), there remains an obligation to adopt, within domestic legal systems, a law that secures family ties, ensuring the child's integration into the family from the moment of birth. With this, it becomes possible to respect family life[25].

Secondly, the right to family life is also composed of a right to mutual enjoyment. Resulting from the case of *Olsson v. Sweden* (no. 1), the company enjoyed by both parents and child is a «fundamental

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21 ECtHR, *Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence*, Updated on 31 August 2021, p. 7 para. 1.

22 *Kroon and Others v. the Netherlands* – «31. The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, as the most recent authority, the above-mentioned Keegan judgment, p. 19, para. 49)», 1994.

23 OLIVEIRA, Guilherme – "*Fique em casa*" – *Notas para uma taxonomia dos "familiares*". JULGAR Online [Em linha]. Julho de 2020, available at http://julgar.pt/fique-em-casa/.

24 ECtHR, *Guide on Article 8*, p. 78 para. 329.

25 *Marckx v. Belgium*, paragraph 31, 1979.

element of family life»[26]. Although there are cases that justify their restriction, notably the right to enjoy each other's company (cf. paragraph 2), the right to family life does imply this notion[27].

None of these changes if, for some justifiable reason, the family is separated. Even then, we must consider the right to family unity or reunification.

But if the rights to family integration and mutual enjoyment are recognizable, it is also true that the analyses of their exercise must consider a balance.

F. The intersection

Being qualified as a situation of restriction of movement, and considering the inability to visit others – notably newborns –, the restrictions to the freedoms guaranteed by Article 2 will necessarily impact the right to family life[28].

When it comes to the intersections between the identified rights: the freedom of movement and the right to family life, the Court is of the understanding that where the situation is analysed from the perspective of Article 2 of Protocol No.4, then it is not necessary to examine whether or not there is a violation of Article 8[29]. The opposite also being true. Thus, when a violation of Article 8 is found to exist, it is also not necessary to analyze whether there has been a violation of Article 2 of Protocol 4[30]. Nevertheless, because it is essential to the analysis, we will consider the intersection of both rights.

It is important to consider that there are situations where the mother and the newborn child are restricted in what concerns their freedom of movement, within a hospital facility, due to the associated danger of the COVID-19 pandemic. Considering the duration of the measures, ranging up to a few days, it cannot be excluded that it might be considered a privation of liberty, contemplating previous cases decided by the Court. Notably, the case of *Khlaifia and Others v. Italy*, where a deprivation on liberty was deemed to exist in a case where the applicants were held in a secure facility for nine and twelve days[31.] However, the number of days involved in cases of limitations associated with COVID-19 infections are decided according to the need for preventing the transmission of a contagious disease not entirely known to the general public or the scientific community. That is why, in addition to the aforementioned, we defend it to be seen as a restriction of movement.

The possibility to engage in social contact was not excluded, although it was limited. It is true that hospital visits were subject to limitations, but the mother and the newborn could still access the outside

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26 *Olsson v. Sweden* (no. 1), paragraph 59, adding that «(…) furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into public care» , 1988.

27 ECtHR, *Guide on Article 8*, p. 71 para. 292.

28 ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 18 para. 73. Considering the recalled impact in situations where there is a travel ban preventing the applicants from travelling to meet their family, namely: *Parmak and Bakir v. Turkey*, 2019, and *Íletmis v. Turkey*, 2005.

29 ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 18 para. 77. Considere para. 79 in *Kotiy v. Ukraine, 2015* or para. 77 at *Penchevi v. Bulgaria*, 2015.

30 Paragraph 62 of *Pfeifer v. Bulgaria*, 2009 and paragraph 56, of *Prescher v. Bulgaria, 2011*, paragraph 54 of *A.E. v. Poland*, 2009, and others.

31 *Khlaifia and Others v. Italy*, 2016.

world through alternative means of communication.

Considering the area of the confinement, it had to be necessarily variable, considering it can change not only from hospital to hospital, but also according to the influx felt at the time.

But mainly, with reference to the supervision or the prohibition to leave the assigned area, it should be noted that there was a specific nature associated with the prohibition of movement. The particular circumstances surrounding these restrictions should not be compared to a detention or arrest. Even though there was a formal restriction on liberty, there was no punitive nature to justify it. Other reasons motivated it, such as the need to prevent the transmission of a threat, a medical condition. It is also important to note that these restrictions were always implemented when there was a confirmed case of COVID-19 or at least a suspected infection. Thus, there was not a limitation on movement when the mother and the newborn tested negative and had no symptoms of the disease.

In this regard, when it comes to defining what is tolerable in restrictive measures, the Court pays attention to situations in which the restriction on the freedom of movement imfringes on particularly sensitive moments of private life and the right to exercise family life[32].

In a situation diametrically opposed to the issue at hand, in a case where an applicant was prevented from travelling to his home and consequently from helping his ailing mother or attending her funeral, the Court stated that the national courts should have taken into account «the exceptional circumstances and the strong humanitarian considerations involved», examining «his request with particular care and scrutiny»[33].

With regard to sensitivity, it is possible to foresee that a situation such as the irreplaceable and unrepeatable moment of birth deserves the same understanding. Therefore, given the particularity of the situation and the significance both for family life and integration and for the child's development, specific consideration should be given, leading national and European judges to a comprehensive approach.

G. Restrictions

1. Preliminary considerations

For the purposes of the current discussion, there are two significant conceivable ways of restricting the freedom of movement and the right to respect for family life through the ECHR; one of the paths entails Article 15, a derogation clause that allows Contracting States to drift, in exceptional circumstances, from their obligations to secure certain rights and freedoms set out in the ECHR[34]; another route follows the previsions of the ECHR that allow for the limitation of the specific aforementioned freedom and right,

32 ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 45 para. 247.

33 *Berkovich and Others v. Russia*, paragraph 96, 2018. The Court then concludes that «Such a rigid and automatic approach cannot be reconciled with the obligation imposed by Article 2 of Protocol No. 4 to ensure that any interference with an individual's right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in the light of the evolving circumstances (see Vlasov and Benyash, cited above, para. 36, with further references)». Similar observations were built in *Manannikov v. Russia*, 2018.

34 ECtHR, *Guide on Article 15 of the European Convention on Human Rights - Derogation in time of emergency*, Updated on 31 December 2021, p. 5, para. 1.

Article 8(2) of the ECHR and Article 2(3) of Protocol No. 4 of the ECHR.

According to Article 15(1) of the ECHR, in times of war or other public emergencies threatening the life of the nation, States may take measures derogating from their obligations under the Convention.

It is important to start off by mentioning that the freedom of movement and the right to respect for family life aren't absolute under Article 15(2) of the ECHR.

Secondly, the circumstance to which "other public emergency threatening the life of the nation" refers is understood as being «an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed»[35], such as the one resulting from the spread of SARS-CoV-2.

It is evident that by March 2020, the COVID-19 pandemic was, if not an actual emergency, at least an imminent one throughout the whole of Europe, and that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order were plainly inadequate[36].

Nevertheless, due to their proximity with the situation and the urgent exigencies felt, it fell on the national authorities to determine if the life of its nation was threatened by a public emergency as well as the nature and extent of the measures necessary to fend it off[37]. Yet, this does not grant the States an unlimited margin for action, it being within the national authorities' margin of appreciation to decide on the presence of an emergency and to dictate the necessary measures subject to European supervision[38].

It is worth noting that «Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation. The Court is not precluded, however, from having regard to information which comes to light subsequently»[39].

Additionally, besides requiring that the measures taken do not violate other obligations under international law, Article 15(1) clearly stipulates that the derogations adopted by the States can only be to the extent strictly required by the requirements of the situation, for which such factors like the nature of the rights affected by the derogation, the circumstances leading to the emergency situation, as well as its duration, should be taken into account[40].

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35 *Lawless v. Ireland (No. 3)*, 1961, para. 28.

36 *Denmark, Norway, Sweden and the Netherlands v. Greece* (the "Greek case"), Commission report, 1969, para. 153; and ECtHR, *Guide on Article 15*, p. 6, para. 10.

37 *Ireland v. the United Kingdom*, 1978, para. 207; *Brannigan and McBride v. the United Kingdom*, 1993, para. 43; *A. and Others v. the United Kingdom*, 20095, para. 173; *Mehmet Hasan Altan v. Turkey*, 2018, para. 91; *Şahin Alpay v. Turkey*, 2018, para. 75; and ECtHR, *Guide on Article 15*, p. 7 para. 12.

38 *Ireland v. the United Kingdom*, 1978, para. 207; *Brannigan and McBride v. the United Kingdom*, 1993, para.43; *A. and Others v. the United Kingdom*, 2009, para. 173; *Mehmet Hasan Altan v. Turkey*, 2018, para. 91; *Şahin Alpay v. Turkey*, 2018, para.75; and ECtHR, *Guide on Article 15*, p. 7 para. 12.

39 *A. and Others v. the United Kingdom*, 2009, para. 177.

40 *Brannigan and McBride v. the United Kingdom*, 1993, para. 43; *Aksoy v. Turkey, 1996*, para. 68; *A. and Others v. the United Kingdom*, 2009, para. 173; and ECtHR, *Guide on Article 15*, p. 9 para. 23.

Although the information which comes to light subsequently can be taken into account[41], similarly to the requirement of a public emergency threatening the life of the nation, the aforementioned factors must be accessed in accordance with the conditions and circumstances that were in force and subsisted when the derogating measures were implemented, and not examined retrospectively[42].

Notwithstanding, under Article 15(3) of the ECHR, the Secretary General of the Council of Europe must be informed of the derogation measures taken and the reasons for adopting them, otherwise Article 15 isn't applicable to the decreed measures[43]. This procedure is set in place in order for the derogation to become public and known by other Contracting States[44].

It is true that the notification of the derogation does not have to take place prior to the measures being taken[45]. No matter how, it appears that during March 2020, most States had chosen to take different approachees to address the pandemic situation, the freedom of movement and the right to respect for family life being restricted on the grounds of Article 2(3) of Protocol No. 4 to the ECHR and Article 8(2) of the ECHR.

Even if not so, it is the position of the ECtHR that the analysis of the validity of a derogation will only take place after the conclusion that the measures taken cannot be justified under the substantive articles of the ECHR[46].

Both Article 8(2) of the ECHR and Article 2(3) of Protocol No. 4 of the ECHR mention public safety, protection of health and protection of the rights and freedoms of others as legitimate aims for restricting the freedom of movement and the right to respect for family life. In spite of the fact that the COVID-19 pandemic easily fits into the acknowledged justifications[47], the Government still had to show that the interference caused by the measures taken to combat the SARS-CoV-2 crises pursued a legitimate aim[48] and that the actions taken in accordance with such measures aimed to seek that end[49].

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41 *A. and Others v. the United Kingdom*, 2009, para. 177; and ECtHR, *Guide on Article 15*, p. 10 para. 25.

42 *Ireland v. the United Kingdom*, 1978, para. 214; *A. and Others v. the United Kingdom*, 2009, para. 177; and ECtHR, *Guide on Article 15*, p. 10 para. 25.

43 *Cyprus v. Turkey*, Commission report of 4 October 1983, para. 67-68; and ECtHR, *Guide on Article 15*, p. 14 para. 42.

44 *Greece v. the United Kingdom*, 1958, para. 158; and ECtHR, *Guide on Article 15*, p. 14 para. 41.

45 *Greece v. the United Kingdom*, 1958, para. 158; and ECtHR, *Guide on Article 15*, p. 14 para. 44.

46 *A. and Others v. the United Kingdom*, 2009, para. 161; *Ireland v. the United Kingdom*, 1978, para. 191; *Lawless v. Ireland (no. 3)*, 1961, para. 15; and ECtHR, *Guide on Article 15*, p. 5 para. 4.

47 EAPIL, COVID-19 and the Right to Respect for Family Life under Article 8 ECHR, 1 June 2020, available at https://eapil.org/2020/06/01/the-interplay-between-covid-19-and-the-right-to-respect-for-family-life-under-article-8-echr/.

48 *Mozer v. the Republic of Moldova and Russia*, 2016, para. 194; *P.T. v. the Republic of Moldova*, 2020, para. 29; and ECtHR, *Guide on Article 8*, p. 12, para. 22.

49 *Kilin v. Russia*, 2021, para. 61; and ECtHR, *Guide on Article 8*, p. 12 para. 22.

It is also a condition, under Article 8(2) of the ECHR and Article 2(3) of Protocol No. 4 of the ECHR, that the interference be carried out in accordance with the law. As such, the restrictions at stake must have had a basis in domestic law[50], this is in contrary to the absence of a specific legal basis[51].

But this requisite also refers to the quality of the law[52]. Therefore, the domestic law must be characterized by foreseeability and accessibility[53]. Regarding accessibility, «the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case»[54]. So, as long as the guidelines in question are in the public domain (for example, online), they satisfy this condition[55].

The domestic law should, also, be foreseeable in its terms, in a way that it is formulated with sufficient precision[56] to let individuals be aware of the circumstances and the conditions that allow the authorities to resort to measures affecting their rights under the Convention[57], as well as the consequences that may arise[58].

Furthermore, «domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which they are entitled under the rule of law in a democratic society»[59].

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50 Concerning Article 8 of the ECHR: *Rotaru v. Romania*, 2000, para. 52; *Amann v. Switzerland*, 2000, para. 50; *Kopp v. Switzerland*, 1998, para. 55; *S. and Marper v. the United Kingdom*, 1995, para. 95; *Klaus Müller v. Germany*, 2020, para. 48; *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332; *Kennedy v. the United Kingdom*, 2010, para. 151; and ECtHR, *Guide on Article 8*, p. 10, para. 15. Respecting Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 106; *Sissanis v. Romania*, 2007, para. 66; *Khlyustov v. Russia*, 2013, para. 68; *Mursaliyev and Others v. Azerbaijan*, 2018, para. 31; *Olivieira v. the Netherlands*, 2002, para. 47; *Landvreugd v. the Netherlands*, 2002, para. 54; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 31, para. 136.

51 *Heglas v. the Czech Republic*, 2007, para. 74; and *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332.

52 Pertaining Article 8 of the ECHR: *Rotaru v. Romania*, 2000, para. 52; *Amann v. Switzerland*, 2000, para. 50; *Kopp v. Switzerland*, 1998, para. 55; *Klaus Müller v. Germany*, 2020, para. 49; *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332; and ECtHR, *Guide on Article 8*, p. 10, para. 15. When it comes to Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 106; *Khlyustov v. Russia*, 2013, para. 68; *Mursaliyev and Others v. Azerbaijan*, 2018, para. 31; *Olivieira v. the Netherlands*, 2002, para. 47; *Landvreugd v. the Netherlands*, 2002, para. 54; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 31, para. 136.

53 In the matter of Article 8 of the ECHR: *Rotaru v. Romania*, 2000, para. 52; *Amann v. Switzerland*, 2000, para. 50; *Kopp v. Switzerland*, 1998, para. 55; *Klaus Müller v. Germany*, 2020, para. 49; and *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332. In reference to Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 106; *Sissanis v. Romania*, 2007, para. 66; *Khlyustov v. Russia*, 2013, para. 68; *Mursaliyev and Others v. Azerbaijan*, 2018, para. 31; *Olivieira v. the Netherlands*, 2002, para. 47; *Landvreugd v. the Netherlands*, 2002, para. 54; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 31, para. 136.

54 *The Sunday Times v. The United Kingdom*, 1979, para. 49.

55 *Khlyustov v. Russia*, 2013, para. 73; and ECtHR, *Guide on Article 2 of Protocol No. 4* , p. 32, para. 137.

56 As to Article 8 of the ECHR: *Klaus Müller v. Germany*, 2020, para. 50; *Amann v. Switzerland*, 2000, para. 56; *Rotaru v. Romania*, 2000, para. 55; *S. and Marper v. the United Kingdom*, 1995, para. 95. For Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 107; *Khlyustov v. Russia*, 2013, para. 68; and ECtHR, *Guide on Article 2 of Protocol No. 4* cit., p. 32, para. 138.

57 In relation to Article 8 of the ECHR: *C.G. and Others v. Bulgaria*, 2008, para. 39; *Fernández Martínez v. Spain*, 2014, para. 117; and ECtHR, *Guide on Article 8* cit., p. 11, para. 18. About Article 2 of Protocol No. 4 of the ECHR:

58 With reference to Article 8 of the ECHR: *Fernández Martínez v. Spain*, 2014, para. 117; *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332; *Kopp v. Switzerland*, 1998, para. 55; *Rotaru v. Romania*, 2000, para. 52; *Amann v. Switzerland*, 2000, para. 50; and *Klaus Müller v. Germany*, 2020, para. 49. In regard to Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 107; *Sissanis v. Romania*, 2007, para. 66; *Khlyustov v. Russia*, 2013, para. 68; *Mursaliyev and Others v. Azerbaijan*, 2018, para. 31; *Olivieira v. the Netherlands*, 2002, para. 47; *Landvreugd v. the Netherlands*, 2002, para. 54; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 31, para. 136.

59 *Piechowicz v. Poland*, 2012, para. 212. As to Article 8 of the ECHR: see, also, *Domenichini v. Italy*, 1996, para. 33; *Nurzyński v. Poland*, 2010, para. 36; *Domenichini v. Italy*, 1996, para. 33, and ECtHR, *Guide on Article 8*, p. 10-11, para. 17. In relation with Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 109; *Sissanis v. Romania*, 2007, para 66; *Khlyustov v. Russia*, 2013, para. 70; *Rotaru v. the Republic of Moldova*, 2020, para. 124; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 32, para. 140.

One question that can come to light is whether Health Authorities, despite their connection to the executive, have the legitimacy to issue guidelines on the management of newborn infants born to SARS-CoV-2-suspected or SARS-CoV-2-positive mothers, mainly those that imply a physical separation between baby and mother, as they pose restrictions on fundamental rights and freedoms.

The answer shall depend on the legal regimes established in different countries[60]. As long as the interference in the freedom and right at stake is authorized by a recognized rule in the national order and such rule is accessible and foreseeable, then, in this aspect, no legality complication should emerge[61]. It is the ECtHR's understanding that the term "law" should be accepted in its substantive sense and not, necessarily, in its formal one, and, thus, is the provision in force[62].

Additionally, adequate safeguards must be adopted to warrant the respect for one's freedom of movement and the right to respect for family life against various possible abuses or, in other words, against arbitrary interference[63].

2. The requirement of necessity in a democratic society

Lastly, Article 8(2) of the ECHR and Article 2(3) of Protocol No. 4 of the ECHR demand that the interference on the freedom of movement and right to respect for family life be necessary in a democratic society. The term "necessary" implies the existence of a "pressing social need" for the interference at hand[64].

It is relevant to highlight that a margin of appreciation is granted to States to make the initial assessment of the pressing social need, on a case-to-case basis[65]. In light terms, the margin of appreciation refers to the space or room that the Strasbourg institutions are willing to give national authorities in fulfilling their obligations under the ECHR[66].

In relation hereto, the machinery for protection contained within the ECHR is subsidiary to the national systems safeguarding human rights and, thus, it is, primarily up to the States to secure the rights

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60 Regina Valutytė, Danutė Jočienė and Rima Ažubalytė. Legality of Human Rights Restrictions During the COVID-19 Pandemic Under the European Convention on Human Rights. Tilburg Law Review. 2020; 26(1): 1–15, p. 5, available at https://doi.org/10.5334/tilr.245.

61 Regina Valutytė, Danutė Jočienė and Rima Ažubalytė. Legality of Human Rights Restrictions, p. 4.

62 *Leyla Şahin v. Turkey*, 2005, para. 88; *Kafkaris v Cyprus*, 2008, para. 139; and *Vyerentsov v Ukraine*, 2013, para. 63.

63 About what was said in relation to freedom of movement: *Rotaru v. the Republic of Moldova*, 2020, para. 24; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 32, para. 143. As to what was said in reference to the right to respect for family life: *Bykov v. Russia*, 2009, para 81; and ECtHR, *Guide on Article 8*, p. 11, para. 19.

64 Pertaining Article 8 of the ECHR: *Dudgeon v. the United Kingdom*, 1981, para. 51; and ECtHR, *Guide on Article 8*, p. 13, para. 28. In reference to Article 2 of Protocol No. 4 of the ECHR: *Khlyustov v. Russia*, 2013, para. 84**;** and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 34, para. 162.

65 As to Article 8: *Dudgeon v. the United Kingdom*, 1981, para. 52; and ECtHR, Guide on Article 8 cit., p. 13, para. 28. In regard to Article 2 of Protocol No. 4 of the ECHR: *Khlyustov v. Russi*a, 2013, para. 84; and ECtHR , Guide on Article 2 of Protocol No. 4 cit., p. 34, para. 16.

66 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, Council of Europe Publishing, 2000, p. 5.

and liberties consecrated in the Convention[67]. When all domestic remedies have been exhausted that the institutions created by the ECHR shall become involved and intervene[68].

As follows from the principle of subsidiarity, each State should decide democratically what is more appropriate for itself and «The principle of review states that the role of the Court is not one of final court of appeal or "fourth instance". Therefore, the main responsibility of ensuring the rights provided in the Convention rests with the Member States, and the role of the Strasbourg organs is limited to ensure whether the relevant authorities have remained within their limits»[69].

In any event, even though the guidelines under observation pursued legitimate aims - public safety, protection of health and protection of the rights and freedoms of others - and, in reference to the narrow time period - March 2020 -, there was a pressing social need - combating the coronavirus -, no restriction can be considered necessary in a democratic society, unless it's proportionated to the legitimate aim pursued[70]. So, despite the existing domestic margin of appreciation, it is still subject to European supervision, which covers the aim of the restrictive measures and their "necessity"[71].

The principle of proportionality[72] requires that all decisions and actions taken by the States are appropriate to the legitimate aim pursued, the aim or purpose resulting from the constitution or from the law. In addition, States must provide a rationale for the measure taken, and also on the specific objective or purpose pursued. The last requirement, consistent with the principle of proportionality, is the need for an evaluation on the proportionality in the narrow sense. To refine this variant of proportionality, States and the ECtHR would look at the proportionality between the restriction resulting from the measure taken, and the gain it brought about. There is also a consideration of the balance of the restriction and the benefits that flow therefrom. A balance will be considered to exist if the restriction on the right does not impact its essential content. All the criteria will then take into account the specific margin of appreciation recognized to the States.

It is apparent that the guidelines that imply the separation between newborn infants and their mothers are appropriate to achieve public safety, the protection of health and the protection of the rights and freedoms of others, and that the motives underlying the abovementioned guidelines are sufficient since they are designed to combat the spread of SARS-CoV-2. However, the actual proportionality in the narrow sense of the different extents and dimensions that the aforementioned separation can take may be dubious.

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67 *Handyside v. The United Kingdom*, 1976, para. 48.

68 *Handyside v. The United Kingdom*, 1976, para. 48.

69 https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#P106_8173.

70 As to Article 8 of the ECHR: *Dudgeon v. the United Kingdom*, 1981, para. 52**;** and ECtHR, *Guide on Article 8*, p. 13, para. 28. In regard to Article 2 of Protocol No. 4 of the ECHR: *Khlyustov v. Russia*, 2013, para. 84**;** and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 34, para. 162.

71 *Handyside v. The United Kingdom*, 1976, para. 49.

72 Kristina Trykhlib, The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights. EU and Comparative Law Issues and Challenges Series, 2020; 4: 128-154, available at https://doi.org/10.25234/eclic/11899.

In March 2020, the knowledge that the scientific community had about the new coronavirus was, as we have said, insufficient. Let us remember: it was known that the transmission of the virus was quick and easy, that the virus could, and did, cause death, and that it was, or at least appeared to be, of greater concern in adults with pre-existing health problems.

The level of knowledge in the various member states was similar. However, it should not be forgotten that the consequences of the virus, namely the number of infections, were different and that in some member states the experience was more overwhelming, as in Italy.

Without prejudice to the fact that knowledge of the virus was very similar in all member states, because the scientific community shared the knowledge it acquired during the course of the pandemic situation, the truth is that the measures taken by member states were different, some more restrictive than others.

Countries such as Portugal, for example, decided to require a minimum distance of 2 metres between the mother's bed and the baby's cot when more restrictive measures were not necessary. In the same circumstances, other countries such as Belgium and Germany have considered that the appropriate minimum distance was 1.5 metres. Furthermore, in Germany and Belgium, after first contact between a mother with suspected or confirmed COVID-19 and her newborn child, the child was kept in isolation until the test result was known, and the child remained in isolation for 14 days even if the result was negative. The same requirement, isolation for a period of 14 days, did not apply in other member states.

It should also be noted that in Poland, in circumstances similar to those described, the newborn was isolated from its mother during hospitalization and breast milk was provided remotely.

Breastfeeding, however, was encouraged in almost all member states, even in the case of separation, and here there is greater consistency in the measures taken by the different states. Nevertheless, it should be noted that in Poland, if the mother tested positive for SARS-Cov-2, although breastfeeding was promoted, the administration of infant formula was considered, even for organizational reasons.

Some member states made it compulsory to test both mother and infant, while others considered testing only in the event of symptoms, and still others considered the infant to be positive for SARS-CoV-2 after contact with a positive mother without testing the newborn, as in the Netherlands, for example.

Notwithstanding, the margin of appreciation which the States hold plays a key role in ascertaining if the principle of proportionality was (not) upheld[73]. Amongst other elements, the extent of the margin of appreciation shall vary according to the presence or absence of the European consensus on a certain matter[74], being narrow if such consensus exists and wider if not[75].

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73 Kristina Trykhlib, The Principle of Proporcionality, p. 139.

74 Kristina Trykhlib, The Principle of Proporcionality, p. 141.

75 Kristina Trykhlib, The Principle of Proporcionality, p. 146.

There appears to not be a consensus on the best measures to combat the proliferation of the coronavirus, as some countries ended up embracing harsher separations between newborns and their mothers than others.

Consequently, in an anti-COVID context, States enjoy a wide margin of appreciation in regard to the right to respect for family life and the disparate guidelines dictating the separation between newborn infants and their mothers should be perceived as being proportionate to the aims pursued.

3. Part III

H. Final considerations

In a globalized world, threats of the magnitude of the one we are dealing with are undeniable, bringing to debate the impacts on the most varied fundamental rights. For this reason, it is essential to think about the future with the lessons of the present.

Faced with the centrality of the rights affected, it is up to the scientific community to reflect on the preservation of the essential core of freedoms. In particular, those applying the Convention are called upon to work together to preserve the rights set out in it.

In the uncertainty of the future, knowing only that children will be part of it, measures adopted in a crisis situation must not compromise their full and healthy development and the adult they will become.

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ECtHR Case Law

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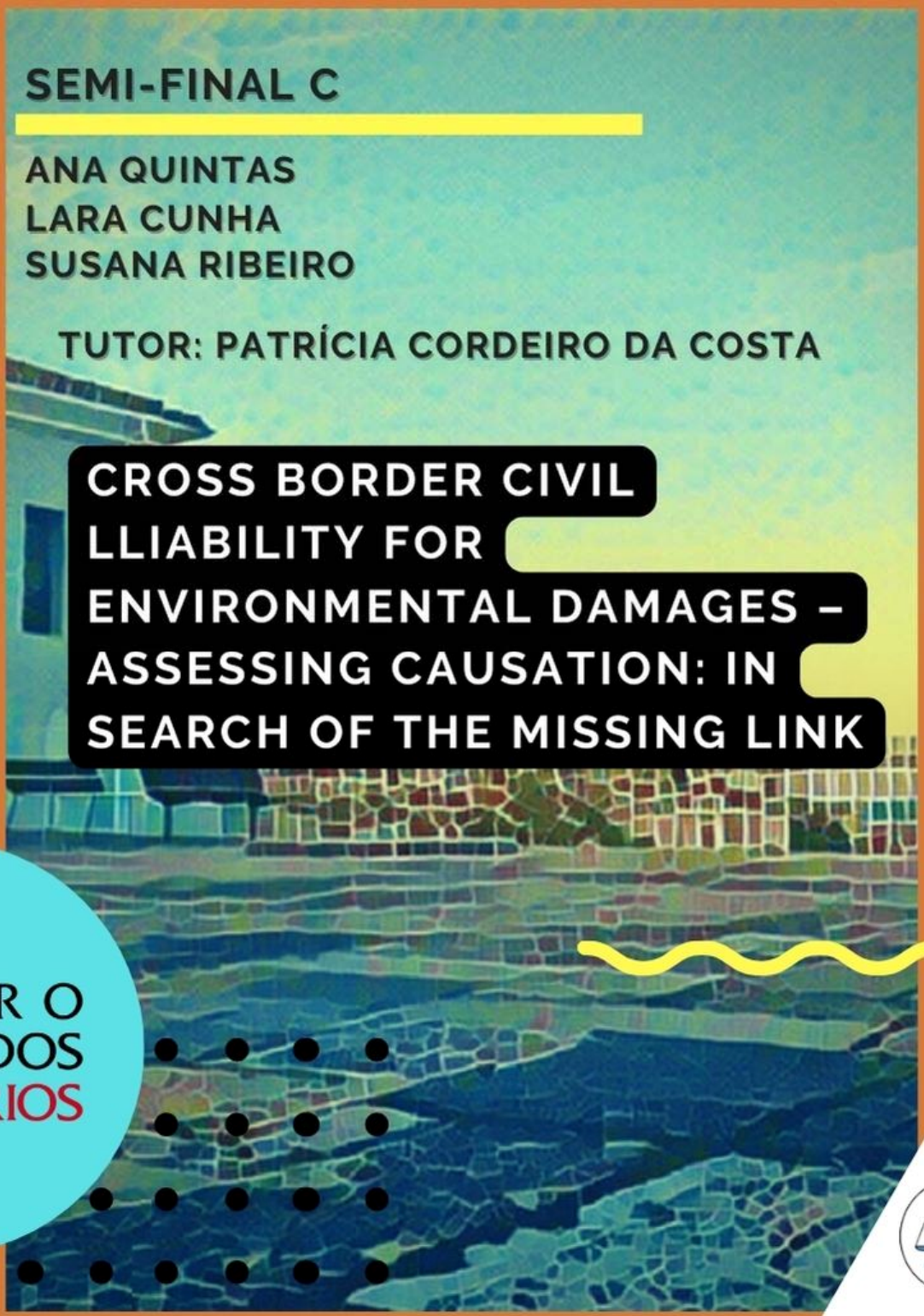
Webgraphy

- https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#P106_8173

Trabalhos

Themis 2022



SEMI-FINAL C

ANA QUINTAS
LARA CUNHA
SUSANA RIBEIRO

TUTOR: PATRÍCIA CORDEIRO DA COSTA

CROSS BORDER CIVIL LLIABILITY FOR ENVIRONMENTAL DAMAGES – ASSESSING CAUSATION: IN SEARCH OF THE MISSING LINK

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

THEMIS

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THEMIS 2022 COMPETITION AGENDA

SEMI-FINAL C
EU and European Civil Procedure

28 June – 1 July 2022
Balatonszemes, Hungary
organized by the EJTN and the
Balatonszemes Judicial Training Centre (BOK),
H-8636, Balatonszemes, Ady Endre utca 22-38,
Hungary

With financial support from the Justice Programme of the European Union

BACKGROUND

EJTN THEMIS Competition is a competition with a unique format, opened to judicial trainees from across Europe and aiming to exchange views and develop new approaches on topics related to international civil and criminal cooperation, human rights and judicial deontology.

The competition is opened to judicial trainees from all training institutions who are members or observers of EJTN. Teams of three judicial trainees accompanied by one teacher/tutor may enroll in the competition which consists of four semi-finals and a grand-final. The official language of the competition is English.

The jury of the competition is chosen from a pool of experts appointed by EJTN Members, that are well-regarded professionals in the field of the given semi-final/final. As a general rule, experts must not have the same nationality as the competing team they will have to assess.

The jury members assessed the overall quality and the originality, the critical thinking and the anticipation of future solutions, the reference to relevant case law, but also the communication skills and the consistency.

Each semi-final had three stages: a written paper on a topic relevant for the subject of the semi-final, an oral presentation of that paper and a discussion with the jury. The maximum number of teams participating in a semi-final is eleven. The winner and runner up of each semi-final will enter the grand-final, consequently there are eight teams in the grand-final. The prize for the winning team is a one-week study visit, organised and financed by EJTN, in any European judicial institution.

AGENDA

Tuesday 28 JUNE 2022		
08:15	**Arrival and Registration of Participants**	
09:00	**Opening Ceremony**	**Dr. Enikő Szilágyi**, head of the Department for International Relations **Markus BRUCKNER,** EJTN Secretary General **Rasmus Van Heddeghem**, EJTN junior project manager
09:30	**Lecture – Hungarian Judicial System**	**Dr. Enikő Szilágyi**, head of the Department for International Relations
10:00	**Group photo & Coffee Break**	
10:30	**Presentation of Rules & Jury Introduction**	**Rasmus Van Heddeghem**, EJTN junior project manager **Jury members:** **Ales Galic (SI)** **Apostolos Anthimos (GR)** **Carlos Santaló Goris (LU)**
10:45	**Presentation and discussion – Team ROMANIA**	**LAZOC, Tudor Iulian** **TUDURACHI, Adelina Maria** **RADU, Artiom** *Tutor : ONIȘOR, Amelia*
12:00	**Coffee Break**	
12:15	**Presentation and discussion – Team FRANCE**	**PIRES, Audrey** **MILNE, Angélique** **MARIN, Grégoire** *Tutor: Charles, JEAUGEY*
13:30	**Lunch**	
14:30	**End of Day 1** Jury deliberation	

18:00	**CULTURAL PROGRAMME** – visit to a vine cellar in Balatonlelle Magyar Borok Pincéje - Balatonlelle-Rádpuszta Gasztro Élménybirtok (radpuszta.hu)	

Wednesday 29 JUNE 2022		
08:30	**Arrival and Registration of Participants**	
09:00	**Presentation and discussion – Team HUNGARY JUD**	**VINCZE, Fanny Rose** **KÁROLYI, Kristóf** **KISS, Laura Olga** *Tutor: Lilla Rainer*
10:15	**Coffee break**	
10:45	**Presentation and discussion – Team NETHERLANDS**	**SPEKSNIJDER, Maartje** **ABBING, Vincent** **HINSKENS-VAN NECK, Mirjam** *Tutor: VAN DEN BERG JETHS-VAN MEERWIJK, Katlijne*
12:00	**Lunch**	
13:00	**Presentation and discussion – Team PORTUGAL**	**SALAZAR RIBEIRO, Susana** **CUNHA, Lara** **QUINTAS, Ana** *Tutor: COSTA, Patrícia Helena*
14:15	**Coffee-break**	
14:30	**Presentation and discussion – Team ALBANIA**	**KOLA, FLUTURA** **MERRUKO, ROMEO** **SHESHI, RENIS** *Tutor: ÇOTA, Edlira*
15:45	**End of Day 2**	

Thursday 30 JUNE 2022		
08:30	**Arrival and Registration of Participants**	
09:00	**Presentation and discussion – Team GERMANY II**	**OBERFELD, Max** **RIPKEN, Gesche** **REMPEL, Kristina** *Tutor: IMGARTEN, Nils*
10:15	**Coffee break**	
10:45	**Presentation and discussion – Team HUNGARY – PRO**	**RÓNAI, Veronika** **MÁTYUS, András** **KOCSIS, Melinda** *Tutor: WEISZENBERGER, Éva*
12:00	**Lunch**	
14:30	**Jury deliberation**	
15:45	**End of Day 2**	
20:00	*Official Themis Dinner* *Place: Kistucsok etterem*	

Friday 1 JULY 2022		
09:30	**Arrival and Registration of Participants**	
10:00	**Awards Ceremony**	Dr. Enikő Szilágyi, head of the Department for International Relations **Jury members:** **Ales Galic (SI)** **Apostolos Anthimos (GR)** **Carlos Santaló Goris (LU)**
12:30	**Closing ceremony**	**Rasmus Van Heddeghem**, EJTN junior project manager
13:00	**End of the Semi-final C**	

JURY MEMBERS

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CROSS BORDERCIVIL LIABILITY FOR ENVIRONMENTAL DAMAGES

Assessing causation: in search of the missing link

TEAM PORTUGAL

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CROSS BORDER CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGES

Assessing causation: in search of the missing link[1]

Abstract: Ecological catastrophes damage our property but, moreover, our health, well-being and lives. In this context, it's unavoidable to view civil liability as a key instrument to prevent environmental damage and compensate those affected. Several efforts have been made to provide legal protection both to the environment and citizens, but some questions remain unanswered in a satisfying manner. The *EU Liability Directive* doesn't include an individual's right to compensation, nor does it provide a definition of causality, failing also to clarify how liability should be assigned when several operators have contributed to the damage. As for the *Lugano Convention*, the dire reality is that it has only been signed by nine States and ratified by none. European Courts' jurisprudence tried to clarify some of these matters. Nevertheless, the concept of relevant causation is still vague and difficult to apply, especially when addressing cross border environmental damages. Is there a solution? There are some positive signs in recent developments within the EU, although still insufficient. We propose the solution should be found through mechanisms already known by legislator and courts, concerning allocation of burden of proof, assessment and weighing of evidence (standard of proof), and distribution of risks between multiple operators.

Keywords: environmental damage; civil liability; causality; burden and standard of proof.

Table of contents: *1) Introduction. 2) Legal framework and its main challenges. 3) The CJEU and ECHR caselaw. 4) Is there a solution? 5) Recent developments. 6) Conclusion.*

1) Introduction

In the words of Edith Brown Weiss, each generation must look at the Earth and its resources not only as an investment opportunity, but as a trust passed on to us by our ancestors, also to be passed on to our descendants, thus rendering all of us as trustees responsible for the integrity of our planet.[2]

It is well documented ecological catastrophes cause serious damage not only to property, but to our lives and health in such a way that, in the long term, the human species survival may be itself at risk. We only must think about acid rains, desertification, and climate change due to global warming, or about the destruction of the seas and the levels of pollution affecting the air we breathe to make the case for the importance and urgency of environmental protection in an effective manner. In this context, it's

[1] This title is respectfully inspired by Boštjan M. Zupančič's work *Causation in Cases of Environmental Degradation: The Missing Link in Adjudicating Human Rights*, 3 Y.B. POLAR L. 113, 118 (2011).

[2] Weiss, Edith Brown, *In Fairness to Future Generations and Sustainable Development*, American University International Law Review 8, n.º 1 (1992), pp. 19-26.

unavoidable to consider civil liability as one of the main tools at our disposal in both preventing environmental damages and compensating those affected. Unfortunately, the efforts already made show limited success, namely due to specific questions raised in this context and for which traditional civil liability solutions may be maladapted, among which: the dilemma between a fault-based liability and a strict liability system; establishment of causation, namely regarding long-distance damages or situations when the damage occurs much later; apportionment of liability when multiple actors are responsible for the damage, and/or when its effects are intensified by natural phenomena; determination of what is damage eligible for compensation and who has the right to it; limitation periods.

2) Legal Framework and its main challenges

Attention to environmental questions as a matter of global concern has increased since the 70's from last century, when, in 1972, was held the first United Nations Conference on the Environment, in Stockholm. Later, in 1992, the ***Rio Declaration*** provided states should develop national law regarding liability and compensation for the victims of pollution and other environmental damage and, on the other hand, also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.[3] From these two instruments, the basic principles of environmental law were drawn, namely the *sustained development principle*, the *polluter-pays principle*, and the *precautionary principle*.

The explicit right to a clean and quiet environment isn't included in the ***European Convention on Human Rights*** or its protocols but, as we will see further on, the European Court of Human Rights (ECtHR) has emphasized on several occasions that the effective enjoyment of the rights encompassed in the Convention depends notably on a sound, quiet and healthy environment. As for the European Union (EU), the 1992 ***Maastricht Treaty*** placed environmental protection as one of its main objectives (Articles 2 and 174/2). Nevertheless, we may also consider earlier EU instruments potentially pertinent to environmental civil liability as, for example, the 1985 ***Product Liability Directive***, under which pollutants may be regarded as a type of product and liability imposed for excessive emissions based on defective products causing harm to property and personal interests. In any case, the EU continued to develop its efforts and, in 2000, the *White Paper on Environmental Liability* proposed a liability scheme embracing both *traditional damage* and *environmental damage.* Four years later, the EU Liability Directive came to light.

The EU Liability Directive

While traditional damage liability schemes are based on tort law, requiring property or personal injury, and

[3] https://www.un.org/en/conferences/environment/rio1992

offering compensation as a remedy, environmental damage schemes only require setbacks to the environment and natural resources and are focused mainly on restoring the injured resources, preventing future offenses, and punishing offenders.

In April 2004, ***Directive 2004/35*** (from now on, mentioned as "Directive") was adopted, encompassing a liability scheme of the latter kind. In fact, the Directive expressly excludes an individual's right to compensation as, according to recital 14, "this directive does not apply to cases of personal injury, damage to private property or economic loss". In the same direction, Article 3 (3) states that the "Directive does not give individuals the right to compensation as a result of environmental damage or the imminent threat of such damage". Accordingly, *environmental damage*, as defined by Article 2, is limited to damage caused to protected species and natural habitats (damage to biodiversity), water or soil.

We could say that, in some sense, civil law is completely removed from the text of the Directive, as it doesn't contemplate compensation for personal or economic damages and, although providing for environmental organizations having some rights of action against public authorities, it doesn't provide for such rights to be actioned by those organizations against the operator responsible. The fundamental reason for this is that the essential scope of this model of environmental responsibility is not ensuring compensation for injured persons, but that polluting installations operators are obliged to adopt positive measures to prevent and/or repair damages to the environment. Accordingly, Annex II of the Directive states that *compensatory remediation* is any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect, further clarifying that *interim losses* don't consist of financial compensation to members of the public.

There are other aspects of this Directive that may merit some additional remarks. The Directive is based in the *polluter-pays principle* (Article 1, recitals 2 and 18), in the sense the costs of repairing environmental damage will be borne by the polluter. However, when the polluter cannot be identified, cannot pay, or presents a valid defense, this principle is rendered ineffective, adding to which, in these situations, although public authorities may restore the environment, they are not obliged to do so. It is true that all Member States' public administration is responsible for protecting the environment, namely when issuing permits for installations, determining which conditions are necessary for those permits and verifying compliance. But the Directive could have gone further, namely providing the administration with the power to adopt corrective measures leading to stricter licensing conditions and more rigorous control of potential polluters. Also of note that, in the event of an environmental accident, an unforeseen and sudden event, harmful for the environment and requiring restoration, Member States may declare the polluter won't bear the costs of restoration if he has acted in accordance with a permit or if there is a so-called development risk (Article 8 (1) (a) and (b)), which largely may render the restoration of the environment unfeasible. On the other hand, the Directive is applicable only when the polluter is at fault or acted with negligence (Article 3 (1) (b)) in

relation to professional activities not listed in Annex III, which predictably will be very difficult to demonstrate if a license to carry out the activity has previously been granted.

It should also be highlighted that one of the main difficulties in applying the Directive is not directly related to environmental damage caused by accidents, but rather to the fact the environment is weakened and degraded. For example, as a rule, car traffic complies with emission limits but, nevertheless, contributes to air pollution, harming the environment and human health; agricultural activity, intensive livestock farming and other practices are legal but, nevertheless, contribute to groundwater and water pollution and soil contamination. In these situations, Directive 2004/35 does not translate into a great solution as it fails to address the problem posed by multiple cumulative causes emerging from different sources and at different moments in time when establishing causation between an activity and the damage to the environment.

In any case, this Directive undeniably establishes a common European starting point, paving the way for further developments, and leaving to each Member State the possibility to go further, namely by providing, in its national legislation, that individuals are entitled to compensation and by setting the conditions necessary for granting that compensation.

The Lugano Convention

The ***Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*** was signed in 21.VI.1993, aiming to ensure adequate compensation for damages resulting from activities dangerous to the environment, as well as means of prevention and reinstatement. As in the Directive 2004/35, its basic principle is that of the *polluter-pays*, thus placing the economic burden where it properly belongs. But this Convention went further, also foreseeing compensation for damages suffered by individuals, including in the definition of *damage* not only loss or damage by impairment of the environment, but also loss of life or personal injury and loss of or damage to property (Article 2 § 7). A *strict liability* regime for damage caused to the environment is provided, thus offering more stringent protection, imposing liability on the operator of the activity, defined as the person exercising control over a dangerous activity (Article 2 § 5).

The Lugano Convention also addresses some of the aforementioned problems. Regarding causality, Article 10 states that, when considering evidence of the causal link between the incident and the damage or, in the context of a dangerous activity as defined in Article 2, paragraph 1, sub-paragraph d, between the activity and the damage, the court shall take due account of the *increased danger of causing such damage* inherent in the dangerous activity. In sequence, the Explanatory Report to the Convention, trying to facilitate the understanding of this provision, states that the Convention does not create a true presumption of a causal link, operating this provision "as a complement to the system of strict liability" and forming "part of all the rules which are designed to assist the person who has suffered damage to prove the causal link which may,

in practice, be difficult". It also provides the Court must consider the increased risk of damage from a specific dangerous activity in order to assist the person suffering the damage to obtain compensation. However, the Explanatory Report doesn't clarify how the causal link should be considered in the cases where a specific dangerous activity is not in place, if a fault-based liability is in check or whether cross-border damage is involved.

Article 11 tackles the problem of multiple actors, stating that when damage results from incidents which have occurred in several installations or on several sites where dangerous activities are conducted or from dangerous activities under Article 2, paragraph 1, sub-paragraph d, the operators of the installations or sites concerned shall be jointly and severally liable for all such damage; but if the operator proves that only part of the damage was caused by an incident in the installation or on the site where he conducts the dangerous activity or by a dangerous activity under Article 2, paragraph 1, sub-paragraph d, then he shall be liable for that part of the damage only. Correspondingly, Article 9 provides that if the person who suffered the damage or a person for whom he is responsible under internal law, has, by his own fault, contributed to the damage, the compensation may be reduced or disallowed having regard to all the circumstances.

Being extremely difficult to hold someone responsible for these types of events, determine the real damage, who controls the risks and establish causation, the Lugano Convention attaches great importance to access to information. Since solid technical evidence is usually needed to build a case, ensuring that sufficient access to information on technical details of the agents' actions is provided minimizes this difficulty.

Main challenges

Environmental concerns and the enactment of national and supranational legislation on the environment have increasingly become the focus of populations, which makes this area of law very recent and still with some edges to clean up and shape. For this reason, we cannot be surprised by its constant change, growth, and evolution, to adapt to the needs of peoples and to new technologies. But does the existing legal framework already in force on a supranational level offer sufficient and adequate protection for those affected by environmental damage?

The ***Lugano Convention*** allows ratification by non-members of the Council of Europe, which is particularly important regarding the transboundary nature of climate change. But, having been adopted in 1993, due to scientific and legal developments occurred in the meantime, it clearly must be updated and adapted in order, namely, to assign civil liability for the negative impact on the climate. Notwithstanding that, one of the main issues concerning the Lugano Convention is that, up until now, only 9 States have signed it and none has yet ratified it, which makes us wonder if, at this point, this Convention is (still) regarded as an important instrument, putting in question its future development and entry into force.

As for the ***Directive***, the following aspects are, in our opinion, particularly relevant in this analysis:

I – As previously highlighted, the Directive expressly excludes its application to the so-called traditional damages: personal injury, damage to private property or economic loss. Consequently, if, for example, an operator discharges toxic material into a small stream that only flows into a lake owned by an individual person, the latter cannot claim compensation for the damage suffered under this Directive and must seek remedy under the national legislation applicable. In this context, if facing a cross boarder event, difficulties of great importance may arise in the absence of harmonization between national tort laws. By providing a very limited definition of damage and of environment protected, the Directive offers insufficient protection to those at risk to be affected by environmental damages.

II – For the Directive to be effectively applicable, one or more operators must be identified, in line with the principle of the polluter-pays. If the polluter can't be identified, or if the person causing the damage has no means to repair, it will be up to State authorities to take control of the damage and adopt the measures appropriate to restore the ante-environmental status. The problem lies in that this State responsibility, subsidiary and without translating into a real obligation, will predictably be often overlooked in favor of other social, economic, or political reasons. On the other hand, the Directive also fails to foresee an obligation for the States to not grant permits or authorizations for activities potentially harmful for the environment unless some specific requirements were met, such as, for example, setting up a guarantee fund for the foreseeable ecological and environmental damages or taking out a high-risk insurance contract in benefit of the authorizing State.

III – Finally, the Directive left open the definition of the relevant causal link between the harmful event and the damage. The Directive states that, for it to be applicable, we must be in the presence of an environmental damage within the three identified limits (habitat, water, and land), and identify the cause of the damage in the sense that a causal link must be established between the damage and the identified operator. But can it be said that, by stating the necessity of a causal link, the Directive is also defining the relevant criteria to establish it? We believe that the answer is negative. In fact, we are dealing with a diffuse concept whose definition was been left to each State. And the problem is that, within each State, we can find different definitions of legal relevant causality, ranging from *conditio sine qua non*, serious probability, adequate cause, creation/augmentation of risk or even no definition in the legal texts, leaving for the courts the task to define it.

Let's take a closer look at this last problem.

One encounters several obstacles when trying to establish causation in environmental damage, whether we move in a strict liability scheme or in a fault-based scheme. The difficulty in defining who is liable is intensifying, in accordance with the increased complexity created by expanding industries and new technologies, whose competition has been skyrocketing with the growth of society and its needs. Due to the ubiquity of toxic substances, the interactions between exposure to those toxics and other factors (natural

factors, third party factors, or preexisting conditions of the injured party), and the frequency of considerable latency periods (which may prove to be even transgenerational), causality, in this context, is notoriously difficult to prove. More so if the plaintiff is required to prove both factual causation (also known as *sine qua non*, to be proven mainly by a contrafactual inquiry, where the "*but-for*" test is the most well-known) and legal causation (such as the factual cause also being adequate or proximate).

In what concerns environmental damage, allocating the burden of proof of factual causation, as such viewed (proof of *conditio sine qua non),* on the injured party may be excessive, not only because it can be hard to prove by an individual with little access to scientific information and to the specific conditions of the operator's activity, but also because the "*but-for*" test can't be met in situations where several causes have contributed to the damage, being all of them sufficient to independently cause it without the contribution of the others: in this situation, the answer to the "*but-for*" test is be negative, thus preventing compensation.

On the other hand, concepts of *proximate cause* or *adequate cause* may also result in unsatisfying solutions. Let's think, for example, of the case where, being exposed to a polluted environment, Mr. X develops a heart condition; years later, driving his car, he passes out from that condition which, by itself, would not be lethal; by passing out, he crashes his car and dies from the injuries suffered in result. The proximate cause of death wasn't the exposure to pollution but the car crash; and the concept of adequate cause may also be unsatisfying, namely in some interpretations, since the exposure and subsequent heart condition were not adequate, *per se*, to independently cause death without the contribution of another event.

Even when the law or the courts allow the lowering of the standard of proof needed to establish a fact (following, for example, the standard of *preponderance of evidence* in the place of more rigorous standards such as *proof beyond any reasonable doubt* or *clear and convincing evidence*), or the use of inferential reasoning to establish causation (example: in order to prove event A was *conditio sine qua non* of damage B, the injured party has only to establish, having both A and B occurred, that A was, *in general*, *capable* of causing B), this conceptualization of the relevant causal link may still be considered insufficient, namely to address the problem of alternative, or uncertain, causation. Let's consider the following example: factory A and factory B have independently discharged a toxic component into a stream; the agriculture exploration of C suffered damages caused *by only one* of those toxic components, toxic A *or* toxic B, without being established which one (A or B) caused, in fact, the damage. In these types of cases, the "*but-for*" requisite is not met, as we can't say that if A didn't discharge the toxic component, C would not have suffered the damage (and the same regarding B).

From the point of view of law and economics, the task of balancing conflicting interests remains difficult as well: if the bar is set too high in what concerns the proof of causality, the deterrence of future harmful actions may be compromised; conversely, if the bar is set too low, it may open the door to frivolous claims.

Several States[4] adopted the concept of causality based on the criterion of the probability of the behavior causing the damage, although differences can be detected regarding the greater or lesser burden of proof of the injured party and the defendant, namely according to the type of causal nexus adopted: i. probability of the injurious event *being capable of causing* the verified injury or ii. probability that the injurious event *caused* the verified injury. In the first hypothesis, the burden of the injured party is lightened, as he only must prove a certain behavior as being capable to cause the damage. Having proven this, it will be up to the defendant, usually more prepared and with access to more information, to tackle the Herculean task of dispelling that probability by demonstrating, with a degree of certainty, that the act did not, in fact, cause the damage.

In close relation lies the question of how to apportion liability when several operators have been found to be responsible the damage. In this matter, the Directive maintains a position of non-interference, leaving once again the task for the Member States. The option for joint and several liability, in the stead of proportional liability, is somewhat easier to sustain when the liable operators acted simultaneously. But the discussion is more intense in other situations, namely the cases of subsequent cumulative causation or alternative causation. The option between joint and several liability and proportional liability is not innocuous, as it will affect the injured party in case of insolvency of one or several operators found liable.

Considering the specificities of environmental damages and the absence of uniform solutions at a national level, we believe the Directive should have addressed the problem directly.

3) The CJEU and ECHR caselaw

As pointed above, not only the legal instruments adopted within the European mainframe give insufficient protection to the victims of environmental damages, but they also fail in helping law practitioners and courts to find a uniform interpretation of certain concepts, particularly when in the presence of cross border environmental damages. The insufficient approach of the Directive and the fact that the Lugano Convention is still waiting to enter in force have created a gap demanding greater interpretative activity by national and supranational courts. Although the two main European Courts have tried to bring more definition to certain concepts, the definition of the relevant causal link for this purpose remains contentious.

The European Court of Human Rights (ECtHR)

The ECtHR has been developing some case-law aimed at clarifying the conditions under which an environmental issue may arise under the European Convention on Human Rights (from now on, "Convention"). Even though the Convention does not explicitly establish a right to a healthy environment, nevertheless, the ECtHR has emphasized that serious damage to the environment can affect the well-being

[4] Hinteregger MONIKA, *The Common Core of European Private Law*, available at: www.cambridge.org/9780521889971

of individuals and environmental damage directly concerns with a wide range of human rights, such as the right to life, the right to a fair trial, the right to private and family life, and property rights[5].

In this context, most of the cases dealt by the ECtHR concerning toxic exposures have fallen under Article 2.º (right to life) and Article 8.º (right to private and family life) of the Convention.

Do each of this Articles demand different approaches on causality?

In the opinion of Katalin Sulyok, "in claims brought under the right to life, causality is relevant at several stages of the inquiry: first, in deciding the applicability of the provision, and subsequently, as to the finding of a breach (…) and the causal link between the alleged violation and the applicant's death or imminent threat to her life lies at the core of the inquiry"; but, for Article 8.º, "proving a causal link between the pollution and the health impairment is a sufficient, but not necessary, requirement".[6] In fact, as the Author quoted reports, in ***Brânduşe v. Romania***, a prisoner suffering from noxious odors from a nearby rubbish tip succeeded with his claim in the clear absence of any health injury, having the Court found that wellbeing can be affected even in such cases.

But that is not to be taken as a general rule, since a brief analysis of the Court case-law shows most applications have failed to meet the admissibility criteria concerning causality.

In ***Tătar v. Romania***, the applicants, father and son, complained the technological process used by a company and the environmental accident that occurred at its site constituted a threat to their lives and health, having aggravated the son's asthma, and that national authorities had failed to take any action. In its decision from 27.01.2009, the ECtHR found a violation of article 8 of the Convention, to the extent that "Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the activity of the company operating the mine might entail, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes, and more generally their right to enjoy a healthy and protected environment"[7]. However, the Court considered the applicants had failed to prove the existence of a causal link between the exposure and the son's asthma. In this assessment, the ECtHR refused to follow a probabilistic approach, stating that, although it had been demonstrated the son suffered from asthma, sodium cyanide was a toxic substance which could, under specific conditions, endanger human health, and a high degree of pollution had been detected in the vicinity of the applicants' home following an environmental accident in January 2000, the concentration of sodium cyanide required to aggravate respiratory illnesses was still unknown. The Court added that the scientific uncertainty wasn't accompanied by sufficient statistical evidence and the document produced by a hospital attesting to a certain increase in

[5] Department for the execution of judgments of the European court of human rights – Thematic Factsheet > Environment, October 2020;

[6] Sulyok, Katalin, *Managing Uncertain Causation in Toxic Exposure Cases: Lessons for the European Court of Human Rights from U.S. Toxic Tort Litigation* (June 20, 2017). Available at SSRN: https://ssrn.com/abstract=2989876

[7] Environment and the European Convention on Human Rights – Factsheet - January 2022;

the number of diseases of the respiratory tract wasn't sufficient to create a causal probability[8].

Of particular note the dissenting opinion by one of the Judges, subscribed by another: in their opinion, the presence of a favorable circumstance combined with the absence of a discernible cause made the causality sufficiently probable for it to be established; thus, having been presented an official report indicating an increase in the number of diseases of the respiratory system in the vicinity, the proof of the absence of harmfulness should have been made, in principle, by the State, without imposing on the applicants an impossible burden, especially in the absence of information concerning the harmful effects of sodium cyanide on the human organism.

In ***L.C.B. v. the United Kingdom***, the applicant's father had been exposed to radiation during nuclear tests in the 1950s. The applicant was born in 1966 and later contracted leukemia, alleging that the State's failure to warn and advise her parents of the dangers of the tests to any children they might have, as well as the State's failure to monitor her health, were violations under Article 2. In its decision from 8.06.1998, the ECtHR considered that the applicant had not established a causal link between the exposure of her father to radiation and her own suffering from leukemia and concluded it was not reasonable to hold that, in the late 1960s, the State's authorities, based on this unsubstantiated link, could or should have acted.

In ***Smaltini v. Italy***, the applicant argued emissions from a steel factory affected her health, later causing her death (the proceedings were continued by her family). She had brought proceedings before national courts, which were discontinued. Before the ECtHR, the applicant alleged the decision to discontinue those proceedings had breached her right to life under Article 2. In its decision from 24.03.2015, the ECtHR declared the application inadmissible, observing that, according to the reports examined by the domestic courts, the incidence of leukemia was no higher in the region in question than in other regions of Italy. The Court also noted the applicant had had the benefit of adversarial proceedings, concluding she had failed to demonstrate, in the light of the scientific data available at the time, national authorities had failed in their obligation to protect her right to life under the procedural aspect of Article 2[9].

In ***Calancea and Others vs. Republic of Moldova***, the applicants' houses were built in 1999 and 2001, both ten meters from a high-voltage power line that began operating in the 1960s. Mrs. Calancea suffered from a heart condition, Mr. Calancea was diagnosed with cancer in 1998, and suffered from high blood pressure and hypertensive heart disease. In 2004, the applicants brought an action seeking to have the high-voltage line moved far enough away to conform to technical and health standards. National courts dismissed their action as unfounded, noting the houses had been built after the high-voltage line had come into operation and without the agreement of the network operator. In its decision from 6.02.2018, the ECtHR noted the local authorities had granted permission to build the houses inside the twenty-meter protection zone

[8] As explained in Guide to the case-law of the European Court of Human Rights – Environment - Updated on 31 August 2021;
9 See note 6;

surrounding high-voltage lines, apparently in breach of the technical regulations in force but this fact, in itself, was not sufficient in order to find a violation of Article 8. It also found the applicants had not demonstrated the strength of the electric field recorded on their land had been such as to pose a real risk to their health, observing that all the readings recorded were well below the limit of 5kV/m recommended by the WHO. The Court therefore considered that it had not been demonstrated that the strength of the electromagnetic field created by the high-voltage line had attained a level capable of having a harmful effect on the applicants' private and family sphere, holding that the minimum threshold of severity required to find a violation of Article 8 of the Convention had not been attained.

When establishing a causal link between certain harm and a source of pollution, the ECtHR has generally demanded applicants to present evidence such as medical certificates or reports (*inter alia*, ***Fägerskiöld v. Sweden***, 2008; ***Cuenca Zarzoso v. Spain***, 2018), highlighting in various occasions, though, that a probabilistic approach would not be sufficient to prove causality.

For instance, in its decision in ***Aleksandar Mastelica and Others v. Serbia*** (2020), the Court emphasized that, in assessing evidence, it has generally applied the standard of proof *beyond reasonable doubt*, adding that "such proof may follow from the coexistence of sufficiently strong, clear, and concordant inferences or of similar unrebutted presumptions of fact, and it has been the Court's practice to allow flexibility in that respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved (…)." In practical terms, though, only in the case of ***Tătar v. Romania*** we can find the calling for a probabilistic approach and only in a dissenting opinion, as mentioned above.

Assessing this trend, Katalin Sulyok points out that "it is notable that an applicant has almost never successfully proven causation based on uncertain evidence when the causal link is disputed by the other party. Instead, violations are declared when the defendant government does not contest the causal link surrounding the harmful effects. This provides a convenient factual basis for the Strasbourg Court to find a violation without assessing the probative value of scientific evidence". Noting that "a causal connection between the violation and the damage sustained is also relevant to awarding compensation", this Author concludes that the ECtHR has a "restrictive view when it comes to assessing causation under Article 41, even in cases when the underlying facts do not involve complex scientific expert evidence".[10]

Particularly in the field of environmental damage, we agree the ECtHR should consider adopting a more nuanced vision of the issues concerning causality and the parties' burden of proof, namely admitting the proof of causality by means of probabilistic and statistical scientific evidence, and/or reversal of the burden of proof in a way that, having the plaintiff been successful in proving the event in question increased the risk of occurrence of damage, it will be up to the other party, to avoid liability, to prove the damage wasn't, in fact, caused by the event. This solution provides, in our opinion, a more balanced distribution of risk,

[10] Sulyok, Katalin, *Managing Uncertain*…

thus allowing the award of adequate compensation to victims and the prevention of future harms in a more effective way, but still keeping in place the floodgates preventing frivolous litigation.

The Court of Justice of the European Union

As pointed out by the Commission to the European Parliament and to the Council, concerning the establishment of the causal link, "the polluter-pays principle as materialized in the ELD requires the establishment of a causal link between the liable activity and the environmental damage or the risk. Since the ELD itself does not specify how such a causal link is to be established, such a definition falls within the competence of the Member States"[11] .

In **Case C-378/08,** the CJEU offered some clues to help establishing causation, declaring that "if it is necessary for the competent authority to establish such a causal link in order to impose remedial measures on operators irrespective of the kind of pollution involved, then that requirement is also a condition for the application of the directive in the case of pollution of a diffuse, widespread character. Such a causal link could easily be established where the competent authority is confronted with pollution which is confined to a particular area and period of time and is attributable to a limited number of operators". But the Court also highlighted that such is not the case with diffuse pollution phenomena and, therefore, the legislature of the European Union considered that, in the case of such pollution, a liability mechanism is not an appropriate instrument where such a causal link cannot be established. Consequently, Article 4 (5) of Directive 2004/35 provides that the directive is to apply to that kind of pollution only where it is possible to establish a causal link between the damage and the activities of individual operators. In that regard, it must be noted that Directive 2004/35 does not specify how such a causal link is to be established. Under the shared competence enjoyed by the European Union and the Member States in environmental matters, where a criterion necessary for the implementation of a directive adopted on the basis of Article 175 EC has not been defined in the directive, such a definition falls within the competence of the Member States", because "where no causal link can be established between the activity and the environmental damage or the imminent threat of damage, such a situation does not fall within the material scope of the ELD and has, therefore, to be treated under national law"[12].

In **Case C-534/13**, the CJEU clearly stated that "in order for the environmental liability mechanism to be effective and for remedial measures to be required of an operator, the competent authority must establish a causal link between the activity of one or more identifiable operators and concrete and quantifiable damage, irrespective of the type of pollution at issue", adding that "the competent authority's obligation to establish

[11] Commission staff working document, refit Evaluation of the Environmental Liability Directive, Report from the Commission to the European Parliament and to the Council pursuant to Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, Brussels, 14.4.2016, SWD (2016) 121 final;
12 Sharing the same view, cases C-379/08 and C-380/08;

a causal link applies in the context of the system of strict environmental liability of operators (…) and also applies in the context of the fault-based liability system — under which liability arises from fault or negligence on the part of the operator".

In **Case C-129/16**, the CJEU, after alluding to its case-law on causality (mentioned above), goes further when stating that "it must be noted that Article 16 of Directive 2004/35 grants Member States the power to maintain or adopt more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements of that directive and the identification of additional responsible parties (…)" and, therefore, it is in compliance with the EU treaties any national provisions that "identifies another category of persons who, in addition to those using the land on which unlawful pollution was produced, share joint and several liability for the environmental damage, namely the owners of that land, without it being necessary to establish a causal link between the conduct of the owners and the damage established".

Analyzing the decisions listed above, it seems that, although the CJEU tried to clarify the scope of the Directive and unify the interpretation of some of its provisions, the setting of requirements for the establishment of causation only merits a timid reference in the first decision (C-378/08), leaving to the Member States national legislation further efforts to better define those requirements.

In this context, of note the Advocate General's opinion in Case C-378/08: "it would be possible – subject to the rules laid down in the Environmental Liability Directive on establishing the causes of damage (...) to conceive of national rules which establish rebuttable presumptions on the causation of damage".

4) Is there a Solution?

In the absence of consensus regarding what is needed to establish causality in the field of environmental damage, should we consider that there's nothing more to be done, after all these years? Or should we continue to strive for the setting of uniform criteria, namely in the European space?

We still believe that a more uniform solution can be found, namely through mechanisms already known by legislator and courts, concerning allocation of burden of proof, assessment and weighing of evidence (standard of proof), and distribution of risks between multiple operators.

As explained above, the ECtHR uses *the beyond-a-reasonable-doubt* standard and while it emphasizes that it allows flexibility in this respect, the truth is, as demonstrated, there are a lot of difficulties involved in its practice as it rarely accepts probabilistic proof of causation.

Some scholars suggest a different allocation of the burden of proof: in most systems, the burden of proof is born completely by the plaintiff[13]; however, in some circumstances, in particular when the activity of the defendant is dangerous in a significant manner, increasing the risk of occurrence of damage, the burden of

[13] For better understanding, Sulyok, Katalin, *Managing Uncertain*…

proof should be reversed into the benefit of the plaintiff, thus accommodating the specific challenges raised by environmental liability.

Other scholars suggest a system of proportional liability based on the probability of causation, *id est*, a causal link could be established if there were less than a 50% probability of causation, but the defendant would only be held liable to the extent of that probability[14].

In this context, there are many lessons we can take from the United States of America case-law, which has a long history of environmental liability cases. There we can find a lower standard of proof (the *more probable than not* standard, or *balance of probabilities*) and, as pointed out the Katalin Sulyok, "the toxic tort example suggests that the balance of probability is a workable compromise between the law's need for certainty and the inescapably uncertain results of scientific research".[15]

We can also find the widespread acceptance of, and reliance on, probabilistic proof of causation, and a wider assessment of the causal link (namely applying the alternative liability theory in cases where it is not possible to prove which one of the defendants' identical conducts was the actual cause of injury). In other words, courts should rely more on statistical evidence to prove general causation, thus improving the court's responsiveness to uncertain causes and alternative defendants.

Katalin Sulyok suggests the following three factors to improve the assessment of the causal link in environmental liability cases, with which we agree: "(1) taking a closer look at scientific evidence and openly evaluating its probative force; (2) accepting probabilistic evidence as proof of uncertain causation; and (3) applying the balance of probability as the standard of proof of uncertain causation. Embracing these proposals would help the courts to apply a more objective and consistent approach to decide the alleged violations in toxic exposure cases."[16]

Just a few words regarding the situation in Portugal, where Law-decree n.º 147/2008 transposed the Directive 2004/35 UE, and is applicable to environmental damage, as well as the imminent threats of such damage, caused as a result of the exercise of any activity carried out within the scope of an economic activity, regardless of its public or private nature, profitable or not, abbreviated as occupational activity.

Its article 5.º provides that "the assessment of the evidence of the causal link is based on a criterion of likelihood and probability that the harmful event is capable of producing the observed injury, taking into account the circumstances of the specific case and considering, in particular, the degree of risk and danger and the normality of the harmful action, the possibility of scientific proof of the causal course and the fulfilment, or not, of protection duties".

[14] Sulyok, Katalin, *Managing Uncertain…*
[15] Sulyok, Katalin, *Managing Uncertain…*
[16] Sulyok, Katalin, *Managing Uncertain…*

This concept of causality – applicable to both types of liability, strict and fault-based – intends to lighten the standard of proof required by adopting a probability criterion linked to scientifically evidence, also entailing an implicit reversion of the burden of proof. Thus, in Portugal, all "that the injured party has to prove is, in short, the probability that the installation is capable of causing the damage. In other words, the injured party has, in short, to demonstrate the probability of the creation or increase of the risk by the installation, of the risk by the agent, «considering the circumstances of the specific case» (concrete and not abstract risk). (…) The agent, in turn, can counterprove the probability of the risk (bringing to the process the elements that allow the judge's conviction about that probability to be destroyed) but can also, of course, make the negative proof of the materialization of the risk in the harmful result. I.e., it can demonstrate that, although the creation of the risk is probable, it was not this risk that materialized in the damage that occurred.[17]"

However, even though Article 4.º provides a rule of joint and several liability when more than one agent is responsible, Portuguese legislation still doesn't address the problem of alternative causality.

Taking all this into account, we propose the following general rules (special rules may be necessary in more specific contexts) for the assessment of causation in environmental damage:

1. To establish the causal link between the incident/activity and the damage, the injured party must prove the occurrence of both, and that the incident/activity *increased the danger of causing the damage*.
2. If those facts have been successfully proven, it will be the operators' burden to prove their activity did not, in fact, cause the damage (negative *conditio sine qua non*).
3. The standard of proof applicable is the *more probable than not standard*.
4. The use of reliable statistical scientific evidence is admissible.
5. When the damage results from incidents having occurred in several installations/activities, its operators shall be jointly and severally liable for the whole damage, unless it's proven the damage was not, in fact, caused by his installation/activity (negative *conditio sine qua non*).
6. Having compensated the injured party for more than his or her individual contribution for the increase of danger of causing the damage, the operator can recover the excess from the other operators in proportion to their individual liability.
7. If the person who suffered the damage or a person for whom he is responsible has, by his own fault, contributed to the damage, the compensation may be reduced or disallowed having regard to all the

[17] As pointed out by Oliveira, Ana Perestrelo de, *A prova do nexo de causalidade na lei da responsabilidade ambiental*, Atas do Colóquio, A responsabilidade civil por dano ambiental, Instituto de Ciências Jurídico-Políticas, Maio de 2010, Faculdade de Direito de Lisboa;

circumstances.

5) Recent developments

On 23 February 2022, the European Commission (Commission) released a proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence (CSDD) and amending Directive (EU) 2019/1937. This proposal, if approved, will require large companies to carry out due diligence to identify and address adverse human rights and environmental impacts of their operations, subsidiaries and value chains, and to produce climate plans, also providing for civil liability in the event of violations of the due diligence obligations imposed on in-scope companies, as well as supervision, enforcement and complaints (article 1).

The Proposed Directive would apply to both EU-based companies and companies incorporated in third countries, depending on its size, sector, and source of revenue: a) companies based in the EU with more than 500 employees and a net worldwide turnover of more than EUR 150 million during the last financial year; b) companies based in the EU with more than 250 employees and a net worldwide turnover of more than EUR 40 million in the last financial year, if at least half of that net turnover was generated in specific high-risk sectors; c) companies established outside the EU with either (i) a net turnover in the EU of more than EUR150 million during the financial year preceding the last financial year, or (ii) a net worldwide turnover of more than EUR 40 million but a net turnover in the EU of less than EUR 150 million, if at least50% of the net worldwide turnover was generated in the high-risk sectors.

The Proposed Directive is not applicable to small and medium enterprises, although they may be impacted if operating within the value chains of the companies that are included in the scope of the proposal .

Concerning to the matter of this paper, the Proposed Directive brings a new approach to civil liability when applied to larger companies in high-risk sectors (Article 22.º).

In the words of Anna Cavazzini, “Member States are required to lay down rules in line with the provisions of this Directive, governing the civil liability of the company for failure to comply with its due diligence obligations. The civil liability applies for damages arising from own operations, subsidiaries, and established business relations (where the company has regular, lasting, and frequent cooperation with that business relationship). For the latter, liability applies only where the adverse impact could have been foreseen, prevented, ceased, or mitigated with appropriate due diligence measures. However, liability is excluded when the damage relates to an indirect partner where the company did conduct due diligence, unless it was unreasonable for the company to expect that its due diligence actions would be adequate. Moreover, member States shall ensure that the liability provided for under this Directive is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member

State, i.e., the EU law will apply even in cases where the harm took place outside the EU".[18]

It merits applause that the Proposed Directive combines both administrative and civil liability, introducing a civil liability clause to ensure that companies can be held liable for harm caused to private parties, thus improving victims' access to justice.

The already in force ELD establishes a framework for environmental liability, based on the polluter-pays principle, for companies' own operations, thus not covering companies' value chain. Therefore, the civil liability regime introduced by the Proposed Directive will be complementary to the one in the ELD also in this regard.

Also meriting a positive note is the extension of its applicability to cases where the harm took place in a non-EU country. In fact, the already existing EU environmental law does not generally apply to value chains outside the EU, even though, as stated in the initial reasoning of the proposal, they may be accountable for up to 80-90 % of the environmental harm resulting from EU production.

Unfortunately, this Proposal Directive isn't immune to critics.

In fact, the proposal was born to deal with the existing differences between national rules on sustainable corporate governance and due diligence, which can impact the functioning of the internal market, taking also into account that these differences would predictably become more serious with time as more and more Member States would adopt diverging national laws. For this reason, the Proposed Directive suggests a new civil liability regime, clarifying which rules apply either in the case the harm occurs in a company's own operation, or at the level of its subsidiaries or at the level of direct and indirect business relations in the value chain, trying at the same time to ensure harmonized rules in cases where otherwise the law applicable to such claim is not the law of a Member State.

Nevertheless, the Proposed Directive left several gaps behind. For one part, as pointed out by Jeffrey Vogt, the "civil liability section is unfortunately drafted in such a way that it will be difficult to use. Article 21(1)(a) provides that member states ensure that companies can be held civilly liable if they failed to take appropriate measures to prevent or minimize potential adverse impacts or ending actual adverse impacts as set forth in Articles 7 and 8 when those adverse impacts occurred and led to damage. While this may sound right, recall that Articles 7 and 8 may be satisfied by entering into contracts with business partners to respect a code of conduct or prevention plan, and that the code is verified by a third-party auditor. Thus, a company may be essentially immune from civil liability if it entered into such an arrangement, unless the injured party were able to prove that these assurances or prevention plan were not appropriate measures – a tall order unless the fact of the harm is itself evidence of the measure not being appropriate».[19]

[18] Cavazzini, Anna, *Proposal for a Directive on Corporate Sustainability Due Diligence: initial analysis*, 2022. Available at: https://www.annacavazzini.eu/wp-content/uploads/Analysis-of-EU-due-diligence-proposal_23-Feb.pdf

[19] Vogt, Jeffrey, *A Missed Opportunity to Improve Workers' Rights in Global Supply Chains*, 2022. Available at: http://opiniojuris.org/2022/03/18/a-missed-opportunity-to-improve-workers-rights-in-global-supply-chains/

The Author also points out that proposal is silent as to which damages are available, the same happening regarding burden of proof and standard of proof, the definition of which, once again, is left to national law. In addition, Anna Cavazzini also points out that as "the proposal conditions liability for harm taking place in the value chain applies only to situations where the company has a regular, lasting and frequent cooperation with the supplier in question, this could have the unintended effect of European companies designing their supply chains in a way that guarantees them more distance and constant change instead of closer cooperation in order to avoid liability". Moreover, this Author also explains that «the proposal limits liability even further in cases of human rights and environmental harm taking place with regards to indirect suppliers. Here, the proposal suggests that a company shall not be held liable unless it can be proved (assumedly by victims) that its due diligence actions had been unreasonable, and in such cases, a reversal of the burden of proof would be key, so that the onus is put instead on the company to prove that it did conduct reasonable due diligence"[20].

In short, although the many benefits of this soon-to-be new Directive are undeniable, it feels that it is a missed opportunity to address many of the practical barriers to transnational human rights litigation as, directly concerning the aim of this paper, it remains left to the claimants the extremely hard effort to prove in court the company's breach of its duties and the causal link between this and the harm suffered.

In any case, the discussion about this Proposed Directive is still on-going, giving us hope that the final text will change in order to ensure a fair distribution of the burden of proof, namely by encompassing solutions closer to our proposal as described above.

6) Conclusion:

As was recently highlighted by the EU Fundamental Rights Agency, Member States' rules on the burden of proof constitute a major barrier in the types of cases object of this paper, and disclosure – the obligation to release company documents in a legal dispute – either does not exist in most European legal systems or is available in only a limited way.[21]

The difficulties faced by parties and courts when assessing the causal link in environmental liability are an acquired fact due to many complex factors such as multicausality, continued pollution and cross border damages.

Even though these questions weren't properly addressed by the European Liability Directive or, to a lesser extent, by the Lugano Convention, they must not be relegated to oblivion, since they constitute key factors to a successful protection of environment and individual victims in particular.

Taking namely into account the contributions provided by other legal systems, we propose that European

[20] Cavazzini, Anna, *Proposal for a Directive…*

[21] European Union Agency for Fundamental Rights, *Business and human rights – access to remedy*, October 2020 (Opinion 1). Available at: https://fra. europa.eu/en/publication/2020/business-human-rights-remedies

legislation on environmental civil liability shall admit a lessening of the requirements necessary for proving the causal link, namely through the acceptance of causal presumptions based on plausible factors, the lowering of the standard of proof, and the admissibility of scientifical statistical evidence. Finally, when various operators are found liable, we propose a joint and several liability scheme.

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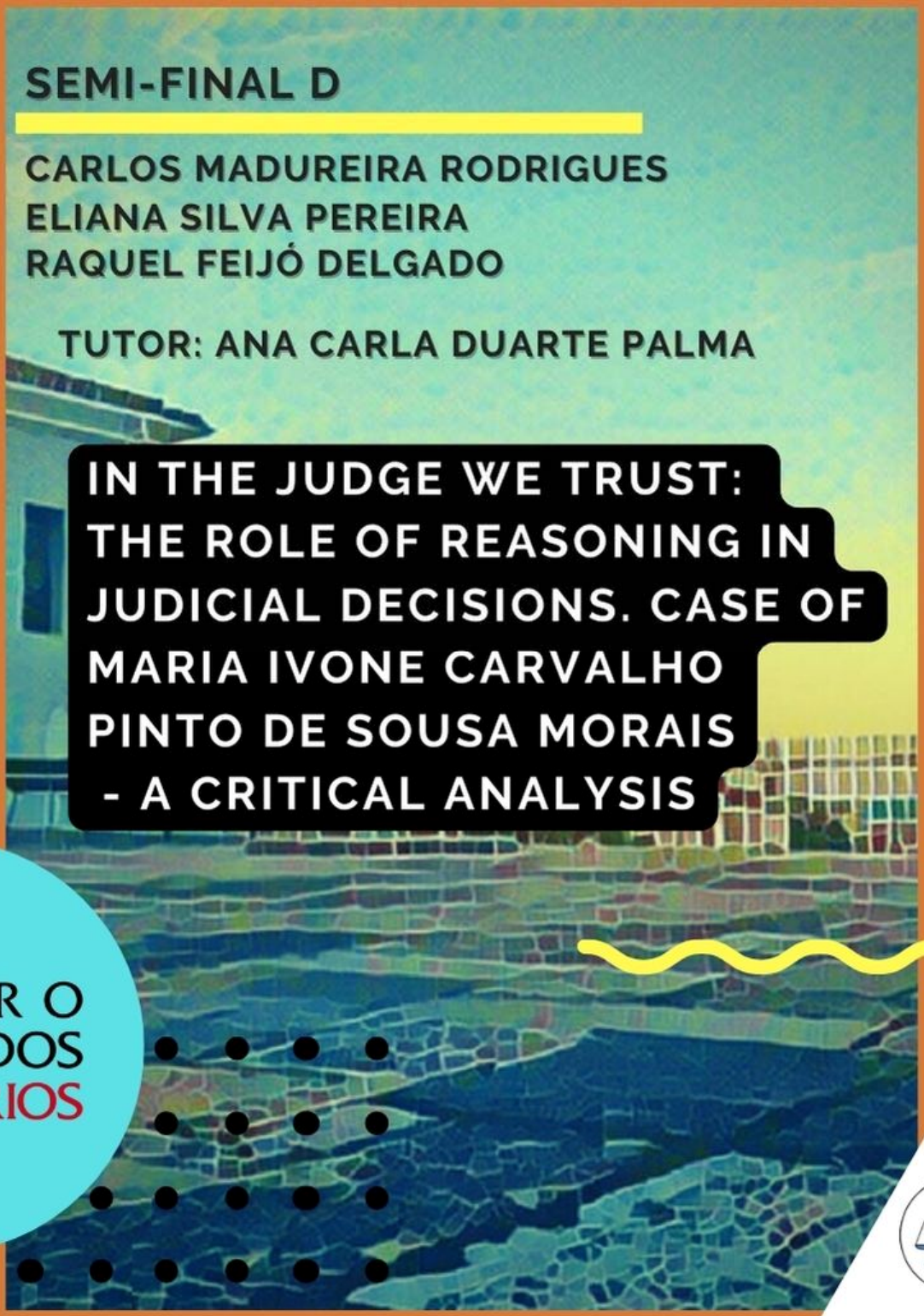

SEMI-FINAL D

CARLOS MADUREIRA RODRIGUES
ELIANA SILVA PEREIRA
RAQUEL FEIJÓ DELGADO

TUTOR: ANA CARLA DUARTE PALMA

IN THE JUDGE WE TRUST: THE ROLE OF REASONING IN JUDICIAL DECISIONS. CASE OF MARIA IVONE CARVALHO PINTO DE SOUSA MORAIS - A CRITICAL ANALYSIS

CENTRO DE ESTUDOS JUDICIÁRIOS

COLEÇÃO THEMIS

THEMIS

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THEMIS 2022 COMPETITION

AGENDA

SEMI-FINAL D

Judicial Ethics and Professional Conduct

12-15 July 2022
Barcelona, Spain

Escuela Judicial CGPJ, Ctra. De Vallvi
drera 43-45, 08017 Barcelona, Spain

With financial support from the Justice
Programme of the European Union

BACKGROUND

EJTN THEMIS Competition is a competition with a unique format, opened to judicial trainees from across Europe and aiming to exchange views and develop new approaches on topics related to international civil and criminal cooperation, human rights and judicial deontology.

The competition is opened to judicial trainees from all training institutions who are members or observers of EJTN. Teams of three judicial trainees accompanied by one teacher/tutor may enroll in the competition which consists of four semi-finals and a grand-final. The official language of the competition is English.

The jury of the competition is chosen from a pool of experts appointed by EJTN Members, that are well-regarded professionals in the field of the given semi-final/final. As a general rule, experts must not have the same nationality as the competing team they will have to assess.

The jury members assessed the overall quality and the originality, the critical thinking and the anticipation of future solutions, the reference to relevant case law, but also the communication skills and the consistency.

Each semi-final had three stages: a written paper on a topic relevant for the subject of the semi-final, an oral presentation of that paper and a discussion with the jury. The maximum number of teams participating in a semi-final is eleven. The winner and runner up of each semi-final will enter the grand-final, consequently there are eight teams in the grand-final. The prize for the winning team is a one-week study visit, organised and financed by EJTN, in any European judicial institution.

Venue location: Spanish Judicial School, **Escuela Judicial CGPJ**, Ctra. De Vallvidrera 43-45, 08017 Barcelona, Spain

AGENDA

Tuesday 12 July 2022		
8:00	**Meeting and Bus departure from plaza Espana in front of Ayre Grand Via hotel to the Judicial School**	
09:30	**Opening Ceremony of the THEMIS 2022 Semi-Final D**	**Opening speech by- tbc** **Markus BRUCKNER,** EJTN Secretary General **Rasmus Van Heddeghem**, EJTN junior project manager
09:45	**Presentation of Rules & Jury introduction** **UNODC Presentation**	Jury members: **Jeremy Cooper (UK)** **Cristina San Juan Serrano (UNODC)** **Goran Selanec (HR)**
10:15	**Coffee Break & Group Photo**	
10:45	**Presentation and discussion – Team PORTUGAL**	**MADUREIRA RODRIGUES, Carlos Sérgio** **SILVA PEREIRA, Eliana Sofia** **BRITO FEIJÓ DELGADO, Raquel** *Tutor:* **DUARTE PALMA, Ana Carla**
11:15	**Presentation and discussion – Team ROMANIA**	**POPESCU Alexandra Marinela** **MOGA Bianca Aureliana**

		AILIOAIE Cornelia Ioana *Tutor:* **ONIȘOR Amelia**
12:30	**Coffee Break**	
12:45	**Presentation and discussion – Team ITALY**	**CASILINI, Angela** **DE MARINIS, Francesca** **CLEMENTE, Elsie** *Tutor: SALAMONE, Chiara*
14:00	**Lunch**	
15:00	**Presentation and discussion – Team AUSTRIA**	**WICK, Kerstin** **DEMUTH, Susanne** **STADLOBER, Hannah** *Tutor: HINGER, Reinhard*
16:15	**End of day 1** Jury deliberation Bus departure from Judicial School to Plaza Espana	

Wednesday 13 July 2022		
7:45	**Meeting and Bus departure from plaza Espana in front of Ayre Grand Via hotel to the Judicial School**	
09:00	**Presentation and discussion – Team BULGARIA**	**ANGELOV, Radoslav** **STANCHEVA, Kalina** **KODZHANIKOLOV, Georgi** *Tutor: LAZAROVA, Angelina*
10:15	**Coffee break**	
10:45	**Presentation and discussion – Team CZECHIA**	**CORITAROVÁ, Lucie** **TOMEŠOVÁ, Klára** **KUDLÍK, Leoš** *Tutor: SPÁČIL Jakub*
12:00	**Lunch**	
13:00	**Presentation and discussion – Team GREECE**	**KOSMIDOU, ATHANASIA** **YIASIN, CHRISTINA** **KREMETIS, STEFANOS** *Tutor: SARANTOPOULOU, Foteini*
14:15	**Presentation and discussion – Team GERMANY**	**WERNER, Julia** **KIEL, Jessica** **REISINGER, Jessica** *Tutor: DATZER, Valerie*
15:30	**End of day 2** Jury deliberation	
16:00	**Guided tour of Barcelona**	

Thursday 14 July 2022		
7:45	**Meeting and Bus departure from plaza Espana in front of Ayre Grand Via hotel to the Judicial School**	
09:00	**Presentation and discussion – Team FRANCE**	**VALLUY, Lauriane** **NOLLET, Etamine** **AMOUNA, Daphné** *Tutor: LACROIX, Mathilde*
10:15	**Coffee break**	
10:45	**Presentation and discussion – Team HUNGARY**	**KARDOS, Enikő** **GÁSPÁR, Zsolt** **GELESITS, Noémi** *Tutor: JÁVORSZKI, Tamás*
12:00	**Lunch**	
13:00	**Presentation and discussion – Team POLAND**	**KOHUT, Daniela** **KAŹMIERSKI, Piotr** **KARMOWSKA, Alicja** *Tutor: MILEWSKA, Katarzyna*
14:15	**Coffee break**	
14:45	**Presentation and discussion – Team NETHERLANDS**	**HELDENS, Jan Jaap** **HOUG, Claire** **VAN DE KANT, Sebastiaan** *Tutor: PEPER, Kees*
16:00	**End of day 3** Jury deliberation Bus departure from Judicial School to Plaza Espana **ORGANISED SOCIAL ACTIVITY**	
20:00	**OFFICIAL THEMIS DINNER**	

Friday 15 July 2022		
8:00	**Meeting and Bus departure from plaza Espana in front of Ayre Grand Via hotel to the Judicial School**	
09:30	**Awards Ceremony**	**<u>Jury members:</u>** **Jeremy Cooper (UK)** **Cristina San Juan Serrano (UNODC)** **Goran Selanec (HR)**
10:30	**Closing ceremony**	**Rasmus Van Heddeghem**, EJTN junior project manager
11:30	**End of the Semi-Final A**	
12:30	Departure of participants Bus departure from Judicial School to Plaza Espana and Airport	

JURY MEMBERS

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Professor, Retired Judge and Consultant

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Judicial Integrity and Rule of Law Specialist - United Nations Volunteer, United Nations Office on Drugs and Crime

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CENTRO DE ESTUDOS JUDICIÁRIOS

Themis 2022

Judicial Ethics and Professional Conduct

In the judge we trust:
the role of reasoning in judicial decisions

Case of Maria Ivone Carvalho Pinto de Sousa Morais

A critical analysis

Centro de Estudos Judiciários – Portugal

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"WE DON'T SEE THINGS AS THEY ARE, WE SEE THEM AS WE ARE"

Anaïs Nin

1. Introduction

The judge, as the representative of the people in the administration of justice, assumes an important role in settling conflicts within society, taking decisions in light of current law regarding the positions of each of the parties, and deciding on the legal solution that should prevail. The judge's decision is imposed on the parties and society in general, binding public and private entities.

The reasoning of judicial decisions is required by the Constitution of the Portuguese Republic (hereinafter "CPR"). This assumes special relevance, insofar as it allows the judges to self-control their work and the reasons that factored into their decisions, and it enables the parties and society in general to perceive and control the judge's cognitive *iter* underlying the decision and the justice thereof. The reasoning also facilitates the control of judicial decisions by higher courts - through the appeal process - and makes it possible to confirm that the limits imposed on the judge's discretion were respected, particularly when deciding based on equity. To this extent, the reasoning of the decision is a source of legitimation for the decision and its binding force.

This paper is aimed at demonstrating, through the analyse of the case of Carvalho Pinto de Sousa Morais, the importance of judicial reasoning in the control of the discretionary powers of the judge. It will critically examine the methodology used by the Portuguese Supreme Administrative Court (hereinafter "SAC") in its decision and assesses whether its arguments demonstrate prejudice and bias against women in society, contrary to the Bangalore principles of independence and impartiality, and the principles of equality and of the prohibition of discrimination, enshrined in the CPR and the European Convention on Human Rights (hereinafter "ECHR").

2. Judicial reasoning

The fundamental idea of public reason was developed early on by Thomas Hobbes, Kant and Rousseu and it became increasingly significant with John Rawls and

Dworking's conception of constitutional democracy[1]. Nowadays, reason-giving is a well-established paradigm in modern societies and an instrument for legitimacy including regarding judicial decisions.

Judicial reason-given is mostly justified for participation, accountability and accuracy reasons[2]. Private parties are autonomous agents in the judicial process, as they are entitled to present their claims, to provide evidence and to participate in the debate within the scope of the dispute. Judicial reasoning also plays a key role in ensuring transparency and accountability of judicial decisions, even in civil law systems where the precedent rule does not apply[3]. The reasoned decision accounts to the general public, enhancing public confidence in the judiciary.

The obligation to explain a decision is also found to improve its quality. The need to account for the decision embraces a process of self-control and self-discipline of the judge in order to consider and reconsider all relevant facts, factors, arguments as well as the applicable law and its interpretation. It also ensures that the decision is not based on irrelevant considerations or speculations. The reasoning of the judicial decision makes it possible to control the judge's cognitive *iter* and, from that point of view, to identify eventual errors of judgment or the violation of certain limits to which the judge is bound. These limits assume special relevance in spaces where the exercise of discretionary powers by the judge are foreseen, as in cases of fixing compensation through equity. The control of the judicial decision's compliance with these limits involves, in the first place, the analysis of the respective reasoning, within the scope of which factors that contradict these limits and that have contributed to the creation of the judge's conviction will eventually be identifiable.

As a result, judicial reasoning is fundamental to the legitimacy of the court decisions, since it provides parties and the public in general with an independent basis for understanding the law in action and the fairness of the decision, as well as creating the standards for judicial review by a superior court.

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[1] For more information see Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, Washington and Lee Law Review Volume 72, Issue 2, Article 3, Spring 3-1-2015, page 483 to 571.

[2] In continental Europe, this obligation dates back to 1790 revolutionary statute on judicial organizations, Title V, article 15, which impose a general obligation for courts for provide reasons for their decisions - see Mathilde Cohen, *When Judges Have op. cit*., p. 558.

[3] In any case, judicial decisions are followed very often, particularly as a method for filling gaps in legislation, as well as a mean of interpretation vague and unclear statutory provisions.

In Portugal, legal reasoning is imposed by the CPR[4] on all judicial decisions, which are not merely administrative in nature. From this constitutional command and in accordance with the civil code procedures, judges are under an affirmative reason giving requirement when deciding on a case, relying on a methodology that brings together the articulation of the factual and the legal basis for the decision. This obligation is a sentencing requirement rule that needs to be observed by all courts and tribunals. Failure to observe these rules makes the award null and void[5].

3. Limits of the judicial decision and of the discretionary powers of the judge

3.1 The Bangalore principles of independence and impartiality

Independence and impartiality of the judiciary are widely recognized worldwide in several international treaties[6] and soft law instruments, including the 1998 European Charter on Statute for the Judges[7] as well as in the Bangalore principles. The Bangalore principles of Judicial Conduct embrace a universally acceptable statement of judicial standard and were developed by the United Nations in 2003 to guide the ethical conduct of judges, as well as to invite Member States to adopt measures to guarantee independence, impartiality and integrity of judges[8].

As provided for in the Bangalore Principles, "[j]*udicial 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*"[9]. The independence is a necessary precondition for impartiality, which in turn "*is essential to the proper discharge of the judicial office. It applies not only to the*

[4]Article 205(1) CPR, available at: https://www.parlamento.pt/legislacao/documents/constitution7threv2010en.pdf.
[5]Article 615 (1)(b) Portuguese Civil Code Procedures, available at: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1959&tabela=leis.
[6] For instance, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953. The full text is available at: https://www.echr.coe.int/documents/convention_eng.pdf; Article 14(1) of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966, available at: https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf.
[7] The European Charter on the Statute for the Judges developed in 1998 of the Council of Europe, available at: https://rm.coe.int/090000168092934f.
[8] Bangalore principles are annexed to the report presented to the fifty-ninth session of the United Nations Commission on Human Rights in April 2003 by the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy, and adopted by the Commission unanimously on the Resolution No. 2003/42, available at: https://www.unodc.org/documents/corruption/Resolutions/E-CN_4-RES-2003-43.pdf. Bangalore Principles of Judicial Conduct are available at: https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf.
[9] Bangalore Principles, op. cit., value 1 – Independence.

decision itself but also to the process by which the decision is made"[10]. The United Nations Basic Principles establishes that "*the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason*"[11].

Independence and impartiality of the judiciary are intertwined. Yet, they are separate concepts. Independence requires that cases before a court are decided based on the facts proved and in accordance with the law, without any type of restrictions and without any type of bias, animosity or pathos. Consequently, it can be argued that «*"impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" connotes absence of bias, actual or perceived*»[12]. This idea also stems from point 2.1 of the Bangalore principles which sets forth that "*a judge shall perform his or her judicial duties without favour, bias or prejudice*." Both bias and prejudice are conditions or a state of mind, attitudes or points of view that are likely to influence the decision in a certain way. Bias is defined in the Commentary on the Bangalore Principles of Judicial Conduct as "*a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction*".[13] Bias and prejudice may manifest in stereotypes[14] and need to be examined from a subjective perspective.

As the European Court of Human Rights (hereinafter "ECtHR") has noted, impartiality of the judicial decisions can be analysed from a subjective and an objective perspective under Article 6 of the ECHR, which establishes the right to a fair trial. The former "*is endeavouring to ascertain the personal conviction of a given judge in a given case"*[15] while the latter aims at *"determining whether he offered guarantees*

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[10] Bangalore Principles, *op. cit*., value 2 – Independence.
[11] United Nations Office on Drugs and Crime - Commentary on the Bangalore Principles of Judicial Conduct, September 2007, page 59, point 57, available at: https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf.
[12] Bangalore Principles, Commentary, *op. cit*., page 40, point 24.
[13] Bangalore Principles, Commentary, *op. cit.*, page 59, point 57.
[14] A stereotype is a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group" - Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, 2010.
[15]ECtHR Case *Piersack v. Belgium* of 1 October 1982, para. 30. available at https://hudoc.echr.coe.int/eng?i=001-57557.

sufficient to exclude any legitimate doubt in this respect". The ECtHR argued that personal impartiality of the judge is presumed unless there is evidence to the contrary[16].

In order to benefit from this assumption, it can be argued that "*judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence*"[17]. Therefore, a decision will not be impartial not only if the judge is not impartial but also if she or he is not perceived to be impartial as a result of expressions and considerations provided for in the decision's reasoning that might be linked to bias, prejudice or stereotypes. This requires judges to be aware and to combat their own subjectivity by adopting an intellectual exercise of self-critical thinking that does not jeopardize the judge's margin of appreciation but rather strengthens the ability to limit biases and prejudice through self-awareness. Having said that, it seems clear that personal bias of a judge and the subjective test of impartiality can be perceived and measured in the judicial reasoning laid down in the award. Thus, as enshrined in the Bangalore commentary "*a judge must be alert to avoid behaviour that may be perceived as an expression of bias or prejudice*" which includes "*statements evidencing prejudgments*"[18].

3.2 The principle of equality in the CPR

Article 13 of the CPR sets forth the principle of equality, determining the right of all citizens to be treated with the same social dignity and equality before the law, establishing that no one can be privileged, favoured, prejudiced, deprived of any rights or exempted from any duty for reasons of ancestry, sex, race, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation. The principle of equality finds its roots in the aristotelic principle of distributed justice, according to which one should give to each individual what is owed. It is a structuring principle of the democratic state based on the rule of the law and of the Portuguese constitutional system[19], binding on all public powers, including the legislative, administrative and judicial branches.

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[16] ECtHR Case *Daktaras v. Lithuania*, of 10 October 2000, para. 30, available at https://hudoc.echr.coe.int/eng?i=001-58855.

[17] See the European Charter on the Statute for the Judges, *op. cit.* point 4.3.

[18] Bangalore Commentary, *op. cit*., page 61 point 62.

[19] See, for instance, Portuguese Constitutional Court judgments of 17th October 2000, No. 436/2000, available at: http://www.tribunalconstitucional.pt/tc/acordaos/20000436.html, and

As it has been developed, the principle of equality postulates three dimensions: the prohibition against arbitrariness, the prohibition against discrimination and the imposition of differentiation[20].

The prohibition against arbitrariness is an external limit to the judicial decision and determines that is not acceptable to give similar treatment to different situations or to differentiate similar situations, without a reasonable justification, based on objective and constitutionally admissible criteria. The prohibition against arbitrariness does not provide a subjective right to a similar treatment in any given circumstance, and it will only be considered breached if there is a violation of a specific fundamental right to equality foreseen in the CPR or when an arbitrary law is applied by the public powers to a case in which rights and interests that are protected by the CPR are being harmed.

The second dimension of the principle of equality is the prohibition against discrimination. This means that is not legitimate to treat subjective categories of individuals differently without substantial justification. Article 13 (2) of the CPR refers to some exemplificative subjective categories of individual, which have been historically more subject to discrimination - ancestry, sex, race, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation[21]. The prohibition against discrimination operates as a presumption, meaning that any discrimination based thereon is unconstitutional unless it's proven to be substantially justified[22].

The prohibition against discrimination refers not only to the abovementioned categories, but also to any discrimination based on other factors in contradiction of the principles of dignity of the human person, democratic state based on the rule of law or when arbitrary or impertinent[23]. It should be pointed out that, the prohibition against discrimination in general does not preclude any kind of different treatments, but only that which is not substantially justified – unfair discrimination - and based on unconstitutional grounds, regarding its purpose and criteria[24]. It only forbids discrimination not based on substantial grounds, *i.e.*, one which is arbitrary or

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and of 2nd June 2004, No. 403/2004, available at: http://www.tribunalconstitucional.pt/tc/acordaos/20040403.html.

[20] See Gomes Canotilho, Vital Moreira, Constituição da República Portuguesa Anotada, Volum I, 4th revised edition, 2007, page 339.

[21]See Portuguese Constitutional Court judgment of 7 June 2018, No. 308/2018, available at: TC > Jurisprudência > Acordãos > Acórdão 308/2018 (tribunalconstitucional.pt).

[22] See José de Melo Alexandrino, *Direitos Fundamentais: introdução geral*, 2007, pages 75 and 76.

[23] *Vide* Gomes Canotilho, Vital Moreira*, op. cit.,* page 340.

[24] *Vide* José de Melo Alexandrino, *Direitos Fundamentais: introdução geral*, 2007, pages 75 ss.

unreasonable[25]. Therefore, different treatment is legitimate if: (i) based on objectively different situations; (ii) not based on any of the suspicion factors foreseen in article 13(2) of the CPR; (iii) has a legitimate purpose according to the CPR; (iv) is proportional to the purpose it is meant to achieve[26]. The differential treatment will be considered justified if it is based on substantial grounds and its purpose and means do not contradict the CPR. The criteria on which the different treatment is based must be fair, either in regard to the principle of equality itself or other constitutional provisions like the principle of the dignity of the human person[27].

The third dimension of the principle of equality is the imposition of differentiation. According to this dimension of the principle, some social, economic and political inequalities should be eliminated or diminished by the public powers in order to compensate the lack of equal opportunities, which imposes positive discrimination in given cases.

As pointed out, the principle of equality binds all public powers, including the judiciary. Regarding the powers of the judiciary, this principle establishes that all citizens shall have access to justice under equal terms, which means that access to the courts cannot be denied to any citizen based on a lack of financial means. On the other hand, this principle implies that the courts must apply the law equally to all citizens, so judges are obliged to apply the law equally to similar cases and must use criteria based on equality in areas where discretionary power operates – *e.g.* when establishing the amount of the award. Although there is no such thing as a right to equal judicial treatment, the judge must pursue the same legal solutions to similar cases and the legislator can approve measures to assure judicial standardization[28].

3.3 The principle of prohibition against non-discrimination in the ECHR

Article 14 of the ECHR states that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This is not a closed

[25] See, for instance, Portuguese Constitutional Court judgment of 22 May 1984, No. 44/84, available at: http://www.tribunalconstitucional.pt/tc/acordaos/19840044.html.
[26] See Gomes Canotilho, Vital Moreira, *op. cit.,* page 340.
[27] *Vide* Gomes Canotilho, Vital Moreira, *op. cit.,* page 341.
[28] See Portuguese Constitutional Court judgment of 13 May 1999, No. 574/98, available at: http://www.tribunalconstitucional.pt/tc/acordaos/19980574.html.

list of grounds of discrimination[29], which can function separately or may interact with each other. The ECtHR has consistently referred to the ancillary nature of article 14, meaning that it is a provision that is used in conjunction with others foreseen in the Convention, considering that it establishes the equal enjoyment of rights and freedoms set forth in the Convention[30]. In order for article 14 to apply, complaints of discrimination must fall within the general scope of protection of one of the substantial rights guaranteed in the Convention. Nonetheless, article 14 also enjoys some degree of autonomy since its application does not depend on the violation of substantive rights[31]. As in, when an issue of discrimination in relation to one of the areas covered by a right foreseen in the Convention is alleged, the ECtHR may address it as a violation of article 14[32].

The ECHR mainly covers civil and political rights, but some economic and social rights also fall within its scope. For instance, the right to respect for private and family life, foreseen in article 8, determines that everyone has the right to see his private and family life, his home and his correspondence respected and there shall be no interference by public authorities with the exercise of this right, except in certain particular and well-founded circumstances. The discrimination can be direct or indirect, irrespective of whether the provision establishes a different treatment for analogous situations or not. In the latter case, the provision does not cause general discrimination itself, but its application causes discriminatory effects on certain groups. In this case, the policy or measure foreseen may not have been intended to discriminate a certain group, however this discrimination occurs when the regime is applied. The ECHR also admits the violation of article 14 in cases of discrimination by association, which is considered to occur when a certain individual is treated in a less favourable way on the grounds of his relation to a person belonging to a particular group. It has also considered that Member States in some cases are obliged to treat

[29] See ECtHR, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, Updated on 31st August 2021, page 14, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf

[30] *Vide* ECtHR, *Guide on., op. cit.,* page 6.

[31] See, for instance, ECtHR Case Sommerfeld v. Germany of 8 July 2003, available at: https://www.legal-tools.org/doc/bd5014/pdf/ and ECtH Case Zarb Adami v. Malta of 20 June 2006, available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Zarb%20Adami%22],%22itemid%22:[%22001-75934%22]}.

[32] See European Union Agency for Fundamental Rights / Council of Europe / European Court of Human Rights, Handbook on European non-discrimination law, 2018 edition, page 29, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf.

particular groups in a more favourable way in order to correct inequalities, and the failure to do so, is also found to be in breach of article 14[33].

In order to decide on a complaint of alleged discrimination, firstly you need to identify if it relates to a situation where different treatment has been given to analogous situations or if different situations were treated in a similar way. Once this has been established, it is for the Government to demonstrate that the difference in treatment is justified.

4. The background to the case of Carvalho Pinto de Sousa Morais

In December 1993, Mrs. Pinto de Sousa was diagnosed with a bartholinitis on the left side of her vagina, a gynaecological disease. Thereafter, she became a patient of the gynaecology department of the Alfredo da Costa Maternity Hospital[34]. Over the course of a year, she carried out medical treatment performed by a gynaecologist, which included, among others, drainages on her vagina. After each treatment, the bartholing gland would swell, causing her pain and suffering and requiring additional treatment with painkillers. The seven drainages that she was subjected to did not yield any results. For this reason, at the beginning of 1995, she was offered a surgery that would remove the Bartholin gland and consequently fix the problem definitely.

On 22 May 1995, Mrs. Pinto de Sousa was admitted to the Alfredo da Costa Maternity Hospital and had both glands, on the left and on the right side of her vagina, permanently removed. However, shortly after being discharged from the hospital, she began to experience a loss of sensation in the vagina, which had become swollen, as well as intense pain in the area. She started suffering from sphincter and genital disorders, including urinary incontinence and fecal retention. Moreover, she had difficulty sitting and walking, she had sleeping disorders, anxiety and could not have sexual relations. Overall, she was found to have a permanent disability of 73%. Mrs. Pinto de Sousa felt frustrated, diminished as a woman and began to experience psychological problems, including depression, and considered suicide. After carrying out several exams and being examined at a private clinic, Mrs. Pinto de Sousa was informed that during the surgery, her left pudendal nerve had been permanently injured due to medical malpractice.

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[33] See, for instance, ECtHR Case Taddeucci and McCall v. Italy, of 30 June 2016, available at: https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-164715%22]}.

[34] Alfredo da Costa Maternity is a public hospital that is currently part of Central Lisbon Hospital Center (*Centro Hospitalar Lisboa Central, E.P.E*), which integrates the National Health System.

On 26 April 2000, Mrs. Pinto de Sousa brought an action against the Alfredo da Costa Maternity Hospital in the Lisbon Administrative Court[35], under the State Liability Act[36]. She claimed a compensation to cover both pecuniary and non-pecuniary damages arising from the inadequate medical treatment provided by the hospital and the physical disability caused by the poorly performed surgical procedure.

Ruling on the merits of the case, on 4 October 2013, the Lisbon Administrative Court found that the civil liability requirements were verified, considering the operation was poorly performed, and the surgeon had acted recklessly, clearly in violation of the medical *legis artis* and the duty of care. The court also found a causal link between the medical negligent conduct and the permanent damages caused by the injury to the left pudendal nerve. The court ordered the Portuguese State to pay an amount of €80.000 in compensation for non-pecuniary damage and an amount of €92.000 for pecuniary damages to Mrs. Pinto de Sousa, of which €16.000 was for the service of a maid that she had to pay to support her with the household tasks.

The case went on appeal before the SAC, which, confirming the verification of the aforementioned requirements upheld the first-instance judgement on the merits, but reduced the global amount that had been awarded. In accordance with the SAC, the compensation for non-pecuniary damages awarded by the Lisbon Administrative Court exceeded what was reasonable and corrected the amount to €50.000. This reduction was justified by the court based on two arguments: Mrs. Pinto de Sousa had a gynaecological condition before the surgery and also at the time of the operation she already had two children and was 50 years old, an age where sexual relations are not as important as in younger years, since its significance decreases with age. With regard to pecuniary damages, the total amount was reduced to €61.000.[37] Regarding the latter damages, the high court considered that the amount awarded to pay the future services of a maid should be reduced from €16.000 to €6.000, considering that it was not proven that Mrs. Pinto de Sousa lost her capacity to take care of domestic tasks and also considering the fact that she probably only needed to take care of her husband, taking into account the age of her children.

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[35] Lisbon Administrative Court (Tribunal Adminsitrativo de Lisboa) is a first instance court.

[36] In 1995 was in force the Decree-Law No. 48 051, of 21 November, available at: https://dre.pt/dre/detalhe/lei/67-2007-628004. At the present, the State Liability Act is regulated by the Decree-Law 67/2007, of 31 December.

[37] SAC case No. 0279/14 of 09.10.2014, available at: http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/683aef3e81f7522480257d70004aee6f?OpenDocument.

Mrs. Pinto de Sousa considered that the decision of the SAC that reduced the amount initially awarded with regard to non-pecuniary damages was discriminatory on the grounds of sex and age and presented the case before the ECtHR[38]. The ECtHR declared the application admissible and held, by five votes to two, that the Portuguese State violated Article 14 read together with article 8 of the European Convention on Human Rights.

5. A critical perspective of methodology used by the SAC

Considering what has been argued in this paper regarding judicial reasoning, the principles concerning judicial conduct and the limits on judicial decisions, there are two main points in the SAC's decision that shall be analysed from a methodological point of view, particularly in the light of the principle of equality enshrined in the CPR and the prohibition against discrimination set forth in the ECHR: *first*, the reference to Mrs. Pinto de Sousa's age and the existence of children to depreciate the importance of an active and satisfactory sexual activity; *second*, the reduction in the amount awarded for the services of a maid along with the reference that Mrs. Pinto de Sousa only needed to take care of her husband.

5.1 The reference to the plaintiff's age and the existence of children to depreciate the importance of an active and satisfactory sexual life

As mentioned above, the SAC reduced the amount of compensation awarded in the first instance, with regard to non- pecuniary damages, from €80,000 to €50,000. From the reasoning found in this part of the decision, it appears that the reduction was due to two factors: one, that Mrs. Pinto de Sousa suffered gynaecological disorders before the surgery and "*it was impossible to determine how much weight was accorded to each factor*"[39]; and two, that when the medical operation occurred, Mrs. Pinto de Sousa already had two children and was 50 years old, an age at which sexual life seems not to be so important as it is in younger years, since it decreases with age.

The first of the arguments put forward by the court — that Mrs. Pinto de Sousa suffered from a disease that caused her pain and discomfort prior to the operation and it would not be possible to reliably determine the percentage of increase in pain caused by the

[38] ECtHR Case *Carvalho Pinto de Sousa Morais v. Portugal*, of 25 July 2017, available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-175659%22]}.
[39] See ECtHR Case Carvalho Pinto de Sousa, *op. cit*., page 22.

procedure — seems to be a reasonable and achievable criterion.

The second argument presented in the reasoning of the decision — that Mrs. Pinto de Sousa, at the time of the operation, was already a mother of two children and was 50 years old, an age at which one's sex life is not that relevant when compared to younger ages — is more controversial.

The judicial reasoning behind this argument is not clear about the impact that this last factor had on the reduction of the amount of the compensation. It is understood, however, that it plays a relevant role in the reasoning of the judge in making the final decision. In these terms, sex and age seem to play a key role in the judicial reasoning, serving as the basis for a different treatment in relation to what would presumably happen if it were a man of the same age, or a younger woman.

It is therefore important to understand whether or not the court's arguments evidence aspects of discrimination based on sex and age or if the differentiation in treatment is grounded on reasonable criteria compatible with the principles of equality and the prohibition against discrimination as provided for in the CPR and the ECHR.

As was highlighted above, the principle of equality, as foreseen in the CPR, insofar as the prohibition against arbitrariness is concerned, limits the judicial decision, determining that it shall not give different treatment to similar situations, without a reasonable justification, based on objective and constitutionally admissible criteria. On the other hand, the prohibition against discrimination dimension, which was specifically invoked by Mrs. Pinto de Sousa before the ECtHR, states that different treatment must not be given to subjective categories of individuals without substantial justification, namely regarding sex — a suspect category foreseen in article 13(2) of the CPR - or age — if seen as a factor based on which a subjective category is created without any other relevant and justified criteria to lead to differentiation in treatment. A differentiated treatment can be justified if based on substantial grounds and its purpose and means do not contradict the CPR, considering a fair criterion in regard to the principle of equality itself or other constitutional provisions.

In similar terms, article 14 of the ECHR states that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This list of grounds of discrimination mentioned is not a closed one.

From these principles stems a prohibition against less favourable treatment to individuals categorised generically according to certain qualities or characteristics, excluding the possibility of treating certain individuals differently solely because of their inclusion in a certain group, according to preconceived or stereotyped ideas.

In addition, in light of the Bangalore principles of independence and impartiality, the judge, when deciding, must consider only the facts concretely demonstrated in court, the rules of experience and the applicable law in force, refraining from considering irrelevant external factors in his decision, which will be the case of preconceived ideas that he or she has about society or a certain group of individuals.

Having said that, it seems that the reasoning behind the decision is not accurate.

Firstly, it is important to note that the conclusion reached by the court that the sex life for a 50-year-old woman with two children does not have the same relevance as it would for a younger woman does not stem from any concretely proven facts in court. Indeed, it does not follow from the proven facts that evidence was put forward — for example, scientific studies — that proves, in general terms, that the relevance of women's sexual lives decreases with age. Even if this evidence had been submitted in court, this would not automatically lead to the conclusion that, in the specific case of Mrs. Pinto de Sousa, this corresponded to the truth, and could eventually function as an evidentiary factor.

Furthermore, it has not been demonstrated in court that the relevance of sex for Mrs. Pinto de Sousa had decreased with advancing age or because she already had two children. It should be noted that, even though the defendant sought to prove that, one would always wonder whether this evidence would not amount to a disproportionate intrusion into Mrs. Pinto de Sousa’s personal life, likely to violate the principle of human dignity.

From the above, it follows that the conclusion reached by the court resulted solely from the generalisation of the preconceived idea — not based on concrete facts — that the sexual life of a woman after a certain age and having experienced motherhood would have less relevance. It is, as such, a differentiation based on factors that should not be considered, insofar as they imply the different treatment of a person — in this case resulting in a reduction in the value of the compensation awarded to her — not because of her intrinsic characteristics, but because she fits into a certain subjective category of individuals, established according to their gender and age.

Although the considerations of age, *per se*, are normally accepted and used by courts to determine compensation for non-pecuniary damages, in this case, the consideration of

the plaintiff's age was not taken into consideration to reduce the compensation due to the fewer number of years that she was expected to live with the new health condition, but to establish that this condition was not so relevant at her age, based only on a generalization and no concrete facts. As the ECtHR concluded, the generalisation done by the court reflects the "*traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people. Apart from being, in a way, judgmental, it omitted to take into consideration other dimensions of women's sexuality"*[40].

The assessment that the SAC undertook to determine the compensation awarded was more than an "*unfortunate use of terms"* as was argued by the Portuguese government in the case before the ECtHR. It applied an outdated gender stereotype and reflected an archaic idea of female sexuality, considering it as being essentially geared towards procreation and ignoring the relevance that it may have for Mrs. Pinto de Sousa as a human being.

The reasoning of a judicial decision and the different treatment of people based on stereotypical ideas about a certain subjective category in which a certain individual belongs constitutes, in itself, a source of inadmissible discrimination in light of the principles of equality and the prohibition against discrimination and infringement of the dignity of the human person. The reasoning under the terms that have been exposed poses the risk of facilitating the perpetuation of traditional views of society and the role of certain categories of individuals therein, in this case women or women of a certain age.

The consideration of these factors in the decision, without considering the applicant's specific situation, also compromises the judge's duties of independence and impartiality, insofar as factors external to the case that are objectively irrelevant must not interfere in the decision. The mere use of stereotypes and prejudices based on Mrs. Pinto de Sousa's age and sex to support a court decision constitutes, in itself, an inadmissible discrimination, irrespective of whether it turns out that, in particular, there is a difference in treatment between the present case and similar cases.

As stated by the concurring opinion of Judge Yudkivska, there is no place for harmful stereotypes and antiquated perceptions of gender roles in rational judicial assessments, since "*judges fail in their role if they facilitate the perpetuation of*

[40] See ECtHR Case Carvalho Pinto de Sousa, *op. cit*., page 17.

stereotypes by failing to challenges stereotyping"[41]. This seems to be what happened in the Mrs. Pinto de Sousa case: wrongful gender and age stereotype caused judges to reach a view of the case based on preconceived beliefs, compromising their independence.

It is also important to note that before the ECtHR, Mrs. Pinto de Sousa claimed that the discrimination by the SAC could be illustrated by comparison to similar cases in which the compensation awarded to men of a similar age to hers who, as a result of medical negligence, were left with similar sequelae. Similar cases were at issue involving people who did not belong to *suspicious categories*, the comparison being useful to ascertain the possible difference in treatment or simply verifying whether the language reflects stereotypes that are discriminatory.

In fact, in her pleadings before the ECtHR, Mrs. Pinto de Sousa presented two cases to support her claim that the decision was discriminatory. In 2008, the Supreme Court of Justice (hereinafter "SCJ")[42] awarded compensation for non-pecuniary damages in the amount of € 224,459.05 as a result of medical malpractice, which left a 59-year-old man who was subject to a full prostatectomy where his prostate gland had been removed, impotent and incontinent. The SCJ psychologist argued that, "*he is now a person whose life is physically painful, and has therefore suffered irreversible consequences"*[43]. Later in 2014, the same court[44] granted compensation for non-pecuniary damages in the amount of € 100,000 to a 55-year-old man, who had been wrongly diagnosed with cancer and had a prostatectomy, which caused him physical suffering and had a permanent impact on his sexual life and mental health. Both situations are similar to the case presented by Mrs. Pinto de Sousa not only regarding the medical malpractice but also in terms of long-term consequences that affected the plaintiffs. Nevertheless, the compensation awarded to Mrs. Pinto de Sousa was significantly lower. These cases illustrate the unfavourable treatment suffered by Mrs. Pinto de Sousa in the face of objectively similar cases, with the award of compensation for similar damages manifestly lower than those in the two comparable cases, with no significant differentiating factors beyond the plaintiff's gender. The

[41] See ECtHR Case Carvalho Pinto de Sousa, *op. cit*., pages 22 and 23.
[42] Both the SAC and the SCJ are superior courts in accordance with article 209 of CPR.
[43] SCJ Case No. 08A183 of 04 March 2008, available at: http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/46ae68362fd8d6148025740200424479?OpenDocument.
[44] SCJ Case No. 1333/11.6TVKSB.L1.S1 of 26 June 2014, available at: http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/2f0a1ebc63bbf87a80257d09003df71c?OpenDocument.

discrimination envisaged through the reasoning of the decision thus appears to be confirmed in the two cases presented.

In the Carvalho Pinto de Sousa Morais case, the ECtHR concluded that there were no valid reasons to justify the difference in treatment among the Portuguese high court decisions, finding the decision of the SAC discriminatory on grounds of age and sex,[45] which is clearly prohibited under article 13(2) of the CPR. As mentioned above regarding article 14 of the ECHR, in order to decide on a complaint of alleged discrimination, as was the case with Mrs. Pinto de Sousa, it is decisive to firstly identify if it relates to a situation where a different treatment to analogous situations has been given or if different situations were treated in a similar way. Once this has been established, it is for the government to demonstrate that the difference in treatment is justified, which did not occur in this case. Indeed, before the ECtHR, the Portuguese government was not able to justify the reason why, in 2008 and 2014, the SCJ "*took into consideration the fact that the men could not have sexual relations and how that had affected them, regardless of their age. Contrary to the applicant's case, the Supreme Court of Justice did not take account of whether the plaintiffs already had children or not, or look at any other factors*".

5.2 The reduction in the amount awarded for the services of a maid

To determine the compensation to address the services of a maid, the SAC also decided on the basis of considerations of equity "*ex aequo et bono"*, as set forth in article 566(3) of the Portuguese Civil Code. From a legal normative approach, equity enables the court to go beyond strict legality in order to attain justice. However, it requires the development of the grounds for the decision, which requires judges to explain the reasons, the rationale and the path taken to achieve a certain order.

In the present case, the SAC decided to reduce the compensation to pay the services of a maid, but did not clearly explain its *ratio decidendi*, and the few reasons given can also be criticised. The court stated that considering the age of her children, Mrs. Pinto de Sousa only needed to take care of her husband, therefore, she would not need to hire a full-time maid. Based on this assumption, the SAC considered that it was reasonable to conclude that she would not spend more than € 100 a month. Yet, no

[45]For more information of judicial failures to deal with discrimination see, S. Hannett, "*Equality at the intersections: the legislative and judicial failure to tackle multiple discrimination"* Oxford Journal of Legal Studies 31.1(2003); 65-86.

calculations were presented nor any reasonable justification, namely a reference to the rules of experience, in justifying that amount.

From a methodological point of view, the SCA's decision to reduce the compensation can be analysed from two different perspectives: on the one hand there is poor judicial reasoning, and on the other hand, the reasoning provided is clearly associated with a gender stereotype.

As already mentioned, judicial reasoning should act, first and foremost, as a tool for judge self-control, as it serves as a critical analysis of the evidence and its consideration must be carried out in accordance with the facts and rules of experience. To generate his or her judgment, even when deciding on the basis of equity, the judge cannot rely on arbitrary, irrational or illogical criteria, but — based exactly on facts or the rules of experience — those that can be explained and understood through reasoning. As the Portuguese Constitutional Court stated "*the assessment of evidence according to the free conviction of the judge does not mean an assessment against the evidence or an assessment that was detached from the legality of the evidence or from the general rules of production of evidence, that is, an arbitrary assessment of the evidence is not admissible"*[46]. Despite being made in connection with the assessment of evidence, the Constitutional Court rational can be equally applicable to a decision based on equity, since it requires a rationality of choice. In the same token, as explained by Amartya Sen "*Rationality of choice, in this view, is primarily a matter of basing our choices — explicitly or by implication — on reasoning that we can reflectively sustain if we subject them to critical scrutiny. The discipline of rational choice, in this view, is foundationally connected with bringing our choices into conformity with critical investigation of the reasons for that choice. The essential demands of rational choice relate to subjecting one's choices — of actions as well as objectives, values and priorities — to reasoned scrutiny*"[47].

The SAC decision twice failed in its mission. It did not explain the rationale for the reduction in the amount of compensation, which is clearly beyond what is legally required under the Portuguese legal framework, and the reason used for such reduction is based on the assumptions that Mrs. Pinto de Sousa only needed to take care of her husband. This

[46] See Portuguese Constitutional Court judgment No. 401/02, of 9 October 2002 available at: https://www.tribunalconstitucional.pt/tc/agredaos/20020401.html.
[47] *Vide* Amartya Sen, *The Idea of Justice*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2009, page 209.

part of the judicial decision seems to make a clear allusion to the role and behaviour of females in society, strictly related to housework, children and husband caring.

Bearing in mind the reasoning behind the SAC's decision, these factors seem to have been decisive in reducing the amount awarded as compensation for expenses related to the maid. As with the reduction in compensation for non-pecuniary damages — referring to the loss of ability to have sexual relations — one is faced with a differentiation based on factors that do not result from proven facts or rules of common experience, but from a stereotyped idea of women as an individual belonging to a subjective category, associated with a role in society of procreating and caring for the husband and children. The reasoning in these terms translates to a sexist and archaic vision of a patriarchal society.

When deciding and substantiating the decision in the terms that have been exposed, the judge does not act in accordance with the duties of independence and impartiality to which he is bound, weighing factors that are not objectively relevant to the decision. This conduct of the judge is in direct contradiction with what is enshrined in the Bangalore commentary when it is mentioned that, "*a judge must be to avoid behaviour that may be perceived as an expression of bias or prejudice*" (…) which includes "*statements evidencing prejudgments*".[48] In addition, as the ECtHR mentioned, "*in the Court's view, those considerations show the prejudices prevailing amongst the judiciary in Portugal, as pointed out in the report of 29 June 2015 by the UN Human Rights Council's Special Rapporteur on the Independence of Judges and Lawyers (see paragraph 28 above) and in the CEDAW's Concluding Observations on the need for the respondent State to address the problem of gender-based discriminatory stereotypes (see paragraph 26 above). They also confirm the observations and concerns expressed by the Permanent Observatory on Portuguese Justice regarding the prevailing sexism within judicial institutions in its report of November 2006 on domestic violence*"[49].

As highlighted early on, the reasoning of a judicial decision based on stereotypical ideas about a certain subjective category of people constitutes a source of discrimination, implying the violation of the principles of equality and the prohibition against discrimination and goes against the respect for the dignity of the human person. As mentioned above, the reasoning in these terms perpetuates a traditionalist view of

[48] See Bangalore Principles, Commentary, *op. cit.*, page 61, point 62.
[49] See ECtHR Case Carvalho Pinto de Sousa, *op. cit*., page 17.

society and the role played by women. The use of stereotypes — in this case relating to gender — to support a court decision, implies unacceptable discrimination in light of the principles of equality and the prohibition against discrimination enshrined in the CPR and the ECHR, respectively. Also using this reasoning, the ECtHR found that the SAC's decision violated article 8 (that foresees that, "*everyone has the right to respect for his private and family life, his home and his correspondence*") taken together with article 14 of the ECHR.[50]

6. Conclusions

"*No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land*." - Article 39, Magna Carta (1215).

Since ancient times, the concept of due process demands that a judgement against a person shall be made in accordance with the law. This idea of due process also means that everyone is entitled to a fair and impartial hearing to determine their legal rights and obligations. This requires courts to give reasons for their decisions, which is imposed, from an external point of view, among others, for transparency, accountability and accuracy reasons.

From an internal point of view of the adjudicative process, judicial reasoning plays a key role in the participation of the parties, accountability, and mostly as an instrument for the judge's self-control. Although "*we have a tendency to believe that somehow the process of becoming a judge effects a substantial transformation, and that judges become different from the rest of us*"[51], the fact is that judges are human beings. So, in order to ensure independence and impartiality of decisions, judicial reasoning needs to be embraced as an intellectual exercise, which enables the judge to decide a case based on facts proven and in accordance with the law, refraining from any type of bias, prejudice, animosity or pathos, as well as the use of expressions that reflect stereotypes.

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[50] *V.* ECHR cases Khamtokhu and Aksenchik v. Russia of 24 January 2017, available at: https://www.conjur.com.br/dl/russia-prisao-perpetua-homens.pdf.

[51] Chad M. Oldfather, *Judges as humans: interdisciplinary research and the problems of institutional design*, Hofstra Law Review, Vol. 36:125 2007, page 127.

From an external point of view, as it constitutes a source of judicial decisional control, the reasoning behind the decision makes it possible to confirm that the limits imposed on the judicial decision and on the judge's discretion were respected. Among other limitations, within the scope of the decisions, judges must, in light of the Bangalore Principles, be independent and impartial, basing their decision solely on the facts and their framework in the face of current legislation — without the interference of any external irrelevant influences — as well as respecting constitutional principles and principles agreed under international treaties and agreements such as the ECHR.

The case presented by Mrs. Pinto de Sousa before the ECtHR illustrates the importance of the reasoning of judicial decisions, in the sense that a well-grounded and accurate decision would have led to greater self-control by the judge, namely in the sense of the use of "*unfortunate terms*". In fact, "[j]*ustice must not only be done it must be seen to be done*" so before finalizing the award, judges and courts need to carry out tests for bias in order to determine whether or not a decision shall be revised and consequently to better promote public confidence in judicial decisions. On the other hand, reasoning makes it possible to control the *ratio decidendi* underlying the judicial decision and, to that extent, identify the points where legal application was not perfect and irrelevant factors to the decision of the case were considered – such as bias and stereotypes - when they should have been ignored.

Therefore, the reasoning behind judicial decisions makes it possible to control the judge's cognitive *iter* and, from that point of view, to identify eventual errors in judgment or the violation of aforementioned limits to which the judge is bound. The possibility that, by means of reasoning, the judge himself or herself, the addressee of the decision, the public in general and the higher courts can control the reasoning underlying the decision, functions as a guarantee of constant monitoring and improvement of the legal technique used. Monitoring judicial decisions in these terms enables the quality of these decisions to improve, as well as allowing legal thinking to evolve, since it is exposed to learning from the merits and demerits of previous judicial decisions.

As future judges, this is the lesson we take with us going forward!

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